

Internet Law: Class 3

**Regulatory, Prescriptive, and Adjudicatory Jurisdiction,
Alternative Regulation and ADR, Domain Names**

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

Poll 1

Which country should regulate (and collect) the sales tax (VAT)?

(Select one.)

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

- Collecting the tax from consumers is cumbersome and ineffective
- South Dakota has no state income tax

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

South Dakota v. Wayfair

- Administrative costs of compliance for the seller
 - Unrelated to whether the seller has a physical presence in the state
- Otherwise disadvantaging local businesses and interstate businesses with local presence compared to remote sellers
 - The physical presence requirement creates an incentive to avoid physical presence in the state
- “The physical presence rule ... has limited States’ ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.”

Poll 2

Which country should regulate online gambling?

(Select one.)

Gibraltar v. U.K.

- Gambling Act 2005 – point-of-source (place-of-supply) principle for non-U.K. operators licensed in selected jurisdictions
- Gambling (Licensing and Advertising) Act 2014 (U.K.) – point-of-consumption principle for all operators

Gibraltar v. U.K.

- Gambling (Licensing and Advertising) Act 2014 (U.K.) – point-of-consumption principle for all operators
- Localization of “facilities for gambling”
- Prescriptive jurisdiction “even if the operator has no intention of targeting British customers but is not able effectively to block such customers accessing its services”

Gibraltar v. U.K.

- Gibraltar Betting & Gaming Association Ltd v. The Secretary of State for Culture, Media & Sport, High Court of Justice, [2014] EWHC 3236 (Admin), October 10, 2014
- Limitation on the freedom to provide services within the European Union (Article 56 TFEU)
- Acceptable grounds of justification (Article 52 TFEU)
- Inadmissibility of economic grounds of justification

Gibraltar v. U.K.

- The Gibraltar Betting and Gaming Association Limited v. Commissioners for Her Majesty's Revenue and Customs Her Majesty's Treasury, Court of Justice of the European Union, C-591/15, Opinion of Advocate General Szpunar, January 19, 2017
- “Gibraltar and the UK are to be treated as one entity”
- Taxation based on the point of consumption

Poll 3

Which country should regulate copyright infringement?

(Select one.)

Poll 4

Which country should regulate limitations on (free) speech?

(Select one.)

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)

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

Pinckney v. KDG Mediatech

- Mr. Pinckney's copyright
- Jurisdiction under the EU Brussels I Regulation
 - “the place where the harmful event occurred or may occur”
- Possible places of harm:
 - Everywhere where content is made available online
 - Austria (place where the CDs were pressed and where Mediatech is domiciled)
 - U.K. (place of the marketers)
 - France (Mr. Pinckney's country of residence)
 - France (place where Mr. Pinckney purchased the records)

Pinckney v. KDG Mediatech

- EU Brussels I Regulation, Art. 5(3)
- “place where the harmful event occurred or may occur”
- “both the place of the damage occurred and the place of the event giving rise to it”
- France (Mr. Pinckney’s country of residence) as “the place where the alleged damage occurred?” (par. 29)
- Previous CJEU decisions: (par. 31)
 - *eDate* – personality rights (par. 36)
 - *Wintersteiger* – industrial property rights (trademark) (par. 37)

Pinckney v. KDG Mediatech

- Copyright not like personality rights
- No general jurisdiction for copyright infringement in the place of domicile of the copyright owner
- No targeting (“directing to”) required for specific jurisdiction under Article 5(3) of the EU Brussels I Regulation
- Accessibility might be enough to establish specific jurisdiction (par. 44)

Targeting

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

Triple Up v. Youku Tudou

- U.S. District Court for the District of Columbia, 2017
- The plaintiff from Seychelles, the defendant from China

Triple Up v. Youku Tudou

- Content viewable in the United States
- Causes of action under
 - U.S. Copyright Act,
 - Lanham Act (false designation of origin, unfair competition), and
 - D.C. common law (unfair competition)
- Youku moved to dismiss for lack of personal jurisdiction

Triple Up v. Youku Tudou

- Youku in China
- Website in Chinese
- Geoblocking for own content
- No subscribers from D.C.
- Website accessible in the U.S.
- Less than 1% of views from the U.S.
- No geoblocking for users' content
- Youku stock traded on the NYSE
- Youku's collaboration with a U.S. software firm
- Youku's agreements with U.S. production studios

Triple Up v. Youku Tudou

- Due Process requirements
 - “[S]ufficient contacts with the United States as a whole ... such that it should reasonably have anticipated being haled into court here.”
- “[M]ere accessibility of the defendants’ websites in the forum cannot by itself establish the necessary minimum contacts.”

Triple Up v. Youku Tudou

- Jurisdictional significance of
 - The use of geoblocking
 - Third-party localized advertising
 - Interactivity of Youku's website

Poll 6

Given the increasing use of geolocation and geoblocking, should a lack of geoblocking equal to “purposeful availment” or targeting for the purposes of analyses of personal jurisdiction and applicable law?

(Select one.)

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

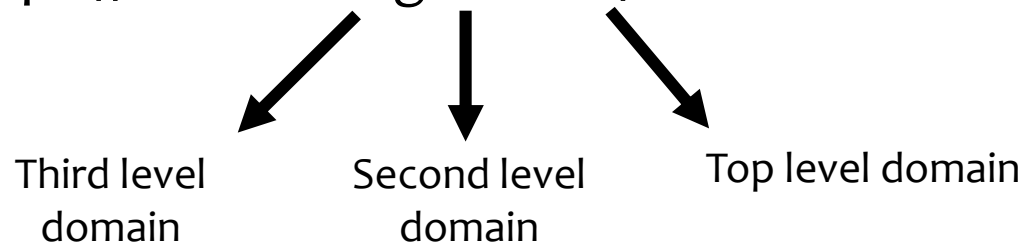
Establishing a domain name

- 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 any 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.”

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

Shared Domain Names

<http://www.scrabble.com/>

Shared Domain Names

<http://www.playtex.com/>

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

- Examples:
 - trimble.com
 - Marketa Trimble = registrant (a personal blog)
 - Trimble company = complainant
 - munichGW2016.com
 - Marketa Trimble = registrant (a course website)
 - The City of Munich = complainant 1
 - The George Washington University = complainant 2

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>

Barcelona.com v. Barcelona

- Why did the City want barcelona.com?
- Why didn't the City obtain barcelona.es or barcelona.eu at the time of the dispute?
- ICANN UDRP proceeding outcome
- Lawsuit in the U.S.
- Jurisdiction of the U.S. court over the City of Barcelona
- The reverse domain name hijacking provision
- Legality of the domain name registration under the Lanham Act, 15 USC 1125(d)
- Which law governs whether a trademark exists or not?
 - Spanish law v. U.S. law v. the law of the dispute resolution provider v. the law of the registry?

.CAT Registry Agreement, Specification 12

“The TLD will be established to serve the needs of the Catalan Linguistic and Cultural Community on the Internet (the "Community"). The Community consists of those who use the Catalan language for their online communications, and/or promote the different aspects of Catalan culture online, and/or want to specifically address their online communications to that Community.”

Examples:

- “Universities, schools, research institutions and other academic entities that use Catalan in their academic activities or teach/promote aspects of Catalan culture
- public or private entities whose aim is promoting the Catalan culture ...
- media using the Catalan language for their communications
- individuals, groups, businesses, organizations, entities or initiatives, however constituted, carrying online communications in Catalan ...”

Choice of law was always present in UDRP cases, to some extent.

- Disagreements exist among UDRP panelists about the role, if any, that **national law** should play in UDRP cases.
- National law is applied to determine the **existence, validity, and ownership of trademarks**.
 - Barcelona.com showed that choice of law does matter in UDRP cases.
- Some panels have applied national law to determine **other issues** in UDRP cases.
 - E.g., non-commercial fair uses of trademarks.
- The **methods** through which UDRP panels select applicable national law have varied.

- The registries for some top-level domains have adapted the text of the UDRP or have adopted a different dispute resolution policy to give **preference to national or local rights**.
 - Listing preferred national rights
 - E.g., .br (Brazil), .eu (European Union), .ie (Ireland), .se (Sweden)
 - Listing applicable law
 - E.g., .de (Germany), .dk (Denmark), .eu (European Union)

Internet Law: Class 3

Marketa Trimble, 22 May 2020