

INTERNATIONAL SATELLITE TELEVISION

Sydney solicitor Martin Cooper concludes a two-part report on papers presented to a Los Angeles communications law symposium.

PAPER 3 — ISSUES RELATING TO INTERNATIONAL REGULATION OF DISTRIBUTION MEDIA

Veronica Ahern is a Washington lawyer who was until recently Director of the Office of International Affairs within the National Telecommunications and Information Administration of the U.S. Department of Commerce. Prior to that she had worked in the FCC's Common Carrier Bureau and done extensive work on the U.S. approach to international telecommunications regulations.

The U.S. position in relation to the allocation of orbit "slots" for broadcasting satellites is that "a flexible" attitude should be adopted and that an a priori plan to allocate specified places in space to particular countries should be rejected. She described countries which advocate such an a priori plan as "extremist" (which, incidentally, includes Australia!).

The U.S. attitude to the 1979 WARC Conference which allocated radio frequencies and to the 1983 Conference which will allocate satellite slots is that the geostationary orbit is virtually unlimited in dimension and need only be regulated to avoid interference. The regulations should not go beyond this.

The U.S. fears that those who advocate an a priori plan under which, for example, Malta would receive the same allocation of "slots" as would Great Britain, is simply a mechanism by which the telecommunications under-privileged would exploit the telecommunications privileged. Ms. Ahern threatened darkly that the U.S. may well withdraw from the International Telecommunications Union, which was created by international convention in 1932 to regulate frequency use, if the U.S. did not "get its way" in relation to the allocation of satellite orbits.

Professor Arved Deringer is a former member of the European Parliament who now practises law in Cologne, West Germany. Professor Deringer described the situation in

relation to the regulation of international telecommunications in Europe as "chaotic".

He pointed out that there are 10 sovereign States, (disregarding Lichtenstein, San Marino and Monaco) in an area the size of that part of the United States which extends from the east coast to the Mississippi River. Each of these sovereign States wishes to protect its local culture, regulate the use of its air waves and profit from the access to a public monopoly.

To date the European Court has been disappointing in its approach to broadcasting issues — e.g. the French ban on liquor ads on television was struck down because it was discriminating as between member States rather than for any reason of fundamental policy (apparently, the ban applied to spirits but not to wine which was seen as favouring France as against the European countries).

Equally, the European Court has held that a ban by the Belgium government upon advertising on cable television (even in circumstances where the program is sourced outside Belgium) is acceptable on "public interest" grounds.

In the area of copyright, the European Court has permitted single country deals for film distribution.

The national courts of European countries have tended to apply national law to broadcasting transmissions even when sourced outside the boundaries of the nationality of the Court.

In Germany the Courts have applied what is called the "effects doctrine" which says in effect that the German Court need only look to the effect of a transmission when determining whether German law is infringed by a foreign sourced transmission.

Thus, an advertisement originating in France which violates German anti-trust law will be punishable by a German Court. The ramifications of this kind of attitude are ridiculous.

The third speaker on this subject was Stuart White, solicitor of Sydney who outlined exhaustively the Australian Aussat program, the general Australian broadcasting regulatory system and speculated upon whether a signal sent from a direct broadcasting satellite is

"broadcasting" as defined in the Broadcasting and Television Act — i.e. a signal "intended for direct reception by the community" and, if not, whether it would then be regulated by the Wireless Telegraphy Act.

Mr White considered the Constitutional power of the Federal government to control both broadcasting satellites and international transmissions and expressed the view that, given the Foreign Affairs power and the Wireless Telegraphy power in S.51 of the Constitution there was ample constitutional power for licensing and regulation of international and direct broadcasting satellite transmissions.

In question time, Ms Ahern gave a useful definition which is that the difference between a common carrier and a broadcaster is that the former is not concerned with content.

PAPER 4 — TRANSPORTABLE CONTRACTS — HENRY GOLDBERG WASHINGTON LAWYER

This Paper was a most detailed and comprehensive analysis of the nature of the contracts to acquire transponders on U.S. satellites. A draft contract was circulated for discussion.

In essence the U.S. approach has been to sell the transponder (which is equipment for moving a signal from the receiver to the transmitting antenna on a satellite) and to back this with a "service agreement" under which the operator provides the satellite platform for the transponder over a stated period of time. The price of the transponder varies from satellite to satellite and depending upon the power but is really controlled by free market forces. The service contract averages out at about \$50,000 per annum.

Payment for the transponders is made in advance and title does not pass until after the launch of the satellite. Failure of a launch is very carefully defined by the number of transponders on the satellite which actually function. The satellite launcher has extensive rights to substitute and to relaunch.

Performance is measured by the power levels of the signals sent by the transponders on the ground and the conflicting interests of the parties are that the buyer wants performance

reliability (rather than compensation for failure of performance) and the seller wants an unfettered ability to operate the satellite, to prevent interference between transponders, to stop illegal operations and breach of FCC (or similar national) regulations and no liability for consequential loss or force majeure.

DIRECT BROADCASTING SATELLITES

Speakers were Mr Francis Fox, Minister of Communications, Canada, Mr Richard Wiley, a Washington lawyer and former chairman of the Federal Communications Commission and Stanley Hubbard, president of the United States Satellite Broadcasting Company and Hubbard Broadcasting Company.

Mr Fox indicated that Canada favoured cable over direct broadcasting satellite systems because it enabled greater control of trans-border transmissions. To this effect, plans are afoot to have 60% of Canadian homes cabled within a very short period but the Minister conceded that it would be necessary for Canadian cable operators to provide programming which was sufficiently attractive to Canadians to dissuade them from acquiring domestic satellite reception dishes to obtain programming from American direct broadcasting satellites. At present, Canada does not propose to impose any artificial barriers to the entry of trans-national transmissions.

Canada has a major constitutional battle raging as to whether the States or Federal government have the right to control cable broadcasting.

The State of British Columbia is proceeding to license cable operators without reference to the Federal Government and other States will probably follow suit. The Federal government is desperately concerned about this action because of its potential for loss of revenue to the Federal government and for the encouragement which it may give to Quebec nationalists and other special interest groups.

Mr Hubbard, whose company received (on 4th November, 1982) the first authorisation from the Federal Communications Commission to operate a direct broadcasting satellite, argued that DBS would be able to offer greater diversity of programming because it can appeal to the

whole country at once. Narrow cast programming had not worked on cable systems because the audience in each cable area was not sufficiently large to justify minority programming.

In Mr Hubbard's view, where CBC cable failed as a provider of minority culture programming, a similar channel on a direct broadcasting satellite could well be viable.

This view was challenged by several speakers including Mr Henry Geller, director of the Washington Centre for Public Policy Research, who said that at the introduction of each development in television transmission, diversity of programming has been the principal justification offered. In no case had the promise been realised.

Mr Geller saw no reason why direct broadcasting satellite space would be occupied by minority programming when aiming for the middle ground had consistently proved the most profitable for operators.

Mr Fox also pointed out that Canadians wanted to adopt a two-way interactive cable system as soon as possible. He conceded that nobody had devised a mechanism to protect the privacy of the consumer in a two-way system, but was confident privacy could be protected by technical means.

SIGNAL RECEPTION — PIRACY

Michael Flint, a London solicitor delivered a comprehensive paper analysing the copyright issues involved in satellite transmission of television programming.

- In order to establish piracy it is necessary to establish copyright. Therefore the first question is: which legal system should apply to determine the copyright owner? The law of the up-link country, the receiving country, the country of the program making or the country which owns the satellite?

- It is clear that no law applies to the satellite itself except by international treaty. There is one treaty called a convention relating to program material disseminated by satellites (generally called the Satellite or Brussels Convention) which has only been ratified by six countries. However, this treaty only applies to point-to-point transmission and not to direct

broadcasting satellites. Furthermore, the treaty does not extend to control anybody above the first receiver of a satellite-transmitted program.

- Mr Flint then examined the impact of article 33 of the Berne Convention (to which the United States is not a party) upon the protection of authors' rights in international transmissions. The Convention clearly regards the point to point transmission by satellite as broadcasting but distinguishes recording and re-broadcast from immediate transmission. Where the programming is live the Berne Convention will not apply. Note that the Berne Convention can only be used to protect an author's rights if he can persuade his state of nationality to take the matter to the International Court of Justice on his behalf. The proceedings would have to be against another state which was a signatory to the Convention.

- Re-transmission of a signal received from a satellite will only be protected if the signal itself is protected. The Berne Convention article II will be breached by a re-transmission if there is copyright in the material making up the original program.

- If a film is taken off satellite and re-transmitted without permission there is a clear breach of copyright, under Australian law, if re-transmitted through cable or over-the-air. If, however, the re-transmission is through a private citizen such as to hotel guests without charge, the problem is more complicated but protection can probably be obtained by relying on the law relating to public performance of works.

INTERNATIONAL COPYRIGHT ISSUES

A panel, including Mr Edward Mosk, well-known Los Angeles copyright lawyer, Professor Melville Nimmer and Professor Cohen Jehoram of Amsterdam University, dealt with the international copyright issues raised by direct broadcasting and point-to-point distribution of programs by satellite.

Professor Jehoram said that with

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point-to-point distribution the originator or up-link party was not "broadcasting" within the meaning of that term in the Berne Convention which terms broadcasting as "for public reception". If this view was correct, the ground station must be the broadcaster for Berne Convention purposes and the effect of this was to immediately eliminate one of the accepted author's rights i.e. the right to "authorise" the broadcast of his work.

Professor Jehoram suggested the solution might be to create an international convention whereby the primary liability for copyright would lie with the ground station and there would then be a secondary liability of the originator if recovery from the ground station operator was not possible. This solution clashes with the provisions of the Berne Convention and Professor Jehoram also believes that it may be too radical to be acceptable to the international community. A compromise could be to place liability entirely upon the originator for point-to-point transmissions.

So far as direct broadcasting satellites are concerned, broadcasting is undoubtedly occurring within the definition of that term in the Berne Convention.

Although opposed by the United States, United Kingdom, Japan and West Germany (Australia, Canada and France abstaining) the United Nations General Assembly by a vote of 107 for and 13 against on the 10th December, 1982 passed a resolution calling upon states to show international responsibility for satellites operated by their nationals.

The ITU principal established at WARK in 1977 was repeated i.e. no state should permit direct broadcasting satellites operated by its nationals to enter air space of another country except by agreement.

These resolutions raised problems which include, can you ask nationals of one country to comply with broadcasting standards of another? This issue is currently being considered by the Council of Europe.

Professor Nimmer gave a brief, lucid explanation of U.S. copyright law as it might apply to satellite transmissions.

Under U.S. law, picking up a satellite signal and passing it on is illegal under S605 of the Communications Act and S111 of the Copyright Act unless licensed by the copyright owner. U.S. law defines these rights in terms of public performance and not broadcasting and therefore the question becomes: where is the performance? Also, is a rebroadcast another performance? This depends on the doctrine of "second transmission" developed in the 1920's to deal with hotels reusing radio programs (Brandeis J., in the 1931 case of *Fortnightly -v- United Artists* held that transmission to a cable service was not a performance and virtually overruled *Buck -v- La Salle Hotel* which had found that a hotel use of program material was a fresh performance).

Subsequent U.S. Supreme Court cases have "moved" the line between the broadcasting side of the equation and the viewing side of the equation backwards and forwards.

The most important recent case has been the *Teleprompters* case which involved distant signal reception and said that the reception of the satellite transmission of a local station program was on the "viewers' side of the line" and not a broadcasting activity.

In the U.S., a compulsory licence now applies by statute to distant signal transmissions and direct broadcasting satellites S111C of the 1982 Copyright Act provides a compulsory licence only to broadcasts by stations authorised by the Federal Communications Commission. S111(A)(1) covers apartment houses and gives a general exemption before multi-point distribution through such buildings. However it is an infringement (S111(b)) if the signal "is not made for reception by the public at large" — i.e. breaking into closed circuit transmissions is illegal. S111(B) seems to allow U.S. law to encompass the satellite treaty but Professor Nimmer says in fact this is not so because he believes direct broadcasting satellites is not a closed circuit anymore than a theatre is not a public performance because you have to pay to get in. He believes that the Supreme Court will say that direct broadcasting satellites are a public performance, if asked to

determine the issue.

On piracy of direct broadcasting satellite transmissions, Professor Nimmer does not believe that these are a public performance but there must be room to prevent such piracy by use of the provisions of the Federal Communications Act.

THE FUTURE

Three experts gave a "crystal ball" view of the future.

Robert Wold, as chairman of the Robert Wold Company which has been variously described as a company engaged in "electronic freight carrying" or the "Koboki" of international telecommunications.

(Koboki is the figure in traditional Japanese theatre who, dressed in black and trying to remain as unseen as possible, acts as a prompter and stage manager of the play.)

Mr Wold described how his company uses transportable earth stations to reticulate programming throughout the world. He described how the live transmission from the top of Mount Everest was effected late in 1982. His company frequently handles transmissions throughout the United States of programs such as "The Super Bowl" and is expanding into video conferencing and other private circuit activities.

Mr Henry Geller saw "pay" as the driving force behind the new technologies. "Pay" means film and this, Mr Geller believes, means a drop in program standards. He described the report of the Hunt Inquiry into cable television in the United Kingdom as "a very flawed document" in its view of a highly controlled cable system offering a whole new diversity of television programming to domestic users.

Mr Geller believes that satellites will, in the long term, only be utilised for delivery of "time sensitive programming" (e.g. sports and current affairs) whereas terrestrial mechanisms including through fibroptic systems will be used for other forms of distribution of programming material.

He noted that the Canadians were trying to blanket the country with

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cable systems so as to dissuade people from incurring the cost of acquiring a domestic receiving dish to take advantage of trans-national transmissions.

Dr Joe Pelton described some of the developments occurring in the technology relating to satellites. He did not see inter-satellite links as occurring much before the end of the century because although the technology was there, the links required an enormous amount of power to transfer over short distances with low signal volume capacity.

He saw rapid development of conformal phase array antennas for domestic use as being one of the great advances to be seen in the near future. These antennas would allow both up-link and down-link transmission and could be (e.g.) incorporated in the roof of domestic houses. He was most optimistic about the future of digital compression techniques to permit the very rapid transmission of (e.g.) television programming.

Dr Pelton thought that the Japanese pursuit of high definition television would turn out to be the right direction for the future and very soon we should have 3-D digital television. This would mean the end of the use of celluloid film.

In the near future, video conferencing would be a standard part of business life. The use of space platforms for rebroadcasting and transmission facilities should be with us by the turn of the century as well as the use of high gain antennas in space to permit very low power signals to be retransmitted at higher power.

Direct broadcasting satellites would permit trans-national programming for special purposes (e.g. for U.S. forces overseas). This will lead to increased international programming and then international advertising.

COMMENTARY AND SUMMARY

To attempt a summary of such a comprehensive analysis of the current state of satellite television is virtually impossible, but some overall impressions were:

(a) Most commentators believe the problems of international piracy

and copyright infringement through satellite transmission of television programming will be solved by technology rather than by the evolution of copyright law. This view appears to derive from the fact that international agreement on such issues is extremely difficult given the various legal systems involved and the conflicting interests of program-producing nations as opposed to program-consuming nations.

(b) On balance, it would appear that direct broadcasting satellites will be one aspect of international communications but point-to-point satellite transmissions and terrestrial reticulation of program material will also remain very important.

(c) A major international row is developing over the allocation of satellite positions in space.

(d) There is reason to believe that the satellite will signal the dawn of truly international television programming and, perhaps, advertising. It is anticipated that this type of programming will commence with cultural programming such as opera and ballet, perhaps musical concerts in general and, of course, news and current affairs. (For example, a Japanese network currently crosses live to New York during its morning current affairs program each day where a Japanese reporter inserts material of current interest to Japanese deriving from America).

(e) Australia would appear to be making a major error if it pursues subscription television by way of over-air transmission as a stepping stone to cable television. Overseas experience would indicate that this is a waste of resources and fundamentally unappealing to audiences asked to pay for the service. The whole technology requires decisiveness and use of "state of the art" technology since progress is occurring so rapidly. If one sees the whole of human history in

terms of one month, man was hunter and gatherer for all but one and one half hours of that month. Four minutes of that month represents the industrial period and only 12 seconds represents the era of satellites and post-industrial technology. This is truly simply the beginning and change can be expected to be extraordinarily rapid. To commit huge technological resources to the wrong decision could doom Australia to slip further and further behind in its utilisation of the new technologies.

(f) It would appear that when one considers that a geo-stationary satellite at the optimum orbit of 22,300 miles above the earth's surface can create a footprint to cover almost 60% of the earth's surface, the future for national control of television programming must be clouded. Given the difficulties experienced by, for example, the Australian Broadcasting Tribunal in attempting to maintain program standards, how much more difficult will this be when much programming is available to Australians from international satellites. One despairs of the international community's efforts to deal with this problem by treaty. Because of its geographic isolation, Australia enjoys a very privileged position in relation to regulatory matters and this position ought to be used to permit more rapid technological advance rather than as an excuse for inactivity.

(g) It is significant that no Australian government representative or interested party from Aussat or the Australian Broadcasting Tribunal was present at this very important conference. Such an absence of interest in international developments can only militate to Australia's disadvantage.

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