

Community patent legislation become available, the application of such principles will become clearer.

Conclusion

The prohibition on patents for software in Europe is already interpreted very narrowly, and it is likely to be further restricted, or eliminated altogether very soon. The trend is likely to shift to an analysis of whether other requirements, such as novelty and inventive step, are satisfied. This presents opportunities for e-commerce and financial businesses to patent new and inventive technology, allowing the development of new areas of exclusive commercial activity.

However, complexities in the application of laws unsuited to e-commerce environments leave the determination of infringement in most commercially useful systems unclear. In particular, if national courts do not assert jurisdiction

over activities involving patented inventions over the internet, it will become very easy to circumvent the patent monopoly granted to the patentee. However, signs that case law is developing to keep pace with developments on the internet have already been seen in relation to trade marks and copyright, in particular in the United States. For their part, the English courts have been quick to recognise the special nature of dealings on the internet and appear willing to take account of those features in the cases they decide. This promises a pragmatic approach in relation to internet software and business system patents in the United Kingdom, making the jurisdiction attractive to patentees with patents for new and inventive systems who wish to curtail infringement quickly using the newer, faster litigation procedures available here.

Jurisdiction and the Internet

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1. Introduction

"Persons outside of Minnesota who transmit information via the internet knowing that the information will be disseminated in Minnesota are subject to jurisdiction of Minnesota Courts for violations of state, criminal and civil laws".

This statement was made by Attorney-General Hubert Humphrey III of Minnesota in 1995.

In reality, if this attitude towards jurisdiction over conduct engaged in using the internet was adopted throughout the world then in effect every nation or state would be imposing the laws of its jurisdiction on all persons throughout the world. The concept of jurisdiction and the

Internet presents some major challenges for e-commerce.

This article considers the:

- concept of jurisdiction;
- the unique features of the Internet which create difficulties applying traditional jurisdictional principles to cyberspace;
- both the United States and the Australian position in relation to Internet jurisdiction;
- the distinction between civil and criminal conduct;
- the preliminary draft *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*; and
- some practical measures to minimise the risks of remote jurisdiction (in other words, being hailed into court in a

foreign jurisdiction).

In addition this article attempts to answer the following questions:

- If I operate a website in Australia and do something that is legal in Australia, can I be sued outside of Australia, if the action is illegal in another place?
- If I enter into an Internet transaction via the Internet with someone outside of Australia, can I be sued there/ or can I sue the other person here?
- In either of the above, which countries' or states' law will apply?

2. The Internet

The Internet is global and non-national¹. It is global because of its nature in transcending

geographic, political and legal boundaries – websites located on a server in a particular country can be accessed anywhere in the world. It is non-national as users concerned of the Internet are generally unaware of or indifferent to the physical location of a website or the physical location of other parties.

However, the traditional rules in relation to jurisdiction have a territorial basis.

The nature of the internet has presented difficulties for courts when attempting to apply traditional rules of jurisdiction to cyberspace. Some features of the internet contributing to the difficulties:

- the location and identity of users is often difficult to determine;
- a website will usually have a worldwide audience;
- the number of internet users is growing rapidly;
- it is relatively easy to move or relocate a website;
- it is possible to host a website in one jurisdiction and direct it outside to many jurisdictions; and
- it is possible to host a website in multiple jurisdictions.

Some commentators have taken the view that the real world should have no control over cyberspace at all and that the application of traditional principles of personal jurisdiction are “incoherent when applied to cyberspace”². This

Article does not propose to delve into the arguments for an against the application of jurisdictional rules to the internet. It is only with the analytical side of the issue, namely whether jurisdiction **can** be exercised over parties based on conduct taking place in cyberspace and not concepts relating to “should” jurisdiction be exercised.

If we accept that conduct undertaken via the Internet can be subject to traditional laws then it is fundamentally important to determine:

- which laws apply in relation to particular persons or transactions;
- which courts or bodies may adjudicate in relation to disputes; and
- how can enforcement or compliance with laws or punishment for non-compliance with laws be carried out.

To reduce the question to a basic level, if you purchase a CD over the internet from a merchant in Singapore will the law apply as if you had travelled to Singapore and bought the CD there or as if the merchant had travelled to Australia and sold the CD to you here?

3. What are the traditional rules relating to jurisdiction?

Australian Rules

In Australia, a court will only have jurisdiction over a defendant if the defendant is validly served with process or voluntarily submits to the jurisdiction by entering an unconditional defence. As such, the rules of the relevant court prescribe the circumstances in which a defendant outside the jurisdiction may be served.

Under the rules for a particular court (and these vary across States and Territories), in most States, a sufficient nexus is

required with the Australian jurisdiction for a person outside of the jurisdiction to be validly served with process.

Some indicia of a sufficient nexus common to most jurisdictions are:

- the existence of a contract connected with the jurisdiction;
- a breach of contract within the jurisdiction;
- commission of a tort within the jurisdiction;
- submission to the jurisdiction;
- if the contract was governed by the jurisdiction;
- damages occurring within the jurisdiction;
- whether the defendant owns the land in the jurisdiction.

In some cases leave of the court must first be obtained. The courts will then often have a discretion to decline jurisdiction where the forum selected is clearly inappropriate. The court has considered the following factors to be relevant in determining if a forum is appropriate:

- Whether there is any significant connection between the court and the subject matter or the parties such as the parties’ domiciles, places of business or the place where the conduct or transaction occurred or where the subject matter is situated;
- Whether there is any legitimate juridical advantage to the plaintiff, such as greater recovery, a more favourable limitation period, better ancillary procedures, or assets within the jurisdiction against which judgment can be enforced; and
- Whether the law of the forum will supply the substantive law to be applied in resolution of the dispute.

Australian Cases

To date there has only been one Australian case dealing with the issue of jurisdiction of an Australian court in relation to conduct occurring over the internet. The case was that of *Macquarie Bank v Berg*³. In this case, the employment of the defendant, an ex-employee of Macquarie Bank, had been terminated and there had been proceedings in relation to the termination in the Industrial Relations Court of New South Wales and the Federal Court. Macquarie Bank brought an action seeking an injunction restraining the defendant from publishing defamatory material on the Internet. While there were reasonable grounds for determining that the defendant was involved in the publication of the defamatory material, the defendant was not located in New South Wales and the acts done by him in relation to the publication of material were done outside of New South Wales, most likely in the United States.

The question of jurisdiction was therefore raised and the court stated that there was authority that it was empowered to restrain conduct occurring or expected to occur outside the territorial boundaries of the jurisdiction⁴. However, the question of whether that power should be exercised is a matter for the court's discretion. The factors which were relevant to the exercise of the discretion according to authority included the potential enforceability of any order made and whether another court is a more appropriate forum. Ultimately, the court did not grant the injunction sought for the following reasons:

- It was unsatisfactory to make an order, the effectiveness of which was solely dependent on the voluntary presence in the jurisdiction of the person against whom the orders are

made;

- Due to the nature of the internet itself, to grant the injunction would have the effect of restraining publication of the material to any place in the world; and
- The court was not aware of any existing means by which material, once published on the internet, could be excluded from transmission to, or receipt in, any geographical area.

For these reasons, the court was not prepared to superimpose the law of New South Wales relating to defamation on every other state, territory and country of the world. The court recognised that the defendant may very well have a right to publish the material according to the laws of another place and to make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of the court.

In summary, the court determined that it had jurisdiction to hear the matter but refused to exercise its discretion to grant the remedy sought on the basis of the extensive effective breadth of the order and the unenforceability of such an order.

"If Australian courts refuse in all Internet cases to exercise jurisdiction over a foreign defendant on the basis that the operation of a court order cannot in practice be limited to a particular jurisdiction, then Australian courts would only exercise jurisdiction over foreign defendants in very limited circumstances. In turn, this would provide an opportunity for foreign defendants to carry on activities that would be otherwise illegal in Australia by conducting them online."⁵

It should be noted that this was a decision of a single judge in the New South Wales Supreme Court and therefore limited in its binding

effect as a precedent within Australia.

In relation to foreign websites accessible in Australia, on the limited law handed down, it is too early to determine how Australian courts will apply the jurisdictional rules. However, under the *Trade Practices Act 1974 (Cth)*⁶ (TPA) the consumer protection provisions contained in part 5 division 2 may not be excluded by providing for a foreign law as the governing law of a contract. Further, as the TPA applies to "corporations engaging in trade or commerce within Australia" which includes by definition foreign corporations then it is fair to say that the consumer protection provisions of the TPA will apply to a foreign corporation operating a website which can be said to be "engaging in conduct within Australia under the TPA".

Within Australia

For cross-jurisdictional matters relating to e-commerce conducted within Australia, the *Service & Execution of Process Act 1992 (Cth)*⁷ provides that any initiating process issued in a State may be served in another State provided service is effected in the same way as service of the initiating process in the place of issue. Accordingly, for internet transactions between two parties located in Australia (as with traditional transactions between two parties located in Australia) consideration of the complex court rules in relation to sufficient nexus with the plaintiff's jurisdiction is not required in order to establish valid service and therefore jurisdiction over the defendant.

Further, under the *Service & Execution of Process Act*⁸ where a judgment in one court is registered in the appropriate court in another State the judgment will have the same force and effect and will be capable of enforcement as if the judgment had been given by the court in which it is registered.

While the New South Wales Supreme Court in *Macquarie Bank v Berg* was not prepared to impose the law of Australia throughout the world in relation to an action brought against a foreign defendant, the Federal Court, New South Wales district, in the case of *ASIC v Matthews*⁹, did not hesitate to grant an injunction restraining Mr Matthews (who was neither a licensed securities adviser nor exempt investment adviser under the *Corporations Law*) from publishing reports or allowing reports to be published about securities on the internet in contravention of the *Corporations Law*. The effect of the injunction was to require the internet site be closed down which effectively restricted publication throughout the world.

Enforcement of Australian Judgments in Other Jurisdictions

If an individual or an entity in Australia does obtain a judgment from an Australian court against an e-business which does not have any assets within the jurisdiction of an Australian court, the holder of the judgment may need to look to enforcing the judgment in another jurisdiction.

It is important to refer to the type of judgment you are seeking to enforce. "Money judgments" are covered by the *Foreign Judgments Act 1991* (Cth). Other orders such as injunctions or declarations may be difficult to enforce internationally if they are not covered by an agreement, treaty or convention.

The *Foreign Judgments Act 1991* (Cth), provides for a reciprocal arrangement between countries that give recognition to Australian judgments. This Act recognises the enforcement of certain foreign judgments in Australia if the judgment country has similar recognition principles in place for

Australian judgments. The regulations to the Act contain a list of countries which the Governor General has recognised as having reciprocal arrangements. [Germany and the United Kingdom are examples.]

Consider a plaintiff wishing to enforce an Australian judgment in Germany. Germany is a country listed in the Schedule to the Regulations of the *Foreign Judgments Act 1991* (Cth). There is no convention or treaty in place between the countries. However, the German Code of Civil Procedure (articles 328, 722 and 723) provides for the recognition and enforcement of decisions of foreign courts.

The United Kingdom is another example of a country which is recognised for its reciprocal enforcement of judgments within the *Foreign Judgments Act 1991* (Cth). However, there is also an Agreement in force between the United Kingdom and Australia relating to the enforcement of civil money judgments called "*the Agreement between the Government of Australia and the Government of the United Kingdom Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*". There is also the UK *Foreign Judgment (Reciprocal Enforcement) Act 1993* which provides for the recognition and enforcement of decisions of foreign courts.

To enforce an Australian judgment in a country not covered by the *Foreign Judgments Act* is more difficult and the procedures vary from country to country. It is possible in some countries to obtain recognition of an Australian judgment to enable assets in that jurisdiction to be attached but this may require fresh legal proceedings instituted in the foreign country.

In this context, the ongoing participation in the Hague

Conference relating to a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters is particularly important. The draft of the Convention is discussed later.

United States Jurisdictional Principles

In the United States, two general principles govern a court's assertion of personal jurisdiction over a foreign party:

- The state long-arm statutes;
- The Due Process clause of the Constitution.

Long-arm statutes provide US state courts with the authority to hale foreign parties into court¹⁰. However, a state's long-arm powers cannot exceed the Constitutional limits of the federal Due Process¹¹. Included within the concept of due process is the maxim that courts will follow fair procedures.

The test applied by the state court in determining if it can assert jurisdiction over a foreign defendant is whether the foreign defendant has "certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice"¹². A foreign defendant will also be subject to the jurisdiction of a US state court where the "nature and quality" of the defendant's contacts with the relevant state are "continuous and systematic".

The United States state courts also recognise the concept of:

- **general jurisdiction** over a foreign defendant which arises as just mentioned where a party's contacts with the particular state are "continuous and systematic"; and
- the concept of **specific jurisdiction** over a foreign defendant which arises out

of a contact which causes the specific injury to the plaintiff. For specific jurisdiction to exist, the following factors must be present:

- there must be a purposeful availment by the defendant of the privilege of doing business within the state;
- the cause of action arises from the defendant's activities within the state; and
- whether it would be fair and reasonable to exercise jurisdiction.¹³

Without a "systematic and continuous" contact with the state such that a defendant could be held accountable for any claim irrespective of the relationship to the injury which is the general jurisdiction head the court must analyse the "quality and nature" of the remaining "minimum contacts" that are related to the alleged injury under the specific jurisdiction head. The minimum contacts necessary for specific jurisdiction over a defendant are contacts of such "quality and nature" that it could be said that a defendant "purposefully availed itself of the privilege of conducting business in the forum state" and that a defendant "should reasonably anticipate being haled into court there". Examples of this principle are:

- (a) When a merchant places their product in the "stream of commerce" with the expectation that they would be bought in the forum state¹⁴; or
- (b) Where one party negotiates, conducts business and signs contracts with a resident in the forum

state¹⁵.

This does not mean however that due process allows specific jurisdiction over a defendant who casually or passively enters the forum state, there must be some additional conduct, showing that the defendant purposefully directed activity to the forum state¹⁶.

There is considerably more United States law in this area than any other country. While there is a greater body of law, not all of the decisions are consistent and it is too early to suggest that any concrete rules have developed. However, there are some dominant themes.

The Sliding Scale

In *Weber v Jolly Hotels*¹⁷ the United States District Court (New Jersey) enunciated a "sliding scale" test when dealing with the issue of jurisdiction and contact with a state through a website. At one end of the scale, personal jurisdiction will exist over a defendant where the website allows a defendant to actively conduct business over the internet. At the other end of the scale there will be no basis for personal jurisdiction where a website is passive in the sense that it merely makes information available to persons in the state. For all areas in between, the application of personal jurisdiction depends on the level of interaction and commercial nature of the website.

A full examination of the various cases decided in the United States is beyond the scope of this article. However the following three cases are examples of conduct at various positions along the scale.

Actively Conducting Business

In *Zippo Manufacturing v Zippo.com*¹⁸ the plaintiff, a

Pennsylvanian manufacturer of cigarette lighters, sued a Californian website and news service (Zippo.com) for trademark infringement. The defendant's contacts with Pennsylvania were through the Internet only and it had entered into over 3000 contracts with Pennsylvanian residents to provide them with its services. The court found that the 3000 separate contracts made with Pennsylvanian residents was substantial enough to be a clear case of doing business over the Internet with residents of Pennsylvania.

Passive Conduct, Not Amounting to Doing Business

In the case of *Bensusan Restaurant v King*¹⁹, the plaintiff owned a well known nightclub in New York named "The Blue Note". The defendant owned a small nightclub in Missouri which used the same name. The plaintiff owned the trademark "The Blue Note". The defendant operated a website advertising the Missouri club and provided a phone number for ordering tickets but once an order was placed the purchaser had to collect the tickets in person and pay at the box office in Missouri and as such no sales were made in New York. The New York District Court found it did not have jurisdiction over the Missouri club because the website was merely supplying information. It is important to note in relation to this case that the internet site was merely an information service and the site stated that it was for the benefit only of the local residents of Missouri.

Grey Area – Level of Interactivity and Commercial Nature

In *CompuServe Inc v Patterson*²⁰, Patterson sold shareware software via CompuServe's business. Patterson was a resident of Texas

but had entered into contacts with CompuServe specifying Ohio law as the governing law. The parties became involved in a dispute and Patterson objected to the jurisdiction of the Ohio court. The Ohio court exercised jurisdiction over Patterson on the basis that he had purposefully transacted business in Ohio, subscribed to CompuServe, entered into a separate agreement with CompuServe and had a continuing commercial relationship with CompuServe in Ohio.

4. Distinction between Civil and Criminal Actions

The above analysis tends to suggest that the law will develop along the lines of a greater propensity to find jurisdiction over a foreign defendant in cases of higher levels of active conduct of business and the greater the extent of purposeful availment of the benefits of doing business in the forum state. Although we have not seen the development of any tests for the sphere of criminal conduct as yet, it can be expected that the cases dealing with criminal conduct will develop on a scale whereby the more serious or sensitive the criminal conduct engaged in, the more likely extradition treaties will be brought into operation and jurisdiction over foreign criminals committing crimes in a particular forum will be held.

It is logical to assume that states or countries will reach out and grasp for persons who injure their citizens. It is suggested that the potential for jurisdiction to be held over a foreign defendant is more likely in areas where governments are particularly sensitive such as:

- hacking;
- virus spreading;
- distribution of pornography;
- national security and terrorism;
- gambling; and

- racism, religion and sexuality.

The recent case in France involving yahoo.com is an example of the French court invoking exorbitant jurisdiction in the case of racist subject matter. The French court in this case issued an injunction against US yahoo.com in relation to content on its website which offered Nazi paraphernalia for auction where the website was available to residents of France. In France, the sale or distribution of Nazi paraphernalia is illegal.

5. Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

While some commentators suggest that the internet is best served by being left to regulate itself, others are advocating a centralised dispute resolution procedure.

While the Hague Conference on Private International Law Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters is not directed specifically to the internet, the ground which it covers will be particularly useful in the context of jurisdiction and the internet.

By way of background, over 40 countries are currently engaged in negotiations to produce a convention on jurisdiction and the recognition and enforcement of foreign civil judgments. The participating countries represent many different legal systems and stages of economic development and include the United States, Canada, Australia and Ireland, all 15 member states of the EU as well as China, Japan, Israel, Egypt, Morocco and a number of Latin American and Eastern European countries.

Universal basis of

adjudication jurisdiction

Under the most recent draft released²¹ the universal basis of adjudication jurisdiction will be the domicile, habitual residence, or principal place of business of the defendant.

Approved basis of adjudication

Some other bases of jurisdiction would be on an approved and possibly mandatory list, including place of injury in a tort action, place of performance in a contract action, and domicile of the insured in an action based on an insurance contract.

To expand on the approved list in more detail:

Article 6 of the draft convention provides that a plaintiff may bring an action in the courts of a state in which:

- (a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
- (b) in matters relating to the provision of services, the services were provided in whole or in part;
- (c) in matters relating to both the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

Article 7 of the draft convention provides that a consumer who enters a consumer contract may bring a claim in the courts of the state in which the consumer is habitually resident if the contract relates to trade or professional activities that the defendant has engaged in or directed to that state, in particular in soliciting business through means of publicity.

Clearly, this article in the draft convention may have far reaching consequences in relation to contracts formed via the Internet. The same clause provides also that a claim against any consumer may only be brought before the courts of the state of habitual residence of the consumer.

If however the parties have agreed that the court of a treaty state shall have jurisdiction to settle any dispute which may arise in connection with a particular legal relationship, that court shall have the jurisdiction and that jurisdiction shall be **exclusive** unless the parties have agreed otherwise.

Under **Article 9** of the convention, a plaintiff may bring an action in the courts of a state in which a branch, agency or other establishment of the defendant is situated (or where the defendant has carried on regular commercial activity by other means)²² provided that the dispute relates directly to the activity of that branch, agency or establishment (or to that regular commercial activity).

This is another particularly important article in the draft convention. The provision that a defendant may be sued in any treaty state in which it has "carried on regular commercial activity by other means" is similar to the US tests for "quality and nature" of minimum contacts in internet jurisdiction cases. If "regular commercial activity by other means" is interpreted to include the broadcasting of a website then the website owner may be sued in another treaty state.

Article 10

Draft article 10 is also relevant in the context of internet conduct. The article provides that a plaintiff may bring an action in tort in either:

- (a) The State in which the act or omission that caused the injury occurred; or
- (b) The State in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

It is interesting to note that it is reported that the United States is strongly behind the articles which extend the jurisdiction to:

- "regular commercial activity by other means"; and
- activities directed at a country.

Prohibited jurisdiction

Under the draft convention, certain other bases of jurisdiction will be prohibited as exorbitant, including transient or tag jurisdiction, jurisdiction on the basis of the plaintiff's nationality, and jurisdiction solely on the basis of presence of the defendant's property in the foreign state.

To expand in relation to the prohibited bases of jurisdiction:

Article 18

Article 18 provides that jurisdiction shall not be exercised by the courts of a treaty state on the basis solely of one or more of the following:

- (a) the presence or seizure in that state of property belonging to the defendant;
- (b) the nationality of the plaintiff;
- (c) the nationality of the defendant;
- (d) the domicile, habitual or temporary residence, or presence of the plaintiff in that state;

- (e) the carrying on of commercial or other activities by the defendant in that state, except where the dispute is directly related to those activities; and
- (f) the temporary residence or presence of the defendant in that state.

"The Grey List"

A third group of bases of adjudication jurisdiction, sometimes referred to as a "grey list" would be neither required nor prohibited, but would be permitted. It is not yet clear whether the bases of jurisdiction in this group would be listed in the convention or would simply not be mentioned in either the "approved" or "prohibited" list. Among the candidates for this grey area are jurisdiction on the basis of doing a business in the foreign state, place of contracting, and status as a co-defendant with a defendant over whom jurisdiction can be asserted.

Essentially, exercise of jurisdiction by the courts of one treaty state over defendants domiciled in another treaty state under a "prohibited basis" of jurisdiction would not be permitted. All treaty states would be required to recognise and enforce judgments rendered on the basis of jurisdiction on the "approved list". Judgments rendered on the basis of jurisdiction on the "grey list" would not be required to be recognised by other treaty states, but states could declare which basis of jurisdiction would support judgments entitled to recognition in their courts.

The final three week diplomatic session of the Hague conference on this project is scheduled for June 2001 and February 2002²³ and it is expected at that time to adopt the final text that will be open for signature and ratification by

States.

If Australia is to become a party to the convention, the enactment of Commonwealth, State and Territory implementing legislation will be necessary to ensure that the rules of court follow the new jurisdictional rules.

6. Practical Steps to Minimise a finding of remote jurisdiction

It can fairly be concluded that while it is unlikely that an Australian e-business setting up a website hosted in Australia will be open to jurisdiction in every place where the website is available, if the website actively solicits business in the other forum inviting the purchase of products or services then this would probably be sufficient to place an e-business under the jurisdiction of the other State or country (at least where the other forum is the United States).

When doing business via the Internet with users in foreign countries, to minimise the risk of any problems arising in relation to foreign jurisdictions (minimise rather than avoid because it is not possible to avoid these risks completely) e-businesses should consider taking the following measures:

- Consider the terms and conditions of the contract (including the governing law) and ensure that the other party has adequate notice of those terms and conditions prior to entering into the contract;
- Consider the laws in the countries in which customers or clients may be located. As this is an onerous task, it may be necessary to:
 - display disclaimers or limit countries to which the product or service is available;
 - block access to certain countries; or

- require customers to identify their country of origin. Tailor the website for particular customers or countries (for example, use only a particular language on the website); Give consideration to trademark and intellectual property issues; Consider whether the product or service offered by the website falls into one of the "sensitive" areas to particular governments.

7. Conclusion

Ultimately a "middle ground" should be sought in this area. E-businesses need to be able to carry on business and broadcast data and information over the internet without onerous multiple country regulation. At the same time, there is a need for governments to protect consumers and users of the internet from internet pirates and unscrupulous parties.

The rules of Australian courts make jurisdiction over a foreign internet player available in a fairly wide range of situations. Whilst an Australian court has found jurisdiction over a foreign internet player in one case to date, it refused to make an order on the basis that the order could not be enforced and would be too broad in its operation.

The US courts have not been so concerned.

It is suggested that the Australian courts will tend to follow the US law in finding jurisdiction in cases where an out of State internet player actively solicitors business or conducts business in the jurisdiction over the internet.

It is also likely that moral, social

and political issues regarding internet conduct will also have a bearing on the propensity of a court to find jurisdiction over a foreign defendant.

If the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters is settled in October and is subsequently adopted in Australia (and all indications are that it will be) then there should be more clarity on the issue of cross-border jurisdiction over internet conduct. Depending on the content of the final Convention document (and judicial interpretation given to it) it is likely that active e-business conduct directed at or engaged in a Convention State or injurious conduct over the internet will open an internet player up to jurisdiction in another Convention State.

ANNEXURE 1 New York States Long Arm Statute (NY C.P.L.R section 302).

Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or

property within the state, except as to a cause of action for defamation of character arising from the act, if he:	Stephens Jaques www.kentlaw.edu/cyberlaw/docs/foreign/Australiaswinson.html.
(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or	6 Section 67. 7 Section 15. 8 Section 105. 9 1999 FCA 164 (19 February 1999).
(ii) expects or should reasonably expect the act to have consequences in the state and derive substantial revenue from interstate or international commerce; or	10 See annexure 1. 11 See Fifth and Fourteenth Amendments to US Constitution. 12 <i>International Shoe v Washington</i> 326 US 310 (1945).
4. owns, uses or possesses any real property situated within a state.	13 <i>Burger King v Rudzewich</i> 471 US 462 (1985).
Ä This paper was presented at the conference “Regulating E-Business,” THC Press, 28 –29 June 2000.	14 <i>Worldwide Volkswagon v Woodson</i> 444 US at 297. 15 <i>Burger King v Rudzewich</i> 471 US at 478-79.
¹ Jew, B. “Cyber Jurisdiction – Emerging Issues and Conflicts of Law When Overseas Courts Challenge Your Web” (December 1998) 37 <i>Computers & Law</i> 24.	16 <i>Asahi Metal v California</i> 480 US at 112. 17 977 F. Supp 327, 333 (1997). 18 952 F. Supp 1119 (1997).
² David R Johnson and David G Post, <i>Law & Borders – The Rise of Law in Cyberspace</i> , 48 <i>Stan L Rev</i> 1367 (1996).	19 937 F. Supp 295, 2971 (1996). 20 89 F 3d 1257, 39 USPQ 2d 1502 6 th Cir 1996.
³ (1999) NSW SC 526 decided in the Supreme Court of New South Wales in June 1999.	21 30 October 1999 – Available at http://www.hcch.net/e/conventions/draft36e.html .
⁴ <i>Helicopter Utilities v Australian National Airlines Commission</i> (1963) ADWN NSW 48 at 51; <i>Dunlop Rubber Company v Dunlop</i> (1921) 1 AC 367.	22 This extension to a ground of “doing business” is being strongly advocated by the United States.
⁵ American Bar Association – Transnational Jurisdiction in Cyberspace Project, Comments – Australia, Mallesons	23 The diplomatic session was originally scheduled for October 2000.