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# Determining Jurisdiction in Cyberspace - The Zippo Test or Effects Test

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## ABSTRACT

*Unlike the conventional world, territorial borders do not exist in the virtual world. On the internet, there are neither political barriers nor any territorial demarcations. The cyberspace is one single space devoid of any national boundaries. This global medium has transformed the world into one single community; one single 'globalEngagingg in online activities are no longer a novel experience yet, there are many unresolved issues unexpended in determining the jurisdiction over the individual which is a fundamental legal threshold in order to pursue one's legal rights. There are two principal modes of testing the jurisdiction have moved to the forefront. One is the "Zippo Test", after the case in which it was first articulated which bases jurisdiction over a non-resident website on the degree of interactivity between the website and the forum. This test has been found by the cyberlawyers, scholars and many Courts to be inexact and therefore not particularly helpful. Consequently, the "Effects" test has evolved which focuses on the effects intentionally caused within the forum by a defendant's online conduct outside the forum. After summarizing the background and evolution of both the Zippo and Effects tests, this article demonstrates that the Courts are not embracing the Effects test as a panacea to the dilemma of determining jurisdiction, but rather a combination of both the Zippo and the Effects test is being employed. Oftentimes a Court will begin its case analysis of with the Zippo test but completes the jurisdictional determination using the Effects test. It is therefore to be advisable for attorneys advocating jurisdiction to use both the tests, since the effects test may work where the sliding scale of Zippo might not.*

## I. INTRODUCTION

In the offline world, disputes are largely resolved through the traditional process of court litigation which is principally structured on a territorial basis, i.e., each country has its own laws and courts, which decide disputes falling under their jurisdiction, mostly on the basis of the application of local laws. As long as the parties to a dispute arising on the Internet belong to the same jurisdiction, there is no problem, as the dispute in such a case would be resolved

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in the same manner as any other offline dispute. For example, XYZ enterprises have their Web site through which they are selling goods manufactured by them. XYZ enterprises are based in Delhi and their customers are also in Delhi. In case any dispute arises between XYZ enterprises and their customer, it would be resolved according to the laws applicable in Delhi. But the problem would arise when their customers are from different countries and they are transacting with them through their Web site.

This dispute resolution mechanism, based primarily on territoriality, faces a number of challenges when applied to disputes arising on the Internet. The internet is by definition international and can be accessed from almost any place on Earth hence **multi-jurisdictional**. On the internet, digitalised data may travel through various countries and different jurisdictions in order to reach its destination. For example, a dispute may arise between two parties who entered into contract on the Internet and who belong to different countries. Now courts of which country should have jurisdiction to determine the dispute? The laws of which country should be relied upon to determine the dispute?

Which Court should hear disputes arising out of Internet activities? On what grounds may a court assert or decline the jurisdiction? What laws should be used to decide a particular dispute? These are perplexing questions currently being faced by courts worldwide because of the transactional nature of the Internet by which people can transcend borders readily and rapidly. One simple and straightforward factor confronting lawmakers is that while most laws have a territorial nexus, the Internet defies the notion of territoriality. The unique nature of the Internet has undermined the very foundation of the traditional notion of jurisdiction and applicable law and the territorially based concepts of law and their application.

There are two principal models of testing jurisdiction have moved to the forefront. One is the “**Zippo Test**”, after the case in which it was first articulated *Zippo Mfg. Co. vs. Zippo Dot Com, Inc.*<sup>2</sup> which bases jurisdiction over a non-resident website on the degree of interactivity between the website and the forum. In addition to Zippo, courts have been analyzing Internet jurisdiction issues under the so-called “**Effects Test**” which is derived from the pre Internet case of *Calder vs. Jones*<sup>3</sup>. This test does not focus on the degree of interactivity between forum resident and non-forum defendant, but rather on the effects intentionally caused within the forum by a defendant’s online conduct outside the forum.

There is a general consensus among cyberlawyers and scholars that the effects test marks the wave of the future in cyber jurisdiction issues, because it can produce “greater certainty” of

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<sup>2</sup> 952 F. Supp. 1119 (W.D. Pa. 1996)

<sup>3</sup> 465 U.S. 783 (1984)

outcome in jurisdictional matters. While the effects test clearly supplies a useful frame of reference whenever personal jurisdiction is an issue, the Zippo test is still often used to define jurisdiction; through mid-June 2002, 164 decisions of federal and state courts involving Internet jurisdiction had cited Zippo, with 46 of these occurring since the start of 2001.

After summarizing the background and evolution of both the Zippo and Effects tests, this article seeks to demonstrate that the courts are not embracing the effects test as a panacea to the dilemma of determining jurisdiction, but rather a combination of both the Zippo and the Effects test is being employed. The effects test will likely have a growing role in e-commerce disputes, but experience so far suggests that: 1) it tends to be more applicable to certain kinds of non-commercial disputes than to others. 2) it can pose problems of subjectivity comparable to those that have arisen in the Zippo test, and 3) in certain kinds of e-commerce disputes, particularly where the defendant operates an online business engaged in transactions in the forum, the Zippo approach may be more applicable than the effects test. Oftentimes, a court will begin its case analysis with the Zippo test but complete the jurisdictional determination using the effects test.

## **II. JURISDICTIONAL ISSUES INVOLVED IN CYBERSPACE**

Questions of jurisdiction in cyberspace are essentially practical. First, does a person who posts information on the World Wide Web have to comply with the laws of every State or Nation from which the website can be accessed? Second, do the Courts of every State or Nation from which the information on the web can be accessed have personal jurisdiction over the creator of the information and the operator of the site? Sorting out the answers to these two basic questions has generated numerous court decisions and commentary over the past several years. There have been diverse attempts to develop uniform principles of jurisdiction in cyberspace<sup>4</sup> but world wide consensus on rules to apply to determine jurisdiction remains elusive.

### **Types of Jurisdiction in Cyberspace**

Jurisdiction is the authority by which courts take cognizance of and decide cases. The word jurisdiction is of large and comprehensive import, and embraces every kind of judicial action. Jurisdiction of our purpose is broadly of two types

- Subject matter jurisdiction
- Personal jurisdiction

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<sup>4</sup> American Bar Association's Jurisdiction in CyberSpace Project, 2000 and The Hague Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgements in Civil and Criminal Matters.

## Principles of Jurisdiction in Cyberspace

The following are all the three principles of jurisdiction. They are :

- Jurisdiction to prescribe
- Jurisdiction to adjudicate
- Jurisdiction to enforce

## Jurisdictional Theories in Cyberspace

Determining whether a State has *jurisdiction to prescribe* is based on different theories.

Broadly, these theories can be categorized into six different classes, namely

- Subjective Territoriality
- Objective Territoriality
- Nationality
- Protective Principles
- Passive Nationality, and
- Universality

## Tests to Determine Jurisdiction in Internet Law Cases

The tests to determine jurisdiction in cyberspace are

- Long Arm Statutes Test
- Minimum Contacts
- **Effects Test**
- **Zippo Sliding Scale Test**

## III. EFFECTS TEST

In *Calder vs. Jones*,<sup>5</sup> the Supreme Court in 1984 described the ‘**Effects Test**’, when a State derives personal jurisdiction over a non-resident defendant. In this case, the National Enquirer, a Corporation based in Florida published an allegedly defamatory article on Shirley Jones, a resident of California. A complaint alleging libel was filed by the complainant against the National Enquirer, its distributors and newspaper’s editor and the journalist who wrote the article in the State Court of California. The Court held that although the article was written, and printed in Florida, the journalist and the editor of the newspaper of the National

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<sup>5</sup> 465 US 783 (1984).

Enquirer had expressly aimed at the California based Jones in California. The effects of the conduct committed in Florida were felt in California where they were directed. So when the National Enquirer had 10 per cent of its total sales in California and the journalist had written the story in Florida by contacting sources in California through telephonic interviews. Although the journalist visited California on business and had its source of news there. In 1998, in *Panavision International vs. Toeppen*,<sup>6</sup> the court reiterated the ‘effects test’ in a case concerning an Illinois resident wherein California State was held to have personal jurisdiction over an Illinois resident. Toeppen engaged in a cybersquatting activity by registering Panavision’s trademark and demanded a hefty amount to transfer the registration to Panavision. The court held that California had specific jurisdiction over the non-resident Toeppen. The court took a view that Toeppen knew that Panavision would feel the effect of his illegal action in California as its principal office was located there. Toeppen had never visited California or registered the domain names there or conducted any business in that State, however, since the effect of his actions in Illinois were felt in California, the exercise of personal jurisdiction by California court was justified.

### Evolution of Calder’s Effects Test

As the Supreme Court stated prior to *Calder*, mere *foreseeability* that an act may have an effect in a forum state ought not to suffice for specific jurisdiction over a defendant, *World-Wide Volkswagen Corp. Vs. Woodson*<sup>7</sup> *Calder* was based on a *malicious* and *specifically-intended effect within the forum*, not on the foreseeability of an effect and certainly not on the mere occurrence of an effect.

There are several important aspects to note about *Calder* and its progeny. First, *Calder* involved an intentional tort—defamation—rather than negligence or a contractual dispute. Defamation is arguably the cause of action most suited for the effects test, because defamation cannot exist unless the defamatory material is *perceived* by someone (other than the plaintiff). A matter of practicality also kicks in: it is easier for a court to find that the greatest impact of a defamation to occur where the plaintiff is best known, i.e., where the plaintiff lives and works. All these factors do not always unite in other torts. Other kinds of torts, such as interference with contract, misuse of trade secrets or patent infringement, may cause an effect, i.e., financial injury, to the plaintiff in its domicile, but the tort may have been fully formed without ever touching that domicile, or the defendant may not have focused on inflicting injury there. Courts applying *Calder* outside the defamation context

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<sup>6</sup> 141 F 3d 1316 (9th Cir 1998).

<sup>7</sup> 444 U.S. 286 (1980).

have produced a mixture of broad and narrow interpretations.

Second, quantitative tests can be useful in measuring intent to cause an effect within the forum. For example, in *Calder* the largest single-state circulation of the offending publication occurred in California. Not many courts that have purported to apply *Calder* have been able to cite a powerful fact like this to buttress jurisdiction. Third, the person affected in *Calder* was an *individual*. If the person affected is not a natural person, it may be more difficult to associate that person with a single forum. For example, prior to *Cybersell* the Ninth Circuit had dodged reaching a conclusion as to whether corporations can invoke the effects test. It found there was no jurisdiction in California over Swedish doctors in an antitrust and libel action based upon articles published in international medical journals which had unfavorably compared the dental implants manufactured by the California plaintiff with those made by a Swedish firm.<sup>8</sup>

### **Zippo Manufacturing Company Case**

In *Zippo Manufacturing Company vs. Zippo Dot Com, Inc.*<sup>9</sup>, plaintiff, manufacturer of tobacco lighters with its principal place of business in Pennsylvania, sued defendant, an Internet subscription news service with its principal place of business in California, for trademark infringement and dilution arising out of defendant's use of the domain names "*zippo.com*", "*zippo.net*" and "*Zipponews.com*" on the Internet. The court noted that the defendant's contacts with Pennsylvania "have occurred almost exclusively over the Internet. Dot com's offices, employees and Internet servers are located in California. Dot Com has entered into agreements with seven Internet access providers in Pennsylvania to permit their subscribers to access providers in Pennsylvania to permit their subscribers to access Dot Com's news service. It was held that **the pennsylvania court was perfectly entitled to exercise jurisdiction.**

## **IV. SLIDING SCALE TEST**

The court in the *Zippo* case evolved a test known as "*Sliding Scale*" test when it comes to the Personal Jurisdiction. 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. For example, in the *CompuServe* case. At the opposite end of the spectrum are situations where a defendant has simply posted

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<sup>8</sup> Core-Vent Corp. vs. Nobel Industries AB, 11 F. 3d 1482 (9th Cir 1993) (Core-Vent).

<sup>9</sup> 952 F. Supp. 1119 (W.D.Pa., Jan 16, 1997)

information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. For example, *Cybersell Inc. vs. Cybersell, Inc. et al*<sup>10</sup>, and *Bensusan Restaurant Corp. vs. King*<sup>11</sup>. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer, like *Martiz, Inc. vs. CyberGold, Inc.*<sup>12</sup> In those 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.

### Evolution of the “Sliding Scale” Test

Early cases involving jurisdiction in cyberspace in the U.S. were marked not only by inconsistencies, but also by failure to appreciate the technological realities of the new medium. One example was a decision of the Connecticut federal court in 1996, *Inset Systems, Inc. vs. Instruction Set Inc.*,<sup>13</sup> where the notion that a passive website triggers jurisdiction over an alleged trademark infringer when it is accessible from the forum was subsequently rejected by the Southern District of New York in *Bensusan Restaurant Corp. vs. King*<sup>14</sup>, without citing *Inset*, and the Second Circuit affirmed. After *Zippo and CyberSell*, the Connecticut federal district again considered jurisdiction based on a website in 2001, it wholly disregarded its own opinion in *Inset*, stating that “**most courts follow the lead of... Zippo**”.<sup>15</sup> The Fifth Circuit in *Mink vs. AAAA Devel. LLC*<sup>16</sup> found that as the orders were not taken through the website, it was deemed to be a “**passive advertisement**”. In the same year, the Tenth Circuit used the *Zippo* analysis in holding that a “passive” website was insufficient for exercise of jurisdiction in Utah over a British bank<sup>17</sup>. And a court in Southern District of New York, while acknowledging the plaintiff’s allegations that defendants’ mobile telephone and two-way email services were used in New York to be “**factually unsupported**”, nevertheless found the mere availability of the defendant’s website in New York made it “**intuitively apparent**” that defendant’s services were used by New York residents, thereby establishing a basis for jurisdiction as an interactive site.<sup>18</sup> In effect, this was judicial transposition of a passive website into a highly interactive website.

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<sup>10</sup> *Cybersell, Inc. vs. Cybersell, Inc. et al.*, 130 F. 3d 414 (9 th Cir. 1997).

<sup>11</sup> *Bensusan Restaurant Corp. vs. King* 937 F. Supp. 296 (S.D.N.Y.1996).

<sup>12</sup> *Martiz, Inc. vs. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

<sup>13</sup> 937 F. Supp. 161 (D. Conn. 1996) (*Inset*)

<sup>14</sup> *Ibid.*

<sup>15</sup> *On-Line Technologies vs. Perkin Elmer Corp.*, 141 F. Supp. 2d 246 (D. Conn. 2001).

<sup>16</sup> 1909 F.3d 333 (5<sup>th</sup> Cir 1999)

<sup>17</sup> *Soma Medical Intern vs. Standard Chartered Bank*, 196 F.3d 1292 (10 th Cir 1999).

<sup>18</sup> *Cable News Network, L.P. vs. GoSMS.com, Inc.*, 2000 WL 1678039 (S.D.N.Y).

### Evolution of the effects test in cyberspace

The first decisions involving the effect test in cyberspace were decided the same year as *Zippo*. In *Edias Software Intern vs. Basis Intern. Ltd.*,<sup>19</sup> where the court held the allegations that the materials were directed at Arizona and allegedly caused foreseeable harm to plaintiff was a basis for jurisdiction under *Calder*. The Northern District of Illinois invoked the Seventh Circuit's relaxed interpretation of *Calder* in a trademark case, *Bunn-O-Matic Corp. vs. Bunn Coffee Service Inc*<sup>20</sup>

### Application of the effects test in defamation cases

Since the Supreme Court decided the *Calder* doctrine in a case involving defamation of a public figure, it is logical that defamation is the type of cause of action where the courts can best apply the effects test. This is because intent to cause harm is an element of the defamation cause of action that it lends itself so easily to an effect test for jurisdiction. It is also important to recognize the difference between having a regularly distributed *publication* as defendant and having its individual reporters as defendants. That difference is exemplified by a case decided by the U.S. Supreme Court the same day as *Calder*, *Keeton vs. Hustler Magazine, Inc.*,<sup>21</sup>. The federal district court found a lack of jurisdiction in Pennsylvania under either *Zippo* or the *the effects test*,<sup>22</sup>. In *English Sports Betting. Inc. vs. Tostigan*<sup>23</sup>, the Eastern District of Pennsylvania, applying the effects test, found that a Virginia website operator published allegedly defamatory articles about the plaintiff, an offshore gambling business owner residing in Pennsylvania. The court held that "*the effects test was not satisfied because the recipient audience is not linked by geography but by a common interest in off-shore sports gambling*". The western District of Tennessee reached a similar result where allegedly defamatory material was posted on the website of a Florida aircraft engine developer<sup>24</sup>. The same Florida aircraft engine developer was also sued for defamation and tortious inference claims where the court held that *jurisdiction was to be determined under Zippo*. In *Rivell vs. Lidov*<sup>25</sup>, it first invoked *Zippo* to determine that the bulletin board "**fits perfectly into the passive website extreme**".

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<sup>19</sup> 947 F. Supp. 413 (D. Ariz. 1996).

<sup>20</sup> 46 U.S.P.Q.2d 1375 (N.D.Ill. 1998) (Bunn-O-Matic)

<sup>21</sup> 465 U.S. 770, 780 (1984).

<sup>22</sup> Barrett vs. Catacombs Press, 44 F. Supp. 2d 717 (E.D. Pa. 1999).

<sup>23</sup> 2002 WL 461592 (E.D. Pa)

<sup>24</sup> Bailey vs. Turbine Design, Inc., 86 F. Supp. 2d 790 (W.D. Tenn., E. Div 2000).

<sup>25</sup> 2001 WL 285253 (N.D. Tex.).

### Application of effects test in trademark infringement cases

*Sports Authority Michigan, Inc. vs. Justballs Inc.*,<sup>26</sup> presents an application of the effects test where the facts were sufficient for jurisdiction over a trademark infringement claim under *Zippo*. The effects test was used to defeat jurisdiction in *Spacey vs. Burger*<sup>27</sup> where the Court in the Seventh Circuit have loosely applied the effects test, which have been inconsistent on the question whether an infringing website should be deemed to be aimed at the owner of a trademark in the place of his place. In *Transcraft Corp. vs. Dornan Trailer Corp.*<sup>28</sup> the Northern District of Illinois ignored the effects test altogether; it found no jurisdiction over a defendant whose website was viewable and accessible in Illinois and invited Illinois residents to contact them via telephone or email, drawing essentially on *Zippo*. The same court in *McMaster-Carr Supply Co. vs. Supply Dept, Inc.*,<sup>29</sup> held that the effects test was automatically satisfied when the defendant registered the plaintiff's mark as its domain name on a passive website knowing that the conduct would harm plaintiff in Illinois, its principal place of business. In *Ford Motor Company vs. Great Domains, Inc.*,<sup>30</sup> the Court in assessing the level of individual targeting, the Court saw the key considerations as: (1) whether the trademark owner has been directly solicited to purchase the domain name; (2) whether the domain name registrant has registered domain names incorporating other protected marks; (3) whether the domain has been offered for sale by the owner and, if so, the price sought; (4) whether the domain owner has a perplexing, legitimate use for the domain name; and (5) any other factors which demonstrate that the act of incorporating the protected mark into a domain name was “**expressly aimed**” at the forum in which the trademark owner resides. Applying this mode of analysis, the court concluded that three of domain names involved in the case created a high likelihood of confusion, three created an “intermediate likelihood of confusion,” and three others created a “low likelihood of confusion,”

### V. ENFORCEMENT JURISDICTION AND THE YAHOO! CASE

The recent lawsuit by the International League Against racism and Aniti-Semitism and the Union of French Law Students against Yahoo!,<sup>31</sup> which has received a lot of attention in the popular press summarizes the difficulties that remain in resolving both the prescriptive and enforcement jurisdictional issues in cyberspace. Two French groups, namely the Union of

<sup>26</sup> 97 F. Supp. 2d 806 (E.D. Mich 2000).

<sup>27</sup> 2001 WL 1869867 (C.D. Cal)

<sup>28</sup> 45 U.S.P.Q.2d 1097 (N.D. Ill. 1997

<sup>29</sup> 1999 WL 417352 (C.D. Ill.)

<sup>30</sup> E.D. Mich., S. Div. 2001.

<sup>31</sup> Yahoo! Inc., vs. La Ligue Contre Le Racisme Et L'Antisemitisme, 169 F. Supp 2d 1181, 2001

French Law Students and the International League Against Racism and Anti-Semitism filed suit against Yahoo! For hosting auctions that displayed and sold Nazi propaganda. The memorabilia auctions were accessible only via the English language site, Yahoo.com. Direct access through Yahoo.fr was not possible. Yahoo! Argued in French court that the French Court did not have jurisdiction over Yahoo!. That plea was denied, and in November of 2000, a French court ruled that Yahoo! Must put filtering systems in place to block users in France from access to the Nazi related goods area, or pay fines of approximately \$13,000 per day. Only a watered down version of the effects test could be seen to apply to the French Court's decision in this case and since Yahoo! Was not targeting France which is a key element in the effects test the assertion of jurisdiction arguably violates the due process requirement of U.S. law.<sup>32</sup> Yahoo! Chose not to appeal the French Court's judgement but rather it challenged the enforcement of the order in the United States. In December of 2000, Yahoo! filed a lawsuit in the United States District Court of Northern California seeking a declaratory judgement that any final judgement of a French court would be enforceable in the United States. Before the California court could address the merits of the case, in a bit of an ironic twist, the French defendants mentioned the California court to dismiss the declaratory judgement suit due to lack of jurisdiction. The U.S.Court denied the motion to dismiss, finding jurisdiction based upon the effects theory. The court ruled that the defendant knowingly engaged in the activities and intended to have an effect on the United States citizens, for example, the use of U.S. marshals to serve Yahoo! officers in California. Clearly, the french citizens purposely availed themselves of the benefits of the United States. A state can only enforce its laws against a defendant in a forum where the defendant can be found or where there are assets belonging to the defendant. Enforcement of a judgement rendered by another forum requires its recognition by another court to enforce it. If it is the judgement of a court in a state in the United States, the Full Faith and Credit Clause of the Constitution requires that it be recognized by another state. When recognition of a judgement of a foreign court is sought in the United States it depends upon the principle of "comity". Comity is not a matter of absolute obligation but it is the recognition which one nation allow within its territory to the legislative, executive or judicial acts of another nation. National procedures required for recognition and enforcement of judgements vary widely around the globe. In the United States, comity is upheld unless to do so would violate due process, personal jurisdiction or some public policy. In order to determine the enforcement jurisdiction of the French court over Yahoo!, the Federal District Court for the Northern District of California found the issue

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<sup>32</sup> Rice, 2002.

to be whether it was consistent with the Constitution and the Laws of the United States for another nation, namely France, through their court order, to curtail the Yahoo! website. The French therefore would be regulating speech by United States' residents within the United States on the basis that such speech could be accessed by Internet users in France. The court was mindful of the extent to which the United States is governed by the **"comity of nations"** but did not believe that comity was a matter of absolute obligation. The court decided the case in accordance with the Constitution, finding that the French Order violated the Constitution of the United States, thereby recognizing that it was necessarily adopting the position that **"certain judgements embedded within this enactment including the fundamental judgement expressed in the First Amendment that is preferable to permit non-violent expression of offensive viewpoints than to impose viewpoint based government regulation upon speech, Yahoo!"**. The court rendered the judgement in favour of Yahoo! in a summary judgement motion that they requested on the declaratory judgement action to find the French Order in violation of the First Amendment. The finding of a threat to Constitutional rights by the Court was the grounds by which it effectively rendered the Order unenforceable and which demonstrates the limits of perspective jurisdiction. This case suggests the *disharmony that continues to exist among nations on questions of jurisdiction*. It appears that courts and legislatures have found legitimate grounds for asserting prescriptive jurisdiction over defendants based upon action taken in cyberspace, but that may have little importance when the plaintiff seeks a restorative remedy. Enforcement jurisdiction, which requires the injured party to attach either the defendant or his tangible assets, becomes an issue of comity or state's recognition of its obligation to enforce a law. Questions of comity have not been resolved sufficiently to assure smooth enforcement on the Internet. Policy makers and governments *will need to address this higher level of enforcement jurisdiction to foster predictability and certain necessary for the growth of commerce on the Internet*.

## VI. INDIAN APPROACH

As far as the criminal law is concerned, the position has been straightened by the IT Act, 2000 which says that if the impact of a particular act is felt in India, Indian courts will have jurisdiction, thereby endorsing the **'effect'** theory.

Looking from a contractual perspective, the law is contained in the Code of Civil Procedure, which says that the jurisdiction lies where the cause of action, whether wholly or partly, arises. This principle would mean even if a part of cause of action has arisen within the precincts or the jurisdiction of an Indian court, the Indian court could exercise jurisdiction.

Section 20 of CPC doesn't talk about due process or minimum contact principles. So, under this theory mere website access could suffice for a court to assume jurisdiction. This moment a plaintiff shows that the Web site is accessible from India, he can show that a part of the cause of action has arisen here because Indian viewers are likely to view the website. Both the **Copyright Act**<sup>33</sup> and the **Trademarks Act**<sup>34</sup> says that the plaintiff can file a suit where he is located; he doesn't need to bother about where the defendant is located. This means Indian court have a wide jurisdiction as far as the Internet is concerned.

But we find that courts in India are, to a larger extent, looking at something beyond mere access of a website. In *Tata Sons vs. Ghassan Yacoub and others*<sup>35</sup>, where the defendant, Ghassan Yacoub, was based in the USA and had registered the domain name Tatagroup.com. The defendant had registered the domain name with network Solutions Incorporated, which is a registrar based in the USA. The Delhi High Court did not go extensively into the question of jurisdiction but made a statement to that effect that the Internet has transactional ramifications, which means it potentially impacts almost every jurisdiction whether it is accessible and we have to look at where is the impact felt. Based on this reasoning, the High Court of Delhi granted an *ex parte* interim injunction against the defendants restraining them from using and transferring the infringing domain name Tatagroup.com. The court accepted the contention put forth by the plaintiff that in matters concerning Internet communications, which have trans-national ramifications, the effect of the impugned transactions in India is an important factor for determining jurisdiction.

In, *Himalayan Drug Company vs. Summit*<sup>36</sup>, the plaintiff, the Himalayan Drug Company, had on their website a huge database on Ayurvedic concepts and the whole range of product and herbs listing out the herbs' anskrit and Latin names, their properties, the medicines it was used in, etc., with graphical and pictorial presentation. The whole database was exactly copied by the defendant who was based in Italy and pasted on a website called '**ayurveda.summit.net**'. The only contact with the plaintiff's was the one stated on the website in the form of an email address '**summit@democrat.com**'. So, the plaintiff sued the defendant along with the Internet Service Provider, also an Italian entity, virtualace.net, who had actually sub leased the domain name and Web page to the infringer. The court exercised jurisdiction in this case because it was a case of copyright violation and under section 62 of

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<sup>33</sup> Copyright Act, 1957

<sup>34</sup> Trademark Act, 1999

<sup>35</sup> Unreported *ex parte* injunction order; Suit No. 1672/99 (Delhi High Court); Refer, presentation of P. Anand, Partner, Anand & Anand, WIPO International Conference on Electric Commerce and Intellectual property (September 1999), available at, <http://ecommerce.wipo.int/meetings/1999/inde.html>.

<sup>36</sup> No. 1719 of 2000 (Delhi High Court)

the Copyright Act, 1957, a suit can be filed at a place where the plaintiff is based. Moreover, the Web site could be opened in Delhi and the damage could also be said to have occurred there. The fact that the defendants belonged to Italy did not resist the court from exercising jurisdiction.

### **Indian position of the jurisdiction in cyber defamation**

*SMC Pneumatics (India) Pvt. Ltd. vs. Jogesh Kwatra*<sup>37</sup> is a first case from India about the *Cyber Defamation*. In this case High Court of Delhi assumed jurisdiction over a matter of jurisdiction over a matter of defamation of reputation of corporate through e-mails. The court passed an *ex-parte* injunction. The Supreme Court of India, in *SIL Import vs. Exim Aides Silk Importers*<sup>38</sup> pointed out that judiciary needs to interpret a statute in the light of technological change that has occurred. Until there is specific legislation in regard to the jurisdiction of the Indian courts with respect to Internet disputes, or unless India is a signatory to an International Treaty under which the jurisdiction of the national courts and circumstances under which they can be exercised are spelt out, the Indian courts will have to give a wide interpretation to the existing statutes, for exercising Internet disputes.<sup>39</sup>

## **VII. DETERMINING JURISDICTION IN CYBERSPACE: ZIPPO SLIDING SCALE TEST OR EFFECTS TEST**

The critiques of the Zippo test adopt a view that the Zippo test is a 'barrier' to promotion of e-commerce on the internet and advocate either Effects test or Target based approach as more liable means of determining jurisdiction. The proponents of the 'effects test' are of the view that the 'effects test' overcomes

this narrow approach and presents a broader approach that does not restrict or restrain the interactivity level on a website.<sup>40</sup> In the present times, almost every website is interactive, with avenues for chatting, instant messaging, and even voice and video chat or other modes of interacting with customers. Therefore, static websites and middle zone websites referred to in Zippo test are in fact redundant. In other words, Zippo test has lost its significance with evolving technology and changing definitions of interactivity. At the same time, effect based approach may lead to uncertainty as the effect of a tortious act committed in one jurisdiction may lead to an effect in more than one jurisdiction. Hence, **the target based approach is a**

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<sup>37</sup> Suit No. 1279/2001. Available at <http://cyberlaws.net/cyberindia/defamation.htm>

<sup>38</sup> (1999) 4 SCC 567

<sup>39</sup> Referred <http://lexwisdom.com/author/lewisdom/> (last updated Dec., 11, 2013).

<sup>40</sup> Professor Michael Geist, "Is There a There There? Towards Greater Certainty for internet Jurisdiction". 16 Berkley Tech LJ 1345 at <http://arxiv.org/ftp/papers/0109/0109012.pdf> (accessed on 18th April, 2020)

**clear and practicable test in order to determine jurisdiction.** The target based approach overcomes pitfalls of the Zippo and the Effects test as it imparts legal certainty by being unaffected by evolving technologies and changing definitions of interactivity. It promotes trust and stability in e-commerce and does not unnecessarily involve other possible jurisdictions as may occur in the effects test. The target based approach is also adopted by Indian courts in precedents.

## VIII. CONCLUSION

Currently, a U.S. Court dealing with the issue of jurisdiction over a non-resident based on his online activity will probably start its inquiry by using a Zippo analysis, but it is increasingly likely that courts will further analyze the issue by applying the effects test, particularly where the case involves a tort claim or where the defendant's website is either passive or only modestly interactive under Zippo. It is therefore advisable for attorneys advocating jurisdiction to use both tests, since the effects test may work where the sliding-scale of Zippo might not.

The effects test like the Zippo test is not free from subjectivity. The issue of jurisdiction is often decided at the threshold of litigation on the pleading and inferences drawn from the pleadings. The same set of facts that might lead one Court to conclude that a defendant intended purposefully to cause an effect within a given jurisdiction might not lead another court to the same conclusion. Moreover not all courts have been equally rigorous in requiring that the forum itself have been purposely targeted in order to invoke the effects test. **"Targeting"** to some courts simply connotes an effort specifically to reach a person who resides in the forum, rather than to generate an impact there. To other courts, it may only connote that effects within the forum was foreseeable. In the end, the cases suggest that predictability of outcomes is perhaps only marginally greater under the effects test than under the sliding scale test. While defendant's intent to inflict injury within the forum must be determined by specific facts in specific cases, several factors are useful in measuring that intent. First and foremost, courts should insist on something beyond accessibility of the defendant's website. There should be allegations of specific intent to inflict damage to the plaintiff within the forum where he resides. There should be a showing that the content in question impacted upon at least a critical mass of actual viewers in the jurisdiction. If the information about Shirley Jones had not been printed in 600,000 copies of the National Enquirer that were distributed in California, but rather posted on a password accessible website used only by registered academics, the factors relied upon in *Calder* would not

logically yield the same result. Beyond allegations of actual intent and impact on relevant persons inside the forum, there are circumstantial factors that courts can consider in determining effect whether targeting of the forum occurred. For example, one is the selection of language in which information is communicated. Initially, the great majority of communication on the World Wide Web was in English, and while the proportion of non english sites is increasing, the language is still so common that its use on a website would not be sufficient to establish the jurisdiction of an English-speaking country. In contrast, a site in hindi could be considered to be targeted at residents of India, just as securities offerings posted in Dutch on the internet are a factor considered by Dutch securities regulators in determining if they are targeted at residents of the Netherlands. Closer to home, a political webcast in Spanish on a largely Spanish-language located in Texas but disparaging a candidate in California, could be said to target Latino voters in California. Currency can be another such factor: when services are quoted in a currency other than that of the website's domicile, this would arguably be evidence of intent to reach that jurisdiction. Again, widely used currencies, such as the U.S. dollar, or generic currencies like the Euro, should not be considered evidence, taken alone, of targeting.

As technology advances, the use of "push" technology would likely be viewed as targeting activity that warrants specific jurisdiction in the location of the pushee. While courts are refining and breach of contract the effects test as described above, courts will continue to rely upon the passive/active analysis of Zippo to evaluate highly interactive or integral websites, particularly in cases involving negligent and non-malicious business torts and breach of contract. Certain torts, such as defamation and many intentional violations of intellectual property laws, are suitable for the effects test. This suggests that as we look to the future, tests for finding jurisdiction may be based upon the type of cause of action or case in controversy. In fact, rather than seeking harmony in rules for jurisdiction across borders, it may be more productive to seek uniformity in standards for jurisdiction based along subject matter lines.

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