DIRECT BROADCAST SATELLITES: PROTECTING RIGHTS OF CONTRIBUTING ARTISTS AND BROADCASTING ORGANIZATIONS

Television came into existence in the late 1920's. Since then remarkable progress has been made in bringing programmes to viewing audiences. Perhaps the area in which television has witnessed the most dramatic progress is in the field of communication satellites.

The first satellite, Intelsat I,[1] better known as Early Bird, was launched into geosynchronous orbit[2] in 1965, creating a new era in global satellite communications. From this beginning the satellite system has grown rapidly, with each successive development contributing significantly to advancements in satellite technology and telecommunications.[3]

Protection of the rights and interests of authors, performers, producers of phonograms and broadcasters, whose works are an intrinsic and essential part of television, has likewise been evolving. Rapid changes in technology, creating new ways in distributing and receiving programme material, has required that similar changes and broader interpretation of laws be designed to protect rights in

1. The International Telecommunications Satellite Organization was created as a result of two international agreements: (1) Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, *open for signature* August 20, 1964, 2 U.S.T. 1705, T.I.A.S. No. 5646, 514 U.N.T.S. 26; and (2) Special Agreement, *open for signature* Aug. 20, 1964, 2 U.S.T. 1745, T.I.A.S. No. 5646, 514 U.N.T.S. 48 [hereinafter cited as INTELSAT]. The INTELSAT System consists of a series of communication satellites as well as earth receiving stations. INTELSAT I (Early Bird) was the first series of INTELSAT satellites launched for commercial communication. Since then, the INTELSAT satellites have continued to improve and expand its services and have become a major provider of the global telecommunications network. For a general discussion of INTELSAT, *see* L. HENKIN, INTERNATIONAL LAW 1056-58 (2d ed. 1980).

2. *Geosynchronous Orbit*: This orbit exists 22,300 miles above the earth. The peculiar characteristic of this orbit is that any object placed in 'geosynchronous orbit' will revolve at the same rate of speed with the earth so as to appear to remain stationary over a given point on earth. The value of positioning broadcast satellites in this orbit is that it would be visible, or available, to earth receiving stations during its entire orbital period of 24 hours. *See, e.g.*, Gehrig, *Geostationary Orbit — Technology and Law*, PROCEEDINGS OF THE TWENTIETH COLLOQUIUM ON THE LAW OF OUTER SPACE 267 (Sept. 25-Oct. 1, 1977).

3. *See* COMSAT Annual Report to the President and the Congress (Nov. 30, 1978) [hereinafter cited as COMSAT Annual Report]. *See also*, COMSAT Guide to the INTELSAT, MARISAT and COMSTAR Satellite System, Office of Public Affairs, Communications Satellite Corporation (1980) [hereinafter cited as COMSAT Guide].

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broadcast transmissions.[4] The most recent effort to offer international protection in the telecommunications field was the 1974 Brussels Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite.[5] This endeavor to incorporate the various interests into an international convention has met many obstacles and as of this writing, the Convention has not entered into force. Needless to say, there appears to be a lacuna as to the protection available to those artists[6] and broadcasting organizations involved in satellite transmissions. The problem will become more evident as satellites begin operating in the form of direct television broadcasting.

This Comment first reviews the affect which the development and growth of communication satellites have had on the relationship between the contributing artists and broadcasting organizations. It then examines two available methods of protecting the works of contributing artists and the transmissions of broadcasting

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4. *Transmissions*: Generally the term has not changed from its original meaning. Transmissions are passages of radio waves between the transmitting station and the receiving station. As defined in the Brussels Convention of 1974 Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite, "the word 'transmits' does not include the marketing or supply of fixations such as phonograms or video tapes. However, the definition is broad enough to cover any present or future telecommunications methods for transmitting signals, including not only traditional forms of broadcasting, but also transmission by cable or other fixed communication channels, laser transmission, and transmission by direct broadcasting satellites." UNESCO/WIPO/CONFSAT 142 (prov.) para. 76 (May 21, 1974).

5. *Opened for signature*, May 21, 1974. *Reprinted in* RECORDS OF THE INTERNATIONAL CONFERENCE OF STATES ON THE DISTRIBUTION OF PROGRAMME-CARRYING SIGNALS TRANSMITTED BY SATELLITES, vii-xxiii (UNESCO/WIPO, Brussels, 1974) [hereinafter cited as Brussels Convention]. *See* notes 101-109 *infra*, and accompanying text.

For purposes of this Comment, the same definitions of operative terms set forth in *Article 1* of the Brussels Convention will apply to the following:

Signal: An electronically-generated carrier capable of transmitting programmes.

Programme: A body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution.

Satellite: Any device in extraterritorial space capable of transmitting signals.

Emitted Signal: Any programme-carrying signal that goes to or passes through a satellite.

Derived Signal: A signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have been one or more intervening fixations.

Originating Organization: The person or legal entity that decides what programme the emitted signals will carry.

Distributor: The person or legal entity that decides that the transmission of the derived signals to the general public or any section thereof should take place.

Distribution: The operation by which a distributor transmits derived signals to the general public or any section thereof.

6. *Artists*: Hereinafter this term refers to and is used interchangeably with the authors, performers, producers of phonograms and other programme-contributors. These interests are distinguished from the broadcasting or originating organizations.

organizations in a direct broadcast satellite system. The first suggested method is to obtain legal protection by way of international organizations under the auspices of their terms; the second is to utilize existing multilateral copyright conventions to protect the interests of contributing artists and broadcasting organizations. Next, this Comment takes the position that while adequate protection would optimally require a new international convention, the realization of an acceptable convention would take a considerably long time. Finally, an analysis is set forth examining how an international clearing house approach might be employed to provide an effective means of insuring these interests while awaiting the development of a widely acceptable convention.

I. TRANSITION FROM CONVENTIONAL BROADCASTING TO SATELLITE COMMUNICATIONS

A. Beyond the Horizon of Conventional Broadcasting

Conventional broadcasting may be described as a terrestrial system of transmitting radio waves from an originating organization to a receiving transmitter which then distributes converted signals to home receiving antennae for viewing purposes.[7] In a conventional system the area of broadcast can be geographically defined, delimited by line-of-sight paths between transmitter and receiver.[8] With this ability to define the area of intended use, transmissions of programme-carrying signals have been a matter of contractual agreement[9] between the holder of rights in the programme material and the broadcasting organization; the amount of renumeration to the copyright holder being conditioned upon the size of the broadcast area.[10] Where the programme was to be

7. Horley, *An Approach to Planning Investment in Telecommunications for Development*, 5 STAN. J. INT'L STUD. 114, 126 (1970).

8. *Id.* This area is capable of being geographically defined largely because a conventional broadcast system operates in the 2-10 GH_z radio frequency band where radio waves behave similarly to light waves and, therefore, cannot follow the curvature of the earth or pass around physical obstacles. Consequently, line-of-sight transmissions normally require that receiving terminals be spaced not more than 25 or 30 miles apart.

9. As to the types of broadcast contracts generally entered into *see* C.R. Meeker III and G.A. Padnick, *Counseling Clients in the Entertainment Industry, 1979*. 2 PRACTICING LAW INSTITUTE 997-1027 (1979). Model draft contracts are set out in the 1979 Supplement, *see Id.* (Exhibits A-K). For comparison *see* BBC HANDBOOK 1979, BRITISH BROADCASTING CORPORATION 245-48 (1979).

10. Straschnov, *Legal Protection of Television Broadcasts Transmitted Via Satellite — Against Their Use without the Permission of the Originating Organization*, 17 BULL. CR. SOC. 27 (1969).

broadcast in a country or territory not within the line-of-sight transmission, agreements or international copyright conventions provided for the purchase of certain rights by the rebroadcasting organization in return for royality payments to the contributing artists.[11] If no such agreement or treaty existed, the programme material would not be made available to that particular territory or country.

Broadcasting in a conventional system enabled contributing artists and broadcasting organizations to establish the area capable of receiving the broadcast. The total area of broadcast was the line-of-sight paths between the transmitter and the receiving antennae, plus any territorial agreements with broadcasting organizations not within the line-of-sight path. Technological advancements in broadcasting, however, soon began supplementing the conventional system. The communication satellite was one such device.[12]

The communication satellite was capable of transmitting broadcast signals into areas never before possible in a conventional system.[13] Its most distinguishable characteristic involves the location of the main transmitter in geosynchronous orbit.[14] This altitude permits the greatly increased range of signal coverage;[15] whereas before, terrestial location of the transmitter limited signal distribution to line-of-sight paths.

B. The Satellite Broadcasting System

The first series of communication satellites launched were exclusively point-to-point,[16] requiring ground receiving stations with

11. *Id.* at 28. On the territoriality principle of international copyright, *see* Kirios, *Territoriality and International Copyright Infringement Actions*, 22 COPYRIGHT LAW SYMPOSIUM 53 (1977).

12. Other supplemental forms of conventional television include cable television, multipoint distribution service, subscription television, video cassettes and discs. The development of the communication satellite has been significant in making available a wider area of broadcast use and in changing the basic concept of line-of-sight transmissions. *See* Janky, *Low-cost Receivers and the Use of Direct Broadcast Satellites for Instructional Television*, 5 STAN. J. OF INT'L STUD. 138, 145-50 (1970).

13. A satellite positioned in geostationary orbit is capable of transmitting signals to a vast geographic area extending to approximately one-third of the earth's surface. UNESCO/WIPO/CONFSAT/42 (prov.) para. 7 (May 21, 1974).

14. Janky, *supra* note 12, at 145.

15. *Id.*

16. *Point-to-point satellites*: These were relatively low powered satellites capable only of transmitting weak signals requiring highly sensitive and powerful earth receiving stations to convert the signal and relay it in the same manner as terrestrial signals. INTELSAT I was of this type. *See* COMSAT Guide *supra*, note 3, at 8.

enormously expensive and highly sensitive equipment.[17] These signals were beamed to specific earth receiving stations[18] and were not capable of diffusion into large areas. Because of the high cost to receive the signal few ground receiving stations were established and unauthorized interceptions of these signals were very rare.[19]

Within a short period, distribution satellites,[20] considerably more powerful than their point-to-point predecessors, were designed and used for television broadcasting. These satellites also sent signals to earth receiving stations. But, unlike the point-to-point satellites, reception of the signal was available to many ground receiving stations which were much simpler and less costly in design.[21] The possibility of intercepting and distributing these signals to unintended areas was thereby increased.[22] Concern over unauthorized interceptions was minimal, however, since most programming relating to questions of copyright were still being distributed by conventional means.[23]

Direct broadcast satellites[24] are expected to begin operation af-

17. UNESCO/WIPO/CONFSAT/42 (prov.) para. 8 (May 21, 1974).

18. Ulmar, *Protection of Authors in Relation to the Transmission Via Satellite of Broadcast Programmes*, REVUE INTERNATIONALE DU DROIT D'AUTEUR 4, 6 (July 1977).

19. Note, *The Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite: A Potshot at Poaching*, 7 N.Y.U. J. OF INT'L L. OF POL. 575-77 (1974) [hereinafter cited as N.Y.U. Note].

20. *Distribution Satellites*: These satellites were much heavier and larger than the satellites used previously. Their signals were able to be transmitted directly to ground relay stations, which would then distribute the signal to individual receivers in the same manner as conventional broadcasting systems. *See* Ulmar, *supra* note 18, at 6. The INTELSAT system utilizes these satellites in providing a multiple point-to-point communication network. *See* COMSAT Guide, *supra* note 3, at 9-12.

21. UNESCO/WIPO/CONFSAT/42 (prov.) para. 8 (May 21, 1974). *See also* Ulmar, *supra* note 18, at 6.

22. *Id.*

23. Because of the high cost to broadcast via the satellite circuit, satellite transmissions were limited to news and sports events. Straschnov, *supra* note 10, at 29. But, currently a growing amount of television programmes are being provided through the satellite system. *See* COMSAT Annual Report, *supra* note 3, at 17-18. *See also* Perle, *Is the Bird Pie in the Sky? — Communications Satellites and the Law*, 27 BULL. CR. SOC. 325, 327 (1980).

24. *Direct Broadcast Satellites*: These satellites are sufficiently powerful to transmit signals which are intended for direct reception by the general public. The term direct reception is further defined in two parts by the Radio Regulations of the International Telecommunications Union. Direct reception encompasses both community reception and individual reception. *See* Partial Revision of the Radio Regulations, Final Protocol, July 17, 1971, 23 U.S.T. 1527, 1573, T.I.A.S. No. 7435, 47. Community reception refers to the "reception of emissions from a space station in the broadcasting satellite service from receiving equipment, which . . . may have antennae larger than those used for individual reception, and intended for use: by a group of the general public at one location; or through a distribution system covering a limited area." *Id.* at 1573. Individual reception, by contrast, entails such satellite

ter the 1983 Regional Administrative Radio Conference (RARC).[25] The direct broadcast satellite will transmit signals which require no conversion at a terrestrial station. Unlike indirect broadcasting systems, using point-to-point and distribution satellites, in which programme-carrying signals are directed via satellite to terrestrial stations which then distribute the programme to home receivers, the direct broadcast satellite will send signals directly into home receiving antennae.[26] The use of these satellites provide the greatest potential for unauthorized interception and use of broadcast signals.[27] However, the two distinct advantages of direct satellites—the low cost of operating a direct broadcast system[28] and the efficiency of serving areas where conventional facilities have difficulty reaching[29]—could make it a highly beneficial and feasible method of furthering international communications.[30]

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reception by "simple domestic installations and in particular those possessing small antennae." *Id.* at 1574.

Direct satellite broadcasting using community reception has already been conducted on an experimental basis. The first major use of the direct broadcast satellite was the Indian Satellite Instructional Television Experiment (SITE) during 1975 and 1976. Educational and health planning programmes were beamed to community receivers in isolated Indian villages too remotely located for conventional television systems. *See* Report on the Joint UN/UNESCO Regional Seminar on Satellite Broadcasting Systems for Education and Development, U.N. Doc. A/AC. 105/160 (1975).

25. *See* notes 41 and 46 *infra*. The 1979 World Administrative Radio Conference (WARC) deferred the issue of whether satellite positions should be allocated on a first-come-first served basis or on *a priori* basis in which orbital positions would be divided among the Nations and reserved for later use. The 1983 RARC is expected to decide this issue and allocate orbital positions and frequencies accordingly among the Western Hemisphere countries. *See* STAFF REPORT ON POLICIES FOR REGULATION OF DIRECT BROADCAST SATELLITES, Federal Communications Commission, Office of Plans and Policy (Sept. 30, 1980).

26. Ulmar, *supra* note 18, at 6. *See also* Outer Space Committee, Report of the Working Group on Direct Broadcast Satellites, 24 U.N. GAOR, 1 Annexes 3, U.N. Doc. A/AC. 105/51 (1969).

27. Mora, *The Future of Direct Transmissions Via Satellite From the Aspect of the Author*, PROCEEDINGS OF THE TWENTY-SECOND COLLOQUIUM ON THE LAW OF OUTER SPACE 57 (Sept. 17-22, 1979).

28. *See* Outer Space Committee, Report of the Legal Sub-Committee on the work of its Fourteenth Session, 24 U.N. GAOR, II Annexes 7, U.N. Doc A/AC, 105/147 (1975). For a cost analysis study of ground receiving equipment for satellite broadcasting, *see* Janky, *supra* note 12, 154-65.

29. Dauses, *Direct Television Broadcasting by Satellite and Freedom of Information*, 3 J. SPACE L. 59 (1975). A global telecommunications network could be accomplished by placing three satellites equilongitudinally in geostationary orbit. This would allow signal transmissions to extend to over approximately ninety percent of the earth's surface.

30. As acknowledged by the United Nations General Assembly, "Technological developments in the field of satellite broadcasting hold the promise of unprecedented progress in communications and the promotion of understanding between peoples and cultures, and has emphasized its belief that broadcasting from satellite could make an effective contribution toward meeting the particular needs and interests of the developing countries." Committee

In the event the direct broadcast satellite system is implemented, a problem arises concerning the protection of the legal rights and interests of contributing artists and broadcasting organizations.[31] For instance, if the originating organization intends to broadcast via direct satellite, the range of signal coverage would not be within its control, nor could a well-defined area of broadcast be determined.[32] The programme would be subject to a geographic area much greater than intended and would be susceptible to an increase in piracy. Although this has been true with indirect satellite transmissions, the opportunity for piracy in the case of direct transmissions is much more dramatic as such transmissions may be intercepted by millions of home receivers.[33]

Under the typical broadcast contract, the broadcaster is obligated to remunerate the contributing artist for the area of his intended broadcast.[34] But where the direct broadcast satellite is used, the programme is diffused throughout an area significantly larger than intended and is incapable of being contractually guaranteed.[35] The method of remuneration under such circumstances presents a dilemma. That the contributing artists should not receive compensation for the unauthorized use of their work in areas of unintended broadcast seems inequitable. Yet it is equally inequitable to hold the broadcaster responsible for an entire area of satellite transmissions where he intends the broadcast to reach only a small portion

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on the Peaceful Uses of Outer Space, 29 U.N. GAOR, I Annexes 1, U.N. Doc. A/AC. 105/127 (1974).

31. *See* Straschnov *supra*, note 10. The author sets forth a detailed discussion concerning the problem created between the programme contributors and the broadcasting organizations in the case of transmissions via satellite. *See also* N.Y.U. Note, *supra* note 19, at 576-78.

32. Straschnov, *supra* note 10, at 28.

33. *See* Mora, *supra* note 27, at 58. The term piracy refers to satellite piracy or the activity known as satellite poaching. It is the unauthorized interception and distribution of programme-carrying signals taken from the satellite by unintended receivers. Prior to satellite use, piracy of conventional broadcast signals was relatively limited to the area of line-of-sight transmissions. Most countries could protect against this activity by enacting laws prohibiting the unauthorized interception of broadcast signals. With the development of satellite communications and its ability to send signals into a much greater area, piracy was recognized as a potentially dangerous problem, although it was not an immediate concern. The enormous cost to receive the satellite signal was the major deterrent to pirate activity. As satellites became more powerful and sophisticated, however, the cost of receiving equipment was reduced and a proliferation of earth receiving stations was seen. Unauthorized interceptions of satellite signals has now become a serious concern to those who use the satellite system. *See* UNESCO/WIPO/CONFSAT/42 (prov.) para. 6 and 8 (May 21, 1974).

34. Straschnov, *supra* note 10, at 27. *See also* note 9 *supra*.

35. Straschnov, *supra* note 10, at 28.

of that area.[36]

The problem which presents itself is how to ensure equitable remuneration to contributing artists and still enable broadcasters full use of the satellite system. The question must be resolved and the answer must guarantee protection to the contributing artists as well as the broadcasting organizations. As advancements in technology bring about actual operation of direct broadcast satellites, coextensive international standards designed to protect against potential wide-scale abuse of the direct satellite signal will be necessary to ensure future use of the system.

II. PROSPECTS OF OBTAINING INTERNATIONAL PROTECTION FOR WORKS TRANSMITTED VIA DIRECT BROADCAST SATELLITE

A. International Organizations

The major international institution with the competency to cover and coordinate activities of a direct broadcast satellite system is the United Nations. The specialized agency of the United Nations, the International Telecommunications Union (ITU),[37] is essential in accommodating the direct broadcast satellite; under the coordinating role of the United Nations, the Committee on Peaceful Uses of Outer Space (COPUOS)[38] is also engaged in seeking an international agreement for use of direct broadcast satellites. The nature and function of both United Nations agencies must be ex-

36. *Id. See also* Mora, *supra* note 27, at 58.

37. The International Telecommunications Union [hereinafter cited as ITU] came into being in accordance with Article 52 of the International Telecommunications Convention, *open for signature* November 12, 1965, 18 U.S.T. 575, T.I.A.S. No. 6267 [hereinafter cited as ITC].

The purposes of the ITU are to maintain and extend international cooperation in the use of telecommunications of all kinds, and to promote the development of technical facilities and the efficiency of telecommunication services. ITC art. 4, sec. 1. For an indepth understanding of the nature of the ITU, *see* D. LEIVE, INTERNATIONAL TELECOMMUNICATIONS AND INTERNATIONAL LAW: THE REGULATION OF THE RADIO SPECTRUM, (1970).

38. The Committee on Peaceful Uses of Outer Space [hereinafter cited as COPUOS] was given permanent authorization on December 12, 1959. G.A. Res. 1472, 14 U.N. GAOR, Supp. (No. 16) 5-6, U.N. Doc. A/4354 (1959).

COPUOS and its two Sub-Committees provide the focal point in the United Nations for all matters concerned with outer space, including direct broadcast satellites. A Working Group on Direct Broadcast Satellites was further established by COPUOS to work closely with the two Sub-Committees and other United Nations agencies in studying and reporting on technical matters of direct broadcasting. For further discussion on COPUOS activities as they relate to satellite broadcasting, *see* K. QUEENEY, DIRECT BROADCAST SATELLITES AND THE UNITED NATIONS (1978).

amined in order to ascertain their appropriateness and capability for securing legal protection of those interests involved in unauthorized interception of direct satellite signals.

1. *The International Telecommunication Union*. The ITU is a specialized agency of the United Nations responsible for regulation of international communication services and allocation of the radio spectrum.[39] With the first launching of communication satellites, radio became a necessary part in the operation of space activities. It soon became essential for the ITU not only to focus on questions involved in regulating conventional radio communications, but to direct its attention to specific questions raised in regulating space telecommunications.[40]

Thus, in 1959, the World Administrative Radio Conference (WARC)[41] of the ITU, adopted the Radio Regulations[42] annexed to the International Telecommunication Convention[43] providing for technical measures in allocation of frequency bands to space services.[44] Over the years, the Radio Regulations have been modified and amended.[45] Various rules and decisions relating to interna-

39. As a specialized agency of the United Nations, the ITU functions as an independent intergovernmental organization related to the United Nations by special agreement. Its members consist of the same members as the General Assembly, plus additional territories. At present there are 154 member countries. It is the major international institution for achieving global agreements on the use of telecommunications. *See* L. HENKIN, *supra* note 1, at 1050-56.

40. *See* Leive, *supra* note 37, at 68-72.

41. World Administrative Radio Conferences (WARC) of the ITU, composed of all ITU members, are responsible for revising regulations, formulating policy and coordinating use of the frequency spectrum on a world-wide level. WARC is a basic feature in the regulatory scheme of coordinating international use of the frequency spectrum as any resolutions adopted by the conference are annexed in the Radio Regulations of the ITC. A conference may be called whenever necessary to deal with specific concerns of international communications, such revisions would, of course, be limited to the nature of the conference's purpose. Only the General World Administrative Radio Conferences (GWARC) have jurisdiction over the entire Radio Regulations. *See* ITC, *supra* note 37, art. 7. *See also* D. LEIVE, *supra* note 37, at 19.

42. The Radio Regulations were adopted and annexed to the ITC at the 1959 WARC in Geneva. Radio Regulations, *open for signature* December 21, 1959, 3 U.S.T. 2377, T.I.A.S. No. 4893.

43. The ITC and annexed Radio Regulations are the major international regulatory scheme governing the apportionment and use of the radio frequency spectrum. These provisions are binding on member Nations. *See* D. LEIVE, *supra* note 37, at 11-14.

44. *Id.* at 339-54.

45. Subsequent amendments to the 1959 Geneva Radio Regulations, revising the Regulations in the area of space telecommunications, were adopted by the ITU Radio Conferences in 1963, 1971 and 1977. Partial Revision, November 8, 1963, 1 U.S.T. 887, T.I.A.S. No. 5603; Partial Revision, July 17, 1971, Final Protocol, 23 U.S.T. 1527, T.I.A.S. No. 7435.

tional space telecommunications also have been extended to the operation of the satellite network, including specific provisions for direct broadcasting satellites.[46] Nevertheless, the ITU may be incapable of providing legal protection for the interests and rights contained in direct satellite transmissions; its regulations are limited to technical matters,[47] and it has no regulatory or judicial authority to enforce its provisions.[48]

In the past, ITU delegates have not been receptive to the idea of introducing new provisions into the ITU's Radio Regulations in order to protect the satellite signal from piracy.[49] The ITU has maintained that its Radio Regulations were designed to control the transmission rather than the content of the signal[50] and that questions concerning private intellectual property rights contained within the signal were beyond the scope of its Convention.[51] Recently, some ITU Nations have avered that the Radio Regulations have gone beyond their technical meaning[52] and that underlying support exists with respect to legal and political issues involved in

46. The ITU Conference in 1971 allocated radio frequency bands to the broadcasting satellite service; in 1977 a world-wide plan for operating direct broadcast satellites in the 12GHz band was established; in 1979 allocation of the spectrum was made for the Western Hemisphere; however, the question of how the orbital slots will be allocated among the Nations in that region will depend on the outcome of the 1983 Regional Administrative Radio Conference (RARC). *See* STAFF REPORT OF POLICIES FOR REGULATION OF DIRECT BROADCAST SATELLITES, Federal Communications Commission, Office of Plans and Policy, (Sept. 30, 1980).

47. *See* notes 49-55 *infra*.

48. *See* notes 56-59 *infra*.

49. Alternative approaches in finding a legal solution to the problem of satellite piracy were discussed at the Third Committee of Governmental Experts on Problems in the Field of Copyright and of the Protection of Performers of Phonograms and Broadcasting Organizations Raised by Transmissions via Space Satellites, Niarobi, 2-11 July 1973. Upon consideration of the ITU as a possible protector of individual rights within the signal, the Kenya delegation asserted that the ITU and the delegations to the ITU did not wish to become involved in any problem of private rights. Attempts had been made to introduce provisions protecting satellite signals into the Radio Regulations or the ITU Convention in 1971 and in connection with the 1973 Conference, but both attempts had failed. UNESCO/WIPO/SAT. 3/23 para. 19 (Aug. 15, 1973).

50. *See, e.g.*, Christol, *The International Telecommunication Union and the International Law of Outer Space*, PROCEEDINGS OF THE TWENTY-SECOND COLLOQUIUM ON THE LAW OF OUTER SPACE 35, 47-49 (Sept. 16-22, 1979). *See also* Moore, *Direct Broadcast Satellites by Treaty or Regulation: The Committee on Peaceful Uses of Outer Space v. the ITU*, PROCEEDINGS OF THE NINETEENTH COLLOQUIUM ON THE LAW OF OUTER SPACE 341 (Oct. 12-15, 1976).

51. *See* note 49 *supra*, at para. 23.

52. For instance, there has been various interpretations as to the meaning of Article 7, Paragraph 428A of the Revised Radio Regulations adopted at the ITU's 1971 WARC. 23 U.S.T. 1527, 1648; T.I.A.S. 7435. Paragraph 428A provides that "In devising the characteristics of a space station in the Broadcasting-Satellite Service, all technical means available

satellite transmissions.[53] This view has been strongly challenged by other delegates who uphold the technical purpose of ITU's regulatory scheme. They assert that the provisions were established for the sole purpose of coordinating telecommunications and eliminating interferences with radio and television transmissions,[54] not as approval for the political and legal issues.

In view of the ITU's persistence to remain strictly technical in nature, any protection afforded to legal interests in the signal transmission would be incidental.[55] Such indirect protection, without substantive support, would be unacceptable for it would lack certainty as to the nature of the right given protection.

Aside from the technical nature of the regulations, the ITU possesses neither extensive regulatory nor judicial authority.[56] Its regulations are not achieved by enforcement, but are complied with on the basis of cooperation for the common good and for each State's own self-interest.[57] It is generally recognized that failure to abide by terms of the ITU's technical framework would result in chaos and ineffective operation of the telecommunications system.[58] The same compelling self-interest is not inherent in providing protection to the content of the signal, for supposedly the telecommunications system could exist and still operate effectively regardless of whether the content were given such protection.[59] Therefore, even if the ITU would initiate such measures, there would be a lack of regulatory power in enforcement of these provisions.

The conclusion that the ITU's regulations would fail to ad-

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shall be used to reduce, to the maximum extent practicable, the radiation over the territory or other countries unless an agreement has been previously reached with such countries."

The view taken by some delegates was that adoption of Paragraph 428A gave approval of the politically debated issue of prior consent. They maintained that Paragraph 428A, as a part of international law, would place a State engaging in direct satellite broadcasting without the prior consent of the receiving State in violation of international law. Christol, *supra* note 50, at 48-50.

53. *Id.*

54. Other views interpreting Paragraph 428A supported the technical purpose of the ITU; that Paragraph 428A was adopted on technical grounds to avoid harmful interferences of broadcast transmissions and problems of unavoidable overspill. *Id.*

55. The traditional policy of maintaining a technical characteristic was ultimately followed; the ITU Radio Regulations serve to guarantee effective coordination and orderly development of the telecommunication satellite system and thus to further the operation of an integrated satellite network. *Id.*

56. D. LEIVE, *supra* note 37, at 24-25.

57. *Id.* at 25.

58. *Id.*

59. *Id.*

dress political and legal issues in the operation of direct broadcast satellites is justified. There is one other United Nations agency, however, which may govern the political and legal aspects of direct broadcast satellites.

2. *United Nation's Committee on Peaceful Uses of Outer Space*. In 1967, by Resolution of the General Assembly, COPUOS was directed "to study the technical feasibility of communications by direct broadcast from satellites and the current and forseeable development in this field."[60] Later, by Special Resolution, the General Assembly asked that the COPUOS Legal Sub-Committee "elaborate principles governing the use by states of artificial air satellites for direct television broadcasting with a view to conclude an international agreement or agreements."[61] After receiving reports and proposals from interested countries, the Legal Sub-Committee succeeded in formulating a set of guidelines in the form of Draft Principles.[62] The Draft Principles consist of nine areas in which there has been consensus: (1) Purposes and objectives, (2) Applicability of international law, (3) Rights and benefits, (4) International cooperation, (5) State responsibility, (6) Duty and right to consult, (7) Peaceful settlement of disputes, (8) Copyright and neighboring rights and (9) Notification to the United Nations.[63]

The eighth principle enumerated is in reference to copyright and neighbouring rights.[64] It provides that "States should cooperate on a bilateral and multilateral basis for the protection of copyright and neighbouring rights by means of appropriate agreements . . . and should give special consideration to the interests of developing countries."[65] As stipulated, there is no explicit grant of pro-

60. U.N.G.A. Res. 2260 (XXII), Dec. 3, 1967.

61. U.N.G.A. Res. 2916 (XXVII), Nov. 9, 1972.

62. By the end of its 1976 session, the Working Group on Direct Broadcast Satellites had completed the texts of nine principles for the regulation of direct satellite broadcasting. U.N. Doc. A/AC. 105/171 Annexes II (1976).

63. The text of the current Draft Principles governing the use of satellites for direct broadcasting has remained as agreed on in previous sessions. The current text appears in U.N. Doc. A/AC. 105/271 Annex I (1980).

64. *Neighbouring Rights*: The term is used in some countries to describe the performer's rights. The name is derived from the fact that their origins are to be found in the neighborhood of copyright. These rights differ from copyright in the extent of protection and in regard to the subjects to which they relate: the subjects of copyright are literary and artistic works whereas the subjects of neighbouring rights are performances, phonograms and broadcasts. Ulmer, *The Rome Convention for the Protection of Performers, Producers of Pronograms and Broadcasting Organizations*—Part II, 10 BULL. CR. SOC. 165 (1962-63).

65. For a provisional assessment of the formulated principles set forth in the Draft and

tection with regard to those rights, only that cooperation should be based on a bilateral or multilateral basis. Therefore, further examination of copyright protection provided by international conventions and individual state legislation is required.

There is no consensus among nations as to all the issues raised in the Draft Principles. Completion of the Draft has been hindered by disagreement on three critical issues: (1) Prior consent, (2) Programme content and (3) Inadmissible broadcasts.[66] So, although the Draft Principles may eventually serve as the international standard governing the non-technical aspects of direct broadcast satellites, until the legal dispute over these three issues are resolved, they remain non-binding on the States.[67] Assuming the Draft does reach completion, compliance with the copyright principle would still involve analyzing the feasibility of each source of existing protection.

B. International Copyright Conventions

Protection of individual works on an international level is provided through bilateral copyright agreements or multilateral copyright conventions. The four most apposite multilateral copyright conventions offering protection to the broadcasting industry are: (1) The 1971 Paris Revision of the Berne Convention for the Protection of Literary and Artistic Works,[68] (2) The 1971 Paris Revision of the Universal Copyright Convention,[69] (3) the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations[70] and (4) the 1974 Brussels

problems which may be encountered, *see, e.g.*, Kopal and Kunz, *Present and Future Legal Problems of Direct Television Broadcasting and Their Reflection in Principles Governing This Kind of Space Activities*, PROCEEDINGS OF THE TWENTIETH COLOQUIUM ON THE LAW OF OUTER SPACE 307, 312-14 (Sept. 25-Oct. 1, 1977).

66. From the outset the Legal Sub-Committee of COPUOS has been confronted with substantial diverging views and positions taken by different State delegations on these three important principles. As of the final meeting of the Working Group on April 2, 1980, no further agreement or compromising solution was reached. For an understanding of the differing views taken by the States, *see* K. QUEENY, *supra* note 38.

67. The Draft Principles must achieve consensus on all matters and then be recommended to the General Assembly where a final vote will be taken. *Id.* at 33.

68. The Berne Convention for the Protection of Literary and Artistic Works, *open for signature*, September 9, 1886, *revised* at Berlin on November 13, 1908, *revised* at Rome on July 2, 1926, *revised* at Brussels on June 26, 1948, *revised* at Stockholm on July 14, 1967, and *revised* at Paris on July 24, 1971, latest revision *reprinted in* 7 Copyright 135 (1971) [hereinafter cited as Berne Convention].

69. Universal Copyright Convention, *open for signature*, September 6, 1952, *revised* at Paris on July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868 [hereinafter cited as UCC].

70. Rome Convention for the Protection of Performers, Producers of Phonograms and

Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite.[71]

1. *The 1971 Paris Revision of the Berne Convention and UCC.* The Berne Convention and the UCC are the two major international treaties offering copyright protection to authors of literary and artistic works.[72] Under the provisions of the 1971 Paris Revision of both the Berne Convention and the UCC, the authors' rights with respect to broadcasting is set forth.[73] Article II*bis* of the Berne Convention guarantees "authors of literary and artistic works exclusive rights to authorize the broadcasting of their works to the public by any other means of wireless diffusion of signs, sounds or images."[74] Article IV*bis* of the UCC ensures the authors "exclusive rights to authorize reproductions by any means, public performances and broadcasting of their works."[75]

The application of these two Conventions to direct broadcast satellites presents many drawbacks. First, the interpretation of the legal definition of broadcasting, under both Conventions, has raised some doubt regarding its application to broadcasts via satellite.[76] The legal definition of broadcasting, as defined in its conven-

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Broadcasting Organizations, *open for signature*, October 26, 1961, 496 U.N.T.S. 44 [hereinafter cited as Rome Convention].

71. Brussels Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite, May 21, 1974, *see* Brussels Convention, *supra* note 5.

72. Generally, the Berne Convention has been characterized as having a more comprehensive, higher standard and stringent set of requirements than other copyright conventions. The Convention provides "national treatment" of foreign works as well as "minimum protection" regardless of the national protection existing in any particular country.

The UCC provides protection on a more limited basis than what is provided by Berne. Formalities required for securing copyright are minimal, thus enabling those countries to become members who would not otherwise be able to meet stricter standards of affording protection. *See, e.g.*, Note, *The Question of Berne Entry for the United States*, 11 Case W. Res. J. Int'l L. 421 (1979).

73. Both Conventions provide for periodical revisions so as to accommodate for developments in technology or changes in sociatal standards. The most recent was the 1971 Paris Revision in which a simultaneous revision of both the Berne and UCC was undertaken. *See, e.g.*, David, *Basic Principles of International Copyright*, 21 BULL. CR. SOC. 1 (1973-74).

74. Berne Convention, *supra* note 68, art. II*bis*. Article II*bis* was adopted at the Brussels Conference in 1948, and has been subsequently retained in the 1971 Paris Revision.

75. UCC, *supra* note 69, art. IV*bis*.

76. Ulmar, *supra* note 18, at 12-18. Two opposing opinions exist as regards the interpretation of the concept of broadcasting in Convention law. On the one hand; interpretation is in the classic, narrower sense as relating solely to the emission of signals which can be received directly by the public; the other interpretation is in a broader sense, that the emissions towards a satellite of programme-carrying signals intended for an indirect reception by the public only after the intervention of terrestrial stations constitutes the act of broadcasting. *Id.* at 18.

tional sense,[77] was drafted to provide exclusive rights only to those emissions which were *intended for direct reception by the general public*.[78] For purposes of direct broadcast satellites, this definition could only be applied if the satellite is viewed as a relay,[79] and for the most part, the majority view is to include direct broadcasts in the traditional concept of broadcasting.[80] Even if the definition is expanded to include direct broadcast satellites, other obstacles are encountered.

Both Conventions require contractual obligations between the author and broadcasting organizations in order to assess the payment of royalties to the author.[81] Since it will be impossible to delimit the area of intended broadcast with direct satellite transmissions, compliance with the Conventions is made difficult; there are no further stipulations which address the problem of how contractual arrangements could be carried out.[82]

It is questionable whether either Convention can offer ade-

77. Article II*bis* of the Berne Convention, as adopted in Brussels 1948, simplified the terminology of the previous Article II*bis* of the 1928 Rome Act. The change in expression from "communication to the public by broadcasting" to "broadcasting" was not intended as a change in the meaning of broadcasting. In making the revision, no modification in the method of broadcasting was imagined. It was not important that the broadcast was received by the general public; all broadcast signals could be intercepted by ordinary receiver sets, and therefore, at the moment of diffusion, there was broadcasting in the legal sense. The possibility that diffusion of signals could occur via satellite — and not capable of being received by ordinary receivers, was not envisaged. *Id*. at 14.

78. The terminology adopted by the Conventions coincided with the definition already existing in the Radio Regulations of the ITC. Article I, section 28, of the Radio Regulations annexed to the ITC, defined radio-diffusion as a kind of radio service which is to be received directly by the general public. ITC, *supra* note 37, art. 1, sec. 28. Under the terms of the Radio Regulations, the frequencies used for satellite relays were different than those used for broadcasts. See Ulmar, *supra* note 18, at 18 (emphasis added).

79. Transmissions in a direct broadcast system have been held to be within the meaning of the definition of broadcast. Because the satellite signal is to be relayed directly to the general public without the intervening third party, the public receives the originating organization's signal directly from the satellite by use of his home receiving antenna. The satellite merely functions as the technical means through which the originating organization emits the signal for interception by the public. *Id.* at 14. *See also*, Szilagyi, *International Copyright Questions of Indirect Broadcasts by Satellite*, PROCEEDINGS OF THE TWENTY-SECOND COLLOQUIUM ON THE LAW OF OUTER SPACE 213 (Sept. 17-22, 1979). The situation where signals were emitted to a satellite to be relayed to a ground receiving station for distribution to the general public has created the main difficulty in interpreting the meaning of broadcasting.

80. It has been acknowledged that the concept of broadcasting as intending reception of the signal directly by the public, would encompass both individual reception and community reception of broadcast satellite signals. *See* Brussels Convention, *supra* note 5, para. 106.

81. For discussion on the contractual obligations arising under Convention Law in a situation involving satellite broadcasting, *see generally* Ulmar, note 18, at 26-30.

82. *Id*.

quate protection. Broadcasting as defined under both Conventions did not encompass the use of broadcast satellites and consequently their provisions do not sufficiently address satellite usage. An inherent drawback also exists in the fact that these two Conventions offer protection only to the authors of literary and artistic works.[83] Other interests which are involved in broadcast transmissions, such as the performer, producer of phonograms and broadcasting organizations, are given no recognition under the Berne Convention or the UCC.[84] Finally, these Conventions are in force only in those countries which are party members — their terms would not apply to territories or countries not signatories of the respective Conventions.[85] Given the wide geographical extent of direct broadcast satellites, in many instances there would be no affordable protection available to the author. For these reasons, it would be more advantageous to seek other protection which would give comprehensive international protection.

2. *The Rome Convention*. The Rome Convention offers protection to groups not otherwise recognized under the Berne Convention or the UCC.[86] It offers protection to three parties whose rights and interests have been subject to abuse in the light of technological developments: performers, producers of phonograms and the broadcasting organizations.[87] These interests are treated separately under the Convention. Article 7 of the Rome Convention provides performers with rights against the broadcasting and communication of their works to the public without their consent.[88] Article 10 of the Rome Convention provides producers of

83. For general information concerning the scope of the Conventions, *see* R. BROWN, JR., CASES ON COPYRIGHT, 808-23 (2d ed. 1974).

84. *Id.*

85. Although the Berne and the UCC are the two major international agreements providing copyright protection, neither Convention includes all leading nations. For example, the Soviet Union is not a member of either Convention, and the United States is not a member of the Berne. An unfortunate consequence in application of these agreements is that between two countries which are not members of the same Convention, no copyright protection exists under the terms of either agreement.

86. Creation of individual rights in the field of intellectual property was necessary as invention and development of technical means simplified the process of reproduction. Modern copyright laws embracing the 'arts' of photography, filming, sound recordings and broadcasting, including transmission through satellite and wired diffusion were required to prevent technology from endangering intellectual creation. *See* Von Rauscher, *The Rome Convention Rights: A Comparative Review of Legislation and International Legal Development Over 12 Years*, 21 BULL. CR. SOC. (1972-74).

87. *Id.*

88. Rome Convention, *supra* note 70, art. 7.

phonograms the right to authorize or prohibit the direct or indirect reproduction of their phonograms.[89] Article 13 provides the broadcasting organizations with the right to authorize the re-broadcast of their broadcasts.[90] Many problems arise as to the application of this Convention in various situations.

Further provisions of the Rome Convention reflect the divergent views among the three parties concerning the extent to which protection is guaranteed. For instance, minimum rights provided in Articles 7, 10 and 13 are subject to the various State's exceptions and reservations.[91] Regardless of whether the Articles grant minimum rights to foreign works, they do not necessarily apply under that country's domestic laws.[92]

Another example of the extent to which application may be diversified is Article 12 which provides for the use of phonograms in broadcasting and communication to the public.[93] Under Article 12, equitable remuneration is to be paid to performers or to producers or to both for the use of commercial phonograms in broadcasting or communicating to the public.[94] However, the decision of

89. *Id.*, art. 10.

90. *Id.*, art. 13.

91. "The Rome Convention, unlike the Berne or UCC which are based on the general principle of national treatment, is based on the twin principles of national treatment and material reciprocity. National treatment may be defined as "the treatment accorded to domestic performances, phonograms, and broadcasts by the domestic law of the Contracting State in which protection is claimed, "subject to the minimum protection provided for in Articles 7, 10, 12 and 13. Contracting States undertake to grant this minimum protection, subject to permitted reservations and exceptions, even if they do not grant it to domestic performances, phonograms, or broadcasts. The principle of material reciprocity is dealt with by way of reservations which any Contracting State is entitled to make by declaration under Article 16." Dittrich, *The Practical Application of the Rome Convention*, 26 BULL. CR. SOC. 287, 299 (1978-79). The differing effects which National legislation could have on the scope of protection of the various rights is also set forth.

92. *Id.* at 290.

93. Article 12 of the Rome Convention reads as follows:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration. Rome Convention, *supra* note 70, art. 12.

94. This provision is an optional one as pursuant to Article 16 regarding the admissibility of reservations. As provided in Article 16:

> Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:
>
> (a) as regards Article 12:
>
> (i) it will not apply the provisions of that Article;
>
> (ii) it will not apply the provisions of that Article in respect of certain uses;

how to pay is left to the individual States[95] and if they wish, contracting States have the option not to apply any of these alternatives.[96] Therefore results in each State as to which rights are given protection vary. This situation is rather unfavorable to a direct broadcast satellite system, in which the signal is expected to extend into widely different areas.

Other problems indicating that the Rome Convention would lack support on a world-wide basis are that since its creation in 1961, only a small number of States have adhered to the Convention.[97] In addition, under Article 24, only countries which are members of the Berne Convention or UCC may enter into the Convention.[98] Since reception of the signal will be possible in countries which are not parties to the Berne Convention or UCC, many receiving countries may not be able to become a member of the Rome Convention and therefore, will not be afforded any protection of their foreign works.

Finally, there is some disadvantage to the authors interest. While the author's authorization is always required for the use of his work, where further authorization is required by the producer, performer or broadcaster, their refusal could limit the use of the authors work, and thus adversely impact upon the authors economic interest.[99]

(iii) as regard phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;

(iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection;

(b) as regards Article 13, it will not apply item (d). of that Article; if a Contracting State makes such a declaration, the other Contracting States shall not be obliged to grant the right referred to in Article 13, item (d), to broadcasting organizations whose headquarters are in that State. *Id.* art. 16. *See also* Ulmar, *The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations—Part III*, 10 BULL. CR. SOC. 219 (1062-63). A comprehensive analysis of the protection provided to each of three parties under the Rome Convention is given.

95. *Id.*

96. *Id.*

97. *See* Dittrich, *supra* note 91, at 291.

98. As provided in Article 24:

This Convention shall be open for accession by any State . . . provided that . . . such State is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works. Rome Convention, *supra* note 70, art. 24.

99. Dittrich, *supra* note 91 at 288.

3. *The Brussels Convention*. The Brussels Convention was the first international convention which attempted to address the specific legal problems which satellite broadcasts were raising.[100] The central issue was whether to grant affirmative rights to originating organizations and if so how to balance the rights of programme-contributors to equalize the situation.[101]

In dealing with the conflict between broadcasters and programme-contributors, the final solution was a compromise which simply required the State to take on the responsibility of providing adequate protection of these interests.[102] Instead of granting the broadcasters new or additional rights, which in turn would have required granting corresponding new rights to the copyright owners, the Convention only required that the "States take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended."[103] It was left to the States to determine what measures were adequate and should be applied.[104]

Although it was a hopeful solution at the time, the Brussels Convention now has little support. The contention is that the protection which the author, performer or producer of phonograms receives under this Convention is only provided indirectly, since the Convention states no specific rights whatsoever. As one author predicts:

> If the nature of the States' legislation is in perogatives of civil law, claims will likely be recognized in behalf of the *originating organization*, and if enforcement comes under penal or administrative law, the proceedings will probably be upon the request of the originating organization. So in any event, there is no guarantee that the copyright owner, for his part, would have standing to initiate a proceeding against unauthorized usage in his behalf.[105]

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100. Recognizing a potential problem in the transmission of programme-carrying signals via satellite, a committee of governmental experts was established to study the problems being raised. Three preparatory meetings of the Committee of Governmental Experts on Problems in the Field of Copyright and of the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Raised by Transmissions Via Space Satellites, held in Lausanne, April 21-30, 1971; Paris, May 9-17, 1972; and Nairobi, July 2-11, 1973, led to the final Brussels Convention, May 24, 1974. See Brussels Convention, *supra* note 5, para. 5-6.

101. *Id.* para. 10-11.

102. *Id.* para. 12.

103. *Id.* art. 2.

104. *Id.* para. 12.

105. Ulmar, supra note 18, at 28.

Furthermore the Convention does not attempt to deal with direct transmissions; its provisions relate to indirect ones only.[106] Finally, only four States have ratified the Convention, hence it has not entered into force.[107]

The Brussels Convention has received criticism as to the sufficiency of protection which it offers.[108] The failure to achieve a more comprehensive agreement has been linked to the period in which the Convention was being discussed. It was brought about at a time when little was known of the potential of satellite broadcasting; only point-to-point satellites were in use and very little programming was broadcast via the satellite circuit. There was also a lack of documentation as to the actual occurrences of piracy. Consequently, formulation of the Convention was primarily based on hypothetical facts.[109]

III. WORKING TOWARDS AN INTERNATIONAL CONVENTION

A. Reaching a New Convention

In view of the existing international agreements, any protection which would be extended to authors, performers, producers of phonograms and broadcasting organizations would be insufficient in addressing the problem directly. The answer to the specific question of providing protection to those interests in direct satellite transmissions optimally lies in a new international convention.[110] Such a convention, setting forth explicit policies and procedures with respect to each interest group, would insure a comprehensive scheme of protection on an international level. But as one commentator has noted "judging from the past experiences such international law-making would consume at least ten years during which an international exlex will prevail."[111]

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106. As set forth in Article 3:

> This Convention shall not apply where the signals emitted by or on behalf of the originating organization are intended for direct reception from the satellite by the general public. Brussels Convention, *supra* note 5, art. 3.

107. As provided in Article 10:

> This Convention shall enter into force three months after the deposit of the fifth instrument of ratification, acceptance or accession. Brussels Convention, *supra* note 5, art. 10.

108. *See* N.Y.U. Note, *supra* note 19, at 596.

109. *Id.*

110. *See* Mora, *supra* note 27, at 57.

111. *Id.*

B. Alternatives in the Interim

During the time in which it takes to convene an international convention, lack of legal protection could detrimentally effect various groups. The following suggests an approach to extend the necessary protection while awaiting the conclusion of such a convention.

1. *Maintaining the Contractual Basis*. Protection of copyright interests in the past has been provided by contractual means.[112] Maintaining a contractual basis for protection may still be utilized if certain accommodations can be made.

Guidelines or model contracts with reference to both national and international broadcasting should be made available to copyright owners and those bodies representing them.[113] In the case of direct broadcast satellites, a "blanket agreement"[114] should set forth the originating organization's obligation to pay royalties based, as before, upon the area in which it intends to broadcast. It should be further stipulated that a secondary obligation will be undertaken by an *international collection and distribution agency*,[115] which is to be responsible for payment in those areas of unintended reception. To secure some safety measure, it should be expressly provided that the original organization would be required to pay an additional fee in the event that the collection and distribution agency did not pay.[116]

Under this agreement, the originating organization is required to pay only for that area which it intended and in no event would

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112. *See* notes 9 & 10 *supra*.

113. Preparation of guidelines and models for drafting of contracts for the use of works in a direct satellite broadcast could be undertaken by international or national copyright information centres. Such guidelines or models would establish the terms authorizing the use of copyright works in the event of direct satellite broadcasting. *See, e.g., Guidelines for the Creation of National and Regional Copyright Information Centres*, 11 COPYRIGHT BULL. 43, 45 (1977).

114. *See* Mora, *supra* note 27, at 58. One solution suggested by this commentator was the conclusion of blanket agreements between those bodies representing the copyright owners' interest and the television-broadcasting organizations obliging the latter to pay an additional fee when a programme is broadcast through a satellite. The agreement suggested by this Comment does not oblige payment in this manner.

115. *See* Ulmer, *supra* note 18, at 26-28. *See also* Szilagyi, *supra* note 79, at 214. Although both commentators discuss indirect broadcasting satellites, a similar situation creating a secondary liability in order to reduce the liability of the original broadcaster could be applied in the instance of direct broadcasting.

116. Rather than *ab initio* obliging the broadcast organization to pay, his liability would arise only when the secondary obligation was breached.

be held liable for the entire range of the signal where there has been no reception.[117] Beyond the area of intended broadcast, the originating organization would only be held liable for those areas where the broadcast has been received, and then only where there has been no remuneration from the international collection and distribution agency.

The conclusion of this type of agreement attempts to balance and equalize the disparity which would otherwise be encountered between these two parties. Thus, the copyright holder receives remuneration for the broadcast of his work into unintended areas and the broadcasters' motive to transmit signals into increasingly smaller areas of intended broadcast (thereby expanding the area for which a particular country would be liable) is curtailed by the requirement of an additional fee should that country not pay.

2. *Nature of an International Collection and Distribution Agency*. The proposed collection and distribution agency would function essentially like an international clearing house[118] for copyright interests in works broadcast by direct satellite.[119] The agency would assume the duties of collecting fees on an international basis and distributing the royalties to copyright proprietors whose works have been received in areas of unintended broadcast.[120] It would also be set up to resemble an international repository[121] for copyright works and use of those works in direct satellite transmissions.

Similar to a clearing house approach,[122] successful operation would require mandatory enrollment of copyright works, registration of all broadcasting organizations which would use the direct

117. To avoid possible allegations of price-fixing and violation of anti-trust laws, the requirement of additional payments by original broadcasters would be contingent or operative only in certain circumstances. The contractual arrangement would not require broadcasters to pay regardless of whether or not the broadcast was used, but only in the event of non-payment by the secondary agency for works used in unintended areas.

118. For a description of a copyright clearing house, *see* Finkelstein, *ASCAP as an Example of the Clearing House System in Operation*, 14 BULL. CR. SOC. 2 (1966-67).

119. *See* Mora, *supra* note 27, at 58.

120. *See, e.g.*, Cunningham, *Information Retrieval and the Copyright Law*, 14 BULL. CR. SOC. 22 (1966-67).

121. The goals and functions of a collection and distribution agency would include such activities as obtaining and maintaining information on copyright works and owners, and exchanging information with other copyright centres. Numerous other activities could also be assumed by such an agency. *See* note 113, *supra*.

122. For comparison, *see* Hampton, *Clearing House as Optimum Solution to Copyright Problems Affecting Communication of Educational and Scientific Information*, 10 BULL. CR. SOC. 18, (1962-63).

broadcast system and a prescribed royalty payment schedule. Information as to the copyright work would include the names and addresses of the proprietors and the scope and duration of the copyright obtained.[123] The information regarding the broadcasting organizations which would use the direct satellite system, would include location of the organization, the frequency which the organization operates and the satellite transponder from which the signal is to be relayed from and the purpose and type of programme-material which it proposes to use.[124] A further requirement would be that the originating organization keep regular contact with the agency as to all programmes broadcast via direct satellite. To achieve a cooperative and comprehensive system of broadcast registration, it would be the task of the collection and distribution agency to keep informed of recent developments and entry of new broadcasting organizations into the direct satellite system.

One way in which a system of broadcast registration could be made possible, is by means of the IFRB's Master Frequency Register[125] which records assignments of frequencies and geostationary satellite orbit. This Register gives formal international recognition to the use of those allocations granted by the ITU.[126] To avoid further problems of record keeping and reporting requirements by the broadcasting organizations, copyright owners and broadcasters should be encouraged to negotiate on this point in their broadcast contract.[127] Thus, it could be expressly provided that the originating organization should cooperate with the international collection and distribution agency for direct broadcasts in supplying accurate documentation of its broadcasting scheduling. The final requirement for the successful operation of the collection and distribution agency is a prescribed royalty payment schedule.

The prescribed royalty schedule[128] would be based upon the area in which the broadcast signal could be disseminated. The ob-

123. *Id.*

124. *Id.*

125. The ITU carries out much of its technical activity through the International Frequency Registration Board (IFRB). Under Article 10 of the 1972 ITC, the IFRB is directed to keep recordings and registration of radio frequency assignments as well as recordings of satellite positions assigned in geostationary orbit. *See* ITC *supra*, note 37, art. 10.

126. *Id.*

127. *See* note 113, *supra*.

128. The function of a prescribed royalty schedule would be to establish fair and reasonable rates to be paid by the geographic coverage area of the satellite. Adjustment of fees would take into consideration various factors, such as whether the country was a developed or developing country and the ability of a country to pay.

jective of this schedule, as distinguished from other clearing house payment formulas,[129] would not require the broadcasting organizations to pay for that area, rather, the schedule would set royalty rates for those unintended areas which receive and use the broadcast.

To carry out the duty of collecting fees, the agency should take the initiative to enter into agreements with national entities responsible for the coordination and operation of national broadcasting systems.[130] This agreement could elucidate a plan for surveying the receiving area in order to assess and compensate for the amount of unintended programming used by each country. Entering into an agreement of this type would require State cooperation and in some instances difficult negotiations.

In seeking to conclude these agreements, additional efforts in obtaining support could be undertaken. For instance, the agency should maintain close connection with various national societies, companies and associations[131] who actively engage in impeding the occurance of piracy.[132] Also, some support may be solicited from two inter-governmental organizations, the United Educational, Scientific and Cultural Organization (UNESCO)[133] and the World Intellectual Property Organization (WIPO)[134] which carry out many

129. Ordinarily payment of royalty fees are provided through a system of licensing requirements by which broadcasting organizations are required to pay a set amount based upon the scope of his service. *See, e.g.*, Stewart, *The Clearinghouse System for Licenses*, 14 BULL. CR. SOC. 8 (1966-67).

130. This would help to alleviate problems which may arise in establishing rates or collecting fees. Cooperation from State bodies and various national entities would assure a more effective system. In any event, State officials and entities should be frequently advised of any actions taken by this agency. *See generally* note 113, *supra*.

131. Public institutions, associations or guilds of authors, translators, publishers, producers of phonograms and videograms, and specialists in the field of copyright could provide great assistance in establishing and effecting the goals of an international copyright institution. *Id.*

132. For instance, in Portugal, a culmination of joint efforts by authorities and the Portuguese Society of Publishers brought charges against forty alleged pirates. This case is discussed in 91 BILLBOARD 3, 113 (January 20, 1979).

133. UNESCO: An inter-governmental organization with 145 member States. It is responsible for developing plans and programmes for copyright. UNESCO's role in the field of space communications has been to develop broadcasting and the flow of educational, scientific, cultural and informational materials. *See* K. QUEENY, *supra* note 37, at 117-137.

134. WIPO: An inter-governmental organization with 81 member States which individually carries out programmes concerning intellectual property on a world-wide basis. WIPO serves as Secretariat of the Berne Union and is statutorily represented on the advisory board of UCC. *See* Bogsch, *The World Intellectual Property Organization: Its Recent Past and Its Future Plans*, 26 BULL. CR. SOC. 195 (1978-79).

programmes and activities in the field of copyright and neighbouring rights.

Furthermore, since the satellites and ground receivers must be of compatible design,[135] local governments should be encouraged to regulate or periodically inventory the manufacture, importation and distribution of home receivers.[136] After compilation and evaluation of the data, a percentage of the sale of receivers capable of picking up unapproved channels would be payable to and collected by the agency for distribution among those deserving of royalty payments.

IV. SUMMARY AND CONCLUSION

When communication satellites first began operating a conflict arose between the contributing artists and the broadcasting organizations. This conflict, although not seriously impeding early broadcasts, has become a growing concern. Satellite technology is about to take another step towards advancing telecommunications in the form of direct broadcasting. Implementation of such a system will subject programme-carrying signals to wide geographical coverage and even further the risk of abuse. Guarantees that certain legal measures are available to protect the interests and rights of contributing artists and broadcasting organizations in a direct satellite transmission will be necessary to assure its actual operation.

This Comment has examined various international organizations and conventions in considering possible sources from which legal protection of direct broadcast satellite transmissions could be obtained. The ITU, as the international regulator of communication services, could possibly extend some protection over the signal content. But the ITU remains devoted to providing the technological framework for such services and any legal protection for interests and rights within the transmission would be indirectly provided.[137]

Another international organization which may oversee the operation of direct broadcast satellites is the United Nations COPUOS. COPUOS has established a set of non-binding Draft Principles which, if given final consensus, would serve to govern future legal problems of direct broadcast satellites. Recognition of

135. *See* Maio, *Direct Broadcasting By Satellite*, COMM/ENT. J. OF COM. AND ENT. LAW 193, 197-98 (1977-78).

136. *Id.*

137. *See* notes 39-59 *supra*, and accompanying text.

the need for copyright protection, as far as contributing artists and broadcasting organizations are represented, is stipulated under the principle of Copyright and neighbouring rights. This principle, however, does not establish any specific measures granting protection to those interests in a direct satellite transmission. Thus, even if the Draft were to reach completion, contributing artists and broadcasting organizations would be required to look elsewhere to determine the scope of their rights.[138]

Examination of the major copyright conventions offering protection to these parties has likewise revealed a lack of comprehensive protection in the situation of direct broadcast satellites. The Berne Convention and the UCC offer protection to authors in the reproduction and rebroadcasting of their works which they have not authorized. But neither Convention was designed for the use of direct satellites for television broadcasting. Thus, application of these Conventions fails to take into account all aspects necessary to fully provide protection to those interests and rights involved in a satellite transmission.[139]

The Rome Convention offers copyright protection to performers, producers of phonograms and broadcasting organizations. Representation of these three interests in one convention has created some disparity and uncertainty as to the extent of protection granted in different situations. Furthermore, the relatively small number of adherents to the Rome Convention reflects the view that this Convention would be insufficient to grant legal protection on a world-wide basis.[140]

Finally, consideration was given to the Brussels Convention. Although not currently in force, this was the first attempt to bring about a resolution of the conflict which satellite broadcasting was creating. Strong differing viewpoints as to what rights and protection would be explicitly guaranteed, resulted in placing the problem in the hands of State legislatures, leaving the issue of specific rights quite unsettled. In addition to its failure to address the problem of legal rights directly, the Convention expressly excluded direct broadcast satellites from its purview.[141]

In the light of the above, it is obvious that protection available under existing international organizations and copyright conven-

138. *See* notes 60-67 *supra*, and accompanying text.
139. *See* notes 72-85 *supra*, and accompanying text.
140. *See* notes 86-99 *supra*, and accompanying text.
141. *See* notes 100-09 *supra*, and accompanying text.

tions is inadequate as applied to signal transmissions from a direct broadcast satellite. The suggested approach set forth in this Comment, which may provide the legal protection unique to direct broadcast satellites, is a proposed international collection and distribution agency. In essence, this agency would undertake to collect fees in those unintended areas which actually received the broadcast signal. These fees would then be distributed to the contributing artists whose works had been used. This type of solution presupposes that national governments and various interest groups would cooperate with and support the operation of such an agency.[142]

This Comment acknowledges that a new international convention would be the most effective way in assuring legal protection of the contributing artists and broadcasting organizations. Conclusion of such a convention, however, may take a long time. With the potential of a direct broadcast satellite system to offer a far reaching and cost-efficient means of global communication, allowing the conflict between these two groups to interfere with its successful operation would be unwarranted. It has been the intention of this Comment to outline a feasible approach which may serve as a temporary solution until a new international convention is ultimately reached.

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142. *See* notes 113-136 *supra*, and accompanying text.