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Laws Relating Satellites And Their Implication For Asia-Pacific Development

By

Neville Peterson
LAWS RELATING SATELLITES
AND THEIR IMPLICATION
FOR ASIA-PACIFIC DEVELOPMENT

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SEMINAR ON SOCIO-ECONOMIC IMPACT OF
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The most critical legal problems of the satellite era have emerged only very recently in the context of the beginning of DBS (Direct Broadcasting by Satellite) television transmissions sent directly to homes fitted with antennas. Viewers in Europe and Japan have access to DBS and the system will begin soon in the United States. Because of the intense debate centering around issues raised by DBS this paper will address itself specifically to this form of satellite broadcast. It should be made clear at the outset that DBS differs from transmissions from satellites which are sent to cable head-ends for distribution through cable networks, which have been in existence for over a decade.

DBS would not be such a subject for legal argument if it were not for the particular 'overspill' problems which are associated with them and which were not foreseen by the World Administrative Radio Conference for the Planning of the Broadcasting-Satellite Service held by the International Telecommunication Union in 1977 which drew up an international plan for DBS. They assumed that signals they assigned to each country from satellites in geostationary orbit could usually be limited to the domestic audience in the originating country (White and White 1988:160). Now it is known that there is still an appreciable level of power outside the essential beam area or 'footprint' and that there is no physical cut-off point. Signals can be received outside main target areas particularly with sophisticated antennas now available. 'Coverage can be extended by recourse to more sensitive, and more expensive, equipment.' (Williamson 1988:31).

Because 'overspill' means that signals can reach populations outside the service area, without the permission of their governments, this raises questions of national sovereignty. For some time now those countries around the Equator, underneath satellites in geostationary orbit, have claimed rights to exercise control over that portion of the orbit directly over their territory, so far without success (Williamson 1988:41). But with DBS there is the particular question of determining the legal obligations of a state for any damage caused by transmissions overspilling its borders and how such damage can be assessed.

It also raises questions related to the regulation of DBS operations within its own boundaries and the degree to which DBS operators are responsible for adhering to the laws and regulations of other countries receiving their messages, particularly those affecting program standards, advertising and copyright.

As White and White say (1988:245), the signal coverage of DBS programs far
surpasses coverage by terrestrial TV transmitters. 'The fact that they offer such high quality and availability, that it is the powerful medium of television, has caused the international community to recognize the immense potential of DBS, both advantageous and disadvantageous'. Others acknowledge its potential for the broadcast of political or simply cultural propaganda (Williamson 1988:48). One DBS satellite can cover 40 percent of the earth's surface with television images. 'No country can keep these images, and their accompanying ideas, out and yet DBS broadcasters are so far private concerns, involving multinational companies, high capital outlays and expectation of high profits' (Taishoff 1987:25). Moreover 'the jurist and legislator are now confronted with a legal void, as static national regulations have not been able to keep pace with technology'.

Consideration of the possible legal and regulatory consequences of DBS seems particularly appropriate for the Asia and Pacific regions because application of the technology has obvious advantages where there are widely separated populations, as in island nations such as Indonesia, the Philippines and in the Pacific, where the growth of cable systems is limited. Also because countries of these regions, as Lent says, 'increasingly assert their cultural diversities' amid 'threats of media and cultural imperialism' (1989:21-22) one would anticipate that they would be particularly concerned about measures to protect their cultural integrity if DBS is permitted to operate. It is precisely this cultural impact which has so concerned those countries already in the path of DBS transmissions. It is argued that countries outside Europe, Japan and North America can benefit from studying the impact of these early DBS services, at the same time ensuring that they do not leave the introduction of appropriate national mechanisms for control and accountability and efforts to negotiate appropriate regional understandings until too late.

State responsibility

Spillovers from DBS are regarded as inevitable. In Europe, for example, each country's satellite program will be received over half of the continent. We can assume therefore that if DBS comes to Asia and the Pacific, there will also be this phenomenon, particularly as commercial interests are anxious to make the most of the opportunity to avoid advertising restrictions in particular countries and increase exposure at no extra cost (Taishoff 1988:45). As one legal expert on EBU matters puts it, in referring to the EBU's Declaration of
Principle regarding Commercial TV Advertising Broadcast by DBS, 'it places too much emphasis on the domestic law of receiving countries, which is precisely the emphasis the satellite advertiser wants to avoid' (Crosby 1987:51, his emphasis).

Following is an outline of the legal complexities of spillover, which is pivotal to developing consensus on state responsibility in DBS satellites. The most obvious of these is the notion that they could contain 'propaganda' which would harm 'the national interest' or 'social life'. The difficulty here is one of definition. These terms mean different things to different people, except in the most extreme cases, such as belligerent, war-provoking material, which is already illegal anyway.

In the case of advertising or product publicity on DBS, unintentional harmful effects could result from material which could damage local industries by creating demand for a foreign product or cause social unrest by creating demand for goods which are relatively unobtainable. Sensitivities vary from region to region and country to country and are reflected in national regulations governing what is permissible. Some countries, of course, ban TV advertisements altogether.

The advertising question is a major obstacle to DBS. Because advertisements are related to cultural norms or way of life, it is argued that advertisements contrary to existing values could threaten those values. In Europe they are represented by the wide range of regulations governing daily quotas, restrictions on the times of day during which advertisements can be broadcast, standards laid down relating to moral, religious or political convictions and prohibitions on advertising alcohol, tobacco and pharmaceuticals. Apart from these categories, there are distinctive bans in several countries such as those on advertising matrimonial agencies and money-lenders. War toys cannot be advertised in Germany or furs in Italy (Taishoff 1987:39-40). The EBU General Assembly of 1983 adopted a declaration of principles which refers vaguely to use of consultation to settle 'practical problems' but carries no obligation to abide by the law of countries receiving DBS signals.

As long as Murdoch's British Sky Television company offered only a cable service it followed the Council of Europe recommendations of 1984 which stipulate that advertisements would have to comply with laws appropriate in the country of origin only and that the normal broadcasting conventions of taste, decency and so on be adhered to. As a cable supplier Sky Television followed the code
of the Independent Broadcasting Authority (IBA) of Britain and restricted some types of advertisements in deference to the regulations in those countries to which it was transmitting. For example it allowed no advertisements to be directed specifically at the Dutch, respecting Dutch law. But it warned in 1988 that 'with DBS it would not necessarily negotiate with national authorities over the advertisements it carries' (Crosby 1987:53). With DBS it has no legal obligation to do so. With cable, the companies receiving and distributing its signals in each country would be bound to keep within national regulations. I emphasise I have no information on whether Sky Television in its DBS mode which began early last year, is negotiating with other nations about advertisements or not.

The major argument used by advertisers and DBS operators in Europe against individual arrangements to satisfy all receiver countries is that the local regulations interfere with the free flow of information across borders, a principle enunciated in a number of international agreements, for example the 1966 International Covenant on Civil and Political Rights, article 19, and in Europe, the European Human Rights Convention, para 2, article 10. The advertiser view has received some support from the Commission of the European Communities (CEC) in its Green Paper, 'Television without Frontiers' (1984) and subsequent draft directive (1986) which argued that so long as broadcasters met basic EEC norms, their messages could not be stopped from crossing frontiers (Hughes 1988:66). Advertisers believe they have the right to impart information and ideas without interference from public authorities and regardless of frontiers, and TV viewers have a concomitant right to receive that information and those ideas (Crosby 1987:54).

Many will not need to be reminded that it is developed countries with the strongest communications technologies that have traditionally put the freedom of information argument. Asian and Pacific countries will no doubt share the reservations of the MacBride Report about one-way information flow. It remains to be seen whether proponents of DBS in the Asia-Pacific context employ this reasoning on free passage of ideas across frontiers.

Before leaving the subject of possible harmful consequences of DBS advertisements it is worth noting that major marketing organisations are apparently of the opinion that individual cultural values and identities marking off one culture from another in Europe have largely disappeared. It is possible,
they feel, to devise advertisements to appeal to all nationalities (Taishoff 1987:45). This is far from being widely accepted and the universal application of the principle would be bound, one would think, to conflict with beliefs that there are identifiable intellectual and moral values which constitute a country's culture. A point of view widely expressed is that this multi-national approach to unsolicited programs and advertisements is bound to harm cultural interests, particularly in smaller countries. 'Cultural propaganda', or 'Dallasization' as it has been called, also has strong political overtones which worry many Europeans and would seem to have relevance for countries in the Asia and Pacific regions.

Despite efforts in Europe by the European Broadcasting Union (EBU) and Council of Europe to determine elaborate uniform principles applicable to advertising nothing has happened which detracts from the state's ultimate responsibility to decide on advertising standards. In a situation where there are 'few international binding legal instruments to regulate satellite broadcasting - merely recommendations for the treatment of issues' (Hughes 1988:64) there is a reliance on national laws. Taishoff therefore argues that 'there is a strong possibility of a conflict of laws arising once DBS becomes fully operational' (1987:51).

Many believe the positive way to approach the situation of determining what liability a state has in this situation for 'damage' due to DBS is through international co-operation. Experts turn to principles and studies produced by international organisations. Thus interest has centred on the International Law Commission which, in a study of the Law of State Responsibility for Damage Arising out of Acts not Prohibited by International Law, defined the customary duty to balance interests which is the balance between a state's freedom of action within its own territory and its duty towards other states (Taishoff 1987:60,64). A United National secretariat survey of 1984 determined that there should be a requirement for states to identify activities which would require prior consultation and compensation in the event of injury. This is called 'impact assessment'.

Here the question of responsibility is related to injury occurring because the state in question failed to assess the harmful impact of its activity and therefore did not take preventive measures. By accepting that absolute responsibility is based upon a state's violation of an international duty, both reports implicitly acknowledge the enduring principle of state sovereignty (Taishoff 1987:92).

Other documents frequently quoted in this context are the Outer Space Treaty
and Space Liability Convention of the United Nations, the latter being the first international legal instrument to impose absolute liability on states in their capacity as states. The Treaty of 1967 and the Convention of 1972 contain a number of articles which may be applicable to DBS including that making states responsible for national activities in outer space, whether governmental or non-governmental, including those causing damage for which it must assume responsibility. Space activities are also to be conducted with due regard to other states' corresponding interests. While not specific in some details the Convention seems to establish that states have responsibility for all their space activities, that both material and non-material damage resulting from such activity is liable for compensation and that states must comply with principles of prior consultation and balancing of interests.

Attempts however by the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) the International Telecommunications Union (ITU) and UNESCO to establish a regulatory framework for DBS have not been as productive as they might have been, largely because of the schism perpetuated by advocates of freedom of information flow and those arguing for sovereign rights of states to give or withhold consent to DBS signals within their borders. The prior consent principle 'has been repeated many times and exists today as the greatest impediment to reaching consensus on principles of a DBS convention' (White and White 1988:246). The advocates of prior consent argue that the state has the right to freely select and develop the elements making up its social, political, economic and cultural system. Those opposed say that prior consent would legitimise international censorship, and stifle technical progress. At one end of the scale is the minimalist approach of the United States while, until recently at least, the Soviet Union has taken the position of maximum control through binding treaty.

Nevertheless Taishoff suggests that consideration of the consequences of the Outer Space Treaty and Convention indicates that the states from which DBS emanates have an obligation to assess possible harmful effects while other affected states should request consultation only on those issues thought to be impinging on their political, commercial or cultural interests.

Broadcasting legislation

DBS will, and is, having a major impact on the broadcasting systems in the countries which it affects. Cable television, which preceded DBS, has put public
The consequence has been a recent trend away from deregulation and towards increasing activity by lawmakers and existing broadcasters aimed at exercising greater control over DBS companies and those involved with expanding cable networks. Huge profits being made by cable operators in the deregulated United States industry have badly affected the traditional terrestrial broadcasters, including the big networks, and will undoubtedly lead to new legislation aimed at limiting the vertical integration of film, cable and telecommunications firms and local monopolies enjoyed by cable firms (Australian 7 December 1989). Britain acted in 1984, with the Cable and Broadcasting Act, to provide for DBS to operate on public service lines, and according to IBA program standards (Davies 1987:73). In Australia too, even though the Government has not yet announced its cable and DBS policies it has acted in anticipation of these developments and announced it will increase the powers of the Australian Broadcasting Tribunal (Australian 2 November 1989).

Hughes has commented on these developments by saying that the hard-won power of national broadcasters and telecommunications administrations will not be easily diminished. 'Ironically it is the current trend towards privatisation which serves to support the status quo, by extending regulation to set standards, control operating conditions and supervise the boundaries between the public and private sectors'. She forecasts that at the end of the period of new media development there will be a good deal more regulation than before, coupled with more freedom of operation in some respects (1988:74). This would enable national governments to stay in control of developments and to dictate their terms according to national priorities. Those involved with DBS recognise that some regulation will always be necessary to prevent advertising anarchy, which in turn would invite governments to step in to stop satellite advertising (Crosby 1987:55).

The future then for public service principles in broadcasting is not entirely clouded. Legal changes are seen as being necessary for the liberalisation of public broadcasting, as we have known it, but there will also be an extension of the scope of public supervision of many telecommunications activities. Public service principles can still be maintained in this climate but these 'need interpretation in terms of a wider conception of relevant communication services' (McQuail 1989:23).
service broadcasting on the defensive. DBS will accentuate this process. As McQuail says 'there is strong pressure to reduce dependence on the license fee, to use private or independent sources of material and to accept more advertising' (1988:20). Nearly all the traditional features that once characterised public service broadcasting in Europe have been called into question such as the close regulation of all content. Taishoff warns that 'the delicate balance between government prerogative and the information industry has been seriously disrupted by the imminence of DBS satellites' (1987:177). Another commentator has argued that 'the overall effect of DBS will undoubtedly be to push the entire thrust of the broadcasting media of a particular country onto a more commercialised footing' (Solomon 1988:36), and that the operation of the system will come to be judged more on economic/market terms than by reference to its social, cultural and political functions. As well as national broadcasters, PTTs (the telecommunications instrumentalities) have also had their monopolies on satellite reception weakened by the legalisation of individual reception of DBS signals.

These pressures have been exacerbated by attacks on entrenched terrestrial media by DBS operators themselves, seeking more liberalisation. Rupert Murdoch, whose Sky Television is now transmitting DBS from Britain to over half a million people, recently attacked the 'elitist' basis of broadcasting by the BBC and ITV and their 'anti-commercial bias' in an address at the Edinburgh International Television Festival (Sunday Telegraph, Sydney 27 August 1989).

The power represented by the wealth and size of the conglomerates running DBS is also seen as threatening to the national broadcasting framework. Murdoch himself is on record as saying that global communications, with DBS in the fore, 'will ultimately be demand-driven by multi-national marketing companies, the IBMs, Sonys, Toyotas, Volvos, Coca Colas of the world' (speech to the International Institute of Communications, Washington, September 1988 quoted in the Australian 14 September 1989). Murdoch with his worldwide broadcasting, film and press interests, has now joined NBC and Hughes Communications in a DBS venture in the United States (Sydney Morning Herald 23 February 1990). These developments should perhaps be viewed in the context of Lent's observation that 'the most threatening trend in Asia is the ownership of Asian mass communications by large corporations which tie in with local government and business industrial complexes, and the multinational corporations' (1989:24). It will presumably be the same combination of forces which will be interested in the region's DBS activities.
DBS and Copyright

As with advertising, the EEC Green Paper 'Television without Frontiers' has provided a focus for debate about the rights of copyright holders for both cable and DBS transmissions. The Green Paper supports the principle of non-voluntary licensing - that is the right of a state to insist on a license to transmit, with remuneration to be decided by a competent authority, where agreements cannot be reached with the copyright holder within two years (appendix 4, Pichler 1987:183-4). The aim is to remove the right to authorise or prohibit simultaneous cable distribution in EEC countries and replace it with 'equitable remuneration'. This non-voluntary licensing principle has been adopted by a number of European countries. This has been mainly as a result of pressure from those concerned with DBS and cable anxious to reduce costs at a time when audiences and revenue in Europe are still not great. The situation however is still very fluid with no agreed EEC formula and with evaluation of potential revenue sources by regulators and copyright holders almost impossible (Hughes 1988:70).

The loss of exclusivity rights to copyright holders has been attacked on the grounds that they will require more money, leading to higher production costs. Also, it is said, incentive for broadcasters to originate programs will decrease with the knowledge that competitors will have access to them with their first transmission (Davies 1987:72).

The United States has had considerable trouble with the pirating of original material from satellites leading to losses for right holders. Because of the so-called TVRO (Television Reception Only) market, in which satellite transmissions intended for cable networks are picked up by domestic dishes, Congress had to pass laws in 1985 under which TVRO operators now have to pay a fee to allow them tape programs in this way. However it is difficult to enforce this law and the use of scrambling technologies has not been adopted by all the companies transmitting. In Europe the DBS piracy problem has apparently been overcome by sophisticated scrambling which can only be reconstructed according to information sent with the signal, rather than by decoders which can be copied (Davies 1987:63). The response by the United States to international piracy of satellite signals, particularly by nations in the Caribbean, has been to tie copyright protection to trade and economic aid (Josiah 1987).

DBS transmissions are however less complicated in copyright terms than those
for cable use, which involve considerable argument over the copyright liability of the receiving station. The Berne Copyright Convention of 1886, as revised at Brussels in 1948, categorises DBS transmissions as broadcasts. The liability towards copyright owners for DBS transmission will always be with the originating organisation. Some questions are however still unresolved. Should royalties be based on audience size which takes into account spillover? Should the originating broadcaster be liable for audiences outside the national boundaries?

It has been suggested that the originating broadcaster should not find it too difficult to acquire the rights for all receiving countries at the same time as the rights for the country of origin (Pichler 1987:36). If any country uses the non-voluntary licensing arrangements, the broadcaster can make use of it.

In her study of satellite copyright, Pichler says 'the accommodation of satellite and cable broadcasting is one of the major challenges which the international protection of copyright has to face today' (1987:154). The goal is to protect the legitimate interests of the authors at the same time as ensuring the widest possible access of the public to their works. She points out that there are differences emerging between interpretations of satellite copyright by the courts and by legislatures and says these need to be harmonised.

Conclusion

As international conventions governing DBS activities are likely to be some time away, national laws will provide the framework for determining the principles upon which they operate within a country's boundaries and the means for asserting sovereignty if foreign DBS transmissions are seen to cause harm to societies. Asian and Pacific countries still have time to determine their policies on DBS and ensure that adequate protection for national interests is provided.

Should broadcasting be further deregulated or provide further opportunities for information flow and advertising revenue with a view to delaying the introduction of DBS? Should national broadcasters, PTTs or Departments of Information be given regulatory control over DBS operators? If they are not who is to set minimal standards? In this connection, one assessment of the future impact of DBS on South Pacific nations says that 'it is vital that DBS only be allowed to be established after proper regulations stipulating levels of control over its output, access and participation and quality of programming have been laid down, whether regionally or by individual governments' (Solomon
With regard to regional co-operation on DBS, organisations like ASEAN and UNESCO spring to mind. No matter which is involved, there is a real need for advertising, copyright and program content agreements, allowing for the certainty of spillover. Beyond this there is the question of transmitting countries bearing in mind the apparent international obligation to consult on programs that have any possibility of causing harm to international audiences, a matter again for regional consensus.

Whether countries in these regions want DBS is perhaps the most important question of all: whether, if operated commercially or by governments, it poses possible risks to Asian societies, or whether, with adequate supervision, it operates in such a way as to provide maximum social benefit. Indonesia, for example, would have to be satisfied that DBS would not interfere with, cut across or negate what has been described as its 'archipelago approach' to satellite broadcasting, enabling the cultures of smaller minority groups to be telecast nationally (Ishadi 1989:45). Whereas Europe and North America might be satisfied with news that contains versions of events seen from a northern perspective, Asian and Pacific countries would presumably want news programs to reflect Third World values, which they are unlikely to get say from the spillover of a DBS operating from within Australia.

Finally let us look at last resort options. It is perhaps worth noting that some experts believe that it is not contrary to international obligations for a state to jam unwanted DBS broadcasts, this view being based on a Council of Europe article aimed at stopping 'pirate' offshore radio broadcasts (Taishoff 1987:173-4). Again using Europe as an example, some experts support the view that DBS advertisements aimed only at foreign audiences can be regarded as unauthorised and countries can take steps to stop them. Switzerland has specifically legislated to prevent unauthorised satellite signals being distributed within the country 'and there is no reason why other countries should not do the same' (Crosby 1987:56). It is not however clear how it can prevent its citizens picking up unauthorised DBS signals. There are many such questions still to be resolved.
References


