

Crossing the Fair Use Line: The Demise and Revival of the
Harry Potter Lexicon and Its Implications for the Fair Use
Doctrine in the Real World and on the Internet
Shira Siskind

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SATELLITE TRANSPONDERS AND FREE EXPRESSION*

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INTRODUCTION

As channels of information flow across the world through satellites, there is a confrontation between two discourses: the discourse of purposive instrumental communication (for which I use the term "strategic communication") and the discourse of free expression. Here—in the world of satellites—is a set of decisions by governments and powerful groups that is almost invisible and that certainly does not exist within a clear legal framework. Regulatory

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crises occur when organized and often status quo-disruptive senders shape a persistent and effective set of messages to be transmitted across national boundaries as part of an overall effort to gain substantial influence in target populations. As a result, decisions involving satellite programming have significant geopolitical implications. How programs flow, and which messages penetrate which societies, can be vital elements of major efforts to affect the thinking of large populations or key elites and alter the power of states, religions, corporations, civil society, advertisers, and others. The intrusion of satellite channels disturbs existing arrangements—both from an economic and a political sense—among existing suppliers of information within a society. Most directly, satellite channels impinge on domestic markets for loyalties, posing significant threats to existing cartels.¹

This article explores (i) how the delivering of signals to homes or local cable systems by direct broadcast satellites has challenged existing arrangements, (ii) how states and other players have reacted to the political implications of such developments, and (iii) how the rhetoric of free expression has been employed at times to mold strategic decisions and how, at other times, this new technology has shaped free expression principles. This article focuses on satellites, but, of course, there are other “new technologies” that offer similar techniques for introducing a player in the market in a way that makes it hard for the target state to escape, including the Internet,² mobile telephones and community radio: in each case they can be used to alter existing arrangements in terms of inputs into the body politic.³ Short wave radio was an

¹ See Monroe E. Price, *Market for Loyalties: Electronic Media and the Global Competition for Allegiances*, 104 YALE L.J. 667 (1994).

² It is a bit of a fool's errand to compare the regulation of the Internet with the regulation of satellite signals. But it may be that satellites are viewed more significantly than the Internet when it comes to the shaping of hearts and minds. Perhaps satellite signals are more like broadcasting in terms of their wide and simultaneous impact. Perhaps they seem more like legacy television as well, because these signals brought pictures that mirrored built-in expectations of impact, and, in large part, they pass through much clearer and more identifiable gatekeepers (primarily cable television). Satellite signals have seemed more tangible and accessible than Internet messages. Yet, for governments that seek to intervene when they sense the potential for harm to their national interest, the general tools of law seem difficult to apply. The narrative that holds attention and molds the global gestalt for satellites is the story of the competition of regional channel services in the Middle East: Al Jazeera, Al Arabiya, and others, and their sudden sway over large populations. For the Internet, the narrative of danger is more likely to involve pornography or other harms to children. Given basic differences in the structure of perceived threats—between the Internet and satellites—it is not surprising that government reactions have been different. But the discussion of satellite signals casts light on general issues in the field of strategy and counter-strategy of communication.

³ “In the present communication age, if a television station is blocked, there is radio. If radio is blocked, there is the Internet. If one site is blocked, another one opens. If the Internet goes down, there are short messaging services. These opportunities allowed private radio stations, like Islamabad-based Power 99, to broadcast live protests in Islamabad

early adept at this technique; but now, throughout the world, satellite signals, both private and governmental, proliferate, many originating in one state and transmitted to another.

New technologies have the allure of possibilities: satellites provide new opportunities, or so it seems, to reach hearts and minds that were not readily accessible at an earlier time. These new technologies inherently transform modes of access to markets, in this case, markets for loyalties. They undermine existing patterns of regulation and place pressure on established patterns of dividing and controlling collective passions. In the process, international norms of free expression that have traditionally been invoked, for example with respect to decisions concerning the carriage of signals, cannot immediately be applied. The context has changed and arguments for the application of old standards will have to be retooled. These new technologies provide strategic opportunities for states, religions, advertisers, and other powerful players to advance their points of view and gain allegiances. One objective of this article is to explore how these entities join power and capital with technology, with particular attention to satellites.⁴

Some years ago, I wrote a little essay, *Satellite Broadcasting and Trade Routes in the Sky*,⁵ which initiated a discussion of these questions. It was my effort at trying to understand the transnational implications, governance issues, and legal structure involved in new forms of the transport and delivery of content via satellite transponders. Clearly, the subject matter increased in importance as satellites became a major, if not dominant, form of moving information across great spans. Given the complexity of the issue, I needed a metaphor to make more comprehensible the world of transponders, orbital slots, and related engineering wonders. I settled on “trade routes” as a mode of simplification. Just as global transportation in goods—spices, textiles, things of physical empire—had altered the world two or three hundred years ago, something similar was happening now through new modes of distribution of words and images. Vast amounts of information were hurtling across the globe; the patterns of distribution undoubtedly had significance in terms of management and control. Contrary to what might be taken as public opinion, this was not just data raining from heaven. As with the shipping trade routes of yore, there likely existed a complex history and evolved modes for man-

when Chief Justice Iftikhar Chaudhry was being brought to the court, through a radio recorder mobile phone.” Gulmina Bilal, *Freedom Violated*, INTERNEWS PAK., Apr. 4, 2007, http://www.internews.org.pk/freedom_violated.php.

⁴ See, e.g., John Markoff, *Georgia Takes a Beating in the Cyberwar with Russia*, N.Y. TIMES, Aug. 11, 2008, <http://bits.blogs.nytimes.com/2008/08/11/georgia-takes-a-beating-in-the-cyberwar-with-russia/>.

⁵ Monroe E. Price, *Satellite Broadcasting as Trade Routes in the Sky*, 11 PUB. CULTURE 387 (1999).

agement hidden in the arcane language of the trade. To understand the complexity of the issue, it would be necessary not only to look at formal legislative and regulatory efforts relating to satellite broadcasting, but also to be something of an ethnographer of satellite policy, looking at the informal (and at times forceful) ways by which governments assured that their objectives were being met.

Through that essay, I sought to provide a framework that would explain the evolving structure of the management of satellite facilities. I suggested that, as with trade routes, states concerned with this new technology—geostationary satellites that could provide multiple signals in a clear and effective way to large terrestrial markets—might seek to establish and control sites or ports that would be key aspects of delivery. In some imagined way, satellites were like vessels. One needed to know who owned and operated them, as for centuries it was important to know what ships were under whose control. Little was (and still is) understood of how various providers of program channels (or individual programs) gain access to satellites and what regulatory mechanism, if any, exists to affect those decisions. In the case of the shipping metaphor, not only was the ownership of the vessel significant, but the vessel's flag and its port of disembarkation could be vital to the question of who had power over the route. Would the same be true of satellites?

The metaphor was far from perfect, but it continues to shed light on several aspects of governance or regulation, including the allocation of slots for geostationary satellites (the orbital slots issue); regulation of satellites; regulation of transponders on satellites; regulation of reception of satellites; regulation of marketing; regulation of retransmission; and finally, regulation relating to content. What it demonstrated, more to the point, was that the context for designing the communications system evolved with only glancing reference to systems of free expression.

This article takes stock of the state of affairs since the 1999 publication of *Satellite Broadcasting and Trade Routes in the Sky*, and the current relevance of the trade routes metaphor. There are significant changes. The transmission of signals via satellite is now so dominant and transforming that it is less necessary to use analogies to try to describe their impact. However, the complexities of arranging transmission, the chokepoints and the regulatory implications, are still far from transparent or widely understood. And, as the strategy of using satellites to reach markets becomes more pronounced, so does the counter-strategy of state resistance. As a result, issues involved in applying freedom of expression norms become more evident.

This article documents shifting issues in the relationship between political authorities and the process of distribution of information over satellites. Looked at in gross and on the surface, it seems as if the world has moved from a highly-regulated licensed terrestrial broadcasting system to one where, as a result of the shift to satellites and the Internet, there is much less opportunity (or possibly appetite) for regulation. But this is far from universal. Increasingly, there is an awareness of the strategic implications of unregulated satellite distribution. Those who initiate many satellite communications do so with a purposive effort to intensify the adherence of distributed constituencies. What this article documents is a kind of push and counter push: the complexities of structuring the control of satellite signals in a state-based system that vaunts national governance subject to a set of international norms.

One feature is paramount: formal regulation of content has, with few exceptions, rarely been an effective theater for playing out governmental interests in satellite signal diffusion. And there is a lack of scholarly literature on the ways in which governments seek to control or affect the functioning of satellite services and their transnational distributions. In a sense, this underscores a point: the ranging of satellite signals has been treated more as a form of strategic business decision than as an interplay between national interests and free expression values. By categorizing the leasing and subleasing of transponders as mere economic transactions, however, their existence as modes of intervening in national public spheres is underplayed. And because there is a relative absence of judicial decisions or similar official documents, observers must rely on reportorial and journalistic accounts and on information gleaned from websites and other unofficial sources.

The challenge is to extract from the anecdotal a better sense of the strategic decisions being made and what amounts to a kind of "common law" of satellite transactions, even more specifically, of interactions between content and the instruments of power. An interplay of strategies seems to emerge, rather than something as grandiose as a developing pattern of "governance." Instead of a deliberate system, there exists a hodgepodge of practices and efforts, often desperate, by states or regional and international entities to intervene when a crisis occurs or is perceived to occur.⁶

⁶ Given the magnitude of the subject, I will have to be selective. I am not going to talk about the ITU and governance in terms of the allocation or assignment of orbital slots. The debate there concerning equitable distribution of orbital positions and first come, first served has been often told. I am going to pursue another line of questioning arising out of the Trade Routes article: namely, whether, rather than looking for a universal or global governance scheme, we can find different regional themes, different forms of state

Steps toward "governance" take form in the accordion between national interest and privatization, of ownership and control of the satellite, and in the exercise of power over the satellite carrier to determine which channels or signals are provided a transponder.

I. BACKGROUND: THE LEAD-IN TO THE INTERNATIONAL DEBATE ON THE OWNERSHIP STRUCTURE OF SATELLITES

The international debate about these questions has gone through several phases: an extensive debate (that ended in tatters) in the United Nations ("UN") to design a system of international standards;⁷ a period in which the most obtrusive question was the potential of satellites to aggravate a perceived trend of American cultural imperialism;⁸ a period of vital and extraordinary growth and maturation;⁹ and a period of increasing informal efforts to find regulatory modes to deal with the new phenomenon. Ownership and control affected these phases, and strategic considerations have played a role in the ownership structure of satellites from the outset. Initially, satellites were in transnational hands or controlled by the United States. The creation of Intelsat as a public entity was a way of acknowledging the conditions of control that might accompany an entirely new mode of transmitting information.¹⁰ It was hardly an implementation of unfettered access to use transponders. Privatization and competition of the satellites removed one of the more automatic modes of control.¹¹ Now, in the post-9/11 world, after the industry has grown, and as the world seems more challenging, there are renewed attempts at regulation and control. The considerations that informed the first stage—the United Nations debate—are present again, but the geopolitical considerations mean different positions for key players. There are many responses. One is the effort, discussed below, to define a rule of law within the European Union to determine who has jurisdiction (and applying what standards) over satellite signals received in Europe or transmitted from there. This response can be contrasted with a variety of ad hoc methods of bilateral and multi-

intervention that turn on particular satellites, or particular footprints, or particular content. Put in metaphorical terms, the inquiry is whether the law governing this trade depends on the ship, the port of call, or the freight (or some combination thereof).

⁷ See KATHRYN M. QUEENEY, *DIRECT BROADCAST SATELLITES AND THE UNITED NATIONS* (Sijthoff & Noordhoff 1978).

⁸ In *Praise of Cultural Imperialism?* FOREIGN POLY (1997), available at <http://bss.sfsu.edu/fischer/IR%20305/Readings/cultural.htm>.

⁹ See TAKASHI IIDA, JOSEPH N. PELTON, & EDWARD ASHFORD, *SATELLITE COMMUNICATIONS IN THE 21ST CENTURY: TRENDS AND TECHNOLOGIES* (AIAA 2003).

¹⁰ See LELAND L. JOHNSON, *THE FUTURE OF INTELSAT IN A COMPETITIVE ENVIRONMENT* (1988); see also Kenneth Katkin, *Communication Breakdown?: The Future of Global Connectivity After the Privatization of INTELSAT*, 38 VAND. J. TRANSNAT'L L. 1323 (2005).

¹¹ See Katkin, *supra* note 10.

lateral informal persuasion and threats.¹²

During the NATO bombing campaign of 1999, Serbian satellite television disappeared from European TV screens after Eutelsat's board voted to eliminate its carriage under heavy pressure from NATO (members of the Eutelsat board were largely isomorphic with that of NATO).¹³ This meant that television viewers in Yugoslavia and Serbs living in the region were only able to receive state television via conventional terrestrial transmitters, which themselves were susceptible to destruction by NATO. The satellite relay had been used to reach Serbs living outside of the range of terrestrial transmitters, and also as a way to resume service after transmitters were knocked off the air. It meant news organizations throughout Europe were unable to monitor Serbian television and the controversial pictures of the aftermath of NATO bombing became more difficult to obtain. Yugoslavia lodged complaints with the International Press Institute ("IPI"), the Organization for Security and Cooperation in Europe ("OSCE"), and the Belgian postal and telecommunications authorities over the decision. The Serbian Information Ministry issued a statement condemning the Eutelsat Board of Directors' decision to discontinue transmitting the Radio-TV Serbia ("RTS") satellite program, thus making RTS inaccessible in European countries, and argued that this "criminal decision [wa]s a culmination of the hypocrisy of the policy pursued by Western powers, which in words urge the freedom of the press while most grossly preventing the flow of information in the world and, thereby, consciously violating the Eutelsat founding principles."¹⁴

In May 1999, Yugoslavian President Milosevic, seeking alternative modes of distribution, was able to get the Israeli Spacecom company to agree to broadcast Yugoslav television and radio program via the AMOS satellite. By the time the U.S. administration recognized what had occurred, the satellite had managed to operate for days, replacing the transmitters that were one of the first targets of the NATO bombers. In July, the United States gently reminded Israel that the Israel Aircraft Industries, which owned twenty-five per cent of Spacecom's shares, had the status of a subcontractor for the U.S. Department of Defense, a status that might

¹² See, for example, Canada's novel mode of determining whether Al Jazeera could be carried on cable services and the application of the United States Terrorism Exclusion list in the case of Al Manar; here, it is also interesting to note domestic informal pressures (i.e., the difficulty of Al Jazeera International in gaining shelf space on U.S. cable systems).

¹³ See Statement of the Serbian Information Ministry, May 27, 1999, available at <http://www.bulgaria-italia.com/fry/rtsat.htm> (responding to the prohibition condemning the Eutelsat Board's decision to terminate transmission of Serbian satellite programming).

¹⁴ *Id.*

be endangered if AMOS did not discontinue broadcasts "aimed at delegitimizing the residents of Kosovo."¹⁵ AMOS complied. These kinds of non-transparent modes of dealing with signals troublesome to powerful global players would continue, but also give way to efforts to create a legal framework. And for a source for that framework, one can turn to early debates at the United Nations.

II. THE UNITED NATIONS, THE PRIOR CONSENT DEBATE, AND THE ARTICULATION OF ISSUES

"Freedom of expression" norms were raised at an early stage at the United Nations. Almost as soon as the extraordinary science-fiction laden prospect of direct-to-home satellite communication became widely seen as actually possible, the UN took up the question of whether international regulation would be desirable. After all, the sending of a signal from one country into the territory of another could be looked at as a triumph of free expression or as a potential violation of national sovereignty.¹⁶ Indeed, most terrestrial broadcasting regulation had been established (at least multilaterally) on the idea that in medium- and long-wave, there should be some sort of agreement for the management of broadcasting signals so that national borders are respected and what might be called "intended spillover" is minimized.¹⁷ Both in the UN and United Nations Education, Scientific and Cultural Organization ("UNESCO"), a similar idea—one of prior consent before a satellite signal is sent transnationally—was debated from the

¹⁵ *RTS Said Taken off AMOS Satellite After US Pressure*, BBC Summary of World Broadcasts, July 16, 1999.

¹⁶ See Colby C. Nuttall, *Defining International Satellite Communications as Weapons of Mass Destruction: The First Step in a Compromise Between National Sovereignty and the Free Flow of Ideas*, 27 HOUSTON J. INT'L L. 389 (2005) (discussing the framing of the debate as conflicting perspectives of governing principles, with some states supporting a "free flow of information" and other states supporting "national sovereignty").

¹⁷ For most of the twentieth century, the international consensus was that radio transmissions should be contained primarily within the boundaries of one nation; the international function, performed mainly through the International Telecommunications Union ("ITU"), was to dispense frequencies so as to assure that conditions of market division along national borders could be realized and enforced. In the interlude between the World Wars, there were bilateral and multilateral agreements to control propaganda subversive to the state system. For example, the League of Nations sponsored the International Convention Concerning the Use of Broadcasting in the Cause of Peace, which provided that:

The High Contracting Parties mutually undertake to prohibit and, if occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the detriment of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party.

International Convention Concerning the Use of Broadcasting in the Cause of Peace, Sept. 23, 1936, 186 L.N.T.S. 301 art. 1 (1936) (highlighting states' continuing "struggle with the question of whether to use law to protect transnational systems or to enhance international freedom to communicate").

late 1960s to the early 1980s.¹⁸

The main forum was the UN Committee on the Peaceful Uses of Outer Space ("COPUOS"),¹⁹ responsible for creating the five major treaties that regulate activities in space. These treaties concern: (1) the use and exploration of space; (2) the rescue and return of astronauts and objects launched into space; (3) liability for damage caused by space objects; (4) registration of objects launched into space; and (5) the use and exploitation of the moon.²⁰ Members of COPUOS's working group argued for "a prohibition on broadcasts beamed from satellites by one State to others without the explicit prior consent of the Government concerned through bilateral or multilateral agreements."²¹ Quite quickly, the debate became a forum for rehearsing Cold War feints and parries, and for consideration of the relationship of satellite transmissions to spheres of influence. The Soviet Union, supported by many developing countries, fought for a prior consent requirement (the USSR claiming it desired to limit political propaganda, others more concerned with the impact on economic development and cultural heritage). Arguments over what were called direct broadcasting services were closely linked to debates on the free flow of information and agitation for the "New World Information and Communication Order."²² The United States, with a tiny group of allies, opposed all restrictions, asserting a commitment to principles of free expression, including a constitutional obligation to protect the rights of U.S. citizens and companies to send signals abroad.²³ The debates reflected long-standing

¹⁸ For details of debates on the prior consent requirement in particular, and regulation of direct broadcasting by satellite in general, see JON T. POWELL, INTERNATIONAL BROADCASTING BY SATELLITE: ISSUES OF REGULATION, BARRIERS TO COMMUNICATIONS (1985), KATHRYN M. QUEENEY, DIRECT BROADCAST SATELLITES AND THE UNITED NATIONS (1978), and NATIONAL SOVEREIGNTY AND INTERNATIONAL COMMUNICATION (Kaarle Nordenstreng & Herbert Schiller eds., 1979).

¹⁹ The UN General Assembly created COPUOS in 1958 in order to specifically acknowledge "the international challenges that space exploration [and satellite communications] could present." Nuttall, *supra* note 16, at 394. The committee "began focusing on developing workable international standards, policy, and law" that took into account the "new and developing challenges and their potential threat to international peace." *Id.*

²⁰ Alexandra M. Field, *INTELSAT at a Crossroads*, 25 LAW & POL'Y INT'L BUS. 1355 (1994).

²¹ See U.N. GAOR Comm. on the Peaceful Uses of Outer Space, Working Group on Direct Broadcast Satellites, *Report of the Second Session of the Working Group on the Direct Broadcast Satellites*, ¶ 7, U.N. Doc. A/AC.105/66 (Aug. 12, 1969); see also U.N. GAOR Comm. on the Peaceful Uses of Outer Space, *Broadcasting from Satellites: Working Paper Submitted by France to the Second Session of the Working Group on Direct Broadcast Satellites*, U.N. Doc. No. A/AC.105/62 (June 30, 1969) (discussing the Soviet position); MARIKA N. TAISHOFF, STATE RESPONSIBILITY AND THE DIRECT BROADCAST SATELLITE 34 (1987) (describing Soviet fears of harmful propaganda).

²² See, e.g., THOMAS L. MCPHAIL, ELECTRONIC COLONIALISM: THE FUTURE OF INTERNATIONAL BROADCASTING AND COMMUNICATION 162 (1987); SEÁN Ó. SIOCHRÚ & BRUCE GIRARD, GLOBAL MEDIA GOVERNANCE: A BEGINNER'S GUIDE 77 (2002).

²³ See Frank Stanton, *Will They Stop Our Satellites*, N.Y. TIMES, Oct. 22, 1972; see also Nuttall, *supra* note 16 (discussing the United States' ardent support of the free flow of information

information strategies of West and East and the framing of political ideologies in the specific context of free flow of information.

The result of the conflict of strategies was failure to pass a binding international treaty on the regulation of direct broadcast satellites ("DBSs"). Rather, in 1982, the UN General Assembly adopted Resolution 37/92, Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting.²⁴ The explicit principle of requiring "prior consent" of the receiving countries was abandoned,²⁵ but paragraph 8 of the nonbinding document provided "States should bear international responsibility for activities in the field of international direct television broadcasting by satellite carried out by them or under their jurisdiction."²⁶ This reflected the alternative approach developed during the UN and UNESCO debates: a set of internationally-agreed standards with the originating country being responsible so that no signal emanating from it would violate them.

As we shall see, the basic issues that guided national strategies in the UN debate continue to guide decisions concerning satellite communications today. The prior consent principle—granting that a state, even in the face of Article 19's right of an individual to receive and impart information, should have some say over the receipt of satellite signals within its borders—lurks. So too does the alternative principle—that there should be common standards (globally or regionally or nationally) determining the content of what is transmitted or received using satellite platforms. These approaches exist as artifacts that find their way into contemporary actions and debates, though not as universal principles and very seldom with reference to their historical antecedents.²⁷ As one way

and objection to virtually any interference with the right to impart information through any media form).

²⁴ The resolution was adopted on December 10, 1982. One-hundred and seven countries voted for the resolution, thirteen voted against, and thirteen abstained. G.A. Res. 37/92 (XXXVII), U.N. Doc. A/RES/37/92 (Dec. 10, 1982) <http://www.un.org/documents/ga/res/37/a37r092.htm> (for the full text of the resolution). See also Nuttall, *supra* note 16, at 395 ("Of the declarations of principles proposed by COPUOS and adopted by the United Nations, the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting (Principles on TV Broadcasting) provides the most focused look at the potential influence the United Nations expected satellite broadcasts to exert across international boundaries.")

²⁵ Section J of the Resolution concerns "Consultations and Agreements between States." See G.A. Res. 92, *supra* note 25. Article 13 reads: "A State which intends to establish or authorize the establishment of an international direct television broadcasting satellite service shall without delay notify the proposed receiving State or States of such intention and shall promptly enter into consultation with any of those States which so requests." *Id.* Article 14 reads: "An international direct television broadcasting satellite service shall only be established after the conditions set forth in paragraph 13 above have been met and on the basis of agreement or agreements in conformity with the relevant instruments of International Telecommunication Union and in accordance with these principles." *Id.*

²⁶ *Id.*
²⁷ One modern call for regulation comes from "advocates of economic growth that support the expansion of the satellite market to promote competition. These economic advocates suggest that regulation is needed to transform the telecommunications markets

to look at emerging patterns, one could say that in the absence of an agreed international approach, there are states that have some adapted versions of these principles, coming as close to a prior consent principle (or to the standards-related alternative) as they technologically and politically can.

III. "INFORMAL" GOVERNANCE AND INFLUENCE

By and large, prior to the end of the 1990s and 9/11, the lack of an overarching international system to govern the distribution of satellite programming was of little significance.²⁸ Global players had not—as part of their communications strategy—fixed on transnational satellite programming, though some such efforts were in their nascence. Evangelical religious groups had begun to show the effectiveness of transnational broadcasting to affect allegiances.²⁹ Diasporic movements began to find the technology hospitable, followed by states seeking to link more closely with their non-resident populations. One such case involving the Kurdish community—and MED-TV—discussed below, raised the major issues of how a set of focused satellite signals could reinforce a national identity among a geographically dispersed group, and what dangers that might pose to territorial integrity. Problems of regulation remained in the background because authoritarian countries could ban satellite dishes or otherwise control the receipt of information. To the extent that there were transnational broadcasting issues of political moment, they involved the residual short-wave radio efforts of the Cold War. These assets diminished in significance during the 1990s with a few idiosyncratic and intense exceptions, such as Radio Marti and Radio Free Asia.

Then, with the founding and broadcasting of Al Jazeera in 1996³⁰ and the NATO bombing campaign of 1999 (and with it a focus on the effort of Serbia to reach Serbians worldwide), the regional and global political impacts of satellite transmissions began to attract renewed attention. As a result, internationally, states over the last decade have again begun groping for some accom-

from monopolies into freely competing markets." Nuttall, *supra* note 16, at 404.

²⁸ See John Tusa, *International Satellite Television – Good Neighbour or Global Intruder?*, 7 EUR. BUS. J. 45 (1995) (discussing insufficiently developed satellite networks, in which numerous major players today "were scarcely in operation, their impact on societies and world events not yet fully felt or clearly demonstrated.")

²⁹ For further discussion, see Michael Serazio, *Media Power, Politics and Proselytizing: The Global Gospel of American Christian Broadcasting*, J. MEDIA & RELIGION 8 (2009), available at <http://www.global.asc.upenn.edu/docs/GlobalGospel.pdf> (discussing the soft power implications of American Christian Broadcasting as it competes in the international marketplace for loyalties). See also Michael Serazio, *Geopolitical Proselytizing in the Marketplace for Loyalties: Rethinking the Global Gospel of American Christian Broadcasting* (manuscript presented at the 94th annual meeting of the NCA Convention on Nov. 21, 2008).

³⁰ MARC LYNCH, VOICES OF THE NEW ARAB PUBLIC: IRAQ, AL-JAZEERA, AND MIDDLE EAST POLITICS TODAY (2006).

modation with the issues and positions put forward in the UN debate of the 1970s. There is not (and most likely will never be) an international agreement that involves the prior consent approach or a set of enforceable international standards. But unilaterally, bilaterally, and multilaterally states will seek similar considerations where they consider it important. And, frequently, the efforts to do so will be informal, non-obvious, almost impermeable. Decisions will be pragmatic (with some recognition of standards and obligations of speech-related human rights). Inferring from past experience, the justification for these formal and informal efforts includes maintaining a balance of loyalties in the receiving country; protecting the business status quo of video providers; decreasing "terrorist" related programming; and maintaining standards of morality. The efforts deal with modes of production, transmission and reception.

The following section uses particular cases to demonstrate how these actions reflect communications goals of the sender, and how restrictions reflect the counter-strategy of the receiving states.

A. *The Case of MED-TV*

The case of MED-TV was one of the first in which the multi-lateral and informal aspects of satellite regulation significantly surfaced and the complexity of arrangements came to the fore. In 1994, MED-TV, a satellite service targeting Kurdish populations worldwide, was granted a 10-year licence by the United Kingdom's Independent Television Commission ("ITC").³¹ MED-TV especially sought to reach Kurdish minorities in Turkey, Iran, and Iraq. The United Kingdom was its locus of licensing because it was "established"³² there, but its programming was produced in large part in Belgium. To some, the satellite feed was a culturally enriching mix of news, entertainment, and education aimed at a historically diasporic community of thirty-five million engaged in rediscovering and redefining Kurdish nationhood and reaffirming its language and culture. Naomi Sakr captured this view, calling MED-TV a "kind of Kurdistan in space,"³³ as it provided a culturally unifying function despite the lack of a Kurdish homeland or single

³¹ The ITC, before being merged into a new entity, OFCOM, regulated commercial TV broadcasts in the UK (whether terrestrial or satellite). Indeed, the UK became home to a variety of satellite services seeking to reach groups or populations abroad and operate with the legitimacy of a British license.

³² Under the Broadcasting Act 1990, the UK's ITC was given the authority to license and regulate commercial television services in the United Kingdom. See *ITC Notes: Introduction*, http://www.ofcom.org.uk/static/archive/itc/itc_publications/itc_notes/view_note57.html

³³ NAOMI SAKR, *SATELLITE REALMS: TRANSNATIONAL TELEVISION, GLOBALIZATION AND THE MIDDLE EAST* 62 (2002).

territorial base. Turkish officials claimed, in sharp contrast, that MED-TV was the media arm of the PKK, the separatist Kurdish force that has been engaged in armed conflict with Turkish government troops and has been deemed by Turkey to be a significant threat to the integrity and unity of the country.³⁴ For Turkey, MED-TV was a foreign intrusion, disturbing the local forms of regulation, and seeking to foment instability and violence.

The Turkish government sought to suppress the receipt of the channel, banning, for example, the purchase and mounting of satellite dishes that could obtain the signals.³⁵ Failing at this effort, Turkey resorted to a strategy to stifle the MED-TV channel by launching a campaign to pressure the British government to withdraw MED-TV's license and sought, in other European capitals, to deny MED-TV leasing rights on government-controlled transponders on Eutelsat.³⁶

The location and ownership of the transponders on the Eutelsat system that were used by MED-TV were politically significant. Under Eutelsat's internal rules, the satellite's transponders were (loosely) controlled by public agencies; the states that controlled those agencies had good bilateral relations with Turkey. Stories were told of MED-TV securing time on a Slovakian-controlled slot on a satellite only to have the Turkish Foreign Minister successfully urge a cancellation through bilateral discussions. MED-TV was unceremoniously bounced from various transponders on Eutelsat, and its contracts for access were cancelled.

One solace, an anchor, as it were, was MED-TV's British license. Whatever the station's political goals, the choice of a relatively secure legal and political system that would govern the delivery of its information seemed one of MED-TV's most important achievements and was a vital part of the strategy for obtaining

³⁴ *Turkey Calls on USA to End MED-TV Broadcasts*, BBC Summary of World Broadcasts, Aug. 30, 1996; *MED-TV Off the Air After UK, Belgian Police Raids*, BBC Summary of World Broadcasts, Sept. 27, 1996; *Turkish Premier Discusses MED-TV with Tony Blair*, BBC Summary of World Broadcasts, Dec. 19, 1997. See also Amir Hassanpour, *Med-TV, Britain, and the Turkish State: A Stateless Nation's Quest for Sovereignty in the Sky* (Nov. 7, 1995) (unpublished paper, Freie Universitat Berlin), available at <http://www.cogsci.ed.ac.uk/~siamakr/Kurdish/KURDICA/hassanpour.html>.

³⁵ For example, its transmission was originally on a satellite that directed its signal from a different location than the more commonly viewed Eutelsat satellites. MED-TV viewers had to turn their satellite dishes in a different direction from those receiving the Eutelsat-originated satellite signal, one that carried traditional Turkish entertainment channel services. The authorities could see the difference in the attitudes of the respective programs of each dish, and could use that information to harass the MED-TV viewers. To protect its viewers, MED-TV had to shift in order to the more commonly-viewed bird in the sky. William Merrifield, *Med-TV: Kurdish Satellite Television and the Changing Relationship between the State and the Media*, <http://www.tbsjournal.com/Archives/Spring05/merrifield.html>; see also *Med TV moves back to Eutelsat*, BBC Summary of World Broadcasts, Aug. 8, 1997.

³⁶ Peter Feuillerade, *Med-TV: 'Kurdistan in the Sky'*, BBC NEWS, Mar. 23, 1999, <http://news.bbc.co.uk/2/hi/world/monitoring/280616.stm>.

transponder space to reach the relevant audience. Its establishment in the UK resulted in MED-TV's being subject to the ITC's content standards. Receiving a British permit allowed MED-TV to claim that it met those standards. This was seen as a means for increasing the chances that its programming would be subject only to legal, as opposed to extra-legal, constraints.³⁷

Yet because of this arrangement, Turkish officials mounted an extensive campaign to pressure the British government to withdraw MED-TV's license and close the producer down. They contended that MED-TV was a "political organization" and therefore, under United Kingdom legislation, precluded from obtaining a British license. In February 1998, the ITC, which was charged with supervision of licensed entities in Britain, penalized MED-TV for three broadcasts, for a total fine of approximately \$150,000. According to the Commission, despite formal warnings, MED-TV violated the impartiality requirements of ITC's programming code. In one breach, according to the ITC, a "40 minute long programme consisted entirely of a political rally organized by the PKK."³⁸ The violation was that: "No context was supplied and there was no balancing material."³⁹ In a second breach of impartiality requirements, MED-TV "seemingly endorsed" the on-camera condemnation of a U.S. list of terrorist organizations. A third transgression of the ITC's rules (neutrality of journalists) involved "personal comments' from a MED-TV journalist in the field, namely a description of the more pro-government Kurdish Democratic Party as 'treacherous and murderous.'⁴⁰ Finally, in 1999 the ITC withdrew MED-TV's license, finding that the station had too often violated standards of objectivity and impartiality.⁴¹ Soon thereafter, MED-TV closed down.⁴² The snake, however, was

³⁷ In my *Trade Routes* article, I said: "At the danger of pushing the metaphor too far, the MED-TV decision to obtain a license in the United Kingdom could be perceived as a rough equivalent of flying the British flag on the main mast." Price, *supra* note 5, at 398.

³⁸ *Med TV Fined for Serious Breaches of ITC Code*, BBC Summary of World Broadcasts, Feb. 6, 1998.

³⁹ *Id.*

⁴⁰ This history is recounted by Monroe E. Price in *What Price Fairness?*, 12 MEDIA STUD. J. 82 (1998).

⁴¹ According to Sir Robin Biggam, the ITC's chair:

Whatever sympathy there may be in the United Kingdom for the Kurdish people, it is not in the public interest to have any broadcaster use the UK as a platform for broadcasts which incite people to violence. Med TV have been given many opportunities to be a peaceful voice for their community; to allow them to continue broadcasting after such serious breaches would be to condone the misuse of the UK's system for licensing broadcasters.

UK Regulator Revokes Kurdish Med TV's Licence, BBC NEWS, Apr. 23, 1999, <http://news.bbc.co.uk/2/hi/world/monitoring/326883.stm>.

⁴² DAVID ROMANO, *THE KURDISH NATIONALIST MOVEMENT: OPPORTUNITY, MOBILIZATION AND IDENTITY* 157 (2006).

scotched, not killed; versions have cropped up, continuously subject to pressures on national hosts, in France and elsewhere, to curtail the service.⁴³ Despite the legal efforts, MED-TV and its progenitors could persist at finding ways of delivering content to its audiences.

B. *The Case of Islah*

The case of MED-TV is atypical because of the formality of the proceedings involving its content. Far more typical is the instance of Islah or Reform Radio.⁴⁴ It involves Abdulzazis Alkhamis, former head of the London-based Saudi Center for Human Rights and his effort—part of a strategy of encouraging civil society—to open up a space for speech in Saudi Arabia that arguably promoted greater public participation and democracy (though there could be other characterizations of the content).⁴⁵

⁴³ A successor, Medya-TV, opened in the summer of 1999, but under different legal circumstances. *New Kurdish TV Station Medya TV*, BBC Summary of World Broadcasts, Aug. 6, 1999.

A new Paris-based Kurdish satellite television station identifying itself as Medya TV has been observed since 30th July. It broadcasts via the Eutelsat Hot Bird 4 satellite at 13 degrees east (10853 MHz vertical polarization, audio subcarrier 6.65 MHz). This transponder also carries Kurdish and Christian programming from the UK-based CTV (Cultural TV). News bulletins formerly carried on CTV appear to have transferred to Medya TV along with some of the presenters. . . . Medya TV carried a live relay of its official launch ceremony in Paris. The ceremony was held in a hall with the Medya logo depicted in laser lights as the stage backdrop. Two large screens on either side of the stage showed the musicians and the announcers, who spoke in Kurdish. What appeared to be a message marking the launching of the station by Kurdish National Congress President Serif Canli was carried at 1710 GMT. It was followed by a similar message in Kurdish from Yasar Kaya, president of the Kurdish parliament-in-exile.

Id. Medya-TV's license was revoked by the French authorities on February 13, 2004. The French court believed that the station had ties with PKK, and CSA, the French Licensing Authority, stated that Medya-TV was a successor to Med-TV. *Kurdish Medya TV Shuts Down*, CLANDESTINERADIO.COM, Feb. 13, 2004, <http://www.clandestineradio.com/crw/news.php?id=211&stm=684&news=318>. The French Appeal Court confirmed the CSA's decision. *Id.*

⁴⁴ See The Movement of Islamic Reform in Arabia (MIRA) Web Site, <http://www.islah.info/index.php?/english/empp11/> (last visited Feb. 2, 2009).

⁴⁵ See David Crawford, *A Battle for Ears and Minds: As Technology Gives New Voice To Dissent, a Saudi Vies to Be Heard*, WALL ST. J., Feb. 4, 2004, at A14. See also Radio Al-Islah, <http://www.mail-archive.com/dx@hard-core-dx.com/msg00472.html> (Dec. 10, 2002, 02:37) for a discussion of Islah's claimed purposes and innovative techniques (taken from BBC Monitoring):

Radio stations run by opposition groups are a rare occurrence in the Arab world, and the launch marks a dramatic breakthrough in a region where public broadcasting is tightly regulated by governments.

The new satellite station Sawt Al-Islah - which means Voice of Reform - is using the latest internet technology to help disgruntled Saudis voice their criticism of the Royal family.

A spokesman for the Movement for Islamic Reform In Arabia told the BBC that by using an internet phone service - known as Paltalk - listeners can take part in the programme and say what they like without risking arrest or harassment.

C. *The Case of Geo TV*

The Saudi example illustrates clandestine, certainly unsanctioned, modes of introducing a signal from London and then having the target government battle against it, activity in the often marginal world of subterfuge and indirection. A very different example of informal efforts to check satellite diffusion involves Geo TV,⁵⁵ an Urdu-language satellite service feeding cable systems and homes in Pakistan. When then-Pakistani President Pervez Musharraf declared a state of emergency on November 3, 2007, Geo TV, like all private television channels, was struck from cable systems. Press accounts, including those on Geo TV, had helped foster street demonstrations against Musharraf's firing of members of the judiciary; Musharraf concluded that these protests were undermining national stability.⁵⁴

Because Geo TV was available through direct-to-home television signals, it could function despite the emergency order. But a regulatory hook existed. As a satellite delivered channel, Geo TV was uplinked from Dubai in the United Arab Emirates ("UAE"), where its main production capacity was located. Its offices were in Dubai's Media City—a place that the progressive Gulf state had established that was to be home to a new industrial gathering of media companies. There, media channels would, it was said, be free to flourish—free, particularly, of the constraints of the countries where the footprint of the satellite signal landed (or so they thought).⁵⁵ Dubai bore no responsibility for the satellite transponder that any denizen of the Media City leased or occupied. It was responsible only for the uplinking.

Then, on November 17, after conversations between the Musharraf government in Pakistan and officials in Dubai, the UAE government announced that it would discontinue its uplinking service to Geo TV.⁵⁶ This action marked a dramatic and important move. There had been rare precedents for intervention by one

⁵⁵ See generally Geo Television Network Homepage, <http://www.geo.tv/> (last visited Feb. 2, 2009).

⁵⁴ For further discussion, see M. Ilyas Khan, *Pakistan's GEO TV 'Warned by UAE'*, BBC NEWS, June 13, 2008, http://news.bbc.co.uk/1/hi/world/south_asia/7452728.stm.

⁵⁵ Dubai Media City is the place where every kind of media business – specifically, Broadcasting, Publishing, Advertising, Public Relations, Research, Music, New Media and Production and Post Production – can operate with collective synergy and individual freedom." *Dubai Internet City and Dubai Media City – Accelerating the Region's Knowledge Economy*, INTERNATIONALREPORTS.NET (2003), <http://www.internationalreports.net/middleeast/dubai/2003/2dubaiinternet.html>.

⁵⁶ Geo continued to distribute information online. And on the day after closing, the company briefly showed its Internet site on a large screen mounted in downtown Islamabad. The showing was discontinued after intervention by the police. *Pakistan: Islamabad Police Halt Large Screen Showing of Geo News TV*, BBC Summary of World Broadcasts, Nov. 20, 2007.

country to stop satellite transmission originating elsewhere, so this was an almost singular event. A statement issued by the UAE government suggested how sensitive a matter this was (especially given that Dubai was representing that the Media City was a place relatively free of regulatory intervention). The statement said:

The United Arab Emirates has always played a positive and constructive role in international affairs, and neutrality has been a key principle of its foreign policy. As such the UAE has always been an advocate of international law and an active contributor to peace and stability in the region. In light of the current sensitive state of affairs in Pakistan, the UAE can only assume its responsibility and maintain its neutrality.⁵⁷

Dubai Media City, for its part, issued a statement saying,

As an entity within the UAE, Dubai Media City would also observe the broad principles of the country's foreign policy and prevent the broadcast of news and material that would undermine those principles. Geo TV and ARY Digital are respected business partners in Dubai Media City for several years. Our relationship with them has been strong and friendly.

We are in discussion with them with regard to the broadcast of their news components and we are confident we will resolve this matter in the best way possible to protect their interests and those of the UAE.⁵⁸

On November 30, 2007, after Musharraf became a civilian president and there was notice that the state of emergency would soon be lifted, Dubai agreed to allow the uplinking of Geo TV once again. Amina Al Rustamani, executive director of media at Dubai Technology and Media Free Zone, was quoted as saying:

We are glad to see GEO News channel back on air from the D[ubai] M[edia] C[ity] which is committed to growing its partners' businesses within the framework of full respect to UAE's

⁵⁷ Amir Wasim, *UAE Admits Stopping Geo, ARY Broadcast*, DAWN, Nov. 18, 2007, <http://www.dawn.com/2007/11/18/top18.htm>.

⁵⁸ *Id.* A trenchant BBC Monitoring World Media Analysis, distributed by the BBC on November 20, 2007, chronicled other instances when the UAE had removed or disabled services that were to originate in Dubai's Media City.

In 2005, former speaker of parliament Mehdi Karrubi was one of the candidates defeated by Mahmud Ahmadinezhad in Iran's presidential election. Frustrated with what he saw as the lack of airtime allowed to those with reformist views, he announced plans to launch a television channel called Saba TV. The intention was to produce the channel's programmes in Iran and then have them sent to Dubai for transmission. But on the day of the planned launch, the person carrying the tapes for the inaugural broadcast was not allowed to disembark at Dubai airport and the whole project was called off. In an interview with the US-funded Radio Farda earlier this year, Aminah al-Rustamani of Dubai Media City said . . . the UAE did not permit any Iranian political publications or broadcasters to operate because it did not want to strain relations between the two countries.

Analysis: Broadcasters Welcome in Dubai, but not Their Domestic Politics, BBC Summary of World Broadcasts, Nov. 20, 2007.

domestic and foreign policies . . . She said she was proud of the partnership between DMC and the International Media Corp., the parent company of Geo TV.⁵⁹

The UAE authorities had stated that the country's neutral foreign policy and its constructive role in international affairs were the reasons behind taking the two Pakistani news channels off air. Even then, Geo TV's sports and entertainment channels had been allowed to uplink on the condition that these would not air any news or current affairs content.⁶⁰

The Geo TV tale is important for a mix of reasons. Most importantly, it echoes the UN discussion about prior consent and the responsibility of the sending country. Here, Dubai acknowledged a foreign policy commitment (briefly, and at least in this case) to recognize the governmental preferences of the state to which a signal is directed. This approach was reminiscent of efforts by the Turkish government to persuade the UK to discipline or curtail MED-TV's Kurdish satellite broadcasting, as discussed above. It was a stunning example of negotiations between countries to limit participants in the market for loyalties. Furthermore, the instance showed what might be called a regulatory gap partly attributable to traditional modes of thinking about the flow of messages. The norm for regulation is at the retail end or the production side of broadcasting. Satellite presents the problem of regulation of the long shipment of information to cable systems and directly to homes from outside a state's territory.

D. *The Case of Al Zawraa*

The case of Al Zawraa provides additional insights into the questions of informal pressure, this time involving a state that is neither the receiver nor the sender of the signal, namely the United States. Al Zawraa started as a broadcast channel in Iraq, with an audience-pleasing entertainment format. Owned by Mishan Al Jaburi, leader of the Sunni Arab Front for Reconciliation and Liberation, the channel over time became more politicized, reflecting the owner's decision to run for the Iraqi parliament. More important, it morphed into what Ibrahim Al-Marashi and others have called insurrectionist television,⁶¹ playing, among

⁵⁹ *Pakistan's Geo News Resumes Transmission from Dubai*, SIFY NEWS, Nov. 30, 2007, <http://sify.com/news/fullstory.php?id=14569251>.

⁶⁰ *See id.* (While Geo was permitted to uplink by Dubai Media Centre, the Pakistani order precluding carriage of the signals on domestic cable systems was maintained since the channel's managers were not immediately prepared to sign a Code of Conduct required by the government).

⁶¹ *See, e.g., Ibrahim Al-Marashi, The Dynamics of Iraq's Media*, 25 CARDOZO ARTS & ENT. L.J. 95, 113 (2007).

other things, repeated videos of jihadist bombings with footage of attacks against multinational forces. In November 2006, the Iraqi government ordered the station to be terminated and its offices in Iraq closed on charges of "inciting violence and murder."⁶²

Banned from using transmitters in Iraq, Al Jaburi staked his future on a satellite strategy, leasing channels on Egyptian-owned Nilesat. The channel's campaign against the U.S.-supported Iraqi government intensified—broadcasting "a blend of pro-insurgent propaganda, video clips of attacks on Coalition forces and calls for violence against Iraqi Shi'is and the Iraqi government," and "audio messages from the Islamic Army of Iraq, an insurgent group dominated by the Iraqi Ba'th Party loyal to former president Saddam Husayn."⁶³ An influential American blogger described showing the Al Zawraa feed to U.S. soldiers and Iraqis:

The soldiers and [interpreters] described the meaning of the images, music and voice overs. There were songs about the Iraqi "victims" of the "U.S. occupiers." The violence in Iraq is squarely placed on the shoulders of the Americans. The images include destroyed mosques, dead women and children, women weeping of the death of their family, bloodstained floors, the destruction of U.S. humvees and armored vehicles, and insurgents firing mortars, RPGs, rockets and AK-47s. Juba, the mythical Iraqi sniper, was featured prominently (the Iraqi soldiers believe he is a composite of multiple snipers.)

The "mujahideen" are portrayed as "freedom fighters," and are seen going through "boot camp training." Attacks from across the country were shown, including in Abu Ghraib, Ramadi, Fallujah, Baiji, Baghdad and elsewhere. The soldiers are seasoned veterans from the 1st Iraqi Army Division, and have served throughout Iraq. Most of the footage was popular, rehashed videos widely distributed on the Internet and in jihadi forums. I recognized many of the videos.

The soldiers were angry at the images before them. "They destroyed my country," said Staff Sergeant Riad.⁶⁴

The U.S. government began discussions with the Egyptian

⁶² Andy Sennitt, *Iraq: US Blacklists Al-Zawraa TV*, BBC MONITORING WORLDWIDE MEDIA, Jan. 10, 2008, available at <http://blogs.rnw.nl/medianetwork/iraq-us-blacklists-al-zawraa-tv>.

⁶³ Peter Feuillerade, *Egypt Row Brews over Iraqi Sunni Channel Al-Zawraa on Nilesat*, BBC MONITORING WORLDWIDE MEDIA, Jan. 9, 2007.

⁶⁴ Bill Roggio, *al-Zawraa: Muj TV*, LONG WAR J., Dec. 10, 2006, http://www.longwarjournal.org/archives/2006/12/muj_tv.php. For Mashaan Aljabouri's response to Roggio's article, see Bill Roggio, *Al-Zawraa Responds to Muj TV*, LONG WAR J., Dec. 25, 2006, http://www.longwarjournal.org/archives/2006/12/alzawraa_responds_to.php (demonstrating Aljabouri's efforts to distinguish al-Zawraa from al Qaeda).

government to terminate the Al Zawraa transponder lease on Nile-sat. Closing Al-Zawraa became a preferred alternative for Iraqi and U.S. officials. A report on Cairo's Al-Misriyun newspaper website in early 2007 said the U.S. ambassador in Cairo had asked Egyptian Information Minister Anas al-Fiqi to

pull the plug on the channel, on the pretext that it constituted the last weapon in the hands of those he described as the Sunni "rebels" in Iraq The minister, however, declined to respond to the ambassador's request initially, affirming that the broadcasting of the channel was purely a business transaction that had nothing to do with politics. The operational costs of the Egyptian satellite required the renting of unoccupied channels But threats made by supporters of the Shi'i Al-Mahdi Army affiliated with Muqtada al-Sadr to attack and kill members of the Egyptian diplomatic mission in Baghdad constituted pressure that drove Egypt to backtrack on its stand in this regard.⁶⁵

There were dissenting voices (though not predominantly on free speech grounds):

This is major dilemma in the modern age of information warfare. On one hand, programs like al-Zawraa provide ready and effective propaganda and recruiting material for the insurgency and al Qaeda, while demoralizing both Western and Middle Eastern allies. On the other, the intelligence gleaned from these operations is deemed too valuable to turn off the tap.⁶⁶

Superficially, Nile-sat officials resisted the pressure and indicated that carriage was merely a contractual matter. The Nile-sat chair was reported as saying, in Al-Misri Al-Yawm, that "Satellites do not monitor the channels they are carrying. Accordingly, the Egyptian satellite should not be part of the dispute regarding the channel. It is the right of whoever is hurt by the material broadcast by Al-Zawraa to respond through their channels or media."⁶⁷

With the threat of being ejected from Nile-sat, Al Jaburi claimed the station would soon be carried "on three satellites from European countries."⁶⁸ He refrained from identifying the satellites "because we are really afraid of American pressures. But after we transmit [from Europe] there will be no fear anymore because we

⁶⁵ Feuilherade, *supra* note 63.

⁶⁶ Roggio, *supra* note 64.

⁶⁷ Feuilherade, *supra* note 63.

⁶⁸ Posting of Lawrence Pintak to USC Center on Public Policy, http://uscpublicdiplomacy.com/index.php/newsroom/pdblog_detail/070110_war_of_ideas_insurgent_channel_coming_to_a_satellite_near_you/ (Jan. 10, 2007, 16:40 PDT).

will be on the air."⁶⁹ By late January, Al-Zawraa was observed to be broadcasting via the Saudi-owned Arabsat and France-based Eutelsat.⁷⁰ In February, the Nile-sat transmission was closed after Nile-sat accused the station of "interference" with other channels.⁷¹ In April, the French regulator required Eutelsat to stop transmission, claiming that the station's broadcasting of propaganda was in breach of the September 30, 1986 law prohibiting stations from incitement to hate and violence for reasons of religion or nationality, and the 1881 law of freedom of the press.⁷²

Finally, on January 9, 2008, Al Jaburi and Al Zawraa were placed on the U.S. sanctions list, precluded from any financial transactions with U.S. citizens or companies.⁷³ According to *Intelligence Online*, published on January 17, 2008:

On Jan. 9, the U.S. Treasury published a list of several individuals and entities subject to financial sanctions for backing Iraqi insurgents. Among them was the Iraqi politician Misham Al Jabouri and the satellite television channel he runs out of Damascus, *Al Zawraa*. Since October, 2006, the station continually ran messages and video clips shot by Sunni Ba'athist militia in their fight against American troops in Iraq.

A year ago *Intelligence Online* reported on Washington's fruitless efforts to prevent Al Zawraa from broadcasting in Iraq (No. 540: Pentagon Loses Airwaves War in Iraq). The efforts gained momentum over the past eight months and have now paid off. The U.S. successively brought pressure to bear on Egypt's Nile-sat operator in February, 2007 and then on the European group Eutelsat in April to stop carrying Al Zawraa. Eutelsat relayed the chain over frequencies leased to Noorsat Global Satellite Communications.

Starting from last spring, only the Pan-Arab operator Arabsat, which is majority-owned by Saudi Arabia, continued to broadcast Al Zawraa via its *Badr3* and *Arabsat 2B* satellites. The State Department complained in vain to Riyadh before opting for a more aggressive strategy. In March, the frequency on which Al

⁶⁹ *Id.*

⁷⁰ See *Iraqi Sunni Al-Zawraa TV Now Carried on Saudi-Based Arabsat*, BBC Summary of Worldwide Broadcasts, Jan. 26, 2007; *Iraqi Sunni Al-Zawraa TV Now Broadcasting on European Satellite*, BBC Summary of Worldwide Broadcasts, Jan. 31, 2007.

⁷¹ *Egypt Takes Militant Iraqi Channel Off Air*, DAILY STAR, Feb. 26, 2007, http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=79858

⁷² See *Décision n° 2007-293*, Apr. 3, 2007, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000822549&dateTexte=>

⁷³ See Press Release, U.S. Department of the Treasury, Treasury Designates Individuals, Entity Fueling Iraqi Insurgency, HP-759 (Jan. 9, 2008), available at <http://www.treasury.gov/press/releases/hp759.htm>.

Zawraa broadcasted on Badr 3 (11747 Mhz) was constantly jammed, forcing the station to cease its programs before switching to another frequency (11765 MHz).

That manoeuvre won a reprieve for Al Zawraa for several months but the offensive resumed in July. Starting from July 7, reception of the station in Iraq became spotty and the channel remained unavailable for days at a time. On July 30, Al Zawraa finally ended broadcasting in Iraq. The channel sent several messages to its audience to say its signals were jammed. On July 24, the Sunni web forum Hanin.net announced that one of the channel's clandestine stations in Iraq had been bombed and that most of its employees were killed.

However, the chain's founder, Al Jabouri, didn't give up the ghost. In October he took part in launching a new satellite television station, *Al Ra'y TV*. The channel, which hasn't yet begun operating, already has a frequency on Nilesat (10911 MHz), on which it beams a red screen bearing the slogan "Wisdom Precedes Courage of the Brave." The owners of Al-Ra'y are Syrian and employ Al Jabouri as a consultant. As a result, the U.S. Treasury sanctions against him won't stop the channel from starting up.⁷⁴

The level of official frustration with Al Zawraa, with its inability to locate the production facilities, and the complex efforts to deny the channel access to distribution facilities, had ended with this step. The Al Zawraa case could be seen as a harbinger of the Arab Satellite Broadcast Charter that I discuss in the conclusion of the article.

E. The Case of Al Manar

I contrast the above examples with the very complex story of Al Manar,⁷⁵ the Hezbollah-related broadcasting station based in Lebanon, which expanded to include a satellite distribution channel targeted at Arabic-speaking populations throughout Europe and beyond.⁷⁶ The production and distribution of programming

⁷⁴ *U.S. Pulls Plug on Insurgent TV; Baghdad*, INTELLIGENCE ONLINE (Jan. 17, 2008).

⁷⁵ *Al Manar TV*, available at <http://www.almanar.com.lb/NewsSite/News.aspx?language=en>.

⁷⁶ A statement from the European Union noted:

In 1991, shortly after Hezbollah actively entered the Lebanese political scene, Al Manar was launched as a small terrestrial station. Although legally registered as the Lebanese Media Group Company in 1997, Al Manar has belonged to Hezbollah culturally and politically since its inception. Today, the terrestrial station can reach Lebanon in its entirety and broadcasts programming eighteen hours daily.

Moreover, Al Manar's satellite station, launched in 2000, transmits twenty-four hours a day, reaching the entire Arab world and the rest of the globe through several major satellite providers. One of the satellite providers which has transmitted Al Manar has been the

was a critical element in Hezbollah's constituency-building within Lebanon, and provided a link to interested audiences in Europe and elsewhere. To reach audiences in Europe, Al Manar deployed on Eutelsat, but almost immediately faced resistance, including from groups that objected to its statements concerning Jews and Israel.⁷⁷ In late 2003, Al Manar was accused, in France, of distributing anti-Semitic programming in violation of French standards.⁷⁸ The introduction of the satellite channel into Europe forced the French state into the role of umpire between conflicting interests.

Because Al Manar originated outside France, and outside the EU, it presented a jurisdictional and governance crisis. The question arose (and here, it is not necessary to take a position on the nature of the programming), whether either the government or the French regulatory agency, the CSA, had authority to take action. In February 2004, CSA and Paris-based Eutelsat entered into an agreement regarding the oversight of satellite broadcasters from outside the EU not licensed by an EU member country.⁷⁹

A Eutelsat press release stated that the organization shared the CSA's "indignation expressed on [the] broadcasting of racist programmes,"⁸⁰ but also made it clear that the carrier, absent regulatory requirement, had no right of censure over the channels it carried.⁸¹ The problem was a typical one involving satellite channels: there was no national license involved that would govern who had authority over the content of the channel. On the other side, the CSA's view, asserted on February 29, 2004, was that because the channel was uplinked to Eutelsat, and Eutelsat was a French company, the broadcasts (or at least the satellite carrier) were within the competence of the regulatory body under the EU's Television Without Frontiers directive.

To clarify this authority in anticipation of some concern over power, the CSA had already applied to the public prosecutor, ar-

French satellite Hot Bird 4, owned by the Eutelsat Satellite organization.

Europa, EU Rules and Principles on Hate Broadcasts: Frequently Asked Questions, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/98&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited Feb. 2, 2009).

⁷⁷ The United States followed France's lead and banned Al Manar's broadcasts into the United States as well. See *U.S. Following French Lead in Banning Hezbollah Station*, AM. INTELLIGENCE WIRE, Dec. 17, 2004.

⁷⁸ See U.S. Dep't of State, Report on Global Anti-Semitism (2005), available at <http://www.state.gov/g/drl/rls/40258.htm>. The report discusses Israel's complaints and states that in November 2004, "Al-Manar, the Lebanon-based television network controlled by Hizballah featuring blatantly anti-Semitic material, obtained a limited 1-year satellite broadcast license from the French authorities. This was revoked shortly thereafter due to Al-Manar's continued transmission of anti-Semitic material." *Id.* France subsequently banned Al Manar. *Id.*

⁷⁹ See *France: Eutelsat, Regulator Agree to Cooperate on Unlicensed Broadcasters*, BBC Summary of Worldwide Broadcasts, Feb. 5, 2004.

⁸⁰ Press Release, Cooperation Between Eutelsat and the CSA (Feb. 3, 2004), available at <http://www.eutelsat.com/news/pdf/2004/pr0402.pdf>.

⁸¹ *Id.*

guing that "[t]he transmission by the Al-Manar channel of thirty episodes of 'Diaspora' may have been seen as anti-Semitic."⁸² The CSA president highlighted the difficulties presented to the agency when dealing with channels established outside the European Union, which still fall under the competence of the French authorities. There were grave jurisdictional issues in engaging in action against satellite operators or their intermediaries through which these external channels were broadcast. The government had to deal with its own strategic concerns: its relationship to domestic communities, its historic relationship to Lebanon, and the confounding nature of disputes within the Middle East as they found their way to Europe.

The CSA and Eutelsat began a policy of cooperation to check television channels transmitted by Eutelsat for their conformity with European legislation. The National Assembly adopted amendments allowing the CSA authority over operators of satellite networks, power to sanction Eutelsat, and authority to ask the Conseil d'Etat—France's supreme administrative court—to order a carrier to cease transmission of a service where a breach of human dignity, the safeguard of public order or the protection of minors was involved.⁸³ Ultimately, by July 2004, the CSA requested the Conseil d'Etat to order Eutelsat to stop transmitting the station. According to the Agence France-Presse news agency, this followed the adoption of a new law on July 9 that gave the CSA new powers to ban unlicensed TV channels.⁸⁴

IV. TOWARDS THE FUTURE

The article examines these examples of satellite transactions to identify emerging models and how these models are related to

⁸² See *France: Broadcast Regulator Explains Anti-Racist Policies*, BBC MONITORING WORLD MEDIA, Mar. 3, 2004.

⁸³ See FRENCH PRIME MINISTER'S OFFICE, PREVAILING AGAINST TERRORISM: WHITE PAPER ON DOMESTIC SECURITY AGAINST TERRORISM, available at http://www.ambafrance-dk.org/IMG/pdf/livre_blanc_english.pdf (discussing its position regarding Al Manar and its subsequent effects to cooperate with European legislation to combat racism).

⁸⁴ The interaction between the informal and the formal in terms of government action is complex, but useful to examine. For example, Al-Nour Radio, deemed a Hezbollah-controlled radio station, was named a "specially designated global terrorist entity" along with Al Manar TV by the United States Department of the Treasury in March of 2006. (U.S. Designates Al-Manar as a Specially Designated Global Terrorist Entity: Television Station is Arm of Hizballah Terrorist Network, <http://www.ustreas.gov/press/releases/js4134.htm>). The designation had its intended consequences: it caused the Spanish Hispasat, GlobeCast American and New Skies Satellite companies to terminate Al-Nour's broadcasting to South America via Hispasat, Asia via AsiaSat, and New Skies Satellite to Europe. The transmission was part of a mix of radio programs provided by ARABSAT, the majority Saudi-owned provider that reaches the Middle East, North Africa, and Europe. Nilesat continued to broadcast Al Manar to locations within its footprint. *Institute Lauds Removal of Hezbollah Radio*, BBC MONITORING WORLD MEDIA, Apr. 7, 2006.

the initial debate, from the 1970s, concerning direct broadcast satellites. Some of these trends are as follows: under the rubric of the "War on Terror," or the "Long War," the United States seemed to be informally encouraging the development of an international standards approach—at least standards that prohibit "terror-promoting" videos. Each country, under this approach, should show its determination to police the propagation of terror in its own domain, and this should include regulating satellite (or website) production and diffusion activity that would encourage terrorism activity elsewhere. This approach remains different from the "prior consent" principle reflected in the UN debate. When a country introduces a new signal that alters the mix of influences in a target society—for example, with BBC Persia programming into Iran, where hearts and minds are strategically at stake, or Radio and TV Marti in Cuba—it does not always seek the acquiescence of the affected sovereign.

But actions in the receiving societies, taken together, still achieve an influence. On the one hand, formal efforts, such as those exercised in the Al Manar example above, still play an important role. Informal decisions of invisible boards of directors remain another strong focus for the exercise of power. The effort to launch Al Jazeera English is one such example. When this service launched, the channel encountered (and still encounters) many difficulties in securing carriage in the United States and Canada, either on cable systems or direct-to-home satellite platforms. For example, it was worthy of note that in summer 2006, the Dish Network agreed to carry the English-language channel, but only on an Arabic tier, while Al Jazeera English wanted wider distribution or better placement. There are very likely business reasons why cable systems in the United States have not carried Al Jazeera English. But global politics, in many cases informal, seem to play a role as well.

China provides another example of informal efforts to control which signals are allowed to enter, using its economic power to apply a new, more forceful version of the prior consent approach. A noted episode has involved efforts of China to limit distribution of New Tang Dynasty TV ("NTDTV"), a New York City-based television station. The channel deems itself an insistent critic of the government of China and the Communist Party; China characterizes it as an instrument of the destabilizing, disfavored Falun Gong, and has undertaken a variety of efforts, targeted towards satellite providers, to prevent the station from air-

ing.⁸⁵

An article by Mei Ning Yan, a faculty member at Hong Kong Baptist University in China,⁸⁶ interpreted China's effort as determinedly and with great difficulty implementing a prior consent rule—not by the process of “global governance” but by old-fashioned, strong-handed and persistent national regulation. Professor Yan quotes the Chinese strategy as “a single satellite in the sky, a single network on the ground.”⁸⁷ China has demonstrated some flexibility in the application of this principle, either through turning a blind eye to significant use of satellite receiver dishes in certain areas, allowing cable carriage of specified foreign satellite-delivered channels, or by permitting carriage of specific channels only in hotels. These could be seen as a carrying out of prior consent, not an abandonment of it.

The EU—in its post Al-Manar consciousness—presents another direction, one that is more regulatory and bureaucratic. The consistent position on regulating satellite broadcasting within the EU had always been that, where a broadcast originates within the EU (not the case with Al Manar), it is the responsibility of the Member State, the so-called “country of origin,” to regulate it. To this end, a series of practical criteria (“establishment” criteria in Audiovisual Media Services Directive Article 2), are designed to determine by an exhaustive procedure which Member State has the jurisdiction:

⁸⁵ Chinese-language NDTV harassed by Beijing; Chinese authorities put pressure on France, REP. WITHOUT BORDERS, May 25, 2004, http://www.rsf.org/article.php3?id_article=10439. (The channel found its way onto the Hotbird satellite and New Skies Satellite (now part of SES) began broadcasting the channel on open signal to Asia on July 1, 2003. Three days after the start of broadcasts, NSS encrypted the signal, preventing Chinese satellite dish owners from seeing the channel. Reporters sans Frontiers, an international organization monitoring freedom of the press worldwide, used characteristically strong rhetoric by stating, on May 25, 2004, that “China has showed itself ready to use the most reprehensible methods to protect its monopoly, including threats, political and financial pressure and blackmail. Regrettably some Western telecommunication companies cave in to Chinese pressure and suspend broadcasts of channels that challenge the Chinese communist party monopoly of the airwaves.” The threat was that China would withdraw business from satellite companies that agreed to carry NDTV. The Reporters sans Frontiers press release provided further examples of China's efforts: “PanAmSat, which carries the Chinese state broadcaster CCTV on many of its satellite platforms worldwide, has also refused to broadcast NDTV . . . In 2002, CCTV left the operator Taipei International because it decided to accept NDTV. The state channel signed a new contract after the removal of NDTV. In February 2003, the US operator Atlanta ADTH went back on an agreement in principle to carry NDTV, for fear of losing contracts with Chinese channels . . . NDTV is now freely accessible to more than 200 million satellite viewers worldwide. The channel was approved in April by the French Superior Audiovisual Council (CSA). Reporters without borders fears that the CSA and the French government are coming under official pressure from China for this licensing decision. Moreover, Eutelsat is legally obliged to comply with the principle of equality of access, pluralism and non-discrimination set out under Article 3 of the Convention that regulates this company under French law.”)

⁸⁶ Mei Ning Yan, *China and the Prior Consent Requirement: A Decade of Invasion and Counter-Invasion by Transfrontier Satellite Television*, 25 HASTINGS COMM. & ENT. L.J. 265 (2003).

⁸⁷ *Id.* at 267-68.

These criteria are:

- the location of the head office of the provider of services,
- the place where decisions on programming policy are usually taken,
- the place where the programme to be broadcast to the public is finally mixed and processed, and
- the place where a significant proportion of the workforce required for the pursuit of the television broadcasting activity is located.⁸⁸

An additional lens through which this debate can be seen involves a kind of conflict of laws. For instance, in the EU, if a program is lawful in the Member State where it is established, then no other member state can deny it entry. (There are specific exceptions to this rule, some of which—for example, looking more at the exclusive target audience of an offering—date from the 2007 amendments to the Television Without Frontiers Directive)⁸⁹. It is the standard of the state of origin that determines whether a channel's programming passes muster.⁹⁰

The Al Manar case was an intermediate step in terms of transparency and an effort to shape a systematic approach to satellite carried channels from outside the EU. Indeed, the reaction of the EU to the Al Manar case is the closest we have come to something that anticipates “global governance” or organized consideration of satellite-related delivery issues across many national boundaries. And it is not very close yet. During the French procedure involving Al Manar, the European Commission worked with the French authorities to achieve a European approach that could be applied to all similar cases.

Because most TV channels from outside the EU broadcasting to Europe used satellite capacities provided either by Eutelsat or by Astra, two countries, France and Luxembourg, respectively, had jurisdiction over a large number of third-country programs re-

⁸⁸ See Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, 37, art. 2, para. 3 (amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities), available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/L_332/L_33220071218en00270045.pdf.

⁸⁹ *Id.* at 31 (presenting graph 34).

⁹⁰ For more discussion on the country of origin approach, see Anna Herold, *Country of Origin Principle in the EU Market for Audiovisual Media Services: Consumer's Friend or Foe*, 31 J. CONSUMER POL'Y 5 (2008), available at <http://www.springerlink.com/content/042512p433t42440/fulltext.pdf>. The debate over a new Audiovisual and Media Services Directive, which replaced the Television Without Frontiers Directive, partially concerned whether to shift, at least partially, from a country of origin to country of receipt approach.

ceived within the European Union. If, as was the case with Al Manar, the satellite channel originates in a third country, outside the EU, different rules apply. Member States must ensure that these broadcasters comply with the EU rules if:

- they use a frequency granted by that Member State,
- they use a satellite capacity appertaining to that Member State or
- they use a satellite up-link situated in that Member State.⁹¹

In March 2005, after the Al Manar decision, EU officials recognized that difficulties would arise if it were only up to the particular states that had jurisdiction over satellite providers to police hate speech (or what might be generically called hate speech) issues.⁹² Better coordination among the states would be essential. The 2007 passage of the Audio Visual Media Services Directive ("AVMS"), amending the Television Without Frontiers Directive, makes use of an uplink in a Member State the priority (after use of granted frequency).⁹³ However, it is not yet clear how many, if any, of the problematic channel providers have shifted uplink sites to take advantage of a different country's jurisdictional approach.

Another problem is presented by third-country broadcasts that can be seen in Europe because of satellite spill over from other countries—i.e., where the channel originates outside the EU and the facility used (satellite, frequency, etc.) also is outside the Member State zone. These spill-over effects are one reason why the cooperation of regulatory authorities within the EU is insufficient and must be complemented by cooperation with regulators from third countries (for example, the Mediterranean Regulators' Group).

A final perspective—one with the appearance of formality but with great elements of the pragmatic and the informal—arises

⁹¹ See Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, *supra* note 89, at 37, art. 2, para. 4.

⁹² Conclusions from the meeting are available at Europa, *High-level Group of Regulatory Authorities in the Field of Broadcasting – Incitement to hatred in broadcasts coming from outside of the European Union*, Mar. 17, 2005, available at http://ec.europa.eu/avpolicy/docs/library/legal/conclusions_regulateurs/concl_reg_fin_en.pdf. ("The regulators and the European Commissioner agree that a more effective fight against incitement to racial and/or religious hatred in audiovisual content originating in EU countries or countries outside the EU is an issue which absolutely and urgently requires closer co-operation between Broadcasting Regulatory Authorities in the Member States, in candidate countries and in countries of the European Economic Area. The recent cases of the Al Manar channel and Sahar 1, forbidden by the French authorities, confirm the need to establish effective and co-ordinated measures.")

⁹³ See also EUROPEAN UNION COMMITTEE, TELEVISION WITHOUT FRONTIERS?: REPORT WITH EVIDENCE (2006-07), available at <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldcom/27/27.pdf>.

from local efforts to control satellite signal distribution in the Middle East. Most satellite channels viewed in the region are transmitted using transponders of two satellites, Nilesat and Arab-sat, both of which are closely tied to the regional governments. The management of the two satellites has varied in terms of the stringency of standards and the degree of control involved in determining what channels would be transmitted. But as is true in most parts of the world, gaining a transponder for the distribution of information is primarily a business decision, not one tied to content.

In February 2008, the Ministers of Information of the Arab League met to develop a regional Arab Satellite Broadcasting Charter ("Charter") that would impact, even if not decisively, what signals would be carried over satellites controlled by members of the League.⁹⁴ They met at a time of great regional frustration occasioned by the extraordinary abundance of satellite signals that were reshaping flows of information in the region.⁹⁵ In societies where information, especially via radio and television signals, had been a highly controlled commodity—where an almost universal characteristic of governance was control over the channels of communication—the satellite revolution was providing an irksome new reality.⁹⁶ Porousness could lead to new political formations, undermine stability and certainly disturb the control of narrative that had been so long a tradition. Some countries barred antennae; some made it an offense to watch certain signals. With the arrival of Al Jazeera in 1996, there was a sea change, as the channel aggressively covered politics in many Middle Eastern capitals. It was an object of frustration to established autocracies since it seemed to touch an important nerve in the regional audience, desirous of receiving more thorough news about their leaders.⁹⁷ In addition, there was the persistent concern about Western channels

⁹⁴ An English translation of the Arab Satellite Broadcasting Charter is available at *Arab Satellite Broadcasting Charter: Principles for Regulating Satellite Broadcasting Transmission in the Arab World*, ARAB MEDIA & SOC'Y, Feb. 2008, available at http://www.arabmediasociety.com/articles/downloads/20080314081327_AMS_Charter_English.pdf.

⁹⁵ See *Arab TV Broadcasters Face Curbs*, BBC NEWS, Feb. 12, 2008, http://news.bbc.co.uk/2/hi/middle_east/7241723.stm.

⁹⁶ See WILLIAM A. RUGH, *ARAB MASS MEDIA: NEWSPAPERS, RADIO, AND TELEVISION IN ARAB POLITICS* (Praeger 2004); see also SAKR, *supra* note 33.

⁹⁷ See MARC LYNCH, *VOICES OF THE NEW ARAB PUBLIC: IRAQ, AL-JAZEERA, AND MIDDLE EAST POLITICS TODAY* (Columbia University Press 2006); MOHAMED ZAYANI, *THE AL JAZEERA PHENOMENON: CRITICAL PERSPECTIVES ON NEW ARAB MEDIA* (Paradigm Publishers 2005); MOHAMMED EL-NAWAWY & ADEL ISKANDER, *AL-JAZEERA: HOW THE FREE ARAB NEWS NETWORK SCOOPED THE WORLD AND CHANGED THE MIDDLE EAST* (Westview Press 2002); Hugh Miles, *Al Jazeera*, 155 FOREIGN POL'Y 20 (Jul-Aug 2006); Naomi Sakr, *Media Development and Democratization in the Arab Middle East*, 6 (1-2) GLOBAL DIALOGUE 98 (Winter/Spring 2004).

bringing Western values (or lack of values) and interfering with traditional teachings and ways of life. The state control that had been central to the nature of the state now threatened to dissipate.⁹⁸

The Charter was an attempt—as it were—to control competition among satellite providers and to impose a set of restraints on what the satellite signals would provide. It was drafted to establish regional standards that would be enforced by the signatories, a mode of determining which law applied, and an internal system for complaint by one country to another with a method for ensuring some compliance with regional goals. The Charter provided guidelines as to what should be prohibited or what regulations should govern the behavior of satellite providers. These satellite providers (broadly conceived) should not, according to the Charter, “jeopardize social peace, national unity, public order and general propriety.”⁹⁹ The satellite entities should adopt standards requiring them to abstain from inciting hatred or ethnic, color, racial, or religious discrimination, from broadcasting any material that would incite violence and terrorism (interestingly, differentiating between terrorism and “resisting occupation”). Furthermore, the Charter would encourage programming that reinforced the religious and ethical values of the Arab society, and would prohibit satellites from broadcasting anything that would insult God, revealed religions, prophets, *mazhabs* (religious schools) and religious symbols of each group (with the groups included not fully identified).¹⁰⁰

There were grace notes that had the flavor of modernization. The satellite broadcasters, according to the Charter, would provide “the largest number possible of programmes and services to maintain the Arab identity and the Islamic culture and values and to highlight the Arab contribution to human civilization.”¹⁰¹ They would promote dialogue and understanding among different cultures.¹⁰² And there is a note of political regional integration to the Charter in the call for satellite agencies to “maintain Arab identity against the negative impact of globalization and reaffirm the speci-

⁹⁸ See RUGH, *supra* note 97. See also Forward or Backward: The 2008 Arab Satellite TV Charter and the Future of Arab Media, Society, and Democracy, Mar. 17, 2008, The Brookings Doha Center (A Project of Saban Center for Middle East Policy), http://www.brookings.edu/~media/Files/events/2008/0317_arab_media/0317_arab_media.pdf (Comments by Saad Eddin Ibrahim, AUC, p 17).

⁹⁹ *Arab Satellite Broadcasting Charter: Principles for Regulating Satellite Broadcasting Transmission in the Arab World* (unofficial translation), ARAB MEDIA & SOC'Y (Feb. 2008), available at http://www.arabmediasociety.com/articles/downloads/20080314081327_AMS_Charter_English.pdf.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

ficity of the Arab world.”¹⁰³ To do this, however, there should be a policy of avoiding the broadcast of “anything that would contradict or jeopardize Arab solidarity.”¹⁰⁴ And, of course, the channels should not insult leaders or national and religious symbols.

Al Jazeera, whose frequent criticisms of many Arab governments made it one of the supposed targets of the Charter, organized a panel discussion the day the Charter was issued. In a video report, one commentator pointed out that regulation of Arab satellite channels was motivated by threats to the more mature, state-based channels from “a large number of profit-seeking channels that aim to attract viewers by nudity, charlatanry, and sectarianism.”¹⁰⁵ Competition yielded a race to the bottom, he argued, where civility would be sacrificed and sensationalism and lack of objectivity would prevail.

Abd-al-Bari Atwan, editor-in-chief of Al-Quds Al-Arabi in London, represented a different current of thinking. In the same panel discussion, he argued that the Charter was drafted because “the repressive, dictatorial Arab governments have begun to realize that Arab public opinion is moving strongly”¹⁰⁶ and Arab information ministers have hastened to “bury this awakening in Arab public opinion”¹⁰⁷ by enacting legislation to “gag and criminalize Arab media.”¹⁰⁸ The priority of the ministers of information, he suggested, was to protect the regimes that made those decisions. The objective of the Charter, he argued, was not necessarily to uphold Arab values and ethics, but “to preserve those repressive measures by governments that engage in torture and corruption, squander public funds, and violate human rights.”¹⁰⁹

The Charter gave additional political cover to governments that wished to impose more restrictions, and it seems to augur a new order of pervasive licensing and authorization—or at least to legitimate more extensive supervision.¹¹⁰ The Charter’s existence

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Al-Jazeera Pundits Discuss Proposed Arab Satellite TV Regulations*, BBC MONITORING WORLD MEDIA, Feb. 20, 2008.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ “Some satellite television channels based in Egypt are concerned, amid assertions by the government on the need to enforce a document regulating the work of satellite television channels. The Arab information ministers endorsed this document at an emergency meeting in Cairo last month.” See *Five Private Egyptian Satellite TV Channels Face Prospect of Closure, Ban*, BBC WORLDWIDE MONITORING, Mar. 7, 2008 (quoting Khalid al-Shami’s March 6, 2008 report in AL-QUDS AL-ARABI, stating “The Specter of Closure Hovers Over Five Channels as a Document Regulating Satellite Television Channels Comes Into Force. Some Security Parties have Power to Ban and Authorize [Channels] and Interfere in the Selection of Subjects and Guests.”).

remains controversial. Some claim that the Charter is so cumbersome as to be ineffective and would not additionally influence state action.¹¹¹ Others argue that the Charter is not a subject of worry, rather, that the standards are designed as a "code of honor," a matter for self-regulation rather than state enforcement.¹¹² Yet already there are accounts that the Charter served to justify additional restrictions by Egypt in contracts for the use of Nilesat;¹¹³ such restrictions might also be imposed on the use of production facilities in media cities in Egypt and elsewhere. Nevertheless, the Charter should be seen in a global context of regulation, alongside a fear of the incompatibility of satellite with domestic control of broadcast signals.

CONCLUSIONS

What I have described is a system in which formal law—even formal agreements among countries—may not be descriptive of governmental actions concerning sensitive content on satellites. I have discussed the use of explicit, transparent modes for regulation and cooperation—such as the effort at coordination at the EU level. Further, I have described how informal relationships among states or between states and programming entities are the more relevant determinant of behavior. What emerges is the need to identify or abstract from the examples above which points require additional understanding. For example, we see in the examples of Geo TV and in some aspects of MED-TV that control over uplinking is a site for negotiation. We can see in the case of Eutelsat and Al Manar that the act of making available a transponder also becomes an opportunity for regulatory intervention. A more formal act, certainly, is placing a satellite service on a Terrorist Exclusion List and thus criminalizing not only the broadcasting entity but also those who deal with it. We can analyze the passage of a signal from the point of production to the point of reception to determine opportunities that have been used to urge or obtain restriction.

In all of this, the role of "law"—law as a set of properly established criteria to limit excessive governmental intervention—is fugitive and hard to capture. A state's efforts to pressure carriers of satellite signals will often be disguised and hardly subject to any jurisdiction. Its actions may be speech repressive and anticompetitive, but still difficult to discern. In many cases, the state will be

¹¹¹ *Al-Jazeera Pundits Discuss*, *supra* note 106.

¹¹² *Al-Jazeera Pundits Discuss*, *supra* note 106.

¹¹³ See, e.g., *Egypt's Nilesat Halts Transmission of London-Based Al-Hiwar TV*, BBC MONITORING WORLD MEDIA, Apr. 3, 2008.

seeking to secure greater control of the words and images that circulate within its borders. At other times, it will be seeking to prevent the diffusion of disfavored views quite broadly. There are scarce mechanisms or standards to determine what limits should be to this kind of conduct.

There is no system of global governance with respect to satellite signals, and it is doubtful that such a system will emerge.¹¹⁴ The EU seeks a more transparent system with respect to certain kinds of content within its borders; conversely, the Arab Charter suggests a somewhat more brutal version of the exercise. In the absence of regulation, informal efforts to persuade, pressure, and even threaten satellite providers are likely to continue. We are beginning to sense patterns emerging, but it is only as the technology itself is becoming slightly overshadowed. Terrorism is the trope that has succeeded in breaking the rule of flows of information where cultural exception, fear of pornography, sweeping concerns about cultural imperialism, and fears for national identity failed. Terrorism has brought the deacons of free expression to the table of regulation, even of clumsy intervention. As a result, the shape of governance of satellite, and as a consequence, of the Internet, may change forever.

¹¹⁴ At an early stage—in the mid-1990s—the United States precluded signals from non-U.S. licensed satellites to send them to the US, except under prescribed circumstances. Leveraging three years of goodwill and momentum amassed by the WTO negotiations, recent U.S. policy has focused on restructuring the ISOs. In May 1996, the FCC issued a notice of proposed rulemaking known as the Domestic International Satellite Consolidation Order ("DISCO I"), which established criteria to permit foreign-based operators to offer service in the United States.

DISCO I proposed a test in which the granting of a license to a foreign operator to provide services in the United States would be contingent upon a showing that U.S.-based satellites have effective competition opportunities ("ECO-SAT test") in: (i) the home market where the foreign operator is licensed; and (ii) all "route markets" that the foreign satellite intends to service from earth stations in the United States. In light of the recent WTO agreement, however, DISCO I was reconsidered because the WTO agreement allows nondiscriminatory access to markets without consideration of where a foreign operator is licensed.

Henry Wong, Comment, *2001: A Space Legislation Odyssey—A Proposed Model for Reforming the Intergovernmental Satellite Organizations*, 48 AM. U. L. REV. 547, 565-66 (1998).