Chapter V: Regulation of Media Flow Into the United States

A. *Regulation of Incoming Information Flow in General*

The legal response of the United States to the entry of information from abroad reflects a clash of opposing principles. On one side stands the concept, grounded in the First Amendment, that government should not interfere with the communication of information, at least when one party to the communication (in this case the listener) is a citizen or resident of the United States.[305] Opposing this concept is a battery of U.S. laws that restrict the incoming flow of information in the interests of national security, foreign policy, the nation's control over its borders, trade protectionism or other concerns.[306] Since there is also a tradition of judicial deference to the legislative and executive branches in matters foreign or international,[307] these laws rarely have been overturned by the courts. The result is something of a standard: U.S. citizens have a right to receive information from abroad, but this right frequently is limited by determinations of the legislative and executive branches.

1. *Principles and Practices Protecting Incoming Information Flow*

The First Amendment and related principles of United States law surely are not limited to communications that both originate and are received within the United States. Legal protections for freedom of speech must have some application to the import and export of information. For this self-evident proposition one finds, however, curiously little judicial support. As of the end of 1986, there were only two major Supreme Court cases. The Court's only squarely relevant holding came in *Lamont v. Postmaster General.*[308] There the Court struck down under the First Amend-

305 *See* Lamont v. Postmaster General, 381 U.S. 301 (1965).
306 *See infra* notes 337–520, 541–82, 603–785, 810–55 and accompanying text.
307 *See, e.g.,* Regan v. Wald, 468 U.S. 222, 242 (1984).
308 381 U.S. 301 (1965).

ment a federal postal statute prohibiting the delivery, except on specific written request by the addressee, of material mailed from abroad that the secretary of the Treasury had determined to be »communist political propaganda.«[309] The Court observed that the statute »sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail.«[310] The Court held that by imposing on the addressee the »affirmative obligation« to request delivery, an obligation »almost certain to have a deterrent effect,« the statute violated the addressee's First Amendment rights.[311]

Three concurring Justices in *Lamont* saw the decision as reflecting a First Amendment right to receive information. »The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.«[312] In subsequent cases, involving domestic rather than transborder communications, the Court provided further support for a First Amendment right to receive information from a willing speaker.[313]

The second major case on transborder speech was *Kleindienst v. Mandel*.[134] The case involved denial of a visitor's visa to a foreign academic invited to speak in the United States.[315] The Court indicated that U.S. citizens have a First Amendment right to receive information from a foreign speaker.[316] But it found that right outweighed, at least on the facts presented, by the government's power to exclude aliens.[317] *Mandel*, which represents a microcosm of both of the opposing approaches to transborder speech, will be discussed in more detail shortly.[318]

Apart from the First Amendment, endorsement of the principle of a free flow of incoming information is reflected in United States support for the Universal Declaration of Human Rights.[319] Article 19 of the Declaration provides: »Everyone has the right to freedom of opinion and expression; this

309 *Id.* at 302–07
310 *Id.* at 306.
311 *Id.* at 307.
312 *Id.* at 308 (Brennan, J., concurring).
313 *E.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, ___ (1969).
314 408 U.S. 753 (1972); *see infra* notes 346–58 and accompanying text.
315 *See* 408 U.S. at 757.
316 *Id.* at 763–64.
317 *Id.* at 769–70.
318 *See infra* notes 346–58 and accompanying text.
319 G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948)

right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.« The Universal Declaration was adopted unanimously by the United Nations General Assembly in 1948.[320] While it is not a treaty and thus not directly controlling law in the United States,[321] it has been cited by several courts[322] and arguably has legal effect, either as part of the customary law of nations or as an authoritative interpretation of the United Nations Charter.[323] Perhaps more important than the Declaration's legal status in the United States is the U.S. government's support for article 19 in international fora.[324] This support should make it politically and morally difficult for the United States to refuse to accept a free flow of information and ideas across its own frontiers, i.e., to fail to practice what it preaches.

In practice, the United States does have a basic openness to information from abroad. Foreign newspapers and periodicals, for example, circulate freely. Any government attempt to restrict their circulation surely would violate, if not the First Amendment rights of the publishers or distributors,[325] the First Amendment rights of Americans wishing to receive the information that the publications contain.[326]

Another way the United States observes a »free flow« commitment is by opening U.S. media, except broadcasting,[327] to alien or foreign ownership. Newspapers, magazines, news services, film and television producers, cable television networks, cable television systems and all other nonbroadcast media in the United States may be owned and controlled by foreign

320 *Id.* The Soviet Union and other East European nations abstained. *Id.*

321 *See* Burke, *et al., Application of International Human Rights Law in State and Federal Courts*, 18 TEXAS INT'L L.J. 291, 305 (1983).

322 *E.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 881–83 (2d Cir. 1980); Zemel v. Rusk, 381 U.S. 1, 14 n. 13 (1964)

323 *See* Burke, *et al., supra* note 321, at 305–08; Powell, *Toward a Negotiable Definition of Propaganda for International Agreements Related to Direct Broadcast Satellites*, 45 LAW & CONTEMP. PROBS., 3, 9 n. 29 (1982); Paust, *Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act*, 45 LAW & CONTEMP. PROBS. 53, n. 3 (1982)

324 *See, e.g.,* Hagelin *supra* note 18, at 294; *supra* notes 16–19 and accompanying text.

325 Publishers or distributors of foreign print media, at least if resident in the United States, probably would have First Amendment protection against restrictions on the distribution of those media. *See* Bridges v. Wixon, 326 U.S. 135, 148 (1945) (»Freedom of speech and of press is accorded aliens residing in this country«); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *See also, e.g.*, Bantam Books, Inc. v. Sullivan, 272 U.S. 58 (1963); Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983).

326 *See* Lamont v. Postmaster General, 381 U.S. 301; *supra* notes 308–18 and accompanying text.

327 *See infra* note 550 and accompanying text.

nationals, regardless of whether they are resident in the United States.[328] In other contexts, such as the production of television programming, the United States endorsement of the »free flow« principle may ring hollow, since in practice the »flow« consists overwhelmingly of American exports.[329] Foreign ownership of U.S. media, however, is a conspicuous reality, especially in newspapers and other publishing enterprises.[330] It is also notable in the cable television industry.[331]

In summary, while the case law remains sparse, the Supreme Court's decision in *Lamont*,[332] together with its opinion in *Mandel*[333] and its rulings in other right-to-receive cases,[334] goes far toward establishing a First Amendment right to receive information from abroad. These cases, combined with U.S. endorsement of the Universal Declaration of Human Rights[335] and with such practices as tolerance of foreign ownership of U.S. nonbroadcast media,[336] provide strong evidence of a national commitment to the concept of a free flow of information into the United States.

328 Restrictions on ownership by resident aliens, at least with regard to print media, might well be unconstitutional. *See* Bridges v. Wixon, 326 U.S. 135, 148 (1945); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *Cf.* Ambach v. Norwick, 441 U.S. 68, 83 (1979) (Blackmun, J., dissenting).

329 *See infra* notes 541-47 and accompanying text.

330 For example, the International Thomson Organization, a Canadian corporation headquartered in London, owns many newspapers in the United States. *See* 1986 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK, at I-379; National Law Journal, May 26, 1980, at 2, col. 3. The Australian Rupert Murdoch owned major daily newspapers in New York, Chicago and Boston, plus other media properties in the U.S., before he acquired U.S. citizenship in 1985 in order to purchase major broadcast properties in the U.S. *See* 1984 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK, at I-439. European publishers have increasingly entered the magazine, trade-journal and book-publishing industries in the United States. *See* Wall Street Journal, June 13, 1985, at 35, cols. 2–4; *see also* National Law Journal, May 26, 1980, at 2, col. 3 (Thomson organization buying a third U.S. speciality publishing company).

331 *See infra* text accompanying notes 591–602. The openness of United States media to foreign ownership apparently goes beyond what is required by the protections for alien investment embodied in the United States's bilateral trade and investment treaties with its major trade partners. These treaties typically exclude »communications,« along with banking, transport and other activities, from their protection of reciprocal investment. *See* Note, *The Rising Tide of Reverse Flow: Could a Legislative Breakwater Violate U.S. Trade Commitments?* 72 MICH. L. REV. 551, 568–71 (1974). The treaty with West Germany specifies that communications »includes radio and television, among other means of communication.« Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, Protocol, para. 11, 2 U.S.T. 183a, T.I.A.S. No. 3593. The treaties do not otherwise define »communications,« but at least some of the U.S. media that are open to foreign ownership – cable television systems, for example – would appear to fall within that term.

332 *See supra* note 308 and accompanying text.

333 *See supra* note 314 and accompanying test.

334 *See supra* note 313 and accompanying text.

335 *See supra* note 324 and accompanying text.

336 *See supra* note 327 and accompanying text.

At the same time, however, the United States has a variety of laws, discussed in the next section, that restrict incoming information flow; despite the First Amendment, these laws, except for the one struck down in *Lamont*, to date have been upheld by the courts.

2. *Restrictions on Incoming Information Flow*

a. *Restrictions on visitors' visas under the McCarran-Walter Act*

The McCarran-Walter Immigration Act[337] contains two provisions that may bar the entry of aliens into the United States, even as short-term visitors, if they hold views offensive to the U.S. government. Subsection 28 of section 1182(a)[338] bars the entry of aliens who are, or at any time have been, »anarchists,« members or affiliates of the Communist Party »or any other totalitarian party,« or persons who »advocate the economic, international, and governmental doctrines of world communism.«[339] Subsection 27[340] bars the entry of aliens who the U.S. government has reason to believe seek to enter the United States »to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.«[341]

Under these provisions – which date from the Joseph McCarthy era of the 1950s – the U.S. government maintains a list, or »Lookout Book,« of aliens to be denied entry.[342] The list was reported in 1984 to include eight thousand persons from Canada alone.[343] In 1986 an official of the U.S. State Department told a congressional committee that in the previous year 47,500 persons had been formally excluded from the country under subsection 28. While the vast majority of these were granted automatic waivers, some 800 had been denied waivers.[344] In addition, 33 aliens had been excluded under subsection 27.[345]

337 8 U.S.C. §§ 1101–1503 (1985).
338 8 U.S.C. § 1182(a)(28) (1982 & Supp. II 1984).
339 *Id.*
340 *Id.* § 1182(a)(27).
341 *Id.* In addition, § 33, added in 1978, bars the entry of any alien who participated in Nazi war crimes or other activities amounting to persecution during the Second World War.
342 *See, e.g.*, Itzcouitz v. Selective Service Local Bd. No. 6, 447 F.2d 888 (2d Cir. 1971).
343 N.Y. Times, Feb. 19, 1984, at 21, col. 1
344 N.Y. Times, Aug. 12, 1986, at 6, cols. 1–2
345 *Id.*

In 1972, in *Kleindienst v. Mandel*,[346] the Supreme Court upheld the application of subsection 28 to deny a visitor's visa to a Marxist scholar from Belgium who was invited to speak at academic conferences in the United States. The attorney general had refused to grant a waiver to permit Mandel's entry, and the Court, by a 6–3 vote, upheld the attorney general's action.[347]

The Court indicated that while Mandel had no constitutional right to enter the country, American academics had a First Amendment right to receive information from him at the academic gatherings he would attend.[348] Such a right could not be denied simply because »the mode of regulation bears directly on physical movement,« rather than on speech, any more than the First Amendment right to receive in *Lamont* could have been denied because the regulation on its face »dealt only with the Government's undisputed power to control physical entry of mail into the country.«[349] Moreover, U.S. citizens' right to hear Mandel was not satisfied by the availability of alternative means for receiving his ideas, such as his books and published speeches, or tapes and telephone hookups. In view of »what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning,« the Court was »loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest« in having direct, personal access to Mandel's ideas.[350]

Nonetheless, the Court held that this constitutional interest could not prevail against the »plenary congressional power to make policies and rules for exclusion of aliens.«[351] The Court previously had held that the power to exclude aliens was »›to be exercised exclusively by the political branches of government,‹«[352] and it was »not inclined in the present context to reconsider this line of cases.«[353]

The Court did stop short of recognizing power in the executive branch to deny a waiver, and hence a visa, to a particular alien because of his ideas. While the government had argued that it need not give any reason for its decision to exclude Mandel,[354] the Court went to some length to avoid

346 408 U.S. 753 (1972).
347 *Id.* at 753, 769.
348 *Id.* at 764.
349 *Id.* at 764–65.
350 *Id.* at 765.
351 *Id.* at 769.
352 *Id.* at 765 (quoting government brief).
353 *Id.* at 767.
354 *See id.* at 769.

confronting this position. Noting that earlier in the litigation the attorney general *had* given a reason for excluding Mandel – Mandel's unknowing and minor violations of the conditions of entry on a prior visit – the Court found that to be sufficient. Where a decision to exclude an alien was based on »facially legitimate and bona fide reasons,« it would not be scrutinized by the Court or weighed against the First Amendment interests in the case.[355]

Mandel thus left the opposing interests in precarious balance. The case confirms that, in accord with *Lamont*, U.S. citizens have a First Amendment right to receive information from foreign speakers, and probably to receive it face to face. At the same time, *Mandel* upholds the »plenary power« of Congress to exclude aliens and indicates that this power comprehends the exclusion of classes of aliens – such as the classes listed in subsection 28 – because of their ideas.[356] The power thus stands in contrast to the »content neutrality« usually required of government action affecting First Amendment rights.[357] Further, while shying away from holding that the government could deny a waiver to a particular alien because of his ideas, the Court said it would not scrutinize any colorable reason that the government put forward for such a denial.[358]

After *Mandel*, Congress moved in 1979 to shift the balance by adding to the McCarran-Walter Act the McGovern Amendment.[359] This provision was adopted »[f]or purposes of achieving greater United States compliance [and] ... encouraging other signatory countries to comply« with the Helsinki Accords of 1975.[360] The amendment provides that when an application for a visitor's visa is made by an alien excludable under subsection 28 »by reason of membership in or affiliation with a proscribed organization,« a waiver allowing the visa should be issued, unless the secretary of state

355 *Id.* at 770.

356 *See id.* at 770.

357 *See, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972); Stone, *supra* note 50.

358 408 U.S. at 770.

359 22 U.S.C. § 2691(a) (1982).

360 *Id. See* Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, *reprinted in* 73 Dep't State Bull. 323 (1975); Paust, *supra* note 323, at 63; Carliner, *United States Compliance with the Helsinki Final Act: The Treatment of Aliens*, 13 VAND. J. TRANSNAT'L L. 397, 400, 407–08 (1980).

certifies to Congress that admission of the alien »would be contrary to the security interests of the United States.«[361]

The executive branch apparently has reacted to the McGovern Amendment by finding some aliens who otherwise would be covered by the amendment to be excludable under subsection 27 instead of subsection 28. In *Abourezk v. Reagan*,[362] the government denied visas under subsection 27 to four persons who might have fallen under subsection 28 and the McGovern Amendment.[363] The decision of the court of appeals somewhat restricted the government's power to act under subsection 27. The court held that when an alien is a member of a proscribed organization so that subsection 28 would apply, the government may not bypass the McGovern Amendment and proceed under subsection 27 unless the reason for the perceived threat to national interests under subsection 27 is independent of the fact of membership in the organization.[364]

In dissent, Judge Robert H. Bork thought subsection 27 properly could come into play if the alien's membership in the proscribed organization »raises additional concerns, as it does when it involves a connection to a government that implicates American foreign policy.«[365] Judge Bork warned that the majority's decision »begins, albeit cautiously, a process of judicial incursion into the United States' conduct of its foreign affairs.«[366] The government has successfully petitioned for Supreme Court review in *Abourezk*.[367]

Under either subsection 27 or subsection 28, a number of foreign intellectuals who hold views offensive to the U.S. government have been denied visitors' visas and thus prevented from expressing their views in the

361 22 U.S.C. § 2691(a).

362 785 F.2d 1043 (D.C. Cir. 1986), *cert. granted*, Dec. 15, 1986, No. 86–656.

363 The four were Tomas Borge, the Interior Minister of Nicaragua; Nino Pasti, former member of the Italien Senate, former general in the Italian armed forces and participant in the World Peace Council, an organization believed by the U.S. State Department to be controlled by the Soviet Communist Party; and Olga Finley and Leonor Rodriguez Lezcano, two Cuban women with expertise in family law who were said by the U.S. State Department to be members of an organization affiliated with the Communist Party of Cuba. 785 F.2d at 1048–49.

364 *Id.* at 1058.

365 *Id.* at 1071 (Bork, J., dissenting).

366 *Id.* at 1076 (Bork, J., dissenting).

367 107 S.Ct. 666 (No. 86–656, *cert. granted*, Dec. 15, 1986) [*aff'd* 56 U.S.L.W. 4001 (Oct. 19, 1987)].

United States.[368] In 1986 a U.S. Senate committee held hearings on a bill designed to prevent such exclusions.[369] Sponsored by Senator Mathias, the bill would have prevented the exclusion of any alien »because of any past or expected speech, activity, belief, affiliation, or membership which, if held or conducted within the United States by a United States citizen, would be protected by the First Amendment to the Constitution.«[370] The Reagan administration opposed the bill, though offering to support »reasonable changes« in subsection 28 to »ameliorate concerns about possible infringements on the First Amendment rights of Americans.«[371]

For a nation committed to the principles of the First Amendment, changes in the McCarran-Walter Act certainly are in order. Subsection 28, which

368 In 1985, Farley Mowat, a prominent Canadian writer on wildlife and conservation, was denied entry. Officials of the U.S. Immigration and Naturalization Service explained that he had been listed for many years in the Service's »Lookout Book,« because he was affiliated with »leftist organizations« and for other reasons that were »confidential.« N.Y. Times, Apr. 24, 1985, at B 10, col. 8. Others whose visa requests have been denied in recent years include Hortensia de Allende, widow of the president of Chile; Gerry Adams, leader of the political wing of the Irish Republican Army; Roberto d'Aubuisson, president of El Salvador's Constituent Assembly; Ruben Zamora, spokesman for the El Salvadoran Revolutionary Democratic Front; Dario Fo and Franca Rame, Italian political satirists; and Patricia Lara, a Colombian journalist. N.Y. Times, Nov. 12, 1986, at 10, cols. 3–7. Nobel laureates Gabriel Garcia Marquez and Carlos Fuentes are among other prominent writers and thinkers who have been barred or have declined to visit the United States because of these laws. N.Y. Times, Apr. 14, 1984, at 24.

The case of Patricia Lara, the Colombian journalist, was especially noteworthy. Ms. Lara came to New York in October 1986 at the invitation of Columbia University to attend ceremonies there honoring Latin American journalists. On arrival she was taken into custody by the Immigration and Naturalization Service, held for five days and then deported to Bogota. INS officials explained that her name had appeared in their Lookout Book and that she was excludable under subsection 27 and other sections of the law. They conducted no hearing and refused to be more specific, saying their information was »of a confidential nature that we can't disclose.« The president of Columbia University said the case was »anathema to a free society.« N.Y. Times, Oct. 15, 1986 at 17, cols. 1–4; N.Y. Times, Oct. 17, 1986, at 6, cols. 5–6. A U.S. assistant secretary of state subsequently said on television that Ms. Lara had been expelled because there was evidence that she was a member of a Colombian terrorist group – a charge the U.S. government had neither made public nor given Ms. Lara a chance to refute before expelling her. *See* Time, Dec. 29, 1986, at 68. Ms. Lara denied the charge. *Id.*

369 S. 2263, 99th Cong. 2d Sess. (1986).

370 *Id.; see* N.Y. Times, Aug. 12, 1986, at 6, cols. 1–2. Senator Mathias, sponsor of the bill, stated (*id.*):

> We are not talking about the rights of aliens. We are talking about the rights of Americans to hear the views of others. Why shouldn't Americans be able to hear unpopular views, even if they diverge from the views of a majority or disagree with official policy?

371 *Id.* The Reagan administration spokesman said: »It is not the policy of this Administration to deny visas to aliens merely because of their abstract political ideology.« He maintained, however, that the government must keep, for foreign-policy reasons, the subsection 27 power to exclude aliens who seek to engage in activities deemed »prejudicial to the public interest.« *Id.*

prima facie empowers the U.S. government to bar short-term visitors because of their ideas or political allegiances, is particularly offensive. To be sure, subsections 27 and 28 are immigration laws, designed to control the flow of people into the United States. As the Supreme Court emphasized in *Mandel*, »plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.«[372] But such policies and rules can operate to restrict the flow of ideas and information into the United States. At least where brief visits are concerned, a country that values free speech and champions a free flow of information across national borders cannot consistently bar visitors from entering its own borders because of their speech or ideas.

b. *Restrictions on foreign travel of U.S. citizens*

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

The Supreme Court has held that freedom to travel abroad is »a constitutional liberty closely related to rights of free speech and association.«[373] Thus a U.S. citizen may not be denied a passport absent evidence that his proposed travel poses a serious threat to U.S. interests.[374] In *Aptheker v. Secretary of State*, [375] the Court invalidated a provision of the Subversive Activities Control Act of 1950 that denied passports to knowing members of communist organizations, saying the statute swept too broadly and hence abridged the freedom of travel.[376] By comparison, in *Haig v. Agee*,[377] the Court allowed the lifting of the passport of an ex-CIA agent, where it was stipulated that his activities abroad were a danger to the U.S. national security.[378]

While lifting an individual's passport for reasons particular to that individual may infringe his constitutional rights, such action is unlikely to have

372 408 U.S. at 769–70.
373 Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964).
374 *See id.* at 514; *see also, e.g.*, Zemel v. Rusk, 381 U.S. 1, 14 (1965).
375 378 U.S. 500 (1964).
376 *Id.* at 514.
377 453 U.S. 280 (1981).
378 *Id.* at 287.

much impact on the incoming flow of information about foreign countries. Other U.S. travelers, including journalists, remain free to go to those countries and report on them. The same cannot be said of restrictions on all travel by U.S. citizens to particular countries. Such restrictions may substantially limit knowledge by the U.S. public of what is happening in those countries.[379] Nevertheless, the Supreme Court has upheld restrictions of this kind. In *Zemel v. Rusk*,[380] the Court upheld a law allowing the secretary of state to invalidate passports to Cuba, finding the right to travel to be outweighed by the national interest in restricting travel to a country belligerent to the United States.[381] The Court dismissed the direct freedom-of-speech claim by denying the existence of a »right to gather information.«[382]

In *Regan v. Wald*,[383] the Court reaffirmed *Zemel* in upholding an executive regulation prohibiting general business or tourist travel to Cuba.[384] The claim based on the constitutional right to travel was rejected as not overcoming »weighty concerns of foreign policy« – in this case, the desire of the U.S. government to deny to the Cuban government access to hard U.S. currency.[385] With respect to the freedom-of-speech claim, the Court said simply that no First Amendment right of the kind present in *Aptheker* was offended by an across-the-board travel restriction.[386] The Court did not consider possible First Amendment rights to receive or gather information, which had made substantial progress in the years since *Zemel*.[387] However, given the high premium that the Court in *Regan v. Wald* placed on deferring to the executive and legislative branches in matters of foreign affairs,[388] it is doubtful that recognition of any such First Amendment rights would have changed the outcome.[389]

The prohibitions on travel by U.S. citizens upheld in *Zemel v. Rusk* and *Regan v. Wald* probably have a significant impact in curtailing the flow into the United States of information about Cuba. Still, the information-

379 Of course, non-U.S. citizens can still go to those countries and report in the United States.
380 381 U.S. 1 (1965).
381 *Id.* at 15–16.
382 *Id.* at 17.
383 468 U.S. 222 (1984).
384 31 CFR § 515.201(b) (1985).
385 468 U.S. at 229.
386 *Id.* at 241–42.
387 *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301 (decided in 1965 after *Zemel v. Rusk*); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748; Kleindienst v. Mandel, 408 U.S. at 762–65.
388 *See* 468 U.S. at 242.
389 *Cf.* Kleindienst v. Mandel, 408 U.S. at 762–65; *supra* text accompanying notes 373–82.

blocking effects of these travel bans are incidental. Few would claim that the bans had the *purpose* of excluding information about Cuba, as the McCarran-Walter Act apparently has the purpose of excluding unwelcome ideas from the United States.[390] Further, restrictions on the movement of people do not necessarily establish precedents for restrictions on the flow of pure information. Where restrictions on pure information are concerned, the Supreme Court's only case in point remains *Lamont*, which struck down the law burdening the flow of mail into the United States.[391]

c. *Customs restrictions on communicative materials*

Along with broad power over the entry of persons into the United States, the legislative and executive branches have significant control over the entry of objects. With respect to communicative materials, the U.S. customs law prohibits the importation of any »obscene« matter, or »any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States.«[392]

The substantive restrictions thus imposed are not onerous. The Supreme Court has held that the applicable standard of »obscenity« is the same one used to judge domestic material.[393] Following this lead, the ban on materials advocating insurrection or illegality has been construed as reaching no farther than domestic law can.[394] Thus, insofar as their substance is concerned, communicative materials from abroad are as free as domestic materials to enter and circulate within the United States.

That freedom, however, may be deceptive, since Customs officials have broader enforcement powers than domestic officials. Searches and seizures within the United States usually require a warrant or probable cause, as provided in the Fourth Amendment to the federal Constitution.[395] The Supreme Court, however, has allowed a search without warrant or probable cause of an incoming letter suspected of carrying heroin.[396] The

390 *See supra* text accompanying notes 337–72.

391 *See supra* notes 308–13 accompanying text. *But see* the recent decision in *Meese v. Keene*, *infra* note 470.

392 19 U.S.C. § 1305(a) (1982). These provisions apply to the importation of »any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing.« *Id.*

393 United States v. 12200-Ft. Reels, 413 U.S. 123 (1973).

394 Church of Scientology v. Simon, 460 F. Supp. 56 (C.D. Cal. 1978), *aff'd mem.*, 441 U.S. 938 (1979). Thus, under Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), materials cannot be excluded on these grounds unless they are »directed to inciting or producing imminent lawless action and ... likely to incite or produce such action.«

395 U.S. CONST., amend. IV; *see, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963).

396 United States v. Ramsey, 431 U.S. 606 (1977).

Court stated that Customs agents may search any luggage or effects crossing the border and that no one could reasonably expect privacy against a border search.[397]

Detention of incoming material for inspection at the border, moreover, delays its distribution in the United States. This delay is not subject to the stringent safeguards that would apply to any such »prior restraint« on the distribution of domestic materials.[398] Responding to a claim of unconstitutional restraint at Customs, a federal district court, in a decision affirmed by the Supreme Court, declared the problem *de minimis*:

> In this case, the Church of Scientology's papers ... were detained for a very short period by the Customs Service before the Service determined the papers to be importable. Under the Customs Service's broad power to restrict imports and conduct a search of material entering the country from abroad, the temporary delay and retention of documents do not constitute a constitutional deprivation.[399]

As this language suggests, a prolonged detention of communicative materials by Customs might amount to a constitutional deprivation.

One use of Customs searches has been recognized as improper. When Edward Haase, an American writer critical of U.S. policy toward Nicaragua, returned to the United States from a trip to Nicaragua in 1985, Customs agents at the Miami airport, together with an FBI agent, searched his luggage and seized and copied some of his papers.[400] In Haase's suit against the FBI and the Customs Service alleging violations of his constitutional rights, the government effectively confessed error, offering to undo everything that had been done to Haase.[401]

The court of appeals nonetheless held that Haase's suit for declaratory relief should not have been dismissed.[402] Haase alleged that other travelers had been similarly subjected to intrusive border searches on returning from Nicaragua, as part of an apparent government policy, and the court ruled

397 *Id.* at 618–19.

398 *See* Freedman v. Maryland, 380 U.S. 51 (1965).

399 Church of Scientology v. Simon, 460 F. Supp at 58, *aff'd mem.*, 441 U.S. 938 (1979).

400 *See* Haase v. Webster, 807 F.2d 208, 210 (D.C. Cir., Dec. 9, 1986).

401 The government offered to return all the copies of Haase's papers and certified that they had not been further copied or disseminated. *Id.* at 211.

402 *Id.* at 217. The court of appeals upheld the district court's dismissal of the claim for injunctive relief. *Id.*

that the government must respond to that allegation.[403] Meanwhile, the Customs Service in August 1986 issued internal directives designed to provide guidance to field agents in such situations.[404]

It thus appears that, at least in Haase's case and perhaps more broadly, the U.S. government improperly searched and seized the papers of travelers returning to the U.S. from Nicaragua. It also appears that this practice or policy was stopped, but only as a result of litigation. In this case, it seems, the legal protections of the U.S. Constitution have freed the incoming flow of information from a government attempt to monitor or restrict that flow.

d. *Customs exemptions for communicative materials under the Beirut Agreement*

The Beirut Agreement is a multination treaty designed to encourage the international circulation of audio-visual materials of an educational character by exempting them from import duties, license requirements, taxes and other restrictions of importing countries.[405] Under the Agreement, a person seeking duty-free treatment for audio-visual materials must apply for a certificate of educational character from the appropriate agency of the exporting country.[406] The certificate is then submitted to the importing country, which makes its own determination whether the material qualifies for exemption, but giving »due consideration« to the exporting country's determination.[407]

The president of the United States, as authorized by legislation implementing the treaty,[408] has designated the United States Information Agency

403 *Id.* at 216

404 The directives covered such subjects as personal searches, photocopying and the legal definitions of sedition and treason. Telephone conversation with Ellen McClain, attorney, U.S. Customs Service, Washington, D.C., Mar. 30, 1987).

405 Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, and Cultural Character, July 15, 1949, 17 U.S.T. 1579, T.I.A.S. No. 6116, 197 U.N.T.S. 3 (entered into force for the United States on Jan. 12, 1967). *See* Note, *USIA Censorship of Educational Films for Distribution Abroad*, 3 CARDOZO ARTS & ENT. L. REV. 403 (1984).

406 Agreement, *supra* note 405, at art. IV, 17 U.S.T. at 1582–84.

407 *Id.*

408 Pub. L. No. 89–634, 80 Stat. 879 (1966).

(USIA) to administer the Beirut Agreement for the U.S.[409] The functions thus conferred on the USIA include both the »certification« of materials for export from the United States and the »authentication« of materials certified by another country for duty-free import into the United States.[410] The regulations used by the USIA in issuing certificates for export were held to violate the First Amendment in *Bullfrog Films, Inc. v. Wick*,[411] a case discussed later in connection with outgoing media flows.[412]

The USIA's conduct in authenticating materials for import into the United States under the Beirut Agreement appears, to date, not to have attracted criticism. This is somewhat surprising. The regulations applied by the USIA in determining whether materials are »educational« for the purpose of U.S. import are identical to those struck down in *Bullfrog Films* with regard to U.S. export.[413]

Moreover, article V of the Beirut Agreement reserves the right of receiving states »to censor material in accordance with their own laws or to adopt measures to prohibit or limit the importation of material for reasons of public security or order.«[414] When the U.S. Congress was considering ratification of the Agreement in 1966, concern was expressed about the entry of foreign political materials. One congressman pointed to article V as assurance that the Agreement »does not require us to bring in a single film from Yugoslavia that is communistic in nature.«[415] To deny duty-free entry to a film because it was »communistic in nature,« regardless of whether such denial was authorized by the Beirut Agreement, would constitute discrimination based on political content that might well violate the First Amendment.[416]

The apparent absence of challenge to the USIA's implementation of the Beirut Agreement with respect to materials imported into the United States may indicate that the Agency has routinely accepted the certifications of exporting countries. Or perhaps would-be importers, located outside the United States, have had legal or practical difficulties in challenging

409 *See* 22 C.F.R. §§ 502.1–502.8 (1986); Bullfrog Films, Inc. v. Wick, 646 F. Supp. 492, 495 (C.D. Cal. 1986) [*appeal docketed*, No. 86–6630 (9th Cir.)].

410 *See* 22 C.F.R. §§ 502.2–502.6 (1986).

411 646 F. Supp. 492 (C.D. Cal. 1986).

412 *See infra* text accompanying notes 859–76.

413 *See* 22 C.F.R. § 502.6 (1986).

414 Agreement, *supra* note 405, at art. V, 17 U.S.T. at 1584.

415 *See* Note, *supra* note 405 at 408.

416 *See, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972); Bullfrog Films, Inc. v. Wick, 646 F Supp. 492, 506 (C.D. Cal. 1986); *see also* Kinsella v. United States, 361 U.S. 234 (1960) (U.S. Constitution prevails over inconsistent treaty).

USIA rulings.[417] In any event, the decision on appeal in *Bullfrog Films* presumably will settle the First Amendment validity of the existing USIA regulations as applied to imports as well as exports.[418]

e. *Regulation of foreign »political propaganda« under the Foreign Agents Registration Act*

One statute squarely aimed at information flowing into the United States from foreign sources is the Foreign Agents Registration Act (FARA),[419] which regulates such information as »political propaganda.«[420] FARA dates from 1938 and 1942, times of world war and of fear that »foreign agents« and »foreign propaganda« could undermine America's resolve.[421] The Act requires every »agent of a foreign principal« to register with the U.S. Justice Department and to file supplemental registration statements every six months.[422] A »foreign principal« is defined as any foreign government, foreign political party, foreign corporation or »person outside the United States« who is not a citizen and domiciliary of the United States.[423] Exemptions are provided for diplomats, persons engaged in private business and certain other classes of people who otherwise would be required to register as agents under the Act.[424]

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

417 *See* Lamont v. Postmaster General, 381 U.S. 301, 307–08 (1965) (Brennan, J., concurring); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972). *But see* Note, *State Laws Restricting Land Purchase by Aliens*, 21 COLUM J. TRANSNAT'L L. 135, 155 (1982). In any event, a would-be importer could have an agent in the United States who was injured by the impact of the USIA regulations on importation of the films and who thus would have standing to sue. *Cf.* Block v. Meese, 793 F.2d 1303, 1308 (D.C. Cir. 1986), *cert. denied*, 106 S. Ct. 3335 (1986).

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

419 22 U.S.C. §§ 611–21 (1982 & Supp. II 1982).

420 *See* 22 U.S.C. §§ 611(j), 614(a), (b); *infra* notes 425–30 and accompanying text.

421 Act of June 8, 1938, ch. 327, 52 Stat. 631; Act of Apr. 29, 1942, ch. 263, 56 Stat. 248. The House Report on the 1938 Act stated that »the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda.« H.R. REP. NO. 1381, 75th Cong., 1st Sess. 2 (1937). *See also infra* note 459.

422 22 U.S.C. § 612.

423 22 U.S.C. § 611(b).

424 22 U.S.C. § 613(a), (d); *see also id.* §§ 613, 611(d), 612(f).

... or with reference to the foreign policies of the United States.«[425] Registered agents are required to place on public file with the Justice Department copies of any »political propaganda« they transmit within the United States.[426] They are required to report publicly to the Department of Justice on the places, the times and the extent of each transmittal,[427] and they are required to label conspicuously each piece of propaganda they transmit.[428] The prescribed label for a film, for example, includes the names of the agent and the foreign principal, a statement that dissemination reports on the film are available for public inspection at the Justice Department, and a statement that »[r]egistration does not indicate approval of the contents of this material by the United States Government.«[429] The prescribed label does not include the word »propaganda.«[430]

While FARA had been held constitutional insofar as it required the registration of foreign agents,[431] two recent cases, one reaching the Supreme Court, challenged the Act's »political propaganda« requirements for the first time.[432] Both cases involved the same three documentary films – one on nuclear war, *If You Love This Planet*, and two on acid rain, *Acid from Heaven* and *Acid Rain: Requiem or Recovery*. All three films were produced by the National Film Board of Canada (Film Board) and distributed in the United States by the Film Board's New York office. The Film Board was an agency of the Canadian government, and its New York office accordingly was a registered foreign agent under FARA. In June 1982, the Film Board submitted to the Justice Department, along with its semi-annual registration statement, a list of sixty-two new film titles for distribution in the United States. In January 1983, the Justice Department, after screening five

425 22 U.S.C. § 611(j). The definition is not entirely neutral. It includes, among other things, communications intended to »promote in the United States racial, religious, or social dissensions.« *Id.*

426 22 U.S.C. § 614(a).

427 22 U.S.C. § 614(a); 28 C.F.R. § 5.401(a), (b); Report Form CRM-159 (1985).

428 22 U.S.C. § 614(b); 28 C.F.R. § 5.402(a).

429 22 U.S.C. § 614(b); 28 C.F.R. § 5.402(e); Report Form CRM 159; *see also* 28 C.F.R. § 5.400(c).

430 *See id.*

431 *E.g.*, Attorney General v. The Irish People, 684 F.2d 928 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1982).

432 Keene v. Meese, 569 F. Supp. 1513 (E.D. Cal. 1983), 619 F. Supp. 1111 (E.D. Cal. 1985), *probable jurisdiction noted*, 106 S.Ct. 1632 (1986); Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986), *cert. denied*, 106 S.Ct. 3335 (1986). The author was of counsel in the Supreme Court for appellee Keene in *Meese v. Keene*. The case was decided April 28, 1987. *See infra* note 470.

of the films, notified the Film Board that the three named films constituted »political propaganda« under FARA.[433]

Two lawsuits followed. *Block v. Meese*[434] was brought by the U.S. distributor of one of the films, together with libraries and other groups wishing to exhibit the films. The would-be exhibitors claimed that they were deterred from showing the films by the fact that their names would be publicly reported as exhibitors of »political propaganda.«[435] The distributor claimed that he lost income as a result of the exhibitors' reluctance to rent or buy the films.[436] The other case, *Keene v. Meese*,[437] was brought by a California state senator who wanted to exhibit the films to stimulate public debate on the issues they addressed. He claimed he was deterred from showing the films by the harm that would result to his political and personal reputation when it became known that he had shown a film officially designated by the U.S. government as foreign »political propaganda.«[438]

In both cases the U.S. government took the position, surprisingly, that while FARA required the foreign agent to put the statutory label on the film, the person exhibiting the film was free to remove it.[439] As a result, the courts in both cases ruled that the plaintiffs could not complain about the labeling requirement.[440]

In *Keene*, the federal district court in California first ruled that the threat to Keene's reputation gave him standing to challenge the Act's designation of the films as »political propaganda.«[441] The court then held that the Act violated Keene's First Amendment rights.[442] »Propaganda« as used in ordinary speech is a »word of reproach,« the court said, and »whoever disseminates materials officially found to be ›political propaganda‹ runs the risk

433 *See* Block v. Meese, 793 F.2d at 1306–07; Keene v. Meese, 569 F. Supp. at 1516. *See generally* Note, *Neutral Propaganda: Three Films »Made in Canada« and the Foreign Agents Registration Act*, 7 COMM/ENT L.J. 435 (1985).

434 Block v. Meese, 793 F.2d 1303.

435 *See* 793 F.2d at 1308. In the case of a film, the prescribed Dissemination Report must include the names of organizations showing the film. *See* 28 C.F.R. § 5.401(a), (b); Report Form CRM-159 (1985).

436 *See* 793 F.2d at 1308.

437 Keene v. Meese, 619 F. Supp. 1111. *See infra* note 445.

438 619 F. Supp. at 1120.

439 Block v. Smith, 583 F. Supp. 1288, 1291 (D.D.C. 1984); Block v. Meese, 793 F.2d at 1307 n.1; Keene v. Meese, 569 F. Supp. at 1519 & n.2.

440 793 F.2d at 1307 n. 1, 569 F. Supp. at 1519 & n. 2. The district court in *Keene* remarked that »[s]ince the chief importance of the labelling requirement is obviously to inform viewers of the origins of the film, it is frankly surprising to learn that exhibitors of material covered by the Act may, with impunity, frustrate Congressional intent.« *Id.*

441 619 F. Supp. at 1119.

442 *Id.* at 1124–25.

of being held in a negative light by members of the public.«[443] Thus Congress had put Keene to the impermissible choice of foregoing his First Amendment right to show the films or suffering harm to his reputation.[444]

The district court's ruling in *Keene* was appealed directly to the U.S. Supreme Court, where the case was argued in December 1986.[445]

Meanwhile, in *Block*, the U.S. Court of Appeals for the District of Columbia Circuit held that the distributor had standing to challenge the Act, since he would lose money as a result of the reluctance of others to exhibit the films.[446] But Judge Antonin Scalia, writing for the court, went on to reject the constitutional challenge. The Act's own definition of »propaganda« was neutral, the court said. If the word had a derogatory meaning in common usage, this did not signify that the U.S. government in using the word was disparaging the speech described by the word but rather that the public looked unfavorably on the objective phenomenon described by the word (political speech designed to persuade). The court held that, in any event, the government itself has the right to speak, and this includes the right to criticize other people's speech.[447]

The Supreme Court declined to review *Block*,[448] leaving *Keene* as the only challenge to FARA before the Court.

The Supreme Court conceivably could rule in *Keene*, as the government has urged,[449] that Keene lacked standing to challenge FARA because the alleged effect on his reputation was too speculative. Such a ruling, however, would seem evasive and unfair in view of the Court's refusal to review *Block*, in which the court of appeals found that standing did exist.[450]

443 *Id.* at 1121, 1124.

444 *Id.* at 1125–26.

445 No. 85–1180, argued Dec. 2, 1986. The case was decided Apr. 28, 1987. *See infra* note 470.

446 793 F.2d at 1307–09.

447 *Id.* at 1310–14.

448 Certiorari was denied in *Block* on July 7, 1986 (106 S.Ct. 3335), two and one-half months after the Court had noted probable jurisdiction in *Keene* (106 S.Ct. 1632, April 21, 1986). *Block*, decided by the court of appeals on June 18, 1986, had been argued more than sixteen month previously in that court on Feb. 12, 1985. *See* 793 F.2d at 1303. It seems possible that the Supreme Court would have agreed to review *Block* if the case had not been delayed in the court of appeals and thus had reached the Supreme Court before the decision to review *Keene*.

449 Brief for the Appellants, Meese v. Keene, No. 85–1180, at 10–18; Reply Brief for the Appellants, No. 85–1180, at 2–8.

450 793 F.2d at 1307–09; *see supra* text accompanying note 446.

Block established that *somebody* was hurt by FARA's treatment of foreign-source speech as »political propaganda« and further that the injury resulted from the Act's effect of deterring the dissemination of such speech in the United States.

Moreover, there are other parties, not before the court in either case but particularly relevant here, who are even more directly affected by the »political propaganda« requirements of FARA. These are the foreign agents and their foreign principals. Unlike the *Keene* and *Block* plaintiffs, who are discouraged from disseminating the speech of foreign agents in the United States by the requirements of the Act, the foreign agents are directly required to file, report and label any »political propaganda« they disseminate.[451]

The impact of these requirements on the foreign agents could not readily be challenged in either *Block* or *Keene*. The Canadian Film Board had decided for political reasons not to join the litigation,[452] and the rules of standing generally limit a party to complaining about injuries he himself has suffered.[453] If a suit were brought by a foreign agent, however, or if the rights of a foreign agent were allowed to be raised by other parties,[454] the direct impact of FARA's requirements on the foreign agent would eliminate any question about standing.[455] Moreover, the effect of those requirements in burdening and »chilling« the foreign agent's speech

451 The foreign agent is not allowed to remove the label (*see* 22 U.S.C. § 614(b); 28 C.F.R. § 5.402(e)) and is thus compelled to communicate the government's message. In a series of cases, the Supreme Court has established a First Amendment right »not to speak,« holding that the government may not compel persons to communicate messages with which they disagree. *E.g.*, Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California, 106 S.Ct. 903 (1986); Wooley v. Maynard, 430 U.S. 705 (1977).

452 A. Kenneth Shere, who was U.S. general manager of the National Film Board of Canada at the time the *Block* and *Keene* cases arose, stated that he was asked to join as a plaintiff in *Block* but refused. He explained:

> As an agency of the Government of Canada, we have no business suing the United States. Our business is to deal government-to-government. [It is] to obey U.S. laws, not to challenge them. Besides we have other fish to fry right now in our relations with the United States.

Telephone Interview with A. Kennth Shere (Jan. 8, 1987).

453 *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Warth v. Seldin, 422 U.S. 490, 498 (1975).

454 The rule against raising another party's rights has exceptions, as where another party confronts »some genuine obstacle« to asserting his own rights. Singleton v. Wulff, 428 U.S. 106, 116 (1976); *see* G. GUNTHER, CONSTITUTIONAL LAW 1148 (11th ed. 1985). The natural political reluctance of the Canadian government to sue the U.S. government, *see supra* note 452, should bring this case under the exception.

455 *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301, 307 (1965); United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973).

would present a strong First Amendment case on the merits, probably stronger than in either *Block* or *Keene*.[456]

The reluctance of the Canadian government to sue the U.S. government in these cases thus should not obscure the burdens that the »political propaganda« requirements of FARA directly impose on foreign agents and on the speech they disseminate in the United States.

Does FARA offend the First Amendment rights of those engaged in disseminating foreign-source speech? The parties in *Block* and *Keene* fought a battle of dictionaries and usage experts over whether »propaganda« is a disparaging word.[457] The Department of Justice, however, had effectively conceded that it was. The Department told a congressional committee in 1983 that it would »support the use of a more neutral term like political ›advocacy‹ or ›information‹ to denominate information that must be labeled.«[458] Moreover, the original purpose of Congress in adopting FARA rather plainly embodied a negative attitude toward »propaganda.«[459]

But even if »propaganda« is not held to be a disparaging term, the Act's labeling, reporting and filing requirements are imposed only on foreign-source speech, not on domestic speech. Foreign material thus is singled out for special disclosure requirements. This is done, moreover, on the premise that foreign material is less objective and less trustworthy than domestic material. As two Supreme Court Justices stated in a 1943 dissenting opinion (with which the Court's majority did not appear to disagree on this point), FARA was »intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from

456 *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); Buckley v. Valeo, 424 U.S. 1, 64–66 (1976). It apparently would not matter whether the foreign agent were a U.S. citizen, since »[f]reedom of speech and of press is accorded aliens residing in this country.« Bridges v. Wixon, 326 U.S. 135, 148 (1945); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

457 *See* 793 F.2d at 1311–12; 569 F. Supp. at 1520–22.

458 Letter from Deputy Attorney General Edward S. Schmults to Chairman Robert W. Kastenmeier, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, Aug. 8, 1983 *reprinted in* Joint Appendix in Meese v. Keene, *supra* note 445, No. 85–1180, at 118.

459 *See supra* note 421. *See also, e.g.*, the Justice Department's statement, in proposing the 1942 amendments adding the »political propaganda« provisions to FARA, that the amendments were designed to strengthen the Act, »[i]n view of the increased attempts by foreign agents at the systematic manipulation of mass attitudes on national and international questions, by adding requirements to keep our Government and people informed of the nature, source, and extent of political propaganda distributed in the United States.« *Amending Act Requiring Registration of Foreign Agents: Hearings on H.R. 6045 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 77th Cong., 1st Sess. 25 (1941) (statement of L.M.C. Smith).

a disinterested source.«[460] While the two Justices thought that »[s]uch legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment,«[461] the assumption that foreign material is less trustworthy than domestic material – less likely to come from »a disinterested source« – would seem to involve content discrimination of a kind now recognized as inconsistent with the First Amendment.[462]

To be sure, discrimination based on source is not necessarily the same thing as discrimination based on content or point of view. But source discrimination itself appears to be constitutionally suspect.[463] Moreover, requirements of source disclosure, even when applied to all speech of a given kind, have been viewed critically by the Supreme Court.[464] When such requirements are imposed on political speech from some sources (foreign) but not from other sources (domestic), they would seem to be especially vulnerable.

Source and content merge in another way. In today's interdependent world, a great many political, economic and environmental issues possess international as well as domestic dimensions. Further, international issues involving the United States often present disagreements between the U.S. government and foreign governments, political parties or other entities abroad.

Acid rain, one of the issues addressed by the Canadian films, is a good example. It involves a bilateral controversy between the governments of the United States and Canada.[465] The effect of FARA with respect to the Canadian films on acid rain is that speech on this issue financed by the Canadian government, when distributed in the United States, must be filed, labeled and reported as »political propaganda.« Meanwhile the U.S. government's speech on the issue bears no such badge of untrustworthiness. On this and other international issues, FARA's discrimination

460 Viereck v. United States, 318 U.S. 236, 251 (1943) (Black, J., joined by Douglas, J., dissenting); *see id.* at 236-____ (majority opinion).

461 *Id.* at ____ (Black, J., dissenting).

462 *See, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972); First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

463 See First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978); Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968, 2927 n.9 (1986); *id.* at 2986–87 (Stevens, J., dissenting).

464 *E.g.*, Buckley v. Valeo, 424 U.S. 1, 64–66 (1976); Talley v. California, 362 U.S. 60 (1960).

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

against foreign-source speech becomes discrimination against views that are opposed to the views of the U.S. government.[466]

FARA probably also deters foreign-source speech in the United States by deterring »foreign principals« from having U.S. agents in the first place. The cumbersome and continuous requirements that FARA imposes on foreign agents with respect to their distribution of »political propaganda« may discourage some foreign entities from using agents to distribute their material in the United States.[467] Foreign-source material can be distributed in the United States without using a »foreign agent,« but often not as effectively.[468] If foreign sources are discouraged from using such agents, the likely effect is to reduce the access of the American public to foreign-source speech.

FARA's regulation of foreign-source speech as »political propaganda« thus burdens that speech not only if »propaganda« is considered a disparaging word but also if the term is considered a neutral one.[469]

Finally, the question is not simply one of First Amendment law. If the United States courts eventually reject the First Amendment challenge to FARA, domestic and international objections to this statute will remain. FARA's singling out of foreign-source speech for regulation as »political

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

467 There is an intended stigma attached to being a foreign agent. *See* the statement by one of the House managers at the time FARA was amended, in 1966, to broaden the exemption for persons engaged in commercial activities: »While there is no disgrace in being registered as a ›foreign agent,‹ there is a stigma that should not be unnecessarily extended.« 112 CONG. REC. 10,536 (1966) (Rep. Poff).

468 Foreign material, political or otherwise, can be sent directly to recipients in the United States by mail or other means, in which case it is not subject to FARA. *See* Note, *supra* note 433, at 440 & n.36; *cf.* Lamont v. Postmaster General, 381 U.S. 301. Also, when foreign-source material is distributed in the United States by someone who is not an agent of the foreign source, FARA does not apply. *See, e.g., Capitalist Edition of Pravda for U.S.*, N.Y. Times, Nov. 30, 1986, at 43, cols. 1–2 (private U.S. citizen publishing a daily edition of *Pravda* in English for distribution in the United States, without contact with the Soviet publishers). In such a case, however, the U.S. distributor must have his own incentives for distributing the material, and the foreign source lacks control (copyright aside) over whether and how the distribution is done.

469 Also questionable under the First Amendment is the way FARA requires government functionaries to sit in judgment on protected speech to determine whether it meets the Act's vague definition of »political propaganda.« Broad as that definition is, see *supra* text accompanying note 425, the Justice Department in *Keene* and *Block* found that only three of sixty-two Canadian films met it. *See supra* text accompanying notes 431–33. Meanwhile the record in *Keene* disclosed that the Soviet films *Alexander Nevsky, Potemkin* and *Crime and Punishment* had been deemed »political propaganda« under FARA. Joint Appendix, *supra* note 458, at 63. The vagueness involved in identifying »political propaganda« under FARA seems constitutionally unacceptable under decisions of the Supreme Court. *E.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

propaganda« will continue to be not only a relic of wartime fearfulness but also an emblem of unwillingness on the part of the United States to let foreign and domestic ideas compete on level ground within its border.[470]

470 The Supreme Court decided Meese v. Keene on April 28, 1987, 107 S. Ct. 1862 (1987). By the vote of 5 to 3, the Court reversed the district court and upheld the constitutionality of FARA's »political propaganda« provisions.

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

On the merits, the Court began by noting that »the term ›political propaganda‹ has two meanings.« one disparaging and one neutral. *Id.* at 1869. The Court further noted that FARA's definition of the term »includes misleading advocacy« as well as accurate, respected advocacy. *Id.* The Court read the statutory definition, however, as »broad« and »neutral.« *Id.* at 1870.

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

First, FARA »does not pose any obstacles to appellee's access to the materials he wishes to exhibit.« the Court said. *Id.* at 1871. Rather, »Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.« *Id.* True, prospective viewers of the films might »harbor an unreasoning prejudice against arguments that have been identified as the ›political propaganda‹ of foreign principlals and their agents.« *Id.* But FARA »allows appellee to combat any such bias simply by explaining ... that Canada's interest in the consequences of nuclear war and acid rain does not necessarily undermine the integrity or the persuasiveness of its advocacy.« *Id.*

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

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

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

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

In claiming neutrality for the statute, the Court also failed to mention recent statements by high Justice Department officials acknowledging its non-neutrality. *See id.* at 1879 (Blackmun, J. dissenting). The Court also passed over statements from the legislative history showing a

f. Restrictions on foreign production of communicative materials: the »manufacturing clause« of the Copyright Act

The flow of communicative materials into a country may be affected by restrictions on foreign production of those materials. To the extent that materials must be produced within the United States, their importation

congressional purpose to limit the spread of »political propaganda.« *See supra* notes 421, 459; 107 S. Ct. at 1871 & nn. 1, 2 (Blackmun, J., dissenting).

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

Particularly relevant here are the implications of the instant case for the position of the United States on transborder speech. The Court quoted approvingly the 1943 dissent of Justices Black and Douglas in Viereck v. United States, 318 U.S. 236, 251; *see supra* text accompanying note 460. The opinion described FARA as »intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source.« 318 U.S. at 251 (Black, J., dissenting), *quoted at* 107 S. Ct. 1871 n. 15.

The Court in *Meese v. Keene* did not merely uphold the statute so described; it expressed no doubt about the contemporary validity of the wartime premise that information of foreign origin is less reliable – less likely to come from »a disinterested source« – than domestic information. The Court thus found it constitutionally sufficient, when the views of the Canadian government about acid rain are treated as »political propaganda« under FARA, that the Act allows the film's exhibitor »to combat any [resulting] bias simply by explaining« that Canada's interest in the subject »does not necessarily undermine the integrity or the persuasiveness of its advocacy.« *Id.* at 1871 Meanwhile, no such treatment, and no such defensive combat, is required for the views about acid rain held by the United States government or by any other domestic speaker.

Strikingly, the Court avoided confronting the issue of FARA's discrimination against foreign-source speech. While recognizing that Keene had raised the issue, the Court simply noted that the district court had rejected Keene's argument, and the Court itself gave no consideration to the argument. *Id.* at 1870. This silent treatment was particularly noteworthy in an opinion by Justice Stevens. A year before, he had dissented from the Court's upholding of a statute that, in his view, discriminated between media inside and outside of Puerto Rico. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968, 2986 (1986) (Stevens, J., dissenting); *see also id.* at 2979 n.9 (majority in response denies such discrimination). In ducking the issue in *Meese v. Keene*, the Court may have wished to avoid an express constitutional endorsement of FARA's discrimination against foreign speech.

In the wake of *Meese v. Keene*, the burden rests on Congress to amend or repeal FARA. Only in that way can the United States remove the deterrence that FARA's regulatory requirements must impose on the circulation of foreign-source speech by actual and potential foreign agents in the United States. *See supra* note 467. Only in that way can the United States show its willingness to let foreign speech compete on equal terms with domestic speech within U.S. borders.

obviously is barred. Whether a requirement of domestic production reduces the volume of communicative materials available in the U.S., and whether it reduces the foreign content of the materials available, will depend on the kind of materials involved.

The »manufacturing clause« of the United States Copyright Act,[471] which expired in 1986, was a classic restriction on foreign production of communicative materials. Dating from 1891,[472] the clause required that nondramatic literary works in the English language, if authored by domiciliaries of the United States,[473] be printed in the United States or Canada in order to qualify for the infringement remedies provided by U.S. copyright law.[474] The clause included various exceptions: for the first 2,000 copies of any work; for works imported for personal use or scholarly libraries; for books in Braille; and others.[475] The purpose of the clause was purely protectionist – »to protect the American printing industry from the competition of foreign printers.«[476]

In 1972, reacting against protectionism, Congress set the manufacturing clause to expire in 1982.[477] In 1982, beset by protectionist pressure, Congress extended the clause, over President Reagan's veto, for another four years.[478] On June 30, 1986, the clause expired, despite a 7–6 vote to renew it and make it permanent by a House of Representatives subcommittee four days earlier.[479] The closeness of the congressional results in 1982 and 1986 suggests that, while the clause is now dead, it could be revived if protectionist sentiment should increase.

Since the requirement of U.S. or Canadian manufacture applied only to books in the English language by domiciliaries of the United States, the impact of the manufacturing clause on the flow of »information« into the

471 17 U.S.C. § 601(a) (1985) [expired 1986].

472 *See* H.R. REP. NO. 94–1476, Copyright Law Revision, 94th Cong., 2d Sess. 164 (1976).

473 The clause applied prima facie to authors who were domiciliaries *or citizens* of the United States. *See* 17 U.S.C. § 601(b)(1) (1985). But it excluded U.S. nationals who were domiciled outside the United States for at least one year immediately preceding the importation of the book, 17 U.S.C. § 601(b)(1) (1985), and thus effectively applied only to domiciliaries of the United States. *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 7.22[A], at 7-155 (1986).

474 17 U.S.C. § 601(b) (1985).

475 *Id.*

476 Stonehill Communications, Inc. v. Martuge, 512 F. Supp. 349, 351 (S.D.N.Y. 1981).

477 17 U.S.C. § 601(a) (1985).

478 Pub. L. No. 97–215, Act of July 13, 1982; 17 U.S.C. § 601(a) (1985); *see* 32 PAT. TRADEMARK & COPYRIGHT J. (BNA) 227 (1986).

479 *See id.* (vote of House Subcommittee on Courts, Civil Liberties and the Administration of Justice on H.R. 4696, June 26, 1986).

United States from abroad would seem to have been small. The clause applied not to the content of the book but to its place of printing. When an English-language book by an author domiciled in the United States is printed abroad, the importation of that book normally brings into the United States no foreign content, i.e., no communication from a foreign source.

On the other hand, because the costs of printing are higher in the United States than in some foreign countries – the *raison d'être* of the manufacturing clause – the ban on foreign printing may have prevented some books from being printed at all. The manufacturing clause was challenged on this ground as inconsistent with the First Amendment and upheld in a 1986 decision of the U.S. Court of Appeals for the Second Circuit.[480] The court's majority saw no constitutional problem, because the clause did not prevent an author from importing his foreign-printed book but only deprived him of full copyright protection if he did.[481] A concurring judge more perceptively thought the clause could raise a First Amendment problem if it inhibited the publication of a book, but he concluded that this danger had not been established, especially in view of the clause's various exceptions.[482]

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

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

480 Authors League of America, Inc. v. Oman, 790 F.2d 220 (2d Cir. 1986).
481 *Id.* at 222.
482 *Id.* at 225 (Oakes, J., concurring).

countries,[483] to limit the amount of foreign-produced programming on domestic television.[484]

If some requirement of domestic production of television programs were adopted, the impact would be more closely related to communicative content than it was with respect to books under the manufacturing clause. Requiring television programs to be produced in the United States would not mean that the same content by the same author, domiciled in the United States, would simply be »manufactured« in the United States rather than abroad. Program production is a collaborative enterprise that involves many people and that often reflects the place of production. Program production in the United States rather than abroad would mean that fewer foreigners would participate and that a program's content would embody fewer foreign ideas, cultures, values and points of view.

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

g. *Restrictions on importing copyrighted works produced abroad*

While the manufacturing clause has expired, another provision that restrains the importation of communicative materials lives on in United States copyright law. Section 602 of the Copyright Act[485] allows a copyright owner to block the import into the United States of copies of his work that were produced abroad, even if their production were lawful and even if the copyrighted work be not otherwise available in the United States.

United States copyright law gives a copyright owner the exclusive right to

483 *See, e.g.*, the proposal of the Commission of the European Communities for a Council directive concerning broadcast activities, submitted to the Council of the European Communities on April 30, 1986. The proposal would require member-states to reserve at least 30% of their television time – apart from news, sports, game shows and advertising – for works produced by nationals of member-states and would raise the percentage to at least 60% three years after the proposal went into effect. 29 O.J. EUR. COMM. (NO. C 179) 4 (1986); arts. 2, 4, 22.

484 Price, *supra* note 18, at 887–88 (1976). The Federal Communications Commission, in adopting its »prime time access rule« that bans programming produced by U.S. television networks from one hour of prime time each evening, showed sympathy for the argument that the rule »discriminates against American producers and favors foreign producers.« Prime Time Access Rule, 50 F.C.C.2d 829, 838 (1975). But the Commission noted »the reduced role which foreign product plays in access programming this year« and said that action to repeal or change the rule to aid U.S. producers was therefore not necessary. *Id.*

485 17 U.S.C. § 602 (1985).

sell, rent or otherwise distribute copies or phonorecords of his work.[486] This right, however, normally is subject to the »first-sale doctrine.« The first-sale doctrine provides that once a particular copy or phonorecord has been lawfully made, the owner of that copy or phonorecord is entitled to sell it, or otherwise transfer it, without further authority from the copyright owner.[487]

Section 602 is an exception, in turn, to the first-sale doctrine. It allows a copyright owner to prohibit the importation into the United States of copies or phonorecords of his work that »have been acquired outside the United States,«[488] even if they were lawfully made and acquired and thus otherwise would be protected by the first-sale doctrine.[489]

Section 602 applies to two separate situations. The first involves »pirate« copies or records – ones produced without any authority from the copyright owner but in a country where their production was nonetheless lawful (typically because the country had no copyright relations with the United States, and hence the work was in the public domain there).[490] The second situation involves copies or records lawfully produced abroad *with* the authority of the copyright owner and otherwise in full compliance with U.S. copyright law.[491] In either situation, under section 602, »the mere act of importation ... would constitute an act of infringement and could be enjoined.«[492]

Section 602 itself has exceptions, but these are limited (more limited than were the exceptions to the manufacturing clause).[493] Section 602 does not apply to copies or records imported by the United States government or by a U.S. state government, except for »use in schools.«[494] It does not apply to the importation of one copy or record at a time for the private use of the importer; to copies or records carried into the United States in a traveler's personal baggage; or to importation by educational or scholarly organi-

486 17 U.S.C. § 106(3) (1985).

487 17 U.S.C. § 109(a) (1985) (»Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title ... is entitled, without the authority of the copyright owner, to sell or otherwise dispose of that copy or phonorecord«).

488 17 U.S.C. § 602(a) (1985) (»Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106 ...«)

489 *See id.*; H.R. REP. NO. 94–1476, Copyright Law Revision, 94th Cong., 2d Sess. 170 (1976).

490 *Id.*

491 *Id.*

492 *Id.*

493 *See supra* note 475 and accompanying text.

494 17 U.S.C. § 602(a)(1) (1985).

zations of one copy of an audiovisual work for archival purposes, or five copies of other works for archival or library lending purposes.[495] Section 602 reportedly is employed by record companies to block the import of recordings of popular music, even if those recordings are out of print or otherwise not available in the U.S.[496]

In addition to use of the statute by record companies holding sound-recording copyrights in recorded music, publishers, composers and songwriters holding composition copyrights in the underlying musical works were seeking, by way of a test case pending in late 1986, to establish *their* right under section 602 to block importation of recordings of the music.[497] This claim could have a much broader impact than the claims of record companies. The claims of record companies are limited to records made since 1972, when copyright protection for sound recordings began in the United States.[498] The claims of the music publishers apply to music released up to seventy-five years ago.[499] Moreover, while the sound recordings on a single record or tape usually have a single owner, an album of ten songs might have ten different composition copyrights; all ten owners would have to give permission for the album to be imported.[500] Yet, under the language and scheme of the Copyright Act, it would appear that the music publishers have a reasonable chance of establishing their claim.[501]

The congressional reports on section 602 offer no reasons for creating this

495 17 U.S.C. § 602(a)(2), (3) (1985).

496 A *New York Times* article in December 1986 reported that a number of recordings of popular music could be purchased abroad but not in the United States, because the copyright owners had blocked import under section 602. Some of the recordings had gone out of print in the United States; others included »many compact discs released in Europe and Japan [that] ... have not yet found American release.« »You have to be very careful about what you import,« one record seller reportedly said. »[I]t's hard to explain to someone why we can't sell them a 12-inch of Springsteen's ›Incident on 57th Street.‹ If it's good enough to be heard in England, why can't an American hear it?« N.Y. Times, Dec. 31, 1986 at C9, col. 1; *see also U.S. Law Spells Bad News for Import Fans*, San Francisco Chronicle, Jan. 1, 1987, at 43, cols. 1–4 (N.Y. Times dispatch).

497 *See* N.Y. Times, *supra* note 496 (case reportedly pending before U.S. District Court in New Jersey).

498 Pub. L. No. 92–140, 85 Stat. 391 (1971); *see* H.R. REP. NO. 94–1476, 94th Cong., 2d Sess. 55 (1976); 1 M NIMMER, NIMMER ON COPYRIGHT § 4.06 [A][1], at 4–34 (1986).

499 *See* 17 U.S.C. § 304(a), (b) (1985).

500 *See* N.Y. Times, *supra* note 496. The owner of a nationwide record-store chain reportedly said, »If the publisher wins, it would stop us importing all kinds of things because there's no way to bookkeep it all.« *Id.*

501 *See* 17 U.S.C. §§ 102, 106 (1985); H.R. REP. NO. 94–1476, 94th Cong., 2d Sess. 53 (1976) (stating that a literary work can be embodied in a phonorecord, which implies that a musical work also can be, and hence can be infringed by unauthorized distribution of the phonorecord).

exception to the first-sale doctrine.[502] The provision seems defensible as applied to »pirate« copies. These were produced abroad without authority from the copyright owner, and their importation at cheap prices would compete unfairly with authorized copies. A ban on importing »pirate« copies existed as well in the 1909 Copyright Act, the predecessor to the present 1976 Act.[503]

Section 602 is hard to defend, however, as applied to copies made abroad *with* the authority of the copyright owner, a provision new in the 1976 Act.[504] The defense offered by record companies – that »[p]arallel imports are an unfair and illicit disruption of the marketplace«[505] – is simply an objection to competition. The first-sale doctrine is designed to protect competition by preventing copyright owners from controlling the »marketplace« for copies of their works once those copies have been sold with the copyright owner's permission.[506] To create an exception for imported copies, as section 602 does, is inconsistent with principles of international free trade and with a free flow of communicative materials across national borders.

Section 602 might be challenged under the First Amendment, but probably without success. A United States resident seeking to import a record or book unavailable in the United States, and blocked from doing so under section 602, might invoke the First Amendment right to receive information from abroad that the Supreme Court has recognized in *Kleindienst v. Mandel*[507] and *Lamont v. Postmaster General.*[508] It would probably be an adequate answer, however, that section 602 does allow the importation of one copy at a time for the private use of the importer, and of five copies of a book or record for library lending purposes.[509]

It is true that, by prohibiting wholesale importation, Section 602 also restricts the ability both of would-be importers to distribute the work in the United States and of many members of the U.S. public to receive the

502 *See* H.R. REP. NO. 94–1476, 94th Cong., 2d Sess. 169–71 (1976); S. REP. NO. 94–473, 94th Cong., 1st Sess. 151–52 (1975); H.R. REP. NO. 94–1733, Conference Report, 94th Cong., 2d Sess. *passim* (1976).

503 1909 Copyright Act, 17 U.S.C. § 107 (1977); *see* H.R. REP. NO. 94–1476, 94th Cong., 2d Sess. 170 (1976).

504 *See id.; compare* 17 U.S.C. § 602 (1985) *with* 1909 Copyright Act, 17 U.S.C. § 109.

505 N.Y. Times, *supra* note 486.

506 *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.12[B], at 8–117, 8–118 (1986); Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).

507 408 U.S. 753 (1972); *see supra* text accompanying notes 314–18.

508 381 U.S. 301 (1965); *see supra* text accompanying notes 308–13.

509 17 U.S.C. § 602(a)(2), (3); *cf.* Authors League of America, Inc. v. Oman, 790 F.2d 220, 225 (2d Cir. 1986) (Oakes, J., concurring); *see supra* note 495 and accompanying text.

work.[510] But the power granted by section 602 is, after all, part of the exclusive rights of the copyright owner under the U.S. copyright law.[511] These rights are authorized by the Constitution[512] and in general are consistent with the First Amendment.[513] For example, a copyrigth owner has the right, without offending the First Amendment, to prevent *any* publication or distribution of his work[514] or to prevent the use of too many quotations from his work in news accounts.[515]

Similarly, although the first-sale doctrine enhances public access to published works, the doctrine probably is not required by the First Amendment. Congress probably could have given copyright owners the right to control all distribution, including all resale, of copies of their works.[516] Section 602 does less than that, lifting the first-sale doctrine only to block the import of copies from abroad.

Does this »discrimination« against foreign copies itself present a constitutional problem? The court of appeals decision upholding the manufacturing clause,[517] which also discriminated against foreign production, suggests not. Moreover, while the manufacturing clause arguably restrained the ability of U.S. authors to publish their works,[518] section 602 gives authors *greater* rights than they otherwise would have under the first-sale doctrine. Section 602 does not hurt U.S. authors but would-be distributors and receivers of the work in the United States.[519] This impact on distributors and receivers seems too slight to overcome the authority of Congress to indulge

510 *Cf. supra* notes 450–56 and accompanying text.

511 *See* 17 U.S.C. §§ 106, 602 (1985).

512 U.S. CONST., art. I, sec. 8, cl. 8.

513 *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218, 2229–30 (1985); 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.10 [A, B], at 1–62 – 1–78.2 (1986).

514 *See* Harper & Row Publishers v. Nation Enterprises, 105 S. Ct. at 2230; Estate of Hemingway v. Random House, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 776, 244 N.E.2d 250, 255 (1968).

515 Harper & Row Publishers v. Nation Enterprises, 105 S. Ct. 2218.

516 *Cf. id.* at 2230 (finding sufficient First Amendment protection embodied in Copyright Act's distinction between expression on the one hand and facts or ideas on the other, and in doctrine of fair use).

517 Authors League of America, Inc. v. Oman, 790 F.2d 220 (2d Cir. 1986).

518 *See id.* at 225 (Oakes, J., concurring).

519 Section 602 does hurt the *foreign* authors of *sound recordings* of the works, by allowing the copyright owner to block importation of those recordings into the United States. Although the statute is not phrased in terms of foreign authorship, but rather of phonorecords »acquired outside the United States« (17 U.S.C. § 602(a); *see supra* note 488), it has a disproportionately injurious impact on foreign authors of sound recordings. It may be argued that this discrimination violates the obligation of »national treatment« imposed on the United States by the Universal Copyright Convention. Universal Copyright Convention, Sept. 6, 1952, art. II, 6 U.S.T. 2731, T.I.A.S. No. 3324; revised July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868.

in a form of protectionism by giving copyright owners special protection against foreign-made copies.[520]
Section 602 thus remains an objectionable provision of United States law, inimical both to free trade and a free flow of information. However, it probably does not offend the First Amendment.

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

The legal stance of the United States toward information flow from abroad bears deep marks of ambivalence. On the one hand, there is support for a »free flow« into the United States, represented most notably by the holding in *Lamont*[521] and by the First Amendment right to receive information from abroad recognized in both *Lamont* and *Mandel*.[522] On the other hand, there are the several statutes that restrict incoming information flow and the court decisions mostly upholding them.
In support of the free-flow commitment, it can be noted that the only cases involving government restrictions on »pure« speech entering the country are *Lamont* and the cases under the Foreign Agents Registration Act. In *Lamont*, the Supreme Court struck down the restriction,[523] and the FARA case, *Meese v. Keene*, at this writing is still before the Supreme Court.[524]
The other statutes inhibiting the flow of information do not involve »pure« speech but speech mixed with the entry of aliens, with travel, with the entry of objects or goods or with the rights of copyright owners.[525] The non-speech activities regulated by these statutes not only are traditional subjects of government regulation but also often involve considerations of national security, foreign policy or border control. The Supreme Court long has given special deference to the executive and legislative branches in these areas.[526]
Still, it is hard to deny that the visa restrictions of the McCarran-Walter Act, though based on the government's power to exclude aliens, are designed to prevent dissemination in the United States of unwelcome ideas from

520 *But see supra* note 519.
521 381 U.S. 301 (1965); *see supra* text accompanying notes 308–13.
522 *See supra* notes 308–18 and accompanying text.
523 *See supra* notes 308–13 and accompanying text.
524 *See supra* note 445 and accompanying text. *But see supra* note 470.
525 *See supra* notes 337–418, 471–520 and accompanying text.
526 *See supra* notes 351–53, 383–89 and accompanying text.

abroad.[527] The Foreign Agents Registration Act is similarly designed. While FARA does not by its terms *exclude* any speech from the United States, it requires that political speech disseminated by agents of foreign entities be filed, reported and labeled as »political propaganda,« on the premise that foreign speech is less trustworthy than domestic speech.[528] The McCarran-Walter Act and FARA both betray an unwillingness on the part of the United States to allow foreign speech to enter the country and compete an equal terms with domestic speech. While these statutes stand, the allegiance of the United States to the free-flow principle remains compromised.

B. *Regulation of Incoming Electronic Media Flow*

This section reviews the provisions of United States law that relate specifically to incoming broadcasts or other transmissions of radio or television programming. There are several reasons for treating electronic media separately. First, broadcasting traditionally *has been* treated separately under U.S. law and subjected to greater regulation than other media.[529] Second, special government regulation or control of broadcasting exists in most other countries as well.[530] Separate consideration of the electronic media in the U.S. therefore facilitates international comparisons.

Third, regardless of whether all these characterizations are valid and whether they justify the special regulation of broadcasting under U.S. law, the broadcast media may be said to have a number of special characteristics. There is the alleged scarcity of broadcast frequencies, which has provided the traditional rationale for the limited First Amendment protection

527 *See supra* notes 354–58 and accompanying text.

528 *See supra* notes 459–62 and accompanying text.

529 *See* FCC v. League of Women Voters, 468 U.S. 364, 376–78 (1984); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 799 (1978); FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978); 15 U.S.C. § 1335 (1973) (prohibiting cigarette advertising »on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission«).

530 *See, e.g.,* B. PAULU, RADIO AND TELEVISION BROADCASTING ON THE EUROPEAN CONTINENT (1967); *International Control of Broadcast Programming in Western Europe*, in THE INTERNATIONAL LAW OF COMMUNICATIONS, ch. 5 (E. McWhinney ed. 1971); C. DEBBASCH, TRAITÉ DU DROIT DE LA RADIODIFFUSION RADIO ET TÉLÉVISION 15–50, 291–317 (1967).

afforded to broadcasting.[531] There is the »uniquely pervasive presence« of the broadcast media »in the lives of all Americans,« particularly in the privacy of their homes.[532] There is broadcasting's unique accessibility to children, including those too young to read.[533] And there is – perhaps the best explanation for the special government controls on broadcasting – the unique popularity, persuasiveness and influence of the medium.[534] Broadcasting's power as a vehicle of news and political communication,[535] as a source of entertainment and acculturation[536] and as a mode of advertising[537] probably goes far to explain the concern of almost all governments to keep this medium under special control.

There is a further reason for treating electronic media separately in a study of U.S. regulation of *transborder* media flows. »Since radio and television signals obviously do not stop at international borders,«[538] they pose special problems for nations wishing to control their international passage. The transborder flow of television transmissions cannot be controlled, as can other kinds of media flows, through traditional methods of government

531 *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969); National Broadcasting Co. v. United States 319 U.S. 190, 226 (1943). *But cf.* FCC v. League of Women Voters, 468 U.S. 364, 376 n. 11 (suggesting Court may reconsider the »prevailing rationale for broadcast regulation based on spectrum scarcity«).

532 FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

533 *Id.* at 749.

534 *See, e.g.*, Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 195 (Brennan, J., dissenting) (»the public's prime source of information«); M. FRANKLIN, MASS MEDIA LAW 760 (3d ed. 1987) (quoting 1980 *New York Times* column by Tom Wicker to the effect that television has become »the principal instrument of American politics«); Gorove, *supra* note 18, at 8 (1985) (reporting view expressed by Soviet delegate to United Nations that »television is the most powerful means of mass communication available«). United States courts, however, would have difficulty in approving the notion that the very persuasiveness of a medium limits its constitutional protection. *See, e.g.*, Stewart, *supra* note 33; Blasi, *supra* note 31.

535 *See e.g.*, M. FRANKLIN, *supra* note 534, at 742. The power of television to move public opinion may come in part from the *simultaneity* of the viewing. When many millions of people each know that millions of others are watching the same broadcast at the same time, they may be more readily moved in their common reactions and resulting public attitudes than when they read newspapers atomistically and alone.

536 *See, e.g.*, Price, *supra* note 18, at 887–90; de Sola Pool, *Direct Broadcast Satellites and the Integrity of National Cultures*, in ASPEN INSTITUTE PROGRAM ON COMMUNICATIONS AND SOCIETY, CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT 27 (1974); Magraw, *supra* note 18, at 27, 29.

537 *See, e.g.*, Banzhaf v. Federal Communications Commission, 405 F.2d 1082, 1100–01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (»[i]t is difficult to calculate the subliminal impact of this pervasive propaganda ... but it may reasonably be thought greater than the impact of the written word«); 15 U.S.C. 1335 (1973), *supra* note 529; Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972).

538 M. FRANKLIN, *supra* note 534, at 716.

border control addressed to immigration, to foreign travel or to objects or mail entering the country.

Moreover, the advent of communications satellites means that it is no longer just »neighboring countries« from which unwanted broadcasts may come.[539] As the national concerns and the international debate over DBS make clear,[540] the allotment and regulation of terrestrial broadcast frequencies no longer can assure a nation that it will not be invaded by undesired broadcasts from abroad. The increasingly international nature of electronic media transmission, and the special difficulties their transmissions pose for government attempts to corral them within national frontiers, call for special treatment of electronic media in a study of regulation of transborder media flows.

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

1. *Restrictions on Foreign Production of Media Content or Foreign Ownership of Communications Facilities*

a. *No limits on foreign production of programming*

The United States to date has placed no legal limits on the amount of U.S. radio or television programming that may be produced or originated abroad. The reason may well lie, not in principle, but in the fact that the United States has had no cause for imposing any such limit. For non-legal reasons, »the percentage of externally produced presentations on the American screen is among the lowest in the world.«[541] Unlike other countries, the United States has not »felt the sting of unwanted foreign programming.«[542] It has had no need to protect its cultural, economic or political values against a massive invasion of foreign material.

If this situation were to change, pressures to limit foreign programming

539 *Id.*
540 *See supra* notes 17–19 and accompanying text.
541 Price, *supra* note 18, at 887.
542 *Id.*

might develop.[543] As has been noted, the manufacturing clause of the Copyright Act, though now expired, could provide a precedent for such measures.[544] Another precedent could be found in the FCC's »prime time access rule.«[545] This rule bars programming produced by the three U.S. television networks from one hour of prime time each evening, »in order that the voices of other persons might be heard.«[546] If the FCC can impose such a restriction in order to reduce the programming sway of the U.S. networks and promote a diversity of programming sources,[547] there is little reason to doubt that the FCC or Congress could take comparable measures to reduce a perceived excess of foreign programming and encourage U.S. program sources. The fact remains that no such measures exist or are now being considered.

b. *Restrictions on foreign ownership of U.S. broadcast stations*

While the United States has no restrictions on foreign ownership of its print media[548] or on foreign production of its broadcast programming,[549] it does limit foreign ownership of its broadcast stations. Section 310 of the Federal Communications Act of 1934 provides that no broadcast license may be held by a foreign government, an alien, a foreign corporation or a corporation whose capital is more than twenty percent foreign.[550]
These provisions date back to the Radio Acts of 1912 and 1927,[551] the predecessors of the present statute. They were intended to protect the national security in wartime. As the secretary of the Navy stated in 1934:

543 *See supra* notes 483–84 and accompanying text.
544 17 U.S.C. § 601 (1985); *see supra* text accompanying notes 483–84.
545 Prime Time Access Rule, 50 F.C.C.2d at 847.
546 *Id.*
547 *See* (basically upholding the rule) Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477, 483 (2d Cir. 1971); NAITPD v. FCC, 516 F.2d 526, 534 (2d Cir. 1975). *Compare* Krattenmaker, *The Prime Access Rule: Six Commandments for Inept Regulation*, 7 COMM/ENT L.J. 19 (1984).
548 *See supra* notes 327–31 and accompanying text.
549 *See supra* notes 483–84 and accompanying text.
550 47 U.S.C. § 310(a), (b) (1985). For corporation holding broadcast licenses indirectly (holding companies), the statute limits foreign ownership or board-of-directors membership to twenty-five percent, with discretion in the FCC to approve deviations. 47 U.S.C. § 310(b)(4). *See generally* Watkins, *Alien Ownership and the Communications Act*, 38 FED. COMM. L.J. 1 (1980).
551 (1912 Radio Act) Pub. L. No. 62–264, 37 Stat. 302 (1912); (1927 Radio Act) Pub. L. No. 70–632, 44 Stat. 1162 (1927). Section 2 of the 1912 Act required broadcast licensees to be U.S. citizens or domestic corporations; section 12 of the 1927 Act further prohibited foreign stock holdings in U.S. corporations that held licenses. *See* Watkins, *supra* note 550, at 4–6.

»[T]he lessons ... learned from the foreign dominance of the cables and dangers from espionage and propaganda disseminated through foreign-owned radio stations in the United States prior to and during the [First World] War brought about the passage of the Radio Act of 1927, which was intended to preclude any foreign dominance in American radio ...«[552] Thus the FCC has declared: »The alien ownership restriction ... is primarily and uniquely fashioned to curb alien activities against the United States in time of war.«[553]

The ban on foreign ownership of broadcast stations was not adopted without misgivings. Even in 1934, some argued that a flat ban was unnecessarily broad, given the president's emergency powers in wartime, and that the rule would unduly restrict international trade in peacetime.[554] In 1985, the ban gained public notice when it led Rupert Murdoch to acquire U.S. citizenship in order to buy broadcast properties in the United States.[555] A major U.S. newspaper commented that »the xenophobia of this rule is half a century out of date.«[556]

The U.S.-citizenship requirement for broadcast licensees apparently has not been challenged on constitutional grounds, but it could be. In other areas, the Supreme Court has treated alienage as a »suspect classification« that must be justified by a compelling state interest.[557] The Court thus has struck down state laws barring resident aliens from becoming engineers[558] or lawyers.[559] On the other hand, the Court has upheld laws barring aliens from becoming public functionaries, such as police, probation officers or school teachers.[560]

Broadcasting is not a public function in the United States.[561] Moreover, broadcasting involves the exercise of First Amendment rights,[562] a fact that argues further against the validity of a law flatly prohibiting resident

552 Watkins, *supra* note 550, at 5, *quoting Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 26 (1934)

553 Attribution of Ownership Interests, 97 F.C.C.2d 997, 1009 (1984); *see* Noe v. FCC, 260 F.2d 739 (1958), *cert. denied*, 359 U.S. 924 (1959).

554 *See* Watkins, *supra* note 550, at 6 f.

555 *See e.g.*, Wall St. J., May 9, 1985, at 28 (editorial).

556 *Id.*

557 *See infra* notes 558–60 and accompanying text.

558 Examining Board v. de Otero, 426 U.S. 572 (1976).

559 *In re* Griffiths, 413 U.S. 717 (1973).

560 *E.g.*, Ambach v. Norwick, 441 U.S. 68 (1979).

561 *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 119 (1973).

562 *E.g.*, FCC v. League of Women Voters, 468 U.S. 364 (1984).

aliens[563] from engaging in the activity.[564] On the other hand, most of the cases striking down U.S. citizenship requirements have dealt with state laws, not federal ones,[565] and the federal government has wide latitude to make policy regarding aliens.[566]

As unnecessary and xenophobic as the ban on alien ownership appears to be, the original »national security« justification probably would still be viewed as a sufficient governmental interest for constitutional purposes. Communications facilities in general are no less important to national security now than they were during the First World War.[567] Moreover, there may well be an international custom of keeping such facilities out of foreign hands.[568] Beyond that, the deference shown by the Supreme Court for legislative judgments in areas of national security and foreign policy indicates that section 310 of the Communication Act would be upheld.[569]

It is therefore worth considering how far the rationale underlying section 310 might extend. One scholar has written that if section 310 is constitutional, and »if it owes its validity to national security considerations,« then »significant implications arise for the power of the United States to regulate incoming signals originating abroad,« such as those from direct-broadcast satellites.[570] He continues: »The federal government could take equivalent steps to protect national security by regulating direct broadcast messages. Under this analysis, an American licensing procedure would be warranted.«[571]

Those implications do not necessarily follow. The FCC indeed has imposed the U.S.-citizenship requirement of section 310 on domestic licensees of direct-broadcast satellites (DBS).[572] However, it has declined to impose

563 Resident aliens are protected by the First Amendment. *See* Bridges v. Wixon, 326 U.S. 135, 148 (1945).

564 *Cf.* FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 800 (1978) (rule against newspaper-broadcast cross-ownership in same city upheld, the Court noting that newspapers remain free to own broadcast stations in other cities).

565 *See, e.g.*, cases cited *supra* notes 558–59.

566 *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 765–67 (1972); Toll v. Moreno, 458 U.S. 1 (1982); Mathews v. Diaz, 426 U.S. 67 (1976); Note, 31 STAN. L. REV. 1069 (1979).

567 Witness the apparent targets of Soviet espionage efforts in the United States in the mid-1980s. *See, e.g.*, N. Y. Times, June 11, 1985, at B5, cols. 3–6 (national ed.).

568 The bilateral trade and investment treaties between the United States and its major trading partners typically exclude »communications« from their provisions assuring reciprocal rights of investment. *See* Note, 72 MICH. L. REV. 551, 568–71 (1974); *supra* note 331 and accompanying text.

569 *See* text at notes 383–89 *supra*.

570 Price, *supra* note 18, at 900.

571 *Id.*

572 47 C.F.R. § 100.11 (1985); *see* note 814 *infra* and accompanying text.

that requirement on entities that lease space on domestic satellites, whether to distribute programming to cable systems in the U.S. or to provide satellite-to-home service (with scrambled signals decodable by paying customers).[573]

Is there a relevant difference? The FCC has explained that a DBS licensee, like a conventional-broadcast licensee, controls »the facility's power or transmissions,«[574] as distinguished from providing programming over a facility controlled by someone else. In this view it is control of the facility itself – »the operational aspects of a valuable communications facility«[575] – that invokes the national-security considerations thought to justify the ban on foreign ownership. At least historically, the view has merit. The perceived danger of foreign ownership lay in the totality of what foreigners might do with the facility in wartime, not simply in their ability to reach the U.S. public with broadcast messages.[576] To be sure, since the operation of a communications facility consists of sending messages, the difference may be only a matter of degree, but the U.S.-citizenship requirement of section 310 rests basically on concerns about media structure, not media content.

Still, the requirement does have implications for other aspects of broadcast regulation. It suggests that other kinds of regulation may be more readily applied to foreign than to domestic broadcasts.[577] Further, section 310, by excluding foreigners from control of U.S. broadcast facilities, »surely results in some reduction in the diversity of voices within the United States.«[578] While its original intent and its constitutional justification are rooted in concerns of national security, particularly in times of war, section 310 inevitably has the continuing peacetime effect of reducing the »foreign content« of U.S. radio and television programming. Section 310 thus constitutes a subordination of the »free flow« principle to concerns of national security, concerns that may well be antiquated.

c. *Restrictions on foreign ownership of DBS licenses*

In its 1982 decision authorizing service by direct-broadcast satellites (DBS)

573 Satellite Business Systems, 95 F.C.C.2d 866, 873 & n.7 (1983).

574 *Id.* at 873 (*quoting* 90 F.C.C.2d at 1258).

575 *Id.* at 873 n.7.

576 *See* the 1934 statement of the secretary of the Navy, text accompanying note 552 *supra* (»the foreign dominance of the cables and dangers from espionage and propaganda«).

577 *See* Comment, *Direct Satellite Broadcasting and the First Amendment*, 15 HARV. INT'L L.J. 514, 524 (1974).

578 Price, *supra* note 18, at 900.

in the United States and granting construction permits to eight would-be DBS operators,[579] the FCC extended to DBS operators the U.S.-citizenship requirement prescribed for broadcast licensees by section 310 of the Communications Act.[580] Regardless of whether this action was required by section 310, it was consistent with the national-security concerns underlying that section.[581] If a conventional-broadcast station in foreign hands somehow represents a threat to U.S. national security, a DBS facility in foreign hands – and capable of reaching virtually all the homes in a U.S. time zone[582] – poses at least as great a threat.

d. *No restrictions on foreign ownership of programming entities using U.S. domestic satellites*

While banning foreign ownership of domestic DBS facilities, the FCC, as already noted,[583] has declined to impose the U.S.-citizenship requirement on entities that distribute programming in the United States by leasing space on conventional satellites.[584] The line thus drawn between control of facilities and provision of programming is not always easy to discern. Thus, the FCC has allowed a domestic satellite operator to lease five transponders for a six-year period, with an option to purchase at any time, to a British company planning to use them to provide direct service to U.S. homes.[585] As the FCC acknowledged, the differences between control of leased transponders for this purpose and control of a DBS satellite were not overwhelming.[586] But the FCC stressed the legal point – perhaps begging the question – that the British company would not need an FCC license for this service,[587] and it noted that »several foreign controlled enti-

579 Direct Broadcast Satellites, 90 F.C.C.2d 676 (1982); STC Decision, 91 F.C.C.2d 953 (1982); *In re* Application of CBS, 92 F.C.C.2d 64 (1982); *see supra* note 291 and accompanying text.
580 90 F.C.C.2d at 723; 47 C.F.R. § 100.11 (1985).
581 *See supra* notes 295–97, 569–70 and accompanying text.
582 Broadcasting, Dec. 10, 1984, at 46.
583 *See supra* text accompanying note 573.
584 *See* Satellite Business Systems, 95 F.C.C.2d at 873 & n.7.
585 Satellite Business Systems, 95 F.C.C.2d at 866 *ff.*
586 The main differences – which do not seem insubstantial – were that the conventional satellite had one-tenth the power of DBS, requiring almost twice as large as receiving dish, and that its signals would be scrambled. *Id.* at 872–73 & n. 6.
587 *Id.* at 873.

ties« already were distributing program services by satellite to U.S. cable systems.[588] Invoking the facilities-programming distinction, the FCC stated that »none of these programming services control the operational aspects of a valuable communications facility,«[589] so that subjecting the foreign entities to foreign-ownership restrictions »would not seem to serve the purposes of Section 310 (b).«[590]

e. *No restrictions on foreign ownership of U.S. cable systems*

In contrast to the U.S.-citizenship requirement for control of conventional-broadcast stations and of DBS facilities, efforts to restrict foreign ownership of cable television systems in the United States have been rejected by both the FCC and the Congress. In 1976 the FCC declined to act against foreign ownership of cable, explaining (a) that the limited foreign investment in U.S. cable systems posed no threat to the national security, and (b) that cable operators lack the »totality« of control over program content possessed by broadcasters.[591] The Commission likened cable instead to nonbroadcast media:

> Alien ownership restrictions do not apply to communicators generally, to newspapers, wire news services, non-license radio and television networks, film and television producers, cable system networks and channel lessees, and it is not clear that they should apply to a system operator solely because of his potential ability to influence, through his program origination efforts, the ideas and attitudes of cable subscribers.[592]

In 1980, as foreign investment in U.S. cable increased, the FCC reconsidered, but adhered to, its position.[593] The Commission refused to interpret section 310 of the Communications Act »as reflecting a general policy against foreign investments in communications enterprises in the United States.«[594] Congress also has declined to move against foreign owner-

588 In addition, other foreign-controlled entities »sell foreign programming to U.S.-owned programming services,« which in trun distribute the programming to cable systems. *Id.* at 873 n. 7.

589 *Id.*

590 *Id.*

591 Cable Television Citizenship Requirements, 59 F.C.C.2d 723, 726 ff. (1976). *See generally* Note, 10 SYRACUSE J. INT'L L. & COM. 113 (1983)

592 59 F.C.C.2d at 727.

593 Foreign Ownership of CATV Systems, 77 F.C.C.2d 73, 81 (1980).

594 *Id.*

ship of U.S. cable systems, except in the most tentative way.[595]

There is an obvious inconsistency between the FCC's position on foreign ownership of cable and its positions on foreign ownership of broadcast stations, DBS facilities and program providers. Broadcasters and DBS operators have been subjected to U.S.-citizenship requirements, while program providers have not been, on the theory that it is physical control of the facility, not influence over program content, that warrants a ban on foreign ownership.[596] With respect to cable television systems, however, control of the facility is overlooked. It is overlooked although a cable operator may control 50 or 100 channels, in contrast to a broadcaster's single channel, and although normally there will be no other cable operator in the city (or a given part of the city).[597] Ignoring this impressive amount of facility control, the FCC creates and rejects the argument that foreign ownership of U.S. cable should be banned »solely because of« the systems operator's »potential ability to influence, through his program origination efforts, the ideas and attitudes of cable subscribers.«[598]

One explanation for the inconsistency lies in the jurisdictional fact that cable systems are not licensed by the FCC, as broadcasters and DBS operators are, but by local or state governments.[599] (Program providers are not licensed at all.) The FCC thus had no ready vehicle for imposing foreign-ownership restrictions on cable.[600]

595 Congress's main concern has been that Canada, the source of almost all the foreign ownership of U.S. cable, did not reciprocate by letting U.S. citizens own Canadian cable systems. *See* Foreign Ownership of CATV Systems, 77 F.C.C.2d at 78; Note, *supra* note 591, at 113–15, 118. A cable bill approved by the Senate Commerce Committee in 1982 authorized the FCC to make rules barring ownership of U.S. cable systems by nationals of countries that did not grant reciprocal rights to U.S. citizens. S. 2172, 97th Cong., 2d Sess., section 605(b); *see* S. REP. NO. 97–518, 97th Cong., 2d Sess. 15(1982); *see also* S. 66, 98th Cong., 1st Sess., section 605(b) (authorizing FCC only to »conduct inquiries« on the subject); S. REP. NO. 98–67, 98th Cong., 1st Sess. 20 (1983). In the Cable Communications Policy Act as finally passed in 1984, however, Congress stopped well short of that. It created a Telecommunications Policy Study Commission for the apparent purpose, among others, of looking into the problem and perhaps exerting pressure on the Canadian government. Cable Communications Policy Act of 1984, 47 U.S.C. § 611 (1985); *see* 130 CONG. REC. S. 14,285 (Oct. 11, 1984) (statement of Senator Packwood).

596 *See supra* notes 574–75 and accompanying text.

597 *See, e.g.*, Omega Satellite Products v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982); H.R. REP. NO. 934, 98th Cong., 2d Sess. 23 (1984).

598 59 F.C.C.2d at 727; *see supra* text accompanying note 592.

599 *See, e.g.*, Cable Franchise Policy and Communications Act of 1984, H.R. REP. NO. 934, 98th Cong., 2d Sess. 23 (1984).

600 To be sure, the FCC has imposed some ownership restrictions on cable, banning ownership by local television broadcasters, television networks and telephone companies. *See* 47 C.F.R. §§ 63.54, 76.501 (1985). But broadcasters, telephone companies and (effectively) television networks are themselves licensed by the FCC.

Another explanation lies in the fact that the foreign ownership of U.S. cable is virtually all from one country, Canada, which is a friend and neighbor of the United States.[601] Both the FCC and the Congress, in their refusal to restrict foreign ownership of cable, apparently were influenced by the »close and friendly ties« between the United States and Canada.[602] It would be unrealistic to ignore the cushion this factor provides for the tolerant position the U.S. has taken on foreign ownership of its cable systems.

2. *Restrictions on Terrestrial Broadcasts into the United States*

a. *Frequency allotments by treaty*

Conventional broadcasts capable of reaching into the United States from neighboring countries are limited by the allotment of frequencies for the broadcast stations. The AM radio allotments are governed by multilateral treaties on broadcasting in the North American Region signed in 1937 and 1950.[603] According to Dean Monroe Price, the allocations between the U.S. and Mexico in the 1937 Agreement, as well as those between the United States and Canada, »leave the implication that clear channel authorization was distributed so that the strongest Mexican and Canadian stations (in terms of geographical reach) were spaced away from the common border.«[604] Dean Price remarks that, in this way, without violating the First Amendment, »some classes of foreign broadcasts can be practically prevented from penetrating American borders.«[605] Whatever was true of the 1937 Agreement, it is not clear that the same policies control the U.S.-Mexico allocations prevailing today.[606]

601 *See* 77 F.C.C.2d at 80; Note, *supra* note 591, at 118.

602 77 F.C.C.2d at 80–81, 82 (opinion of Commissioner Washburn); id. at 77.

603 North American Regional Broadcasting Agreement, Dec. 13, 1937, 55 Stat. 1005 (1941), T.S. No. 962; North American Regional Broadcasting Agreement, Nov. 15, 1950, 11 U.S.T. 413; *see* FEDERAL COMMUNICATIONS COMMISSION, ANNUAL REPORT FISCAL YEAR 1982, at 29–30.

604 Price, *supra* note 18, at 898 f. (*citing*, with respect to Mexico, C.B. ROSE, NATIONAL POLICY FOR RADIO BROADCASTING 241 (1940)).

605 Price, *supra* note 18, at 898 f.

606 Although Mexico was not a party to the 1950 Regional Agreement, a separate agreement was subsequently reached between the U.S. and Mexico generally paralleling the 1950 Agreement. *See* FEDERAL COMMUNICATIONS COMMISSION, *supra* note 603, at 30.

b. *Regulation of programming transmitted from the United States for broadcast back into the United States*

One provision of United States law imposes U.S. regulation, indirectly, on programming broadcast into the United States from another country. Section 325(b) of the Federal Communications Act requires an FCC permit for the transmission of material from the United States »to a radio station in a foreign country« for the purpose of broadcasting the material back into the United States.[607] The provision derives from attempts in the 1930s by some stations that were denied U.S. radio licenses to move their transmitters to Mexico and receive American programming there for broadcast back into the United States.[608] Congress's theory was that »[t]he United States cannot control such transmitting apparatus, but it can at least place difficulties in the way of securing American [program] talent.«[609]

Where section 325(b) applies,[610] it reflects an aggressive U.S. concern for the content of broadcasts into the United States from another country. In a 1935 case, the FCC denied the required permit on the basis that »[t]he character of the programs likely to be arranged and transmitted from the proposed studio [in the United States] does not appear to be such as would promote better international relations or serve the public interest.«[611] Thus, the focus there was limited to the programs to be transmitted from the United States for retransmission back into the U.S.

In a 1957 case, the FCC took a similarly restrained approach, granting the permit because it found nothing wrong with the U.S.-originated programs. The FCC said it lacked jurisdiction »to make determinations with respect to the programming of the Mexican station.«[612] The court of appeals, however, reversed.[613] The court said that while the FCC lacked power »to prevent [the Mexican station] from broadcasting to San Diego locally originated programs which are objectionable by American standards,« it did have power »to refrain from issuing a permit which would give those pro-

607 47 U.S.C. § 325(b) (1985).
608 Price, *supra* note 18, at 898.
609 C.B. ROSE, *supra* note 604, at 240.
610 The provision was held not to apply where the programming was conveyed from the United States to Mexico by the physical delivery of recorded programs instead of by radio transmission. Baker v. United States, 93 F.2d 332 (5th Cir. 1937), *cert. denied*, 303 U.S. 642 (1938).
611 *In re* Yount, 2 F.C.C. 200, 207 (1935).
612 *See* Wrather-Alvarez Broadcasting, Inc. v. FCC, 248 F.2d 646, 650 (D.C. Cir. 1957).
613 *Id.*

grams a larger American audience.«[614] The court held that the FCC, in deciding whether to grant the permit, was required to consider the total programming of the Mexican station to determine whether it had »such serious defects ... as would affect the public interest.«[615]

Used in this manner, section 325(b) would seek to employ programming supplied from the United States as a lever to regulate all the programming of foreign stations broadcasting into the United States. While the provision thus has broad implications, it appears to have been used rarely and to have had little practical impact. After fifty years, the two cases noted appear to be the only ones in which section 325(b) has been applied.

c. *Prohibition of »pirate« broadcasting into the United States*

The United States prohibits unlicensed radio broadcasting – »pirate« broadcasting[616] – from ships offshore into the United States. Thus in *United States v. McIntire*,[617] the government, relying on both section 301 of the Communications Act[618] (prohibiting the use of radio without an FCC license) and the International Telecommunication Convention of 1959,[619] succeeded in enjoining broadcasts from a ship three and one-half miles off the coast of New Jersey. Citing the national interest in preventing interference with the use of duly licensed frequencies and also »the adverse effects of defendants' unlicensed broadcasts upon the public interest,« the court upheld »the power of the United States to restrict and regulate radio broadcasts originating beyond territorial limits.«[620]

The concept of pirate broadcasts into a nation from beyond its boundaries, and without its authorization,[621] can cover not only the traditional pirate transmitters on the high seas but also the new possibility of unauthorized broadcasts into a nation's territory from a satellite. There is a tension between condemning pirate broadcasts from an offshore ship and insisting that nations tolerate a »free flow« of incoming broadcasts from satellites.[622]

614 *Id.* at 651.

615 *Id.*

616 A »pirate« broadcaster has been defined as »one who transmits into the territory of a nation from beyond that nation's territorial boundaries and without its authorization.« Smith, *Pirate Broadcasting*, 41 S. CAL. L. REV. 769, 770 (1968).

617 370 F. Supp. 1301 (D.N.J. 1974).

618 47 U.S.C. § 301 (1985).

619 International Telecommunication Convention (1959), art. VII, para. 1(1), 12 U.S.T. 2377, 2480.

620 370 F. Supp. at 1302 f.

621 *See supra* note 616.

622 *See* Hagelin, *supra* note 18, at 219 n. 55; *supra* notes 17–19 and accompanying text.

Meanwhile, if an offshore, foreign or satellite station succeeds in broadcasting into the United States, even in violation of U.S. law, members of the U.S. public apparently are entitled to receive the broadcasts. Section 705 (formerly section 605) of the Federal Communications Act,[623] which prohibits the unauthorized reception of radio communications, probably does not apply at all to reception with the consent of the sender.[624] In any event, section 705 contains a proviso exempting »any radio communication which is transmitted by any station for the use of the general public,«[625] a provision that would appear to protect reception of pirate broadcasts. In addition, the First Amendment's »right to receive« might well prevent government interference with reception by U.S. residents of broadcasts transmitted to them.[626] Also possibly relevant is section 326 of the Federal Communications Act, which prohibits the FCC from interfering »with the right of free speech by means of radio communications.«[627]

d. *U.S. retaliation against advertising by U.S. firms on Canadian stations with U.S. audiences*

United States television stations located near the Canadian border are widely received in Canada, thanks to the high penetration of cable in the major Canadian cities along the border.[628] The television interchange between the United State and Canada thus flows largely in one direction, with some fifty-four percent of prime time viewing in Canada devoted to programs produced in the United States.[629]

Since so many Canadians watch U.S. television, U.S. stations became good media for Canadian advertisers. In 1974 the Canadian government estimated that Canadian advertisers were spending $20 million per year at bordering U.S. television stations, or about ten percent of the total television advertising revenues in Canada.[630]

This outflow of advertising dollars dismayed the Canadian government, especially in light of its potential impact on cultural policy objectives for

623 47 U.S.C. § 705 (formerly § 605) (1985).
624 *See infra* notes 693–700 and accompanying text.
625 47 U.S.C. § 705(a) (1985).
626 *See* Lamont v. Postmaster General, 381 U.S. at 301 ff.; *cf.* Stanley v. Georgia, 394 U.S. 447 (1969).
627 47 U.S.C. § 326 (1985).
628 *See* Stoler, *The Border Broadcasting Dispute: A Unique Case Under Section 301*, 6 INT'L TRADE L.J. 39, 40–41 (1981). The cable penetration in major Canadian markets was estimated in 1978 at seventy percent. *Id.* at 40.
629 *Id.* at 41.
630 *Id.*

Canadian television.[631] Hence in 1976 Canada adopted a tax law denying to Canadian advertisers a business-expense deduction for advertising placed on U.S. broadcast stations and directed primarily to a Canadian audience.[632] Owners of the U.S. broadcast stations near the border protested, claiming that their advertising revenues from Canadian sources had dropped by more than fifty percent as a result of the law.[633]

At the behest of these »border broadcasters,« Congress in 1984 passed legislation responding in kind.[634] The »Canadian Mirror Act« denies a tax deduction to U.S. advertisers for the expenses of advertising »carried by a foreign broadcast undertaking and directed primarily to a market in the United States,« where the foreign country denies the reciprocal deduction to its advertisers.[635]

Such tit-for-tat retaliation between friendly neighbors represents an unfortunate resolution of a trade dispute. But President Carter, in recommending the legislation to Congress, rejected four apparently stronger proposals by the U.S. border broadcasters for economic retaliation against Canada.[636] Regardless of whether the U.S. legislation was a reasonable response to the Canadian move, it clearly was a response and not a U.S. initiative. The burden imposed by the twin U.S. and Canadian enactments on the flow of broadcast advertising between the U.S. and Canada is essentially the work of Canada, albeit resulting from felt economic and cultural needs.

That burden, in any event, has little impact on media content. If U.S. advertisers use U.S. stations instead of Canadian stations to reach the U.S. audience, the content of neither the advertising nor the programs is likely

631 *Id.*

632 Act of Sept. 22, 1976, Bill C-58, § 3 (presented by the minister of finance to the First Session of the Thirtieth Canadian Parliament, Apr. 19, 1975); *see* Stoler, *supra* note 628, at 42–43; Broadcasting, Oct. 15, 1984, at 64; Nov. 5, 1984, at 46.

633 Stoler, *supra* note 628, at 43.

634 Trade and Tariff Act, Pub. L. No. 98–573, 98 Stat. 2991 (1984) (amending section 162 of Internal Revenue Code of 1954); *see* Stoler, *supra* note 628, at 46–53.

635 Pub. L. No. 98–573, 98 Stat. 2991 (1984).

636 Stoler, *supra* note 628, at 51. The other proposals were: (i) special duties on all Canadian feature films and records imported to the U.S.; (2) quantitative restrictions on imports of Canadian feature films and records to the U.S.; (3) continuation of the provision of U.S. tax law limiting deductions for expenses incurred attending conventions abroad; and (4) taking account of the »unreasonable« nature of the Canadian law »when dealing with Canada on matters of mutual concern.« *Id.*

to change much.[637] Somewhat like the now-expired manufacturing clause of the U.S. Copyright Act, this restraint addresses the place of origination rather than the content of the material communicated.[638]

e. *Carriage of foreign broadcast signals by U.S. cable systems*

The FCC in its regulation of cable television does not treat cable carriage of foreign broadcast stations much differently from cable carriage of domestic stations. The FCC rules define a television broadcast station as including »any television station licensed by a foreign government,«[639] and they make it clear that foreign stations »may ... be carried« by U.S. cable systems if consistent with the rules.[640]

The rules do provide that foreign stations, unlike domestic ones, *need* not be carried. Foreign stations may not assert a claim to compulsory carriage, or to program exclusivity, against U.S. cable systems.[641] The FCC's »must carry« and program-exclusivity rules were designed to protect local broadcast stations against cable competition, in support of the »localism« policy embedded in the FCC's licensing scheme.[642] It does not seem unreason-

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

638 *See supra* notes 479–80 and accompanying text.

639 47 C.F.R. § 76.5 (1985).

640 47 C.F.R. § 76.5 (1985). The equal treatment of foreign stations when cable systems choose to carry them was illustrated in Kiro, Inc. v. FCC, 631 F.2d 900 (D.C. Cir. 1980). There, a television station in Seattle, Washington, affiliated with the CBS network, complained about competition from Seattle cable systems carrying Canadian stations, since those stations offered CBS network programming before that programming was available on CBS affiliates in the U.S. The FCC denied relief, applying its usual standard of whether the complaining station had shown substantial economic harm from the cable competition, and the court of appeals affirmed. The fact that the alleged harm arose from carriage of *foreign* stations by the U.S. cable systems was not accorded any significance.

641 47 C.F.R. § 76.5 (1985).

642 *See* M. FRANKLIN, *supra* note 534, at 915, 918; United States v. Southwestern Cable Co., 392 U.S. 157, 166 (1968). The program-exclusivity rule was terminated in 1980. *See* M. FRANKLIN, *supra* note 534, at 915; *In re* Cable Television Syndicated Program Exclusivity Rules (Docket No. 20988), *In re* Inquiry Into the Economic Relationship Between Television Broadcasting and Cable television (Docket No. 21284), 82 F.C.C.2d 375 (1980). The must-carry rule, as then drafted, was held to violate the First Amendment in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986).

able to deny this protection to foreign stations that are not licensed by the FCC.

FCC regulation aside, there is one notable way in which U.S. law discourages cable carriage of foreign stations. The 1976 Copyright Act establishes a compulsory copyright license for cable carriage of »distant signals,« enabling cable systems to carry nonlocal stations on payment of government-prescribed royalties.[643] This compulsory license expressly covers signals of Canadian and Mexican stations.[644] It does so, however, only for carriage of those signals by U.S. cable systems located near the Canadian or Mexican border – specifically, within 150 miles of the Canadian border or within »off-air« reception range of stations in Mexico.[645]

Microwave or satellite facilities are capable of transmitting Canadian or Mexican signals – or signals from more distant countries – to cable systems anywhere in the United States.[646] One may ask, therefore, why foreign signals were not treated the same as U.S. signals insofar as the compulsory license was concerned. To be sure, in the view of Congress the hard decision was to bring *any* carriage of Canadian or Mexican signals under the compulsory license.[647] Moreover, cable systems near the border were, by and large, the ones already carrying Canadian or Mexican signals.[648] But if a U.S. cable system remote from the border wants to carry a foreign signal – if, for example, a system in central California or northern New Mexico, where there are many Mexican-Americans, wants to carry a signal from

643 17 U.S.C. § 111(c)(1), (4) (1985).

644 17 U.S.C. § 111(c)(4).

645 17 U.S.C. § 111(c)(4); *see infra* notes 654–59 and accompanying text. Cable systems north of the 42d parallel but more than 150 miles from the Canadian border may also carry Canadian signals under the compulsory license. 17 U.S.C. § 111(c)(4).

646 *See, e.g.*, M. FRANKLIN, *supra* note 534, at 914; Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 COMM/ENT L.J. 477, 481 (1979–1980) (television »superstations« distributed nationwide by satellite).

647 The Senate bill would have made »the carriage of any foreign signals by a cable system ... subject to full copyright liability, because the compulsory license was limited to the retransmission of broadcast stations licensed by the FCC.« H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 94 (1976) (»House Report«). The House Committee, and eventually the Congress, decided not to go that far, recognizing »that cable systems primarily along the northern and southern border have received authorization from the FCC to carry broadcast signals of certain Canadian and Mexican stations.« *Id.*

648 *Id.* To take further account »of those cable systems that are presently carrying or are specifically authorized to carry Canadian or Mexican signals,« the House Committee, and the Congress, »grandfathered« under the compulsory license any Canadian or Mexican signals already carried at the time of the Act, even if the cable systems were outside the prescribed zones along the border. *Id.* at 95; *see* 17 U.S.C. § 111(c)(4).

why should it not be entitled to do so under the compulsory

[649]

ign stations left out of the compulsory license, and the owners of rights on the programs transmitted by those stations, presumably hted by this result. They thus are given full copyright protection U.S. cable systems remote from the border.[650] This protection en- m, at least in theory, to negotiate their own royalties for carriage by stems.[651]

rests of copyright owners, however, are not the paramount considera- here the compulsory license is concerned. The compulsory license nates the interests of copyright owners in order both to enable cable to carry the programs of distant stations and to enable the public to those programs.[652] Given this purpose, it seems unlikely that Con-

ress suggested no good reason. That broadcast stations in the United States are »li- d by the FCC« (House Report, *supra* note 647, at 94), while stations abroad are not, ittle relevance. Unlike the compulsory-carriage and program-exclusivity rules (*see* note 642 and accompanying text), the compulsory license is not a benefit for the stations d but a restriction imposed on them. While the House Committee saw the issue as g »important international questions of the protection to be accorded foreign copy- d works in the United States« (House Report, *supra* note 647, at 94), it did not say those questions were. The international obligation of the United States is only to give gn works the same protection accorded to domestic works. Universal Copyright Conven- *supra* note 519, at art. II. The House Committee further stated:

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

se Report, *supra* note 647, at 94. The Committee did not explain why it would not be rranted or justified« to treat foreign signals the same as U.S. signals insofar as the com- ory license was concerned. *See* text accompanying notes 654–59 *infra*.

17 U.S.C. § 111 (1985); Universal Copyright Convention, *supra* note 519.

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

desirability of the compulsory license is suggested by the vehement complaints of U.S. yright owners against Canada for not reciprocating by providing them with comparable mpensation for carriage of their programs by Canadian cable systems. *See International pyright/Communications Policies: Hearings Before the Subcomm. on Patents, Copyrights d Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 1–2 (1983) 983 Hearings«); *see also* Broadcasting, Oct. 13, 1986, at 104 (»sense of the Senate« resolu- n). Of course, what the U.S. copyright owners want from Canada is a compulsory license tead of *no* compensation for their signals, whereas Canadian and Mexican stations left t of the compulsory license by U.S. copyright law are consequently entitled to *full* compen- tion. It may be, however, because of the difficulties of negotiating individual royalties, t in practice the choice is between compulsory carriage and no carriage.

e, e.g., House Report, *supra* note 647, at 89; M. FRANKLIN, *supra* note 534, at 916.

gress left most foreign stations out of the compulsory license, while including all domestic stations, in order to benefit the foreign stations and their program-copyright owners. It seems more likely that Congress, in declining to extend the compulsory license to Mexican and Canadian signals generally (or to all foreign signals), determined that it was less important for the U.S. cable audience to have access to foreign programs than to domestic programs. It is not clear why the choice between domestic and foreign programs should not have been left to the U.S. viewing public, with the compulsory license applying to all signals once it applied to any.[653] Such equal treatment of domestic and foreign media would have been more consistent with the »free flow« principle.

Other congressional judgments about foreign programming and U.S. audiences are embodied in the particular lines drawn by Congress in applying the compulsory license to Canadian and Mexican signals. With respect to Canadian signals, Congress made the license applicable to U.S. cable systems located within 150 miles of the border (or north of the 42d parallel, where that is a greater distance).[654] »Thus the cities of Detroit, Pittsburgh, Cleveland, Green Bay and Seattle would be included within the compulsory license area, while cities such as New York, Philadelphia, Chicago, and San Francisco would be located outside the area.«[655] One may ask why the viewing public in New York, Philadelphia, Chicago and San Francisco, rather than the Congress, should not judge the desirability of receiving Canadian signals in those cities.

With respect to Mexico, instead of specifying a distance from the border, Congress made the compulsory license applicable where U.S. cable systems receive the Mexican signals »off the air« rather than by microwave or satellite.[656] To receive adequately a Mexican signal off the air, a U.S. cable system normally would have to be within 100 miles of the transmitter.[657] Thus a cable system in a U.S. border city such as San Diego presumably could receive under the compulsory license a station from the Mexican border city of Tijuana.[658] But cable systems in central California or north-

653 *See supra* notes 643–47 and accompanying text.

654 17 U.S.C. § 111(c)(4).

655 House Report, *supra* note 647, at 94.

656 17 U.S.C. § 111(c)(4).

657 Although the distance for good off-the-air reception varies with the terrain, the height of the transmitter and other factors, normally it is under 100 miles. Telephone conversation with Brian James, engineer, National Cable Television Association, Washington, D.C. (Apr. 20, 1987).

658 *Cf.* BROADCASTING/CABLECASTING YEARBOOK 1985, at C-1983 (list of television stations in San Diego market includes Tijuana station).

ern New Mexico apparently could not receive Mexican signals under the compulsory license. Neither could a cable system in Los Angeles, which is beyond the off-the-air distance from Mexico.[659]

Since these and other areas of the United States distant from the Mexican border have large Mexican-American populations, the congressional judgment excluding such areas from the compulsory license may operate to deny Mexican programming to cable audiences that would wish to receive it.

The off-the-air test for bringing Mexican signals under the compulsory license has the further result of discriminating not only among cable audiences in the United States but also among stations in Mexico. It means that U.S. cable systems can carry under the compulsory license only stations located in Mexico's border cities – and not, for example, a station in Mexico City, whose signal could reach the border only by microwave or satellite. As a result, the Mexican stations received in the United States are likely to reflect the U.S. cultural influence that is pronounced along the border, instead of the most authentic Mexican culture represented by stations deeper inside the country.

3. *U.S. Restrictions on Reception or Retransmission of Signals from Foreign Satellites*

As of December 1984, some eighty active telecommunications satellites were revolving in geostationary orbit above the equator.[660] Approximately fifteen of them belonged to the International Telecommunications Satellite Organi-

659 *See supra* note 657. Los Angeles is approximately 110 miles from Tijuana.

660 Smith, *Space WARC 1985: The Quest for Equitable Access*, 3 B.U. INT'L L.J. 229, 231 n.9 (1985) (*citing* Second Report of the Advisory Committee for the ITU World Administrative Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It, Jan. 1985, at 2). Geostationary orbit exists 22,300 miles above the equator. A satellite in that orbit revolves at the same speed as the earth and thereby remains »stationary« over a given point on the earth. *See* Cryan & Crane, *International Telecommunications Pirates: Protecting U.S. Satellite Signals From Unauthorized Reception Abroad*, 17 N.Y.U. J. INT'L L. & POL. 851, 851–52 & authorities cited (1985). A geostationary satellite's signal is receivable over a large area, or »footprint.« Hence it is »an almost ideal method of distributing programming, either as an intermediary to local broadcast stations or cable systems, or as a direct transmitter in what is known as DBS (direct broadcast satellite) transmission service.« 1983 Hearings, *supra* note 651, at 17 (statement of David Ladd). The discussion in this section is limited to non-DBS satellites; DBS is discussed in the text accompanying notes 810–57 *infra*.

zation (INTELSAT).[661] Approximately twenty-five were domestic satellites of the United States.[662] The remaining forty or so were domestic or regional satellites of other countries, including Canada, Australia, Mexico, Brazil, Indonesia and the Soviet Union.[663] In the United States, and probably other countries, »it is virtually impossible to watch television or listen to the radio without soon seeing or hearing something that ... at some point pass[ed] through a satellite transponder.«[664]

Given the large and growing role of satellites in distributing television programming throughout the world, national restrictions on the reception or retransmission of signals from foreign satellites may constitute important barriers to incoming media flow. This section examines the extent to which such restrictions exist in United States law.

a. *Reception without consent of originator*

Reception in the United States of a program-carrying signal from a foreign satellite – other than a DBS satellite[665] – without the consent of the originator[666] may violate several provisions of United States law. The most readily applicable prohibition is found in section 705(a) (formerly section 605)

661 INTELSAT Report 1985–86, at 1. INTELSAT is an international consortium that operates a system of communications satellites and earth receiving stations serving more than 165 nations, dependencies and territories. *Id.* In 1984 INTELSAT had 63 signatories to its treaty and revenues of more than $411 million. *See* Separate Systems, 101 F.C.C.2d 1046 (1985). *See generally* L. HENKIN, INTERNATIONAL LAW: CASES AND MATERIALS 1056–58 (2d ed. 1980). INTELSAT was established by the »Interim Agreements« in 1964. T.I.A.S. No. 5646. The »Definitive Agreement« (Agreement) went into effect Feb. 12, 1973. 23 U.S.T. 3813, T.I.A.S. No. 7532.

662 Staple, *The New World Satellite Order: A Report from Geneva*, 80 AM. J. INT'L L. 699, 701 (1986) (*citing* Memorandum Opinion & Order, 50 Fed. Reg. 35,228 (1985) (1985 U.S. Orbital Assignment Plan)).

663 Staple, *supra* note 662, at 701 (*citing* D. DEMAC, G. CODDING, H. HUDSON, & R. JAKHU, EQUITY IN ORBIT: THE 1985 SPACE WARC, Ann. B. (International Institute of Communications, 1985).

664 Broadcasting, July 8, 1985, at 43.

665 As already noted, this section is concerned with conventional, »fixed service« satellites that transmit programming to broadcast stations, cable systems or other distributors, and not with direct-broadcast satellites (DBS) that in the future may broadcast directly to homes *See supra* note 660; Hagelin, *supra* note 18, at 265. In any event, reception from a DBS satellite presumably would not be without the consent of the originator. *See infra* notes 691–700 and accompanying text; *supra* notes 623–24 and accompanying text.

666 References to the consent of the »originator« include the consent not only of the entity that transmits the signal carried by the satellite but also of the owners of the copyrights on the programs carried by the signal.

of the Federal Communications Act,[667] The second and third sentences of section 705(a) provide:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.[668]

At least one of these provisions apparently would apply to prohibit reception of satellite signals without the consent of the originator.[669]

There are, however, at least two possible defenses under section 705. First, a 1984 amendment exempts the reception »for private viewing« of »satellite cable programming,« if the signal is not scrambled and if a market mechanism has not been established to let people pay to receive the signal.[670] Second, the proviso to section 705(a) exempts from the section's coverage »any radio communication which is transmitted by any station for the use of the general public.«[671] These possible defenses, together with others based on the Constitution, will be discussed shortly in considering the legal status of particular examples of foreign satellite reception in the U.S.[672]

In addition to section 705, reception of a signal from a foreign satellite without the consent of the originator, if done by a cable system that retrans-

667 47 U.S.C. § 705(a) (1985). *See* 130 CONG. REC. 14,286, Oct. 11, 1984, Explanation of Section 705 as Redesignated and Amended by H.R. 4103 (statement of Sen. Packwood) (sec. 705 »provides protection against the unauthorized reception of subscription television (STV), multi-point distribution services (MDS), and satellite communications«).

668 47 U.S.C. § 705(a) (1985).

669 The second sentence, expressly covering any person »not being authorized by the sender,« presumably would apply whenever the person receiving the satellite signal »divulge[s] or publish[es]« the programming to any other person – that is, lets anyone else view it. Even if the person receiving the signal views the programming in hermit-like isolation, he probably has »receive[d]« it without »being entitled thereto« and used it »for his own benefit,« in violation of the third sentence. On the applicability of section 705(a) to the unauthorized reception of satellite signals, see, e.g., 130 CONG. REC. S14,286 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood); Regulation of Domestic Receive-Only Satellite Earth Stations, 74 F.C.C.2d 205, 215–16 (1979); Rice, *Calling Offensive Signals Against Unauthorized Showing of Blacked-Out Football Games: Can the Communications Act Carry the Ball?*, 11 COLUM-VLA J.L. & ARTS 413, 424, 426 (1987). On the applicability of the third sentence of section 705(a) to a person who views the programs for his own enjoyment without financial gain, see, e.g., Movie Systems v. Heller, 710 F.2d 492, 494 & n.5 (8th Cir. 1983); Rice, *supra*, at 421–22 & n.56.

670 47 U.S.C. § 705(b) (1985); *see infra* notes 704–22 and accompanying text.

671 47 U.S.C. § 705(a); *see supra* note 625, *infra* note 696, and accompanying text.

672 *See infra* text accompanying notes 704–58.

mitted the signal, would produce a violation of U.S. copyright law.[673] It also could constitute an invasion of privacy under applicable state law.[674] Further, failure by the United States to take measures against unauthorized reception of foreign-satellite signals could violate treaty obligations of the U.S. It might violate article 17 of the International Radio Regulations, in which the member-states of the International Telecommunication Union agree to prohibit and prevent »the unauthorized interception of radio communications not intended for the general use of the public.«[675] A refusal by the U.S. government to act against unauthorized »distribution« of satellite signals also might violate the Brussels Satellite Convention, which obligates each of its signatories »to take adequate measures to prevent the distribution on or from its territory of any program-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended.«[676]

b. *Reception with consent of originator*

(i) *The FCC's position: such reception is illegal unless authorized by the FCC*

If someone in the United States receives programming from a foreign satellite[677] *with* the consent of the originator, does the reception violate United States law? The Federal Communications Commission says it does, unless the FCC has given its own consent.

The FCC first took this position in a 1979 decision in which it lifted its regu-

673 *See* 17 U.S.C. § 111(b) (1985).

674 *See* W. PROSSER & P. KEETON, TORTS 850 (5th ed. 1984).

675 International Telecommunication Convention, *supra* note 619, at art. 17. *But cf.* Cryan & Crane, *supra* note 660, at 864 (»the ITU has not sought to regulate airwave piracy, and therefore is not a promising forum for satellite signal carriers seeking to stem signal theft«).

676 Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (ratified by United States in October 1984), art. 4(i), (iii), 28 PAT. TRADEMARK & COPYRIGHT (BNA) 723. However, the Convention provides broad exceptions. Member-states need not prohibit unauthorized reception of signals carrying »reports of current events,« used for instructional purposes, quoted in accordance with »fair practice,« or distributed »solely for the purpose of teaching.« *Id.*, art 4(i), (ii), (iii). Ratification of the Brussels Convention was considered by the U.S. Copyright Office and other federal agencies to require no new legislation in the United States; section 705 of the Communications Act, together with the copyright laws, was regarded as adequate implementing legislation. *See* 1983 Hearings, *supra* note 651, at 32–33 (statement of David Ladd). *See generally* Cryan & Crane, *supra* note 660, at 871–74.

677 References to »foreign satellites« mean domestic or regional satellites of foreign nations and do not include INTELSAT satellites. *See supra* notes 660–63 and accompanying text.

lation of receive-only satellite earth stations (i.e., dish antennas).[678] The Commission recounted that domestic satellite service was initiated in the United States at the end of 1973, and by early 1977 its growth had become explosive.[679] Early receive-only earth stations, being very expensive, were installed primarily by common carriers to serve multiple users.[680] But the technology and the equipment market advanced quickly, and in 1975 the FCC first authorized a cable system to construct an earth station for its own private use.[681] A flood of similar applications followed, and the FCC progressively streamlined its procedures. In 1977 it dropped the requirement that earth-station licensees obtain FCC approval to receive specific programming from a domestic satellite.[682] In 1979 the FCC deregulated receive-only earth stations altogether, ruling that a license was no longer necessary to construct and operate one.[683]

But this did not mean, the FCC declared, that an earth-station operator could receive programming from a *foreign* satellite, even with the consent of the originator, without governmental permission. The Commission said that the treaty obligations of the United States under the INTELSAT Agreement stood in the way.[684] Under section XIV(d) of the Agreement, a signatory-nation intending to use satellite-related facilities separate from the INTELSAT system for the purpose of international telecommunications must first notify and consult with INTELSAT, in order to assure technical compatibility and »to avoid significant economic harm to the global system of INTELSAT.«[685] Only after such consultation has taken place, and INTELSAT's Assembly of Parties has responded with its recommendations, may the proposed non-INTELSAT operation go forward.[686] The FCC noted these treaty obligations and continued:

> Thus, any deregulation of receive-only earth stations does not imply permission to receive service from non-U.S. domestic satellites ... Such permission can be

678 Reregulation of Domestic Receive-Only Satellite Earth Stations, 74 F.C.C.2d 205 (1979) (»Earth Stations«); *see also In re* Amendment of Parts 73 and 97 of the Commission's Rules Concerning Rebroadcasts of Transmissions of Non-Broadcast Radio Stations, 101 F.C.C.2d 32, 43 (para. 34) (1985) (»Rebroadcasts«); Transborder Satellite Services, 88 F.C.C.2d 258, 278 n.25 (1981).

679 Earth Stations, *supra* note 678, at 207.

680 *Id.*

681 Florida Cablevision, 54 F.C.C.2d 881 (1975); *see* Earth Stations, *supra* note 678, at 207.

682 Florida Cablevision, 67 F.C.C.2d 339 (1977); *see* Earth Stations, *supra* note 678, at 207–08.

683 Earth Stations, *supra* note 678, at 264.

684 *Id.* at 219 n. 27; *see* T.I.A.S. No. 7532; *see supra* note 661.

685 T.I.A.S. No. 7532; art. XIV(d); Earth Stations, *supra* note 678, at 219 n. 27.

686 T.I.A.S. No. 7532; art. XIV(d); Earth Stations, *supra* note 678, at 219 n. 27.

provided only after discharge of our treaty obligations to INTELSAT. Therefore, until such permission is granted, any reception of non-U.S. signals is unauthorized and subject to the sanctions of Section 605 [of the Federal Communications Act].[687]

(ii) *Evaluation of the FCC's position*

The FCC's position evidently is respected by earth-station operators. At least one such operator does seek permission from the FCC, subject to the consultation process with INTELSAT, in order to receive programming from a foreign satellite even with the consent of the originator.[688] It is not clear, however, where the FCC gets the legal authority for its position.

The FCC seems to rely basically on the INTELSAT Agreement. Since that Agreement provides that permission to receive international telecommunications service from a non-INTELSAT satellite can be granted »only after discharge of our treaty obligations to INTELSAT,« the FCC reasons that »until such permission is granted, any reception of non-U.S. signals is unauthorized and subject to the sanctions of Section 605.«[689] One must ask whether this reasoning is sound.

Reception of signals from a foreign satellite by a person in the United States, with the consent of the originator but without the permission of the U.S. government pursuant to the INTELSAT Agreement, might indeed violate the obligations *of the United States* under that Agreement. Article XIV(d) requires that the consultation process first be pursued »[t]o the extent that any Party or Signatory *or person within the jurisdiction of a Party*« intends to use non-INTELSAT facilities for international telecommunications.[690] It does not follow, however, that non-INTELSAT reception

687 *Id.* at 219 n.27. *See also* Rebroadcasts, *supra* note 678, at 43 (para. 34) (INTELSAT Agreement »protected in the U.S. through enforcement of Section 705«).

688 *See, e.g.*, *In re* Cable News Network, Inc., Application for authority to construct and operate a receive-only earth station in the Domestic Fixed-Satellite Service, to be located in Atlanta, Georgia, to receive signals from all domestic communications satellites as well as the Soviet Union's GHORIZONT STATIONS 4 and 7 satellites, Memorandum Opinion, Order and Authorization, File No. 907–DSE-L-85, May 14, 1985 [«GHORIZONT«]; Comments of Turner Broadcasting System, *In re* Amendment of Parts 73 and 97 of the Commission's Rules Concerning Rebroadcasts of Transmissions of Non-Broadcast Radio Stations, BC Docket 79–47, RM 2830, 101 F.C.C.2d 32 (1985), filed Oct. 24, 1984, at 4–7 (»Turner Comments«); *see also infra* notes 770–78 and accompanying text.

689 Earth Stations, *supra* note 678, at 219 n. 27.

690 Agreement, *supra* note 661, at art. XIV(d). (emphasis added).

by a person in the United States would violate U.S. domestic law. Article XIV(d) manifests no intention to be self-executing.[691] Indeed, it is doubtful whether a treaty can be self-executing so as to impose criminal sanctions under U.S. law without an implementing act of Congress.[692]

The FCC purports to find such implementing legislation in section 605 (now section 705) of the Communications Act. Reception of non-U.S. satellite signals without official permission given pursuant to the INTELSAT process, the FCC says, »is unauthorized and subject to the sanctions of Section 605.«[693] The FCC appears never to have indicated which provision of section 705 it relies on.[694] It is hard to find anything in section 705 that has the claimed effect. Apparently the FCC reads section 705 as a general prohibition of »unauthorized« reception of radio communications, and it then concludes that reception lacking government approval pursuant to the INTELSAT Agreement is »unauthorized.«[695] But, lengthy and opaque as section 705 is, there is nothing in it that can reasonably be read as prohibit-

691 A treaty is self-executing if it »manifests an intention that its provisions shall be effective under the domestic law of the parties at the time it comes into effect.« RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 154(2) (1965); *see also* Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892, 896–97 (1980) (»whether the treaty aims at the immediate creation of rights and duties of private individuals which are enforceable and to be enforced by domestic tribunals«); *id* at 898 n. 29 (»the treaty must ... be specific enough not to need further concretization by domestic action«).

692 »Treaty regulations that penalize individuals ... are generally considered to require domestic legislation before they are given any effect.« Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980) (*citing* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 159 (1972)). *See* RESTATEMENT *supra* note 691, at § 141(3) (1965) (treaty cannot be self-executing to extent it involves »governmental action that under the Constitution can be taken only by the Congress«); Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CALIF. L. REV. 643, 651 (1937) (listing the appropriation of money and the imposition of penalties for criminal offenses as two examples of such governmental action); The Bello Corrunes, 19 U.S. (6 Wheat.) 151, 171–72 (1821); *see* also United States v. Postal, 589 F.2d 862, 877 & authorities cited (5th Cir. 1979).

693 Earth Stations, *supra* note 678, at 219 n. 27; *see also* Rebroadcasts, *supra* note 678, at 43; Transborder Satellite Services, 88 F.C.C.2d 258, 278 n. 26 (1981).

694 Earth Stations, *supra* note 678, at 219 n. 27; Rebroadcasts, *supra* note 678, at 40.

695 *See* Transborder Satellite Services, 88 F.C.C.2d at 278 n. 25:

> The Communications Act, in Section 605, prohibits the unauthorized interception and disclosure of interstate or foreign radiocommunications except those designated as broadcasts for use by the general public .... After completion of the INTELSAT coordination process, and with the bilateral concurrence of the foreign government, Section 605 will not stand as an impediment to the reception of transborder television programming at U.S. receive-only earth stations.

ing reception with the consent of the sender.[696] Moreover, explicit language would be required since section 705 is a criminal statute, to be strictly construed.[697]

There would also be First Amendment problems in making the reception of a foreign satellite signal illegal where the sender has given consent. In *Lamont*, the Supreme Court struck down a much less onerous burden on incoming speech, namely, the requirement that the addressee send in a postcard request in order to receive mail from abroad.[698] True, the communication there was by mail rather than radio, and the use of radio frequencies traditionally has justified greater regulation.[699] Further, the United States has a substantial interest in complying with its treaty obligations to INTELSAT. On the other hand, the First Amendment interests at stake here could be stronger than in *Lamont* – if, for example, the signals from the foreign satellite carried news coverage and the receiving entity were a news organization wanting to retransmit that news in the United States.[700]

Thus, if the U.S. Congress had passed a law requiring FCC permission for reception of programming from a foreign satellite with the consent of the sender, a substantial constitutional question would be presented. Congress

696 Section 705(a) contains five, quite-wordy sentences, which may be summarized as follows: The first sentence prohibits any person receiving a communication from divulging its contents, »except through authorized channels,« to »any person other than the addressee,« or to a person employed to forward the communication, or on demand of lawful authority. The second sentence provides that »[n]o person not being authorized by the sender shall intercept« any communication and divulge its contents. The third sentence provides: »No person not being entitled thereto shall receive« any communication and use it »for his own benefit or for the benefit of another not entitled thereto.« The fourth sentence provides that »[n]o person having received any intercepted radio communication« shall divulge its contents or use it for his own benefit. The fifth sentence provides that the section shall not apply to »any radio communication which is transmitted by any station for the use of the general public.« 47 U.S.C. § 705(a) (1985).

The FCC conceivably might rely on the third sentence, arguing that a person is not »entitled« to receive a signal from a foreign satellite, although he has the consent of the sender, if he does not also have the permission of the FCC given after compliance with the INTELSAT Agreement. But some specific language should be necessary, especially in a criminal statute, to establish that permission must come from the government and not just the sender. The third sentence seems more reasonably read as the twin of the second sentence – prohibiting reception where the second sentence prohibits interception, in both cases without the consent of the sender.

697 *See* Rathbun v. United States, 355 U.S. 107, 111 (1957); Brandon v. United States, 382 F.2d 607, 611 (10th Cir. 1967); United States v. Hall, 488 F.2d 1983, 195 (9th Cir. 1973).

698 Lamont v. Postmaster General, 381 U.S. 301, 305–07 (1965); *see supra* text accompanying notes 308–11.

699 *See, e.g.*, FCC v. League of Women Voters, 104 S. Ct. 3106, 3116–18 (1984); *supra* note 529 and accompanying text.

700 *See* GHORIZONT, *supra* note 688; *see infra* notes 770–78 and accompanying text.

has not passed such a law, but the FCC interprets section 705 as though it had. This position is untenable.

c. *Examples of U.S. reception of foreign satellite signals*

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

(i) *Backyard-dish reception*

By mid-1986 more than 1.5 million homes in the United States had their own earth stations – »backyard dishes« – to receive television programs from satellites.[701] The satellites at which these dishes are pointed include foreign satellites.[702] Since dish owners normally lack the consent of the signal's originator, their reception of satellite signals has been assumed to violate section 705 of the Federal Communications Act, as that section stood prior to the 1984 »satellite cable programming« amendment.[703] The questions arise whether that amendment covers reception of signals from *foreign* satellites and whether other protection for such reception can be found in section 705.

The 1984 amendment provides a specific exemption from section 705 for reception of satellite signals by home earth stations. It exempts the reception of »any satellite cable programming for private viewing« unless the signal is scrambled or, if it is not scrambled, unless there is a »marketing system« through which dish owners can buy the right to view the programming.[704] While most U.S. programmers have responded to the amend-

701 Broadcasting, Oct. 6, 1986, at 74.

702 *See, e.g., Sky's the Limit on Home Sales of Satellite Dishes*, San Francisco Chronicle, June 10, 1985, at 20 (»Programming includes commercial-free feeds from the major networks, foreign broadcasts and even pay-TV channels such as those offering first-run movies«); *Nyetwork TV: America Tunes in Soviet Broadcasts*, Wall St. J., Nov. 18, 1986, at 1, col. 4

703 *See supra* notes 667–69. *See* National Subscription Television v. S & H T.V., 644 F.2d 820 (9th Cir. 1981); Chartwell Communications v. Westbrook, 637 F.2d 459 (6th Cir. 1980); Cryan & Crane, *supra* note 660, at 859; 130 CONG. REC. S14,286, Oct. 11, 1984 (statement of Sen. Packwood on Cable Communications Policy Act of 1984), *quoted supra* note 667. The reception presumably would violate the second and/or third sentence of section 705. *See supra* note 668.

704 47 U.S.C. § 705(b) (1985); Pub. L. No. 98–549, §§ 5(a), 6(a); 98 Stat. 2802, 2804 (Oct. 30, 1984).

ment by scrambling their satellite-carried signals,[705] programmers using foreign satellites may not have done so.[706] If signals carried by foreign satellites are not scrambled, and are not subject to a marketing system,[707] the question remains whether the 1984 amendment protects U.S. dish owners in receiving those signals.

There appears to be nothing in the amendment that precludes its application to foreign satellites. But the programming must be »satellite cable programming,«[708] defined as programming »primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers.«[709] This test apparently would protect the U.S. reception of some signals carried by Canadian satellites, which evidently are transmitted to Canadian »cable operators« similar to cable operators in the United States.[710]

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

There is nothing in the statutory terms »cable operators« or »cable subscribers,« however, that indicates any such limitations.[711] In addition, no reason appears why the purpose of the amendment – to make cable programming available for home-dish reception, unless the signal is scrambled or a marketing plan provided – does not apply to a state-run and state-funded cable operation.

What then if the programming carried by the foreign satellite is distributed, not by cable, but by broadcast stations? In this situation, the 1984 amendment clearly does not apply. It may be suggested, however, that home-dish

705 *See* Broadcasting, Oct. 6, 1986, at 74 (most major cable programmers will have scrambled their satellite feeds by early 1987); Broadcasting, Feb. 2, 1987, at 9 (CBS broadcast network sets July 1987 date to begin scrambling its satellite feed to its affiliates).

706 *See, e.g., infra* text accompanying notes 723–57 (reception of unscrambled Soviet programming).

707 The purpose of the amendment presumably would require that the marketing system be available to viewers in the United States.

708 47 U.S.C. § 705(b) (1985).

709 47 U.S.C. § 705(c)(1) (1985).

710 *See* 1983 Hearings, *supra* note 651, at 20 (statement of David Ladd, Register of Copyrights).

711 »[C]able operators« easily includes a government cable operation. »[C]able subscribers« can mean separately paying subscribers, but can just as well mean more generally the people who receive, and are entitled to receive, the cable service.

reception now is protected by the proviso to section 705, which exempts reception of »any radio communication which is transmitted by any station for the use of the general public.«[712] The argument would be that since broadcasting is defined by the Communications Act as radio communications »intended to be received by the public,«[713] satellite transmissions that result in conventional broadcasts are »for the use of the general public« under the proviso.[714]

In support of the argument, it can be said that nothing in the statutory language prevents treating the broadcast-bound satellite signal as a transmission »for the use of the general public,« especially when the broadcast proceeds simultaneously with reception of the signal by the broadcast station. Further, broadcast networks, like cable networks, are able to protect their satellite signals by scrambling them.[715] If they fail to do so, why shouldn't their signals be fair game in the open sky for home dishes?[716]

Still further, the Communications Act, through its definition of »broadcasting« and its exemption for signals transmitted »for the use of the general public,« arguably embodies a policy of enabling members of the public to have access somehow to broadcast programming. This policy may be offended if members of the U.S. public are prohibited from receiving at their home earth stations, for private viewing, broadcast-bound programs from foreign satellites, when satellite reception is the *only* way those programs can be received in the United States.[717]

712 47 U.S.C. § 705(a) (1985).

713 47 U.S.C. § 153(o) (1985); *see* National Subscription Television v. S & H T.V., 644 F.2d 820, 823 (9th Cir. 1981); Chartwell Communications v. Westbrook, 637 F.2d 459, 465 (6th Cir. 1980).

714 Conventional broadcasts are distinguishable in this respect from subscription broadcasts (STV) intended only for paying subscribers. *See, e.g., id.* It may further be argued with respect to some countries that satellite transmissions destined for cable or other nonbroadcast distribution are likewise »for the use of the general public.« *See infra* note 736.

715 *See supra* note 287.

716 The argument can claim inferential policy support in the Electronic Communications Privacy Act of 1986, Pub. L. No. 99–508, 100 Stat. 4573 (Oct. 21, 1986). This act, while amending the federal anti-wiretapping laws to reach unauthorized interception of new communications technologies, excludes from its coverage the interception of an unscrambled satellite signal »transmitted ... to a broadcasting station for purposes of retransmission to the general public,« provided that the interception is not »for the purposes of direct or indirect commercial advantage or private financial gain.« *Id.* § 101(d)(2), 100 Stat. 4577 (Oct. 21, 1986). The legislative history makes clear, however, that the Act does not authorize any conduct that violates section 705(a) of the Communications Act. *See* H.R. REP. NO. 647, 99th Cong., 2d Sess. 43–44 (1986); 132 CONG. REC. S14,452–53 (daily ed. Oct. 2, 1986) (statement of Sen Mathias); Rice, *supra* note 669, at 437–38.

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

But the argument confronts major problems. The home earth station receives the signal *from the satellite*. At that point the signal is not being broadcast but is being transmitted point-to-point to the broadcast station. Point-to-point transmission, as distinct from broadcasting, probably was intended to be outside the section 705 proviso.[718] Moreover, the argument would have to apply also to reception of broadcast-network programming from United States domestic satellites. Such an interpretation of the proviso, making it applicable to »satellite broadcast programming,« would seem contrary to the limited congressional intent behind the 1984 »satellite cable programming« amendment.[719] This is especially so because the satellite feeds of the major U.S. broadcast networks lack the commercials that the local stations insert in the programming.[720] Reception of the program signals directly from the satellite thus would undermine the broadcast marketing scheme, a result Congress did not intend.[721]
For these reasons, the argument that the section 705 proviso protects home-dish reception of broadcast-bound programming, whether received from foreign or from U.S. domestic satellites, must be rejected.[722]

(ii) *Reception for academic purposes*

Legally questionable reception of foreign satellite signals is also found increasingly at U.S. universities. According to a 1984 report, »Columbia

718 *See* Cryan & Crane, *supra* note 660, at 859 (section 705, with limited exemption for reception of satellite cable programming, »covers theft of ... ›point-to-point‹ radio messages«). In 1979 the FCC held, and a federal district court agreed, that transmissions by amateur radio operators were not as a general rule »for the use of the general public« under the proviso, in large part because they were point-to-point transmissions. James Reston, Jr., 72 F.C.C.2d 662, 667–68 (1979); Reston v. FCC, 492 F. Supp. 697, 701 n.3, 702 (D.D.C. 1980). As a result section 605 was amended in 1982 to make clear that reception of amateur transmissions is within the proviso: »any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.« 47 U.S.C. § 705(a); *see* Communications Amendments Act of 1982, Pub. L. No. 97–259, Sept. 13, 1982; S. REP. NO. 97–191, 97th Cong., 2d Sess. 8–10 (1981); HOUSE CONFERENCE REPORT NO. 97–765, 97th Cong., 2d Sess. 59–60 (1982).

719 *See* 130 CONG. REC 14,286, 14,287 (Sen. Packwood) (»This authorization is carefully designed as a specific, limited exception to the general liability associated with unauthorized use«); Rice, *supra* note 669, at 426, 433, 438–39.

720 *See* San Francisco Chronicle, June 10, 1985, at 20, *quoted supra* note 702; Rice, *supra* note 669, at 434–35.

721 *Cf.* National Subscription Television v. S & H T.V., 644 F.2d 820, 825 (9th Cir. 1981) (decoding of STV signals would undermine STV marketing scheme).

722 The possibility of a First Amendment right to receive satellite programming is considered in the text accompanying notes 739–54 *infra*.

University has announced that it is receiving up to 15 hours a day of live television programs broadcast internally in Russia.«[723] Having installed an eleven-foot rooftop dish antenna to receive signals from four domestic satellites of the Soviet Union, Columbia reportedly was using the programs for research and teaching purposes.[724] According to a *Wall Street Journal* article in November 1986, a growing number of U.S. universities, cable systems, U.S. government officials and private individuals were receiving Soviet programming.[725] So far as appears, neither Columbia University nor any of the other recipients, with one exception, had obtained the consent of the Soviet originators.[726]

University reception of foreign satellite programming differs from home earth-station reception in at least two legal respects. First, the universities are engaged in an educational and scientific endeavor. If Columbia University were sued by the Soviets for copyright infringement in receiving the satellite programming and if the Soviets otherwise had a good claim under the U.S. copyright law, the educational, scientific and nonprofit nature of Columbia's activity might well provide a »fair use« defense.[727] It is doubtful, however, that the Soviets would have a good claim in the first place. The Copyright Act exempts the »public reception« of a television transmission »on a single receiving apparatus of a kind commonly used in private homes.«[728] Notwithstanding the technical sophistication of the antenna used by Columbia to receive the Soviet programming,[729] the receiving sets

723 Broadcasting, Nov. 5, 1984, at 79.

724 *Id.*

725 *Nyetwork TV, supra* note 702, at 1, col. 4. The article reported that five small companies had been formed »to build and market Soviet TV reception stations and the software to run them.« Some fifteen universities already had the receivers (which sold from $10,000 to $100,000); a dozen more universities planned to buy them in 1987; and »[p]romoters claim no fashionable campus will be without Moscow TV in a few more years.« The United States Information Agency began receiving the signals in June 1986. Meanwhile ten cable companies in large cities, including New York, were planning to carry one week of Soviet programming to test the market. *Id.*

726 The *Wall Street Journal* article reported that one earth-station operator asked the Soviets for permission and received it, in return for arranging a study of U.S. reactions to Soviet television. *Id.*

727 *See* 17 U.S.C. § 107(1), (4) (1985); 17 U.S.C. § 110(2) (exemption for transmission of a work as part of »the systematic instructional activities of a ... nonprofit educational institution,« but limited to nondramatic works). *See also* Harper & Row, Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218, 2225–27 (1985).

728 17 U.S.C. § 110(5) (1985); *see* H.R. REP. NO. 94–1476, 94th Cong., 2d Sess. 86–87 (1976); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 157 (1975).

729 *See Nyetwork TV, supra* note 702.

on which the programs are shown may well be of a kind commonly used in private homes.[730]

If the Soviets were to have no case against Columbia under the Copyright Act, what about the private action they might bring for violation of section 705 of the Communications Act?[731] Here a second difference between Columbia and the home earth station cuts *against* the university. To the extent that the Soviet programming is distributed to viewers in the U.S.S.R. by cable systems, home earth-station owners in the U.S. probably are protected in receiving the satellite signals by the 1984 amendment to section 705.[732] A university, however, could not claim this protection. The amendment is limited to »private viewing,« defined as viewing for private use »in an individual's dwelling unit.«[733]

Reception of Soviet signals by a U.S. university without consent thus would seem to violate section 705, unless it could find protection in the »use of the general public« proviso.[734] As indicated earlier, that proviso probably does not protect the reception of signals being transmitted point-to-point but only those being broadcast.[735] Hence, even if the signals ultimately are distributed to the Soviet public by broadcasting, the university's reception of them from the Soviet satellite, without the consent of the originator, would still appear to violate section 705.[736]

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

731 *See* 47 U.S.C. § 705(d)(3) (1985). The U.S. government might also bring a civil or criminal action against Columbia for violating section 705. *See* 47 U.S.C. § 705(d)(1).

732 47 U.S.C. § 705(b), (c) (1985); *see supra* text accompanying notes 286–88.

733 47 U.S.C. § 705(b), (c)(4) (1985).

734 47 U.S.C. § 705(a), (1985); *see supra* note 671 and accompanying text.

735 *See supra* text accompanying notes 717–21.

736 *See supra* note 722 and accompanying text. *If* the reception of satellite signals were within the proviso when the signals ultimately are distributed to the public by broadcasting, one might argue, in the context of Soviet signals, that the proviso should apply regardless of the mode of distribution. In the U.S. context, only broadcasting is considered to be »for the use of the general public,« while cable and other distribution modes are considered commercial, subscriber-supported, limited-audience enterprises. *See* 47 U.S.C. § 153(o); National Subscription Television v. S & H T.V., 644 F.2d 820, 823 (9th Cir. 1981); statement of Senator Packwood, 130 CONG. REC. 14,286, *supra* note 667. In the Soviet Union, however, it may be that all modes of program distribution are state provided and available generally to the public in the area served. If so, any programming transmitted by a Soviet satellite would be »for the use of the general public.« This theory would protect reception not only by universities but also by anyone in the United States. (Cable systems that retransmitted the Soviet programs would remain liable for copyright infringement. *See* 17 U.S.C. § 111(c).) The theory still founders, however, on the likely inapplicability of the section 705 proviso to signals being transmitted point-to-point. *See supra* notes 717–21 and accompanying text.

Are there any other defenses for the university? Perhaps the First Amendment provides a right of access to unscrambled satellite signals, when those signals carry the basic television programming of a nation and when that programming otherwise would be inaccessible for study in the United States.[737] Regardless of whether the »free flow« principle supports a right to broadcast into a country without that country's consent,[738] it may support a right, protected against the U.S. government by the First Amendment, to *receive* from any country television programming transmitted to the public there.[739]

But the claim seems too broad, vague and novel to stand independently on a First Amendment foundation. There is no satisfactory way to define and limit the programming to which the right of access would apply.[740] There is no stopping place short of an unfettered right to receive from any satellite any unscrambled signal carrying »programming.«[741] Programmers indeed can scramble their signals,[742] and the day may come when unscrambled satellite signals are viewed as being in the public domain. It is hard to believe, however, that the First Amendment already goes so far.

The First Amendment interest in university reception of Soviet programming might be accommodated, however, in another, more flexible way. If the educational and nonprofit character of the university's use of the programs would support a fair-use defense to a Soviet claim of copyright infringe-

737 *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (First Amendment right of access to criminal trials); *id.* at 583 (Stevens, J., concurring) (describes decision as holding that »an arbitrary interference with access to important information« abridges First Amendment).

738 *See supra* text accompanying notes 16–19.

739 As one indication of international norms, the Brussels Satellite Convention, *supra* note 676, obligates each signatory to take action against »the *distribution* on or from its territory of any program-carrying signal by any *distributor* for whom the signal emitted to or passing through the satellite is not intended.« Brussels Satellite Convention, art. 2 (emphasis added). The Convention apparently contemplates no action against the simple reception of satellite signals by home viewers.

740 One may ask whether satellite-carried *cable* programming, if unscrambled, would thus be made available by the First Amendment for *nonprivate* viewing, overriding section 705. 47 U.S.C. § 705(a), (b), (c); *see supra* notes 286–88 and accompanying text. Or whether reception of the unscrambled satellite feeds of the U.S. broadcast networks, free of local commercials, would thus become a constitutional right. *See supra* notes 720–21 and accompanying text. Attractive as the latter idea may be, it is hard to find support for it yet in the First Amendment.

741 Indeed, if unscrambled satellite signals are in the public domain, it is hard to see how the right of access can be limited to »programming« and prevented from reaching telephone conversations and other »private« communications.

742 *See supra* note 705 and accompanying text.

ment,[743] a fair-use defense might be read into section 705 as well.[744]
Just as the fair-use defense to copyright infringement reflects First Amendment interests,[745] a fair-use defense under section 705 could vindicate the interest in access to a nation's television programming.[746] Fair use could provide a suitably flexible vehicle under section 705, just as it does in copyright law. It could protect reception of satellite programming for »nonprofit, educational purposes« but not reception »of a commercial nature.«[747] It could take into account the effect of the signal reception on the »potential market« for the programming.[748] On this basis the reception of Soviet programming, distributed free across an entire nation, might be protected, while liability was retained for reception of programming distributed by cable systems or other market-based modes.[749]
There is, however, a substantial obstacle to reading a fair-use defense into section 705. Congress has expressly included in section 705 two »fair use« provisions – for »private viewing« of »satellite cable programming,«[750] and for reception of signals transmitted »for the use of the general public.«[751] Especially since the section was amended in this context as recently as 1984,[752] it is a fair inference that no further exceptions were intended.[753] Thus, while the question is debatable, respect for congres-

743 *See supra* note 727 and accompanying text.
744 The fair-use defense originally was read into copyright law by the courts. *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218, 2225 (1985). It is true that section 705 is not limited to copyright considerations. It is aimed not simply at the taking of the material but at the way it is taken: by intercepting a communication without the consent of the sender. *See* 47 U.S.C. § 705(a). One would not want to give a wiretapper a fair-use defense under section 705 based on his educational, nonprofit use of the material overheard. In the case of unscrambled signals received from a satellite, however, the element of eavesdropping is much more attenuated. With more than 1.5 million satellite dishes operating in the United States alone, *see supra* note 701 and accompanying text, the reasonable expectation of privacy for an unscrambled signal would seem quite limited. *Cf.* United States v. Ramsey, 431 U.S. 606 (1977) (no justified expectation of privacy as against border search).
745 *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 105 S. Ct. 2218, 2230 (1985):
746 *See supra* notes 737–39 and accompanying text.
747 17 U.S.C. § 107(1) (1982 and Supp. III 1985).
748 17 U.S.C. § 107(4) (1982 and Supp. III 1985).
749 The Brussels Satellite Convention takes a fair-use approach to the unauthorized reception of satellite signals. It provides exemptions for reception of satellite signals carrying »reports of current events,« or used for instructional purposes, or distributed »solely for the purpose of teaching.« Brussels Satellite Convention, *supra* note 676, at art. 4(i), (iii); *see supra* notes 704–17 and accompanying text.
750 47 U.S.C. § 705(b) (1985); *see supra* note 670 and accompanying text.
751 47 U.S.C. § 705(a) (1985); *see supra* note 671 and accompanying text.
752 Pub. L. No. 98–549, §§ 5(a), 6(a), 98 Stat. 2802, 2804 (Oct. 30, 1984); *see supra* notes 284–86 and accompanying text.
753 *See* statement of Senator Packwood, *quoted supra* note 667, concerning the 1984 amendment, 130 CONG. REC. 14,286, 14,287.

sional intent should restrain the courts from reading a fair-use defense into section 705.

Still, a fair-use defense would represent sound public policy. University reception of Soviet programming for educational purposes should not violate United States law. Congress therefore should amend section 705. The amendment might extend the exception already created for »private viewing« of »satellite cable programming«[754] to cover private or educational viewing of any satellite-carried programming, if unscrambled. Alternatively, Congress might simply authorize the courts to apply to the reception of unscrambled satellite signals under section 705 the same principles of fair use that are applied to copyright infringement.

Another possible solution for U.S. universities desiring to receive Soviet programming is to ask the Soviets for permission. In one reported instance where this was done, permission was granted.[755] However, the Federal Communications Commission apparently would take the position that the universities were violating section 705 even if they had the Soviets' permission, as long as they did not also have the FCC's permission pursuant to the INTELSAT consultation process.[756] This FCC interpretation of section 705, erroneous in any event,[757] seems especially inappropriate here. While it stands, however, the FCC's condemnation of even consented-to reception of foreign satellite signals, absent the FCC's own permission, underlines the need for congressional action to establish that reception without consent for appropriate purposes does not violate U.S. law.

(iii) *Reception for retransmission as news*

A third current example of U.S. reception of foreign satellite signals involves reception by a news organization for the purpose of retransmitting the material as news within the United States. This problem will be considered after examining cases in which the reception of foreign satellite signals is specifically permitted by U.S. law.[758]

d. *Permitted reception of foreign satellite signals under U.S. law*

In some situations the FCC has authorized the reception in the United

754 47 U.S.C. § 705(b) (1985); *see supra* note 670 and accompanying text.
755 *See Nyetwork TV, supra* note 702.
756 *See supra* notes 684–87 and accompanying text.
757 *See supra* notes 688–97 and accompanying text.
758 *See infra* notes 770–78 and accompanying text.

States of programming from foreign domestic satellites. Three examples are the FCC's *Transborder* policy; FCC permission given to Cable News Network for continuing reception of Soviet signals; and grants of special temporary authority to Cable News Network for coverage of international news events.

(i) *The FCC's* Transborder *decision*

In its 1981 *Transborder* decision,[759] the FCC permitted owners of earth stations in the United States to receive programming from Canadian domestic satellites (and simultaneously permitted U.S. domestic satellite carriers to provide programming to reception points in Canada, as well as in Central America and the Caribbean). At least some of the proposed reception services,[760] if not all of them,[761] had the consent of the originators.[762] The FCC determined that the proposed use of U.S. earth stations for international service from a nearby country would be consistent with U.S. law – in particular, the Communications Satellite Act of 1962[763] – and with the U.S. commitment to INTELSAT and its global satellite system.[764] As suggested by the U.S. State Department, the FCC applied two tests for determining whether use of non-INTELSAT facilities for an international service should be approved: (1) whether the INTELSAT global system could

759 Transborder Satellite Video Services, 88 F.C.C.2d 258 (1981).

760 *See id.* at 262, 263.

761 The FCC did not discuss the consent question, possibly implying that consent was present in all cases. *See*, however, the FCC's 1985 final order approving the services, which states that it »does not include the video programming of superstations (WGN, WOR, and WTBS) and other premium pay services (i.e. Showtime etc.) because of copyright concerns.« 220 Television, No. 318-DSE-ML-78, Nov. 22, 1985, para. 4, n.2.

762 The FCC here reiterated its position that reception by a U.S. earth station of a signal from a foreign satellite, even with the consent of the sender, would be »unauthorized,« in violation of section 705 of the Communications Act, if it did not also have the permission of the FCC after the INTELSAT consultation process. 88 F.C.C.2d at 278 & n.26; *see supra* notes 684–87 and accompanying text. This time the FCC sought to bolster the position by relying also on the International Radio Regulations (I.R.R.), in which the members of the International Telecommunication Union agree to prevent »the unauthorized interception of radiocommunication not intended for the general use of the public.« 88 F.C.C.2d at 278 & n.26; ch. VI, Administrative Provisions for Stations, ITU Radio Regulations, Art. 23(a) (1982). But the I.R.R. share with the INTELSAT Agreement a lack of apparent intent, and probably of legal capacity, to impose self-executing criminal sanctions on persons in the U.S. *See supra* notes 691–92 and accompanying text. Moreover, the I.R.R. fall short even of the INTELSAT Agreement in lacking any suggestion that an interception is »unauthorized« when it has the consent of the sender but lacks the permission of the government. *Compare supra* text accompanying note 690.

763 47 U.S.C. §§ 701–44 (1985).

764 88 F.C.C.2d at 271–76.

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de the service, or (2) whether it would be clearly uneconomical or al for that service to use the INTELSAT system.[765] The Commission that INTELSAT was technically able to provide the transborder over its satellites but that the use of INTELSAT facilities for these would be »uneconomical, ... impractical and undesirable.«[766] The ecision was not final; it required that the consultation process ticle XIV(d) of the INTELSAT Agreement be pursued before the der service could begin.[767] This process took four years, reaching on (and approval) at the October 1985 meeting of the INTELSAT y of Parties.[768] In November 1985, the FCC issued final grants of y for the transborder services.[769]

FCC approval for continuing reception from Soviet satellites

her approval of foreign satellite reception, the FCC permitted a ews organization, Cable News Network, to receive signals from atellites. In February 1985, CNN sought FCC permission to receive tlanta (Georgia) earth station, located within the footprint of one of viet Union's GHORIZONT satellites, news programming transon the satellite by the Soviet-bloc news agency, Intervision.[770] With ion's consent, CNN planned to extract segments for insertion into n news programming.[771] A few months later, CNN signed a ar agreement with the U.S.S.R.'s State Committee for Television adio (Gostelradio) to exchange news, entertainment and sports proing.[772]

y 1985, the FCC, applying its *Transborder* standards, approved request.[773] The approval was conditioned on consultation by the with INTELSAT pursuant to article XIV(d) of the INTELSAT ment.[774] It was also made subject to: (a) possible modification »as t of consultation with the Secretary of State on foreign, political and l matters«; and (b) »express immediate revocation without hearing«

at 279–81.
at 280–81.
at 284.
220 Television, No. 318-DSE-ML-78, Nov. 22, 1985, para. 1.
id., paras. 1, 3, 4. The FCC previously had issued some authorizations based on the uary 1985 INTELSAT meeting. *Id.*
HORIZONT, *supra* note 688, at paras. 1, 3.
at para. 3.
oadcasting, June 3, 1985, at 129.
HORIZONT, *supra* note 688, at paras. 6–10; *see supra* notes 759–69 and accompanying t.
HORIZONT, *supra* note 688, at para. 11.

if the FCC, in consultation with the Secretary of State, should determine that revocation was »in the public and national interest.«[775]

In October 1985, the INTELSAT Assembly of Parties approved the CNN proposal.[776] Meanwhile the State Department had also given approval, subject to two added conditions: (a) that CNN be required to submit to the FCC and the State Department »a report covering the first five months of usage of the Soviet signal in terms of CNN air time and CNN's understanding of any Soviet use of CNN news programming«; and (b) that the license be granted for only six months, »with renewal requiring a favorable foreign policy finding made by the Department of State.«[777]

In November 1985, the FCC, though noting that the six-month term would be »considerably shorter than the term that can be granted under the Communications Act,« decided to »defer to the State Department because of the important foreign policy considerations that are involved here.« It thus gave final approval to CNN's application on the conditions proposed by the State Department.[778]

(iii) *Special temporary approvals for news coverage*

The FCC also has sometimes granted »special temporary authority« (STA) to receive a foreign satellite signal for the purpose of news coverage of a particular event. In 1984 the Commission granted an STA to Turner Broadcasting System (parent of Cable News Network) to receive from Canada's Anik B satellite coverage of the Pope's visit to Canada.[779] In this and other cases involving Canada, the FCC found that no further steps were necessary. Bilateral coordination was provided by a 1982 exchange of letters between the U.S. and Canada governing the transborder use of U.S. and Canadian domestic satellites, and INTELSAT coordination was pro-

775 *Id.*

776 *See In re* Cable News Network, File No. 907-DSE-L-85, Nov. 15, 1985, para. 3.

777 *Id.* at para. 3. The State Department's determination would be based in part on CNN's report. *Id.*

778 *Id.* at paras. 4–10. Subsequently, CNN asked the FCC for a six-month extension of the license, explaining that the earth station had not yet been contructed because the planned site had proved unavailable. In September 1986, the FCC granted the extension. *In re* Cable News Network, Inc., File No. 907-DSE-L-85, Sept. 22, 1986. In doing so, it noted, and adopted, the State Department's further stipulation that CNN's report on its use of Soviet programming and Soviet use of its programming must be submitted prior to any renewal of the license. *Id.* at para. 5. *See supra* note 777 and accompanying text.

779 *See* Turner Comments, *supra* note 688, at 6.

vided by INTELSAT's approval in 1982 of U.S.-Canada transborder services.[780]

Also in 1984, the FCC granted Turner an STA to receive from a Soviet satellite coverage of the Soviet bloc's »Friendship Games.«[781] This time it could not be said that INTELSAT coordination had been accomplished in advance. But the FCC, stressing the immediacy of the need and the limited duration of the use, nonetheless made the STA effective immediately, without going through the INTELSAT process.[782] In 1985 the FCC granted Turner an STA to receive from a Soviet satellite coverage of the Soviet Union's 40th anniversary celebration of the end of the Second World War, again without waiting for the INTELSAT coordination process.[783]

These STA grants have made INTELSAT increasingly unhappy. INTELSAT charges that the FCC, by its willingness to bypass the coordination process, demonstrates its lack of understanding of U.S. obligations under the INTELSAT Agreement.[784] In INTELSAT's view, it is not the FCC, but only INTELSAT's Assembly of Parties acting as part of the coordination process, that has authority to determine such questions as economic harm to INTELSAT from the proposed service.[785]

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

e. Constitutional problems in the U.S. law governing reception from foreign satellites

There are First Amendment problems in a U.S. legal rule that compels a news organization, such as Cable News Network, to apply to the FCC for permission to carry on-the-scene coverage of particular news events. The need to get a government license in order to report a news event would

780 *See* Turner Comments, *supra* note 688, at 6; *In re* applications of Cable News Network, Inc. for modification of radio station license to add the ANIK-B satellite as a point of communication (»Anik-B Proceeding«), FCC File Nos. 2409-DSE-ML-84, 2410-DSE-ML-84, Dec. 6, 1984, para. 5.

781 *See* Turner Comments, *supra* note 688, at 6 n.2

782 *See id.*

783 Broadcasting, June 3, 1985, at 84.

784 *Id.* (reported statement of INTELSAT deputy director).

785 *Id.*

seem to be a classic »prior restraint« forbidden by the First Amendment.[786]

In 1985 the Turner Broadcasting System urged the FCC to lift the rule. Commenting in an FCC proceeding concerning the rebroadcasting of radio transmissions,[787] Turner sought a ruling »that it does not violate Section 605 to rebroadcast brief excerpts of programming obtained from foreign satellites, without FCC approval, but with the consent of the signal originator.«[788] Turner urged the FCC to conclude that »tapping into« foreign satellite programming, with the consent of the originator, for the purpose of retransmitting brief portions as part of bona fide news programming was a »modified fair use« that did not require INTELSAT coordination at all.[789] Alternatively, Turner said the United States should ask INTELSAT to coordinate such use by news organizations on a »generic« basis »for all present and future non-INTELSAT satellites.«[790]

Turner's argument, which was opposed by the Communications Satellite

786 *See* Near v. Minnesota, 283 U.S. 697, 713–14 (1931); Grosjean v. American Press Co., 297 U.S. 233, 245–50 (1936); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 590 n.17 (1976) (Brennan, J., concurring). Among the different kinds of prior restraint, this one recalls the licensing scheme of 17th-century England, which the First Amendment was especially intended to repudiate. *See* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 650 (1955); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973).

The First Amendment objections become concrete when the government arranges the prior-licensing requirement in the way the FCC did, at the request of the State Department, in ruling on Turner's application for continuing authority to receive programming from Soviet satellites. *See supra* notes 775–78 and accompanying text. When the license term is made as brief as six months, with a report required from the licensee on its use of Soviet programming and Soviet use of its programming, and when renewal is conditioned on »a favorable foreign policy finding made by the Department of State« (*see supra* text accompanying note 777), the licensee is put on notice that its permission to carry such news will not be continued if the arrangement does not satisfy the U.S. government.

787 Rebroadcasts, *supra* note 678.

788 Turner Comments, *supra* note 688, at i (Summary). Turner pointed out that the INTELSAT approval process »can take from one and a half to three years,« and that if Turner bypassed the INTELSAT process it would »risk the sanctions – both civil and criminal – that could be imposed pursuant to Section 605.« *Id.* at 5,7. Acknowledging that there were special facilitating arrangements between the U.S. and Canada, Turner said: »The problem for a U.S. news organization is that news events are fast-breaking and unpredictable and do not all originate in Canada.« *Id.* at 5–6.

789 *Id.* at 7–8. Turner pointed out that in copyright law, »›fair use‹ can be made of copyrighted material even without consent of the copyright holder,« and said it was seeking only the ability to use material from foreign satellites with the consent of the originator but without prior FCC approval. *Id.* at 7. *Cf. supra* text accompanying notes 743–54 (possible fair-use defense under section 705 without consent of originator).

790 Turner Comments, *supra* note 688, at 9 n.3

Corporation (Comsat),[791] failed to engage the FCC. »[T]he issues with respect to United States treaty obligations and international agreements raised in Turner's request are beyond the scope of this proceeding,« the FCC found, refusing to rule on Turner's request.[792] The Commission claimed it was taking no position on the request, but it noted that »once a licensee has obtained clear authority from the Commission to receive and use foreign satellite programming, there is no bar to rebroadcasting such programming.«[793] The implication seemed clear that licensees like Turner were expected to obtain that »clear authority from the Commission.«

Turner's position, however, was well taken. The First Amendment means, the Supreme Court has said, that journalists are »free to seek out sources of information not available to members of the general public,« and that »government cannot restrain the publication of news emanating from such sources.«[794] When a news organization must get the government's permission to use on-the-scene television footage obtained abroad – regardless of whether it must also wait while the government pursues a diplomatic consultation process – the organization's news coverage, if not restrained, is delayed and burdened in a way offensive to the First Amendment.[795]

To be sure, the FCC bases its position on the obligations of the United States under the INTELSAT Agreement.[796] Ratified treaties like the INTELSAT Agreement are law in the United States.[797] In case of con-

791 *See* Rebroadcasts, *supra* note 678, at 43 (para. 34). Comsat argued that Turner's request was inconsistent with the FCC's established position on »blanket authority to intercept foreign satellites,« and further that it introduced questions of »United States treaty obligations and other national and foreign policy interests« that went beyond the specified issues in the FCC's proceeding. *Id.* at 43 (para. 34). (Comsat is the designated U.S. representative to INTELSAT. *See* 100 F.C.C.2d 250 n.5 (1984).)

792 Rebroadcasts, *supra* note 678, at 43–44 (para. 35).

793 *Id.*

794 Pell v. Procunier, 417 U.S. 817, 834 (1974). The amendment prevents government from »limiting the stock of information from which members of the public may draw.« First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). *See also* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1944) (L. Hand, J.) (»the dissemination of news from as many different sources, and with as many different facets and colors as is possible«). In FCC v. League of Women Voters, 468 U.S. 364 (1984), the Supreme Court struck down a restriction on editorializing by public broadcasters, noting that editorial opinion »lies at the heart of First Amendment protection.« *Id.* at 381. News coverage, whether domestic or foreign, also lies at the heart of First Amendment protection. *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

795 *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 609 & n. 38 (1976) (Brennan, J., concurring); New York Times Co. v. United States, 403 U.S. 713, 715 (1971) (Black, J.) (First Amendment violated by »every moment's continuance« of a restraint on publication that did *not* involve a fast-breaking news story).

796 *See, e.g.*, Earth Stations, *supra* note 678, at 219, n. 27.

797 U.S. CONST., art. VI; United States v. The Schooner Peggy, 1 Cranch. 103, 109–10 (U.S. 1801).

flict, however, they must give way to the Constitution.[798] Such a conflict is presented by the rule requiring FCC permission before a U.S. news organization can obtain news coverage from a foreign satellite, even with the consent of the originator.

f. *The right to rebroadcast programming received from a foreign satellite*

Apart from the right to receive programming from a foreign satellite, there is a separate question about the right to retransmit that programming in the United States – as Cable News Network would do by including excerpts of Soviet news programming in its own news coverage.[799] Until recently, FCC regulations were confusing on the point.[800] But CNN, in its various applications for FCC permission to receive programming from foreign satellites, apparently had never considered it necessary to ask separate permission to retransmit the programming received. Such a requirement might indeed be an impermissible prior restraint, not on the gathering of news, but on its publication.[801]

In any event the answer is now clear. In a 1985 ruling, the FCC stated: »[O]nce a licensee has obtained clear authority from the Commission to receive and use foreign satellite programming, there is no bar to rebroadcasting such programming.«[802] Thus, United States law poses obstacles to the reception of programming from foreign satellites but not to the retransmission of that programming once legally received.

g. *Summary concerning U.S. reception of signals from foreign satellites*

Two points stand out from this examination of U.S. law concerning reception of programming from foreign satellites. First, reception of such programming in the United States, even for private viewing at home or for academic purposes, may well be unlawful under section 705 of the Communications Act if done without the consent of the originator. It appears to be lawful only if the reception is for private viewing and if the programming is distributed in its home country by cable.[803] Beyond that, one can argue (a) that the reception is lawful because the programming is transmitted »for

798 Kinsella v. United States, 361 U.S. 234 (1960).
799 *See supra* text accompanying notes 770–78.
800 *See* 47 C.F.R. § 73.1207(b)(4), (c) (1984); *see also* 47 U.S.C. § 325(a) (1985).
801 *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971).
802 Rebroadcasts, *supra* note 678, at 43–44 (para. 35).
803 *See supra* text accompanying notes 704–11.

the use of the general public« under the proviso to section 705; or (b) that a »fair use« defense should be read into section 705 for the reception of programming used for nonprofit educational purposes.[804] However, both arguments are likely to fail, and should fail, under section 705 as presently written.[805] A First Amendment right to receive unscrambled satellite signals without the consent of the originator also seems untenable at this time, though one day it may be recognized.[806]

Second, the FCC claimes that reception of foreign satellite signals *with* the consent of the originator is illegal under section 705, unless approved by the FCC pursuant to the INTELSAT Agreement.[807] The FCC takes this position even with respect to reception by a news organization for the purpose of news reporting in the United States.[808] The FCC's claim stands on weak ground, however, both as an interpretation of section 705 and as a restriction of First Amendment speech.[809]

4. *Possible U.S. Restrictions on Foreign DBS Broadcasts into the United States*

There appear to be no existing provisions of United States law that expressly apply to foreign direct-broadcast satellites (DBS) or to the broadcasts they might make into the United States. In addition, no such satellites are as yet in existence. Assuming, however, that a foreign DBS existed and were broadcasting, or claiming the right to broadcast, into the United States, one could ask whether existing U.S. law would be hospitable to those broadcasts or whether it might be invoked against them.

There is a certain hospitality. Section 705 of the Federal Communications Act, which prohibits unauthorized reception of radio communications, exempts »any radio communication which is transmitted by any station for the use of the general public,«[810] a protection that presumably would cover foreign DBS broadcasts.[811] The First Amendment also might pre-

804 *See supra* text accompanying notes 712–21, 743–49.
805 *See supra* text accompanying notes 722, 736, 750–53; *but cf. supra* text accompanying notes 754–57.
806 *See supra* notes 737–42 and accompanying text.
807 *E.g.*, Earth Stations, *supra* note 678, at 219 n.27.
808 *See supra* notes 786–93 and accompanying text.
809 *See supra* notes 794–98 and accompanying text.
810 47 U.S.C. § 705(a) (1985).
811 *See supra* note 714 and accompanying text.

vent the government from restricting reception of such broadcasts.[812] Neither of these protections for broadcast reception, however, necessarily would preclude the U.S. government from taking measures, unilaterally or internationally, to regulate the broadcasts or prevent them from taking place. Various provisions of U.S. law could be invoked to support such measures. Many of these provisions have already been mentioned, but they are collected here with specific reference to foreign DBS.

a. *Restrictions on foreign involvement in U.S. communications*

(i) *Foreign-ownership restrictions*

Section 310 of the Federal Communications Act prohibits ownership of U.S. broadcast stations, or more than twenty-percent control of them, by foreigners or foreign governments.[813] This prohibition has been applied by the FCC to licensees of *domestic* DBS.[814] FCC licensing presumably applies only to frequencies controlled by the United States, so foreign DBS operators presumably would not be subject to section 310 or to the domestic DBS regulatory scheme.[815] But if a foreign DBS were broadcasting into the United States, as it readily could,[816] the policy behind the U.S. ownership restrictions arguably would be undermined by foreign ownership of such a facility.[817]
The argument is readily resisted. As noted earlier,[818] the national-security considerations thought to require the banning of foreign ownership of United States communications facilities were based on fears of hostile use in wartime and were concerned with the total capability of those facilities, not simply with their ability to broadcast to a United States audience.[819] Especially when the broadcasts come from »foreign« communications facilities, it might be recognized as beyond the legitimate concern of the United States to insist, or try to insist, that the facilities be under U.S. ownership.

812 *See* Lamont v. Postmaster General, 381 U.S. 301 (1965); *supra* notes 739–42 and accompanying text.
813 47 U.S.C. § 310(a), (b) (1985); *see supra* note 550 and accompanying text.
814 47 C.F.R. § 100.11 (1985); *see supra* notes 572, 579–80 and accompanying text.
815 *See* Comment, *supra* note 577, at 524.
816 *See* Hagelin, *supra* note 18, at 269; Magraw, *supra* note 18, at 29.
817 *See* Price, *supra* note 18, at 900.
818 *See supra* notes 551–56 and accompanying text.
819 *See* Attribution of Ownership Interests, 97 F.C.C.2d 997, 1009 (1984); Note, *supra* note 591, at 116 ff; *supra* note 576 and accompanying text.

(ii) *Foreign »political propaganda«*

The Foreign Agents Registration Act[820] provides that when an »agent of a foreign principal« disseminates material in the United States that is designed to influence its recipients concerning the policies of the United States or a foreign nation, that material is »political propaganda« and must be labeled, filed, and reported to the U.S. government as such.[821] The Justice Department regulations make it clear that FARA applies to material »televised or broadcast« by such an agent.[822] The question thus arises whether a foreign DBS operator broadcasting into the United States would be subject to FARA's requirements.

Under the present statute, the answer seems to be no. The broadcasts would come directly from the satellite to U.S. homes, with no »agent« distributing them in the United States. The DBS operator itself might be an »agent of a foreign principal,« but the DBS operator would not be acting »within the United States,« as the statute requires.[823]

On the other hand, the purpose of FARA – to advise the U.S. public about the source of foreign »political propaganda« disseminated to them[824] – certainly would apply to DBS broadcasts. So if Congress adheres to that purpose, and if FARA survives constitutional attack,[825] the Act might be amended to impose its requirements on foreign DBS broadcasts (and perhaps other broadcasts)[826] into the United States. The impracticality and presumptuousness of such a move, however, might strengthen the case for dismantling FARA's »political propaganda« requirements.[827]

820 22 U.S.C. §§ 611–21 (1985); *see supra* notes 419–70 and accompanying text.

821 22 U.S.C. §§ 611(c), (j), 614(a), (b), (c) (1985).

822 28 C.F.R. § 5.402(d) (1986) (»[p]olitical propaganda ... which is televised or broadcast, or which is caused to be televised or broadcast, by an agent of a foreign pricipal, shall be introduced by a statement which is reasonably adapted to convey to the viewers or listeners thereof such information as is required under section 4(b) of the Act«).

823 22 U.S.C. §§ 611(c)(1), 614(a), (b). *See* Note, *supra* note 433, at 440; Note, *Government Exclusion of Foreign Political Propaganda*, 68 HARV. L. REV. 1393, 1398 (1955); Schwartz & Paul, *Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship*, 107 U.PA. L. REV. 621, 626 (1959).

824 *See supra* note 460 and accompanying text.

825 It now has. *See* Meese v. Keene, 107 S. Ct. 1862 (1987), *supra* note 470.

826 There would be no clear reason to limit such an amendment to DBS broadcasts. The same purpose might well apply, for example, to the Soviet programming brought into the United States by Cable News Network (*see supra* notes 770–778 and accompanying text), or, for that matter, to British Broadcasting Corporation (BBC) programs shown on U.S. television.

827 *See supra* notes 457–70 and accompanying text.

b. *Policies underlying the regulation of U.S. broadcasting*

(i) *Effects of a new service on the existing system*

In administering and interpreting the Federal Communications Act, the FCC and the courts have been solicitous of certain values built into the U.S. broadcast system. These values include »local service,«[828] a diversity of program sources[829] and advertiser-supported »free« programming.[830] When cable television began to grow in the 1960s, for example, it was held back by the FCC on the ground that it threatened local broadcasting.[831] Before authorizing domestic DBS service, the FCC weighed the potential benefits of that service against the potential adverse impact on existing licensees, particularly on the ability of existing licensees to provide local service.[832]

It would be at odds with this policy and tradition to allow foreign DBS to broadcast into the United States without first considering the potential effects on the existing U.S. broadcast system.[833] Rather than stand by and let foreign DBS operators threaten the long-nurtured values of that system, the United States could be expected, through international negotiations or other means, to seek limitations or prohibitions on foreign DBS in order to protect those values.

(ii) *Content controls*

Incoming DBS broadcasts also would challenge U.S. restrictions on broadcast content. »Obscenity,« which is not protected by the U.S. Constitution

828 *See, e.g.*, Public Service Responsibility of Broadcast Licensees (»Blue Book«), FCC, 1956 (broadcast station »a sort of mouthpiece on the air for the community it serves,« *quoting* Great Lakes Broadcasting Co., Federal Radio Commission Docket No. 4900, 1928); Sixth Report and Order, Television Allocations, 41 F.C.C. 1967 (1952) (first priority: to provide at least one television service to all parts of the U.S.; second priority: to provide each community with at least one television broadcast station); FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 475 (1940); Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958).

829 *See, e.g.*, Multiple Ownership of Standard, FM, and Television Broadcast Stations, 22 F.C.C.2d 306 (1970); on reconsideration, 28 F.C.C.2d 662 (1971). *See generally* R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 99 (1973).

830 *See, e.g.*, Subscription Television Service, 15 F.C.C.2d 466 (1968).

831 *See* United States v. Southwestern Cable Co., 392 U.S. 157, 175–77 (1968).

832 Direct Broadcast Satellites, 90 F.C.C.2d 676, 680–83, 684–92 (1982).

833 *See* Hagelin, *supra* note 18, at 290; Price, *supra* note 18, at 892 ff.

in any medium,[834] is prohibited in broadcasting by one U.S. statute[835] and made a ground for FCC license suspension by another.[836] Moreover, the Supreme Court has held that language that is »indecent,« though not »obscene,« may be prohibited in broadcasting, although in other media it has First Amendment protection.[837] Special content controls are justified in broadcasting, the Court has said, by the »pervasiveness« of the medium and its accessibility to children,[838] both attributes that would hold true for foreign DBS broadcasts.

The FCC also has used less formal powers in the name of protecting the public, especially children, from »offensive« programming of various kinds. After the FCC began receiving complaints about »drug-oriented« song lyrics, for example, it warned broadcasters that their public-interest responsibilities required them to pre-screen the lyrics of the songs they broadcast,[839] a warning well calculated to take the offending songs off the air.

United States law thus embodies strong concerns about obscene, indecent or otherwise offensive content in broadcasting. Foreign DBS broadcasts could well carry material unacceptable by U.S. standards.[840] It seems unlikely that the U.S. would remain passive as a »free flow« of offensive programming from a foreign DBS operation washed over the U.S. broadcast audience. The United States could be expected to try to regulate or prevent such broadcasts not only because of their own content but also to protect the integrity and effectiveness of U.S. domestic broadcast regulation. It would be pointless to regulate domestic broadcasting while foreign DBS broadcasts went unrestrained.

(iii) *»Political« obligations*

United States law imposes on broadcasters three major obligations to support public debate and the political process. The »fairness doctrine« requires broadcasters, once they have aired one point of view on a controversial issue of public importance, to give reasonable coverage to opposing

834 Roth v. United States, 354 U.S. 476 (1957).
835 18 U.S.C. § 1464 (1985).
836 47 U.S.C. § 303(m)(1)(D) (1984).
837 FCC v. Pacifica Foundation, 438 U.S. 726 (1978). The Court defined »indecent« as involving »nonconformance with accepted standards of morality.« *Id.* at 740.
838 *Id.* at 748–49.
839 *See* Yale Broadcasting Co. v. FCC, 478 F.2d 594, (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973) (upholding the FCC action).
840 *See* Price, *supra* note 18, at 900-01.

points of view on that issue.[841] Second, broadcasters must give or sell »reasonable amounts of time« to candidates for federal political office during their campaigns.[842] Third, after providing air time to one candidate for a public office, a broadcaster must give »equal opportunities« to all other candidates for that office.[843]

The significance of these obligations in the U.S. system of broadcast regulation has been underscored in the very context of DBS. In its 1982 decision authorizing domestic DBS,[844] the FCC, in order to minimize the regulatory burden on the new service, declared that the classification of a DBS operator as either »broadcaster« or »common carrier« under the Communications Act would depend on how the operator functioned.[845] If the operator provided its own programming, it probably would be regulated as a broadcaster and thus be subject to the »political« obligations.[846] If the operator leased its transmission facilities to other programmers, it would be regulated as a common carrier and thus be required to lease without discrimination to all comers.[847] In the latter case, the FCC indicated, neither the DBS operator nor the programmer would be treated as a broadcaster and be subject to the »political« obligations of broadcast regulation.[848]

The FCC met a stiff rebuke on this point from the court of appeals.[849] Reversing this part of the Commission's order, the court quoted a statement from the legislative history of the 1927 Radio Act declaring that unless regulatory obligations were imposed on broadcasters, »American thought and American politics will be largely at the mercy of those who operate these stations.«[850] The court emphasized that »DBS, with its power to reach into every home in the United States, has a potential impact far in excess of the limited radio services« with which Congress was originally concerned.[851] Under the FCC's approach, the court continued, a well-funded candidate »could purchase enough time on a broadcast station operated as a common carrier to dominate American thought and

841 Fairness Report, 48 F.C.C.2d 1 (1974) [the FCC repealed the fairness doctrine in August 1987; *see supra* note 146]; *see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
842 47 U.S.C. § 312(a)(7) (1985); *see* CBS v. FCC, 453 U.S. 367 (1981).
843 47 U.S.C. § 315 (1985).
844 Direct Broadcast Satellites, 90 F.C.C.2d 676 (1982).
845 *Id.* at 708–09.
846 *Id.* at 709.
847 *Id.*
848 *Id.* at 709–11.
849 NAB v. FCC, 740 F.2d 1190 (D.C. Cir. 1984).
850 *Id.* at 1202.
851 *Id.*

American politics without any regulatory restraints.«[852] It was to avoid such a result »that Congress imposed restraints such as the equal opportunity rule upon broadcasters.«[853] Hence the court required the FCC to impose the regulatory obligations of a broadcaster on someone, either the DBS operator or its programmer-customer.[854]

The court's concerns would apply equally to foreign DBS. An unregulated foreign DBS operation could discriminate among candidates for U.S. political office in terms of access, equal opportunities and editorial support, free of any legal obligation to provide reply time. Given the enormous geographic range and the number of channels that DBS could command,[855] the intrusion into the U.S. political process could be substantial. The United States could not readily accept a »free flow« so jarring to the rules it has established for the political process by which the nation governs itself.

c. *Summary concerning foreign DBS*

Foreign DBS broadcasts into the United States, uncontrolled and unregulated by the United States, would pose fundamental challenges to U.S. broadcast regulation and its underlying policies. The United States accordingly could be expected to resist foreign DBS operations or to seek to regulate them.[856] The U.S. interest in preventing or regulating such broadcasts would be reinforced not only by the practical difficulty of preventing reception once the broadcasts took place but also by the likelihood that reception in the United States would be protected by the existing section 705 of the Communications Act and quite possibly by the First Amendment as well.[857]

852 *Id.* at 1203.
853 *Id.*
854 *Id.* at 1205. *See also* United States Satellite Broadcasting Co. v. FCC, 740 F.2d 1177, 1187 (D.C. Cir. 1984).
855 *See* NAB v. FCC, 740 F.2d at 1202.
856 *See*, Hagelin, *supra* note 18, at 290–91; Price, *supra* note 18, at 887; Magraw, *supra* note 18, at 27, 30.
857 *See supra* notes 712–17, 738–39 and accompanying text.