COMMENTS

MEXICAN-UNITED STATES BORDER BROADCASTING DILEMMA

Along the southern border of the United States, radio and television stations in Mexico frequently beam programming north of the boundary to capture the American advertising dollar. Broadcasting near an international boundary creates problems since electromagnetic waves ignore borders and can be readily received in a country other than that from which the signal was sent.[1] Although international broadcasting conferences and their resulting agreements primarily deal with such technical matters as interference, standardization of equipment, and multinational registration of broadcasting frequencies to prevent conflicts between stations in neighboring countries,[2] domestic lawmakers have opted to legislate further restrictions in this area.[3] Such a provision in the federal law of the United States[4]

1. LeRoy, *Treaty Regulation of International Radio and Short Wave Broadcasting*, 32 AM. J. INT'L L. 719 (1938). [Hereinafter cited as LeRoy]. This article, written during the ascendency of Nazi Germany and the use of radio by that regime for propaganda purposes, is especially sensitive to broadcasting across international borders to foreign audiences. LeRoy differentiates radio from other communications media on three grounds:

> First, radio is limited by a physical factor called interference. Second, electromagnetic waves are in no way limited by political boundaries. Third, radio lends itself exclusively to certain public service functions.

Id. at 719. These same observations, of course, would apply to television of our day.

2. International Wireless Telegraph Convention, Nov. 3, 1906, 37 Stat. 1565, T.S. No. 568, Martens Nouveau Recueil (ser. 1) (effective July 1, 1908 for the United States May 17, 1912). Article 8 states the document's purpose:

> The working of the wireless telegraph stations shall be organized as far as possible in such a manner as not to disturb the service of other wireless stations.

3. 47 U.S.C. § 151 (1970). The United States established the Federal Communications Commission according to this section to control domestic broadcasting for the following reasons:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose

recently affected the operation of a television station licensed by Mexico, XETV, Channel 6, in Tijuana, Baja California. The proximity of metropolitan San Diego, California, permits its residents to receive a signal of "city-grade" quality from Channel 6 in Mexico. Since 1956, XETV has been the American Broadcasting Company (A.B.C.) affiliate for the San Diego market.[5] As a result of this affiliation, XETV has broadcasted primarily in the English language with local advertising and productions in addition to A.B.C. network shows designed for viewing in the United States.

A San Diego ultra high frequency (U.H.F.) television station,[6] KCST, Channel 39, won the right to carry the A.B.C. shows for the San Diego area. A seventeen year-old A.B.C. franchise has been taken from XETV by administrative action of the United States government which was upheld by this country's courts.[7] With this decision on record, other Mexican stations broadcasting in English to United States audiences may become defendants in petitions before the United States Federal

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of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication there is created a commission to be known as the "Federal Communications Commission."

4. 47 U.S.C. § 325(b) (1970). The statute allows United States control over foreign stations that broadcast the United States programs originating within this country. This section requires express permission for such activities:

> No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Federal Communications Commission upon proper application therefor.

5. *In re* Application of American Broadcasting Companies Inc., 13 R.R. 1248 (1956).

6. D. LEIVE, INTERNATIONAL TELECOMMUNICATIONS AND INTERNATIONAL LAW: THE REGULATION OF THE RADIO SPECTRUM 358 (1970) [hereinafter cited as LEIVE]. Ultra High Frequency transmissions or U.H.F. frequencies on the broadcast spectrum are between 300 and 3,000 MHz [Megahertz] and include television channels 14 through 83 inclusive. The more established channels 2 through 23 are in the Very High Frequency or V.H.F. range between 30 to 3.000 MHz.

7. *In re* Application of American Broadcasting Companies. Inc., 35 F.C.C. 2d 1 (1972). This commission decision was upheld in — F.2d — (D.C. Cir., 1972).

Communications Commission and in litigation in the courts of the United States.

To date, all governmental inquiries by the United States on this question have been concerned with permission to send a broadcasting signal across the border to Mexico for re-broadcast back to the United States.[8] This comment will explore the re-broadcasting permits along with provisions in notes exchanged between governments that assign specific broadcasting frequencies as a means toward resolving questions posed by stations seeking non-domestic listeners and viewers.

I. HISTORICAL BACKGROUND OF BROADCASTING REGULATION

When broadcasting via electromagnetic waves ceased being a laboratory curio, wireless communication had a noticeable impact on international law.[9] This technological development was oblivious to the artificialities of international boundaries, as the radiating nature of electromagnetic waves make reception depend upon geographic and atmospheric conditions—not political barriers.[10] The automobile caused few accidents until more than one "horseless carriage" ventured around town, just as broadcasting was not an especially controversial topic until the number of broadcasters grew in any given geographical area. When interference started between stations on the same or nearby frequencies, disputes arose. If the interference was from a broadcast in a foreign country, the indignity was often greater.[11] Issues of sovereignty and territorial rights often were raised in the early decades of the twentieth century as interference from radio waves crossed national borders.[12]

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8. *In re* Application of American Broadcasting Companies, Inc., 18 F.C.C. 2d 641 (1969). The Federal Communications Commission gave regular approval for sending programs from the United States to Mexico and Canada for re-broadcast under 47 U.S.C. § 325(b) (1970).

9. Leroy, *supra* note 1. at 720. The first international radio conference was held in Berlin in 1903, to deal with early broadcasting problems such as unrestricted use of the air waves and reluctance of radio operators to communicate with other operators not using the same make and design of equipment.

10. *Id.*, at 719.

> These distinctive physical characteristics of the art [see note 1, *supra* where the three distinctions are listed] have been controlling in the formulation of the international regulatory regime.

11. *Id.*

> The efficient performance of radio's unique service necessitates freedom from interference. This can be assured only by closely coordinating regulation by political authority. To be effective, regulation must be synchronized in both the national and international realms.

12. *Id.*, at 737. Nazi propaganda promulgated beyond the borders of Ger-

In international law a precedent already existed for dealing with advancing communication technology. The International Telegraphic Union of 1865 addressed itself to relations among nations connected by the then revolutionary medium of the telegraph.[13] Twenty European States at the 1865 Paris Conference adopted rules for administrative and technical control of telegraphy.[14] First the telephone and then the radio were incorporated into the international regulatory scheme.[15] Awareness of the rapidly evolving nature of electronic communications led to regular sessions to reevaluate existing international rules as the state of the art progressed.[16] It was the 1906 Berlin Conference that laid the groundwork for the Radiotelegraphic Convention.[17] The current International Telecommunications Union resulted from the 1932 Madrid Conference which combined the separate regulations for the telegraph and broadcasting into one structure.[18] The United States, interestingly enough, avoided the International Telegraphic Union opting for the traditional American preference to have free enterprise develop technological fields.[19] The same predeliction for free enterprise persisted toward the private sector, but the United States chose to become more involved with international discussions and agreements in this field.[20]

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many in the years before World War II exposed the world to this type of unwanted radio reception for the first time:

> The impact of this electro-magnetic barrage on the people of this hemisphere is raising serious issues of policy for the Government of the United States.

13. LEIVE, *supra* note 6, at 31.

14. *Id.*

15. *Id.* The telephone in the 1870's was dealt with by altering existing provisions in telegraph regulations, while radio was the sole subject of the 1906 Radiotelegraph Convention that patterned its measures after the International Telegraphic Union.

16. *Id.* This followed the practice already established by the International Telegraphic Union.

17. *Id.*

18. *Id.*, at 32.

19. LeRoy. *supra* note 1, at 720.

> It is significant that at this first attempt at international regulation a conflict arose which has continued down to the present time in various forms; namely the struggle between public service and private exploitation.

20. *Id.*, at 721. One may speculate that the rapid growth of radio coupled with its greater tendency for abuse by unregulated operators as compared with the more easier controlled telegraph could have been motivation for a change of position by the United States. Also, remaining outside an international regu-

Interference between stations on the same or adjacent frequencies in the various nations was the main thrust of international agreements on broadcasting.[21] International frequency registration and technological standardization were some of the means utilized toward this end.[22] Who should actually operate a broadcasting station and what restrictions or guidelines should dictate procedures and policies became strictly a matter of municipal law at the discretion of each individual nation.[23] As in the XETV-KCST controversy, international agreements are relevant only to the question of which country is allocated what frequency or in the case of television stations, who is allocated what channel.[24] The United States-Mexican agreements by which channels are assigned are supplemental to the International Telecommunications Convention and were drawn to solve regional communications problems.[25]

Under terms of these special agreements the San Diego-Tijuana assignments on the very high frequency (V.H.F.) band include channels 8 and 10 for San Diego while Tijuana gets 6 and 12.[26] KCST operates on Channel 39 as one of the two

latory scheme could have harmed prospects for United States broadcasting interests.

21. LEIVE, *supra* note 6, at 41.

22. *Id.*, at 41-42.

23. LeRoy, *The International Radiotelegraph Conference*, 14 A.B.A.J. 86 (1928).

> The allocated scheme is not rigid except as it may involve international interference. Any signatory power [to the International Telecommunications Union] may operate as it pleases through the whole gamut of frequencies.

Id., at 88.

24. This falls under the rights of nations to prepare regional agreements with their neighbors to solve the mutual need for broadcasting frequencies as opposed to the question of who and how the frequences assigned by these agreements are operated. The former decisions are controlled by normal international agreements, whereas the latter fall under each nation's legislative authority. *See* International Telecommunications Convention. Dec. 9, 1932, 49 Stat. 2393, T.S. 867, 27 L.N.T.S. 455 (effective January 1, 1934, for the United States June 12, 1934).

25. *Id.* Article 13 of this Convention provides for special arrangements:

> The contracting governments reserve the right, for themselves, for the private operating agencies recognized by them, and for other operating agencies recognized by them, and for other operating agencies duly authorized to that effect, to conclude special arrangements on service matters which do not concern the governments in general. However, such arrangements must remain within the terms of the Convention and of the Regulations annexed thereto, as regards interference which their application might be likely to cause with the services of other countries.

26. Assignment of Television Channels Along United States-Mexican Bor-

U.H.F. assignments to San Diego.[27] As signals transmitted on television frequencies can be received only within a limited geographic area (usually not beyond 50 miles[28]), the agreements between the two countries compensate for the relatively few channels available by clearly specifying the channels reserved for each city.[29] Provisions are also made for slight alterations of the channel frequencies to avoid possible interference on the same or adjacent channel up to several hundred miles within Mexico or the United States.[30] The basic purpose for international broadcasting agreements, elimination of interference, is clearly present.[31] The particular channel-to-city assignments in many instances look toward future use by reserving channels for areas where predicted population growth and shifts will ultimately demand more stations than presently exist.[32] Current agreements between the United States and Canada follow a similar assignment pattern.[33] The international agreements remain silent as to who should operate the stations and what standards of subject matter selection should be met by broadcasters. These are matters to be decided by each signatory for the interests of his individual nation.[34]

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der, April 18, 1962, 13 U.S.T. 997, T.I.A.S. No. 5043, 452 U.N.T.S. 3 [hereinafter cited as V.H.F. Agreement].

27. Allocation of Ultra High Frequency Channels to Land Border Television Stations, July 16, 1958, 9 U.S.T. 1091, T.I.A.S. No. 4089, 335 U.N.T.S. 139 [hereinafter cited as U.H.F. Agreement].

28. LEIVE, *supra* note 6, at 364.

29. V.H.F. Agreement, *supra* note 26, Section I the agreement contemplates station transmitters "shall be located so that a good grade of service is provided to the city specified." Table A lists Mexican cities by state with assigned channels opposite each location, while Table B presents assignments for the United States in a similar fashion.

30. *Id.*, at Tables A and B. For engineering reasons specified channels assigned to the United States and Mexico "offset" their video (picture) carrier frequency plus or minus 10KHz (kilohertz) to avoid interference with stations within the interior of the other country on the same or adjacent channels.

31. *Id. See* the provisions for frequency offsets.

32. U.H.F. Agreement, *supra* note 27, at Tables A and B. The agreement, for example, provides Tijuana with four U.H.F. channels and San Diego with the same number. To date, Tijuana is using none of the allocations and San Diego only two. This reservation for future needs is made for every city on both sides of the border. Similar considerations are reflected in agreements with Canada. *See* Canadian-United States of America Television Agreement, June 23, 1952, 3 U.S.T. 4443, T.I.A.S. No. 2594, 207 U.N.T.S. 25.

33. Canadian-United States of America Television Agreement, June 23, 1952, 3 U.S.T. 4443, T.I.A.S. No. 2594, 207 U.N.T.S. 25.

34. V.H.F. Agreement, *supra* note 26, at §§ I. and J. The agreement is

Difficulties and disputes faced by early broadcasters that often involved trans-border broadcasting led to unilateral legislation by the United States.[35] The measures were not much more than patchwork at first, as they were drawn to counter only the most atrocious abuses of the airwaves. Congress relied upon its power to regulate interstate commerce as conferred by the interstate commerce clause of the Constitution to enact this legislation.[36] Few years passed before the United States revamped radio legislation and created a regulatory agency, the Federal Radio Commission.[37] A semblance of the modern regulatory system for broadcasting was established in 1934 with creation of a body that is still in existence, the Federal Communications Commission (F.C.C.).[38] At this time television was in the experimental stage. The eventual development of television in commercial broadcasting did not alter the basic direction of communication law, as fundamental methods and standards had been established with sufficient flexibility to handle broadcasting as a category—television as well as radio.[39] Television licensees must meet the same standards and comply with the same procedures as do radio stations.[40] The measuring standards in the XETV-KCST

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only to assign channels to minimize interference and allow "maximum efficiency."

35. Note, *State Regulation of Radio and Television*, 73 HARV. L.R. 386, 387 (1959). The first Congressional act to regulate radio broadcasting was the Radio Act of 1927, 44 Stat. 1162.

36. Federal jurisdiction over broadcasting under the power of Congress to regulate interstate commerce, U.S. CONST.. art. I, § 8, has been specifically construed for radio and television. Federal Radio Commission v. Nelson Brothers Bond and Mortgage Co., 289 U.S. 266, 279 (1933) places radio under interstate commerce:

> No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.

The same conclusion is reached for television in Allen B. Dumont Labs, Inc. v. Carroll, 184 F.2d 153 (3d Cir. 1950):

> The television programs broadcast by plaintiffs are received by persons possessing television sets not only within the borders of the Commonwealth of Pennsylvania but also, depending upon the location and power of the broadcasting station, in Delaware, Maryland, New Jersey, West Virginia, Ohio, and New York.

Id., at 154.

37. Federal Radio Act of 1927, 44 Stat. 1162.

38. Federal Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 (1970).

39. Allen B. Dumont Labs, Inc. v. Carroll, 184 F.2d 153 (3d Cir. 1950). The decision puts television into the same regulatory framework as radio.

40. *Id.*

controversy turn on a principle of law established in the pre-television era.[41]

The principle used as the F.C.C.'s standard for evaluating license applications or renewal requests is whether the station and its programming policies meet "public interest, convenience or necessity."[42] The F.C.C. views this as a comparative standard to allocate a limited number of broadcasting licenses among competing applicants by assessing how a potential licensee can provide a public service more effectively than another.[43] This present standard has been questioned by Nixon administration officials who suggest less of a nationwide set of criteria and more of a locally oriented approach calling for station licensees to be "substantially attuned" to the needs and interests of the station audience.[44] However, the "public interest, convenience or necessity" guide is still in use. It is this criterion that comes into play when permission is sought to send a radio or television program by telephone line or other means across a border for the purpose of re-broadcasting across this boundary to a predominately United States audience.[45] Under 47 U.S.C. section 325 (b), transmissions across the border are permitted at the discretion of the F.C.C. This 325(b) permit was designed to control overzealous sales pitches, misrepresentations of products offered for sale, and indiscreet programming that might be trans-

41. *In re* Application of American Broadcasting Companies, Inc., 18 F.C.C. 2d 641, 645 (1969). The Federal Communications Commission in setting the 325(b) request for hearing, required that the statutory standard of "public interest, convenience, and necessity," be applied when deciding whether Tijuana's Channel 6 could retain the A.B.C. affiliation. This is the benchmark established in the radio era to decide the awarding of broadcasting licenses. *See* 47 U.S.C. § 307(a) (1970).

42. 47 U.S.C. § 307(a) (1970). The statute spells out the criteria for evaluating prospective broadcasters:

> The [Federal Communications] Commission, *if public convenience, interest, or necessity will be served thereby*, subject to the limitations of this chapter, shall grant to any therefor a station license provided for by this chapter. [Emphasis added].

43. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). The same reasoning procedure is utilized by the Commission in reaching a decision under § 325(b) for foreign rebroadcasting permits as expressed here:

> Since the beginning of regulation under the Act of 1927 comparative considerations have governed the application of standards of "public convenience, interest, or necessity" laid down by the law.

44. Los Angeles Times, March 14, 1973, § I, at 6, col. 5.

45. *In re* application of American Broadcasting Companies, Inc., 18 F.C.C. 2d 641, 645 (1969).

mitted from Mexican stations with studios and offices in the United States.[46]

The 325(b) regulation permits the United States government to scrutinize all aspects of a proposal to serve an American audience from a Mexican station with programming originating in the United States.[47] This statutory permit gave the F.C.C. jurisdiction to take the A.B.C. franchise from XETV by disallowing transmission of the A.B.C. programming to Tijuana from San Diego to the XETV transmitter where the signal was then beamed back into the United States.[48] Soon after its enactment, section 325(b) was tested in the courts and found not to apply to prerecorded material taken to Mexico for broadcasting.[49] This loophole in the statute was successfully utilized

46. Brinkley v. Fishbein, 110 F.2d 62 (5th Cir. 1940), *cert. denied*, 311 U.S. 672 (1940). Plaintiff in this libel action unsuccessfully attempted to recover damages for a discussion of his radio broadcasting practices in an American Medical Association publication article entitled "Modern Medical Charlatans." The court held for the defendant magazine editor accepting truth as a defense. The plaintiff had lost his radio broadcasting license but subsequently obtained one from the Mexican government that allowed him to continue reaching an audience in the United States. His broadcasts included solicitations for money by mail in return for medical advice and prescriptions.

47. Wrather-Alvarez Broadcasting, Inc. v. Federal Communications Commission, 248 F.2d 646 (D.C. Cir. 1957). In returning XETV's original 325(b) permit request for A.B.C. affiliation to the Commission for rehearing, the court held commissioners must consider the larger American audience XETV would draw for locally produced programs of possibly objectionable nature by American standards if the A.B.C. affiliation were allowed. In setting guidelines for the awarding of 325(b) permits, the court said it was error for the Commission not to consider the character of the local programming XETV produces.

48. *In re* Application of American Broadcasting Companies, Inc., 18 F.C.C 2d 641, 644 (1969). XETV claimed the government of the United States was without jurisdiction to deprive a Mexican station of the A.B.C. affiliation, but the Commission dimissed this argument:

> Obviously we have no regulatory authority over XETV, whose programming as relates to the needs and interests of the citizens of Mexico, is exclusively under Mexican jurisdiction. However, in the context of section 325(b) of the Act, we are required to determine the degree to which XETV's locally originated programming serves the needs and interests of persons residing within areas of the United States reached by XETV's signal.

49. Baker v. United States, 93 F.2d 332 (1937). The holding of the court permits uninterrupted operation by Mexican stations seeking an American following if the program materials are carried across the border in prerecorded form. No 325(b) permit is required unless the program originates in the United States and is sent to a transmitter in Mexico directly by electrical or mechanical means for rebroadcast. The defendant won reversal of his conviction for transporting recorded broadcasts across the border without permission:

> It may be that what was done was intended to be prohibited, but the intention is not expressed with the clearness that is required in a penal

by XETV in 1957. While the station was awaiting approval of its 325(b) permit, it transported kinescope recordings of A.B.C. shows to Tijuana for broadcast.[50] This was specifically allowed by the court when challenged by opponents of XETV's 325(b) permit in the District of Columbia Circuit Court of Appeals.[51] The Mexican station is continuing to seek an audience in the United States by showing movies and old television series broadcast with equipment located entirely south of the border thus avoiding the 325(b) permit requirement.[52]

II. INTERNATIONAL IMPLICATIONS

All of the compelling concerns mentioned above are relevant to meeting the United States standard of public interest, convenience or necessity. However, where do the equities lie in an international context? What decision would be appropriate in this and other similar cases on the basis of existing bilateral and multilateral pacts involving trans-boundary broadcasting? In other words, does the Washington, D.C., Circuit Court of Appeals ruling stand up in light of international principles that were not part of that decision?[53] Additionally, what international legal guidelines might prove satisfactory for dealing with concerns of broadcasters along the Mexican-United States border or along other boundaries were patterns of a similar nature have developed?[54]

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law. The law as written does not prohibit the recordation of sound waves in the United States and sending the record to Mexico to have the sound waves there reproduced and broadcast.

50. Wrather-Alvarez Broadcasting, Inc. v. Federal Communications Commission, 248 F.2d 648 (1957). The court allowed XETV to broadcast A.B.C. programs on film that were transported to the Tijuana transmitter for broadcast. The decision was based on *Baker, supra* note 49, by accepting the analogy of sound recordings to television kinescope recordings.

51. *Id.*, at 650.

52. *In re* Application of American Broadcasting Companies, Inc., 18 F.C.C. 2d 641, 643 (1969).

53. Of course, no treaty or customary international law has ever entered into such a decision. The 325(b) permit does not necessarily account for changes in population, economic conditions, and social needs on both sides of the borders of the United States. Nor does it expressly recognize the rights and duties the signatories to the existing television channel allocation agreements have to utilize assigned television frequencies for the benefit of the nation to which particular channels are provided.

54. The problem should not be narrowly thought in terms of the border between the United States and Mexico alone. The XETV-KCST controversy merely points up the difficulty where it is at present most acute. In any border

As has been mentioned above the basic motivations for international broadcasting agreements have centered on elimination of interference between stations of different countries.[55] The notes exchanged between the governments of the United States and Mexico are no different with precise technical data included in these agreements for this singular purpose.[56] However, the tradition of frequency registration and precautions under the International Telecommunications Union to avoid interference have become so routine, in most instances, multilateral and bilateral pacts have accomplished their purpose in this respect.[57] Social and economic elements also enter into preparation of these notes although sometimes subtly and unexpressed as such. For example, the careful balance between the American and Mexcian allocations shows more than a mere deference to diplomacy and protocol.[58] A plainly conscious goal is fair distribution of channels to serve the actual needs of the border and near-border area communities of each of the two nations.[59] The awareness of business ambitions and nationalism had a role in distribution of the available frequencies to border cities.[60] It seems a common intention of the agreements is to divide equitably between the two countries the use of television channels.[61] As the assignments of channels take into consideration population patterns and growth projections,[62] the designated channels

area where broadcasters licensed in one country seek to serve those in another, a similar situation arises.

55. LEIVE, *supra* note 6, at 40.

56. U.H.F. Agreement, *supra* note 27 at § G, Tables A and B. The agreement calls for careful location of the transmitters, and the channel assignments in the tables list certain channels to adjust frequencies to avoid interference.

57. LEIVE, *supra* note 6, at 182.

> [T]he great majority of disputes involving harmful interference are settled bilaterally by the administrations concerned, very often on the operating level and not always with strict regard to the respective legal positions of the two stations under the Regulations [of the International Telecommunications Union].

58. U.H.F. Agreement, *supra* note 27, at Tables A and B. These tables list channel assignments by cities. Cultural, trade activities, and national pride are reflected, for example, by giving San Diego and Tijuana each four U.H.F. stations.

59. *Id.*, at § A. The purpose of the agreement is to provide television service "at location within 200 miles (320 kilometers) of the land border between the two countries."

60. *Id.*, at Tables A and B. It will be recalled that there is a balanced number of channels between the two cities.

61. *Id.* Again, the agreement calls for ample channels for border cities of the two nations in arrangements similar to the San Diego-Tijuana area.

62. *Id.* Note neither San Diego nor Tijuana, as typical examples, have

are clearly labeled for the city they are to serve.[63] This is specifically outlined in the agreements to assure that the anti-interference intentions of the notes are carried out and that transmitters are not too distant from the communities they are required to serve.[64] If predictions of interference problems can be made and stations located to avoid difficulties, the planning would be to no avail should transmitters not be reasonably near the cities called for in the notes.[65] Technical reasons alone demand stations to be where the agreements say they should be.[66] The notes also indicate a purpose beyond assurances of properly functioning and non-interfering transmitters operating in an orderly array across the North American continent. This purpose—to provide public service[67]—becomes a significant factor in determining the status of a non-domestic broadcasting station desiring to serve American audiences under international law.

It would follow that a station assigned by international agreement to serve Tijuana, Mexico, or any other city, should be primarily providing programming of significance to the population of the assigned metropolitan areas in the country of assignment. By international agreement XETV should cater to Tijuana, Baja California, not to San Diego, California.[68] Assuming

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utilized their full allocations of channels. To date San Diego has only two of the four U.H.F. channels allocated to it in operation and Tijuana has none.

63. *Id.*, at § G.

> A television transmitter shall be located to serve the city to which the channel is assigned and promote the over-all efficiency of the assignment plan.

Also, in Tables A and B the intent to provide specific cities with television service can be assumed from the careful listing of channels with particular cities.

64. *Id.*

65. *Id.*, at § A. "[T]he location of the station will be determined by the transmitter location." This would indicate a station with its transmitter in San Diego is one of the San Diego allocations. The same would apply to a transmitter in Tijuana as one named for that city's quota.

66. *Id.*, at Tables A and B. The choice of which channels are designated for particular localities and provisions for transmitter frequency adjustment are engineered to minimize interference. Deviation of the plan by placing transmitters at excessive distances would be contrary to the agreement at § G which calls for transmitters in the assigned cities "to promote the over-all efficiency of the assignment plan."

67. *Id.*, at § A. Taking again the phrase "[T]he location of the station will be determined by the transmitter location" one can imply the intention to provide a public service to that community designated for the channel in the Tables of channel assignments.

68. V.H.F. Agreement, *supra* note 26, at § A. This agreement calls for channels to be identified with the cities where their transmitters are located in

this conclusion, observers looking to the international law can find the United States court findings consistent with the spirit of the relevant international agreements.[69] However, this concurrence is somewhat academic as XETV will continue to serve the San Diego public as an independent station selling advertising to American businesses for non-network entertainment.[70] It seems in point to determine the appropriateness of this alternative action. If no XETV shows originate from studios in San Diego and no 325 (b) permit is obtained for the non-network material, the United States government would have no statutory means to limit English language programming. The situation would be similar to that found in *Baker v. United States* where recorded material was permitted uncontrolled passage over the Mexican border for rebroadcast.[71] The result is a Mexican station still competing in an American advertising market and Mexican citizens not receiving the public services of a television channel reserved for them by negotiations of their government. A further question emanates from potential contests between other Mexican and American licensees where the Mexican station on a frequency assigned to a Mexican community is fighting the battle of the ratings with American oriented programming. At least two AM and two FM radio stations in the Tijuana area alone fit into this category inevitably precipitating a united front of opposition from competing American station owners.[72]

III. THE XETV-KCST DISPUTE

KCST won the right to broadcast A.B.C. network programs for the San Diego metropolitan area in an out-of-court agree-

almost identical language to the U.H.F. Agreement: "[T]he location of the station shall be determined by the transmitter location."

69. Bay Cities Broadcasting, Inc. v. Bass Broadcasting, Inc. — F.2d — (D.C. Cir. 1972). The court upheld the award of the A.B.C. network franchise for San Diego to the station defined in international agreements as one that should serve San Diego.

70. *In re* Application of American Broadcasting Companies, Inc., 18 F.C.C. 2d 641, 643 (1969).

71. *See* note 49 *supra.*

72. A.M. radio stations XETRA and XPRS, as well as F.M. radio stations XEHIS and XEHERS in this portion of the border area may fit into this category whether or not a 325(b) permit is required, *i.e.*, stations with Tijuana studios or program material brought across the border prerecorded would escape the statute under the *Baker* exception. The San Diego-Tijuana situation with Mexican licensees broadcasting to audiences in the United States are found along the entire length of the border.

ment between the two stations which A.B.C. announced February 22, 1973.[73] XETV's only legal recourse remaining in its four-year fight to keep the A.B.C. franchise was a petition to the United States Supreme Court for a writ of certiorari on the decision awarding the franchise to KCST by not renewing XETV's 325(b) permit.[74] The memorandum of understanding settling the dispute was filed with the F.C.C. after XETV lost its case before the District of Columbia Circuit Court of Appeals.[75] The XETV management gave consideration to a Supreme Court petition but decided to abandon the plan.[76] The station had turned to the courts after a 1972 F.C.C. finding that the public interest was no longer being served by A.B.C.'s use of the Mexican station.[77] The lone success in XETV's court battle was scored at the very beginning of the litigation when in May, 1971, an F.C.C. examiner found for the Tijuana station saying A.B.C.'s national coverage would be hampered if XETV lost the 325(b) permit.[78] In return for the memorandum of understanding, KCST agreed to a delay in transfer of all A.B.C. programming for four months instead of the statutory 30 days after the final court holding.[79]

It is clear that the F.C.C. decision and the subsequent court rulings were rendered only on principles of United States domestic law.[80] The international agreements assigning the channels to their respective nations were not considered in the litigation.[81] It was solely on the basis of section 325(b), that the issue was resolved using the standards prescribed for a station wishing to transmit programs by any means outside of the United States for broadcast by a foreign station to American listeners. However, this was not the first instance of extraterritorial application of municipal law to regulate what a foreign station may trans-

73. — F.C.C.2d — (1973).

74. San Diego Union, Feb. 23, 1973, § B, at 1, col. 1.

75. *Id.*

76. *Id.*

77. *Id.*

78. *In re* Application of American Broadcasting Companies, Inc., 35 F.C.C. 2d 1 (1972).

79. San Diego Union, note 74 *supra.*

80. *In re* Application of American Broadcasting Companies, Inc. 35 F.C.C. 2d 1 (1972). This theme is repeated to show however proper the Commission's procedure may be, the broader scope of an international perspective was excluded.

81. *Id.* Indeed, such considerations are irrelevant in the proceedings.

mit in the way of network programming. XETV, has litigated the same issue before although the opponents were different and XETV's ownership was not the same as today.[82]

When XETV first obtained the A.B.C. franchise in 1957, the two San Diego V.H.F. stations then in operation, KFMB and KFSD, attempted to block their new competitor. They won a temporary delay of the permit on the issue of whether or not the F.C.C. should have taken into account the possible offensive nature of XETV's non-network programming to a United States audience.[83] The challengers said more American viewers would be inclined to watch the non-network fare presented over XETV if that station were carrying A.B.C. entertainment.[84] The F.C.C. reheard the matter to satisfy this requirement and reinstated the permission to XETV for re-broadcasting across the border.[85] KFMB provides Columbia Broadcasting System (C.B.S.) programming, over V.H.F. Channel 8, while KFSD (now with call letters KGTV) is a National Broadcasting Company (N.B.C.) affiliate operating on V.H.F. Channel 10. The broad standard in both this instance and in the recent case is still the statutory bench mark of public interest, convenience and necessity as it affects people in the United States.[86]

Other collateral issues have been raised by KCST in their efforts to become San Diego's A.B.C. affiliate. Looking toward the public interest aspect, KCST specifically mentioned the lack of restrictions by the Mexican government over what broadcasters put on the air.[87] In sharp contrast, article 63 of the Mexican Radio and Television Federal Law forbids programming "contrary to good customs."[88] Segments of A.B.C. shows such as "Dr.

82. *See* note 47 *supra.*

83. *Id.*, at 648.

84. *Id.*, at 647.

85. *Id.*, at 648.

86. *In re* Application of American Broadcasting Companies, Inc., 18 F.C.C. 2d 641, 645 (1969).

87. *In re* Application of American Broadcasting Companies, Inc., 35 F.C.C. 2d 16, 48 (1972). KCST raised the issue of "overcommercialization," or running more commercials than is allowed United States' stations. KCST claimed A.B.C., itself, had repeatedly warned XETV about the practice which had on occasion cut into network shows. Also, KCST pointed out a lack of local news coverage.

88. *Id.*, at 50. The court translated full text of article 63 as follows:

> All transmission which corrupt the language and those contrary to good customs are forbidden, be it in the form of malicious expressions, insolent words or images, phrases and scenes with a double meaning, defenses of violence or crime; also forbidden is everything which is vilifying or offensive to civic cult of heroes or religious beliefs, or discrimi-

Marcus Welby" which dealt with a Mexican abortion in one episode and network news broadcasts dealing with drug traffic across the border and student unrest in Mexico City were deleted by XETV engineers without conferring with Mexican legal counsel.[89] Additionally, XETV provides no local news while KCST has assisted A.B.C. in providing coverage of nationally significant news stories occurring in San Diego and giving local candidates for office and backers of election propositions a forum to present their viewpoints.[90] The ownership of the Mexican station was also a point raised in the arguments by KCST.[91] XETV is wholly owned by the Azcarraga family of Mexico City who also own Tijuana's other television station, XEWT, Channel 12.[92] XETV's San Diego facilities are owned and operated by Bay City Television, Incorporated, a California corporation closely held by the Azcarragas.[93] The Tijuana studios and transmitters are operated by Radio-Television, S.A., also an Azcarraga enterprise.[94] The nature of the ownership and the relatively untrammeled freedom enjoyed by Mexican station operators were among the points advanced by KCST to show how they could better serve the pub-

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natory towards races; it is also forbidden to use low comedy or offensive sounds.

89. *In re* Application of American Broadcasting Companies, Inc., 35 F.C.C. 2d 1, 11 (1972). XETV reportedly deleted two-minute news clips on student riots in Mexico City in 1968, and "Operation Intercept," a large-scale crackdown on narcotics smuggling in 1970. The "Marcus Welby" sequence was two and one half minutes in length and portrayed an abortion facility in Mexico which is contrary to their law. The chief engineer, known as the "responsible engineer" in Mexico, also kept two entire shows from the air. One proscribed episode dealt with Mexican bandits and corrupt Mexican army officers as part of the "Outcasts" series. The other banned story was from the "Smith Family" and included militant Mexican-Americans in the plot. The engineer must comply with article 63 or face the loss of his license as well as that of the station. Responsible engineers attend classes for three years of a curriculum on their non-technical duties. *Id.*, at 50-51.

90. *In re* Application of American Broadcasting Companies, Inc., 35 F.C.C. 2d 16, 49 (1972). XETV was unable to provide A.B.C. with a news "feed" when the *U.S.S. Pueblo* crew arrived in San Diego, in January, 1969, after their year's imprisonment in North Korea. XETV has mobile studios and equipment, but it remains in Mexico and is used largely for making commercials. Their last local newscast was in 1967.

91. *In re* Application of American Broadcasting Companies, Inc., 35 F.C.C. 2d, 1, 3 (1972).

92. *Id.* Federal regulations in the United States would not allow one owner to have two channels in the same market.

93. *Id.*

94. *Id.*

lic interest through handling the A.B.C. affiliation.[95]

Other F.C.C. considerations could have included a government policy to encourage U.H.F. stations wherever a television market is dominated by the more established V.H.F. channels. KCST, operating on U.H.F. Channel 39, found itself subject to technical criticism. XETV argued that if KCST took A.B.C., 22,000 San Diego area families would be unable to view the network offerings.[96] The logical development of XETV's argument is that public interest would not be served by a U.H.F. station carrying a network's programming if lowland and valley areas now clearly receiving the signal from XETV are unable to get comparable reception from KCST.[97] As a counter, KCST maintained that its signal reaches about ninety percent of the San Diego area television receivers, 80,000 of which are tied in with the growing cable television firms.[98] Cable alleviates the need for a good signal from the air and improves reception even where the U.H.F. signal is of "fringe" quality. In addition, cable television appears headed for an expansion which would enlarge KCST's effective geographic service area.[99]

IV. A PROPOSED SOLUTION

A solution may lie in restructuring or amending the existing bilateral agreements allocating the radio and television frequencies. Following the lead of United States communication law[100] and the avowed purpose of the international agreements,[101] new measures could be drawn up to rectify the situation by determining what actually is the public interest, not only for Americans but the citizens of Mexico as well. Joint studies could survey the need for radio and television services in each particular border area on both sides of the boundary. Perhaps a flexible

95. *In re* Application of American Broadcasting Companies, Inc., 18 F.C.C. 2d 641, 643 (1969). KCST claimed XETV's programming policies were substandard when judged against requirements imposed on United States stations. XETV countered by claiming voluntary compliance with Federal Communications Commission policies such as the equal time rule for political candidates.

96. *Id.*, at 643.

97. *Id.*

98. *Id.*

99. San Diego Evening Tribune, Jan. 17, 1973, § B, at 13, col. 1.

100. 47 U.S.C. § 325(b) (1970).

101. U.H.F. Agreement, *supra* note 27, at § A. The bilateral agreement seeks to "govern the assignment and utilization of the [available television frequencies]."

permit issued by a bilateral commission could allow the licensee of one nation to serve the residents of the other. Redrafting of existing notes could demand a station broadcast chiefly to its named city. This should not indicate anything inherently wrong, for example, with XETV providing non-network programs to San Diego, but it would serve the public interest of residents in San Diego and Tijuana if the needs of each were quantified and steps taken to fulfill them. If it is found that XETV is necessary to achieve a desired level of service to Tijuana and northern Baja California, its English language broadcasting could be stopped or curtailed. With the establishment of a bilateral commission to explore this type of circumstance, a compromise permit might be issued possibly allowing forty percent Spanish programming and sixty percent English or whatever ratio would approximate the requirements of the respective audiences. This flexibility would permit changes in the ratio if alterations in population or other factors are evidenced. Similar procedures conceivably would be suitable along the Canadian-United States border. The parallel cultural patterns and common language along most of the northern border present less of a problem although United States stations selling advertising time opposite Canadian operators may quarrel with that conclusion.[102]

Under such a commission system as proposed, a Mexican licensee could possibly broadcast almost entirely in English whereas a United States station could exclusively transmit Spanish programs. Nevertheless, in either situation, service to the public would be commensurate with the actual needs of the people within the reception area. No suggestion is advanced to re-allocate frequencies and channels to the other nation. The foreseeable nationalistic reaction and vested property interests could make this course of action extremely difficult.[103]

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102. *In re* Application of American Broadcasting Companies, Inc., 18 F.C.C. 2d 641, 644 (1969). Almost forgotten in the XETV-KCST controversy is that the original permit renewal application by XETV was part of A.B.C.'s request to renew all permits for stations in both Mexico and Canada carrying A.B.C. programming. The renewal of 325(b) permits for Canadian stations was approved without comment. Perhaps a broadcaster in the United States who feels an economic interest in blocking a Canadian station from broadcasting network transmissions from this country may some day initiate an action similar to KCST's.

103. Such a system with a commission would not supplant the exchange of notes between nations nor end the need for legislation as § 325(b). Its value would lie in providing a veneer adjustment to assure existing laws, treaties, and

V. CONCLUSION

Following the Circuit Court of Appeals decision and the subsequent memorandum signed by the parties involved giving the A.B.C. franchise to KCST over the previous franchise holder XETV, it seems that other stations in the United States may seek some legal means to end competition for the advertising dollar in this country from Mexican-licensed stations. The issues to date have been decided only on the basis of United States law as normally applied in United States courts. Many Mexican stations have sales offices or even studios north of the border making them subject to the jurisdiction of the United States. As this entire problem involves questions of international law, attention should be focused in that direction to resolve the problem.

As notes exchanged between the Mexican and United States governments have established specific broadcasting frequencies for specific cities, it would seem appropriate that the enumerated cities be the beneficiaries of the public services that each station can provide. Amendments to these agreements could enforce a rule that a station named to a certain community serve that municipality. A bilateral commission could issue permits to applicants desiring to serve transboundary listeners on a full-time or part-time basis depending upon the needs of the respective citizenries as established by independent studies. Social, cultural, economic, and political considerations apparently were behind the assignment of the limited numbers of available frequencies to the available cities by the international pacts. Surveys concentrating on these factors could quantify actual needs on a community by community basis. It would appear to be an evasion of the intent embodied in these agreements to allow a city in the United States to be, in effect, served by more than its allotted share of stations on the broadcasting spectrum. Although the Mexican ownership of XETV chose to continue in the United States market without A.B.C. network programming, the process of international negotiation and agreement may still give Tijuana residents a chance to regain what was deemed rightfully theirs by international agreement, namely public service from television Channel 6 if a demonstrated need can be found.

Should such an assignment procedure prove workable, simi-

agreements more effectively bring the benefits of broadcasting to all levels of society in border communities in light of social, economic, and political exigencies.

lar commissions could be created for control of frequencies along the United States-Canadian border or any international boundary where a need is evident.

This approach could also return to solely Mexican use or partial use all of those stations now broadcasting to the United States cities nearby on television, F.M. or A.M. radio frequencies. Bilateral agreements already name the Mexican communities to be served by these broadcasters. Amendments clarifying the purpose of these notes exchanged between the two governments could reserve specific frequencies for the exclusive use of the indicated cities subject only to specific exception granted on an individual application basis.

Tracy Lowman Tibbals