

International Jurisdiction and the Internet

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The Internet touches every country in the world. That universality is a great part of its strength as a tool for business. However, it also creates unique business risks. Worldwide access exposes web site operators and Internet publishers to the possibility of being haled into courts around the globe. 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. 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, 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 that will be described below 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*,¹ 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.

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

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.² 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.³ 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.⁴

A more promising development for Internet publishers comes from Canada. In *Bangoura v. Washington Post Co.*,⁵ 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.⁶ “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 favorable 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.

I. Categories of Causes of Action

As mentioned earlier, laws relating to jurisdiction and the Internet vary depending upon the particulars of the web sites and the underlying cause of action. Most cases involving issues of

² 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.

³ See 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>).

⁴ See *American Reporter in Zimbabwe Acquitted but Ordered Deported*, MEDIA LAW LETTER (MEDIA LAW RESOURCE CENTER), July 2002, at 55.

⁵ [2005] O.J. No. 3849 (Ont. C.A.), leave to appeal dismissed, [2006] SCCA No. 497 (February 16, 2006).

⁶ 15 ILR (P&F) 342, [2004] 234 D.L.R. 456 (Ont. Super. Ct. J.), rev’d [2005] O.J. No. 3849 (Ont. C.A.), leave to appeal dismissed, [2006] SCCA No. 497 (February 16, 2006).

international jurisdiction and Internet web sites involve two broad categories of factual situations and associated causes of actions.

A. Causes of Action Based on Content Alone

This group of cases involves situations in which a web site is subject to a lawsuit based solely on its content. Typical examples of such causes of action include copyright infringement, defamation, and prosecution for obscenity, hate speech, and the like. In such cases, it is easy to argue that the web site should only be subject to the laws of the country in which it is based to avoid a situation in which every web site must conform to the most restrictive set of laws that exists worldwide. However, as the *Toben* case in Germany illustrates and the *Yahoo!* case in France suggests,⁷ web site content may give rise to liability in foreign countries if it violates applicable local laws. In addition, causes of action such as copyright infringement and defamation may give rise to complicated questions of targeting a foreign forum by causing injury to a copyright holder or defamed party in a foreign country. *Bangoura* illustrates that even where the effects of a content-based cause of action may be felt in a given forum – e.g., a reputational harm that follows the plaintiff – courts will scrutinize their bases for asserting jurisdiction.

B. Causes of Action Based on Conducting Business Online

This group of cases involves situations in which a company is doing business over the Internet. These cases involve typical e-commerce web sites and involve causes of action such as breach of contract, products liability, etc. Jurisdiction in such cases often depends upon the nature of interactivity of a web site; a web site operator can often exert some control on the laws that will apply by appropriate web site design. This is also an area in which governmental organizations such as the European Union (“EU”) have attempted to establish universal and predictable laws.

II. Distinguishing Between Types of Jurisdiction

While discussing international jurisdiction in the context of the Internet, it is useful to distinguish between three broad categories of jurisdiction that are often conflated: legislative jurisdiction (or jurisdiction to prescribe), judicial jurisdiction (or jurisdiction to adjudicate), and executive jurisdiction (or jurisdiction to enforce).⁸ These three concepts are closely related, but distinct.

Legislative jurisdiction or jurisdiction to prescribe refers to a state legislature’s authority to make its substantive laws apply to particular parties or circumstances. In general, a legislature’s authority to prescribe certain behavior within its territory or by its nationals is undisputed. 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 strain 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

⁷ See Part IV.

⁸ See Louis Henkin *et al.*, *International Law* 1046 (3d ed. 1993).

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's 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.⁹ 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.

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 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").

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. First Amendment.¹⁰ 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.¹¹ 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.¹² The First

⁹ 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).

¹⁰ *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001), *rev'd on other grounds*, 379 F.3d 1120 (9th Cir. 2004), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 2006).

¹¹ *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

¹² 877 F.Supp. 1, 23 Media L. Rep. 1367 (D.D.C. 1995).

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.¹³

The following sections discuss the treatment of the issue of jurisdiction and the Internet by various courts and regulators across the world.

III. The European Union

In almost all cases, the issue of whether a publisher will be subject to the jurisdiction of national courts is a matter of the internal laws of that nation. One of the few exceptions to this principle is the European Union, which is one of the few multinational entities that has established principles of jurisdiction and choice of law that apply to multiple countries. This section will present a brief survey of emerging choice of law principles in the 25-country EU.

There is one positive directive within Europe that may set the stage for a more enlightened view of Internet jurisdiction. On June 8, 2000, the EU adopted Directive 2000/31/EC on electronic commerce (the "E-Commerce Directive"), which establishes basic harmonized rules in such areas as electronic contracts, electronic commercial communications, and online provision of professional services. The E-Commerce Directive, which applies only to electronic commerce activities within the EU, suggests that companies should be subjected only to the jurisdiction and the law of the Member State in which they are "established":

Information society services should be *supervised at the source of the activity*, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, *such information society services should in principle be subject to the law of the Member State in which the service provider is established*.¹⁴

This principle is sensible because only the country in which a publisher is "established" can fully regulate its activities; it also is a concept that is sensitive to general principles of international law, discussed below, which recognize that one state should not prescribe its laws in a manner that interferes with a sister state's ability to prescribe its own legal concepts.

An attempt to make the "country of origin" approach more precise is the advocacy of a "single point of publication" rule to determine which country's law should apply to a particular content claim. Under this framework, claims would be governed by the law of the nation in which the publisher last had an opportunity to exercise editorial control over the publication. This proposal, which members of the U.S. media industry have advanced before the European Commission and the High Court of Australia in an *amicus curiae* brief in the *Gutnick* litigation,

¹³ *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 406 F.Supp.2d 274 (S.D.N.Y. 2005).

¹⁴ E-Commerce Directive, recital 22 (emphasis added), available at

<http://europa.eu.int/ISPO/ecommerce/legal/documents/2000_31ec/2000_31ec_en.pdf>.

is designed for an Internet publishing context in which content can be viewed instantaneously in many locations but there is only one place from which the publisher controls content as a final matter (that is, the point at which final editorial decisions are made and final technical work is done to upload the material).¹⁵ The advocates of the “single point of publication” rule point out that it complements the country of origin rule by ensuring that there is a principal place of publication, and therefore a country of origin, for every article. The proposal also accounts for the widespread phenomenon of inadvertent digital publishing—even publishers who attempt to prevent their publications from being distributed in certain countries may fail to control circulation completely, especially if a publisher releases content online. The content may be forwarded without the publisher’s consent to other individuals, or it may be re-circulated at a later point in time by others. The single point of publication rule accounts for this fact because “publication” would be deemed to take place at the point at which there is a final opportunity for the publisher to exercise control over content. This rule has not, to date, been adopted.

The E-Commerce Directive states it “neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts.”¹⁶ With respect to jurisdiction, the seminal EU accord is the Brussels Regulation.¹⁷ Under the Brussels Regulation, persons domiciled in a Member State may generally be sued in the courts of that member state.¹⁸ This provision mirrors the concept of general jurisdiction discussed above. Article 5(3) further provides that “in matters related to tort,” persons domiciled in a Member State may be sued “in the courts for the place where the harmful event occurred or may occur.” This provision aligns with American notions of specific jurisdiction. Similarly, for contractual disputes, Article 5(1) permits the plaintiff to bring suit in the courts “for the place of performance of the obligation in question.” The Brussels Regulation also provides consumer protections in Article 16(1), under which a consumer may sue under a contract in the country where the consumer is domiciled.

Article 4 provides that if a defendant is not domiciled in a Member State, “the jurisdiction of the courts of each Member State shall . . . be determined by the law of that Member State.” Thus, under Article 4 of the Brussels Regulation, a defendant website operator from the United States would be subject to the jurisdictional rules of the EU nation in which the plaintiff chooses to bring suit, not the uniform rules established for the EU generally.

¹⁵ For a description of this proposal, *see* Media Law Resource Center’s Comments to the European Commission, <http://www.europa.eu.int/comm/justice_home/unit/civil/consultation/contributions/mlrc_en.pdf>.

¹⁶ E-Commerce Directive, recital 23; *see also id.* at Article 1 § 4. The E-Commerce Directive directs Member States to adopt legislation to aid the free movement of information society services between the Member States, including provisions relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions, and cooperation between Member States. *See id.* at Article 1 §§ 1-2.

¹⁷ Brussels Regulation, superseding the Brussels Convention, Council Regulation (EC) No. 44/2001 of 22 December 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, *available at*

<http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf>

¹⁸ Brussels Regulation, Article 2.

With respect to choice of law, the 1980 Rome Convention controls in contractual disputes.¹⁹ The general rule is that the law of the country with which the contract is “most closely connected” will govern, to the extent that the parties have not otherwise agreed to apply a different body of law. The choice of law in non-contractual disputes is still unresolved. Most EU Member States apply the rule of *lex loci delicti commissi*, which provides that the law of the place where the act was committed applies to the dispute.²⁰ Such a rule is inadequate to resolve choice of law questions in complex international dealings, however, and the EU Member States do not yet have a predictable body of law. Dispute-specific facts – including the location of where the damage was sustained, the country with which the case is most closely connected, and the extent to which the courts favor claimants – may all have an effect on the choice of law determination.²¹

The Rome II treaty has been proposed in order to provide a uniform EU rule on choice of law questions in non-contractual disputes, including defamation, copyright infringement, and the privacy torts.²² Under Rome II, the law of the country in which the damages arise would apply to most tort actions. The law of another country, however, could apply to disputes arising out of non-contractual obligation where the matter is “manifestly more closely connected” with the other country. In April 2004, the United Kingdom House of Lords issued a report stating its preference for a “country of origin” rule to govern choice of tort law for defamation and privacy actions:

A country of origin rule would have certain advantages, notably simplicity and certainty. It would point to one law . . . To adopt a country of origin rule would also accord with, though not necessarily in all cases replicate, the host country/place of establishment regimes found in the E-Commerce and other Single Market measures. A country of origin rule would encourage enterprise, education and the widest dissemination of knowledge, information and opinion.

House of Lords European Union Committee, *The Rome II Regulation, Report with Evidence* [2004] 8th Report of Session 2003-04 at ¶¶ 117-130.

Recent negotiations over Rome II have rejected the “country of origin” approach and have resulted in a draft general rule that currently provides as follows:

Article 5—General rule

1. Where no choice has been made [by the parties], the law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise,

¹⁹ Available as amended at

< [http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126\(02\):EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126(02):EN:HTML)>.

²⁰ Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”), July 22, 2003, Explanatory Memorandum at § 2.1, available at

< http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0427en01.pdf>.

²¹ *Id.*

²² Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”), February 21, 2006, available at

< http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2006/com2006_0083en01.pdf> (“Amended Rome II”).

irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.

3. [However], where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question. For the purpose of assessing the existence of a manifestly closer connection with another country, account shall be taken *inter alia* of the expectations of the parties regarding the applicable law.

The European Parliament in June 2005 proposed several promising amendments to the text of Rome II.²³ First, it proposed a new Recital citing the need for uniformity in the modern “communications environment” and specifically pointing to the “nature of press freedom and its role in society.”²⁴ The European Parliament proposed that the media “deal responsibly with rights relating to the personality” and that it autonomously establish a “self-obligating European Media Code and/or a European Media Council.”²⁵ Other proposals friendly to Internet publishers included a proposed amendment to Article 5(3) that would have clarified that a court could find “manifestly closer connections” to another country on the basis of additional factors, including “the need for certainty, predictability, and uniformity of result” and “the policies underlying the foreign law to be applied and the consequences of applying that law.”²⁶

The European Parliament further recommended an amendment to Article 6, an Article specifically governing privacy and personality torts, which would have provided that the choice of law analysis take account of factors including “the country to which a publication or broadcast is principally directed,” “the language of the publication or broadcast,” and “sales or audience size in a given country as a proportion of total sales or audience.”²⁷ This analysis would have applied “*mutatis mutandis* to Internet publication.”²⁸ “This [would have made] for more legal certainty for publishers and broadcasters and [resulted] in a straightforward rule applying to all publications, even those carried out on the Internet.”²⁹

²³ Report on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”), June 27, 2005, Eur. Parl. Doc. A6-0211/2005, *available at* <[http://www.europarl.eu.int/registre/seance_pleniere/textes_deposes/rapports/2005/0211/P6_A\(2005\)0211_EN.doc](http://www.europarl.eu.int/registre/seance_pleniere/textes_deposes/rapports/2005/0211/P6_A(2005)0211_EN.doc)>.

²⁴ *Id.*, amend. 10, proposed Recital 12(a).

²⁵ *Id.*

²⁶ *Id.*, amend. 26, Article 3 [new Article 5].

²⁷ *Id.*, amend. 30, Article 6.

²⁸ *Id.*; *mutatis mutandis* signifies that differences in the Internet publishing context would be taken into consideration.

²⁹ *Id.*

Recently, in February 2006, the European Commission rejected essentially all of these proposed amendments to Rome II.³⁰ It found that the proposals would be “too generous to press editors rather than the victim of alleged defamation in the press,” and deleted Article 6 entirely.³¹ With respect to the proposed development of a code of ethics for the media, the Commission determined that such a requirement would be “way out of place in a conflict-of-laws regulation.”³² The present version of Rome II now provides that its choice of law principles do not apply to disputes involving “violations of privacy and of personal rights by the media.”³³ With respect to other non-contractual disputes, Article 5(3) of the amended Rome II proposal does permit the court to account for “the expectations of the parties regarding the applicable law,” a consideration that did not appear in prior versions.

Despite this recent setback for Internet publishers, all Member States of the EU and 21 additional signatories are bound to the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).³⁴ Article 10 of the ECHR protects freedom of expression, although in a manner weaker than that provided by the U.S. First Amendment. Article 6 of the ECHR also provides for fair trials and procedural justice. Other multinational treaties with which media lawyers should familiarize themselves include the United Nations’ International Covenant on Civil and Political Rights (“ICCPR”), the American Convention on Human Rights (“ACHR”), and the African Charter on Human and Peoples’ Rights (“ACHPR”).

IV. Individual European Countries

Several recent cases have seen individual European countries asserting jurisdiction over materials posted on web sites established by companies or individuals domiciled in other countries. For example, in the famous case of *Association Union des Etudiants Juifs de France v. Yahoo! Inc.*,³⁵ 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 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 2004.³⁶ In a 2-1 decision, the panel held that the district court did not have jurisdiction over LICRA and UEJF because LICRA

³⁰ Amended Rome II.

³¹ *Id.* at 6, § 3.4 (Amendments Rejected).

³² *Id.* at 5.

³³ *Id.* at Article I, § 2(h).

³⁴ Available online at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

³⁵ 6 ILR (P&F) 434, Tribunal de Grande Instance de Paris, Nov. 20, 2000.

³⁶ 16 ILR (P&F) 283, 379 F3d 1120 (9th Cir 2004), *rev’g* 9 ILR (P&F) 171, 169 F Supp 2d 1181 (ND Cal 2001).

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.³⁷ 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.³⁸ 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 where 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 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.

A more recent case from the United Kingdom provides a more helpful precedent for Internet publishers. In *Dow Jones & Co., Inc. v. Jameel*,³⁹ an English court refused to exercise

³⁷ *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

³⁸ 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.

³⁹ [2005] EWCA Civ. 75 (3 Feb. 2005).

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.⁴⁰

V. The United States

Most U.S. courts that have addressed the issue of jurisdiction and the Internet have done so in the national rather than international context. However, the federal system in the U.S. suggests that the same rationale that applies to jurisdictional questions with respect to U.S. states should apply to foreign countries as well. The only important distinction in this regard is that U.S. courts regularly apply the law of another state even after establishing jurisdiction, while in the international context, courts are likely to apply their own nation's laws once they have established jurisdiction. In other words, unlike in the EU or other international disputes, cases within the U.S. are less likely to collapse the jurisdiction and the choice of law questions into a single inquiry.

Perhaps not surprisingly, the U.S. has taken a common law approach to establishing its law relating to jurisdiction and the Internet. After some initial confusion, the law is beginning to stabilize. Generally speaking, companies that “do business” over the Internet and are heavily involved in online sales can expect to be subject to jurisdiction in any state in which such sales are conducted. The key that has emerged is “targeting”—if a publisher has not specifically targeted its content toward a specific state, it should not be held to be subject to the jurisdiction and law of that state consistent with due process of law.

This principle has evolved over the past decade much as the Internet itself has evolved. One of the first cases to address the issue of jurisdiction and the Web was *Inset Systems, Inc. v. Instruction Set, Inc.*⁴¹ 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.”⁴²

This expansive view of jurisdiction did not last. The first case to recognize that not all web sites are created equal was *Zippo Manufacturing v. Zippo Dot Com, Inc.*,⁴³ which established

⁴⁰ *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).

⁴¹ 1 ILR (P&F) 729, 937 F Supp 161 (D Conn 1996).

⁴² *Id.* at 165.

⁴³ 2 ILR (P&F) 286, 952 F Supp 1119 (WD Pa 1997).

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."⁴⁴ 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 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.⁴⁵

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*,⁴⁶ 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.*,⁴⁷ 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.⁴⁸ 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*,⁴⁹ 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

⁴⁴ *Id.* at 1124.

⁴⁵ *Id.*

⁴⁶ 3 ILR (P&F) 515, 190 F3d 333 (5th Cir 1999).

⁴⁷ 3 ILR (P&F) 215, 130 F3d 414 (9th Cir 1997).

⁴⁸ 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).

⁴⁹ 2 ILR (P&F) 410, 33 F Supp 2d 907 (D Ore 1999).

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 analyzing 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.”⁵⁰ Citing *World-Wide Volkswagen Corp. v. Woodson*,⁵¹ 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.”⁵² The court explained that its requirement of “deliberate action” was central to the notion that the defendant had purposefully availed itself of the laws of the forum state, and was the “something more” required by the plurality opinion in *Asahi Metal Industry Co. v. Superior Court*.⁵³

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.

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.*⁵⁴ 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 “vitiating 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.”⁵⁵ 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.’”⁵⁶

⁵⁰ *Id.* at 921.

⁵¹ 444 US 286 (1980).

⁵² *Millennium* at 921 (citing *World-Wide Volkswagen* at 297).

⁵³ 480 US 102 (1987).

⁵⁴ 4 ILR (P&F) 294, 199 F.3d 1343 (DC Cir 2000).

⁵⁵ *Id.* at 1350.

⁵⁶ *Id.* (citing *World-Wide Volkswagen* at 297).

Decisions in the U.S. Courts of Appeal have embraced this approach. In *Toys “R” Us, Inc. v. Step Two S.A.*,⁵⁷ for example, 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.*,⁵⁸ however, rejected the *Zippo* test in favor of the *Calder v. Jones* effects test⁵⁹ 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. Toepfen*,⁶⁰ the Ninth Circuit found jurisdiction in a case in which a nonresident 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*,⁶¹ 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.”⁶² 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 haled 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

⁵⁷ 12 ILR (P&F) 764, 318 F.3d 446 (3d Cir 2003).

⁵⁸ 12 ILR (P&F) 404, 50 Fed. Appx. 339 (9th Cir 2002).

⁵⁹ 465 US 783 (1984).

⁶⁰ 1 ILR (P&F) 699, 141 F3d 1316 (9th Cir 1998).

⁶¹ 12 ILR (P&F) 379, 315 F3d 256 (2002), *cert. denied*, 538 US 1035 (2003).

⁶² *Id.* at 263.

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*.⁶³

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.⁶⁴ 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.⁶⁵ However, as noted above in Part II, attempts by individual states to proscribe certain activities on the Internet are increasingly being limited by the dormant commerce clause, which prohibits undue burdens on interstate commerce.

VI. Conclusion

While certain principles relating to jurisdiction in the Internet era are becoming clearer, the situation outside the United States suggests that the applicable rules may be murky for some time yet. Uncertainty, particularly coupled with a challenging business environment, can act as a damper on investment and innovation. The brightest spot on the horizon is the EU's E-Commerce Directive and its sensible approach to apportionment of legal responsibility. Developments in the international content area, however, continue to be troubling, with courts outside the United States almost uniformly seizing jurisdiction over disputes that arose away from their territory. This area will demand increasing vigilance in the near term. Online businesses are advised to utilize self-regulatory measures, appropriate site design, language, and content to mitigate the effects of uncertain jurisdictional laws. Media lawyers should be alert to the increasing potential for foreign claims and become more conversant in content laws that may apply outside of the United States.

[Last update March 2006—Ed.]

⁶³ *Cadle Co. v. Schlichtmann*, 123 Fed. Appx. 675 (6th Cir. 2005).

⁶⁴ *Minnesota v. Granite Gate Resorts, Inc.*, 1 ILR (P&F) 165, 568 NW2d 715 (Minn Ct App 1997).

⁶⁵ *United States v. Thomas*, 2 ILR (P&F) 22, 74 F3d 701 (6th Cir), *cert denied*, 519 US 820 (1996).