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Finding a Basis for International Communications Law:  

The Satellite Broadcast Example

Lizbeth Hasse*

I. INTRODUCTION: THE LACK OF AN INTERNATIONAL COMMUNICATION LAW

Freedom of information is not a well-established concept in an international law context. An international human right to receive and convey information is perhaps universally recognized. But, limitations on the right, its scope and its priority vary sharply from country to country. The basic U.N. articulation of the "right" is contained in Article 19 of the Universal Declaration of Human Rights which provides that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."1 Numerous U.N. and UNESCO resolutions reaffirm Article 19, as do most of the important human rights documents adopted by the U.N. General Assembly in the last 50 years.2 As this article points out, the broad language of Article 19 and the general areas of concern it sets out provide little direct guidance as to the acceptability or the illegitimacy of any particular kind of regulation of expressive activity. Nor does the Declaration give any clue as to what the appropriate re-

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1 G. A. Res. 217, 3 U.N. GAOR Supp. (No. 13) at 71, 74-75 (art. 19), U.N. Doc. A/810 (1948) [hereinafter Universal Declaration of Human Rights]. See also, BASIC DOCUMENTS IN INTERNATIONAL LAW 135 (I. Brownlie ed. 1967). This declaration is not a legally binding instrument. Still, some of its provisions amount to general principles of law. See, for example, the statute of the International Court of Justice, Article 38 (I)(c). Its important function is as an authoritative guide, as produced by the General Assembly of the United Nations, to the interpretation of the U.N. Charter. As such, the declaration of human rights has much indirect legal effect and has been considered by the U.N. Assembly and many international law commentators as an important part of international law. For discussions of the status of the declaration of human rights see, H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS, 1950; McDougal and Bebr, Human Rights in the United Nations, 58 AM. J. OF INT. L. 603 (1964).

response by the international community or some law-enforcing body should be to a particular violation. One way in which a provision may be given substantive interpretation is by each adherents drawing on its own internal principles, rules and traditions governing communication and expression. Obviously, this would lead to a diversity of interpretations and, inevitably as communications become more and more transnational, disputes over the limits of restrictions of transnational broadcast and reception.

A consequence of such diversity in the approaches to these disputes is that in order to arrive at a consensus on the issue, the law must be so fragmented or compromised as to sap it of most of its substance. A case in point is international copyright protection, where in the absence of a treaty the general approach is not an actual internationalization of the law, but a piecemeal procedure that applies to foreigners not in residence there. If, and only if an alien’s country provides copyright protection and that alien complied with his own country’s formalities, then copyright is granted to one alien on the terms that it is granted to a citizen, not on the terms of the alien’s country.3

In theory, there are two general approaches to creating an international regulation which takes into account the differences in the national laws of those consenting to it. One procedure would be to internationalize a minimum standard as the agreed common standard. The other would be to allow various parties to the agreement to make exceptions regarding specific points with which they disagree. This second approach, while it must be faulted for the lack of uniformity it would promote, would permit the setting of higher standards, on the proviso that in specific circumstances specified parties can avoid them. Depending on the field which the proposed international law is designed to regulate, one approach or the other may be more desirable. Clearly, if the field subject to the regulation is regarded as a matter of basic human rights, there is both genuine need for the firm establishment of a “lowest common denominator” and, at the same time, less likelihood that parties will permit or tolerate exceptions to the “basic” right by other participating countries. Thus, the issue of whether freedom of expression or free flow of information laws should be uniform but minimal, or more substantial but varied in their application is the subject for another, more in depth, discussion.

At the national level in American law, where the concept of freedom of expression — whether embodied as a right, privilege or limitation on

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state action — is well developed and given high priority as a concept it nonetheless remains abstract.\(^4\) The abstract simplicity of the idea set out in a constitutional provision as "the freedom of speech" is to be contrasted with the complexity of the legal rules and cases applying it. That is, the provision expresses the "freedom" in simple and absolute form — "Congress shall make no law . . . abridging the freedom of speech"\(^5\) — but, put into practice, this "freedom" encompasses a large variety of restrictions on speech and other forms of expression all of which form the body of "free speech" law. A few of its more familiar components include: obscenity prohibitions,\(^6\) restrictions on ownership of multiple organs of communication,\(^7\) copyright restrictions on performance and duplication,\(^8\) restrictions in the name of national security on the access to information,\(^9\) privacy,\(^10\) libel and defamation limitations.\(^11\) In spite of the remarkable difference between the simplicity of the formulation of the constitutional basis for this qualitatively protected "freedom" and the elaborate complex of legal structures implementing this protection, it is not an over-generalization to say that Americans seem content with the simplistic formulation, that, while there may be disputes in practice about where to draw limits on the limitations on expressive activity, everyone seems to know just what someone is appealing to when the "freedom of speech" or the "free flow of information" is invoked as support for engaging in an activity. On the American domestic front, in the complicated interplay of simple provision and elaborate implementation, the force of the simple phrase is not lost.

That the formulation of the concept can be left as unspecified as it is


\(^5\) U.S. CONST. amend. I.


\(^7\) News America Pub., Inc. v. F.C.C., 844 F.2d 800 (D.C. Cir. 1988) (constitutionality of an extension of waiver to newspaper owner who held television broadcast license).

\(^8\) Gero v. Seven-Up Co., 535 F. Supp. 212 (E.D. N.Y. 1982), aff'd, 714 F.2d 113 (distinction between free flow of ideas and embodiment of ideas accommodate conflicting interests of First Amendment and copyright laws).

\(^9\) U.S. v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), cert. denied, 409 U.S. 1063 (restrictions on former CIA officer's publication of classified information).

\(^10\) Ranchos La Costa v. Superior Court of Los Angeles County, 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), cert. denied, 450 U.S. 902 (privacy is paramount to free speech when defendant makes defamatory lie invading privacy).

\(^11\) Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490 (D.D.C. 1987) (context will determine whether libel or slander will be considered privileged as statement of opinion).
and, yet, apparently, both serve its protective purpose and permit the
development of an array of detailed and workable rules about kinds of
expression and limitations on them is testament to the degree to which an
understanding of the constitutional phrase is shared within one particu-
lar national realm.

II. EXPANDING COMMUNICATION FIELD CALLS FOR THE CREATION
OF A COHESIVE BODY OF INTERNATIONAL
COMMUNICATIONS LAW

As communications, both in their reach and their means, become
generally transnational, the lack of an integrated transnational communi-
cations law becomes all the more apparent. Furthermore, the possibility
of a multiplicity of disputes over the use of highly sophisticated and pow-
erful communications technology which, on an international communica-
tions basis, may effectively erase national boundaries becomes all the
more real. On a transnational scale, it is only in the last few years that
communications and information policy have developed as issues per se.
This recent phenomenon is partly the result of actual and promised tech-
nological advances in transnational satellite and cable broadcasting.12

12 Not surprisingly, advances in satellite communications technology have outstripped the laws
designed to regulate its use. See, e.g., Note, Law in a Vacuum: The Common Heritage Doctrine in
communications law, to the extent it exists as a body of law, was The International Telegraph Con-
vention ("Telegraph Convention"), established by 20 nations in 1865. The Telegraph Convention
was the ancestor of the International Telecommunications Union ("ITU"), formed in 1932, largely
because of transnational disputes over the distribution of radio frequencies. See, e.g., Jakhu, The
Evolution of The ITU's Regulatory Regime Governing Space Radiocommunication Services and Geos-
tationary Satellite Orbit, in 8 ANNALS OF AIR & SPACE LAW 381, 381-83 (1983). Because the ITU's
purpose was formulated in very general terms, its concerns encourage satellite as well as radio broad-
cast. As the 1973 mandate declares, "with a view to harmonizing the development of telecommunications
facilities, notably those using space technologies, with a view to the full advantage being
taken of their possibilities." International Telecommunication Convention, Oct. 25, 1973, art. 4,
para. 2(c), 28 U.S.T. 2495, 2512, T.I.A.S. No. 8572 [hereinafter "Telecommunications Conven-
tion"]). The Telecommunications Convention regulates both frequency allocation and assignment of
geostationary satellite positions among its members. Id. at 2518.

It must be acknowledged that the ITU has had to keep up, not only with new forms of broad-
cast technology, but with the new possibilities for communications events, that the new technologies
create, i.e. simultaneous ("space-bridge") television broadcasts, instant information transfer and ex-
change systems, private links between personal computers, teleconferencing in all areas between
scientific labs, hospitals, political bodies, geographically remote areas, etc. Rapid technological ad-
vances and the relatively stagnant nature of the law means that the technology may often encourage,
or at least allow, an evasion of current law. For example, media organizations with access to satel-
lites or satellite photos have the capacity to obtain photos of places where photography is restricted
by law. The country with the restrictions cannot readily enforce them against satellite photography,
or does one nation have much capacity to guard electronically transmitted data or to keep other
nations from eavesdropping on electronically stored information. On this topic, see U.S. CONGRESS,
OFFICE OF TECHNOLOGY ASSESSMENT, COMMERCIAL NEWSGATHERING FROM SPACE: A TECHNI-
the solution to the regulatory infancy of this field is to develop a body of communications law — embracing many of the aspects which developed domestic communications law takes into account, i.e., copyright and licensing, allocation of frequencies, free speech and free flow of information issues, access issues, national security, obscenity, libel and defamation and "fighting words" kinds of restraints — those attempting to establish such a body of international communications law will have to consider: 1) that the diversity of treatment of communication access to and availability of information and technology capacities between different countries means that transnationalization of communications law cannot be achieved by a simple expansion of national-based regulation; 2) that, again because of this diversity, the piecemeal production of international communications agreements and projects on a contract by contract basis 'between particular countries with different practices, principles and levels of technological development, the individual nature of which has characterized many transnational telecommunications ventures to date, may spawn more problems that it avoids; 3) that any developments in the international law of communications must entail a probing examination of philosophical underpinnings of different nations' treatment of technological and communications innovation. In short, one cannot expect that an international communications law can be constituted by domestic communications law writ large.

The basic differences between law in the international arena and law within the domestic realm go beyond the lack of means of enforcement at the international level or the problems of creating a recognized and authoritative law-making body. Far deeper is the more substantive problem of determining what the scope of that law should be; what values should it protect, what values and interests have priority, what kinds of matters should the law regulate, and when does legal regulation become overly intrusive. These concerns are more pronounced when the matter to be regulated is as culturally specific as information and expressive behavior.

To ignore the fundamental difference between the international and national scope of any law which is potentially transnational in effect and particularly of laws regulating the free flow of information is to risk creating domestic regulations that make domestic sense and international nonsense. Illustrative of just this kind of tunnel-visioned law-making are the U.S. regulations known as the Land Remote-Sensing Communication Act of 1987 issued by the National Oceanographic and Atmospheric Administration governing licensing and access of the media and other enti-
ties to communications satellites and the information they produce.\(^{13}\)

III. THE EXAMPLE OF FEDERAL REGULATION OF LAND REMOTE-SENSING SATELLITES: DOMESTIC REGULATION OF AN INTERNATIONAL PHENOMENON

The Land Remote-Sensing Commercialization Act of 1984 authorizes private U.S. media to launch land remote-sensing satellites and authorizes private media use of nonmilitary U.S. government satellites as they are available.\(^{14}\) Land remote-sensing satellites contain radiation scanners which detect electromagnetic radiation as it is reflected off the earth's surface and relay the measurement of this radiation to a satellite ground station which in turn encodes the measurements of radiation as computer images. The quality of the product is dependent not only upon the position of the satellite but also upon atmospheric conditions; clouds and smog can obscure the surface or interfere with detection of radiation. Satellites travel in polar orbits and take approximately 100 minutes to circle the globe. As the earth rotates and satellites travel consistently in a pole-to-pole orbit, they cover different parts of the globe during each orbit. For the private media, land remote-sensing satellites, though as yet of questionable reliability, offer access to information which is often unobtainable by any other means. For example, views of the Afghan conflict of refugee camps in remote parts of Ethiopia. But, while the land remote-sensing satellites offer interesting possibilities for pictorial information gathering, federal NOAA Land Remote Sensing Commercialization Act which governs their use and by private parties give little indication as to how the Secretary of Defense and Secretary of Commerce, who are the authorized parties, will evaluate applications by the private media for exploitation of remote-sensing satellites and information gathered thereby in general public broadcasts.

The Act does not explicitly indicate the extent to which the private media will be allowed to use images generated by the satellites, but, instead, governs the granting and denial of licenses and access. The Act largely addresses national security concerns as public policy considerations. That is, while it establishes the possibility for private parties to participate in the use of, or indeed launch their own remote-sensing satellites, the bulk of the interests mentioned in the regulations as guides for implementation of the Act involve national security or foreign policy factors. For example, in citing the purposes of the Act, the regulations set out to "maintain the United States' worldwide leadership in civil remote-sensing, preserve its national security, and fulfill its international obliga-


The Act requires that the Secretary of Commerce, in granting or reviewing applications for licenses under the Act or considering any specific satellite use under the Act, consult with the Secretaries of Defense and of State who are directed to determine whether national security, foreign policy or international interests are affected by the proposed uses. Constitutional or other free expression or free flow of information issues are not raised in the Act as factors to be considered in the application process or other implementation procedures. The major requirement of applicants for licenses and other uses is that they provide operational information regarding their remote-sensing space systems on which the Secretary of Commerce may base review to insure compliance with "any applicable international obligations and national security concerns of the United States." While the Act puts no limit on the number of remote-sensing satellite systems that may be licensed to private applicants, it also provides that licenses are to be granted on a "space-available basis." Yet, the Act does not give the Departments of Commerce, State or Defense any guidelines for assigning priorities in distribution of licenses when the space available is limited. The lack of direction for resolving this technical problem will almost inevitably raise constitutional issues including how to allocate resources on a nondiscriminatory and content-neutral basis so as not to raise charges of unconstitutional favoritism or other interference in the "freedom of speech." Most revealing of the extent to which the Act ignores first amendment issues is a provision in a recent proposed rulemaking on the Licensing of Private-Sensing Space Systems raising the following issue: that "individual judgments [regarding the granting or denial of license or of the limitations imposed in consideration of national security or international obligations are] made in a context affected by rapidly changing technology and must be made on a case-by-case basis."

Because satellite systems are expensive, access or ownership is not

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15 Id. § 4202(2).
16 Id. § 4277(a)(b).
17 Id. § 4241(b).
18 Id. §§ 4241-4244.
19 Id. § 4245(a).
21 The cost factor, too, changes with the technology. In 1964, when INTELSAT was established, a "single global system" was the most cost-effective design because the costs of developing a separate global satellite system was prohibitive for one or a small group of nations. Today, with the variety of services that are transmitted by satellite — from banking to information exchange to electronic mail — no one system can meet the demand. INTELSAT uses rate-average pricing and gives no concessions for "high-density" users, thus insuring adequate space for all members and that large volume users subsidize less developed participants. All participants own investment shares, of which the U.S. holds 23 percent. See Gantt, The Commercialization of Space — Twenty Years of Experience: Some Lessons Learned, 12 J. SPACE L. 109, 117 (1984).
just a technological problem, but also an economic one. Thus, concerns about distribution and access affect not only the granting of priority among numerous applicants, but whether or not organizations with modest financial means can demand access to the communication product obtained by those who own satellites or licenses to use them. Again, this is an issue on which the Act with its single-minded invocation of national security concerns gives no guidance.

The lack of any expression of first amendment considerations in the Act is remarkable in a regulation that affects such factors as fundamental to constitutional doctrine as the content and accessibility of information. Clearly, if Congress were to write a law that restricted the content of telephone conversations or newspaper publications that happened to be transmitted by satellite or limited the availability of new telephone access to certain parties on the grounds that the telephone system utilized satellite transmissions available only on a limited basis, the law would be unconstitutional. What makes the lack of freedom of expression concerns especially remarkable in the NOAA Remote-3 Sensing Act is the fact that in international proposals or debates concerning the regulation of transnational satellite transmission, the U.S. has consistently held a front line position against any restraints on the content of satellite broadcasts and particularly against proposals allowing for the requirement of prior national consent before a signal could be transmitted across an international border.\(^2\)

In this vein, it is notable that the Act fails to supply provisions that acknowledge the international nature of satellite broadcasting and the problems that attempts to regulate in an international realm may engender. The Departments of Commerce, State and Defense are given the authority to regulate or limit information gathering by satellite and access to information gathered in that fashion, can they also regulate access by domestic organizations to or the use by domestic organization of satellites and material gathered by satellites which are owned or controlled by other nations. Unlike the domestic regulations set out in the statute, which govern the assignment of orbital space, such restrictions would not be predicated on the availability of orbital space to the licensing body. Thus, perhaps, under the rationale set out in the Act for controlling distribution, the government would have no power to restrict accessibility to information gathered or the means of gathering information in an international realm. Consequentially, those U.S. organizations with access to international satellite systems would have an advantage over those

which, because of limited financial means or other limitations, did not have the same status. This built in discriminatory consequence should surely raise constitutional issues.

Concomitantly, to what extent should other countries’ similar regulations, in the interest of their national security or any other internal interest be enforced or recognized by the U.S. government in restricting its own citizens? And, to what extent can the U.S. hope to effectively control the satellite information gathering activities of foreign organizations?

IV. ATTENTION TO THE BASIC PRINCIPLES OF INTERNATIONAL COMMUNICATIONS

What the limitations of the Land Remote-Sensing Commercialization Act most clearly affirm is that international communications law cannot be constructed by the mere expansion of a particular system of domestic law governing this field. The extent of conflicts inherent in such an approach to communications law is evident in the issues that have been raised in the international realm when different nations have actually debated the provisions of proposed transnational communications agreements. United Nations resolutions expressly or implicitly concerning direct satellite broadcasting (“DSB”) provide some of the clearest reflection of the various concerns which U.N. participants raise in debates about regulations in the transnational communications area.

As a subject of international law and policy, DSB combines issues raised in a number of fields — radio (frequency spectrum) communications, television broadcasting, space diplomacy and technology, and information law — the regulations of which have developed for the most part quite independently of one another, and, if they are to be applied to satellite broadcast problems, will have to be modified in a coherent manner to handle the specificities of this cross-cultural transnational and extraterrestrial communications technology. A number of the cross-disciplinary legal issues and principles involved are collected in the UNESCO General Conference Resolution which will be examined here. There have been quite a number of UNESCO resolutions, conferences and policy studies that address some aspect of transnational space communications. I have chosen to look at this particular one, an April 19, 1980 General Conference Resolution, because this resolution itemizes several of the interrelated issues and problems for which, as of yet, no coherent body of law exists.

23 Again because of the range of issues it invokes, our example is communications satellite regulations.
25 Id.
The resolution begins, after reaffirmation of principles invoked in a variety of U.N. and UNESCO agreements and declarations generally concerning human rights, with a reiteration of Article 19 of the Universal Declaration of Human Rights:

I. **Recalling** more particularly Article 19 of the Universal Declaration of Human Rights which provides that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" and Article 29, which stipulates that, like all others, "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."26

The debates centering around free flow of information across transnational borders and other freedom of speech issues in the context of high technology, particularly satellite transmission, exemplify the extent to which Article 19 is not subject to a uniform interpretation. The UNESCO resolution 4/19, 1980 goes on to articulate the extensively shared principles that are meant to guide cooperation on an international basis in the field of information and mass communication. Again, it should be noted that the universality of the language belies the degree to which these ideas, when put to the test of international communications practice, are subject to much debate.

**Recalling** also the declaration in the Constitution of Unesco that "the States Parties to this Constitution, believing in . . . the unrestricted pursuit of objective truth and in the free exchange of ideas and knowledge, are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purpose of mutual understanding and a truer and more perfect knowledge of each other's lives."27

Already with this provision, the freedom of opinion and expression has been somewhat qualified for the purpose of promoting understanding and more "perfect knowledge" of others' lives. The qualification would permit, for example, a distinction between information and propaganda. It might allow restrictions on communications promoting violence or likely to lead to misunderstandings. The next provision goes even further in opening up possibilities for content restrictions on the "free flow of information":

**Recalling** moreover that the purpose of Unesco is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and

26 *Id.*

27 *Id.*
fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations" (Article 1 of the Constitution).\textsuperscript{28}

The Resolution proceeds with the suggestion that a new international order in communications and information will not promote the interests of dominating nations, but may, by some means create a cooperation among participants.

Noting the increasing attention devoted to communication problems and needs by other intergovernmental organizations, both regional and international, notably the Movement of Non-aligned Countries which, in the Declaration of the Colombo Summit (1976), stated that "a new international order in the fields of information and mass communications is vital as a new international economic order" and, in the Declaration of the Havana Summit (1979), noting progress in the development of national information media, stressed that "co-operation in the field of information is an integral part of the struggle for the creation of new international relations in general and a new international information order in particular."\textsuperscript{29}

The concerns for national sovereignty and cultural identity raised in the next section would further qualify the "free flow of information" interest where communications across transnational borders may threaten the continuation of certain cultural or national characteristics.

Conscious that communication among individuals, nations and peoples, as well as among national minorities and different social, ethnic and cultural groups can and must, provided that its means are increased and practices improved, make a greater contribution to individual and collective development, the strengthening of national and cultural identity, the consolidation of democracy and the advancement of education, science and culture, as well as to the positive transformation of international relations and the greater expansion of international co-operation.\textsuperscript{30}

The task for the members is to consider communications regulations in light of particular "circumstances"; one such circumstance is the limited supply of geostationary orbits.

Invites Member States:

\textbullet\textbullet\textbullet\textbullet

(c) to take the Commission's recommendations into consideration in the preparation and strengthening of their national communication capabilities, without losing sight of the fact that differing social, cultural and economic circumstances call for a variety of approaches to the

\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
definition and implementation of national policies and systems and to
the identification and overcoming of the obstacles to development in
the field of information and communication;
(d) to bear in mind also the fundamental need to safeguard freedom of
opinion, expression and information; to ensure that the peoples are
given the widest and most democratic access possible to the function-
ing of the mass media; and to make communication an integral part of
all development strategies;
(e) to further the development of communication infrastructures, pay-
ing special attention to the establishment of fairer telecommunication,
postal and other tariffs, and to defining a liaison with the International
Telecommunication Union and other competent organizations of the
United Nations system the conditions necessary for a more equitable
utilization of limited natural resources such as the electromagnetic
spectrum and geostationary orbits.31

The "new international [information and mass communications] or-
der" language of the General Resolution 4/19, 1980 reflects UNESCO's
acknowledgment of the extent to which international practices and poli-
cies in the communications field based on traditional concepts of freedom
of speech and the free flow of information have recently been subject to
considerable discussion.32 The idea of creating a new international infor-
mation and mass communications order is closely linked to the develop-
ment of communications in third world countries. The creation of such a
"new order" as remarked in Part I of the Resolution is not actually es-

tablished in any U.N. document. Instead the ideas of preserving culture
and sovereignty, of promoting reciprocity and circulation of information,
of limiting obstacles to the access to the means of communication as well
as to the information itself and generally of creating a "more just and
better balanced world information and communication order"33 have
found their way into a number of U.N. documents all of which, in giving
voice to these concepts, give considerable force to concerns that are fre-
quently incompatible with U.S. constitutional doctrine or regulations.

31 Id. para. 10.
32 See Powell, Direct Broadcast Satellites: The Conceptual Convergence of the Free Flow of In-
formation and National Sovereignty, 6 CAL. W. INT'L L.J. 1 (1975); Hagelin, Prior Consent and the
Free Flow of Information Over International Satellite Radio and Television: A Comparison and Cri-
tique of U.S. Domestic and International Broadcasting Policy, 8 SYRACUSE J. INT'L L. & COM. 265
also G.A. Res. 34/182, 34 U.N. GAOR Supp. (No. 46) at 83, U.N. Doc. A/34/46 (1979) (particu-
larly the preamble and part I). P. LASKIN & A. CHAYES, Control of the Direct Broadcast Satellite:
Values in Conflict, in ASPEN INSTITUTE PROGRAM ON COMMUNICATIONS IN SOCIETY 3-14 (Palo
Alto, California 1974).
V. THE INTELSAT EXAMPLE: AN ATTEMPT TO CREATE A NEW COMMUNICATIONS ORDER AROUND THE SAME IRRECONCILABLE PRINCIPLES

Satellite communications are the focus here, and have received as much attention as they have in the international communications regulation discussions because, more than cable or wire transmission, satellite overcomes the distance and topographical obstacles to communication, and, thus, gives more play to conflicts that are international in scope. Until 1985, the only means by which a U.S. common carrier could gain access to a "global" satellite-based network was through the Communications Satellite Corporation ("COMSAT")\(^\text{34}\), the congressionally established organization that granted access to the International Telecommunications Satellite Organization ("INTELSAT"). This gave COMSAT a monopoly in the U.S. satellite broadcasting market, a monopoly only recently eroded by limited FCC additional authorities for private international communication systems. It is estimated that in 1986 there were approximately 80 satellites in active telecommunications use in "geostationary" (stationary over a particular spot on the earth) orbit of which about fifty were INTELSAT satellites, about twenty-five of which were of U.S. origin. The INTELSAT consortium is made up of about 110 member nations that share the system of telecommunications satellites and earthbound receiving stations. The allocation problems that led to the 1971 establishment of INTELSAT to monitor the distribution of access to the communications satellites was, in principle, not new. INTELSAT draws on the model and some of the concerns of the International Telecommunications Union of 1932 ("ITU") to regulate problems associated with the allocation of radio spectrum frequencies on an international level.\(^\text{39}\)

The purpose of the ITU as of 1947\(^\text{40}\) was to "coordinate efforts with a view to harmonize the development of telecommunications facilities,

\(^{34}\) See, e.g., E. McWhinney, The International Law of Communications, 11-20 (1971).


\(^{40}\) E.W. Ploman, International Law Governing Communications and Information 227 (1982).
notably those using space techniques, with a view to full advantage being taken of their possibilities."

The preamble to the INTELSAT definitive agreement declares the goal of INTELSAT "a single global commercial telecommunication satellite system" seeming to approve the creation of a monopoly such as COMSAT. The definitive agreement goes on to emphasize the necessity for "the provision on a commercial basis of the space segment required for international public telecommunication services of high quality and reliability to be available on a non-discriminatory basis to all areas of the world." Just these two quotes raise interesting issues. First of all, the provision of a "single global commercial telecommunications" system may in reality conflict with the goal of assuring availability of satellite communications on a nondiscriminatory basis to all areas of the world. Furthermore, providing high quality services on a nondiscriminatory basis is in reality a more ambitious proposal than simply allowing equal access. What are the factors to be considered in evaluating whether or not a transnational communications system is truly nondiscriminatory?

There is a limited amount of space in which a given number of satellites can operate in the geosynchronous orbit where most communication satellites lie. This means that technologically less developed countries or those without the financial means to put satellites in space are threatened with the loss of the possibility of participation in the system in the future.

While the U.S. has strongly supported INTELSAT, it has generally opposed U.N. proposals and resolutions calling for regulations that would limit access to or redistribution of limited geosynchronous resources. Furthermore, in all U.N. and UNESCO discussions about communications and information technology, the U.S.'s strongest support has always been for the principle of a free flow of information which

41 International Telecommunications Convention, supra note 39 at 2512.
42 INTELSAT Agreement, supra note 36, at 3814.
43 Id. at 3819.
44 "Non-discriminatory" is not actually defined in the definitive agreement, and thus must be elucidated by its context in the agreement which expresses a concern for availability to "all areas of the world."
46 The Soviet system INTERSPUTNIK was formed when the USSR refused to join INTELSAT because of the strong ownership presence of COMSAT, the U.S. signatory. Note, Bypassing INTELSAT: Fair Competition or Violation of the INTELSAT Agreement?, 8 FORDHAM INT'L L.J. 479, 484 (1985).
precludes such practices are prior consent or cooperation with any other country's policy or mechanisms for limiting or screening the broadcasts into that country.  

In attempting to resolve disputes about how communications, satellite resources and information should be regulated, the means which U.N. resolutions have consistently employed to acknowledge and attempt to give fair play to the tremendous diversity of national legislation and underlying philosophy dealing with communications and information has been to incorporate by reference a number of principles — i.e. sovereignty, free exchange, equal access, and fair distribution of limited resources. Obviously, these principles may, when put into practice, come into conflict. They may, however, imply no more conflict than that which is engendered and often resolved on the domestic context, by, for example, in the United States, a whole body of information and communications law including copyright law, first amendment doctrine, and technological and communications regulatory law. One task is to examine what kind of conflict is inevitably incited when the fundamental principles are invoked by the UNESCO resolution and in other equally international debates. This kind of study will not so much identify a place from which to begin to formulate an international communications law but rather one from which to decide what the limits are to creating a cohesive body of law out of inherently conflicting interests and principles.

The U.N. resolutions set forth the fundamental concerns which are raised again and again in international debates about regulation of transnational communication. How far apart the participants can be in their expectations, requirements or the contents of the principles affecting international communications practices while at the same time they can agree on the basic concerns articulated in the resolutions is well documented by one dispute in which the U.S. stood against all other members. The Soviet Union had submitted a draft agreement to the general assembly which proposed certain controls over satellite broadcasting and included a prior consent agreement by the receiving country and substantial limitations on the content of broadcast transmitted by satellite.

48 See Crawford, Toward an Information Age Debate in CHRON. INT'L COM. 3 (1980).
51 U.N. Doc. A/8771 (1972). One commentator claims that the disagreements among U.N. signatories when it comes to drafting anything more specific than a list of general concerns affecting communications practices stem from a fundamental, perhaps unresolvable, difference in attitude towards, not the function of freedom of communication, but even more basic the definition or role of international cooperation generally: "The West believes that increased cooperation automatically leads to appeasement [or security]; the East considers that increased security leads gradually to cooperation." Martelane, T. "The third basket", in Helsinki and Belgrade. Intermedia 5 No. 5
The Soviet proposal asked for prohibition of several kinds of broadcasts, including: (a) broadcasts detrimental to the maintenance of international peace and security; (b) broadcasts representing interference in intra-state affairs of any kind; (c) broadcasts involving an encroachment on fundamental human rights, on the dignity and worth of a human person, and on fundamental freedoms for all without distinction as to race, sex, language or religion; (d) broadcasts propagandizing violence, horrors, pornography, and the use of narcotics; (e) broadcasts undermining "the foundations of the local civilization, culture, way of life, traditions or language"; (f) broadcasts which misinform the public on these and other matters. These categories were later reformulated in a provision which asked the member states to prohibit satellite broadcasts which would publicize [] ideas of war, militarism, national and racial hatred and enmity between peoples, which is aimed at interfering in the internal domestic affairs of other States, or which undermines the foundations of the local civilization, culture, way of life, traditions or language.

The United States stood on first amendment principles in opposing the proposal in any of its versions. A subcommittee was constituted to discuss the irreconcilable issues that had been raised by the proposal. Those specific issues on which the subcommittee could not reach a consensus are further indications of the differences in fundamental principles adhered to by member nations. The requirement of obtaining consent for any broadcast from a recipient nation could not be formulated in terms that were acceptable to all the members. Alternatives were proposed which covered the range from requiring consent to all broadcasts aimed at a foreign nation to an alternative in which consent was not required but cooperation between the states encouraged. Also, content regulation was an area in which the subcommittee was unable to reach a consensus to offer to the general assembly. The alternatives in the area of content regulation ranged from the requirement that member states should cooperate with each other with respect to program content to a proposal which reiterated the specific prohibited matters which the Soviet proposal sought to prohibit. A conclusion to be drawn from the sub-committee's report was that no compromise would be possible on the principles of prior consent and content control.

(1977). While the East-West dichotomy may not, in practical fact, be as stark today as it was in 1977 the basic contradictions in the principles to which nations appeal in their attempts to construct an international communication law remain.

53 Id.
54 Id. at 14.
55 Id.
56 Id. at 17.
VI. A NEW APPROACH: LOOKING BEYOND IRRECONCILABLE PRINCIPLES TO FIND SHARED INTERESTS

The purpose of this article is not to advocate increased restriction on or regulation of transnational communications under international law. Rather, it is to propose a procedure or approach under which a topic, international information exchange on transnational communications, the consideration of which has frequently led to an impasse on issues of principle, can be more substantively discussed.

In view of the U.N. Subcommittee’s failure to arrive at any consensus on the issues raised in the Soviet proposal, it is interesting to recall the extent to which the NOAA Act constituted both a version of prior consent and content control. Indeed, many F.C.C. practices and codes are compatible with content-oriented regulations on an international scale. Certainly, the F.C.C. does not hide its interest in regulating broadcasts which contain or promote violence, pornography, matters considered to be a poor influence on children, and advertising in certain areas such as tobacco and alcohol.\(^{57}\)

Is there any consistency to the U.S. unmitigated opposition to proposals, even when vaguely formulated, for content regulation or prior consent, and its own practice of allowing a complexity of regulations on communication under first amendment law? Certainly, it is not always the case that the first amendment would be inconsistent with regulation of transnational messages or the flow of information in an international realm. For example, regulation of advertising or restraints on defamatory or obscene broadcasts would be quite consistent with established U.S. doctrine.

There has been no lack of discussion of the ideological or philosophical issues raised by the U.N. resolutions and other attempts to regulate transnational communication. In general, the law review articles recapitulate the U.N. debate by discussing the issues around which potential member parties to the resolution break down.\(^{58}\) These issues are generally denominated by: individual rights, the free flow of information, national sovereignty, noninterference, avoidance of conflict, prior consent, protection for developing nations, national security, and recognition of "common heritage" all of which have been examined again and again as the background to competing concepts which affect negotiations over resolutions concerning transnational satellite communications.\(^{59}\) One can continue to debate the same principles and recapitulate the same im-

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\(^{57}\) See, e.g., Inquiry Into Alleged Broadcast and Cable Casts of Obscene, Indecent or Profane Material by Licensees, Permittees, or Cable Systems, 40 F.C.C. 2d 105 (1973); Broadcasting in America and the F.C.C.’s License Renewal Process, 14 F.C.C. 2d 1 (1968).

\(^{58}\) See infra note 59.

\(^{59}\) See, e.g., Powell, supra note 32. D’Arcy, Broadcasting in the Global Age, 43 COMBROAD 2
passes. Instead of disagreeing about the fundamental and irrevocable principles this new approach, and one which may be helpful not only on the international level but also in the formulation of domestic communications law, particularly the regulations like the NOAA Act, would be to just what it is about communication itself which is valuable to all the participants seeking to negotiate an international agreement. Perhaps, the problem is not so much that one party or another will not agree to any mechanism of restrain, for example, advertising or certain kinds of propaganda, but, rather, that the member will not agree to compromise a particular principle. The point is that, in reality, one practice may be consistent with two inconsistent principles. An approach which has not been pursued and which in fact may allow the nations to arrive at an articulation of compatible rules interests rather than remaining at the level of debating incompatible principles is to ask what precisely are the properties of communication which are essential to an efficient international communications system. If those fundamental properties are articulated, one might then be able to move from those features to the creation of rules which stand the chance of being consistent with un compromisable principles. The following is an example of the properties of communication which would have to be taken into account: Communication as a commodity — communication products and means have a worth; this worth can be exchanged; losing it or enhancing it has a cost or value. Communication as a method of establishing and negotiating relationships — forms of communication and results of communication are the basis for relationships between organizations and between individuals. As such, they must be protected and allowed to exist and continue. Interference in them can interfere with relationships or change or damage parties to those relationships. Communication as a resource — communication means and their results may be scarce, limited or infinite depending upon the mechanism and other practical facts such as cost,


60 A good example is noted by Karjala and Sugiyama in their comparative study of Japanese and American Copyright Law:

[M]any apparent differences in analytical style between Japanese and American judges can be reconciled by focusing on the results of the cases rather than the actual language used to justify those results. This is particularly true in the standards for determining infringement. In America, the almost uniform judicial litany is that copying is proved by access plus substantial similarity and that infringement is determined by substantial similarity of protected elements. In Japan, the verbal formulations of the standards for infringement are much more vague and show greater variety, but one cannot say . . . the results [of the] Japanese courts are consistently more or less protective of copyright than those of the United States.

the state of technology affecting transmission and storage, etc. As such, the regulation of the communication may have to respond to changes in the status of communication as a resource in the same way that regulation of energy responds to changes in supply and technology. *Communication as a form of human behavior* — communication is a means of self-expression and of creation; it allows for the expression of one’s personality, desires, frustrations and humanity. While as a “form of human behavior” or of self-expression, it may be considered as an end in itself it is only one end of the individual.

If we consider regulations of communication in the international sphere from the perspective of what communication is rather than what irreconcilable principles any regulation of it must acknowledge, we may find a way of arriving at rules that, because they fit actual facts also are compatible with the principles at stake. Chafee’s famous statement about balancing expresses the value of this approach:

> Or to put the matter another way, it is useless to define free speech by talk about rights. The agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock ... To find the boundary line of any right, we must get behind rules of law to human facts. In our problem, we must regard the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right. It must never be forgotten that the balancing cannot be properly done unless all the interests involved are adequately ascertained, and the great evil of all this talk about rights is that each side is so busy denying the other’s claim to rights that it entirely overlooks the human desires and needs behind that claim.\^6^1

The reason that this is the appropriate time and the international realm the appropriate context for (re)considering the facts of communication and avoiding a debate over long-established principles is that with new technologies for communication enabling a more rapid and denser flow of information and at the same time making the control of information much more difficult, it may make sense to regulate certain forms of communication because of their power, pervasiveness, and interference — to an extent to which the regulation of less intrusive technologies such as print would be a violation of constitutional protections or human rights. One need only think of the degree to which the electronic collection and processing of information has diminished individual privacy to

\^6^1 Z. CHAFFEE, *supra* note 4, at 31.
understand that uniform application of broad principles about freedom of speech will have very different consequences depending on the nature of the media to which they are applied. As certain new technologies significantly expand the volume, the reach and the speed of the spread of information breaking down boundaries between individual and state and between states the task of the courts, of the U.N., of other international communications law-makers will be to trace the limits on controls of information in accord with our developing faculties for gathering, storing and transmitting information. The goal should be to make sure that the important properties of communication, such as those suggested above are not lost and also that other important properties of the individual and important values are not sacrificed in an unexamined application of sacred principles to shifting technologies.