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Global Information Policymaking and Domestic Law

FRED H. CATE*

The global information age presents both opportunities and challenges for U.S. domestic law for two distinct, but related, reasons. First, information is inherently global; it respects neither geographical nor legal boundaries. As a result, it is particularly unsusceptible to ad hoc national regulation. Second, information is at the heart of the U.S. economy. Both the economic importance of the rapidly growing information services sector and the central role of information in almost all political and economic activities, particularly multinational business, necessitate the creation of consistent, multinational legal and technical standards.

The United States, however, has not consistently recognized that its own self-interest lies in multinational cooperation and the development of truly global information-related standards. In fact, U.S. policymakers are unmistakably schizophrenic; they negotiate multinational responses with allies and trading partners to some important global information problems, while expressing hostility to other multinational information law regimes. Often, the U.S. position changes over time as U.S. interests shift. For example, U.S. lawmakers delayed for more than a century before according even the most minimal copyright protection to works created by non-U.S. authors, and almost another century before bringing U.S. law into basic compliance with the major multinational copyright order.1 As a result of the delay, U.S. authors suffered at the hands of international pirates and U.S. efforts to protect its intellectual property interests were severely hampered. But as little as the United States could afford to be separated from its allies and trading partners with regard to copyright protection, it can afford even less to go it alone where the full panoply of information products and

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1. See infra notes 26-32 and accompanying text.
services are involved. The costs of doing so, particularly in the face of rapidly advancing digital information technologies, are staggering.

This article examines the nature of information in the global economy—its inherently global characteristics and its importance to business and political activities. It then explores three episodes in which the United States has encountered other nations over issues of information policy and law. The article concludes that information's power, scope, reach, and importance, both as a vital sector of the U.S. economy and as the essential underpinning of so many other critical activities, raise the stakes of going it alone and threaten to impose increasingly higher costs to consumers, to business, and to the operation of government. Instead, national governments should recognize that their own self-interest lies in compatible legal regimes, workable international standards, and global cooperation.

I. INFORMATION IN THE GLOBAL ECONOMY

The impact of the new, global information age on U.S. domestic law can hardly be overstated for at least two reasons. These reasons are the global characteristic of information and the essential nature of information to multinational business and government activities.

A. The Global Characteristic of Information

First, information is inherently global; it respects no boundaries. Anne Branscomb, head of the American Bar Association Science and Technology Section Project on International Information Networks, has written: "[t]he very existence of information technology is threatening to nation states." According to Professor Joseph N. Pelton:

We are not talking about a modest proposition here. Telepower in its various forms—telecommunications, electronic entertainment, computer and information services, robotics, artificial intelligence, and expert systems—is already reshaping the global economy, internationalizing labor, and shifting jobs in space, time, and

 Whether in a wire (or optical fiber) or beamed from a satellite or microwave dish, information—particularly electronic information—is ubiquitous. Unlike a truckload of steel or a freight train of coal, television and radio signals, and telephone, facsimile and modem communications are difficult to pinpoint and almost impossible to block, through either legal or technological means.

As a result of its inherently transnational character, information has been the subject of some of the earliest multinational agreements, treaties, and organizations. Bilateral postal treaties were concluded as early as 1601 between France and Spain and 1670 between France and England. As Professor Jost Delbrück has quipped, the establishment of the Austro-German Postal Union in 1850 made it possible to send a letter in the nineteenth century across the dozens of principalities that made up what is now Germany in less time than it takes the Bundespost to deliver a letter across Germany today. The Postal Congress of Berne in 1874 created the General Postal Union which established a multinational postal regime (administered today by the Universal Postal Union, or UPU) seventy-four years before the General Agreement on Tariffs and Trade (GATT) was opened for signature. This global framework is so comprehensive, and the practical difficulty of separating domestic and international mail so great, that UPU regulations today set the terms for domestic, as well as international service.

4. Since the digital information flowing in cables or moving through space will be, in effect, a single, homogenous stream, it will become increasingly impossible to maintain any of the traditional distinctions between transmissions carrying news, entertainment, financial data or even personal phone calls. This intermixing of data will make it impossible to pass laws restricting the transmission of one kind of information without impinging on all the others.

W. Sparks, Address to the Conference on World Communications. Annenberg School of Communication, University of Pennsylvania, Philadelphia (May 1980), quoted in Branscomb, supra note 2, at 1006.
6. Id.
Electronically transmitted information also sparked multinational agreements almost immediately upon its commercial deployment. The telegraph was first employed commercially in the early 1840s, and by 1849, bilateral and multilateral agreements were in place to facilitate and regulate its transnational use. In 1865, Napoleon III called an international conference in Paris to address technical standards, codes, and tariffs for the telegraph. The twenty countries attending negotiated the first International Telegraph Union, which later combined with the Radiotelegraph Conference to form the International Telecommunications Union (ITU). In short, by the time the telephone appeared on the scene in 1876, there already existed an eleven-year-old structure for dealing with multinational electronic communication.

Today, in addition to the UPU and ITU, information and communication are the subject of hundreds of regional and international agreements and organizations, such as the Convention for the Protection of Literary and Artistic Works (the Berne Convention ("Berne")), the World Intellectual Property Organization, INTELSAT, EUTELSAT, ARABSAT, and InterSputnik. Along with these provisions for enhancing and regulating the multinational flow of information have come agreements including provisions that protect information-related rights, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights.


B. Information and Multinational Business

The second reason that the global information age is particularly important to the U.S. economy and legal structure is that information, perhaps because of its inherently global characteristics, is increasingly the subject of, and essential to, all business and governmental activities. This significance of information was forcefully recognized in the Clinton Administration’s recent National Information Infrastructure Agenda for Action:

"Information is one of the nation’s most critical economic resources . . . . By one estimate, two-thirds of U.S. workers are in information-related jobs, and the rest are in industries that rely heavily on information. In an era of global markets and global competition, the technologies to create, manipulate, manage and use information are of strategic importance to the United States."

During the 1980s, for example, U.S. business alone invested one trillion dollars in information technology. Communications and related industries are among the fastest growing, most profitable segments of the U.S. economy, accounting for 9.2 percent of the U.S. Gross Domestic Product. The information sector is second only to defense in its positive contribution to the U.S. trade balance. Before the end of the decade, information is likely to be first.

In addition to being the subject of international trade, efficient, rapid communications are essential to the operations of the government and national and multinational businesses. Branscomb writes, “Transborder data

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19. The figures showing the importance of information to the European economy are similar. Estimates published in the Financial Times in 1992 indicate that telecommunications alone will account for six percent of the EC’s Gross Domestic Product by the turn of the century and that more than half of all EC jobs already “depend on information and communication technology.” Hilary Clarke, Resistance in Europe, FIN. TIMES, Oct. 15, 1992, at III2.
flow has become indispensable to the very existence of transnational enterprise and to the currently flourishing global marketplace. . . . Information is the lifeblood that sustains political, social, and business decisions.\textsuperscript{20}

Consider, for example, the growing global market for financial services: banking, securities and commodities trading, letters of credit, currency conversions, and loan guarantees. Approximately five percent of U.S. services exports are in financial services;\textsuperscript{21} as of mid-1992, the United States held 66.3 percent of the world market for financial services, far ahead of the United Kingdom with 17 percent and Japan with 5.1 percent.\textsuperscript{22} What is a global financial system but a “network of information?”\textsuperscript{23} The importance of information is not limited to broadcasters and telephone companies; it is indeed the “lifeblood” of the global economy.

As a result, both governments and businesses have a vital stake in workable and consistent technical and regulatory standards and practices from country to country to facilitate information as a multinational commodity and service as an essential component of multinational business activities. Even if it were possible to restrict information to the boundaries of a single country, it is not profitable or practical to do so.\textsuperscript{24}

II. \textbf{GLOBAL PRESSURES ON DOMESTIC LAW AND THE U.S. RESPONSE}

It is commonplace to observe that, with few exceptions, states participate in international arrangements when it is in their best interest to do so, or when those arrangements can be molded to conform with states’ perceived self-interests. When an international agreement or organization no longer serves a state’s interest, either short or long term, that state is likely to seek to extricate itself or to avoid its obligations under the no longer profitable arrangement. Exceptions are rare, occurring only where a principle or commitment to some other, higher norm will at least partially guide a state’s actions, perhaps slowing pursuit of its own interest.

\begin{itemize}
\item \textsuperscript{20} Branscomb, supra note 2, at 989.
\item \textsuperscript{22} UK. Financial Services Hold 17 Percent of Market, FIN. TIMES, Aug. 25, 1992, at 6.
\item \textsuperscript{23} CHARLES GOLDFINGER, LA GÉOFINANCE 401 (1986).
\item \textsuperscript{24} See generally U.S. DEPT. OF COMMERCE, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, GLOBALIZATION OF THE MASS MEDIA (1993).
\end{itemize}
The two features of information identified above—its inherently global characteristics and its importance as a commodity, a service, and an essential facilitator of all business activities—have particular relevance for the way in which the United States has perceived its own self-interest. Historically, the United States has not consistently acted in concert with its trading partners with regard to information policy. While the U.S. government has been an active participant and, in many cases, a leader in intergovernmental agencies dealing with technical aspects of information and communication (such as spectrum allocation), it has often resisted participation in multinational policy-level agreements.

U.S. policymakers remain confused as to where the nation’s self-interest lies, and U.S. information-related laws and policies reflect that confusion. The inherently global characteristics of information and its role in American business are magnifying the importance of U.S. participation in global information policymaking and institutions. Yet these same features are increasingly perceived as threats to U.S. leadership in the information economy and heighten U.S. concern over protecting that so-called dominance. In some important sectors of the global information economy, the United States is increasingly likely to be found at least negotiating with, if not actually agreeing with, its allies and trading partners. In others, where the United States is unable to reconcile its interests within a global policymaking framework, the government’s hostility to that framework is intense. Branscomb has written, “Indeed, the most recent U.S. policy analysis [regarding international information regulation] evidences both myopia and paranoia.”

A. Copyright

For an example of the United States ultimately recognizing the need to come within the global fold, consider the U.S. position towards international

25. Branscomb, supra note 2, at 987 n.5. Despite its traditional stance of encouraging worldwide cooperation on information technology . . . the United States seems increasingly unready, unwilling, and even unable to lead the world community into an international system of information exchange that maximizes shared use of information resources. As the United States sees its leadership position eroded by strong competitors in the international information marketplace, the pendulum of American opinion on these policy questions swings in the opposite direction towards information protectionism, information independence, and even information indifference. Id. at 986-87.
copyright protection. For more than a century, the United States resisted participating in any multinational copyright structure. The nation was, in the words of David Nimmer, an “island, its jurisprudence having evolved in isolation from developments elsewhere.”

In fact, until 1891, copying a non-U.S. work was not even a crime in the United States. Then, in 1952, the United States joined the Universal Copyright Convention (UCC), while refusing to participate in the older, more powerful and encompassing 1881 Convention for the Protection of Literary and Artistic Works.

In 1988 Congress finally enacted those basic changes necessary for the United States to accede to the Berne Convention and the United States joined seventy-nine other countries which were signatories of that Convention.

While U.S. domestic copyright law is still out of compliance with Berne on the duration of copyright protection and provides only the most limited protection of authors’ rights, the country now at least can join the rest of the world at the intellectual property table.

Much of the impetus for this move came from U.S. intellectual property owners who desired the broad multinational protection afforded by membership in Berne. Losses to U.S. copyright holders by piracy abroad were estimated by the U.S. International Trade Commission to be $7.2 billion in 1988, up from $1.5 billion only four years earlier.

The twenty-four countries that had ratified Berne but not the UCC and had no bilateral copyright agreements with the United States were under no legal obligation to protect the rights of U.S. copyright holders. Moreover, U.S. efforts to encourage compliance with international copyright agreements by countries such as Thailand, that provided safe havens to copyright pirates, were hindered by the United States’ own refusal to join Berne. In 1988 the U.S. Trade Representative testified before Congress, “it is often hard to convince other countries to provide strong copyright protection when we do not


30. Nimmer, supra note 26, at 211.

belong to the premier international treaty in the area of copyright." In short, if the interests of U.S. creative industries were to be protected, adherence to the global copyright regime reflected in the Berne Convention was essential.

B. Broadcast Regulation

For a recent example of intense U.S. hostility to a multinational informational order that is perceived as threatening U.S. participation in global information markets, consider the U.S. response to the European Commission's EC Council Directive Concerning the Pursuit of Television Broadcasting Activities, adopted by the EC Council of Ministers on October 3, 1989. Under the Directive, in addition to notable provisions protecting minors, regulating advertising and sponsorship, providing for a right of reply, and prohibiting the airing of harmful programming (such as cigarette advertisements), each of the twelve Member States of the EC must ensure that "where practicable and by appropriate means," a majority of broadcast transmission time, excluding time occupied by news, sports, games, advertising and teletext, is reserved for "European works."


34. The Council is composed of the ministers from each of the EC's 12 Member States: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

35. Broadcasting Directive, supra note 33, art. 4. "European works" are defined to include programming originating from Member States or other European states which are party to the Convention, which also meet one of three conditions: (1) they are made by producers "established" in Member States; (2) the production of the works is supervised and actually controlled by producers established in Member States; or (3) a majority of financing for each production is supplied by EC co-producers and the co-production is not controlled by any producer established outside of the EC. Id. at art. 6.

"European works" may also include programming originating from European states that are neither Member States nor adherents to the Convention, but is produced by producers established in Member States or by producers in European countries which will agree to abide by the Treaty of Rome, provided that the production must be "mainly made" with authors and workers residing in European countries. Id.

Programming that meets none of the definitions above can still be considered a European work "to an extent corresponding to the production of the contribution of European co-producers to the total production costs," provided that the production is made "mainly" with authors and works residing in European countries. Id.
The firestorm of protest touched off in the United States by this action made the country’s response only five years earlier to the New World Information Order, which ultimately led to the United States’ withdrawal from UNESCO, look mild. \(^{36}\) Jack Valenti, President of the Motion Picture Association of America, argued that the European restriction “hurls a lance right at the heart of the U.S. industry’s future.” \(^{37}\) Richard Frank, President of Walt Disney Studios, predicted that the broadcasting Directive marks the beginning of a descent “into a new dark age of unending economic warfare.” \(^{38}\)

The U.S. government responded to the European broadcasting Directive with similar agitation. On October 23, 1989, the U.S. House of Representatives unanimously approved a resolution attacking the Directive as “restrictive and discriminatory” and calling on the Bush Administration to take “all appropriate and feasible action” to protect U.S. access to European broadcasting markets. \(^{39}\) Bush Administration Trade Representative Carla

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36. I have written elsewhere that the U.S. response to the Directive is not unlike the response to the New World Information Order. See Fred H. Cate, *The First Amendment and the International “Free Flow” of Information*, 30 VA. J. INT’L L. 401 (1990). When UNESCO’s International Commission for the Study of Communications Problems released its 1980 report, *Many Voices, One World*, calling for greater balance in news reporting and communications resources between the developed and developing worlds, reaction to the proposals throughout the United States was uniformly hostile, often characterizing the issue as being an attempt by “undemocratic governments” to censor the press. *INT’L COMM’N FOR THE STUDY OF COM. PROBS., MANY VOICES, ONE WORLD* (1980). In fact, more than half of the 141 pieces that *The New York Times* ran between 1976 and 1983 dealing with the debate in UNESCO were editorials and columns criticizing the “quiet moves” being made by UNESCO to “curb freedom of the press.” In an editorial entitled “UNESCO as Censor,” the Times referred to UNESCO as “the thought-controllers.” Donna C. Wood, Perspectives on a New World Information Order 33 (1985) (unpublished A.B. thesis, Stanford University). When the Soviet Union in the 1974 UNESCO General Conference introduced a “draft declaration on fundamental principles governing the use of the mass media in strengthening peace and international understanding and in combatting war, racism and apartheid,” the United States delegation walked out of the Conference. *Id.* at 40. The text of the draft declaration was never officially published. In 1976, U.S. Secretary of State Henry Kissinger threatened that the United States would withdraw from UNESCO if the Mass Media Declaration was adopted. Howard Frederick, *UNESCO’s Mass Media Declaration, Ten Years of Accomplishment?*, INTERMEDIA, July-Sept. 1987, at 76. The United States withdrew from UNESCO in December 1984.


Hills issued a statement “deplor[ing]” the EC’s decision as “blatantly protectionist and unjustifiable,” and referring to the European content provision as “an enemy of free trade.” The administration initiated multilateral action under the GATT on December 1, 1989, by entering into the consultative process required under GATT prior to filing a complaint.41

The United States also threatened unilateral action against the EC under Section 301 of the Omnibus Trade and Competition Act of 1988.42 Trade Representative Hills took the first step toward beginning a Section 301 investigation on April 26, 1991, when she placed the EC on a Section 301

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41. *U.S. Enters Into GATT Consultations with EC Over Broadcasting Directive*, U.S. Department of State memorandum. According to Julius Katz, Deputy U.S. Trade Representative, the Administration believes that the Directive violates Article I of GATT, dealing with most-favored-nation status, by according preferential treatment to broadcast programming from “other non-EC members of the Council of Europe.” Hearings, supra note 38, at 9 (statement of Julius Katz). Moreover, the Directive violates Article III’s national treatment provision, “which requires GATT contracting parties to extend to the products of other contracting parties treatment ‘no less favorable’ than that accorded to like products of national origin.” Id. at 11, *quoting GATT*, supra note 7, art. III.

Action under the GATT could take years and the GATT has no independent enforcement authority. GATT recommendations for enforcement must be accepted unanimously by the membership; any European country could therefore veto any proposed enforcement. *See Brian L. Ross, “I Love Lucy: But the European Community Doesn’t: Apparent Protectionism in the European Community’s Broadcast Market*, 16 BROOKLYN J. INT’L L. 529, 543-44 (1990). Moreover, action concerning the broadcasting Directive under GATT is likely to be on the Administration’s back burner at present because of growing controversy between the United States and the EC over other GATT matters, particularly provisions governing agricultural services. *See generally GATT and the Uruguay Round*, U.S. DEP’T ST. DISPATCH, Nov. 19, 1990, at 277. Deputy Trade Representative Katz announced on October 22, 1990, that broadcasting was likely to be excluded from the talks.


Under Section 301, action by the President or the U.S. Trade Representative is required whenever the Trade Representative determines that “the rights of the United States under any trade agreement are being denied,” or when “an act, policy, or practice of a foreign country ... violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or ... is unjustifiable and burdens or restricts United States commerce.” Pub. L. No. 100-418, § 1301(a) (codified at 19 U.S.C. § 2411(a)(1) (1990)); *see generally Ross*, supra note 41, at 546 (citation omitted).

If the Trade Representative makes such a determination, he or she is required to take all “appropriate and feasible action ... to obtain the elimination of such act, policy, or practice,” including, but not limited to, “suspend, withdraw, or prevent the application of, benefits of trade agreement concessions ... impose duties or other import restrictions on the goods of, and notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country ... enter into binding agreements with such foreign country.” Pub. L. No. 100-418, §§ 1301(a)(1)(B)(ii), 1301(c)(1) (codified at 19 U.S.C. §§ 2411(a)(1)(B)(ii), 2411(c)(1) (1990)).
“priority watch list” because of the broadcasting Directive.\textsuperscript{43} If the EC is subsequently designated a “priority foreign country,” the Trade Representative then has thirty days to begin formal negotiations designed to remedy the trade grievance, and six months to determine whether retaliatory action is necessary. In placing the EC on the so-called “watch list”—a largely symbolic measure since the designation invokes no statutory authority or time limits—the Trade Representative noted that the EC had met some, but not all, of the criteria for priority designation. EC officials responded by largely ignoring the designation, saying that the move was “destined for U.S. domestic competition.”\textsuperscript{44}

The U.S. response to the EC broadcasting Directive clearly reflects the importance to the U.S. economy of information-related industries and the importance to those industries of foreign markets. Copyrighted programming of all forms accounted in 1989 for over $173 billion in revenues and over $22 billion in exports.\textsuperscript{45} Compared with imports, exports of U.S. television programming, films, and music generated a trade surplus of $8 billion during 1991.\textsuperscript{46} In short, any multinational regime that threatens to limit the United States’ ability to export programming poses a serious trade issue. Moreover, and perhaps more important, any multinational regime from which the United States is excluded—and particularly a regime, such as the EC, whose members are closely involved with other associations, such as NATO, in which the United States does share an interest—is unlikely to be received warmly by the United States.\textsuperscript{47}

James Buckley, Under Secretary of State for Security, Assistance, Science and Technology during the Reagan Administration, testified in 1982 about the United States’ concern over an earlier multinational regime

\textsuperscript{43} USTR Designates China, India, and Thailand Most Egregious Violators Under Section 301, 8 Int’l Trade Rep. (BNA) 643 (May 1, 1991).

\textsuperscript{44} Quoted in EC Officials Say USTR Section 301 Action “Destined for U.S. Domestic Consumption,” 8 Int’l Trade Rep. (BNA) 646 (May 1, 1991).

\textsuperscript{45} Draft Final Text of the Results of the Uruguay Round of Multinational Trade Negotiations: Hearing before the Subcomm. on Trade of the House Comm. on Way and Means, 102d Cong., 2d Sess. 102 (1922) [hereinafter Uruguay Round] (statement of Eric H. Smith).

\textsuperscript{46} Noreene Janus, Hollywood Meets the NAFTA, BUS. MEXICO, May 1992, at 1.

threatening U.S. information interests: the MacBride Commission’s report on the New World Information Order. “For the United States,” Secretary Buckley said, “communications and information technologies represent a leading edge of U.S. strength. Policy and practice in international communications and information activities must actively enhance the overall well-being of the United States, the lives of its people, and its system of government.”

The EC Directive is seen by critics as posing a similar threat. Exports of U.S. television programming and films to European countries constitute approximately $1.8 billion in revenues to the U.S. television and film industries. Moreover, it is the European resale market for television movies that turns many losers into big money-makers. Secretary Buckley’s lament with regard to the potential economic impact of the New World Information Order that other countries “wish to gain a foothold in an area which represents the wave of the future,” is certainly applicable to the EC broadcast Directive.

As a result, although U.S. information businesses are doing a booming business in Europe—largely aided by the unified markets and more uniform standards—the U.S. government is on record as unalterably opposed to the quota provisions of the Directive. The U.S. government has also

49. Hearings, supra note 38, at 41 (statement of Jack Valenti).
shown its willingness, even enthusiasm, for using trade sanctions as a way of dealing with information-related disputes. In addition to Section 301, multinational commerce in information and communications products and services is subject to a growing array of domestic trade laws. The inherently global qualities of information and its significance for business has arguably not made the United States more pliable, but rather increased its concerns about, and hardened its opposition to, perceived limits on U.S. information products and services.

III. NEW PRESSURES ON UNITED STATES INFORMATION LAW AND POLICY: DATA PROTECTION

The inherently global characteristics of information and its importance to U.S. business interests have forced substantial change in U.S. domestic law in the case of copyright. In the case of broadcasting regulation,

Trans-Atlantic Dialogue on European Broadcasting 1, 1989). A virtual explosion in European broadcasting outlets is expected to increase available air time in EC countries from 250,000 per year to more than 400,000 per year within five years. Harper, supra note 50, at 44. "That means that from the current 80,000 hours a year, foreign broadcasters can look forward to up to 200,000 hours, an increase of 150 percent." Id. Moreover, under the current country-by-country quota system, the penalties for non-compliance have proved severe in some countries. During the summer of 1989, the French Conseil supérieur de l'audiovisuel announced it would fine television stations $10,000 for every hour of programming that exceeded French national broadcasting quotas. They promptly imposed a $6 million fine against the station, La Cinq, for failing to adhere to existing national quotas limiting programming of non-French origin. *Hearings, supra* note 38, at 54 (statement of Richard Frank).


The Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (extended by *The Export Administration Authorization for Fiscal Year 1993-94*, Pub. L. No. 103-10, 107 Stat. 40 (codified at 50 U.S.C. app. § 2401 (1991))), authorizes export controls "(1) [t]o protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand; (2) [t]o further significantly the foreign policy of the United States and to fulfill its international responsibilities; and (3) [t]o exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States." *Export Administration Regulations, 15 C.F.R. §§ 768, 770.1(a)* (1993). The range of "commodities" covered, for example, includes "technical data." 15 C.F.R. § 770.2 (1993).

however, those twin characteristics have combined to strengthen U.S. obduracy. Today, however, a new set of global information issues threatens traditional U.S. jurisprudence and markets, namely the regulation of automated data processing and the protection of personal privacy. It remains to be seen how the Clinton Administration will respond.

While European countries have afforded significant, detailed, practical protection to individual privacy rights, particularly in the context of electronically stored and processed information, the United States affords virtually none. For example, Austria, France, Germany, Ireland, Luxembourg, Sweden and the United Kingdom have broad statutes that provide a general set of privacy rights applicable to both public and private sectors. Soon, under the European Commission’s amended proposal for a Council Directive on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data, all European countries will be required to enact laws protecting personal privacy and prohibiting the transmission of personal information to countries perceived as ignoring privacy concerns, for example, the United States.

Under the still-pending Directive, every EC member state would have to enact laws ensuring, among other things, that personal data—defined broadly by the Directive as “any information relating to an identified or identifiable natural person”—must be accurate, relevant, not excessive and used only for the legitimate purposes for which it was collected. Personal data may be processed (which is defined by the Directive as any operation performed upon the data, whether not automated) only with the consent of the data subject. The collection and processing of data revealing “racial or ethnic origin, political opinions, religious beliefs, philosophical or ethical persuasion . . . [or] concerning health or sexual life”

56. Id. art. 26 (“Member States shall provide that the transfer, whether temporary or permanent, to a third country of personal data which are undergoing processing or which have been collected with a view to processing may take place only if the third country in question ensures an adequate level of protection”). See generally Fred H. Cate, The EC Data Protection Directive and U.S. Business and Law, A.B.A. Sec. Int’l L. & Prac. (forthcoming 1994).
58. Id. art. 6.
59. Id. art. 2(b).
60. Id. art. 7(a).
The data subject must be informed and provided with certain mandatory disclosures if data is to be collected, processed and/or distributed to a third party, and he or she must have access to the data, the opportunity to object to its collection, processing and/or disclosure, and the opportunity to correct any factual errors.

The United States and many other countries have no comparable system of data protection. Although the United States Supreme Court claimed to recognize a constitutional interest “in avoiding disclosure of personal matters” in *Whalen v. Roe*, no Court decision has ever reversed a legislative or administrative action based on that supposed right. Moreover, such a constitutional right—even if vindicated by a court—would apply only against governmental action. Federal statutes addressing private actions touching on personal privacy, although numerous, offer little, if any, effective protection to individuals.

As a result, American businesses with interests in personal data collected, stored or processed in Europe, and particularly American businesses with operations in Europe, fear that they will be unable to move that data legally to the United States, even if they own it. Privacy scholar David Flaherty writes:

The European data protectors view the current situation as an excellent opportunity to put pressure on Canada and the United States for improved data protection. They anticipate blocking the movement of personal data from European branches of multi-nationals to Canadian or American branches, because equivalent data protection does not exist. For various reasons, including nationalistic ones, they are very serious about this . . .

61. *Id.* art. 8.
62. *Id.* arts. 10-12.
63. *Id.* arts. 13-15.
64. 429 U.S. 589, 599 (1977).
The American private sector, accustomed as it is to no government regulation for data protection, is especially exercised about the potential impact of the draft Directive on the data handling activities of American-controlled multinationals and has made predictable approaches for protection to the Department of State and the Office of the International Trade Representative.66

U.S. businesses have good reason to be worried. Already, France, acting under French domestic law,67 has prohibited the French subsidiary of an Italian parent company from transferring data to Italy because Italy did not have an omnibus data protection law.68 The French Commission nationale de l’informatique et des libertés has required that identifying information be removed from patient records before they could be transferred to Belgium,69 Switzerland and the United States.70 Similarly, the first prohibition on transnational data transfer by the British Data Protection Registrar under national law71 forbade a proposed sale of a British mailing list to a United States direct mail organization.72

The threat to U.S. business is quite real and is only exacerbated by the pending EC data Directive’s provision requiring European states to enact laws forbidding the transfer of personal data to countries without adequate legal data protection.73

69. Id. (citing Délibération No. 89-98 du 26 sept. 1989 reprinted in C.N.I.L., 10e Rapport d’activité 35-37 (1990)).
70. Id. at S163 (citing interview with Ariane Mole, Attachée Relations internationales, Direction juridique de la Commission nationale de l’informatique et des libertés, in Paris, France (June 6, 1991)).
72. Reidenberg, supra note 68, at S163 (citing OFFICE OF THE DATA PROTECTION REGISTRAR, SEVENTH ANNUAL REPORT 33-34 (1990)).
This situation, as suggested by the French action against Italy, Belgium, and Switzerland, is further complicated for multinational companies by the diversity of national regulatory structures in place for protecting personal privacy. For U.S. companies such as Citicorp, the nation’s largest bank and operator of the Citicorp Global Information Network in ninety-three countries, the variety of legal standards with which the network must comply threatens the existence of the network and its ability to offer services such as automated currency conversion. A uniform, multinational standard would be of obvious value; the absence of such a standard will stymie innovative activities by multinational companies.

What impact on U.S. domestic law might be expected from the certain passage of the EC data protection Directive and the considerable need for more uniform legal privacy standards? Will the Congress enact, and the President sign, legislation creating protection for personal data more in line with the Directive? Probably not, or at least not as a result, directly or indirectly, of the Directive and other international pressure. On the other hand, will there be political artillery fire and retaliatory trade sanctions against the EC for restricting transborder data flows? There is no UNESCO involved in this situation that the United States can pull out of, as it did when developing countries threatened to restrict news flows in the 1970s and 1980s. Nevertheless, last year’s Clinton Administration response to the EC equipment directives makes the possibility of some tit-for-tat response not altogether unlikely.

The most likely scenario is repetition of a now-common combination of three responses. First, the U.S. government will unleash some harsh political rhetoric. Second, under cover of that rhetoric, U.S. factions will make a great effort to get along. That effort will probably include U.S. business and, to a lesser degree, government, seeking to diplomatically knit together what little sectoral data protection law does exist in the United States into the "adequate" level of protection called for under the data processing Directive. It also probably will include quiet efforts by U.S. businesses in Europe to offer at least token cooperation with European government regulators (for example, by reducing the amount of personal data collected and shipped to the United States). Third, EC enforcement of the restrictive provisions will be lax at best. EC officials, like their U.S. counterparts, will try to get along.

This scenario, of course, poorly serves both the purposes of data protection law and the interests of U.S. business in more uniform, or at least compatible, national data protection regimes. Therefore, as long as national interest in data protection elsewhere keeps up, U.S. businesses may lead, or at least encourage, a longer term effort to work out some international standard for a basic level of data protection.

IV. THE VIEW FORWARD

So what? Other than some innocuous predictions about how the EC and the United States will muddle through yet another trade-based confrontation, what more can an examination of these three episodes of multinational information policymaking offer?

It provides at least one lesson of more transcendent significance. The progression from copyright to broadcasting to data protection marks a technological evolution that poses new and infinitely greater challenges to global and national policymaking. Precisely because of the twin characteristics of information—it is inherently global and it is increasingly essential to global business activities—U.S. hesitancy to embrace a more international order in the face of advancing technology will pose increasingly higher costs for the government, businesses and economy of the United States. It took U.S. lawmakers more than a century to accord even

76. For an excellent analysis of the likelihood of doing so, see Reidenberg, supra note 68, at S167-70.
the most minimal protection to works created by non-U.S. authors. It then
took nearly another century before the United States brought its law even
remotely into compliance with the major multinational copyright order. As
a result of the delay, U.S. works were pirated for many years (in many cases
legally) and U.S. efforts to protect its intellectual property interests were
severely hampered.

Those costs, however, will pale by comparison if the United States is
similarly myopic and slow to address the copyright issues posed by digital
technology, massive data bases, high speed data transmission, and
undetectable visual and auditory image manipulation. Paul Goldstein, Stella
W. and Ira S. Lillick Professor of Law at Stanford Law School, has written
only somewhat facetiously about a "celestial jukebox."77 Rather than own
individual phonorecords, compact discs, cassette tapes, video cassettes, or
even computer software, future generations would simply dial up their
desired programming from a digital master database. The programming
would then be delivered by satellite or optical fiber. As a result, rather than
the high up-front cost and ecologically unsound practice of buying
individual copies of media, each user would pay a far smaller per use fee
to cover the operation of the master database and to pay the creators of the
requested programming.

Professor Goldstein’s fanciful idea is in many ways today near reality,
and our legal structures for recognizing and compensating authors and
producers are light years behind. Currently, U.S. negotiators are arguing
with their European counterparts about whether to apply “national treatment”
or “reciprocity” in the stalled Trade-Related Intellectual Property in Services
talks.78 Great. By the time they work that one out, the basic practice that
posed the issue—distinguishing among the nationality of creators in the
payment of royalties—will be moot.

The same is true for broadcasting. For more than thirty years, the
world’s population—at least for those few who watch television—has
received broadcast television through three incompatible standards. The
1953 NTSC (National Television Standards Committee) standard for color

77. Paul Goldstein, Copyright in the Information Age, STAN. LAW., Fall 1991, at 4, 8.
78. See, e.g., Uruguay Round, supra note 45, at 104 (statement of Eric H. Smith); International
Developments Discussed at Conference, 2 Copyright L. Rep. (CCH) ¶20,703 (Oct. 29-30, 1992) (quoting
U.S. Registrar of Copyrights Ralph Oman: “We may be seeing the beginning of the end of Berne as an
effective International Treaty.”).
television in the United States is incompatible with both the PAL (Phase Alteration Lines) standard used in fifty-eight countries, including most of Western Europe, and SECAM (Sequential Color with Memory), used in France, the Commonwealth of Independent States and twenty-one other countries, including most of Central Europe. As a result, programming and equipment produced in the United States are incompatible with European programming equipment and vice versa.

Now with high definition television ("HDTV") a technological reality, national governments are pursuing conflicting HDTV systems. We once again face the prospect of three different standards—a U.S. standard, a European standard and a Japanese standard—each incompatible with the other.\(^79\)

The United States can ill afford to remain a "copyright island." Although its internal market is large, the country can afford even less to shut itself off from European, Japanese, and other suppliers and purchasers of broadcast equipment, services and programming. But the real danger for the United States is that it may become an "information island," isolated from the rest of the world in the very commodity that is essential to its economy. U.S. lawmakers and policymakers face an urgent challenge to recognize that there is something different about information. Its power, scope, reach, and importance, as both a vital sector of the United States economy and as the essential underpinning of so many other critical sectors, raise the stakes of going it alone. The long-term price of information-related laws that are incompatible with those of other nations and of stonewalling or ignoring multinational information agreements and organizations exceeds any short-term benefits resulting from such policies.

The failure to reach real solutions speedily—to do more than try to get along under a veneer of rhetoric—will impose increasingly higher costs to consumers, to business and to the operation of government. Individual countries, like the United States, must recognize that, because of the global characteristic of information and its centrality to the modern economy, their own self-interest lies in compatible legal regimes, workable international standards, and global cooperation.

\(^79\). Presidents of Sony, Thompson and Zenith Disagree on Approaches to HDTV, COMM. DAILY, July 1, 1991, at 2; Randall M. Sukow, Worldwide Digital, High-Definition Television Transition Plans Outlined in Montreux, BROADCASTING, July 1, 1991, at 52.