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Discussion Following the Remarks of Mr. Peter Robinson and Mr. Hugh Donaghue

Discussion

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Discussion Following the Remarks of Mr. Peter Robinson and Mr. Hugh Donaghue

QUESTION, Professor King: We have got a problem here. We have tried the voluntary approach which has resulted in these guidelines. Or is it the multilateral treaty approach that is preferable? If we go the treaty route do we start with a bilateral treaty approach and then go to a multilateral treaty approach? How do we get this thing off of the ground? You've stated the problem—now what is your solution?

ANSWER, Mr. Robinson: We are not going to get a quick resolution to the whole range of issues that I just discussed. Therefore, anything that can happen bilaterally and multilaterally will help.

One of the things that I would like to see is a discussion on this access question since I think that it is extremely important. A discussion between Canadians and Americans on this one issue would help enormously since we have some specific problems that have arisen in this regard in the Canadian-U.S. context. Also, it would be useful to take these discussions up with the developing countries, as well.

COMMENT, Professor King: The problem is that the developing countries, such as Brazil, have a different approach, even more nationalistic than some of the developed nations. With these developing countries, I think you start from a very low base and try to move up from there.

COMMENT, Mr. Roseman: Going back to the infrastructure question, what you are dealing with is something which is universal to all modern economic activity. It gets into every area of economic activity now and it's constantly expanding; therefore, if you are trying to negotiate in this area, where presently few, if any, rules exist, you risk creating new rules that may lead to restrictions.

In a group of lawyers, you especially see that all kinds of restrictions are possible. An example of this is how the Israeli and U.S. governments are trying to negotiate now on computer services. While the Israelis may not be as great a trading partner to the U.S. as Canada is, they too are running into heavy water, particularly over national security. Constantly you come up against various reasons why you shouldn't or why you can't conclude an agreement. It seems in the end that you are trying to package smoke and it just doesn't work.

ANSWER, Mr. Donaghue: That may well be, but I'll just go back to the initial days when we started with the privacy issue. When the Swedish law or the other laws were developing in Europe, U.S. multinationals went to the U.S. government and said, "My God, look at these

nontariff barriers being set up over there." Why were they setting up these laws?

The Europeans, on the other hand, saw those multinationals out there that were going to store all of this data and were going to misuse it; there were even talks about data havens. Remember the days of pirate radio broadcasts? They conceived that our computers would be sitting on some island out in the ocean processing all types of data and violating the privacy of European citizens. The Europeans had one perception of the issue. We had an entirely different one. Through the OECD and through the seminars and symposiums that we held, we came to understand that there were legitimate social issues involved.

At the same time, the Europeans learned that these multinationals had good policy procedures for privacy in force in their own companies — realizing that people are our best asset.

Another important issue is the right of access. If I am storing my data in another country, and doing so because it is the easiest way to process, or because I am accessing a data base that is in another country, what do I have to do to guarantee future access to that data base? Let's say that I was accessing a data base from some company and all of a sudden they cut me off. I would have some legal recourse if the company was within my country, but probably would not have the same legal recourse if I'm accessing it from outside my country.

QUESTION, Mr. Bradley: I have a question for Mr. Donaghue regarding clarifications on two of the situations that you described. The first situation is the Swedish example; I'm assuming that you were describing that Sweden was trying to control data generated in Sweden?

ANSWER, Mr. Donaghue: That's correct.

QUESTION, Mr. Bradley: Not data generated on Swedes in the U.S., for example?

ANSWER, Mr. Donaghue: No.

QUESTION, Mr. Bradley: Secondly, could you briefly recapitulate what motives you think were related to the International Institution of Applied Systems Analysis (IIASA) situation?

ANSWER, Mr. Donaghue: The IIASA is an East/West think tank started back in the early 1970's when the United States and Soviet Union entered into a period of detente. Canadians, as well as many Americans, are heavily involved in the IIASA. The U.S. withdrew support of it in 1982 as a foreign policy decision. What I objected to was the rationale that was given for that decision: the IIASA's access to Lockheed Dialogue System, a commercially available data base.

As chairman of the advisory committee, I wrote a letter to the U.S. government objecting to that rationale. The response I got was not very satisfactory, but what was worse was when the President of the United States responded to Chancellor Kryevski with that same rationale. That sets a very, very bad precedent. If it were a government data base, such

as Medlars or a similar data base under government control, that rationale would be fine. In this particular case, the Dialogue is made up of many smaller data bases, many of which have been constructed by Europeans who have said that if it were their prerogative, they would have provided access to the databases upon request.

COMMENT, Mr. Bradley: Just to re-enforce what you are saying, I coincidentally happened to be involved in that at the time. We in Canada, both the government and, more particularly, the academic community that was working with IIASA, were similarly distressed. Not only didn't we like the foreign policy decision that was taken, but the kinds of rationales the Administration used to justify that foreign policy decision were, at best, stretching the area. Furthermore, I think many of us would have been much happier if the Administration had just made the decision instead of trying to justify it with either a lot of red herrings or situations that could set a very bad precedent.

COMMENT, Mr. Donaghue: Absolutely correct.

QUESTION, Mr. Hayhurst: I'm sure that most of us believe that there is a copyright in many data bases and you did make the suggestion that perhaps there is no legal recourse if someone accesses a data base from a foreign country. I dare say that if someone does that, and at least reproduces a substantial part of it in a material form, he may be a copyright infringer. Maybe it isn't that he merely shows it on the screen. I'm just interested to know whether you have allowed any intellectual property lawyers into your group or are you going to freeze us all out?

ANSWER, Mr. Donaghue: No, no we would never do that. First of all, access to the data bases is granted through contractual arrangements; you are right, there are many data bases that are copyrighted. The Office of Technology Assessment (OTA) is conducting a study looking at the copyright aspect of certain data bases. The question of what is copyrightable has been raised regarding data bases that are constantly being added to or changed.

Most of the copyrightable data bases that are in use in the United States are ones that, once constructed, remain fixed and then are continually accessed. If the data base is added to or changed, it must be copyrighted again. But we are getting to the point where we have interactive data bases and the question has been raised in the OTA study as to whether or not those are copyrightable.

COMMENT, Mr. Donaghue: I just want to add one further point with regard to copyright. There is a project underway right now where the computer that resides in a publishing firm in London is being used by several authors—a couple in the United States and a couple in Europe—who are using terminals to produce a book which has its entire contents in the computer, not in printed form.

What if some operator, one of these days, is in the publishing firm,

hits the right button, and prints this book which he decides to copyright? Can he? I don't know the answer to this.

There is another very interesting issue with regard to research and development. We are getting to the point now where, in certain kinds of projects, the computer is the residual repository of the research. A computer was used in the development of custom semiconductor chips in the United States not too long ago. The computer was the residual of the actual research that was performed by professors and students working on terminals. What if somebody dumped out the results of that research and used it without the consent of the researchers? I don't know what the answer is, but we are entering into some very fascinating areas of computer law; there will always be a place for lawyers. In fact, there probably will be more work than you want to see.