

WHOSE LAW SHOULD APPLY?



CIO Canada
September 1999

by
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When it comes to the Internet, the 'travellers' model' of legal jurisdiction may make sense, but it will encourage sub-standard consumer protection.

As tool of commerce, the Internet is being transformed from a delivery vehicle of information and software to a carrier of more complex relationships.

If all of the players involved in a web transaction are located in the same jurisdiction, no extraordinary questions arise as to their legal relationship. If two or more of the players are in different jurisdictions, however, territoriality becomes important.

Statutes and regulations are governed by an overall assumption that, except for express language to the contrary, their scope is limited to persons, property, and events within the territorial boundaries of the jurisdiction. Sovereign states may extend jurisdiction beyond their borders where justified but generally do so only in limited circumstances. Subordinate jurisdictions, such as provinces and municipalities, are restricted to territorial limitations without exception.

The concept of territoriality also plays an important role in the workings of private international law as it relates to both contracts and tort (breach of duty, other than under contract, leading to liability for damages). When a contract does not contain a provision regarding the choice of law, the issue of what law should govern a contract is determined by the presence of several factors, one of which is the jurisdiction or state where the contract was entered into. In tort law, Canadian courts have held that the most important factor to be taken into account when identifying the law that should apply is the jurisdiction or state where the tort took place and where injury was sustained. So what rules should apply to the Internet?

Consider what would happen should you decide to pack the van and head to Florida this winter. You will be exposed to advertising and other commercial activities in each of the jurisdictions through which you pass. Your actions will be governed by local laws, and you will be protected with respect to the actions of others by those same local laws. If you purchase consumer goods you will be protected by the same consumer protection legislation that is available to the local population. If you buy insurance, the local laws governing the sale of insurance will apply to your purchase. No other arrangement would be practical. The people dealing with you cannot be expected to know or to govern themselves by any other rules.

It is submitted that the same arrangement should apply to the Internet user involved in a browsing transaction. Web site advertising cannot be targeted or filtered for different users. All consumers, no matter where they are located, will be exposed to the same advertising displayed on a web site located in a certain jurisdiction.

If the Internet is to realize its full potential, a retailer must know the rules of commerce that are to apply. Any rule which would require the retailer to identify the consumer with reference to a jurisdiction would in itself eliminate, to a large extent, the very reason for the web transaction: its speed and efficiency. A requirement to further inquire into all of the local laws and regulations which may apply to a particular consumer would cripple the Internet as an instrument of commerce. It would appear, therefore, that the travellers' analogy to Web commerce is the only practical view to be adopted for legal purposes.

But a rule such as this would and should be unacceptable to policy makers for obvious reasons. Taken to its extreme, the travellers' model would encourage movement of Internet

services to jurisdictions of least protection — indeed, may even encourage have-not jurisdictions to compete for web-hosting businesses on the basis of minimal regulations and consumer protection.

The U.S. Courts have already begun the process of judicial lawmaking to protect their nationals from substandard protection, with the unfortunate result that Canadian web-based merchants may need to take extra precautions to stay on the right side of extra territorial applications of U.S. laws.

It is submitted that from the point view of Canada, a comprehensive solution is possible only through international treaties of major consuming states with significant potential for cross-border electronic commerce.

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