THE CONSISTENT INCONSISTENCY IN DEFINING CYBERSPACE SPATIAL LEGAL BOUNDARIES

FERNANDO BARRIO*

Resumen

El presente trabajo tiene como objetivo analizar la situación de los aspectos jurisdiccionales de las transacciones llevadas a cabo mediante las redes electrónicas. Está motivado en la falta de consideración adecuada, tanto por parte de la academia como de los juzgados, del tema en cuestión, el que resulta fundamental para brindar certeza a los negocios en Internet. A tal efecto, se analiza la jurisprudencia de los Estados Unidos de América, buscando establecer la existencia o falta de coherencia en las decisiones judiciales con respecto a la jurisdicción. La selección del país no es arbitraria y obedece al volumen de tráfico y a la cantidad de usuarios de Internet que dicha nación ostenta, así como a la importancia que ese Estado tiene en marcar tendencias sobre cuestiones legales de alcance internacional. El análisis muestra que las Cortes de los Estados Unidos han incorporado, desde mediados del siglo XX, a la posibilidad de encontrar jurisdicción sobre un demandado residente en el foro del juzgado, la opción de que una Corte se declare competente en un caso que en el que el demandado se encuentre en extraña jurisdicción, si las actividades de dicho demandado tuvieran como objetivo lucrar de, o afectar a, el territorio sobre el cual la Corte tuviera imperio. El advenimiento de Internet puso en tela de juicio tales presupuestos, ya que su uso en sentido estricto significaría que el demandado estaría sujeto a todas las jurisdicciones en las cuales su página podría ser vista o, en caso contrario, en ninguna. Para lograr resolver tal dilema, las cortes Norteamericanas han recurrido a interpretaciones flexibles de previas decisiones, lo cual ha dejado una sensación de fragmentación e inconsistencia en los fallos judiciales referidos al tema estudiado. Por un lado, algunas Cortes se han inclinado por declararse competentes sólo en casos en los que la página Web del demandado se permita un determinado nivel de interactividad o la conducta del demandado esté

* Senior Lecturer in Business Law, London Metropolitan University, UK/Des Lee Visiting Lecturer for Global Awareness, Webster University, MO, USA.

dirigida directamente hacia el foro, mientras que en otra serie de casos, juzgados han hallado que tenían competencia cuando páginas Web del demandado, no interactivas sino estáticas, causaban cierto efecto en el foro, siendo la intención del demandado irrelevante en tales casos. Ante tal inconsistencia, corroborada en casos muy recientes, el trabajo concluye que se hace necesaria la urgente intervención de tribunales superiores o del correspondiente poder legislativo.

This paper analyses the current situation of Internet jurisdiction within United Status, looking for instances of coherence or incoherence between different judicial decisions at different levels. The topic is addressed due to the perceived lack of attention that both the academia and the courts have given to the issue, when it is an issue that precedes the analysis of substantial ones during court procedures. The analysis shows how with the advent of Internet the jurisprudence began to diverge to finish having two different sets of decision using different principles to decide similar situations. On one hand certain courts find jurisdiction only when the activity of the defendant is directed toward the forum of the court, while others would assert jurisdiction when the activity of the defendant has an effect on the forum, even if is not directed towards it. This situation creates a great deal of uncertainty and such inconsistency needs to be addressed by either the US Supreme Court or the legislative body.

I. Introduction

Globalization and global exchange of goods and services are not new and it can be argued that the origins of international law in its modern sense can be traced to the need of establishing clear rules to trade globally in the face of national commercial rivalries. The famous Mare Liberum[2] was originally only one chapter of a bigger and vast theoretical treatise that Hugo Grotius wrote to defend the seizure by Dutch merchants of a Portuguese nao and its cargo in the strait of Singapore,[3] which showed both that global trade was already taking place and that the situation was impacting the

[2] An English version can be found at http://socserv2.mcmaster.ca/~econ/ugcm/3ll3/grotius/Seas.pdf (last visited on October 2006).

[3] Holland was at war with Spain and Portugal when Captain Jacob van Heemskerk captured the loaded merchant ship, the Santa Catarina, in 1603. Heemskerk was employed with the United Amsterdam Company (part of the Dutch East India Company), and though he did not have authorization from the company or the government to initiate the use of the force, many of the shareholders were eager to accept the riches that he brought back to them. Not only was the legality of keeping the prize questionable under Dutch law, but a faction of shareholders (mostly Mennonite) in the Company also objected to the forceful seizure on moral grounds, and the Portuguese were demanding their cargo back. The scandal led to a public judicial hearing and a wider contest to sway public opinion. It was in this wider contest that representatives of the Company called upon Grotius to draft a polemical defense of the seizure.

evolution and study of the law. Accordingly, it could be argued that the hype about the globalisation brought about by information and communications technology, and espacially Internet, is misplaced due to the so-called new phenomenon being no more than the same phenomenon in a different, albiet more advanced, degree. However, what has made Internet so perculiarly interesting and challenging for scholars and courts alike is its ubiquity and the potential, realised or not, of allowing people from different social statements and different countries to engage in interactions at a certain level of equality,[4] and those characteristics are the ones that lead to the conclusion that the situation been faced in the last decade with Internet constitute such a difference in degree that it should be interpreted as a new class.

The appereance of a phenomenon representing a new class, or its own class, usually leads to question this fact and, from the strict legal point of view, to question the adequacy of the laws to deal with it. Thus, the early works on legal issues involving Internet revolved around the need or not of having a set of specific rules to deal with interactions taking place within the realm of electronic networks. Papers and books were filled with references to Gibson's Neuromancer,[5] trying to explain to the neophites what Cyberspace[6] was about and how the term was coined, and there seemed to be two clearly divided camps: one sustaining that the law was already able to cope with computers, modems and nerds, and other sustaining that law was an endangered specie and needed to be fully revamped to not become a museum object.[7] Within this context, many assumed that the law was not going to be able to cope with the "natural characteristics" [8] of Internet, and that its possibility to trascend borders almost seemesly would automatically implied that either Internet users would be subject to every

[4] For a discussion about the impact of Internet in social interactions, see Slevin (2000) The Internet and Society.

[5] William Gibson published *Neuromancer* in 1984 and that book went on to become the first novel to win the holy trinity of science fiction, constituted by the Hugo Award, the Nebula Award and the Philip K. Dick Award.

[6] Gibson coined the term "cyberspace" in his novelette *Burning Chrome*, published in 1982 by Omni magazine, but it was through his use in Neuromancer that the term Cyberspace gained enough recognition to become the de facto term for the virtual space created by digital networks during the 1990s.

[7] See the already classic speech by Judge Easterbrook in which he compared the need for Cyberspace law with the need for the law of the horses available at http://www.law.upenn.edu/law619/f2001/week15/easterbrook.pdf (last accessed online on November 2006) and Lawrence Lessig response at http://cyber.law.harvard.edu/works/lessig/LNC_Q_D2.PDF (last accessed on November 2006).

[8] It never hurts to repeat that Internet has no natural characteristics but characteristics that were given by its creators and that those characteristics can be changed.

countries jurisdiction or to none.[9] However, it can be said that the overemphasis on discussing the feasibility of using the "old" law in the new medium shadowed the very important issue of jurisdiction and both courts and scholars neglected the search for a proper answer to the question about which court should hear a case where the potential liability arises from an action taken in Internet.

Early works on cyberlaw, Internet law and similar topics devoted few pages and not much attention to the question of jurisdiction. A review of some of those works shows that less than four percent of the material was devoted to jurisdictional issues with most of them not having a specific chapter about it and the situation did not improve during the new wave of publications seen at the beginning of the millennium. Even today, jurisdiction as autonomous topic within major works on Internet law is some sort of *rara avis*.[10] However, it is possible to claim that such works should have started with a full discussion about Internet jurisdiction before entering into analyzing other also important issues affecting interaction taking place within the realm of electronic networks.

Jurisdiction is based on the notion of borders and on the artificial boundaries created by humans and their political constructions to ensure the exercise of power over the territory encompassed by them, but Internet posses the problem of not having properly delimited borders, which creates a conflict with normal rules of jurisdiction and generates uncertainty both for people interacting online and people affected by that interaction. It can be argued that the conflictive situation and the uncertainty could be greatly minimized by proper action of the legislative bodies and/or the courts, but recent experience shows a lack of consistency over jurisdictional issue in both legislatures and tribunals.

This paper tries to highlight the mentioned inconsistency to then conclude with some brief recommendations. In order to do so the first part analyzes the general situation of cyberjurisdiction according to case law, mainly in the United States of America to then focus on more specific situations arising from contractual or quasi-contractual relations in the same

[9] The extreme of example of assuming that the electronic networks domain was outside of any courts' jurisdiction can be found in John Barlow's "A Declaration of Independence of Cyberspace" available at http://homes.eff.org/~barlow/Declaration-Final.html (last accessed on November 2006).

[10] While the recount is clearly not exhaustive, the percentage was measured from the works that follow, which may be taken as sufficiently representative: Roesner (1997) *Cyberlaw*; Johnston, Handa & Morgan (1997) *Cyberlaw*; Edwards & Waelde (1997) *Law & the Internet, regulating cyberspace*; Sarra (2000) *Comercio Electronico y Derecho*; Akdeniz, Walker & Wall (2000) *The Internet, Law and Society*; Edwards & Waelde (2000) *Law & the Internet, a framework for electronic commerce*; Reed & Angel (2003) *Computer Law*; Bolotnikoff (2004) *Informática y Responsabilidad Civil*; Fernandez Delpech (2004) *Internet: su problematica juridical*; Bainbridge (2004) *Introduction to Computer Law*; Lloyd (2004) *Information Technology Law.*

jurisdiction. The choice of those sources of law and political entity is not random nor it obeys to any personal preference, but it is based on the fact that the US represents a little more than a fifth of the world's Internet usage with a penetration of 69.1%.[11] Furthermore, the mentioned country represents one of the major legal systems of the world and is between the ones that perhaps exert the biggest influence in international legal affairs.

II. General issue on Internet jurisdiction in the courts

In the United States of America, magistrates have had difficulties trying to figure out how to apply traditional jurisdiction rules to interactions carried out through Internet. The Due Process Clauses of the US Constitution state that "[n]o person shall be [...] deprived of life, liberty, or property, without due process of law...." [12] and before 1945 that was to understood as not subjecting non-residents to the jurisdiction of a court unless the defendants were served with process within its boundaries or the defendant voluntarily appeared in the court or had property within the jurisdiction of the court.[13] It was in International Shoe Co v Washington[14] that the US Supreme Court decided that for a court to assume personal jurisdiction over a defendant he or she must have sufficient minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice."[15] Here it can be seen that the US Supreme Court built upon the already existing presence requirement by interpreting that the term only implied the activity of a person in the forum.[16] However, the same court found the need to further refinement of the minimum contacts' test and in Hanson v Denckla[17] held that an act was

[11] Their exact combined percentage of the World's Internet usage is 21.1%. Available at http://www.internetworldstats.com/stats.htm (last visited November 2006).

[12] The Due Process Clauses are incorporated into the 5th and 14th Amendments to the US Constitution and while they may seem to refer to different jurisdictions (5th Amendment to the Federal Government and 14th to the States' governments), the US Supreme Court has interpreted them as being identical, what was once explained by Justice Felix Frankfurter : "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." Malinski v. New York, 324 U.S. 401, 415 (1945).

[13] P*ennover v Neff*, 95 US 714 (1887).

[14] 326 US 310 (1945).

[15] *International Shoe Co v Washington*, 326 US 310, 316 (1945). The concept of "fair play" and purposely availing itself to the forum was further explained and refined in *Asahi Metal Industry Co. v. Superior Court* 480 U.S. 102 (1987), where the US Supreme Court used the test consisting of a five factor test for it: (1) burden on the defendant, (2) interests of the forum state, (3) interest of the plaintiff, (4) interstate efficiency, and (5) interstate policy interests.

[16] *Ibid*, 316f (1945).

[17] 357 US 235 (1958).

required implying that "the defendant purposefully avails itself of the privilege of conducting activities within the forum…",[18] transforming a rigid "presence-requirement" test into a flexible "objective-intention" test. The flexibility of the new test led to the impression that jurisdiction's reach had become too broad, so the US Supreme Court put a limit by subjecting it to the requirement of reasonableness in World-Wide Volkswagen Corp v Woodson.[19] Still, it can be clearly be argued that by abandoning the link to presence and supplanting it by that of connection, US courts have added a great deal of discretion and uncertainty into their decisions.

In the Internet context, it has been generally claimed that a remote forum is excluded from exercising jurisdiction because the contacts are only established through a server that is not within the forum, especially when the defendant's activities are not directed at the forum state,[20] but courts also have found many instances where online activity led to finding nexus with the forum. In CompuServe Inc. v Patterson,[21] a the US Court of Appeals for the Sixth Circuit decided that a computer programmer in Texas was subject to Ohio jurisdiction by entering into a contract with the Ohio based CompuServe under which CompuServe distributed and sold copies of software written by Patterson. Although during contract negotiations the programmer had never visited Ohio, the court found that defendant "created a connection"[22] between himself and the forum state when he subscribed to CompuServe and entered into a Shareware Registration Agreement, which designated Ohio as the forum state. The court also found that Patterson was on notice that Ohio law would govern and also established that his connection with the forum was further demonstrated by sending the software to Ohio over a three year period, his advertisement of the software on the CompuServe system, and his financial demands on the company that led to the suit.[23] In the same year, the US Court of Appeals for the Second District found jurisdiction, which had been negated by the District Court based on lack of minimum contacts, on the grounds that defendants had used the plaintiff reservation systems, to which they were obliged by the licence of rent-a-car franchise.[24] But probably more important, the court questioned whether physical contact with the forum was of any "critical consequence" in the modern era.[25]

[18] *Hanson v Denckla*, 357 US 235, 253 (1958).
[19] 444 US 286 (1980).
[20] *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999).
[21] 89 F.3d 1257 (6th Cir. 1996).
[22] *CompuServe*, Inc. v Patterson 89 F.3d 1257, 1264 (6th Cir. 1996).
[23] *Ibid*.
[24] *Agency Rent-A-Car Sys., Inc. v. Grand Rent-A-Car Corp*, 98 F.3d 25 (2d Cir. 1996).
[25] *Ibid*. 459.

The answer to whether physical contact was relevant under the new technological conditions seemed to be given many years before in International Shoe Co v Washington, but courts keep finding different solutions to problems that looked similar. In People v. Lipsitz[26] the respondents claimed that the court did not have jurisdiction over their Internet activity,[27] and that was the basis of the claim brought by the New York Attorney General seeking to enforce consumer fraud and false advertising laws against several related companies, physically present in the State, based on the claim that the defendants engaged in the fraudulent conduct nationwide audience using e-mail.[28] The court held that usual standards for jurisdiction were sufficient to cover the novel litigation and that the defendants were physically located in the state because the companies conducted business in the forum due to "being a subscriber to a local Internet service provider and [to selling] a product through that provider".[29] The court also held that the defendants' acts were sufficiently connected with the forum because the acts physically occurred in the forum, even though the impact may have been felt in another jurisdiction.[30] However, in Edias Software Int'l, L.L.C. v. Basis Int'l, Ltd.,[31] the court found that the plaintiff made a *prima facie* case for jurisdiction because the defendant, by contacting the plaintiff's employees via telephone, fax, and e-mail communications, selling products to the plaintiff for distribution, invoicing the plaintiff, visiting the plaintiff offices within the forum and disseminating defamatory statements that caused harm in the forum,[32] had availed himself to the jurisdiction of the forum and because the effect of his actions could be certainly be felt in the forum. The effect test looked as having an extra boost by Panavision Int'l, L.P. v. Toeppen,[33] where Panavision, a California company, sued Toeppen, an Illinois resident, for trademark infringement resulting from the defendant's alleged cyber squatting and the court found that California had jurisdiction over the defendant, but made it clear that CompuServe, Inc. v. Patterson was distinguishable because the defendant's actions could not be defined as "doing business".[34] Instead of broadening the analysis of CompuServe to cover circumstances not envisioned by the Sixth Circuit, the court applied tort analysis and found jurisdiction under the "effects" test

[26] 663 N.Y.S.2d 468 (1997).
[27] *Ibid*. 577.
[28] *Ibid*. 573.
[29] *People v Lipsitz,* 663 N.Y.S.2d 468, 578 (1997).
[30] *Ibid*. 579.
[31] 947 F. Supp. 413 (D. Ariz. 1996).
[32] Edias v Basis, *ibid*. 422.
[33] 938 F. Supp. 616 (C.D. Cal. 1996) then confirmed by *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998).
[34] *Panavision Int'l v Toeppen*, 32 938 F. Supp. 616, 622 (C.D. Cal. 1996).

created in Calder v Jones.[35] It was the Western District of Pennsylvania in Zippo Manufacturing v. Zippo Dot Com, Inc.[36] that distinguished between active and passive web sites and held that remote, passive web sites did not resulted in personal jurisdiction within a forum, what became to be known as the Zippo Test.

The case was about a domain name dispute and was brought by Zippo Manufacturing Corporation, which filed a complaint in the Western District of Pennsylvania against Zippo Dot Com under the Federal Trademark Act, alleging trademark dilution, infringement, and false designation, but the defendant moved to dismiss the case for lack of personal jurisdiction. The plaintiff was (still is) well known for its lighters, while the defendant operated an Internet website and an Internet news service and had obtained the exclusive right to use the domain names "zippo.com", "zippo.net", and "zipponews.com." Zippo Dot Com, a California corporation with its principal place of business in Sunnyvale, California, had contacts with Pennsylvania that were almost exclusively over the Internet and maintained no offices, employees, or agents in Pennsylvania. The company's advertising in Pennsylvania consisted only of the information that was available to Pennsylvania residents through their website and of its 140,000 paying customers, approximately two percent (3,000) were Pennsylvania residents, who had subscribed to its service by completing an online Internet application. Finally, the defendant had entered agreements with seven Internet access providers in Pennsylvania to permit their subscribers to access Zippo Dot Com's news service, two of which were located in the Western District of Pennsylvania.

In analyzing personal jurisdiction over the defendants in Pennsylvania, the court established a three-category range of Internet activity. The first category includes situations where a defendant clearly does business over the Internet by entering into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet. The court found that these were the facts before it and that personal jurisdiction was proper. [37] A second category of Internet activity includes passive websites. Passive websites are those that may be accessed by Internet browsers, but do not allow interaction between the host of the website and a visitor to the site. Passive websites do not conduct business, offer goods for sale, or enable a person visiting the website to order merchandise, services, or files. Passive websites merely

[35] 465 U.S. 783 (1984), a case in which the United States Supreme Court held that a state could assert personal jurisdiction over the publisher of a national magazine which published an allegedly libellous article about a resident of that state, and where the magazine had wide circulation in that state.

[36] 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

[37] Zippo v Zippo, 952 F. Supp. at 1124.

provide information to a person visiting the site. Here the court determined that passive websites provide insufficient grounds for the exercise of personal jurisdiction.[38] Between these two extremes are those websites characterized as interactive. Interactive websites enable a user to exchange information with the host computer. In some instances, these sites may tailor their own output to reflect the user's indicated interests. The court held that in the case of interactive websites, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web.[39] It can also be said that courts seem to pay special attention to any deleterious effect that the website may cause, even if passive.

A more recent case that has dealt with the issue of interactivity and harmful effect was brought up in a French court, but it then had American repercussions. Ligue contre le racisme et l'antisemitisme et Union des etudiants juifs de France c. Yahoo! Inc. et Societe Yahoo! France[40] (LICRA v. Yahoo!) was a French court case decided by the High Court (Tribunal de Grande instance) of Paris in 2000. The original case related to the sale by auction of memorabilia from the Nazi period by internet and a related case before the United States courts concerning the enforcement of the French judgement reached the 9th US Circuit Court of Appeals, where a majority of the judges ruled to dismiss Yahoo!'s appeal. Criminal proceedings were also brought in the French courts against Yahoo!, Inc. and its then president Timothy Koogle: the defendants were acquitted on all charges, a veredict that was upheld on appeal. In the original French case, LICRA complained that Yahoo! was allowing sales of memorabilia from the Nazi period in its online auction service, contrary to Article R645-1 of the French Criminal Code, facts that were not contended during the case. The discussions of the case were centered on issues of jurisdiction. The defendant sustained that these auctions were conducted under the jurisdiction of the United States and that there were no technical means to prevent French residents from participating in these auctions, at least without placing the company in financial difficulty and compromising the existence of the Internet. Furthermore, the defense noted that their servers were located on US territory, that their services were primarily aimed at US residents, that the First Amendment to the United States Constitution guarantees freedom of speech and expression, and that any attempt to enforce a judgement in the United States would fail for unconstitutionality.[41] As such, they contended

[38] *Ibid*.

[39] *Ibid*.

[40] Tribunal de Grande Instance de Paris: *LICRA v. Yahoo!* Inc., No. RG 00/05308 (November 20, 2000).

[41] Yahoo! claimed that prohibiting the sale of such items would contravene the US Constitution's First Amendment, what was dismissed by the French Court and later by the Court of Appeal for the Ninth Circuit too.

that the French court was incompetent to hear the case. An interim judgment of May 2000 confirmed the illegality of the activity under French law and designated a group of experts to advise the court as to what technical measures might be taken to prevent the repetition of the offense. The team of experts reported on November 2000 and within one week the court rendered an injunction against the defendant.

The court ruled that there were sufficient links with France to give it full jurisdiction to hear the complaint. In particular it noted that the auctions of Nazi memorabilia were open to bidders from any country, including France; that the display of such objects, and the viewing of such objects in France, caused a public nuisance and was forbidden under French criminal law; that Yahoo! Inc. was aware that French residents used its auction site, as it displayed French-language advertisements on its pages when they were accessed from computers in France, point that was also referred to in the injunction against Yahoo! Inc. The court specifically dismissed the claim that the alleged problems of enforcing a judgement were sufficient to nullify its competence, and pointed out that the fact that advertisement in French was seeing in the American website when accessed from France clearly showed the possibility of blocking those sites to French viewers.[42]

In consequence, on December 21, 2000, Yahoo filed a complaint in the U.S. District Court (NDCal) against LICRA and UEJF seeking a declaratory judgment that the French judgment is unenforceable in the U.S. because it violates the free speech clause of the First Amendment of the U.S. Constitution and LICRA and EUJF fought Yahoo's action, not on its merits, but on a variety of procedural grounds. On June 7, 2001, the District Court issued its Order Denying Motion to Dismiss in which it rejected the French defendants' argument the Court lack personal jurisdiction and on November 7, 2001, the District Court issued its Order Granting Motion for Summary Judgment in favor of Yahoo. The French defendants took the case in appeal to the US Court of Appeal for the Ninth Circuit raising three issues, arguing that the District Court lacked personal jurisdiction, that the case was not ripe (because they have not yet sought to enforce the French judgment in the U.S.), and that the abstention doctrine[43] applied. The court found that the District Court lacked personal jurisdiction, and therefore reversed, without addressing the other two appeal issues. The Court reviewed the Supreme Court's minimum contacts analysis in International Shoe

[42] The full version of the case, in French, is available at http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/ord_tgi-paris_201100.htm (last visited November 2006).

[43] Abstention doctrine is any one of several doctrines that a United States federal court can apply to refuse to hear a case, when hearing the case would potentially intrude upon the powers of the states or other countries courts.

v. Washington,[44] and the 9th Circuit's application of this analysis in Bancroft & Masters, Inc. v. Augusta Nat'l Inc.[45] The court said that:

"Exercise of jurisdiction is consistent with these requirements of "minimum contacts" and "fair play and substantial justice" where (1) the nonresident defendant has purposefully directed his activities or consummated some transaction with the forum or a resident thereof, or performed some act by which he purposefully availed himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction is reasonable."

The Court then concluded that the first element, purposeful availment, is lacking.

Other international contemporaneous international cases seem to also emphasize the effect approach, as Dow DowJones & Co. v. Gutnick,[46] where the High Court of Australia subjected Dow Jones to suit in Australia for defamation in that country under Australian law arising from a web posting on a U.S.-based server, and as when the High Court of Justice in the United Kingdom found that Governor Arnold Schwarzenegger's campaign manager could be sued for defamation in the British courts as the result of statements about a U.K. resident that appeared on a newspaper website in the United States.[47]

III. The situation with contract and quasi-contract issues

Contracting through Internet presents a new set of questions to Web site owners, business partners and consumers because in cyberspace communications rise above spatial boundaries, which creates a different set of jurisdictional problems in disputes between buyers and sellers, such as where a contract was formed or which state's law applies. Internet technology allows relationships whereas a customer reads or downloads information from an e-merchant's Web site as well as relationships where an e-merchant sends information to a customer automatically, and because of that the question of the location of legal contact becomes complex.

[44] 326 U.S. 310 (1945).
[45] 223 F.3d 1082 (2000).
[46] 210 C.L.R. 575 [Austl.] (2002).
[47] *Richardson v. Schwarzenegger*, 2004 EWHC 2422 (Q.B. Oct. 29, 2004).

Following with the situation of the United States, the same two different groups of court decisions that emerged for general relations involving Web sites or torts committed online or by using computers, have emerged for contractual disputes. One thread of cases has granted jurisdiction over non-residents on the grounds that their Internet involvement involved considerable interactivity, the so-called follow-on contracts. In Cody v. Ward,[48] a federal district court found that it had jurisdiction based on telephone and e-mail communications that completed a commercial transaction started over Prodigy's "Money Talk" [49] discussion forum for financial matters. In that case, the Internet activities of the person finally subjected to the jurisdiction of a court involved more than a visit to a passive Web site. In other instances courts have claimed jurisdiction based on solicitation of donations, signing up subscribers for Net services, and negotiations and other dealings that occurred as the result of an initial Internet communication.[50]

In the second group, cases in which US courts have refused to exercise jurisdiction over an out-of-state person or business because of mere Web site access or creation can be found. In Bensusan Restaurant Corp. V. Richard King,[51] when a jazz club called the Blue Note, located in Columbia, Missouri, established a Web site on which it advertised, it become entangled in an issue related to trademark infringement and jurisdiction. People that wanted to visit the establishment of the Mid-West had to telephone to order tickets and physically take delivery of them at the club in Missouri, and its website also contained a disclaimer that the Blue Note was not affiliated with the famous New York jazz club of the same name.[52] When the famous Blue Note that is located in New York's Greenwich Village brought a trademark infringement suit, the federal court dismissed the action for lack of jurisdiction, reasoning that a Web site that merely provides information is not equivalent to advertising, selling, or promoting in

[48] 954 F. Supp. 43 (D. Conn., 1997).

[49] Money Talk was a very popular billboard for financial issues that became even more famous for a case of Internet Libel, v.g. *Stratton Oakmont, Inc. v. Prodigy Services Co*., 1995 WL 323710 (N.Y. Sup. Ct. 1995). According to the Prodigy entry in Wikipedia, "[i]n 1994 Prodigy became the first of the early-generation dialup services to offer access to the World Wide Web and to offer Web page hosting to its members. Since Prodigy was not a true internet service provider, programs that needed an Internet connection, such as Internet Explorer and Quake multiplayer, could not be used with the service. Prodigy developed its own web browser, but it lagged well behind the mainstream browsers in features. In 1997, the company retooled itself as a true internet service provider, making its main offering Internet access branded as *Prodigy Internet* and de-emphasizing its antiquated interface and its own editorial content, which were rebranded as *Prodigy Classic*. Prodigy Classic was discontinued in November, 1999 because it was decided that for financial reasons, its aging software should not be updated for Y2K. In the end, the service had 209,000 members".

[50] Girasa (2001).

[51] 126 F.3d 25 (2nd Cir. 1997).

[52] Although irrelevant to the issue of jurisdiction , it is important to note that the Blue Note of Columbia predates the famous one of New York.

New York City, and the federal appeals court, while reaffirming the lower court ruling, estimated significant that almost hundred percent of the customers of the defendant's Blue Note lived in Missouri.

In the 1998 case IDS Life Insurance Co. v SunAmerica, Inc.,[53] plaintiff IDS Life sued SunAmerica for unfair competition, tortious interference with contract, misappropriation of trade secrets, and intentional interference with business relationships. The plaintiff claimed that the defendant was inducing IDS's sales agents to leave the company and switch their customers over to SunAmerica in violation of the plaintiff's employment contracts,[54] but the courts refused to find jurisdiction solely on the basis of SunAmerica's operation of a Web site.[55] This case reflects the common approach in the second group of cases in that mere, general Web site access is insufficient to confer jurisdiction on a court over a non-resident defendant. These two lines of US court decisions, here again, confirm the use of a sliding-scale standard in deciding e-commerce jurisdiction issues that relates to the amount and level of online commercial activity, as established in the already discussed Zippo v Zippo.[56] To repeat and rephrase the finding of the court, it can be said that the likelihood that personal jurisdiction can be held to exist is directly proportional to the nature and quality of commercial activity that an company conducts over the Internet and if the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmissions of computer files over the Internet, personal jurisdiction is proper. At the opposite end are circumstances where a defendant has simply posted information on an Internet Web site that is accessible to users in foreign jurisdictions; here a passive Web site that does little more than make information available to those who are interested and it is not ground for the exercise of personal jurisdiction. The position in the middle is taken by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

The legal uncertainty met by those conducting business through electronic networks is substantially increased by interacting with parties from other nations. It is possible that a foreign court could understand as reasonable to exercise jurisdiction over a US merchant who engaged in an e-business transaction with one of its citizens. Under current law, a foreign nation can usually assert jurisdiction over non-residents when the exerci-

[53] 136 F.3d 537, 539-41 (7th Cir. 1998).
[54] *Ibid*. 539.
[55] *Ibid*. 541.
[56] 952 F. Supp. 1119 (W.D. Pa. 1997).

se of that jurisdiction is reasonable, but under international law, a State is limited on its authority to exercise jurisdiction in cases that involve foreign interests or activities.[57] International law, however, does not impose hard and fast rules on States delimiting areas of national jurisdiction. Rather, it leaves States wide discretion in the matter.

Within the realm of contractual or quasi-contractual issues, there is a need to deal with the ways that business can and should use to reduce the likelihood of being summoned into court in an undesirable jurisdiction. Between the measures that can be adopted, the website would normally have to include both a forum selection clause relating the use of the website to the state or country in which a hypothetical case would be heard, and a choice of law provision stating which state's or nation's law applies, and it is expected that the user of such website would have agreed with those terms by entering into a commercial transaction or by merely using the site. In general terms the US Supreme Court held that forum selection clauses are generally enforceable because a person can consent to personal jurisdiction, in Burger King v. Rudzewicz,[58] However, courts decide whether those clauses are enforceable on a case-by-case basis, and in The Bremen v. Zapata Off-Shore Co.,[59] the Supreme Court indicated that forum selection clauses must be fair and reasonable to be enforced. These same principles also apply to a choice of law provision. Caspi et al v Microsoft Network[60] can be used to show these principles at work in the online environment.

Microsoft Network, MSN, an online computer service, required prospective subscribers to view multiple computer screens of information, including a membership agreement containing a forum selection clause.[61] The membership agreement appeared on the screen in a scrollable window next to blocks providing the choices "I Agree" and "I Don't Agree," either of which prospective members had the option to click at any point,[62] and the New Jersey appellate court struck down a dispute to the forum selection clause due to not being no basis to assume that it was given unfairly or designed to conceal its provisions.[63] The court concluded the plaintiffs knew they were entering into a contract, which leads to the conclusion that the decision would have been different if the owner had not brought it to the attention of the user. Accordingly, forum selection and/or

[57] Restatement (Third) of the Foreign Relations Law of the U.S. § 401 cmt. a (1987).
[58] 471 U.S. 462 (1985).
[59] 407 U.S. 1 (1972).
[60] 323 NJ Super 118 (AppDiv 1999)
[61] *Ibid*. 118.
[62] Caspi et al v Microsoft Network, 323 NJ Super 118, 118 (AppDiv, 1999).
[63] *Ibid*. 121.

choice of law clauses that appear only at the bottom of the home page but not on subsequent pages may be found to be unenforceable, because some Internet users will not visit a Web site via a home page but may do so from a link found in other site or from a bookmark list in the user's browser.[64]

IV. Continuing the inconsistency

The recent US Court of Appeals for the Ninth Circuit's ruling in Pebble Beach v. Caddy,[65] holding that the U.S. District Court lacks personal jurisdiction over a citizen and resident of the United Kingdom who operates a passive website that a U.S. plaintiff asserts infringes and dilutes its trademark rights, is a new development that might seem to follow the sliding scale established in Zippo v. Zippo and further clarify the issue of assertion of personal jurisdiction over a defendant using a website, but when coupled with other recent cases reaffirms the need for the US Supreme Court to intervene in the matter. The case, where the Court of Appeal concluded that the defendant did not satisfy the mentioned test established in Calder v Jones (expressly aiming the conduct at the forum) seems to contradict Luv N' Care v. Insta Mix,[66] an also very recent case where the US Court of Appeals for the Fifth Circuit borrowed the stream commerce theory from product liability law to find that a district court of Louisiana had personal jurisdiction over a Colorado defendant who also did not expressly aim his conduct at the forum. It might be argued that this later case does not relate to Internet (it was a copyright infringement, trademark dilution and unfair competition under the Lanham Act suit over a bottle cap) but if the stream of commerce theory can be borrowed in that case, nothing would pre-empt the use in Internet personal jurisdiction situations, and the issue is whether expressly aiming the conduct at the forum is relevant or not. While still leaves as good law cases like Panavision v Toeppen, where, as explained before, the defendant was cyber squatting with the express intent to extract money from the claimant by selling its domain name for which the claimant had a valid trademark, the two recent cases increase uncertainty about the need of action directed to the forum of the court. The 9th Circuit Court said that it had no doubt that there was a requirement "that 'something more' than just a foreseeable effect to conclude that personal jurisdiction is proper" and that "an internet domain name and passive website

[64] The legality of the practice know as deep linking is beyond the scope of this work, but some links (deep) to pages dealing with the topic can be found on the American Library Association website at http://www.ala.org/Template.cfm?Section=ifissues&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25306 (last visited November 2006).

[65] No. 04-15577, 2006 WL 1897091(9th Circ. July 12, 2006).

[66] No. 04-31171 (5th Circ. Jan 25, 2006).

alone are not 'something more' and, therefore, alone are not enough to subject a party to jurisdiction," to then conclude that the defendant did not purposefully aim his actions at California. This seems in accordance with ALS Scan v. Digital Services Consultants[67] but contradicts Gorman v. Ameritrade,[68] where the US Court of Appeal for the District of Columbia Circuit found that personal jurisdiction based on a website could exist and said that cyberspace "is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar. Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet".[69]

The uncertainty seems to extend to defamation cases, where the 9th Circuit court held in Northwest Healthcare Alliance v. HealthGrades.com[70] that the District Court has personal jurisdiction over an out-of-state defendant in a defamation case, based solely upon its publication of the allegedly defamatory statements in its "passive" internet web site, situation that seems to mirror the already discussed High Court of Australia's decision in Dow Jones v. Gutnick. However, these decisions don't suit very well with and contradict directly the US Court of Appeals for the Fourth Circuit opinion in Stanley Young v. New Haven Advocate et al.,[71] where it said that that a court in Virginia did not have jurisdiction over defendants located in Connecticut, who wrote allegedly defamatory stories about a Virginia claimant and published them on the Internet. To be able to assert personal jurisdiction over the newspapers, the court held that they must "(1) direct electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts".[72] The stream of contradictory cases could fill not a paper like this but a whole encyclopaedia and it seems that the situation is not close to an end.

V. Conclusion

It can be argued that few years into the 21st Century to discuss the relevance of electronic commercial transactions and other forms of interaction through electronic networks is irrelevant, and it can be said that there is

[67] No. 01-1812 (4th Circ. June 14, 2002).

[68] 293 F.3d 506 (D.C. Cir. 2002).

[69] *Ibid*. 510.

[70] Unpublished. The text of the decision can be found at http://www.techlawjournal.com/courts2001/healthgrades/20021007.asp (last visited November 2006).

[71] No. 01-2340 (4th Cir., December 13, 2002).

[72] *Ibid*.

also some degree of consensus about the need of using some of the old laws adapted to the new medium as well as creating some new whole sets of regulations. However, it can also be seen that both the courts and the academic have not devoted the necessary amount of time and study to issues related to jurisdiction and these are normally treated tangentially while dealing with other issues.

Within that context, the analysis of the situation in the United States, jurisdiction chosen due to its relative importance and its influence over the developments of international legal issues, shows that lack of guidance from superior courts and legislature create a great deal of unnecessary uncertainty. The already established principles of finding jurisdiction through minimum contacts seem to have been to test by the advent of cyberspace, and until now it is a test that they are failing. One group of cases seem to suggest that still is true that aiming a conduct to the forum of the court is what would trigger finding nexus, while other group, as numerous and arising from the same level in the judicial hierarchy, seems to focus exclusively on the effect that the activity over the forum.

Further studies need to be conducted in order to assess and compare with other jurisdiction, but it can be said confidently that in Internet jurisdiction the only consistency is the inconsistency of the courts.

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