

Internet Law: Class 2

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INTERNET LAW IN MIPLC | PROFESSOR
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"Internet Law"

11 - 18 July 2022

Class Slides



This course covers a variety of internet law topics while addressing a theme that is arguably emerging as the major theme of the decade for internet law: the role that internet service providers (such as access providers, search engines, and social media) are playing in shaping speech, norms, and the society. In its commercial beginnings, the internet was a space for a limited group of expert users; later, the internet became an alternative to other media and commercial spaces. Lately, and even more so during the Covid-19 pandemic, the internet has become the primary space for human endeavors and interactions. The role of ISPs has developed and has grown commensurately with this development, but the law has not kept up with the increase in the ISPs' role. The course will discuss topics such as

<http://internetlawinmiplc.com/>

Class 2 (Wednesday, 13 July 2022)

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

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Adjudicatory Jurisdiction

22. GOVERNING LAW; JURISDICTION.

The validity and effect of this Agreement and any disputes hereunder shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania, United States of America, without reference to rules governing choice of laws. Both parties irrevocably consent to the exclusive subject matter jurisdiction, personal jurisdiction and venue of the courts of the Commonwealth of Pennsylvania, Allegheny County and the United States District Court of the Western District of Pennsylvania, for all disputes regarding any duties, obligations or rights under or arising out of this Agreement.

<https://www.paireddomains.com/agreement.html?from=pairnic>, 20 May 2020

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

- A continuing lack of clarity in the United States concerning the law of personal jurisdiction as it applies in Internet-related cases
- **General jurisdiction**
 - Significantly limited by recent U.S. Supreme Court decisions
- **Specific jurisdiction**
 - The dispute must “arise out of or [be] connected with the activities within the [forum] state.” *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)
 - Courts must not “impermissibly allow a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis.” *Walden v. Fiore*, 571 U.S. 277, 279 (2014)

SPECIFIC JURISDICTION IN THE U.S. 9TH CIRCUIT

- (1) The non-resident defendant must **purposefully direct** his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he **purposefully avails** himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
 - (2) The **claim must be one which arises out of or relates to** the defendant's forum-related activities; and
 - (3) The exercise of jurisdiction must comport with **fair play and substantial justice**, i.e. it must be reasonable.
- Boschetto*, 539 F.3d at 1016
- Reasonableness factors:
 - 1) burden on D
 - 2) forum state’s interest in adjudicating the dispute
 - 3) P’s interest in obtaining convenient and effective relief
 - 4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies
 - 5) the shared interest of the several states in furthering fundamental substantive social policies

The Zippo sliding-scale test

- Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997)

“If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. ...

A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction....

The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”

Targeting

- Used in various countries in the context of jurisdictional and/or choice-of-law analyses
- Different factors
 - 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
- No jurisdiction over the Chinese defendant

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

<p>UMG v. Kurbanov (4th Cir. 2020)</p> <ul style="list-style-type: none"> • Copyright infringement • Plaintiff in the United States, defendant in Russia • Domain names on .biz, .com – domains administered in Virginia • Domain names registered by GoDaddy (U.S.) • The defendant appointed an agent for “notice and takedown” under the DMCA (U.S.) • Advertisements localized based on user location • Advertisements through agencies in the Ukraine and the United States • Russian courts to decide disputes under the “Terms of Use” • Many users in the United States (the third country), about 500,000 in Virginia <p>Jurisdiction found in the case</p>	<p>AMA v. Wanat (9th Cir. 2020)</p> <ul style="list-style-type: none"> • Copyright infringement, trademark infringement, unfair competition • Plaintiff in the United States, defendant in Poland • Domain names on .com – domain administered in the United States • Domain names registered on the Polish version of GoDaddy • DNS server in the United States • Servers in the Netherlands • Advertisements localized based on user location • Users in the United States (19.21% of all users – the most from any one country) <p>No jurisdiction found in the case</p>
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WALDEN V. FIORE

- 571 U.S. 277, 288 (2014)
- The Court warned in the decision against courts “impermissibly allow[ing] a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis...”

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

- CJEU, C-170/12, 2013
- 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)

SERVER LOCATION

MacDermid v. Deiter (2d Cir. 2012)

- Trade secrets & unauthorized access to a computer system
- P: US
D: Canada
- Server in Connecticut; D’s computers in Canada
- Connecticut long-arm statute
- D’s knowledge of the server location ?

Choice of Law

Targeting in choice of law in the EU

- L'Oréal SA v. eBay Int'l AG, C-324/09, 2011
 - Trademarks
- Football Dataco Ltd. v. Sportradar GmbH, C-173/11, 2012
 - Databases

McBee v. Delica Co., Ltd.

- 417 F.3d 107, 116 (1st Cir. 2005)
- The language of the website
- The manner in which the website was listed in search engine results, and
- There was no actual confusion by users when visiting the website

RJR Nabisco, Inc. v. European Community

- 136 S. Ct. 2090 (2016)
- The place of the “conduct relevant to [a] statute’s focus” will determine whether cases involve a permissible extraterritorial application of the statute in situations where the reach of the statute is not considered to be extraterritorial.
- If the conduct occurs in the United States, the statute applies.

Questions about Targeting Factors

- Top-level domain
 - .tv, .cc
 - No geographical ties to many ccTLDs, geoTLD
- Language
 - English as a universal language?
 - Automated translation
- Phone number
 - Uses of chats, VoIP
- Delivery and warranty conditions
 - Digital online delivery, incl. 3D printing
- Third-party activities
 - Use of advertising by platforms

Targeting

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

Enforcement Jurisdiction

Yahoo!, Inc. v. La Ligue Contre Le Racisme et
L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006)

Sarl Louis Feraud Intl. v. Viewfinder, Inc., 489 F.3d 474
(2nd Cir. 2007)

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

Intermediaries

- Choice of law in cases of primary liability v. secondary liability of intermediaries
- Enforcement against non-parties
 - Google v. Equustek

Internet Domain Names

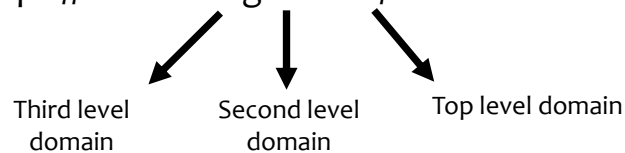
Establishing a Domain Name

- 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/host2ip.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

- 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

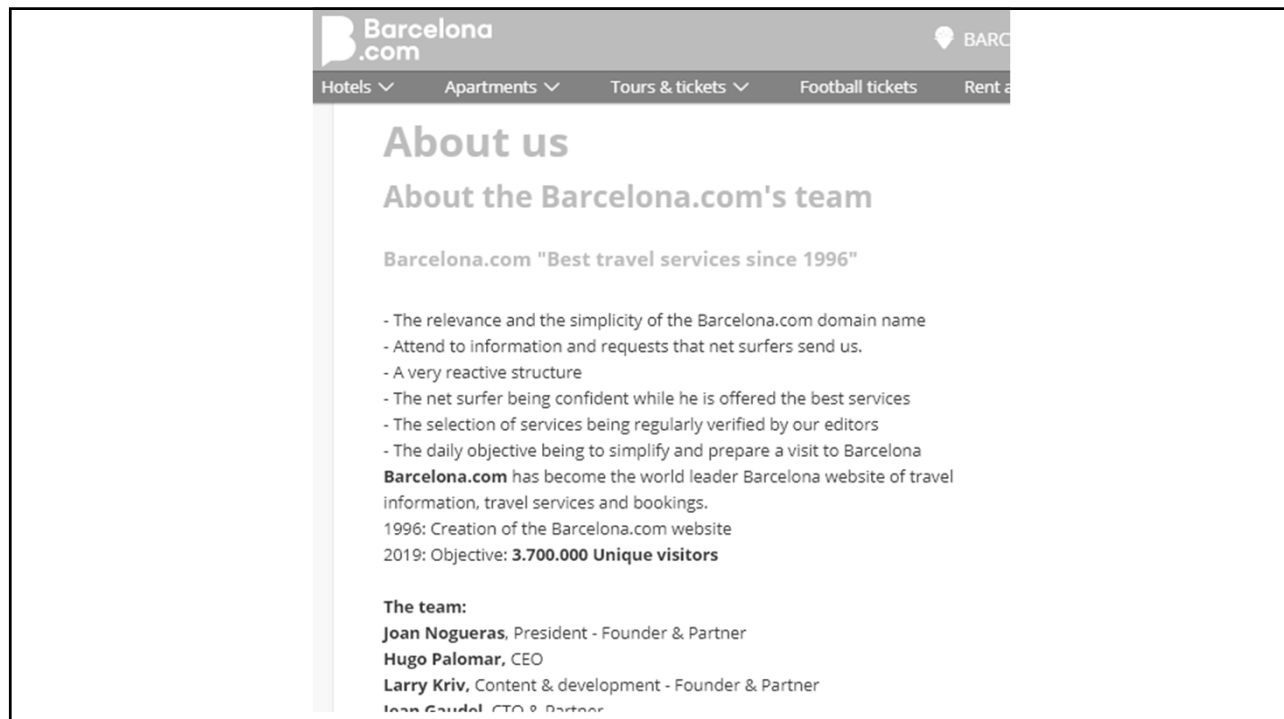
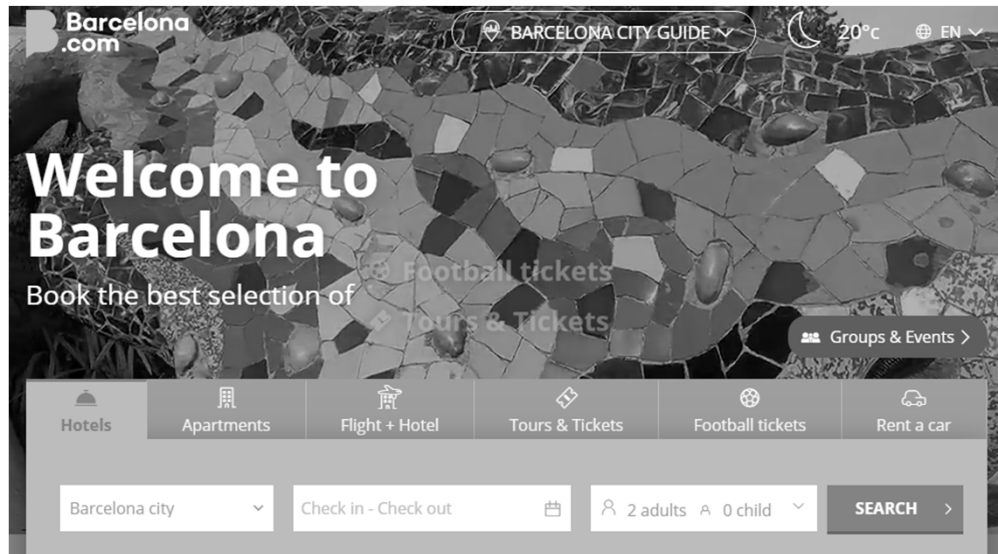
- **Remedies**
 - Cancellation of the domain name
 - Transfer of the domain name
- **v. Uniform Rapid Suspension System**
 - “a lower-cost, faster path to relief for rights holders experiencing the most clear-cut cases of infringement”
<https://newgtlds.icann.org/en/applicants/urs>
 - Only three providers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

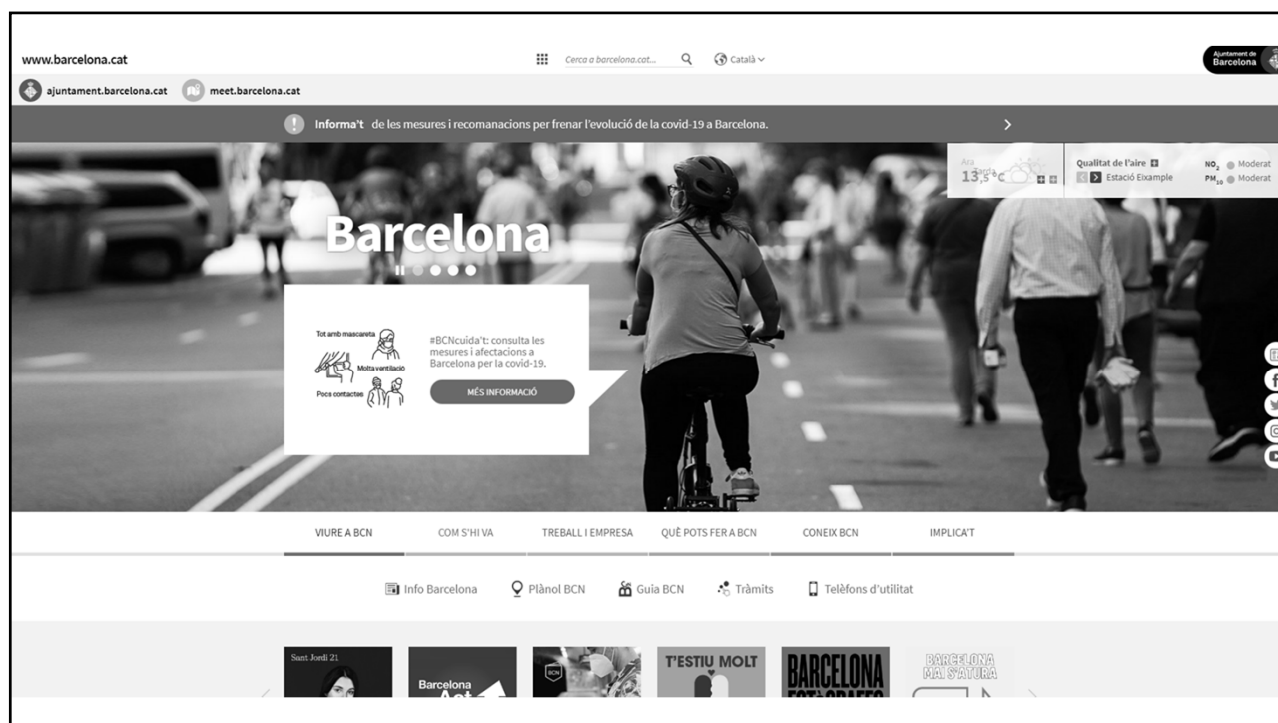
ICANN Dispute Resolution v. Court Proceedings

- “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.

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- 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)

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Trademarks on the Internet

- Domain names
- Webpages
- Metatags
- Keywords
- Adwords

Trademarks on the Internet

- | | |
|----------------|-------------------------------|
| • Domain names | • Use in commerce? |
| • Webpages | • Consumer confusion? |
| • Metatags | • Initial consumer confusion? |
| • Keywords | • Dilution? |
| • Adwords | |

Internet Law: Class 2

Professor Marketa Trimble