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Jurisdiction and the Internet after Gutnick and Yahoo!

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This author dedicates this paper to his Mum and eternal inspiration, Nelly Saadat. He would also like to extend his deepest thanks to Hooma, Melissa, Dad, Marilyn, Charbel, Annesley, Rose, Nana, Greg and many others.

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Abstract

This paper considers jurisdictional issues associated with the Internet, with a focus on defamation as it arises on the Internet. The leading Australian case of *Gutnick* provides a key basis for analysis, and reveals that the traditional rules of jurisdiction can, and do, provide a sound basis for Internet regulation.

Keywords: Internet, defamation, hate speech, *Barrick Gold Corporation v Lopehandia*, *Zippo Manufacturing Company v Zippo Dot Com, Inc.*, *Dow Jones v Gutnick*, *Godfrey v Demon Internet Limited*, *Calder v Jones*, *Chadha & Osicom Technologies v Dow Jones & Co, Inc.*, *Berezovsky v Michaels*, Brussels Regulation.

1. Introduction

The *definition* of the Internet is a largely uncontroversial matter. In technical terms, the Internet is essentially “a decentralised, self-maintained telecommunications network.”¹ There is, however, nothing ordinary about the *benefits* associated with such a telecommunications network. The Internet provides its users with a previously unprecedented ability to communicate. E-mail provides virtually instantaneous global messaging, and information published on the world-wide-web (a subset of the Internet) is viewable and *usable*² upon creation, by any person with a connection to the Internet.³ In becoming a medium used by hundreds of millions of people⁴, the Internet has become an essential tool for commerce.⁵

The United States (“U.S.”) Supreme Court provided its impressions of the Internet in 1997, labelling the Internet “a unique medium – known to its users as ‘cyberspace’ – located in no particular geographical location but available to anyone, anywhere in the world.”⁶ This description provides but a glimpse of the jurisdictional problems that have arisen as a result of the emergence of such a “revolutionary”⁷ medium.

Scope of Paper

This paper is divided into two major sections: sections two and three. Section two analyses why the Internet raises jurisdictional problems – or, alternatively, – why the rules of jurisdiction, if applied traditionally, may be said to pose a threat to Internet conduct. ‘Conduct’ can denote many types of legal actions, both civil and criminal. The limitations of this paper necessitate, however, that only certain categories of legal disputes are examined. Specifically, there will be a focus on the jurisdictional problems associated with the conflict of ‘speech’ laws across jurisdictions, and in particular, the problems associated with defamation⁸ on the Internet. There will be a broad discussion of how the rules of jurisdiction (essentially, laws with respect to choice of forum and choice of law) operate in the U.S., the European Union (“EU”) and major Commonwealth countries.⁹ The assertion that the existing rules of jurisdiction may cause a ‘chilling effect’ over the Internet will be considered.

Section three of this paper will critically evaluate examples of how jurisdictions have sought to regulate Internet conduct. In the case of Internet defamation, the Australian case of *Gutnick* will provide a key basis for analysis. Throughout this section, the practical effects of these cases will be considered and used as a basis for evaluating the traditional rules of jurisdiction.

Regulating the Internet

At the outset, it must be acknowledged that although jurisdictional issues are at the heart of Internet regulation, the “Internet covers a broad range of regulatory concerns.”¹⁰ This paper is specifically concerned with jurisdiction as it relates to certain Internet conduct – that is, defamation and speech on the Internet. Other regulatory concerns, such as the “communication protocols that define the Internet,”¹¹ while critical to the Internet’s operation, are outside the scope of this paper.

Is the Internet Different From Other Media?

The Internet provides its users with a new way of communicating and interacting. At first, however, it is important to determine whether the Internet allows people to do ‘new things’ or whether it largely allows people to do *existing* things in *new ways*, albeit in *greater volumes*. This is a necessary distinction to be drawn, as the answer directly impacts upon the manner in which the Internet should be regulated.

Jack Goldsmith, in an influential¹² article,¹³ argues that:

[c]yberspace transactions are no different from “real-space” transnational transactions. They involve people in real space in one jurisdiction communicating with people in real space in other jurisdictions in a way that often does good but sometimes causes harm.¹⁴

Goldsmith’s position is in direct opposition to many Internet legal scholars who argue that the Internet is “exceptional”¹⁵ and that:

the questions raised by [Internet] conduct are indeed different, and more difficult, than the analogous questions raised by its realspace counterpart, and ... we [cannot] resolve the jurisdictional dilemmas ... by applying the ‘traditional legal tools’ developed for similar problems in realspace.¹⁶

It is tempting to accept the “exceptionalist”¹⁷ view of the Internet. The Internet is undoubtedly a revolutionary leap above “mail or telephone or smoke signal.”¹⁸ Nevertheless, treating the Internet as a separate ‘space’ that should be regulated distinctly from ‘real space’¹⁹ would require a significant departure from traditional legal principles. Goldsmith continued to maintain in 2000 that the Internet would not be rendered unusable by the application of the traditional rules of jurisdiction.²⁰ Before examining the recent *Gutnick* case (and its important impact on Internet regulation), however, the question of whether the Internet is fundamentally different will be addressed.

The arguments made by Goldsmith in “Against Cyberanarchy” are oft-quoted,²¹ and were subject to refutation by David Post in “Against ‘Against Anarchy’”. To summarise Goldsmith’s main contention, he posits that:

[t]ransactions in cyberspace involve real people in one territorial jurisdiction either (i) transacting with real people in other territorial jurisdictions or (ii) engaging in activity that causes real-world effects in another territorial jurisdiction. To this extent, activity in cyberspace is functionally identical to transnational activity mediated by other means, such as mail or telephone or smoke signal.²²

Post disputes this main contention by claiming that it is this “scale” that fundamentally distinguishes Internet transactions from their real-world counterparts.²³ Post argues that the use of analogy to determine the appropriate regulation of Internet conduct becomes

impossible because “differences in degree sometimes become differences in kind.”²⁴ In principle, this is a powerful assertion. Post’s argument, however, fails to persuade, not least because of the example he uses to illustrate the alleged importance of scale. Citing the case of *Religious Technology Center v. Netcomm Online Services, Inc.*,²⁵ (“*Netcomm*”) Post demonstrates how the application of a settled legal principle (in this case: strict liability in copyright law) would have led to an absurd outcome.²⁶

Importantly, however, the outcome in *Netcomm* need not have been any different if the alleged copyright infringement occurred on a small scale. The relevant legal principle remains unchanged; that is, that an Internet service provider should be not held liable for unknowingly transmitting copyrighted material on behalf of its customers. In principle, it matters not whether the transmission of copyrighted material occurs on a mass scale. In many ways, the Internet service provider is akin to the manufacturer of videocassette recorders.²⁷ In the same way that legal responsibility lies with the person video-recording copyrighted material, rather than the manufacturer of video-recording equipment,²⁸ responsibility must lie with the person uploading (or downloading) copyrighted material. Justice Stevens in *Betamax* held that:

[t]he sale of copying equipment ... does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial non-infringing uses.²⁹

Likewise, an Internet service provider provides a service that is widely used for “legitimate” and “unobjectionable purposes.”³⁰ This approach was very recently affirmed by the U.S. Ninth Circuit Court of Appeals in the decision of *Metro-Goldwyn Mayer Studios, Inc, et al v Grokster Ltd, et al*,³¹ where peer-to-peer file-sharing computer networking software makers were not held to be vicariously liable for copyright infringement by users. Notably, the Court of Appeal held that:

The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be ... a video recorder ... or an MP3 player. Thus, *it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses*, despite their apparent present magnitude.³² [emphasis added]

Post’s exceptionalist position becomes more unconvincing when further examples that include the question of jurisdiction are cited. In other words, it is not difficult to find examples of offline transactions that are functionally equivalent to their online counterparts. Media companies, in the pre-Internet era, distributed (and continue to distribute) their publications in multiple jurisdictions, although the costs associated with this may be relatively high.³³ Likewise, mail-order companies continue to provide consumers with a method of ordering goods from overseas retailers, without the need for an Internet presence. As Post points out, in economic terms, the marginal cost of servicing multiple jurisdictions, *ceteris paribus*, is significantly lower for companies operating on the Internet.³⁴ Newspaper readers are no longer forced to purchase overseas periodicals at inflated prices and delayed timeframes.³⁵ For shoppers, the opportunity to order products over the Internet, with real-time product and inventory information, is more enticing than relying on outdated mail order catalogues.³⁶ Consequently, the quantity of newspapers able to be read internationally, and

the number of international consumer transactions that can occur, is significantly greater on the Internet. Concluding that the Internet facilitates scale is not, however, the same as concluding that transactions that occur on the Internet undergo a transformation from their real-space counterparts, and by extension, require separate regulation.

Furthermore, and with respect, Post's suggestion that "border crossing events and transactions"³⁷ were "previously at the margins of the legal system and of sufficient rarity to be cabined off into a small corner of the legal universe"³⁸ is not necessarily correct. Firstly, border crossing events and transactions have existed in significant volumes long before the Internet, and even if confined to "airplane crashes, mass torts, multistate insurance coverage, or multinational commercial transactions"³⁹ amount to a significant body of jurisprudence. Multi-jurisdiction commercial transactions alone, going back to *International Shoe Co. v Washington*,⁴⁰ have been responsible for considerable case law. Notwithstanding, asserting that the Internet means "virtually all events and transactions have border-crossing effects"⁴¹ obscures the reality that while the Internet creates the *potential* for limitless "border crossing effects",⁴² in the overwhelming majority of instances, no *legal* "border crossing effects"⁴³ ensue.

An Alternative View?

For Goldsmith and Post, the solution to jurisdiction on the Internet turns on whether the Internet is "no different"⁴⁴ or "indeed different"⁴⁵ to real space. Goldsmith claims that the Internet is not deserving of distinct jurisdictional rules. Having decided that the Internet is different, Post proposes that "decentralized self-governing institutions"⁴⁶ should regulate the Internet. David Menthe, however, appears to offer a third-way.⁴⁷ Menthe argues that the Internet should be regulated in the same way as the other established "international spaces,"⁴⁸ namely Antarctica, outer-space and the high-seas. Accordingly, jurisdiction should be determined according to the *nationality* of the parties. In making his claim, Menthe specifically rules out the traditional rules as a basis for determining jurisdiction on the Internet:

In Cyberspace, jurisdiction is *the* overriding conceptual problem for domestic and foreign jurisdictions alike. Unless it is conceived of as an international space, cyberspace takes all of the traditional principles of conflicts-of-law and reduces them to absurdity. Unlike traditional jurisdictional problems that might involve two, three, or more conflicting jurisdictions, the set of laws which could apply to a simple homespun webpage is *all of them*.⁴⁹

Without making judgement on the practical benefits of Menthe's proposition (matters of practicality are discussed in section three),⁵⁰ it is nonetheless apparent that Menthe considers the problem of scale as the basis for the need of a different approach to the Internet. In other words, because the Internet contains millions of websites, Internet conduct (whether it is akin to real space conduct or not), in potentially causing a nightmare conflict-of-laws scenario, needs to be regulated separately. This is equivalent to the position advanced by Post. In both cases the authors cite the enormous scale facilitated by the Internet, coupled with the lack of (existing) clarity with respect to the rules of jurisdiction on the Internet. They conclude that the application of the existing rules of jurisdiction would be unworkable, and then devise a plan for ensuring the Internet does not disintegrate under the weight of overlapping jurisdictional claims.

Menthe also fails to persuade because he compares two relatively disused international spaces (Antarctica and outer-space) with a very heavily used space (the Internet). It is perhaps more convincing to argue that obscure and little-known international spaces, such as Antarctica and outer space, should be treated exceptionally. It is in Antarctica and outer space (and not the Internet) that we are *not* able to find transactions that are “functionally identical”⁵¹ to their real space equivalents.

Goldsmith rightly contends that because, in principle, Internet conduct is “functionally identical”⁵² to real space conduct, the traditional rules of jurisdiction should (at least *prima facie*) apply. In terms of practicality, he further argues that the application of the traditional rules of jurisdiction to Internet conduct can “be both effective ... and legitimate,”⁵³ and that the “threat of multiple national regulation of Internet transactions is significantly exaggerated.”⁵⁴ These additional claims will be evaluated in section three.

The Traditional Rules of Jurisdiction

*“Scholars who study conflicts of law are used to regulatory conflict.”*⁵⁵

Having concluded that there is no *prima facie* theoretical (or in-principle) basis for separate rules of jurisdiction for Internet conduct, the traditional rules of jurisdiction will be considered. These rules will then be examined with respect to (non-Internet) international business disputes. Media companies, for example, that sell their publications in foreign jurisdictions will be shown to be subject to the defamation laws of those jurisdictions. Although defamation is relatively less likely to be a problem in foreign jurisdictions (on the mere basis that circulation of a newspaper will be much higher in the domestic jurisdiction), media companies are nonetheless exposed to lawsuits in countries where they choose to sell their publications.

The problem of conflict of laws and jurisdiction pre-dates the Internet. The following discussion will broadly⁵⁶ examine the traditional rules of jurisdiction and assess their operation and effectiveness. Even if the Internet is considered to be “unexceptional”, there is no point in subjecting it to *objectively* bad rules. To provide a basis for later analogy, cases involving non-Internet based international business transactions with jurisdiction disputes will be considered.

The rules of jurisdiction can be divided into the following categories:

- a) the jurisdiction to prescribe (or ‘legislative’ jurisdiction);
- b) the jurisdiction to adjudicate (or ‘judicial’ jurisdiction); and
- c) the jurisdiction to enforce (or ‘enforcement’ jurisdiction).

The jurisdiction to prescribe “is the right of a state to make its law applicable to the activities, relations, the status of persons, or the interests of persons in things.”⁵⁷ Although this description is taken from the U.S. literature,⁵⁸ it provides an adequate basis for understanding prescriptive jurisdiction generally. With respect to the Internet, the jurisdiction to prescribe is manifested in laws that a jurisdiction may pass regulating material anywhere on the Internet. Consequently, prescriptive jurisdiction may involve states seeking to apply their laws extra-territorially – that is, to activities that take place outside their physical boundaries (including the uploading of material to the Internet from a jurisdiction that permits such uploads).

The jurisdiction to adjudicate refers to the power of a state to require a defendant to appear before a court and defend a claim. In most Commonwealth common law countries and the

U.S., the courts' ability to adjudicate a dispute arises when the defendant is properly served with a writ. At common law, the writ may be personally served on a person who is present within the jurisdiction⁵⁹ or, if the person is outside the jurisdiction, service outside of jurisdiction may be allowed.⁶⁰ The service of a foreign writ is illegal in some jurisdictions,⁶¹ and even if the defendant is legally served outside the forum state's jurisdiction, the defendant may choose not to enter a court appearance. At this point, enforcement jurisdiction becomes relevant.

The enforcement jurisdiction of courts is perhaps even more limited than their adjudicative jurisdiction. The courts of one country will not always enforce the judgements of another country.⁶² This represents an extremely important limitation on the power of courts in any jurisdiction seeking to (successfully) hand down judgements against persons located in foreign jurisdictions (particularly where judgement has been made in default of appearance, and where the defendant has no assets in the court's jurisdiction).

Although a court's jurisdiction may be constrained involuntarily (as in the case of enforcement jurisdiction), states also *voluntarily* limit the jurisdiction of their courts. This is manifested in rules which do not give a court jurisdiction in certain cases, as well as rules that permit courts to decline jurisdiction in order to allow a foreign court to exercise its jurisdiction (known as the principle of *forum non-conveniens*).

States enact laws to voluntarily *limit the jurisdiction of their courts* both unilaterally and multilaterally. In the United Kingdom, for instance, the Civil Procedure Rules only permit service of a writ outside jurisdiction in certain circumstances.⁶³ Likewise, in the U.S., service of a state writ may only be done in accordance with the limitations of the U.S Constitution.⁶⁴

On the multilateral front, the member states of the European Union have passed the Brussels Regulation.⁶⁵ This agreement prevents overlapping assertions of jurisdiction by the signatory states⁶⁶ of the Regulation, by providing rules for determining which court shall have jurisdiction. The Regulation stipulates that:

[t]he rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of interest.⁶⁷

To give effect to this aim, Article 2(1) of the Regulation provides that "subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".⁶⁸ In this sense, the Regulation provides a degree of certainty for Europeans entering into inter-state business transactions. In most cases, European persons can only be sued in the member state within which they are domiciled. For persons not domiciled in a member state, however, the national rules of jurisdiction continue to apply.⁶⁹

On a voluntary basis, select jurisdictions⁷⁰ will *decline* jurisdiction in accordance with the principle of *forum non-conveniens*. This principle reflects the fact that often multiple states will have a basis for claiming jurisdiction, but that one state may be a "more appropriate

forum”⁷¹ or “clearly inappropriate forum.”⁷² The burden of proving *forum non-conveniens* falls on the defendant (as the plaintiff, by serving a writ, selects the forum).

Freedom of contract also allows persons to specify the jurisdiction within which disputes shall be contested. Indeed, it is common for international business contracts to specify both the choice of court and law that will apply in the event of a legal dispute arising out of the contract. Where an exclusive jurisdiction clause is provided for in a contract, common law courts have tended to exercise their discretion strongly in favour of giving effect to the contract agreed by the parties.⁷³

It can, therefore, be argued that persons that enter into international business transactions either: (i) have a degree of control over where potential litigation may arise out of a contract (via the use of choice of court/law clauses); and/or (ii) are able to discern, with a level of certainty, the potential jurisdictions within which they may be “hailed into court”.⁷⁴ States that a person has no connection with, for example, are unlikely to take jurisdiction in a dispute concerning such a person. Even if a state were to claim jurisdiction in such circumstances, the enforcement power of the state (over the unrelated person) would be very limited. As mentioned above, states will not always enforce the judgements of foreign courts. Non-enforcement is especially likely to occur in circumstances where a judgement has been handed down against a person that, either has no connection with the foreign state, or did not contest the proceedings in the foreign state.⁷⁵ States will also not enforce foreign judgement involving taxation, penal or other public laws.⁷⁶

While a person is unlikely to be subject to the jurisdiction of a completely remote state, it is often the case that a person will have a degree of connection with a *number* of states. Moreover, among the many states that a person may have connection with, it is likely that a person will have a *preferred* jurisdiction for litigating. This will depend on the facts and circumstances of each case (for example, whether it is a dispute involving breach of contract or defamation, and whether the person is plaintiff or defendant). The rules of jurisdiction, however, do not operate to provide litigators with their *preferred* forum. An argument of *forum non-conveniens* will not always be successful, and under the Brussels Regulation, the court (properly) seized first must not decline jurisdiction simply because there may be a more appropriate forum (and its judgement automatically gains recognition in other member states).⁷⁷

Furthermore, examples exist where a person’s tenuous connections to a state have given rise to the jurisdiction of the courts of that state. In *South India Shipping v Bank of Korea*,⁷⁸ the defendant Korean bank had a small branch located in England. This branch, while having no connection with the legal dispute that had arisen between its parent (the Bank of Korea) and South India Shipping, was nonetheless served with an English writ. On appeal, Lord Ackner held that the bank had “established a place of business within Great Britain and it matters not that it does not conclude within the jurisdiction any banking transactions or have any banking dealings with the general public as opposed to other banks or financial institutions.”⁷⁹

In contrast, under the Brussels regulation, jurisdiction over the branch of a company only arises out of the activities of the branch.⁸⁰ This is a more sensible approach, and prevents plaintiffs from forum shopping (in situations where the defendant has multiple branches). Although companies can limit the number of jurisdictions within which they may be sued by establishing separate subsidiaries rather than branches, this is not always possible. Banks, for

instance, require a minimum level of capital for each subsidiary (this is not the case for branches).

Pre-Internet Cases

Although the 2000 English defamation case of *Berezovsky v Michaels*⁸¹ also involved the question of material published on the Internet,⁸² significantly, the defendant also circulated hard-copies of its publication in multiple jurisdictions. The defendant – *Forbes*, a business magazine written, edited and circulated largely in the US – published an article concerning two prominent Russian citizens. The magazine had a circulation of almost 800,000 copies in North America, just over 1,900 copies in England and 13 copies in Russia. The plaintiffs confined their claim for damages to publication of the magazine in England,⁸³ unsurprising given England’s plaintiff-friendly defamation laws.⁸⁴ The publisher sought to stay the action, arguing that England was not the appropriate forum. In a majority decision, the House of Lords denied the publisher’s application.

In the leading opinion delivered by Lord Steyn, His Lordship held:

[t]he present case is a relatively simple one ... It is ... a case in which all the constituent elements of the torts occurred in England. The distribution in England of the defamatory material was significant. And the plaintiffs have reputations in England to protect. In such cases it is not unfair that the foreign publisher should be sued here.⁸⁵

Lord Hoffman, however, in his dissent, held that:

[w]hatever the reputation of the plaintiffs in this country, it was a reputation based on their activities in Russia. Once it is appreciated that the real object of this litigation is to show that they were defamed in respect of those activities rather than to calculate the compensation for damage to their reputations in England, the existence of those reputations is no longer a factor of overwhelming importance. The plaintiff’s are *forum shoppers in the most literal sense*.⁸⁶ [emphasis added]

Berezovsky v Michaels was a majority decision of the House of Lords. On one hand, the majority judges respected the right of plaintiffs to make use of English courts to obtain compensation for damage suffered in England. In contrast, the dissenting judges examined the legal dispute in its broader context. That is, the alleged defamation largely occurred in the U.S., where the overwhelming majority of *Forbes* magazine readers were located.

Although the findings of the dissenting judges are compelling (given how appropriate the label of “forum shopper” could be for the plaintiffs in this case), the majority judgement is, on balance, the right approach. The defendants, while having only a small magazine circulation in England, nonetheless sought to obtain business profits in England. The plaintiffs presumably had, given the costs of defamation litigation, reputations in England to uphold. In writing their article about them, then, it is reasonable for the *Forbes*’ editors to expect that they might be sued in the courts of England, where their magazine has a physical circulation.

While it might be argued that the plaintiffs had no (worthy) reputation in England to defend, if this was the case, then the 1999 outcome in *Chadha & Osicom Technologies v Dow Jones & Co, Inc.*,⁸⁷ should certainly have applied. The plaintiff in *Chadha* was prevented from bringing an action of defamation arising out of an article published in *Barron’s* magazine

(owned by Dow Jones & Co, Inc). The court held that there was little evidence of any connection between the claimant and England or of any injury to reputation in England.⁸⁸

The approach in *Chadha* was cited with approval in 2004 in *King v Lewis & Ors*,⁸⁹ where the plaintiff (Don King) was held to indeed have a reputation in England worth defending.

The position in the U.S. (with respect to inter-state defamation) is found in the leading 1984 decision of *Calder v Jones*.⁹⁰ The test formulated by the Supreme Court in this case has become known as the ‘effects test’. Jones, a professional entertainer who lived and worked in California and whose television career was centred there, brought suit in California Superior Court, claiming that she had been defamed in an article written and edited in Florida and published in the *National Enquirer* (“the Enquirer”), a national magazine having its largest circulation in California. Calder, president and head of the Enquirer, and Smith, the reporter who wrote the relevant article, both residents of Florida, were served with process by mail in Florida, and, on special appearances, moved to quash the service of process for lack of personal jurisdiction.⁹¹

On appeal in the U.S. Supreme Court, Justice Rehnquist held that the:

intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must ‘reasonably anticipate being haled into court there’ [citing *World-Wide Volkswagen Corp. v. Woodson* 444 U.S. 286 (1980)] to answer for the truth of the statements made in their article.⁹²

Justice Rehnquist, in particular, emphasised the “effects”⁹³ of the Enquirer’s Florida conduct in California. These substantial effects gave rise to their liability in California.

This approach is consistent with that of the English courts. Indeed, the English cases suggest that the decision to uphold the jurisdiction of the Californian court would have been made much more readily by English judges under English law, given Jones’s substantial reputation in, and connection with, California. Further, it is not surprising that an argument of *forum non-conveniens* was not made by the Enquirer. Florida’s claim to being a more appropriate forum, simply because the article was written and edited there, is unsupportable. California, on the facts presented, was the natural forum.

Adding the Internet to the Fray

It is the year 2005, and thousands of the world’s newspapers are available for access on the Internet. The potential for multiple-jurisdiction defamation actions is rife. Indeed, as a corollary of spurring burgeoning international activity and commerce, the Internet has provided easier ways for people to be part of international legal disputes. Newspaper publishers with an Internet presence, in particular, are somewhat more likely to fall foul of foreign defamation and hate-speech laws (although this should not be exaggerated). On one hand, Post’s reasoning potentially amounts to the conclusion that the newspaper of Country A (“Herald Times”, for the sake of argument), published on the Internet, should be immune from the defamation laws of Country B. The basis for this: the fact that the Herald Times is now available (and accessible) on a very large scale. That is, potentially millions of people in

Country B are able to download and view the Herald Times, whereas in the pre-Internet age, the newspaper was only available in smaller quantities in select newsstands in Country B.

Yet it is not immediately clear why the Internet, in facilitating the increased availability of the Herald Times in Country B, and the associated increased *potential* for defamation, should be subject to different legal rules. As a matter of legal principle, the contention that “scale matters” has been determined to be unconvincing.

If scale does not distinguish the Internet from real space it then must be asked whether other policy considerations are relevant. This is an entirely separate issue, and often particular fact situations will dictate the appropriate approach. These are now considered.

2. Speech on the Internet: Litigation Lets Loose

This section will begin by examining defamation on the Internet, with *Gutnick* as a focus for discussion. Whether *Gutnick*, having been decided in accordance with the traditional rules of jurisdiction, proves that such rules are adequate or inadequate for disputes arising on the Internet will be considered. This section will touch on the ongoing litigation in *Yahoo!*, a prominent case involving (among other things) the sale of Nazi memorabilia on the Internet. *Yahoo!* has only recently further unfolded, with a decision of the U.S. Court of Appeals for the 9th Circuit on 23 August 2004. Finally, this section will also examine other relevant cases, including the leading U.S. authority for minimum contacts on the Internet, as well as a recent Canadian decision on Internet defamation.

Defamation on the Internet

Prior to *Gutnick*, the first case to be heard on the issue of defamation on the Internet was *Godfrey v Demon Internet Limited*,⁹⁴ an English case involving a domestic plaintiff and defendant. Although the alleged defamatory material (“the posting”) was uploaded to the Internet by a U.S. person,⁹⁵ the plaintiff⁹⁶ brought action against Demon Internet,⁹⁷ the Internet Service Provider (“ISP”) hosting the posting on its servers. The plaintiff submitted that Demon Internet *published* the posting by hosting it, in accordance with s. 1 of the Defamation Act 1996.⁹⁸ It was also submitted that Demon Internet’s failure to remove the posting, after having been advised of its existence by the plaintiff, prevented Demon Internet from availing themselves of the common law defamation defence of “innocent dissemination.”⁹⁹

Significantly, Justice Morland noted in his judgement that English law did not contain an equivalent of the U.S. statutory provision of “precluding courts from entertaining claims that would place a computer service provider in a publisher’s role.”¹⁰⁰ Initially, Justice Morland held that Demon Internet “were clearly not the publisher of the posting defamatory of the Plaintiff within the meaning [of the Defamation Act]”. Despite this, because the plaintiff notified Demon Internet of the publication of the posting, they had an obligation to remove it, or else remain liable for defamation.

This first English case of defamation on the Internet did not prove to be especially groundbreaking for two main reasons: (i) *Godfrey* was an English case where jurisdiction was not at issue, as both plaintiff and defendant were English; and (ii) ISPs that unknowingly host allegedly defamatory material are only potentially liable if they ignore a request to remove the relevant material. In the U.S., ISPs are not liable at all.¹⁰¹

Gutnick

Of all the cases involving jurisdiction on the Internet, the *Gutnick* case is considered to be one of the most important. In *Gutnick*, the High Court of Australia applied Australia's traditional rules of jurisdiction to determine that Australian courts do have jurisdiction to adjudicate alleged defamation on the Internet. The case is considered especially important, as it was the first judgement of any nation's final appellate court on the jurisdiction issue in an *international* defamation case involving Internet-based publication.

The facts in *Gutnick* are as follows. Dow Jones & Company, Inc ("Dow Jones") prints and publishes the Wall Street Journal newspaper and Barron's magazine. Since 1996, Dow Jones has operated wsj.com, a subscription news site on the Internet. Those who pay an annual fee may have access to the information to be found at wsj.com. Those who have not paid a subscription may also have access if they register their details. Access is at all times only available with a user name and a password. The information at wsj.com includes *Barron's Online* in which the articles published in the current printed edition of Barron's magazine are reproduced.¹⁰²

The edition of *Barron's Online* for 28 October 2000 (and the equivalent edition of the magazine dated 30 October 2000) contained an article entitled "Unholy Gains" in which several references were made to Gutnick. It was in this article that Gutnick claimed that he was defamed. Gutnick brought an action in the Supreme Court of Victoria (Australia) against Dow Jones claiming damages for defamation.¹⁰³

Gutnick lives in the Australian state of Victoria and has his business headquarters there. Although Gutnick conducts business outside Australia, including in the U.S., and has made significant contributions to charities in the United States and Israel, much of his social and business life could be said to be focused in Victoria.¹⁰⁴

The wsj.com site had about 550,000 subscribers in October 2000. Not all of these subscribers could be identified, but approximately 1700 paid subscribers were known to have Australian addresses, of which about 300 were in Victoria. Dow Jones has an office in the U.S. state of New Jersey, where servers hosting its wsj.com website are located.¹⁰⁵

In bringing an action against Dow Jones, Gutnick confined his claim in respect of publication of the article that occurred in Victoria. In proceedings before the Supreme Court of Victoria, Dow Jones applied for an order that the plaintiff's service of writ and statement of claim be set aside, or an order that further proceedings in the matter be permanently stayed.¹⁰⁶ Dow Jones contended that the Supreme Court of Victoria lacked jurisdiction in the matter, or alternatively, that the state of Victoria was a "clearly inappropriate forum."¹⁰⁷

Justice Hedigan concluded that the allegedly defamatory article was "published in the state of Victoria when downloaded by Dow Jones subscribers who had met Dow Jones's payment and performance conditions and by the use of their passwords."¹⁰⁸ Dow Jones's contention that the publication of the article in *Barron's Online* occurred at their servers in New Jersey was rejected. In concluding that Gutnick was defamed in Victoria, Dow Jones's submission that Victoria was a clearly inappropriate forum was also rejected.¹⁰⁹

Dow Jones's request for special leave to appeal to the Victorian Court of Appeal was rejected. The Court of Appeal was quick to conclude that Justice Hedigan's decision was "plainly correct."¹¹⁰

Dow Jones's request for special leave to appeal to the High Court was, however, accepted. As Australia's final appellate court, the High Court's decision to accept the appeal attracted a significant amount of international interest. The High Court granted¹¹¹ numerous international media organisations¹¹² leave to intervene in conjunction with Dow Jones.

In a unanimous decision, the full court of the High Court affirmed the Victorian Supreme Court's decision, and denied Dow Jones's appeal. The appeal focussed on the critical question of *where* the article available on *Barron's Online* was published. Although Australia's traditional rules of defamation quite clearly pointed to publication having occurred in Victoria (in each and every instance that the article was downloaded by a subscriber residing in the state), Dow Jones, et al, urged the court to establish separate rules for Internet-based publications.

Specifically, Dow Jones argued that the rule for Internet publication should be akin to the U.S. defamation "single publication rule", and that an article should be deemed published when it is uploaded to a server (an approach labelled "the law of the server"¹¹³ by Menthe). The location of the server, it was suggested, should determine the applicable choice of law and jurisdiction.

Dow Jones, et al, desperately sought to emphasise the special nature of the Internet, and argued that by virtue of being on the Internet, a publication should be subject to different rules. Senior Counsel on behalf of the interveners also attempted to advance the argument akin to that put forward by Post, namely that "the question of degree becomes a difference of kind."¹¹⁴ In other words, Internet conduct is different because the *scale* of the Internet transforms otherwise analogous non-Internet conduct. It was further argued that unlike the situation of a newspaper being distributed (in hardcopy) abroad, "with the Internet you cannot know"¹¹⁵ where a website will be viewed.

Justice Kirby, in contrast to the other seven justices of the court, accepted the submission by Dow Jones, et al, that the Internet is a unique medium. Justice Kirby held that:

the Internet is not simply an extension of past communications technology. It is a new means of creating continuous relationships in a manner that could not previously have been contemplated...¹¹⁶

Despite this, Justice Kirby held that it was the responsibility of the legislature to reform the common law rules of defamation, and that there were limits to "judicial innovation."¹¹⁷

In a joint judgement, however, Chief Justice Gleeson, and Justices McHugh, Gummow and Hayne expressed less enthusiastic impressions of the Internet. In response to the suggestion that the Internet is different to any previous communications technology, the following was held:

It was suggested that the World Wide Web was different from radio and television because the radio or television broadcaster could decide how far the signal was to be broadcast. It must be recognised, however, that satellite broadcasting now permits very wide dissemination of radio and television and it may, therefore, be doubted that it is right to say that the World Wide Web has a uniquely broad reach. It is no more or less ubiquitous than some television services. In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact. *However broad may be the reach of any particular means of communication, those who make information accessible by a particular method*

do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.¹¹⁸ [emphasis added]

With the exception of Justice Kirby, therefore, six of the seven High Court justices appear to have accepted Goldstone's "un-exceptionalist" view of the Internet. The justices did not find any inherent reasons why the Internet should be subject to different common law rules.

Dow Jones, et al, in addition to arguing that the Internet is qualitatively different to previous communications technologies, advanced policy reasons for having a single publication rule for Internet material. Unless there was such a rule, it was suggested, there would be a "chilling effect"¹¹⁹ on material available on the Internet, because Internet publishers would be exposed to law suits anywhere in the world. Justice Kirby held that this would be a concern:

particularly in cases where the plaintiff has a substantial reputation in more than one legal jurisdiction and seeks to recover for the damage in all such jurisdictions in a single proceeding. In such a case, potential liability in defamation for the publication of material relating to such a person on the Internet may indeed have a chilling effect on free speech merely because one of those jurisdictions has more restrictive defamation laws than the others. This approach could subject Australian defendants to the more restrictive defamation laws of foreign jurisdictions.¹²⁰

This concern was, however, rejected by a majority of the court on a twofold basis. Firstly, with respect to the suggestion by Dow Jones that the single publication rule for Internet material be centred on the location of the server hosting the material. The court held that this would allow:

publishers ... to manipulate the uploading and location of data so as to insulate themselves from liability in Australia, or elsewhere: for example, by using a web server in a 'defamation free jurisdiction', or one which the defamation laws are tilted decidedly towards defendants.¹²¹

Although Dow Jones qualified their proposed 'server rule' by stipulating that "adventitious"¹²² or "opportunistic"¹²³ servers be subject to exceptions, this was considered to provide "greater appearance of certainty than it would have in fact."¹²⁴ The court held that the words "adventitious" and "opportunistic" would provide little certainty and that "overthrowing established legal rules for new ones ... would require great precision in the formulation of detailed exceptions if a satisfactory judicial reformulation were to be achieved."¹²⁵

Secondly, in addition to concluding that the server rule proposed by Dow Jones, et al, would be unsatisfactory, the court countered the argument that media companies would be required to defend law suits in a multitude of unforeseeable jurisdictions. This concern was mitigated, according to the court, by the fact that (i) journalists writing articles about prominent personalities could always anticipate the jurisdiction(s) in which they may be required to defend defamation allegations;¹²⁶ and (ii) that "plaintiffs are unlikely to sue for defamation published outside the forum unless a judgement obtained in the action would be of real value to the plaintiff. The value that a judgement would have may be much affected by whether it can be enforced in a place where the defendant has assets."¹²⁷

In response to the policy concerns raised by the appellants, the court held that *not* applying the traditional common law rules would also raise serious policy questions. In particular, Justice Callinan held that:

what the appellant seeks to do, is to impose upon Australian residents for the purposes of this and many other cases, an *American legal hegemony* in relation to Internet publications. The consequence, if the appellant's submission were to be accepted would be to confer upon one country, and one notably more benevolent to the commercial and other media than this one, an effective domain over the law of defamation, to the financial advantage of publishers in the United States, and the serious disadvantage of those unfortunate enough to be reputationally damaged outside the United States. A further consequence might be to place commercial publishers in this country at a disadvantage to commercial publishers in the United States.¹²⁸ [emphasis added]

Gutnick was, therefore, the first important case that directly examined defamation on the Internet, in facts analogous to *Berezovsky v Michaels*. In both cases:

- a) the extent of defamation occurring within the forum state was significantly less than in the U.S., where the allegedly defamatory material was written and originally published;
- b) the plaintiff's confined their claims to defamation occurring within the forum state only (presumably with the full knowledge that any defamation claim in the U.S. would be thwarted by *New York Times Co v Sullivan*)¹²⁹
- c) the argument of *forum non-conveniens* was rejected because no choice of law question arose¹³⁰; and
- d) the applicable defamation and jurisdiction laws were largely similar.

The following section will examine the global reaction to *Gutnick*, whether the High Court erred in its findings, and finally, whether the decision is bad for the Internet.

Reaction to *Gutnick*

The decision in *Dow Jones v Gutnick* attracted significant international media attention. A lengthy *Washington Post* article published on 11 December 2002 included predictions that the Internet could be rendered "unusable as a vehicle for mass communication"¹³¹ and that the decision "could crimp the increasingly free flow of information across borders that the Internet has unleashed."¹³² These were, effectively, predictions of a 'chilling effect'.

The Australian newspaper went further, suggesting in an editorial that the High Court judges "remain entrapped by the arcane art of the common law and the inglorious history of defamation law as a tool of the powerful."¹³³ In contrast to other criticism, however, *The Australian* believed the decision to be more than bad policy – the decision was also *bad law*. It was, according to *The Australian*, incumbent upon the High Court to revise the common law to "properly comprehend the new world of the Internet."¹³⁴

As mentioned above, of the seven justices only Justice Kirby seems to have recognised a need for reform of the law to grapple with the unique challenges posed by the Internet. Justice Kirby held that "the appellant (and interveners) have established real defects in the current Australian law of defamation as it applies to publications on the Internet"¹³⁵ and that

[t]he notion that those who publish defamatory material on the Internet are answerable before the courts of any nation where the damage to reputation has occurred, such as in the jurisdiction where the complaining party resides, presents difficulties: technological, legal and practical.¹³⁶

Notwithstanding, Justice Kirby maintained that it was the responsibility of the legislature, and not the courts, to reform the law, and that “that this Court would not be justified to change the rules of the Australian common law as would be necessary in this case to respond to the submissions of the appellant.”¹³⁷

On the policy front, all seven justices sought to downplay the concerns raised by the appellant, with Justice Kirby maintaining that the “spectre of ‘global’ liability should not be exaggerated”.¹³⁸ Justice Kirby also held that:

[i]t is true that the law of Australia provides protections against some of those difficulties which, in appropriate cases, will obviate or diminish the inconvenience of distant liability ... Apart from anything else, the costs and practicalities of bringing proceedings against a foreign publisher will usually be a sufficient impediment to discourage even the most intrepid of litigants. Further, in many cases of this kind, where the publisher is said to have no presence or assets in the jurisdiction, it may choose simply to ignore the proceedings.¹³⁹

In Defence of the High Court

The remaining six justices echoed Justice Kirby’s reassurances that their decision would not necessarily have significant impact on the Internet. It is submitted that the High Court’s claims are highly persuasive. Additionally, the criticisms levelled at the High Court’s decision do not survive rigorous analysis.

From the perspective of the Australian common law, the decision reached by the High Court is, in the words of the Victorian Court of Appeal, “plainly correct.”¹⁴⁰ The single-publication rule is not part of Australia’s common law on defamation, and while publication that occurs on a mass scale theoretically results in scores of individual causes of action, established principles of the common law prevent multiple law suits.¹⁴¹ It is well-established in Australian jurisprudence that the tort of defamation arises when a “defamatory publication is comprehended by the reader, the listener, or the observer.”¹⁴² Furthermore, it would be “wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension.”¹⁴³

Dow Jones, et al, understood these aspects of Australia’s defamation law, but urged the High Court to embrace its suggested approach (encompassing the server rule, discussed above). The fact that the High Court declined to (i) radically reshape Australia’s common law rules on defamation for Internet publications; and (ii) do so in the manner proposed by the appellants and interveners is laudable. Although ultimate appellate courts are obliged to adapt the common law to new fact situations (a responsibility recognised by the High Court),¹⁴⁴ this responsibility must always be exercised with extreme care.

Most ultimate appellate courts in developed countries do not have directly elected judges – the highest courts of Australia, the U.S. and UK all *appoint* the judges of their highest courts

according to established processes. Reform of the law is principally, and rightfully, the responsibility of democratically elected legislatures.

Even if the case for common law reform by the High Court could be established, reform in the manner proposed by Dow Jones, et al, would be highly undesirable. The server rule, if adopted, would create tremendous uncertainty and would require a new body of jurisprudence to develop some semblance of predictability. Interpretation of the words “adventitious” or “opportunistic” would undoubtedly vary between jurisdictions, in much the same way that England and Australia approach the test of *forum non-conveniens* differently.¹⁴⁵

What, then, are the implications for the Internet after *Gutnick*? Matthew Collins, having written widely on defamation on the Internet,¹⁴⁶ considers the case to have “the potential to chill freedom of speech”.¹⁴⁷ Collins argues that “foreign publishers may decide to water down or not publish material which has the potential to damage the reputations of Australians ... or try to restrict Australians from having access to their site.”¹⁴⁸ Evidence of this may already exist. Many newspaper websites (including the *New York Times*, *Guardian* and *Sydney Morning Herald*) now require compulsory (and usually free) registration. This allows the websites to identify their readers – particularly their physical location.

Like the High Court, however, Collins maintains that the “implications of the High Court’s decision should not be exaggerated or overstated.”¹⁴⁹ There is, indeed, no basis for the predicting the demise of the Internet. For a simple free registration, a ubiquitous publication such as the *New York Times* remains accessible¹⁵⁰ worldwide (even to Australians!) in this ‘post-Gutnick era’.

It must be remembered that Dow Jones was found liable partly because it actively solicited subscribers for its wsj.com website from around the world. In many cases subscribers made credit card payments for access to wsj.com’s content, and Dow Jones could readily ascertain the quantity and location of its subscribers. A subscription-only website such as wsj.com can be described as an “active” website in the language of *Zippo Manufacturing Company v Zippo Dot Com, Inc*¹⁵¹ (discussed below). In future, Dow Jones may shield itself from liability by ensuring that certain articles are not available to subscribers from particular jurisdictions. The very same technology that allows Dow Jones to widely disseminate its publications will also allow¹⁵² it to, in what will be the vast minority of cases, block certain articles from being ‘published’ in specific jurisdictions. While this does not amount to a *utopian* level of accessibility for information on the Internet, it is infinitely preferable to a situation where Dow Jones’s publications are not available on the Internet (and consumers do not have instantaneous access to the *bulk* of overseas publications).

Zippo’s Test

In *Zippo*, the Pennsylvania District Court adapted the minimum contacts test for specific personal jurisdiction in Internet cases. A “sliding scale” test was developed for determining whether a defendant’s conduct over the Internet allows a (U.S.) state to exercise personal jurisdiction over him. The court held that:

This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. *Compuserve, Inc. v. Patterson*, 89 F.2d 1257 (6th Cir. 1996). At the opposite end are situations where a

defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. E.g. *Bensusan Restaurant Corp., v. King*, 937 F.Supp. 296 (S.N.D.Y. 1996). The middle ground is occupied 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. E.g. *Maritz, Inc. v. Cybergold, Inc.*, 1996 U.S. Dist. Lexis 14976 (E.D.Mo. Aug. 19, 1996).¹⁵³

Furthermore, the Pennsylvania court made it clear that, irrespective of one's conception of the Internet, "[w]hen a defendant makes a conscious choice to conduct business with the residents of a forum state, 'it has clear notice that it is subject to suit there'".¹⁵⁴

It is not entirely clear, however, whether a non-subscription based website (that is, a "passive" website in the words of *Zippo*) would also result in Australia's courts delivering a "Gutnick" decision (that is, a finding of jurisdiction). Australian courts do not apply a sliding scale test. In the case of passive websites, therefore, defendants before Australian (and even UK) courts will need to mount an argument of *forum non-conveniens* in order to have proceedings stayed.

A passive website with real connections to only one or two states (that is, the states in which the website was created and/or is hosted) should not ordinarily be subject to the jurisdiction of other states, simply because the website is able to be downloaded from those states. By way of analogy, the consumer who travels abroad and purchases a product in Country Y (where the product's sale is legal) and then returns to Country X (his domicile, where the product is not legal) is *alone* responsible for importing an illegal product into his country. The vendor in Country Y cannot be held responsible as he did not actively solicit business from residents of Country X.

Fortunately, states that seek to claim jurisdiction over all material on the Internet (simply because a computer within the jurisdiction is able to download material from anywhere on the Internet) will be prevented from *effectively* exercising such jurisdiction. The Attorney General for the U.S. state of Minnesota, for example, issued a memorandum in 1995 stating that "[p]ersons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws."¹⁵⁵ Even if this memorandum continued to be a valid expression of Minnesota law (*Zippo* indicates the contrary, in accordance with the limitations of long-arm jurisdiction), there are significant practical limits to Minnesota's ability to assert its jurisdiction.

Internet Defamation in Canada

Canada's Ontario Court of Appeal handed down a decision on 4 June 2004 in the case of *Barrick Gold Corporation v Lopehandia*.¹⁵⁶ Although this case concerned two Canadian residents, the plaintiff resided in the province of Ontario, while the defendant resided the province of British Columbia. Jurisdiction was, therefore, relevant, particularly in relation to the request for injunction. In the decision of first instance, Justice Swinton held that the defendant had extensively and maliciously defamed the plaintiff; however, she refused to award punitive damages, and crucially, denied a request for an injunction against the defendant (to prevent him from continuing to post defamatory messages on the Internet).

With respect to the request for injunctive relief, Justice Swinton held that as the defendant did not have assets in Ontario, the courts of Ontario could not supervise the enforcement of the injunction against the defendant in British Columbia.

On appeal, the Court of Appeal granted C\$50,000 punitive damages, finding the defendant's conduct to be "malicious and high handed ... unremitting and tenacious"¹⁵⁷ involving "defamatory publications that are vicious, spiteful, wide-ranging in substance, and world-wide in scope."¹⁵⁸ On the jurisdictional issue of injunctive relief, the Court of Appeal granted the plaintiff's request, holding that:

- e) there was a real and substantial connection between the matter and Ontario (the defamatory statements caused damage to Barrick's reputation in Ontario, were read by residents of Ontario, and were accessible on an Internet message board operated by an Ontario ISP);
- f) Ontario ISPs (such as Yahoo! Canada) could be stopped from distributing the plaintiff's defamatory messages; and
- g) the order "may be enforceable in British Columbia."¹⁵⁹

Given the malicious nature of the defendant's actions, and his knowledge of the plaintiff's reputation in Ontario, the Court of Appeal's decision was appropriate. Not only does the case establish "that Canadian courts are willing to adapt traditional legal principles to respond to the exigencies of the Internet,"¹⁶⁰ it highlights the level of harm that actions in cyberspace can cause in real space.

Hate Speech on the Internet

Having examined defamation on the Internet, with a particular focus on the important case of *Gutnick*, the discussion will now turn to the regulation of hate speech on the Internet. The problem of hate speech on the Internet arises because of the varying degrees to which freedom of expression is allowed in different jurisdictions. *Yahoo!*¹⁶¹ is considered the most important case on this issue; however, other cases involving multinational Internet companies (involving, for instance, Amazon.com, Inc)¹⁶² have the potential to arise.

In contrast to *Gutnick*, *Yahoo!* has been considered, by free speech advocates, to be a victory for the Internet. In reality, it is a victory for those who support the traditional rules of jurisdiction, and those who seek protection under the U.S. Constitution's First Amendment.¹⁶³ As previously mentioned, the small body of jurisprudence with respect to Internet conduct has allowed the Internet to flourish as an extremely popular, and effective, method of mass communication. Unencumbered by the laws of any one jurisdiction, 'netizens' (that is, Internet citizens) have enjoyed immense freedom to discuss political, social and economic issues.

Regimes that are reluctant to allow their residents to tap into such a medium continue to control access from *within* their territories. This reflects the practical limits associated with attempts to impose extra-territorial jurisdiction. The government of the People's Republic of China, for example, highly regulates Internet access from inside China. An Amnesty International report in November 2002 showed that:

With the introduction of the Internet, news reaches China from a multiplicity of sources enabling people to form opinions, analyse and share information and to communicate in ways previously unknown in China ... However, the potential of the Internet to spread new ideas has led the authorities to take measures to control

its use. The authorities have introduced scores of regulations, closed Internet cafes, blocked e-mails, search engines, foreign news and politically-sensitive websites, and have *recently introduced a filtering system for web searches on a list of prohibited key words and terms*. Those violating the laws ... may face imprisonment and according to recent regulations some could even be sentenced to death.¹⁶⁴ [emphasis added]

Not all countries, however, take the hardline approach of the Chinese government. Other countries seek to impose what can be considered reasonable limitations on freedom of expression, in order to protect minority groups from vilification and discrimination, without resorting to imposing physical barriers to Internet access. What amounts to reasonable legal limitations on freedom of expression in 'normal' democratic states is, however, quite debatable. The citizens of many states¹⁶⁵ do not have a constitutionally guaranteed right to freedom of expression (akin to the First Amendment of the U.S. Constitution), and where such a right exists, it is subject to interpretation by courts.

In the case of certain European countries (notably Germany and France), the need to grapple with the demons of Nazism has led to special laws banning, for example, the sale of Nazi memorabilia including Adolf Hitler's infamous book *Mein Kampf*.

In April 2000, La Ligue Contre Le Racisme et l'Antisemitisme ("LICRA" – a French non-profit organisation dedicated to eliminating anti-Semitism), sent a 'cease and desist' letter to Yahoo!'s U.S. headquarters informing Yahoo! that the sale of Nazi and Third Reich related goods ("Nazi memorabilia") through its auction services violated French law. LICRA threatened legal action in France unless Yahoo! complied with its demands. Although Yahoo! subsequently blocked the sale of Nazi memorabilia on its www.yahoo.fr website, certain items continued to be available on the main Yahoo! auction site at www.yahoo.com. LICRA argued that because this main site was also accessible by French citizens, Yahoo! continued to be in violation of French law.

The French Court held that blocking French access to www.yahoo.com was technically possible, and that because www.yahoo.com could be viewed by French citizens, it came within the jurisdiction of France. It ordered Yahoo! to comply, or face penalties.

Yahoo! sought a declaratory judgement that the "French Court's orders are neither cognizable nor enforceable under the laws of the United States."¹⁶⁶ On 7 November 2001, Judge Fogel granted Yahoo!'s request for declaratory judgement. Substantively, this was to be expected. U.S. courts have previously denied enforcement of foreign judgements that have been deemed incompatible with the U.S. Constitution, including enforcement of foreign defamation judgements.¹⁶⁷ Judge Fogel held that:

[w]hat is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States *on the basis that such speech can be accessed by Internet users in that nation* ... The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press.¹⁶⁸ [emphasis added]

Procedurally, however, Judge Fogel was found to have erred according to U.S. Court of Appeals for the 9th Circuit, in a decision on 23 August 2004. The Court of Appeals held, in a majority judgement, that Yahoo!:

must wait for the foreign litigants to come to the United States to enforce the judgement before its First Amendment claim may be heard by a U.S. court.

The Court of Appeal's decision has little practical impact for Yahoo! Even if LICRA were to seek enforcement of the French Court's decision in the U.S. (something Judge Fogel's decision pre-emptively barred), it is unlikely that a U.S. court would give effect to the French Court's orders.

While *Yahoo!* is a victory for free speech on the Internet, more importantly it demonstrates that the existing rules of jurisdiction, in their practical operation, do not have the effect of chilling speech on the Internet (in the case of *Yahoo!*, quite the opposite). Although French judges (and the Minnesota Attorney General) would like to impose their law on the entire Internet, fortunately, there are important practical limits to their powers.

3. Conclusion

On one side of the debate it is claimed that:

“[o]ur traditional notions of jurisdiction have made a relatively smooth transition into cyberspace... Surprisingly, our conventional notions of jurisdiction have adapted well to this new cyber-environment ... No new rules are necessary, because although the Internet is a new forum, parties, as always, exist in physical space.”¹⁶⁹

A report prepared by the American Bar Association (“ABA”)¹⁷⁰ supports the minimum contacts standard for determining jurisdiction on the Internet. The minimum contacts standard, with its sliding scale approach, does indeed result in less aggressive assertions of jurisdiction than in countries such as the UK and Australia, where minimum contacts does not exist.

Yet despite predictions following *Gutnick* of the “demise of the Internet”¹⁷¹ no such thing has occurred. Media companies continue to provide their publications on the Internet, albeit with the aforementioned registration requirements. Moreover, while the “threat of multiple regulatory exposure”¹⁷² exists, this “has not prevented enormous Internet growth in recent years.”¹⁷³

Irrespective of how quickly technology advances, however, and how *seemingly* irrelevant national borders become, the world will continue to have distinct nations with distinct priorities. Even in the micro-world of the European Union, the language of ‘ever closer union’ is being redefined to reflect national priorities. For this reason, the small transaction costs associated with unilateralism are indeed worth paying, particularly if a medium such as the Internet can continue to thrive notwithstanding.

Notes and References

¹ *Dow Jones & Company, Inc v Gutnick* [2002] HCA 56, para 80. The proceedings in the High Court of Australia will hereafter be called “*Dow Jones v Gutnick*”. General reference to the proceedings (including the

decision of first instance, the Court of Appeal decision, and the High Court's decision) will hereafter be "*Gutnick*". The full citation for the decision of first instance will be provided where relevant.

² 'Usable' means the Internet has the ability to interact with its users. Interaction is an important concept in relation to jurisdiction. See, in particular, section 3(e) below.

³ The Internet does not require proprietary software for access. Any software platform (including Windows, Macintosh and UNIX) that can 'understand' Internet protocols can establish a connection to the Internet.

⁴ United Nations Conference on Trade and Development, *E-Commerce and Development Report, 2002: Executive Summary* (2002) 1.

⁵ *Ibid.*

⁶ *Reno v ACLU*, 117 S.Ct. 2329, 2334-35 (1997).

⁷ "It is indeed a revolutionary leap in the distribution of information ... It is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression." *Dow Jones v Gutnick*, para 164.

⁸ The tort of defamation can be further broken down into 'libel' and 'slander', depending on the common law jurisdiction. This paper will not consider this distinction (see Collins, below n146, 41). 'Defamation', as referred to throughout this paper, should be given its ordinary meaning.

⁹ Principally Canada, Australia and New Zealand.

¹⁰ J Goldsmith, "Unilateral Regulation of the Internet: A Modest Defence", 11 *EJIL* (2000) 135, at 147.

¹¹ *Ibid.*, 148.

¹² D Post, "Against 'Against Cyberanarchy'", 17 *Berkley Technology Law Journal* (2002) 1371. See, in particular, note 41.

¹³ J Goldsmith, "Against Cyberanarchy", 65 *Chicago Law Review* (1998) 1239.

¹⁴ *Ibid.*, 1239-1240.

¹⁵ Post, above n12, 1390.

¹⁶ *Ibid.*

¹⁷ Post, above n12, 1366.

¹⁸ Goldsmith, above n13, 1240.

¹⁹ D Post & D Johnson, “Law and Borders: The Rise of Law in Cyberspace”, 48 *Stanford Law Review* 1367. This article’s central theme is that the irrelevance of physical location on the Internet supports the argument for decentralized self-governing institutions.

²⁰ Goldsmith, above n10.

²¹ Post, above n12.

²² Goldsmith, above n13, 1239-1240.

²³ Post, above n12, 1369.

²⁴ *Ibid*, 1340.

²⁵ 907 F.Supp 1361 (N.D.Cal. 1995).

²⁶ That is, the absurdity of an Internet Service Provider being guilty of copyright infringement for unknowingly transmitting copyrighted material. Ultimately, Judge Whyte held that Netcomm “cannot be held liable for direct infringement” (above n13, 1373).

²⁷ *Sony Corporation of America, Inc., et al. v Universal City Studios, Inc, et al.* 464 U.S. 417 (1984) (hereafter “*Betamax*”).

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ CV-01-8541 (hereafter “*Grokster*”).

³² *Ibid*, 11746.

³³ The New York Times, for instance, is available for sale in many of the world’s largest cities.

³⁴ Post, above n12, 1375.

³⁵ The Sydney Morning Herald will only be available on London newsstands after a 23 hour flight from Sydney.

³⁶ The Internet's ability to allow commerce to be conducted with minimal infrastructure costs spawned the explosive growth of thousands of Internet companies from 1996 – 2002. While a significant majority of the first pure-Internet companies have since closed, this is more a reflection of consumers' early unwillingness to purchase certain products on the Internet, rather than the Internet business model *per se*. For example, the high-profile collapse of *boo.com*, an Internet clothing retailer, showed the difficulties associated with selling fashion on-line. Amazon.com, in contrast, the world's leading Internet retailer, is making profits, largely as a result of selling books, CDs and DVDs (source: Amazon.com SEC 10-K filing, 25/02/2004).

³⁷ Post, above n12, 1386.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ 326 U.S. 310 (1945) (hereafter "*International Shoe*").

⁴¹ Post, above n12, 1386. Emphasis not added.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Goldsmith, above n13, 1239.

⁴⁵ Post, above n12.

⁴⁶ Ibid.

⁴⁷ D Menthe, "Jurisdiction in Cyberspace: A Theory of International Spaces", 4 *Mich. Telecomm. Tech. L. Rev* 69 (1998).

⁴⁸ Ibid.

⁴⁹ Ibid, 71. Emphasis not added.

⁵⁰ A rigorous evaluation of the practical benefits of Menthe’s proposed approach is, however, beyond the scope of this paper.

⁵¹ Goldsmith, above n13, 1239.

⁵² Goldsmith, above n13, 1239.

⁵³ Goldsmith, above n10, 136.

⁵⁴ *Ibid*, 135.

⁵⁵ *Ibid*, 148.

⁵⁶ The constraints of this paper prevent a fuller discussion of private international law. See L Collins, “Dicey and Morris on the Conflict of Laws” (13th ed, London: Sweet & Maxwell, 2000).

⁵⁷ Menthe, above n47.

⁵⁸ Restatement (Third) of Foreign Relations Law of the United States, s401 (1987).

⁵⁹ *Laurie v Carroll* (1958) 98 CLR 310.

⁶⁰ This may only be done in accordance with the court’s own rules for service of a writ outside jurisdiction.

⁶¹ For example, Switzerland does not permit a writ to be served by international post, considering it a breach of its sovereignty (see <http://foia.state.gov/masterdocs/07fam/07m0950.pdf>).

⁶² *Matusevitch v Telnikoff*, 877 F Supp 1 (DDC, 1995); *Bachchan v India Abroad Publications Inc*, 585 NYS 2d 661 (NY County SC, 1992).

⁶³ Rule 6.20, Civil Procedure Rules.

⁶⁴ U.S. states have passed ‘long-arm’ statutes in order to facilitate the issue of writs for persons located in other states (both U.S. and overseas). The U.S. Supreme Court sanctioned these statutes in *International Shoe*, in accordance with the U.S. Constitution (1787), Amendment XIV (1868), section 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”). The “minimum contacts” rule provides that jurisdiction over a person shall only exist if the person has a minimum level of contacts with the state. This requires a careful examination of the facts and circumstances of each case.

⁶⁵ Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (hereafter, “Brussels Regulation” or “the Regulation”).

⁶⁶ Denmark, an EU member state, opted out of the Brussels Regulation and applies the rules of the Lugano Convention (16 September 1988) on jurisdiction and the enforcement of judgements. Iceland, Norway and Switzerland (non-EU member states) also apply the Lugano Convention. The Lugano Convention is substantially similar to the Brussels Regulation.

⁶⁷ Para 11, Brussels Regulation.

⁶⁸ Article 2(1), Brussels Regulation.

⁶⁹ Article 4(1), Brussels Regulation (“If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State”).

⁷⁰ Most civil law countries do not accept the principle of *forum non-conveniens*.

⁷¹ *Spiliada Maritime Corporation v Cansulex Ltd.* [1987] AC 46, *Piper Aircraft v Reyno*, 454 U.S. 235.

⁷² *Voth v Manildra Flour Mills Pty Ltd* (1990) 97 CLR 124.

⁷³ *Lewis Construction Co Pty Ltd v Tichauer (M) Societe Anonyme* [1966] VR 341; *Huddart Parker Ltd v Ship “The Mill” and Her Cargo* (195) 81 CLR 502.

⁷⁴ See below n94.

⁷⁵ *Emanuel v Symon* [1908] 1 KB 302 (CA).

⁷⁶ *United States of America v Inkley* [1988] 3 W.L.R. 304 (Ct. App.).

⁷⁷ Article 5 of the Brussels Regulation.

⁷⁸ [1985] 1 Lloyds Rep. 413.

⁷⁹ *Ibid* 417.

⁸⁰ Article 5(5) Brussels Regulation.

⁸¹ [2000] 2 All ER 986.

⁸² Lord Steyn declined to discuss specific issues arising out of the publication of the offending magazine via the Internet, suggesting that there had been insufficient evidence before the court to enable the issue to be considered adequately.

⁸³ Including distribution of hard copies of the magazine, and publication of the offending material in England and Wales via the Internet.

⁸⁴ R Weaver & G Bennett, *Is the New York Times 'Actual Malice' Standard Really Necessary? A Comparative Perspective*, 53 La. L. Rev. 1153.

⁸⁵ *Ibid*, 994.

⁸⁶ *Ibid*, 1005.

⁸⁷ [1999] EMLR 724 (hereafter, "*Chadha*")

⁸⁸ *Ibid*.

⁸⁹ [2004] EWHC 168 (QB).

⁹⁰ 465 U.S. 783.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ [1999] EWHC QB 244 (hereafter "*Godfrey*").

⁹⁵ This person could not be identified.

⁹⁶ A natural person resident in England.

⁹⁷ A company carrying on business in England and Wales.

⁹⁸ Hereafter "Defamation Act".

⁹⁹ *Godfrey*, above n94, para 2.

¹⁰⁰ *Ibid*, para 44. Justice Morland cites the U.S. case of *Zeran v America Online* [1997] 129 F3d 327. For this reason, and because of operation of the First Amendment of the U.S. Constitution, cases analogous to *Godfrey* can not readily be found in the U.S.

¹⁰¹ *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* 923 F. Supp. 1231 (N.D. Cal. 1995).

¹⁰² *Dow Jones v Gutnick*, above n1, para 1.

¹⁰³ *Ibid*, para 2.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*, para 169.

¹⁰⁶ *Ibid*, para 5.

¹⁰⁷ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (that is, the argument of *forum non-conveniens*).

¹⁰⁸ *Gutnick v Dow Jones & Co, Inc* [2001] VSC 305, para 60 (hereafter “*Gutnick v Dow Jones*”).

¹⁰⁹ *Dow Jones v Gutnick*, above n1, para 7.

¹¹⁰ *Dow Jones & Company, Inc v Gutnick* [2001] VSCA 249.

¹¹¹ *Dow Jones & Company, Inc v Gutnick* M3/2002 (hereafter “*Dow Jones v Gutnick* transcript”).

¹¹² These organisations were not confined to the U.S. Interveners were: Amazon.com, Inc, Associated Press, Association of Alternative Newsweeklies, BloombergLP, Cable News Network LP, LLLP, Guardian Newspapers Ltd, Knight Ridder, Inc, Media/Professional Insurance, The New York Times Company, News Limited, Online News Association, Reuters Group PLC, Time Inc, Tribune Company, The Washington Post Company, Yahoo! Inc, Internet Industry Association, and John Fairfax Holdings Ltd.

¹¹³ Menthe, above n47, 79. In arguing for the Internet to be regulated as an “international space”, Menthe shows why the “law of the server” would be undesirable.

¹¹⁴ *Dow Jones v Gutnick* transcript, above n111, line 1636.

¹¹⁵ *Ibid.*

¹¹⁶ *Dow Jones v Gutnick*, above n1, para 118.

¹¹⁷ *Ibid.*, para 123.

¹¹⁸ *Ibid.*, para 39.

¹¹⁹ *Dow Jones v Gutnick*, above n1, para 152.

¹²⁰ *Ibid.*, para 152.

¹²¹ *Ibid.*, para 199.

¹²² *Ibid.*, para 20.

¹²³ *Ibid.*

¹²⁴ *Ibid.*, para 21.

¹²⁵ *Ibid.*, para 131.

¹²⁶ In the words of the joint judgement: “in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort.” *Ibid.*, para 54.

¹²⁷ *Ibid.*, para 53. As of 29 August 2004, Gutnick’s case had yet to reach a hearing on its merits.

¹²⁸ *Ibid.*, para 201.

¹²⁹ 376 US 254 (1964).

¹³⁰ That is, English and Australian law (respectively) was applicable.

¹³¹ J Krim, “Internet Libel Fence Falls; Court in Australia Says U.S. Publisher Can Be Sued There”, *Washington Post*, 11 December 2002, A10.

¹³² *Ibid.*

¹³³ Editorial, *The Australian*, 11 December 2002.

¹³⁴ *Ibid.*

¹³⁵ *Dow Jones v Gutnick*, above n1, para 137.

¹³⁶ *Ibid.*, para 165.

¹³⁷ *Ibid.*, para 123.

¹³⁸ *Ibid.*, para 133.

¹³⁹ *Ibid.*

¹⁴⁰ *Dow Jones & Company, Inc v Gutnick* [2001] VSCA 249.

¹⁴¹ In the words of the joint judgement: “Clearly, the common law favours the resolution of particular disputes between parties by the bringing of a single action rather than successive proceedings. The principles of res judicata, issue estoppel, and what has come to be known as Anshun estoppel, all find their roots in that policy. The application of that policy to cases in which the plaintiff complains about the publication of defamatory material to many people in many places may well lead to the conclusion that a plaintiff may not bring more than one action in respect of any of those publications that have occurred before the proceeding is instituted or even, perhaps, before trial of the proceeding is complete.” *Dow Jones v Gutnick*, above n1, para 36.

¹⁴² *Ibid.*, para 26.

¹⁴³ *Ibid.*

¹⁴⁴ Per Justice Kirby, “it is appropriate to recall that in a parliamentary democracy such as that established by the Australian Constitution, [there is a need] for caution in judicial alteration of basic and long held legal rules.” *Ibid.*, para 128.

¹⁴⁵ During the proceedings in *Dow Jones v Gutnick*, Justice Gaudron remarked that “I should have thought, that notwithstanding the apparent difference of wording in relation to forum non conveniens, the probabilities are that throughout the common law [world] the results are pretty much on a par.” In response, Justice Kirby said “I am not sure about that.” *Dow Jones v Gutnick* transcript, above n111, lines 4320-25.

¹⁴⁶ M Collins, *The Law of Defamation and the Internet* (New York: Oxford University Press, 2001).

¹⁴⁷ M Collins, “Defamation on the Internet After *Dow Jones & Company Inc v Gutnick*”, (2003) 8 *Media & Arts Law Review* 3, 181.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, 182.

¹⁵⁰ Indeed, the *New York Times* continues to offer readers (anywhere in the world) the opportunity, for a fee, to download an electronic edition of the daily newspaper. For details, see <http://www.nytimes.com/ee>.

¹⁵¹ 952 F Supp 1119 (WD Pa, 1997) (hereafter “*Zippo*”).

¹⁵² Although it is conceded that an Internet user may disguise their physical location by adopting certain measures (for example, dialling into a foreign ISP), such conduct is highly exceptional. Moreover, certain Internet services are highly regulated in order to be available only to consumers of specific jurisdictions. For example, the iTunes Music Service (“ITMS”, a music download service provided by Apple, Inc.) was previously only available to residents of the U.S. Internet users attempting to use the ITMS would be refused access, unless they could prove U.S. residency (by providing details of a U.S. bank account and address). The ITMS is now available in 19 countries.

¹⁵³ *Ibid.*, 1124.

¹⁵⁴ *Ibid.*, 1126-7.

¹⁵⁵ Memorandum of Minnesota Attorney General (July 18, 1995).

¹⁵⁶ [2004] O.J. No. 2329.

¹⁵⁷ *Ibid.*, para 64.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, para 76.

¹⁶⁰ B Freedman, “Ontario Court Issues Injunction Against Internet Defamation” *CLE Society of British Columbia* (available at <http://www.cle.bc.ca/CLE/Analysis/Collection/04-12345-barrick>).

¹⁶¹ The proceedings involving Yahoo! Inc (collectively hereafter “*Yahoo!*”) include the litigation in France (*UEJF and LICRA v Yahoo! Inc. and Yahoo France* (hereafter “*LICRA v Yahoo!*”) (an English translation of the decision can be found at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm>), as well the subsequent litigation in the U.S. (*Yahoo!, Inc v La Ligue Contre Le Racisme et l’Antisemitisme, et al*, 169 F Supp 2d 1181, 6 (hereafter, “*Yahoo! v LICRA*”).

¹⁶² See <http://www.tau.ac.il/Anti-Semitism/updates/i99020.html>.

¹⁶³ United States Constitution (1787), Amendment 1 (1791).

¹⁶⁴ Amnesty International, “People’s Republic of China State Control of the Internet in China”, AI Index: ASA 17/007/2002, 1 (available at <http://web.amnesty.org/library/>).

¹⁶⁵ Such as Australia and New Zealand.

¹⁶⁶ *Yahoo! v LICRA*, above n161.

¹⁶⁷ *Matusevitch v Telnikoff*, 877 F Supp 1 (DDC, 1995) and *Bachchan v India Abroad Publications Inc*, 585 NYS 2d 661 (NY County SC, 1992) – both being British libel judgement not enforced in the U.S.

¹⁶⁸ *Ibid*, 8.

¹⁶⁹ T Gray, “Minimum Contacts in Cyberspace: The Classic Jurisdiction Analysis in a New Setting”, 1 *Journal of High Technology Law* 1, 85-86.

¹⁷⁰ American Bar Association, *Achieving Legal and Business Order in Cyberspace*, 29-30 (2000), cited by Gray (above n168).

¹⁷¹ P Waldmeir, “Borders return to the Internet”, *Financial Times* 15 December 2002.

¹⁷² Goldsmith, above n10, 148.

¹⁷³ *Ibid*.