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Jurisdictional issues and the internet – a brief overview 2.0

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ABSTRACT

Issues of Internet jurisdiction remain a key challenge for the application of law to the online environment. Despite of a large volume of academic writings on the topic, these issues continue to be perceived as complex and inaccessible. This article aims to provide an accessible introduction to private international law as it applies to the Internet. As such, it is hoped that it may be a useful resource for courses in IT law, Internet law, e-commerce law or the like, as well as for anyone looking to refresh their understanding of exactly what it is that people are struggling with in the field we may call Internet jurisdiction.

1. Introduction

Imagine a state proclaiming that it will claim jurisdiction[1] over, and apply its laws to, any website that can be accessed from a computer located in its territory. The response would perhaps be outrage from some. Others would point to the ineffective nature of such a rule, and yet others would perhaps view the model as infeasible. Indeed, when the Attorney General's office of Minnesota in the mid-1990 s issued a statement that '*[p]ersons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws*',[2] it was met with strong criticism.[3]

Against this background, persons unfamiliar with private international law might be surprised to find that many, not to say most, states' private international law rules do in fact provide for jurisdictional and legislative claims over any website that can be accessed in its territory, in relation to a wide range of legal matters. This is as true today as it was in 2003 when I first made this claim.

There is now a steady flow of journal articles, books and book chapters dealing with what broadly may be termed Internet jurisdiction. This is helpful, indeed necessary, as much remains to be worked out on this complex topic. In fact, despite the amount of attention directed at Internet jurisdiction these days, it may be fair to say that our rate of progress is painfully slow.

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[1] The term 'jurisdiction' can have two different meanings. It can refer to the court's authority to hear a particular dispute, or to a particular law area. In this paper it will, however, only be used in the former meaning.

[2] Memorandum of Minnesota Attorney General as found in: Bernadette Jew, 'Cyber Jurisdiction – Emerging Issues & Conflict of Law when Overseas Courts Challenge your Web' (1998) Computers & Law 23.

[3] See e.g. ibid and Darrel Menthe, 'Jurisdiction in Cyberspace: A Theory of International Spaces' (1998) 4(69) Mich Telecom and Tech LR.

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At any rate, one consequence of the flow of publications on Internet jurisdiction is that one cannot expect to get the opportunity to publish works that merely introduce the topic; after all, such works will, by necessity, fail to add to current knowledge.

However, I sometimes have the feeling that what we need are, at least a few, publications going 'back to basics' ; in a sense 'jurisdiction for dummies' . And I think this applies more broadly in the information technology law field. We are too often faced with a wealth of advanced materials without the necessary means easily to understand the basics.

I am writing this contribution with the aim to fill this gap as far as Internet jurisdiction is concerned. I hope that this article will be useful for those who teach courses in IT law, Internet law, e-commerce law or the like, who are looking to provide their students with an accessible overview of the relevant jurisdictional issues. However, perhaps the article can also be useful more broadly. I hope it may be useful, for example, for anyone looking to refresh their understanding of exactly what it is that people are struggling with in the field we may call Internet jurisdiction. At any rate, readers well versed in the intricacies of Internet jurisdiction need not concern themselves with reading this particular article.[4]

In writing this article, I draw upon a paper I published in 2003[5] – some 15 years ago – with exactly the same purpose. This approach was chosen neither out of laziness nor out of some mistaken belief that time has stood still. Rather, by making reference to the state of affairs in 2003, I hope to be able to show more clearly what progress has been made and to highlight where we stand today.

In the text below, I go through the components of private international law (or as the discipline is referred to in Common Law systems: conflict of laws) and describe how they work in the Internet context. I refer to a number of key cases from around the world, and I highlight the difficulties we have encountered, and continue to encounter. However, first of all, given that this is a special occasion, I want to start by saying a few words about what this exceptional journal – *Computer Law & Security Review* – has meant for me.

2. What CLSR means to me

I started writing about jurisdictional issues and the Internet in 2000 when I undertook a Master of Law at the University of New South Wales, in Sydney Australia. One of my strongest memories from that period is spending time in the library and being unable to find *any* materials at all dealing with Internet jurisdiction. While there were only a few articles published on the topic back then, the reason for my research failures in the library was found in the fact that I, literally, could not even spell 'jurisdiction' (apparently there is nothing called "juristriction")! For good reasons, I have kept this story from my past a secret until now.

In 2001, I enrolled into the doctoral program and started working full time with my thesis on private international law and the Internet. And with the kind support of my supervisors, after a couple of months, I – for the very first time – had the pleasure of completing an article, submitting it to a journal and getting the both surprising and overwhelmingly joyful response that the article was accepted. The article was titled 'What should Article 7 – Consumer contracts, of the proposed Hague Convention, aim to accomplish in relation to e-commerce?' [6] and addressed the consumer protection provision of the, then proposed, *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* which has now re-emerged in a new version.[7] The journal for which it was accepted was CLSR (which then stood for *Computer Law & Security Report*), and the kind and supportive editor was Professor Stephen Saxby. I remain forever grateful for him having given me the chance to publish in his excellent journal, and for the confidence that happy experience gave me.

Since this occurrence in 2001, CLSR has remained one of my favourite journals, and I have sought to contribute one article roughly every year; this one being my 17th. However, this habit is by no means only sparked by loyalty. I have always found that articles published in CLSR reach a broad and diverse audience, and indeed, my most cited article – by far – 'Privacy and consumer risks in cloud computing' [8] (233 citations as of 4 May 2018 according to Google Scholar) was published in CLSR. Some would say that the reason that this is my most cited article is that it was co-authored by Dr Roger Clarke (another long-time supporter of CLSR). However, admitting that would provide my dear co-author with far too much satisfaction, so I will steadfastly deny any such suggestions.

3. General observations about internet jurisdiction

As mentioned, this article examines the issues associated with the application of private international law to online activities. In doing so, the four interconnected elements of private international law: jurisdiction, choice of law, the courts' option of declining jurisdiction, and recognition and enforcement will be examined.[9] Examples and experiences will pri-

[4] For such readers, there is a wealth of materials published on an almost daily basis, but I would like to take this opportunity to engage in some shameless self-promotion and direct attention to Dan Svantesson, *Solving the Internet Jurisdiction Puzzle* (OUP 2017).

[5] Dan Svantesson, 'Jurisdictional Issues and the Internet – A Brief Overview, Cyberspace 2003: Normative Framework' (October 2003) Brno Czech Rep. I also draw from and expand upon research presented in Dan Svantesson, *Private International Law and the Internet* (3rd edn, Kluwer Law International 2016) and in Svantesson, *Solving the Internet Jurisdiction Puzzle* (n 5).

[6] Dan Svantesson, 'What should Article 7 – Consumer contracts, of the proposed Hague Convention, aim to accomplish in relation to e-commerce?' (2001) 17(5) Computer L & Sec Rep 318-25.

[7] See further The Hague, 'The Judgments Project' <https://www.hcch.net/en/projects/legislative-projects/judgments> accessed 31 March 2018.

[8] Dan Svantesson and Roger Clarke, 'Privacy and consumer risks in cloud computing' (July 2010) 26(4) Computer L & Sec Rev 391-397.

[9] Tradition would have us recognise three categories only. However, in my view, we do well to recognise the courts' option of declining jurisdiction as something separate to the question of when a court may claim jurisdiction. See further Svantesson, *Private International Law and the Internet* (n 6) at 16-17.

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