

Judicial Competence and Cloud

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September 15, 2003



October 17, 2012



The Pirate Cloud

“Moving to the cloud lets TPB move from country to country, crossing borders seamlessly without downtime. All the servers don’t even have to be hosted with the same provider, or even on the same continent”



The Pirate Cloud

“All communication with users goes through TPB’s load balancer, which is a disk-less server with all the configuration in RAM. The load balancer is not in the same country as the transit-router or the cloud servers”

“The communication between the load balancer and the virtual servers is encrypted. So even if a cloud provider found out they’re running TPB, they can’t look at the content of user traffic or user’s IP-addresses.”



The Pirate Cloud

“If the police decide to raid us again there are no servers to take, just a transit router. If they follow the trail to the next country and find the load balancer, there is just a disk-less server there. In case they find out where the cloud provider is, all they can get are encrypted disk-images”

<https://www.facebook.com/ThePirateBayWarMachine>

Three types of disputes

“Right” holder vs. alleged infringer
special jurisdiction over infringement

“Right” holder vs. Cloud SP
General jurisdictions

Service user vs. Cloud SP
contract
choice of court agreement

Subject-matter / exclusive jurisdiction: two legal traditions

Common-law countries

- *In personam* jurisdiction
- Subject-matter jurisdiction

Civil law countries

- General rule (domicile)
- Special jurisdiction rules
- Exclusive jurisdiction

Subject-matter / exclusive jurisdiction: two legal traditions (contd.)

Lucasfilm vs Ainsworth [2011]
UKSC 39



Exclusive jurisdiction

Ex. Brussels Regulation, Art 22
(4):

“proceedings concerned with the
registration or validity
of patents, trade marks, designs,
or other similar rights
required to be deposited or
registered”

Ex. Japanese CCP, Art 3-5 (3):

IP registered in Japan – Japanese
court only

Personal Jurisdiction: analogy to Cloud?

A factory in Switzerland discards polluted waste to Rhine river.

The damage occurs in
Switzerland, France
Germany, and Holland

Where should a plaintiff in the
Netherlands sue?



eDate & Martinez case

Sunday Mirror article ‘Kylie Minogue is back with Olivier Martinez’

French actor Martinez brought an action in Paris: private life

Sunday Mirror: no substantial link for a French court to assert jurisdiction

Need for sufficient, substantial or significant link (Brussels Regulation, Art 5(3))?

- Number of hits
- Targeting, Language?
- Parties’ Nationality/residence
- Other factors?



Personal jurisdiction

ECJ: eDate Advertising GmbH v. X (C-509/09)

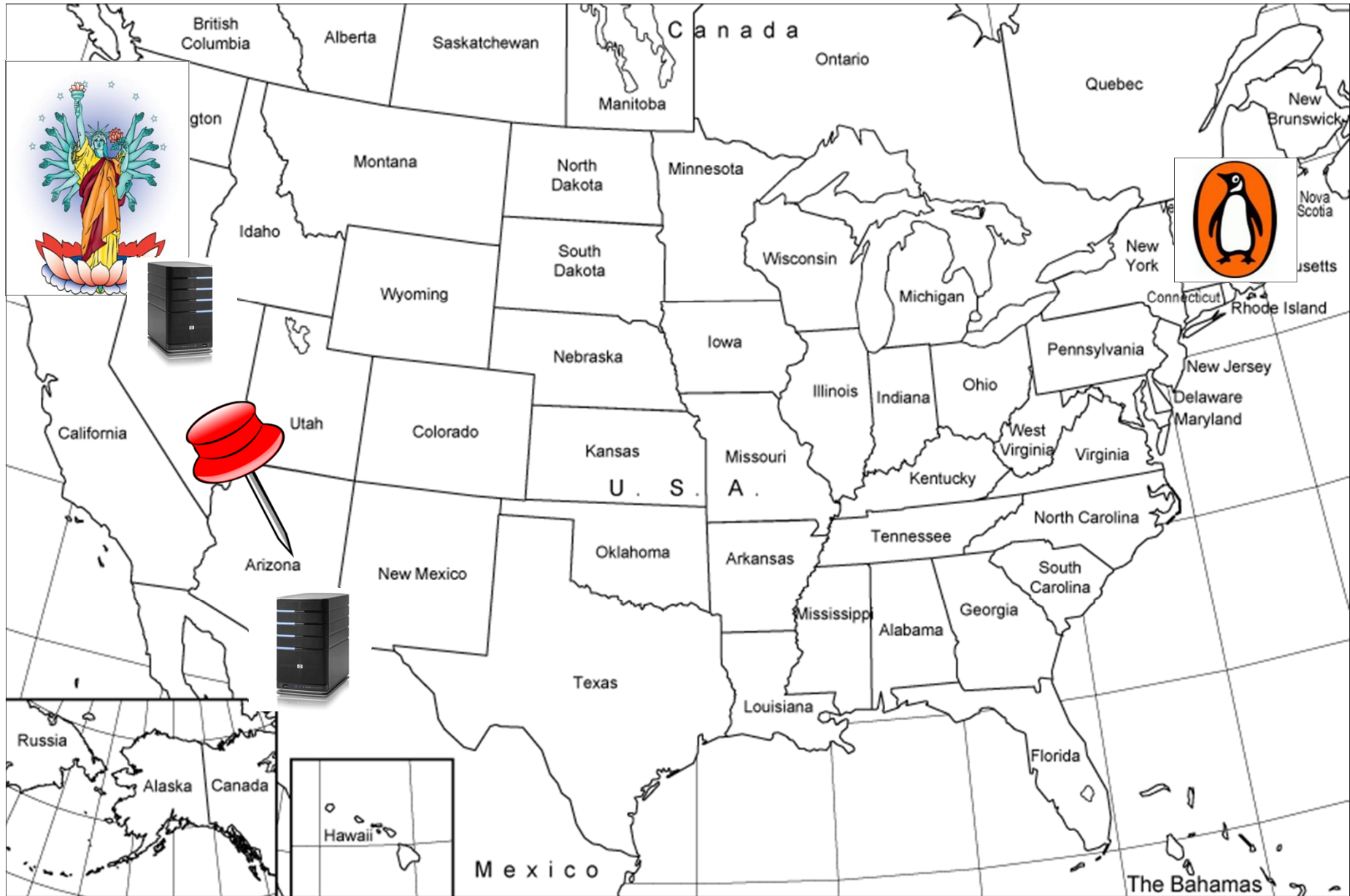
Olivier Robert Martinez v. Société MGN Limited (C-161/10)

Infringement of personal right via Internet

‘the place where the harmful event occurred or may occur’,
used in Article 5(3):

- State of establishment of the publisher of the information infringing personality rights, (all damages)
- State in which the information was published and in which the holder of personality rights claims to have been the victim of an attack on his reputation, (local damage)
- State where **the ‘centre of gravity of the dispute’**, among the rights and interests involved, is located; (all damages)

Penguin v American Buddha, 16 N.Y.3d 295



Personal jurisdiction (contd.)

Penguin Group (USA) Inc. v. American Buddha, 640 F.3d 497 (2011)

NY as “situs of injury” plus the following factors:

1. Infringement is in another state
2. Defendant "expects or should reasonably expect the act to have consequences in the state" and,
3. "derives substantial revenue from interstate or international commerce."
4. "minimum contacts"
5. "traditional notions of fair play and substantial justice"

= no Pandora's box

CLIP Principles



- Art 2:202: Jurisdiction of a court where alleged infringement occurs or may occur, ***unless***:
 - The defendant has not acted in that state to initiate or further the infringement
 - Activities were not directed to that state
- The scope of jurisdiction
 - Place of infringement: territorially limited jurisdiction
 - Cross-border jurisdiction:
 1. Jurisdiction pursuant to Art 2:202 and
 2. The infringer is habitually resident, and →
 3. (a) Substantial activities in that state *or*
(b) Harm in that state is substantial with regard to the infringement in its entirety

PRINCIPAL PLACE OF
BUSINESS OF A
NATURAL PERSON

Some considerations

“Right” holder v. alleged infringer:

Cloud → Acceleration to focus on injury?

Injury + additional factors as tendency among existing different approaches

harmonization through list up essential factors?

Requirements for recognition of foreign judgments to be harmonized

Some considerations (contd.)

“Right” holder v. alleged infringer

“Right” holder v. Cloud SP

Injunction and Enforcement:

Data Center as infrastructure? Cf. server

More anti-suit injunction?

Cf. Microsoft Corp v. Motorola inc., 9th Cir,
No.12-35352, 9/28/12