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TRANSBORDER DATA FLOWS: THE INTERNATIONAL LEGAL FRAMEWORK

by EDWARD W. PLOMAN

The communications scene in the United States provides fascinating insights into the workings of the American legal system. First and foremost, it is a lawyer's paradise. In connection with the passage of the 1976 Copyright Act, statements were made which literally recommended litigation as a means for clarifying and firming up the law. In light of this recent statement by the Chairman of the Senate Commerce Committee, "I remain convinced that ultimately statutory deregulation will be necessary and desirable because the FCC's decision to deregulate radio is certain to be litigated," the current policy of telecommunications deregulation seems designed to invite litigation.

Some American observers seem to find that the role of social arbitration and the task of defining government's purpose, which properly belong to the legislature, have shifted too much to the courts. Be that as it may, other countries will hardly walk this route. Even those within the western legal tradition do not seem keen on using litigation and the courts for these purposes. Countries with very different legal traditions, such as China, positively dislike and discourage recourse to litigation and court action.

In addition to its many other problems, work on an international legal framework for communications is made difficult because of differences in legal traditions and approaches among the nations seeking accord. Interestingly enough, this aspect is never mentioned in international legal negotiation. In case of disagreement, there is often the imputation of sinister ulterior motives, of attempts at political or commercial domination, or of ideological pigheadedness. Generally, there is no recognition that differences of opinion that are taken to be of a political nature may depend instead on differences in legal approach.

Let us take a concrete example which in certain respects is very similar to current issues concerning the regulation of transborder

data flows. For more than ten years, work on international legal principles to govern television broadcasting via satellite has proceeded in the United Nations Outer Space Committee. Extreme positions originally held by some members have changed with time, but so far the necessary consensus has not been achieved. The basic issues have concerned, on the one hand, the principle of free flow of information and the various interpretations given to this principle, and, on the other hand, the right of each country to organize its communication systems, including television, as it sees fit. The problems go beyond purely political considerations. If a country has decided not to allow commercial advertising on television, on what grounds could it be imposed from outside? Issues such as these have centered around the question of whether there should be a prior agreement before one country puts up a satellite system intended for transmissions to other countries. While a majority of countries are agreed on the desirability of some governing principle, a few countries, spearheaded by the United States, have so far resisted more than a vague rule about consultation. Thus, there has been a deadlock in the United Nations where the issue has been discussed in diplomatic-legal terms. At the same time, the technical regulation of direct satellite broadcasting has been the subject of agreement in the context of the International Telecommunication Union (I.T.U.). Interestingly enough, all countries, including those that object in the United Nations context, have in the ITU context agreed to rules that go beyond the rather mild formulations proposed in the United Nations. The arguments used to explain such contradictions have become byzantine in their convolutions.

Disagreements as to correct legal principles spring from political, ideological, and social differences. There is, however, another dimension which rather refers to legal philosophy: the differences in attitude toward the creation of law. Even within the western legal tradition, there are obvious differences between a civil law approach and a common law attitude toward the creation of law. Accepting the risk of compressing the arguments, a summary of the situation might look as follows.

According to the civil law tradition, the legislator creates order out of chaos. It is therefore logical and natural that law should be created before the occurrence of an event and in terms of a general, systematic approach. In fact, the legislator would be lacking social responsibility if he did not act this way. In the civil law perspective, which includes socialist law, it is therefore necessary to work towards the adoption of rules for satellite broadcasting in due time and to provide a general legal framework for this new activity.

The fundamental characteristics of common law are described

in terms of its being judge-made law which seeks to provide a singular and particularized solution at a trial rather than to formulate a general rule of conduct. There is an aversion against legislation until there is a proven need for statutory rules. Pressure for early rules on satellite broadcasting would be seen as awkward at best, as foreclosing possibilities and hindering technological development or as hiding sinister political motives. It would thus be natural to avoid or delay as long as possible any decision on legal rules, a position which the civil law perspective would interpret as procrastination or as hiding sinister political motives. In such a situation it would help to untangle the different dimensions of disagreement and not automatically to ascribe dark designs to the other side.

If differences in attitude can be seen between legal systems within the western legal tradition, the differences will become even more pronounced when other major legal systems, such as Islamic or Chinese law, are taken into account. Since we cannot avoid facing the development of international law in a multi-cultural world, the sooner we face this new situation the better.

There may be even worse problems in tackling international communications law. As the controversies in UNESCO and other forums have shown, we have not even been able to define what we are quarreling about. What do we refer to when we speak of a new world "communications" and "information" order? What is meant by "information" in the title of this issue of the *Computer/Law Journal*? A court recently revealed that there are over one hundred definitions of the term "communications" currently in use. The same would be true for information, if anybody were to bother to count.

It is difficult, moreover, to define the boundaries of communication and information. It seems perfectly logical to describe communication as the transport of information and ideas as opposed to the transport of people, goods, and money. But in which category do we put the transport of a computer expert to a meeting or the transport of a letter when both the person and the document would be useless without the information they carry?

Thus, we are often talking about law to govern objects and activities which are yet undefined. In the absence of a generally agreed upon terminology and conceptual framework, we find ourselves faced with on the one hand a debate and a law so general as to invite any interpretation, and on the other hand a series of specialized areas in watertight compartments. In keeping with this compartmentalization of thinking and action, each aspect of communication is dealt with in isolation, without any overall view beyond statements of vague generality. Even the work of engineers and technicians has traditionally related to one particular mode of

communication or a particular technology without a coherent overview even within their specialized fields. Attempts to consider the organization of the various communication systems themselves, the structure of different information flows, and their interaction and interrelationships, have been rare. The same compartmentalization is also prevalent at more general levels of discourse. The old dictum that art is communication no longer seems to be applied, at least not among communication experts. Literature, dance, music, and the visual arts are classified as "culture" and generally are not included in communications except under the rather off and slightly contemptuous heading of "traditional forms of communication," which presumably includes such traditional forms as interpersonal communication. Pop music and comic books are relegated to the openly contemptuous category of mass culture or popular entertainment. Certain formalized modes of communication are placed in a separate category called education. This has left communication free to become swamped by modern technology and mass media. Much the same can be said about the use of information. We are told that we are now entering the information age and the information society. We seem to disregard the fact that societies functioned before the advent of electronics, and that in order to do so, they possessed functioning systems for communication and the transfer of information.

This compartmentalization is typical of behaviour among communication specialists, including lawyers. Telecommunications law, copyright law, space law, and data regulation have each been developed in a watertight compartment by its own priesthood.

In analyzing the levels of institutionalization in international relations, an American expert has used the concept of "epistemic" or "cognitive" communities. The expression sounds awkward and difficult, but the concept itself is clear. The expression "episteme" was borrowed from the French structuralist Michel Foucault. It refers to a dominant way of looking at reality, i.e., sets of shared references and symbols, mutual expectations. Epistemic communities grow up around shared espistemes which define and delimit the proper construction and interpretation of reality for the members of the community.

Such epistemic communities may derive from bureaucratic position, scientific, technical or legal training, shared disciplinary paradigms or from the function of representing national authorities at the international level.

Thus, level of organization is a pronounced feature of the communications/information field. Such epistemic communities form crisscrossing patterns of relations which sometimes are highly

structured but often are surprisingly isolated from one another. Sometimes they combine in alliances for specific purposes, and often they work at cross-purposes.

In the communications field, epistemic communities can be related to different sets of experts in the development of policy and the law. A number of such communities may be identified.

—a set of diplomatic-legal experts who traditionally are involved in the work of the United Nations and some few other specialized bodies;

—a set of technical experts mainly concerned with telecommunications whose work and contacts focus on the International Telecommunication Union and related bodies;

—a copyright community centered on the World Intellectual Property Organization and Unesco comprising both governmental officials responsible for copyright issues and representatives of all interest groups concerned. E.g., authors, performing artists, record producers, publishers, film producers, broadcasting organizations, and most recently computer experts;

—a space and satellite community which involves both governmental and private enterprise representatives, both manufacturers of hardware and users of space facilities;

—a more recent set represented by the computer/data experts who are involved to varying degrees in the work of the OECD, Council of Europe and the Intergovernmental Bureau of Informatics; and

—several subsets within the mass media set, including broadcasting press, cinema, and video etc., which interact to some extent, but which more often than not remain within their own environment.

Other identifiable epistemic communities comprise a research community split along various ideological and disciplinary lines and a rapidly growing broker community consisting of consultants, free lance experts, and the like.

Recent developments have forced some of these communities into contact with each other. Such issues as the legal principles for satellite broadcasting brought together, although uneasily, the diplomatic-legal set, the technical-regulatory experts, and the space and satellite community. Generally, however, epistemic communities do not mix well. For example, when copyright experts and telecommunication experts were brought together in connection with the negotiations on an international legal regime against piracy of television signals transmitted via satellites, they did not manage more than a dialogue of the deaf. It remains to be seen whether the various com-

munities that need to get involved in transborder data issues will manage better.

Each of these communities seems associated with a particular set of issues. Each community has particular legal regimes which it develops and for which it feels responsible. These represent its own territory and are to be jealously guarded against intrusions from outside.

Another reason for this split into different legal branches is that legal concepts and principles in the communications field have generally been linked to a specific technology or level of technology. Relevant legal rules and law-making institutions often prove inadequate when faced with a rapidly changing technology. The legal framework antedates the communications revolution. Concepts and legal approaches that have been developed for one mode of communication, the press, for example, are now stretched beyond their inherent capacity to cover new situations. The adaptation to changing circumstances is mainly patchwork. This peacemeal approach has resulted in the adoption of legal rules that cover limited, even arbitrary, aspects that are in the interest of particular institutions or social groups or that represent sloppy responses to uncontainable technological and social pressures.

Consequently, the present image of law and regulation in the communications field is one of rapid change and considerable confusion. Neither national legislation nor international rules provide for a coherent communications or information law. Such law as exists is pluralistic, uncoordinated and based on limited, functional objectives. Communications and information are the concern of various branches of law which are of varied origin and separate evolution, which draw upon different concepts and legal approaches and which result in rules that are, to varying degrees, deficient and contradictory.

The lack of consistency and coherence in legal concepts and applicable provisions is also conditioned by historical circumstance. While important branches of international communications law, such as telecommunications regulation and copyright, first developed in the mid-1800's, others are based on more modern legal and political concepts. In these early areas of international functional law, the original concepts and rules were formulated primarily by a number of European nations. More recently developed branches of law, such as space law, have evolved in a wider international context.

Given these circumstances, it is perhaps not surprising that experts in one legal branch seemed unaware of applicable rules in

other legal branches especially when an overall compilation of applicable legal instruments does not even exist. I therefore decided to undertake such a collection. This proved more difficult than I had envisaged, however.

The first problem I encountered was the absence of any coherent body of law which could be defined as international communication and information law. Not only is existing law dispersed among a variety of legal regimes, but the approaches which were adopted were varied and were often contradictory. Thus, information law was used either in relation to the area of freedom of information or the area of computerized information services. Sometimes, the expression "international law of communications" referred to what others called information law or to telecommunications law and relevant provisions in space law. In order to provide an overall approach, it was necessary to include a wide range of instruments, which were adopted by a variety of international organizations, and which covered both general principles of international law and detailed technical regulation.

Because concepts such as communications and information are now given very broad interpretation, the second problem facing me was to determine the limits of the subject areas to be included. Toward this end, a reasonable starting point seemed to be a focus on communications as the movement of information and on transportation in so far as it concerned the movement of information fixed on physical support.

Thirdly, there was the problem of how to organize the material. Since no generally accepted conceptual framework exists, it was necessary to develop one. The goal was to provide a framework that would at least be reasonably logical and would be of practical value as a practical guide through the maze of rules. The categories finally used and set out below are not logically consistent since they combine divisions according to subject matter and according to organizational origin. This works well in certain cases and not in others. Moreover, to a large extent, the categories used follow the present sectorial division which is overlapping, contradictory and becoming outdated. This division also reflects unresolved problems and conflicts of interests and principles. For example, what, if anything, is to be done to reconcile the partly contradictory principles of free flow of information and intellectual property rights, an issue which is of increasing importance in the data field?

Moreover, it was necessary to make it clear that general principles of international law apply as much to international relations in the communications/information field as they do in other areas. Thus, general rules such as those laid down in the Charter of the

United Nations are applicable to communications issues. There are also a number of international legal instruments governing a wide range of subject matters which include specific provisions concerning the role of communications or information for achieving stated objectives. One set of such instruments may be illustrated by the international conventions on the elimination of racial discrimination and on the suppression of apartheid which include rules concerning the conduct of communications. Similarly, instruments setting out objectives in areas such as social progress and economic development include references to the contribution communications makes. In addition, a number of agreements impose on states duties of reporting information in such areas as meteorology (World Weather Watch), health (epidemic warnings), and statistics, for example.

The legal instruments that deal explicitly and specifically with communications and information have been set out in nine categories.

I. INFORMATION LAW

In international law, there is at present no generally recognized or agreed upon category known as information law. The expression is used to cover a variety of subjects. Often it designates rules concerning freedom of information and media regulation. In other cases, however, the same expression refers to computerized information systems and transborder data flows. In addition, rules that have been included in this category are sometimes referred to as the international law of communications.

In the approach adopted for this collection, information law is associated mainly with human rights, thus it concerns both freedom of information and free flow of information. The distinction between these two concepts is to some extent arbitrary since they are often seen not only as overlapping but also as inseparable. It has, however, been used to distinguish the mandates of the United Nations and of UNESCO in this field. Also, in recent years, this distinction has been overtaken by events through the emergence of new concepts which attempt to provide a more comprehensive and unified approach. Examples are such concepts as the new international information order and the right to communicate.

Under the heading of information law have been included international rules concerning:

- freedom of information;
- the free flow of information;
- the regulation of specific media;
- the protection of journalists and codes of ethics;

- the protection of individual rights, such as privacy;
- new world information and communications order; and
- other emerging concepts, such as the right to communicate.

It should be noted that binding legal instruments as well as important non-binding recommendations and resolutions have been included in this area and those which follow. This indicates the direction in which international law is developing. Instruments adopted at the international level as well as important regional instruments, such as the European and inter-American conventions on human rights, are also found in this area.

II. TELECOMMUNICATIONS LAW

Telecommunications law is one of the oldest branches of modern functional international law. Following a series of bilaterial agreements between European governments, the first multilateral agreements for the regulation of the international telegraph transmissions were concluded in 1865. As new communications technologies and services developed, additions were made to the international regulations and to the administrative structure. Today, the International Telecommunication Convention covers all forms of telecommunications, including technical aspects of space communications and data transmission. The International Telecommunication Union (I.T.U.) is within the United Nations system, the body responsible for virtually all international regulation in this field.

Agreements related to telecommunications have also been concluded also in contexts other than the I.T.U. Thus, at the European level, the Council of Europe has sponsored an agreement prohibiting pirate broadcasting, and similar provisions have been proposed for inclusion in the Law of the Sea Convention.

III. POSTAL LAW

International postal law is another venerable branch of international law, dating back to 1874 when the Universal Postal Union was founded. Through the Universal Postal Convention, the member states of the Union form a single postal territory and guarantee freedom of transit for correspondence. International postal agreements are supplemented by regional agreements.

IV. SPACE LAW

Space law is that body of international legal norms that governs outer space activities. Space law is a recent addition to interna-

tional law. It has developed since the early 1960's mainly under the auspices of the United Nations and its Committee on the Peaceful Uses of Outer Space. Following the adoption of the basic legal document in this field, the Outer Space Treaty of 1967, work has continued on agreements covering specific issues of which two fall in the communications field: legal principles for satellite broadcasting and legal principles for remote sensing of the earth via satellites.

Agreements on the technical aspects of satellite and all other forms of space communication have been adopted within the context of the International Telecommunication Union. At the operational level, special agreements have been concluded for the establishment of such organizations as Intelsat, Intersputnik and Inmarsta. These agreements often include important principles concerning the conduct of satellite communication and the relations between states in this respect.

V. INTELLECTUAL PROPERTY RIGHTS LAW

Reference to intellectual property rights are included in all major human rights instruments. Specific legislation has developed in two branches: (1) industrial property law which deals with the protection of inventions, trademarks, industrial designs, new plant varieties, etc., and the suppression of unfair competition, and (2) copyright and neighboring rights which cover all forms of literary, including scientific, and artistic products and performance, and the protection of such groups as performing artists, record producers and broadcasting organizations.

The two main intergovernmental organizations involved are the World Intellectual Property Organization (WIPO) and UNESCO.

VI. INFORMATICS LAW

The notion of informatics law has been designed as referring to law and regulation specifically governing automated information services and data systems as well as transborder data flows. Present international agreements concern the protection of privacy. An example is the European Agreement sponsored by the Council of Europe and the OECD guidelines. General principles are set out in the Statutes of the Intergovernmental Bureau of Informatics.

VII. TRADE AND CUSTOMS REGULATIONS

The international movement of information increasingly presents important trade and commercial aspects. Agreements on trade and economic relations can therefore be expected to play a

growing role in the international regulation of information and communications. Attention should be paid to instruments such as those related to the United Nations Conference on Trade and Development (UNCTAD), the General Agreement on Tariffs and Trade (GATT), and the Rome Treaty establishing the European Economic Community.

In this category have also been included customs agreements, many of which have been concluded under the auspices of the Customs Cooperation Council.

VIII. CULTURE AND EDUCATION

Culture and education are closely related to communications and information in that agreements in one of these areas will often include provisions applicable to others. International law applicable to culture and education is based on the provision included in all major human rights instruments. Although these standard-setting provisions have been supplemented by some specified binding instruments, most international legal documents in these fields are of a non-binding character.

IX. NATIONAL SECURITY AND LAW ENFORCEMENT

Provisions concerning communications and information have been included in regional security agreements (NATO) and in agreements concerning international cooperation for law enforcement (Interpol).

In any discussion of whether and how transborder data flows should be regulated at the international level, it would seem logical first to analyze which existing provisions are applicable. It is easy to see that provisions in a number of the above-mentioned branches of law are directly applicable to data flows and informatics. Thus, transborder data flows are subject to:

- general principles of international law;
- various aspects of information law as here defined;
- relevant provisions of telecommunications law which are applicable to all users of telecommunication facilities, as well as specific rules concerning data transmission;
- relevant provisions of space law as they refer to the use of satellite communication and other uses of space facilities;
- postal law and customs regulation in so far as computer output is transported on physical support;
- intellectual property law in terms both of industrial property law and copyright; in this area particular attention has lately been lavished on the interpretation and application of current

international provisions to computer programs, computer-originated works, and the use of protected works in computerized data banks; and

- trade regulation, which can be expected to play an ever larger role in the area of transborder data flows.

Finally, there is the special category mentioned here under the heading of informatics law. The international provisions specifically adopted in this field are a response to the recognition that existing rules were inadequate. This is obvious in the extension of privacy rules represented by the European Agreement and the DECD guidelines. The major issue for the future is thus whether existing international law and regulation will be adequate to provide the required international legal regime or whether new rules and new international agreements are required.