

# Internet Law: Class 2

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## **Class 2 (Friday, 16 April 2021)**

1. Adjudicatory jurisdiction on the internet
2. Choice of law
3. Recognition and enforcement of foreign judgments
4. Internet domain names
5. Metatags, keywords, and adwords

## Physical Locations on the Internet

- User (recipient, viewer of content)
- Website operator
- Content creator (uploader)
- ISP
  - User connection
  - Website hosting
- Domain name registrar
- Domain name registry
- Computer / device
- Server
- Network (gateways, routers, switches, cables)

## Regulatory/Prescriptive Jurisdiction

## Who Regulates Conduct on the Internet?

- Conduct on the internet v. the functioning of the internet
- Prescriptive jurisdiction (national laws)
  - Conduct occurring in the country's territory
  - Conduct having an effect in the country's territory
  - Conduct by the country's citizens, even if they are abroad

## Territorial Scope of National Laws

- Extraterritoriality of national laws
  - Intentional extraterritorial design
  - The result of localization
  - Indirect extraterritorial effects
- Localization of conduct
  - Ex.: online sale, free on board sale (FOB)
  - Ex.: copyright infringement (*Viewfinder*)

## Principles of Regulation

- Point-of-source principle
  - E.g., EU E-Commerce Directive; EU SatCab Directive
- Point-of-consumption principle
  - Country-of-reception principle
  - E.g., the current U.K. online gambling regulation

## South Dakota v. Wayfair

- U.S. Supreme Court, 2018
- A sales tax imposed in the U.S. state of the consumer (South Dakota)
- Can an out-of-state seller be required to collect and remit the tax for online sales?

## South Dakota v. Wayfair

- A State “may tax exclusively interstate commerce as long as the tax does not create any effect forbidden by the Commerce Clause”

A tax must

- (1) Apply to an activity with a substantial nexus with the taxing State;
- (2) Be fairly apportioned;
- (3) Not discriminate against interstate commerce; and
- (4) be fairly related to the services the State provides.

## South Dakota v. Wayfair

- The “physical presence requirement”
  - From the U.S. Supreme Court’s decisions from 1967 and 1992
  - Mail-order companies with no physical presence in the taxing states
- The Court: “Each year, the physical presence rule becomes further removed from economic reality...”
- The nexus requirement is closely related to the due process requirement
  - Personal jurisdiction – no need of physical presence

## GDPR (General Data Protection Regulation)

- Natural persons – processing of personal data – free movement of personal data (Art. 1.1)
- Territorial scope (Art. 3)
- Transfers on the basis of an adequacy decision (Art. 45)

## GDPR

“Each supervisory authority should be competent on the territory of its own Member State to exercise the powers and to perform the tasks conferred on it in accordance with this Regulation. This should cover in particular the processing in the context of the activities of an establishment of the controller or processor on the territory of its own Member State, the processing of personal data carried out by public authorities or private bodies acting in the public interest, processing affecting data subjects on its territory or processing carried out by a controller or processor not established in the Union when targeting data subjects residing on its territory. ...”

(Recital 122)

## Principles of Regulation

- Point-of-source principle v. point-of-consumption principle
  - Which principle is better from the enforcement point of view?

## Principles of Regulation

- Party autonomy? Can parties choose?

# Adjudicatory Jurisdiction

## Adjudicatory Jurisdiction

- Which court(s) should have jurisdiction over a person/entity?
- How many court(s) should have jurisdiction over a person/entity?
- What should be the territorial scope of claims and remedies?
  - transitory v. non-transitory causes of action
- General jurisdiction
- Specific jurisdiction

## Targeting

- Used in various countries in the context of jurisdictional and/or choice-of-law analyses
  - E.g., *Lucasfilm*, par. 190
- Different factors used
  - Top-level domain
  - Language
  - Phone number
  - Delivery and warranty conditions

## Targeting

- What if no apparent targeting by the defendant?
- Targeting the world v. targeting nowhere?

## UMG RECORDINGS V. KURBANOV

- 4th Cir. 2020 (June 26, 2020)
- No general jurisdiction in VA
- District court: Kurbanov did not take any actions to purposefully avail himself of Virginia, and UMG Recordings' claims did not arise out of forum-related activities.
- 4th Circuit: remanded
  - In the relevant period (11 months) more than ½ million unique visitors to the website from Virginia
  - Any advertising displayed on the websites to Virginia users is directed towards Virginia
  - “Kurbanov facilitates targeted advertising by collecting and selling visitors’ data. While he has outsourced the role of finding advertisers for the websites to brokers, the fact remains that he earns revenues precisely because the advertising is targeted to visitors in Virginia.”
  - Other contacts with Virginia

UMG v. Kurbanov (4 <sup>th</sup> Cir. 2020)	AMA v. Wanat (9 <sup>th</sup> Cir. 2020)
<ul style="list-style-type: none"> <li>• Copyright infringement</li> <li>• Plaintiff in the United States, defendant in Russia</li> <li>• Domain names on .biz, .com – domains administered in Virginia</li> <li>• Domain names registered by GoDaddy (U.S.)</li> <li>• The defendant appointed an agent for “notice and takedown” under the DMCA (U.S.)</li> <li>• Advertisements localized based on user location</li> <li>• Advertisements through agencies in the Ukraine and the United States</li> <li>• Russian courts to decide disputes under the “Terms of Use”</li> <li>• Many users in the United States (the third country), about 500,000 in Virginia</li> </ul>	<ul style="list-style-type: none"> <li>• Copyright infringement, trademark infringement, unfair competition</li> <li>• Plaintiff in the United States, defendant in Poland</li> <li>• Domain names on .com – domain administered in the United States</li> <li>• Domain names registered on the Polish version of GoDaddy</li> <li>• DNS server in the United States</li> <li>• Servers in the Netherlands</li> <li>• Advertisements localized based on user location</li> <li>• Users in the United States (19.21% of all users – the most from any one country)</li> </ul>

# Choice of Law

## Enforcement Jurisdiction

### Lucasfilm v. Ainsworth

- High Court of Justice, Court of Appeal, 2009 (U.K.)
- Enforcement of a U.S. judgment in the United Kingdom
- Ground for jurisdiction of the U.S. court – “long-arm” jurisdiction

## Lucasfilm v. Ainsworth

- Which country's law does the U.K. court apply to analyze whether the U.S. court had jurisdiction? (par. 191)
- Can "sufficient presence" in the U.S. be established through an internet activity? (pars. 188-189)
- "Mere selling of goods from country A into country B does not amount to the presence of the seller in country B." (par. 192)

## Multiplicity Problem & The Practice I

- Potential enforcement difficulties limit the number of jurisdictions in which it is practicable to file a lawsuit
- Even if an action is a transitory cause of action, it might not be strategically advisable and economically feasible to file lawsuits that claim violations of multiple countries' laws
  - Alienation of the judge
  - Lack of or difficult access to evidence in multiple jurisdictions
  - PR impact of a large-scale enforcement campaign

## Multiplicity Problem & The Practice II

- Limitations on personal jurisdiction
- It is unlikely that a plaintiff will sue in multiple countries
- Choice of law issues might be unfamiliar to litigants
- Courts hesitate to adjudicate under multiple countries' laws (e.g., forum non conveniens in the U.S.)
- Remedies under a single country's law might provide sufficient redress

## Internet Domain Names

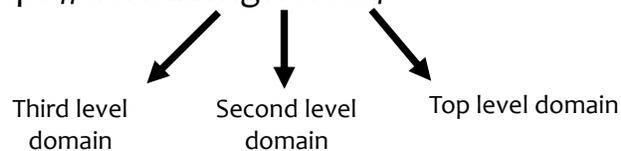
## Establishing a domain name

- ICANN
- Registry
- Registrar
- Considerations in establishing a domain name
  - Top-level domain
    - Generic v. country-level
  - Domain name
    - Trademarks, brands
    - Memorable
- Role of search engines

## Internet Domain Names

- Domain names translate IP addresses into easier-to-remember names
  - <http://www.hcidata.info/hostzip.htm>

- <https://www.law.gwu.edu/>



- Domain names are designated to and maintained by registries
  - <https://www.icann.org/resources/pages/listing-2012-02-25-en>

## Internet Domain Names

- **Top level domains**

- <https://www.icann.org/resources/pages/listing-2012-02-25-en>
- Original seven gTLDs: .com, .edu, .gov, .int, .mil, .net, and .org
- Generic domains
  - .com, .net, .org
- Generic purpose-limited domains
  - .edu, .gov, .mil, .int
- Country-code domains
  - .us, .co, .cm, .de, .fr, .li
- New generic top-level domains
  - .auto, .vegas, .netflix
  - <https://newgtlds.icann.org/en/program-status/delegated-strings>

## Territoriality and Domain Names

- An IP address as an equivalent to a physical address
- Geographical affiliation of domain names with the territory of the domain depends on registry rules

### **Territory-based registration eligibility requirements**

- The requirements are based on factors such as nationality, residence, place of incorporation, place of business, trademark ownership, or other types of association with the territory to which the domain is linked.
  - E.g., .ca (Canada), .dz (Algeria), .eu (European Union), .fr (France), .us (United States)
- Some registries did eventually lift some of their territory-based registration eligibility requirements.
  - E.g., .se (Sweden), .si (Slovenia), .pt (Portugal), .fr (France –partially)
- But new top-level domains have appeared that impose territory-based registration eligibility requirements.
  - E.g., .corsica, .kyoto, .osaka, .paris, .london, .scot

### **.us Nexus Requirements**

- (a) A natural person
- (i) who is a citizen or permanent resident of the United States of America or any of its possessions or territories, or
  - (ii) whose primary place of domicile is in the United States of America or any of its possessions, or
- (b) an entity or organization that is
- (i) incorporated within one of the fifty (50) U.S. states, the District of Columbia, or any of the United States possessions or territories or
  - (ii) organized or otherwise constituted under the laws of a state of the United States of America, the District of Columbia or nay of its possessions or territories, or
- (c) an entity or organization (including a federal, state, or local government of the United States or a political subdivision thereof) that has a bona fide presence in the United States. You further represent and warrant that the name servers you have listed are located within the United States.

## .paris Registration Requirements

“To register and renew a .paris domain name, You must be an individual or corporate entity with a bona fide presence in the Greater area of Paris at the time of registration and thereafter.

In practice, You must be able to demonstrate either:

- a. That You are a resident in the Greater area of Paris, or
- b. That You pursue occupational, personal, business or cultural activities in the Greater area of Paris, or
- c. That You are directly or indirectly attached to the Greater area of Paris.”

.paris Registration Policy, <http://bienvenue.paris/wp-content/uploads/2014/09/Registration-Policies-Paris-20150115-n-force-on-20-April-2015.pdf>

## Territoriality and Domain Names

- **.cc, .tv**
  - Examples of unrestricted country-code domains
- **.vegas**
  - “Anyone, any where in the world, is qualified and eligible to register a .Vegas Domain Name. There are no nexus requirements associated with domain name registrations.”

## Protection of Words and Short Phrases

- A domain name may be up to 256 characters long.
- But some registries limit domain names to 63 characters.
- Some registries have set a minimum number of characters for a domain name.

## Protection of Words and Short Phrases

- Copyright (generally no protection for short phrases and individual words)
- Trademarks / service marks
  - Registered v. common-law marks
  - Tied to particular goods or services v. famous marks (dilution)
  - Territorial v. well-known marks
- Designation of origin (geographical indications, appellations of origin)
  - Sui generis protection v. unfair competition
- Protection of entity names
- Protection of personal names

## **ICANN Uniform Domain-Name Dispute-Resolution Policy**

- What is the nature of the Policy?
- Who are the parties bound by the Policy?
- Disputes:
  - (1) The domain name “is identical or confusingly similar to a trademark or service mark in which the complainant has rights;” and
  - (2) The Registrant has “no rights or legitimate interests in respect of the domain name;” and
  - (3) The Registrant’s “domain name has been registered and is being used in bad faith.”

## **ICANN Uniform Domain-Name Dispute-Resolution Policy**

- Registrant’s “rights and legitimate interests”
- Registrant’s registration and use in bad faith

## ICANN Uniform Domain-Name Dispute-Resolution Policy

- Some registries have adopted the ICANN Policy as is
- Some registries have modified the ICANN Policy
  - Example:
  - **.ie**
    - Instead of “a trademark or service mark” the .ie Policy lists “a **protected identifier**,” which may be
      - “Trade and service marks protected in the island of Ireland.
      - Personal names (including pseudonyms) in which the Complainant has acquired a reputation in the island of Ireland.
      - Geographical indications that can prima facie be protected in the island of Ireland.”

.ie Dispute Resolution Policy, <https://www.iedr.ie/dispute-resolution/>

## ICANN Approved Providers for Uniform Domain-Name Dispute-Resolution Policy

- Arab Center for Domain Name Dispute Resolution (ACDR)
- Asian Domain Name Dispute Resolution Centre
- Canadian International Internet Dispute Resolution Centre (CIIDRC)
- The Czech Arbitration Court Arbitration Center for Internet Disputes
- The National Arbitration Forum (U.S.)
- WIPO (Geneva)

<https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>

## ICANN Uniform Domain-Name Dispute-Resolution Policy

- **Remedies**
  - Cancellation of the domain name
  - Transfer of the domain name
- **v. Uniform Rapid Suspension System**
  - “a lower-cost, faster path to relief for rights holders experiencing the most clear-cut cases of infringement”
    - <https://newgtlds.icann.org/en/applicants/urs>
  - Only three providers
  - The only remedy = a temporary suspension of a domain name

## ICANN Dispute Resolution v. Court Proceedings

- “Availability of Court Proceedings” under the ICANN Policy
- **U.S. provisions**
  - The Anti-cybersquatting Consumer Protection Act, 15 USC 1125(d) (1999)
    - <https://www.law.cornell.edu/uscode/text/15/1125>
  - The Reverse Domain Name Hijacking provision, 15 U.S.C. §1114(2)(D)(v)
    - <https://www.law.cornell.edu/uscode/text/15/1114>

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