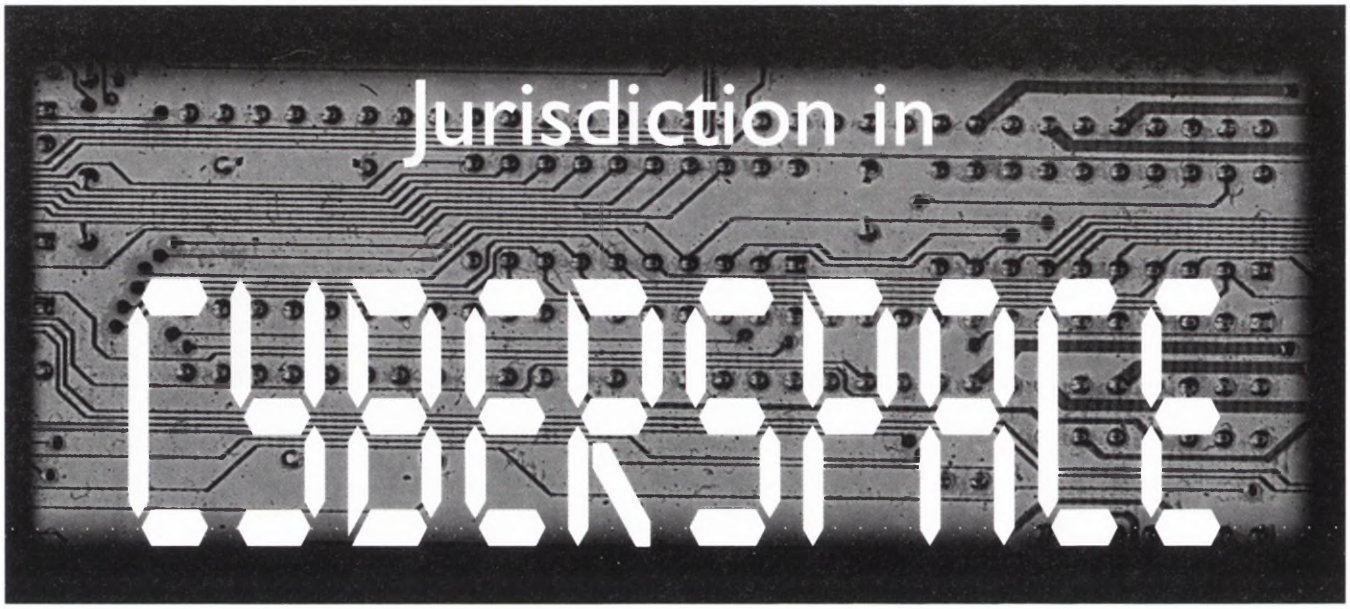

– the gutnick decision

The decision of *Gutnick v Dow Jones*[1] in the Supreme Court of Victoria addresses two significant issues for the cyberlawyer – defamation on the Internet and jurisdiction on the Internet. This paper deals with the latter.

Contemporary communications circumvent national boundaries creating a new and stimulating locale called cyberspace. Lawyers are still coming to grips with the application of traditional legal principles to this international network. The application of jurisdictional concepts is particularly problematical. *Gutnick's case,* handed down in August 2001, is the first significant contribution in Australia.

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The first Australian case prior to *Gutnick* raising the issue of Internet jurisdiction was *Macquarie Bank v Berg*[2]. Berg was a disgruntled ex-employee of Macquarie Bank who placed defamatory material regarding the bank on the Internet. Berg had moved to California and the material in question was located on a server in that state. Macquarie Bank sought an ex parte interlocutory injunction to restrain the material being published on the Internet. The uniqueness of the Internet is such that publications are continuous 24 hours a day for as long as the material remains online. Simpson J described the uniqueness in the following terms (at para 12).

"...once published on the Internet, material is transmitted anywhere in the world that has an Internet connection. It may be received by anybody, anywhere, having the appropriate facilities... to make the order as initially sought, would have the effect of restraining publication of all the material presently contained on the website to any place in the world. Recognising the difficulties associated with orders of such breadth, (counsel) sought to narrow the claim by limiting the order sought to publication or dissemination 'within NSW'. The limitation, however, is ineffective."

The factors against the grant of jurisdiction included the enforceability of such an order, the undesirability of superimposing the law of New South Wales relating to defamation on every other state, territory and country of the world, and the interlocutory nature of the application (see paras 14-16).

The second Australian decision touching upon Internet jurisdiction is *ACCC v Purple Harmony Plates Pty Limited*[3], decided in August 2001 in the Federal Court of Australia. This case dealt with consumer protection issues and raised eccentric constitutional questions. The respondent's Internet web page included false misrepresentations.

Goldberg J held that the Federal Court had jurisdiction to adjudicate over the web site and included in his rationale that:

- The company carried on commercial activities within Australia;
- Failure to have ".au" in the designation was not a deciding factor;
- The website was registered in the name of the company;
- The managing director of the company was the administrative contact for the site;
- It is irrelevant that the company which administers ".com" domain names is governed by the laws of Virginia in the USA;
- It is the company's managing director which has the authority to control the material to be placed on the website.

In relation to *Gutnick v Dow Jones*, Dow Jones publishes the Wall Street Journal and a related publication the *Barrons Magazine* (*Barrons*). *Barrons* contained an article, which inter alia alleged that Victorian businessman Joseph Gutnick was "masquerading as a reputable citizen when he was a tax evader who had laundered large amounts of money". The magazine sold 305,563 hard copies, 14 in Victoria, but was available on the website wsj.com to some 550,000 subscribers, some 300 in Victoria. Dow Jones servers were located in New Jersey. His Honour particularly examined jurisdiction arising from the Internet connection as this could affect the award damages.

First his Honour distinguished three Internet services: one the "push" service, for example, e-mail; the Usenet method whereby a person may access the service on meeting the conditions of the Internet Service Provider (ISP) such as payment coupled with a password; and the World Wide Web. The latter two were described as "push-pull technology" whereby the requestor instigates the downloading. Dow Jones submitted the distinction was critical in determining the place of publication. His Honour regarded the Internet as unique and revolutionary (para 63).

In his flamboyant and colourful way, Geoffrey Robertson QC for Dow Jones made many unsuccessful "bold assertions ... remarkable for its ambition":

- "the imposition of liability on the basis of the place of publication occurring in the place of downloading would have a serious 'chilling effect' on free speech" (para 16).
- "a narrow rule was appropriate for the age of globalization." (para 17).
- "the Internet offer(s) Australians the greatest hope of overcoming the tyranny of distance and that it would be contrary to the national interest for a State court in Australia". (para 18)
- His Honour has "a national duty to decide that there was no jurisdiction in Australia even if (holding) a legal view to the contrary, and that it is (his Honour's) duty publicly to ▶

declare that Mr Gutnick's action against Dow Jones take place in New Jersey" (18)

- downloading is "self-publishing" (19)
- "the process is akin to taking a book out of a library in New Jersey and taking it home to Victoria to read" (15);

His Honour rejected these arguments subtly charging Mr Robertson with daring imagination, "Mr Robertson briefly flirted with the proposition that cyberspace was a defamation-free zone, but did not develop it. Nor shall I." (20)

His Honour preferred the pragmatic path that publishing took place where the material was downloaded. The following authorities were referred to in support of His Honour's view.

"His Honour preferred the pragmatic path that publishing took place where the material was downloaded."

The case of *Digital Equipment Corporation v Alta Vista Technology Inc*[4] dealt with transfers via the Internet. The Court stated, "Using the Internet under the circumstances of this case is as much knowingly 'sending' into Massachusetts the allegedly infringing and therefore tortious uses of Digital's trademark as it is a *telex, mail or telephonic transmission*; the only difference is the transmission is not singularly directed at Massachusetts, in the way that a letter addressed to this State, or telephone or fax number with a Massachusetts area code would be. But ATI 'knows' that its Website reaches residents of Massachusetts who choose to access it, just as surely as it 'knows' any lateral telephone call is likely to reach its destination" (para 38).

Hedigan J doubted several statements made in *Macquarie Bank v Berg* and acknowledged that the court did address the undesirability of superimposing the law of New South Wales in a case of an Internet publication in every State, Territory and country of the World. However his Honour considered the comments to be obiter.

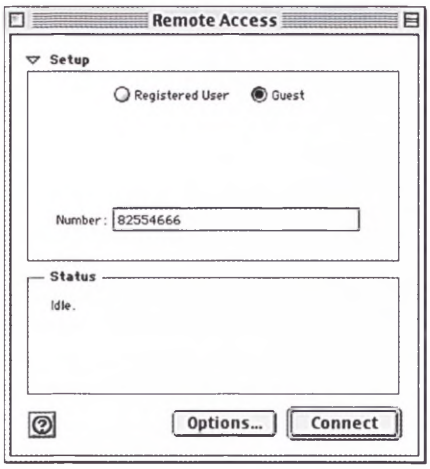
In *Lee Teck Chee v Merrill Lynch International Bank*[5] the High Court of Malaya, considered a claim arising out of material placed on a newspaper web site in Singapore. Nathan J held that the alleged defamatory words had been spoken in Singapore and publication had not taken place within Malaya. However, importantly, there was no evidence that any person in Malaya had accessed the web site.

In *Kitakufe v Oloya Ltd*, an unreported judgment of the Ontario Court of Justice, the Court assumed jurisdiction in a defamation suit arising out of publication in a newspaper published in Uganda and republished on the Internet. Hume J took into consideration the proposition that the Uganda Court was better fitted to deal with the allegations, issues of malice, ethnic rivalry, defence credibility and the expense and inconvenience involved for the defence credibility witnesses to travel to Canada. Reliance was also placed on the fact that the defendant was based in Uganda and had its assets there. Nevertheless, the words of Hedigan J this is "a case which a superior court assumed jurisdiction over a defamation suit on the basis of access to the Website and its reception (that is, downloading) in Ontario, Canada." (para 48, brackets supplied)

In *Godfrey v Demon Internet Ltd*[6] Moreland J identified three principal facilities of the Internet as e-mail, the World Wide Web and Usenet. The case was primarily concerned with Usenet. The defendant carried a news group that stored postings for about a fortnight. An unknown person made a posting impersonating and defaming the plaintiff. The plaintiff informed the defendant and requested its removal within ten days. The defendant failed to comply and Moreland J held that the transmission of a defamatory posting from the storage of a news server constituted a publication of that posting to any subscriber who accessed the news group containing that posting. Moreland J stated:

"In my judgment the defendant, whenever it transmits and whenever there is transmitted from the storage of its news server a defamatory posting, publishes that posting to any subscriber to its ISP who accesses the news group containing the posting. Thus every time one of the defendant's customers accesses 'stock.culture.thai' and sees that posting defamatory of the plaintiff there is publication to that customer."

In *Calder v Jones*[7] Shirley Jones was a famous entertainer who lived and worked in California. Jones was defamed by an article in the National Enquirer. The National Enquirer was published in Florida but had a nationwide circulation including a substantial readership in California. The US Supreme Court held that "jurisdiction may be exercised over a foreign defendant who directs his or her defamatory message at the forum and the plaintiff suffers harm there. Subsequently, personal jurisdiction over a defendant was exercised based on the defendant's operation of a Website accessible in the forum where harm was caused to the

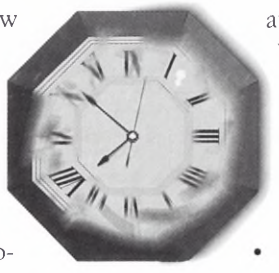


"The uniqueness of the Internet is such that publications are continuous 24 hours a day for as long as the material remains online."

plaintiff in the forum." (para 57)

Hedigan J concluded that "the place of defamation is the jurisdiction where the defamatory material was published and received by the plaintiff, rather than where it was spoken or written, (which the reference to authorities which I have made on balance establishes), the U.S. cases to which I have referred are consistent with them. ... the article ... was published in the State of Victoria when downloaded by Dow Jones subscribers who had met Dow Jones's payment and performance conditions and by the use of their passwords." (paras 58 and 60 brackets supplied).

His Honour questioned whether a web server could distinguish between a specific request for a web site and the systematic approach of search engines, commenting that difference is a matter of choice. His Honour's view was that the web server was not passive, as suggested by Robertson, but rather participatory. His Honour rejected Robertson's suggestion that the Internet was "just a 'pull' method" so that, "When the so-called knock on the door comes it is a Web server that opens" (para 66). "In the same nanosecond it enters into cyberspace in New Jersey and arrives in Victoria... it is as much published and delivered in Victoria as it is sent for delivery from New Jersey." Accordingly his Honour decided that publication takes place on downloading" considering that the information is released and received virtually instantaneously (para 67).



Hedigan J mocks Robertson's "bold assertions" commenting that the unique nature of the Internet must not lead to the abandonment of the analysis that the law has traditionally and reasonably followed to reach just conclusions. His Honour expressed concern that Mr Robertson's arguments, "attractively presented as they were, became enmeshed in the pop science language of 'get' messages, 'pulling off', 'firewalls', and "trumpeting of cyber-space miracles" degenerated into "sloganeering" which in the end decides nothing (paras 70 and 71).

"The point simply is that if you do publish a libel justiciable in another country with its own laws ... then you may be liable to pay damages for indulging that freedom ..." (para 75).

The significant factors for the Court were:

- Downloading of the publication in Victoria;
- The plaintiff's residence, business headquarters, family, social and business life are in Victoria;
- The plaintiff seeks to have his Victorian reputation vindicated by the courts of the State in which he lives;
- The plaintiff undertook not to sue in any other place.

His Honour pointed out that Mr Gutnick was indelibly Victorian, connected with no other place and that any documentation or evidence concerning the matter will all be found in Victoria. His Honour concluded that the most significant of the features favouring a Victorian jurisdiction is "it would be verging on the extraordinary to suggest that Mr Gutnick's action in respect of that part of the publication on which he sues should be removed for determination to the State of New Jersey."

Given the potential difficulties of dealing with a multiplicity of jurisdiction when using the Internet, the case law on Internet disputes should be monitored. The application of traditional rules without modification may lead to jurisdiction based on minimal contacts within the forum. This writer has proposed the imposition of an effects test.[8] Hedigan J referred to *Calder v Jones* for good reason. The court pointed to places where the relevant publication was read, and where the plaintiff lived and suffered harm, California, was the "focal point both of the story and of the harm suffered" and so jurisdiction in that location was based on the "effects" of the defendants' Florida conduct (at 789). The analogy to Internet was not lost on Hedigan J and His Honour's approach should be applauded, as should the rejection of the defendant's colourful objections. PL

Footnotes:

1 [2001] VSC 305
2 [1999] NSWSC 526
3 [2001] FCA 1062
4 960 F Supp. 456 (D Mass 1997)
5 [1998] CLJ 188
6 [1999] 4 AllER 343
7 (1984) 465 US 783
8 See chapter 16, Turner's Australian Commercial, 23rd ed, 2001.