DIRECT BROADCAST SATELLITES AND FREEDOM OF SPEECH

In the twentieth century, television has become the dominant medium for national and international communication.[1] With the advent of satellite broadcasting, viewers of the world are now able to see such significant events as man's lunar space travels and the Olympic games.

Communication through the use of satellites is a present reality. Direct Broadcast Satellites (D.B.S.) provide simultaneous transmissions of newsworthy events to a worldwide audience[2] through the use of only three orbiting satellites.[3]

This capability presents the means of using this form of communication in a variety of beneficial ways. For example, pro-

1. Heinz-Dietrich Fischer, *Forms and Functions of Supranational* Communication, in INTERNATIONAL COMMUNICATIONS 5 (H. Fischer & G. Merill ed. 1970).

2. Current technology has primarily used point-to-point broadcasting. This system requires that the television signal be transmitted by wire or cable to a sending station on earth. The signal is then transmitted to an orbiting satellite which rebroadcasts the signal to an earth receiving station where it is then sent, by wire or cable, to a regular television broadcasting station for broadcast into the home. Chayes & Chazen, *Policy Problems in Direct Broadcasting from Satellites*, 5 STAN. J. INT'L. STUD. 4 (1970). For a more detailed discussion of communication satellite technology, see AMERICAN INSTITUTE OF ASTRONAUTICS AND AERONAUTICS, 19 COMMUNICATION SATELLITE SYSTEMS TECHNOLOGY (R. Marsten ed. 1966).

Direct Broadcast Satellites are being developed in two distinct modes. One mode requires the use of a community receiver to pick up the signal from a satellite and relay it to home sets via cable. In the other mode, the signal will be broadcast directly from the satellite to the home receiver. Seamons, *Returns from Space Exploration: Overview on Space Achievements*, in ORGANIZING SPACE ACTIVITIES FOR WORLD NEEDS (E.A. Steinhoff ed. 1971). The community receiver mode is the less costly and will be put into use for the first time by the United States in 1974. Committee on the Peaceful Uses of Outer Space, Report of the Working Group on Direct Broadcast Satellites, U.N. Doc. A/AC. 105/117, at 3 (1973) [hereinafter cited as Working Group Report]. The United States will use Direct Broadcast Satellites (D.B.S.) in the remote areas of the Rocky Mountain States, Alaska, and the Appalachians in order to improve education and the dissemination of news.

3. The satellites are placed in orbit at an altitude of 22,300 miles from the earth. At this altitude the satellits orbit the earth at same speed as the earth revolves, thereby seeming to be fixed in one position. This is termed a geostationary orbit. Each of the three satellites can effectively transmit over one-third of the earth's land mass. LAY & TAUBENFIELD, THE LAW RELATING TO ACTIVITIES OF MAN IN SPACE (1970).

graming via Direct Broadcast Satellites can be used to supplement education of persons located in remote areas, to disseminate news of impending disasters or storms, and to present sporting and cultural events. This medium, used properly, may aid in the exchange and understanding of divergent social, political, and religious viewpoints in an effort to promote world peace.[4]

Since it is possible for a nation with the necessary technology to broadcast directly into the homes of citizens of other nations, the use of Direct Broadcast Satellites raises a number of problems. Conceivably, the content of such broadcasts may prove offensive to a receiving nation to such an extent that message content may be regulated or censored.[5]

Several underdeveloped nations fear that transmissions via Direct Broadcast Satellites may undermine cultural mores or the prevailing political system.[6] Other nations, including the Union of Soviet Socialist Republics, object to the use of Direct Broadcast Satellites on the ground that propaganda transmissions may lead to social discontent, racial hatred, or war.[7]

Recognition of these problem areas necessitated a series of conferences to study and to make proposals regarding the regulation of program content.[8] In October of 1972, the United Na-

4. D'Arch, *Direct Broadcast Satellites and Freedom of Information,* in THE INTERNATIONAL LAW OF COMMUNICATIONS 149 (E. McWhinney ed. 1971). *See also* Working Group Report, *supra* note 2, at 10.

5. Some, but certainly not all of the other problem areas include frequency allocation and management as indicated in Leive, *Regulating the Use of the Radio Spectrum,* 5 STAN. J. INT'L STUD. 21 (1970); initiation and regulation of national and regional systems discussed in Colino, *Intelstat, Doing Business in Outer Space,* 6 COLUM. J. TRANSNAT'L L. 17 (1967); *Draft "Intersputnik Agreement,"* reproduced in 7 INT'L LEGAL MATERIALS 1368 (1968); Note, The Legal *Problems of International Telecommunications with Special Reference to Intelsat,* 20 TORONTO L.J. 287 (1970). *See also* Errlia, *Problems Raised by the Content of Television Programs Transmitted by Telecommunications,* in THE INTERNATIONAL LAW OF COMMUNICATIONS 149 (E. McWhinney ed. 1971).

6. Gold, *Direct Broadcast Satellites: Implications for Less-Developed Countries and for World Order,* 12 VA. J. INT'L L. 66 (1971). Mr. Gold points out that many countries fear being forced into accepting U.S. programming with its emphasis on individualism and activism. *See also,* Smith, *The Legal Ordering of Satellite Telecommunications: Problems and Alternatives,* 44 IND. L.J. 337 (1969).

7. Zhukov, *Tendencies and Prospects of the Development of Space Law: The Soviet Viewpoint,* in NEW FRONTIERS IN SPACE LAW 73 (E. McWhinney & M. Bradley ed. 1969).

8. *Introductory Report on Telecommunications by Satellite* in INTERNATIONAL ASTRONAUTICAL FEDERATION, PROCEEDINGS OF THE ELEVENTH COLLOQUIUM ON THE LAW OF OUTER SPACE 166 (New York 1966).

tions, after considering various regulatory proposals, adopted the U.S.S.R. proposal to assign the Committee on the Peaceful Uses of Outer Space to study the problem of regulation.[9] At this juncture, the United States opposed the U.S.S.R. proposal on the ground that insufficient emphasis was placed on the free flow of information and ideas and that the beneficial aspects of Direct Broadcast Satellites were not recognized.[10]

When the Working Group on Direct Broadcast Satellites met in June of 1973, the United States issued a precautionary plea that regulation of D.B.S. would be premature at that time.[11] Although the Working Group was unable to establish definite regulations,[12] two significant draft proposals were annexed to the final Report.[13]

Since neither draft proposal was adopted by the Working Group, both will be reconsidered in 1974. This Comment will analyze both regulatory proposals. The provisions dealing with regulation of program content will be measured against the standards of international law and the first amendment to the United States Constitution to determine whether the United States should become a Party to an agreement embodying these provisions.

I. INTERNATIONAL PRINCIPLES AFFECTING THE FREE FLOW OF INFORMATION

A. Regulation of Freedom of Information in Outer Space

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies[14] is the primary document in a consideration of the regulation of activities in outer space. The treaty states that the activities of man in outer space will be regulated according to international law and the Charter of the United Na-

9. G.A. Res. 2916, 27 U.N. GAOR Supp. 30, at 14, U.N. Doc. A. 8730 (1972).

10. *See* U.N. Monthly Chronicle Vol. IX, No. 11, at 37 (1972) and 67 U.S. DEP'T STATE BULL. 686-87 (1972).

11. 69 U.S. DEP'T. STATE BULL. 197 (1973).

12. Working Group Report, *supra* note 2, at 13. The Working Group on Direct Broadcast Satellites will hereinafter be referred to as the Working Group.

13. *Id.*, annex III and annex IV.

14. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (1967) [hereinafter cited as Outer Space Treaty].

tions.[15] This means that the U.N. Charter, other positive international law, and customary international law, will each affect the regulation of man's activities in space.

The preamble of the Outer Space Treaty is the only section which deals directly with the use of communications in space. The preamble contains a statement which condemns the use of any propaganda "designed or likely to provoke or encourage any threat to the peace. . . ."[16] The legal basis for the prohibition is a 1947 General Assembly resolution condemning certain types of propaganda.[17] At the very least, the preambular statement and the wording of article III of the Outer Space Treaty can be used to prevent the use of propaganda which is likely to provoke or actually cause a breach of the peace.[18]

There is disagreement as to whether the Outer Space Treaty applies to space communications.[19] Realistically viewed, the purpose of the Outer Space Treaty was to set down broad guidelines for the regulation of all of man's activities in space. In view of the emphasis placed on the treaty by the Working Group,[20] it is likely that the treaty will be used as a basis to regulate specific activities in space.[21] There is no reason to assume that it cannot be used to support a legal regime for satellite broadcasting.[22]

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15. *Id.*, at 208. Article III provides that:

> States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United States, hereinafter referred to as the U.N. Charter, in the interest of maintaining international peace and security and promoting international cooperation and understanding.

16. Outer Space Treaty, *supra* note 14.

17. G.A. Res. 110, U.N. Doc. A/519 (1947). For purposes of analysis, it is assumed that the types and definitions of the prohibited propaganda mentioned in the preamble are identical to those contained in the 1947 U..N. resolution.

18. Outer Space Treaty, *supra* note 14, article III.

19. Valters, *Perspectives in the Emerging Law of Satellite Communication*, 5 STAN. J. INT'L STUD. 53, 64 (1970). Valters points out that the U.S. and the U.S.S.R. disagree as to whether or not specific provisions of the treaty apply to satellite communication.

20. Working Group Report, *supra* note 2. *See also* G.A. RES. 2916, 27 U.N. G.A.O.R. Supp. 30, U.N. Doc. A 8730 (1972).

21. Other regulatory documents covering man's activities in space refer to the Outer Space Treaty as one basis for the regulation. Working Group Report, *supra* note 2, annex III & IV.

22. *See* Valters, Perspectives in the Emerging Law of Satellite Communication, 5 STAN. J. INT'L STUD. 53, 64-65 (1970).

The Outer Space Treaty states that the principles embodied in the U.N. Charter apply to outer space.[23] The U.N. Charter does not make any specific reference to the use of speech or the concept of freedom of information.[24] However, it does take a positive approach to strengthening and promoting peace.[25] The U.N. Charter also states that "promoting and encouraging human rights . . ."[26] constitutes one of the purposes of the United Nations. Article 2 requires that member nations respect the principle of sovereignty[27] and refrain from the threat or use of force against the "territorial integrity or political independence of any State . . ."[28] Based on the foregoing, a nation could reasonably argue that the only types of communication which can, or should be, prohibited are those which seek to breach the peace or violate the territorial integrity or political sovereignty of another nation. The inclusion of the concept of freedom of information as one of the basic human rights to be promoted and encouraged does not necessarily follow from a reading of the U.N. Charter.

The Outer Space Treaty also states that outer space activity will be regulated according to principles of international law.[29] There has never been general ratification of a treaty dealing with the concept of freedom of information.[30] The Universal Declaration of Human Rights[31] does specifically point to and advocate this concept as a basic human right. Article 19 of the Declaration of Human Rights expresses the view that one has the right to freedom of opinion and is free to seek, receive, and impart information using any media and crossing any frontier.[32] Yet, there is some dispute as to whether the Declaration of Human Rights has been accepted as customary international law.[33]

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23. Outer Space Treaty, *supra* note 14, Preamble.

24. The Charter states that members will observe basic human rights but does not mention any specific rights. *See* U.N. CHARTER, art. 55.

25. *Id.*, art. 1, paras. 1 & 2.

26. *Id.*, art. 1, para. 3.

27. *Id.*, art. 2, para. 1.

28. *Id.*, art. 2, para. 4.

29. Outer Space Treaty, *supra* note 14, Preamble.

30. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. 16, U.N. Doc. A/6316, at 52 (1966) [hereinafter cited as Convent on Civil and Political Rights].

31. G.A. Res. 217A, U.N. Doc. A/810 (1948) [hereinafter referred to as the Declaration of Human Rights].

32. *Id.*, art. 19. This article sets out what the General Assembly believes are the rights involved in the free flow of information.

33. Eleanor Roosevelt, one of the U.S. representatives involved in the vote

While the document has had substantial support among nations, it is difficult to assume that it will be accepted as a statement of international law since the treaty designed to implement it has not been ratified by the requisite number of nations.[34]

While there is little positive or customary international law upon which to base a strong case for the free flow of information, awareness of the concept is widespread. There has been a recent clamor over its status[35] and some current resolutions seem to indicate that the principle is thriving, even if not universally accepted.[36] One could argue that the United Nations Educational, Scientific and Cultural Organization's (UNESCO) Declararation of Guiding Principles in the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange[37] is evidence that the concept is gaining acceptance. In its preamble, the UNESCO Declaration cites the U.N. Charter, the Declaration of Human Rights, and the Outer Space Treaty as its guiding principles.[38]

The UNESCO Declaration was adopted in 1972 and presented to the Working Group on D.B.S. in 1973.[39] Although no action was taken on the Declaration, it will be among the agenda items facing the Working Group in their 1974 meeting.[40] It may be difficult to characterize the UNESCO Declaration as evidence of the growing acceptance of the concept of freedom of information in light of the fact that a number of representatives

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on the declaration, stated that it was not to be taken as a binding agreement or a statement of law. 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 243 (1965). *See also* Von Glahn, *The Case for Legal Control of "Liberation" Propaganda*, 31 LAW & CONTEMP. PROB. 553 (1966). Others have expressed the view that the Declaration has a great deal of influence on many nations in the conduct of their relations. O'Brien, *International Propaganda and Minimum Public Order*, 31 LAW & CONTEMP. PROB. 589 (1966).

34. Covenant on Civil and Political Rights, *supra* note 30. This covenant incorporates the Declaration of Human Rights and is designed to implement that document as a treaty.

35. Working Group Report, *supra* note 2.

36. Covenant on Civil and Political Rights, *supra* note 30. This document, which considers freedom of information a basic right, has not come into force as a treaty. Thus, there is no positive international law dealing with freedom of information. *See also* UNESCO Declaration in text accompanying notes 37-38 *infra*.

37. *See* U.N. Doc. A/AC. 105/109 (1973).

38. *Id.*, at 4.

39. Working Group Report, *supra* note 2, at 2.

40. *Id.*, at 16.

to the Working Group failed to mention it at all.[41] In fact, in speaking of the Declaration, a UNESCO spokesman said "It is simply a statement, a declaration which binds no one and which we feel does not establish principles to which objections could be taken."[42]

Positive international law does not support the concept of freedom of information. Even though the International Covenant on Civil and Political Rights was unanimously adopted by the General Assembly of the United Nations,[43] it does not yet have the force of a treaty.[44] There exists an additional question as to exactly what freedom of information means.[45]

B. Propaganda and Direct Satellite Broadcasting

Propaganda is of primary concern for the regulation of D.B.S.[46] The capability of D.B.S. to reach such vast audiences makes it an excellent medium for propaganda purposes. Based upon the existing prohibitions against various types of propaganda and the proposals submitted to the Working Group, a nation has ample legal principles on which to base actions taken against unwanted propaganda.[47]

A party to the Outer Space Treaty is held responsible for all its activities in space.[48] Jamming is considered as one means of stopping propaganda, but several factors mitigate against its use. The United Nations has passed resolutions against the jamming of broadcasts,[49] and jamming is not available to a majority

41. Working Group Report, *supra* note 2, at 1. Although the UNESCO report was before the committee, many delegations made no mention of it in their summaries of the conference. *Id.*, at 2.

42. Report of the Committee on the Peaceful Uses of Outer Space, U.N. Doc. A/AC. 195/P.V. 113, at 27 (1972).

43. [1966] U.N.Y.B. OF HUMAN RIGHTS 418 (1966).

44. Covenant on Civil and Political Rights, *supra* note 30. The covenant is still open for signature.

45. Working Group Report, *supra* note 2, at 13. The chairman of the Working Group here summarized the many conflicting views on freedom of information.

46. Thomas, *Approaches to Controlling Propaganda and Spillover from Direct Broadcast Satellites*, 5 STAN. J. INT'L STUD. 167 (1967). *See also* Zhukov, *supra* note 7.

47. *See* Smith, *Pirate Broadcasting*, 41 S. CAL. L. REV. 769 (1968); *See also* Comment, *Direct Broadcasting From Satellites: The Case for Regulation*, 3 N.Y.U.J. INT'L L. & POL. 72 (1970).

48. Outer Space Treaty, *supra* note 14 at art. 1.

49. 2 U.N. GAOR 14, U.N. Doc. A/519 (1948).

of nations due to the fact that it is both technically difficult and costly.[50]

The U.N. Charter specifically forbids the threat of force against the sovereignty of another State.[51] This is a sufficient basis to make a case against threatening or warmongering propaganda. The Outer Space Treaty expressly condemns propaganda which may cause a breach of the peace or a threat of war.[52] That the Outer Space Treaty provides that outer space is to be used only for peaceful purposes, reemphasizes that prohibition.[53]

Theoretically, there does not appear to be a problem with making a case against warmongering propaganda.[54] However, it is difficult for a group of nations to adequately define warmongering propaganda. A routine communication received by two adjacent nations could conceivably be called warmongering propganda in one nation and objective reporting in the other. Innocuous television broadcasts could be interpreted as subtly urging

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50. Difficulties in jamming are apparent in that:

> Jamming is unquestionably effective as far as radio waves are concerned, but a satellite broadcasting television signals presents singular problems. Recalling that a DBS transmits high frequency television signals in a line-of-sight manner which are then picked up by a parabolic or dish antenna, it is clear that one cannot jam them in the same simple manner as lower frequency radio waves. Longer wave length radio waves are reflected off the ionosphere, diffusing through the whole space below and, in effect, arriving at the receiving antenna from every direction. The television waves from a direct broadcast satellite arrive at the receiving antenna in a single direction from the satellite. To jam such waves, interfering waves must, according to the design of the receiving antenna, arrive at approximately the same angle from above. Therefore, depending on the selectivity of the receiving antennas it is trying to overpower, an earth-bound jamming tower will only be able to jam in a limited area around its base.
>
> One may similarly jam the satellite as it is receiving its signals from the originating earth station, for now a jamming station will be able to approximate the line-of-sight taken by the target signal. But this is technically difficult to accomplish and easy to counter. It appears that the sole means of reliable direct control left the ordinary nation by the DBS concept is technically very difficult, if not impossible. If there is to be any guarantee of order, it must be imposed by the agency controlling the satellites themselves.

Comment, *Direct Broadcasting From Satellite: The Case For Regulation*, 3 N.Y.U.J. INT'L L. & POL. 72, 81-82 (1970) (footnotes omitted).

51. U.N. CHARTER, art. 2, para. 4.

52. Outer Space Treaty, *supra* note 14, Preamble.

53. *Id.*

54. Larson, *The Present Status of Propaganda in International Law*, 31 LAW & CONTEMP. PROB. 439, 442 (1966). Mr. Larson points out the five sources of international law as expressed in the U.N. Charter, and goes on to give examples of each where warmongering propaganda has been declared illegal. *See also* Babrakov, *War Propaganda: A Serious Crime Against Humanity*, 31 LAW & CONTEMP. PROB. 473 (1966).

a nation's people to accept an adverse political doctrine or to overthrow the government.

If it is difficult to recognize and regulate the most overt and offensive type of propaganda, it is more difficult where the propaganda is less offensive.[55] Many nations do consider the regulation of propaganda to be of prime importance. Before a treaty regulating D.B.S. can achieve this goal, there is a need for a more workable definition and a better understanding of the term "propaganda."

II. THE DOMESTIC LAW OF THE UNITED STATES AND FREEDOM OF INFORMATION

The first amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or the press; . . . ."[56] From this amendment a substantial amount of case law has developed in an attempt to help define the concept of freedom of speech and the press in the United States.

A. Constitutional Nexus Between Treaties and Free Information

With the approval of the Senate, the President can enter into treaties which, along with the Constitution and Congressional Acts, are a part of the supreme law of the land.[57] The scope of this power, however, has been the source of some controversy. While the Constitution does not expressly limit the treaty making power, the evolving case law has imposed some definite limitations.[58] The case of *Missouri v. Holland*,[59] involving a treaty be-

55. Falk, *On Regulating International Propaganda: A Plea for Moderate Aims*, 31 LAW & CONTEMP. PROB. 622 (1966). *See also* Von Glahn, *The Case for Legal Control of Liberation Propaganda*, 31 LAW & CONTEMP. PROB. 553 (1966).

56. U.S. CONST., amend. I.

57. The President of the United States has the power to enter into treaties, subject to the approval of two-thirds of the Senate. U.S. CONST., art. II, § 2. The "Supremacy Clause" puts treaties on par with the Constitution and congressional acts. *Id.*, art. VI, § 2.

58. Geofroy v. Riggs, 133 U.S. 258, 267 (1889).

> The treaty power, as expressed in the Constitution, is in its terms unlimited except by those restraints which are found in that instrument against the actions of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids. . . .

59. 252 U.S. 416, 432 (1920).

tween the United States and Great Britain regulating the hunting of game birds which migrate between Canada and the United States, held that a treaty will not be enforced if it violates any provision of the Constitution. *Reid v. Covert*,[60] involving a treaty between the United States and Japan, has been cited for the principle that a treaty, to be enforceable as law, is certainly subject to the constraints imposed by the Constitution.[61]

These cases indicate that a treaty entered into by the United States will be subject to careful scrutiny to ensure that Constitutional standards are met. By analogy, a treaty which seeks to regulate the program content of satellite broadcasting must meet the requirements of the first amendment.

Accordingly, the United States Government takes the position that freedom of information is basic to a free society and must be embodied in any treaty regulating satellite broadcasting.[62] To understand the scope of freedom of information, one must examine the case law setting forth domestic standards governing that freedom. Although the freedom to speak and publish is guaranteed by the Constitution, there are certain limitations upon that freedom.[63] For example, laws which impose civil or criminal sanctions for libelous utterances have been held valid.[64] Similarly, speech and writings of an obscene nature have not received the full protection of the first amendment.[65] Speech which tends to incite the listener to violate a criminal law[66] or advocates the participation in the active overthrow of the government[67] has also been prohibited.

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60. 354 U.S. 1, 17 (1957).

61. Ruddy, *American Constitutional Law and Restrictions on the Content of Private International Broadcasting*, 5 INT'L LAW. 102, 107 (1971).

62. The State Department indicated that:

> The approach of the Soviet proposal presents difficult problems because it would affect very fundamental principles to which the United States and many other countries attach cardinal importance. I refer to our strong 200-year-old belief in the free exchange of information and ideas. A primary basis for the maintenance of democratic institutions is the controlling application of this principle, which is also, of course, enshrined in the United Nations Charter.

67 U.S. DEP'T STATE BULL. 686 (1972).

63. Schenck v. United States, 249 U.S. 47, 52 (1919). The Court states that: "The most stringent protection of free speech would not protect a man falsely shouting fire in a public theatre."

64. New York Times v. Sullivan, 376 U.S. 255 (1964).

65. Miller v. Calif., 413 U.S. 15 (1973).

66. Schenck v. United States, 249 U.S. 47, 52 (1919).

67. Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961).

To understand freedom of speech in the United States, it is necessary to determine the method of regulation as well as the type of speech regulated. Most of the proposals for the regulation of satellite broadcasting call for the evaluation of the program content prior to broadcast.[68] United States case law has set forth stringent requirements which must be adhered to before a prior restraint may be imposed.[69] Statutes, regulations, and injunctions which seek to prohibit publication or prevent expression before it occurs, have been held invalid unless specific requirements are met.[70] Only in unusual circumstances, such as war, have prior restraints been allowed to stand.[71] Thus, a treaty which allows the government to censor program content prior to broadcast would have to be very specific in its terms and implementing legislation in order to meet Constitutional standards.

The requirements outlined above are apparently applicable if control is to be exercised over the content of programs emanating from the United States to either foreign or domestic audiences. The fact that the Communications Satellite Act[72] has created a quasi-commercial satellite system indicates that a large number of the programs transmitted abroad will be commercially produced and sponsored. While there is little doubt that the government can exercise some control over what is communicated to other nations,[73] the extent of this regulation has not been tested in the light of commercial programming. The restrictions on the control of incoming programming will also be required to stand up to Constitutional safeguards. The right of freedom of information seems to encompass the right to receive information not otherwise prohibited as well as to impart it.[74]

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68. Working Group Report, *supra* note 2, annex III and IV.

69. Near v. Minnesota, 283 U.S. 697 (1931); Bantam Books v. Sullivan, 372 U.S. 58 (1963).

70. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

71. Near v. Minnesota, 283 U.S. 697 (1931).

72. Communications Satellite Act of 1962, ,76 Stat. 419, 47 U.S.C. §§ 701-44 (1964) [hereinafter referred to as COMSAT]. The Act makes COMSAT a corporation whose stock is traded publicly and whose officers are outside the government. The corporation, however, works very closely with the government. *Id.*, at §§ 721, 732-734.

73. 18 U.S.C. § 953 (1948). Communications with foreign governments which are intended to influence their relations with the United States are prohibited.

74. Klien, *Toward an Extension of the First Amendment: A Right of Acquisition*, 20 U. MIAMI L. REV. 114 (1965) [hereinafter Klien].

B. Constitutional Control of Propaganda

The desire of nations to exclude offensive propaganda seems to be one of the main reasons for controlling program content. The United States domestic law, enacted to regulate warmongering or subversive speech, outlines the types of speech which can or cannot be regulated. However, the majority of the applicable cases deal with the control of private propaganda initiated within the territorial confines of the United States and directed toward the overthrow of the receiving government. D.B.S. will pose several new legal problem areas. There will be programs which originate abroad and are authored both by governments and by individuals. Programs designed for consumption in the United States could be subject to some regulation. Public and private broadcasts emanating from the United States and aimed at foreign consumption may also generate a need for controls.[75]

The control of the content of incoming programs, both public and private, will also give rise to some practical problems. If the United States Government seeks to regulate propaganda contained in this type of programming, the cases which construe the Smith Act[76] will be applicable. The Smith Act was designed to regulate that type of speech advocating the illegal overthrow of the United States Government by force or violence. The act, and case law interpreting it, specifically set out the type of speech which can be regulated.

The constitutional validity of the Smith Act was upheld in *Dennis v. United States.*[77] The Supreme Court held that Congress has the power to protect the government from violent overthrow and that any expression or utterance designed to incite such a result could be limited.[78] The Smith Act, however, does not limit the teaching or advocacy of the overthrow of the government as an abstract principle. The speech must be aimed at the advocacy of violent action toward the goal of overthrowing the government by force.[79] The requirement that the violent action be imminent has also been imposed by the Supreme

75. Van Alstyne, *The First Amendment and The Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROB. 530 (1966).

76. 18 U.S.C. § 10 (1946), *as amended* 18 U.S.C. § 2385 (1964).

77. 341 U.S. 494 (1951).

78. *Id.*, at 499-500.

79. Yates v. United States, 354 U.S. 298 (1957).

Court.[80] Using this standard, the only type of incoming propaganda which can be regulated by the government is that which incites imminent action in the violent overthrow of the government of the United States.

Government regulation of the content of its official outgoing programs designed for foreign consumption is not likely to raise any Constitutional issues.[81] Commercial programming originating in the United States and designed for consumption abroad will be subject to some governmental controls under the provisions of the Communications Satellite Act. COMSAT, being a quasi-public organization, must work closely with the United States Department of State.[82] The power of the government to conduct foreign relations may also be invoked to aid in finding a Constitutional basis for regulating this type of propaganda.[83]

The greatest problems are likely to arise in the regulation of propaganda emanating from abroad. The question of standing to bring a suit to determine if freedom of speech has been violated when an individual is denied access to information is not fully settled.[84] *Lamont v. Postmaster General* may be read as granting standing to one who has been denied the right of access to information.[85]

III. A CONSTITUTIONAL AND INTERNATIONAL ANALYSIS OF THE U.S.S.R. AND CANADA-SWEDEN PROPOSALS

The Working Group received two documents addressing the control of D.B.S. at their meeting in 1973.[86] The U.S.S.R. proposal was presented for consideration as a treaty.[87] It has also been submitted to the Legal Sub-Committee for its considera-

80. Brandenburg v. Ohio, 395 U.S. 444 (1969).

81. Van Alstyne, *supra* note 75 at 531, 532.

82. Communications Satellite Act of 1962, 76 Stat. 419, 47 U.S.C. §§ 721, 741, 742 (1964).

83. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

84. Klien, *supra* note 74.

85. Lamont v. Postmaster General, 381 U.S. 301 (1966). In this case, Lamont, as addressee to correspondence, was able to assert first amendment rights even though not the initiator of the speech. Justice Brennnan, in his concurring opinion, saw it as a question of access to speech. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." *Id.*, at 308.

86. Working Group Report, *supra* note 2, annex III and IV.

87. *Id.*, annex III.

tion.[88] The joint proposal of Canada and Sweden was presented as a working paper to aid in further study of the control of D.B.S.[89] Although not presented for consideration as a treaty, its reception at the meeting of the Committee on the Peaceful Uses of Outer Space indicates that some of the principles advanced are likely to be incorporated into a treaty.[90]

A. U.S.S.R. Convention on Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting

The preamble to the U.S.S.R. proposal calls attention to the possibility that D.B.S. may bring about problems of a political, social, and legal nature. The preamble also contains a statement that the "misuse" of such broadcasts could be detrimental to a States' interest. The preamble emphasizes that the reduction of possible conflicts between States is the purpose of the proposal. The Outer Space Treaty and the U.N. Charter are referred to in the preamble and considered applicable to aid as a legal basis for the regulation.[91]

The United States will probably protest the present wording of the preamble because of its negative connotations.[92] The major emphasis of the wording of the preamble is on potential conflicts. Only one phrase speaks toward the potential benefits of D.B.S.[93] Additionally since article 19 of the Declaration of Human Rights is not mentioned anywhere in the proposal, the United States will oppose this proposal.[94]

Article I, paragraph 1, of the U.S.S.R. proposal, states that direct satellite broadcasting:

> [S]hall be carried out exclusively in the interests of peace, progress, the development of mutual understanding, and the

88. Committee on the Peaceful Uses of Outer Space, U.N. Doc. A/AC. 105/P.V. 122 (1973).

89. Working Group Report, *supra* note 2, annex IV.

90. 28 U.N. GAOR, Report of the Comm. on the Peaceful Uses of Outer Space, Supp. 20 at 13, U.N. Doc. A/9020 (1973).

91. Working Group Report, *supra* note 2, annex III, at 1.

92. This has been the position of the State Dep't as indicated in 67 U.S. DEP'T STATE BULL. 687 (1972).

93. Working Group Report, *supra* note 2, annex III, at 1. *See also* text accompanying note 95 *infra*.

94. *See* note 11 *supra*. It seems that the State Dep't has taken this as an essential element.

> strengthening of friendly relations between all States and peoples.[95]

This will not raise any problems because the United States has consistently maintained that peace development and an understanding of different societies is a major goal of D.B.S.

Article III of the proposal would limit the transmission of commercial messages or advertising to instances where the nations involved have agreements allowing the transmission of such messages.[96] The power of the United States Government to regulate foreign commerce could be invoked as a legal basis for the acceptance of this article.[97] However, there are practical considerations which may mitigate against acceptance of article II. The overwhelming majority of United States programming is paid for by advertising. This specific prohibition could cut down on the number and quality of programs from the United States. A possible solution is a compromise whereby commercial messages carry only the name of the company which sponsors the program.

Article IV would also raise Constitutional questions.[98] This article excludes "any material publicizing ideas of war, militarism, nazism, national and racial hatred and enmity between peoples . . . ."[99] Material which is "immoral" or interferes with the conduct of domestic or foreign affairs is also proscribed. This type of wording clearly conflicts with both the constitutional principles surrounding the Smith Act[100] and with the regulations on the use of prior restraints.[101] Article IV may also raise questions of an international nature. The international bans on propaganda are limited to prohibiting that type of propaganda which tends to cause a breach of the peace. Article IV would extend the prohibition to even "publicizing" ideas of war or political philosophies which tend to be less than democratic.

Article V raises similar objections by eliminating all broadcasts which have not been expressly consented to by the receiving State.[102] The United States would consider this prohibition an

95. Working Group Report, *supra* note 2, annex III, at 2.
96. Working Group Report, *supra* note 2, annex III, at 2.
97. U.S. CONST., art. I, § 8.
98. Working Group Report, *supra* note 2, annex III, at 2.
99. *Id.*
100. 18 U.S.C. § 10 (1946), *as amended*, 18 U.S.C. § 2385 (1964).
101. *See* note 67 *supra* and accompanying text.
102. Working Group Report, *supra* note 2, annex III, at 2.

unconstitutional prior restraint.[103] Additionally, it is contrary to the Declaration of Human Rights since it does away with the freedom to send and receive information across national boundaries.[104] The concept of national sovereignty over ones air space, however, is one basis for considering article V as meeting minimum international legal standards.[105]

Article VI restates the illegality of broadcasts as stated in article IV and points out the following particular types of broadcasts considered offensive:

> a. Broadcasts detrimental to the maintenance of international peace and security;
>
> b. Broadcasts representing interference in intra-State conflicts of any kind;
>
> c. Broadcasts involving an encroachment on fundamental human rights, on the dignity and worth of the human person and on fundamental freedoms for all without distinction as to race, sex, language or religion;
>
> d. Broadcasts propagandizing violence, horrors, pornography and the use of narcotics;
>
> e. Broadcasts undermining the foundations of the local civilization, culture, way of life, traditions or language;
>
> f. Broadcasts which misinform the public on these or other matters.[106]

Some of these prohibitions are likely to be viewed as illegal prior restraints.[107] There are also Smith Act problems raised by this article.[108] Some of the provisions are overbroad in that they include protected speech and require the speaker to act as a censor.[109] A lack of any positive international law to cover these situations may or may not mitigate against acceptance. Strict adherence to the principle of free flow of information under the

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103. Near v. Minnesota, 283 U.S. 697 (1931).

104. *See* Declaration of Human Rights, *supra* note 31.

105. Estep & Kearse, *Space Communications and the Law: Adequate Controls after 1963?*, 60 MICH. L. REV. 873, 879-884 (1962).

106. Working Group Report, *supra* note 2, annex III, at 2-3.

107. These provisions require a State to refrain from types of broadcasting which may not bring about the harm sought to be regulated. *See* Near v. Minnesota, 283 U.S. 697 (1931).

108. Paragraphs a, b, e & f do not, on their face, seem to meet the requirements of the U.S. case law. *See* note 67 *supra* and accompanying text.

109. If a regulation of speech is so broad that it regulates speech which is protected by the Constitution, as well as that which is unprotected, it is overbroad. U.S. v. Robel, 389 U.S. 258 (1967).

Declaration of Human Rights would prohibit an acceptance of article VI.[110]

Article VII may also be adverse to the interests of the United States. The article prohibits broadcasting by organizations which are not controlled by the government of the State in which the organization is located.[111] It is uncertain whether the U.S.S.R. considers that COMSAT[112] is controlled by the government. If the U.S.S.R. does consider COMSAT to be a commercial organization, operating apart from government control, it is unlikely that the United States would sign a treaty containing article VII.

The U.S.S.R. proposal raises both constitutional and international issues in its efforts to control the content of programs carried by D.B.S. The nature of the problems raised are so basic to the United States concept of freedom of speech that it is unlikely that the proposal could be accepted by the United States if offered as a treaty.

B. Draft Principles Governing Direct Broadcasting by Satellite by Canada and Sweden

The Canadian-Swedish proposal is much less restrictive than the proposal by the U.S.S.R. The preamble contains many references to the positive aspects of D.B.S.[113] One paragraph specifically states that satellite broadcasting:

> [M]ust be governed by international law so as to ensure the free flow of communications on a basis of respect for the sovereign rights of States and the principles of non-intervention and equality. . . .[114]

The international concepts of freedom of information which serve as the legal foundation for their proposal cover a wider range than those contained in the U.S.S.R. proposal. The Canadian-Swedish proposal mentions the Human Rights Declaration and the International Covenant on Human Rights.[115]

Article II of the Canadian-Swedish proposal directs itself to the manner in which satellite broadcasting should be carried out.

110. *See* Declaration of Human Rights, *supra* note 31.
111. Working Group Report, *supra* note 2, annex III, at 2.
112. *See* COMSAT, *supra* note 72.
113. Working Group Report, *supra* note 2, annex IV.
114. *Id.*, at 1.
115. *Id.*

> Direct television broadcasting by satellite shall be carried out in a manner compatible with the maintenance of international peace and security, the development of mutual understanding and the strengthening of friendly relations among all States and peoples. Such broadcasting shall also be conducted on the basis of respect for the principles of the sovereignty of States, non-intervention and equality and in the interest of promoting the free flow of communications.[116]

Although there is a definite emphasis on the free flow of communications, parts of the proposal can be interpreted in a manner which would restrict the flow of information. The statement that "Broadcasting shall also be conducted on the basis of respect for the principles of the sovereignty of States . . . "[117] presents such a possibility. This would be contrary to the Declaration of Human Rights section which states that one has the right to seek and receive information across national boundaries.[118] Since broadcasting "shall be carried out in a manner compatible with the maintenance of international peace and security . . . ,"[119] article II will raise issues under the United States Constitution as it seems vague and overbroad.[120]

Article V requires that there be no broadcasts to another State without the consent of the receiving State.[121] This could raise the same issues as article V of the U.S.S.R. proposal.[122] This also indicates that if the Canadian-Swedish proposal is accepted as a treaty, there will be a need for negotiating bilateral treaties before States may broadcast to one another. The greater the number of bilateral and regional treaties required, the greater the possibility of restricting the free flow of information.

The Canadian-Swedish proposal is certainly less restrictive than the U.S.S.R. proposal in its wording. This could serve to render it defective under the United States Constitution. The proposal does not specifically state the types of speech to be prohibited under article II. The Constitutional requirements for specificity in regulations of speech may not be met without a pre-

116. *Id.*, at 2.
117. *Id.*, at 2.
118. Universal Declaration of Human Rights, *supra* note 31.
119. Working Group Report, *supra* note 2, annex IV, at 3.
120. *See* Thornhill v. Alabama, 310 U.S. 88 (1940).
121. Working Group Report, *supra* note 2, annex IV, at 3.
122. *See* note 102 *supra* and accompanying text.

cise definition of what is sought to be regulated.[123] The Canadian-Swedish proposal is close to the United States position on freedom of speech. With a few refinements of the articles which do not meet Constitutional standards, this proposal would be close to being acceptable by the United States as a treaty.

IV. CONCLUSION

The Constitution of the United States and the case law which interprets it, place very stringent limitations upon the governmental control of speech. A treaty, like any other law, is subject to judicial review to determine whether it meets Constitutional standards.[124] The Department of State has taken the position that the domestic concepts of freedom of speech will play a determinative role in the negotiation and signing of a treaty regulating D.B.S.[125] The United States is not likely to enter into a treaty which does not meet the Constitutional requirements of freedom of speech. The two proposals offered by the U.S.S.R. and Canada-Sweden do not yet meet the required standards. However, the need for some type of regulation of D.B.S. is apparent.

In the forum of the United Nations, there is general agreement that peace and mutual understanding are highly desirable. D.B.S., through the spread of information and education, can help achieve peace and understanding. While D.B.S. could be misused as an instrument of propaganda designed to incite war or internal strife, there is no reason to believe that a treaty cannot be negotiated which will respect the desire to stop warmongering propaganda and still allow for the free flow of information. The use of the United States' concept of freedom of speech could aid in those negotiations.

There is little doubt that an attempt to utilize domestic concepts of freedom of speech on an international scale will meet with some opposition.[126] The domestic principles of freedom of

123. *See* note 103 *supra* and accompanying text.

124. Missouri v. Holland, 252 U.S. 416 (1920); Reid v. Covert, 354 U.S. 1 (1957). *See also* text accompanying note 59 *supra.*

125. *See* 67 U.S. DEP'T STATE BULL. 686 (1972) *and* 69 U.S. DEP'T STATE BULL. 19 (1973).

126. It has been stated that:

> We start with the traditional libertarian premise that restrictions on expression are to be viewed with disfavor and confined as narrowly as possible. Nevertheless, . . . we conclude that an effort to achieve a

speech have taken more than 200 years to develop. The international principles dealing with the subject are much more recent. Many nations have not grown up with as strict an adherence to this principle which has helped shape our institutions and society. However, if other nations are sincerely interested in regulating propaganda and preserving the free flow of information, the United States' concepts are the most useful from which to achieve both goals.

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kind of global first amendment would be doomed to failure and would be widely misread as an attempt to reach foreign audiences for the financial profit and political advantage of this country.

Chayes & Chazen, *Policy Problems In Direct Broadcasting From Satellites*, 5 STAN. J. INT'L STUD. 4, 13 (1970).