
THE INTERNET AND JURISDICTION: LESSONS FROM THE AMERICAN EXPERIENCE

1 Introduction

Global computer-based communications cut across territorial borders, creating a new realm of activity and undermining the feasibility and legitimacy of applying laws based on geographic boundaries. Territorial borders, in general, delineate areas within which different sets of legal rules apply. The Internet has no territorially-based boundaries, because the cost and speed of message transmission on the Internet is almost entirely independent of physical location. Messages can be transmitted from any physical location to any other location without any physical cues or barriers that might separate certain geographically remote places and people. Location remains vitally important, but only location within a virtual space consisting of “addresses” of the workstations (computers) between which messages and information are routed.

What complicates matters, however, is the fact that the Internet is indifferent to the physical location of those computers and there is no necessary connection between an Internet address and physical location. No single entity owns the Internet and its global reach and internal complexity continue to frustrate efforts to control its use and its users. Furthermore, the Internet’s diversity complicates jurisdictional analysis because its uses and its users differ greatly. There are multiple ways to access the network, multiple owners of its component parts and a myriad of methods to transmit and receive information across the Internet. The variety of potential users and potential Internet contacts makes it difficult to draw an analogy between different cases and in the absence of legislation, requires courts to look at the circumstances of each case. This creates jurisdictional concerns that will cut across all electronic transactions that take place over the Internet.

The explosive growth of online business has, therefore, raised concerns about applying existing substantive and procedural doctrine, both largely defined by geography, to a world without physical borders. The law of personal jurisdiction, which emerged from territorial principles, presents difficult and challenging problems. Although some commentators propose new regimes to solve these problems, others believe that existing doctrine can adequately accommodate Internet jurisdiction disputes.

The aim of this note is to explore how these problems are dealt with in the United States of America (USA) and to draw some lessons for South Africa from the American experience.

2 United States of America

Before a court can have jurisdiction, such jurisdiction has to be proper in terms of both statutory and constitutional law of the USA. Two conditions would therefore have to be met. Firstly, a state long-arm provision has to apply. Each state enacts its own long-arm statute listing the types of cases which confer personal jurisdiction over a non-resident defendant who is not "present" within the state. (See in this regard *Burnham v Superior Ct of Cal* 495 US 604 639 fn 14 (1990); *Omni Capital Int'l v Rudolf Wolff & Co* 484 US 97 105 (1987); and *Insurance Corp of Ireland v Compagnie des Bauxites de Guinee* 456 US 694 713 (1982). See also Nagy "Personal Jurisdiction and Cyberspace" 1998 6 *CommLaw Conspectus* 101 102; Sheehan "Predicting Personal Jurisdiction" 1998 66 *University of Cincinnati LR* 385 390-391; Nathanson "Property Rights and Personal Jurisdiction" 1997 58 *University of Pittsburgh LR* 911 930; Ackermann "An Examination of Personal Jurisdiction Applied to a New World" 1997 71 *St John's LR* 403 405-406; Kalow "From the Internet to Court" 1997 65 *Fordham LR* 2241 2250-2251; Logue "Applying Traditional Personal Jurisdiction Analysis to Cyberspace" 1997 42 *Villanova LR* 1213 1218; Aiken "Jurisdiction" 1997 48 *Mercer LR* 1331 1338; Stott "Personal Jurisdiction in Cyberspace" 1997 XV *Journal of Computer & Information Law* 819 823; Mayewski "The Presence of a Web Site" 1997 73 *Indian LJ* 297 299; and Rose "Related Contacts and Personal Jurisdiction" 1994 82 *California LR* 1545 1556-1557.)

Secondly, any statutory assertion of jurisdiction has to comply with due process. The Due Process Clause protects individual liberty by prohibiting unwarranted assertions of personal jurisdiction. (On the history of due process, see Lawack-Davids *Aspects of Internet Payment Instruments* unpublished LLD thesis UNISA 2000 422-423 (hereinafter "Lawack-Davids *Internet Payment Instruments*"). For more detail on due process and jurisdiction, see Nagy 1998 6 *CommLaw Conspectus* 102; Sheehan 1998 66 *University of Cincinnati LR* 391-394; McCarty "Internet Contacts and Forum Notice" 1998 39 *William and Mary LR* 557 563; Mayewski 1997 73 *Indian LJ* 300; Kalow 1997 65 *Fordham LR* 2251; Logue 1997 42 *Villanova LR* 1218; Aiken 1997 48 *Mercer LR* 1338-1339; and Stott 1997 XV *Journal of Computer & Information Law* 823-824.)

A distinction is normally drawn between two types of personal jurisdiction, namely general and specific jurisdiction. General jurisdiction is exercised over a cause of action arising outside the forum state, whereas specific jurisdiction is exercised over a cause of action directly arising out of, or merely relating to, a defendant's forum state activity. (The distinction is attributed to Von Mehren and Trautman, who first articulated this distinction. See their article "Jurisdiction to Adjudicate" 1966 79 *Harvard LR* 1121 1136 for more detail. See also Nagy 1998 6 *CommLaw Conspectus* 102; and Mayewski 1997 73 *Indian LJ* 300.)

The United States Supreme Court in *World-wide Volkswagen Corp v Woodson* (444 US 286 (1980)) articulated a two-branch due process test for state court personal jurisdiction. (For a discussion of this case, see

Ackermann 1997 71 *St John's LR* 407-409. See also the description of the minimum purposeful contacts requirement in *Burger King Corp v Rudzewicz* 471 US 462 474 (1985).) The jurisdictional test which is used to determine whether an exercise of personal jurisdiction satisfies due process, therefore, consists of two inter-related requirements.

Firstly, the defendant must have purposefully created contacts with the forum and those contacts have to rise to such a level that the defendant could reasonably expect to face lawsuits in the forum based on its contacts. The first branch, also referred to as the "minimum contacts" branch, focuses on the connection or affiliation of the non-resident defendant with the forum state and the relationship between that nexus and the litigation. (See in this regard *Asahi Metal Industry Co v Superior Court* 480 US 102 108-110 (1987); *Burger King Corp v Rudzewicz supra* 471-476; and *Hanson v Denckla*, 357 US 235 251 (1958). For more recent cases see also *Carefirst of Maryland Inc v Carefirst Pregnancy Centers Inc* 334 F 3d 390 (4th Cir 2003); and *Christian Sci Bd Of Dirs of the First Church of Christ v Nolan* 259 F 3d 209 (4th Cir 2001). For a more detailed discussion of evolution of the jurisdictional due process in the USA and in particular, the minimum contacts branch, see Ackermann 1997 71 *St John's LR* 407; Nathenson 1997 58 *University of Pittsburgh LR* 931; Kalow 1997 65 *Fordham LR* 2251; Aiken 1997 48 *Mercer LR* 1338; Stott 1997 XV *Journal of Computer & Information Law* 824; Gassman "Jurisdiction in Cyberspace and the Public Figure Doctrine" 1996 XIV *Journal of Computer & Information Law* 563 572; Rose 1994 82 *California LR* 1547; Stravitz "Sayonara to Minimum Contacts" 1988 39 *South Carolina LR* 729 731-783; Clermont "Restating Territorial Jurisdiction" 1981 66 *Cornell LR* 411 423-424; and Stephens "Sovereignty and Personal Jurisdiction Doctrine" 1991 19 *Florida State University LR* 105 133-134.)

Secondly, the exercise of jurisdiction has to be fair and reasonable (see in this regard *Asahi Metal Indus Co v Superior Court supra* 110-114 where the court applied fairness and reasonableness considerations to invalidate the exercise of personal jurisdiction). The considerations of fairness and reasonableness were also described in *Burger King Corp v Rudzewicz (supra* 477) as the "constitutional touchstone" of the minimum contacts test. (See in this regard also Aiken 1997 48 *Mercer LR* 1338; Logue 1997 42 *Villanova LR* 1219; Kalow 1997 65 *Fordham LR* 2252; and Gassman 1996 XIV *Journal of Computer & Information Law* 572.) This requirement prevents the exercise of personal jurisdiction based on the conduct of another. The court in *Hanson v Denckla (supra* 253) rejected minimum contact created by the unilateral action of a third party and it prohibited the exercise of personal jurisdiction based on random, fortuitous or attenuated contacts. (See also *Burger King Corp v Rudzewicz supra* 475; and *Keeton v Hustler Magazine Inc* 465 US 710 774 (1984).)

The second tier, therefore, requires evaluation of other factors to test whether an assertion of jurisdiction complies with fair play and substantial justice. This test is referred to as the fairness, convenience or reasonableness branch (for a more detailed examination, see Stravitz 1988 39 *South Carolina LR* 753-754 and 776-782).

2 1 *Personal jurisdiction and the Internet*

There have been four important American appeals court decisions resolving online jurisdictional disputes, despite more recent cases dealing with this issue. (The four decisions are *Panavision Int'l LP v Toeppen* (No 97-55467, 1998 WL 178553 (9th Cir Apr 17, 1998) aff'g 938 F Supp 616 (CD Cal 1996); *Cybersell Inc v Cybersell Inc* (130 F 3d 414 (9th Cir 1997)); *Bensusan Restaurant Corp v King* (126 F 3d 25 (2d Cir 1997) aff'g 937 F Supp 295 (SDNY 1996); and *CompuServe Inc v Patterson* (89 F 3d 1257 (6th Cir 1996)). Cf, however, *Hornell Brewing Co v Rosebud Sioux tribal Court* 133 F 3d 1087 (8th Cir 1998).)

Even though some cases rely exclusively on long-arm statutes to resolve these disputes, the vast majority of decisions engage in both statutory and constitutional analysis. (In *Bensusan Restaurant Corp v King supra* the court relied on a New York long-arm statute. A Connecticut statute was relied upon in *E-Data Corp v Micropatent Corp* 989 F Supp 173 175 (D Conn 1997). In *Telco Communications v An Apple A Day* 977 F.Supp 404 405 (ED Va 1997) a Virginia long-arm statute was relied upon.) For example, no court has yet exercised general jurisdiction over a non-resident web advertiser. (See Meyer "World Wide Web Advertising" <http://www.wlu.edu/~lawrev/text/543/Meyer.htm> visited 2000-03-07. See Stravitz 1988 39 *South Carolina LR* 929. See also the remarks in *Bensusan Restaurant Corp v King supra*.) However, because many state long-arm statutes reach to the limits of due process, the two-step analysis transforms into a single constitutional inquiry, as stated above. Hence, the discussion focuses on jurisdictional due process in Internet disputes.

In certain instances the Internet is used in a manner which is analogous to other communications media, for example, if the Internet is used to direct communication to a particular forum state resident by sending an e-mail message, the Internet is not any different from other forms of direct communication. Courts in the USA have had little difficulty applying conventional analysis in these circumstances. When a misrepresentation is made or when a contract is breached, it matters not whether the misrepresentation or breach occurred by traditional methods of person-to-person communication or by e-mail. (For an example of misrepresentation and Internet disputes, see *Cody v Ward* 954 F Supp 43 44-45 (D Conn 1997).) In *Hall v LaRonde* (66 Cal Rptr 2d 399 (Cal Ct App 1997)) the court upheld jurisdiction over a contract dispute negotiated exclusively by e-mail and telephone. In this instance, the misrepresentation or breach of contract is purposefully directed at a forum state resident, the forum plaintiff's cause of action directly arises out of the electronic communication and the non-resident sender of the e-mail should, in terms of traditional analysis, reasonably anticipate forum state litigation.

The Internet's geographical insensitivity places the issue of purposefulness at the heart of the cases which dealt with World Wide Web advertising (*Burger King Corp v Rudzewicz supra* 472). The geographic indifference surrounding most transmissions of information on the Web leaves courts without a reliable

guide to the defendant advertiser's intent and reasonable expectations. Sheehan (1998 66 *University of Cincinnati LR 428*) states that the process of advertising software, obtaining payment, for example, through the use of credit cards or electronic funds transfers, and delivering the products by authorising access for downloading, can be entirely automated. It is, therefore, unclear where the merchant reasonably foresees being hauled into court or into which states he purposefully directs his activities. Furthermore, Burk ("Federalism in Cyberspace" 1996 28 *University of Connecticut LR 1095 1109-1111*) argues that the application of the minimum contacts test to Internet contacts would lead to anomalous results because "the network's structural indifference to geographic position is incongruous with the fundamental assumptions underlying the *International Shoe* test". The question is whether the advertiser intends to avail itself of a limited number of forums, of every forum, or of cyberspace itself (*Wines v Lake Havasu Boat Mfg Inc* (846 F 2d 40 43 (8th Cir 1988))).

In *Inset Sys Inc v Instruction Set Inc* (937 F Supp 161 165 (D Conn 1996)) the court held that "Instruction has directed its advertising activities via the Internet and its toll-free number towards not only the State of Connecticut, but to all States". Furthermore, the question can be posed whether the placement of an advertisement on the Internet alerts the defendant to the reasonable foreseeability of suit within every forum the advertisement reaches. For example, in *Burger King Corp v Rudzewicz* (*supra* 472) the court noted that the defendant must have "fair meaning" of possibility of suit within the forum. In *World-Wide Volkswagen v Woodson* (*supra* 297) the court held that the defendant's conduct has to give rise to reasonable anticipation of suit within the forum. Sheehan (1998 66 *University of Cincinnati LR 428-430*) argues that it may be that the answer to this question depends upon how strictly courts are willing to enforce the plaintiff's burden of alleging and proving grounds for jurisdiction. The author is of the view that perhaps a government sufficiently determined to impose jurisdiction could induce cyber merchants to identify and screen the location of their buyers before concluding sales, thereby vitiating what many see as the main advantage of Internet communications, namely the freedom from geographical constraints. (For an example of where the court held that the plaintiff had failed to discharge its burden to allege facts demonstrating that the defendant had done any business with persons in the forum state, see *E-Data Corp v Micropatent Corp supra*. Cf however, *SuperGuide Corp v Kegan supra*, where the court assumed all necessary jurisdictional facts with very little assistance from the plaintiff.)

Although it is unlikely that the courts would ever recognise "cyberspace" as a unique jurisdiction free from control by territorially-based courts, the American courts disagree about whether the simple act of placing an advertisement on the Internet constitutes purposeful availment of every forum within the reach of the Web. This brings us to the question whether a website is sufficiently purposeful to establish minimum contacts. A few approaches exist, namely the "mere placement" approach, the "website-plus" approach, "the middle ground" and the "post-*Zippo* approach".

2 1 1 *The “mere placement” approach*

Three courts have used the mere placement approach to web advertising contacts to assert jurisdiction over non-resident defendants. *Inset System Inc v Instruction Set Inc* (*supra* 165) involved a trademark dispute between two computer companies. The Connecticut plaintiff, Inset, brought suit in Connecticut against the Massachusetts defendant, Instruction Set, on a variety of claims including trademark infringement. Instruction Set maintained a website with the domain name “inset.com” and the toll-free telephone number “1-800-US-INSET”. Inset owned the federally registered trademark “Inset”. The court found minimum contacts despite the defendant’s assertions that it did not regularly conduct business in Connecticut and that it did not have employees in the state (see *Inset System Inc v Instruction Set Inc supra* 163-165). The court held that the United States District Court for the District of Connecticut exercised personal jurisdiction over a Massachusetts computer company whose Internet advertisement contained elements that allegedly infringed the plaintiff’s trademarks. The court based its finding of minimum contacts primarily on the defendant’s web advertising activities. Firstly, the court noted that web advertising and toll-free numbers “are designed to communicate with people and their businesses in every state”. Secondly, the court held that web advertisements could reach as many as ten thousand Connecticut Internet users. Finally, the court determined that web advertisements are more pervasive and accessible than television and radio advertisements. Consequently, the court held that these gave Instruction Set sufficient warning of potential lawsuits arising from the use of the Internet for advertising. In addition, the court briefly noted the absence of any mitigating factors which could have rendered the exercise of jurisdiction unfair and unreasonable. (See *Inset System Inc v Instruction Set Inc supra* 163-165. See also McCarty 1998 39 *William and Mary LR* 580-582; Ackermann 1997 71 *St John’s LR* 412-416; Logue 1997 42 *Villanova LR* 1232-1233; Mayewski 1997 73 *Indian LJ* 318; Aiken 1997 48 *Mercer LR* 1347; Kalow 1997 65 *Fordham LR* 2259-2260; and Stott 1997 XV *Journal of Computer & Information Law* 844.)

In *Maritz Inc v Cybergold Inc* (947 F Supp 1328 (ED Mo 1996)) the United States District Court for the Eastern District of Missouri exercised jurisdiction over a non-resident advertiser whose web advertisement contained allegedly infringing marks. The court explained its minimum contacts finding by noting the unique features of the Internet compared to traditional and more familiar forms of communication. The Internet was referred to as “an entirely new means of information exchange” and as a “tremendously more efficient, quicker, and vast means of reaching a global audience” compared to both the postal system and toll-free numbers. Special emphasis was placed by the court on its findings that the Cybergold website responded indiscriminately to the users’ requests for information. The court used these comparisons to find that the nature and quality of contacts provided by the maintenance of a website on the Internet are clearly of a different nature and quality to other means of contact within a forum. The determinative factor which the court used in its conclusion that Cybergold purposefully availed itself of Missouri

was its observation that “by simply setting up and posting information at, a website in the form of an advertisement or a solicitation, one has done everything to reach the global Internet audience”. This simple action, the court held, satisfied the purposeful availment requirement. In addition, the court held that its exercise of personal jurisdiction was fair and reasonable. (See *Maritz Inc v Cybergold Inc supra* 1330-1336. See also Kalow 1997 65 *Fordham LR* 2260-2262; Aiken 1997 48 *Mercer LR* 1345-1347; Stott 1997 XV *Journal of Computer & Information Law* 846-852; Mayewski 1997 73 *Indian LJ* 320; Ackermann 1997 71 *St John’s LR* 416-418).

The third significant decision was that of the court in *State v Granite Gate Resorts Inc* (No C6-87-89, 1997 WL 557670 (Minn Ct App Sept 5, 1997)). A Minnesota State District Court exercised personal jurisdiction over a web advertiser on consumer protection related claims. Although the court identified various factors that contributed to its finding of purposeful availment, one factor dominated the court’s minimum contacts analysis. It was held that the defendants’ web advertisement “logically appeared to be maintained for the purpose and in anticipation of being accessed and used by any and all Internet users, including Minnesota residents”. Furthermore, as in the previous case, the court held that “[w]hen one sets up and posts advertising information, one does everything necessary to reach the global Internet audience”. Therefore, according to the court, the Web’s reach and efficiency made the mere availability of a web advertisement in the forum a sufficient ground for the exercise of jurisdiction. Finally, the court held that considerations of fairness and reasonableness did not limit its ability to exercise personal jurisdiction. This decision was subsequently confirmed by a Minnesota Appeals Court (*State v Granite Gate Resorts Inc supra*). In particular, this court held that the defendants’ Internet advertising, although not specifically directed at Minnesota, “demonstrated a clear intent to solicit business from markets that include Minnesota” and had resulted in multiple contacts with Minnesota and at least one successful solicitation. The court of appeals also found that considerations of fairness and reasonableness did not prevent it from exercising personal jurisdiction in this instance.

It is evident from the above that the approach followed by the courts in these three cases was that the mere use of the Internet for advertising contributed to, or fully established, minimum contacts and justified the courts’ exercise of specific personal jurisdiction. It would seem that this approach derives from the stream of commerce analysis used in *Asahi Metal Indus Co v Superior Court (supra* 112). The stream of commerce approach requires the defendant’s actual knowledge that a product it placed into the stream of commerce is marketed in the forum. If a court cannot determine that the defendant knew its products reached the forum, the court may not exercise jurisdiction. (See in this regard *Asahi Metal Indus Co v Superior Court supra* 117. For an examination of this decision, see Sheehan 1998 66 *University of Cincinnati LR* 404-409; McCarty 1998 39 *William and Mary LR* 572; Stott 1997 XV *Journal of Computer & Information Law* 828-830; Logue 1997 42 *Villanova LR* 1223-1225; Kalow 1997 65 *Fordham LR* 2253-2255; Aiken 1997 48 *Mercer LR* 1337-1338; and Stravitz 1988 39 *South Carolina LR* 783-812.)

However, this test seems too inflexible for the consistent constitutional application of the minimum contacts test to web advertising contacts. As seen above, the Internet is indifferent to geographical boundaries or physical location. It would therefore be difficult to require actual knowledge. The difference between conventional stream of commerce and the Internet is evident. Ackermann (1997 71 *St John's LR* 423) argues that each court's interpretation in the *Inset* and *Maritz* cases of their respective long-arm statutes and minimum contacts analysis tends to indicate that both courts would find personal jurisdiction in most, if not all, cases where the sole contact with the forum state was a web page. The author further states that if both cases are followed, findings of personal jurisdiction in future web page cases appear destined to become the norm.

2 1 2 The "website-plus" approach

Other courts have held that a passive website is insufficiently purposeful to establish minimum contacts in any forum where the website is accessible. (See *eg*, *Cybersell Inc v Cybersell Inc supra* where it was held that all that it did was post an essentially passive home page on the web. See also *Bensusan Restaurant Corp v King supra* 300 which involved a general access passive website; *SF Hotel Co v Energy Ins Inc* 985 F Supp 1032 1035 (D Kan 1997); and *Transcraft Corp v Doonan Trailer Corp* 45 USPQ 2d (BNA) 1097 (ND Ill 1997). *Cf*, however, *Heroes Inc v Heroes Found* 958 F Supp 1 (DDC 1996) in which it was held that a passive website is sufficient.) In *Inset Sys Inc v Instruction Set Inc (supra* 163-164) a similar decision was made.

In the leading case of the "website-plus-more" cases, *Bensusan Restaurant Corp v King (supra* 300) the court held that "[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide – or even worldwide – but, without more, it is not an act purposefully directed toward the forum state". (See also the confirmation of this principle in *ALS Scan v Digital Consultants Inc* 293 F 3d 707 (2002); *Hasbro Inc v Clue Computing Inc* 45 USPQ 2d (BNA) 1170 (D Mass 1997).) The court thus rejected the mere placement approach and held that the mere foreseeability that a defendant's website might be accessed in the forum was insufficient to satisfy due process. The court, therefore, required additional evidence that a defendant targeted the forum through the Web before it would find minimum contacts. (The United States Court of Appeals for the Second Circuit affirmed the district court's decision, *Bensusan Restaurant Corp v King* No 1383 1997 WL 560048 (2d Cir 10 1997) *aff'g* 937 F Supp 295 (SDNY 1996).)

The effect of this decision is that a court is prevented from finding minimum contacts between a web advertiser and a forum unless the plaintiff can present evidence that the defendant "actively sought to encourage" forum residents to access its site or otherwise derived measurable benefits from the forum through its web advertisement. However, some advertisers intend to avail themselves of every forum through the Internet but they specifically target none. It is submitted that, as a website is accessible at all times to Internet users in any particular forum, it is reasonable to require additional

conduct, beyond putting up the website, to establish minimum contacts. Otherwise, personal jurisdiction over website creators would have no rational limits (see also Stravitz 1988 39 *South Carolina LR* 939; Nagy 1998 6 *CommLaw Conspectus* 109; Wilske and Schiller "International Jurisdiction in Cyberspace" 1997 50 *Federal Communications LJ* 117 150; and Cendall and Arbogast "Issues of Jurisdiction" 1996 *The National LJ* C7). Ackermann (1997 71 *St John's LR* 418-421 and 432) argues that sometimes more should be required before there is a finding of personal jurisdiction when the sole "minimum contact" with a forum state is a web page. Kalow (1997 65 *Fordham LR* 2263) criticizes this case on the basis that the court chose its minimum contacts test without regard to the unique circumstance it was confronting. (See also Stott 1997 XV *Journal of Computer & Information Law* 835-836; and Mayewski 1997 73 *Indian LJ* 321.) However, it remains unclear how much more is required. Some courts held that the requirement of something more is satisfied by any additional activity, no matter how marginal (see for *eg*, *American Network Inc v Access America Connect Atlanta Inc* 975 F Supp 494 498-499 (SDNY 1997); *Superguide Corp v Kegan* (No CIV 4: 97 CV 181, 1997 WL 754467 (WDNC Oct 8, 1997)); *Heroes Inc v Heroes Found supra*; *Maritz Inc v Cybergold Inc supra* 1333). Other courts properly require that additional conduct be meaningful and related to the forum plaintiff's claims. In these instances, defendants generally ship offending products into the forum state in addition to maintaining a website. In *Gary Scott Int'l Inc v Baroudi* (981 F Supp 714 (D Mass 1997) the court upheld jurisdiction. (In this case a website was maintained plus infringing products were shipped into the state or agreements were entered into to provide online services to substantial numbers of forum state residents.) In *Zippo Manufacturing Co v Zippo Dot Com Inc* (952 F Supp 1119 1121 (WDPa1997)) a website was maintained plus the defendant had contracts with 3000 Pennsylvania subscribers, representing two percent of the defendant's customer base. See also the more recent cases of *Toys "R" Us Inc v Step Two* (318 F 3d 446 (2003)); *Young v New Haven Advocate* (318 F 3d 86 (2002)); and *Pavlovich v DVD Copy Control Association* (58 P 3d (2002)).

Stravitz (1988 39 *South Carolina LR* 939) argues that the website-plus cases will continue to produce unacceptable results unless the courts take a new approach to resolving online jurisdictional disputes. He argues that some reasonably predictable middle position is desirable. The author submits that when the *Calder* effects analysis is employed, the courts can and should be more circumspect in finding forum effects. Only when a non-resident defendant intentionally engages in conduct expressly targeted at the forum state or its residents can a court rationally conclude that a defendant should reasonably anticipate being hauled into court there. He furthermore submits that any Internet contract, except perhaps a passive website, should be sufficient to pass muster under the minimum contacts branch. Acceptance of this view eliminates the need to engage in inherently subjective determinations of purposefulness. Stravitz argues that, as in the *Burger King* case, the emphasis should be placed on the second branch convenience factors. This emphasis will allow jurisdiction to be asserted unless the chosen forum is fundamentally unfair. Focusing the crucial due process analysis on

the second branch may not substantially improve predictability, but at least the inquiry will focus on fair play and substantial justice. The author states that because the Internet transcends geography, it is the ideal context in which to focus jurisdictional analysis squarely on whether a chosen forum will provide all parties with fair play and substantial justice (Stravitz 1988 39 *South Carolina LR* 929-941).

2 1 3 The “middle ground” approach

A more flexible approach seems to be that of the court in *Zippo Manufacturing Co v Zippo Dot Com* (*supra* 1119). This case concerned trademark infringement claims brought by the manufacturer of Zippo brand lighters against an Internet news service. The defendant maintained a website which advertised its news service. In addition to its advertising contacts, the defendant had contracts with 3 000 subscribers in Pennsylvania, where the court appeared to understand the complexities involved in applying the minimum contacts test to contacts made through the Internet. The district court exercised personal jurisdiction and explained that the propriety of exercising personal jurisdiction over non-resident commercial Internet users is “directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet”. The court held that the more commercial activity a defendant conducts, the greater the ability of a court to exercise personal jurisdiction. The court divided commercial Internet activity into three categories, namely passive websites, interactive websites and electronic contacts between residents of different forums. It was held that passive websites that simply display information do not establish minimum contacts between the defendant and the forum. However, the court held that defendants who reach out into other forums and knowingly enter into contracts with residents in these forums subject themselves to the possibility of suits in these forums. Finally, the court noted that a grey area exists between a passive website and the electronic contract (*Zippo Manufacturing Co v Zippo Dot Com supra* 1124). This is described as the middle ground where the user can interact with the host computer. In this middle ground, the constitutionality of an exercise of jurisdiction “is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website” (*Zippo Manufacturing Co v Zippo Dot Com supra* 1121-1127).

The *Zippo* case has in recent cases been referred to as the seminal case on the “middle ground” or “sliding scale” approach” (see *eg, Sublett v Wallin*, 94 P 3d 845 851 (NM 2004); *Toys “R” Us Inc v Step Two SA supra* 452; *Carefirst of Maryland Inc v Carefirst Pregnancy Centers Inc supra* 399). It seems that the court took a step in the right direction when it recognised that a constitutional analysis of Internet contacts depends on the quality and nature of the defendant’s Internet activities. However, it can be argued that this was not far enough. The minimum contacts analysis has to account for the fact that some businesses operate entirely on the Internet and others advertise on the Internet and encourage the user to come to the advertiser’s local outlet, store or night club, for example.

2 1 4 *The post-Zippo approach*

Despite the widespread acceptance of the *Zippo* doctrine, by 2001 many courts were no longer strictly applying the *Zippo* approach, but were rather using other criteria to determine when assertion of jurisdiction was appropriate. Numerous judgments reflect that courts in the USA moved towards a broader, effects-based approach when deciding whether or not to assert jurisdiction in the Internet context. (See *eg*, *Search Force v DataForce International* 112 F Supp 2d 771 (SD Ind 2000); *Neato v Great Gizmos* 2000 WL 305949 (D Conn 2000); *Uncle Sam's Safari Outfitters Inc v Uncle Sam's Navy Outfitters – Manhattan Inc* 96 F Supp 2d 919 (ED Mo 2000); *Neogen Corp v Neo Gen Screening Inc* 109 F Supp 2d 724 (WD Mich 2000); *Blakey v Continental Airlines Inc* 164 NJ 38 (NJ 2000); *Nissan Motor Co Ltd v Nissan Computer Corporation* 89 F Supp 2d 1154 (CD Cal 2000); *Euromarket Designs Inc v Crate & Barrel Ltd* 96 F Supp 2d 824 (ND Ili 2000); *Bochan v La Fontaine* 68 F Supp 2d 701 (ED Va 1999).) For example, the issue before the court in *Euromarket Designs Inc v Crate & Barrel Ltd* (*supra*) was whether an Illinois-based company could sue an Irish retailer with an interactive website that allowed Illinois residents to order goods for shipment to a foreign address in a local court for trademark infringement. The court held that the pivotal considerations in resolving this issue were whether the defendant's conduct purposefully and deliberately availed itself of the forum and whether the defendant's conduct and connection with the forum was such that it should reasonably anticipate being hauled into court there. The court further held that the defendant deliberately established minimum contacts with Illinois and purposefully availed itself of the privilege of conducting activities in Illinois under the effects doctrine set in *Calder v Jones* (465 US 783 (1984)).

In addition to the broader approach mentioned, there are also proponents of a "targeted-based" approach. This approach seeks to identify the intentions of the parties and assess the steps taken to either enter or avoid a particular jurisdiction. For example, in *Bancroft & Masters Inc v Augusta National Inc* (223 F 3d 1082 (9th Cir 2000)) the court required "something more". The court held:

"We now conclude that 'something more' is what the Supreme Court described as 'express aiming' at the forum state ... Express aiming is a concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."

The Organisation for Economic Cooperation and Development (OECD) *Consumer Protection Guidelines* of 1999 referred to the concept of targeting by stating that businesses should take into account the global nature of electronic commerce and, wherever possible, should consider various regulatory characteristics of the markets they target (see OECD *Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Guidelines* (9 December 1999) http://www.oecd.org/dsti/sti/it/consumer/prod/CPGuidelines_final.pdf (6 April

2005)). Furthermore, the American Bar Association Internet Jurisdiction Project released a report in 2000 in which it also recommended targeting as one method of addressing the issue of Internet jurisdiction. The report stated that a forum can be “targeted” by those outside it and desirous of benefiting from connecting with it via the Internet and that such a relationship will subject the foreign actor to both personal and prescriptive jurisdiction. A clear understanding of what constitutes targeting is, therefore, critical (American Bar Association *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* 2000 <http://www.abanet.org>).

2 1 5 Fairness and reasonableness

The precise role of the fairness and reasonableness considerations in web advertising remains uncertain. Although one court has refused to exercise personal jurisdiction based on the grounds of fairness and reasonableness, the discussion of these considerations in other cases has been limited. In *Expert Pages v Buckalew* (No C-97-2109-VRW, 1997 WL 488011 2-5 (ND Cal Aug 6, 1997)) the court held that there were minimum contacts between the defendant and the forum, but refused to exercise personal jurisdiction on the grounds of fairness and reasonableness. (See also Aiken 1997 48 *Mercer LR* 1347-1349. In *Expert Pages v Buckalew* (*supra*) the considerations of fairness and reasonableness which the court took into account were the fact that the burden on the defendant would be “very substantial” and because the contacts between the defendant and the forum were “barely greater than the constitutional threshold”. The District Court’s finding of no minimum contacts in *Bensusan Restaurant Corp v King* (*supra* No 1383) rendered an analysis of these considerations unnecessary. In addition, none of the defendants in the three cases which followed the “mere placement” approach (*Maritz Inc v Cybergold Inc supra* 1334; *State v Granite Gate Resorts Inc supra* 11; and *Inset Sys Inc v Instruction Set Inc supra* 165) presented compelling cases of unfairness or unreasonableness.

It is submitted that courts can expect defendants to argue that the exercise of jurisdiction in the forum presents an undue burden (*Expert Pages v Buckalew supra* 5). Plaintiffs might argue that they need the forum to exercise jurisdiction in order to obtain convenient and effective relief (see *eg, State v Granite Gate Resorts Inc supra* 11 for a description by the court of the attorney-general’s interest in enforcing the state’s consumer protection laws and so obtaining convenient and effective relief). However, it seems that these arguments will not differ substantially from the same arguments in more traditional personal jurisdiction cases.

One will have to await further developments because the considerations of fairness and reasonableness are as important as the analysis of minimum contacts, as explained above. One can only hope that there will indeed be a case where a court finds sufficient minimum contacts and that the considerations of reasonableness and fairness need to be decided in order for the court to assert or refuse personal jurisdiction.

3 Implications for South Africa

The rules of jurisdiction in South Africa are territorial in their application. (For more detail on jurisdiction in South Africa, see Lawack-Davids *Internet Payment Instruments* 383-404. See in particular the examination of the jurisdiction of the Supreme Court in terms of s 19 of the Supreme Court Act 59 of 1959 385-386.) For example, South African courts cannot prosecute foreign businesses or individuals who breach our legislation, unless some physical asset or the person of the offender is attached or arrested. Concepts such as “residence”, “place”, “territory” and “domicile” are still important in asserting jurisdiction in South Africa (see *eg*, an examination on arrest and attachment in this regard and on the leading connecting factors in Lawack-Davids *Internet Payment Instruments* 388-394 and 397-406, respectively).

The Electronic Communications and Transactions Act (25 of 2002), unfortunately does not deal with jurisdiction of the courts in a civil case, but is restricted to jurisdiction of the courts in respect of offences committed wholly or partly in the Republic of South Africa, on board any ship or aircraft registered in the Republic, on a voyage or flight to or from the Republic and offences committed by a South African citizen or a person with permanent residence or who carries on business in the Republic (s 90).

The judgment in *Tsichlas v Touch Line Media* (2004 2 SA 112 WLD) illustrates the need for clear legal principles in this regard. In this case, the applicant (Tsichlas) alleged that defamatory statements relating to her (the applicant) were published on a website, hence an application was made for an interdict restraining publication of such material. The applicant sought relief in the Witwatersrand Local Division (WLD). The respondent averred that the WLD lacked jurisdiction as its principal place of business is in Cape Town and not in Sandton. The court held that the statements were accessed by and therefore “published” to the applicant’s attorney within the area of the court’s jurisdiction. In other words, “mere access” would be sufficient to comply with the requirement of publication of the alleged defamatory statements. It is unfortunate that the court stated that it did not propose to deal with the various complications which may arise from this finding. In fact, it was held that the court’s conclusion “would mean that whenever anybody anywhere in the world accesses this website and reads and understand the words which are complained of in this matter, there will have been publication to that user at the particular place where the user has accessed the website. Bearing in mind that we are dealing with the Internet and electronic communications, that national or geographic boundaries would not apply and that distances are irrelevant, the implications of this conclusion are enormous”.

It is submitted that the above judgment clearly illustrates that application of common law principles to electronic communications and the Internet does not always present the best solution. It is submitted that specific legislation should be promulgated, but only after consultation with lawyers and industry on issues of jurisdiction, conflict of laws and enforcement of foreign judgments. It is recommended that, ultimately, legislative provisions should bear in mind the geographical indifference of the Internet and the fact that

concepts such as “location”, “place” and “physical presence” cannot be used to assert jurisdiction.

It is further recommended that South Africa play an active role in international efforts aimed at harmonisation of these rules. The problem of international legislation is that it is not unified yet and that in the absence of unification, each state legislates for its own benefit. As a result of the diversity of state laws on some of the issues raised in this note, a consumer may find himself better protected under the laws of certain states. It is therefore recommended that in the absence of rules specifically addressing Internet disputes, a solution seems to lie in South Africa entering into bilateral and multi-lateral treaties. A good point of departure would be to use the Southern African Development Community (SADC) as the first forum to forge a multi-lateral treaty in the region and thereafter, to enter into such treaties with all our major trading partners. It is further submitted that because Internet disputes are global in nature, uniform rules will be needed that will govern the issue of jurisdiction in Internet disputes.

The different approaches followed in the USA indicate that jurisdiction on the Internet is indeed a difficult issue to tackle and that a hasty approach cannot be followed. What is needed is a clear understanding of how the Internet operates, in particular its geographical indifference. As far as regulation of Internet jurisdictional issues is concerned, it is important to note that the Americans have advocated a hands-off approach to the Internet, to avoid stifling its natural growth. Furthermore, the Supreme Court of the United States has rebuffed early efforts to control Internet content (see in this regard *Reno v ACLU* 117 S Ct 2329 2334 (1997); and *American Libraries Association v Pataki* 969 F Supp 160 183-184 (SDNY 1997)).

An important caution should be borne in mind. Although disputes arising from Internet contracts have to be resolved somewhere, it is unnecessary and unwise for the courts or regulators to adopt an inflexible approach to jurisdictional issues involving the Internet. The great changes brought about by the Internet and the World Wide Web demand cautious handling by the courts and legislators. It is submitted that this approach be endorsed in the South African context.

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