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Direct Broadcasting By Satellite:
A Domestic and International Legal Controversy

**By Juliana Maio**

Member third year class. *The author wishes to thank Jordan Kerner, a member of the California Bar, for his assistance in the preliminary development of this note.*

**Introduction**

THE ADVENT of satellite communications made possible for the first time the worldwide relay of word and image. Advances in technology now bring broadcast of satellite close to practical realization, with predictions of the availability of operational systems within the forthcoming decade. Direct satellite broadcasts are already being conducted on an experimental basis in both the United States and Canada in tele-education, tele-medicine, community interaction, and data communications. This method of communication is potentially useful for both domestic and international purposes.

The possibility of direct satellite broadcasting has impelled the members of the United Nations to demand a set of binding principles governing the use of this new technology, with particular emphasis

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1. See, e.g., Note, *The Communications Satellite Corporation: Toward a Workable Telecommunication Policy*, 27 Hastings L. J. 72 (1976). Three systems were successively put into operation: “point-to-point” telecommunications, “distribution” satellites and “direct broadcast” satellites. In the point-to-point telecommunications system the signal is transmitted by a relatively low-power satellite to powerful and sensitive receiving earth stations. These transmit/receive earth stations are connected to the terrestrial telecommunications networks, which relay the televised signal in the same way as any other television broadcast to the transmitting stations which broadcast it to individual receivers. In the distribution satellite system satellites transmit the signal directly to ground relay stations, which distribute it to individual receivers in the same way as conventional land-based transmissions. Direct broadcast satellites involve a system in which signals transmitted or retransmitted by space stations are intended for direct reception by individual or community receivers. Barrow and Manelli, *Communications Technology - A Forecast of Change* (pts. I - II), 34 L. & Contemp. Prob. 205, 431 (1969).


on the right of recipient States to control what their people receive. Since 1972 the United Nations Committee for the Peaceful Uses of Outer Space (CPUOS) has been drafting a set of principles which might lead to an acceptable international agreement. A Legal Subcommittee and a Working Group has been created to aid the CPUOS in this task.\(^4\)

This note will examine the implications for both domestic and international law which arise from the draft agreement currently before the CPUOS Legal Subcommittee. Part I will provide the reader with a general background in the technology of direct broadcasting satellites. Part II will trace the history of the United Nations' efforts to deal with this new technology. The second section will also identify the legal and political issues of international concern, with particular attention to the issues of prior consent, and of control over program content, the two most crucial and sensitive of those debated at the United Nations. Part III will analyze existing international law as it applies to the issues raised by direct television broadcasting by satellites. Finally, Part IV will discuss the domestic constitutional problems which could arise from a draft agreement which would require the United States to restrict international transmissions by its broadcasters.

**PART I. TECHNOLOGICAL BACKGROUND**

**Benefits of the New Technology**

There is a general agreement that the direct broadcast satellite promises great benefits to mankind.\(^5\) Many remote areas of the world which cannot be reached with existing communications systems will be able to receive programs of cultural, economic, and educational importance.\(^6\) This is particularly true for developing countries where

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4. The Legal Subcommittee has been assigned the task of drafting a statement of these principles. The draft will then be submitted to the CPUOS for endorsement, which in turn will submit it to the United Nations General Assembly for adoption. The General Assembly then will decide whether to adopt these principles in the form of a declaration or a resolution open for ratifications as a treaty. For the purpose of this note, it is assumed that the elaboration of these principles will become a part of a treaty on direct broadcasting from satellites.

5. The Working Group in the CPUOS expressed the view that: "technological developments in the field of satellite broadcasting hold the promise of unprecedented progress in communications and the promotion of understanding between peoples and cultures, and has emphasized its belief that broadcasting from satellite could make an effective contribution toward meeting the particular needs and interests of the developing countries. 29 U.N. GAOR, Committee on the Peaceful Uses of Outer Space, 1 Annexes, at 1, U.N. Doc. A/AC. 105/127 (1974).

limited facilities for conventional television broadcasting are often confined to their largest cities. For such countries, construction of a truly national television system by means of land-based relay and interconnection facilities is often economically unfeasible.7 The satellite can substantially reduce the overall cost of constructing a national television system by spanning long distances, by serving where terrain makes construction of conventional facilities difficult, and by operating in areas where the population is widely diffused.8 Such a system would still be costly,9 but satellite might at least bring it within the realm of economic possibility for those countries, particularly if there is financial and technical assistance from the developed world.

TECHNOLOGY

In order to assess the significance of the information control problems which some countries anticipate in connection with direct satellite broadcasting, it is important to distinguish broadcasting satellite services for community reception and those for individual reception. A general broadcasting satellite service is defined by the Radio Regulation of the International Telecommunications Union (ITU) as, “a radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public.”10 However, a footnote to the ITU definition divides the possible types of “direct reception” into two parts: individual reception and community reception.11 “Individual reception” refers to the reception of satellite transmissions by simple domestic installations with

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8. In India, where conditions of this sort exist, a very successful experiment has just been made using NASA’s ATS-1, ATS-3, and ATS-6 satellites. In a joint effort by NASA and the Indian Space Research Organization (ISRO), the ATS-6 satellite, the first satellite capable of broadcasting directly into small receivers, was used by the Indian government to relay television programs to some 5,000 villages and cities in seven states. These programs were produced by India, and stressed improved agricultural techniques, family planning and hygiene, school instruction, teacher education, and occupational skills. NASA Press Release No. 75-153 (May 20, 1975); NASA Press Release No. 76-101 at 2-3 (May 26, 1976).

9. It is now possible to build and launch a satellite with enough power that direct reception of television is possible using a ground terminal costing not millions of dollars, as was formerly the case, but five thousand dollars or less. Current research may result in a further reduction in cost — to a few hundred dollars — in the near future. Hupe, supra note 7.


11. Id. at 1573 n.1.
small antennae.\textsuperscript{12} "Community reception," on the other hand, encompasses reception of the satellite signals by more complex equipment which is intended for use by the general public either at one location or through redistribution covering a limited area.\textsuperscript{13} Current technology permits individuals reception only through specially designed television receivers. Existing home receivers must be augmented to receive these signals. However, the means to permit direct reception of satellite transmissions by conventional units may soon be developed.\textsuperscript{14}

Thus, broadcasting satellites are essentially of two kinds: those that can broadcast into an augmented community receiver for service to that community and those that can broadcast directly into home receivers. It is the latter type of satellite that most seriously concerns the countries which are seeking binding principles governing direct satellite broadcasting. The controversy arises from the fact that satellite technology will enable broadcasters to beam television programs directly into slightly modified individual television receivers, eliminating the necessity of sending the signal through large government-controlled ground stations in each country.\textsuperscript{15}

The satellite is seen by many as another step in a kind of informational imperialism, giving the major developed countries substantial control over information received by the less developed ones.\textsuperscript{16} Some governments are concerned that information and opinions reaching their citizens directly will lead to enhanced political opposition. This view is not peculiar to States of a particular ideology. Some States fear the impact of Soviet information and propaganda; others fear the threat of ideas and information from the United States.\textsuperscript{17} As Ronald Stowe, United States delegate to the CPUOS Legal Subcommittee, recognized:

\textsuperscript{12} Id. at 1574.
\textsuperscript{13} Id. at 1574 n.1. For a more detailed description of the technical design of a direct broadcast distribution system and the equipment necessary for direct reception (including a cost estimate for production in a potential user nation), see Janky, \textit{Low-Cost Receivers and the Use of Direct Broadcast Satellites for Instructional Television}, 5 \textit{STAN. J. INT'L STUD.} 138 (1970).
\textsuperscript{14} B. Signitzer, \textit{Regulation of Direct Broadcasting from Satellites} 8 (1976).
\textsuperscript{17} Id. Stowe Statement, supra note 15, at 7-8.
“there are legitimate interests, including our own, that would call for restrictions.” Thus, potential political and social effects of direct satellite broadcasts have been the primary motivation for international discourse.

CONTROL THROUGH TECHNICAL MEANS

It is the official position of the United States delegation at the CPUOS Legal Subcommittee that, given the present state of technology, any additional principles to govern the use of direct broadcasting satellites are unnecessary. The delegation regards existing international law, particularly the Radio Regulations established by the ITU, as sufficient to govern the use of such systems as they exist today, or will exist within the foreseeable future.

The United States at first opposed the drafting of such principles to govern the use of direct broadcasting satellites on the ground that international action was premature. Indeed, because of economic and technological considerations, direct-to-home reception is not likely to be in operation prior to 1985. Furthermore, while several broadcast satellite services for community reception have been demonstrated, none of these experiments has involved direct-to-home reception. It is clear that any legal question involving the use of direct broadcasting satellites cannot be resolved without consideration of the available technology. Moreover, a rapid legal solution to the problem of direct broadcasting from satellites is unnecessary, since technical means to prevent the receipt of unwanted broadcasts are currently available.

Community receivers could be governmentally supervised or controlled in most, if not all, States. These States could regulate the operation and use of their community receivers internally without interference by other States and, if they felt it necessary, could exclude unwanted telecasts altogether. For example, not any satellite capable

20. Doyle Interview, supra note 3. He stated: “The radio regulations offer so many safeguards that there is no need of a prior consent principle.”
22. Doyle Interview, supra note 3.
24. Doyle Interview, supra note 3.
25. Id.
of broadcasting into community receivers could broadcast into all community receivers any place in the world. The satellite and the ground receiver must be of compatible design. Thus, antennae could be designed to receive only the frequencies occupied by approved satellite broadcasting systems. As a further check, local governments could regulate the use of community receivers once they had been installed. If a powerful frequency were identical with, or close enough to, an approved frequency to result in unwanted reception, the government could prevent the operation of community receivers during periods of objectionable programming. Clandestine receivers picking up unapproved channels would be unlikely due to the expense and the obviousness of large antennae.

Controlling the receipt of undesirable broadcasts would not be a novelty. Japan, after 1933, forbade the possession of shortwave radio sets and imposed penalties for listening to foreign broadcasts. Nazi Germany in the 1930's introduced a receiver called the "People's Set" which was incapable of receiving foreign broadcasts. In the Soviet Union in 1951, only eighteen percent of the existing radios were capable of direct over-the-air reception; the majority were restricted to the more easily controlled cable reception.

On the other hand, broadcast direct-to-home will be more difficult to control, although several means of limiting reception are currently available. A government could forbid all home reception by banning the manufacture, importation, or distribution of home reception antennae or adaptors, and could limit the manufacture of home receivers to only those capable of receiving the one or two government-approved channels.

THE EFFECT OF WARC '77

Some commentators have argued that the problem of intentional radiation of tele-broadcasts from one State to the territory of another will not arise after the World Administrative Radio Conference (WARC) in 1977. In 1973, the Plenipotentiary Conference of the

27. Id.
29. Doyle Interview, supra note 3.
30. See B. Murty, PROPAGANDA AND WORLD PUBLIC ORDER 55 (1968).
31. Doyle Interview, supra note 3.
32. Id.
33. Memorandum on Direct Television Broadcasting by Satellite and the Legal Norms for Its Use, 26 EBU REVIEW 58 (1975) [hereinafter cited as EBU REVIEW].
International Telecommunications Union resolved that WARC be convened in Geneva, Switzerland, on January 10, 1977, for the planning of the broadcasting satellite service in the 11.7-12.2 GHz frequency band. The purpose of WARC '77 is to: (1) establish sharing criteria for the bands 11.7-12.2 GHz; (2) plan for the use of each band; and, (3) establish procedures to govern the use of these bands by direct broadcasting satellites. These topics will necessitate consideration of the technical characteristics of transmissions, the number of television channels required in the frequency spectrum, the position in the geostationary orbit of the satellite radiating these signals, the shape and dimension of the beam or beams of the satellite transmitting antennae (i.e., demarcation of the area served), the direction in which the beam will be pointed, and coordination and notification procedures. Each country showing a need for the use of direct-broadcasting programs will be assigned a frequency within the band. Use of those bands will be permitted under ITU regulations on a non-interference basis. A nation’s deliberate attempt to transmit programs into channels already in use in another country’s direct broadcast system would therefore be ineffective, as the result would be interference rather than clear reception of any program. Furthermore, such an action would contravene the International Telecommunications Convention.

PART II. UNITED NATIONS ACTIVITIES AND ISSUES INVOLVED IN DIRECT SATELLITE BROADCASTING

The United Nations’ Involvement

The United Nations’ interest in direct broadcasting satellites developed from its early concern with international satellite communications. At its 1968 session, the General Assembly devoted particular attention to direct broadcasting by satellite when it approved the establishment of a Working Group on direct-broadcast satellites within the Committee on the Peaceful Uses of Outer Space. However, it

34. 52 F.C.C.2d 1069 (1975).
35. Id. at 1071.
36. Id. at 1073.
38. 26 EBU REVIEW, supra note 33, at 61. It should be noted, however, that “it is certainly possible that during the planning week a State may express its intention of radiating broadcasts to another State, but in this event it must indicate in detail all the elements mentioned above, i.e., the country to which it intends to radiate broadcasts and the characteristics of the broadcasts, for the purpose of inclusion in the plan.”
39. 1974 CPUOS, Annex 6, supra note 2, at 3. The Working Group’s original man-
was not until August 1972, when Mr. Gromiko, Minister for Foreign Affairs of the Soviet Union, urged the United Nations General Assembly to prepare an international convention on principles to govern the use of direct-satellite broadcasts, that the United Nations became directly involved in the regulation of the new technology. A few months later, the General Assembly called upon its CPUOS "to elaborate principles governing the use by States of artificial air satellites for direct television broadcasting with a view to conclude an international agreement or agreements." The United States cast the only vote against the resolution.

In the following two years, the United States, the Soviet Union, Canada, Sweden, and Argentina, submitted working papers on principles, and the Working Group produced a report which covered in detail the areas of consensus as well as various divergent views. In May 1974, the Legal Subcommittee drafted fourteen principles; consensus was reached on only three of them. At its last meeting in May 1976, the Legal Subcommittee reached nine areas of consensus, dropped two issues, and left three to be resolved. The remaining issues are: (1) prior consent; (2) program content; and (3) unlawful and inadmissible broadcasts. These three issues have been the most sensitive and most heatedly debated, and a wide divergence among the different views remains.

date was "to study and report on the technical feasibility of communication by direct broadcast from satellites and the current foreseeable developments in this field, including comparative user costs and other economic considerations, as well as the implications of such developments in the social, cultural, legal and other areas." McIntyre, U.S. Cautions Against Premature International Regulation of Developing Direct Broadcast Satellite Technology, DEPT. STATE BULL. 197 (July 30, 1973).

42. The United States wants no international agreement at all, at least at this time. Some of the reasons given stem from questions concerning national and international lack of experience with this still undeveloped aspect of space communication, concern lest future technological development be inhibited, and possible adverse effects on the free exchange of ideas and information. U.S. Mission Press Release (USUN-13 (72)) (statement by Robert C. Tyson, United States Representative, in Plenary, in explanation of vote on Direct Broadcast Satellites).
44. 1974 CPUOS, Annex 6, supra note 2.
45. Schaeffer Interview, supra note 23.
46. Id.
THE UNITED STATES AND THE SOVIET UNION:

TWO DIFFERENT APPROACHES

The United States was initially reluctant to enter into negotiations for the elaboration of principles governing the use of direct broadcasting satellites. It has since modified its position, and in 1974 tabled a paper containing draft principles on direct broadcasting. The draft presented the American view that there should be no express restriction on the flow of information, either through a code of conduct or in a prior consent requirement. Since then, the United States has softened its position. In August 1975, then Secretary of State Henry Kissinger, in his statement on international law before the American Bar Association meeting in Montreal, suggested that any system of direct television broadcasting by satellite should be accompanied by full consultation. The substance of this proposal was that prior to undertaking direct television broadcasting, States within the reception area be notified of the intention to broadcast, and good faith efforts to reconcile problems be made. However, as remarked by Mr. Kalmann Schaeffer, of the Executive Office of the President in the Office of Telecommunications Policy, "consultations do not imply an international set of principles which in effect constitute international censorship. The United States will never assent to an official principle that states that a prior consent has to be obtained." On the other hand, the 1972 Soviet Union convention proposed a regime of strict control with a code of broadcasting conduct and a re-

47. The United States recognized that many members favored guidelines, and realized the needs and national sensitivities of other countries with regard to Direct Television Broadcasting by Satellite. Stowe Statement, supra note 15, at 4-5.


49. While the proposal places no express restrictions on the conduct of international satellite broadcasting, it states that it "should be carried out in a manner compatible with the maintenance of international peace and security with a view to enhancing cooperation, mutual understanding and friendly relations among all states and peoples." The American declaration then reiterates the American view that international satellite broadcasting "should... be conducted in a manner which will encourage and expand the free and open exchange of information and ideas," and couples this with an injunction to take "into account differences among cultures and maximize[e] the beneficial use of new space communications technologies." Id. at art. III-IV.

50. "We are committed to the wider exchange of communication and ideas. But we recognize that there must be full consultation among the countries directly concerned." Address by Secretary of State Henry A. Kissinger, American Bar Association Annual Convention (Aug. 11, 1975).


52. Schaeffer Interview, supra note 23.
quirement of the recipient country's prior consent. The Soviet Union also proposed that each State promise not to use television broadcast satellites to endanger the peace, to encroach on fundamental human rights, to depict violence, horrors, pornography and the use of narcotics, or to misinform the public. Article V of the Soviet proposal would require that transmission to a foreign State be done "only with the express consent of the latter." Article VI (1) would make any satellite broadcast to a foreign State which has not given the necessary consent an illegal act allowing the receiving country to "utilize the means at its disposal" to "counteract" such broadcasting. Those "means" apparently include jamming signals and actual destruction of broadcast satellites. The Soviet Union has since modified this position, but the proposed regime still calls for the consent of the receiving country to broadcast.

After four years of negotiations, no final compromise has yet been reached within the CPUOS Legal Subcommittee. Following is a presentation of alternative proposals on each of these three issues as drafted by the Legal Subcommittee in Geneva on May 26, 1976.

(1) PRIOR CONSENT

ALTERNATIVE A

Direct television broadcasting by means of artificial earth satellites specifically aimed at a foreign State shall require the consent of that State. The consenting State shall have the right to participate in activities which involve coverage of territory under its jurisdiction. This participation shall be governed by appropriate arrangements between the States involved.

This alternative was formulated by the Canadian/Swedish working paper. The two countries felt that the principle of prior consent is closely linked with that of participation; the State consenting to the receipt of broadcasts from another State should be allowed to partici-
partake in the activities involved in their production.\textsuperscript{60} This position is consistent with the Soviet proposal.

**ALTERNATIVE B**

Direct broadcasting by satellite may be subject to such restrictions imposed by the State carrying out or authorizing it as are compatible with the generally accepted rules of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.

The consent of any State in which such broadcasting is received is not required, but the State carrying it out or authorizing it should consult fully with any such receiving State which so requests concerning any restrictions to be imposed by the former State.\textsuperscript{61}

This alternative is congruent with the United States' position, calling for minimal regulation and furthering of the free flow of information and ideas.\textsuperscript{62}

(2) PROGRAM CONTENT

**ALTERNATIVE A**

The broadcasting of commercial advertising, direct or indirect to countries other than the country of origin, should be on the basis of appropriate agreements between the countries concerned.

Notwithstanding the foregoing, States undertaking activities in direct television broadcasting by satellites should in all cases exclude from the television programmes any material which is detrimental to the maintenance of international peace and security, which publicizes ideas of war, militarism, national and racial hatred and enmity between peoples, which is aimed at interfering in the domestic affairs of other States or which undermines the foundations of the local civilization, culture, way of life, traditions or language.\textsuperscript{63}

The above reflects the position of the Soviet Union as formulated in Article IV of its working paper.\textsuperscript{64}

**ALTERNATIVE B**

States or their broadcasting entities which participate in direct television broadcasting by satellite with other States should cooperate with one another in respect to programming, programme content, production and interchange of programmes.\textsuperscript{65}

\textsuperscript{60} This alternative would be consistent with the Soviet proposal. However, the Soviet proposal does not mention the concept of participation. 1974 CPUOS, Annex 2, \textit{supra} note 53, at art. V.

\textsuperscript{61} 1976 CPUOS, Annex 2, \textit{supra} note 58.

\textsuperscript{62} See text accompanying note 49 \textit{supra}.

\textsuperscript{63} 1976 CPUOS, Annex 2, \textit{supra} note 58, at 2.

\textsuperscript{64} 1974 CPUOS, Annex 2, \textit{supra} note 53, at art. IV.

\textsuperscript{65} 1976 CPUOS, Annex 2, \textit{supra} note 58, at 4.
As this proposition calls for consultations and not de facto censorship, it would be consistent with the United States’ working paper. It is also consistent with Article VIII of the Canadian/Swedish working paper.

(3) UNLAWFUL/INADMISSIBLE BROADCASTS

States shall regard as unlawful and as giving rise to the international liability of States direct television broadcasts specifically aimed at a foreign State but carried out without the express consent of the latter, containing material which according to these principles should be excluded from programmes, or received as a result of unintentional radiation if the broadcasting State has refused to hold appropriate consultations with the State in which the broadcasts are received.

In case of the transmission to any State of television broadcasts which are unlawful, that State may take in respect of such broadcasts measures which are recognized as legal under international law.

States agree to give every assistance in stopping unlawful direct television broadcasting by satellite.

Any broadcasts that a State does not wish to be made in its territory or among its population and in respect of which it has made known such decision to the broadcasting State are inadmissible.

Every transmitter, State, international organization or authorized agency shall refrain from making such broadcasts or shall immediately discontinue such broadcasts if it has begun to transmit them.

These propositions reflect Articles VIII and IX of the Soviet proposal. The United States proposal is silent on the question of illegality.

The following is a review of the nine principles agreed to by the CPUOS Legal Subcommittee on May 26, 1976.

(1) PURPOSES AND OBJECTIVES

This first principle recognizes that direct television broadcasting by satellite should contribute to the preservation of international peace and security and to the development of mutual understanding and the strengthening of friendly ties and cooperation among all States and all peoples, while fostering economic and social development, promoting cultural exchanges and improving the educational level of all peoples.

66. 1974 CPUOS, Annex 2, supra note 53. For a discussion of content regulations in the United States, see infra Part III.
(2) APPLICABLE LAW

The second principle establishes that existing international law forms the basis for the conduct of States in the organization of direct television broadcasting by satellite.\(^{70}\)

(3) RIGHTS AND BENEFITS

It is here recognized that all States have an equal right to conduct direct television broadcasting by satellite and to enjoy the benefits of new technology without discrimination of any kind.\(^{71}\)

(4) INTERNATIONAL COOPERATION

In view of the fact that at the present time the development of direct television broadcasting by satellite would be technically and economically difficult, the United Nations strongly encourages international cooperation in the development and use of the direct broadcasting system.\(^{72}\)

(5) STATE RESPONSIBILITY

States are made internationally responsible for all direct broadcasting satellite activities which are either carried out by them or under their jurisdiction.\(^{73}\)

(6) DUTY AND RIGHT TO CONSULT

The sixth principle requires that any State requested to do so by another State enter into consultations with the requesting State about direct satellite broadcasting activities that are likely to affect the requesting State.\(^{74}\)

(7) PEACEFUL SETTLEMENT OF DISPUTES

This principle calls for consultation or use of established procedures for the settlement of disputes which may arise from the use of direct broadcast satellites.\(^{75}\) Under this principle, jamming would almost certainly be considered an illegal act.

(8) COPYRIGHT AND NEIGHBORING RIGHTS

Cooperation on a bilateral basis for protection of copyrights and

\(^{70}\) Id., cf. 1974 CPUOS, Annex 2, supra note 53, at 11, para. 34(c) (where the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights were regarded by several delegations as applicable). The new draft of principle, 1976 CPUOS, Annex 2, supra note 58, omits reference to these two instruments.

\(^{71}\) 1976 CPUOS, Annex 2, supra note 58, at 2.


\(^{73}\) 1976 CPUOS, Annex 2, supra note 58.

\(^{74}\) Id. at 2.

\(^{75}\) Id. at 3.
neighboring rights by means of appropriate agreements between the interested States is prescribed.76

(9) NOTIFICATION TO THE UNITED NATIONS

The final principle asks for States conducting or authorizing activities in connection with direct satellite broadcasting to inform the Secretary General of the United Nations "to the greatest extent possible of the nature of such activities."77

PART III. THE INTERNATIONAL USE OF DIRECT BROADCASTING SATELLITES IN LIGHT OF EXISTING INTERNATIONAL LAW

1. The Nature of the Controversy

The eventuality of direct broadcasting by satellite has generated a confrontation between two ubiquitous concepts in international relations. The first of these is the principle of the free flow of information and ideas, the function of which is not only to protect free expression, but also to protect the right of peoples to receive information and ideas.78 In the context of the present discussion, this principle would both prevent censorship of programs broadcast internationally via direct satellites and support a free exchange of information among states. The second principle is that of national sovereignty, including the recognition of a right to preserve national identity against foreign propaganda.79 This concept is intimately connected with the issue of government control over the free and open exchange of ideas and information among individuals as well as among States, and in particular with the question of what extent governments should be able to control what their people see on television.

The principles of freedom of information and of state power to control dissemination of information appear incompatible on their face if strictly construed. However, just as the first amendment right of freedom of expression can be abrogated to some extent by governmental regulations,80 so the international principles of freedom of expression and of national sovereignty may also be limited. Thus, in a given international instrument, both of these international principles

76. Id.
77. Id.
80. See text infra Part IV.
can in fact be reconciled. It would be misleading to regard either as prevailing over the other.

Should a principle on program content (and particularly on prior consent) be included in an international agreement on direct broadcasting by satellite, the healthy equilibrium between freedom of information and state sovereignty, as recognized by many existing international instruments, would be destroyed. The danger of establishing a precedent which might be applied in other areas is to be feared.

As has been shown, many existing international instruments, some of which have binding force, protect freedom of expression as a fundamental right, and a provision for censorship in a successive treaty could, under certain circumstances, either abrogate the free expression provisions of prior treaties or be held invalid as inconsistent with prior treaties. Under article 30, paragraph 4(b) of the Vienna Convention on the Law of Treaties, a treaty covering the same subject matter as


a prior treaty would prevail over the inconsistent terms of the prior treaty as long as all parties to the prior treaty concluded the successive treaty. Hence, a prior treaty could be terminated if all the parties thereto entered into a subsequent and incompatible treaty on the same subject matter, and expressly provided for such termination. As applied in our context and assuming the existence of a treaty on direct broadcasting by satellite which would include a censorship provision, the above rule implies that as to those States party to both treaties, the subsequent treaty on direct broadcasting would prevail. As to a State party to both treaties and a State party to only one, the treaty to which both states are parties, i.e. the prior treaty protecting freedom of information, would govern. Given the large number of States likely to ratify a treaty on direct broadcasting from satellites, and given that a great many of these States were party to one of the binding treaties protecting freedom of information, it is to be expected that the freedom of information provisions of these prior treaties would be abrogated by the subsequent censorship provisions. Such a result is undesirable and it is urged that before entering into international agreement calling for broadcast censorship, a nation should seriously consider the consequences of such adherence.

As evidenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Covenant on Civil and Political Rights, the Universal Declaration of Human Rights of the United Nations, major United Nations' recommendations and resolutions, and numerous bilateral treaties or conventions, freedom of information and ideas has for a long time been a matter of concern in international law and has always been considered a fundamental right. The following international instruments specifically proclaim the prevalence of the principle of freedom of information.

2. The Right to Communicate Across Boundaries

(a) The European Convention for the Protection of Human Rights

84. Id. at art. 59.
85. Stowe Interview, supra note 18.
86. See note 83 supra.
89. Declaration, supra note 78.
91. See note 82 supra.
and Fundamental Freedoms\textsuperscript{92} was signed at Rome on November 4, 1950, by the member States of the Council of Europe. It is particularly noteworthy in that it entitles "any person, non-governmental organization or group of individuals" to lodge complaints with the specifically established European Commission of Human Rights against any State party which has recognized the competence of the Commission to receive such petitions.\textsuperscript{93}

Article 10(1) of the Convention recognizes, subject to certain conditions and restrictions which might be necessary in the interests of national security and public safety, the right to freedom of expression. This right includes "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."\textsuperscript{94}

(b) The International Covenant on Civil and Political Rights\textsuperscript{95} on a worldwide level, was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 1966. The Covenant entered into force on March 23, 1976,\textsuperscript{96} three months after deposit with the Secretary General of the Thirty-Fifth Instrument of Accession.\textsuperscript{97} The Covenant specifically confirmed the fundamental right of freedom of expression. This right includes "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [the expressor's] choice."\textsuperscript{98} Conditions on the exercise of these rights may be imposed only by law as necessary

(1) for respect of the rights or reputation of others.
(2) for the protection of national security or of public order (ordre public), or of public health or morals.\textsuperscript{99}

\textsuperscript{92} U.N. Y.B. on Human Rights 418-26 (1950).
\textsuperscript{93} Id., art. 25 (1) at 422.
\textsuperscript{94} Id. at 421.
\textsuperscript{95} 20 U.N. Y.B. 423-31 (1966).
\textsuperscript{96} As of June 15, 1976, 58 States had ratified or acceded to the Covenant: Barbados, Bulgaria, Byelorussian SSR, Canada, Chile, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Ecuador, Federal Republic of Germany, Finland, German Democratic Republic, Hungary, Iran, Iraq, Jamaica, Jordan, Kenya, Lebanon, Libya, Madagascar, Mali, Mauritius, Mongolia, Norway, Rumania, Rwanda, Sweden, Syria, Tunisia, Ukrainian SSR, Union of Soviet Socialist Republics, Great Britain, Tanzania, Uruguay and Yugoslavia. In addition, Australia and the Phillipines had ratified the International Covenant on Economic, Social and Cultural Rights, bringing the total of the ratifications or accessions to that Covenant to 40.
\textsuperscript{99} Id., art. 19(3) at 426.
An optimal protocol to the Covenant which provides individuals with a right of complaint after exhaustion of available local remedies, has also entered into force.

(c) A Specific Draft Convention on Freedom of Information has been on the agenda of the United Nations General Assembly since its 14th Session in 1968. This Draft Convention declares the following guiding principles:

1. Each Contracting State undertakes to respect and protect the rights of every person to have at his or her disposal diverse sources of information.

2. Each Contracting State shall secure to its own nationals and each of the nationals of every other Contracting State as are lawfully within its territory, freedom to gather, receive and impart without governmental interference, save as provided in article 2, and regardless of frontiers, information and opinion orally, in writing, or in print, in the form of art or by duly licensed visual or auditory devices.

Article 2(1) points out that the exercise of these freedoms carries with it duties and responsibilities. That exercise, however, may be subject to such necessary restrictions as are clearly defined by law and applied in accordance with the law in respect to national security and public order (ordre public).

(d) The Universal Declaration of Human Rights was adopted on December 10, 1948 by the United Nations General Assembly. Article 19 states that

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions . . . and to seek, receive,
and impart informations and ideas through media and regardless of frontiers.\textsuperscript{105}

Paragraph 2, in the preamble, and Article 30 are of particular interest. The second paragraph of the preamble welcomes "the advent of a world in which Human beings shall enjoy freedom of speech . . ."\textsuperscript{106} Article 2 extends the document’s affirmation of basic human rights to every individual without distinction of any kind.\textsuperscript{107}

Article 30 reinforces the principle of a fundamental right to information by concluding that "nothing in the Declaration may be interpreted as implying . . . any right to perform any act aimed at the destruction of . . . the rights and freedoms set forth herein."\textsuperscript{108}

Article 12 limits this fundamental right to information by protecting individual rights to privacy and restricting attacks upon reputation.\textsuperscript{109}

3. \textit{Limitations upon the International Right of Free Expression}

As recognized by article 54 of the Vienna Convention on Treaties,\textsuperscript{110} treaties sometimes specify that, in certain circumstances or under certain conditions, the operation of a treaty or of some of its provisions may be suspended. Under such circumstances a party (or parties) would be excused from the performance of its obligations under the treaty.

The international instruments discussed in the previous section as such are binding. The principle of freedom of information is considered to be a fundamental right. Except in time of war an international regime of censorship has never been established. Freedom of information can be considered an international customary law. See 13 \textit{Dig. Int'l L.} 1040-68 (1968). It is interesting to note that while the Union of Soviet Socialist Republics refuses to recognize the United Nations Declaration of Human Rights as binding law applicable in the issue of direct broadcasting satellites, and even though the Union of Soviet Socialist Republics did not vote for the Declaration, like all member States it has accepted the obligations of the Charter, and in recent years has also recognized the Declarations' force as a document that interprets the Charter. Newman, \textit{Interpreting the Human Rights Clauses of the United Nations Charter}, 5 \textit{Human Rights Journal} 283, 286 (1972).

\textsuperscript{105} Declaration, \textit{supra} note 78.

\textsuperscript{106} Id. The preamble reads: "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."

\textsuperscript{107} Id., art. 2.

\textsuperscript{108} Id., art. 30. Art. 30 reads: "Nothing in this Declaration may be interpreted as implying for any State, group or person any rights to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

\textsuperscript{109} Id., art. 12.

\textsuperscript{110} Vienna Convention, \textit{supra} note 83, art. 54.
evidence the existence of provisions governing the suspension of the freedom of expression clauses under certain circumstances. We now turn to the definition and scope of application of these restrictive provisions.

(a) National Security

The term "national security" has not been defined by any official United Nations declaration or commentary. In its 1966 report, the International Law Commission refused to involve itself in the formulation of a draft article covering the general principles governing reparations to be made for a breach of a treaty and the grounds which may be invoked to justify the non-performance of one.111

"Self-defense" has traditionally been admitted in international law as a ground for exoneration from responsibility.112 Since the adoption of the United Nations Charter, the right of self-defense has at all times been recognized as exercisable by the State for its own preservation, but is subject to conditions in Article 51 of the Charter. This doctrine covers situations of armed conflict, which must exist before the right of self-defense may properly be exercised.113 However, in practice, self-defense is not limited to so-called "international law in time of war."114 The existence of a "State of necessity" has sometimes been linked to self-defense. This is particularly evident in one of the bases of discussion prepared by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930).115

The Committee drafted the following text:

Basis of discussion No. 24.
A state is not responsible for damages caused to a foreigner if it proves that its act was occasioned by the immediate necessity of self-defense against a danger with which the foreigner threatened the state or other persons.116

A compilation of the opinions of various writers117 shows that a definition of such danger would include the following three criteria:

1. The peril must be one which threatens some vital interest of the state.

113. U.N. Charter art. 51.
114. Oppenheim, supra note 113.
115. 5 League of Nations O.J. 128 (1929).
116. Id.
2. The peril must be "grave and imminent".
3. The state must have been "unable to counter-act the peril by other means".

According to the above definition, a force majeure or a fundamental change of circumstances (e.g., where a party to a military and political alliance involving exchange of military and scientific information has a radical change of government incompatible with the basis of the alliance) would justify the termination of a treaty on grounds of the maintenance of national security. In the instant context, it could restrict or suspend freedom of information.

(b) Public Order or Safety

The Documents referring to the need to maintain public order as a ground for restricting freedom of information are more explicit. Article 2(1) of the Draft Convention on Freedom of Information refers to public order as the systematic dissemination of false reports harmful to friendly relations among nations and of expressions inciting to war or to national, racial, or religious hatred; attacks on founders of religions; incitement to violence and crime; public health and morals; the rights, honor and reputation of others and the fair administration of justice.

These restrictions shall, however, "not be deemed to justify the imposition by any State of prior censorship on news, comments, and political opinions."120

Article 20 of the International Covenant on Civil and Political Rights specifies the circumstances under which restrictions on the rights of freedom of information may be exercised, stating that "any propaganda for war shall be prohibited by law," and further that "any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited . . . by law."

These limitations upon the right of freedom of information establish a general code of content to promote international peace and friendly relations among States. Apart from the restrictive clauses attached to the formulation of a right to freedom of expression, the United Na-

119. Draft Convention on Freedom of Information, supra note 90, at art. 2(1).
120. Id. at art. 2(2).
121. Covenant on Civil and Political Rights, supra note 98, art. 20 at 46.
tions,\textsuperscript{122} as well as unaffiliated countries,\textsuperscript{123} have passed resolutions condemning seditious propaganda.

The United Nations Charter acknowledges that principles of national sovereignty are a significant factor in any quest for peace and security in international relations.\textsuperscript{124} It identified the purpose of the United Nations as "to maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to peace."\textsuperscript{125}

The United Nations General Assembly Resolution 110(II), passed in 1947, states, "The General Assembly condemns all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage any threat to the peace, breach of peace, or act of aggression."\textsuperscript{126} In 1950, the General Assembly reaffirmed Resolution 110(II) and added, in part:

\begin{quote}
THE GENERAL ASSEMBLY

...\textit{Declares} that such propaganda includes:
\begin{itemize}
  \item[(1)] Incitement to conflicts or acts of aggression;
  \item[(2)] Measures tending to isolate the peoples from any contact with the outside world, by preventing the Press, radio, and other media of communication from reporting international events and thus hindering mutual comprehension and understanding among peoples;
  \item[(3)] Measures tending to silence or distort the activities of the United Nations in favor of peace or to prevent their peoples from knowing the views of other States Members.\textsuperscript{127}
\end{itemize}

These provisions, regulating to some extent the international dis-
\end{quote}

\textsuperscript{122} See U.S. Dep't. of State, 13 Digest of International Law 1008 (1968).
\textsuperscript{123} See, e.g., id. at 1018. The India-Pakistan Declaration. A distinction is drawn between broad content control and censorship. With respect to the word "restrictions" in art. 19, para. 3 of the International Covenant of Civil and Political Rights, the Secretary General, in his annotations, commented: "the restrictions in para. 3 were not to be understood as authorizing censorship. There was all the difference in the world, it was said, between a system of censorship and a reminder to the journalist of his duties and responsibilities and of the limitations which might be placed upon him in the exercise of the right to freedom of expression." 10 U.N. GAOR, Annexes, Agenda Item 28 (part II) Annotations on the text of the draft International Covenants on Human Rights, U.N. Doc. A/2929, July 1, 1955, at 50.
\textsuperscript{124} See generally U.N. Charter arts. 1, 2.
\textsuperscript{125} Id. art. 1.
\textsuperscript{126} U. S. Dep't of State, 13 Digest of International Law 1008 (1968).
semination of information and ideas, reflect the customary international law requiring that, in time of peace, States prevent official utterances within their territories which would tend to produce civil violence in a friendly state.\textsuperscript{128}

The Soviet program content proposal would only evidence international customary law of information content and the various United Nations resolutions codifying it. However, acceptance of the Soviet proposal on prior consent would be tantamount to licensing international censorship.

PART IV. THE UNITED STATES CONSTITUTION AND INTERNATIONAL AGREEMENTS

1. First Amendment as a Constraint on the United States Power to Enter Into International Agreements

Assent by the United States to a set of principles restricting the content of material transmittable via direct broadcasting satellites and requiring national consent before a signal could be purposely beamed at a State would raise grave first amendment issues. Should the Soviet Union’s proposal become incorporated in a treaty, the United States would be empowered to prevent foreign broadcasters from sending messages deemed subversive by the United States government to Americans. The United States would be obligated to screen the outgoing programs of American producers by enforcing the consent standards of the receiving States.\textsuperscript{129} This might be an unconstitutional infringement on American broadcasters’ rights of free speech.\textsuperscript{130} Further, if it were held unconstitutional for the United States government to screen incoming programs (an infringement of a citizen’s “right to hear”), the government would be forced to acquiesce in receiving unedited political information and sending only such programs as would be acceptable to foreign regimes.

Although no treaty has ever been held unconstitutional, it is well


\textsuperscript{129} Because of the principle that makes a State internationally responsible for broadcasts originating within its borders (\textit{supra} note 73 and text accompanying) the United States may want to screen outgoing broadcasts lest it be internationally responsible for them.

\textsuperscript{130} But see Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), \textit{cert. denied} 396 U.S. 842 (1969) (The FCC may regulate the content of broadcasts). A full discussion of the limits on FCC power to regulate program content and hence to screen foreign or domestic broadcast is beyond the scope of this note. However, that the constitutional problems involved are serious is beyond dispute.
established that a treaty is subject to constitutional limitations. This is true despite the confusion created by Missouri v. Holland in which the Supreme Court stated that "Acts of Congress are the Supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." This dictum implies that things may be accomplished by treaty power that could not constitutionally be achieved by exercise of congressional power alone. This decision must, however, be read and limited to the context of the facts involved in the Missouri Birds case.

The Missouri Birds case was brought by the State of Missouri to prevent the enforcement of the Migratory Birds Treaty Act of July 3, 1918 on the grounds that the treaty was an unconstitutional interference with the rights reserved to the States by the 10th amendment. The question raised in this case was whether migratory birds were a "proper subject of negotiation" for a treaty with foreign nations. The State of Missouri argued that Congress had no authority under the Commerce Clause to regulate the subject matter in question, directly or indirectly. Hence, the issue presented to the court involved the distribution of federal and state powers and whether such distribution remained unchanged when dealing with international concerns.

It should be noted that the Court in this case recognized that a treaty is subject to constitutional limitations. As Justice Holmes stated in the opinion of the Court:


133. B. Schwartz, Constitutional Law 273 (1972).


135. The Court ruled that, under its foreign affairs power, Congress can enact legislation on any subject which deals with, relates to, or affects the relations of the United States with other nations. The foreign affairs power can support legislation on any matter of international concern.

136. Missouri v. Holland, supra note 132, at 419.
Every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all other departments of the government; can bind the government to do that which the Constitution forbids.\textsuperscript{137}

That the Constitution binds Congress in its treaty-making power was forcefully and explicitly stated by Justice Black in \textit{Reid v. Covert}.\textsuperscript{138} In this case it was held unconstitutional for dependents of military personnel overseas to be tried for murder under the court martial procedures of the \textit{Uniform Code of Military Justice}, although such trial had been held in accordance with an agreement between the United States, Great Britain, and Japan. The court martial proceedings did not include safeguards to which the defendants would have been constitutionally entitled had they been tried in the United States. The government contended that this practice was necessary to carry out the United States' treaty obligations. The court stated:

\begin{quote}
The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.\textsuperscript{139} ... The prohibitions of the constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.\textsuperscript{140}
\end{quote}

Thus, \textit{Reid v. Covert} holds that a treaty, like a statute, must be made in pursuance of the Constitution to be valid. It would indeed be singular if, while the Federal Government could not take a particular action contrary to a constitutional prohibition, it need only conclude a treaty with a foreign country to be able to exercise the very power forbidden by the Constitution.

Accordingly, the United States will not be able to adhere to provisions of an international agreement on direct broadcasting satellites that would be violative of the first amendment. This does not mean, however, that the mere existence of a provision for prior consent in an international agreement would violate the first amendment, but rather that the United States government might not be able to enforce a provision basing denial of consent to broadcast of a program on that program's content. Thus, the United States might be unable to enforce such provisions against her own citizens and could not censor the inflow

\begin{footnotes}
137. \textit{Id.}
139. \textit{Id.}
140. \textit{Id.}
\end{footnotes}
of information received or the outflow of information desired to be broadcast abroad.

2. Federal Communications Commission's Authority: 
   An Analogy

a. Program Content

   It has been established in the previous section that constitutional constraints bind equally acts of Congress and treaties. Hence, the same constitutional standard will be applied in determining the constitutionality of a statute and that of a treaty. Our attention now turns to the scope of the standards under which domestic, as well as international broadcasting can be regulated without infringing upon the first amendment right of free speech. Our ultimate concern is to arrive at the formulation of a constitutional standard that may be applied to test the validity of a treaty on direct broadcasting from satellites.

   The existing domestic standard is broadly based on statutory regulations. To the extent that the courts have held these statutes to be constitutional, they aid in determining what international limits on freedom of information could be contained in a treaty to which the United States is a party. However, it would be argued that as the statutory agency established by Congress to regulate broadcasting, the Federal Communications Commission (FCC) has not exercised its regulatory authority — and hence the authority of Congress — to the fullest extent possible under the first amendment.

   It has been settled from the beginning that, even though broadcasting is protected by the first amendment, such protection does not guarantee an unfettered right of expression. Congress may limit access to radio waves through licensing in the public interest,\(^{141}\) and statutory authority has given the FCC the power to restrict and control some aspects of program content.\(^{142}\)

   Radio and television affect the public interest in the fair interpretation of information and the protection of morals;\(^{143}\) thus, some governmental examination of program content has long been accepted by the Supreme Court as part of the regulatory process.\(^{144}\) The authority of the Federal Communications Commission to regulate program content derives primarily from the Commission's broad mandate to allocate

frequencies on the basis of the “public convenience, interest, or necessity.” The most conspicuous use of this power relates to specific programs in the field of political and controversial programming. The Commission’s regulations in this area center around the Equal Time requirement of the Communications Act and the Fairness Doctrine.

(1) Equal Time: Section 315 of the Communications Act requires that a licensee permitting one candidate to broadcast must “afford equal opportunities to all other such candidates for that office.” The statute provides also that the licensee shall not censor any such political material. The Equal Time provision is the most obvious example of Congress’ willingness to restrict the broadcaster’s autonomy in the interest of some higher public good, in this case the promotion of fair debate over the air as a part of the American political process. The Supreme Court found in section 315 a congressional intent to encourage the broadcast media’s “broadest possible utilization.”

(2) The Fairness Doctrine: As interpreted by the Commission and affirmed by the Supreme Court, the Fairness Doctrine requires a station licensee to give adequate coverage of important public issues and to provide a fair coverage that accurately reflects opposing views. Further, under its public interest standard, a licensee is required affirmatively to seek out controversial issues, which must then be presented fairly.

The Commission also exerts enormous control through the initial grant of broadcasting licenses and the comparative hearing process. Even if only one applicant for a particular frequency has satisfied the minimum technical requirements, the Federal Communications Commission may refuse to grant him a license if it finds his program proposals unsatisfactory. When there is more than one applicant for an open channel, the Commission conducts a comparative hearing to evaluate the relative merits of the various extensive proposals submitted to it. While the FCC gives detailed consideration to other matters as well, the comparison of program proposals can be con-

146. Red Lion Broadcasting Co. v. FCC, supra note 141.
148. Id.
149. Id.
151. Red Lion Broadcasting Co. v. FCC, supra note 141.
sidered the essence of the comparative hearing, since the Commission will determine on the basis of competitive presentations which potential licensee is more likely to serve the public interest.\textsuperscript{156} Accordingly, license applicants are asked to submit proposals showing the percentage of planned programming in the various categories.\textsuperscript{157} The standard of balance is a flexible one, but it is evident that certain program classifications are looked upon with more approval than others.\textsuperscript{158}

In addition, the Communications Act permits the Federal Communications Commission to "prescribe the nature of the service to be rendered by each class of licensed station,"\textsuperscript{159} and to limit transmissions accordingly. The Act also forbids the broadcasting of "any obscene, indecent, or profane language,"\textsuperscript{160} and although this provision is now part of the Criminal Code,\textsuperscript{161} the Federal Communications Commission has continued to apply it in license proceedings.\textsuperscript{162} The Congressional prohibitions against broadcasting lotteries\textsuperscript{163} and gambling information\textsuperscript{164} have been amplified by rules promulgated by the Federal Communications Commission.\textsuperscript{165}

It is now well settled that Congressional interference in citizens' freedom to broadcast is constitutional.\textsuperscript{166} However, in the name of public interest, Congress could consistently with the first amendment exercise more extensive control over broadcasting. For example, as suggested by the Court in \textit{Red Lion},\textsuperscript{167} the Congress might legitimately elect to operate broadcasting as a governmental enterprise; or Congress could give broadcasting the character of public ownership, or of a public utility and a common carrier.\textsuperscript{168} Congress could also decide that

\textsuperscript{156} NBC v. United States, 319 U.S. 190 (1943).
\textsuperscript{157} Id.
\textsuperscript{158} In evaluating a program proposal for a license, the FCC will consider as a strong criteria a balanced programming — i.e., amount of time spent on local self-expression, local talent, children's programs, and service to minority groups. See, e.g., Middle Tennessee Enterprises, Inc., 1 F.C.C.2d 1227, 1230-31 (1965); Triangle Publications, Inc., 28 F.C.C.2d 80, 85 (1971).
\textsuperscript{159} 47 U.S.C. § 303(b) (Supp. V 1975).
\textsuperscript{160} 47 U.S.C. § 303(m)(1)(D) (Supp. V 1975) authorizes the Commission to suspend the license of any operator upon proof that the licensee: "has transmitted . . . communications containing profane or obscene words, language, or meaning . . . ."
\textsuperscript{165} 1 RAD. REG. 55 (1961).
\textsuperscript{166} Red Lion Broadcasting Co. v. FCC, supra note 141.
\textsuperscript{167} Id.
broadcasting stations should be "open mikes" and that "each citizen in the community should have an opportunity, in rotation, to appear on the radio or television to share his ideas with his fellow citizens."\textsuperscript{169}

In considering the constitutionality of a regulation, it is important to distinguish governmental action which assures access of the public to information and ideas from governmental action which deprives the public of access to information. To be sure, the purpose of the first amendment is to assure the free flow of ideas and enlightenment.\textsuperscript{170} In \textit{Associated Press v. United States},\textsuperscript{171} the purpose of the first amendment was characterized as providing for "the widest possible dissemination of information from diverse and antagonistic sources." Hence, whatever form of regulation a governmental action might take, it would be consistent with the first amendment as long as such regulation assured free expression in furtherance of the over-all public interest.\textsuperscript{172}

The above-formulated standard could be considered a standard for broadcasting applicable both domestically and internationally. Thus, in its negotiations for a treaty over direct broadcasting from satellites, the United States delegation could assent to any form of regulation over program content as long as such regulation fosters the American public interest, i.e., the constitutionally protected interest in robust discussion of public affairs. International implications entailed by these regulations have to be considered in the making of this treaty, but the United States could constitutionally adhere to the Soviet draft proposal restricting broadcasted programs whose content "endangers the peace" or encroaches on "fundamental human rights." Such a restriction must be distinguished from the restriction of information that might stir dissatisfaction or dissent, or conflict with national policy or the international order.

b. PRIOR CONSENT-PRIOR RESTRAINT

As we have seen, the United States Constitution permits some control over the program content of a broadcast if such control is in the public interest. On the other hand, the Constitution provides for a very rigid standard when dealing with prior restraint regulations.

Prior restraint is an official restriction imposed in advance upon a communication, as distinct from a subsequent punishment for communication made in violation of a law forbidding that type of com-

\begin{footnotes}
\item[171] Id.
\item[172] NBC v. United States \textit{supra} note 156.
\end{footnotes}
Prior restraint relates to the method of limitation, not just to its substance. In Nebraska Press Association v. Stuart, the Court reiterated its position that first amendment guarantees afford special protection against orders prohibiting the publication or broadcast of particular information or commentary — orders that impose a "prior" restraint on speech.

In this case, the court discussed and accepted the Near and Pentagon Papers cases' condemnation of prior restraint as presumptively unconstitutional. The government thus carries a heavy burden of showing justification for the enforcement of such restraint. The Court in Near stated that there are two narrowly-defined exceptions to the prohibition against prior restraint: 1) obscene material, and 2) national security.

Obscenity is not protected by the freedoms of speech and press, but it is presumed that for the most part the material broadcast to the United States will not be obscene. The only question then, is whether programs received from abroad via direct-broadcast satellite, as well as United States programs intended for broadcast abroad, may be enjoined because of an overwhelming national interest.

The Pentagon Papers case deals primarily with the issue of national security, and the three concurring opinions expressly limit the invocation of the doctrine to situations where "disclosure . . . will surely result in direct, immediate and irreparable damage to the nation or its people." This case, as well as previous Supreme Court cases, indicates that in an extremely narrow class of cases the first amendment's ban on prior judicial restraint may be overridden. War and fear of war as well as protection against "incitements to acts of violence and the overthrow by force of orderly governments" have been held adequate justification for departures from the constraints of the first amendment. In the Pentagon Papers case, the concurring opinion of Justice Brennan appears to indicate that a situation less extreme than war could justify a prior restraint. Justice Brennan states that even in

179. Pentagon Papers case, supra note 177, at 730. (Stewart, J., concurring).
peacetime the suppression of information would be constitutional if such suppression would prevent the "setting in motion of a nuclear holocaust."\textsuperscript{181} Whether it is the fear of war or the setting "in motion of a nuclear holocaust," it is clear that, as evidenced by the \textit{Pentagon Papers} case, the burden of overcoming the presumptive unconstitutionality of prior restraints is still formidable.

The \textit{Pentagon Papers} case was brought by the United States to enjoin the \textit{New York Times} and the \textit{Washington Post} from publishing a classified study entitled "History of United States Decision-Making Process on Viet Nam Policy" on the grounds that publication posed a threat to the national interest.\textsuperscript{182} The Court held that there could be no prior restraint on publication, although a majority of the court believed that the release of the surreptitiously-obtained (classified "Top Secret-Sensitive") documents would be harmful to the Nation and that their publication could be violative of various espionage statutes.\textsuperscript{183}

Thus, from the position taken by the Supreme Court, it is evident that the United States would not be able to assent to a principle of prior consent without violating the first amendment, unless it could prove that free reception of foreign broadcast or free transmission of American broadcasters would "surely result in direct, immediate, and irreparable damage to the nation" or to the international order.

The United States today is not so dismantled politically or socially that the reception of foreign broadcasts (even political propaganda) would so disrupt order as to inevitably provoke the United States to initiate a war or a nuclear holocaust. Likewise, the international order does not appear at this moment to be so fragile that the free dissemination of ideas would probably result in direct, immediate and irreparable damage to the international community. In view of the absence or a present emergency situation, the establishment of a prior restraint could not be justified.

The 1976 draft on direct broadcasting from satellites, as formulated by the Legal Subcommittee,\textsuperscript{184} would make the United States responsible for the material broadcast under its jurisdiction. It is reasonable to assume, then, that the United States would want to take certain precautions to avoid the broadcast of materials that would create international dissent and unrest. Thus, even if censorship of programs broadcast abroad cannot be affected, the United States could, as we

\textsuperscript{181} \textit{Pentagon Papers} case, \textit{supra} note 177, at 726.
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Supra} note 58, and text accompanying.
have seen, exercise some control over the nature of broadcasts directed to another country. This control could be exercised through the imposition of a licensing requirement. Congress could grant licenses on the basis of respect for international good-will and understanding, with the power to suspend or revoke the licenses should a licensee fail to observe the standard.

**Conclusion**

With respect to the international legal aspects of the television broadcasting satellite service, the proposals that have been put forward are unnecessary at this time. The need is not so much for new, special rules banning satellite propaganda as it is for more effective application of the existing rules. However, that the United States has involved itself in the elaboration of these principles is a fait accompli. Under these circumstances, the United States should continue to take a strong stance in the defense of freedom of expression.

The first amendment allows some leeway in connection with regulation of radio and television, and the United States representatives at the Legal Subcommittee would not be acting beyond their constitutional mandate in agreeing to certain restrictions on the content of international direct broadcast from satellites. However, certain concessions already made seem to indicate that the United States delegation is willing to compromise more than it should.

In its fifth session, the Working Group was of the view that the principle of free flow of information, as embodied in the Universal Declaration of Human Rights as well as other documents, was relevant to the conduct of activities in the field of direct television broadcasting by satellite. However, the present draft of principles, as formulated in May 1976, fails to recognize the principle of freedom of information as applicable to an agreement on direct television broadcasting by satellite, and refers only to the principle of national sovereignty as embodied in various international agreements.

This failure to do justice to so fundamental a concept of international law as freedom of expression and of information is a fault that must be corrected. The United States delegation at the CPUOS Legal Subcommittee should bring the issue back to the floor of debate at its

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188. *Id.*
next meeting. Indeed, it is important to consider that since enforcement procedures are few, international law depends very much upon respect for the law and the goodwill between States. Good international law makes for good adherence to the international law.

Whatever final provisions might be concluded, it must be recognized that adherence to an international principle of censorship could violate the United States Constitution as well as establish an unwanted precedent in the international right of freedom of information. The United States, both as an impartial observer of its own laws and as a supporter of a strong peaceful system of international order, should not sanction the imposition of international censorship.