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Council of Europe

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Steps Toward A European Agreement On Satellite Broadcasting

Frits W. Hondius*

THE ADVENT OF SATELLITE BROADCASTING IN EUROPE

This article is a progress report, written at the beginning of 1983. It is about the unfolding of a new communications medium, satellite broadcasting, in Europe. It is very probable that by the time of publication, many new developments will have taken place. However, this analysis may still be helpful later on to allow those responsible for the development and use of this powerful new channel of communication to know what the expectations and apprehensions were in 1983. Feedback from history is indispensable to builders of the future, provided that someone is willing to commit to paper a record of contemporary history.

To begin this record, I will make a few remarks about the terminology to be employed in it. The term “satellite broadcasting” is used to denote both “direct broadcasting by satellite” (DBS), as defined by the 1971 World Administrative Radio Conference for Space Telecommunications,¹ and another type of service which has emerged as a hybrid between telecommunications and cable television. This service may take many forms, depending on the particular configuration, such as a “super-station,” as developed in the United States, or a satellite-to-cable service, which has recently emerged in the private sector both within and between some European countries.

Direct broadcasting by satellite will become operational in a number of western European countries in 1986. In principle, this technique may be used for radio as well as television. In practice, however, its most important application will be in the field of television. The present state of the art does not yet permit it to serve the majority of radio listeners who use portable and vehicle receivers.

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Three large countries in Europe and one group of smaller countries have already publicly declared their intention to go ahead with DBS. France and Germany are jointly producing a satellite (TDF-1 for France, TV-Sat for Germany), in order to supply each country with a three-channel service. Sweden, Norway, Finland, and Iceland are cooperating on the NordSat system, for which Sweden is developing a satellite, Tele-X, possibly in cooperation with Norway and Finland. Luxembourg intends to start a DBS service, to be financed mainly by commercial advertising. It is the prospect of spillovers from this satellite service into other European countries which has triggered lively debates in Europe on the question of DBS.  

In several other European countries, the options for DBS are being actively studied, and Italy, Spain, and Portugal will eventually use the system. Portugal, for example, will be better able with DBS to reach its outlying island regions of Medeira and the Azores. After assessing the transborder broadcasting potential of DBS and its high cost, several other countries are considering the possibility of sharing this facility on a multinational basis. Switzerland, for example, is engaged in talks both with French-speaking countries (France and Belgium) and with its German-speaking neighbor, Austria.

Although originally some countries had emphatically stated that they were not going to use DBS, for example, the Netherlands, whose small surface and flat terrain hardly justifies such a broadcasting technique, today all countries of Western Europe are at least studying the possibility of using DBS. One of the reasons for this change of attitude is that while, in the beginning, the only available DBS option seemed to be a very expensive system covering a wide territory, it is now clear that there are in fact two other options which are attractive to smaller countries or countries with an uneven population distribution. The first option, already mentioned, is the sharing of a DBS facility between a number of countries. The second option is the establishment of satellite-to-cable systems, *i.e.*, using a fixed-satellite service to feed programs originating in one country into cable systems of another. Such a service is not "broadcasting" within the meaning of international radio-communication regulations, but a mere transport of signals. Its effect for viewers is for all intents and purposes the same as DBS.

A private satellite-to-cable system was first developed by a British company, Satellite Television Ltd. (Director: Brian Haynes). It supplies television programs to Norway and Finland. Dutch and Belgian cable networks have more or less illegally picked up and distributed to their subscribers television programs transmitted by the Soviet fixed service satellite Gorizont 2. In an experimental program, called Eurikon, five European broadcasting organizations used the same satellite to cable technique in 1982 in order to simulate DBS. Satellite Television Ltd. and Eurikon
have used the European experimental satellite Orbital Test Satellite (OTS) which was launched by the European Space Agency (ESA) and is managed by EUTELSAT, a European intergovernmental consortium. The next satellite to be operated by this consortium is the European Communications Satellite (ECS). In February 1983 the Netherlands government announced that the Dutch public broadcasters would be authorized to use ECS for the transmission of programs. When making this announcement, the government did not state explicitly who would be expected to use it for what. It simply staked a claim.

There is an interesting parallel between the development of satellite and computer services. Originally, the use of these new information technologies seemed reserved to the big users, hence the "Big Brother" syndrome. Thereafter, diversification began to take place as a combined result of economic considerations (the sharing by many users of computer and satellite capacity) and the linking up with other information technologies. In the computer field, the marriage between data processing and telecommunication has led to telematics. In the field of electronic media, a variety of services will soon be available through a variety of channels. Apart from traditional public broadcasting (news, entertainment, sports, educational, and cultural programs, etc.), there will be "new media" (pages of information of the teletext or videotext type) and programs originated by cable operators over and above those transmitted by public broadcasters.

In Western Europe, the prospect that this Pandora's box will soon open has led to broad discussions at the national and European levels. One is struck by the suddenness of the political debates in Europe on satellite broadcasting, which erupted in 1981 and rose to a fevered pitch in 1982. After all, the advent of satellite broadcasting was accurately forecast as long as fifteen years ago. The construction, launching and operation of European space vehicles is the result of years of international cooperation in research, planning, industrial development, and investment. In 1977, almost ten years before the expected entry into operation of DBS, the World Administrative Radio Conference (WARC) in Geneva produced a plan for the allocation of radio frequencies in the 12 GHz-band as well as orbital positions for satellite broadcasting in Region 1 (Europe and Africa). Political discussions about the principles which should govern the use of outer space for DBS have been going on in the United Nations since 1972. The principles which should govern international information and communication were the subject of intensive debates in UNESCO since 1976. In both UNESCO and the UN, the Western European nations defended a common philosophy regarding the freedom of expression and information and the function and role of the media against the views of the communist and third world countries.

Why, then these sudden controversial discussions among Europeans
about satellite broadcasting? An important reason is of course money. The financial, economic, and industrial stakes are enormous. But, there is also another reason: in contrast to the technological and economic aspects, which can be planned and quantified, the social, cultural and political aspects remain very much a matter of subjective judgment and speculation. Countries which decide to take this important step into the future feel the need to do so on the basis of a broad national consensus, the formation of which may however take longer than the average lifetime of governments or parties in power.

Finally, the introduction of satellite broadcasting in Europe automatically affects other countries. Even if a country decides not to introduce DBS for the moment, it will nevertheless feel the impact of other countries' DBS in its own media structures. This factor of uncertainty complicates national media policies.

NATIONAL AND EUROPEAN INITIATIVES ON SATELLITE BROADCASTING

One might have expected that in Europe the initiative toward an international agreement on DBS would come from countries which do not intend to use this medium for the time being, but which are going to be affected by other countries' DBS. The opposite has been the case, however. The alarm in Europe has been sounded by two large countries, Germany and France, both of which will themselves use DBS.

In April 1982 the government of the Federal Republic of Germany asked the Committee of Ministers of the Council of Europe to study the possibilities for the early conclusion of a European agreement on broadcasting. The German government was concerned that DBS might have a destabilizing effect on the media structures, in particular when advertising money was "siphoned off" from one country to the DBS system of another. The Committee of Ministers responded to this initiative by instructing its Deputies to prepare a report on the possibilities of arriving at a legal instrument as envisioned by Germany for their next Session (November 1982).

While that work was in progress, the French government took another initiative outside the framework of the Council of Europe. In July 1982 it convoked in Paris an intergovernmental conference of a limited number of countries on a subject globally defined as "the European audiovisual space" (espace européen de l'audiovisuel). The intellectual father of this project was a senior government official, Jacques Thibau (at present French ambassador to Belgium), who argued in favor of close cultural cooperation between European countries using DBS, to make sure that this new medium
would not lead to a lowering of cultural standards or to the invasion of European media by non-European programs. It would be left to further contacts between European governments to decide how the results of this Conference could be merged with the work already under way in the Council of Europe. The Thibau initiative had the merit of stressing that beginning in 1986, all European television stations will be visible and have to coexist together in one limited area, like goldfish in an aquarium.\(^{13}\)

The fact that the smaller European countries seem to be less nervous about satellite television than their larger neighbors becomes understandable if one takes into account that they have already been exposed to spillover for years. Foreign satellite television will, therefore, not disturb them more than foreign terrestrial broadcasting. On the contrary, DBS will bring them a wide variety of foreign programs from different countries, instead of the present situation in which they receive only the broadcasts of immediate neighbors. The smaller European countries (Belgium, Netherlands, Denmark, Switzerland, and Liechtenstein) have a dense cable network, and routinely receive many foreign programs.\(^{14}\) Larger countries such as Germany and Great Britain have, until now, had very few cable systems, or, like France, have had none at all, and hence, have had fewer outlets for the distribution of foreign broadcasts. Through DBS such broadcasts will suddenly be available in the entire territory of these countries and enter into head-on competition with the national broadcasting organizations.

Smaller European countries will be able to launch direct broadcast satellites if they join other countries in multinational groups (e.g., NordSat) or acquire private investments from abroad. In either case their DBS networks may become serious competitors to the national broadcasting organizations of larger countries which never before faced competition.

At the European level, the first initiative on DBS was launched by the Parliamentary Assembly of the Council of Europe, which, on October 2, 1981, adopted Recommendation 926 (1981) on questions raised by cable television and direct satellite broadcasts.\(^{15}\) This Recommendation was based on a report prepared by a Dutch Socialist member of the Assembly, Piet Stoffelen. The Recommendation gave a very guarded welcome to DBS in Europe. After recalling that not only public broadcasters but also private companies intend to use this medium, the Recommendation listed a series of evils which might result from DBS if the Council of Europe and the governments of member states did not step in. Spillovers of satellite television programs outside the national borders might undermine national broadcasting laws. Since the same programs would be broadcast to a large part of Europe, it was feared that the intellectual and cultural plurality of Europe would be undermined. As for cable systems, these were believed to undermine the intellectual property rights of authors, composers and
performing artists. The independence of program-makers might be jeopardized by the influence of capital suppliers and advertisers. The Assembly concluded that a European agreement was needed to secure such independence, to educate the people with regard to the new media, to protect copyright, and to develop a code of standards regarding program content that would also be acceptable to broadcasting organizations.

On one issue, Recommendation 926 was plainly wrong: it stated, in paragraph 12, that "in accordance with WARC decisions, no satellite broadcasts may take place without prior agreement of the state at which territory the broadcasts are primarily directed." WARC is concerned solely with the use of frequencies and orbital positions, not with the broadcasts made through them.

THE ROLE OF THE STEERING COMMITTEE ON THE MASS MEDIA (CDMM)

In order to carry out the instructions they had received from the Committee of Ministers in April 1982, the Ministers' Deputies asked the Intergovernmental Committee of Experts on Media Policy (MM-PO) to prepare a draft report on DBS. The MM-PO Committee is a sub-committee of the Council of Europe's Steering Committee on the Mass Media (CDMM), which was set up in 1976 in order to assist the member States of the Council of Europe in developing policies to enhance the role of the media in a free and democratic society. Over the years the CDMM (until 1980 called CAHMM, Ad Hoc Committee on the Mass Media) carried out a large number of studies on the functioning of the media in Europe. In recent years it has concentrated on three sets of problems: freedom of expression and information, intellectual property rights and the impact of new electronic media. Its work on freedom of expression and information was brought to a successful conclusion on April 29, 1982, when the Committee of Ministers adopted, at the proposal of the CDMM and of the Ministers' Deputies, a solemn Declaration on the Freedom of Expression and Information. This instrument reaffirmed the commitment of the member states, individually as well as collectively, to this freedom.

Two factors had prompted the adoption of this Declaration. First, while the machinery set up under the European Human Rights Convention affords effective international protection against violations of the freedom of information, it does not spell out what positive steps governments might take to foster this freedom. The Declaration succinctly defines those steps. Second, the liberal media philosophy of the Western democracies has come under heavy attack in world fora, such as UNESCO.

It has therefore become essential for European countries to state what
the freedom of expression and information means to them, even if such a statement is not necessary for Europe, itself, where the freedoms are sufficiently known. The Declaration affirms that, to Europeans, they mean, \textit{inter alia}, open government; no censorship or other arbitrary controls or constraints on participants in the information process, on media content or on the transmission and dissemination of information; reasonable and equitable access to communication channels; and plurality. The final paragraph of the Declaration considers the problems raised by new information technologies, including DBS, stating that it is the Council of Europe's policy

\[\textit{[to]} \text{ ensure that new information and communication techniques and services, where available, are effectively used to broaden the scope of freedom of expression and information.}^{19}\]

On April 29, 1982, the same day as the Declaration was adopted, the Committee of Ministers told the CDMM, and in particular its MM-PO Committee, to begin work on DBS. The paragraph of the Declaration cited above became the principal guideline for this work.

The work entrusted to the MM-PO was exploratory. The Committee was asked to survey the situation of DBS in Europe to identify the problems and to give its opinion on the feasibility of some kind of agreement. During the period between May and September 1982, the MM-PO held three plenary and two working party meetings. On October 12, 1982 its final activity report on the possibility of reaching agreement on a legal instrument relating to direct satellite broadcasting was approved by the parent Committee, the CDMM, and presented on November 10, 1982 to the Committee of Ministers at its 71st Session. The report has remained an internal working document and has therefore not been published, but its main conclusions have been communicated by the Committee of Ministers to the Parliamentary Assembly and the press.\(^{20}\)

The MM-PO re-emphasized in its report the crucial importance of the freedom of expression and information, regardless of frontiers, as expressed by worldwide instruments\(^{21}\) (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, the UNESCO Constitution), Council of Europe instruments (European Human Rights Convention Declaration on Freedom of Expression and Information) as well as the Helsinki Final Act of August 1, 1975. It was therefore not considered necessary to reaffirm this freedom once more with regard to satellite broadcasting, but clearly, the existing texts were to be constantly kept in mind when special rules relating to DBS were drawn up.

The Committee of Ministers endorsed the view which the MM-PO expressed in the report that it was not advisable for the moment to draw
up an international treaty relating to DBS. For one thing, it is not yet clear what the actual problems raised by DBS will turn out to be. Moreover, few states would be willing to bind themselves at this early stage. The MM-PO therefore suggested, and the Committee of Ministers confirmed, that it was preferable to prepare Recommendations on various aspects of satellite broadcasting.

In other words, the “agreement” on DBS which the government of the Federal Republic of Germany had asked for, would not, for the time being, take the form of a single, binding instrument (a convention for example), but rather, of a series of voluntary steps on specific aspects. It was not to be ruled out however, that at a later stage such voluntary arrangements could be transformed into one or more binding instruments. It should be pointed out that the Council of Europe has successfully followed this technique in several other fields, such as data protection.22

Finally, with regard to the contents of such recommendations, the MM-PO drew up an inventory of the problems to be confronted. It found that there were two problems which had to be considered as priorities, advertising by satellite and the protection of copyright in relation to cable systems. Also, apart from these specific themes, it was suggested that the CDMM would be allowed to take up any question in the field of satellite broadcasting brought to its knowledge.

This conclusion was shared by the Committee of Ministers which decided at its 71st Session, on November 10, 1982, that the report constituted a satisfactory basis for further work. “Ministers agreed that closer cooperation between Council of Europe member States in this new field would help to enhance the positive aspects of DBS and to prevent or attenuate negative effects. They instructed their Deputies to continue, as a matter of urgency, the work in this field with a view to drawing up Recommendations to member Governments.”23

ADVANTAGES AND POSSIBLE DISADVANTAGES OF DBS

It should be noted that the Committee of Ministers used much more positive words on the subject of satellite broadcasting than the earlier memorandum of the German government and Recommendation 926 of the Assembly, which had mainly emphasized the problems and dangers inherent in DBS. The MM-PO Committee, when preparing its study for the Committee of Ministers, felt that one should in all fairness list both the advantages and the possible disadvantages of DBS. After all, DBS was going to be used. The role of the Council of Europe should not only be to lament its negative effects, but also to indicate how it could be used in a positive and constructive fashion.
A Resolution adopted on March 12, 1982 by the European Parliament on radio and television broadcasting in the European Community supported the view. This Resolution was based on a report prepared by Mr. Hahn which emphasized that satellite television could become an admirable vehicle for better understanding and communication between the peoples of Europe. The practical proposals contained in the report, i.e., that every country should use its fifth DBS channel for spreading the European message, and that there was a need for some new European broadcasting institution, did not arouse great enthusiasm because the existing national broadcasting institutions are jealously protective, and because countries which invest huge sums of money in DBS would broadcast national rather than supranational programs. However, the report had the merit of emphasizing that Europe should come forward with ideas about what should be done with DBS rather than only state what should not be done.

Similarly, it was acknowledged in the Council of Europe that satellite broadcasting had important technical advantages: the immediate and almost total coverage of a vast territory (elimination of "shadow zones"); coverage of outlying mountainous or insular locations with the same quality of service as densely populated areas; lower vulnerability than ground installations; possibility of additional broadcasting frequencies outside the congested VHF/UHF bands; means of providing additional channels more economically than by the development of a terrestrial transmission network; improvement of the quality of sound and picture and creation of new types of service; and encouragement of international cooperation. The report also noted, as benefits of DBS, that the public would enjoy a wider selection of foreign programs and hence, have a wider choice; while broadcasting organizations, especially those which depend on revenues contingent on audience size, could possibly benefit from increased audiences.

On the negative side, the problems considered by the Council of Europe can be summarized under three main headings: the risk of destabilization of existing media structures, problems of quality and cultural values, and encroachments on individual rights.

It was correctly considered that the risk that DBS would destabilize existing media structures was one of its most serious challenges. The member States of the Council of Europe have repeatedly emphasized that the existence of a rich variety of independent media is a sine qua non for the attainment of the three fundamental principles laid down in the Preamble to the Statute of the Council of Europe: genuine democracy, human rights, and Rule of Law. Before pronouncing itself on this question, the MM-PO thought it advisable to obtain more evidence from governments, international organizations (such as the Commission of the EEC and the European Space Agency), non-governmental organizations representing
the press, public broadcasters, the advertising community, and consumers’ organizations.

It was brought home to the Committee that the cost of direct satellite broadcasting will be considerable. It was told that for the system alone, i.e., the cost of the launching and operation of satellites and ground station facilities, but not including the cost of program provision or domestic receiving equipment, the United Kingdom estimates the 1980 prices were £235 to 310 million. The main sources of revenue for financing these costs of capital investment and operation will be government subsidies, license fees, and advertising. Since the public is not likely to be inclined to pay much higher license fees than at present for terrestrial television, and considering the difficult present budgetary situation of most governments, commercial advertising is regarded as one of the most important potential sources of revenue.

It is feared by some that the spending of advertising money for DBS will decrease the advertising revenue for the daily and periodical press, which are already in a serious financial crisis. The further weakening of the press would be fatal for a country’s media structures as a whole. This problem would be compounded by the flow of advertising money from one country to another. Other problems arise in the case of those West European countries which carry no advertising on television (Belgium, Denmark, Norway, and Sweden) and it may also be expected that many foreign advertising messages will not conform with the national rules on advertising of the receiving country.

No firm conclusions were reached with regard to the likely effects of satellite advertising on the existing media. Advertisers believe that DBS will open new markets and attract advertising which had no previous outlet. In any event, it would hardly be possible in the present economic situation in Europe to impose protectionist restrictions on the international flow of advertising money. There is a real problem however with regard to advertising standards which differ from one country to another. This issue was retained as a priority for future work, in the form of a Recommendation.

In the light of the MM-PO’s report, the government of the Federal Republic of Germany no longer insists on the need for an international agreement against the “siphoning off” of advertising money. At present it emphasizes that advertising messages constitute “information” in the sense of freedom of information guaranteed under the various international human rights instruments. A contrary opinion is held by the government of the Netherlands, which has supported this opinion with a report written at its request by a Committee of three distinguished legal experts (the Boukema Committee).26 The report approves a ruling of the government to the effect that foreign broadcasts aimed at audiences in the Netherlands,
and containing specific commercial messages in Dutch, may be lawfully banned from the cable networks. It should be emphasized, however, that as long as the European Commission and Court of Human Rights have not ruled on the issue, the validity of the Boukema report remains to be tested.

In the context of media structures, the attention of the Council of Europe has also been drawn to the problem of prospective broadcasters shopping around for countries with the least stringent rules for admission to the broadcasting system. As with problems of advertising, this problem could be neutralized by an international harmonization of rules on admission to the broadcasting system. A useful parallel may be drawn here with the provisions of the Council of Europe’s Data Protection Convention 1981, relating to the establishment of a common core of basic rules as an effective remedy against “data havens.”

THE COUNCIL OF EUROPE’S PLAN OF ACTION

In February 1983, the Council of Europe’s Steering Committee on the Mass Media (CDMM) adopted a plan to effect the decisions taken by the Committee of Ministers at its 71st Session in November 1982. This plan consists of a series of sector activities with a view to drawing up guidelines in the form of recommendations to member governments. The plan of action is to be completed in 1986, the year when DBS is expected to become operational. It also coincides with the end of the Council of Europe’s second Medium Term Plan (1981-1986).

The CDMM has drawn up a list of eight activities, two of which have been referred for further action to its legal subcommittee, the Committee of Legal Experts in the Media Field (MM-JU). The six other activities have been entrusted to the Committee of Experts on Media Policy (MM-PO).

Activities Entrusted To The Committee Of Legal Experts In The Media Field (MM-JU)

The MM-JU was asked to look into the problems of intellectual property rights arising from cable television and the legal status of satellite-to-cable services. In spite of the fact that satellite broadcasting would appear to make cable systems redundant for television reception, cable systems remain very much in demand for a variety of reasons. They are less damaging to the environment and less expensive than individual satellite reception facilities. Two-way (interactive) cable opens prospects for citizens’ participation; fiber optics promises to reach a new level of technical achievement. During the past fifteen years the use of cable has however given rise to serious conflicts over the protection of copyright and neighboring rights.
(i.e., the rights of performing artists, phonogram producers, and broadcasters) relating to the works distributed by cable. Under the Berne Copyright Convention, to which all Council of Europe member states are parties, authors of protected works have the exclusive right to authorize the broadcasting of works, as well as the right to authorize rebroadcasting carried out by an organization other than the original one (article 11 bis). A whole series of lawsuits in Austria, Switzerland, Federal Republic of Germany, Netherlands and before the European Court of Justice in Luxembourg has been provoked by the question of whether cable systems should be regarded as a mere method of improving reception or as new broadcasts. The latter doctrine now prevails. For a number of years the Council of Europe, as well as the two international organizations serving the Berne Union and the Universal Copyright Convention, i.e., the World Intellectual Property Organization and UNESCO, have served as the sites for the search for an acceptable solution by governmental experts and representatives of organizations defending the interests of cable operators and the copyright owners.

Since copyright has the character of private law, a contractual solution is preferable in principle, but this is hard to realize in practice. Under Article 11 bis of the Berne Convention, the legislator may determine the conditions under which the rights are exercised, if necessary by non-voluntary licenses. One country has instituted such licenses in 1980, but other countries are very reluctant. Neither the model contract terms proposed by CISAC and European Broadcasting Union, in cooperation with two international organizations representing film producers and distributors, and some cable distributor associations, nor the Model Legislation produced by WIPO and UNESCO has so far been accepted by all parties concerned. In an effort to stimulate these tripartite negotiations between right holders, cable operators and governments, in early 1983 the CDMM presented to the Committee of Ministers a report prepared by three eminent copyright experts, Messrs. R. Dittrich, A. Kerever (Rapporteur), and W. Weincke. More pressure will be needed to bring about a definitive European consensus. The copyright and neighboring rights problems become even more serious when programs are broadcast by satellite. Authors and performing artists derive their royalties from the communication of their work to the public. When their audience is enlarged by cable distribution, satellite broadcasting, or a combination of both, they should be able effectively to exercise their exclusive right. The wider the audience, the earlier the public will be saturated.

The Council of Europe has improved the legal protection of one category of right-owners, the broadcasters, through its 1960 European Agreement on the Protection of Television Broadcasts, to which ten of its member States are at present a Party. The Agreement gives broadcasters
protection against unauthorized rebroadcasting or cable distribution and it also provides that before the end of 1984 all parties should join the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations. Since this deadline has proved to be too early for some countries, an amending Protocol, opened for signature on March 21, 1983, will extend that date until 1990.34

Legislation, judicial action, and law enforcement in the field of copyright, to put it mildly, do not evolve at the same speed as technology. New threats to copyright protection arise in the field of video and sound recording. The Council of Europe is monitoring these problems, independently of its DBS activities, both within the framework of its MM-JU Committee and through a major project in its cultural sector on creativity and cultural industries.

It is hoped that the MM-JU will succeed within the next three years, if possible, in bringing authors, performers, broadcasters, and cable operators nearer to a common understanding and, as a minimum, prevent satellite broadcasting from further complicating the problem.

The satellite-to-cable study, which was also entrusted to the MM-JU, is closely connected with the foregoing, but involves a number of legal elements other than intellectual property rights, namely telecommunications law and broadcasting law. The Committee is likely to consider the legal position of both a party who dispatches a program via a communications or fixed service satellite, and that of the party who receives and distributes from them. Distinctions may have to be made among parties sending or receiving programs within their country of residence, between member States of the Council of Europe, and to and from countries outside the circle of member States.

Activities Entrusted To The Committee Of Experts On Media Policy (MM-PO)

The CDMM has entrusted the following six subjects to the Committee of Experts on Media Policy (MM-PO) for further study and possible action: advertising by satellite, leasing of satellite channels, contacts between countries affected by satellite broadcasting, cooperation among broadcasters in matters such as audience research or European programs, protection of individual rights and industrial consultations.

This is an ambitious program, and it is doubtful that the MM-PO itself could investigate all these questions in detail and produce agreed European policy guidelines. However, on many question the necessary groundwork has already been established by others. In those cases the action of the Committee may consist of bringing that work to the attention of decision-makers in the field of satellite broadcasting or drawing certain conclusions.
from that work at the European level. On the subject of advertising by satellite, the Committee is likely to follow up a report produced earlier by the CDMM on “Advertising in Radio and Television,” as well as the draft Declaration of “Principles Regarding Commercial TV Advertising Broadcast by DBS” to be considered by the EBU Administrative Council in the course of 1983. At its meeting in March 1983, the Committee considered a draft Recommendation which it intends to present for final adoption by the Committee of Ministers by the end of the year.

The question of leasing of satellite channels is basically a new problem. It is desirable that the member States harmonize their approaches to this question as much as possible, in conformity with provision II(e) of the Declaration on the Freedom of Expression and Information which states that it is the goal of the member States to achieve “the availability and access on reasonable terms to adequate facilities for the domestic and international transmission and dissemination of information and ideas.” Member states may wish to inform each other and, it is hoped, consult each other on who may be granted access: organizations performing public broadcasting, other organizations, domestic users, foreign users, etc., and under what conditions. Although in the spring of 1983 only two such services were in operation, involving five OTS transponders, it is expected that the entry into service in 1983 of a new communications satellite, European Communications Satellite (ECS), launched by ESA and operated by EUTELSAT, may lead to the establishment of a dozen cable-to-satellite services utilizing up to fifty transponders.

The question of contacts between countries affected by DBS will probably give rise to an interesting political debate. The initiative concerning the espace audiovisuel européen, launched by the French government in 1982, envisaged negotiations between like-minded governments, on the basis of three main principles: free flow of information, respect for the plurality of European cultures and “the specificity of their expression” and the development of various forms of audiovisual cooperation. After the Paris Conference of July 1982, three working meetings were organized, by the German government in Berlin on television and cinema (October 1982), by the Dutch government in The Hague on advertising and finance (November 1982), and by the Belgian government in Brussels on general media policy, (December 1982). A second enlarged conference, originally planned for January 1983, has been postponed mainly because European governments wanted ample time and no pressure as to how to organize their contacts.

Apart from the fact that such contacts already take place at the political level in the Council of Europe and at the broadcasters’ level in the European Broadcasting Union, the hesitation of other European governments to agree to an intergovernmental consultation arrangement is founded on their respect for broadcasters’ independence. Moreover, there has been a
further problem, *i.e.*, how such an intergovernmental negotiation in Europe on a consultation arrangement, as envisaged by France, could be reconciled with the attitude of the same European governments in the Outer Space Committee of the United Nations. The work in this Committee began in 1972 and was concluded on December 10, 1982 with the adoption of Resolution (37) 92 by the U.N. General Assembly. 36 Most European states voted against this Resolution, with only one European state voting for it. Two European states which had voted against it in the Special Political Committee abstained in the General Assembly vote.

In the United Nations the European states have consistently defended the view that direct broadcasting by satellite would add a completely new dimension to international communication which would increase the free flow of information, foster cultural exchanges and thus contribute to the interdependence of peoples. Another group of countries, belonging to the Soviet camp, took the view that the question whether direct broadcasts by satellite should be allowed to overspill borders depended on the programs' content. Countries in which such broadcasts originate should obtain the prior consent of the receiving countries. Their failure to do so would constitute a violation of the sovereignty of receiving countries. Delegates from many developing countries rallied to this position on another ground, *i.e.*, that their cultural identities had to be protected against the impact of television programs broadcast via satellite by technically advanced countries. Although the final text of Resolution (37) 92 no longer maintained the principle of “prior consent,” it retained the duty of states where DBS programs originate to enter into consultations and agreements with any receiving State which so requests. The majority of European states did not accept the retention of this duty because it would give rise to arbitrary interference with the free flow of information. Moreover, European governments could not accept state responsibility for the programs emanating from their territory, nor would they accept responsibility for media content. The member states of the Council of Europe had adopted a similar attitude two years earlier during the discussions in UNESCO on the concept of a New World Information and Communication Order, which culminated in 1980 at the 20th Session of the General Conference of UNESCO with the adoption of Resolution 4/19 on the report of the MacBride Commission. 37 On this occasion too, the Europeans rejected the idea of state responsibility for the media or state control over media content.

The logical consequence of this constant European attitude would appear to be a similar liberal and tolerant attitude with regard to the satellite broadcasts of one's own European neighbors and great reticence toward the idea of compulsory European inter-state contacts. The idea that one could afford to be more severe with one's friends than one's political opponents, which was fashionable for some years in various popular
movements in Europe, is not an acceptable principle for relations between
states. The only other justification for the proposal concerning obligatory
contacts would be that these contacts would not have as their object the
defense of one's national interests or the protection against foreign inter-
ference, but the promotion of common European interests. But again, it
would be difficult for most countries to accept that this should be compul-
sory or conducted at governmental level.

The question of obligatory contacts is closely related to the theme of
"cooperation between broadcasting organizations and schemes for European programs,"
which has also been submitted to the MM-PO. This theme has been
largely inspired by the Eurikon experiment with the possible creation of
European satellite television channel. Early in 1982, the European Broad-
casting Union (EBU), a consortium of public broadcasters, was rudely
aroused by a suggestion made by Mr. Hahn in the European Parliament
about a possible new broadcasting institution. Neville Clark of IBA (Brit-
ain) mobilized five public broadcasting organizations (IBA, NOS, RAI,
ORF, and ARD), members of EBU, which during the period May to
December 1982, beamed 200 hours of television programs via the Orbital
Test Satellite (OTS) at other European countries, subtitled or dubbed
translations being provided where necessary. The provisional result of the
experiment was that the idea of a Pan-European channel had worked,
despite shortcomings. The idea of a Pan-European channel, jointly operat-
ed by public broadcasters of different European countries, is viewed with
sympathy not only in Europe itself, but perhaps even more in other conti-
nents because it would provide them with a daily digest of the best of
European television. The Council of Europe, in conjunction with the EEC,
could give moral support to the European experiment as such, as well as
to the coordination of the accompanying audience research. There would
also be a more theoretical matter for their consideration: to what extent the
obligation of catering to the needs of other European countries could be
inscribed into the conditions (cahiers de charges) for the licensing of broad-
casters under national law.

Protection of the rights of individuals encompasses a broad scale of rights which
are already guaranteed at the national level and in conventions and recom-
endations of the Council of Europe, such as consumer protection, right
of reply, equal opportunity and data protection. In principle, the protection
of copyright also falls within this category, but as we have mentioned
above, it will be dealt with separately by the legal committee, MM-JU. The
main problems encountered here result from the regional scale of DBS. It
is one thing to afford a remedy to a person in his own country when facts
about him are grossly misrepresented by his own country's television,
but we face a problem of a different order when the program in question
is shown in a large number of countries. One of the basic questions to be
considered in this connection is whether it is possible and desirable to solve such problems by way of legislation and treaty-making.

Each country has its own ways of solving these problems. For example, a statutory right of reply is an established institution in some countries, but is totally unacceptable in others for valid reasons. This does not mean that the objective pursued by the first group of countries is not achieved by other means in the second group. Bearing in mind those differences which may be an obstacle to the realization of the rights of individuals, the international community should nevertheless take the appropriate steps to bridge the gap.

The subject of industrial consultations, which closes the list of subjects to be treated by the Council of Europe, appears at first sight to be superfluous. I have mentioned above that there has certainly not been any lack of European cooperation in the field of research, production and operation of satellite television equipment. What may have been lacking, however, is consultation among the users about their needs and wishes. The aerospace and communications industries have developed a product and are now in search of users. Furthermore, it is alleged that certain seemingly technical details may have a decisive influence on program content. It is stated for example that one of the reasons for the high incidence of violence on the screen is the comparatively low number of lines per screen. At present it is easier technically to broadcast programs with lots of violence than, say, a program for stamp collectors. A higher-definition screen might give scope to a wider variety of programs.

CONCLUSION

The debates on satellite broadcasting are dominated by three factors: policy, law, and culture. Never before have governments been faced with questions of media policy of such magnitude, complexity, and urgency. Several countries have set up special media policy committees with a view to elaborating consistent plans for the general framework of media development. But not all governments in Europe proceed with the same spirit of openness as that of the United Kingdom, which published position papers on both satellite broadcasting and cable television and invited comments and expression of opinions in any form in this area. Other governments prefer to keep their plans to themselves until time is ripe for legislation. This, of course, leads to pressures and rumors which may provoke reactions from politicians, interest groups, or individual ministers, which is an unsatisfactory system of policy-making. Among the aims of governments in the media field, the Declaration of April 29, 1982 of the Council of Europe mentions the "pursuit of an open information policy in
the public sector, including access to information, in order to enhance the individual's understanding of and his ability to discuss freely political, social, economic, and cultural matters. It is desirable that governments should practice such openness in the first place with regard to media policy itself.

The legal factor is also of great importance. It is said that whatever develops in the field of satellite broadcasting, lawyers will have their hands full. It should first be remembered that satellite broadcasting is inherently a matter for international law. Its four major legal components, the use of outer space for satellite broadcasting, the use of the frequency spectrum, the international flow of information and ideas, and copyright and neighboring rights are the subject of international conventions, resolutions, recommendations and other standards of international law. These set the parameters for national legislation in the field.

Furthermore, different branches of law which are involved, such as space law, telecommunications law, human rights and the law of torts, are mixed together to an unprecedented degree. Certain contradictions between the behavior of European states in the framework of the United Nations and its specialized agencies on the one hand, and in various European organizations or in bilateral talks on the other, can be traced back to the fact that the different branches of international law used to be handled by different government departments. It is interesting to note in this connection that in some European countries the initiative towards an integrated policy in the field of information and communication has come from departments of foreign affairs. The lack of a coherent national media policy becomes most obvious when one has to present the media policy of one's country's to other states. A further obstacle to such coherence is the difference in speed of various ships in the fleet. International copyright law develops very slowly, whereas international law in other fields may develop very quickly, as does the law of the European Economic Community.

Some communications experts are of the opinion that satellite broadcasting is at present over-rated, and that it may be overtaken in the near future by literally more down-to-earth techniques such as fiber optics. Should this eclipsing occur, satellite broadcasting should nevertheless be credited for having speeded up the process of bringing greater coherence into the fabric of national and international law.

This is especially the case in that fundamental part of the law devoted to human rights. The freedom of expression and information and the free international flow of information have time and again been challenged in connection with the question of satellite broadcasting. The western nations, who may have their own differences, are united in their unflinching defense of this basic value of society. At the same time, they may now make a step forward in the progressive development of human rights law.
It is worth considering whether the time has not come for extending the human rights catalogue by a “right to communicate.” Attempts in this direction have been undertaken in various bodies, especially UNESCO. A right to communicate could consist of (i) a right to the existence of communication facilities, (ii) access to those facilities on fair terms, and (iii) a right to use them nationally and transnationally, with the right belonging to individuals and groups.

Given the communications explosion, it appears to many that a formal recognition of such a right is both envisionable and desirable. This issue is complicated by the insistence of authoritarian countries that the right to communicate should be another “human right of the state,” which is a reason for defenders of the true freedom of the media to scrutinize carefully any proposed articulations of this new right. I regret this, although it should be carefully considered whether the right to communicate makes sense as a right per se rather than as a policy in support of the freedom of information. In that latter sense it is confirmed by the Declaration of April 29, 1982 which sets out the aim of equal access to communication channels.

Finally, the cultural aspect of satellite broadcasting has provided Europe with a fundamental debate worthy of Toynbee or Spengler. According to some, a new ghost is walking around in Europe, called “Dallas” (an American television series). They maintain that the huge scale and cost of television broadcasting leads to a neo-Marxian Verelendung der Massen (opiate of the masses), the showing of programs of ever lower taste to ever larger audiences. This would lead to the loss and destruction of national and cultural values. The remedy would be international treaties guaranteeing respect for those cultural values. The contrary view is that satellite broadcasting may lead to greater diversity and higher quality of programs. The division of roles between local, regional and national media could become more distinct and satellite broadcasting could cater to minority audiences too small for present terrestrial systems. It could also stimulate competition. At any rate, taste cannot be defined by treaty.

I hope that in the future the editors of this journal will return to the issue of satellite broadcasting to permit an evaluation of the progress of mankind in this field.

NOTES

ted or retransmitted by space stations are intended for direct reception by the general public. In the broadcasting satellite service, the term "direct reception" shall encompass both individual reception and community reception." [hereinafter cited as Radio Regulations]; Becker, Is Europe Ready For Satellite TV?, Europe, July-Aug., 1982, at 6.


3 Radio Regulations, supra note 1, at para. 3102 3.3 defines fixed-satellite service as follows: A radiocommunication service between earth stations at specified fixed points when one or more satellites are used; in some cases this service includes satellite-to-satellite links, which may also be effected in the inter-satellite service; the fixed satellite service may also include feeder links for other space radiocommunication services.

4 Id. at para. 3040 3.17 (broadcasting service is defined as "(a) radiocommunication service in which the transmissions are intended for direct reception by the general public. This service may include sound transmissions, television transmissions or other types of transmission); cf. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43, art. 3(f); reprinted in House Comm. on the Judiciary, 87th Cong., 1st Sess., Rep. on the Diplomatic Conference 15 (Comm. Print 1961) (defines broadcasting as "the transmission by wireless means for public reception of sounds or of images and sounds . . .").

5 Satellite Television obtained the authority from EUTELSAT in December, 1981 to operate service for up to 40 hours a week, via British Telecom. Finland gave its approval for reception in March, 1982. Norway followed suit in April. A short-lived link was established with Malta; however, the Malta Broadcasting Authority found the draft contract to be unacceptable.

6 See On peut capter la TV soviétique à la côte, Le Soir, Nov. 25, 1982 (this press report reveals that the Soviet transmissions were "captured" by a parabolic antenna of 2 meters in diameter located in Bruges and were distributed to subscribers of the "Teveo" and "Tevewest" cable systems).

7 See Announcement of the First Experimental European Television Service Via Satellite, by Lord Thomson, Chairman of the Independent Broadcasting Authority of London, May 12, 1982. The Eurikon-IBA/EBU pan-European experiment consisted of a series of week-long tests, starting the week of May 24, 1982, coordinated by the broadcasting services of Austria (ORF), West Germany (ARD), Holland (NOS) and Italy (RAI). See supra note 39 and accompanying text.

8 See Press Report by the Prime Minister, NRC Handelsblad, Feb. 19, 1983 (by staking out his claim, the Netherlands hoped to retain the option EUTELSAT gave it).

9 See generally Thiebaut, Legal Framework of Communications Programs in the European Space Agency, this volume.

10 See generally Anawalt, Direct Television Broadcasting and the Quest for Communication Equality, this volume.

11 The Council of Europe has twenty-one member states, ten of which are also members of the European Economic Community (indicated by italics). These are: Austria, Belgium, Cyprus, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. The Vatican City and Finland participate in the mass media work by sending observers to the meetings.

12 Press Communiqué (No. 23) by the Federal Republic of Germany, Bonn, 1982. The communiqué noted that at Germany's initiative, the Council of Ministers considered questions relating to direct broadcasting by satellite. Having regard to the rapid technological developments in this field, they agreed on the importance and range of the problem and were of the opinion that the Council of Europe, which had
been studying these questions for some years, offered the appropriate framework for reaching a common approach to direct satellite broadcasting and possibly an agreement on a number of rules. . . .


14 The following figures illustrate the percentages in which cable TV systems have penetrated homes in various European countries as of December 31, 1981: Austria—2.5%; Belgium—78%; Denmark—50%; Ireland—23%; W. Germany—35%; Luxembourg—50%; Netherlands—66%; Norway—23%; Sweden—46%; Switzerland—50%; United Kingdom—14%. This data was provided to the author courtesy of the International Alliance for Distribution by Wire.


16 Recommendation, supra note 15, at 3.

17 See Declaration by the Committee of Ministers, noted in forum COUNCIL EUR. 1982-2, at 20 [hereinafter cited as Declaration].


19 Declaration, supra note 17.

20 See Press Release by the Committee of Ministers of the Council of Europe, Nov. 10, 1982, No. C(82) 64, at ¶ 5 ("Ministers considered a report on the question of direct broadcasting by Satellite (DBS) drawn up by their expert committee on the mass media following the decisions taken at the April Session."); See also Press Release of Europe Press Agency, Nov. 20, 1982, No. 3490 (Brussels).


27 See Hondius, A Decade of International Data Protection, 1983 NETHERLANDS INTERNATIONAL LAW REVIEW.


(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images:
(ii) any communication to the public by wire, or rebroadcasting of the broadcast of the
work, when this communication is made by an organization other than the original one:

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority . . .


31 INTERNATIONAL LABOR ORGANIZATION ET AL., MODEL PROVISIONS FOR THE PROTECTION OF AUTHORS, PERFORMERS, PRODUCERS OF PHONORAM AND BROADCASTING ORGANIZATIONS IN CONNECTION WITH DISTRIBUTION BY CABLE (1982).

32 See supra note 30.


34 Id. (protocol of Mar. 31, 1983).

35 Advertising in Radio and Television Broadcasts, Council of Europe, 70th Session, Mass Media Files No. 1 (1982).

36 Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, G.A. Res. 37/92, U.N. Doc. A/RES/37/92 (1983). The final vote was as follows:

For: 107 (including Turkey)
Against: 13 (including Belgium, Denmark, W. Germany, Iceland, Italy, the Netherlands, Norway, Spain, and the United Kingdom).
Abstaining: 6 (including Austria, France, Greece, Ireland, Portugal, and Sweden).


38 See supra note 7 and accompanying text.


40 See Declaration, supra note 17.

41 For an excellent analysis, see Report of the Steering Comm. on the Mass Media, Council of Europe, 70th Sess., Mass Media Files No. 4 (1983) (prepared by H. Lhoest), on the Interdependence of the Media at the request of the Steering Committee.)