

Jurisdiction in Cyberspace: A Question of Conflict of Laws?

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Abstract — One of the most difficult tasks in applying the law in cyberspace is determining in what jurisdiction the legal process should take place. There are numerous cases where disparate jurisdictions have vied for venue but should the venue be based upon geography? Geography is a slippery slope when it comes to pinning down jurisdiction in cyberspace because, as has been noted, cyberspace is not a place in the sense that we generally think of physical space.

Clark characterizes cyberspace as "... collection of computing devices connected by networks in which electronic information is stored and utilized, and communication takes place"¹

In a prior research paper, Stephenson defines cyberspace as a "...complex global information infrastructure that facilitates communication between technology such as computers, networks and other digital systems, both independently and on behalf of people using it. Cyberspace is distinct from physical space and the constraints imposed by it such as geographic boundaries."²

If cyberspace is not a "place" in the physical or geographic context, how do we apply laws fittingly? This paper suggests an alternative to geographic venue: suitable choice of law across affected geographies. While this simply is a first step to developing a more complete cyber jurisprudence, it seeks to answer the most prickly question in applying the law to events in cyberspace: "Whose law governs?"

Keywords— Cyber, cyberspace, cyber law, cybercrime, cyber tort, jurisdiction, choice of law

I. Introduction

There is a bevy of stumbling blocks to establishing a proper jurisdiction for event occurring in cyberspace. Today, virtually all of cyberspace transits at least state boundaries and, often, international borders. An event begun in one geographic jurisdiction may complete in another and, in the process, may be complicated by events in intervening jurisdictions. Often – as in international events – the laws in these jurisdictions vary significantly. If there is to be settled law in cyberspace, it must recognize additional criteria beyond, simply, geographic borders. Such

concepts as *comity* and *vested rights* become serious, and sometimes crippling issues.

In applying both the doctrine of "comity" and the idea of "delegation" to Cyberspace, a local sovereign is called upon to defer to the self-regulatory judgments of a

¹ Chris Reed, Online and Offline Equivalence: Aspiration and Achievement, 18 International journal of law and information technology 248(2010).

² Defining Cyberspace in the Context of the Law. (2017)

*population partly, but not wholly,
composed of its own subjects.³*

Lornzen, translating Huber (from the 1600s) presents us with three postulates for solving conflict of laws issues:⁴

- (1) *The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.*
- (2) *All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.*
- (3) *Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.*

While this offers a rough construct for applying law in cyberspace, it also offers some complications. The most important issue is where was the event committed? If I sit in Wisconsin at my computer in my own dwelling place and engage in an activity that is illegal in Wisconsin – such as on-line gambling – on a casino site located in a Caribbean island, where is the law being broken, if at all?

The obvious answer is in Wisconsin because that is where my actions took place. However, an argument might be made for the island – where, of course, there is no law against on-line gambling – because although my keystrokes occurred in Wisconsin, nothing actually occurred until they reached the casino. So the actual event – although triggered by me – took place at the casino's web server which might be hosted in yet a third location.

Here, we get some guidance from the United States Code Annotated (10)(A)⁵:

(A) In general.--*The term*

"unlawful Internet gambling" means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.
(emphasis added)

We can see that our question of jurisdiction in this case is well-settled under Federal law. Our argument was the same as that of Interactive Media Entertainment and Gaming Association⁶. The Court rejected the argument. This is a fairly simple example of a case where the settled law is definitive. Not all cases in cyberspace are as simple.

In most, if not all, cases involving an event in cyberspace there is an underlying event that would, if it occurred in physical space, be subject to jurisdictional issues. For example, a case of defamation, if it occurred in cyberspace, could also occur in physical space and it certainly could traverse multiple jurisdictions (e.g., a defamatory letter to the editor of the "Wall Street Journal" mailed by a reader in New Mexico).

This implies that we can apply the same jurisdictional criteria in cyberspace that we can in the physical space. In the next section we will explore that by addressing traditional conflict of laws paradigms. In Section III we will address the issues of comity and vested rights.

³ David Post David R. Johnson, Law and Borders - The Rise of Law in Cyberspace "First Monday - peer-reviewed journal on the Internet" at <http://firstmonday.org/article/view/468/389>.

⁴ Jack Goldsmith Lea Brilmayer, Erin O'Hara O'Connor, Conflict of Law - Cases and Materials

⁵ 31 U.S.C.A. § 5362 (West)

⁶ Interactive Media Entertainment and Gaming Ass'n Inc. v. Attorney General of U.S., C.A.3 (N.J.) 2009, 580 F.3d 113

II. Applying Conflict of Laws in the Physical Space as a Guideline for Jurisdiction in Cyberspace

The First Restatement Approach

The obvious starting point for a discussion on jurisdiction is identification of the place of the wrong. Here, we get some help from the First restatement of Conflicts of Law, §377 – The Place of the Wrong.⁷

The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

Rule 1. Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body.

Rule 2. When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.

...

Rule 4. When a person sustains a loss by fraud, the place of wrong is where the loss is sustained, not where the fraudulent representations are made.

Rule 5. Where harm is done to the reputation of a person, the place of

wrong is where the defamatory statement is communicated.

Here, we get a couple of clues to help us apply the Restatement's *Lex Loci Delicti* approach. This, while settled law, is, today, a minority view. We present it as a starting point for further analysis.

Applying the Restatement's *Lex Loci Delicti* approach we can see that a geography is relatively simple to define. In simple cases – Rule 1 – we simply use the location where the harm takes effect. When the harm is, for some reason, delayed – as with poison – the location is where the effect occurs and not where the wrong was initiated.

In our example of online gambling, this could be contrary to the Federal law defining the place of the wrong as where the gambling act was initiated. Following the Restatement, no law has been broken since the online casino – the place of the effect – has no law against gambling online.

In our defamation example, using Rule 5, the law of New Mexico would apply since that is where the statement was communicated initially to the newspaper. A statement is defamatory if it is broadcast to at least one other person. The newspaper simply repeated what was sent to it.

However, things get a bit complicated in this example because the *Wall Street Journal* is a republisher and, unless privileged, is held to the same standards as the original publisher.⁸ Arguably, the same criteria could apply in cyberspace since there are defined start and end points located in physical geography. So, in this case we might find that the place of communication was two-fold: the original publisher and the *Wall Street Journal*.

But what of cyberspace? The first publisher is the person who posted the defamatory statement to, for example, Facebook. But where is Facebook? Is it the headquarters or, perhaps, the location of the Facebook servers? And, Since a large organization such as Facebook uses a cloud of globally distributed servers, how does one pinpoint the server from whence the defamatory statement was, actually, published?

We get a bit more help for the Restatement when it comes to fraud. Rule 4 is quite clear and can apply either in the physical or the cyberspace. But note that in the introduction to the rules in §377 it states that the place of the wrong is the place *where the last event necessary to make an actor liable for an alleged tort takes place*. In this case, the place of wrong is where the victim of the fraud resides because that is where the fraud impacted the victim

⁷ American Law Institute, Restatement (First) of Conflict of Laws § 377 (American Law Institute. 1934).

⁸ W. Jonathon Cardi Marc A. Franklin, Michael D. Green, Gilbert Law Summaries - Torts (Thompson West 24 ed. 2008)

making that the last event necessary to make the fraudster liable.

This distinction – the last event necessary – offers a potential guideline if we approach jurisdiction by placing the jurisdiction where the *Lex Loci Delicti* exists as defined under the Restatement.

The Second Restatement Approach – The Most Significant Relationship

In 1971 the American Law Institute published the Second Restatement which changes some elements of conflict materially.⁹ Section 6 states, in relevant part,

- (1) *A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.*
- (2) *When there is no such directive, the factors relevant to the choice of the applicable rule of law include*
 - (a) the needs of the interstate and international systems,*
 - (b) the relevant policies of the forum,*
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,*
 - (d) the protection of justified expectations,*
 - (e) the basic policies underlying the particular field of law,*
 - (f) certainty, predictability and uniformity of result, and*
 - (g) ease in the determination and application of the law to be applied.*

This defines the significant relationship test. Generally, it says that the *Lex Loci Delicti* test of the first Restatement is subservient to a more comprehensive test. However, there still are jurisdictions that follow the first Restatement.

While the Most Significant Relationship is seemingly quite different from the *Lex Loci Delicti* approach, there are similarities if we look at the terms of the second Restatement as adding definition and granularity to those of the first.

For example, looking at defamation, we determined that under the first Restatement we should fix the jurisdiction in the state (or country) where the defamer resides. Expanding upon that, using the terms of the second Restatement, each of the criteria under § 6 could apply as supporting or nullifying the explicit geographic expectations of the first.

For example, we could look at the state of the defamer and, under subsection (2)(b), decide that the relevant policies of that forum do not apply to our case. Or, perhaps, under subsection (1) we might find that the forum has a specific, well-settled policy that addresses our issue.

The point here is that jurisdiction, even when decided by conflicts – or choice – of laws is not dissimilar in cyberspace from the physical space. It needs to be considered differently in some cases, though, because, like the example of the distributed servers of Facebook, there are glitches in how we define the jurisdictions through which the packets fly over the Internet. However, here again we can draw a few simple conclusions.

For example, does the packetstream pause long enough at any single jurisdiction to be considered subject to (2) all subsections? This might be the case if one could show forensically that a particular server, located in a particular jurisdiction, contained the defamatory material, received it first from the initial defamer (before any other server in a distributed cluster of servers) and, without forwarding it to another server, broadcasts the materials directly to the Internet. That can be technically challenging, to be sure, but legally it is quite straightforward.

III. Comity and Vested Rights in Cyberspace

These two issues form an integral part of the topic of conflict of laws. Simply, Brillmayer, Goldsmith and O'Hara O'Connor¹⁰ define them as:

Comity: nonmandatory acceptance by one jurisdiction of the law of another

⁹ American Law Institute, Restatement (Second) of Conflict of Laws § 6 (American Law Institute, 1971).

¹⁰ Jack Goldsmith Lea Brilmayer, Erin O'Hara O'Connor, Conflict of Law - Cases and Materials (Wolters Kluwer 7 ed. 2015).

And

Vested rights: right to recovery under the law of the place where the tort occurs, a right that thereafter accompanies the person and may be used as the basis for a lawsuit even in a jurisdiction that would not impose liability if the same events had taken place within its borders.

This pair of issues may, actually, form the most difficult challenge to jurisdictional issues in cyberspace if there is no settled basis for determining jurisdictional boundaries.

However, if we consider jurisdiction in cyberspace in terms of conflict of laws, particularly taking into account the guidelines in the first and second Restatements, the assumptions of comity and, to some extent, vested rights are baked in already.

For example in Gary McKinnon v Government of the USA, Secretary of State for the Home Dept¹¹ the UK court recognized – although not nonmandatory – the notion of comity when it denied the appeal of the defendant opposing extradition from the UK to the US for hacking computers of the US military. Defendant argued that, for a variety of reasons, extradition to the US should be barred. As a UK citizen he submitted that he should be repatriated to a UK prison.

A second example of comity is the reversal of the anti-SLAPP (Strategic Lawsuit Against Public Participation)¹² in Mireskandari v. Gilbert¹³. Gilbert was accused of illegally accessing a database in the UK. Plaintiff, a UK company, sued and the defendant petitioned the court to remove the case to the US where anti-SLAPP laws applied (California). The trial court granted defendant's anti-SLAPP motion and the plaintiff appealed. Among the plaintiff's arguments was that,

Defendants would therefore be able to violate English civil procedure rules, yet suffer no recourse from an

English court because they reside in California, and they would also suffer no recourse from a California court because of California's litigation privilege. This interferes with the English judicial system's ability to ensure the integrity of its proceedings and violates principles of comity.¹⁴ (Emphasis added)

The appeals court reversed the trial court and remanded the matter with instructions to deny the motion. Since the core of the original case involved hacking this example has a flavor of cyberspace and, as well, a direct reference to comity between the US and the UK. It illustrates that there often is an element of cyberspace in many legal proceedings and it is difficult at times to separate cyber from physical space for the purposes of selecting jurisdiction.

IV. Conclusions

Although definitive conclusions are premature, we submit that there is enough similarity and overlap between the physical and the cyberspace that we can apply many physical, or traditional (such as the Common Law) concepts in cyberspace with equal efficacy.

It has become clear that physical concepts of jurisdiction – such as subject matter, geographical, etc. – are inadequate for cyberspace. In prior research papers¹⁵ Stephenson has pointed out the difficulty of obtaining a one-to-one correspondence between traditional boundary-based jurisdictional definitions and the pervasiveness of cyberspace. Therefore, it is reasonable to assume that another paradigm is needed. We submit that conflict of laws offers a starting point for that discussion.

¹¹ Gary McKinnon v Government of the USA, Secretary of State for the Home Dept, Case No: CO/5897/2006 High Court of Justice Queen's Bench Division Divisional Court 3 April 2007

¹² "A lawsuit intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition" – see https://en.wikipedia.org/wiki/Strategic_lawsuit_against_public_participation#cite_note-onthemedia_01-1, footnote [1]

¹³ Shahrokh MIRESKANDARI, Plaintiff and Appellant,

v. Laurie GILBERT et al., Defendants and Respondents. D070251 Filed 9/28/2017 – not officially published – Wstlaw citation: 2017 WL 4294467 *Mireskandari v. Gilbert*, No. D070251, 2017 WL 4294467 (Cal. Ct. App. Sept. 28, 2017)

¹⁴ See 2017 WL 3313907 (Cal.App. 4 Dist.) (Appellate Brief) Court of Appeal, Fourth District, California, Division 1. Shahrokh MIRESKANDARI, Plaintiff and Appellant, v.Laurie GILBERT et al., Defendants and Respondents. Appellant's Reply Brief.

¹⁵ See Stephenson, "Defining Cyberspace in the Context of the Law" and Stephenson, "Defining a Cyber Jurisprudence", unpublished research papers.

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