

JURISDICTION AND THE INTERNET: THE “REAL WORLD” MEETS CYBERSPACE

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I. INTRODUCTION

In a world where global communications are increasingly dependent on the Internet,¹ traditional geographic and territorial borders are disappearing, leaving in their wake important and unanswered questions. Cyberspace is different from the “real world” because it is boundary-less. This lack of defined, territorial borders has necessitated exploration into new areas of law that is developing to regulate this technological arena. International Jurisdiction is one of the most important areas of the law. It requires new ways of thinking to develop ideas on adapting and regulating cyberspace. Many of these new ideas are similar, yet different from traditional forms of legal thought.

Amongst the emerging issues evolving in the new field of cyberlaw, none is more important and difficult to define than Jurisdiction.² Traditionally, territorial borders separating countries into distinct entities marked which laws would be used to resolve a conflict. Every country in the world with an organized legal system has its own variation of Civil Procedure. The question

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1. IDC estimates that the number of Internet users worldwide will grow from approximately 97 million at the end of 1998, to approximately 320 million by the end of 2002. This reflects a compound annual growth rate of 34.8%. The rapid growth in popularity of the Internet is due in large part to increasing computer and modem penetration; development of the Wide World Web; the introduction of easy-to-use navigational tools; and utilities and the growth in the number of informational, entertainment, and commercial applications available on the Internet, at <http://www.idc.com> (last visited Oct. 27, 2000).

2. In July of 1999, an Internet Law and Policy Forum took place in Montreal, Canada. One of the major topics of the conference was “Jurisdiction: Building Confidence in a Borderless Medium”. Many experts in the field of law and technology made presentations on the subject. Several of these experts are cited throughout this article.

of where jurisdiction lies in order to solve a conflict and why it should lie there is essential to Civil Procedure. Jurisdictional problems come to the forefront of a conflict when a legal dispute occurs in a world without borders. The Internet provides an "information superhighway" that is accessible any place in the world where a person has access to a telephone wire.³ If a legal conflict occurs resulting from information or content found on the Internet, where will the conflict be resolved and whose law applies? There are several competing theories that have developed to address this difficult question. This article will illustrate the traditional concepts for solving international conflicts over Jurisdiction. It will then present several theories on how to confront these conflicts when they occur in Cyberspace. Analysis of the best methods for confronting the issue of global jurisdiction in cyberspace will follow, leading to a conclusion.

II. WHAT IS THE INTERNET?

In order to understand the problems that the Internet presents to traditional notions of International Jurisdiction, one must have basic knowledge of the Internet. One must know what the Internet is and where it came from. The Internet is a product of the United States Department of Defense Advanced Research Projects Agency (ARPANET).⁴ While it is highly doubtful that the developers of ARPANET had the modern evolution of the Internet in mind at the time of its creation, there was the idea of using the network for education.⁵ Today, education is only one of the endless applications of the Internet. An infinite stream of information on subjects ranging from Astronauts to Zebras can be located with the click of a computer mouse.

The modern Internet is a huge network that spans the globe. The basic make-up consists of local computer networks that are connected to regional networks that come together to form national and international systems.⁶ These systems form "webs" that are connected to each other, essentially creating an "information superhighway" commonly known as the Internet. Communications on the Internet are in a machine language called Internet

3. According to NUA Ltd., An Internet Survey site, through various measurements and surveys, have estimated the number of users online to be 359.98 million worldwide. The following is a breakdown of the numbers by region. Africa, 3.11 million; Asia/Pacific, 89.43 million; Europe, 94.22 million; Middle East, 2.40 million; Canada & USA, 157.24 million; Latin America, 13.4 million, at http://www.nua.ie/surveys/how_many_online/index.html (last visited Oct. 27, 2000).

4. Juliet M. Oberding & Terje Norderhaug, *A Separater Jurisdiction for Cyberspace*, at <http://www.ascusc.org/jcmc/vol2/issue1/juris.html> (last visited Oct. 27, 2000).

5. *Id.*

6. Dan L. Burk, *Jurisdiction in a World Without Borders*, 1. Va. J.L. & Tech. 3 (Spring 1997), available at http://vjolt.student.virginia.edu/graphics/vol1/vol1_art3.html (last visited Oct. 27, 2000).

Protocols.⁷ This language is transmitted over the Internet in packets of data that are broken up and sent through the network at whatever pace the connection can capacitate. The address of the final destination identifies these data packets. Each packet travels over different routes depending on available capacity and speed from computer to computer until it reaches its intended destination.⁸ Once they reach their destination, these packets of data come together to form the requested page.

The route that the final product takes may travel through various states of the United States as well as through various countries of the world. The network design is to move information as quickly as possible along the system and does not recognize any defined territorial borders. Because of this objective, it is likely that information will travel through several different jurisdictions before it reaches its final destination.

There is no real way to monitor the information that passes over the Internet. Additionally, there are no realistically feasible ways for countries to block Internet transmissions. Internet protocols do not recognize geographic location.⁹ This lack of ability to control and screen information transmitted on the Internet leads to legal problems. Without a specific authority to oversee these problems, the question becomes, how can legal conflicts be resolved. Who has jurisdiction to decide and solve these problems?

III. TRADITIONAL JURISDICTIONAL ISSUES

In order to file a lawsuit in the United States, the court hearing the case must have jurisdiction over the subject matter of the issue and over the defendant(s). Subject matter jurisdiction in federal cases depends on the diversity of citizenship between the parties. It also depends on whether a specific issue of federal law arises.¹⁰ The more complex issue is whether the court can assert personal jurisdiction over the defendant. For a court to have personal jurisdiction over a person, the court must conclude that the person has "minimum contacts" within the forum state, so as not to offend traditional notions of due process.¹¹ A defendant must purposely avail himself or herself within the forum state by being present in the state, doing business within the state, or maintaining certain activities within the state. The defendant must

7. *Id.*

8. *Id.*

9. *Id.*

10. FED. R. CIV. P. § 1331.

11. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Due Process Clause of the 14th Amendment permits the courts to exercise personal jurisdiction over persons with sufficient minimum contacts. *Id.*

have had sufficient, continuous contacts within the forum.¹² Therefore, non-residents of one state are still subject to the jurisdiction of the court in that state if the court finds that they maintained the necessary minimum contacts required for asserting personal jurisdiction.

A significant problem arises when actions filed are a result of conflicts arising in cyberspace. The Internet flows freely and is available in every state and every country. This creates a direct challenge to the minimum contact rule. Courts are examining what constitutes minimum contact with respect to Internet issues. It may not be enough to say that a person has established minimum contacts in a forum just because another person was able to gain access to a website within the forum. If this were true, every state in the United States and every country around the world with similar minimum contact standards would be able to claim personal jurisdiction over anyone with a website. Legal scholars propose that well defined standards be established when determining personal jurisdiction based on cases dealing with conflicts originating in cyberspace.

United States' Courts are making efforts to clarify the question of jurisdiction for cases arising from conflicts originating on the Internet. One factor for determining whether minimum contacts exist in a forum is by deciding if a particular website is passive or active.¹³ *Weber v. Jolly Hotels* used a test based on this issue. The defendant in that case was an Italian hotel that advertised on the Internet. The plaintiff booked a room in the hotel through a licensed travel agent in New Jersey. The plaintiff's injury occurred while in the hotel in Italy. The issue presented in the case was whether a corporation's advertisement on the Internet was enough to support general jurisdiction. The *Weber* Court held that advertising on the Internet, without further solicitation, could not support jurisdiction in this case. The Court asserted that the nature and quality of contacts is key when determining whether personal jurisdiction can be asserted in Internet cases.¹⁴ A determining factor is whether a defendant's website simply places information on the Internet, or whether the website facilitates a means for soliciting and conducting business. The Court reasoned that without deciding the characteristic nature of the website, a defendant could be open to legal action anywhere that the website is accessible.¹⁵ This departs from the well-established precedent that a person needs to be 1) present in or 2) purposely availing ones self of the forum state that is attempting to establish personal jurisdiction in order for there to be minimum contacts.

12. *Id.* at 317-19.

13. *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D. N.J. 1997).

14. *Id.* at 330-31.

15. *Id.* at 333.

While it may be a valid assertion that the nature and quality of contacts is a significant factor in determining whether personal jurisdiction can be asserted in Internet cases, this is not as simple as it seems. Many websites are established with the purpose of providing information and not for advertising or for the solicitation of business. However, this does not mean that they are not actively making contacts within a forum. A leading case in this area is *Zippo Manufacturing Company v. Zippo Dot Com*.¹⁶ Although this is a case involving United States jurisdictions; it should be persuasive with respect to how international law may want to address jurisdictional issues. *Zippo* involves trademark infringement on the Internet. Trademark infringement is a problem that will have a significant impact on the international community. For example, a French company could be using a trademark to do business on the World Wide Web as a United States company conducting business with the same or similar trademark. Anyone doing business with these companies may experience confusion from the similarities of the trademarks and consequently, conflicts could arise. Trademarks used by a French Corporation in France will no longer have an effect on a United States Corporation using the same or similar trademark. The effortless ability to access the Internet has made the world smaller, thus facilitating the need to protect companies and individuals intellectual property rights.

The *Zippo* Court addressed trademark infringement on the Internet in the United States when the Zippo Manufacturing Company, a cigarette lighter manufacturers domiciled in Pennsylvania, brought suit against a California Internet news service company, Zippo Dot Com, for trademark infringement. Zippo Dot Com's website advertised its service and had an electronic application used to subscribe to their service. They had contracts with Internet providers in Pennsylvania and had subscription agreements with 3000 residents of Pennsylvania. The Court held that jurisdiction in Pennsylvania was proper because Zippo Dot Com had purposely availed itself of the law and economy of Pennsylvania.¹⁷ The Court, specifying that this was a distinctive situation because it was an Internet case, applied the *International Shoe*¹⁸ minimum contacts analysis. The court in *Zippo* established a "sliding scale" which measures the degree of interactivity of the website.¹⁹ The Court broke the scale down into three levels. The first is a passive website. A passive website is a site that merely distributes information.²⁰ The second level is an

16. *Zippo Manufacturing Company v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997).

17. *Id.* at 1126.

18. *International Shoe*, 414 U.S. at 316. In *International Shoe*, the court defined for the first time what contacts a defendant would have to establish in a particular forum so as to have "minimum contacts" within the meaning of the law. *Id.*

19. *Zippo*, 952 F. Supp. at 1119.

20. *Id.* at 1124.

intermediate website. Intermediate websites are able to exchange information between the host and the user.²¹ The third level is an active website. An active website enables the host to conduct business over the Internet. The Court defines conducting business over the Internet as entering into a contract over the Internet and/or knowingly and continuously engaging in the transmission of computer files over the Internet.²²

In order to satisfy due process requirements, a defendant, acting as a reasonable person, would have to anticipate being haled into court in the forum that the activity that is conducted.²³ The *Zippo* Court in fact did believe that Zippo Dot Com should have foreseen jurisdiction in Pennsylvania. According to the Court, the level of activity was sufficient to subject the defendant to the laws of that forum.

The test established in *Zippo* is a model from which to base new international laws on jurisdictional conflicts arising on the Internet. While the laws of various countries may differ with respect to jurisdiction based on "real world" conflict, compromises are necessary when it comes to the Internet. Everyone conducting activity on the Internet should be guaranteed due process of law. The type of conflict that is causing the dispute will often determine the solution, but in many circumstances, the ruling described in *Zippo* can provide a basic test to use as guidance. If a company or individual transmits information over the Internet, and a conflict occurs, one should examine the nature of the information. In addition, an analysis must be conducted to determine whether the website is passive, active, or intermediate. Finally, a determination as to whether a reasonable person could anticipate being haled into court in that forum is determined. With respect to cases of international conflict, if a person should have anticipated that the information they were disseminating over the Internet would possibly cause a problem, they should foresee judgment in the forum where the conflict occurs. It is entirely feasible that an American using a website to post information or conduct business may have to face suit in Argentina. This would be true if it is determined that a reasonable person conducting that activity should have foreseen that problems could occur in Argentina. Naturally, these situations are determinable on a case-by-case basis, but this is a starting point for handling the complicated litigation that will arise over international jurisdiction conflicts.

IV. INTERNET JURISDICTIONAL ISSUES

There are an infinite number of Internet issues that will give rise to conflicts over jurisdiction. Consequently, varieties of scholars have commented

21. *Id.*

22. *Id.*

23. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1979).

on the conflicts that have arisen and could arise with respect to jurisdictional issues on the Internet.

Hypothetically, international jurisdiction problems could arise involving hate speech on the on the Internet. The First Amendment of the United States Constitution protects pro Nazi material on the Internet.²⁴ This information, originating in the United States, is accessible in Germany. However, German law restricts the proliferation of Nazi material and information in Germany. This raises the question of the German government's ability to have jurisdiction over the person who places such information on the World Wide Web. Should the German government have personal jurisdiction over the creator of the website created and domiciled in the United States?

Applying the interactivity test set forth by the *Zippo* Court to the aforementioned hypothetical is challenging. However, if the international legal community starts to analyze these issues in the same manner, specific tests can evolve based on the facts of each individual conflict.

In analyzing whether the German government should have jurisdiction in this situation, the first issue addressed is to determine the website's level of activity. This is an issue not easily answered and is a strong argument for creating legislation to deal with conflicts of this nature.

If the website is passive and only distributes information, it would be inconsistent with due process for the Germany to have personal jurisdiction over the defendant in Germany. The website would not be purposely availed to any forum in particular. The German government may argue that the laws of its country are different from most others when it comes to this type of information. Germany may argue that those who established the website should have known that the website is accessible in Germany and therefore should have expected being haled into court in Germany.

If the level of activity of the Nazi material website is deemed intermediate or active, different conclusions result regarding the jurisdictional question. If the nature of the website is to actively exchange information between users and the host, then purposeful availment to the benefits of the forum occur.

If it is determined that business is being conducted over the website, it may be concluded that minimum contacts are being maintained within the forum. In these cases, the German government would have a strong argument that jurisdiction should lie in Germany. The border-less nature of the Internet is evident to those that participate in the medium. If the website is actively conducting business in a forum, the hosts should expect to be subject to jurisdiction in that forum.

24. Henry H. Perritt, Jr., *Jurisdiction and the Internet: Basic Anglo/American Perspectives, Internet Law and Policy Forum, Jurisdiction: Building Confidence in a Borderless Medium*, Montreal Canada, at <http://www.ilpf.org/confer/present99/perrittpr.htm> (July 1999).

Another issue that could present itself on the Internet involves professional licensing.²⁵ For instance, if a doctor in England offers medical advice over a website, does the United States government have jurisdiction to say that the doctor is practicing medicine in the United States without the proper license?

If the medical website is passive, it is only distributing information. The website should clearly disclaim that the content is for informational purposes only, not to offer medical advice or diagnosis. This being the situation, it would be unlikely that personal jurisdiction in the United States would be consistent with due process.

If the website features an exchange of information between the user and host and this information is in the form of medical advice, an intermediate level of activity will exist. In this case, the totality of the circumstances should be examined to determine the nature of the information exchanged and if the defendant should have anticipated being haled into court if problems arose over the exchange of the aforementioned information. In a situation such as this, whether medicine is being practiced without a license will have to be determined based on the kind of information being exchanged. Heightened scrutiny is required on a case-by-case basis for intermediate level websites. Whether those responsible for offering information should have to answer suit in foreign jurisdictions will depend on the specific nature of the information exchanged.

For personal jurisdiction to be consistent within the forum, a website must be actively conducting business. If a doctor in England is offering medical advice, or attempting to dispense medications in exchange for payment, in the United States there is a strong likelihood that the doctor is practicing medicine without a license. In these cases, personal jurisdiction lies within a United States forum. Again, the level of activity of the website lends to determining a good starting point for deciding issues of international jurisdiction for Internet conflicts.

It is important to realize that the *Zippo* test is only a starting point for answering the question of international jurisdiction on the Internet. Different variations of Civil Procedure exist from country to country. Certain perspectives in the United States regarding enforcing jurisdiction are fundamentally different from other countries. For example, Japanese Civil Procedure states that the general grounds for jurisdiction depend on the domicile of the defendant.²⁶ Therefore, the plaintiff can sue the defendant in

25. *Id.*

26. Kazunori Ishiguro, *Traditional Legal Concepts for the Internet and the Global Information Infrastructure; A Japanese Perspective*, Internet and Law Policy Forum, Montreal, Canada, at <http://www.ilpf.org/confer/present99/ishiguropr.htm> (July 1999).

the defendant's domicile. The United States Supreme Court²⁷ has ruled that a foreign plaintiff can sue a defendant in the United States domicile of the defendant only in cases where it is not precluded by forum non-conveniens.²⁸ The differences between the United States and Japan are indicative of the variations that exist between countries throughout the world.

One manner in which we could resolve the variations that exist in civil procedure laws between countries is to form a treaty standardizing laws in cyberspace. However, the constitutional systems of participating countries in a treaty will still create an imbalance in the harmonization of a standard rule system.²⁹ University of Tokyo Professor Kazunori Ishiguro illustrates this conflict. He notes that in the United States a treaty has the same rank in terms of judicial importance as a federal law. The rank of international law is lower than that of federal law, but higher than state law.³⁰ In Germany, international law is considered above federal law, but a treaty is generally treated the same as federal law.³¹ According to the Japanese Constitution, international law and treaties take precedent over national law.³² These fundamental differences among countries will be an impediment to harmonizing the international law dictating jurisdiction on the Internet.

V. DIFFERING VIEWS ON THE INTERNET JURISDICTIONAL PROBLEM

There are several different theories on the number of problems that jurisdictional issues will cause in cyberspace. There are also several theories as to what the solutions to those problems should be. Professor Henry H. Perritt, Jr. illustrates in his article three examples of conflicting hypotheses on the Internet Jurisdiction issue.³³ Jack Goldsmith of the University of Chicago offers the first hypothesis. David R. Johnson³⁴ and David G. Post³⁵ present contradicting views on the issue. Peter Swire offers a compromised view of the first two.

Jack Goldsmith of the University of Chicago has set forth one prominent theory.³⁶ He asserts that the "hype" created by Internet jurisdictional issues are just that, "hype." He is of the opinion that well-established theories of

27. Piper Aircraft v. Reyno, 454 U.S. 235, 254 (1981).

28. Ishiguro, *supra* note 26.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Perritt, *supra* note 24.

34. Chairman of Counsel Connect and Co-Director of the Cyberspace Law Institute.

35. Visiting Associate Professor of Law, Georgetown University Law Center and Co-Director of the Cyberspace Law Institute.

36. Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199 (1998).

international law that have been in place for many years will provide the answers to any questions raised in cyberspace, the same as they do with traditional jurisdictional conflicts.

It is likely that the issue of Internet Jurisdiction will cause a great deal of over-excitement as new cases arise at a rapid pace in the near future. This would seem to be natural when a new medium is expanding as quickly as the Internet. However, to say that new laws and dramatic variations on current doctrine are not necessary to deal with the legal complications resulting from the Internet is overly optimistic. Jurisdiction in the real world depends on clear territorial divisions between nations. Once these divisions disappear, as they disappear on the Internet, new regulations must be enacted. Traditional law is important and not to be discarded. Current rules will be the basis for the ever-expanding set of regulations that will need to be established and used to deal with conflict resulting from disputes in cyberspace.

David R. Johnson and David G. Post³⁷ suggest a theory that contradicts Goldsmiths. They assert that a whole new area of law needs to arise to deal with the rising issues of jurisdiction on the Internet. Their article provides an example of how the United States government could traditionally not impose United States trademark law on a Brazilian business operating in Brazil. Post and Johnson explain that this is impossible because it would require that the United States be able to assert physical control over those that run the business in Brazil. This would be in direct contradiction to the Brazilian government's right to be the only governing body to have such control over its citizens. This control comes from physical territorial borders, and as previously illustrated, physical borders do not exist in cyberspace. Governments have responded to the lack of physical borders by attempting to regulate the flow of electronic information as it crosses their borders.³⁸ This is a difficult undertaking that most likely is impossible and impractical. Johnson and Post conclude that the World Wide Web has created a new arena where new rules must evolve. They assert that this area should be distinct from current doctrine and new regulations need to develop based on the special characteristics of cyberspace.

The inherent border-less nature of the Internet will necessitate an evolution in jurisdictional doctrine in order to regulate legal conflicts on the Internet. However, traditional international law provides the building blocks for future regulations. The concepts of minimum contacts within a forum and a defendant anticipating facing suit in a forum are good starting points for creating Jurisdiction rules in cyberspace. These concepts must be adapted to fit legal issues that arise on the Internet depending on the nature of the website.

37. David R. Johnson & David G. Post, *Law and Borders - The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367 (1996).

38. *Id.* at 1374.

A third theory offers a compromising position to the aforementioned two. Peter Swire suggests that the size of the entity providing the Internet service will determine jurisdiction issues.³⁹ Entities such as large multinational corporations will likely have significant physical presence in countries that have access to their Internet services or products. Therefore, traditional notions of jurisdiction apply. However, Swire suggests that new concepts and variations on traditional laws will need to be created for the smaller entities in countries that have access to Internet services or products.

This theory is provocative in that it concentrates on the "real world" concept of physical presence. While the size of the entity may have a connection to the issue of jurisdiction, the type of website that the entity maintains will give a better result.

Regardless of which theory best addresses the problem of Internet jurisdiction; using the test suggested by the *Zippo* Court is a logical starting point. All websites, whether they are active, passive, or intermediate are judged according to the *Zippo* test. This focuses attention on the website itself as opposed to the size of the entity behind the site. By focusing on the characteristics of the website, real world concepts, which do not appear in cyberspace, such as size and physical presence, will cease to exist.

VI. CONCLUSION

Jurisdiction in cyberspace is a very important area of the law. Current international law is not well equipped to handle all of the complex issues that will arise from conflicts based in cyberspace. However, the current law is a good basis from which to mold laws that will fit questions of jurisdiction on the Internet. United States courts have started to address the question of where jurisdiction should lie in cases arising from conflicts occurring on the Internet.

In addition to the courts concern with the potential problems arising in cyberspace, users of the Internet are policing each other. Websites now contain legal disclaimers that suggest what kind of information is contained on the site. The legal ramifications of accessing the webpage are clear and rules are set for using the information contained. This self-regulation by creators and hosts of websites is the best, first line of defense for preventing legal conflicts from occurring.

As the Internet continues to grow, the cyber-community as a whole should become more responsible for monitoring what is being proliferated over the system. Court should not be responsible for addressing every problem that arises in cyberspace. Most Internet users will not be able to afford defending

39. Henry H. Perrit, Jr., *Jurisdiction and the Internet: Basic Anglo/American Perspectives*, *Internet Law and Policy Forum, Jurisdiction: Building Confidence in a Borderless Medium* at <http://www.ilpf.org/confer/present99/perritpr.htm> (July 1999) (citing Peter Swire).

suits in multiple jurisdictions or complying with different regulations of the various jurisdictions through which they might electronically venture.⁴⁰ In order to avoid these pitfalls, efforts must be made to continue; 1) creating uniform international laws pertaining to the Internet; 2) increase self-regulation by hosts and users; and 3) better educate law makers of how the Internet and World Wide Web function.

No other medium has created a global community as widespread and accessible as the Internet. Without physical boundaries to block the free flow of information, people have been able to come together and communicate around the world like never before. The Internet has made it possible for people of all levels of social and economic backgrounds to have a voice in a plethora of issues. Enacting and enforcing international laws and regulations will protect the interests of all of the entities communicating in cyberspace. This will be a complicated process, but one that is essential for the protection of a world advancing towards free flowing communication and cooperation.

40. Burk, *supra* note 6.