United States Regulation of Transborder Speech

by Stephen R. Barnett*

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I

Introduction

Today's world, if not quite a global village, is highly international in its consciousness. An article in a magazine published in Lebanon sets off a political scandal in the United States. An article in a magazine published in Lebanon sets off a political scandal in the United States.\footnote{See Pear, \textit{The Reagan White House: Missing the Iran Arms Story: Did the Press Fail?}, N.Y. Times, March 4, 1987, at A15, col. 3 (late city ed.).} Events in South Africa or Nicaragua, in Chernobyl or Bhopal, are quickly known around the world. More than 1,400 foreign journalists are based in the United States.\footnote{The Foreign Press Center, a division of the United States Information Agency, reports that its mailing list of foreign journalists based in the United States includes about 750 in New York City, 525 in Washington, D.C., and 150 in Los Angeles. Telephone interview with Nicholas King, Director of the Foreign Press Center in New York (March 16, 1987); telephone interview with Don Jones, Director of the Foreign Press Center's Los Angeles office (March 16, 1987).} Foreign opponents of United States policies take their case to the American public. The distinction between domestic and international issues increasingly blurs. Many issues of national security, economics, health, the environment, culture, and even politics that are debated within a country, especially a country as conspicuous as the United States, have international or worldwide dimensions.

Given the resulting flow of media communications into and out of the United States, it is surprising that so few questions have arisen concerning the protection afforded to transborder speech by the first amendment to the United States Constitution. The Supreme Court has touched on the subject in an immigration law case involving the government's power to deny a visitor's visa on the basis of the ideological or political persuasions of the would-be visitor, and in cases involving the government's power to restrict the foreign travel of U.S. citizens. But, as of the end of 1986, the Court had only once confronted a restriction on "pure speech" crossing the border. In \textit{Lamont v.}  

\footnote{2. The Foreign Press Center, a division of the United States Information Agency, reports that its mailing list of foreign journalists based in the United States includes about 750 in New York City, 525 in Washington, D.C., and 150 in Los Angeles. Telephone interview with Nicholas King, Director of the Foreign Press Center in New York (March 16, 1987); telephone interview with Don Jones, Director of the Foreign Press Center's Los Angeles office (March 16, 1987).}  
\footnote{3. Kleindienst v. Mandel, 408 U.S. 753 (1972); see infra text accompanying notes 58-71.}  
\footnote{4. E.g., Regan v. Wald, 468 U.S. 222 (1984); Haig v. Agee, 453 U.S. 280 (1981); Aptheker v. Secretary of State, 378 U.S. 500 (1964); see infra text accompanying notes 87-104.}
Postmaster General,5 decided in 1965, the Court held invalid under the first amendment a statute requiring that “communist political propaganda” mailed into the United States be detained at the Post Office until the addressee was notified and requested its delivery.6

Presently, attention to transborder speech in United States law appears to be increasing. In December 1986, the Supreme Court heard arguments in Keene v. Meese,7 a case challenging the provisions of the Foreign Agents Registration Act that regulate as “political propaganda” the speech disseminated in the United States by agents of foreign entities.8 In October 1986, a federal district court struck down the regulations used by the United States Information Agency in deciding whether to certify films as “educational” for the purpose of duty-free import to other countries under an international agreement.9 Also in 1986, the Supreme Court accepted for review a new case dealing with the denial of visitors’ visas for reasons based on the ideological or political leanings of the would-be visitors.10 Academic attention also is beginning to focus on regulation of transborder speech.11

Meanwhile the technology of communications, particularly of communications satellites, is increasingly capable of making national frontiers irrelevant.12 Legal restrictions on transborder speech hence are growing in their impact, since there is more potential speech to restrict,13 at the same time that they come under increased judicial and professional scrutiny. Ap-

5. 381 U.S. 301 (1965); see infra text accompanying notes 20-24.
6. 381 U.S. at 305.
8. See 22 U.S.C. §§ 611(j), 614(a)-(b) (Supp. 1985); infra text accompanying notes 131-88; infra note 189.
10. Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), 56 aff’d by an equally divided court, 400 U.S.L.W. U.S. (Oct. 19, 1987); see infra text accompanying notes 76-81. See also Haase v. Webster, 807 F.2d 208 (D.C. Cir. 1986), reinstating a lawsuit against the FBI by an American writer alleging that it was FBI policy to search and seize at customs the papers of U.S. travelers returning from Nicaragua. See infra note 116-21 and accompanying text.
12. See, e.g., M. FRANKLIN, MASS MEDIA LAW 716 (3d ed. 1987); infra text accompanying notes 257-59.
13. See infra, e.g., text accompanying notes 257-59, 380-84.
praisal of the restrictions that exist in United States law is therefore timely.

Another reason for examining those restrictions springs from the position the United States has taken in international debates on transborder speech. The United States has championed the principle of a "free flow" of information across national frontiers. It has staunchly supported Article 19 of the Universal Declaration of Human Rights, which declares a right to "seek, receive and impart information and ideas through any media and regardless of frontiers."\(^\text{14}\)

The "free flow" position of the United States has been particularly evident in debates at the United Nations over control of direct broadcast satellites (DBS).\(^\text{15}\) In those debates the United States has opposed almost any restriction on transborder DBS, and especially any requirement for "prior consent" by the country receiving the broadcasts.\(^\text{16}\)

In these contexts, both domestic and international, it is appropriate to canvass the restrictions on transborder speech that exist in United States law and to evaluate them under the first amendment. Such a study may advance the growing debate over the validity or wisdom of specific restrictions. In addition, by bringing together diverse laws scattered through the United States Code, adopted at different times and for different purposes, a study of this kind may promote a more systematic, generic approach to transborder speech. At the same time, in view of the international position taken by the United States, such a study can usefully show to what degree the United

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16. In 1982, for example, in opposing a General Assembly Resolution supporting the principle of prior consent, the U.S. delegate declared that: "[A]ny principle requiring that [a] broadcaster must obtain the consent of a foreign Government would violate United States obligations towards both the broadcasters and the intended audience; it would also violate article 19 of the Universal Declaration of Human Rights on the right to freedom of expression." 37 U.N. GAOR Special Political Comm. (34th mtg.) at 11, U.N. Doc. A/APC/37 34 (1982).
States allows a "free flow" of information across its own borders. A comprehensive study of U.S. restrictions on transborder speech thus can help determine whether these restrictions, the product of piecemeal accumulation over many years, are consistent both with national policies existing today and with the first amendment.

This article presents such a survey of United States laws regulating transborder speech, together with a commentary on their underlying policies and their constitutional validity. The article deals first with speech flowing into the United States and then—more briefly, since fewer laws apply—with outgoing speech. Each part focuses first on provisions regulating information flow in general and then on provisions addressed specifically to the electronic media, radio and television.

II
Regulation of Speech Flowing Into the United States

A. Regulation of Incoming Information Flow in General

The legal response of the United States to the entry of information from abroad reflects a clash of opposing principles. On one side stands the concept, grounded in the first amendment, that government should not interfere with the communication of information, at least when one party to the communication (in this case the listener) is a citizen or resident of the United States.17 Opposing this concept is a battery of United States laws that restrict the incoming flow of information in the interests of national security, foreign policy, the nation's control over its borders, trade protectionism, or other concerns.18 And since there is also a tradition of judicial deference to the legislative and executive branches in matters of foreign or international affairs,19 these laws rarely have been overturned by the courts. The result is something of a standoff: U.S. citizens have the right to receive information from abroad, but this right frequently is limited by determinations of the legislative and executive branches.

18. See infra notes 48-247 and accompanying text.
1. **Principles and Practices Protecting Incoming Information Flow**

The first amendment and related principles of United States law surely are not limited to communications that both originate and are received within the United States. Legal protections for freedom of speech must have some application to the import and export of information. For this self-evident proposition one finds, however, curiously little judicial support. As of the end of 1986 there were only two major Supreme Court cases. The Court's only opinion that addressed the position directly was *Lamont v. Postmaster General.*\(^20\) There the Court struck down, under the first amendment, a federal postal statute prohibiting the delivery, except on specific written request by the addressee, of material mailed from abroad that the Secretary of the Treasury had determined to be "communist political propaganda."\(^21\) The Court observed that the statute "sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail."\(^22\) The Court held that by imposing on the addressee the "affirmative obligation" to request delivery, an obligation "almost certain to have a deterrent effect," the statute violated the addressee's first amendment rights.\(^23\)

Three concurring justices in *Lamont* saw the decision as reflecting a first amendment right to receive information. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."\(^24\) In subsequent cases involving domestic rather than transborder communications, the Court has provided further support for a first amendment right to receive information from a willing speaker.\(^25\)

The Supreme Court's second major case on transborder speech, through 1986, was *Kleindienst v. Mandel.*\(^26\) The case

20. 381 U.S. 301 (1965).
21. Id. at 302-07.
22. Id. at 306.
23. Id. at 307.
24. Id. at 308 (Brennan, J., joined by Goldberg and Harlan, JJ., concurring).
26. 408 U.S. 753 (1972); see infra notes 58-71 and accompanying text.
involved denial of a visitor's visa to a foreign academic invited to speak in the United States. 27 The Court indicated that U.S. citizens have a first amendment right to receive information from a foreign speaker. 28 But it found that right outweighed, at least on the facts presented, by the government's power to exclude aliens. 29

Apart from the first amendment, the United States' endorsement of the principle of a free incoming flow of information is reflected in its support for the Universal Declaration of Human Rights. 30 Article 19 of the Declaration provides: "Everyone has the right to freedom of opinion and expression. This right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." 31 While the Universal Declaration is not a treaty and thus not directly controlling law in the United States, 32 it has been cited by several courts 33 and arguably has legal effect, either as part of the customary law of nations or as an authoritative interpretation of the United Nations Charter. 34 Perhaps more important than the Declaration's legal status in the United States is the United States government's support for Article 19 in international forums. 35 This support should make it politically and morally difficult for the United States to refuse to accept a free flow of information and ideas across its own frontiers—to fail to practice what it preaches.

In practice, the United States does have a basic openness to information from abroad. Foreign newspapers and periodicals, for example, circulate freely. Any government attempt to re-

27. See 408 U.S. at 757.
28. Id. at 763-64.
29. Id. at 769-70.
31. Id. The Universal Declaration was adopted unanimously by the United Nations General Assembly in 1948 (the Soviet Union and other East European nations abstaining). Id.
33. E.g., Filartiga v. Pena-Irala, 630 F.2d 876, 881-83 (2d Cir. 1980); Zemel v. Rusk, 381 U.S. 1, 14 n.13 (1964).
35. See, e.g., Hagelin, supra note 15, at 294.
strict their circulation surely would violate, if not the first amendment rights of the publishers or distributors,36 the first amendment rights of Americans wishing to receive the publications.37

Another way the United States honors the “free flow” principle is by opening U.S. media, except broadcasting,38 to alien or foreign ownership. Newspapers, magazines, news services, film and television producers, cable television networks, cable television systems, and all other nonbroadcast media in the United States may be owned and controlled by foreign nationals, whether or not they reside in the United States.39 In other contexts, such as production of television programming, United States endorsement of the free flow principle may ring hollow, since in practice the flow consists overwhelmingly of American exports.40 Foreign ownership of U.S. media, however, is a conspicuous reality, especially in newspapers and other publishing enterprises41 and cable television.42


37. See Lamont v. Postmaster General, 381 U.S. 301 (1965); supra notes 20-24 and accompanying text.

38. See infra notes 267-302 and accompanying text.


40. See infra notes 260-66, 644-50 and accompanying text.


42. See infra text accompanying notes 311-22. The openness of United States media to foreign ownership apparently goes beyond what is required by the protections for alien investment embodied in the United States' bilateral trade and investment treaties with its major trade partners. These treaties typically exclude “communica-
In summary, while the case law remains sparse, the Supreme Court's decision in Lamont, together with its opinion in Mandel and its rulings in other right-to-receive cases, goes far toward establishing a first amendment right to receive information from abroad. These cases, combined with U.S. endorsement of the Universal Declaration of Human Rights and with practices such as tolerance for foreign ownership of U.S. nonbroadcast media, provide strong evidence of a national commitment to the concept of a "free flow" of information into the United States.

But at the same time, the United States has a variety of laws, discussed in the next section, that restrict incoming information flow. And despite the first amendment, these laws, except for the one struck down in Lamont, have to date been upheld by the courts.

2. Restrictions on Incoming Information Flow

(a) Restrictions on Visitors' Visas Under the McCarran-Walter Act

The McCarran-Walter Immigration Act contains two provisions that may bar the entry of aliens into the United States, even as short-term visitors, if they hold views offensive to the U.S. government. Subsection 28 of section 1182(a) bars the entry of aliens who are, or at any time have been, "anarchists," members or affiliates of the Communist Party "or any other totalitarian party," or persons who "advocate the economic, institutions," along with banking, transport, and other activities, from their protection of reciprocal investment. See Note, The Rising Tide of Reverse Flow: Could a Legislative Breakwater Violate U.S. Trade Commitments?, 72 Mich. L. Rev. 551, 568-71 (1974). The treaty with West Germany specifies that communications "includes radio and television, among other means of communication." Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, United States-Germany, Protocol, para. 11, 2 U.S.T. 183a, T.I.A.S. No. 3593. The treaties do not otherwise define "communications," but at least some of the U.S. media that are open to foreign ownership, such as cable television systems, would appear to fall within that term.

43. See supra notes 20-24 and accompanying text.
44. See supra notes 26-29 and accompanying text.
45. See supra note 25 and accompanying text.
46. See supra notes 30-35 and accompanying text.
47. See supra notes 36-37 and accompanying text.
49. See generally Shapiro, Ideological Exclusions: Closing the Border to Political Dissidents, 100 Harv. L. Rev. 930 (1987); Neuborne & Shapiro, supra note 11, at 722-28.
ternational, and governmental doctrines of world communism . . . .” Subsection 27 bars the entry of aliens who the U.S. government has reason to believe seek to enter the United States “to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.”

Under these provisions (which date from the Joseph McCarthy era of the 1950s) the U.S. government maintains a list, or “Lookout Book,” of aliens to be denied entry. The 1984 list was reported to include eight thousand persons from Canada alone. In 1986 an official of the U.S. State Department told a congressional committee that in the previous year 47,500 persons had been formally excluded from the country under subsection 28. While the vast majority of these had been granted automatic waivers, some 800 had been denied waivers. In addition, 33 aliens had been excluded under subsection 27.

In the 1972 case of *Kleindienst v. Mandel*, the Supreme Court upheld the application of subsection 28 to deny a visitor's visa to a Marxist scholar from Belgium who was invited to speak at academic conferences in the United States. The Attorney General had refused to grant a waiver to permit Mandel's entry, and the Court, by a 6-3 vote, upheld the Attorney General's action.

The Court indicated that although Mandel had no constitutional right to enter the country, American academics did have a first amendment right to receive information from him at the academic gatherings he would attend. This right to receive

51. *Id.*
52. *Id.* at § 1182(a)(27).
53. *Id.* In addition, subsection 33, added in 1978, bars the entry of aliens who participated in Nazi war crimes or other “persecution of any person because of race, religion, national origin, or political opinion” during the years 1933-45. 8 U.S.C. § 1182(a)(33).
54. *See, e.g., Itzcouitz v. Selective Service Local Bd. No. 6, 447 F.2d 888, 889 (2d Cir. 1971); Shapiro, supra note 49, at 932.
55. *N.Y. Times*, Feb. 19, 1984, at 21, col. 1; *see Shapiro, supra note 49, at 932 (approximately 50,000 persons listed in 1986 as potentially excludable under subsections 27 or 28).
56. *N.Y. Times*, Aug. 12, 1986, at 6, col. 1; *see also Shapiro, supra note 49, at 931 n.11.
58. 408 U.S. 753 (1972).
59. *Id.* at 770.
60. *Id.* at 753, 770.
61. *Id.* at 764.
could not be denied simply because “the mode of regulation bears directly on physical movement,” any more than the same right could have been denied in *Lamont* because the regulation on its face “dealt only with the government’s undisputed power to control physical entry of mail into the country.” 62 Moreover, the Americans’ right to hear Mandel was not satisfied by the availability of alternative means for receiving his ideas, such as his books and published speeches, or tapes and telephone hook-ups. In view of “what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning,” the Court was “loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest” in having direct, personal access to Mandel’s ideas.63

Nonetheless, the Court held that this constitutional interest could not prevail against the “plenary congressional power to make policies and rules for exclusion of aliens.” 64 The Court previously had held that the power to exclude aliens was “to be exercised exclusively by the political branches of government,”65 and it was “not inclined in the present context to reconsider this line of cases.” 66

The Court did stop short of recognizing power in the executive branch to deny a waiver, and hence a visa, to a particular alien because of his ideas. While the government had argued that it need not give any reason for its decision to exclude Mandel,67 the Court went to some length to avoid confronting this position. Noting that earlier in the litigation the Attorney General had given a reason for excluding Mandel (Mandel’s unknowing and minor violations of the conditions of entry on a prior visit), the Court found that to be sufficient. Where a decision to exclude an alien was based on “a facially legitimate and bona fide reason,” it would not be scrutinized by the Court or weighed against the first amendment interests in the case.68

*Mandel* thus left the opposing interests in precarious balance. The case confirms that, in accord with *Lamont*, U.S. citizens have a first amendment right to receive information from foreign speakers, and probably to receive it face-to-face. At the

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62. *Id.* at 764-65.
63. *Id.* at 765.
64. *Id.* at 769.
65. *Id.* at 765 (quoting brief of the United States).
66. *Id.* at 767.
67. See *id.* at 769.
68. *Id.* at 770.
same time, Mandel upholds the "plenary power" of Congress to exclude aliens, and indicates that this power comprehends the exclusion of classes of aliens (such as the classes listed in subsection 28) because of their ideas. The power thus stands in contrast to the "content neutrality" usually required of government action affecting first amendment rights. And while the Court shied away from holding that the government could deny a waiver to a particular alien because of his ideas, it said it would not scrutinize any colorable reason that the government put forward for such a denial.

After Mandel, Congress moved to shift the balance by adding the McGovern Amendment to the McCarran-Walter Act in 1979. This provision was adopted "[f]or purposes of achieving greater United States compliance [and] ... encouraging other signatory countries to comply" with the Helsinki Accords of 1975. The amendment provides that when an application for a visitor's visa is made by an alien excludable under subsection 28 "by reason of membership in or affiliation with a proscribed organization," but otherwise admissible to the United States, the Secretary of State "should" recommend to the Attorney General that a visa be issued, unless the Secretary of State certifies to Congress that admission of the alien "would be contrary to the security interests of the United States."

The executive branch apparently has reacted to the McGovern Amendment by finding some aliens who otherwise would be covered by the amendment to be excludable under subsection 27 of the McCarran-Walter Act instead of subsection 28. In Abourezk v. Reagan, the government denied visas under subsection 27 to four persons who might have fallen under subsection 28 and the McGovern Amendment. The decision of

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69. Id.; see supra text accompanying note 51.
73. Id. See Conference on Security and Cooperation in Europe: Final Act, reprinted in 73 DEP'T STATE BULL. 323 (1975); Paust, supra note 34, at 63; Carliner, United States Compliance with the Helsinki Final Act: The Treatment of Aliens, 13 VAND. J. TRANSNAT'L L. 397, 400, 407-08 (1980).
75. See Neuborne & Shapiro, supra note 11, at 724-25 & n.22.
77. The four were Tomas Borge, the Interior Minister of Nicaragua; Nino Pasti, a former member of the Italian Senate, former general in the Italian armed forces, and
the court of appeals somewhat restricted the government's power to act under subsection 27. The court held that when an alien is a member of a proscribed organization so that subsection 28 applies, the government may not bypass the McGovern Amendment and proceed under subsection 27 unless the reason for the perceived threat to national interests under subsection 27 is independent of the fact of membership in the organization.\(^7\)

In dissent, Judge Robert H. Bork thought subsection 27 properly could come into play if the alien's membership in the proscribed organization "raises additional concerns, as it does when it involves a connection to a government that implicates American foreign policy . . . ."\(^79\) Judge Bork warned that the majority's decision "begins, albeit cautiously, a process of judicial incursion into the United States' conduct of its foreign affairs."\(^80\) The government has successfully petitioned for Supreme Court review in \textit{Abourezk}.\(^81\)

Under either subsection 27 or 28, a number of foreign intellectuals who hold views offensive to the U.S. government have been denied visitors' visas and thus prevented from expressing their views in the United States.\(^82\) In 1986, a U.S. Senate com-

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78. 785 F.2d at 1048-49.
79. Id. at 1071 (Bork, J., dissenting).
80. Id. at 1076 (Bork, J., dissenting).
82. In 1985, Farley Mowat, a prominent Canadian writer on wildlife and conservation, was denied entry. Officials of the U.S. Immigration and Naturalization Service (INS) explained that he had been listed for many years in the Service's "Lookout Book" because he was affiliated with "leftist organizations" and for other reasons that were "confidential." \textit{N.Y. Times}, Apr. 24, 1985, at 10, col. 8. Others whose visa requests have been denied in recent years include Hortensia de Allende, widow of the president of Chile; Gerry Adams, leader of the political wing of the Irish Republican Army; Roberto d'Aubuisson, president of El Salvador's Constituent Assembly; Ruben Zamora, spokesman for the El Salvadoran Revolutionary Democratic Front; Dario Fo and Franca Rame, Italian political satirists; and Patricia Lara, a Colombian journalist. \textit{N.Y. Times}, Nov. 12, 1986, at 10, cols. 3-7. Novelists Gabriel Garcia Marquez and Carlos Fuentes are among other prominent writers and thinkers who have been barred or have declined to visit the United States because of these laws. \textit{N.Y. Times}, Apr. 14, 1984, at 24, col. 3. See Shapiro, supra note 49, at 930, 933 n.23, 935 & n.35; Neuborne & Shapiro, supra note 11, at 723, 725-28.

The case of Patricia Lara, the Colombian journalist, was especially noteworthy. Ms. Lara came to New York in October 1986 at the invitation of Columbia University to
mittee held hearings on a bill designed to prevent such exclusions. The bill would have barred the exclusion of any alien "because of any past or expected speech, activity, belief, affiliation, or membership which, if held or conducted within the United States by a United States citizen, would be protected by the first amendment to the Constitution." The Reagan Administration opposed the bill, though offering to support "reasonable changes" in subsection 28 to "ameliorate concerns about possible infringements on the first amendment rights of Americans."

For a nation committed to the principles of the first amendment, changes in the McCarran-Walter Act are in order. Subsection 28, which prima facie empowers the U.S. government to bar short-term visitors because of their ideas or political allegiances, is particularly offensive to first amendment values. To be sure, subsections 27 and 28 are immigration laws, designed to control the flow of people into the United States. As the Supreme Court emphasized in Mandel, "plenary congressional
power to make policies and rules for exclusion of aliens has long been firmly established." But such policies and rules can operate to restrict the flow of ideas and information into the United States. At least where brief visits are concerned, a country that values free speech and champions a free flow of information across national borders cannot consistently bar visitors from entering its own borders because of their speech or ideas.

(b) Restrictions on Foreign Travel of U.S. Citizens

The United States restricts the incoming flow of information when it prevents U.S. citizens from traveling to other countries. Such travel provides the traveler, his associates, and his domestic audiences with information about those countries, information that may relate to the policies or actions of the United States government as well. Travel restrictions can be divided into two kinds: a ban on travel anywhere by a particular person, and a ban on travel by all persons to a particular country.

The Supreme Court has held that freedom to travel abroad is "a constitutional liberty closely related to rights of free speech and association ...." Thus a U.S. citizen may not be denied a passport absent evidence that his proposed travel poses a serious threat to U.S. interests. In *Aptheker v. Secretary of State*, the Court invalidated a provision of the Subversive Activities Control Act of 1950 that denied passports to knowing members of communist organizations, saying the statute swept too broadly and hence abridged the freedom of travel. By comparison, in *Haig v. Agee* the Court allowed the Secretary of State to lift the passport of an ex-CIA agent, where it was stipulated that his speech activities abroad (which included the naming of U.S. intelligence agents) posed a danger to the U.S. national security.

While lifting an individual's passport for reasons particular to

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87. "In many different ways, direct contact with other countries contributes to sounder discussions at home." Kent v. Dulles, 357 U.S. 116, 127 (1958) (quoting Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 195-96 (1956)).
89. *Id. at 514; see also, e.g., Zemel v. Rusk*, 381 U.S. 1, 14 (1965).
91. *Id. at 514.
93. *Id. at 287.*
that individual may infringe his constitutional rights, such action is unlikely to have much impact on the incoming flow of information about foreign countries. Other U.S. travelers, including journalists, remain free to go to those countries and report on them. The same cannot be said of restrictions on all travel by U.S. citizens to particular countries. Such restrictions may substantially limit knowledge by the U.S. public of what is happening in those countries. Nevertheless, the Supreme Court has upheld restrictions of this kind. In Zemel v. Rusk, the Court upheld a law allowing the Secretary of State to invalidate passports to Cuba, finding the right to travel outweighed by the national interest in restricting travel to a country belligerent to the United States. The Court dismissed the direct freedom-of-speech claim by denying the existence of a “right to gather information.”

In Regan v. Wald, the Court reaffirmed Zemel in upholding an executive regulation, issued under the Trading With the Enemy Act, treating as prohibited economic transactions the purchase of food and lodging by ordinary tourist or business travelers to Cuba. The claim based on the constitutional right to travel was rejected as not overcoming “weighty concerns of foreign policy,” in this case the desire of the U.S. government to deny to the Cuban government access to hard U.S. currency. With respect to the freedom-of-speech claim, the Court said simply that no first amendment right of the kind present in Aptheker was offended by an across-the-board travel restriction. The Court did not consider possible first amendment rights to receive or gather information, which had made substantial progress in the years since Zemel. However, given the high premium that the Court in Regan v. Wald placed on deferring to the executive and legislative branches in matters

94. Of course, non-U.S. citizens can still go to those countries and report in the United States.
95. 381 U.S. 1 (1965).
96. Id. at 15-16.
97. Id. at 17.
100. 468 U.S. at 229.
101. Id. at 241-42.
of foreign affairs, it is doubtful that recognition of any such first amendment rights would have changed the outcome.

The prohibitions on travel by U.S. citizens upheld in Zemel v. Rusk and Regan v. Wald probably have a significant impact in curtailing the flow into the United States of information about Cuba. Still, the information-blocking effects of these travel bans are incidental. Few would claim that the bans had the purpose of excluding information about Cuba, as the McCarran-Walter Act apparently has the purpose of excluding unwelcome ideas from the United States. Further, restrictions on the movement of people do not necessarily establish precedents for restrictions on the flow of pure information. Where restrictions on pure information are concerned, the Supreme Court's only case in point, through 1986, was Lamont, which struck down the law burdening the flow of mail into the United States.

(c) Customs Restrictions on Communicative Materials

Along with broad power over the entry of persons into the United States, the legislative and executive branches have sig-

104. Cf. Kleindienst v. Mandel, 408 U.S. at 762-65 (recognizing the first amendment right but finding that on the facts presented, the power to exclude aliens outweighed it).
105. But cf. Neuborne & Shapiro, supra note 11, at 759 (amount spent by American travelers to Cuba prior to regulation upheld in Regan v. Wald was dwarfed by amount of trade still allowed with multinational affiliates of U.S. corporations, "giving rise to a strong suspicion that the regulations were intended to cut off travel rather than dollars").
106. See supra notes 48-86 and accompanying text.
107. 381 U.S. 301. See supra notes 20-24 and accompanying text. But see the more recent decision in Meese v. Keene, infra note 189. The Trading With the Enemy Act, involved in Regan v. Wald, has a now-limited application to pure information flow. The restrictions imposed under the Act on trade with Cuba, North Korea, Vietnam, and Cambodia prohibit the import of books, periodicals, or films from those countries, unless the U.S. Treasury Department grants a special license based on lack of economic benefit to the designated nation, or unless the transaction falls within one of the exceptions provided for research institutions, "scholars," and news organizations. See 50 U.S.C. app. § 5(b) (1982); 31 C.F.R. §§ 500.204, 515.101-515.809, 515.544, 515.545(a)(1)-(2), 515.546 (1985); Neuborne & Shapiro, supra note 11, at 728-32. These restrictions reportedly were enforced during the 1960s against material from North Vietnam and China and in 1981 against material from Cuba. Id. at 731-32, 754-55. In the face of litigation, however, the government in 1982 agreed to allow the unlicensed import of "single copies" of books, newspapers, and other materials from the designated countries, and that position evidently still stands. Id. at 731-32, 754. Unlicensed imports of more than one copy by members of the general public remain prohibited. Id. at 732 & n.57, 754.
significant control over the entry of objects. With respect to communicative materials, the U.S. customs law prohibits the importation of any "obscene" matter, or "any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States . . . ."\textsuperscript{108}

The substantive restrictions thus imposed are not onerous. The Supreme Court has held that the applicable standard of "obscenity" is the same one used to judge domestic material.\textsuperscript{109} Following this lead, the Court has affirmed a decision construing the ban on materials advocating insurrection or illegality as reaching no farther than domestic law\textsuperscript{110}. Thus, so far as their substance is concerned, communicative materials from abroad are as free as domestic materials to enter and circulate within the United States.

That freedom, however, may be deceptive, since customs officials have broader enforcement powers than domestic officials. Searches and seizures within the United States usually require a warrant or probable cause, as provided in the fourth amendment to the federal Constitution.\textsuperscript{111} The Supreme Court, however, has allowed a search without warrant or probable cause of an incoming letter suspected of carrying heroin.\textsuperscript{112} The Court stated that customs agents may search any luggage or effects crossing the border, and that no one could reasonably expect privacy against a border search.\textsuperscript{113}

If incoming material is thus detained for inspection at the border, its distribution in the United States is delayed. This delay is not subject to the stringent safeguards that would apply to any such "prior restraint" on the distribution of domestic materials.\textsuperscript{114} Responding to a claim of unconstitutional restraint at customs, a federal district court, in a decision af-

\textsuperscript{108.} 19 U.S.C. § 1305(a) (1982). These provisions apply to the importation of "any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing . . . ." Id.
\textsuperscript{110.} Church of Scientology v. Simon, 460 F. Supp. 56, 58 (C.D. Cal. 1978), aff'd mem., 441 U.S. 938 (1979). Thus, under Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), materials cannot be excluded on these grounds unless they are "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."
\textsuperscript{111.} U.S. CONST., amend. IV; see, e.g., Wong Sun v. United States, 371 U.S. 471 (1963).
\textsuperscript{113.} Id. at 618-19.
\textsuperscript{114.} See, e.g., Freedman v. Maryland, 380 U.S. 51 (1965).
firmed by the Supreme Court, declared the problem de minimis:

In this case, the Church of Scientology's papers . . . were detained for a very short period by the Customs Service, before the Service determined the papers to be importable. Under the Customs Service's broad powers to restrict imports and conduct a search of materials entering the country from abroad, this temporary delay and retention of documents do not constitute a constitutional deprivation. As this language suggests, a prolonged detention of communicative materials by customs might amount to a constitutional deprivation.

One use of customs searches has been recognized as improper. When Edward Haase, an American writer critical of U.S. policy toward Nicaragua, returned to the United States from a trip to Nicaragua in 1985, customs agents at the Miami airport, together with an FBI agent, searched his luggage and seized and copied some of his papers. In Haase's suit against the FBI and the Customs Service alleging violations of his constitutional rights, the government effectively confessed error, offering to undo everything that had been done to Haase.

The court of appeals nonetheless held that Haase's suit for declaratory relief should not have been dismissed. Haase alleged that other travelers had been similarly subjected to intrusive border searches on returning from Nicaragua, as part of an apparent government policy, and the court ruled that the government must respond to that allegation. Meanwhile, the Customs Service in August 1986, issued internal directives designed to provide guidance to field agents in such situations.

117. The government offered to return all the copies of Haase's papers and certified that they had not been further copied or disseminated. Id. at 211.
118. Id. at 217. The court of appeals upheld the district court's dismissal of the claim for injunctive relief. Id.
119. See also Neuborne & Shapiro, supra note 11, at 733 (“In practice, the statute [19 U.S.C. § 1305, see supra note 108 and accompanying text] has served as an invitation to overzealous border officials anxious to seize books and newspapers that appear unfriendly to the United States”).
120. 807 F.2d at 216.
121. The directives covered subjects such as personal searches, photocopying, and the legal definitions of sedition and treason. Telephone interview with Ellen McClain, attorney for the U.S. Customs Service, Washington D.C. (March 30, 1987).
It thus appears that, at least in Haase's case and perhaps more broadly, the U.S. government improperly searched and seized the papers of travelers returning to the U.S. from Nicaragua. It also appears that this practice or policy was stopped, but only as a result of litigation. In this case, it seems, the legal protections of the U.S. Constitution have freed the incoming flow of information from a government attempt to monitor or restrict that flow.

(d) Customs Exemptions for Communicative Materials
Under the Beirut Agreement

The Beirut Agreement is a multinational treaty designed to encourage the international circulation of audio-visual materials of an educational character by exempting them from import duties, license requirements, taxes, and other restrictions of importing countries. Under the Agreement, a person seeking duty-free treatment for audio-visual materials must apply for a certificate of educational character from the appropriate agency of the exporting country. The certificate is then submitted to the importing country, which makes its own determination whether the material qualifies for exemption, but giving "due consideration" to the exporting country's determination.

The President of the United States, as authorized by legislation implementing the treaty, has designated the United States Information Agency (USIA) to administer the Beirut Agreement for the U.S. The functions thus conferred on the USIA include both the "certification" of materials for export from the United States and the "authentication" of materials certified by another country for duty-free import into the United States. The regulations used by the USIA in issuing certificates for export were held to violate the first amendment

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123. Treaty, art. IV, 17 U.S.T. at 1582-84.
124. Id.
in *Bullfrog Films, Inc. v. Wick*, a federal district court decision, now on appeal, that is discussed later in connection with outgoing speech.

The USIA’s conduct in authenticating materials for import into the United States under the Beirut Agreement appears, to date, not to have attracted criticism. This is somewhat surprising. The regulations applied by the USIA in determining whether materials are “educational” for the purpose of U.S. import are identical to those struck down in *Bullfrog Films* with regard to U.S. export.

Moreover, Article V of the Beirut Agreement reserves the right of receiving states “to censor material in accordance with their own laws or to adopt measures to prohibit or limit the importation of material for reasons of public security or order.” When the U.S. Congress was considering ratification of the Agreement in 1966, concern was expressed about the entry of foreign political materials. One congressman pointed to Article V as assurance that the Agreement “does not require us to bring in a single film from Yugoslavia that is communistic in nature.” To deny duty-free entry to a film because it was “communistic in nature,” whether or not such denial was authorized by the Beirut Agreement, would constitute discrimination based on political content that might well violate the first amendment.

The apparent absence of challenge to the USIA’s implementation of the Beirut Agreement with respect to materials seeking duty-free import into the United States may indicate that the Agency has routinely accepted the certifications of exporting countries. Or perhaps would-be importers, located outside the United States, have had legal or practical difficulties in challenging USIA rulings. In any event, the decision on ap-

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128. 646 F. Supp. 492 (C.D. Cal. 1986), *appeal docketed*, No. 86-6630 (9th Cir.).
129. *See infra* text accompanying notes 594-610.
132. *See Note, supra* note 122, at 408.
peal in *Bullfrog Films* presumably will settle the first amendment validity of the existing USIA regulations as applied to imports as well as exports.135

(e) Regulation of Foreign “Political Propaganda” Under the Foreign Agents Registration Act

One statute squarely aimed at information flowing into the United States from foreign sources is the Foreign Agents Registration Act (FARA),136 which regulates such information as “political propaganda.”137 FARA dates from 1938 and 1942, times of world war and of fear that “foreign agents” and “foreign propaganda” could undermine America’s resolve.138 The Act requires every “agent of a foreign principal” to register with the U.S. Justice Department and to file supplemental registration statements every six months.139 A “foreign principal” is defined as any foreign government, foreign political party, foreign corporation, or “person outside of the United States” who is not a citizen and domiciliary of the United States.140 Exemptions are provided for diplomats, persons engaged in private business, and certain other classes of people who otherwise would be required to register as agents under the act.141

FARA imposes on registered agents several requirements with respect to any “political propaganda” they distribute in the United States. “Political propaganda” is defined for the most part neutrally, as any communication intended to “influence a recipient . . . with reference to the political or public interests, policies, or relations of a foreign country . . . or with reference to the foreign policies of the United States . . . .”142 Registered agents are required to place

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135. If the regulations are struck down in their application to exports, the Agency surely will not attempt to preserve them for imports, where a U.S. audience would be affected. See Lamont v. Postmaster General, 381 U.S. 301 (1965).


137. See 22 U.S.C. §§ 611(j), 614(a)-(b); infra notes 139-47 and accompanying text.


140. 22 U.S.C. § 611(b).

141. 22 U.S.C. § 613(a), (d); see also id. §§ 611(d), 612(f), 613.

142. 22 U.S.C. § 611(j) (1979). The definition is not entirely neutral. It includes,
on public file with the Justice Department copies of any "political propaganda" they transmit within the United States.\textsuperscript{143} They are required to report publicly to the Department of Justice on the places, times, and extent of each transmittal.\textsuperscript{144} And they are required to label conspicuously each piece of propaganda they transmit.\textsuperscript{145} The prescribed label for a film, for example, includes the names of the agent and the foreign principal, a statement that "dissemination reports" on the film are available for public inspection at the Justice Department, and a statement that "[r]egistration does not indicate approval of the contents of this material by the United States Government."\textsuperscript{146} The prescribed label does not include the word "propaganda."\textsuperscript{147}

While FARA had been held constitutional insofar as it required the registration of foreign agents,\textsuperscript{148} two recent cases, one reaching the Supreme Court, challenged for the first time the act's "political propaganda" requirements.\textsuperscript{149} Both cases involved the same three documentary films — one on nuclear war, \textit{If You Love This Planet}, and two on acid rain, \textit{Acid from Heaven} and \textit{Acid Rain: Requiem or Recovery}. All three films were produced by the National Film Board of Canada (Film Board) and distributed in the United States by the Film Board's New York office. The Film Board was an agency of the Canadian government, and its New York office accordingly was a registered foreign agent under FARA. In June 1982, the Film Board submitted to the Justice Department, along with its semi-annual registration statement, a list of sixty-two new film titles for distribution in the United States. In January 1983, the Justice Department, after screening five of the films, notified

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\textsuperscript{143} 22 U.S.C. § 614(a) (1979).
\textsuperscript{144} 22 U.S.C. § 614(a) (1979); 28 C.F.R. § 5.401(a)-(b); Report Form CRM-159 (1985).
\textsuperscript{145} 22 U.S.C. § 614(b) (1979); 28 C.F.R. § 5.402(a).
\textsuperscript{146} 22 U.S.C. § 614(b) (1979); 28 C.F.R. § 5.402(e); Report Form CRM-159; see also 28 C.F.R. § 5.400(c).
\textsuperscript{147} 22 U.S.C. § 614(b) (1979).
\end{flushleft}
the Film Board that the three named films constituted "political propaganda" under FARA.\textsuperscript{150}

Two lawsuits followed. The U.S. distributor of one of the films, together with libraries and other groups wishing to exhibit the films, brought Block v. Meese.\textsuperscript{151} The libraries and other groups claimed that the distributor's required public reporting of their names as exhibitors of "political propaganda" would deter them from showing the films.\textsuperscript{152} The distributor claimed that he lost income as a result of exhibitors' reluctance to rent or buy the films.\textsuperscript{153} Meanwhile, a California state senator who wanted to exhibit the films to stimulate public debate on the issues they addressed brought Keene v. Meese.\textsuperscript{154} He claimed he was deterred from showing the films by the harm to his political and personal reputation that would result, he said, when it became known that he had shown a film officially designated by the U.S. government as foreign "political propaganda."\textsuperscript{155}

In both cases, the U.S. government took the position, surprisingly, that while FARA required the foreign agent to put the statutory label on the film, the person exhibiting the film was free to take the label off.\textsuperscript{156} As a result, the courts in both cases ruled that the plaintiffs could not complain about the labeling requirement.\textsuperscript{157}

In Keene, the federal district court in California first ruled that the threat to Keene's reputation gave him standing to challenge the act's designation of the films as "political propaganda."\textsuperscript{158} The court then held that the act violated Keene's


\textsuperscript{151} Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986).

\textsuperscript{152} See 793 F.2d at 1308.

\textsuperscript{153} See supra note 7. See infra note 189.

\textsuperscript{154} 619 F. Supp. at 1120.

\textsuperscript{155} See Block v. Smith, 583 F. Supp. 1288, 1291 (D.C. Cir. 1984); Block v. Meese, 793 F.2d at 1307 n.1; Keene v. Smith, 569 F. Supp. at 1519 & n.2.

\textsuperscript{156} See 793 F.2d at 1308. 569 F. Supp. at 1519 & n.2. The district court in Keene remarked that "[s]ince the chief importance of the labelling requirement is obviously to inform viewers of the origins of the film, it is frankly surprising to learn that exhibitors of material covered by the Act may, with impunity, frustrate Congressional intent." Id.

\textsuperscript{157} 619 F. Supp. at 1119.
first amendment rights.\textsuperscript{159} "Propaganda" as used in ordinary speech is a "word of reproach,"\textsuperscript{160} the court said, and "whoever disseminates materials officially found to be 'political propaganda' runs the risk of being held in a negative light by members of the general public."\textsuperscript{161} Thus, Congress had put Keene to the impermissible choice of foregoing his first amendment right to show the films or suffering harm to his reputation.\textsuperscript{162} The district court's ruling in \textit{Keene} was appealed directly to the U.S. Supreme Court, where the case was argued in December 1986.\textsuperscript{163}

Meanwhile, in \textit{Block}, the U.S. Court of Appeals for the District of Columbia Circuit held that the distributor had standing to challenge FARA, since he would lose money as a result of the reluctance of others to exhibit the films.\textsuperscript{164} But Judge Antonin Scalia, writing for the court, went on to reject the constitutional challenge. FARA's own definition of "propaganda" was neutral, the court said. If the word had a derogatory meaning in common usage, this did not signify that the U.S. government in using the word was disparaging the speech the word described, but rather that the public looked unfavorably on that kind of speech (political speech designed to persuade).\textsuperscript{165} In any event, the court continued, the government itself has the right to speak, and this includes the right to criticize other people's speech.\textsuperscript{166} The Supreme Court declined to review \textit{Block},\textsuperscript{167} leaving \textit{Keene} as the only challenge to FARA before the Court.

The Supreme Court conceivably could rule in \textit{Keene}, as the Government urged,\textsuperscript{168} that Keene lacked standing to challenge

\textsuperscript{159} \textit{Id.} at 1124-25.
\textsuperscript{160} \textit{Id.} at 1121.
\textsuperscript{161} \textit{Id.} at 1124.
\textsuperscript{162} \textit{Id.} at 1125-26.
\textsuperscript{163} See \textit{supra} note 7.
\textsuperscript{164} 793 F.2d at 1307-09.
\textsuperscript{165} \textit{Id.} at 1312.
\textsuperscript{166} \textit{Id.} at 1310-14.
\textsuperscript{167} Certiorari was denied in \textit{Block} on July 7, 1986 (106 S. Ct. 3335), two and one-half months after the Court had noted probable jurisdiction in \textit{Keene} (106 S. Ct. 1632, April 21, 1986). \textit{Block} was decided by the court of appeals on June 18, 1986, and had been argued in that court on Feb. 12, 1985, more than 16 months before. \textit{See} 793 F.2d at 1303. If \textit{Block} had not been delayed in the court of appeals, it would have reached the Supreme Court before the grant of review in \textit{Keene}; in that situation, the Court might well have granted review in \textit{Block} as well.
\textsuperscript{168} Appellant's Brief at 10-18, Keene v. Meese, 107 S. Ct. 1862 (85-1180); Appellant's Reply Brief at 2-8, Keene v. Meese, 107 S. Ct. 1862 (85-1180).
FARA because the alleged effect on his reputation was too speculative. Such a ruling, however, would seem evasive and unfair in view of the Court’s refusal to review Block, in which the court of appeals found that standing did exist.\textsuperscript{169} Block established that somebody was hurt by FARA’s treatment of foreign-source speech as “political propaganda,” and further that the injury resulted from the Act’s effect in deterring the dissemination of such speech in the United States.

Moreover, there are other parties, not before the court in either case but particularly relevant here, who are even more directly affected by the “political propaganda” requirements of FARA. These are the foreign agents and their foreign principals. FARA has an impact not only on persons like the Keene and Block plaintiffs, who are discouraged by the act’s requirements from disseminating the speech of foreign agents in the United States, FARA also imposes its requirements much more directly on the foreign agents, who must file, report, and label any “political propaganda” they disseminate.\textsuperscript{170}

The impact of these requirements on the foreign agents could not readily be challenged in either Block or Keene. The Canadian Film Board had decided for political reasons not to join the litigation,\textsuperscript{171} and the rules of standing generally limit a party to complaining about injuries he himself has suffered.\textsuperscript{172} If a suit were brought by a foreign agent, however, or if the rights of the foreign agent were allowed to be raised by other parties,\textsuperscript{173} the
direct impact of FARA's requirements on the foreign agent would eliminate any question about standing.\(^7\) Moreover, the effect of those requirements in burdening and "chilling" the foreign agent's speech would present a strong first amendment case on the merits, probably stronger than in either Block or Keene.\(^7\)

The reluctance of the Canadian government to sue the U.S. government in these cases thus should not obscure the burdens that the "political propaganda" requirements of FARA impose, not only on American distributors like the Block and Keene plaintiffs, but more directly, on foreign agents and the speech they disseminate in the United States.

Does FARA offend the first amendment rights of those engaged in disseminating foreign-source speech? The parties in Block and Keene fought a battle of dictionaries and usage experts over whether "propaganda" is a disparaging word.\(^7\) The Department of Justice, however, had effectively conceded that it was. The Department told a congressional committee in 1983 that it would "support the use of a more neutral term like political 'advocacy' or 'information' to denominate information that must be labeled."\(^7\) Moreover, the original purpose of Congress in adopting FARA rather plainly embodied a negative attitude toward "propaganda."\(^7\)

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\(^7\) See supra note 171. The natural political reluctance of the Canadian government to sue the U.S. government, see supra note 171, should bring this case under the exception.


\(^7\) See 793 F.2d at 1311-12; 569 F. Supp. at 1520-22.


\(^7\) See supra note 138. See also, e.g., the Justice Department's statement, in proposing the 1942 amendments adding the "political propaganda" provisions to FARA, that the amendments were designed to strengthen the act. "[i]n view of the increased attempts by foreign agents at the systematic manipulation of mass attitudes on national and international questions, by adding requirements to keep our Government and people informed of the nature, source, and extent of political propaganda distributed in the United States . . . ." Amending Act Requiring Registration of Foreign Agents: Hearings on H.R. 6045 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 77th Cong., 1st Sess. 25 (1941) (statement of L.M.C. Smith).
But even if "propaganda" is not held to be a disparaging term, the Act's labeling, reporting, and filing requirements are imposed only on foreign-source speech, not on domestic speech. Foreign material thus is singled out for special disclosure requirements. This is done, moreover, on the premise that foreign material is less objective and less trustworthy than domestic material. As two Supreme Court justices said in a 1943 dissenting opinion (a statement with which the Court's majority did not appear to disagree), FARA was "intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source."\(^{179}\) While the two justices thought that "[s]uch legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment,"\(^{180}\) the assumption that foreign material is less trustworthy than domestic material—less likely to come from "a disinterested source"—would seem to involve content discrimination of a kind now recognized as inconsistent with the first amendment.\(^{181}\)

To be sure, discrimination between groups of speakers is not necessarily the same thing as discrimination based on content or point of view. But speaker-based discrimination itself appears to be constitutionally suspect.\(^{182}\) Moreover, requirements of source disclosure, even when applied to all speech of a given kind, have been viewed critically by the Supreme Court.\(^{183}\) When such requirements are imposed on political speech by some speakers (foreign), but not by other speakers (domestic), they should be especially vulnerable.

Moreover, in this context the speaker-based discrimination implicates the speaker's point of view. In today's interdependent world a great many political, economic, and environmental issues possess international as well as domestic dimensions.

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179. Viereck v. United States, 318 U.S. 236, 251 (1943) (Black, J., joined by Douglas, J, dissenting); see id. at 236 (majority opinion).
180. Id. at 251 (Black, J, dissenting).
Furthermore, international issues involving the United States often present disagreements between the U.S. government and foreign governments, foreign political parties, or other entities abroad. Acid rain, one of the issues addressed by the Canadian films, is a good example. It involves a bilateral controversy between the governments of the United States and Canada. FARA requires films on acid rain that are financed by the Canadian government to be filed, labeled and reported as "political propaganda" when distributed in the United States. Meanwhile the U.S. government's speech on acid rain bears no such badge of untrustworthiness. On this and other international issues, FARA's discrimination against foreign-source speech becomes discrimination against views that are opposed to the views of the U.S. government.

FARA probably also deters foreign-source speech in the United States by deterring "foreign principals" from having U.S. agents in the first place. The cumbersome and continuous requirements that FARA imposes on foreign agents with respect to their distribution of "political propaganda" may discourage some foreign entities from using agents to distribute their material in the United States. Foreign-source material can be distributed in the United States without using a "foreign agent," but often not as effectively. If foreign sources are discouraged from using such agents, the likely effect is to reduce the access of the American public to foreign-source speech.

184. See, e.g., U.S.-Canadian Relations Take a Testy New Turn, N.Y. Times, Feb. 26, 1983, at 3, col. 5 ("The neighbors remain far apart on the issue of acid rain").

185. Cf. First National Bank of Boston v. Bellotti, 435 U.S. at 785 ("suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people").

186. There is an intended stigma attached to being a foreign agent. See the statement by one of the House managers at the time FARA was amended, in 1966, to broaden the exemption for persons engaged in commercial activities: "While there is no disgrace in being registered as a 'foreign agent,' there is a stigma that should not be unnecessarily extended." 112 CONG. REC. 10536 (1966).

187. Foreign material, political or otherwise, can be sent directly to recipients in the United States by mail or other means, in which case it is not subject to FARA. See Note, supra note 150, at 440 & n.36; cf. Lamont v. Postmaster General, 381 U.S. 301. Also, when foreign source material is distributed in the United States by someone who is not an agent of the foreign source, FARA does not apply. See, e.g., Capitalist Edition of Pravda for U.S., N.Y. Times, Nov. 30, 1985, at 43, cols. 1-2 (private U.S. citizen publishing a daily edition of Pravda in English for distribution in the United States, without contact with the Soviet publishers). In such a case, however, the American distributor must have his own incentives for distributing the material, and the foreign source lacks control (copyright aside) over whether and how the distribution is done.
FARA's regulation of foreign-source speech as "political propaganda" thus burdens that speech whether or not "propa-
ganda" is considered a disparaging word. 188

Finally, the question is not simply one of first amendment law. If the United States courts eventually reject the first amendment challenge to FARA, domestic and international ob-
jections to the statute will remain. FARA's singling out of for-
eign-source speech for regulation as "political propaganda" will
continue to be not only a relic of wartime fearfulness, but an
emblem of unwillingness on the part of the United States to let
foreign and domestic ideas compete on level ground within U.S.
borders. 189

188. Also questionable under the first amendment is the way FARA requires gov-
ernment functionaries to sit in judgment on protected speech to determine whether it
meets the act's vague definition of "political propaganda." Broad as that definition is,
see supra text accompanying note 142, the Justice Department in Keene and Block
found that only three of 62 Canadian films met it. See supra text accompanying note
150. Meanwhile the record in Keene disclosed that the Soviet films Alexander Nevsky,
Potemkin, and Crime and Punishment had been deemed "political propaganda"
under FARA. Joint Appendix at 63, Keene V. Meese, 107 S. Ct. 1862 (85-1180). The
vagueness involved in identifying "political propaganda" under FARA seems constitu-
tionally unacceptable under decisions of the Supreme Court. E.g., Coates v. City of

1862). By the vote of 5 to 3, the Court reversed the district court and upheld the con-
stitutionality of FARA's "political propaganda" provisions.

The majority opinion, by Justice Stevens, first held that Keene had standing to
challenge the statute. The Court explained that Keene had submitted detailed, un-
contradicted affidavits supporting the conclusion "that his exhibition of films that
have been classified as 'political propaganda' by the Department of Justice would sub-
stantially harm his chances for reelection and would adversely affect his reputation in
the community." Id. at 1868. At best, Keene "would have to take affirmative steps at
each film showing to prevent public formation of an association between 'political
propaganda' and his reputation," and in any event those steps "would be ineffective
among those citizens who shun the films as 'political propaganda.'" Id. at 1868-69.

On the merits, the Court began by noting that "the term 'political propaganda' has
two meanings," one disparaging and one neutral. Id. at 1869. The Court further noted
that FARA's definition of the term "includes misleading advocacy" as well as accu-
rate, respected advocacy. Id. at 1869. The Court read the statutory definition, how-
ever, as "broad" and "neutral." Id. at 1870.

The Court then held that the district court had erred in ruling that FARA's use of
the term "political propaganda" placed unconstitutional burdens on Keene's speech.

First, FARA "does not pose any obstacles to appellee's access to the materials he
wishes to exhibit." Id. at 1871. Rather, "Congress simply required the disseminators
of such material to make additional disclosures that would better enable the public to
evaluate the importance of the propaganda." Id. True, prospective viewers of the
films may "harbor an unreasoning prejudice against arguments that have been identi-
fied as the 'political propaganda' of foreign principals and their agents . . . ." Id. But
FARA "allows appellee to combat any such bias simply by explaining . . . that Can-
(f) Restrictions on Foreign Production of Communicative Materials: the "Manufacturing Clause" of the Copyright Act

The flow of communicative materials into a country may be affected by restrictions on foreign production of those materials. A country's interest in the consequences of nuclear war and acid rain does not necessarily undermine the integrity or the persuasiveness of its advocacy. *Id.*

Second, the Court found the reasoning of the district court to be "contradicted by history." *Id.* at 1872. Since FARA's "political propaganda" provisions were more than four decades old, "it seems obvious that if the fear of misunderstanding had actually interfered with the exhibition of a significant number of foreign-made films, that effect would be disclosed in the record." *Id.* at 1872-73. There was no evidence that any public suspicion engendered by the word "propaganda" had "had the effect of Government censorship." *Id.* at 1873.

Finally, the Court invoked "the respect we normally owe to the Legislature's power to define the terms that it uses in legislation." *Id.*

The Court's opinion is unpersuasive in several respects. It is notable, in general, for its narrow concentration on the arguments made by the district court and its failure to respond at any point to the dissenting opinion.

In relying on the asserted neutrality of the statute's definition of "political propaganda," the Court ignored what Justice Blackmun in dissent called "the realities of public reaction to the designation." *Id.* at 1874 (Blackmun, J., dissenting). The Court itself had recognized those realities in its discussion of standing, where it noted that Keene would have to take affirmative steps at each film showing to prevent harm to his reputation. *See id.* at 1868-69.

In claiming neutrality for the statute, the Court also ignored recent statements by high Justice Department officials acknowledging that the statute was not neutral. *See id.* at 1879 (Blackmun, J., dissenting). The Court likewise passed over statements from the legislative history showing a non-neutral congressional purpose of deterring the spread of "political propaganda." *See supra* notes 138, 178; 107 S. Ct. at 1874 & nn.1, 2 (Blackmun, J., dissenting).

More broadly, the Court's opinion does casual violence to first amendment doctrine. In stressing that FARA did not have "the effect of Government censorship" (id. at 1873), the Court ignored many decisions holding that government can violate the first amendment not only by prohibiting or censoring speech, but also by inhibiting or deterring speech. *See id.* at 1876 (Blackmun, J., dissenting) (*citing*, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)). In defending FARA on the ground that it "simply requires . . . additional disclosures . . ." (id. at 1871), the Court ignored decisions striking down disclosure requirements because they had a deterrent effect on speech. *See id.* at 1877 (Blackmun, J., dissenting) (*citing*, e.g., Talley v. California, 362 U.S. 60 (1960)).

Particularly relevant here are the implications of Meese v. Keene for the legal attitude of the United States towards transborder speech. The Court quoted approvingly the 1943 dissenting opinion of Justice Black in Viereck v. United States, 318 U.S. 236, 251; quoted at 107 S. Ct. 1871 n.15; *see supra* note 179 and accompanying text. That opinion, stating that FARA "implements rather than detracts from the prized freedoms guaranteed by the first amendment," described the act as "intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source." 318 U.S. at 251 (Black, J., dissenting), quoted at 107 S. Ct. 1871 n.15.

The Court not only found constitutionally acceptable in 1987 the wartime premise that foreign speech is less reliable than domestic speech — less likely to come from a
als. To the extent that materials must be produced within the United States, their importation obviously is barred. Whether a requirement of domestic production reduces the volume of communicative materials available in the United States, and whether it reduces the foreign content of the materials available, will depend on the kind of materials involved.

The "manufacturing clause" of the United States Copyright Act, which expired in 1986, was a classic restriction on foreign production of communicative materials. Dating from 1891, the clause required that nondramatic literary works in the English language, if authored by domiciliaries of the United States, be printed in the United States or Canada in order to...
be able to invoke the infringement remedies provided by U.S. copyright law.\textsuperscript{193} The clause had various exceptions: the first 2,000 copies of any work; works imported for personal use or scholarly libraries; books in Braille; and others.\textsuperscript{194} The purpose of the clause was purely protectionist—"to protect the American printing industry from the competition of foreign printers."\textsuperscript{195}

In 1972, reacting against protectionism, Congress set the manufacturing clause to expire in 1982.\textsuperscript{196} In 1982, beset by protectionist pressure, Congress extended the clause, over President Reagan's veto, for another four years.\textsuperscript{197} On June 30, 1986, the clause expired, despite a 7-6 vote to renew it and make it permanent by a House of Representatives subcommittee four days earlier.\textsuperscript{198} The closeness of the congressional results in 1982 and 1986 suggests that, while the clause is now dead, it could be revived if protectionist sentiment should increase.

Since the requirement of U.S. or Canadian manufacture applied only to books in the English language by domiciliaries of the United States, the impact of the manufacturing clause on the flow of "foreign" speech into the United States would seem to have been small. The clause applied not to the content of a book, but to its place of printing. When an English-language book by an author domiciled in the United States is printed abroad, the importation of that book normally brings no foreign content, no communication from a foreign source, into the United States.

On the other hand, because the costs of printing are higher in the United States than in some foreign countries (the \textit{raison d'être} of the manufacturing clause), the ban on foreign printing may have prevented some books from being printed at all. The manufacturing clause was challenged on this ground as inconsistent with the first amendment, and was upheld in a 1986 de-

\footnotesize{
\textsuperscript{193} See 2 M. NIMMER, NIMMER ON COPYRIGHT § 7.22[A] (1986).
\textsuperscript{195} Id.
\textsuperscript{196} Id.
cision by the U.S. Court of Appeals for the Second Circuit.\textsuperscript{199} The court’s majority saw no constitutional problem because the clause did not prevent an author from importing his foreign-printed book, but only deprived him of full copyright protection if he did.\textsuperscript{200} A concurring judge was more perceptive in noting that the clause could raise a first amendment problem if it inhibited the publication of a book, but concluded that this danger had not been established, especially in view of the clause’s various exceptions.\textsuperscript{201}

In any event, if the manufacturing clause did prevent some books from being published, they would have been English-language books by authors domiciled in the United States. Regrettable as the loss to the American public might have been, it would not have been a loss of communicative content from abroad.

As a precedent, however, the manufacturing clause could have a wider impact. It was a precedent for legislation requiring that communicative materials disseminated in the United States, at least if authored by domiciliaries of the United States, be produced in the United States. The model could be invoked to support a requirement that a certain proportion of programs on U.S. television be produced in the United States. Such a requirement is not unthinkable. As one writer has observed, if the time came when “the United States ha[d] lost its preeminent position in the packaging and export of information and entertainment,” and “the volume of programming from abroad increased substantially,” legislation might well be proposed or enacted in the United States, as it has been in other countries,\textsuperscript{202} to limit the amount of foreign-produced programming on domestic television.\textsuperscript{203}

\textsuperscript{199} Authors League of Am., Inc. v. Oman, 790 F.2d 220 (2d Cir. 1986).
\textsuperscript{200} Id. at 222.
\textsuperscript{201} Id. at 225 (Oakes, J., concurring).
\textsuperscript{202} See, e.g., Proposal of the Commission of the European Communities for a Council Directive Concerning Broadcast Activities, submitted to the Council of the European Communities on April 30, 1986. The proposal would require Member States to reserve at least 30% of their television time, apart from news, sports, game shows, and advertising, for works produced by nationals of Member States, and would raise the percentage to at least 60% three years after the Proposal went into effect. O.J. EUR. COMM. (No. C 179) 4, arts. 2, 4, 22, (July 17, 1986).
\textsuperscript{203} Price, The First Amendment and Television Broadcasting by Satellite, 23 UCLA L. REV. 879, 887-88 (1976). The Federal Communications Commission, in adopting, in 1975, its “prime time access rule” that bans programming produced by U.S. television networks from one hour of prime time each evening, showed sympathy...
If some requirement of domestic production of television programs was adopted, the impact would be more closely related to communicative content than it was with respect to books under the manufacturing clause. Requiring television programs to be produced in the United States would not mean that the same content by the same author, domiciled in the United States, would simply be "manufactured" in the United States rather than abroad. Program production is a collaborative enterprise that involves many people and often reflects the place of production. Program production in the United States rather than abroad would mean that fewer foreigners participated, and that the programs' content embodied fewer foreign ideas, cultures, values, and points of view.

The fact remains that the manufacturing clause, after existing in United States law for almost a century, was allowed to expire in 1986. This congressional decision must be counted as an important move by the United States away from protectionism in the realm of communicative materials.

(g) Restrictions on Importing Copyrighted Works Produced Abroad

While the manufacturing clause has expired, another provision that restrains the importation of communicative materials remains in United States copyright law. Section 602 of the Copyright Act \(^\text{204}\) allows a copyright owner to block the import into the United States of copies of his work that were produced abroad, even if their production was lawful and even if the copyrighted work is not otherwise available in the United States.

United States copyright law gives a copyright owner the exclusive right to sell, rent, or otherwise distribute copies or phonorecords of his work \(^\text{205}\). This right, however, normally is subject to the "first-sale doctrine." The first-sale doctrine provides that once a particular copy or phonorecord has been lawfully made, the owner of that copy or phonorecord is entitled to

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205. Id. § 106(3).

for the argument that the rule "discriminates against American producers and favors foreign producers." Prime Time Access Rule, Second Report and Order, 50 F.C.C.2d 829, para. 22 (1975). But the Commission noted "the reduced role which foreign product plays in access programming this year," and said that action to repeal or change the rule to aid American producers was therefore unnecessary. Id.
sell it, or otherwise transfer it, without further authority from the copyright owner. 206

Section 602 is an exception to the first-sale doctrine. It allows a copyright owner to prohibit the importation into the United States of copies or phonorecords of his work that "have been acquired outside the United States," 207 even if they were lawfully made and acquired. 208

Section 602 applies to two separate situations. The first involves "pirate" copies or records produced without authority from the copyright owner, but in a country where their production was nonetheless lawful (typically because the country had no copyright relations with the United States, and hence the work was in the public domain there). 209 The second situation involves copies or records lawfully produced abroad with the authority of the copyright owner, and otherwise in full compliance with U.S. copyright law. 210 In either situation, under section 602, "the mere act of importation . . . would constitute an act of infringement and could be enjoined." 211

Section 602 itself has exceptions, but limited ones (more limited than were the exceptions to the manufacturing clause). 212

Section 602 does not apply to copies or records imported by the United States government or by a U.S. state government, except for "use in schools." 213 It does not apply to the importation of one copy or record at a time for the private use of the importer; to copies or records carried into the United States in a traveler's personal baggage; or to importation by educational or scholarly organizations of one copy of an audiovisual work for archival purposes, or five copies of other works for archival or library lending purposes. 214

206. Id. § 109(a) ("Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of that copy or phonorecord").

207. Id. § 602(a) ("Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106").


209. Id.

210. Id.

211. Id.

212. See supra text accompanying note 194.


214. Id. § 602(a)(2)-(3).
Section 602 reportedly is employed by record companies to block the importation of recordings of popular music that are out of print or otherwise not available in the U.S.\textsuperscript{215}

In addition to use of the statute by record companies holding the sound-recording copyrights in recorded music, a test case was pending in late 1986, in which publishers, composers, and songwriters holding the composition copyrights in the underlying musical works were seeking to establish their right under section 602 to block importation of recordings of the music.\textsuperscript{216} This claim could have a much broader impact than the claims of record companies. The claims of record companies are limited to records made since 1972, when copyright protection for sound recordings began in the United States.\textsuperscript{217} The claims of the publishers, composers, and songwriters apply to music released up to seventy-five years ago.\textsuperscript{218} Moreover, while the sound recordings on a single record or tape usually have a single owner, an album of ten songs might have ten different composition copyrights; all ten owners would have to give permission for the album to be imported.\textsuperscript{219} Nevertheless, under the language and scheme of the Copyright Act, it would appear that the publishers, composers, and songwriters have a reasonable chance of establishing their claim.\textsuperscript{220}

The congressional reports on section 602 offer no reasons for

\footnotesize{\textsuperscript{215} A \textit{New York Times} article in December, 1986, reported that a number of recordings of popular music could be purchased abroad but not in the United States, because the copyright owners had blocked import under section 602. Some of the recordings had gone out of print in the United States; others included "many compact discs released in Europe and Japan [that] . . . have not yet found American release." "You have to be very careful about what you import," one record seller reportedly said. "[I]t's hard to explain to someone why we can't sell them a 12-Inch of Springsteen's 'Incident on 57th Street.' If it's good enough to be heard in England, why can't an American hear it?" \textit{N.Y. Times}, Dec. 31, 1986, at C9, col. 6. \textit{See also U.S. Law Spells Bad News for Import Fans}, San Francisco Chron., Jan. 1, 1987, at 43, col. 1 (\textit{N.Y. Times} dispatch).

\textsuperscript{216} \textit{See} \textit{N.Y. Times}, supra note 215 (case reportedly pending before U.S. District Court in New Jersey).


\textsuperscript{218} \textit{See} 17 U.S.C. § 304(a)-(b) (1985).

\textsuperscript{219} \textit{See} \textit{N.Y. Times}, supra note 215. The owner of a nationwide record-store chain reportedly said, "If the publisher wins, it would stop us importing all kinds of things because there's no way to bookkeep it all." \textit{Id.}

\textsuperscript{220} \textit{See} 17 U.S.C. §§ 102, 106 (1985); H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976) (stating that a literary work can be embodied in a phonorecord, which implies that a musical work also can be, and hence can be infringed by unauthorized distribution of the phonorecord).}
creating this exception to the first-sale doctrine.\textsuperscript{221} The provision seems defensible, however, as applied to "pirate" copies. These are copies produced abroad without authority from the copyright owner, and their importation at cheap prices would compete unfairly with authorized copies. A ban on importing "pirate" copies also existed in the 1909 Copyright Act, predecessor to the present 1976 Act.\textsuperscript{222}

Section 602 is hard to defend, however, as applied to copies made abroad with the authority of the copyright owner, a new provision in the 1976 Act.\textsuperscript{223} The defense offered by record companies — that "[p]arallel imports are an unfair and illicit disruption of the marketplace"\textsuperscript{224} — is simply an objection to competition. The first-sale doctrine is designed to protect competition by preventing copyright owners from controlling the "marketplace" for copies of their works once those copies have been sold with the copyright owner's permission.\textsuperscript{225} To create an exception for imported copies, as section 602 does, is inconsistent with principles of domestic competition and international free trade, and with a free flow of communicative materials across national borders.

Section 602 might be challenged under the first amendment, but probably without success. A United States resident seeking to import a book or record unavailable in the United States, and blocked from doing so under section 602, might invoke the first amendment right to receive information from abroad that the Supreme Court has recognized in \textit{Kleindienst v. Mandel} \textsuperscript{226} and \textit{Lamont v. Postmaster General}.\textsuperscript{227} It would probably be an adequate response, however, that section 602 allows the importation of one copy at a time for the private use of the importer, and of five copies of a book or record for library lending purposes.\textsuperscript{228}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{224} N.Y. Times, \textit{supra} note 215.
\item \textsuperscript{225} See 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.12[B] (1986); Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).
\item \textsuperscript{226} 408 U.S. 753 (1972); see \textit{supra} text accompanying notes 26-29, 58-71.
\item \textsuperscript{227} 381 U.S. 301 (1965); see \textit{supra} text accompanying notes 20-24.
\item \textsuperscript{228} 17 U.S.C. § 602(a)(2)-(3); cf. Authors League of Am., Inc. v. Oman, 790 F.2d
\end{enumerate}
\end{footnotesize}
It is true that, by prohibiting wholesale importation, section 602 also restricts the ability of would-be importers to distribute works in the United States, and the ability of many members of the U.S. public to receive the work. But the power granted by section 602 is, after all, part of the exclusive rights of the copyright owner under the U.S. copyright law. These rights are authorized by the U.S. Constitution and are generally consistent with the first amendment. For example, a copyright owner has the right, without offending the first amendment, to prevent any publication or distribution of his work, or to prevent the use of too many quotations from his work in news accounts. Similarly, although the first-sale doctrine enhances public access to published works, the doctrine probably is not required by the first amendment. It is likely that Congress could have given copyright owners the right to control all distribution, including all resale, of copies of their works. Section 602 does less than that, lifting the first-sale doctrine only to block the import of copies from abroad.

Does this "discrimination" against foreign copies present a constitutional problem? The court of appeals decision upholding the manufacturing clause, another provision that discriminated against foreign production, suggests not. Moreover, while the manufacturing clause arguably restrained the ability of U.S. authors to publish their works, section 602 gives U.S. authors greater rights than they would have under the first-sale doctrine. Section 602 hurts, not U.S. authors, but would-be dis-

220, 225 (2d Cir. 1986) (Oakes, J., concurring), discussed supra notes 199-201 and accompanying text.
229. Cf. the asserted deterrent effects on the import of foreign information under the Foreign Agents Registration Act, supra notes 151-55, 169-75 and accompanying text.
235. Cf. id. at 560 (finding sufficient first amendment protection embodied in Copyright Act's distinction between expression on the one hand and facts or ideas on the other, and in doctrine of fair use).
236. Authors League of Am., Inc. v. Oman, 790 F.2d 220 (2d Cir. 1986).
237. See id. at 225 (Oakes, J., concurring).
tributors and receivers of the work in the United States. This impact on distributors and receivers seems too slight to overcome the authority of Congress to indulge in a form of protectionism by giving copyright owners special protection against foreign-made copies.

Section 602 remains an objectionable provision of United States law, at odds at once with competition, free trade and the free flow of information. However, it probably does not offend the first amendment.

3. Summary Concerning U.S. Regulation of Incoming Information Flow in General

The legal stance of the United States toward information flow from abroad bears deep marks of ambivalence. On the one hand there is support for a "free flow" into the United States, represented most notably by the holding in Lamont and by the first amendment right to receive information from abroad recognized in both Lamont and Mandel. On the other hand there are the several statutes that restrict incoming information flow, together with the court decisions mostly upholding them.

In support of the free-flow commitment, it can be noted that the only cases involving government restrictions on "pure" speech from abroad are Lamont and the cases under the Foreign Agents Registration Act (FARA). In Lamont, the Supreme Court struck down the restriction, while the FARA case, Meese v. Keene, was still before the Supreme Court as this text was written. The other statutes inhibiting the flow of information do not involve "pure" speech, but speech mixed

238. Section 602 does hurt the foreign authors of sound recordings of the works, by allowing the copyright owner to block importation of those recordings into the United States. Although the statute is not phrased in terms of foreign authorship, but of phonorecords "acquired outside the United States" (17 U.S.C. § 602(a), see supra note 195), it has a disproportionately injurious impact on foreign authors of sound recordings. It may be argued that this discrimination violates the obligation of "national treatment" imposed on the United States by the Universal Copyright Convention. Universal Copyright Convention, concluded Sept. 6, 1952, art. II, 6 U.S.T. 2731, T.I.A.S. No. 3324, revised July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868.

239. But see supra note 238.

240. 381 U.S. 301 (1965); see supra text accompanying notes 20-24.

241. See supra notes 26-29, 58-71 and accompanying text.

242. See supra notes 20-24 and accompanying text.

243. See supra notes 136-89 and accompanying text. On the decision, see supra note 189.
with the entry of aliens, with travel, with the entry of objects or goods, or with the rights of copyright owners.\textsuperscript{244} The nonspeech activities regulated by these statutes not only are traditional subjects of government regulation, but often involve considerations of national security, foreign policy, or border control. The Supreme Court has long given special deference to the executive and legislative branches in these areas.\textsuperscript{245}

Still, it is hard to deny that the visa restrictions of the McCarran-Walter Act, though based on the government’s power to exclude aliens, are designed to prevent dissemination in the United States of unwelcome ideas from abroad.\textsuperscript{246} The Foreign Agents Registration Act is similarly designed. While FARA does not by its terms exclude any speech from the United States, it requires that political speech disseminated by agents of foreign entities be filed, reported, and labeled as “political propaganda” on the premise that foreign speech is less trustworthy than domestic speech.\textsuperscript{247} The McCarran-Walter Act and FARA both reveal an unwillingness on the part of the United States to allow foreign speech to enter the country and compete on equal terms with domestic speech. While these statutes stand, the allegiance of the United States to the free-flow principle remains compromised.

B. Regulation of Incoming Electronic Media Flow

This section reviews the provisions of United States law that relate specifically to incoming broadcasts or other transmissions of radio or television programming. There are several reasons for treating electronic media separately. First, broadcasting traditionally has been treated separately and subjected to greater regulation than other media under U.S. law.\textsuperscript{248} Second, special government regulation or control of broadcasting exists in most other countries as well.\textsuperscript{249} Separate considera-

\textsuperscript{244} See supra notes 36-104, 108-35, 204-39 and accompanying text.
\textsuperscript{245} See supra notes 58-71, 103 and accompanying text.
\textsuperscript{246} See supra notes 48-86 and accompanying text; Shapiro, supra note 49, at 934-35, 940-42.
\textsuperscript{247} See supra notes 179-81 and accompanying text.
\textsuperscript{249} See, e.g., B. PAULU, RADIO AND TELEVISION BROADCASTING ON THE EUROPEAN CONTINENT (1967); THE INTERNATIONAL LAW OF COMMUNICATIONS, ch. 5 (McWhin-
tion of the electronic media in the U.S. therefore facilitates international comparisons.

Third, whether or not these characterizations justify the special regulation of broadcasting under U.S. law, the broadcast media are thought to have a number of special characteristics. There is the alleged scarcity of broadcast frequencies, which has provided the traditional rationale for the limited first amendment protection afforded to broadcasting. There is the "uniquely pervasive presence" of the broadcast media "in the lives of all Americans," particularly in the privacy of their homes. There is broadcasting's unique accessibility to children, including those too young to read. And there is the unique popularity, persuasiveness, and influence of the medium. Broadcasting's power as a vehicle of news and political communication, as a source of entertainment and acculturation, and as a mode of advertising probably goes far to ex-

250. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). But cf. FCC v. League of Women Voters of Cal., 468 U.S. at 376 n.11 (suggesting the Court may reconsider the "prevailing rationale for broadcast regulation based on spectrum scarcity").

251. FCC v. Pacifica Foundation, 438 U.S. at 748.

252. Id. at 749.


254. See, e.g., M. FRANKLIN, supra note 253, at 742 ("vivid field telecasts during the Vietnam war may have been a strong factor in the shift of public attitude against that war, beyond the potential of any print journalism"); see also supra note 253. The power of television to move public opinion may come in part from the simultaneity of the viewing. When many millions of people each know that millions of others are watching the same broadcast at the same time, they may be more readily moved in their common reactions and resulting public attitudes than when they read newspapers alone.

plain the concern of almost all governments to keep this
time of in medium under special control.

There is yet another reason for treating electronic media sep-

arately in a study of U.S. regulation of transborder speech.
"Since radio and television signals obviously do not stop at in-
ternational borders," they pose special problems for nations
wishing to control their international passage. The transborder
flow of television transmissions cannot be controlled, as can
other kinds of media flows, through traditional methods of gov-
ernment border control applied to immigration, foreign travel,
or objects or mail entering the country.

Moreover, the advent of communications satellites means
that it is no longer just "neighboring countries" from which un-
wanted broadcasts may come. As the national concerns and
international debate over DBS make clear, the allotment and
regulation of terrestrial broadcast frequencies no longer can as-
sure a nation that it will not be invaded by undesired broad-
casts from abroad. The increasingly international nature of
electronic media transmissions, and the special difficulties
these transmissions pose for governmental attempts to corral
them within national frontiers, call for special treatment of
electronic media in a study of regulation of transborder media
flows.

The provisions of U.S. law that address incoming electronic
media flows are divided in this section into three categories: (1)
restrictions on foreign production of media content or on for-
eign ownership of U.S. communications facilities; (2) restric-
tions on terrestrial broadcasts into the United States; and (3)
restrictions on the reception or retransmission in the United
States of program-carrying signals from foreign satellites.

256. See, e.g., Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), cert. denied,
396 U.S. 842 (1969) ("It is difficult to calculate the subliminal impact of this pervasive
propaganda.... [It may reasonably be thought] greater than the impact of the written

257. M. FRANKLIN, supra note 253, at 716.

258. Id.

259. See supra notes 15-16 and accompanying text. See also Gorove, supra note 15,
at 8 ("The fear among nations favoring prior consent [to DBS broadcasts] is that for-

eign [DBS] could influence their cultural, political and ideological identity in ways
they cannot control")).
1. **Restrictions on Foreign Production of Media Content or Foreign Ownership of Communications Facilities**

(a) No Limits on Foreign Production of Programming

The United States to date has placed no legal limits on the amount of U.S. radio or television programming that may be produced or originated abroad. This may be because the United States has had no cause for imposing any such limit. For non-legal reasons, "the percentage of externally produced presentations on the American screen is among the lowest in the world."\(^\text{260}\) Unlike other countries, the United States has not "felt the sting of unwanted foreign programming."\(^\text{261}\) It has had no need to protect its cultural, economic, or political values against a massive invasion of foreign material.

If this situation were to change, pressures to limit foreign programming might develop.\(^\text{262}\) As has been noted, the manufacturing clause of the Copyright Act, though now expired, could provide a precedent for such measures.\(^\text{263}\) Another precedent could be found in the FCC's "prime time access rule."\(^\text{264}\) This rule bars the broadcast of programs produced by the three U.S. television networks from one hour of prime time each evening, "in order that the voices of other persons might be heard."\(^\text{265}\) If the FCC can impose such a restriction in order to reduce the programming sway of the U.S. networks and promote a diversity of programming sources,\(^\text{266}\) there is little reason to doubt that the FCC or Congress could take comparable measures to reduce a perceived excess of foreign programming and encourage American program sources. The fact remains that no such measures exist or are now being considered.

(b) Restrictions on Foreign Ownership of U.S. Broadcast Stations

While the United States has no restrictions on foreign owner-
ship of its print media, or on foreign production of its broadcast programming, it does limit foreign ownership of its broadcast stations. Section 310 of the Federal Communications Act of 1934 provides that no broadcast license may be held by a foreign government, an alien, a foreign corporation, or a corporation whose capital is more than twenty percent foreign.

These provisions date back to the Radio Acts of 1912 and 1927, the predecessors of the present statute. They were intended to protect the national security in wartime. As the Secretary of the Navy stated in 1934:

the lessons . . . learned from the foreign dominance of the cables and dangers from espionage and propaganda disseminated through foreign-owned radio stations in the United States prior to and during the [First World] War brought about the passage of the Radio Act of 1927, which was intended to preclude any foreign dominance in American radio.

Thus the FCC has declared: "The alien ownership restriction . . . is primarily and uniquely fashioned to curb alien activities against the United States in time of war." In 1985, the ban gained public notice when it led Rupert Murdoch to acquire U.S. citizenship in order to buy broadcast properties in the United States. A major U.S. newspaper commented that

267. See supra notes 36-37 and accompanying text.
268. See supra notes 260-61 and accompanying text.
272. Watkins, supra note 269, at 6 (quoting Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 26 (1934)).
274. See Watkins, supra note 269, at 6.
"the xenophobia of this rule is half a century out of date."

The U.S. citizenship requirement for broadcast licensees apparently has not been challenged on constitutional grounds, but it could be. In other areas, the Supreme Court has treated alienage as a "suspect classification" that must be justified by a compelling state interest. The Court thus has struck down state laws barring resident aliens from becoming engineers or lawyers. At the same time, however, the Court has upheld laws barring aliens from becoming public functionaries such as police, probation officers, or school teachers.

Broadcasting is not a public function in the United States. Moreover, broadcasting involves the exercise of first amendment rights, a fact that argues further against the validity of a law flatly prohibiting resident aliens from engaging in the activity. On the other hand, most of the cases striking down U.S. citizenship requirements have dealt with state laws, not federal ones, and the federal government has always had wide latitude to make policy regarding aliens.

Although the ban on alien ownership appears to be unnecessary and xenophobic, the original "national security" justification probably is still a sufficient governmental interest to withstand constitutional challenge. Communications facilities in general are no less important to national security now than they were during the First World War. Moreover, there may well be an international custom of keeping such facilities out of foreign hands. Beyond that, the deference shown by the

276. Id.
277. See infra notes 278-80 and accompanying text.
283. Resident aliens are protected by the first amendment. See Bridges v. Wixon, 326 U.S. 135, 148 (1945).
284. Cf. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 800 (1978) (rule against newspaper-broadcast cross-ownership in same city upheld, the Court noting that newspapers remain free to own broadcast stations in other cities).
285. See, e.g., cases cited supra notes 278-80.
287. Witness the apparent targets of Soviet espionage efforts in the United States in the mid-1980s. See, e.g., N.Y. Times, June 11, 1985, at B5, col. 3 (national ed.).
288. The bilateral trade and investment treaties between the United States and its major trade partners typically exclude "communications" from their provisions assur-
Supreme Court towards legislative judgments in areas of national security and foreign policy indicates that section 310 of the Communications Act would be upheld.289

It is, therefore, worth considering how far the rationale underlying section 310 might extend. One scholar has written that if section 310 is constitutional, and “if it owes its validity to national security considerations,” then “significant implications arise for the power of the United States to regulate incoming signals originating abroad,” such as those from direct broadcast satellites.290 “The federal government could take equivalent steps to protect national security by regulating direct broadcast messages. Under this analysis, an American licensing procedure would be warranted.”291

Those implications do not necessarily follow. The FCC indeed has imposed the U.S. citizenship requirement of section 310 on domestic licensees of direct broadcast satellites (DBS).292 However, it has declined to impose that requirement on entities that lease space on domestic satellites, whether to distribute programming to cable systems in the U.S. or to provide satellite-to-home service (with scrambled signals that paying customers can decode).293

Is there a relevant difference? The FCC has explained that a DBS licensee, like a conventional broadcast licensee, controls “the facility’s power or transmissions,”294 as distinguished from providing programming over a facility controlled by someone else. In this view, it is control of the facility itself — “the operational aspects of a valuable communications facility”295 — that invokes the national security considerations thought to justify the ban on foreign ownership.

At least historically, the view has merit. The perceived danger of foreign ownership is based on the totality of what foreigners might do with the facility in wartime, not simply on

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289. See supra text accompanying notes 103-04.
290. Price, supra note 203, at 900.
291. Id.
294. Id.
295. Id.
their ability to reach the U.S. public with broadcast messages. To be sure, the difference may be only a matter of degree, since the operation of a communications facility consists of sending messages. But the U.S. citizenship requirement of section 310 rests basically on concerns about media control, not media content.

Still, the requirement does have implications for other aspects of broadcast regulation. It suggests that other kinds of regulation may be more readily applied to foreign than to domestic broadcasts. Further, section 310, by excluding foreigners from control of U.S. broadcast facilities, “surely results in some reduction in the diversity of voices within the United States.” While its original intent and its constitutional justification are rooted in concerns of national security, particularly in times of war, section 310 inevitably has the continuing peacetime effect of reducing the “foreign content” of U.S. radio and television programming. As long as the United States maintains section 310, it is declaring, with respect to one fundamental aspect of the U.S. broadcast media, that the principle of openness to foreign input is secondary to asserted concerns of national security, concerns that may well be antiquated.

(c) Restrictions on Foreign Ownership of DBS Licensees

In its 1982 decisions authorizing service by direct broadcast satellites (DBS) in the United States and granting construction permits to eight would-be DBS operators, the FCC extended to DBS operators the U.S. citizenship requirement prescribed for broadcast licensees by section 310 of the Communications Act. Whether or not this action was required by section 310, it was nevertheless consistent with the national security concerns underlying that section. If a conventional broadcast station in foreign hands somehow represents a threat to U.S.

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296. See supra text accompanying note 272 (1934 statement of the Secretary of the Navy that not only propaganda but espionage are the dangers of foreign dominance).


298. Price, supra note 203, at 900.


300. 90 F.C.C.2d at app.D, subpart B; 47 C.F.R. § 100.11 (1985); See supra text accompanying note 292.

301. See supra notes 270-73, 287-88 and accompanying text.
national security, a DBS facility in foreign hands—a facility capable of reaching virtually all the homes in a U.S. time zone—poses at least as great of a threat.

(d) No Restrictions on Foreign Ownership of Programming Entities Using U.S. Domestic Satellites

While banning foreign ownership of domestic DBS facilities, the FCC, as already noted, has declined to impose the U.S. citizenship requirement on entities that distribute programming in the United States by leasing space on conventional satellites. The line thus drawn between control of facilities and provision of programming is not always easy to discern.

Thus, the FCC has allowed a domestic satellite operator to lease five transponders for a six-year period, with an option to purchase at any time, to a British company planning to use them to provide direct service to U.S. homes. As the FCC acknowledged, the differences between control of leased transponders for this purpose and control of a DBS satellite were not overwhelming. But the FCC stressed the legal point (perhaps begging the question) that the British company would not need an FCC license for this service, and noted that “several foreign controlled entities” already were distributing program services by satellite to U.S. cable systems. Relying on the distinction between facilities and programming, the FCC stated that “none of these programming services control the operational aspects of a valuable communications facility,” so that subjecting the foreign entities to foreign-ownership restrictions “would not seem to serve the purposes of section 310(b).”

303. See supra text accompanying note 293.
304. See Satellite Business Systems, 95 F.C.C.2d 866, para. 17 & n.7; supra notes 293-94 and accompanying text.
306. The main differences—which do not seem insubstantial—were that the conventional satellite had one-tenth the power of DBS, requiring almost twice as large a receiving dish, and that its signals would be scrambled. Id. at para. 16.
307. Id. at para. 17 n.7.
308. In addition, other foreign-controlled entities “sell foreign programming to U.S. owned programming services,” which in turn distribute the programming to cable systems. Id.
309. Id. at para. 17.
310. Id.
(e) No Restrictions on Foreign Ownership of U.S. Cable Systems

In contrast to the U.S. citizenship requirement for control of conventional broadcast stations and of DBS facilities, efforts to restrict foreign ownership of cable television systems in the United States have been rejected by both the FCC and Congress. In 1976, the FCC declined to act against foreign ownership of cable, explaining (a) that the limited foreign investment in U.S. cable systems posed no threat to national security, and (b) that cable operators lack the "totality" of control over program content possessed by broadcasters. The Commission compared cable instead to nonbroadcast media:

Alien ownership restrictions do not apply to communicators generally, to newspapers, wire news services, non-license radio and television networks, film and television producers, cable system networks and channel lessees, and it is not clear that they should apply to a system operator solely because of his potential ability to influence, through his program origination efforts, the ideas and attitudes of cable subscribers.

In 1980, as foreign investment in U.S. cable increased, the FCC reconsidered but adhered to its position. The Commission refused to interpret section 310 of the Communications Act "as reflecting a general policy against foreign investments in communications enterprises in the United States."

Congress also has declined to move against foreign ownership of U.S. cable systems, except in the most tentative way.


312. 59 F.C.C.2d at para. 9.


314. Id. at para. 20.

315. Congress' main concern has been that Canada, the source of almost all foreign ownership of U.S. cable, did not reciprocate by letting Americans own Canadian cable systems. See id. at para. 12; Note, supra note 311, at 113-15, 118. A cable bill approved by the Senate Commerce Committee in 1982 authorized the FCC to make rules barring ownership of U.S. cable systems by nationals of countries that did not grant reciprocal rights to U.S. citizens. S. REP. No. 2172, 97th Cong., 2d Sess. § 605(b) (1982); see also S. REP. No. 518, 97th Cong., 2d Sess. 15 (1982); S. REP. No. 66, 98th Cong., 1st Sess. § 605(b) (1983) (authorizing FCC only to "conduct inquiries" on the subject); S. REP. No. 67, 98th Cong., 1st Sess. 20 (1983). In the Cable Communications Policy Act as finally passed in 1984, however, Congress stopped well short of that. It created a Telecommunications Policy Study Commission for the apparent purpose, among others, of looking into the problem, and perhaps exerting pressure on the Canadian govern-
There is an obvious inconsistency between the FCC's position on foreign ownership of cable and its positions on foreign ownership of broadcast stations, DBS facilities, and program providers. Broadcasters and DBS operators have been subjected to U.S. citizenship requirements, while program providers have not been, on the theory that it is physical control of the facility, not influence over program content, that warrants a ban on foreign ownership.\footnote{With respect to cable television systems, however, control of the facility is overlooked. It is overlooked although a cable operator may control 50 or 100 channels, in contrast to a broadcaster's single channel, and although normally there will be no other cable operator in the area.\footnote{Ignoring this impressive amount of facility control, the FCC creates and rejects the argument that foreign ownership of U.S. cable should be banned solely because of the system operator's "potential ability to influence, through his program origination efforts, the ideas and attitudes of cable subscribers."\footnote{One explanation for the inconsistency lies in the fact that cable systems are not licensed by the FCC, as broadcasters and DBS operators are, but by local or state governments.\footnote{Program providers are not licensed at all.} The FCC thus had no ready vehicle for imposing foreign-ownership restrictions on cable.\footnote{Another explanation lies in the fact that the foreign ownership of U.S. cable is virtually all from one country, Canada, a friend and neighbor of the United States.\footnote{Both the FCC and Congress, in their refusal to restrict foreign ownership of cable, apparently were influenced by the "close and friendly ties" between the United States and Canada.\footnote{It would be unrealistic}}}}}

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\begin{footnotes}
\footnote{See supra notes 294-95, 303-10 and accompanying text.}
\footnote{See, e.g., Omega Satellite Products v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982); H.R. REP. NO. 934, 98th Cong., 2d Sess. 23 (1984).}
\footnote{Cable Television Citizenship Requirements, 59 F.C.C.2d at para. 9; see supra text accompanying notes 311-12.}
\footnote{See, e.g., Cable Franchise Policy and Communications Act of 1984, H.R. REP. NO. 934, 98th Cong., 2d Sess. 23 (1984).}
\footnote{The FCC has imposed some ownership restrictions on cable, banning ownership by local television broadcasters, television networks, and telephone companies. See 47 C.F.R. §§ 63.54, 76.501 (1985). But broadcasters, telephone companies, and (effectively) television networks are themselves licensed by the FCC.}
\footnote{See Foreign Ownership of CATV Systems, Memorandum Opinion and Order, 77 F.C.C.2d 73, para. 17 (1980); Note, supra note 311, at 118.}
\footnote{See 77 F.C.C.2d at para. 8 (opinion of Commissioner Washburn).}
\end{footnotes}
to ignore the cushion this factor provides for the tolerant position the U.S. has taken on foreign ownership of its cable systems.

2. Restrictions on Terrestrial Broadcasts Into the United States

(a) Frequency Allotments by Treaty

Conventional broadcasts capable of reaching into the United States from neighboring countries are limited by the allotment of frequencies for the broadcast stations. The AM radio allotments are governed by multilateral treaties on broadcasting in the North American Region signed in 1937 and 1950.\(^3\) According to Dean Monroe Price, the allocations between the U.S. and Mexico in the 1937 Agreement, as well as those between the United States and Canada, "leave the implication that clear channel authorization was distributed so that the strongest Mexican and Canadian stations (in terms of geographical reach) were spaced away from the common border."\(^3\) Dean Price remarks that in this way, without violating the first amendment, "some classes of foreign broadcasts can be practically prevented from penetrating American borders."\(^3\) Whatever was true of the 1937 Agreement, however, it is not clear that the same policies control the U.S.-Mexico allocations prevailing today.\(^3\)

(b) Regulation of Programming Transmitted from the United States for Broadcast Back into the United States

One provision of United States law imposes U.S. regulation, indirectly, on programming broadcast into the United States from another country. Section 325(b) of the Federal Communications Act requires an FCC permit for the transmission of material from the United States "to a radio station in a foreign country" for the purpose of broadcasting the material back into

\(^3\) Price, supra note 203, at 898 (citing, with respect to Mexico, C.B. Rose, NATIONAL POLICY FOR RADIO BROADCASTING 241 (1940)).
\(^3\) Price, supra note 203, at 898-99.
\(^3\) Although Mexico was not a party to the 1950 Regional Agreement, a separate agreement was subsequently reached between the U.S. and Mexico generally paralleling the 1950 Agreement. See 1982 FCC. ANN. REP., supra note 323, at 30.
the United States. The provision derives from attempts in the 1930's by some stations that were denied U.S. radio licenses to move their transmitters to Mexico and receive American programming there for broadcast to United States audiences. Congress' theory was that "[t]he United States cannot control such transmitting apparatus, but it can at least place difficulties in the way of securing American [program] talent."

Where section 325(b) applies, it reflects an aggressive U.S. concern for the content of broadcasts into the U.S. from another country. In a 1935 case, the FCC denied the required permit on the basis that "[t]he character of the programs likely to be arranged and transmitted from the proposed studio [in the United States] does not appear to be such as would promote better international relations or serve the public interest. . . ." Thus, the focus was limited to the programs to be transmitted from the United States for retransmission back into this country.

In a 1957 case, the FCC took a similarly restrained approach, granting the permit because it found nothing wrong with the U.S. originated programs. The FCC said it lacked jurisdiction "to make determinations with respect to the programming of the Mexican station." The court of appeals, however, reversed, noting that while the FCC lacked power "to prevent [the Mexican station] from broadcasting to San Diego locally originated programs which are objectionable by American standards," it did have power "to refrain from issuing a permit which would give those programs a larger American audience." The court held that the FCC, in deciding whether to grant the permit, was required to consider the total programming of the Mexican station to determine whether it had "such serious defects . . . as would affect the public interest."

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328. Price, supra note 203, at 898.
329. C. B. Rose, supra note 324, at 240.
330. The provision was held not to apply where the programming was conveyed from the United States to Mexico by the physical delivery of recorded programs instead of by radio transmission. Baker v. United States, 93 F.2d 332 (5th Cir. 1937), cert. denied, 303 U.S. 642 (1938).
333. Id.
334. Id. at 651.
335. Id.
Used in this manner, section 325(b) employs programming supplied from the United States as a lever to regulate all the programming of foreign stations broadcasting into the United States. While the provision has broad implications, it appears to have been rarely used and to have had little practical impact. After fifty years, the two cases noted appear to be the only ones in which section 325(b) has been applied.

(c) Prohibition of “Pirate” Broadcasting into the United States

The United States prohibits unlicensed radio broadcasting, “pirate” broadcasting,\(^\text{336}\) from ships offshore into the United States. Thus in United States v. McIntire,\(^\text{337}\) the government, relying on both section 301 of the Communications Act\(^\text{338}\) (prohibiting the use of radio without an FCC license) and the International Telecommunications Convention of 1959,\(^\text{339}\) succeeded in enjoining broadcasts from a ship three and one-half miles off the coast of New Jersey. Citing the national interest in preventing interference with the use of duly licensed frequencies, and also “the adverse effects of defendants' unlicensed broadcasts upon the public interest,” the court upheld “the power of the United States to restrict and regulate radio broadcasts originating beyond territorial limits.”\(^\text{340}\)

The concept of pirate broadcasts into a nation from beyond its boundaries, and without its authorization,\(^\text{341}\) can cover not only the traditional pirate transmitters on the high seas, but also the new possibility of unauthorized broadcasts into a nation's territory from a satellite. There is tension between condemning pirate broadcasts from an offshore ship and insisting that nations tolerate a “free flow” of incoming broadcasts from satellites.\(^\text{342}\)

In any event, if an offshore, foreign, or satellite station suc-

\(^{336}\) A “pirate” broadcaster has been defined as “one who transmits into the territory of a nation from beyond that nation's territorial boundaries and without its authorization.” Smith, Pirate Broadcasting, 41 S. CAL. L. REV. 769, 770 (1968).


\(^{340}\) 370 F. Supp. at 1302.

\(^{341}\) See supra note 336.

\(^{342}\) See Hagelin, supra note 15, at 291 n.55; supra notes 14-16 and accompanying text.
ceeds in broadcasting into the United States, even in violation of U.S. law, members of the U.S. public apparently are entitled to receive the broadcasts. Section 705 (formerly section 605) of the Federal Communications Act,343 which prohibits the unauthorized reception of radio communications, probably does not apply at all to reception with the consent of the sender.344 But section 705 in any case contains a proviso exempting "any radio communication which is transmitted by any station for the use of the general public . . .,"345 a provision that would appear to protect reception of pirate broadcasts. In addition, the first amendment's "right to receive" might well prevent government interference with reception by U.S. residents of broadcasts transmitted to them.346 Also possibly relevant is Section 326 of the Federal Communications Act, which prohibits the FCC from interfering "with the right of free speech by means of radio communications."347

(d) U.S. Retaliation Against Advertising by U.S. Firms on Canadian Stations With U.S. Audiences

United States television stations located near the Canadian border are widely received in Canada, thanks to the high penetration of cable in the major Canadian cities along the border.348 The television interchange between the United States and Canada thus flows largely in one direction, with some fifty-four percent of prime time viewing in Canada devoted to programs produced in the United States.349

Since so many Canadians watch U.S. television, U.S. stations have become good media for Canadian advertisers. In 1974, the Canadian government estimated that Canadian advertisers were spending twenty million dollars per year at bordering U.S. television stations, or about ten percent of the total television advertising revenues in Canada.350

344. See infra notes 406-18 and accompanying text.
349. Id. at 41.
350. Id.
This outflow of advertising dollars dismayed the Canadian government, especially in light of its potential impact on the cultural policy objectives for Canadian television.\textsuperscript{351} Hence in 1976, Canada adopted a tax law denying Canadian advertisers a business-expense deduction for advertising placed on U.S. broadcast stations and directed primarily to a Canadian audience.\textsuperscript{352} Owners of the U.S. broadcast stations near the border protested, claiming that their advertising revenues from Canadian sources had dropped by more than fifty percent as a result of the law.\textsuperscript{353}

At the behest of these "border broadcasters," Congress, in 1984, passed legislation responding in kind.\textsuperscript{354} The "Canadian Mirror Act" denies a tax deduction to U.S. advertisers for the expenses of advertising "carried by a foreign broadcast undertaking and directed primarily to a market in the United States," where the foreign country denies the reciprocal deduction to its advertisers.\textsuperscript{355}

Such tit-for-tat retaliation between friendly neighbors represents an unfortunate resolution of a trade dispute. But President Carter, in recommending the legislation to Congress, rejected four apparently stronger proposals by the U.S. border broadcasters for economic retaliation against Canada.\textsuperscript{356} Whether or not the U.S. legislation was a reasonable response to the Canadian move, it clearly was a response and not a U.S. initiative. The burden imposed by the U.S. and Canadian enactments on the flow of broadcast advertising between the countries is essentially the work of Canada, albeit resulting from perceived economic and cultural needs.

That burden, in any event, has little impact on media con-

\textsuperscript{351} Id.
\textsuperscript{352} Act of Sept. 22, 1976, Bill C-58 § 3 (presented by the Minister of Finance to the First Session of the Thirtieth Canadian Parliament, April 18, 1975); see Stoler, supra note 348, at 42-43; BROADCASTING, Oct. 15, 1984, at 64; BROADCASTING, Nov. 5, 1984, at 46.
\textsuperscript{353} Stoler, supra note 348, at 43.
\textsuperscript{356} Stoler, supra note 348, at 51. The other proposals were: (1) special duties on all Canadian feature films and records exported to the U.S.; (2) quantitative restrictions on imports of Canadian feature films and records to the U.S.; (3) continuation of the provision of U.S. tax law limiting deductions for expenses incurred attending conventions abroad; and (4) taking account of the "unreasonable" nature of the Canadian tax restriction "when dealing with Canada on matters of mutual concern." Id.
tent. If U.S. advertisers use U.S. stations instead of Canadian stations to reach the U.S. audience, the content of neither the advertising nor the programs is likely to change much. \(^\text{357}\)

Somewhat like the now-expired manufacturing clause of the U.S. Copyright Act, this restraint addresses the place of origination rather than the content of the material communicated. \(^\text{358}\)

(e) Carriage of Foreign Broadcast Signals by U.S. Cable Systems

The FCC's regulation of cable television does not treat cable carriage of foreign broadcast stations much differently from cable carriage of domestic stations. The rules define a television broadcast station as including "any television broadcast station licensed by a foreign government," \(^\text{359}\) and they make it clear that foreign stations "may . . . be carried" by U.S. cable systems if consistent with the rules. \(^\text{360}\)

The FCC's rules do provide that foreign stations, unlike domestic ones, need not be carried by U.S. cable systems. Foreign stations may not assert a claim to compulsory carriage, or to program exclusivity, against U.S. cable systems. \(^\text{361}\) The FCC's "must carry" and program-exclusivity rules were designed to protect local broadcast stations against cable competition, in support of the "localism" policy embedded in the FCC's licensing scheme. \(^\text{362}\) It does not seem unreasonable to deny this pro-

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357. The same is probably true if Canadian advertisers use Canadian stations instead of U.S. stations to reach the Canadian audience. There is, however, a potential indirect effect on program content if the Canadian stations use the additional revenues to produce programming. In this respect, the Canadian legislation may function as a tax levied on Canadian advertisers, and on U.S. stations, to subsidize the production of Canadian programming.

358. See supra notes 190-201 and accompanying text.

359. 47 C.F.R. § 76.5(b) (1986).

360. Id. The equal treatment of foreign stations when cable systems choose to carry them was illustrated in Kiro, Inc. v. FCC, 631 F.2d 900 (D.C. Cir. 1980). The case involved a television station in Seattle, Washington, affiliated with the CBS network, which complained about competition from Seattle cable systems carrying Canadian stations, since those stations offered CBS network programming before that programming was available on CBS affiliates in the U.S. The FCC denied relief, applying its usual standard of whether the complaining station had shown substantial economic harm from the cable competition, and the court of appeals affirmed. The fact that the alleged harm arose from carriage of foreign stations by the U.S. cable systems was not accorded any significance.

361. 47 C.F.R. § 76.5(b) (1986).

tection to foreign stations that are not licensed by the FCC.

FCC regulation aside, there is one notable way in which U.S. law discourages cable carriage of foreign stations. The 1976 Copyright Act establishes a compulsory copyright license for cable carriage of “distant signals,” enabling cable systems to carry nonlocal stations on payment of government-prescribed royalties. This compulsory license expressly covers signals of Canadian and Mexican stations. It does so, however, only for carriage of those signals by U.S. cable systems located near the Canadian or Mexican border — specifically, within 150 miles of the Canadian border or within “off the air” reception range of stations in Mexico.

Microwave or satellite facilities are capable of transmitting Canadian or Mexican signals (or signals from more distant countries, for that matter) to cable systems anywhere in the United States. One may ask, therefore, why foreign signals were not treated the same as U.S. signals so far as the compulsory license was concerned. To be sure, in the view of Congress the hard decision was to bring any carriage of Canadian or Mexican signals under the compulsory license. Moreover, cable systems near the border were, by and large, the ones already carrying Canadian or Mexican signals. But if a U.S.
cable system remote from the border wants to carry a foreign signal—if a system in central California or northern New Mexico, for example, where there are many Mexican-Americans, to carry a signal from Mexico—why should it not be entitled to do so under the compulsory license?369

The foreign stations left out of the compulsory license, and the owners of the copyrights on the programs transmitted by those stations, presumably are delighted by this result. They are given full copyright protection against U.S. cable systems remote from the border.370 This protection enables them, at least in theory, to negotiate their own royalties for carriage by those systems.371

any Canadian or Mexican signals already carried at the time of the Act, even if the cable systems were outside the prescribed zones along the border. Id. at 95. See 17 U.S.C. § 111(c)(4) (1985).

369. Congress suggested no good reason. That broadcast stations in the United States are "licensed by the FCC," House Report, supra note 367 at 94, while stations abroad are not, has little relevance. Unlike the compulsory-carriage and program-exclusivity rules, see supra note 362 and accompanying text, the compulsory license is not a benefit for the stations carried, but a restriction imposed on them. While the House Committee saw the issue as raising "important international questions of the protection to be accorded foreign copyrighted works in the United States," House Report, supra note 367, at 94, it did not say what those questions were. The international obligation of the United States is only to give foreign works the same protection accorded to domestic works. Universal Copyright Convention, concluded Sept. 6, 1952, art. II, 6 U.S.T. 2731, T.I.A.S. No. 3324, revised July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868. The House Committee further stated:

While the Committee has established a general compulsory licensing scheme for the retransmission of copyrighted works of U.S. nationals, a broad compulsory license scheme for all foreign works does not appear warranted or justified. Thus, for example, if in the future the signal of a British, French, or Japanese station were transmitted in the United States by a cable system, full copyright liability would apply.

House Report, supra note 367, at 94. The Committee did not explain why it would not be "warranted or justified" to treat foreign signals the same as American signals so far as the compulsory license was concerned. See supra text accompanying notes 367-68 and infra text accompanying notes 370-72.


371. In practice, one may wonder whether the compulsory license is not a net advantage for foreign stations. By enabling U.S. cable systems to carry their signals without prior negotiation, it may produce carriage by systems that otherwise would not make the effort. At the same time, the license enables the station and the copyright owners to collect royalties automatically from the Copyright Royalty Tribunal. See 17 U.S.C. § 111(d), 801-10 (1985).

The desirability of the compulsory license is suggested by the vehement complaints of U.S. copyright owners against Canada for not reciprocating by providing them with comparable compensation for carriage of their programs by Canadian cable systems. See International Copyright/Communications Policies: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 1, 1-2 (1983) [hereinafter 1983 Hearings]; see also BROADCASTING,
The interests of copyright owners, however, are not the paramount considerations where the compulsory license is concerned. The compulsory license subordinates the interests of copyright owners in order to enable cable systems to carry the programs of distant stations, and in order to enable the public to receive those programs. Given this purpose, it is unlikely that Congress left most foreign stations out of the compulsory license, while including all domestic stations, in order to benefit the foreign stations and their program-copyright owners. It seems more likely that Congress, in declining to extend the compulsory license to Mexican and Canadian signals generally (or to all foreign signals), determined that it was less important for the U.S. cable audience to have access to foreign programs than to domestic programs. It is unclear why the choice between domestic and foreign programs was not left to the U.S. viewing public, with the compulsory license applying to all signals once it was applied to any. Such equal treatment of domestic and foreign media would have been more consistent with the “free flow” principle.

Other congressional judgments about foreign programming and U.S. audiences are embodied in the particular lines drawn by Congress in applying the compulsory license to Canadian and Mexican signals. With respect to Canadian signals, Congress made the license applicable to U.S. cable systems located within 150 miles of the border (or north of the 42d parallel where that is a greater distance). Thus, “Detroit, Pittsburgh, Cleveland, Green Bay and Seattle would be included within the compulsory license area, while New York, Philadelphia, Chicago, and San Francisco would be located outside the area.”

One may ask whether the viewing public in New York, Philadelphia, Chicago, and San Francisco, rather than the Congress, should judge the desirability of receiving Canadian signals in those cities.

Oct. 13, 1986, at 104 (“sense of the Senate” resolution). To be sure, what the U.S. copyright owners want from Canada is a compulsory license rather than no compensation for their signals, whereas Canadian and Mexican stations left out of the compulsory license by U.S. copyright law are consequently entitled to full compensation. It may be, however, because of the difficulties of negotiating individual royalties, that in practice the choice is between compulsory carriage and no carriage.

372. See, e.g., House Report, supra note 367, at 89; M. FRANKLIN, supra note 362, at 916.

373. See supra notes 363-67.


With respect to Mexico, instead of specifying a distance from the border, Congress made the compulsory license applicable for U.S. cable systems that receive the Mexican signals "off-the-air" rather than by microwave or satellite.\textsuperscript{376} To receive a Mexican signal adequately off-the-air, a U.S. cable system normally would have to be within 100 miles of the transmitter.\textsuperscript{377} Thus, a cable system in a U.S. border city such as San Diego presumably could receive, under the compulsory license, a station from the Mexican border city of Tijuana.\textsuperscript{378} But cable systems in central California or northern New Mexico apparently could not receive Mexican signals under the compulsory license. Neither could a cable system in Los Angeles, which is beyond off-the-air distance from Mexico.\textsuperscript{379}

These and other areas of the United States have large Mexican-American and Spanish-speaking populations despite their distance from the Mexican border. The congressional judgment excluding these areas from the compulsory license therefore may deny Mexican programming to cable audiences that would wish to receive it.

The off-the-air standard for bringing Mexican signals under the compulsory license has the further result of discriminating, not only among cable audiences in the United States, but among stations in Mexico. This standard means that carriage by U.S. cable systems under the compulsory license is limited to stations located in Mexican border cities. The licensed carriage would not extend, for example, to a station in Mexico City, whose signal could reach the border only by microwave or satellite. As a result, the Mexican stations received in the United States are likely to reflect the U.S. cultural influence that is more pronounced along the border, instead of the more authentic Mexican culture offered by stations deeper inside the country.

\textsuperscript{377} Although the distance for good off-the-air reception varies with the terrain, the height of the transmitter, and other factors, it is normally under 100 miles. Telephone interview with Brian James, engineer for the National Cable Television Association, Washington, D.C. (April 20, 1987).
\textsuperscript{378} Cf. BROADCASTING/CABLECASTING YEARBOOK 1985, at C-163 (list of television stations in San Diego market includes Tijuana stations).
\textsuperscript{379} See supra note 376. Los Angeles is approximately 110 miles from Tijuana.
3. U.S. Restrictions on Reception or Retransmission of Signals from Foreign Satellites

As of December 1984, there were approximately eighty active telecommunications satellites revolving in geostationary orbit above the equator. Approximately fifteen of them belonged to the International Telecommunications Satellite Organization (INTELSAT). Approximately twenty-five were domestic satellites of the United States. The remaining forty or so were domestic or regional satellites of other countries, including Canada, Australia, Mexico, Brazil, Indonesia, and the Soviet Union. In the United States, and probably in other countries, "it is virtually impossible to watch television or listen to the radio without soon seeing or hearing something that . . . at some point pass[ed] through a satellite transponder."

Given the large and growing role of satellites in distributing television programming throughout the world, national restrictions on the reception or retransmission of signals from foreign satellites may constitute important barriers to incoming media

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flow. This section examines the extent to which such restrictions exist in United States law.

(a) Reception Without Consent of Originator

Reception in the United States of a program-carrying signal from a foreign satellite—other than a DBS satellite—without the consent of the originator may violate several provisions of United States law. The most readily applicable prohibition is found in section 705(a) (formerly section 605) of the Federal Communications Act. The second and third sentences of section 705(a) provide:

No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

At least one of these sentences apparently would apply to prohibit reception of satellite signals without the consent of the originator.

385. As already noted, this discussion is concerned with conventional, “fixed service” satellites that transmit programming to broadcast stations, cable systems, or other distributors, and not with direct broadcast satellites (DBS) that in the future may broadcast directly to homes. See supra note 380; Hagelin, supra note 15, at 265. In any event, reception from a DBS satellite presumably would not be without the consent of the originator.

386. References to the consent of the “originator” include the consent not only of the entity that transmits the signal carried by the satellite, but also of the owners of the copyrights on the programs carried by the signal.


389. The second sentence, expressly covering any person “not being authorized by the sender,” presumably would apply whenever the person receiving the satellite signal “divulge[s] or publish[es]” the programming to any other person, that is, allows anyone else to view it. Even if the person receiving the signal views the programming in hermit-like isolation, he probably has “receive[d]” it without “being entitled thereto” and used it “for his own benefit,” in violation of the third sentence. On the applicability of section 705(a) to the unauthorized reception of satellite signals, see, e.g., 130 Cong. Rec. 14287 (Oct. 11, 1984) (statement of Sen. Packwood), quoted supra note 387; Regulation of Domestic Receive-Only Satellite Earth Stations, First Report and Order, 74 F.C.C.2d 205, para. 31 (1979); Rice, Calling Offensive Signals Against
There are, however, at least two possible defenses under section 705. First, a 1984 amendment exempts the reception "for private viewing" of "satellite cable programming," if the signal is not scrambled and if a market mechanism has not been established to let people pay to receive the signal. Second, the proviso to section 705(a) exempts from the section's coverage "any radio communication which is transmitted by any station for the use of the general public." These possible defenses, together with others based on the Constitution, will be discussed shortly in considering the legal status of particular examples of foreign-satellite reception in the U.S.

In addition to section 705, reception of a signal from a foreign satellite without the consent of the originator, if done by a cable system that retransmitted the signal, would produce a violation of U.S. copyright law. It also could constitute an invasion of privacy under applicable state law.

Further, failure by the United States to take measures against unauthorized reception of foreign-satellite signals could violate treaty obligations of the U.S. It might violate Article 17 of the International Radio Regulations, in which the member states of the International Telecommunications Union agree to prohibit and prevent "the unauthorized interception of radio communications not intended for the general use of the public." A refusal by the U.S. government to act against unauthorized "distribution" of satellite signals also might violate the Brussels Satellite Convention, which obligates each of its signatories "to take adequate measures to prevent the distribution on or from its territory of any program-carrying signal by any distributor for whom the signal emitted to or passing through

Unauthorized Showing of Blacked-Out Football Games: Can The Communications Act Carry the Ball?, 11 COLUM J. L. & ARTS 413, 424, 426 (1987). On the applicability of the third sentence of section 705(a) to a person who views the programs for his own enjoyment without financial gain, see, e.g., Movie Systems v. Heller, 710 F.2d 492, 494 & n.5 (8th Cir. 1983); Rice, supra, at 421-22 & n.56.

391. 47 U.S.C. § 705(a); see supra note 345, infra notes 430-40, and accompanying text.
392. See infra text accompanying notes 421-76.
the satellite is not intended."³⁹⁶

(b) Reception With Consent of Originator

(i) The FCC’s Position: Such Reception Is Illegal Unless Authorized by the FCC

If someone in the United States receives programming from a foreign satellite³⁹⁷ with the consent of the originator, does the reception violate United States law? The Federal Communications Commission says it does, unless the FCC has given its own consent.

The FCC first took this position in a 1979 decision in which it lifted its regulation of receive-only satellite earth-stations (i.e., dish antennas).³⁹⁸ The Commission recounted that domestic satellite service had been initiated in the United States at the end of 1973, and by early 1977 its growth had become explosive.³⁹⁹ Early receive-only earth stations, being very expensive, were installed primarily by common carriers to serve multiple users.⁴⁰⁰ But the technology and the equipment market advanced quickly, and in 1975 the FCC first authorized a cable system to construct an earth station for its own private use.⁴⁰¹ A flood of similar applications followed, and the FCC progres-

³⁹⁶. Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, art. 4(i), (iii) (ratified by United States in October 1984), reprinted in 28 PAT. TRADEMARK & COPYRIGHT J. (BNA) 723, art. 4(i), (iii) [hereinafter Brussels Satellite Convention]. However, the Convention provides broad exceptions. Member states need not prohibit unauthorized reception of signals carrying “reports of current events,” used for instructional purposes, quoted in accordance with “fair practice,” or distributed “solely for the purpose of teaching . . . .” Id. at art. 4(i), (ii), (iii). Ratification of the Brussels Convention was considered by the U.S. Copyright Office and other federal agencies to require no new legislation in the United States; section 605 of the Communications Act, now section 705, together with the copyright laws, was regarded as adequate implementing legislation. See 1983 Hearings, supra note 371, at 32-33 (statement of David Ladd). See generally Cryan & Crane, supra note 380, at 871-74.

³⁹⁷. References to “foreign satellites” mean domestic or regional satellites of foreign nations and do not include INTELSAT satellites. See supra notes 380-83 and accompanying text.


³⁹⁹. 74 F.C.C.2d at para. 6.

⁴⁰⁰. Id.

sively streamlined its procedures. In 1977, it dropped the requirement that earth-station licensees obtain FCC approval to receive specific programming from a domestic satellite. In 1979, the FCC deregulated receive-only earth-stations altogether, ruling that a license was no longer necessary to construct and operate one.

But this did not mean, the FCC declared, that an earth-station operator could receive programming from a foreign satellite, even with the consent of the originator, without governmental permission. The Commission said that the treaty obligations of the United States under the INTELSAT Agreement stood in the way. Under section XIV(d) of the Agreement, a signatory nation intending to use satellite-related facilities separate from the INTELSAT system for the purpose of international telecommunications must first notify and consult with INTELSAT, in order to assure technical compatibility and "to avoid significant economic harm to the global system of INTELSAT." Only after such consultation has taken place, and INTELSAT's Assembly of Parties has responded with its recommendations, may the proposed non-INTELSAT operation go forward. The FCC noted these treaty obligations and continued:

Thus, any deregulation of receive-only earth stations does not imply permission to receive service from non-U.S. domestic satellites . . . . Such permission can be provided only after discharge of our treaty obligations to INTELSAT. Therefore, until such permission is granted, any reception of non-U.S. signals is unauthorized and subject to the sanctions of Section 605 [of the Federal Communications Act].

(ii) Evaluation of the FCC's Position

The FCC's position evidently is respected by earth-station operators. At least one such operator does seek permission from the FCC, subject to the consultation process with INTELSAT,

403. Earth Stations, supra note 398, at para. 7.
404. Id. at para 35 n.27; see T.I.A.S. No. 7532; see supra note 381.
405. T.I.A.S. No.7532 at art. XIV (d); Earth Stations, supra note 398, at para. 35 n.27.
406. Earth Stations, supra note 398, at para. 35 n.27.
407. Id. See also Rebroadcasts, supra note 398, at para 34 (INTELSAT Agreement "protected in the U.S. through enforcement of section 705").
in order to receive programming from a foreign satellite with the consent of the originator.\textsuperscript{408} It is not clear, however, where the FCC gets the legal authority for its position.

The FCC seems to rely basically on the INTELSAT Agreement. Since that Agreement provides that permission to receive international telecommunications service from a non-INTELSAT satellite can be granted "only after discharge of our treaty obligations to INTELSAT," the FCC reasons that "until such permission is granted, any reception of non-U.S. signals is unauthorized and subject to the sanctions of Section 605."\textsuperscript{409} One must ask whether this reasoning is sound.

The reception of signals from a foreign satellite by a person in the United States, with the consent of the originator but without the permission of the U.S. government pursuant to the INTELSAT Agreement, might indeed violate the obligations of the United States under that Agreement. Article XIV (d) requires that the consultation process first be pursued "[t]o the extent that any Party or Signatory or person within the jurisdiction of a Party" intends to use non-INTELSAT facilities for international telecommunications.\textsuperscript{410} It does not follow, however, that non-INTELSAT reception by a person in the United

\textsuperscript{408} See, e.g., In the Matter of Cable News Network, Inc., Memorandum Opinion, Order and Authorization, File No. 907-DSE-L-85, May 14, 1985 (application for authority to construct and operate a receive-only earth-station in the domestic fixed-service, to be located in Atlanta, Georgia, to receive signals from all domestic communications satellites as well as the Soviet Union's GHORIZONT STATIONS 4 and 7 satellites); Rebroadcasts, 101 F.C.C.2d at para. 6 Comments of Turner Broadcasting System [hereinafter Turner Comments]; see also infra notes 489-502 and accompanying text.

In addition to the various requests by Cable News Network, in February 1987, Orbita Technologies Corp., a company specializing in the reception of programming from Soviet domestic satellites, filed a similar request with the FCC. Orbita asked the FCC for permission to downlink programming from Soviet satellites, with the permission of the Soviets, on behalf of Discovery Channel, a cable programming service that proposed to retransmit 66 hours of the Soviet programming during one week to its 14 million cable subscribers in the United States. Broadcasting, Feb. 16, 1987, at 53-54, 97. The FCC denied permission, saying the request had been made too late for the required INTELSAT coordination. Id. at 97. Although Orbita contended that it did not need FCC permission, because the reception "would cause no economic harm to Intelsat," Orbita and Discovery bowed to the FCC's ruling and sought to obtain the programming through INTELSAT satellites instead. Broadcasting, Feb. 23, 1987, at 96. As a result of heavy INTELSAT traffic, they received only 28 hours of "live" programming, and Discovery used tapes for the rest of the hours. Id. See also infra notes 497, 505.

\textsuperscript{409} Earth Stations, supra note 398, at para. 35 n.27.

\textsuperscript{410} INTELSAT Definitive Agreement, art. XIV(d), 23 U.S.T. 3813, T.I.A.S. No. 7532 (1973) (emphasis added).
States would violate U.S. domestic law. Article XIV (d) manifests no intention to be self-executing.\textsuperscript{411} Indeed, it is doubtful that a treaty can be self-executing so as to impose criminal sanctions under U.S. law without an implementing Act of Congress.\textsuperscript{412}

The FCC purports to find such implementing legislation in section 605 (now section 705) of the Communications Act. Reception of non-U.S. satellite signals without official permission given pursuant to the INTELSAT process, the FCC says, "is unauthorized and subject to the sanctions of section 605."\textsuperscript{413} The FCC appears never to have indicated which provision of section 605 (now section 705) it relies on.\textsuperscript{414} Apparently the FCC reads section 705 as a general prohibition of "unauthorized" reception of radio communications, and then concludes that reception lacking government approval pursuant to the INTELSAT Agreement is "unauthorized."\textsuperscript{415}

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\textsuperscript{411} A treaty is self-executing if it "manifests an intention that its provisions shall be effective under the domestic law of the parties at the time it comes into effect." RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, SECOND, § 154(2) (1965); see also Riesenfeld, The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?, 74 AM. J. INT'L L. 892, 896-87 (1980) ("whether the treaty aims at the immediate creation of rights and duties of private individuals which are enforceable and to be enforced by domestic tribunals"); id. at 898 n.29 ("the treaty must . . . be specific enough not to need further concretization by domestic action").

\textsuperscript{412} "Treaty regulations that penalize individuals . . . are generally considered to require domestic legislation before they are given any effect." Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980) (citing L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 159 (1972)). See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, SECOND, § 141(3) (1965) (treaty cannot be self-executing to extent it involves "governmental action that under the Constitution can be taken only by the Congress"); Riesenfeld, The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions, 25 CAL. L. REV. 643, 651 (1937) (listing the appropriation of money and the imposition of penalties for criminal offenses as two examples of such governmental action); The Bello Corrunes, 19 U.S. (6 Wheat.) 151, 171-72 (1821); see also United States v. Postal, 589 F.2d 862, 877 & authorities cited therein (5th Cir. 1979).

\textsuperscript{413} Earth Stations, supra note 398, at para. 35 n.27; accord, Rebroadcasts, supra note 398, at para. 34; Transborder Satellite Services, 88 F.C.C.2d 258, para. 44 n.26 (1981).

\textsuperscript{414} Earth Stations, supra note 398, at para. 35 n.27; Rebroadcasts, supra note 398, at para. 84.

\textsuperscript{415} See Transborder Satellite Services, 88 F.C.C. 2d at para. 44 n.26:

The Communications Act, in Section 605, prohibits the unauthorized interception and disclosure of interstate or foreign radio-communications except those designated as broadcasts for use by the general public. . . . After completion of the INTELSAT coordination process, and with the bilateral concurrence of the foreign government, Section 605 will not stand as an impediment to the reception of transborder television programming at U.S. receive-only earth stations.
opaque as section 705 is, there is nothing in it that can reason-
ably be read as prohibiting reception with the consent of the
sender.\textsuperscript{416} Moreover, explicit language would be required since
section 705 is a criminal statute, to be strictly construed.\textsuperscript{417}

There would also be first amendment problems in making
the reception of a foreign satellite signal illegal where the
sender has given consent. In \textit{Lamont}, the Supreme Court
struck down a less onerous burden on incoming speech, the
requirement that the addressee send in a postcard request in or-
der to receive mail from abroad.\textsuperscript{418} True, the communication
there was by mail rather than radio, and the use of radio fre-
quencies traditionally has justified greater regulation.\textsuperscript{419} Fur-
ther, the United States has a substantial interest in complying
with its treaty obligations to INTELSAT. On the other hand,
the first amendment interests at stake here could be stronger
than in \textit{Lamont} — if, for example, the signals from the foreign
satellite carried news coverage, and the receiving entity was a
news organization wanting to retransmit that news in the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{416} Too long and wordy to quote in full, section 705(a) is more usefully summa-
\item \textsuperscript{417} The FCC conceivably might rely on the third sentence, arguing that a person is not
\item \textsuperscript{418} See United States v. Hall, 488 F.2d 193, 195 (9th Cir. 1973); Brandon v. United
\item \textsuperscript{419} See, \textit{e.g.}, FCC v. League of Women Voters, 468 U.S. 364, 376-78 (1984); \textit{supra}
\end{enumerate}
\end{footnotesize}
United States.\textsuperscript{420} Thus, if the U.S. Congress had passed a law requiring FCC permission for reception of programming from a foreign satellite with the consent of the sender, a substantial constitutional question would be presented. Congress has not passed such a law, but the FCC interprets section 705 as though it had. This position is untenable.

(c) Examples of U.S. Reception of Foreign Satellite Signals

Against that background, some current examples of foreign-satellite reception in the United States pose interesting legal questions.

(i) Backyard Dish Reception

By mid-1986 more than 1.5 million homes in the United States had their own earth stations—"backyard dishes"—to receive television programs from satellites.\textsuperscript{421} The satellites at which these dishes are pointed include foreign satellites.\textsuperscript{422} Since dish owners normally lack the consent of the signal's originator, their reception of satellite signals has been assumed to violate section 705 of the Federal Communications Act, as that section stood prior to the 1984 "satellite cable programming" amendment.\textsuperscript{423} The questions arise whether that amendment covers reception of signals from foreign satellites, or whether other protection for such reception can be found in section 705.

The 1984 amendment provides a specific exemption from section 705 for reception of satellite signals by home-earth-stations. It exempts the reception of "any satellite cable programming for private viewing" unless the signal is scrambled

\textsuperscript{420} See supra note 408; infra notes 489-517 and accompanying text.
\textsuperscript{421} Broadcasting, Oct. 6, 1986, at 74.
\textsuperscript{422} See, e.g., Sky's the Limit on Home Sales of Satellite Dishes, San Francisco Chron., June 10, 1985, at 20 col. 1 ("Programming includes commercial-free feeds from the major networks, foreign broadcasts and even pay-TV channels such as those offering first-run movies"); D'Anastasio, Nyetwork TV: America Tunes in Soviet Broadcasts, Wall St. J., Nov. 18, 1986, at 1, col. 4.
or, if it is not scrambled, unless there is a “marketing system” through which dish owners can buy the right to view the programming. While most U.S. programmers have responded to the amendment by scrambling their satellite-carried signals, programmers using foreign satellites may not have done so. If signals carried by foreign satellites are not scrambled, and are not subject to a marketing system, the question remains whether the 1984 amendment protects U.S. dish owners in receiving those signals.

There appears to be nothing in the amendment that precludes its application to foreign satellites. But the programming must be “satellite cable programming,” defined as programming “primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers.” This test apparently would protect U.S. reception of some signals carried by Canadian satellites, which evidently are transmitted to Canadian “cable operators” similar to cable operators in the United States.

Where the satellites of other countries are concerned, questions arise. Must “cable operators” be private entrepreneurs? Must “cable subscribers” pay separately for the cable service (as distinct from supporting the government that provides the service)? An affirmative answer to either question would exclude from the 1984 amendment any programming carried by a foreign satellite to a government-furnished cable system that serves all homes in a given area, as may exist in the Soviet Union and other countries.

There is nothing in the statutory terms “cable operators” or “cable subscribers,” however, that indicates any such limita-

425. See Broadcasting, Oct. 6, 1986, at 74 (most major cable programmers will have scrambled their satellite feeds by early 1987); Broadcasting, Feb. 2, 1987, at 9 (CBS broadcast network sets July 1987 date to begin scrambling its satellite feed to its affiliates).
426. See, e.g., infra text accompanying notes 443-46, 500-02 (reception of unscrambled Soviet programming); supra note 408.
427. The purpose of the amendment presumably would require that the marketing system be available to viewers in the United States.
429. Id. § 705(c)(1).
tions. In addition, no reason appears why the purpose of the amendment—to make cable programming available for home dish reception, unless the signal is scrambled or a marketing plan provided—does not apply to programming destined for a state-run and state-funded cable operation in another country.

What then if the programming carried by the foreign satellite is distributed in the foreign country, not by cable, but by broadcast stations? In this situation the 1984 amendment clearly does not apply. It may be suggested, however, that the homedish reception now is protected by the proviso to section 705, which exempts reception of "any radio communication which is transmitted by any station for the use of the general public." The argument would be that since broadcasting is defined by the Communications Act as radio communications "intended to be received by the public," satellite transmissions that result in conventional broadcasts are "for the use of the general public" under the proviso.

In support of the argument, it can be said that nothing in the statutory language prevents treating the broadcast-bound satellite signal as a transmission "for the use of the general public," especially when the broadcast proceeds simultaneously with reception of the signal by the broadcast station. Further, broadcast networks, like cable networks, are able to protect their satellite signals by scrambling them. If they fail to do so, why shouldn't their signals be fair game in the open sky for home dishes?

431. "[C]able operators" easily includes a government cable operation. "[C]able subscribers" can mean separately-paying subscribers, but can just as well mean the people who receive, and are entitled to receive, the cable service.


434. Conventional broadcasts are distinguishable in this respect from subscription broadcasts (STV) intended only for paying subscribers. It may further be argued, with respect to some countries, that satellite transmissions destined for cable or other non-broadcast distribution are likewise "for the use of the general public." See infra note 454.

435. See supra note 425 and accompanying text.

436. The argument can claim inferential policy support in the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 4573 (1986). This act, while amending the federal anti-wiretapping laws to reach unauthorized interception of new communications technologies, excludes from its coverage the interception of an unscrambled satellite signal "transmitted . . . to a broadcasting station for purposes of retransmission to the general public," provided that the interception is not "for the purposes of direct or indirect commercial advantage or private financial gain." Id.
Still further, the Communications Act, through its definition of "broadcasting" and its exemption for signals transmitted "for the use of the general public," arguably embodies a policy of enabling members of the public to have access somehow to broadcast programming. This policy may be offended if members of the U.S. public are prohibited from receiving at their home-earth-stations, for private viewing, broadcast-bound programs from foreign satellites, when satellite reception is the only way those programs can be received in the United States.437

But the argument confronts major problems. The home-earth-station receives the signal from the satellite. At that point the signal is not being broadcast, but is being transmitted point-to-point to the broadcast station. Point-to-point transmission, as distinct from broadcasting, probably was intended to be outside the section 705 proviso.438 Moreover, the argument would have to apply also to reception of broadcast-network programming from United States domestic satellites. Such an interpretation of the proviso, making it applicable to "satellite broadcast programming," would seem contrary to the limited congressional intent behind the 1984 "satellite cable-programming" amendment.439 This is especially so because the satellite


437. One may reply, however, that if U.S. viewers are too remote to receive the foreign broadcasts, they are not within the "public" that was intended to have access to those broadcasts under either the definition of "broadcasting" or the section 705 proviso.

438. See Cryan & Crane, supra note 380, at 859 (section 705, with limited exemption for reception of satellite cable programming, "covers theft of...point-to-point" radio messages"). In 1979, the FCC held, and a federal district court agreed, that transmissions by amateur radio operators were not as a general rule "for the use of the general public" under the proviso, in large part because they were point-to-point transmissions. In the Matter of James Reston, Jr., FOIA, Memorandum Opinion and Order, 72 F.C.C.2d 662, paras. 12-13 (1979); Reston v. FCC, 492 F. Supp. 697, 701 n.3, 702 (D.D.C. 1980). As a result, section 605 was amended in 1982 to make clear that reception of amateur transmissions is within the proviso: "any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator." 47 U.S.C. § 705(a); see Communications Amendments Act of 1982, Pub. L. No. 97-259 (1982); S. REP. NO. 191, 97th Cong., 2d Sess. 8-10 (1981); H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 59-60 (1982).

439. See 130 CONG. REC. 14286, 14287 (statement of Sen. Packwood) ("This authori-
feeds of the major U.S. broadcast networks lack the commercials that the local stations insert in the programming. Recep-
tion of the program signals direct from the satellite thus would undermine the broadcast marketing scheme, a result Congress did not intend.

For these reasons, the argument that the section 705 proviso protects home-dish reception of broadcast-bound programming, whether received from foreign or from U.S. domestic satellites, must be rejected.

(ii) Reception for Academic Purposes

Legally-questionable reception of foreign satellite signals is also found increasingly at American universities. According to a 1984 report, "Columbia University has announced that it is receiving up to fifteen hours a day of live television programs broadcast internally in Russia." Having installed an eleven-foot rooftop dish antenna to receive signals from four domestic satellites of the Soviet Union, Columbia reportedly was using the programs for research and teaching purposes. According to a November, 1986 Wall Street Journal article, a growing number of American universities, cable systems, U.S. government officials, and private individuals were receiving Soviet programming. So far as appears, only one of these receivers had obtained the consent of the Soviet originator.
University reception of foreign-satellite programming may differ from home-earth-station reception in at least two legal respects. First, the universities are engaged in an educational and scientific endeavor. If Columbia University was sued by the Soviets for copyright infringement in receiving the satellite programming, and if the Soviets otherwise had a valid claim under U.S. copyright law, the educational, scientific, and non-profit nature of Columbia's activity might well provide a "fair use" defense. \(^4\) It is doubtful, however, that the Soviets would have a good claim in the first place. The Copyright Act exempts the "public reception" of a television transmission "on a single receiving apparatus of a kind commonly used in private homes." \(^4\) Notwithstanding the technical sophistication of the antenna used by Columbia to receive the Soviet programming, \(^4\) the receiving sets on which the programs are shown may well be of a kind commonly used in private homes. \(^5\)

If the Soviets have no case against Columbia under the Copyright Act, they still may have a private action for violation of section 705 of the Communications Act. \(^6\) Here a second difference between Columbia and the home-earth-station cuts against the university. To the extent that the Soviet programming is distributed to viewers in the U.S.S.R. by cable systems, home-earth-station owners in the U.S. probably are protected ranging a study of American reactions to Soviet television. *Id.* at 29, col. 4. More recently it was reported that Orbita Technologies Corp., a company that markets equipment for receiving programming from Soviet satellites and that had provided an installation to Columbia University since 1984, in spring 1986 "received permission ... from the Soviet government to downlink anything it wanted from [Soviet MOLNIYA satellites] for educational purposes." *Broadcasting*, Feb. 16, 1987, at 53.


449. See Wall St. J., *supra* note 445; *Broadcasting*, Feb. 16, 1987, at 53 (Soviet MOLNIYA satellites, received at Columbia, are in eccentric polar orbit instead of geostationary orbit, which required development of software to track the satellites and switch from one to another as each became operational).

450. It might also be argued that any performance at Columbia is not "public" (see 17 U.S.C. § 106(4) (1987)). But the argument would seem precluded by the act's definition of "publicly" as "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." 17 U.S.C. § 101 (1987).

in receiving the satellite signals by the 1984 amendment to section 705.\textsuperscript{452} A university, however, could not claim this protection. The amendment is limited to “private viewing,” defined as viewing for private use “in an individual’s dwelling unit.”\textsuperscript{453}

Unconsented reception of Soviet signals by an American university thus would seem to violate section 705, unless it could find protection in the “use of the general public” proviso.\textsuperscript{454} As indicated earlier, that proviso probably does not protect the reception of signals being transmitted point-to-point, but only those being broadcast.\textsuperscript{455} Hence, even if the signals ultimately are distributed to the Soviet public by broadcasting, the university’s reception of them from the Soviet satellite, without the consent of the originator, would still appear to violate section 705.\textsuperscript{456}

Are there any other defenses for the university? Perhaps the first amendment provides a right of access to unscrambled satellite signals, when the signals carry the basic television programming of a nation and when that programming otherwise would be inaccessible for study in the United States.\textsuperscript{457} Whether or not the “free flow” principle supports a right to broadcast into a country without that country’s consent,\textsuperscript{458} it

\begin{itemize}
\item \textsuperscript{452} 47 U.S.C. § 705(b)-(c) (1985); see supra text accompanying notes 424-31.
\item \textsuperscript{453} 47 U.S.C. § 705(b)-(c)(4) (1985).
\item \textsuperscript{454} 47 U.S.C. § 705(a) (1985); see supra notes 391, 432-36, and accompanying text.
\item \textsuperscript{455} See supra text accompanying notes 438-41.
\item \textsuperscript{456} See supra notes 438-42 and accompanying text. If the reception of satellite signals were within the proviso when the signals ultimately are distributed to the public by broadcasting, one might argue, in the context of Soviet signals, that the proviso should apply regardless of the mode of distribution. In the American context, only broadcasting is considered to be “for the use of the general public,” while cable and other distribution modes are considered commercial, subscriber-supported, limited-audience enterprises. See 47 U.S.C. § 153(o) (1987); National Subscription Television v. S & H TV, 644 F.2d 820, 823; Statement of Senator Packwood, 130 CONG. REC. 14286, supra note 387. In the Soviet Union, however, it may be that all modes of program distribution are state-provided and available generally to the public in the area served. If so, any programming transmitted by a Soviet satellite would be for the use of the general public. This theory would protect reception not only by universities, but by anyone in the United States. (Cable systems that retransmitted the Soviet programs would remain liable for copyright infringement. See 17 U.S.C. § 111(c)). The theory still founders, however, on the likely inapplicability of the section 705 proviso to signals being transmitted point-to-point. See supra notes 438-42 and accompanying text.
\item \textsuperscript{457} Cf. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (first amendment right of access to criminal trials); id. at 583 (Stevens, J., concurring) (describes decision as holding that “an arbitrary interference with access to important information” abridges first amendment).
\item \textsuperscript{458} See supra text accompanying notes 14-16.
\end{itemize}
may support a right, protected against the U.S. government by the first amendment, to receive from any country television programming transmitted to the public there.\textsuperscript{459}

But the claim seems too broad, vague, and novel to stand independently on a first amendment foundation. There is no satisfactory way to define and limit the programming to which the right of access would apply.\textsuperscript{460} There is no stopping place short of an unfettered right to receive from any satellite any unscrambled signal carrying “programming.” While programmers indeed can scramble their signals,\textsuperscript{461} and the day may come when unscrambled satellite signals are viewed as in the public domain, it is hard to believe that the first amendment already goes so far.

The first amendment interest in university reception of Soviet programming might be accommodated, however, in another, more flexible way. If the educational and nonprofit character of the university’s use of the programs would support a fair-use defense to a Soviet claim of copyright infringement,\textsuperscript{462} a fair-use defense might be read into section 705 as well.\textsuperscript{463}

\textsuperscript{459} As one indication of international norms, the Brussels Satellite Convention, see supra note 396 and accompanying text, obligates each signatory to take action against “the distribution on or from its territory of any program-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended.” Brussels Satellite Convention, art. 2 (emphasis added). The Convention apparently contemplates no action against the simple reception of satellite signals by home viewers.

\textsuperscript{460} One may ask whether satellite-carried cable programming, if unscrambled, would thus be made available by the first amendment for nonprivate viewing, overriding section 705. 47 U.S.C. § 705(a)-(c); see supra notes 424-27 and accompanying text. Or whether reception of unscrambled satellite feeds of the U.S. broadcast networks, free of local commercials, would thus become a constitutional right. See supra notes 438-42 and accompanying text. Or how “scrambling” is to be defined for constitutional purposes, and why the constitutional right should not extend to the decoding of “scrambled” signals, at least if this can readily be done with commonly available equipment.

\textsuperscript{461} See supra note 425 and accompanying text.

\textsuperscript{462} See supra note 447 and accompanying text.

\textsuperscript{463} The fair-use defense originally was read into copyright law by the courts. See Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218, 2225 (1985). It is true that section 705 is not limited to copyright considerations. It is aimed not simply at the taking of the material, but at the way it is taken—by intercepting a communication without the consent of the sender. See 47 U.S.C. § 705 (a). One would not want to give a wiretapper a fair-use defense under section 705 based on his educational, nonprofit use of the material overheard. In the case of unscrambled signals received from a satellite, however, the element of eavesdropping is much more attenuated. With more than 1.5 million satellite dishes operating in the United States alone, see...
Just as the fair-use defense to copyright infringement reflects first amendment interests, a fair-use defense under section 705 could vindicate the interest in access to a nation's television programming. Fair-use could provide a suitably flexible vehicle under section 705, just as it does in copyright law. It could protect reception of satellite programming for "nonprofit, educational purposes," but not reception "of a commercial nature." It could take into account the effect of the signal reception on the "potential market" for the programming. On this basis the reception of Soviet programming, distributed free across an entire nation, might be protected, while liability was retained for reception of programming distributed by cable systems or other market-based modes.

There is, however, a substantial obstacle to reading a fair-use defense into section 705. Congress has expressly included in section 705 two "fair use" provisions—for "private viewing" of "satellite cable programming" and for reception of signals transmitted "for the use of the general public." Especially since the section was amended in this context as recently as 1984, it is fair to infer that no further exceptions were intended. Thus, while the question is debatable, respect for congressional intent should restrain the courts from reading a fair-use defense into section 705.

Still, a fair-use defense would represent sound public policy. A country's television programming today provides an indispensable window into its culture, politics, language, and its soci-

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467. The Brussels Satellite Convention takes a fair-use approach to the unauthorized reception of satellite signals. It provides exemptions for reception of satellite signals carrying "reports of current events," or used for instructional purposes, or distributed "solely for the purpose of teaching." Brussels Satellite Convention, reprinted in 28 PAT., TRADEMARK, AND COPYRIGHT J. (BNA) 723, art. 4(i), (iii); see supra note 396 and accompanying text.
468. 47 U.S.C. § 705(b) (1985); see supra notes 424-30 and accompanying text.
469. 47 U.S.C. § 705(a) (1985); see supra notes 432-42 and accompanying text.
ety. For those wishing to study and know the country, access to its television programming is no less important than access to its newspapers, magazines, or books. When the nationwide, publicly-distributed programming of the Soviet Union or any other foreign country is accessible on satellites receivable in the United States, reception of the satellite signals for purposes of nonprofit education or research should not violate United States law. Congress therefore should amend section 705. The amendment might extend the exception already created for "private viewing" of "satellite cable programming" to cover private or educational viewing of any satellite-carried programming, if unscrambled. Alternatively, Congress might simply authorize the courts to apply to the reception of unscrambled satellite signals under section 705 the same principles of fair-use that are applied to copyright infringement.

Of course, American universities desiring to receive Soviet programming might ask the Soviets for permission. In one reported instance where permission was requested from the Soviets, it was granted. But even if permission in all appropriate cases could be assured, it would not solve the legal problem. The position taken by the Federal Communications Commission on reception of signals from foreign satellites means that the universities would be violating section 705 even if they had the Soviets' permission, as long as they did not also have the FCC's permission pursuant to the INTELSAT consultation process. This FCC interpretation of section 705, erroneous in any event, seems especially wrong-headed here, given the nature of the material being received and the other considerations that support a fair-use defense. While the FCC's position stands, however, the consent of the originator does not suffice to make the reception legal.

(iii) Reception for Retransmission as News

A third current example of U.S. reception of foreign satellite signals involves reception by a news organization for the purpose of retransmitting the material as news within the United

473. 47 U.S.C. § 705(b) (1985); see supra notes 424-30 and accompanying text.
474. See Wall St. J., supra note 446, at 1, col. 4; see also the report on Orbita Technologies Corp. receiving an apparently blanket permission from the Soviet government to receive programming for educational purposes. Id.
475. See supra notes 397-407 and accompanying text; see also supra note 408.
476. See supra notes 408-20 and accompanying text.
States. This problem will be considered after examining cases in which the reception of foreign satellite signals is specifically permitted by U.S. law.\footnote{477. See infra notes 498-504 and accompanying text.}

(d) Permitted Reception of Foreign Satellite Signals Under U.S. Law

In some situations the FCC has authorized the reception in the United States of programming from foreign domestic satellites. Three such examples are the FCC's Transborder policy, FCC permission given to Cable News Network for continuing reception of Soviet signals, and grants of special temporary authority to Cable News Network for coverage of international news events.

(i) The FCC's Transborder Decision

In its 1981 Transborder decision,\footnote{478. Transborder Satellite Video Services, Memorandum Opinion and Order, 88 F.C.C.2d 258 (1981).} the FCC permitted owners of earth-stations in the United States to receive programming from Canadian domestic satellites (and simultaneously permitted U.S. domestic satellite carriers to provide programming to reception points in Canada, as well as in Central America and the Caribbean). At least some of the proposed reception services,\footnote{479. See id. at paras. 5, 14.} if not all of them,\footnote{480. The FCC did not discuss the consent question, possibly implying that consent was present in all cases. However, the FCC's 1985 final order approving the services states that it "does not include the video programming of superstations (WGN, WOR, and WTBS) and other premium pay services (i.e., Showtime etc.) because of copyright concerns." In re 220 Television, No. 318-DSE-ML-78, para. 4, n.2., Nov. 22, 1985.} had the consent of the originators.\footnote{481. The FCC here reiterated its position that reception by a U.S. earth-station of a signal from a foreign satellite, even with the consent of the sender, would be "unauthorized," in violation of section 705 of the Communications Act, if it did not also have the permission of the FCC after the INTELSAT consultation process. 88 F.C.C.2d at para. 44 & n.26; see supra notes 397-407 and accompanying text. This time the FCC sought to bolster the position by relying also on the International Radio Regulations (I.R.R.), in which the members of the International Telecommunications Union agree to prevent "the unauthorized interception of radiocommunication not intended for the general use of the public." 88 F.C.C.2d at para. 44 & n.26 (quoting Ch. VI, Administrative Provisions for Stations, ITU Radio Regulations, art. 23(a) (1982)). But the I.R.R. share with the INTELSAT Agreement a lack of apparent intent, and probably of legal capacity, to impose self-executing criminal sanctions on persons in the U.S. See supra notes 411-12 and accompanying text. Moreover, the I.R.R. fall short even of the INTELSAT Agreement in lacking any suggestion that an interception is "unau-}
The FCC determined that the proposed use of U.S. earth-stations for international service from a nearby country would be consistent with U.S. law, in particular the Communications Satellite Act of 1962,\textsuperscript{482} and with the U.S. commitment to INTELSAT and its global satellite system.\textsuperscript{483} As suggested by the U.S. State Department, the FCC applied two tests for determining whether use of non-INTELSAT facilities for an international service should be approved: (1) whether the INTELSAT global system could not provide the service, or (2) whether it would be clearly uneconomical or impractical for that service to use the INTELSAT system.\textsuperscript{484} The Commission found that INTELSAT was technically able to provide the transborder services over its satellites, but that the use of INTELSAT facilities for these services would be "uneconomical, . . . impractical and undesirable."\textsuperscript{485} The FCC's decision was not final, but required that the consultation process under Article XIV (d) of the INTELSAT Agreement be pursued before the transborder service could begin.\textsuperscript{486} This process took four years, reaching completion (and approval) at the October 1985 meeting of the INTELSAT Assembly of Parties.\textsuperscript{487} In November 1985, the FCC issued final grants of authority for the transborder services.\textsuperscript{488}

(ii) FCC Approval for Continuing Reception from Soviet Satellites

In another approval of foreign satellite reception, the FCC has given permission to an American news organization, Cable News Network (CNN), to receive signals from Soviet satellites. In February 1985, CNN sought FCC permission to receive at its Atlanta, Georgia, earth station, within the footprint of one of the Soviet Union's GHORIZONT satellites, news programming transmitted on the satellite by the Soviet-bloc news agency, Intervision.\textsuperscript{489} With Intervision's consent, CNN planned to

\textsuperscript{483} 88 F.C.C.2d at paras. 29-30.
\textsuperscript{484} Id. at paras. 46-54.
\textsuperscript{485} Id. at paras. 49-54.
\textsuperscript{486} Id. at paras. 58-59.
\textsuperscript{488} See id., paras. 1, 3, 4. The FCC previously had issued some authorizations based on the January 1985 INTELSAT meeting. Id.
\textsuperscript{489} Ghorizont, Memorandum Opinion and Order No. 907-DSE-L-85 at paras. 1, 3, May 14, 1985 [hereinafter Ghorizont].
extract segments for insertion into its own news programming.\textsuperscript{490} A few months later, CNN signed a two-year agreement with the U.S.S.R.'s State Committee for Television and Radio (Gostelradio) to exchange news, entertainment, and sports programming.\textsuperscript{491}

In May 1985, the FCC, applying its \textit{Transborder} standards, approved CNN's request.\textsuperscript{492} The approval was conditioned on consultation by the U.S. with INTELSAT pursuant to Article XIV(d) of the INTELSAT Agreement. It was also made subject to: (a) possible modification "as a result of consultation with the Secretary of State on foreign, political and related matters"; and (b) "express immediate revocation without hearing" if the FCC, in consultation with the Secretary of State, should determine that revocation was "in the public and national interest."\textsuperscript{493}

In October 1985, the INTELSAT Assembly of Parties approved the CNN proposal.\textsuperscript{494} Meanwhile, the State Department had also approved, but subject to two added conditions: (a) that CNN be required to submit to the FCC and the State Department "a report covering the first five months of usage of the Soviet signal in terms of CNN air time and CNN's understanding of any Soviet use of CNN news programming"; and (b) that the license be granted for only six months, "with renewal requiring a favorable foreign policy finding made by the Department of State."\textsuperscript{495}

In November 1985, the FCC, though noting that the six-month term would be "considerably shorter than the term that can be granted under the Communications Act," decided to "defer to the State Department because of the important foreign policy considerations that are involved here."\textsuperscript{496} It thus gave final approval to CNN's application on the conditions proposed by the State Department.\textsuperscript{497}

\textsuperscript{490} Id. at para. 3.
\textsuperscript{491} \textit{Broadcasting}, June 3, 1985, at 129.
\textsuperscript{492} \textit{Ghorizont}, supra note 489 at paras. 6-10.
\textsuperscript{493} Id. at para. 11.
\textsuperscript{494} Id. at para. 3.
\textsuperscript{495} Id. The State Department's determination would be based in part on CNN's report. Id.
\textsuperscript{496} Id.
\textsuperscript{497} See id. at paras. 4-10. Subsequently, CNN asked the FCC for a six-month extension of the license, explaining that the earth-station had not yet been constructed because the planned site had proved unavailable. In September 1986, the FCC granted the extension. Cable News Network, Inc., No. 907-DSE-L-85, Sept. 22, 1986.
(iii) *Special Temporary Approvals for News Coverage*

The FCC also has sometimes granted "special temporary authority" (STA) to receive a foreign satellite signal for the purpose of news coverage of a particular event. In 1984, the Commission granted an STA to Turner Broadcasting System (parent of Cable News Network) to receive coverage from Canada's Anik B satellite of the Pope's visit to Canada. In this and other cases involving Canada, the FCC found that no further steps were necessary. Bilateral coordination was provided by a 1982 exchange of letters between the U.S. and Canada governing transborder use of U.S. and Canadian domestic satellites, and INTELSAT coordination was provided by INTELSAT's approval in 1982 of U.S.-Canada transborder services.

In 1984, the FCC granted Turner an STA to receive coverage of the Soviet bloc's "Friendship Games" from a Soviet satellite. This time it could not be said that INTELSAT coordination had been accomplished in advance. But the FCC, stressing the immediacy of the need and the limited duration of the use, nonetheless made the STA effective immediately, without going through the INTELSAT process. In 1985, the FCC granted Turner an STA to receive from a Soviet satellite coverage of the Soviet Union's fortieth anniversary celebration of the end of the second world war, again without waiting for the INTELSAT coordination process.

These STA grants have made INTELSAT increasingly unhappy. INTELSAT charges that the FCC, by its willingness to

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In doing so it noted, and adopted, the State Department's further stipulation that CNN's report on its use of Soviet programming and Soviet use of its programming must be submitted prior to any renewal of the license. *Id.* at para. 5. *See supra* note 495 and accompanying text.

The State Department reportedly again was instrumental in the FCC's February 1987 action denying permission to Orbita Technologies to receive Soviet programming for the purpose of retransmission in the United States by the Discovery cable channel. *See supra* note 408. The FCC's Common Carrier Bureau reportedly acted "at the prompting of State Department" in denying the permission on the ground of failure to go through the INTELSAT consultation process. *Broadcasting*, Feb. 23, 1987, at 96.


500. *See Turner Comments, supra* note 408, at para. 6 n.2.

501. *See id.*

bypass the coordination process, demonstrates its lack of understanding of U.S. obligations under the INTELSAT Agreement. In INTELSAT's view, it is not the FCC, but only INTELSAT's Assembly of Parties, acting as part of the coordination process, that has authority to determine such questions as economic harm to INTELSAT from the proposed service.

This clash between the FCC and INTELSAT over the granting of STAs illustrates the tension, indeed the fundamental inconsistency, built into this area of U.S. law. A process requiring advance approval by the U.S. government, not to mention protracted coordination with INTELSAT, cannot be squared with the journalistic demands of reporting news events. Whether such a process can be squared with the first amendment is considered next.

(e) Constitutional Problems in the U.S. Law Governing Reception from Foreign Satellites

There are first amendment problems in a U.S. legal rule that compels a news organization to apply to the FCC for permission to carry on-the-scene coverage of particular news events. The need to get a government license in order to report a news event would seem to be a classic "prior restraint," forbidden by the first amendment.

The first amendment objections become concrete when the government denies the permission and thus prevents the broadcasts from taking place as planned. This happened in February 1987 when the FCC, reportedly at State Department "prompting," denied to Orbit a Technologies and the Discovery Channel permission to receive Soviet programming directly from Soviet satellites for the purpose of retransmission by Discovery to its 14 million cable viewers. See supra notes 408, 497. As a result, Discovery during that week could transmit only 28 hours of Soviet programming live, instead of 60 or more as planned, and had to use tapes to make up the difference. Broadcasting, Feb. 23, 1987, at 96. In addition, Discovery had to pay additional money for the INTELSAT satellites that the FCC required it to use. Id. These burdens on Discovery's speech may well have been open to constitutional attack. Discovery's project of bringing typical Soviet television programming (including news programming) to the American public served informational and educational purposes near the heart of the first amendment. Moreover, the project was put together hur-
In 1985, the Turner Broadcasting System urged the FCC to lift the rule. Commenting in an FCC proceeding concerning the rebroadcasting of radio transmissions, Turner sought a ruling "that it does not violate section 605 to rebroadcast brief excerpts of programming obtained from foreign satellites, without FCC approval, but with the consent of the signal originator." Turner urged the FCC to conclude that "tapping into" foreign satellite programming for the purpose of retransmitting brief portions as part of bona fide news programming, with the consent of the originator, was a "modified fair use" that did not require INTELSAT coordination at all. Alternatively, Turner said the United States should ask INTELSAT to coordinate such use by news organizations on a "generic" basis "for all present and future non-INTELSAT satellites."

Turner's argument, which was opposed by the Communications Satellite Corporation (Comsat), failed to engage the FCC. "[T]he issues with respect to United States treaty obligations and international agreements raised in Turner's request are beyond the scope of this proceeding," the FCC found, refusing to order on Turner's request. The Commission claimed it
was taking no position on the request, but noted that "once a licensee has obtained clear authority from the Commission to receive and use foreign satellite programming, there is no bar to rebroadcasting such programming." The implication seemed clear that licensees like Turner were expected to obtain that "clear authority from the Commission."

Turner's position, however, was well taken. The first amendment means, the Supreme Court has said, that journalists are "free to seek out sources of information not available to members of the general public," and that "government cannot restrain the publication of news emanating from such sources."

When a news organization must get the government's permission to use on-the-scene television footage obtained abroad (whether or not it must also wait while the government pursues a diplomatic consultation process) the organization's news coverage, if not restrained, is delayed and burdened in a way offensive to the first amendment.

To be sure, the FCC bases its position on the obligations of the United States under the INTELSAT Agreement. Ratified treaties like the INTELSAT Agreement are law in the United States. In case of conflict, however, they must give way to the Constitution. Such a conflict is presented by the rule requiring FCC permission before a U.S. news organization can obtain news coverage from a foreign satellite, even with the consent of the originator.

512. Id.
514. See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 609 & n.38 (Brennan, J., concurring); New York Times Co. v. United States, 403 U.S. 713, 715 (1971) (Black, J.) (first amendment violated by "every moment's continuance" of a restraint on publication that did not involve a fast-breaking news story). See also the February 1987 episode involving the Discovery Channel, supra note 408.
515. See, e.g., Earth Stations, supra note 398, at para. 35 n.27.
516. United States v. The Schooner Peggy, 5 U.S. (1 Cranch.) 103 (1801); U.S. Const. art. VI.
517. See Reid v. Covert, 354 U.S. 1, 16-18 (1957) (Black, J.).
(f) The Right to Rebroadcast Programming Received from a Foreign Satellite

Apart from the right to receive programming from a foreign satellite, there is a separate question about the right to retransmit that programming in the United States — as Cable News Network would do, for example, by including excerpts of Soviet news programming in its own news coverage.\(^{518}\) Until recently, FCC regulations were confusing on the point.\(^{519}\) But CNN, in its various applications for FCC permission to receive programming from foreign satellites, apparently has never considered it necessary to ask separate permission to retransmit the programming. Such a requirement might indeed be an impermissible prior restraint, not on the gathering of news, but on its publication.\(^{520}\)

In any event, it is now clear that such separate permission is not required. In a 1985 ruling the FCC stated: "once a licensee has obtained clear authority from the Commission to receive and use foreign satellite programming, there is no bar to re-broadcasting such programming."\(^{521}\)

On the other hand, in enforcing its policy on foreign-satellite programming the FCC appears to distinguish between reception and rebroadcasting. The FCC maintains that reception alone, if done without FCC approval, is prohibited.\(^{522}\) Yet when various universities and other entities have been described in the press as engaged in receiving programs from Soviet satellites (evidently without FCC approval),\(^{523}\) and have even publicly proclaimed that they were doing so,\(^{524}\) the FCC, so far as appears, has taken no action. At the same time, the FCC has insisted on granting or withholding permission to entities that seek its approval to receive and retransmit Soviet programming in the United States.\(^{525}\)

The distinction draws no support from the FCC's view of the

\(^{518}\) See supra text accompanying notes 490-502.
\(^{519}\) See 47 C.F.R. § 73.1207 (b)(4), (c) (1984); see also 47 U.S.C. § 325(a) (1985).
\(^{521}\) Rebroadcasts, supra note 398, at para. 35.
\(^{522}\) See supra notes 397-407 and accompanying text.
\(^{523}\) See Wall St. J., supra notes 445-46.
\(^{524}\) See supra note 443 and accompanying text.
\(^{525}\) See the FCC rulings on requests by Cable News Network reported supra notes 489-502 and accompanying text. See also the denial of permission to the Discovery Channel reported supra note 408.
Conceivably it is explained by the fact that the retransmitting entities, unlike those that simply receive programs, have been submissive enough to ask the FCC for approval. More likely, however, the submissiveness is itself based on a recognition that the FCC considers the retransmission of foreign-satellite programming to be subject to regulation, while the simple reception of such programming is not.

Such a view, lacking any basis in the law as seen by the FCC, would involve a discrimination against media entities — against entities that not only receive programming but also transmit it — that could raise questions under the first amendment.

(g) Summary Concerning U.S. Reception of Signals from Foreign Satellites

Two points stand out from this examination of U.S. law concerning reception of programming from foreign satellites. First, reception of such programming in the United States, even for private viewing at home or for academic purposes, may well be unlawful under section 705 of the Communications Act if done without the consent of the originator. It appears to be lawful only if the reception is for private viewing and if the programming is distributed in its home country by cable.

Beyond that, one can argue (a) that the reception is lawful because the programming is transmitted “for the use of the general public” under the proviso to section 705; or (b) that a “fair use” defense should be read into section 705 for the reception of programming used for nonprofit educational purposes. But both arguments are likely to fail, and should fail, under section 705 as presently written. A first amendment right to receive unscrambled satellite signals without the consent of the originator also seems untenable at this time, though one day it may be recognized.

Second, the FCC claims that reception of foreign satellite signals with the consent of the originator is illegal under section 705, unless approved by the FCC pursuant to the INTELSAT

526. See supra notes 397-407 and accompanying text.
527. There is also the fact that Turner Broadcasting System, owner of the Cable News Network, holds a license from the FCC for a valuable television station. See Turner Comments, supra note 408, at 1.
528. See supra text accompanying notes 424-31.
529. See supra text accompanying notes 432-72.
530. See supra text accompanying notes 457-61.
The FCC takes this position even with respect to reception by a news organization for the purpose of news reporting in the United States. The FCC's claim stands on weak ground, however, both as an interpretation of section 705 and as a restriction of first amendment speech.

III

Regulation of Speech Flowing Out of the United States

A. Regulation of Outgoing Information Flow in General

If there is surprisingly little United States law on the application of the first amendment to information flowing into the United States, there is even less on information flowing out of the country. There appears to be only one court decision directly on point, the 1986 ruling by a federal district court in Bullfrog Films, Inc. v. Wick. In that case, involving the U.S. government's certification of films as "educational" for the purpose of duty-free import to other countries under the Beirut Agreement, the court squarely considered "whether the First Amendment applies with equal force to communications directed toward foreign audiences as it does to domestic communications." The U.S. government took the position in Bullfrog Films that "the exercise of free speech within foreign nations by Americans is subordinate to significant foreign policy considerations and, as such, subject to reasonable regulation." The court disagreed. Analyzing Haig v. Agee and other Supreme Court

531. See, e.g., Earth Stations, supra note 398, at para. 35 n.27.
532. See supra notes 489-502 and accompanying text. See also supra note 408.
533. See supra notes 408-20, 505-27, and accompanying text.
534. See supra text accompanying notes 3-6.
535. 646 F. Supp. 492 (C.D. Cal. 1986), appeal docketed, No. 86-6630 (9th Cir.).
536. See supra notes 122-35 and accompanying text; infra notes 584-610 and accompanying text.
537. 646 F. Supp. at 502.
538. See id. at 503. Previously, in Haig v. Agee, 453 U.S. 280 (1981), see supra text accompanying notes 92-93, the government had told the Supreme Court that the Secretary of State could refuse to issue a passport to a U.S. citizen who proposed to go to a foreign nation to denounce U.S. policy toward that nation, since "the freedom of speech that we enjoy domestically may be different from that that we can exercise in this context." 453 U.S. at 319 n.9 (Brennan, J., dissenting) (quoting oral argument of Solicitor General).
“right to travel” cases relied on by the government, the court found that they did not establish a lower level of constitutional protection for speech by Americans abroad than for domestic speech.

However that may be, speech by Americans abroad is not necessarily the same as speech by Americans in the United States to audiences abroad. When media content flows from the United States to other countries, what crosses the border is “pure speech,” unencumbered by the movement of persons and by attendant government powers such as the control of foreign travel. When what enters the United States is speech alone, like the mail in Lamont, the protection afforded by the first amendment may be substantially stronger than it is, for example, when what enters is a live foreign visitor, subject to the government’s power to exclude aliens. Similarly, the constitutional protection of outgoing speech may be stronger when the speaker remains in the United States, and pure transborder speech ensues.

Still, the audience is foreign, and this fact arguably undercuts the first amendment claim. If the chief purpose of the first amendment is to let truth prevail in the marketplace of ideas, and specifically to enable Americans to enlighten themselves in order to govern themselves, these objectives arguably do not apply when the audience is foreign. The government thus contended in Bullfrog Films: “the world at large is not a ‘First Amendment forum.’”

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541. Id.
542. Cf., e.g., Haig v. Agee, 453 U.S. at 306-09.
543. Lamont v. Postmaster General, 381 U.S. 301 (1965); see supra text accompanying notes 20-24.
547. 646 F. Supp. at 503 n.16. The government additionally contended, as stated by the court, that when United States citizens direct their speech to foreign audiences, the government may regulate such speech on the basis of content; further, that the traditional standards for determining if a law is unconstitutionally vague should be relaxed when foreign audiences are involved, since the govern-
The government was wrong. When the audience is foreign, the constitutional protection afforded to speech should not be diminished. In the first place, what the Constitution protects is "freedom of speech." It would elevate the asserted purpose of the first amendment over the amendment itself to deny protection to the speaker or the speech because of the location or nationality of the audience. Second, facilitating the search for truth, political or otherwise, is not the only respected purpose of the first amendment. In addition to the social ends served by freedom of expression, "[s]peech is protected not as a means to a collective good but because of the value of speech conduct to the individual." This purpose applies regardless of the nationality, the location, or perhaps even the existence of the audience.

Third, the world at large is a first amendment forum. The interdependence of nations and the worldwide reach of communications media in today's world make the "marketplace of ideas" no less international than the marketplace of trade. Political, military, economic, and other decisions made abroad can affect the United States almost as readily as decisions made in the United States. Speech conveyed from the United States to a foreign audience can have an impact, directly or indirectly, on domestic debate in the United States.\footnote{As the court in \textit{Bullfrog Films} said with respect to an American speaking abroad: "the government obviously could not constitutionally prohibit, say, an American professor of political science from expressing his or her opinions before an international symposium in Paris on the ground that his or her foreign listeners do not participate in the American political process." \textit{646 F. Supp. at 506-07}.}

\footnote{548. U.S. CONST. amend. I.}

\footnote{549. As the court in \textit{Bullfrog Films} said with respect to an American speaking abroad: "the government obviously could not constitutionally prohibit, say, an American professor of political science from expressing his or her opinions before an international symposium in Paris on the ground that his or her foreign listeners do not participate in the American political process." \textit{646 F. Supp. at 506-07}.}


\footnote{551. Cf. \textit{Bullfrog Films}, 646 F. Supp. at 503 n.16 ("matters occurring abroad, e.g., government 'news leaks' to the foreign press, are likely to find their way into this country and become a part of our domestic political debate"). As the \textit{Bullfrog} court further pointed out, inhibition of a U.S. speaker who is addressing a foreign audience may "chill" that speaker's future speech to domestic audiences. \textit{Id. at 502 n.14}. \textit{See also Finzer v. Barry}, 789 F.2d 1450, 1477, 1487 (D.C. Cir. 1986), \textit{cert. granted sub nom. Boos v. Barry}, 107 S. Ct. 1282 (Feb. 23, 1987), No. 86-803 (Wald, C. J., dissenting).}
The court in *Bullfrog Films*, thus, correctly concluded that, "in the absence of some overriding governmental interest such as national security, the First Amendment protects communications with foreign audiences to the same extent as communications within our borders."552

Against that background, the following sections review provisions of U.S. law that restrict information flowing out of the country.553

1. *Restrictions on International Mail*

A U.S. restriction on *incoming* mail was held to violate the first amendment in *Lamont v. Postmaster General*.554 In handling outgoing mail, however, the United States stands ready to enforce restrictions adopted by other countries.

As one example of this readiness, a provision of the Foreign Agents Registration Act authorizes the U.S. Post Office to block politically-inflammatory mail sent by a foreign agent in the United States to another "American republic" whose law bars the material.555

More broadly, U.S. willingness to block international mail undesired by other countries is reflected in provisions of the Universal Postal Union to which the U.S. has subscribed. The

("there can be no clear-cut division between foreign and domestic political debate—limiting speech addressed to foreign embassies will inevitably affect the competition of ideas in the United States").

552. 646 F. Supp. at 502.

553. In addition to the provisions reviewed in the text here, restrictions on the foreign travel of U.S. citizens, when based on what those citizens may say while abroad, also constitute controls on information flowing out of the country. See Haig v. Agee, 453 U.S. 280 (1981), and *supra* text accompanying notes 87-93; Neuborne & Shapiro, *supra* note 11, at 738-40.

554. 381 U.S. 301 (1965); *see supra* notes 20-24 and accompanying text.

555. 22 U.S.C. §§ 611(j), 618(d) (1979). These sections of FARA provide that if an "agent of a foreign principal" offers for mailing to "any other American republic" material that promotes "any racial, social, political, or religious disorder," forceful conflict, or the forceful overthrow of a government in an American republic, and if the Postmaster General is informed by the Secretary of State that the diplomatic representative of that republic has declared "that the admission or circulation of such communication or expression in such American republic is prohibited by the laws thereof and has requested in writing that its transmittal thereto be stopped," the Postmaster General may declare the matter to be nonmailable.

The material described in section 618(d) falls under clause (2) of FARA's definition of "political propaganda." *See* 22 U.S.C. § 611(j) (1979). Unlike the rest of FARA, which requires the labeling, filing, and reporting of foreign "political propaganda" distributed in the United States (*see* 22 U.S.C. § 614; *supra* text accompanying notes 139-47), this subsection provides for the actual stopping of "political propaganda" on its way out of the United States.
United States has agreed through the Universal Postal Union to refuse to accept for mailing materials that are prohibited by the destination country. Among the prohibitions currently listed for various countries: Peru will not accept "Communist propaganda;" Indonesia bars printed matter in the Indonesian language that was printed outside Indonesia, except for educational books approved by the Indonesian Department of Commerce; Iran prohibits fashion newspapers; and the Soviet Union excludes toys "of a military nature" or "in the form of a military firearm."

As Dean Price has observed, these regulations "assume that the United States can constitutionally be party to an international agreement for the exchange of information where one party reserves the right to censor." The regulations may not be constitutional, at least if the United States itself performs a censoring or blocking function. While the foreign addressees may have no first amendment right to receive uncensored mail from the United States, the sender of the mail is a speaker in the United States who can claim the first amendment's protection.

Nonetheless, these regulations have been accepted and adopted by the U.S. government and are apparently enforced. They would provide a precedent for agreement by the United States, for example, to an international DBS convention recognizing rights of receiving states to regulate or help shape in-

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556. UNITED STATES POSTAL SERVICE, INTERNATIONAL MAIL MANUAL § 131.32 (1986) ("Articles which are prohibited by the destination country, are nonmailable."). Moreover, mail containing such materials may be returned or seized by the destination country, "whether or not notice of such prohibition or restriction has been provided to or published by the Postal Service." Id. at § 131.33.

557. See id. at app. D.

558. Id.

559. Id.

560. Id.

561. Price, supra note 203, at 891 n.63.

562. Cf. Lamont v. Postmaster General, 381 U.S. at 307-08 (Brennan, J., concurring) (case might be troublesome if it turned on first amendment rights of foreign senders); Kleindienst v. Mandel, 408 U.S. at 762 (alien speaker has no first amendment right to enter U.S.).

563. See Bridges v. Wixon, 326 U.S. 135, 148 (1945). Cf. Procunier v. Martinez, 416 U.S. 396, 408-09 (1974) (whatever the merits of prisoner's claim to uncensored correspondence with an outsider, the outsider has first amendment interest in uncensored correspondence with the prisoner (citing Lamont)); Lamont v. Postmaster General, 381 U.S. at 308 (Brennan, J., concurring) (addressees in U.S. have first amendment right to receive); Kleindienst v. Mandel, 408 U.S. at 762-65 (professors in U.S. may have first amendment right of access to foreign speaker).
coming DBS broadcasts.564

2. Export Restrictions

The United States has extensive restrictions on the export of information considered to have national-security significance. Under the Arms Export Control Act,565 the State Department has issued regulations limiting the export of classified information and of unclassified information related to weapons and munitions.566 Unclassified “technical data” may also require an export license.567 However, these regulations are subject to a general exemption permitting the export of unclassified information in printed form which is available to the public through newsstands, bookstores, subscriptions, or public libraries.568

Under the Export Administration Act,569 the Department of Commerce has issued regulations requiring a license for the export of a large range of advanced technical information.570 The information covered need not be classified, and its technical applications need not be military.571

Under the Atomic Energy Act of 1954,572 the export of a wide range of information related to nuclear technology is prohibited unless approved by a number of U.S. officials.573 In United States v. The Progressive,574 the government claimed authority under this act to restrain the publication of unclassified material in the public domain concerning atomic technology, publication of which allegedly threatened “immediate, direct and irreparable harm to the interests of the United States.”575 The court granted the government’s request for an injunction, but the case was withdrawn when it became evident that the material was already publicly known.576

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564. See Price, supra note 203, at 890-91.
567. Id. at § 125.2.
568. Id. at §§ 125.1(a), 120.18.
571. See id.
573. 10 C.F.R. § 810.6 (1987).
574. 467 F. Supp. 990 (W.D. Wis. 1979), dismissed mem., 610 F.2d 819 (7th Cir. 1979).
575. Id. at 991.
576. The Justice Department announced that the publication of similar material had mooted its attempts to block publication of the Progressive’s article. See Knoll,
Under one or more of these statutes, particularly the Arms Export Control Act, the U.S. Department of Defense claims the right to restrict or cancel the presentation of unclassified research papers at international scientific conferences in the United States.\(^{577}\) The theory is that delivery of a scientific paper to an audience including foreigners constitutes an "export" of the technical data and hence requires an export license.\(^{578}\) On this basis the government in 1982 forced the cancellation of at least 100 of the 700 papers scheduled for presentation at an international symposium of photo-optical engineers,\(^{579}\) and again in 1985 forced the cancellation of at least twelve papers at a photo-optical conference and limited the attendance by foreign scientists at the presentation of other papers.\(^{580}\) The government also has defined the teaching of certain technical, though unclassified, information to foreign students as an export of technical data requiring an export license, and has warned university professors to use care in such instruction.\(^{581}\) Many universities have vigorously rejected the government's efforts,\(^{582}\) but at least one major university has offered a course open only to U.S. citizens.\(^{583}\)

3. *Certification of "Educational" Films for Duty-Free Import to Other Countries*

As discussed earlier,\(^{584}\) under the Beirut Agreement\(^{585}\) a person seeking duty-free transborder shipment for audiovisual materials must apply for a certificate of their educational, scientific, or cultural character from the appropriate agency of the exporting country.\(^{586}\) The certificate is then submitted to the

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\(^{577}\) See Neuborne & Shapiro, supra note 11, at 740-41.

\(^{578}\) Id. at 741.

\(^{579}\) Id. and authorities cited.

\(^{579}\) N.Y. Times, Apr. 8, 1985, at 11, cols. 5-6 (national ed.).

\(^{580}\) See Neuborne & Shapiro, supra note 11, at 741 and authorities cited.

\(^{581}\) Id.

\(^{582}\) Id. at 741-43 & n.98. On the first amendment issues raised by restrictions on the export of scientific information see id. at 764; Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 WM. & MARY L. REV. 863 (1985).

\(^{583}\) See supra text accompanying notes 122-35.


\(^{585}\) Treaty, art. IV, para. 2.
importing country, which makes its own determination but must give "due consideration" to the exporting country's certification.\footnote{587}{Treaty, art. IV, paras. 4-6; On the administration of the Beirut Agreement by the United States with respect to audiovisual materials seeking duty-free import into the United States, see supra notes 122-32 and accompanying text.}

Under the terms of the treaty, materials shall be deemed of "educational, scientific and cultural" character:

(a) When their primary purpose or effect is to instruct or inform through the development of a subject or an aspect of a subject, or when their content is such as to maintain, increase or diffuse knowledge, and augment international understanding and goodwill; and

(b) When the materials are representative, authentic, and accurate; and

(c) When the technical quality is such that it does not interfere with the use made of the material.\footnote{588}{Treaty, art. I.}

In the United States, the President has designated the United States Information Agency (USIA) to administer the Agreement.\footnote{589}{See Bullfrog Films, Inc. v. Wick, 646 F. Supp. 492, 495 (C.D. Cal. 1986); Pub. L. No. 89-634, 80 Stat. 879 (1966).} One of the USIA's implementing regulations,\footnote{590}{22 C.F.R. §§ 502.1-502.8 (1985). Under the regulations, applications for certification first are reviewed by an Attestation Officer; a denial by him may be appealed to a Review Board; and final Agency review is by the Director of USIA. 22 C.F.R. §§ 502.3(g), 502.5(b), 502.5(c) (1986).} defining the materials the Agency will certify, incorporates word-for-word the definition contained in the treaty.\footnote{591}{22 C.F.R. § 502.6(a)(3).} A second, "interpretive" regulation provides that the Agency will not certify materials "which by special pleading attempt generally to influence opinion, conviction or policy (religious, economic or political propaganda), to espouse a cause, or conversely, when they seem to attack a particular persuasion . . . ."\footnote{592}{Id. § 502.6(b)(3).} A third regulation, also "interpretive," provides:

The Agency does not regard as augmenting international understanding or good will and cannot certify or authenticate any material which may lend itself to misinterpretation, or misrepresentation of the United States or other countries, their peoples or institutions, or which appear to have as their purpose or effect to attack or discredit economic, religious, or political views or practices.\footnote{593}{Id. § 502.6 (b)(5).}
In *Bullfrog Films, Inc. v. Wick*, the owners of seven films that the USIA had declined to certify challenged the USIA regulations as inconsistent with the first amendment. The films included *In Our Own Backyards: Uranium Mining in the United States, Whatever Happened to Childhood?*, and *From the Ashes: Nicaragua Today*. The USIA had found the films ineligible because they "espouse[d] a cause," were "inaccurate" or "imbalanced," or were capable of "being misunderstood by foreign audiences lacking adequate American points of reference." While declining to certify these films, the USIA had certified such films as *To Catch a Cloud: A Thoughtful Look at Acid Rain*, by the Edison Electrical Institute; *Radiation . . . Naturally*, by the Atomic Industrial Forum; and *The Family: God’s Pattern for Living*, by the Moody Institute of Science.

Judge Tashima of the federal district court in California, ruling in October 1986, first found that the plaintiffs had standing to challenge the USIA certification process. He then concluded that, in the absence of some overriding interest such as national security, "the First Amendment protects communications with foreign audiences to the same extent as communica-

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594. 646 F. Supp. 492 (C.D. Cal. 1986), appeal filed, No. 86-6630 (9th Cir.).
596. 646 F. Supp. at 496. For example, *In Our Own Backyards: Uranium Mining in the United States* was found to "espouse a cause and influence opinion" because it presented "an anti-nuclear message" and had a purpose of "persuading the audience that all uranium mining should be prevented." *Id.* *Whatever Happened to Childhood?* was found not to be "representative" because "the Agency does not find that the youth in the film are typical or representative of all American youth today." *Id.* *From the Ashes: Nicaragua Today* was rejected because it led viewers to conclude "that the United States is the primary cause of instability, poverty, and oppression in Nicaragua," thereby constituting both "an attempt to persuade" and "an attack on the institutions of the United States." *Id.* at 496-97. The film was also found to be unbalanced because it did not discuss "any of the reasons for the policy adopted by the Government of the United States toward the present or former government of Nicaragua." *Id.* at 497.
597. *Id.* The last film was certified under a section of the regulations making materials eligible if "intended for use only in denominational programs or other restricted organizational use in moral and religious education . . . ." 22 C.F.R. § 502.6(b)(3); see 646 F. Supp. at 497 n.7.
598. 646 F. Supp. at 497-502. Although the plaintiffs remained free to distribute their films anywhere in the world, and simply had to pay whatever customs duties the importing country might require, they had been denied the exporting country’s certification which is "an indispensable prerequisite to obtaining the benefits of the Treaty," the court said. *Id.* at 501-02.
Applying the first amendment, the court held that the USIA's two "interpretive" regulations were unconstitutionally vague. No one could know what was meant by terms such as "special pleading," or "attempt generally" to influence opinion, or "seem to attack a persuasion," the court said. Further, the two regulations impermissibly "discriminate on the basis of political content." In particular, the provision rejecting materials that "misrepresent" the United States "places the government in the position of determining what is the 'truth' about America, politically and otherwise." The court held the first interpretive regulation additionally invalid because it prohibited certification of materials that state a point of view, thus impermissibly limiting expressions of opinion on issues of public controversy.

The court also struck down the regulation that adopted verbatim the treaty's definition of "educational." The requirements that the material "augment international understanding and goodwill" and be "representative, authentic and accurate" were unduly vague, and the term "accurate" also involved content discrimination and a government determination of truth, the court said. The court did not strike down the treaty itself, expressing the belief that regulations could be drafted that would fit within the treaty's definition of "educational" and still be specific and neutral enough to comply with the United States Constitution. The court ordered the USIA to reconsider the eligibility of each of the plaintiffs' films under proper constitutional standards.

The district court's decision in Bullfrog Films (which the government has appealed) is correct. It is sound both in its path-breaking analysis of the first amendment's application to "foreign audience" speech and in its appraisal of the USIA
regulations under first amendment standards. Although denial of a certificate under the Beirut Agreement does not block export of the materials, it burdens their export more substantially than the statute in Lamont burdened the import of material through the mails.\textsuperscript{610} The Beirut Agreement admittedly requires the U.S. government to determine, somehow, what films are "educational." Developing neutral and specific standards for this task does pose a difficult problem. Perhaps the solution lies, not only in drafting better standards, but in delegating the job of applying them to a body insulated from direct government control. In any event, determinations founded on the vague and content-based standards reviewed in Bullfrog Films cannot coexist with the first amendment.

B. Regulation of Outgoing Electronic Media Flow

1. Licensing of International Broadcast Stations

While the USIA regulations in Bullfrog Films could at least claim their genesis in a treaty, no such explanation can be offered for the overt content regulation of outgoing speech found in the FCC's licensing scheme for international broadcast stations. These are stations, licensed to private entities, that broadcast overseas from the U.S. on short-wave frequencies. The applicable regulations require licensees to "render only an international broadcast service which will reflect the culture of this country and which will promote international goodwill, understanding, and cooperation."\textsuperscript{611} This provision was strongly opposed on its adoption in 1939.\textsuperscript{612} But it remains in effect and apparently has not been challenged in the courts.\textsuperscript{613}

Another FCC regulation for international radio stations restricts commercial advertisements. Among other things, it requires that commercials "give no more than the name of the sponsor of the program and the name and general character of

\begin{itemize}
  \item \textsuperscript{610} 381 U.S. 301 (1964).
  \item \textsuperscript{611} 47 C.F.R. § 73.788(a) (1986).
  \item \textsuperscript{612} It was met by the "united opposition of the industry and ... attacked in Congress as being an entering wedge for censorship of domestic programs." C.B. Rose, NATIONAL POLICY FOR RADIO BROADCASTING 244 (1940). But the protests were mooted when the wartime government took over private international broadcasting, and they have not resurfaced. See Garay, WRNO Worldwide: A Case Study in Licensing Private US International Broadcast Stations, 26 J. BROADCASTING 641, 642 (1982).
  \item \textsuperscript{613} See 47 C.F.R. § 73.788(a) (1986); Price, supra note 203, at 897.
\end{itemize}
the commodity, utility or service, or attraction advertised.\footnote{614} This requirement was adopted by the FCC "because it appeared that institutional advertising [as distinct from product advertising] would create a better impression of the United States."\footnote{615}

The private international broadcast service of the United States, while still limited, has grown in recent years.\footnote{616} In 1973, the FCC set a flexible ceiling of 100 frequency-hours per day for all U.S. private international broadcasters as a group; each station used varying frequencies and had to apply for daily frequency assignments for each season.\footnote{617} At that time, the number of frequency-hours used per day had fallen from about seventy-five to about forty-five in the previous two years.\footnote{618} In 1986, U.S. private international broadcasters as a group used about 450 frequency-hours per day.\footnote{619}

One constant of private international broadcasting has been the dominance of religious programming. Of the stations operating in 1986, only one clearly did not have a religious format.\footnote{620}

The single nonreligious station, which went on the air in 1982, was the first station licensed in nearly two decades.\footnote{621} Its license application met considerable resistance at the FCC, reflecting at least in part an official reluctance to have anyone but the U.S. government broadcasting abroad from the United States.\footnote{622} The FCC chairman said of the application:

I think a . . . fundamental issue is: Should we have this type of allocation of frequencies? Why should private entities be broadcasting viewpoints overseas? That's part of the VOA [Voice of America], RFE [Radio Free Europe], or other govern-

\footnote{614. 47 C.F.R. § 73.788(b)(1) (1986). This requirement was waived by the FCC, however, for WRNO, the one clearly-commercial international station it has licensed. Telephone interview with Jonathan David, Chief of International Negotiations, Mass Media Bureau, FCC (March 27, 1987); see infra text accompanying notes 621-24.}
\footnote{615. International Broadcasting, Report and Order, 41 F.C.C.2d 736, para. 34 (1973).}
\footnote{616. In 1980, only four stations were transmitting. Garay, supra note 612, at 642.}
\footnote{617. In 1985, twelve stations were listed in an industry directory. See BROADCASTING/CABLECASTING YEARBOOK 1985, at B-350 (1986).}
\footnote{618. \textit{See} Garay, supra note 621, at 644; 41 F.C.C. 2d at para. 16.}
\footnote{619. Telephone interview with Tom Polzin, Mass Media Bureau, FCC (March 27, 1987).}
\footnote{620. \textit{See} BROADCASTING/CABLECASTING YEARBOOK, supra note 616, at B-350-51. An attorney at the FCC's Mass Media bureau explained that the stations are not commercially attractive because of the relatively steep power requirements for international transmission. Telephone interview with Jonathan David, Chief of International Negotiations, Mass Media Bureau, FCC (March 27, 1987).}
\footnote{621. \textit{See generally} Garay, supra note 612.}
\footnote{622. \textit{Id.}}
ment entities. Why should foreign policy be determined by a private licensee's view? 623

The chairman, however, was alone in opposing the application.624 And his view was at odds with the 1948 Smith-Mundt Act, which created the United States Information Agency.625 That act prohibits the U.S. government from monopolizing short-wave broadcasting, and provides that the USIA director "shall reduce such Government information activities whenever corresponding private information dissemination is found to be adequate." 626 On the other hand, the limited scope of private overseas broadcasting from the United States suggests that the FCC chairman's view may better reflect the prevailing reality.

2. U.S. Government Use of International Broadcast Frequencies

Despite Congress' directive that the government not monopolize overseas broadcasting,627 something not very far from that has happened. In 1973, overseas broadcasting by the Voice of America (VOA), the broadcasting arm of the United States Information Agency, had increased to about 440 frequency-hours per day, while private international transmissions had decreased to about forty-five frequency-hours per day.628 The FCC at that time set a ceiling of 100 frequency-hours per day for private transmissions, over the protests of VOA that even this was too much.629 Noting the statutory prohibition of a government monopoly, the FCC remarked that "[t]o set a ceiling on private international broadcasters that would give them less than one-fifth of the frequency-hours used by the U.S.-based

623. Id. at 649-50.
624. See id.
625. United States Information and Educational Exchange Act, 22 U.S.C. § 1462 (1985). The chairman also need not have worried about the foreign-policy predilections of the new licensee. The licensee's programming objective was to "play rock 'n' roll music for the world" and turn a profit in the process. Garay, supra note 612, at 652. Confronted with the regulation requiring service that "will reflect the culture of this country," see supra text accompanying note 611, the licensee responded, reasonably enough, that "[t]here's nothing more American in our culture than rock music . . . ." Garay, supra note 612, at 654 & n.56.
627. 22 U.S.C. § 1462 (1985); see International Broadcasting, 41 F.C.C.2d at para. 11; see supra text accompanying note 626.
628. 41 F.C.C.2d at para. 5; see supra text accompanying note 618.
629. 41 F.C.C.2d at para. 8.
stations of VOA borders on being contrary to this mandate." 630

By 1986, private international transmissions had increased tenfold to about 450 frequency-hours per day. 631 But transmissions by the VOA had increased almost threefold, to about 1200 frequency-hours per day. 632 Private transmissions thus still amounted to a little more than one-third the volume of government transmissions. Moreover, the 100-frequency-hour "ceiling" on private transmissions has not been formally changed. 633 That ceiling serves, perhaps, to keep private international broadcasters on notice that they should not expect too much. The deterrent effect on actual and potential broadcasters is difficult to estimate.

The ceiling on private frequency-hours is not the only way the U.S. government discourages private international broadcasting and protects its own position on the international airwaves. By limiting private broadcasters to "institutional" commercials that give no more than "the name and general character" of the article advertised, 634 the FCC makes the service unattractive to potential commercial broadcasters. It is no wonder that, until 1982, all the private international stations had religious formats. 635 Justifying its ceiling on frequency hours, the FCC in 1973 noted ironically, "we may not expect a great rush into international broadcasting since it is not a financially remunerative activity." 636 Further government efforts to limit the private service were evidenced in the resistance at the FCC to licensing the one commercial station in 1982. 637

These efforts by the U.S. government to keep international broadcasting mostly for itself not only seem inconsistent with the congressional directive that government information activities be reduced "whenever private information dissemination is found to be adequate." 638 They contradict the FCC's own observation that "[a] credibility gap attaches to governmental broad-

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630. Id.
631. See supra note 619 and accompanying text.
632. Telephone interview with Phil Goodwin, communications specialist, Voice of America (May 7, 1987) (the 1200-frequency-hour figure includes both VOA Europe and Radio Marti broadcasts to Cuba).
633. Telephone interview with Jonathan David, supra note 620.
634. 47 C.F.R. § 73.788(b)(1) (1985); see supra note 614 and accompanying text. But see supra note 614.
635. See supra notes 620-21 and accompanying text.
637. See generally Garay, supra note 612.
638. 22 U.S.C. § 1462 (1985); see supra text accompanying note 626.
casting. Broadcasting by private stations is often more effective because it has a greater credibility." Further, for a nation that gives such a dominant role in its domestic broadcast system to private, commercial broadcasting, such reluctance to show the same face to the world suggests a lack of self-confidence about what goes on at home.

The U.S. government’s enthusiasm for its own overseas broadcasting was demonstrated anew in 1985 by the inauguration of a new Voice of America service, called Radio Marti, broadcasting to Cuba. So far as the content of the U.S. government’s overseas broadcasting is concerned, the Congress has required that Voice of America news broadcasts be “accurate, objective, and comprehensive.” The statute also requires that VOA “present a balanced and comprehensive projection of significant American thought and institutions,” that it “present the policies of the United States clearly and effectively,” and that it “also present responsible discussion and opinion on these policies.” After some debate, Congress made Radio Marti subject to the same standards.

The extent to which VOA broadcasts meet these standards is difficult to gauge from the United States. One reason is a statutory directive that information disseminated abroad by the USIA “shall not be disseminated within the United States,” except that it shall be available on request, “for examination only,” to members of the press, scholars, and members of Congress. While this provision presumably seeks to protect the U.S. public from government propagandizing, it also denies to the U.S. public knowledge about the content of the information, or propaganda, disseminated by their government to the rest of the world.

3. Sale of U.S. Television Programming Abroad

There are no direct limits in U.S. law on the sale of U.S. tele-

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639. 41 F.C.C.2d at para. 12. The efforts are not solely the FCC’s, however. As the Commission noted, the increased budgets of the Voice of America demonstrate congressional support for VOA’s proliferating broadcast activities. Id. at para. 5.
642. Id.
vision programming (or other media content) for distribution abroad. Any such limits not only would be inconsistent with U.S. trade interests, but would raise constitutional problems as well.645

The foreign market for U.S. television programming is so substantial, however, that the control of this market by the three major U.S. networks has been limited in an attempt to reduce network control over the production of programming in the U.S. The FCC has barred the networks from syndicating in foreign countries programs of which the network was not the sole producer, and from acquiring financial interests in the exhibition or distribution of such programs abroad.646 In 1983, the FCC proposed to lift these restrictions, along with parallel restrictions governing syndication and financial interests in the U.S.,647 but opposition from the motion picture industry killed the proposal.648 In any event, similar restrictions have been imposed on the three networks by consent decrees in antitrust suits brought by the U.S. government.649 These decrees, which go somewhat farther than the FCC restrictions,650 will remain in effect, unless modified, until the late 1980s or early 1990s.651

The limitations thus imposed on the export of television programming produced by the U.S. networks seem fundamentally different from other U.S. limitations on outgoing media flow. In this case, the regulation of transborder speech serves as an adjunct of a domestic regulatory policy, the effort to reduce


It is hard to find here any of the national security considerations that support export controls on technological information. See supra notes 565-83 and accompanying text.


649. E.g., United States v. NBC, 449 F. Supp. 1127 (C.D. Cal. 1978); see also U.S. v.

650. Unlike the FCC regulations, the consent decrees prohibit the networks from procuring the rights to foreign syndication of foreign-produced programming in the same negotiations in which they obtain domestic syndication rights. See 94 F.C.C.2d 1019, at para. 19 (1983).

network dominance, and is not based on reasons peculiar to transborder communications.

4. Satellite Distribution of U.S. Programming Abroad

Just as United States law restricts the use of satellites to bring television programming into the United States, companies wishing to send programming abroad by way of satellite also must contend with U.S. legal requirements. If U.S. cable networks or other program distributors wish to use even INTELSAT satellites to send their programming abroad, they need the permission of the FCC. FCC permission is required under provisions of the Communications Act regarding new transmission services, and also under provisions of the Communications Satellite Act regarding construction and operation of international earth-stations. The FCC, however, now readily grants these permissions. In 1984, the Commission liberalized its policy on ownership of U.S. earth-stations using the INTELSAT system. It ruled that such stations no longer need be owned by a consortium of carriers, and said further that applications to provide television services through such stations would be processed "in routine fashion." Thus, in 1985, the Commission granted an application by Turner Teleport, Inc., a subsidiary of Turner Broadcasting System, to transmit television programming through INTELSAT satellites over the Atlantic.

But signal transmissions by way of satellite are expensive. Therefore, just as receiving stations in the United States seek to receive programming from foreign domestic satellites already carrying the signals, where the "footprint" of the satellite falls on the United States, carriers and programmers

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652. See supra text accompanying notes 397-407.
654. INTELSAT, 100 F.C.C.2d at paras. 13 n.23, 20 n.43, 22.
655. Id. at para. 55.
656. See id. paras. 3, 21, 56.
658. See infra note 666.
seek to distribute programming carried by U.S. domestic satellites to countries abroad in the same manner.

In its 1981 Transborder decision, the FCC ruled, not only that U.S. earth-stations could be used to receive programming from Canadian domestic satellites, but also that U.S. domestic satellites could be used to distribute programming to Canada and to countries in Central America and the Caribbean. Since these were non-INTELSAT satellites, the Commission ruled that the consultation process established in the INTELSAT Agreement had to be observed. As noted earlier, this requirement could hinder the reception of programming in the United States, including news programming, and thus presents constitutional problems. The requirement may have the same effect on the transmission of programming from the United States, and so may present similar problems (involving this time a U.S. speaker).

Where the footprints of U.S. domestic satellites do not reach, it has been necessary for U.S. programmers to use INTELSAT satellites to distribute their product abroad. Currently, however, INTELSAT is losing its monopoly position over international satellite communications from the United States. In 1984, President Reagan determined that the U.S. national interest required separate U.S. systems providing international satellite service, as long as restrictions were imposed to protect the economic health of INTELSAT. The FCC subsequently established policies for authorizing separate systems and condi-

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660. Transborder Satellite Video Services, 88 F.C.C.2d 258 (1981); see supra notes 478-88 and accompanying text.
661. See supra text accompanying notes 478-80.
662. See 88 F.C.C. 2d at paras. 8-15.
663. Id. at paras. 48-60.
664. See supra notes 505-27 and accompanying text.
665. Cf. supra notes 534-52 and accompanying text.
666. At least one U.S. programmer complains that distribution of U.S. programming to distant countries has been impeded by monopoly prices charged by INTELSAT for the use of its satellites. The general counsel of Turner Broadcasting System, parent of Cable News Network, said in 1985 that efforts to "take CNN international" were impeded by INTELSAT's pricing policy. He said that networks in Australia and Japan wanted to receive CNN's news programming, that the reception costs were minimal because the footprint of CNN's INTELSAT satellite fell there, but that INTELSAT's extra charges for down-link points added a prohibitive cost of some $120,000 per receiving country. Telephone interview with Robert Ross, general counsel, Turner Broadcasting System (Jan. 22, 1985).
tionally granted six applications, subject to the INTELSAT coordination procedure.\textsuperscript{669} The first of these applications was approved by the INTELSAT Assembly of Parties in April 1987.\textsuperscript{670}

The FCC initially restricted the separate-system operators to selling their facilities or leasing them for a minimum of one year, in order to protect INTELSAT's basic revenues.\textsuperscript{671} But the FCC subsequently reversed its position and ruled that the sale-or-lease requirement did not preclude contracts of one year or more for "occasional use television service."\textsuperscript{672} This ruling presumably will facilitate the use of the separate systems to distribute news programming by U.S. television networks that do not use the facilities on a full-time basis.

Until recently, then, the INTELSAT system appeared to pose substantial obstacles, both legal and financial, to the satellite distribution of private U.S. programming abroad — much as the U.S. government's domination of the short-wave frequencies impeded the terrestrial distribution of private U.S. radio programming.\textsuperscript{673} The \textit{Transborder} decision and the advent of private international satellite systems, however, may markedly liberate the distribution of U.S. programming by satellite.

\section*{C. Conclusion Concerning Outgoing Speech}

United States restrictions on outgoing speech are less developed than restrictions on incoming flow, largely because the available policy justifications are not as numerous or strong. There is less room to invoke national security or foreign policy considerations, and no room to rely on the government's power to exclude aliens or on trade protectionism. Hence, there is no restriction on outgoing speech that is nearly as broad as the regulation of all political speech distributed by "foreign agents" in the United States under the Foreign Agents Registration Act,\textsuperscript{674} or the facial exclusion under the McCarran-Walter Act.

\begin{footnotesize}
\begin{itemize}
\item[671.] Separate Systems, 101 F.C.C.2d at paras. 120-23.
\item[672.] Separate Systems Reconsideration Order, Docket No. 84-1299 FCC (April 17, 1986); compare Separate Systems, 101 F.C.C.2d at paras. 120-23.
\item[673.] See supra notes 627-44 and accompanying text.
\item[674.] See supra text accompanying notes 137-48.
\end{itemize}
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of all would-be visitors who have been “communists.”

At the same time, the restrictions on outgoing speech reflect some effort by the U.S. government to shape the content of transborder information. The government appears to acknowledge this objective by its claim in Bullfrog Films that “the exercise of free speech within foreign nations by Americans is subordinate to significant foreign policy considerations . . . .” The USIA regulations struck down in Bullfrog Films show an effort by the U.S. to deny duty-free treatment under the Beirut Agreement to films critical of United States positions. These appear to be much the same kinds of films that are treated as “political propaganda” under the Foreign Agents Registration Act. Thus, while not attempting directly to stop the transborder flow of such films, the U.S. government restricts that flow in both directions. It regulates the films as “propaganda” when they are distributed on behalf of a foreign entity within the United States, and it seeks to prevent the films from circulating duty-free to other countries.

Meanwhile, the U.S. government’s domination of the international short-wave frequencies suggests a desire to maximize the government’s own speech to the rest of the world at the expense of speech by private U.S. citizens.

Still, these efforts by the U.S. government to restrict outgoing speech are quite limited in scope. The overwhelming proportion of that speech is unaffected. Moreover, the U.S. government’s decision to license private international satellites outside the INTELSAT system may markedly facilitate the distribution of U.S. television programming to other countries, as well as the distribution in the United States of programs and news from abroad.

IV
Conclusion

United States regulation of transborder speech reflects per-

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675. See supra text accompanying notes 48-86.
676. See supra note 538 and accompanying text.
677. See supra notes 584-610 and accompanying text.
678. Compare supra notes 594-96 and accompanying text with supra notes 149-50 and accompanying text.
679. See supra notes 611-40 and accompanying text.
680. See supra notes 666-72 and accompanying text.
vasively the opposing tendencies already noted. There are first amendment rights to receive information from abroad and to send information abroad—rights recognized most clearly by the Supreme Court’s decision in Lamont, the Court’s opinion in Mandel, and the district court’s decision in Bullfrog Films. But there also are various laws restricting transborder information flows, and these laws generally have been upheld by the courts.

 Particularly hard to reconcile with the “free flow” and first amendment commitments of the United States are the visa restrictions of the McCarran-Walter Act and the “political propaganda” provisions of the Foreign Agents Registration Act. Both statutes show an unwillingness to allow foreign speech to enter the United States and compete on equal terms with domestic speech.

 The most important restrictions on transborder flow with respect to the electronic media are the ban on foreign ownership of U.S. broadcast facilities and the rules limiting reception of signals from foreign satellites. The ban on foreign ownership, though antiquated and unnecessary, can claim some historical justification and apparently is consistent with international practice. It also is balanced by U.S. toleration for foreign ownership in virtually all other media.

 The restriction on reception of signals from foreign satellites, insofar as it applies (in the view of the FCC) to reception with the consent of the originator, is based on the treaty obligations

681. See supra text accompanying notes 17-19, 240-47.
682. Lamont v. Postmaster General, 381 U.S. 301 (1965); see supra notes 20-25 and accompanying text.
685. See supra notes 48-189 and accompanying text.
686. See supra notes 48-86 and accompanying text.
687. See supra notes 136-89 and accompanying text.
688. Cf. Schauer, Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications, 26 WM. & MARY L. REV. 779, 780 (1985) (“Issues such as the exclusion of foreign speakers precisely because of their political views, or the identification of foreign films as propaganda, present for consideration governmental actions that would, if taken in the domestic context, present core first amendment violations”) (footnotes omitted).
689. 47 U.S.C. § 310(a); see supra notes 267-302 and accompanying text.
690. See supra notes 267-302 and accompanying text.
691. See supra notes 272-73, 288 and accompanying text.
692. See supra notes 38-42, 303-22 and accompanying text.
of the United States to INTELSAT. On its face, this is a content-neutral consideration. But the FCC's position, as applied to incoming signals, harbors a distinct strain of content control. Content control is most apparent in the FCC's imposition of conditions, requested by the U.S. State Department, limiting Cable News Network to a six-month license for reception of Soviet programming and stipulating that renewal depends on a "favorable foreign-policy finding." Potential content control is also inherent in the requirement that CNN (or other U.S. programmers) get FCC permission to receive any programming from a foreign satellite, even for coverage of a news event. It is hard to see why this requirement is not a "prior restraint" inconsistent with the first amendment.

Content control and the first amendment aside, the FCC's requirement of FCC approval for reception of foreign-satellite signals with the consent of the originator lacks support in section 705 of the Communications Act or in any other provision of U.S. law.

U.S. law does restrict the reception of foreign-satellite signals without the consent of the originator, even for private viewing at home or educational viewing at universities. Present law appears to permit such reception only for home viewing of unscrambled signals being transmitted by the satellite to cable systems. This state of the law is difficult to condemn today on first amendment grounds. The law should be amended, however, to legitimize nonprofit educational viewing of unscrambled signals, preferably on a fair-use rationale.

Across the range of U.S. regulations of transborder speech, a number of provisions seem inconsistent with the "free flow" position of the United States, if not also with the first amendment. This should not be surprising. The diverse laws discussed in this report were adopted at different times, in different political climates, and for different purposes. They

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693. See supra notes 404-07 and accompanying text.
694. See supra notes 492-97 and accompanying text; see also supra notes 408, 497, 505 (Discovery Channel's effort to carry Soviet programming).
695. See supra notes 408, 489-527 and accompanying text.
696. See supra note 505 and accompanying text.
697. See supra notes 397-417 and accompanying text.
698. See supra notes 385-96, 421-72 and accompanying text.
699. See supra notes 421-72 and accompanying text.
700. See supra notes 457-61 and accompanying text.
701. See supra notes 462-73 and accompanying text.
have never been collectively and systematically considered by the U.S. Congress from the point of view of their impact on transborder speech, or of their consistency with current U.S. principles respecting both domestic and international speech.

These laws are overdue for such an appraisal. They need to be measured against both the "free flow" commitment of the United States and the first amendment. Lacking such an assessment, United States regulation of transborder speech will continue to reflect a wide gap between the nation's laws and its principles.