

COMMENT

From Here and There to Everywhere: The Emergence of *Lex Aetheria*

*Justice Roger Hughes**

1. OVERVIEW

The purpose of my lecture and this article is to recognize that there is emerging an international body of law and enforcement of Court Orders directed to regulate the content of telecommunications, including the Internet. A *lex aetheria* is following in the footsteps of earlier international law such as *lex mercatoria* and *lex maritima* because of the need to transcend national boundaries in order to deal with what is recognized by all civilized nations to be undesirable activity, whether it be criminal, anti-social or infringement of rights.

2. IN THE BEGINNING

Earth, air, fire and water are the classical elements held by many in ancient times to constitute the building blocks of the world. To that, some added a fifth element or essence — a quintessence — aether. Aristotle described aether as that perceived in the heavenly regions and unchangeable. Vedic literature describes aether as a void. Today, we consider the aether as that through which communication signals are transmitted.

How to control what passes through the aether is a modern dilemma. Similar dilemmas have been confronted by our predecessors; for example, while an army may control land, control of the seas over which many boats from many countries pass is more problematic. The Emperor Antoninus (138-161 AD),

* 2016 Grafstein Lectures – University of Toronto Faculty of Law. Certified Specialist in Intellectual Property Law and in Civil Litigation, Law Society of Upper Canada. Appointed Judge of the Federal Court, and *ex officio*, member of the Federal Court of Appeal, June 1, 2005. Appointed as a Judge of the Court Martial Appeal Court of Canada on June 23, 2006.

as reported in the Digest of Justinian (sixth century AD), proposed a legal solution:

I, indeed, am Lord of the world but the law is lord of the sea.
Let it be judged by Rhodian Law, prescribed concerning
nautical matters, so far as no one of our laws is opposed.

Thus developed Maritime Law, *lex maritima*. I propose a similar development of *lex aetheria*, Law of the Aether.

3. EARLIER DAYS

In earlier days, communications travelled by wire, for instance Morse's telegraph and Bell's telephone. Later developments such as Marconi's radio transmissions, followed by television broadcasts, dispensed with wires and travelled through the aether, "spilling" across national borders.

We now have a variety of communications over wires, such as the Internet, and through the aether, including far-reaching broadcasts, and ships located just beyond national waters broadcasting commercial signals to adjacent nations, to mention just a few.

Is a lawless chaos emerging? Is there hope for some just and equitable regulation of the aether? Most civilized nations seek to impose some form of control over communications considered to be criminal — for instance, child pornography, hate messages, incitement to riot, and recruitment into radical groups — but only where they can assert jurisdiction. Commercial enterprises seek the assistance of laws and courts to preclude or regulate unwanted exploitation and misuse of their copyright properties and proprietary information.

4. SOME MODERN DIFFICULTIES

Issues facing modern courts and lawmakers seeking to regulate and gain jurisdiction over communications include:

- activities beyond the physical national boundaries which nonetheless have impact within national boundaries;
- anonymity of source and receiver through the chain by which information passes to the consumer; and,
- the extent of liability of those who provide only pieces of data or intermediary services which contribute to the entirety delivered to the ultimate consumer.

Here are some illustrations of the difficulties presented by modern communication technologies, including the Internet, to the courts.

I will start with the *Norwich Order* line of cases. *Norwich Pharmacal Co. v. Customs & Excise Commissioners*,¹ as decided by the House of Lords, was quite literally about chicken feed or, more precisely, about a patented antibiotic chemical mixed into minute quantities of chicken feed. The patent owner wanted to know who was mixing that chemical, without their permission, into chicken feed, which was then imported into the United Kingdom. The government excise commissioners knew but would not tell. Lord Denning put the matter clearly in the first two paragraphs of his reasons:

The Norwich Pharmacal Co. is an American corporation which owns a patent. Smith Kline and French Laboratories Ltd. are an English subsidiary and licensee of the patent. I will call them "the plaintiffs." They have letters patent for a chemical compound. In the specification it is designated by a very long name. I will not write it or repeat it. It is claim 2. It has 36 letters and five figures. The plaintiffs have given it a shortened name which I can both write and repeat. It is "furazolidone." This substance is useful for putting into poultry food because it gives the birds some protection against infection by microbes. Very little of it goes a very long way. The plaintiffs mix it with chalk in the proportion of about one-quarter of furazolidone to three-quarters of chalk. This I will call the furazolidone mixture. This goes even further. Only half a pound of the mixture goes into one ton of feeding stuff. Some large poultry farms buy pure furazolidone themselves, or the mixture of chalk and furazolidone, and put it themselves into the feeding stuff. But smaller farms buy the final feeding stuff from merchants who have previously injected the furazolidone mixture into it.

The plaintiffs make the furazolidone in this country, and mix it with chalk here, and sell the mixture here. They have a strong belief, however, that a lot of "pirate" furazolidone is being imported into this country from abroad. Sometimes it is brought in by big farmers. At other times it is brought in by merchants who put it into poultry food which they sell. The plaintiffs want to put a stop to these "pirate" importations. But they do not know who are the people who are importing it. They have no means, they say, of finding out: because the final foodstuff contains only a small amount of furazolidone. "It is,"

¹ [1974] A.C. 133.

says the manager of their legal department, “for practical purposes impossible to show that this furazolidone is not lawful material originating with my company or its associates.”

Lord Denning concluded that public interest demands that the commissioners keep the names of the importers secret; if importers knew that their names might be disclosed, they would find ways to circumvent frank disclosure. However, he was in the minority.

The majority of the House of Lords held otherwise and ordered disclosure, a so-called *Norwich Order*. Lord Kilbrandon, one of the majority, said:

The most attractive way to state an acceptable principle, intellectually at least, may be as follows. The dispute between the plaintiff and the defendants is of a peculiar character. The plaintiff is demanding what he conceives to be his right, but that right in so far as it has patrimonial substance is not truly opposed to any interest of the defendants; he is demanding access to a court of law, in order that he may establish that third parties are unlawfully causing him damage. If he is successful, the defendants will not be the losers, except in so far as they may have been put to a little clerical trouble. If it be objected that their disclosures under pressure may discourage future customers, the answer is that they should be having no business with wrongdoers. Nor is their position easily distinguishable from that of the recipient of a subpoena, which, in total disregard of his probable loss of time and money, forces him to attend the court for the very same purpose as that for which discovery is ordered, namely, to assist a private citizen to justify a claim in law. The policy of the administration of justice demands this service from him.

But it is not necessary, in such a case as is being figured, to go as far as this. The defendants are not mere bystanders — although even if they be such they could in due time be called on to give oral evidence. The position in which they find themselves has been described in several ways; in a rather different context Lord Romilly M.R. in *Upmann v. Elkan*, L.R. 12 Eq. 140, 147 said of the importer that he was “mixed up with the transaction,” and, of the dock company who were mere warehousemen, that “in many respects the position of the dock company does not differ from his [the importer’s].” . . .

A number of cases follow the line of reasoning of the House of Lords in granting a *Norwich Order*. The Ontario Court of Appeal in *GEA Group AG v. Ventra Group Co.*,² extended the concept of such

² (2009), 96 O.R. (3d) 481.

an Order requiring pre-action disclosure of information in the hands of a third party — disclosure which, in a case where fraud is suspected, would allow proper formulation of pleadings in an action yet to be commenced.

The United States Court of Appeals for the Federal Circuit in *In re Posco*,³ permitted disclosure of information obtained on discovery in a United States Court to the parties in proceedings in Japan and Korea where courts could not order such disclosure.

Turning more closely to the world of communication, we have *Voltage Pictures LLC v. John Doe*,⁴ and a line of similar cases. In proceedings in the Federal Court of Canada, the court was faced with “bitTorrent” technology. This was described by Prothonotary Alto in *Voltage* at paragraph 12:

[12] There appears to be little dispute about how the technology works. When a file is uploaded to a BitTorrent network that is referred to as “seeding”. Other P2P network users, called “peers”, can then connect to the user seeding the file. BitTorrent breaks a file into numerous small data packets, each of which is identifiable by a unique hash number created using a hash algorithm. Once the file is broken into packets other peers are able to download different sections of the same file from different users. Each new peer is directed to the most readily available packet they wish to download. Peers copy files from multiple users who may have the file available on the BitTorrent network. The peer then becomes a seeder as the data packet is distributed to other peers connected to the BitTorrent network. Once a packet is downloaded it is then available to other users who are also connected to the BitTorrent network.

A request was made by Voltage for a form of *Norwich Order* which would require the Internet Service Provider (ISP) to provide identification of their subscribers such that Voltage could trace the persons who, without permission, posted Voltage’s copyright works in the bitTorrent system. The court granted such an Order subject to several conditions including compensation to the ISP for its reasonable expenses in providing such information (see the Order and Reasons of March 17, 2015 in Federal Court file T-2058-12 for the calculation of such expenses).

³ 794 F.3d 1372 (No. 2015-112).

⁴ 2014 FC 161.

Courts in other countries have made similar Orders including the Federal Court of Australia in *Dallas Buyers Club LLC v. iiNet Ltd.*,⁵ and the English and Wales Court of Appeal in *Golden Eye (International) Ltd. v. Telefonica UK Ltd.*⁶

The United States courts have also made similar Orders — though not calling them *Norwich Orders* — in cases like *Voltage Pictures, LLC v. Does 1-198*,⁷ a decision of the Federal District Court in Oregon, and in *AF Holdings, LLC v. Does 1-1,058*,⁸ a decision of the United States Court of Appeal for the District of Columbia.

Moving away from *Norwich Orders* to injunctions, very recently, the British Columbia Court of Appeal in *Equustek Solutions Inc. v. Jack*,⁹ dealt with a request by a copyright owner to the British Columbia courts for an injunction to restrain Google, which was not a party to the action and not resident in British Columbia, from permitting its search engine to be used for the purposes of “crawling” the Internet, and providing to interested persons in British Columbia, among others, links to certain sites which provided unauthorized copies of the plaintiff’s copyright material. The court gave such an Order. Groberman J.A., for the panel, wrote at paragraphs 60 to 64, 84, and 85:

60 It is important to recognize that the issue is not, or at least not wholly, one of jurisdiction. Common law courts have limited their exercise of remedial powers, not simply due to concerns about jurisdiction, but also as a matter of curial self-restraint.

61 In this case, Google argues that the authority of the Supreme Court to grant injunctive relief depends on the existence of a justiciable claim between the applicant and the respondent. It says that because the plaintiffs have not alleged that Google has committed (or is about to commit) a legal wrong against them, they are not entitled to an order against Google.

62 It is unusual for courts to grant remedies against persons who are not parties to an action. The reasons for this are obvious - most civil claims are concerned with the vindication of a right,

⁵ [2015] FCA 317 and 838.

⁶ [2012] EWCA Civ 1740.

⁷ 2013 U.S. Dist. Lexis 66729.

⁸ 752 F.3(d) 990 (2014).

⁹ 2015 BCCA 265.

and the remedial focus will be on that right. Further, notions of justice demand that procedural protections be afforded to a person against whom a remedy is sought. The usual method of providing such protections is to require the claimant to bring an action against the respondent, giving the respondent the rights of a party.

63 A party claiming damages or equitable relief for a civil wrong, or a declaration of rights will normally be required to make the person against whom the claim is made a defendant in the action.

64 This does not mean, however, that courts are powerless to make orders against non-parties. Google acknowledges discovery orders under the principles enunciated in *Norwich Pharmaceutical Co. v. Customs and Excise Commissioners* (1973), [1974] A.C. 133 (H.L.) may be made against non-parties. There are, in fact, many types of orders that are routinely made against non-parties - subpoenas to witnesses, summonses for jury duty and garnishing orders are common examples. Many of these orders have a statutory basis or are purely procedural, but others derive from the inherent powers of the court or are more substantive in nature.

...

84 While British Columbia courts will generally have in personam jurisdiction over residents of the Province, the inverse - i.e., that British Columbia courts will not have in personam jurisdiction over non-residents - is not true. Courts may have in personam jurisdiction over non-residents in a variety of situations. The chambers judge found that she had in personam jurisdiction over Google on the basis that it does business in the Province.

85 Once it is accepted that a court has in personam jurisdiction over a person, the fact that its order may affect activities in other jurisdictions is not a bar to it making an order.

This decision is on appeal to the Supreme Court of Canada.

The Supreme Court of Canada dealt with issues respecting extraterritoriality in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*,¹⁰ concerning copyright tariffs for communications of musical works over the Internet. The court was required to consider a variety of issues including: whether a tariff could be imposed where a

¹⁰ [2004] 2 S.C.R. 427.

communication originated outside Canada and was received in Canada; what was the liability, if any, of the Internet Service Provider; whether the location of a host server inside or outside Canada made a difference; and, whether “caches” of information within Canada made a difference. The majority decision of the court was delivered by Binnie J. At paragraphs 54 to 78, he made an extensive review as to the competence of the legislature and the courts regarding matters arising extraterritorially. He adopted the “real and substantial” connection to Canada test, and held that there was such a connection whether Canada was the country of transmission or the country of reception. He wrote at paragraphs 57 to 63:

57 The applicability of our Copyright Act to communications that have international participants will depend on whether there is a sufficient connection between this country and the communication in question for Canada to apply its law consistent with the “principles of order and fairness ... that ensure security of [cross-border] transactions with justice”; see *Morguard Investments*, supra, at p. 1097; see also *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 56; *Sullivan and Driedger* [page 455] on the Construction of Statutes (4th ed. 2002), at pp. 601-2.

58 Helpful guidance on the jurisdictional point is offered by La Forest J. in *Libman v. The Queen*, [1985] 2 S.C.R. 178. That case involved a fraudulent stock scheme. U.S. purchasers were solicited by telephone from Toronto, and their investment monies (which the Toronto accused caused to be routed through Central America) wound up in Canada. The accused contended that the crime, if any, had occurred in the United States, but La Forest J. took the view that “[t]his kind of thinking has, perhaps not altogether fairly, given rise to the reproach that a lawyer is a person who can look at a thing connected with another as not being so connected. For everyone knows that the transaction in the present case is both here and there” (p. 208 (emphasis added)). Speaking for the Court, he stated the relevant territorial principle as follows (at pp. 212-13):

I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is

sufficient that there be a “real and substantial link” between an offence and this country [Emphasis added.]

59 So also, in my view, a telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, “is both here and there”. Receipt may be no less “significant” a connecting factor than the point of origin (not to mention the physical location of the host server, which may be in a third country). To the same effect, see *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 52; *Kitakufe v. Oloya*, [1998] O.J. No. 2537 (QL) (Gen. Div.). In the factual situation at issue in *Citron v. Zundel*, *supra*, for example, the fact that the host server was located in California was scarcely conclusive in a situation where both the content provider (Zundel) and a major part of his target audience were located in Canada. The Zundel case was [page 456] decided on grounds related to the provisions of the Canadian Human Rights Act, but for present purposes the object lesson of those facts is nevertheless instructive.

60 The “real and substantial connection” test was adopted and developed by this Court in *Morguard Investments*, *supra*, at pp. 1108-9; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 325-26 and 328; and *Tolofson*, *supra*, at p. 1049. The test has been reaffirmed and applied more recently in cases such as *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at para. 71; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78; *Unifund*, *supra*, at para. 54; and *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72. From the outset, the real and substantial connection test has been viewed as an appropriate way to “prevent overreaching ... and [to restrict] the exercise of jurisdiction over extraterritorial and transnational transactions” (La Forest J. in *Tolofson*, *supra*, at p. 1049). The test reflects the underlying reality of “the territorial limits of law under the international legal order” and respect for the legitimate actions of other states inherent in the principle of international comity (*Tolofson*, at p. 1047). A real and substantial connection to Canada is sufficient to support the application of our Copyright Act to international Internet transmissions in a way that will accord with international comity and be consistent with the objectives of order and fairness.

61 In terms of the Internet, relevant connecting factors would include the situs of the content provider, the host server, the intermediaries and the end user. The weight to be given to any

particular factor will vary with the circumstances and the nature of the dispute.

62 Canada clearly has a significant interest in the flow of information in and out of the country. Canada regulates the reception of broadcasting signals in Canada wherever originated; see *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42. Our courts and tribunals regularly take jurisdiction in matters of civil liability arising out of foreign transmissions which are received and [page 457] have their impact here; see *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 8 C.P.R. (4th) 1 (Alta. C.A.); *Re World Stock Exchange* (2000), 9 A.S.C.S. 658.

63 Generally speaking, this Court has recognized, as a sufficient “connection” for taking jurisdiction, situations where Canada is the country of transmission (*Libman*, supra) or the country of reception (*Liberty Net*, supra). This jurisdictional posture is consistent with international copyright practice.

The court held that ISPs were not liable to pay a tariff because their role was passive and did not constitute a “communication”. The issue respecting such liability was set out by Binnie J., at paragraphs 79 to 81:

79 I therefore turn to the question of the extent to which Canada has exercised its copyright jurisdiction in relation to the Internet Service Providers at issue in this appeal.

80 SOCAN asserts Canadian copyright in the material transmitted from outside Canada to an end user in Canada. It is true that end users in Canada wind up with copyrighted material in their possession, and a communication to the Canadian user has therefore [page 463] occurred. The question is whether Tariff 22 imposes a licensing requirement on the appellants and others performing an intermediary function in telecommunications.

81 At this point the prospect of seeking to collect royalties from foreign infringers is not an attractive prospect for SOCAN. The question therefore is whether any or all of the appellants, in the ordinary course of their business, impart or transmit copyrighted music, and thereby do themselves infringe the copyrights represented by the respondent, within the meaning of the Act.

At paragraphs 105 to 107, Binnie J. dismissed the notion that the location of the host server, whether in Canada or not, made any difference.

105 This added limitation arose from a misreading by the Board of the earlier decision of the Federal Court of Appeal in *Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* (1994), 58 C.P.R. (3d) 190 (“CAB 1994”). The Board described what it conceived to be the effect of CAB 1994 as follows at p. 459:

CAB 1994 makes it clear that communications occur where the transmission originates. The place of origin of the request, the location of the person posting the content and the location of the original Web site are irrelevant. As a result, the right to authorize must be obtained from the person administering the right in Canada only when the information is posted on a Canadian server, and the right to communicate must be obtained from that same person only when the transmission originates from a server located in Canada. [Emphasis added.]

I agree with Evans J.A. that CAB 1994 which dealt with the timing of a transmission, not its location, “does not support the Board’s conclusion” (para. 172). The correct view is that a content provider is not immunized from copyright liability by virtue only of the fact it employs a host server outside the country.

106 Conversely, a host server does not attract liability just because it is located in Canada. A simple “host server” test would catch communications that have no connection to Canada other than the location of a piece of physical equipment, serving a neutral role as a technological conduit. Indeed it may be “impossible for the user to predict the location of the [host] server”; see A. P. Reindl, “Choosing Law in Cyberspace: Copyright Conflicts on Global Networks” (1997-1998), 19 Mich. J. Int’l L. 799, at p. 820.

107 It is on this aspect of the test that I respectfully disagree with my colleague LeBel J., who accepts the Board’s geographic limitation, i.e., that for copyright purposes there is no communication in Canada unless a communication “originates from a host server located in Canada ... [This] provides a straightforward and logical rule” (para. 146). My colleague agrees that in the first instance the liability of a host server provider, as with any other Internet Service Provider, should be determined by whether or not the host server provider limits itself to “a conduit” function, as discussed above, and thereby qualifies for protection under s. 2.4(1)(b). However, in my colleague’s view, even those participants in an Internet telecommunication who step outside the “conduit” role, and who would otherwise be

liable for copyright infringement, will be exempt from liability for Canadian copyright unless the host server itself happens to be located here. In my view, with respect, such an added requirement would be unduly formalistic and would tilt the balance unfairly against the copyright owners. If there are to be formalistic rules they should be imposed by Parliament.

At paragraph 115, Binnie J. dismissed the notion that the creation of a “cache” made any difference:

115 In the Board’s view, the means “necessary” under s. 2.4(1)(b) were means that were content neutral and were necessary to maximize the economy and cost-effectiveness of the Internet “conduit”. That interpretation, it seems to me, best promotes “the public interest in the encouragement and dissemination of works of the arts and intellect” (Théberge, supra, at para. 30) without depriving copyright owners of their legitimate entitlement. The creation of a “cache” copy, after all, is a serendipitous consequence of improvements in Internet technology, is content neutral, and in light of s. 2.4(1)(b) of the Act ought not to have any legal bearing on the communication between the content provider and the end user.

5. ATTEMPTS AT CREATING MULTI-JURISDICTIONAL LAW AND ENFORCEMENT

The problems created by multi-jurisdictional broadcasts are not new; similar problems have existed for a very long time, leading to concepts such as *lex mercatoria* and *lex maritima*, as well as to international treaties and commercial arbitration. I turn to some of these issues.

6. JURISDICTION — FOREIGN JUDGMENTS

Before considering whether a court will assume jurisdiction over a matter in the first instance, it is interesting to consider how our courts treat decisions of foreign courts when it comes to enforcing their judgments in Canada. Recently, the Supreme Court of Canada held that it would enforce a judgment of a South American court, subject to defences such as fraud, denial of natural justice, public policy and the like.

In the recent unanimous decision of the Supreme Court of Canada in *Chevron Corp. v. Yaiguaje*,¹¹ Gascon J. held that a party

¹¹ 2015 SCC 42.

could seek recovery in Canada of damages and penalties imposed by a court in Ecuador. He wrote at paragraph 27:

To recognize and enforce . . . a judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied.

and at paragraph 44:

the purpose of an action for recognition and enforcement is not to evaluate the underlying claim, but rather to assist in enforcing an already adjudicated obligation.

and at paragraph 46:

enforcement is limited to measures - like seizure, garnishment, or execution - that can be taken only within the confines of the jurisdiction, and in accordance with its rules.

and at paragraph 77:

Once the parties move past the jurisdictional phase, it may still be open to the defendant to argue any or all of the following: . . . a stay . . . decline to exercise jurisdiction on the basis of forum non conveniens; . . . defences . . . (i.e. fraud, denial of natural justice, or public policy).

The Supreme Court was speaking of an action to recover money by way of a foreign judgment as to damages. The foreign court had assumed jurisdiction, the Canadian court was simply asked to enforce its judgment.

7. ASSUMING ORIGINAL JURISDICTION

Will our courts assume original jurisdiction, for instance, to enjoin a foreigner whose activities impinge on Canadians?

The British Columbia Court of Appeal in *Equustek Solutions Inc. v. Jack*,¹² granted an injunction against Google, who was not a party and not even within the jurisdiction, to enjoin the use of a “crawler” provided by Google to Internet users which provided links to sites providing unauthorized use of the plaintiff’s copyright material.

Groberman J.A., for the panel, wrote:

Para. 62: “It is unusual for courts to grant remedies against persons who are not parties to an action.”

¹² 2015 BCCA 265.

Para. 64: “This does not mean, however, that courts are powerless to make orders against non-parties.”

Para. 84: “Courts may have in personam jurisdiction over non-residents in a variety of situations.”

Para. 85: “Once it is accepted that a court has in personam jurisdiction over a person, the fact that its order may affect activities in other jurisdictions is not a bar to it making an order.”

This decision is on appeal to the Supreme Court of Canada.

Another situation arose in a case considered by the Federal Court of Canada in a trade-mark context. In *HomeAway.com Inc. v. Hrdlicka*,¹³ the court had to consider whether a party, which placed advertisements for vacation home rentals on its website, having a server in the United States, could claim use of the trade-mark “in Canada”. That website was visited by Canadians, as well as by persons in other countries. Could the website’s owner claim “use” of its trade-mark appearing on the website in Canada? It was held that it could. The court wrote at paragraphs 10 and 14:

10 The resolution of this matter turns on a question of use, in this case of the initials VRBO as a trade-mark, for services described as vacation real estate listing services.

...

14 As will be discussed, the use of the trade-mark at issue, VRBO, is the offering vacation rental services and by advertising such services over the web. The trade-mark will appear on the screens of computer users in Canada and elsewhere. Given that HomeAway is a Delaware company, we may presume that the information is inputted through one or more computers in the United States. The computer screens display the information in Canada as well as elsewhere.

...

The United Kingdom Chancery Court dealt with the territorial aspects of jurisdiction in copyright material transmitted over the Internet in *Omnebell (Pty) Ltd. v. Egpsxxx Ltd.*¹⁴ A South African-

¹³ 2012 FC 1467.

¹⁴ [2014] EWHC 3762.

based escort service owned copyright in photographs of certain of their escorts. A competitor, also based in South Africa, was making unauthorized use of some of those photographs in association with its escort services. The service owning the copyright in the photographs brought an action in the United Kingdom against the copying firm (now bankrupt) and a British citizen said to be the sole director and shareholder of the copying firm. The issue before the court was whether it had jurisdiction over the dispute. This issue was determined by consideration of whether the website targeted persons in the United Kingdom. Birss J. stated the issue at paragraph 12:

12 It is clear that the question of whether a website is targeted to a particular country is a multi-factorial one which depends on all the circumstances. Those circumstances include things which can be inferred from looking at the content on the website itself and elements arising from the inherent nature of the services offered by the website. These are the kinds of factors listed by the CJEU in Pammer in the passage cited by Arnold J. However as can be seen from paragraph 51 of Arnold J's judgment he took other factors into account too, such as the number of visitors accessing the website from the UK. I agree with Arnold J that these further factors are relevant. Their relevance shows that the question of targeting is not necessarily simply decided by looking at the website itself. Evidence that a substantial proportion of visitors to a website are UK based may not be determinative but it will support a conclusion that the acts of communication to the public undertaken by that website are targeted at the public in the UK.

Mere accessibility on the Internet was not enough; there had to be targeting of persons located in the United Kingdom. Birss J. wrote at paragraph 40:

40 It was common ground that mere accessibility on the internet is not enough to show infringement, otherwise every website would be potentially amenable to the jurisdiction of every country in the world. However, as Mr Ward submitted, a finding that this site is at least in part targeted to the UK is consistent with the purpose of that concept in copyright law. The way the site is constructed with a global front page will clearly attract users from many countries. The operators of the website intend that to be the case. There is nothing surprising about the fact that a substantial proportion of the visitors to the South African sub-domain are from the UK.

It was found on the evidence that, while persons in the United Kingdom were a minority of the target audience, there was a sufficient degree of targeting persons in the United Kingdom so as to provide jurisdiction in the courts of that country to grant relief.

These cases illustrate a variety of situations where the courts must come to grips with multi-jurisdictional issues involving the Internet and broadcast materials. The courts focus on the real and substantial connection with the jurisdiction, the targeting of persons within the jurisdiction, or commercial exploitation within the jurisdiction, in order to find some basis to make an Order, even if the Order might be unenforceable.

8. *LEX MERCATORIA*

Lex mercatoria or merchant law is an ancient concept derived from the need for expeditious resolution of disputes arising between merchant and merchant or merchant and customer, often in the context of fairs and markets where peddlers (in old French, *piepuldreaux* or powder foot, a derogatory term for peddler — corrupted in English to piepowder) from abroad would often appear to sell their wares. A Court of Piepowder would be set up by the master of the fair to deal quickly with disputes arising during the course of the fair. These courts gradually extended their jurisdiction so broadly that, in England, they were severely curtailed by a statute of Edward IV, 17 Edw. IV, Ch. 2.

Administered by these courts were a collection of laws, which, from time to time, were published in various treatises in various jurisdictions such as France, Calatonia and England, one of the last of which was “*Lex Mercatoria or A Complete Code of Commercial Law*” by Wyndham Beawes in 1813.

There are disputes among scholars as to whether *lex mercatoria* still exists or whether it has been subsumed into national law, by jurisprudence and codification, in most countries. One of the greatest proponents of the latter view is Lord Mustill of the House of Lords, who wrote (before he became a Law Lord) in *Commercial Arbitration*:

Indeed, we doubt whether *lex mercatoria* even exists, in the sense of an international commercial law divorced from any State law: or, at least, that it exists in any sense useful for the solving of commercial disputes. It is undeniable that a *lex mercatoria* did once prevail in certain fields of law, particularly where there was already a body of ancient law upon which to

build. Here, the law was primarily to be derived from the writings of scholars. But all this has long been swamped by legislation and by the flood of reported decisions. So far as the old *lex mercatoria* now exercises any influence on the course of commercial business, it does so by virtue of having been received into the laws of individual states through the medium of judicial decision, and to a lesser degree, through being embodied in legislation.¹⁵

9. *LEX MARITIMA*

The late William Tetley Q.C. wrote an excellent treatise on *lex maritime*. He defined *lex maritime* or general maritime law as follows:

The general maritime law is a *jus commune* (a law that applies in a particular state unless there is a specific statute limiting it), is part of the *lex mercatoria*.

...

The *lex maritime* (the *ius commune* of maritime law) was quite uniform throughout Western Europe, until about the sixteenth century.

The principal source of early maritime law in Europe was an oral, customary *lex maritime*, applicable to commercial transport of goods by sea, which came to be accepted by European merchants between the ninth and twelfth centuries. The *lex maritime* was a branch of a wider customary mercantile law, the *lex mercatoria*. The influence of the *lex maritime* increased when it was codified and the customs thereby became formalized. Three documents exerted the most influence on this merchant, maritime law: the *RColes of Oleron*, appearing in written form by the end of the twelfth century, were accepted in northern and western Europe from the Atlantic coast to Spain to Scandinavia; the *Consolato del Mare* governed Mediterranean maritime affairs from about the late 1300's and later the *Laws of Wisbuy* (based on the *RColes of Oleron*) controlled trade in the Baltic.

These three "documents" were not really codes in the modern sense. They were rather compilations of decisions rendered by merchant-judges in real-life cases, usually accompanied by a

¹⁵ M.J. Mustill & S.C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed. (London: Butterworths, 1989) at 81.

loosely-formulated principal thought to be relevant to future incidents of the same kind.¹⁶

Tetley reviewed the many jurisdictions, including common law and particularly civil law, which have embraced and developed *lex maritima*. He concluded:

Is there a *lex mercatoria* in the twentieth century? The answer must be “yes” in maritime law, it being the general maritime law in such countries as the U.K., the U.S. and Canada (the *lex maritima*), derived from the *lex mercatoria*, the *RColes of Oleron*, the merchants’ and admiralty courts, going as far back as the twelfth century. It also exists in various international documents and understandings which have no legal authority, national or international, such as BIMCO bills of lading, standard form charterparties, the CMI’s Uniform Rules of Sea Waybills *145 1990 and the York/Antwerp Rules of 1994 on general average.

A new *lex mercatoria* would also appear to exist in international commercial arbitration, particularly maritime arbitration, and is slowly being added to by reported awards of arbitrators. These awards are based increasingly on international trade usages and custom and on general principles of law recognized and accepted by the international community of merchants. Moreover, such arbitral awards are beginning to form a real arbitral jurisprudence to which subsequent awards refer for support.

Justice L’Heureux-Dubé of the Supreme Court of Canada has endorsed the concept of international maritime law, drawn from a variety of sources in civil law and common law, as being established in Canadian law. She wrote in *Q.N.S. Paper Co. c. Chartwell Shipping Ltd.*:

A review of the history of the High Court of Admiralty, especially when it was granted expanded jurisdiction, reveals that whenever that Court sought to find general principles underlying maritime law, its method was to look to a variety of sources, including the civil law and the common law. That comparative method was in keeping with the nature of maritime law, which is, after all, international in character. It is a method which remains appropriate today in those cases where courts have no specific body of rules to apply to a matter falling within Canadian maritime law.¹⁷

¹⁶ “The General Maritime Law — The *Lex Maritima*” (1994) 20 *Syracuse J. Int’l L. & Com.* 105.

¹⁷ [1989] 2 S.C.R. 683 at 725.

All is not happiness and tranquility, however, in the maritime world; the high seas remain a lawless area. Ian Urbina wrote an article for *The New York Times*, reproduced in *The Toronto Star*, July 19, 2015, bearing the headline, “*How the high seas have become the new Wild West.*” In it, he said:

Few places on the planet are as lawless as the high seas, where egregious crimes are routinely committed with impunity. Today’s maritime laws have hardly more teeth than they did centuries ago, when history’s great empires first explored the oceans’ farthest reaches.

Murders regularly occur offshore — thousands of seafarers, fishermen or sea migrants die under suspicious circumstances annually, maritime officials say — but culprits are rarely held accountable. No one is required to report violent crimes committed in international waters.

10. ARBITRATION

As Tetley concluded above, maritime law has evolved to a point where many disputes are settled by arbitration, with the London Maritime Arbitrators Association among the most popular.

Arbitration has long been a popular method for resolving disputes between parties who have agreed to it, as well as a method imposed by the state or nation upon parties in a variety of circumstances. To quote again from Mustill’s book:

Essentially, those who devise a law of arbitration may choose between two alternative views of the relationship. First, they may regard arbitration as an aspect of public law. The arbitrator is a delegate of judicial powers which are essentially the property of the State. The powers of enforcement or control are attached to the arbitral process because that process belongs to the state, even if called into existence by a private bargain. The State has the right and duty to ensure, though [sic] the medium of the courts, that the reference is conducted in accordance with procedural norms which the State itself lays down.

Alternatively, the legal system may treat arbitration as a branch of private law. Recognising the value of the institution, the State will lend its own coercive powers to reinforce the process at points of weakness. Nevertheless, the formulation of the rights, duties and powers of the arbitrator, and the mutual obligations of the parties in relation to the conduct of the reference, are

created and regulated by the private bargain between the parties, and are no concerns of the State.¹⁸

The most ambitious attempt to impose international uniformity in arbitral proceedings is the Model Law of the United Nations Commission on International Trade Law (UNCITRAL), adopted in final form by the United Nations on December 11, 1985, Resolution No. 40/72. A large number of countries, including Canada, have adopted the Model Law by legislation.¹⁹ Provisions for enforcement of awards have been made in the *Federal Courts Rules*.²⁰ Several disputes have been submitted for resolution in accordance with the Model Law including, for Canada, the complaint made by a major United States pharmaceutical company that Canadian courts were not applying patent law as they should be in accordance with what it perceived to be international standards.²¹

Redfern and Hunter, in their book, conclude as to future developments in respect of the Model Law:

UNCITRAL has played a much more significant role in relation to international commercial arbitration than is generally recognised. Taken together, the New York Convention, the UNCITRAL Arbitration Rules and the Model Law represent a significant contribution to the development of the international arbitral process, which is designed to produce a binding and enforceable method for the resolution of disputes in international trade. It is unarguable that such a system is required, and that there is a constant need for it to be developed in order to meet the demands of modern international trade. UNCITRAL carries great weight partly because it is an organisation which itself has the backing of most, if not all, of the world's major trading nations; and partly because it is recognised as being one of the most effective and well supported agencies of the United Nations, both in the calibre of the state delegations and in its use of external experts from accredited non-governmental organisations. This can be an important element when parties are negotiating an arbitration clause, or if they are considering the adoption of a set of procedural rules for an arbitration clause, or if they are considering the adoption of a set of procedural rules

¹⁸ Mustill, *supra* note 15 at 4.

¹⁹ *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd supp.).

²⁰ SOR/98-106, rr. 328 to 334.

²¹ *Eli Lilly & Co. v. The Government of Canada*, UNCITRAL ICSID Case No. UNCT/14/2.

for an arbitration after a dispute has arisen, particularly where one of the parties is a state-owned organisation.²²

11. INTERNATIONAL TREATIES AFFECTING TELECOMMUNICATION

The United Nations General Assembly in 1970 adopted a Resolution (A/RES/25/2625) entitled “*Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations.*” Among the principles adopted was:

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

...

c. States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;

Thus, a seemingly “hands off” approach to domestic commercial laws is adopted. This does not, however, seem to impact international co-operation and harmonization of laws.

With respect to broadcasting and, in particular, with respect to technical matters such as the assignment and use of communication facilities, the International Telecommunications Union (ITU), originally formed as the *International Telegraph Convention* in 1865, became a specialized agency of the United Nations in 1947.

²² A. Redfern, M. Hunter & M. Smith, *Law and Practice of International Commercial Arbitration*, 2nd ed. (London: Sweet & Maxwell, 1991) at 527.

Canada has, through a variety of policies published by Industry Canada and other government pronouncements, largely but not entirely adhered to the ITU standards.

The ITU, however, does not deal with the content of what is broadcast. The ITU co-ordinates the shared global use of the radio spectrum, promotes international cooperation in assigning satellite orbits and assists in the development and coordination of worldwide technical standards. It deals with the construction and maintenance of highways but not the vehicles and their contents that travel those highways.

In 2012, Royal Assent was given to the *Copyright Modernization Act*, which was intended to address a number of issues arising from modern communications technology. The *Copyright Act* was amended so that Canada could adhere to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. New rights for copyright owners are extended to nationals of WIPO countries in Canada and to Canadian nationals in WIPO countries. These rights include the right protecting technology used to restrict access and use of content.

The *Copyright Modernization Act* balanced these new rights for copyright owners with extensive exemptions from liability for certain digital uses, especially non-commercial uses by individuals and uses by educational institutions and libraries.

The Act also clarified ISPs liabilities and obligations, which continue to be very limited, while attempting to prohibit activities by those in the business of infringement.

12. ICANN

Among the most notable private endeavours dealing with public and private use of the Internet is the Internet Corporation for Assigned Names and Numbers (ICANN).

Created with the blessing of the United States Department of Commerce in 1998, ICANN is an organization now free of control by that Department, headquartered in Los Angeles, California. It has a Governmental Advisory Committee consisting of representatives of over one hundred countries, and a number of observers representing a large number of interested international organizations.

ICANN administers the registration of Internet protocol identifiers and the use of Internet addresses. It has a dispute

resolution mechanism including the provision of a tribunal with authority to require identifiers to be altered or assigned to another.

ICANN is not, however, a universal mechanism for assignment of Internet identifiers. Places such as the Deep Web operate outside traditional systems in which illegal activities proliferate.

13. IGNORING LOCAL AUTHORITY

The Canadian Radio-television and Telecommunications Commission's (CRTC) recent dust-up with Netflix serves as a reminder that the exercise of jurisdiction of a national tribunal can only go so far when it attempts to regulate a foreigner.

14. IS THERE A *LEX AETHERIA*?

Lex mercatoria and *lex maritima* were, in reality, a collection of laws gathered together from time to time by authors and jurists and administered by a variety of courts and tribunals of many nations.

Such laws were not static; they continually evolved. Sometimes, evolution was by a process we know as common law; sometimes Emperors or International Treaties solidified or changed the direction of these laws.

Professor Viktor Mayer-Schönberger of Oxford University is quoted as urging that a supranational body should be set up to act as a global clearinghouse to deal with law enforcement requests according to common rules.²³ Even *The Economist* suggests that this may take years of tedious negotiations and might fail.

The desirability of a uniform law of the aether is evident but such a law is probably impossible to obtain. However, the recognition that there is no national body of law, but that there is a need for international respect for a body of laws pertinent to the aether, is attainable. Professor Arthur Taylor von Mehren stated the goals of multistate law:

If human society were so organized that all aspects of life moved within economic, social, legal, and political spheres that were unitary and coextensive, the problems dealt with through choice of law would never arise. In primitive societies, economic, political, and social activity is often so confined; the tribe, family, or village furnish the basic — and almost exclusively the relevant — unit for all aspects of human activity. In such an

²³ “Governments grapple with law enforcement in the virtual world,” October 10-16, 2015 edition of *The Economist* at 62.

organizational framework, the motivations and principles affecting human conduct will be viewed largely from a single perspective. In the contemporary world, however, individuals and enterprises often participate in the affairs of several communities; a single course of conduct may be viewed in differing economic, social, and political terms by each of the communities to which the activity is in some sense related. The discipline of choice of law is concerned with the identification and systematic handling of situations in which the persons concerned and the interests and policies at stake have significant connections with more than one community.²⁴

He concluded at page 371:

Perhaps the principle which can best reconcile these considerations in certain cases of true conflict is the one these solutions imply — that the views of all legal orders which have significant claims to control a multistate situation should be recognized according to the degree of concern each possesses in the given situation. If the complexities involved in applying this principle and developing substantive-rule solutions that fairly accommodate the views of all significantly concerned jurisdictions are manageable, choice of law theory and practice could, by utilizing such rules, take a large step toward resolving the ancient conflict between the objectives of aptness and of decisional harmony.

Arbitration can be a solution in resolving the disputes of willing parties; treaties can function to establish pathways over which broadcasts can travel. What is required is an effective means for dealing with those who do not willingly submit themselves to regulation. The copyright infringers, the pornographers, and to those who incite hate or violence, to name a few, require that courts, backed by with effective enforcement, step in.

There is no need to re-invent what was established before the Piepowder Courts administering *lex mercatoria* gradually coalesced into national courts. The administration of *lex maritima* became absorbed into national laws and international arbitration.

I propose therefore:

- that we recognize that there is evolving a *lex aetheria*;
- that national courts follow the example of the Emperor Antoninus and recognize and enforce the decisions and orders of foreign courts, for instance in enjoining certain

²⁴ “Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology” (1974) 88 Harv. L. Rev. 344 at 349.

behaviour, so long as the national laws of their country would not oppose it;

- that a greater effort be made to collect the decisions of the various courts of many nations such that legal scholars may attempt to rationalize and harmonize those decisions;
- that there be greater discussion between scholars, judges and regulators to strengthen respect and harmony with a goal to establish a living *lex aetheria*.

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