UNIT- 7

INTERNATIONAL POSITION OF INTERNET JURISDICTION; CASES IN CYBER JURISDICTION

STRUCTURE

7.1 INTRODUCTION

Cyberspace is a world of its own, in other words it is a ‘‘borderless’’ world. It refuses to accord to the geopolitical boundaries the respect that private international law has

always rendered to them and on which it is based. Therefore there is a requirement to have a different solution to this different problem. The traditional rules were evolved to address a category of disputes which involved legally relevant foreign elements. Here, ‘‘foreign’’ mentions to territorially foreign, determined by and according to the geopolitical boundaries. The internet, on the other hand, is truly a borderless world. It refuses to solidarity to the (traditional) geopolitical boundaries the respect and sanctity which has been historically conferred to them. The disregard of these boundaries by the internet gives rise to a multitude of problems, of which the problem of jurisdiction is but the foremost. The issue gains special significance in matters concerning cyberspace in that cyberspace is merely a medium of effecting or facilitating certain acts, which have real world implications. Thus acts committed in the ‘‘borderless cyber world’’ eventually have to be enforced in the bordered real world. The problem of jurisdiction arises because it is only in the real world that there exist mechanisms to confer rights, immunities, privileges, etc. with no corresponding equivalent in the cyber world. On account of the differences in the normative standards of conduct among the different political entities in the real world, the question of jurisdiction becomes particularly important, for what may be legal in one legal system may be prohibited by another, and the same may be circumstantially justifiable in yet another. For example, the degree to which the exercise of the freedom of speech and expression is permitted in different legal systems. As much of the freedom guaranteed to individuals in the United States and India is not available in many other states, particularly the Islamic and the Communist world. On account of the absence of a pluralist regime, there exists no such difference in the cyber world. In other words, the differentiation between legality and illegality is not maintained in the cyber world, independent of the real world.

7.2 OBJECTIVES

After reading this unit you will be able to understand the following:

- Jurisdiction issues in the borderless world of Internet
- Personal jurisdiction in cyberspace
- Principle of international jurisdiction
- Jurisdiction to prescribe
- Jurisdiction to adjudicate
- Jurisdiction to enforce
- The case of Minnesota
- The position in the United State
- The position in England and Europe
- The Brussels (I) Regulation
- The position in India

- Some important cases in cyber jurisdiction

7.3 SUBJECT

7.3.1 PRINCIPLE OF INTERNATIONAL JURISDICTION

As an international rule each state must accord respect to the sovereignty of every other and must not interfere with features by which sovereignty is established by other states. Territoriality to that extent is an inevitable consequence of sovereign equality of states and peaceful coexistence. Considering the territorial nature of sovereignty today, as a universal rule, jurisdiction is limited to everybody and everything within the sovereign's territory and to his nationals everywhere. In other words, laws extend not further than the sovereignty of the State which enforce them. Jurisdiction is meant the right of a state to prescribe, give effect to, and adjudicate upon violations of, normative standards for regulation of human conduct. The term ''jurisdiction'' covers within its ambit the authority of a sovereign to act in legislative, executive and judicial character. These three concepts are closely related, but distinct.

(1) Legislative jurisdiction or jurisdiction to prescribe refers to a state legislature's authority to make its substantive law, which apply to particular parties or circumstances. In general, a legislature's authority to prescribe certain behaviour within its territory or by its citizens is undeniable. A more controversial but increasingly accepted basis for legislative jurisdiction is the prohibition of actions taken in a foreign state that cause injury or bad "effects" in the home state. The worldwide nature of the Internet places great stress on the traditional principles of legislative jurisdiction. For example, no one seriously disputes Germany's or France's power to keep its nationals or people within its territory from viewing Nazi propaganda or other forms of hate speech. However, when their laws apply to web sites that are established in foreign countries, as was the case in *Yahoo!* and *Toben*, France's and Germany's legislative jurisdiction is far more controversial. One increasingly prevalent limitation on legislative jurisdiction within the United States' federal system is the dormant commerce clause. Laws passed by individual U.S. states are invalid under the dormant commerce clause if they unduly burden or discriminate against interstate commerce.[1] A similar principle applies to laws by EU member states that are seen as protectionist and violating the EU common market efforts. While this is a complex area of the law with few easily predictable results, the practical effect is that laws passed by U.S. states or EU member states that impose undue burdens on online businesses without a legitimate purpose (such as consumer protection) might be subject to challenge under the dormant commerce clause or the EU common market principle.[2]

(2) Judicial jurisdiction or jurisdiction to adjudicate refers to the authority of a state to subject parties to proceedings in its courts or other tribunals. There are two types of

[1]*See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005) (dormant commerce clause violated by state laws discriminating against the direct sales of wine by out-of-state wineries).

[2]International Jurisdiction and the Internet;Kurt Wimmer;Eve R. Pogoriler; COVINGTON & BURLING WASHINGTON, D.C.

judicial jurisdiction, known in the U.S. as general jurisdiction and specific jurisdiction. General jurisdiction allows courts to exercise jurisdiction over parties regardless of whether the cause of action has any relation to the forum state. General jurisdiction typically requires "continuous and systematic" contacts with a forum, such as an established "bricks and mortar" business. This concept has very little applicability to the Internet since a web site alone is insufficient to give rise to general jurisdiction, and the only businesses that would be subject to such jurisdiction would be those that had a real world presence in the forum and already anticipated being sued there. Specific jurisdiction, on the other hand, allows courts to exercise jurisdiction over parties when there is some minimal relationship between the defendant, the cause of action, and the forum state (the seminal U.S. case, *International Shoe v. Washington*, uses the term "certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and justice").

(3) Executive jurisdiction or jurisdiction to enforce refers to the authority of a state to use its resources to compel compliance with its law. This typically flows from the jurisdiction to adjudicate, and international law principles of comity usually require states to assist in the enforcement of judicial decisions of other states. There are, however, limits to such international cooperation. For example, U.S. courts typically will not enforce foreign defamation judgments that are inconsistent with the U.S.[3] First Amendment. After the French court's ruling in the *Yahoo!* case, Yahoo! sought an order from a U.S. court barring enforcement of the French judgment in the U.S. The lower court sided with Yahoo!, although a plurality of an en banc panel of the Ninth Circuit Court of Appeals recently reversed on the grounds that the case was not yet ripe.[4] A leading case in this area is *Matusevich v. Telnikoff,* in which the U.S. District Court for the District of Columbia held that it would preclude enforcement of a British libel judgment for speech that would be protected under the U.S. First Amendment.[5] The First Amendment limitation to the enforcement of foreign judgments is not limited to defamation cases. For example, in New York, a court recently refused to enforce a French unfair competition and intellectual property judgment against an American website operator, holding that the First Amendment protected the website's decision to post pictures of models wearing copyright-protected designs.[6]&[7]

7.3.2 JURISDICTION ISSUES ON INTERNET

The Internet touches every country in the world. That universality is a great part of its strength as a tool for business as well as also creates unique business risks. Worldwide access exposes web site operators and Internet publishers to the possibility of being hailed into courts around the globe. Businesses must therefore determine the extent to which they should conform to

[3]*Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 1 69 F.Supp.2d 11 81 (N.D. Cal. 2001), *rev'd onother grounds*, 379 F.3d 1120 (9th Cir. 2004), *rev'd en banc*, 433 F.3d 11 99 (9th Cir. 2006).
[4]*Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 11 99 (9th Cir. 2006).
[5]877 F.Supp. 1 , 23 Media L. Rep. 1367 (D.D.C. 1995).
[6]*Sarl Louis Feraud Int'l v. Viewfinder, Inc.* , 406 F.Supp.2d 274 (S.D.N.Y. 2005).
[7]International Jurisdiction and the Internet;Kurt Wimmer;Eve R. Pogoriler; COVINGTON & BURLING WASHINGTON, D.C.

various local laws; they must predict not only where they can expect to be sued, but also which jurisdiction's law will apply. Several recent cases illustrate the increasing dangers of web sites being subject to the laws of countries outside which they are based. These cases also illustrate that not all web sites are created equal, and that questions of jurisdiction often depend on the facts in an individual case and the particular cause of action. These factors, along with the rapid growth of the Internet and the lack of technological expertise of many courts and regulators, have led to a growing and often inconsistent body of law relating to jurisdiction. However, a pattern is gradually emerging that suggests that a web site should only be subject to the laws of the state in which its server is located[8], although this result depends in large part upon the interactivity of the web site and the extent to which it is targeted to a particular forum. Still, the need for a more stable legal framework for businesses has led to several efforts to create universal and predictable laws.

First, Australia's High Court has held that the Dow Jones publication *Barrons* is subject to the jurisdiction of Australian courts because it can be accessed over the Internet in Australia. In *Dow Jones & Co. v. Gutnick,*[9] the court held that Dow Jones was subject to suit in Victoria for allegedly defamatory material that appeared in an online version of *Barrons*, despite the fact that the web site is published and hosted in New Jersey, and that Victorian law would apply. The court's decision rested, in part, on the subscription nature of the site by which *Barrons* is accessed in Australia. Because the publication at issue was available through a subscription service with a handful of subscribers who paid using Australian credit cards, the court found that Dow Jones has accepted the risk of being sued in Australia and would be required to defend the suit there.[10]

Second, Andrew Meldrum, an American journalist writing for the *Guardian*, a London newspaper, was prosecuted in Zimbabwe on charges of "abuse of journalistic privileges by publishing falsehoods" on the basis of stories published in the *Guardian* in England and posted on its web site, which is published and hosted in England.[11] The *Guardian* was not available in paper copy in Zimbabwe at all. Prosecutors took the position that Zimbabwe's criminal courts have jurisdiction over any content published on the Internet if that content could be accessed in Zimbabwe.[12] On July 15, 2002, Mr. Meldrum was acquitted of the charges against him by the district court in Harare. Immediately upon acquittal, however, Mr. Meldrum was served with deportation papers. Judge Godfrey Macheyo refused to address the jurisdiction argument, effectively leaving the door open for future prosecutions against foreign journalists based on Internet distribution of their stories.

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[8]See "law of server", unit 5

[9]12 ILR (P&F) 346, [2002] HCA 56 (Dec. 10, 2002)

[10]International Jurisdiction and the Internet;Kurt Wimmer;Eve R. Pogoriler; COVINGTON & BURLING WASHINGTON, D.C.

[11]*See* "U.S. Citizen Becomes First Journalist Tried Under Zimbabwe's New Press Law," NEWS MEDIA UPDATE (REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS), July 1, 2002. Domestic journalists have been prosecuted under the law as well, and a Zimbabwe journalist stood as a co-defendant with Mr. Meldrum in the prosecution in Harare.

[12]Geoffrey Robertson, *Mugabe Versus the Internet*, THE GUARDIAN, June 17, 2002 (available at http://www.guardian.co.uk/Archive/Article/0,4273,4435071 ,00.html).

A more promising development for Internet publishers comes from Canada. In *Bangoura v.Washington Post Co.*,[13] the Ontario Court of Appeal recently reversed a lower court's ruling that the *Post* was subject to Canadian jurisdiction for content that was available on the Internet. The trial court had held that the availability of the article on the Internet – even though it had been downloaded only once, by the plaintiff's counsel – was sufficient for jurisdiction. "I would be surprised if [the Post] were not insured for damages for libel or defamation anywhere in the world," the judge noted in his opinion. "And if it is not, then it should be." The Court of Appeal reversed, finding that the content "did not reach significantly into Ontario." The opinion expressed reciprocity concerns, observing that an exercise of jurisdiction in this case "could lead to Ontario publishers and broadcasters being sued anywhere in the world with the prospect that the Ontario courts would be obliged to enforce foreign judgments obtained against them." The opinion rejected reliance on the Australian *Gutnick* case, noting simply that it would not be "helpful in determining the issue before this court." Despite the favourable outcome in this case for the Internet publisher, it is important to note that *Bangoura's* precedential value may be limited to some extent by the unique facts of the case, including the fact that the plaintiff moved to the forum state several years after publication of the offending content.[14]

7.3.3 REJECTING TERRITORIALITY: THE CASE OF MINNESOTA

Minnesota is one of the first jurisdictions to attempt a general exercise of jurisdiction over up loaders (and to a lesser extent, downloaders) outside their own territorial boundaries. Minnesota's Attorney General, Hubert Humphrey III, issued a memorandum stating that "Persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws."[15] Since Hubert Humphrey III's memorandum was issued, a federal district court and the Minnesota Court of Appeals have applied his rationale and found personal jurisdiction based merely on the fact that information placed on the Internet was downloadable in the state in question.[16] The opinion in *Minnesota v. Granite Gate Resorts* (a case argued for the state by the very same Hubert Humphrey III), accepted the Attorney General's argument and asserted jurisdiction over the website owner based in part on the fact that "during a two-week period in February and March 1996, at least 248 Minnesota computers accessed and 'received transmissions from' appellant's websites."[17]

In *Maritz*, a federal district judge accepted the plaintiff's "downloadable" argument most likely because of its conceptual simplicity, and additionally because of the

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[13][2005] O.J. No. 3849 (Ont. C.A.), leave to appeal dismissed, [2006] SCCA No. 497 (February 16, 2006).

[14]International Jurisdiction and the Internet;Kurt Wimmer;Eve R. Pogoriler; COVINGTON & BURLING WASHINGTON, D.C.

[15]Memorandum of Minnesota Attorney General (July 18, 1995) (reproduced at <http://www.state.mn.us/ebranch/ag>)

[16]Maritz v. Cybergold, 947 F. Supp. 1328 (E.D. Mo. 1996); Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (1997).

[17]Granite Gate, 658 N.W.2d at 718.

traditional preference of courts and choice of law schemes to find jurisdiction in the domestic forum. Fortunately, no federal appellate court has made a binding determination, and no case involving *in personam* jurisdiction and the Internet has yet been decided by the Supreme Court. Therefore, these judicial missteps have not yet become formidable law. Minnesota's concerns are no doubt sincere, but the memorandum itself is not. Everybody "knows" that all information in cyberspace may be downloaded in Minnesota, and such an eventuality is always foreseeable. Minnesota's rule thus makes all of cyberspace subject to Minnesota law. If every state took this approach the result would be unbearable, especially for multinational corporations with attachable assets located all over the world. Nonetheless, Minnesota's law lays out a simple syllogism that is easy for lawyers to grasp: anyone who "being without the state, intentionally causes a result within the state prohibited by the criminal laws of this state," is subject to prosecution in Minnesota.Since anyone who puts up a webpage knows that it will be visible from Minnesota, "downloadable" in Minnesota's Attorney General's memorable words, then every Internet actor intentionally causes a result in the state of Minnesota and is subject to Minnesota's criminal laws. This simple approach, conceivably appealing at first, dissolves upon a sufficiently detailed international legal analysis. A much more sensible view is that of the Florida Attorney General: "the resolution of these matters must be addressed at the national, if not international, level."[18]An interesting question for strict constructionists is whether, under the federal system, Minnesota has any obligations under international law. As a practical matter, Minnesota, as well as all states and nations, will be constrained by international law. Where possible, the Supreme Court always interprets congressional mandates in accordance with international law,[19] and that presumption is possibly stronger against state legislatures.[20] Indeed, most provisions of U.S. foreign relations law are designed to keep international questions in federal hands. Of course, treaties are the "supreme law of the land," superior to any state law. At any rate, considerations of comity, which are underdeveloped and often thinly conceived in relations between the United States and foreign sovereigns, will be important if Minnesota attempts to assert this jurisdiction internationally. Minnesota's approach has several problems. First, Minnesota has ignored the presumption against extraterritorial in application of U.S. laws. It seems that the Minnesota Attorney General was under the impression that, because the mode of analysis for conflicts of law is the same for conflicts between U.S. states as for conflicts between a U.S. state and a foreign country, the results will also always be the same. The sovereignty of individual American states, however, is not as easily of fended (or defended) as the sovereignty of nation-states. Under the theory of international spaces,[21] Minnesota has no jurisdiction to prescribe law over objects in cyberspace because under the federal system, Minnesota has no "nationality" to assert. Nationality is a function of national sovereignty, and the jurisdiction predicated thereon is federal Second, Minnesota has conflated *in personam* jurisdiction with the jurisdiction to prescribe law. The former is subject to the "minimum contacts"[22] analysis, the latter is not. A nexus with Minnesota territory

[18]See, International Jurisdiction and the Internet;Kurt Wimmer;Eve R. Pogoriler; COVINGTON & BURLING WASHINGTON, D.C.
[19]*See* Alexander Murray v. Charming Betsy, 6 U.S. 64, 118 (1804).
[20]Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 143 (1938); *but see* Nielsen v. Johnson, 279 U.S. 47, 52 (1929).
[21] See unit 6
[22]International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

sufficient to establish *in personam* jurisdiction over a defendant may not be sufficient to give Minnesota the jurisdiction to prescribe a rule of law for the action. Indeed, Minnesota courts may have *in personam* jurisdiction over a defendant but may, according to their own choice of law statutes, choose to apply foreign law in the case at hand. Although the analysis conducted in *Granite Gate* looks like a standard *in personam* jurisdiction decision, the court really decided the case while assuming it had the jurisdiction to prescribe law for actions incyberspace. The court looked no further than its own state's long-arm statute in finding *in personam* jurisdiction without considering issues of federalism, comity, or international law, i.e., without considering whether jurisdiction to prescribe existed or not.

In short, objective territoriality is not a blanket to be thrown over cyberspace, but is appropriate only in unusual circumstances, where the state asserting jurisdiction on this principle is somehow the *target* state, uniquely or particularly affected by an action intended to cause such an effect. Under international law, Minnesota needs to find another basis for asserting prescriptive jurisdiction over actions in cyberspace.

7.3.4 THE POSITION IN THE UNITED STATE

7.3.4.1 PERSONAL JURISDICTION

A court must find sufficient nexus between the defendant or the res, on the one hand and the forum on the other to properly exercise jurisdiction. The law of personal jurisdiction has changed over time reflecting changes of a more mobile society. The two bases for a US court to exercise jurisdiction are as follows:

Territoriality

Physical presence in a state is always a basis for personal jurisdiction. The exercise of jurisdiction is permitted over people and property within the territorial borders.[23] Even when an out-of-state individual enters the forum state for a brief time the physical presence is a basis for personal jurisdiction.[24] Physical presence in the forum state satisfies the requirement of constitutional due process.

Jurisdiction over out-of-state defendants

A US court exercises jurisdiction through the ‘‘out-of-state statute’’ route, where the defendant is not physically present. There are two requirements, whose must be fulfilled by the court for exercise personal jurisdiction over an out-of-state defendant.[25] First, there must be statutory authority granting the court jurisdiction over the defendant. And, secondly, the due process clause of the Constitution must be satisfied. In determining whether a court may exercise personal jurisdiction over a defendant requires a two-step inquiry. First test is the legislative

[23]*Pennoyer v Neff* 95 U.S. 714 (1877);
[24]*Burnham v Superior Court* 495 U.S. 604 (1990).
[25]In *Hess v Pawloski* 274 U.S. 352 (1927), it was held by the US Supreme Court that jurisdiction may be exercised over any non-resident who was operating a motor vehicle within the state and was involved in an accident.

sanction, which relates to the inquiry, whether there is a legislative grant of authority authorising the court to exercise jurisdiction over the defendant? Some federal statutes authorises the court to exercise personal jurisdiction over any defendant located within the United States. If no specialised federal law provision exists, the Federal Rules of Civil Procedure direct the federal court to look to the ‘‘long-arm’’ statute[26] of the state in which the court is located to determine the question of personal jurisdiction over the defendant. The second test is concern with the constitutional limitations. A statutory basis must further pass the test of constitutional limitations. In 1877, in the landmark *Pennoyer v Neff*[27] decision, the US Supreme Court, holding that the due process clause of the Constitution constrains the states in the exercise of personal jurisdiction over non-residents, observed that (1) ‘‘every State possesses exclusive jurisdiction and sovereignty over persons and property *within* its territory’’; and, (2) ‘‘no State can exercise direct jurisdiction and authority over persons or property *without* its territory’’.

7.3.4.2 MINIMUM CONTACTS

The Supreme Court in *International Shoe v Washington*[28]first made lenient the rule to include the criterion of ‘‘minimum contact’’ on the reasoning that the due process requires only that in order to subject a defendant to a ‘‘judgement *in personam* [personal jurisdiction]’’, if he be not present within the territory of the forum, he have ‘‘*certain minimumcontacts*’’ with it such that ‘‘the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’ ’’.[29]Courts must consider both the amount and nature of the party’s contacts with the state and the relationship between the contacts and the claims when determining whether the court can exercise personal jurisdiction over that party.

Reasonable anticipation

In order to further safeguard the rights of out of state defendants, a further caveat was added to the ‘‘quality and nature of minimum contacts test’’. This was that the defendant’s contact with the forum state should be foreseeable,[30] i.e. a court would not have jurisdiction unless it could be shown that the defendant had ‘‘purposefully availed’’ himself of the privilege of conducting business in the forum.[31] This ‘‘critical’’ test of ‘‘foreseeability’’ is not the mere likelihood that

[26]See generally C.M. Cerna, ‘‘Hugo Princz v. Federal Republic of Germany: How far does the LongArm Jurisdiction of US Law reach’’ (1995) 8(2) *Leiden Journal of International Law* 377.

[27]95 U.S. 714 (1877).

[28]326 U.S. 310 (1945). The case involved a Washington court attempting to assert jurisdiction over a corporation that was incorporated in Delaware and had a principal place of business in Missouri

[29]*International Shoe v Washington*, above fn.35, 316

[30]*World-Wide Volkswagen Corp v Woodson* 444 U.S. 286 (1980). The case concerned a car accident that occurred in Oklahoma and for which the Oklahoma state court was held not to have jurisdiction over out-of-state defendants. The defendants, a New York car dealer and a New England regional distributor, sold the plaintiffs, then residents of New York, a car in New York. The plaintiffs subsequently moved to Arizona, and while travelling through Oklahoma got into an accident caused by the allegedly defective car.

[31]*Cybersell, Inc v Cybersell, Inc* 130 F. 3d 414; *Hanson v Denckla* 357 U.S. 235, 253 (1958).

a product will find its way into the forumstate, but required a reasonable anticipation of being haled into court there.[32]

7.3.4.3 EFFECTS CASES

In the ‘‘effects’’ cases,[33] the Supreme Court based jurisdiction on the principle that the defendant knew that his action would be injurious to the plaintiff therefore he must be reasonably presumed to have anticipated being ‘‘haled into court where the injury occurred’’. The ‘‘effects’’ cases are of particular importance in cyberspace because any conduct in cyberspace often has effects in various jurisdictions.[34]

To summarise, the treatment of the issue of jurisdiction in the United States—based on the ‘‘minimum contacts’’ standard—is as follows:

- there must be ‘‘some act by which the defendant *purposefully avails [itself] of the privilege of conductingactivities with the forum state*’’[35];
- the plaintiff must show ‘‘either that the defendant’s contacts with the forum are continuous and systematic, or that the suit arises out of or is related to those contacts’’[36];
- the defendant’s conduct and connection with the forum state must be such that ‘‘he should reasonably anticipate being haled into court there’’[37]; and
- the exercise of personal jurisdiction must be ‘‘reasonable’’.[38]

7.3.5 THE POSITION IN ENGLAND AND EUROPE

7.3.5.1 PERSONAL JURISDICTION

The English conflict rules have more or less adhered to the rule of territoriality as the basis of an adjudicative jurisdiction. In England,

‘‘There are now two quite different sets of rules as to jurisdiction of the English courts. In many cases, jurisdiction is still governed by what may be called the ‘traditional rules’, though in a growing proportion of cases, they are replaced by the ‘Convention rules’ ’’[39].

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[32]*Cybersell*, above fn.40.
[33] See generally *Calder v Jones* 465 U.S. 783 (1984); *Keeton vHustler Magazine, Inc*. 465 U.S. 770 (1984).
[34] “International Jurisdiction in Cyberspace: A comparative Perspective” by Amit Sachdeva available at http://vaishlaw.com/article/Cyberspace%20Jurisdiction-Amit%20Sachdeva.pdf
[35]*Hanson*, above fn.40
[36]*Helicopteros Nacionales de Colombia v Hall* 466 U.S. 408, 415–416 (1984).
[37]*WorldWide Volkswagen Corp v Woodson*, above fn.39, 297.
[38]*Burger King Corp v Rudzewicz* 471 U.S. 462, 476–477 (1985). The Supreme Court has also offered a list of five jurisdictional ‘‘fairness factors’’, which include the inconvenience to the defendant of defending in that forum, the forum state’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in efficient resolution of interstate conflicts, and the shared interest of the states in furthering substantive social policies. Burger King at 477.
[39]David McClean (ed.), *Morris: The Conflict of Laws*, 4th edn (Universal Publishing Co, 2004), p.60; See also, *Dicey and Morrison Conflict of Laws*, above fn.73, 291–301.

The rules of international jurisdiction of the EC Member States are now governed by a Community instrument, Regulation 44/2001. This substitutes the Brussels Convention, which after March 1, 2002 ceases to operate between the Parties to that Convention, except in their relations to Denmark. The Regulation is binding in its entirety and directly applicable to the Member States. The Regulation is binding on and applicable to the United Kingdom also as a result of the exercise by the United Kingdom of the ‘‘opt-in’’ option.

7.3.5.2 THE BRUSSELS (I) REGULATION

The traditional rules on jurisdiction in the United Kingdom (and elsewhere in Europe) underwent a substantial modification with the coming into force of the EC Treaty and the respective accession by the states thereto. This happened on account of two specific treaty provisions contained in the EC Treaty: first, Art.249 of the EC Treaty which provides for taking of measures including adoption of directives and regulations in matters over which the Community has competence; and secondly, amendment of the EC Treaty by the Amsterdam Treaty, as a result of which matters concerning ‘‘cooperation in civil jurisdiction’’ stood transferred from the third to the first pillar. Articles 65 and 293 of the EC Treaty underwent amendment and the competence was therefore divided between the Community and the Member States. This gave the EC competence to take measures in accordance with Art.249. The Council of European Union, thus complying with Arts 61(c) and 67(1) of the EC Treaty and considering the Commission’s proposal and the opinions of the Parliament and the ESC, adopted EC Council Regulation 44/2001 on December 22, 2000. The Regulation entered into force on March 1, 2002 in accordance with Art.76 of the Regulation.

The Regulation aims at providing highly predictable and well-defined rules[40] on jurisdiction in order to maintain an area of freedom, security and justice[41] ensuring free movements of persons,[42]sound operation of the internal market[43] and sound administration of justice.[44]The Regulation therefore applies in ‘‘civil and commercial matters whatever the nature of the court or tribunal’’.[45]The general rule is the rule of jurisdiction based on domicile of the defendant, i.e. ‘‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of *that* Member State’’.[46] The ‘‘domicile-jurisdiction’’ rule is not, however, an absolute one and admits of a number of exceptions provided for under Arts 3 to 7.

7.3.5.3 PERSONAL JURISDICTION IN CYBERSPACE

In England, cases raising the issue of jurisdiction in cyberspace have been limited in number and confined particularly to matters of defamation and cybercrimes. There will be no great difficulty in finding a basis for the assertion of jurisdiction by the English courts in most cases involving defamation via the internet. The publication of the defamatory material within the

[40] Regulation 44/2001 Preamble Recital 11.
[41]Regulation 44/2001 Preamble Recital 1.
[42] Regulation 44/2001 Preamble Recital 1.
[43]Regulation 44/2001 Preamble Recital 2.
[44] Regulation 44/2001 Preamble Recital 12.
[45]89 Regulation 44/2001 Art.1 (1).
[46] Regulation 44/2001 Art.2(1) (emphasis added).

jurisdiction of a court is a basis for the exercise of jurisdiction under the traditional rules, the Conventions and the Regulation since this constitutes the place where the harmful event occurred. The place of publication is at the very heart of the cause of action for defamation. The fact of publication in the jurisdiction of court is therefore highly relevant.[47] Since for the purpose of the defamation law, material is published at the place(s) where it is read, heard or seen, rather than the place from which it originates,[48] a separate publication occurs, or and a separate cause of action accrues each time the material is read, heard or seen. This furnishes the basis for jurisdiction to virtually all places in the world because of the publication to a global audience.[49] An English court in such a case would therefore be tempted to consider the plea of *forum non conveniens*. The differences in the possibility of the publishers to limit the circulation of materials published mark the difference between internet publications and the more traditional publication such as newspapers and magazines. There is therefore force in the argument in cases involving internet publications that a rule like the English doctrine of *forum non conveniens* should be more readily exercised. With regard to the contracts entered into through cyberspace, there is little reason to assume that a different and rather flexible treatment would be accorded to such contracts. Any argument in favour of a treatment any more favourable than that accorded to a non-electronically concluded contract is expected to be dismissed by the ECJ considering the present mood, trend and objective of ECJ, which seems to be ‘‘one Europe’’. In such a case, expecting that the court would dilute its regime and puncture its harmonisation drive merely to respond to a technological advancement seems too improbable.[50] Secondly, if in respect of e-contracts the jurisdiction regime is sought to be made less rigid, it may provide the parties to act contrary to the spirit of the Regulation even while complying with form; and all this merely be opting for cyberspace as the ‘‘place’’ of contracting.[51]

7.3.6 THE POSITION IN INDIA

7.3.6.1 PERSONAL JURISDICTION

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[47] *Schapira v Ahronson* [1999] E.M.L.R. 7355; *Berezvosky vMichaels* [2000] 2 All E.R. 986 (‘‘The distribution in England of the defamatory material is significant. And the plaintiffs have reputations in England to protect. In such cases, it is not unfair that the foreigner publishers should be sued here’’, per Lord Steyn); *Cordoba Shipping Co Ltd v National State Bank, New Jersey* [1984] 2 Lloyd’s Rep. 91; *cf. Krotch v Rossell et Campagnie Societ´ e des´Personnes a Responsibilit` e Limit´ ee´* [1937] 1 All E.R. 725.

[48] 108 *Shevill v Presse Alliance* [1995] 2 A.C. 18; *Lee Teck Chee vMerill Lynch International Bank Ltd* [1998] 4 C.L.J. 188 (Malayan High Court); *Pullman v WalterHill & Co Ltd* [1891] 1 Q.B. 524; *Bata v Bata* [1948] W.N. 366.

[49] *Lee Teck Chee v Merill Lynch International Bank Ltd*, above

[50] See generally Christopher William Pappas, ‘‘Comparative US and EU Approaches to E-Commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation’’ (2002) 31 *DenverJournal of International Law and Policy* 325; G.G.J. Morse, ‘‘International Shoe v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction’’ (1995) 28(2) U. C. Davis Law Rev. 999.

[51] “International Jurisdiction in Cyberspace: A comparative Perspective” by Amit Sachdeva available at http://vaishlaw.com/article/Cyberspace%20Jurisdiction-Amit%20Sachdeva.pdf

The principle of *lex fori* is applicable with full force in all mattes of procedure. No rule of procedure of foreign law is recognised. It was held in *Ramanathan Chettier v SomaSunderam Chettier*[52] that India accepts the well-established principle of private international law that the law of the forum in which the legal proceedings are instituted governs all matters of procedure. In India, the law of personal jurisdiction is governed by the Code of Civil Procedure 1908 (the Code). The Code does not lay any separate set of rules for jurisdiction in case of international private disputes.[53]It incorporates specific provisions for meeting the requirements of serving the procedure beyond territorial limits. The Code provides general provisions regarding jurisdiction on the basis of pecuniary limit, subject matter and territory. Sections 16 to 20 of the Code regulate the issue of territorial jurisdiction for institution of suits.[54]

7.3.6.2 PERSONAL JURISDICTION IN CYBERSPACE

Unfortunately, only a very few cases concerning personal jurisdiction in cyberspace have been decided by the superior courts in India.[55] The reason perhaps is that residents in India have not yet accepted or adapted themselves to this new technology as a fit mechanism to undertake legal obligations (coupled with an extremely slow justice delivery system). The approach adopted is similar to the "minimum contacts" approach of the United States coupled with the compliance of the proximity test of the Code.[56]

In short the Indian position as may also be inferred from the trend of the Indian courts may be summarised as: 'an Indian court would not decline jurisdiction merely on the ground that the international contract in entered through the internet. It examines the two bases of jurisdiction: domicile of the defendant and proximity to cause of action. Even if one is found to be satisfied, the Indian court it seems would assume jurisdiction. However, it would be for the plaintiff to prima facie also convince that the courts elsewhere do not have a better basis of jurisdiction since the Indian courts in such a case may also feel tempted to analyse the issue of jurisdiction from the stand point of the doctrine of *forum nonconveniens* as also anti-suit injunctions and thus decline to exercise jurisdiction even where there existed legal basis to do so.[57]

7.3.7 SOME IMPORTANT CASES IN CYBER JURISDICTION

Some of cases, which are crucial in cyber jurisdiction are discussed below:

In the case of *Association Union des Etudiants Juifs de Francev. Yahoo! Inc.*,[58] a French court ordered Yahoo!—a U.S. company—to use all means necessary to prevent French users from accessing its auction site, which featured Nazi paraphernalia in violation of French laws. The court rejected Yahoo!'s arguments that it should be subject to U.S. and not French law because

[52]AIR 1964 Mad. 527; see also *Nallatamlei v Ponuswami* ILR [1879] 2 Mad. 406
[53]See ss.9 and 15 of the Code of Civil Procedure 1908
[54] For detail see unit 6- Indian context of jurisdiction
[55]Though there are a few cases on cyber crimes and domain name disputes. See for example, *BulBul Roy Mishra v City Public Prosecutor*, Criminal Original Petition No.2205 of 2006, decided April 4, 2006.
[56] (India TV) Independent News Service Pvt Ltd v India Broadcast Live LLC CS (OS) No.102/2007, decision dated July 10, 2007.
[57] ibid
[58] 6 ILR (P&F) 434, Tribunal de Grande Instance de Paris, Nov. 20, 2000.

its server was located in the United States and its web site was targeted to U.S. users. Yahoo! responded by filing suit in the United States, arguing that the French judgment could not be enforced against it consistent with the First Amendment. The U.S. District Court hearing the case found that it could exercise jurisdiction over the French claimants and agreed with Yahoo! that the enforcement of the French judgment would violate the U.S. Constitution. The Ninth Circuit reversed that judgment in August 2004.[59] In a 2-1 decision, the panel held that the district court did not have jurisdiction over LICRA and UEJF because LICRA and UEJF had not "wrongfully" sought to avail itself of the benefits of California's laws. Yahoo! sought en banc review. Recently, a divided panel rehearing the case en banc dismissed the case without reaching the merits.[60] While eight of the 11 judges agreed with Yahoo! that California courts could assert specific personal jurisdiction over LICRA and UEJF, a plurality concluded that the court should dismiss the case on ripeness grounds.

In December 2000, Germany's highest court let stand the conviction of an Australian national and well-known Holocaust revisionist, Frederick Toben, for views expressed on his Australian web site. And in Italy, an Italian court asserted jurisdiction over a libel that occurred in Israel but was accessible through the Internet.[61] A web site created and hosted in Israel allegedly defamed an Italian man, who complained to Italian prosecutors. The prosecutor initiated a criminal prosecution for defamation. The lower court dismissed the case for lack of jurisdiction because the web sites were not published in Italy. An Italian appeals court reversed the lower court's dismissal for lack of jurisdiction, finding that although the web sites were "published abroad," the offense was within the jurisdiction of the Italian courts because the effects of the publication occurred in Italy. Under the Italian model, consequently, Internet publishers would be subject to jurisdiction in Italy in cases were the plaintiff can allege that the content caused harm in Italy, regardless of where the act of publication occurred. While these cases suggest a troubling trend away from the "country of origin" principle even in cases that do not involve online sales to consumers, a deeper analysis of the *Yahoo!* case reveals a rather traditional approach to the exercise of jurisdiction. That case was brought against both Yahoo! and Yahoo! France, which is Yahoo!'s business targeted to and located in France. Once Yahoo! established Yahoo! France and began shipping goods that were illegal under French law to French nationals living in France, it was "doing business" in France under a traditional jurisdictional analysis. Yahoo! took positive steps to exploit the French market by targeting content to French users. Given these facts, it should come as no surprise that Yahoo! was subject to jurisdiction in France. The *Toben* case represents a far more troubling precedent, as does the Italian case. There, a passive web site based in Australia resulted in the prosecution of its operator in Germany under German law that prohibits denial of the Holocaust. This case sets a troubling precedent under which the content of a web site would have to be tailored to the standards of every country in the world—from the relatively tolerant standards of the United States's First Amendment, to the standards in many European countries that make many kinds of hate speech

[59]1 6 ILR (P&F) 283, 379 F3d 1 120 (9th Cir 2004), *rev'g* 9 ILR (P&F) 171, 169 F Supp 2d 1181 (ND Cal 2001).
[60]*Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 11 99 (9th Cir. 2006).
[61]*See* Corte di Cassazione, closed sez., 27 Dec. 2000, n.4741 , V (English translation available at <http://www.cdt.org/speech/international/20001227italiandecision.pdf>). The names of the complainant or the web sites attempted to be prosecuted are not published in the court's decision.

illegal, to perhaps even the indecency standards of countries in the Middle East that are very different from those in Western countries. Of course, it is worth observing that the topic of Nazi speech remains extremely controversial, and cases that involve controversial topics (such as abortion in the United States) are sometimes decided on bases other than a strict interpretation of the law.[62]

A more recent case from the United Kingdom provides a more helpful precedent for Internet publishers. In *Dow Jones & Co., Inc. v. Jameel*,[63]an English court refused to exercise jurisdiction over the U.S. publisher of the *Wall Street Journal* for an allegedly defamatory article. Although the article did not name the plaintiff, the online version provided readers with a link to a document naming the plaintiff as somebody who had provided funds to al Qaeda. The court held that it would not exercise jurisdiction because only a handful of subscribers to the website had accessed the document. In general, however, England remains a friendly jurisdiction for libel plaintiffs. In one case, a London court exercised jurisdiction over a defamation suit regarding a book published in the United States; only 23 U.K. residents had purchased the book through international Internet sites.[64]

One of the first cases to address the issue of jurisdiction and the Web was *Inset Systems, Inc. v.Instruction Set, Inc.*[65] This 1996 case involved a trademark infringement dispute in which the plaintiff relied on the defendant's web site for establishing jurisdiction. The court established an expansive view of the effect a web site would have on the jurisdiction analysis. Finding that the defendant "directed its advertising activities via the Internet . . . not only to Connecticut, but to all states," the court held that the defendant had, through its web site, "purposefully availed itself of the privilege of doing business within Connecticut."[66]

This expansive view of jurisdiction did not last. One of the first case to recognize that not all web sites are created equal was *Zippo Manufacturing v. Zippo Dot Com, Inc.*,[67] which established three broad categories of web sites that turn on the sites' interactivity. Under *Zippo*'s "sliding scale" approach, at one end of the scale were web sites that conducted business over the Internet with forum-state residents, which would always be subject to jurisdiction. An example of such a web site would be Amazon.com, which seeks detailed information from its customers and ships products to them in states across the country. At the other end of the scale are passive web sites that do "little more than make information available to those who are interested, which is not grounds for the exercise of personal jurisdiction."[68] An example of such a web site would be a used bookstore owner that merely posted his inventory on a store web site along with other information such as directions to the store. In the middle of *Zippo*'s sliding scale are situations in which a defendant operates an interactive web site, allowing a user to

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[62] "International Jurisdiction and the Internet" byKurt WimmerEve R. Pogoriler,Convington &Burling Washington, D. C.

[63]39 [2005] EWCA Civ. 75 (3 Feb. 2005).

[64]*Khalid Salim Bin Mahfouz v. Ehrenfeld*. The defendant author chose not to defend the suit, resulting in a default judgment, available on the plaintiff's website at http://www.binmahfouz.info/news_20050503_full.html (last accessed March 23, 2006).

[65]41 1 ILR (P&F) 729, 937 F Supp 1 61 (D Conn 1996).

[66]*Id.* at 165.

[67]2 ILR (P&F) 286, 952 F Supp 1 119 (WD Pa 1997)

[68]*Id.* at 11 24.

exchange information with the server. In such cases, the *Zippo* court said, a court must review the "level of interactivity and commercial nature of the exchange of information" to determine whether jurisdiction may be established. Subsequent courts have used *Zippo*'s sliding scale as a starting point in their analyses and have, for the most part, followed its reasoning. This is especially true of cases at either end of the *Zippo* sliding scale. For example, in *Mink v. AAAA Development LLC,*[69] the Fifth Circuit followed *Zippo* in finding that the defendant's web site, which included information about its products and services, was a passive web site despite providing users with a printable mail-in order form, regular and e-mail addresses, and a toll-free number. The court noted that the defendant's web site was not interactive enough to support a finding of jurisdiction because customers could not actually make purchases online. In another passive web site case, *Cybersell,Inc. v. Cybersell, Inc.*,[70] the Ninth Circuit found that a passive web site that did not specifically target Arizona residents was not sufficient to confer jurisdiction in Arizona. Since the defendant, a Florida company, merely established a passive web site and did nothing more to encourage Arizona residents to access its site, the court held that there was no "purposeful availment" and, hence, no personal jurisdiction.

As for cases that fall in the middle of the *Zippo* scale, several subsequent courts followed *Zippo* and engaged in fact-specific inquiries regarding the interactivity and commercial nature of the web site.[71] Recent cases, however, have further refined the *Zippo* test for the middle class of interactive web sites. In *Millennium Enterprises, Inc. v. Millennium Music, LP,*[72] the court refined and raised the standard for finding jurisdiction for a commercial web site. This case involved a trademark infringement claim brought by an Oregon company against a South Carolina company with the same name. The plaintiff sought to establish jurisdiction in Oregon based on the defendant's web site, which was capable of online transactions. The court held that the "doing business" category of *Zippo* should be reserved for those cases in which the business in question conducted a significant portion of its business online. In contrast, the defendant in this case had not sold a single product to anyone in Oregon except for an employee of the plaintiff who bought the product for the purpose of establishing jurisdiction. In analysing the case under the middle category of *Zippo*, the court raised the bar by requiring "deliberate action" directed at the forum state consisting of "transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state."[73] Citing *World-Wide Volkswagen Corp. v. Woodson,*[74] a classic U.S. Supreme Court case on personal jurisdiction, the court held that the standard for jurisdiction is that "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."[75] The court explained that its requirement of "deliberate action" was central to the notion that the defendant had purposefully availed itself

[69]3 ILR (P&F) 515, 190 F3d 333 (5th Cir 1999)
[70]3 ILR (P&F) 215, 130 F3d 414 (9th Cir 1997)
[71]*See, e.g., Edberg v. Neogen*, 17 F Supp 2d 104 (D Conn 1998); *E-Data Corp. v. Micropatent Corp.*, 1 ILR (P&F) 377, 989 F Supp 173 (D Conn 1997); *CD Solutions v. Tooker*, 965 F Supp 17 (ND Tex 1997).
[72]49 2 ILR (P&F) 410, 33 F Supp 2d 907 (D Ore 1999).
[73]*Id.* at 921.
[74]444 US 286 (1980)
[75]*Millennium* at 921 (citing *World-Wide Volkswagen* at 297).

of the laws of the forum state, and was the "something more" required by the plurality opinion in *Asahi Metal Industry Co. v. SuperiorCourt*.[76]

The *Millennium* court's logic was certainly a step in the right direction for a sensible approach to jurisdictional analysis. Under the "deliberate action" approach, merely establishing a web site did not mean that the web site operator had purposefully availed itself of the laws of every state in the country (and every country in the world). Instead, the jurisdictional inquiry focuses more closely on deliberate action taken by the defendant, which is a superior measure of where a defendant can expect to be subject to suit. Such an approach allows online businesses to tailor their activities based upon where they wish (and do not wish) to be subject to suit. This approach also harmonizes the traditional personal jurisdiction analysis with that conducted in the Internet context.[77]

In a more recent refinement of the *Zippo* approach, the D.C. Circuit followed much the same reasoning as *Millennium* in *GTE New Media Services Inc. v. BellSouth Corp.*[78] In this case, the plaintiff sued for violations of the antitrust laws and sought to establish jurisdiction over the defendants in the District of Columbia based upon District residents being capable of accessing the defendant's web site. In soundly rejecting this argument, the court stated that such an approach would "vitiate long-held and inviolate principles of federal court jurisdiction" since, under the plaintiff's approach, "personal jurisdiction in Internet-related cases would almost always be found in any forum in the country."[79] The court went on to state that jurisdictional rules should serve to "give 'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' "

Decisions in the U.S. Courts of Appeal have embraced this approach. For example, in *Toys "R" Us, Inc. v.Step Two S.A.*,[80] the Third Circuit toughened its own *Zippo* sliding scale test (measuring a web site's level of interactivity) by finding no jurisdiction over a fully interactive web site without a showing that the defendant had not intentionally targeted or knowingly conducted business with forum residents. The Ninth Circuit, in *Northwest Healthcare Alliance,Inc. v. Healthgrades.com, Inc.,*[81] however, rejected the *Zippo* test in favour of the *Calder v. Jones* effects test[82]and found jurisdiction where a web site's tortious effects were felt in the state where the plaintiff did business. The Court found that the defendant website had "purposefully interjected itself" into the forum state by targeting in-state health care providers in its system of grading home-health-care providers.

A departure from the "doing business"/passive site/"deliberate action" categories is the case of situations involving intentional torts. In *Panavision International, L.P. v. Toeppen*,[83] the Ninth

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[76]480 US 102 (1987).
[77] "International Jurisdiction and the Internet" byKurt WimmerEve R. Pogoriler,Convington &Burling Washington, D. C
[78]4 ILR (P&F) 294, 199 F.3d 1 343 (DC Cir 2000)
[79]*Id.* at 1350.
[80]12 ILR (P&F) 764, 318 F.3d 446 (3d Cir 2003).
[81] 12 ILR (P&F) 404, 50 Fed. Appx. 339 (9th Cir 2002).
[82] 465 US 783 (1984)
[83]1 ILR (P&F) 699, 141 F3d 1316 (9th Cir 1998).

Circuit found jurisdiction in a case in which a non-resident defendant registered Panavision's trademark as the domain name for its web site and then sought to extort money from the plaintiff. The court applied the "effects" test of *Calder v. Jones* to find that the defendant's conduct had the effect of injuring the plaintiff in California, its principal place of business, and that this outcome was foreseeable enough to the defendant so as to give him reason to anticipate being haled into court there. This jurisdictional analysis has held up for other Internet cases involving intentional torts; however, it has not been extended to non-intentional trademark infringement cases such as *Cybersell*. Some courts have also determined that jurisdictional tests based on interactivity are not dispositive in defamation cases. "Even a passive Web site may support a finding of jurisdiction, if the defendant used its website to intentionally harm the plaintiff in the forum state." *Hy Cite Corp. v. Badbusinessbureau.com*, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004).

Recently, a new leading case has emerged, and the focus of the analysis has shifted. Rather than focusing on the interactivity of the site, the most in-depth focus now should be on whether the publisher in question has specifically targeted its content to the forum state. In *Young v. New Haven Advocate*,[84] the Fourth Circuit looked to the principles articulated in *Calder* and held that the inquiry should determine whether the publisher "(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State." This is a realistic, business-oriented focus that is appropriate for the evolution of the industry in an age when virtually all web sites promote some degree of interactivity, the more relevant due process question is whether the web site's owner could reasonably anticipate being held to the law of a particular state and being held into court in that state. As the Young analysis sensibly provides, that question should be answered by determining whether the publisher has actually targeted the state. Some form of the *Calder*-influenced *Zippo* test has now been used by courts in almost every Circuit. For example, the Sixth Circuit recently held that Ohio had no jurisdiction over a Massachusetts website in a defamation case, applying both *Calder* and *Zippo*.[85]

It should be noted that the above cases discuss jurisdiction to adjudicate. There have also been legal battles over the jurisdiction to prescribe. For example, Minnesota courts permitted Minnesota to enforce its anti-gambling laws on foreign defendants because the defendants solicited Minnesota residents to gamble via the Internet (case discussed above).[86] Similarly, a couple maintaining a bulletin board service in California were convicted of obscenity in Tennessee because they knew Tennessee residents subscribed to their service.[87]

Since cyberspace is a global phenomenon which transcends, ignores and bypasses geo-political borders, solutions likely to be appropriate must also be global, or in any case multilateral. No single model solution is sufficient in itself to adequately address the problem. Cyber

[84] 12 ILR (P&F) 379, 315 F3d 256 (2002), cert. denied, 538 US 1035 (2003).
[85] *Cadle Co. v. Schlictmann*, 123 Fed. Appx. 675 (6th Cir. 2005).
[86] *Minnesota v. Granite Gate Resorts, Inc.*, 1 ILR (P&F) 165, 568 NW2d 715 (Minn Ct App 1997)
[87] *United States v. Thomas*, 2 ILR (P&F) 22, 74 F3d 701 (6th Cir), *cert denied*, 519 US 820 (1996)

jurisdiction can be addressed only by a proportionate contribution from all the models, complementing and supplementing each other.

7.4 SUMMARY

Cyberspace is a world of its own, in other words it is a ‘‘borderless’’ world. It refuses to accord to the geopolitical boundaries the respect that private international law has always rendered to them and on which it is based. Therefore there is a requirement to have a different solution to this different problem. The traditional rules were evolved to address a category of disputes which involved legally relevant foreign elements. Here, ‘‘foreign’’ mentions to territorially foreign, determined by and according to the geopolitical boundaries. The internet, on the other hand, is truly a borderless world. It refuses to solidarity to the (traditional) geopolitical boundaries the respect and sanctity which has been historically conferred to them. The disregard of these boundaries by the internet gives rise to a multitude of problems, of which the problem of jurisdiction is but the foremost.

As an international rule each state must accord respect to the sovereignty of every other and must not interfere with features by which sovereignty is established by other states. Jurisdiction is meant the right of a state to prescribe, give effect to, and adjudicate upon violations of, normative standards for regulation of human conduct.

Legislative jurisdiction or jurisdiction to prescribe refers to a state legislature’s authority to make its substantive law, which apply to particular parties or circumstances. The worldwide nature of the Internet places great stress on the traditional principles of legislative jurisdiction.

Judicial jurisdiction or jurisdiction to adjudicate refers to the authority of a state to subject parties to proceedings in its courts or other tribunals. General jurisdiction typically requires “continuous and systematic” contacts with a forum, such as an established “bricks and mortar” business. This concept has very little applicability to the Internet since a web site alone is insufficient to give rise to general jurisdiction, and the only businesses that would be subject to such jurisdiction would be those that had a real world presence in the forum and already anticipated being sued there. Specific jurisdiction, on the other hand, allows courts to exercise jurisdiction over parties when there is some minimal relationship between the defendant, the cause of action, and the forum state.

Executive jurisdiction or jurisdiction to enforce refers to the authority of a state to use its resources to compel compliance with its law.

The Internet touches every country in the world. That universality is a great part of its strength as a tool for business as well as also creates unique business risks. Businesses must therefore determine the extent to which they should conform to various local laws; they must predict not only where they can expect to be sued, but also which jurisdiction’s law will apply.

Several recent cases illustrate the increasing dangers of web sites being subject to the laws of countries outside which they are based. Australia’s High Court has held that the Dow Jones publication *Barrons* is subject to the jurisdiction of Australian courts because it can be accessed over the Internet in Australia. Andrew Meldrum, an American journalist writing for the *Guardian,* a London newspaper, was prosecuted in Zimbabwe on charges of “abuse of journalistic privileges by publishing falsehoods” on the basis of stories published in the *Guardian* in England and posted on its web site, which is published and hosted in England. A

more promising development for Internet publishers comes from Canada. In *Bangoura v.Washington Post Co.*, the Ontario Court of Appeal recently reversed a lower court's ruling that the *Post* was subject to Canadian jurisdiction for content that was available on the Internet.

Minnesota is one of the first jurisdictions to attempt a general exercise of jurisdiction over up loaders (and to a lesser extent, downloaders) outside their own territorial boundaries. Minnesota's concerns are no doubt sincere, but the memorandum itself is not. Nonetheless, Minnesota's law lays out a simple syllogism that is easy for lawyers to grasp: anyone who "being without the state, intentionally causes a result within the state prohibited by the criminal laws of this state," is subject to prosecution in Minnesota. Since anyone who puts up a webpage knows that it will be visible from Minnesota, "downloadable" in Minnesota's Attorney General's memorable words, then every Internet actor intentionally causes a result in the state of Minnesota and is subject to Minnesota's criminal laws. This simple approach, conceivably appealing at first, dissolves upon a sufficiently detailed international legal analysis. Minnesota's approach has several problems. Minnesota has ignored the presumption against extraterritorial in application of U.S. laws. Minnesota has no jurisdiction to prescribe law over objects in cyberspace because under the federal system, Minnesota has no "nationality" to assert. The court looked no further than its own state's long-arm statute in finding *in personam* jurisdiction without considering issues of federalism, comity, or international law, i.e., without considering whether jurisdiction to prescribe existed or not.

In short, objective territoriality is not a blanket to be thrown over cyberspace, but is appropriate only in unusual circumstances, where the state asserting jurisdiction on this principle is somehow the *target* state, uniquely or particularly affected by an action intended to cause such an effect. Under international law, Minnesota needs to find another basis for asserting prescriptive jurisdiction over actions in cyberspace.

Physical presence in a state is always a basis for personal jurisdiction. The exercise of jurisdiction is permitted over people and property within the territorial borders. A US court exercises jurisdiction through the ''out-of-state statute'' route, where the defendant is not physically present. There are two requirements, whose must be fulfilled by the court for exercise personal jurisdiction over an out-of-state defendant. First, there must be statutory authority granting the court jurisdiction over the defendant. And, secondly, the due process clause of the Constitution must be satisfied.

To summarise, the treatment of the issue of jurisdiction in the United States—based on the ''minimum contacts'' standard—is as follows:

- there must be ''some act by which the defendant *purposefully avails [itself] of the privilege of conductingactivities with the forum state*'';
- the plaintiff must show ''either that the defendant's contacts with the forum are continuous and systematic, or that the suit arises out of or is related to those contacts'';
- the defendant's conduct and connection with the forum state must be such that ''he should reasonably anticipate being haled into court there''; and
- the exercise of personal jurisdiction must be ''reasonable''.

The English conflict rules have more or less adhered to the rule of territoriality as the basis of an adjudicative jurisdiction. In England, there are now two quite different sets of rules as to jurisdiction of the English courts. In many cases, jurisdiction is still governed by what may be called the 'traditional rules', though in a growing proportion of cases, they are replaced by the 'Convention rules'.

The rules of international jurisdiction of the EC Member States are now governed by a Community instrument, Regulation 44/2001. This substitutes the Brussels Convention, which after March 1, 2002 ceases to operate between the Parties to that Convention, except in their relations to Denmark. The Regulation is binding in its entirety and directly applicable to the Member States. The Regulation is binding on and applicable to the United Kingdom also as a result of the exercise by the United Kingdom of the ''opt-in'' option.

In England, cases raising the issue of jurisdiction in cyberspace have been limited in number and confined particularly to matters of defamation and cybercrimes. The fact of publication in the jurisdiction of court is therefore highly relevant. Since for the purpose of the defamation law, material is published at the place(s) where it is read, heard or seen, rather than the place from which it originates, a separate publication occurs, or and a separate cause of action accrues each time the material is read, heard or seen. This furnishes the basis for jurisdiction to virtually all places in the world because of the publication to a global audience.
It was held in *Ramanathan Chettier v SomaSunderam Chettier* that India accepts the well-established principle of private international law that the law of the forum in which the legal proceedings are instituted governs all matters of procedure. In India, the law of personal jurisdiction is governed by the Code of Civil Procedure 1908 (the Code). The Code does not lay any separate set of rules for jurisdiction in case of international private disputes.

Unfortunately, only a very few cases concerning personal jurisdiction in cyberspace have been decided by the superior courts in India. The approach adopted is similar to the ''minimum contacts'' approach of the United States coupled with the compliance of the proximity test of the Code.

7.5 GLOSSARY

1. COMITY- In law, comity is legal reciprocity—the principle that one jurisdiction will extend certain courtesies to other nations (or other jurisdictions within the same nation), particularly by recognizing the validity and effect of their executive, legislative, and judicial acts. In the law of the United States, *comity* may refer to the Privileges and Immunities Clause(sometimes called the *Comity Clause*) in Article Four of the United States Constitution. This clause provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

2. EN BANC- French for "in the bench," it signifies a decision by the full court of all the appeals judges in jurisdictions where there is more than one three- or four-judge panel.

3. *IN PERSONAM*- ***In personam*** is a Latin phrase that literally **means** "against the person" or "directed toward a particular person."

4. LONG-ARM STATUTE- The name ‘‘long-arm’’ comes from the purpose of these statutes, which is to reach into another state and exercise jurisdiction over a non-resident defendant.

5. *FORUM NON CONVENIENS*- (Latin for "forum not agreeing") (FNC) is a (mostly) common lawlegal doctrine whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties. As a doctrine of the conflict of laws, *forum non conveniens* applies between courts in different countries and between courts in different jurisdictions in the same country.

6. *LEX FORI-Lex fori*(Latin for the laws of a forum) is a legal term used in the conflict of laws used to refer to the laws of the jurisdiction in which a legal action is brought. When a court decides that it should, by reason of the principles of conflict of law, resolve a given legal dispute by reference to the laws of another jurisdiction, the *lex causae*, the *lex fori* still govern procedural matters.

7.6 SAQS

1. TICK THE CORRECT ANSWER:

(i) Legislative jurisdiction is also refer as:

(a) jurisdiction to prescribe

(b) jurisdiction to adjudicate

(c) jurisdiction to enforce

(d) all of above

(ii) Which of the following statement is correct in the case, where the defendant is not physically present:

(a) A US court exercises jurisdiction through the ‘‘out-of-state statute’’ route.

(b) Due process clause of the Constitution must be satisfied.

(c) First test is the legislative sanction.

(d) All of above

(iii) The ‘‘long-arm’’ statute means:

(a) Law has long arm.

(b) Statute has long arm.

(c) it is a jurisdiction route, applying in the case of the absence of any specialised law provision.

(d) None of above

(iv) Which of the following is always a basis for personal jurisdiction:

(a) Physical presence of defendant

(b) Territoriality

(c) Satisfaction of due process clause of the Constitution

(d) All of above

(v) In which of the following case, the US Supreme Court, hold that, "no State can exercise direct jurisdiction and authority over persons or property *without* its territory'':

(a) Minnesota v. Granite Gate Resorts

(b) Gutnick case

(c) Pennoyer v Neff

(d) Bangoura v.Washington Post Co

2. TRUE AND FALSE STATEMENTS

(i) In India, the law of personal jurisdiction is governed by the Code of Civil Procedure 1908 (the Code).

(a) True (b) False

(ii) The Code of Civil Procedure 1908 lays separate set of rules for jurisdiction in case of international private disputes.

(a) True (b) False

(iii) U.S. courts generally enforce foreign defamation judgments that are inconsistent with the U.S.

(a) True (b) False

7.7 REFERENCES

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7.8 SUGGESTED READINGS

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2. “International Jurisdiction in Cyberspace- A Comparative Perspective” by Amit M. Sachdeva
3. “International Jurisdiction and the Internet” by Kurt Wimmer Eve R. Pogoriler, Convington &Burling Washington, D. C.

7.9 TERMINAL QUESTIONS AND MODEL QUESTIONS

1. Explain various Jurisdiction issues on Internet.

2. What do you understand by the ‘territoriality’? Is it major issue in Internet jurisdiction?

3. Describe the international position on Internet jurisdiction with the help of case laws.

7.10 ANSWER SAQS

1. (i) (a); (ii) (d); (iii) (c); (iv) (d); (v) (c);

2. (i) True; (ii) False; (iii) False