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The Proper Basis for Exercising Jurisdiction in Internet Disputes: Strengthening State Boundaries or Moving Towards Unification?

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The Proper Basis for Exercising Jurisdiction in Internet Disputes: Strengthening State Boundaries or Moving Towards Unification?

Niloufer Selvadurai [*]

It is widely accepted that the nature of internet technology and communications has served to undermine the effectiveness of the rules of international law which govern the determination of jurisdiction in internet disputes. Private international law developed on the premise of geographically discrete areas that could be effectively governed by nations with clear and delineated boundaries. However, the nature of internet communications dissects and transcends national boundaries. Material published on the internet can be uploaded in one state, downloaded in another, and viewed in a large number of other states. Damage is typically simultaneously suffered in multiple states, and parties to internet disputes are often domiciled or conduct business in differing jurisdictions. In such a context, the question becomes *on what basis* should jurisdiction be determined? While there is widespread agreement on the nature of the challenge posed by internet jurisdiction, there is significant divergence in the proposed solutions.[1] The wide spectrum of recommendations for law reform and refinement range from those which further strengthen and delineate state boundaries to those which embrace unification and international jurisdiction.[2] The purpose of the present article is to identify and analyze the merits of the various

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[1] *See, e.g.*, Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. & TECH. L. REV. 69 (1998); Andrea M. Matwyshyn, *Of Nodes and Power Laws: A Network Theory Approach to Internet Jurisdiction Through Data Privacy*, 98 NW. U. L. REV. 493 (2004); Dan Jerker B. Svantesson, *Geo-location Technologies and Other Means of Placing Borders on the 'Borderless' Internet*, 23 J. MARSHALL J. COMPUTER & INFO. L. 101 (2004).

[2] *See generally* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Angus Johnston & Edward Powles, *The Kings of the World and Their Dukes' Dilemma: Globalisation, Jurisdiction and the Rule of Law*, *in* GLOBALISATION & JURISDICTION 13–54 (Piet Jan Slot & Mielle Bulterman eds., Kluwer Law International 2004); Patrick R. Wautelet, *What Has International Private Law Achieved in Meeting the Challenges Posed by Globalisation?*, *in* GLOBALISATION AND JURISDICTION, *supra*, at 55–77 (Piet Jan Slot & Mielle Bulterman eds., Kluwer Law International 2004).

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veins of scholarship and recommendations on this tangled issue. A consideration of law and theory, case law and scholarly discourse, will lead to the conclusion that the movement to unification provides the most effective solution to achieve consistency and certainty in the determination of jurisdiction in internet disputes.

The determination of jurisdiction over internet activities is a critical legal issue because it has become the central forum of the battle to integrate the rule of law in the Information Society.[3] Hence, it is important to establish clear and consistent grounds on which jurisdiction can be asserted in internet disputes. As Kightlinger notes, "companies large and small generally prefer predictable legal environments to unpredictable environments," and the same could be said of users.[4] The commercial significance of the issue is highlighted by the growing concern as to the practice of forum selection, commonly termed "forum shopping."[5] The present lack of "unification"[6] or "decisional harmony"[7] in jurisdiction rules creates an incentive for forum shopping.[8] In *Smith Kline & French Laboratories, Ltd. v. Bloch*, Lord Denning eloquently noted that "[a]s a moth is drawn to the light, so is a litigant drawn to the United States."[9] In such a context, in which a plaintiff can bring its case in multiple jurisdictions, a well-advised plaintiff is likely to commence proceedings in the most favorable forum.[10]

I. JURISDICTION

The notion of "jurisdiction" in international law is multifaceted. In *United States of America v. Vanness*, it was observed that the word "[j]urisdiction is a

[3] Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1951 (2005).

[4] Mark F. Kightlinger, *A Solution to the Yahoo! Problem? The EC E-Commerce Directive as a Model for International Cooperation on Internet Choice of Law*, 24 MICH. J. INT'L L. 719, 765 (2003).

[5] HELENE VAN LITH, INTERNATIONAL JURISDICTION AND COMMERCIAL LITIGATION: UNIFORM RULES FOR CONTRACT DISPUTES 5–6 (T.M.C. Asser Press 2009).

[6] *Id.* at 5.

[7] *Id.* at 6. *See also* Franco Ferrari, *'Forum Shopping' Despite International Contract Law Conventions*, 51 INT'L & COMP. L.Q. 689 (2002); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507 (1995); Friedrich K. Juenger, *Forum Shopping Domestic and International*, 63 TUL. L. REV. 553 (1989); Trevor C. Hartley, *'Libel Tourism' and Conflict of Laws*, 59 INT'L & COMP. L.Q. 25 (2010).

[8] VAN LITH, *supra* note 5, at 5–6.

[9] Smith Kline & French Lab. Ltd. v. Bloch, 2 All E.R. 72, 74 (1983), *available at* http://unisetca.ipower.com/other/cs3/19832AER72.html.

[10] *See generally* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

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word of many, too many, meanings."[11] The strict definition of the word "jurisdiction" means the authority of a court to decide a matter.[12] The term is also more loosely used to describe three elements: the authority of the court to decide a matter, the choice of law to apply to the determination of the matter and the enforcement of judgments.[13] Once it is established that a court has jurisdiction to hear a dispute, the court must determine the law that is applicable to the proceedings. The "choice" is between the law of the forum or another state, but occasionally, the forum court may have to choose between the laws of two foreign states.[14]

The three-layered structure of jurisdiction mirrors the three-layered structure of the internet as identified by Benkler and Werbach and analyzed by Geist.[15] Benkler notes that communication systems can be delineated into three distinct layers.[16] The first layer comprises the physical layer consisting of the physical infrastructure required to connect phones, computers, router and other transmission technology.[17] The second layer is described as the logical layer and is composed of technology required to access the network.[18] The third layer is a content layer, housing the content of the communication.[19] Geist notes that the internet jurisdiction can be similarly conceptualised in three layers.[20] The first layer is an application layer that determines whether courts are entitled to adjudicate a particular dispute.[21] The second layer is a substantive layer in which courts apply

[11] United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996).

[12] BRIAN FITZGERALD ET AL., INTERNET AND E-COMMERCE LAW: BUSINESS AND POLICY 58–59 (2d ed. 2011).

[13] *Id.*

[14] *Id.* at 90. *See further* Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT'L LAW. 991 (1998) (discussing the issue of choice of law); Joel R. Reidenberg, *States and Internet Enforcement*, 1 UNIV. OTTAWA L. & TECH. J. 213 (2004) (discussing the issue of enforcement of decisions through internet instruments).

[15] Michael Geist, *Is There a There There? Towards Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH L.J. 1345, 1353 (2001) (discussing Professor Yochai Benkler's presentation content at a New York University Conference).

[16] *Id.* at 1353.

[17] *Id.*

[18] *Id.* at 1353–54.

[19] *Id.*

[20] *Id.*

[21] Geist, *supra* note 15, at 1354.

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their substantive laws to resolve a dispute.[22] Finally, there is the enforcement layer, and Geist notes that the online environment often resists the enforcement of foreign judgments due to significant distances and relatively insignificant monetary awards.[23]

The stricter use of the term "jurisdiction" is however confined to the first of these three senses and refers to the court's authority to decide a matter.[24] For the present analysis, the strict use of the term "jurisdiction" will be utilized. Therefore, issues of choice of law and enforcement are outside the ambit of the discussion. A State is found to have personal jurisdiction over a foreign defendant when it has authority to require a defendant to appear before its courts and defend a claim.[25] The notion of "State" refers to a nation, a state or another geographically delineated area where a unitary legal system operates.[26] Personal jurisdiction is established where a defendant voluntarily submits to a court's jurisdiction or where the defendant has been validly served with an originating process pursuant to the rules of the court.[27] Closely connected to the question of jurisdiction is the principle of party autonomy.[28] This principle essentially holds that parties should be free to decide the forum for the adjudication of disputes.[29] The issue of jurisdiction rules only becomes relevant in the absence of a choice of forum agreement between parties.[30]

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[22] *Id.*

[23] *Id. See* Alan Reed, *Jurisdiction and Choice of Law in a Borderless Electronic Environment*, *in* THE INTERNET, LAW & SOCIETY (Yamin Akdeniz et al. eds., Longman Pearson 2000). *See also* Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167 (1998); Richard Garnett, *Are Foreign Internet Infringers Beyond the Reach of the Law?*, 23 U.N.S.W. LAW. J. 105 (2000).

[24] FITZGERALD ET AL., *supra* note 12, at 58.

[25] *Id.* at 58. *See also* Bernadette Jew, *Cyberjurisdiction—Emerging Issues and Conflicts of Law When Overseas Courts Challenge Our Web*, *in* COMPS. & LAW 23 (1998); Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521 (2003).

[26] FITZGERALD ET AL., *supra* note 12, at 90.

[27] *Id.* at 59.

[28] Ronald Brand, *Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice* 8 (Univ. of Pittsburgh School of Law Working Paper No. 25, 2005), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1025&context=pittlwps.

[29] *Id.* at 8.

[30] *Id.* at 10.

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II. ASSERTING JURISDICTION ON THE BASIS OF PURPOSEFUL AVAILMENT

There are a variety of established grounds on which the courts of one State can exercise jurisdiction over a citizen, corporation or organization of another State in order to adjudicate matters that have affected parties within its boundaries.[31] In the context of internet disputes, the leading basis for asserting jurisdiction has been the purposeful availment principle.[32]

Courts in the United States have frequently exercised personal jurisdiction over non-residents on the basis that a non-resident defendant has "purposefully availed" itself of the privileges and benefits of the State.[33] In assessing what constitutes purposeful availment in the context of internet disputes, two distinct lines of case law have emerged.[34] These two streams can be broadly described as the *Zippo* "sliding scale approach"[35] and the *Calder v. Jones* "effects and targeting" approach.[36] The *Zippo* scale has now largely fallen out of favor and the prevailing test is the *Calder v. Jones* "effects and targeting" test.[37] The effects doctrine adopted by courts in the United States can be viewed as being essentially derived from the principle of territoriality.[38] It is useful to consider both lines of authority.

The sliding scale approach outlined in *Zippo*[39] requires the court to analyze the "nature and quality of commercial activity" of the website involved in the proceedings when determining whether jurisdiction is established.[40] The court noted that "[o]ur review of the cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet."[41]

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[31] FITZGERALD ET AL., *supra* note 12, at 71.

[32] *Id.* at 73.

[33] *Id.* at 73–74.

[34] *Id.*

[35] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123–24 (W.D. Pa. 1997).

[36] Calder v. Jones, 465 U.S. 783, 788–90 (1984).

[37] FITZGERALD ET AL., *supra* note 12, at 78.

[38] *See infra* Part IV.

[39] *Zippo*, 952 F. Supp. at 1119.

[40] *Id.* at 1123–24.

[41] *Id.* at 1124.

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Under the *Zippo* test, websites are seen to encompass a spectrum of differing levels of interaction with the jurisdiction in question.[42] On one end of the spectrum are clearly "passive websites," which are confined to mere advertising and do not actively "reach out and touch" the territory in question.[43] The court described these websites as a forum "where a defendant has simply posted information on an internet website which is accessible to users in foreign jurisdictions."[44] A passive website, a 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.[45]

On the other end of the spectrum are situations where a defendant clearly does business over the internet and has a fully interactive website that seeks to actively engage with the population of the territory in question.[46] The court determined that in order to assert jurisdiction, such a website must reach out and touch the territory in question.[47] The court noted that asserting personal jurisdiction over a defendant is proper when a defendant contracts with the residents of a foreign jurisdiction in transmitting computer files over the internet.[48]

Interestingly, a center position relates to interactive websites where a user is able to exchange information with the host computer.[49] In such cases, it is necessary for the court to examine "the level of interactivity and the commercial nature of the exchange of information that occurs on the website."[50]

The *Zippo* case involved a trademark dispute between Zippo Manufacturing Company, the plaintiff whose principal place of business was in Pennsylvania, and Zippo Dot Com, the defendant who operated a commercial internet news service

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[42] *Id.* at 1123–24.

[43] *Id.* at 1124.

[44] *Id.*

[45] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* While the *Zippo* test places heavy emphasis on the nature and level of interactivity of the website (i.e. passive or interactive), the court also recognised the intention of the defendant. In dismissing the defendant's contention that the connection to Pennsylvania was coincidental and fortuitous, the court noted that the defendant "consciously chose to conduct business in Pennsylvania, pursuing profits from the actions that are now in question." *Id.* at 1127. The court responded that the transmission of files was wholly within the defendants control and that therefore the defendant could not maintain that the ensuing contracts were coincidental or fortuitous. *Id.* at 1126.

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website from California.[51] The plaintiff alleged that the defendant's use of the domain name "Zippo" constituted trademark dilution, infringement and false designation pursuant to the United States Federal Trademark Act 1946.[52] The Pennsylvania federal court justified personal jurisdiction on the basis that the website had contracted with approximately 3,000 residents of Pennsylvania and seven Pennsylvania internet access providers.[53] The court also examined the intended object of the transactions in question and noted that it was "the downloading of electronic messages that formed the bases of the suit in Pennsylvania."[54] In light of the level of interaction with Pennsylvania, the court found personal jurisdiction despite the fact that only 2% of the defendant's subscribers were residents of Pennsylvania.[55]

In contrast, under the *Calder v. Jones*[56] effects and targeting test, personal jurisdiction is found where the defendant is found to have engaged in harmful intentional actions which were expressly aimed at the forum state and caused harm, and the majority of the harm was suffered and the defendant could foresee that it would likely to be suffered, in the jurisdiction in question.[57] The test was first presented in *Calder v. Jones*, a defamation case that did not involve the internet. It was subsequently applied by a United States District Court in *Metro Goldwyn Mayer Studios Inc. v. Grokster, Ltd.*,[58] a dispute involving the internet, specifically a dispute regarding the use of file-sharing software on the internet.

The *Metro* case involved a copyright dispute.[59] The defendant provided free proprietary software called Kaza Media Desktop to internet users enabling them to search and exchange digital media with other users via the file-sharing software.[60] The plaintiff brought an action in California for copyright infringement.[61] The

[51] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1121 (W.D. Pa. 1997).

[52] 15 U.S.C. §§ 1051–1127 (2006).

[53] *Zippo*, 952 F. Supp. 1119, at 1125–26.

[54] *Id.*

[55] *Id.* at 1127.

[56] Calder v. Jones, 465 U.S. 783 (1984).

[57] *Id.*

[58] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 243 F. Supp. 2d 1073, 1089 (C.D. Cal. 2003). *See also* FITZGERALD ET AL., *supra* note 12, at 157–58.

[59] *Metro-Goldwyn-Mayer*, 243 F. Supp. 2d at 1080.

[60] *Id.*

[61] *Id.*

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defendant sought to dismiss the action on the basis of a lack of jurisdiction.[62] After a careful consideration of the facts, the court found that it had jurisdiction to adjudicate the matter. In reaching its decision, the court noted that the defendant was aware that the Kaza Media Desktop software was used by millions of residents in California, and that the defendant was aware that it would be harmed by the copyright infringement facilitated by its software.[63]

A. The Merits of the Purposeful Availment Approach

While the *Zippo* sliding scale test has been applied and refined in a number of federal decisions including, most notably, *Neogen Corp. v. New Gen Screening*,[64] it has now been largely replaced by the effects and targeting test. The effects and targeting test has been noted with approval in a variety of cases, one of them being the leading Australian case of *Dow Jones & Comp. v. Gutnick*.[65] In *Dow Jones*, the High Court held that an appellant who published allegedly defamatory material on an online news service using servers based in New Jersey was within the personal jurisdiction of the Supreme Court of Victoria, Australia, on the basis that the alleged defamatory material caused damage to the defendant in the State of Victoria.[66] Similarly, the High Court of Justice in the United Kingdom applied the effects approach in *Richardson v. Schwarzenegger*[67] to hold that a plaintiff, a resident of the United Kingdom, could sue for defamation in the United Kingdom for statements made on a news website originating in the United States.

The targeting-based approach has also received support from scholars such as Hen who notes that it is proper for a country to assert jurisdiction over a defendant who places content on a website which actively targets its citizens.[68] Rice and Gladstone note that targeting-based analysis is a key ingredient in the application of the effects test.[69] Redienburg notes that "[t]he internet became popular precisely because of the promise of a global audience" and that this promise cannot not be

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[62] *Id.*

[63] *Id.*

[64] Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883 (6th Cir. 2002).

[65] Dow Jones & Co. Inc. v. Gutnick, [2002] 210 CLR 575 (Austl.).

[66] *Id.*

[67] Richardson v. Schwarzenegger, [2004] EWHC 2422 Q.B. (Eng.).

[68] Julie L. Henn, *Targeting Transnational Internet Content Regulation*, 21 B.U. INT'L L.J. 157, 175–77 (2003).

[69] *Id.* at 158.

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used to "absolve online activities of legal responsibility."[70] He notes that while online technologies were initially designed for "geographically indifferent access," commercial pressures and the dynamic nature of the internet have now resulted in "geolocation and the re-creation of geographic origin and destination."[71] Redienburg concludes that "[t]his design feature [of the internet] and its malleability mean that Internet activity is 'purposefully availing' throughout the Internet whenever content is posted without geolocation filtering."[72] Thus, as States are gravitating to an effects doctrine, they are elevating "submission to the rule of law rather than capitulation to an Internet attack."[73]

However, it can be argued that when determining jurisdiction, the technological evolution of the internet has undermined the relevance of the concept of purposeful availment. The approach of assessing jurisdiction on grounds of territoriality, by relying on the characteristics of a particular website is a technologically non-neutral principle that is likely to be rendered ineffective by technological evolution. Since the formulation of the test 15 years ago, the level of interactivity of commercial websites has significantly evolved to the extent that the vast majority of commercial websites are now interactive in nature and offer online purchase or contact processes. In such a context, the interactivity of the website approach, which seeks to classify websites based on passivity or activity, is no longer a fine-grain approach to determining the nuances of the nature and extent of a website's connection to the jurisdiction in question. In such a context, the conclusion in *Dow Jones*, that a web publication has an effect and hence, justifies jurisdiction wherever the publication is read and comprehended, seems to be the single and inevitable result of applying the purposeful availment principle.[74] As Justice Kirby acknowledged, "[t]he nature of the Web makes it impossible to ensure with complete effectiveness the isolation of any geographic area of the Earth's surface from access to a particular website."[75]

Citron further notes that the entire concept of purposeful availment can be rendered irrelevant by certain uses of technology such as, Voice over Internet Protocol ("VoIP") technology, because such technology attaches to individuals

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[70] Reidenberg, *supra* note 3, at 1956.

[71] *Id.*

[72] *Id.* at 1956.

[73] *Id.*

[74] *Dow Jones & Company*, 210 CLR 575, at 26.

[75] *Id.* at 84.

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rather than geographical locations.[76] In such a context, it is not possible to assert that the sender of the communication has availed himself or herself of a particular jurisdiction as there is no correlation between the telephone number to which the communication is transmitted and the geographical location at which the receiver takes delivery of the communication.[77] Citron suggests instead a theory of "fair play and substantial justice" for asserting jurisdiction in VoIP disputes.[78]

Redish further argues that the technological development of the internet effectively "renders the concept of purposeful availment both conceptually and practically irrelevant," noting that "[a]n individual or entity may so easily and quickly reach the entire world with its message that it is simply not helpful to inquire whether, in taking such action, the individual or entity has consciously and carefully made the decision either to affiliate with the forum state or to seek its benefits."[79] Timofeeva notes that there are a significant number of websites that welcome all interested surfers and do not expressly "target" anyone.[80] The targeting-based approach would seem to exempt such sites from the States' control.[81]

Therefore, it would be preferable if the assessment of jurisdiction was not based on the technological features of the website but instead, on the substantive issues relating to content. For example, the diversity of languages used on internet websites is not expressly addressed under the targeting-based test. To what extent is the language employed a relevant consideration in determining jurisdiction? This movement from the use of technological features to substantive features to govern regulation is occurring in other areas of international technology law, notably in the convergence law review discourse.[82] In 2003, the European Union passed a new

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[76] Danielle Keats Citron, *Minimum Contacts in A Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1485, 1493–95 (2006).

[77] *Id.* at 1486.

[78] *Id.* at 1520–21.

[79] Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 606 (1998).

[80] Yulia A. Timofeeva, *Worldwide Prescriptive Jurisdiction in Internet Content Controversies: A Comparative Analysis*, 20 CONN. J. INT'L L. 199, 214 (2005).

[81] *Id.*

[82] Australian Convergence Review Committee, *Convergence Review—Final Report* (Apr. 2012). *See further* Niloufer Selvadurai, *Convergence and Media Ownership: The Merits of Repealing the '2 out of 3 Rule' and Adopting a National Public Interest Test*, 62 TELECOMM. J. AUSTL. 1, 1–3 (2012); Niloufer Selvadurai, *Regulating for the Future—Accommodating the Effects of Convergence*, 13 TRADE PRAC. LAW J. 20, 21–22 (2005).

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regulatory framework for electronic communications that seeks to govern on the substantive characteristics of the services provided rather than on the basis of the nature of the transmission technology adopted (i.e. broadcasting spectrum or telecommunications network).[83] This new approach was subsequently adopted by other nations, such as South Africa, and is being actively debated in other nations such as Australia.[84] It is asserted that a similar paradigm shift is necessary in the realm of the application of private international law to the selection of jurisdiction in disputes involving the internet.

B. The Development of a Technology-Neutral Purposeful Availment Theory

It does not appear that internet jurisdiction can be solved by creating technological boundaries around the internet. However, many private international rules currently in place, including the purposeful availment theory, are inherently technology-specific formulations. Matwyshyn's theory of "Trusted Systems" seeks to address this problem by extending and developing the purposeful availment theory to create a new and technology-neutral paradigm for asserting personal jurisdiction in internet proceedings.[85] The objective of this theory is to craft a new

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[83] The regulatory framework consists of four central directives, supported by a series of non-binding guidelines and recommendations. Directive 2002/21/EC, of the European Parliament and of the Council of the European Union of Mar. 7, 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002 O.J. L 108/33; Directive 2002/20 EC of the European Parliament and of the Council of the European Union on the authorization of electronic communications networks and services, 2002 O.J. L 108/21; Directive 2002/58/EC of the European Parliament and the Council of the European Union of July 12, 2002 concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 O.J. L 201/37; Directive 97/66/EC of the European Parliament and of the Council of the European Union of Dec. 15, 1997 concerning the Processing of Personal Data and the Protection of Privacy in the Telecommunications Sector, 2002 O.J. L 24/1; Commission Recommendation of the European Communities of Feb. 11, 2003 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to *ex ante* Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services, 2003 O.J. L 114/45. See Commission of the European Communities, *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, Towards an Information Society Approach*, COM (97) 623 (1997), for the law reform discourse prior to the enactment of the new laws.

[84] AUSTL. COMMC'N & MEDIA AUTH., CONVERGED LEGISLATIVE FRAMEWORKS—INTERNATIONAL APPROACHES (July 2011); DEP'T OF BROADBAND, COMMC'NS & THE DIGITAL ECON., CONVERGENCE REVIEW—FRAMING PAPER (Apr. 2011); DEP'T OF BROADBAND, COMMC'NS & THE DIGITAL ECON., CONVERGENCE REVIEW—EMERGING ISSUES PAPER (July 2011); DEP'T OF BROADBAND, COMMC'NS & THE DIGITAL ECON., CONVERGENCE REVIEW—FINAL REPORT (Apr. 2012). *See also* HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE (N.Y. Univ. Press 2d ed. 2006); CONVERGENCE AND FRAGMENTATION: MEDIA TECHNOLOGY AND THE INFORMATION SOCIETY (Peter Ludes ed., Intellect Books 2008).

[85] Matwyshyn, *supra* note 1, at 529.

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"jurisdictional paradigm" for internet proceedings.[86] The article begins by asking whether "internet-related harms warrant a fundamentally different personal jurisdiction paradigm."[87] The article unequivocally concludes that a fundamentally different personal jurisdiction paradigm is warranted because it provides a firmer ground for the future evolution of jurisdiction precedents in cases involving harm arising from new media.[88]

Matwyshyn argues that the present tests applied by the courts are limited in their use because they are not technology neutral: "[w]ithout acknowledging it, they evolve around one particular incarnation of Network Communications, the World Wide Web, in a technologically stagnant manner. As such they are destined for a short shelf-life. They do not provide sufficient intellectual flexibility for use with the next generation of Network Communications."[89] She advocates the abandonment of both the *Zippo* sliding scale approach and the *Calder v. Jones*' effects and targeting approach.[90] She further supports the adoption of the "Trusted Systems" approach that is based on the notion of consensual social responsibility.[91] This entails adopting a new approach that is grounded in consensual social responsibility.[92] For example, a content service provider purposefully avails itself of a forum when it chooses to give access to its content to a critical mass of citizens within a particular forum. Resultantly, this creates a social responsibility that requires that particular provider to maintain the jurisdiction's stability of its "'trusted systems' of economic and information exchange."[93] In such a situation, the content service provider has submitted to the personal jurisdiction of the forum.[94]

However, a significant limitation of Matwyshyn's theory is that its application is confined to the resolution of intentional torts and infringement of intellectual property, making it an unlikely solution for the issue of internet jurisdiction.

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[86] *Id.* at 494. *See also* A. Michael Froomkin, *The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 OR. L. REV. 49 (1996).

[87] *See* Matwyshyn, *supra* note 1, at 493.

[88] *Id.* at 540–42.

[89] *Id.* at 509.

[90] *Id.* at 496–97.

[91] *Id.* at 531–32.

[92] *Id.* at 535.

[93] Matwyshyn, *supra* note 1, at 530.

[94] *Id.* at 529–31. *See also* FITZGERALD ET AL., *supra* note 12, at 79–80.

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Therefore, the adoption of a trusted systems model would seem to add another layer of complexity to an already complicated set of jurisdiction rules.[95]

III. ASSERTING JURISDICTION ON THE BASIS THAT THE INTERNET IS A SEPARATE INTERNATIONAL SPACE

In response to the complex issues raised by private international law, some scholars have suggested that the best solution to the problem is to view the internet as a separate international space that extends beyond the jurisdiction of any individual nation.[96]

Johnson and Post are leading cyber-libertarians who have suggested that the internet should be viewed as a separate space.[97] They suggest that "the line that separates online transactions from our dealings in the real word is just as distinct as the physical boundaries between our territorial governments—perhaps more so."[98] They argue that any regulation of such a separate space would be in the form of self-regulation.[99] These views of Johnson and Post echo the early utopian visions of the internet as a free place. As the internet's economic and commercial significance became more clear,, these early views were replaced by a more pragmatic discourse as to means of regulating internet transactions. It seems that the complexity of achieving effective and consistent regulation has prompted a return to this early view.[100]

The main obstacle to the adoption of such an approach is that of business efficacy and commercial certainty. Such an approach would render the internet a high-risk realm for commercial transactions and deter both businesses and consumers from engaging in internet commerce.[101] Svantesson notes that self-regulation may lower the public's trust in the use of the internet, and draws

[95] Matwyshyn, *supra* note 1, at 497–500.

[96] David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996). *See also* Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 CORNELL INT'L L.J. 435, 436–37 (2000); Dan Jerker B. Svantesson, *Borders On, or Border Around—The Future of the Internet*, 16 ALB. L.J. SCI. & TECH. 343, 345 (2006).

[97] Johnson & Post, *supra* note 96, at 1367.

[98] *Id.*

[99] *Id.* at 1367–69.

[100] *See generally* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) (Goldsmith's response to the view presented by Johnson and Post). *See also* David G. Post, *Against "Against Cyberanarchy,"* 17 BERKELEY TECH. L.J. 1365 (2002) (for Post's response).

[101] Svantesson, *supra* note 96, at 361.

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attention to the practical problems of achieving international agreement to make the internet a separate space.[102]

Additionally, due to technological evolution, the process of delineating activities in the real world and the internet space has become more challenging. The convergence of technological, social, and economic realms led to the bundling of cable, telephone and internet services, as well as the creation of "smart" home appliances and "wired" houses.[103] In such a landscape, Svantesson notes that getting a beer out of a networked fridge may involve crossing the line into cyberspace![104]

A. A Theory of International Spaces

Like Johnson and Post, Menthe believes that cyberspace should be treated as a separate space.[105] However, Menthe advocates that this separate realm should be governed by the laws of public international law and presents a "Theory of International Spaces."[106] Menthe suggests that that there are currently three distinct international spaces under public international law—Antarctica, international space, and the high seas—and argues that cyberspace should be treated as a fourth international space.[107]

Territoriality and nationality are two of the established principles which can be grounds for asserting jurisdiction within public international law.[108] The territoriality principle presumes the "absoluteness of boundaries and sovereign power within them."[109]

As the territoriality principle is firmly linked to national boundaries, it may at first appear to be wholly unsuited to determining jurisdiction in internet content disputes. Internet content disputes typically occur transnationally without an

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[102] *Id.*

[103] *Id.* at 363.

[104] *Id.* (William Gibson first created the term "cyberspace" in the novel *Neuromancer* (WILLIAM GIBSON, NEUROMANCER (1984)).).

[105] Menthe, *supra* note 1.

[106] *Id.* at 70.

[107] *Id.*

[108] Timofeeva, *supra* note 80, at 201.

[109] *Id.* On the basis of the territorial principle, a state may assert jurisdiction over persons, property, acts and events occurring within its prescribed territory. The subjective territorial principle asserts jurisdiction on the basis that the offending activity occurs within the territory. In comparison, the objective territorial principle asserts jurisdiction on the basis that the offending activity has its primary effect within the relevant territory even though the activity itself has its origins outside the territory.

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obvious direct connection to a particular territory.[110] However, as Timofeeva notes, the territoriality principle is useful in controlling internet content issues as it enables a State to assert jurisdiction over a variety of parties such as, online business and internet service providers, and financial intermediaries, who are residents of the State and are involved in providing access to the internet or hosting internet content.[111] Additionally, Timofeeva notes that territorial jurisdiction may apply when a State exercises jurisdiction in a domain name dispute.[112]

Jurisdiction can also be asserted on the basis of the nationality principle which states that a State may assert jurisdiction on the basis of the nationality of the actor or victim.[113] Such an assertion of jurisdiction is irrespective of the geographic location of where the act was committed.[114] The nationality principle appears to be eminently suited to the seamless, geographically neutral flow of content over the internet.[115]

Menthe notes that the theory of international spaces only accepts the nationality principle as the basis of jurisdiction in outer space, Antarctica and the high seas.[116] He notes that in outer space, the relevant category is the nationality of the registry of the vessel.[117] In Antarctica, the relevant category is the nationality of the governing base, and on the high seas, the relevant category is the nationality of the vessel.[118] Similarly, he notes that in cyberspace, nationality should be the determinative factor for asserting jurisdiction.[119] Menthe concludes that "[s]uch a rule will provide predictability and international uniformity. It strikes a balance

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[110] *Id.* at 202.

[111] *Id.*

[112] *Id.* at 203. *See also* Stefan Bechtold, *Governance in Namespaces*, 36 LOY. L.A. L. REV. 1239, 1259 (2003).

[113] Timofeeva, *supra* note 80, at 203.

[114] *Id.* at 203.

[115] The protective principle forms the basis for asserting jurisdiction over parties for acts committed outside the state that affect the security of the state. Universal jurisdiction is available in limited circumstances where acts are sufficiently heinous to violate the laws of all States. The assertion of universal jurisdiction has to date been largely confined to case involving war crimes and acts of genocide and terrorism. *See* IAN BROWNLIE, PRINCIPLES OF PUBL. INT'L LAW 307 (5th ed. 1998). *See also* Timofeeva, *supra* note 80, at 215.

[116] Menthe, *supra* note 1, at 83.

[117] *Id.*

[118] *Id.*

[119] *Id.*

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between anarchy and universal liability, and it works. Recognition of cyberspace as an international space is more than overdue. It is becoming imperative."[120]

Svantesson suggests that Menthe underestimates the relevance of the fact that cyberspace is not a physical realm such as outer space, Antarctica and the high seas.[121] So, even if Menthe's initial premise that cyberspace should be regulated as a separate space, its non-physical nature would justify the application of the territorial principle.[122] Additionally, the protective principle could be evoked in circumstances where the internet threatens the security of the State, such as where a state is exposed to a computer virus.[123] Svantesson concludes that the fundamentally non-physical nature of the internet precludes comparison between physical international spaces and cyberspace.[124]

Therefore, while it seems that jurisdiction in internet disputes cannot be exclusively asserted on the basis of cyberspace being a fourth international space justifying the application of the nationality principle of jurisdiction, Menthe's analysis serves to draw attention to the value of public international law in providing a solution to the problem of internet jurisdiction. Specifically, Menthe's conclusion as to the inadequacy of present private international law is compelling. Menthe argues that unless cyberspace is viewed as a separate international space:

> [C]yberspace takes all the traditional principles of conflicts-of-law and reduces them to absurdity. Unlike traditional jurisdictional problems that might involve two, three, or more conflicting jurisdictions, the set of laws which could apply to a simple homespun webpage is *all of them*.[125]

Few would dispute the truth in the above statement, and it prompts a consideration of the wider role of public international law in achieving unification in the approach to internet jurisdiction. This will be the subject of the final section of the article.

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[120] *Id.* at 102.

[121] Svantesson, *supra* note 96, at 365.

[122] *Id.* at 366.

[123] *Id.*

[124] *Id.*

[125] Menthe, *supra* note 1, at 70–71.

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IV. THE ROLE OF TECHNOLOGICAL TOOLS

When faced with the challenges of determining jurisdiction in internet disputes, scholars are increasingly turning to technological tools and systems to precisely delineate the reach of websites so that it is easier to determine jurisdiction in internet disputes.[126] The argument presented is that the internet is already regulated by a combination of law and technology, and that developing further technological structures to further regulate internet access is merely an extension of the present reality.[127]

A. The Imposition of Technological Boundaries

The role of technology in the context of the jurisdiction question is examined by Reidenberg[128] and Svantesson in their leading articles on the use of technology to regulate the internet.[129] In an early article, Reidenberg noted that the network design, standards and system configurations can impose rules on internet participants.[130] In a subsequent article, he noted that technology empowers sovereign states with very portent electronic tools to enforce their laws.[131] For example, technologies such as filters and packet interceptors, and tools such as viruses and worms, can enforce laws and provide sanctions for malfeasance.[132]

It is suggested that such electronic tools can create "electronic boundaries" that prevent wrongdoers from entering a State's "electronic zone."[133] Reidenberg acknowledges that the requirements of a democratic society dictate that a carefully prescribed criteria must be adopted to govern such instruments.[134] However, if such

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[126] See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999), for a general discussion of the relationship between regulation and technology. Lessig considers the values to be kept in mind when working through the conflict between regulations of law, and regulations of code: "To the extent that the law uses code, but non-transparently, we have reason to question the technique of law. And to the extent that law can achieve its end through code, we have reasons to require that the code be narrowly tailored to serve only legitimate state ends." *Id.* at 548. *See also* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic Books 1999).

[127] Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998) [hereinafter *Lex Informatica*].

[128] *Id.*

[129] Svantesson, *supra* note 96, at 357–58.

[130] *Lex Informatica*, *supra* note 127, at 555.

[131] Reidenberg, *supra* note 3, at 1963–64.

[132] *Id.* at 1963.

[133] *Id.* at 1963–64.

[134] *Id.* at 1964.

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technological enforcement instruments are framed in a manner analogous to the use of traditional civil procedure, Reidenberg argues that it will be feasible to create jurisdictional zones that are established through architectural design: "These zones will consequently contain geographical indicators because wireless access, the new Internet addressing protocol known as Ipv6, and commercial pressure all require geographic localization. These zones then form a focus for the establishment by states of the rule of law."[135]

In determining whether and how to use technology to enforce the law, it is necessary for the State to balance the magnitude and urgency of the threat to public order against the effectiveness of the technological tool considered for deployment.[136] If the tool is not likely to be effective against the violation of the rule, Reidenberg argues that collateral implications may be more significant than any justificatory use.[137] Finally, the State must consider the ultimate enforcement objective, whether it is the cessation of the offending activity or the compelling of a violator to pay monetary damages.[138] Reidenberg concludes that the design of such zones can give internet participants the freedom of choice to select whether or not their activities give rise to contacts empowering states with personal jurisdiction and the application of local laws.[139] Finally, Reidenberg endorses technological innovation as a means of creating products and services to facilitate such informed participation choices by internet users.[140] Svantesson notes that they are likely to be or already perhaps are already sufficiently accurate for "legal purposes."[141]

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[135] *Id.* at 1971.

[136] *Id.* at 1964–65.

[137] Reidenberg, *supra* note 3, at 1964.

[138] *Id.* at 1964–65.

[139] *Id.* at 1973.

[140] *Id.* at 1971.

[141] Svantesson, *supra* note 1, at 110. Svantesson outlines the potential operation of geo-locating technologies by saying:

> As the access-seeker enters the appropriate Uniform Resource Locator ("URL") into his or her browser, or clicks on the appropriate hyperlink, an access-request is sent to the server operating the requested Web site. As the server receives the access-request, it, in turn, sends a location request (e.g. forwards the access-seeker's Internet Protocol ("IP")) address) to the provider of the geo-location service. The provider of the geo-location service has gathered information about the IP addresses in use, and built up a database of geo-location on the information in this database, the provider of the geo-location service gives the Web site server an educated guess as to the

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It can be argued however, that the imposition of technological borders on the internet would undermine its universal reach and ultimately, create more problems than it can solve. The central problem with the imposition of technological boundaries on the internet is that it would radically reduce online business and global exchanges, and hence, it will likely to be opposed by both the public and the industry. It would undermine the most compelling characteristics of internet transactions, global reach, ubiquity and ease of access.[142]

V. TOWARDS AN INTERNATIONAL CONVENTION ON INTERNET JURISDICTION

After analyzing various solutions that have been presented for the identification of the proper basis of determining jurisdiction in internet disputes, it is suggested that the formulation and reliance of international conventions is the most effective strategy.[143] There is considerable support for the view that international agreement on jurisdiction in internet disputes is the best means of enhancing clarity and consistency in this area.[144]

A. Hague Convention on Choice of Court Agreements

The present international agreements governing international trade and commerce do not expressly address the issue of determining jurisdiction in internet disputes. The Hague Convention on Choice of Court Agreements ("HCCA"), signed in June 2005 by Member States of the Hague Conference on Private International Law, applies in international cases to exclusive choice of court agreements on civil and commercial matters.[145] Article 5 states that "[t]he court or courts of a Contracting State designated in an exclusive choice of court agreement

> access-seeker's location. Armed with this information, the Web server can provide the access-seeker with the information deemed suitable, or if desirable, deny access to the requested content.

[142] Svantesson, *supra* note 96, at 357–58.

[143] *See* Rene David, *The Methods of Unification*, 16 AM. J. COMP. L. 13, 24 (1968). *See also* Johnston & Powles, *supra* note 2, at 14–20 (2004). *See also* Wautelet, *supra* note 2.

[144] Benedicte Fauvarque-Cosson, *Comparative Law or Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple*, 49 AM. J. COMP. L. 407, 415 (2001). *See generally* Andrew Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L. REV. 373, 373 (1995).

[145] Hague Convention on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

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shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State."[146]

While the HCCA is a valuable development, it is still limited by a variety of critical factors. The most obvious limitation is that it only applies where there is a formal exclusive choice agreement.[147] Article 1(2) defines an exclusive choice of court agreement to be one which designates the courts of a Member State or States to the Hague Convention to hold the exclusive jurisdiction for adjudicating disputes.[148] Furthermore, the agreement must either be written or be available in a form which is accessible for subsequent reference.[149] Additionally, the HCAA only applies to civil and commercial matters, leaving whole realms of internet disputes such as content regulation and internet crime outside its ambit.[150] Finally, because it does not apply to tortuous disputes, it will not assist in determining jurisdiction in internet defamation disputes.[151]

It is interesting to note that the initial draft of the HCCA was much wider in scope. The present 2005 Agreement is the result of a lengthy discourse that commenced in 1993 as the "Hague Project on International Jurisdiction and Enforcement in Civil and Commercial Matters."[152] At the Seventeenth Session of the Hague Conference on Private International Law in May 1993, "[t]he Working Group proposed a [C]onvention of a mixed type, as suggested by the American scholar von Mehren."[153] The proposed Convention would be mixed because it would include "uniform rules for direct jurisdiction *and* rules for recognition and enforcement of judgments."[154] No consensus was reached on the 1993 draft proposal so it was determined that a "bottom-up" approach would be preferable to the previously employed "top-down" approach.[155]

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[146] *Id.* at art. 5.

[147] *Id.* at art. 1(1).

[148] *Id.* at art. 1(2).

[149] *Id.* at art. 3.

[150] *Id.* at art. 1(1).

[151] *Id.* at art. 2.

[152] VAN LITH, *supra* note 5, at 14.

[153] *Id.* at 15 (discussing the contribution made by Arthur von Mehren's *Recognition Convention Study* in Final Report to the U.S. Department of State (1992)).

[154] *Id.* at 15.

[155] *Id.* at 15–16.

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Subsequently in April 2002, the Hague Conference on Private International Law identified a list of "hard-core issues" to be addressed including choice of court clauses, defendant's domicile, submissions, branches, trusts, physical torts and counter-claims.[156] No agreement was reached on the 2002 agenda either, so the project was narrowed to address only choice of court agreements.[157] This resulted in the successful June 2005 Hague Convention on Choice of Court Agreements.[158] The time taken to deliberate and achieve consensus on the narrow jurisdictional issue of choice of court agreements does not augur well for the design and implementation of a more comprehensive international convention on the determination of internet jurisdiction.[159]

While the 1993 Hague draft proposal did not succeed, the 2000 report entitled "Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet" provides useful guidelines on the issue.[160] The project proposes six jurisdictional default rules that should form the basis of any solution to a jurisdictional dispute arising from an e-commerce transaction.[161] The first rule stipulates that every party on the internet is subject to a personal and prescriptive jurisdiction.[162] The second rule states that where a web site is passive and does not target any particular State, personal or prescriptive jurisdiction should not be assigned.[163] Under the third rule, a court may assert jurisdiction over a sponsor in a State (such as a website content provider) in the absence of an enforceable contractual choice of law and forum provision if the following two conditions are met: (1) The sponsor is a habitual resident or has its principal place of business in the State; and (2) There is evidence to suggest that:

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[156] *Id.* at 16.

[157] *Id.*

[158] VAN LITH, *supra* note 5, at 16.

[159] *See generally* FAUSTO POCAR, THE HAGUE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND JUDGMENTS: PROCEEDINGS OF THE ROUND TABLE 77 (2005); P.E. Nygh, *Declining Jurisdiction Under the Brussels I Regulation 2001 and the Preliminary Draft Hague Judgments Convention: A Comparison*, *in* REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW—ESSAYS IN HONOUR OF SIR PETER NORTH 303, 308 (James Fawcett ed., 2002). *See also* Kurt H. Nadelmann, *The International Unification of Law: Uniform Legislation Versus International Conventions Revisited*, 16 AM. J. COMP. L. 28–50 (1968).

[160] *See generally* Richard Paul Salis, *Achieving Legal and Business Order in Cyberspace*, 7 LEX ELECTRONICA (2001), *available at* http://www.lex-electronica.org/articles/v7-1/Salis.htm (summarizing American Bar Association, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801 (2000)).

[161] *Id.* at (1)(A)(5)–(9).

[162] *Id.* at (1)(A)(5).

[163] *Id.*

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(a) the sponsor has targeted the State and the claim arises out of a transaction involving website consent; or (b) the website is interactive and the sponsor could be fairly considered to have knowingly engaged in business transactions in the State.[164] Interestingly, under the fourth rule, a sponsor's installation of disclosures, disclaimers, software and other technical blocking strategies seeking to prevent users from accessing the site or service are considered measures of good faith, which are capable of protecting the sponsor from being subjected to an end user's jurisdiction.[165]

The proposed rules have a variety of merits. First, as the applications of the proposed rules are not predicated on a choice of court arrangement, they can be applied more broadly than the Hague Convention. Moreover, the proposed rules are also wider in application than the targeting and effects principle for determining internet jurisdiction. This is because the Report goes on to propose that jurisdiction should not be enforced merely because it is permissible under the rules of international law. The sixth default jurisdiction rule proposes other factors that should be considered in determining internet jurisdiction.[166] Such factors include the "risk of legal conflicts as a result of the application of state laws, the potential hindrance of e-commerce trading, the gravity of the regulatory or tax benefits to be gained, and the interests of justice or convenience of the parties."[167]

The negative aspect of the rules is that they do not provide any greater certainty and predictability on the issue of determining jurisdiction in internet disputes than the purposeful availment test. The uncertainty that exists in case law as to what constitutes targeting seems to apply equally to the application of default jurisdiction rules. However, in a context in which the *Zippo* test still continues to be used in the courts, the rules form a clear selection of the targeting approach when applying the purposeful availment basis for asserting jurisdiction in internet disputes. Resultantly, it provides greater certainty to the issue of jurisdiction than what presently exists the law.

B. Towards Unification of Jurisdiction Rules

A compelling case can be made for further unification of jurisdiction at an international level. The primary benefit for unification of international jurisdictional rules is that the "international community would benefit from

[164] *Id.* at (1)(A)(6).

[165] *Id.*

[166] Salis, *supra* note 160, at (1)(A)(9).

[167] *Id.*

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jurisdictional certainty and predictability in cross-border activities and transnational commercial contracts."[168] Van Lith further suggests that:

> [j]urisdictional certainty through unification of international jurisdiction can be achieved by finding uniform jurisdiction rules suitable for international (contractual) disputes. This entails eliminating exorbitant jurisdiction rules, avoiding multiple forums and finding acceptable and feasible connecting factors for a uniform jurisdictional system.[169]

It is argued that the present uncertainty generates a variety of negative and positive conflicts. Positive jurisdictional conflicts occur when the presence of multiple competent forums results in forum shopping.[170] In comparison, negative jurisdictional conflicts arise when disparate national jurisdiction rules lead to an absence of a forum, creating a jurisdictional vacuum which leaves the parties with no avenue of resort.

Historically, a significant obstacle to the development of an international agreement in this area is that internet disputes simultaneously involve a variety of disparate issues that are traditionally dealt with under differing topics of law.[171] For example, a single internet content dispute can hypothetically involve issues of commerce, free speech, violations of privacy, and tortious and criminal liability. Traditionally, all such legal issues have been adjudicated separately but internet content disputes weave all of these issues together, resulting in a difficult barrier to international harmonization.

A second significant obstacle to the acceptance of rules of international jurisdiction is that such rules are commonly viewed as constituting an unreasonable interference with state sovereignty.[172] By unifying the rules for international jurisdiction, a State's independence and autonomy is undermined as it is forced to

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[168] *See* VAN LITH, *supra* note 5, at 19.

[169] *Id.* at 20.

[170] *See generally* Ferrari, *supra* note 7 (explaining the effects of the choice of forum clause and absence of the choice of forum clause in foreign jurisdictions, namely the difference between default choice of forum clauses present in various European conventions).

[171] *See* Timofeeva, *supra* note 80, at 199.

[172] *Id.* at 217.

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either accept or reject jurisdiction in a particular case.[173] In many cases, an international agreement would compel a State to accept or refuse jurisdiction pursuant to the agreement.[174] Moreover, the failure of the 1993 proposal of the Hague Choice of Court Agreements suggests that it is unlikely that a unification consensus can be achieved. Commentators have also criticized the move to unification, Fauvarque-Cosson noted that the unification movement appears to be "in crisis."[175] Similarly, van Lith notes that the *Proceedings of the Round Table* record the comments of Pierre Mayer that the "metaphysical interest or this romantic idea behind unification" of the "spectacle of uniformity" in a globalized world, is misplaced.[176] It is suggested that "trying to achieve uniformity brings with it serious drawbacks."[177] It has been further suggested that the world is not ready for an international solution. Timofeeva suggested that a "realistic goal" would be to harmonize existing and developing jurisdiction rules in internet disputes at a national level.[178] Such an approach would entail generalizing such harmonized rules into "customs of international law" and establishing "common principles not from below rather than 'above.'"[179]

Despite these acknowledged challenges, what emerges from the various proposed solutions is that it is in the interests of *both* individual States and the international community as a whole to seek unification at an international level through the formulation of international conventions and principles.[180] While the experience with the formulation of the HCCA is not encouraging, it is suggested that the world today is more cognisant of the need to achieve harmonization of jurisdiction rules in order to support internet commerce than it was in 2005. Further, it is submitted that in harmonizing and formulating international jurisdiction rules, it is critical to integrate the objective of technology-neutrality. This objective will enable the rules of determining jurisdiction to be based on the substantive characteristics of the internet relationship and transaction instead of the technical characteristics of the website, which being typically fluid and evolving, do not provide a solid basis for the design of jurisdiction rules.

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[173] VAN LITH, *supra* note 5, at 21.

[174] Salis, *supra* note 160, at 32.

[175] Fauvarque-Cosson, *supra* note 144, at 415.

[176] VAN LITH, *supra* note 5 n.99.

[177] *Id. See also* Matthew Fagin, *Regulating Speech Across Borders: Technology vs. Values*, 9 MICH. TELECOMM. & TECH. L. REV. 395–455 (2003).

[178] Timofeeva, *supra* note 80, at 224.

[179] *Id.* at 224.

[180] *See generally* Fagin, *supra* note 177.

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VI. CONCLUSION

The reach, popularity and immediacy of the internet make it a very different vessel of communication and publication that must be addressed by private international law. While it has always been challenging to apply jurisdictional principles to trans-border disputes,[181] it is clear that the internet has heightened this challenge to a qualitatively new level.[182] In such a landscape of technological evolution, it is necessary to design new fine-grain and technologically-neutral principles for determining internet jurisdiction.[183] The proposed solutions range from strengthening existing jurisdiction rules, to modifying, extending and developing present jurisdiction rules to the creation of a whole new language of jurisdictional basis for the determination of internet disputes.[184]

It can be seen that the judicial and academic consideration of the vexed issue of internet jurisdiction has sought to engage with the realities of the internet landscape and sought to address a variety of issues such as the nature and extent of the influence asserted, the level of interactivity and the nature and foreseeability of the damage caused. However, despite such endeavours, there remains a high level of divergence in the proposed reforms and refinements. The central issue to be addressed is whether internet jurisdiction should be developed to support pervasive, far-reaching, extraterritorial regulation or whether it should be developed to consciously limit the exercise of such jurisdiction.[185]

Once the importance of achieving international unification of jurisdiction rules is accepted, the international law is both sufficiently flexible and realistic to address the challenge of unification. As Fagin notes, the belief that international law can meet this challenge of achieving unification can perhaps be derived from the similarities between the international legal framework and the Internet itself:

> Like the Internet, international law is spun from the convergence of shared norms and rules—technical standards that help it operate.[186] Like international law, the Internet is itself driven by the benefits of and beset

[181] Timofeeva, *supra* note 80, at 201.

[182] *Id.*

[183] Fagin, *supra* note 177, at 406.

[184] Timofeeva, *supra* note 80, at 201.

[185] *Id.* at 200.

[186] Fagin, *supra* note 177, at 455.

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> by the challenges of a global coexistence.[187] While a new medium, the internet encourages the application of old strategies and demands of us the implementation of the underlying commitments and aspirations of the international legal framework—if we desire to maintain the benefits of interdependence we must work as one to forge workable solutions in support of our common goals.[188]

Cassese famously noted that international law is a "realistic" legal system.[189] "It takes into account existing power relationships and endeavours to translate them into legal rules."[190] Therefore, the unique and flexible features of the internet which form a challenge to the application of traditional principles of private international laws also contain the very seeds of the solution.

[187] *Id.*

[188] *Id.*

[189] ANTONIO CASSESE, INTERNATIONAL LAW 12 (2d ed. 2005).

[190] *Id.* at 12–13.

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