National Law School Journal

Volume 2 | Issue 1 Article 13

1-7-1990

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(1990) 2 NLSJ 125

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I. Changes in the technological, economic and political reality

The development of communications in industrialized nations has been determined by a number of extra-legal factors, to which, however, the legal system must react and has in fact reacted. One important factor is certainly the new production and transmission technologies for mass communication—for instance, the use in many countries of telecommunications and broadcasting satellites, copper and fibre-optic cables and, above all, advances in micro electronics. In the field of terrestrial broadcasts, new frequencies have been opened up; cables and satellites create new paths for broadcasts and new transmission areas. Revolutionary changes in recording and playback technologies (e.g., VCR) increase mobility and reduce costs. Although these changes have not occurred in all countries, they are everywhere on the verge of being introduced. Communications is an expanding sector of the economy.

From an economic standpoint, the electronic media have been recognized as an expanding economic sector into which both traditional media firms—such as publishing houses—and companies outside the branch have been pushing their way. Supported by new technological possibilities, large, even worldwide, markets are forming for software and hardware in the broadcasting sector. However, it is not only the large, multinational or international undertakings that are seeking to take over these markets: A particularly promising recipe for economic success appears to be offered by the various interlocked media sectors, which permit one media field's know-how, technical and personnel facilities, marketing organization and so on to be used by the others.

It is becoming increasingly apparent that the dynamics of the broadcasting market exercise a stronger influence on development than statutory law is able to do. Reality shows that law must give way or be modified when it obstructs the expansion of the broadcasting market. The trend toward deregulation is a logical consequence of commercialisation and internationalization.

The salient points of this development can be characterized as follows: In addition to technological change, attention must be given to the commercialisation of broadcast programming, the internationalization of media markets, the "multimedianess" of leading corporate giants, economic concentration, and a governmental policy of growing deregulation.[1]

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1. On these trends, see Wolfgang Hoffmann-Riem, *Internationale Medienmarkte—Nationale Rundfunkordnungen. Anmerkungen zu Entwicklungstendenzen in Medienbereich*, in 34 Rundfunk And Fernsehen 5-22 (1986); Jeremy Tunstall, Communications Deregulation—The unleashing of America's Communications Industry (1986) (Oxford): Video Media Competition—Regulation, Economics and Technology (ed. by Eli M. Noam 1985) (New York). Andre Lange & Jean—Luc Renaud. The Future of the European Audio visual Industry (1989) (Manchester).

The above-described trends towards change are not neutral as to the content of communication. In particular, the guise as well as the constitutional significance of mass communications are changing. Thus far in Europe, mass media's functions in state and cultural policies were principally emphasized, and its publicised message was taken as the reference point for the structuring of policy decisions, at least in the area of broadcasting. But now, the publicizing dimension has taken a back seat to considerations of economics and economic policy, which have been forcing their way into the forefront of efforts to change the broadcasting structure.[1] These trends crop up not simply in the broadcasting area; rather, they truly begin to emerge with the use of other new communications technologies that traditionally have been subject to less regulation than the broadcasting sector.

In addition to internationalization and commercialisation there are also other developments, such as attempts to localize media[2] for the purpose of creating new opportunities for non-professional communication — as can be seen, for instance, with "public access" in radio or television.[3] These do not, however, determine development but rather serve as a supplement to a media system primarily aimed at larger markets, a system based on the development of large transborder markets and large interlocked multimedia systems.

II. The sphere of protection afforded by freedom of communications and the media

Under these circumstances, it might appear anachronistic to reflect on national law. Nevertheless, the development of communications markets will, for the time being also continue to be influenced by national and international law insofar as these are able to be influenced by law.

The communications and media sector has traditionally been influenced by law, even though media law has only recently taken shape as an independent area of the law. The media sector is presently a particularly good subject for studying how economic, technological, political and social conditions act upon the legal system and how traditional law is changing. Especially worthy of observation is West Germany's legal-media system, which for years had resisted the privatisation of broadcasting but now is aligning itself with the Europe-wide trend of deregulation. The West German media system has been predominantly developed by case law on freedom of communication. In order to understand the development of the media and freedom of communication it is necessary to study the basic legal conditions and comprehend the concept of basic rights, especially that pertaining to freedom of communication.

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1. The initiatives of the European Commission are prototypical in this regard. See Commission of the European Communities, Green Paper: Television without Frontiers. Green Paper on the Establishment of a Common Market for Broadcasting, Especially for Satellite and Cable, of June 14, 1984, Eur. Comm. Doc. Com. (84) 300 final; Common Position of April 13, 1989 taken by the Council on a Council directive on the coordination of certain provisions laid down by law, regulation on administrative action in Member States concerning the pursuit of broadcasting activities (Television Directive), Eur. Comm. Doc. Com. (88) 154 final, *reproduced in* Rundfunk and Fernsehen 324 (1989). **See also**, *e.g.* Ernst-Joachim Mestmacker, in In Welcher Weise empfiehlt es sich, die Ordnung des Rundfunks und sein Verhaltnis zu anderen Medien - auch under dem Gesichtspunkt der Harmonisierung - zu regeln? Vol. 2 of the Standige Deputation Deutschen Juristentages, 09-037 (1986) (Munich).
2. **See** the comparative analysis by Hans J. Kleinstuber, *et al.*, Lokales, nicht-kommerzielles Radio, 2 vols. (1988) (Hamburg).
3. **See** the review of literature and the substantive remarks in Ulrich Patzold, Der Offene Kanal im Kabelpilotprojekt Dortmund, vol 3 (1987) (research accompanying the Dortmund pilot cable project by the State of North Rhein-Westphalia).

A. Freedom of opinion, information and the media

1. The state of the law in India and West Germany

The concept of freedom of communication is known throughout the world. As India created its constitution some 40 years ago. it is also provided for fundamental rights, picking up in the process on the notion of freedom found in the U.S. and English Bills of Rights and in the French Revolution. Prior to 1950, such guarantees of liberty were nonexistent in India,[1] although in the 1930s, there were corresponding political demands for this. Freedom of communication was likewise introduced into West Germany's Basic Law, which entered into force in 1949. Based on earlier ideals from the 19th century (in particular, on the so-called St. Paul's Church Constitution of 1848) and 20th century (the Weimar Constitution of 1919), a number of traditional, political freedoms were given constitutional protection; freedom of association and assembly, freedom of science and education, and freedom of communication.

Freedom of opinion and the press lies at the core of the concept of liberty in democracies. In West Germany's Basic Law, this freedom is provided to individual citizens, as well as to institutions of the press, film and broadcasting. It is recognized today that all forms of mass media fall within the scope of this guarantee, including those that are only now beginning to come to the fore on account of new technological developments.

As is generally known, India's constitution lacks an express reference to the mass media. At the same time, however, it is recognised that freedom of the press is covered by freedom of expression.[2] This situation is different for broadcasting. As was the case in the German Reich, broadcasting has a relatively long tradition in India. In both countries, it was developed with strong protection from the state, although in India it was initially the responsibility of a private concern, the Indian Broadcasting Company. In the German Reich, on the other hand, broadcasting from the outset came into being under the supremacy of the Reich Postal Service.[3] During the period of National Socialism (1933-1945), the Government exploited this situation in order to employ broadcasting for massive propaganda purposes.

Following the War, a lesson was drawn from this abuse of broadcasting in Germany. Just as with the press, broadcasting was to be independent of the state. The model for this was the British BBC. The freedom of broadcasting set forth in West Germany's Basic Law was intended to, and in fact does, protect this independence. A corresponding guarantee is not to be found in the Indian Constitution; the exercise by the Government of influence over broadcasting, which has been in effect since 1930, continues to be the rule in India.

In the following, I will not deal with the development of the freedom of opinion and the media in India but rather with its significance in the Federal Republic of Germany. I will only go into the state of the law in India in order better to illustrate similarities or differences.

2. Free expression of opinion

The constitutional anchor of the system of communications law in West Germany in Article 5 of the Basic Law (*Grundgesetz*). This norm recognizes three different basic rights of communication. In the first place, the expression and dissemination of opinions, i.e., the activities of the communicator, are protected. The term "opinion" covers not only

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1. See K.D. Gaur, Law of International Telecommunications in India, 78 (1988) (Baden-Baden).
2. See *e.g.*, *Sakal Newspapers ltd* v *Union of India*, 1972 AIR 305 (S.C).
3. The development of German broadcasting is chronicled in the internationales Handbuch far Rundfunk And Fernsehen 1988-98, at pp. B 1 ff. (ed. by Hans Bredow Institute 1988) (Baden-Baden).

value judgments in the broadest sense but also statements of fact. Protected is the transmission of information, regardless of whether this information originates in one's own sphere or is simply passed on. The reach of the protection afforded by this basic right is independent of the choice of form in which communication is expressed (word, writing, picture, etc.) The state is not permitted to define expressions of opinion as valuable or worthless or as important or meaningless and thereby to offer differing levels of protection. Opinions and facts need not be related to "political subjects" or to affairs of public significance. On the contrary, communicative development is broadly protected, with all forms expression being covered: artistic, musical and even symbolic. Protection is also not denied merely because the expressed opinion serves other purposes—e.g., commercial purposes—in addition to the communicative purpose.[1] Thus, commercial and other (for instance, political) advertisements are protected.[2]

3. Freedom of reception as a part of freedom of information

The Federal Constitutional Court has emphasized that Article 5, of the Basic Law protects the "process of communication", which covers not only the freedom to express and disseminate opinions but also the "freedom to take note of expressed opinions, to inform oneself".[3] In only one respect, however, has freedom of reception been particularly addressed—namely, as the freedom to inform oneself without restriction from generally accessible sources. The freedom to use a source available only to the recipient—for instance, one accessible to a friend in a personal conversation—is protected not by this special form of freedom of information but rather as a necessary supplement to the general freedom of opinion.

The reason why freedom of information values generally accessible sources so highly is rooted in a lesson derived from history, e.g., the period of National Socialism, which supported dictatorship in part by prohibiting the reception of such generally accessible sources as foreign radio. The special protection afforded by freedom of information presupposes that the source of the information is "generally accessible". This is usually the case "when the source of the information is both technically suited and intended to provide information to the general public i.e. to a circle of persons not specific as to individuals."[4] Newspapers, radio and other forms of mass communications fall within this definition. General accessibility can also be effectuated abroad: it suffices for the applicability of freedom of information that the source is accessible at some location, which can also lie outside the Federal Republic.

The right to inform oneself includes the right to use technical facilities, like antennas, in order to receive information. Yet there is no constitutional obligation on the state to establish technical facilities for the private reception of information. Under West German law,[5] the Bundespost (West Germany's PTT) generally acts as the constructor

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1. Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court: hereinafter, BVerfGE) 30, 336, 352. **See also** Albrecht Hesse, *Werbung and Rundfunkfreiheit.* Zeitschrift fur Urheber-und Medienrecht/Film und Recht 1987, 548 with further references
2. For the press, see BVerfGE 21, 271, 278, ff.; BVerfGE 64, 108, 114. The matter was left open with regard to broadcasting in BVerfGE 74, 297, 341, **Contra** Entscheidungen des Bundesverwaltungsgerichts (Decisions of the Federal Administrative Court: hereinafter. BVerfGE) 2, 172, 178. **See also** Gerhard Wacke, *Werbeaussagen als MeinungsauBerungen,* in Festschrift fur Schack 197, 207 (1966); Peter Lerche. Werbung and Verfassung 76 ff. (1967; Fritz Drettmann, Wirtshaftswerbung and Meinungsfreiheit 93 ff, (1984).
3. BVerfGE 57, 319.
4. BVerfGE 27, 83.
5. Of special relevance are the Act on Telecommunication Facilities (*Gesetz uber Femmeldeanlagen*). In the version published on March 17, 1977 and the Telecommunications Directive (*Telekommunikationsordnung.*).

and operator of these cable systems. Consequently, it is legally obliged to act in an impartial manner and to provide adequate opportunities to use the cable network for the transmission of information.

For the recipient, the right to inform oneself without restriction by the state covers the mere reception of information, as well as active procurement of information, including the use of technical devices.[1] Since this only involves a defensive right *vis-a-vis* the Government, freedom of information brings with it no claim that the state provide sources of information. However other norms—such as the constitutional principles of rule by law (*Rechtsstaat*), social justice (*Sozialstaat*) and democracy—can and do imply a legal duty on governmental organs to ensure that adequate opportunities for information are provided for.[2] This may include measures against exclusive rights if they undermine the right of the public to information.[3]

4. Media freedom

In addition to the freedom of opinion and reception, guarantees are in place for "freedom of the press and freedom to report *via* broadcasting and film". This is the so-called media freedom, e.g., the freedom to publicize through a mass medium. Although the term "mass communications" does not appear in the Constitution, it is implicitly taken as the basis for the delimitation between freedom of opinion (in the sense of the first sentence of Article 5(1) of the Basic Law) and the somewhat different media freedom (in the sense of the second sentence of Article 5(1)). One can define mass communications as follows: It is communication accessible to the general public or a part of it, whose contents are distributed or disseminated by certain means of dissemination (e.g. printed products, radio film exhibition) suited and destined for communication to the general public or a part thereof.[4] Institutions that produce or disseminate the contents of mass communications are commonly referred to as "mass media."

Historically, the protection of the mass media flows from the maintenance of the traditional basic right of freedom of the press. Freedom of broadcasting and of film were included in the 20th century. The second sentence of Article 5(1) is understood in a broad sense, such that new means of mass communications (e.g. television) are also brought within its sphere of protection; this includes the use of new broadcasting technologies, such as cable and satellite broadcasting.

B. Subjective and objective substance of basic rights

In dealing with the freedoms of communication, it is extremely important to take into account their foundation under basic-rights theory. Article 5 of the Basic Law is a part of the liberal tradition surrounding basic rights in Western Europe, protecting free communicative activity from interference by the state (a basic right's "defensive" character). Any individual may use his subjective basic right to oppose state action. It is sometimes even held that a defensive right is also to be employed against non-governmental agencies of power that are able to impair basic rights in a state-like

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1. BVerfGE 27, 82.
2. This issue was left open by the Federal Administrative Court, Die Offentliche Verwaltung 1979, 102. **See also** von Ingo von Munch, Grundgestez, Randnummer 20 on Article 5 (3d ed. 1985) (Munich); Hans D Jarass, *Nachrichtensperre and Grundgesetz — Die Offentlichkeit als Verjassungsdirektive, Archiv fur* Presserecht 1979, 228, 230-31.
3. **See** BVerfGE 70, 310, 312 with a comment by Wolfgang Hoffmann-Riem. Juristenzeitung 1985, 627-28.
4. On attempts to define this, see Hans D. Jarass, Die Freiheit der Massenmedien 29 ff. (1978) (Baden-Baden), with further references; Joachime Scherer, *Teletextsyteme And Prozedurale Rundfunkfreiheit*, Der Staat 1983, 354 ff; Wolfgang Hoffmann-Riem, Alternativkommentar zum Grundgesetz, Randnummer 119 (2d ed. 1989) (Neuwied).

manner.[1]

The subjective-or individualized-element of basic rights is accompanied by another, generally termed "objective". This means that a basic right operates as an objective (directive) principle of the legal system in interpreting other norms. Therefore, the basic right can indirectly exert influence on the interpretation of all norms, including when they directly relate to communication. The state is at the same time under a programmatic duty (a constitutional directive) to establish a sound and well-functioning system with regard to communications that is free and democratic, such that every person is provided with the opportunity to form freely an individual opinion and contribute to the formation of public opinion. The Government is thus to facilitate the formation of opinion "in a comprehensive sense, which is not limited to the mere reporting or news or conveyance of political opinions but rather covering every conveyance of information and opinion."[2] Of particular importance is the protection of the functioning of the media system in all areas of life—for instance, with regard to information not simply in "developments in Government" or "current affairs" but also on "development in social life."[3]

In order to ensure the process of communication in a comprehensive sense, the freedom from state domination and interference alone does not suffice. For this reason, the Federal Constitutional Court has required, at least for the area of broadcasting, the creation of a "positive regulatory framework."[4] which guarantees the plurality and independence of broadcasting. Furthermore, the state's duty to establish this sort of system is also determined by provisions regarding constitutional goals that flow from the principles of democracy, the rule of law and social justice. As a result, the sphere of state duties also includes seeing to it that the necessary legal and other (economic, social, cultural etc.) conditions are present for the exercise of the basic freedom.[5] Although the state is not obligated to provide for comprehensive communications, it must ensure that the formation of free, individual opinion and public opinion with the aid of the mass media is not only theoretically but also actually possible.

C. The establishment of limitations *versus* structuring

The objective substance of the basic right is a remarkable construct, which has a lasting effect on the interpretation of Article 5 of the Basic Law—for both individual and mass communications. The exercise of freedom of communication and information is subject to special provisions, which will be treated in the following. Two different types must be distinguished: special limitations on freedom of communication, on the one hand, and the structuring of the communications order, on the other.

1. Limitations on freedom of communication

Article 5(2) of the Basic Law establishes special limitations on freedom of communication, which act in a negative fashion to safeguard other objects of legal protection that may be in conflict with it. These objects serve interests other than the facilitation of freedom of communication—such as protection of personality, copyright and young persons—that might be impaired by communicative activity. Similar

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1. See Konrad Hesse, Grundzuge des Verfassungsrechts in der Bundesrepublik Deutschland. Randnummer 357 (16th ed. 1988) (Heidelberg), with reference to BVerfGE 25, 256, 263-64; BVerfGE 62, 230 244-45.
2. BVerfGE 57, 319 with reference to among others, BVerfGE 12 205 260.
3. See *e.g.* BVerfGE 35, 222; BVerfGE 59, 258. For example, the area of entertainment by the mass media also falls within the scope of protection.
4. BVerfGE 57, 320. See also BVerfGE 73, 118, 152-53; for the areas of the press, see BVerfGE 20, 162, 176.
5. See generally Konard Hesse *Bestand and Bedeunung der Grundrechte in der Bundesrepublik Deutschland,* Europaische Grundrechte Zeitschrift, 1978, 443.

endeavours also find recognition under the Indian Constitution. However, the West German Basic Law is somewhat more restrained than the Indian constitution as is particularly shown by the amendments to the Indian Constitution in 1951 and 1963. In West Germany, it is basically forbidden that the freedom of opinion and the media can be limited in order to achieve, for instance, such goals as friendly relations with foreign states or public order (understood as public peace, safety and tranquillity). The risk is considered to be too great that the state might take such objects of legal protection which of necessity are defined broadly, as a pretext for suppressing the freedom of opinion and the media. It is, however, in all respects permissible also to protect in exceptional cases such objects as the functioning of the state or the reputation of its representatives, although in the later case, protection does not extend to pointed, unsparing attacks but rather only to massive defamation or vilification.[1]

The Basic Law does not expressly list the permissible limitations on the freedom of communication, referring instead to "general laws" (*allgemeine Gesetze*) as limits. The Federal Constitutional Court has taken this to mean laws that do not *per se* forbid an opinion or the expression of an opinion: rather, the court reads the Basic Law as having intended laws that serve to protect an object to be safeguarded in any event, regardless of communication or a given opinion, i.e., the protection of a community value that takes precedence to the exercise of freedom of expression.[2] Laws directed against communication as such or a certain opinion are in this sense no longer "general laws".[3] A general law must serve a legitimate purpose, i.e, aim at warding off dangers to an object of legal protection when such protection takes precedence to the freedom of communication. Furthermore, the manner in which protection is undertaken must be legitimate. This means above all that in protecting this object, the impairment of the freedom of communication must be reasonable, appropriate and necessary.[4] Objects that have been recognized as meriting protection include that of young persons and of personal dignity. In particular, it is not permitted to offend someone by way of false allegation or defamatory opinion. Also warranting protection is the functioning of governmental organs. Nevertheless, when the Government, its officials or its policy is criticized, this never gives rise to a case for protection. Nor even the "esteem of the state" as such is an object of protection. Only when the functioning of the state is endangered can the expression of an opinion be enjoined, if at all.

Even though it is, in principle, recognized that the freedom of opinion and the media may be restricted in order to protect a certain object, it must nevertheless further be examined whether sufficient consideration has actually been given to the lofty status of freedom of communication.

It should be determined in the course of a balancing of legal merits whether in a concrete instance the interest in communication or that in protection is predominant—or whether it is possible to arrive at a "gentle compromise", such that both interests are taken into account (the so-called practical concordance).[5] To this extent, one must scrutinize closely which particular object is promoted by the general law and whether this is to take precedence to the protection of the freedom of communication. It is furthermore examined by the court whether the impairment of freedom of communication is reasonable, appropriate and necessary in order to respect the other object to be protected.[6]

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1. For case law, cf. K.E.Wenzel, Das Recht der Wort-und Bildberichterstattung 126-127, 158 (3d ed. 1986).
2. BVerfGE 7, 198, 209-10, BVerfGE 62, 230 243-44.
3. See BVerfGE 7, 198, 209-10.
4. See BVerfGE 59, 231, 265 BVerfGE 71, 162, 181: BVerfGE 71, 206, 214,
5. The term comes from Hesse, *supra* note 17 at Randnummer 317 ff.
6. BVerfGE 59, 231, 265: BVerfGE 71, 162, 181: BVerfGE 71 206 214.

This is similar to the requirement of reasonableness under Indian law. However, the West German Federal Constitutional Court strives to apply the standards strictly: in cases of doubt, the freedom of communication takes precedence. The basic concept is that the freedom of opinion is one of a democracy's most highly protected rights and that a democracy must also be able to tolerate sharp differences of opinion.

Article 5(1), third sentence, of the Basic Law forbids censorship, although this is limited to pre-censorship. This is to prevent the systematic supervision and conscription of communication processes. In this manner, the intimidation of citizens is also to be avoided. It is, however, possible to impose sanctions subsequently—i.e., following expression of an opinion—when, for example, a violation of the law has occurred.

2. Structuring of the communications order

One must distinguish between the establishment of these limitations on communications, on the one hand, and the structuring of the overall communications order, on the other. The latter involves positive guarantees by the state to ensure the functioning of the communications order, in particular, those that enable the free formation of opinion. To this extent, one might speak—in the terminology found in the Indian constitution-of "directive principles of the state policy."[1] The legal power to create a positive order does not run so far in the Federal Republic as to bring, for example, broadcasting under the control of the Government. On the contrary, the state must ensure that broadcasting remains independent, especially *vis-a-vis* the state. The high rank of the communications order in the entire legal order is to be secured—e.g. also in the civil law, which regulates the legal relationships among citizens (a so-called indirect side effect of basic rights).[2] The communications order is also to be protected against the unilateral use of power, especially the unilateral exercise of influence by private parties, for instance, powerful conglomerates.[3]

The protection of the communications order is the point of departure above all for legislation on broadcasting. By way of substantive, organizational and procedural rules, it is particularly to be ensured that the "the variety of existing opinion finds expression in a spectrum and with a degree of completeness as great as possible and that comprehensive information is offered in this fashion."[4] The connection between broadcasting and formation of public opinion in all areas of life is for this concept the occasion to subject public and private broadcasting to special public—service obligations (see *infra* section III(B).

The right and obligation to structure the mass-media system is also the basis for regulations on the retransmission of broadcasting signals in cable networks. According to the Federal Constitutional Court,[5] the state is also obligated as regard re-transmission to establish certain minimum conditions and to provide for their supervision. Especially indispensable are basic principles that "guarantee a minimum of substantive balance, objectivity and mutual respect."[6]

D. Parallels to other legal systems

The distinction between the setting of limits and the structuring of the communications order can also be found in other Western European legal systems.

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1. Arts 36 ff. of the Constitution of India.
2. See BVerfGE 7, 198 205-06; BVerfGE 66, 116,135-36.
3. See BVerfGE 20, 162, 176; BVerfGE 25, 256, 264 ff.
4. BVerfGE 57, 320.
5. BVerfGE 73, 196.
6. *Ibid* at 199.

However, it is apparently nowhere so accentuated as in the case law of the West German Federal Constitutional Court. This distinction can be recognised in the special media legislation of other countries on, in particular, broadcasting. For example, in France, Great Britain, Austria and the Netherlands, the traditional system of public broadcasting is not to be solely construed as a setting of limits in the interest of safeguarding those objects not relating to communications. On the contrary, these laws primarily seek to ensure the functioning of the broadcasting order, for instance, the orientation toward broadcasting's function as trustee of society or the maintenance of a balance between various political forces.

In the European Human Rights Convention (EHRC) — which in West Germany has (only) the rank of statutory law[1] — this distinction is also manifested. West Germany's Federal Constitutional Court has not yet ruled on the interpretation of Article 10 of the EHRC. In my opinion, there is a clear structural parallel between Article 5 of the Basic Law and Article 10 of the EHRC.

III. Structuring of the communications order

A. Private forms of financing and organization for press, film and videotex

The West German Federal Constitutional Court has emphasized that the legislature is endowed with large discretion as regards set-up when it seeks to regulate the system of mass communications. Responsible for this are the legislatures of West Germany's eleven states. However, the federal legislature is able to establish basic structures for the press and film by way of so-called framework legislation (Article 75 of the Basic Law), although it has thus far not done so. The state legislatures have placed the various mass media under differing orders.

In the absence of contrary rules, the principle of freedom of establishment and performance applies for the press, cinema film, videotex and the rental and distribution of video.[2] There is no licensing procedure in place, and any individual is free to establish and operate such a media undertaking. One is also free with regard to the form of organization and financing. In this manner, press companies and agencies are organized as private enterprises under private law, as are studios, distributors and other companies for the production of film and video. The same goes for audio companies and suppliers of videotex services. The latter might, however, subsequently be prohibited from offering their services when they violate certain duties (**see** *e.g.* Article 12(3) of the Treaty on Videotex).

At least for the press, it is disputed in legal literature whether forms of private enterprise are, with regard to organization and financing, irrevocably guaranteed under constitutional law.[3] Although the Federal Constitutional Court has not yet had the opportunity to rule on this, it has treated the private-enterprise structure of the press as a foregone conclusion,[4] thus indicating that this structure does not present a problem under present conditions. At the same time the court has shown concern regarding the degree of concentration[5] and has long held that the state is obliged where necessary to ward off

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1. Hesse, *supra* note 21, at Randnummer 278.
2. For the press, **see** BVerfGE 20, 174 ff.
3. *Pro: Hermann von Mangoldt, Friedrich Klein & Christian Starck, Grundgesetz*, vol 1. Randnummer 38 ff. 45, 58 on Article 5(1), (2) (1985) (Munich); **Contra** Wolfgang Hoffmann-Riem, *Massenmedien*, in Handbunch des Verfassungsrechts 400-01, 410, 414 ff. (ed. by Ernst Benda, Werner Maihofer & Hans-Jochen vogel 1983) (Berlin/New York).
4. BVerfGE 20, 175 ff. BVerfGE 25, 268; BVerfGE 52, 296.
5. **See** the indications in BVerfGE 73, 177; BVerfGE 74, 133; BVerfGE 57, 322.

dangers that might arise for a free press from the creation of monopolies on opinion.[1]

The same undoubtedly goes for other media-including the so-called "new" media-that operate along the principles of private enterprise. As long as their publicizing "power" is more limited than that of the press and broadcasting the courts will likely be more tolerant with respect of processes of concentration. The requirements regarding the type of organization depend on the role a given mass medium plays in the process of the formation of public opinion. The potential danger emanating from film and video, for example, is seen as relatively insignificant such that they are not subject to special rules on structure and organization.

It is to be assumed that the principle of private-entrepreneurial freedom of establishment also applies to the emerging possibilities for communication-provided, however, that the legislature has not established special rules. For example, some state legislatures have anticipated the introduction of so-called quasi-broadcasting services. i.e. services that are in the nature of mass communications but that are not classified as broadcasting. For these, special supervisory and, occasionally, licensing procedures have been provided for[2] or reserved.[3] The legislature has in mind here special text-retrieval services or the automatized individual requesting of music pieces or films from audio or video libraries.[4]

B. Regulation of private broadcasting

Particularly extensive rules apply to the operation of broadcasting and to the retransmission of broadcast programming. These will be discussed in detail in the following.

1. Retransmission of broadcasts *via* cable

The retransmission of broadcasts over cable is subject to broadcasting laws, which however provide for less stringent commitments than for the operation of broadcasting itself. The rules all apply the principles that simultaneous and unaltered retransmission presents no legal problem as long as the programs are able to be received in the respective areas with an ordinary antenna. When programming from one West German state is introduced into another by way of special retransmission facilities, it generally suffices that the original broadcast was legally permissible in the originating state.[5] Programming introduced from abroad requires permission for retransmission in several states, which may not, however, be refused for reasons of transmission content.[6]

West German cable systems have a transmission capacity of 24, sometimes 35, television programs older systems, less. When these capacities are insufficient, then decisions as to priority are inevitable. The relevant laws often provide that majority decisions by the cable subscribers are to be taken into consideration.[7] In making priority decisions, programming originating in EC member states is not to be treated less favourably than domestic programming, although German-language programming

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1. BVerfGE 20, 176.
2. See *e.g.*, the State Media Law of Baden-Wurttemberg, §§ 33 ff.
3. See *e.g.* the Media Law of the State of Hamburg, §1 para, 2.
4. See the comments by Martin Bullinger & Christoph Goedel, Landesmediengesetz Baden-Wiirttemberg, Kommentar, Randnummer 8 on § (1986) Baden-Baden).
5. See also the Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag*), article 11.
6. See *e.g.* the Media Law of the State of Hamburg, §41 (2). The Lower Saxony State Broadcasting Law, § 44, only requires the giving of notice, with a subsequent possibility to enjoin. Further details can be found in the "Synopse der rundfunkrechtlichen Regelungen in der Bundesrepublik Deutschland, Stand: 31.7.1986" prepared by the Legal Commission of West Germany's First (ARD) and Second (ZDF) Programs, III Media Perspektiven Dokumentation 182 ff.
7. Details in the Synopse, *supra*, note 6, at 188 ff.

receives preference. The federal Constitutional Court has not yet had the opportunity to rule on the details of retransmission.

2. Licensing of broadcasters

The courts have thus far often been faced with the issue of whether a broadcaster has a legal claim to a licence. On the one hand, this is a basic question of constitutional law; on the other, it is an issue of the application of the respective media laws. Up to now, the Federal Constitutional Court has left the matter open, but it has held that a legal basis is necessary for the licensing of broadcasters.[1] Thus, a legal claim has only been recognised pursuant to the broadcasting laws. This leads to the rejection of a claim to licensing stemming directly from the Constitution.

3. Rules regarding the operation of broadcasting

In West Germany, intensive debate — both politically and legally—has surrounded the issue of the requirements that laws must provide for the operation of private broadcasting, including the retransmission of programming. In several decisions, the Federal Constitutional Court has given these requirements more definite shape, and the state legislatures have had to acquiesce in them.

The court has always assumed that the special situation of broadcasting, which is characterized by scarcity of frequency and great financial expenditure, is one—but by no means, the only—justification for the fact that freedom of broadcasting must be specially guaranteed by substantive, organizational and procedural rules.[2] Competition alone, said the court, does not adequately ensure that all, or least most, social groups and intellectual movements actually have their say. Above all allowance had to be made for both the possibilities of a concentration of power over opinion and the danger of the abuse stemming from the one-sided exercising of influence on public opinion. Therefore, the court has held that guarantees must be established to ensure that the spectrum of domestic programming actually corresponds in essence to the existing variety of opinion; it must be prevented that individual holders of opinion in possession of transmission facilities and the requisite financial means dominate the formation of public opinion.[3]

In the so-called Fourth Broadcasting Decision in 1986, however, the court once again strongly focused on the frequency situation, stating though that the state of shortage had not yet been overcome.[4] The court also referred to the increasing Europeanization and internationalization of the broadcasting market,[5] apparently as an indication that regulations at the national level have at best only limited effectiveness.

The court was highly sceptical of the possibility that the public-service duty is reasonably able to be fulfilled in a private broadcasting market. It cannot be expected that private broadcasters will offer a wide spectrum of programming,

> since they are virtually exclusively dependent on revenues from advertising for the financing of their operations. These revenue will flow in all the more lucratively when private programming achieves sufficiently high ratings. The suppliers of such programming are thus faced with the economic necessity or offering programs with

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1. BVerfGE 57, 320-21 **see also** BVerfGe, Neue Zeitschrift fur Verwaltungsrecht 1986, 379, 380; Bayerische Verfassungsgerichtshof (Bavarian Constitutional Court; BayVerfGH). Archiv fur Presserecht 1987, 394, 396: Oberverwaltungsgericht Hamburg (Hamburg Administrative Court of Appeals), Neue Zeitshrift fur Verwaltungsrecht 1985, 124 126.
2. **See** in particular, BVerfGe 57, 322, with reference to BVerfGE 12, 205, 261; BVerfGE 31, 314 326.
3. BVerfGE 57, 322-23
4. BVerfGE 73, 154.
5. *Ibid* at 154-55.

> the highest possible mass appeal—which is accomplished by successfully maximizing viewer and listener shares—at the lowest possible costs.

Programs that are of interest to only a limited number of viewers or listeners will at best only be limitedly available, "although it is by way of such that the entire spectrum of comprehensive information is to be attained."[1]

The court was forced to capitulate to the reality of the situation. Wishing to respect the political desire for the introduction of private broadcasting, which was being expressed in the political sphere with increasing intensity, it reduced the requirements that it had earlier formulated for broadcasting. The court does not totally exempt private broadcasting from commitments, but it has lessened them to a degree that provides it with the chance to develop. The court no longer demands the maintenance of comprehensive variety but rather makes do with a "basic standard of balanced variety", which covers only the "essential" requirements of variety of opinion.[2] This holding also eases the legal requirements on the retransmission of broadcasting signals.

In order to compensate for this moderation, the court has attempted to stabilize the system of public broadcasting, which has been caught up in distress, and thus to preserve for listeners and viewers the alternative of traditional public-service broadcasting. The long-term maintenance of public broadcasting is achieved, among others, by accepting relaxed conditions of existence for private broadcasting only with the prerequisite that the activities of public broadcaster, set up along the lines of the traditional normative requirements, remain intact.[3] In characterising the inalienable position of public broadcasting, the court has used the term "basic provision" (*Grundversorgung*). Public broadcasting is charged with ensuring not only that the entirety of the population is offered programming that provides comprehensive information within the overall spectrum of the traditional broadcasting duty but also that the variety of opinion is maintained. The programming that public broadcasting remains obligated to offer must cover all branches of broadcasting, serve the process of forming public and political opinion, contain information going beyond entertainment and running news coverage, and observe the cultural responsibility of broadcasting. Basic provision means full provision of broadcasting, not simply "minimum provision."[4] The court is seeking to ensure that public broadcasting remains able to exercise its essential functions even under conditions of a pan-European broadcasting market. This means that it be given a guarantee of development. Thus, basic provision must be maintained in technology, such that reception by all is possible. Financing as well must be adequately ensured.[5]

The transition to a dual broadcasting organization is, with regard to private broadcasting, associated with a number of requirements. Only in the exceptional case are these limitation rules in the sense of Article 5(2) of the Basic Law; generally, they go to structure under Article 5(1). Such rules on structuring can be effected with various types of regulation. I term them, on the one hand, imperative guidance and control and, on the other, structural constraints. Imperative guidance and control refers to requirements and prohibitions as well as sanctions, regarding conduct. Structural constraints instead create framework data, in particular, those of an organizational or procedural variety. These include the decision for or against the market model, requirements as to the pluralistic composition of programming advisory committees or supervisory authorities. etc. Both types are employed on West Germany's media landscape. I will not deal with them in

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1. *Ibid* at 155-56.
2. *Ibid* at 160.
3. *Ibid at* 157 ff.; BVerfGE 74, 325 ff.
4. BVerfGE 74, 325-26.
5. *Ibid* at 342.

detail, treating instead two important fields of regulation.

a. Battling concentration

When broadcasting is conducted by private companies, this usually results very quickly—as can be observed throughout the world—in a state of concentration. Large media companies thereby become influential mass communicators. This is particularly to be seen in the U.S., the most recent example being the August 1989 merger between Time Inc. and Warner Communications. West Germany as well has large media undertakings, such as the Bertelsmann Group, which was the world's largest media syndicate prior to the above-mentioned creation of the U.S. media giant. West Germany also has an influential press undertaking with the Springer Publishing Company and a film dealer, Leo Kirch, who controls nearly the entire market for the provision of broadcasters with cinema films and television series. Due to such concentration processes, the risk of unilateral power over opinion arises. The state is called upon to use its laws to ensure that large media companies do not endanger the variety of opinion and the freedom of communication. Therefore, structural precautions have been set up; these include measures to protect against the "dominating power over opinion."[1] The Constitutional Court does not assume that market forces alone are able to afford such protection, making additional legal rules necessary. Rules of economic law—especially, anti trust law—are a possible starting point, although in no way in and of themselves sufficient.[2] It is commonly necessary to provide additionally for special rules in broadcasting law. These chiefly include precautions against cross—and multiple ownership, in particular, cross-ownership between the press and broadcasting.[3] When such rules are insufficient for ensuring a widely varied supply and for preventing one-sided power over opinion, then supplementary precautions are necessary— which must extend all the farther, when broadcasting is all the more removed from a structure that generates a guarantee of plurality. Possible guarantees include, in the court's view, an undertaking in which provider associations hold shares (*Anbietergemeinschaft*)—internally organized along pluralistic lines—as broadcaster[4] or, for individual providers, the establishment of pluralistic advisory committees that are able to exercise influence on programming.[5]

West German legislation has often provided for several—though weak—rules for limiting cross—and multiple ownership,[6] and it has commonly seen to it that *Anbietergemeinschaften* are given preferential treatment when it comes to licensing. With regard to the battling of concentration, it is, however, to be noted that legal precautions have not been able to prevent various sorts of multimedia combinations. In particular, publishing companies[7] have persistently managed to establish themselves in the area of broadcasting.[8] Companies having nothing to do with the media have as well been able to force their way into the new market. The possibility of treating and exploiting broadcast programming as an economic commodity has enticed undertakings from a variety of sectors. Access to the market was easiest for those firms that brought their own financing

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1. On the necessity of this protection, see BVerfGE 73, 160 172 ff.
2. *Ibid* at 174-75.
3. *Ibid* at 175 ff.
4. *Ibid* at 174-175; BVerfGE 74, 330.
5. BVerfGE 73, 175; BVerfGe 74, 330.
6. See the Synopse, *supra*, note 6, pp 134, at 148 ff.
7. The Federal Constitutional Court does not provide publishing companies with a legal privilege, but it does allow them to operate in the area of broadcasting. See BVerfGE 73, 192 ff.
8. Data on combinations can be found, for example, in Horst Roper, *Stand Der Verflechtung von privatem Rundfunk und Presse 1987*. Media Perspektiven 1987, 693 ff.' Horst Roper *Formationen* deutscher *Medienmultis 1988*. Media Perspektiven 1988, 749 ff; Carsten Jens, *Private Horfunk—Eine Verlegerdomane*, Media Perspektiven 1989, 23 ff.

with them, with their being able to use economies of scale and to develop interlocked multimedia and international systems. One can presently observe the development of networks as well as special undertakings that supply programming.[1] Foreign companies are also increasingly beginning to enter the West German broadcasting market after having initially been deterred by the complicated, fragmented media law in this country.

b. Content commitments

The Federal Constitutional Court assumed that from the aspect of programming as well, the power of the market to control itself is not adequate for taking into account broadcasting's public-service obligation. The necessary "substantive" rules of broadcasting law go far beyond the scope of the proposed EC Television Directive.[2] They include duties of truth, care, fairness and protection, e.g., that of young persons, in some cases also the duty of pluralistic variety.[3] These rules must be neutral with respect to content. Quota rules, which are to be introduced by the EC Directive, have thus far found little resonance in the West German legislatures. Only in exceptional cases can one find loosely formulated expectations with regard to programming of national or EC production.[4]

However, all laws contain rules on the modalities of financing, especially regarding advertising. Although private broadcasters are given discretion in choosing their source of financing, the especially important advertising financing is bound up with restrictions. A certain degree of unification—and, at the same time, mitigation—in the requirements was achieved by Article 7 of the West Germany Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag*). Some of these provisions will have to be amended in order to adhere to the EC Directive—for instance, the rule on the maximum amounts of advertising time (currently 20% of the daily transmission time). Other rules contain the precept of separation of advertising from the rest of broadcast programming, the requirement of identifying advertising and the prohibition on advertisers exercising influence on the contents of programming. Sponsoring is also subject to certain, though vague, limitations for instance, the prohibition (which is nearly impossible to supervise) on any direct connection between the program sponsored and the economic interests of the sponsor. In directives of the directors of the states media conference, these rules have been more narrowly specified, although at the same time in a relatively loose fashion.[5]

c. Supervision of broadcasting

As experience demonstrates,[6] it is difficult to seek to influence the conduct of broadcaster with the aid of structural and/or content-related rules. The broadcasters generally resist such rules when they touch upon their publicizing and economic freedom to develop, and they find ways to get around them.[7] The Federal Constitutional Court has

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1. For a review of the situation, see Marlene Woste *Networkbildung durch die Hintertur? Programmzulieferer fiir privaten Horfunk in der Bundesrepublik*, Media Perspektiven 1989, 9. For the classification of the findings from the standpoint of legal policy, see Christian Schurig, *Programmzuliefenung zwischen Wirtschaftlichkeit and Vielfalt* in DLM Jahrbuch 88, 50 ff. (ed. by the Conference of the Directors of the State Broadcasting Authorities 1988) (Munich).
2. *Supra* note 1, pp 126.
3. See the Synopse, *supra* 6, pp 134, at 156 ff.
4. See Media Law of the State of Hamburg,§ 18(4).
5. See the Common Directive of the West German State Broadcasting Authorities on the Implementation of the Advertising Rules in the Interstate Treaty on Broadcasting, *reproduced in* DLM Jahrbuch 88, *supra* note 1, at 615 ff.
6. See Wolfgang Hoffmann-Riem, Rundfunkaufsicht im Ausland: GroBbritannien Frankreich und die USA (1989).
7. This has been documented in empirical studies by Gerd-Michael Hellstern, Wolfgang Hoffmann-Riem, Jurgen Reese & Michael Ziethen, Rundfunkaufsicht, 3 columns (1989) (Dusseldorf).

held that the Basic Law requires effective supervision of the broadcasting obligations.[1] For this reason, special authorities have been set up to supervise programming commitments as well as structural constraints; these authorities are at the same time responsible for licensing broadcasters and for supervising the retransmission of broadcasts *via* cable.

In West Germany, the supervisory authorities are not tied to any state[2] and are usually—although this is not necessary—set up according to the pluralistic model. The main organ is a generally large, collegial body in which various political and social forces are represented.[3] The authorities have the right to raise objections, to impart directives and to revoke licences.[4] In keeping with practice,[5] the Federal Constitutional Court assumes that initially informal possibilities are employed, such as discussions and correspondence, and that these instruments of the policy of "raised eyebrows" are effective.[6] Should official powers prove to be inadequately effective, the legislature is obligated to improve them.[7] Practice shows that the supervisory authorities have substantial difficulties with effective supervision, and despite intensive supervision, they tend to interpret legal requirements somewhat reservedly. This reduces possible conflicts.[8] There are nowhere any indications that the legislature has used the empirical limits on the effectiveness of supervision as the occasion to reform the set of legal instruments.

IV. Conclusion

The problems that I have described, as well as the paths to resolve them, are typical for a country with high economic prosperity and a well-developed media system with competing broadcasters and press companies. I am well aware of the fact that India has, in part, entirely different problems facing it. Particularly in the area of broadcasting, a different concept is pursued in India. This is justified by reference to broadcasting's important function in the development of society. In a book authored by an Indian, the following objectives were listed as being decisive for broadcasting activities:

- to act as a catalyst for social change;
- to promote national integration;
- to stimulate a scientific temper in the minds of the people;
- to disseminate the message of family planning as a means of population control and family welfare;
- to provide essential information and knowledge in order to stimulate greater agricultural production;
- to promote, and help preserve, an environmental and ecological balance;
- to highlight the need for social welfare measures, particularly those for the welfare of women, children and the less-privileged;
- to promote interest in games and sports; and
- to create artistic and cultural heritage values.[9]

Although such objectives are commendable, the question still remains as to how far broadcasting can contribute to their fulfilment and how large the risk is that politicians

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1. BVerfGE 73, 167.
2. On the requirement of governmental independence, see *Ibid*, at 164 ff.
3. On this construction, see *ibid* at 170-71.
4. See *Ibid* at 169; see also the survey of the rules in the Synopse, *supra* note, 44, at 168ff.
5. See Wolfgang Hoffmann-Riem, *Moglichkeiten and Effektivitat der Rundfunkaufsicht, in Rundfunkaufsicht,* supra note, 7, pp 138, at vol 3; Rundfunkaufsicht in vergleichender Analyse.
6. BVerfGE 73, 169.
7. *Ibid.*
8. On supervisory practice, see Rundfunkaufsicht, *supra* note 7, pp 138.
9. K.D. Gaur, *supra*, note 1, pp 127, at 132.

use such objectives as a pretext for bringing broadcasting under their control in order to pursue entirely different objectives, such as keeping themselves in political power.

Broadcasting in the Federal Republic is placed under a number of obligations by law. For example, the North German Broadcasting Association (*Norddeutsche Rundfunk*; NDR) is legally obligated "to provide all broadcasting recipients with an objective, comprehensive overview of international, national and state events in all essential areas of life. Its programming is to serve to inform, educate, advise and entertain".[1] Furthermore, "NDR must respect human dignity in its programming. It is to assist in strengthening the respect for life, liberty and freedom from bodily harm as well as for the beliefs and opinions of others NDR's programming is to promote international understanding, to advocate peace and the unity of Germany in peace and justice, and to call for social justice. The moral and religious convictions of the population are to be respected."[2] Representatives of various societal groups use their influence on supervisory boards in the broadcasting corporations in order to see to it that these objectives are adhered to. This applies, however, only for public broadcasting; private (commercial) broadcasting is subject to considerably weaker commitments.

It can nevertheless be stated for all broadcasters that the expectations that society can be positively influenced are substantially lower than, for instance, in India. A contributing factor for this may be that it is even disputed among scientists as to the extent to which broadcasting is able to make a positive contribution to the development of society. Moreover, there is a significant fear that broadcasting can be abused by politicians. With respect to commercial broadcasting, accepting the duty to promote the objectives of societal development is inconsistent with its basic, economic orientation. When broadcasting becomes an economic good, then decisive for the broadcaster is how this good can best be brought to the market and achieve this greatest possible economic returns. It is my guess that India will also be able to make this observation if the plans for the establishment of a commercial broadcasting channel are carried through.

It goes without saying that every country is ultimately itself responsible for the development of its broadcasting order. There are no patent formulae that promise success in the same fashion throughout the world. Nevertheless. I believe that it is important for every country to have its own answer on hand for the question of what its broadcasting order is to look like and what can be expected of broadcasting.The Federal Republic has decided to allow broadcasting to develop as independently as possible. West Germany is a wealthy country, where most people are able, for example, to afford at least some of the products that are extolled in radio or television advertising. Nonetheless, many are troubled by the fact that broadcasting in the Federal Republic is treated less and less as a cultural asset and is primarily becoming an economic asset.

The commercialisation of broadcasting will in all likelihood have a lasting effect on society's value system. International experience demonstrates that in the process, a commercial broadcasting system contributes to broadcasting being used principally as an entertainment medium. The tried and true concept—communication is of special significance for the formation of political opinion—thereby recedes into the background. But it is of course just as legitimate to provide for the entertainment of citizens, in particular, for as high a quality as possible. In my opinion, it would be most regrettable if the democratic function of mass communication were thereby to be lost from sight.

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1. § 5 of the NDR Interstate Broadcasting Treaty.
2. *Ibid* at § 6.