

here and there:
unpacking the complexity of
internet jurisdiction

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spyware and jurisdiction

- local vs. offshore
- privacy vs. criminal
- spyware subset -- model for multiple issues
 - spam
 - fraud
 - id theft
 - phishing

is there a there there?

- 2001 btlj article on internet jurisdiction
- zippo test unsatisfactory
- move toward targeting based analysis
- targeting indicia
 - contract
 - technology
 - actual or implied knowledge

is there a there there?

- fundamental principles remain valid
- zipco receives just lip service today
- greater use of targeting analysis
- technology more important -- used for commercial purposes
- awareness of potential compliance and liability issues

complexity

1. commercial activities
2. defamation
3. regulatory/enforcement

defamation split

- no unified theory because no unified approach
- u.s. vs. commonwealth (australia, uk, canada)
- law of the poster vs. law of the target

homeless harms

- no home and no jurisdictional target
- practical enforcement challenges
- *r v. libman* (scc 1985)

“everyone knows the transaction in
the present case is both here and there”

unpacking net jurisdiction

commercial	targeting analysis
defamation	law of the poster vs. law of the target
regulatory/ enforcement	two perspectives: - regulator or enforcer - legislator

unpacking net jurisdiction

regulator or enforcer	<p><u>three stage analysis:</u></p> <ul style="list-style-type: none">-<u>key considerations</u> (effects, alternatives, action elsewhere)-<u>limitations</u> (statutory, efficacy, resource, co-operative)- <u>forum</u> (national, bilateral, multinational)
legislator	practically powerless vs. practically powerful

commercial

- zippo referenced but rarely followed
- proven to least challenging
 - choice of forum vs. choice of law
 - contractual mitigation of risk
 - cost/necessity of doing business
 - other risks greater - fraud, chargebacks

defamation

- law of the poster (u.s. - lidov, young)
vs.
- Law of the target (commonwealth - gutnick (au), lewis (uk), bangoura (can))
- defamation divide has had an impact
 - aba/icc study finds media chill
 - companies intervening in bangoura

regulatory - key considerations

- effects in the jurisdiction? - if create local harm, inclined to act (*granite gate*)
- is there an alternate regulator? - “unregulated exchanges are homeless” (*wse*)
- alternate enforcement mechanism? - seize domains (*ftc v. pereira*)
- likelihood of action elsewhere? (*acc v. chen*)

regulatory - limitations

- Statutory limitation - may be precluded from acting (*abika*)
- Efficacy limitations - is law undermined if ineffective? (*acc v. chen*)
- Resource limitations
- Co-operative limitations - absence of mou or other data sharing agreement

regulatory - forum

- national
- bi-lateral mechanisms
- multi-lateral mechanisms

regulatory - forum

- national (can-spam)
- bi-lateral mechanisms (agt. with spain, au)
- multi-lateral mechanisms (london action plan)

legislative

- practically powerless
 - recognition that limits of regulatory power; particularly if smaller country
 - australia -- gambling and content regulation carves out foreign sites
- practically powerful
 - ability to extend national laws outside jurisdiction
 - eu - data protection directive
 - us - coppa, acpa

application to spyware

- clear effects in the jurisdiction
- alternatives? -- technical solutions, mkt pressure
- efficacy and resource concerns
- co-operative tools

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