

Commercial Speech, Transborder Data Flows and the Right to Communicate under International Law

For several years now, proponents of a “new world information order” have challenged the free flow of news, data and advertising across national frontiers. One result of this clash between democratic values and, primarily, third world concerns about the social, economic and political implications of the new information technologies has been debate about the need for a newly defined “right to communicate” under international law. The author believes a right to communicate already exists under international law that embraces commercial speech and transborder data flows.

The issue can be framed by reference to two brief texts: The first is Article 19 of the Universal Declaration of Human Rights, which was adopted unanimously by the General Assembly of the United Nations on December 10, 1948:

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The second text is Paragraph 10 of the Declaration of Mexico on Informatics, Development and Peace adopted by the Intergovernmental Bureau for Informatics (IBI) on June 23, 1981:

The right to information such as it is recognised by the Universal Declaration of Human Rights and international treaties has acquired, due to the technological revolution, a scope which is qualitatively and quantitatively different from that which prevailed when they were adopted. The concept of the “right to information” needs to be reinterpreted in the light of changes due to informatics.

The latter statement reflects the concern of the leadership of some developing countries that Western domination of the new technologies of the information era will increase the gap in economic development between the

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rich and poor nations and influence unduly the cultural and political life of the third world. A number of industrial countries have concerns of their own about the economic and social implications of transnational information flows. These concerns range from the protection of personal privacy to the protection of emerging high technology industries. One result of the LDC concerns has been efforts in the United Nations to project a new international information order. Another result of concerns in various countries has been the proliferation of obstacles to the free flow of information in a variety of forms ranging from privacy legislation to discriminatory pricing of telecommunications services.

All countries have a legitimate interest in enjoying a fair share of the benefits of the new technologies. In my view, these interests are poorly served by attacks upon the freedom to impart and to receive information which is recognized in the Universal Declaration of Human Rights. That freedom is not absolute in any country, and it is scarcely realized in many. But it remains an essential element of man's aspirations to self-government. Any effort to restrict the principle of the free flow of information in my view should be firmly resisted by the United States and by like-minded countries. We must also resist protectionist economic measures if the international community is to derive the full benefit of the new technologies.

On the other hand, there may be an interest shared by a great many countries in developing a new set of internationally recognized rights and responsibilities relating to transborder information flows that would encourage technological innovation and economic growth by facilitating the free flow of commercial information and the development of informatics industries wherever they can serve the public. In fact, elements of such a legal regime are beginning to emerge from the actions of national authorities and international organizations. I would go so far as to suggest that we can now outline a general principle of international law that can be the basis for the elaboration of an international legal regime by negotiation on various levels and by reciprocal national rule-making. It is unlikely that this process will result in agreement on a general treaty on the right to communicate under international law. It is more likely to produce a number of agreed points arising out of the accommodation of specific interests in particular economic and legal contexts. In the brief time available this morning I shall attempt to identify the present sources of a right to communicate under international law and those areas where substantial work is needed in the future.

At the outset, I should like to mention a number of interests that need to be accommodated in any meaningful international regime for transborder data flows.

1. the right to establish and to operate data processing, information and other computer services within states and across international boundaries;

2. the right of access to foreign data bases and data processing facilities, and to international communications links at reasonable rates and without discrimination;
3. the diffusion of new technologies on reasonable commercial terms;
4. the recognition of proprietary interests in new forms of intellectual property and technology such as computer software and satellite signals;
5. the protection of personal privacy; and
6. the interests of all states in national security, economic development and the public health and safety.

Any legal regime that encompasses these interests, if it is to be broadly acceptable, will have to reflect a balance of rights and responsibilities. It will have to allow sovereign states a measure of discretion in the implementation of the regime, and it must represent a broad mutuality of economic interests. With these aims in mind I shall now address the basis of a legal right to communicate under international law that is becoming discernible in existing texts and practices.

The starting point is Article 19 of the Universal Declaration of Human Rights.¹ A strong argument can be made that the right to receive and to impart information stated there is an international legal norm that applies to commercial speech and to transborder data flows. Although resolutions of the General Assembly of the United Nations do not have the force of law, the Universal Declaration was adopted unanimously and is widely regarded as being declaratory of general principles of international law.² Moreover, sixty-nine countries have accepted the principle of freedom of information as a matter of treaty obligation by adhering to the International Covenant on Civil and Political Rights.³ Article 19 of the Covenant is nearly identical to Article 19 of the Universal Declaration except for its omission of a specific reference to the freedom to hold opinions. Both texts state expressly that the freedom to receive and to impart information and ideas applies to "any media" and "regardless of frontiers."

The fact that this freedom is severely restricted in many countries does not mean there is no international norm. If observance were the sole criterion, most of the basic human rights recognized in the Universal Declaration would have to be deemed premature. The recognition of these norms as law is important, even if they are implemented imperfectly. Under Chapter IX of the United Nations Charter states are responsible internationally for the treatment of their own nationals, as well as aliens, as regards

¹Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948).

²See *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

³International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). President Carter signed the Covenant on behalf of the United States in 1977, 11 years after its adoption. However, the Senate had not yet given its advice and consent to ratification. See Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 423-24 (1979).

basic human rights and fundamental freedoms.⁴ The abuse of human rights is now an appropriate subject for diplomatic representations and for action by international organizations.

At the same time, it must be recognized that the right to receive and to impart information is not absolute. It has limitations and it implies responsibilities. In our own society we accept the prohibition of defamation. We punish the unauthorized reproduction of copyrighted works. We impose limits on obscenity and, in the case of a clear and present danger, we sometimes restrict political speech.

At the international level, Article 29 of the Universal Declaration recognizes that governments may restrict certain rights, including the freedom of information, "for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Article 19 of the Covenant refers to national security as well as public order, health and morals.⁵ Each state has the responsibility to permit the free flow of information but it also must protect other human rights and freedoms. The way states balance these interests when they compete determines the legal and political environment in which we live.

In the context of such a balancing process, it can be argued that the international right to freedom of information extends to commercial speech and data flows "through any media and regardless of frontiers." Support for this position can be found in the jurisprudence of the U.S. Supreme Court respecting the First Amendment; in various international agreements; in scholarship; and in the recent work of international organizations relating to the protection of privacy in the context of transborder data flows. All of these developments flow from the recognition that the free flow of information is essential to the public and private decision-making which is necessary for economic activity.

The Supreme Court addressed this fundamental fact in 1976 in the case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), where it held unconstitutional as an infringement of the First and Fourteenth Amendments a state law forbidding price advertising for prescription drugs. The Court said:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that these decisions, in the aggre-

⁴*U.N. CHARTER*, Articles 55 & 56; *Filartiga v. Pena-Irala*, *supra*, 881.

⁵The International Telecommunications Convention, done at Malaga—Torremolinos, October 25, 1973, TIAS 8572, contains a similar parallel statement of rights and qualifications. In Article 18, Members of the I.T.U. "recognize the right of the public to correspond by means of the international service of public correspondence. The services, the charges and the safeguards shall be the same for all users in each category of correspondence without any priority or preference." Articles 19 and 20, however, reserve the rights of the Members (1) to stop transmission of any private telegram on such grounds as security, public order or decency, and (2) to suspend the service indefinitely for all or certain kinds of correspondence.

gate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . (425 U.S. at 765)

This rationale has been applied by the Supreme Court in other cases holding invalid state or local regulations barring the posting of For Sale signs,⁶ barring advertising of contraceptives,⁷ and barring advertising prices of routine legal services.⁸

The Court has made clear, however, that the right of commercial speech under the First Amendment is not absolute. To be protected, commercial speech must concern lawful activity, and it must not be misleading. Even protected commercial speech can be restricted by law when the government is seeking to promote a substantial public interest, the regulation directly advances that interest, and the restriction imposed is not more extensive than necessary. The Court developed this analysis in 1980 in the case of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), where it struck down a regulation banning all promotional advertising by electric utilities because it believed the state could promote the conservation of energy by less intrusive means.

Last July, the Court reviewed an ordinance of the city of San Diego prohibiting, for esthetic reasons and traffic safety, most billboards except certain campaign posters and commercial billboards advertising goods manufactured and services rendered on the premises.⁹ The ordinance was held unconstitutional because of its effects on noncommercial speech, but a majority of the Justices indicated they could have approved that particular restriction of commercial speech. It may be too soon to determine whether this dictum represents a change of emphasis, but the Court continues to strike down state regulations of commercial speech that are overly broad. In the most recent case, decided on January 25, *In re R.M.J.*, the Supreme Court held that the states could not prescribe the precise wording of lawyers' advertisements absent a showing that the prescribed phrases are the only means of avoiding deception.¹⁰

Thus, the Supreme Court has recognized that the importance of informed decision-making in the marketplace gives rise to a First Amendment right to communicate truthful information concerning commercial transactions. However, government may restrict that right to protect other public interests provided the regulation directly serves that interest and is not more intrusive than necessary.

It would be interesting to consider for a moment how this test would apply to the recommendations adopted by the World Health Organization

⁶*Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

⁷*Carey v. Population Services International*, 431 U.S. 678, 701-02 (1977).

⁸*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

⁹*Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981).

¹⁰50 U.S.L.W. 4185. See also *American Future Systems, Inc. v. The Pennsylvania State University*, 688 F.2d 907 hearing denied, 688 F.2d 916 (1982) *inter alia*, that the University had not justified the restriction of the presentation of price information in the course of authorized product demonstrations in the common areas of residential halls.

last year in the Code of Marketing of Breastmilk Substitutes.¹¹ The Code recommends that states enact legislation to prohibit all advertising to the general public for those products and to regulate the contents of their labels and other promotional materials in great detail. The Code's goal—promoting infants' health by encouraging breastfeeding—is surely a substantial one. Nevertheless, there are less restrictive means of achieving that goal than a total ban upon the communication of truthful information. Public attention has focused on the serious problems of malnutrition in the third world, but I have seen very little comment on the serious implications of legal measures prohibiting speech.

There is no specific authority extending the First Amendment principles adopted by the Supreme Court to international law, but the Court's decisions have influenced the development of international law in the past.¹² In this case, the Court's rationale—the requirements of informed decision making—applies with equal force to Article 19 of the Universal Declaration, which is the counterpart of the First Amendment in international law. We cannot expect the international community to follow the U.S. example precisely, but there are shared interests in recognizing that states must consider the public interest in the free flow of information when regulating commercial speech and data flows. It should not be assumed, for instance, that national regulation of international information flows are valid if they are intended to subvert, or have the effect of subverting, international agreements or standards relating to trade, telecommunications or transportation. Some regulations of information may violate the GATT or bilateral commercial treaties. Others may contravene regulations or recommendations under the International Telecommunications Convention.

Moreover, recent international Acts concerning transborder data flows have applied the same kind of standard to national regulation in the interest of privacy as the Supreme Court has applied to commercial speech. This issue has been addressed by the Organization of Economic Cooperation and Development in the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data adopted on September 23, 1980¹³ and by the Council of Europe in the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, signed at Strasbourg on July 28, 1981.¹⁴ The two instruments promote the same basic principles of personal privacy and individual liberty:

1. that personal data should be collected by legitimate means for limited economic and commercial purposes;

¹¹Resolution WHO 27.43, HANDBOOK OF RESOLUTIONS & DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD, Volume II, 4th ed., Geneva, at 58 (1981).

¹²The Trailsmelter Arbitration, *United States v. Canada* (1938, 1941), 3 U.N.R.I.A.A. 1905.

¹³OECD, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, OECD Doc. No. ISBN 92-64-12155-2 (March 1980).

¹⁴Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, opened for signature January 28, 1981, Euro. T.S. 108.

2. that the information collected and stored should be relevant to those purposes and used for no other;
3. that such personal data should be accurate and confidential; and
4. that an individual should have access to data concerning him or her, the right to challenge the relevance and accuracy of that data, and the right to have it erased or corrected, if the challenge is successful.¹⁵

Both instruments contemplate government regulation to protect these interests. The OECD guidelines recommend that member states take account of these principles in their national legislation. The Council of Europe Convention obligates states that become party to it to enact legislation to enforce these principles. However, both instruments recognize that the free flow of personal data across frontiers is essential to economic activity¹⁶ and both incorporate limitations on government regulation of transborder data flows in the name of privacy.

Specifically, the guidelines state that "member countries should avoid developing laws, policies and practices in the name of the protection of privacy and individual liberties, which could create obstacles to transborder flows of processed data that would exceed requirements for such protection."¹⁷ This sounds very much like the standard applied by the Supreme Court to state regulation of commercial speech. In the same vein, Article 12 of the Convention provides in effect that no state party to the Convention shall restrict "transborder flows of personal data going to the territory of another party" "for the sole purpose of the protection of privacy" "where the regulations of the other party provide an equivalent protection." Restriction in that circumstance would be excessive for the purpose.

Support for this type of analysis also can be found in a thoughtful paper prepared for UNESCO last year by Desmond Fisher, an Irish broadcasting official.¹⁸ While I cannot accept Fisher's premise that Article 19 of the Universal Declaration needs to be restated, and I find his formulation of the right to communicate so general as to be lacking any normative content,¹⁹ his analysis is often helpful. For example, Fisher argues that society's right to limit freedom of expression can be exercised only in the interest of protecting other equal or superior human rights such as the right to life, to religious belief, to the free choice of government and, perhaps, another individual's right of expression (page 22). Again, this analysis is similar to that developed by the Supreme Court in the commercial speech cases. Commercial speech and data flows are protected but they can be restricted by reasonable measures necessary to protect other public interests.

¹⁵Guidelines, Part Two, ¶7-14; Convention, arts. 5-8.

¹⁶Guidelines, Preamble & Recommendation 2; Convention, Preamble.

¹⁷Part Three, ¶ 18.

¹⁸THE RIGHT TO COMMUNICATE: A STATUS REPORT, 1981.

¹⁹"Everyone has a right to communicate. Communication is a fundamental social process which enables individuals and communities to exchange information and opinions. It is a basic human need and the foundation of all social organization. The right to communicate belongs to individuals and the communities which they compose." (at 38).

Having stated the broad principle, the next question is whether international law and practice provide any guidance for practical arrangements among states to balance competing interests and to facilitate the introduction and utilization of new technologies in the informatics industries. It is generally recognized that the regime established under the General Agreement on Tariffs and Trade does not apply as well to trade in services as it does to trade in goods. The Administration hopes to begin to remedy that situation at the GATT Ministerial Meeting this fall. New trade legislation under consideration by Congress will encourage that program, but we know this will be a complex effort and cannot expect quick results.

On the other hand, the FCN treaties entered into by the United States with such states as France, Germany and Japan generally provide rights of establishment, national treatment and most-favored nation treatment for most economic activities. They also recognize the right to gather information for dissemination abroad by the print and electronic media, and they further provide that nationals of either party shall be permitted within the territory of the other party "to communicate freely with other persons inside and outside such territories by mail, telegraph and other means open to general public use."²⁰ If nationals of a treaty party have the right to participate in trade and commerce on a nondiscriminatory basis, and if they have a flat right to use the means available to the public for domestic and international communications, there is a clearly implied right to offer computer-based information and data processing services from inside and outside the host country.

This right to communicate is not to be confused with a right to operate communications facilities. The U.S. FCN treaties generally include an exception from national treatment for certain sensitive sectors, including domestic communications. Ironically, an effective right to communicate that would embrace transborder data flows may depend on the exclusion of data processing and information services from the definition of "communications." The same distinction will be necessary to maintain an open international market for computer services outside the scope of the state monopolies that operate communications services in most foreign countries. Fortunately, this distinction has been recognized thus far by the Federal Communications Commission, in the consultative bodies of the International Telecommunications Union and, to a lesser extent, by Japanese and European regulatory authorities.

This is not the forum in which to detail the conclusions of the FCC in the proceedings which have become known as Computer I and Computer II. The point I wish to make is that the Commission struggled with a number of working definitions of communications services and computer services that may be useful to other national and international regulatory bodies. I

²⁰*E.g.*, Article II (6), Treaty of Friendship, Commerce and Navigation Between the United States of America and the Federal Republic of Germany, October 29, 1954 TIAS 3593, 273 UNTS 3.

have in mind, particularly, the competition authorities of the European Community as they address the scope of state monopolies of communications²¹ and the consultative committees of the International Telecommunications Union as they address such issues as the availability of leased lines.²² It is doubtful other authorities will follow the FCC so far as to draw the line between "basic communications services," on the one hand, and all "enhanced services" on the other.²³ But "data processing" is not the same thing as "message switching"²⁴ and some test will be necessary to distinguish various types of hybrid services.

This is clearly one of the areas where substantial further work is necessary to develop the elements of a right to communicate under international law. Up to now most companies wishing to provide computer services in Europe and Japan have been able to work out their problems through ad hoc negotiations. These negotiations often have been difficult, but there still is no groundswell of support for new international legal standards. My own guess is that the continuing advance of technology will make it even more difficult and, yet, more important to develop such standards at the intergovernmental level. I am confident we shall have the opportunity to return to this subject frequently in the years ahead.

²¹See treaty establishing the European Economic Community, Rome, Mar. 25, 1957, 298 U.N.T.S. 11, Arts. 85-94; Ramsey, *Europe Responds to the Challenge of the New Information Technologies: A Teleinformatics Strategy for the 1980s*, 14 CORNELL INT'L J. 237, 273-283 (1981).

²²The Consultative Committee International Telephone and Telegraph (CCITT) Recommendations provide that

[t]he leased circuit service is normally authorized in international relations where telecommunications circuits remain available after the needs of the public telecommunications services have been satisfied. However, administrations should recognize the requirement for leased circuits in their planning. Recommendation D.1.5 (1980).

²³See *In Re Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, (*Final Decision*) 77 F.C.C. 2d 384 (*Computer II*), appeal filed, *sub nom.*, *Computer & Communications Industry Association, et al. v. F.C.C.*, No. 80-1471, 81-1193 (D.C. Cir.). Essentially, the FCC defined *basic* communications services as a "pure transmission capability over a communication path that is virtually transparent in terms of its interaction with the customer supplied information," and defined *enhanced services* as everything else. *Computer II*, *supra* 77 F.C.C. 2d at 420.

²⁴The FCC's first attempt to distinguish between communications and data processing services resulted in a model where *data processing* was defined as "the use of [a] computer for operations which include, *inter alia*, the functions of storing, retrieving, sorting, merging and calculating data, according to programmed instructions." See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Facilities*, 28 F.C.C. 2d 291 (1970) (*Tentative Decision*); 28 F.C.C. 2d 267 (1971) (*Final Decision*) *aff'd in part sub nom.*, *GTE Service Corp. v. F.C.C.*, 474 F.2d 724, 729 (2d Cir. 1973), decision on remand, 40 F.C.C. 2d 293 (1973). *Message Switching* was defined as "computer controlled transmission of messages" utilizing communications facilities where the "content of the message" was unaltered. *Id.*

