1-1-2004

An introduction to jurisdictional issues in cyberspace

Dan Jerker B. Svantesson
Bond University, dan_svantesson@bond.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/law_pubs
Part of the Conflict of Laws Commons, and the Internet Law Commons

Recommended Citation

An Introduction to Jurisdictional Issues in Cyberspace

DAN SVANTESSON**

Abstract

Imagine a state proclaiming that it will claim jurisdiction 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 Advocate-General's office of Minnesota in the mid 90's issued a statement that: 'persons 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', it was met with strong criticism. Against this background, persons unfamiliar with private international law (or as the discipline is referred to in common law systems, conflict of laws) might be surprised to find that many, not to say most, states' private international law rules do in fact provide for jurisdictional claims over any website that can be accessed in its territory, in relation to a wide range of legal matters. Similarly,

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 article it will, however, only be used in the former meaning.


** This article is based on a paper titled 'Jurisdictional Issues and the Internet - A Brief Overview', which was published as part of the collection of lectures from the Cyberspace 2003: Normative Framework conference held in Brno (Czech Rep., October 2003).

Dr Dan Jerker B. Svantesson is an Assistant Professor at the Faculty of Law, Bond University, and a Research Associate of the Baker & McKenzie Cyberspace Law and Policy Centre. Further, Dan is the contributing editor for the "Jurisdictional Issues" pages of www.worldlii.org, and the National Convener for the International Law Interest Group of the Australasian Law Teachers Association.
many, not to say most, states’ private international law rules do provide for the court to apply the law of the state where the court is located in many situations where jurisdiction is being exercised over a foreign website.

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 are examined. Examples and experiences are primarily drawn from Australia, and particular focus is placed on the Internet defamation dispute between US publishing giant, Dow Jones & Company Inc, and Victorian businessman, Joseph Gutnick. However, non-Australian materials, particularly from the European Union (i.e. community instruments), the People’s Republic of China and the United States of America, are relied upon.

1. Private International Law

The first thing to note, in relation to private international law, is that each state makes its own private international law rules (i.e. the private international law rules are part of the domestic law of each state). However, as is exemplified in the European Union’s Brussels Regulation 44/2001, states are free to enter into international arrangements regarding their private international law rules. Further, it is to be noted that the private international law rules are part of the states’ procedural rules (i.e. the laws regulating procedural issues such as the manner in which the court should act), as contrasted to the states’ substantive laws like contract laws, defamation laws or intellectual property laws. While courts may apply foreign substantive laws, they will ordinarily only apply their own procedural rules. Finally, it is important to be aware of the distinction between civil matters (i.e. matters relating to the interaction of, and relationship between, individuals, businesses and organisations) and criminal matters (i.e. matters relating to the laws

4 While state legislation varies within Australia, the regulations of concern in this article are similar in most States. However, the Australian examples used will be drawn from the State of Victoria.


6 ‘The branch of the law which creates, defines, and regulates people’s rights, duties, powers, and liabilities’ Peter Nygh and Peter Butt, Butterworths Concise Australian Legal Dictionary (Sydney, Butterworths, 1998).

7 Typical civil matters include contractual disputes, defamation disputes and intellectual property disputes.
regulating what acts are punishable as crimes). While jurisdictional issues arise in both civil and criminal contexts, private international law rules are only applicable in civil matters.

2. The Gutnick Case

Dow Jones published an article titled 'Unholy Gains' in its business journal *Barron's Magazine* in October 2000. The article implied, amongst other things, that Mr Gutnick had laundered money through the jailed Victorian money launderer Nachum Goldberg. The relevant copy of *Barron's Magazine* sold approximately 300,000 copies. Of these only a very small number came to Australia, but some of them were in fact sold in Victoria. The article was also available on Dow Jones' website, www.wsj.com. The site is essentially a fee-based subscription-service. However, Dow Jones tried to downplay this by making reference to the fact that anybody could access the material on the site through a trial subscription. Out of approximately 550,000 people subscribing to the Internet version of the magazine it was estimated that 1,700 paid for the service using Australian-issued credit cards. No exact number of readers could be established for either the paper or the online edition, but it was suggested that important Victorian business people had in fact read the article. The proceedings were focused on the online publication.

Mr Gutnick sued Dow Jones in the Supreme Court of Victorian (VSC) seeking damages for defamation. As explained in the High Court's majority judgment, a plaintiff is permitted to serve process without the leave of the court. In order to obtain leave to proceed, the plaintiff must subsequently demonstrate that the process makes claims of a kind that are supported by the applicable court rules (in this case, one or more of the paragraphs of *Victorian Supreme Court Rules* (VSCR) r 7.01(1)), and in relation to torts, particularly r 7.01(1)(i) and r 7.01(1)(j):

8 Typical criminal matters include prosecutions of theft and murder.

9 While the jurisdictional issues involved are basically the same also in criminal matters, different rules, and to an extent different considerations, apply.


12 Unless the defendant submits to the jurisdiction by filing an unconditional appearance.
Jurisdictional Issues in Cyberspace

(1) Originating process may be served out of Australia without order of the Court where

[...]  

(i) the proceeding is founded on a tort committed within Victoria;  

(j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring.

The defendant may ask the court to decline to exercise its jurisdiction or set aside service. This is done by entering a conditional appearance. In other words, Dow Jones had the right to appear in court to dispute Victorian jurisdiction, and by doing so did not necessarily submit to the jurisdiction of the Victorian court in relation to an actual defamation proceeding.

A procedural detail of great importance is that Mr Gutnick limited his claim to damages he allegedly suffered in Victoria by publications taking place in Victoria. Furthermore, Mr Gutnick also undertook not to sue in any other forum. As will be illustrated below, this delimitation was, potentially, of vital importance.

At first instance, the VSC had to decide whether or not it could exercise jurisdiction over the dispute. On the 28th of August 2001 Hedigan J of the VSC handed down his judgment in the case, the effect of the judgment was to allow Mr Gutnick to sue the US publishing company in his home forum, Victoria. Dow Jones sought leave to appeal the matter to the Court of Appeal of the Supreme Court of Victoria. The Court of Appeal concluded that the decision of the VSC was plainly correct and refused leave to appeal, and thereby confirmed the judgment of the primary judge.

Dow Jones was granted limited special leave to appeal to the High Court and the case was argued before the full bench of the High Court of Australia on the 28th of May 2002. At the High Court proceeding, a group of 18 businesses and organisations were granted leave to intervene. The intereners included, amongst others, Yahoo, News Limited and

---

13 The issue of choice of law was not discussed at length in the VSC.  
Amazon.com. Not surprisingly the interveners' submission were supportive of the appellant, Dow Jones. So far it has been rare for interventions like this to be allowed in Australia, and it is arguable that the fact that the intervention was allowed illustrates that the Court recognised the seriousness of the implications of this case.

All of the seven High Court judges dismissed the appeal. The majority judgment was supported by four of the judges. Three judges, Gaudron, Kirby and Callinan JJ, presented their own reasons for dismissing the appeal, but it appears that all judges were in agreement about the fundamental legal issues raised in the case. At the same time it is interesting to see how, for example, Callinan J and Kirby J are in total disagreement about a non-legal, but very fundamental issue of how 'new and different' Internet communication really is. Kirby J stated that:

> Intuition suggests that the remarkable features of the Internet (which is still changing and expanding) makes it more than simply another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals.

While Callinan J argued that:

> The Internet, which is no more than a means of communication by a set of interconnected computers, was described, not very convincingly, as a communications system entirely different from pre-existing technology.

It is both interesting and telling that, despite this very large difference in their view of the Internet, and Internet communication, Callinan J and Kirby J came to the same conclusions in the fundamental legal issues. It could be said that Dow Jones was fighting an 'uphill battle' all along – if the Court applied existing law, Dow Jones would lose. So Dow Jones had to try to convince the Court that Internet defamation cases need to be treated in a different manner than other defamation cases. In the words of Callinan J: 'The question which this case raises is whether the

---

16 A full bench was sitting at the High Court hearing.
17 Note, however, that Gaudron J presented only very limited views of her own (i.e. different from the majority judgment).
18 Above n.11 [164].
19 Ibid [180].
development of the Internet calls for a radical shift in the law of defamation.20

Dow Jones presented somewhat different arguments before the High Court, as compared to in the VSC. Especially in the VSC, Dow Jones' arguments were, not surprisingly, in large parts 'policy-oriented' rather than legal. Dow Jones placed great significance on the fact that the role played by a Web-publisher is relatively passive compared to other publishers, for example newspaper publishers. At the same time, they continued, the role of those accessing material on the Web is more active than for example the readers of a newspaper. This approach was largely ignored in the High Court hearing, and was also strongly criticised by Callinan J.21

It was further suggested that publishers would avoid publishing in Australia if Dow Jones were to lose this case. During the High Court hearing this suggestion was supported by financial evidence. It was claimed that Dow Jones earned approximately $12,000 from the Victorian subscribers of their website.22 That is a paltry sum compared to what presumably was invested in this trial. With this in mind, it certainly seems likely that some foreign publishers may attempt to prevent Australians from accessing their material - an outcome that obviously is undesirable for Australia. However, the quote also illustrates a weakness in Dow Jones' arguments. While calling attention to the risk of Australians being prevented from accessing Internet material, Mr Robertson QC representing Dow Jones, was also trying to emphasise that there are no effective means for preventing access-seekers based on their geographical location – an obvious contradiction.23

3. Jurisdiction

Ordinarily, the first issue a court will consider in a cross-border dispute is whether or not it has jurisdiction to hear the dispute. A court must

20 Ibid [168].
21 Ibid [180-186].
23 The suggestion that websites are unable to determine the geographical location of access-seekers constituted a fundamental part of Dow Jones' arguments.
have both subject-matter jurisdiction (i.e. jurisdiction over the type of dispute concerned) and personal jurisdiction (i.e. jurisdiction over the parties involved in the dispute). In practice, the subject-matter jurisdiction criterion simply means that a plaintiff cannot, for example, turn to the family court in relation to an intellectual property dispute. Another example would be that a party must initiate the proceedings at an appropriate court level; one cannot ordinarily turn to the highest court of a state on an initial level. The criterion of personal jurisdiction, on the other hand, can give rise to more complex issues and will be the focus for the discussion of jurisdiction in this article.

The rules regulating jurisdictional claims are mainly location focused. For example, as far as contracts are concerned, the court might query where the disputed contract was formed,24 where the contract was broken25 or where the contract was performed.26 Similarly, in relation to torts the court might examine where the tort was committed27 or where the damages were suffered.28 In addition, the court might very well look to where the server is located,29 and/or where the defendant is located, domiciled or habitually residing30 both in relation to torts and contract. While the jurisdictional grounds in contractual disputes often point to the court in one of the contractual parties' home state, the jurisdictional grounds relating to torts are extremely wide when applied in the

29  E.g. Interpretation of the Supreme People's Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright, 22nd of November 2000, The Supreme People's Court, Article 1. See also the US case: Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).
Internet context. For example, damages stemming from the tort of defamation can occur virtually anywhere, which means that a defendant in a defamation proceeding might be subjected to a wide range of jurisdictional claims. The dispute between Joseph Gutnick, and Dow Jones illustrates this point. The majority of the High Court of Australia found that Victoria may exercise jurisdiction over Dow Jones as the tort sued for was committed in Victoria and damages were suffered in Victoria. The foundation for the court's conclusion can arguably be said to be found in the following passage, which recently was cited, and indeed relied upon, by a Canadian court:

However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.

A similar line of reasoning can be found, for example, in the writings of Chicago-based professor, Jack Goldsmith:

A manufacturer that pollutes in one state is not immune from the antipollution laws of other states where the pollution causes harm just because it cannot predict which way the wind blows. Similarly, a cyberspace content provider cannot necessarily claim ignorance about the geographical flow of information as a defense to the application of the law of the place where the information appears.

It is respectfully submitted that these two quotes represent a too simplistic, and antiquated, way of thinking. What the Court and

---

34 Bangoura v Washington Post 235 DLR (4th) 564, at [19].
Goldsmith are saying is undeniably true, but it does not take account of the fact that in today's society a website is not only, or indeed always, aimed at attracting distant attention. People frequently rely on the Internet to impart information for local consumption, such as information about the menu of a local restaurant or the opening hours of the local library. Thus, even if people know that everything they put on the 'net' can be accessed from virtually anywhere in the world, that does not necessarily mean that they intended to publish in every jurisdiction on the planet, or indeed, that publication all over the world was a natural and probable consequence (compare to Kirby J’s reasoning).37

The approach taken by Goldsmith and by the majority of the High Court of Australia, in the Gutnick case, can be contrasted to the approach taken in the US. Around the same time as the Gutnick case came before the High Court, a US court decided a domestic US case involving a very similar fact pattern. In Young v New Haven Advocate38 two newspapers based outside Virginia published articles, in part discussing the conduct of residents of Virginia, in Virginia.39 The articles were available both offline and online. The United States Court of Appeals for the Fourth Circuit concluded that:

The newspapers did not post materials on the Internet with the manifest intent of targeting Virginia readers. Accordingly, the newspapers could not have 'reasonably anticipated being haled into court [in Virginia] to answer for the truth of the statements made in their articles.' Calder, 465 U.S. at 790 (quotation omitted). In sum, the newspapers do not have sufficient Internet contacts with Virginia to permit the district court to exercise specific jurisdiction over them.40 (emphasis added)

It is submitted that the US approach of taking into account the fact that not everything on the Internet is aimed at the world at large, represents

38 315 F 3d 256 No 01-2340 (13th of December 2002).
39 Maximum-security prisons in Connecticut were overcrowded, and as a consequence, Connecticut had contracted with Virginia to house a number of Connecticut prisoners. The articles in question discussed the state of a penal institution in Virginia as well as the conduct of its warden.
40 Young v New Haven Advocate 315 F 3d 256 No 01-2340 (13th of December 2002), p. 7. The targeting approach has also been strongly advocated in recent literature. See, e.g., Gregory J. Wrenn, 'Cyberspace is real, national borders are fiction: The protection of expressive rights online through recognition of national borders in cyberspace', (2002) 38 Stan. J. INT’L L. 97.
a step in the right direction even if, as I have discussed elsewhere, the finer details of the US approach may not necessarily be ideal.

Turning to contracts, it is to be noted that the question of jurisdiction is commonly regulated in contractual choice of forum clauses. Websites commonly include so-called ‘click-wrap’ agreements (i.e. non-negotiated contracts of adhesion that normally are entered into when one party clicks on the ‘I agree’ or ‘Accept’ button on the website). Typically, the person is presented with an extensive list of clauses and has to, without the opportunity of negotiations, either accept or decline to proceed with whatever the contract relates to. Such contracts frequently set out to regulate both jurisdiction and choice of law. There is only a limited amount of case law on this type of contract of adhesion, and different courts have taken different approaches. Sometimes the click-wrap contract is held to be valid, and sometimes not. That is no different to other forms of contract. What is important to remember is that there is no general rule against this relatively novel way of forming contracts. The problem, however, is that more often than not, people in general, and arguably consumers in particular, simply do not take the time to read the agreement and do not have the knowledge to adequately understand the implications of the agreement (perhaps particularly choice of forum and choice of law clauses). In research done on this topic, 90% of the respondents indicated that they never read the whole agreement; while at the same time 64% indicated that they always click ‘I agree’. Furthermore, 55% did not believe that they entered into a legally binding contract when clicking ‘I agree’! At the same time, it must of course be acknowledged that click-wrap contracts represent an


43 The available case law is mainly from the US. For a discussion of some of the issues involved in this type of contract, see for example, the Australian Copyright Law Review Committee’s report, Copyright and Contract (30 April 2002).

effective way of concluding mass-market contracts. The question is whether they are too effective, at the expense of fairness.

The US courts' reasoning in relation to so-called 'click-wrap' contracts is exemplified in Caspi v. Microsoft Network, L.L.C.\textsuperscript{45}. There the plaintiffs had brought a class action against Microsoft in relation to a unilateral change to the membership fees of the defendant's service 'MSN'. The click-wrap contract stated that the agreement was governed by the laws of the state of Washington and that Washington courts had exclusive jurisdiction. In evaluating the validity of the contract, the court noted that the plaintiffs' consent did not appear to be the result of fraud. Further, as '[t]he on-line computer service industry is not one without competition, and therefore consumers are left with choices as to which service they select'\textsuperscript{46} the plaintiffs 'were not subjected to overwhelming bargaining power in dealing with Microsoft'\textsuperscript{47}. Referring to Carnival Cruise Lines v. Shute\textsuperscript{48} and Hodes v. S.N.C Achille Lauro Ed Altri-Gestione\textsuperscript{49}, the court also noted that:

In order to invalidate a forum selection clause, something more than merely size difference must be shown. A court's focus must be on whether such an imbalance in size resulted in an inequality of bargaining power that was unfairly exploited by the more powerful party.\textsuperscript{50}

After this, the court went on to examine whether the choice of forum clause contravened public policy, and whether the enforcement of the choice of forum clause would inconvenience a trial.\textsuperscript{51} Finally, the court examined the plaintiffs' claim that they did not receive adequate notice of the forum selection clause. In doing so, the court noted that 'there was nothing extraordinary about the size or placement of the forum selection clause text'\textsuperscript{52}, thus, to conclude that the plaintiffs were not bound by the

\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
\textsuperscript{50} Above n.45.
\textsuperscript{51} Neither of these questions prevented the choice of forum clause being upheld.
\textsuperscript{52} Above n.45.
choice of forum clause 'would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented.' In this context, the court made reference to *Rudbart v. North Jersey Dist. Water Supply Comm'n* and stated that:

> Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contract as a whole.

In contrast, it has been held that simply including a disclaimer on a website does not necessarily bind the visitors to the terms and conditions stated in the disclaimer. Similarly, it has been held that an invitation to agree to a license agreement did not bind the users as they could download the software in question, without affirming their agreement to the terms of the license agreement.

The European Union has taken a stricter approach to the validity of choice of forum clauses. For example, in the context of business to consumer trade, Article 16 of the relevant European instrument, the *Brussels Regulation 44/2001*, overrides choice of forum provisions and, a little simplified, provides protection for a consumer to the extent that the consumer may sue the seller in the consumer's home state while, at the same time, the business can only sue the consumer in the consumer's

---

53 Ibid.
55 Above n.45.
56 'It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with any one using the web site.' Ticketmaster Corp., et al. Tickets.com, 2000 U.S. Dist. Lexis 4553 (C.D. Ca., March 27, 2000).
home state. While this type of provisions has existed for quite some time, cross-border consumer trade has increased enormously due to the Internet.

For the parties, the question of jurisdiction is important for several reasons. Typically, a party may want the dispute to be heard in its home state for practical reasons; for example, due to confidence in, or familiarity with, the local court system, or to minimise that party's own expenses while increasing the other party's expenses. Often, however, a more important consideration is the fact that the choice of forum determines which court will adjudicate the matter, which in turn decides which choice of law rules will apply, which in turn determines the applicable law, and of course the substantive law being applied determines which party will be successful in the dispute. Thus, when a party disputes a court's jurisdiction, it often does so with the applicable law in mind. As a matter of fact, it seems reasonable to suggest that, while forum-shopping involves the choice of forum, the underlying motivation is frequently a desire to have a certain law applied in the adjudication of the dispute. The Gutnick case, mentioned above, illustrates this point. The fact that Dow Jones did appear before the courts in Australia to dispute the courts' jurisdiction seems to suggest that what the defendant, Dow Jones, was trying to achieve was to ensure that US law was applied to the dispute, rather than for more practical reasons trying to avoid the matter being heard in Australia. If the dispute was heard in the US, a US court would have applied US law and Dow Jones would have enjoyed the protection of freedom of speech provided by the First Amendment of the US Constitution.

From a normative perspective, the jurisdictional dilemma is of course that too wide jurisdictional claims are unjust towards the defendant, and too narrow jurisdictional claims might deprive the plaintiff of legal remedies.

4. Choice of law

If a court finds itself to have jurisdiction, it will turn to the question of which substantive law it should apply. As the applicable law is the standard that ultimately will decide which party is successful, the choice

59 Defined as 'Selection by a plaintiff of a court of justice best suited to the plaintiff's needs by reason of commercial, legal, or personal advantage.' Peter Nygh and Peter Butt, Butterworths Concise Australian Legal Dictionary (Sydney, Butterworths, 1998). Forum shopping is often regarded as undesirable almost to the extent of 'foul play'.
of law question could be said to be the most important question. The choice of law rules also focus primarily on locations as is exemplified in the widely spread choice of law rule in torts, \textit{lex loci delicti} (i.e. the law of the place of wrong).\textsuperscript{60} While the detailed manner in which the \textit{lex loci delicti} rule is applied varies somewhat from state to state, a common feature is that it often favours the \textit{lex fori} (i.e. the law of the forum). For example, under Australian law the \textit{lex loci delicti} rule appears ‘neutral’ as it simply points to the place of wrong. However, the underlying rules of defamation law, for example, are biased towards the \textit{lex fori}. Since the tort of defamation is deemed to have been committed where the defamatory material enters the mind of a third person, it is easy to ensure that the \textit{lex loci delicti} points to the \textit{lex fori} – all you need to do is show that somebody within Australia (or more exactly the desired Australian state) read or heard the defamatory material.\textsuperscript{61} This structure makes it very difficult for publishers to predict which countries’ laws they need to comply with. The technology of newspaper publications, for example, is such that a newspaper will only be available at those places the publisher has targeted. It could be said that the starting point is zero percent publication-coverage, and for that number to increase the publisher must target a community, country or region 'with its newspaper. World Wide Web (the 'web') publications, on the other hand, work in exactly the opposite way. Once the material is made available on the web, it has virtually one hundred percent publication-coverage, and for that percentage to decrease, the publisher must take action by ‘dis-targeting’ undesirable communities, countries or regions. When combining the current bias towards the \textit{lex fori} with the extremely high immediate publication-coverage of WWW communications, we can speak of a diminishing nexus, and sometimes proportionality, between action and effect(s). The effect(s) of an action can occur virtually

\textsuperscript{60} The \textit{lex loci delicti} rule is for example applied in Australia (see: \textit{Regie National des Usines Renault SA v Zhang} [2002] HCA 10), and is also suggested to be the main rule (Article 3) in the proposed \textit{European ROME II Regulation on the Law Applicable to Non-contractual Obligations} (see further: Proposal presented on the 22nd of July 2003). As far as the People’s Republic of China is concerned, it can be noted that a form of the \textit{lex loci delicti} rule is applied (General Principles of the Civil Law of the People’s Republic of China, Article 146(1)), but the details around its application are somewhat unclear.

\textsuperscript{61} As is discussed in relation to the courts’ option to decline jurisdiction (below), it is common for the plaintiff to limit the claim to damages suffered within the forum. In addition to the consequences this has in relation to the courts’ option to decline jurisdiction, it also ensures that the \textit{lex fori} is applied to the entire dispute.
anywhere, and be totally out of proportion with the action giving rise to it. In such a climate, it is not easy being a web publisher.

In the Gutnick case, Dow Jones argued that US law was to be applied rather than the laws of Victoria. Dow Jones suggested that it would be unreasonable for publishers to take into account the laws of all forums from which the Internet can be accessed and argued for a single point of publication, similar to the 'single publication rule' applied in some US states. Simplified, under this rule the court ought to focus on one place of publication only, rather than as traditional common law does, on each and every place of publication. A problem for Dow Jones was that the article was uploaded in New Jersey, while the editorial control was exercised in New York, and Dow Jones did not really seem willing to decide which of these locations and consequently laws they argued to have the closest connection to the case. When pressed to do so, Mr Robertson QC pointed to New Jersey as the place of publication. However, Mr Robertson QC still insisted that the fact that the article was researched, written and edited in New York was of relevance.

It should also be remembered that the single publication rule would have far wider jurisdictional implications if adopted in Australia, than it currently has in the US. This is due to the differences in private international law rules. If Australia were to adopt the single publication rule, plaintiffs would be limited to sue in the publisher's forum, unless the plaintiff could sue in one of the Australian states and territories that accept jurisdiction based on damages suffered within the forum. In contrast, US courts may base jurisdiction on grounds other than the location of publication (e.g. 'doing business' within the forum, or even the server in question being located within the forum). It is therefore

62 The single publication rule was extensively discussed and then dismissed by the majority of the High Court, above n.11, [29-37].
63 Above n 22, point 184.
64 Ibid, points 190-194.
65 While the single publication rule's effect on the applicable law presumably would be the same in Australia as in the US.
66 Available under the court rules of the Federal Court, and the courts of the Northern Territory, New South Wales, Queensland, South Australia and Victoria.
submitted that the single publication rule, if adopted, would have quite different implications in Australia, than what it has had in the US.

The interveners argued that, for the choice of law at least, in relation to the publication of defamatory material on the World Wide Web publication occurs at the point at which there is a last opportunity for the publisher to take steps to exercise control over publication, that is, the point at which final editorial decisions are made and final technical work is done to upload material.

There is no lack of problems associated with accepting this argument. First, if this model is applied in relation to choice of law, the consequence is that an Internet publication is published at one time and place for the sake of jurisdiction and another for the sake of choice of law. This is not a major problem, but it is not the most appealing model. Secondly and much more importantly, the suggested model is unable to address a case such as the one at hand. In the Gutnick case, the article was uploaded in New Jersey but the editorial control was exercised in New York. In placing the focus on both the point at which final editorial decisions are made and final technical work is done to upload material, the model is not fit to handle such a situation.

Another problem with Dow Jones' and the interveners' approaches is that their models invite publishers to upload70 the material in forums

---

69 See further: Spang-Hanssen, *Cyberspace Jurisdiction in the U.S. - The International Dimension of Due Process* (Oslo: Norwegian Research Center for Computers and Law, 2001), in particular pp. 139-143, discussing jurisdictional claims in US Internet defamation cases.

70 It is interesting to note that also identifying the location of 'uploading' can be problematic. And any suggestion proposing that the location of uploading should be in centre of focus must define where uploading takes place. [Does uploading take place where the person, and computer from which the material is sent, are located?] Or does uploading take place where the server to which the material is uploaded, is located? Kirby J appears to suggest that uploading takes place where the server to which the material is uploaded, is located: 'If the place of uploading were adopted as the place of publication which also governs the choice of applicable law, the consequence would often be, effectively, that the law would assign the place of the wrong for the tort of defamation to the United States. Because of the vastly disproportionate location of webservers in the United States when compared to virtually all other countries (including Australia) this would necessarily have the result, in many cases, of extending the application of a law of the United States (and possibly the jurisdiction and forum of its courts) to defamation proceedings brought by Australian and other foreign citizens in respect of local damage to their reputations by
with favourable laws. This could be prevented by the introduction of some form of abuse control, but as soon as that is done, the model that was to be preferred for its simplicity, is no longer simple.

Contractual regulation of the applicable law (i.e. choice of law clauses) has already been discussed above in the context of choice of forum clauses. Thus, the only thing left to note is that it seems that mandatory rules overruling choice of law clauses are somewhat more common than mandatory rules overruling choice of forum clauses.71

More generally, the normative dilemma in relation to choice of law could be said to be that, each state has a legitimate interest in applying its laws to acts done, or having a real or potential effect, in their respective territory. As different states have different laws, this creates a confusing overlap of laws that actors on the Internet might have to consider and adjust their conduct to.

5. Declining Jurisdiction

While the jurisdictional tests and the choice of law often are structured in very similar manners in different states, the courts’ discretion to decline jurisdiction varies considerably from state to state. Generally speaking, the courts of states following the civil law tradition have less discretionary power to decline jurisdiction than their common law counterparts.72 In common law countries courts have the option of declining to exercise jurisdiction under the doctrine of forum non conveniens. The interpretation of this doctrine, however, varies greatly. In most common law countries, a court will decline jurisdiction if there is another more appropriate forum, while under Australian law, a court will decline jurisdiction only if the court is a clearly inappropriate forum.


While the practical difference between the 'more appropriate forum' test and the stricter Australian 'clearly inappropriate forum' test is not always visible, it is submitted that a rule focusing on more appropriate alternative forums makes more sense in our increasingly globalised world, than the somewhat parochial 'clearly inappropriate forum' test does. However, Australia's diverting approach was confirmed in *Regie National des Usines Renault SA v Zhang* and was not in dispute in the Gutnick case.

There is no single factor that determines whether or not a common law court will decline jurisdiction under the doctrine of *forum non conveniens*. For example, while one of the factors taken into consideration is the applicable law, case law shows that the mere fact that an Australian court will have to apply foreign law does not make it a clearly inappropriate forum. A range of factors may be taken into account in determining the issue of *forum non conveniens*. In broad terms, the following categories of factors are of relevance:

- The connection between the selected forum and the subject matter of the dispute as well as the parties;
- Judicial, practical and economic advantages and disadvantages for the parties;
- The availability of alternative forums; and
- The substantive law to be applied.

It is hard to think of instances where conditions specific to cross-border Internet contacts would give rise to other considerations than the ones mentioned above.

---


74 However, during the High Court hearing of the Gutnick case, Kirby J hinted an interest in re-examining the *forum non conveniens* test, above n.22, point 1937. See further: Dan Svantesson, *Dow Jones v Gutnick* – update on the High Court appeal, (2002) 5(3) *Internet Law Bulletin* 25.


76 For a discussion of which factors Hedigan J took into account in *Gutnick v Dow Jones* [2001] VSC 305 see: Dan Svantesson, 'The Gutnick v. Dow Jones decision – Which questions were answered and which were not?', (2002) 4 *Internet Law Bulletin* 73.
The courts did not find reason to decline jurisdiction in the Gutnick case, and it is submitted that this was largely due to the fact that Mr Gutnick limited his claim to damages suffered in Victoria due to publication in Victoria and at the same time undertook not to sue anywhere else. In the words of Gaudron J:

If a plaintiff complains of multiple and simultaneous publications by a defendant of the same defamatory matter there is, in essence, a single controversy between them, notwithstanding that the plaintiff may have several causes of action governed by the laws of different jurisdictions. Accordingly, if, in such a case, an issue arises as to whether an Australian court is a clearly inappropriate forum, a very significant consideration will be whether that court can determine the whole controversy and, if it cannot, whether the whole controversy can be determined by a court of another jurisdiction.

As the respondent has limited his controversy with the appellant to the publication of defamatory matter in Victoria, the controversy is one that can be determined in its entirety by the Supreme Court of that State and there can be no question of multiple suits in different jurisdictions.77

Finally, attention should be drawn to the potential relevance of the doctrine of forum non conveniens in the Internet context. In the High Court hearing of the Gutnick case, Kirby J noted that:

It seems to me [...] that that [the issue of forum non conveniens] is the place in which the Internet problem is going to be solved in the world. Countries are going to say, ‘Of course we've got jurisdiction. The damage happened here or some other - we can serve here but it is much more convenient that this matter be litigated in another place’.78

This quote should make clear the important role the doctrine of forum non conveniens plays in common law countries. Yet, at a first glance, the current trend of suing only in relation to local damages would appear to negate the value of the doctrine. For example the courts in three Internet defamation cases, the Gutnick79 case, the Harrods80 case and the

77 Above n.11, [64–65].
78 Above n.22, points 1484 - 1487.
79 Above n.11.
Investasia case, found no reason to decline jurisdiction since the plaintiffs' actions related only to harm suffered within the respective states, and which court could be more suitable to determine a dispute relating exclusively to damages suffered within state X? This line of reasoning certainly has a logical appeal, but at the same time it could perhaps be described as a simple trick by which the plaintiff circumvents the doctrine of forum non conveniens. However, the plaintiff does so at the expense of only being awarded damages for harm done within the state where the court is located. Consequently, even though the doctrine of forum non conveniens might not protect a foreign defendant from being sued in a certain forum, it might have the effect of preventing the plaintiff from seeking world-wide damages when suing in that forum.

6. Recognition and Enforcement

While the focus of literature, relating to jurisdictional issues and the Internet, often is placed on the strongly connected, and often entwined, issues of jurisdiction and choice of law, the recognition and enforcement of judgments is a vital and decisive component of private international law and must not be overlooked. After all, it is often of little use for a party to know that, for example, a Czech court can claim jurisdiction and will apply Czech law, if the subsequent judgment cannot be enforced at a place where the other party has assets. Getting a judgment recognised and enforced in a foreign forum is seldom easy and, in a sense, the general complexity of getting foreign judgments recognised and enforced in a forum in which the defendant has assets, works as a protection for defendants in international litigation. In this context it should be noted that there is an inbuilt balance in that, while larger actors (e.g. multinational corporations) may have assets in several states, and thereby have a larger risk exposure, they also have more resources (e.g. access to sophisticated legal advice) to protect themselves and while small actors (e.g. private individuals) have little or no means to protect themselves, they often also have limited assets (which might make it

---

81 Investasia Ltd and Another v Kodansha Co Ltd and another HKCFI 499.
82 Of course, also a judgment that cannot be enforced can have a moral value. For example, a judgment in favour of a plaintiff in a defamation case might very well carry great value as ‘evidence’ that the defamatory material was untrue. However, this sort of moral value should be kept separate from the legal value discussed in the text above.
uneconomical to sue them) and these assets are ordinarily in one state only, thereby limiting their risk exposure.

In the absence of international agreements, the circumstances in which a state will recognise and enforce foreign judgments are often very limited and do not correspond with the circumstances under which courts of that state can exercise jurisdiction. We can here talk about a gap between what is seen as reasonable grounds for jurisdictional claims and what is seen as reasonable grounds for the recognition and enforcement of foreign judgments. For example, while Australian courts may claim jurisdiction on a variety of grounds, in the absence of agreements, they will only recognise and enforce foreign judgments if the foreign court had jurisdiction based on the presence or residence of the defendant within the foreign forum or based on the voluntary submission by the defendant to the foreign court. Thus, it may be important for a plaintiff to carefully evaluate on which grounds he or she should ask the court to base its jurisdiction. In other words, the connection between jurisdiction and the potential of recognition and enforcement must be acknowledged. In contrast, there are no similar implications of the choice of law. Ordinarily, only if the choice of law offends 'natural justice' would there be any connection between the choice of law and the recognition and enforcement.

The mentioned gap was clearly illustrated in the dispute between the US Internet company, Yahoo, and two French associations, La Ligue Contre Le Racisme et L'Antisémitisme (LICRA) and L'Union Des Etudiants Juifs De France (UEFJ). Yahoo was operating a website which, amongst other things, contained an auction service where Nazi

83 Such as the Brussels Regulation 44/2001 (discussed above).
84 The right to be given a fair hearing and the opportunity to present one's case, the right to have a decision made by an unbiased or disinterested decision maker and the right to have that decision based on logically probative evidence'. Peter Nygh and Peter Butt, Butterworths Concise Australian Legal Dictionary (Sydney, Butterworths, 1998).
85 A court would ordinarily not enforce a foreign judgment if that judgment offends 'natural justice'.
86 Note that this was essentially a criminal matter and different rules apply in relation to the recognition and enforcement of judgments in criminal matters, as compared to judgments relating to civil disputes. Note also that the company name is actually 'Yahoo!', but the exclamation mark will be left out in this article.
memorabilia was frequently on offer.\textsuperscript{87} LICRA and UEFJ attempted to have Yahoo remove the Nazi material from the auction service, in accordance with French penal Code\textsuperscript{88}; Yahoo refused. When a French court ruled that Yahoo must take steps to prevent French Internet users from accessing the sections of the auction site containing Nazi memorabilia,\textsuperscript{89} Yahoo turned to a US court seeking a summary judgment to the effect that US courts would not enforce the French decision. While acknowledging France's right to make law for France, Fogel J decided in Yahoo's favour, granting the summary judgment, declaring that the 'First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet'\textsuperscript{90}. Furthermore, as it appears unlikely that Mr Gutnick will get any favourable Australian judgment enforced in the US\textsuperscript{91}, the Gutnick case can be said to illustrate the mentioned gap.

It is submitted that it might be reasonable for a French court to exercise jurisdiction over an act violating French law in France, and it might be reasonable for a US court to refuse to recognise and enforce a foreign judgment infringing a US company's freedom of speech as protected by the US Constitution, in relation to an act done by that company exclusively in the US. Similarly, it does not seem unreasonable for a Victorian court to decide a dispute in which an Australian citizen, habitually residing in Victoria, having the majority of his social and professional life in Victoria, is seeking to vindicate his reputation in Victoria and seeks damages only in relation to harm done in Victoria. At the same time, it would arguably be reasonable for a US court to refuse to enforce a foreign judgment infringing a US company's freedom of expression as protected by the US Constitution, in relation to an act done...

\textsuperscript{87} However, the auction service was not at all specifically designed for the purpose of auctioning Nazi material.

\textsuperscript{88} Section R645-1.

\textsuperscript{89} \textit{International League Against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEFJ) v Yahoo! Inc.} High Court of Paris, 20th of November 2000.

\textsuperscript{90} \textit{Yahoo!, Inc. v La Ligue Contre Le Racisme et L'Antisemitisme}, 169 F.Supp. 2d 1181 (N.D. Cal. 2001), at 22.

\textsuperscript{91} \textit{Telnikoff v Matusevich} 347 Md. 561, 702 Atlantic 2d 230 (Md. Ct App 1997). For a discussion of other cases where foreign defamation judgments have been refused enforcement of public policy grounds, see: Kurt Wimmer, \textit{International Liability for Internet Content: Publish Locally, Defend Globally} (Covington & Burling, 2003) \url{http://www.cov.com/publications/download/oid110557347.pdf}. 
by that company exclusively in the US. Herein lies one of the greatest normative challenges as far as the Internet is concerned.

7. Final Remarks and Speculations as to the Future

The above should have made clear that the problems private international law must address in the online context are not (as has been frequently said in earlier literature\textsuperscript{92}) that Internet interactions occur nowhere and thereby fall outside the legal systems. Rather, what causes the difficulties is that Internet interactions potentially occur everywhere and come under the jurisdiction and laws of multiple legal systems. While there are limiting factors, such as enforcement difficulties, those who place material on the Internet are currently exposing themselves to the jurisdiction and laws of a wide range of states. Indeed, it seems that many states’ private international law rules provide for jurisdictional claims over any website that can be accessed in its territory, in relation to a wide range of legal matters. Similarly, states’ private international law rules do provide for the court to apply the law of the state where the court is located in many situations where jurisdiction is being exercised over a foreign website.

It seems unreasonable to assume that those active on the Internet will not react to this arguably dangerous situation. The potentially worldwide legal risks associated with web content are likely to prompt providers of web content to take steps to limit the availability of their content. This can be done in several manners, but it is particularly interesting to note the development of so-called geo-location technologies aimed at what can be called geo-identification. Relying on databases that match IP addresses with likely geographical locations, these technologies allows a website operator to distinguish between access-seekers based on their geographical location. Indeed, as the provided content can be adjusted depending on the access-seekers’ geographical location, geo-identification has the advantage of providing the website operator with the means to comply with multiple, varying, and even contradictory, local regulations. The value of this cannot be emphasised enough in a world where substantive laws vary considerably from state to state, but material may be accessible from every state where Internet connection is possible.

Currently, the use of geo-location technologies is rather limited. However, a recent study illustrated that 37 percent of the responding

companies sought to identify user location, 38 percent did not do so, and 20 percent were unsure. Further, the study showed that North American respondents (69 percent) were far more likely than either Asian (41 percent) or European (29 percent) to implement identification measures. This cultural difference was also apparent in relation to the respondents' thoughts of the future of the problems discussed in this article:

Companies from North American [sic] responding to the survey were far more concerned with Internet jurisdiction issues than their counterparts in Europe and Asia. By a ratio of six to one, US companies said that the Internet jurisdiction issues has [sic] become worse over the past two years and four of every five companies say they feel that matters will worsen by 2005. In contrast, responding Asian and European companies think that the risk associated with the issue has improved since 2001 and will improve further by 2005.

As to the Gutnick case, we should bear in mind that Dow Jones must have known that they provided material to people in Victoria in exchange for money. It is therefore difficult to conclude that it was wrong for the Court to decide in the manner it did. On the other hand, it is worrying that the High Court's judgment provides so little room for deciding differently a case involving other circumstances. The Court may have been more willing to depart from the established rules if the website in question was not a fee-based subscription-service, and if the defendant was not a large resource-rich publishing company. In a public interest perspective, this question is certainly the most interesting part of the Gutnick case. In the VSC, Hedigan J placed great significance on the fact that the website was not a 'normal, open for all' type of website. However, this fact was given far less attention in the High Court's judgment, which certainly is a cause for concern. In that sense the decision of the VSC was more promising for the future. According to the

---


94 Ibid.

95 Some parts of the judgment can possibly be interpreted as indications of some room being provided for deciding a case involving another set of circumstances differently. See for example: above, n.11 [44, 165 and 167].

96 Above n.14, for example [19] and [41]. In contrast the only part of the High Courts judgment that could be interpreted as making a similar distinction is found in para 7, above n.11 (a website like WSJ.com).
decision of the High Court it seems that as long as the plaintiff limits his or her claim to damages suffered in Victoria due to publication in Victoria, there is nothing in the Australian system to prevent the court from deciding the dispute and, in doing so, applying Australian law. This could be contrasted to Pillai v. Sarkar97 decided by an English court. There the plaintiff sued in respect of comments made in an article that had a circulation of approximately 75,000 in India but only 15 in England. The plaintiff limited his complaint to the copies that had been sold in England and yet French LJ ruled that the appropriate forum was Calcutta and not England.98

All the above has illustrated that the current rules of private international law of many countries, take an effects-focused approach – focus is placed on the location of the effect of an act rather than on the location where the act was performed – leading to some sort of 'when causing an effect in Rome, do as the Romans do' situation. The problem, however, is that it is virtually impossible to know if you are going to 'cause an effect in Rome', or anywhere else for that matter, when placing content on the Internet.

98 See also Kroch v Rossell [1937] All ER 725.