

CHAPTER 5: PROBLEM OF JURISDICTION OF COURTS IN INTERNET RELATED DISPUTES

E-commerce has become the buzzword of the world. The zest of doing global transactions through Internet has become tempting. Ironically, because a page on the World Wide Web can reach web surfers in every corner of the world, there arises the issue where exactly a person who has a cause of action, based upon a web transaction, may sue. The outlook that placing a page on the Internet can subject the web publisher to a law suit anywhere on the earth can certainly have a chilling effect on perhaps the most powerful medium of communication. It is found that emergence of the Internet will make the traditional rules of law obsolete.

The unique characteristics of the Internet such as its decentralised nature, disregard of territorial based boundaries, low cost, and fastest mode of communication may easily give rise to issues that involve parties from more than one jurisdiction ⁽¹⁾. Messages can be transmitted from one physical location to any other location without degradation, and without any physical cues of barriers that might otherwise keep certain geographically remote places and people separate from one another. The net enables the transactions between the people who do not know, and in many cases cannot know each other.

All this creates a new forum of law- a law of cyberspace – based on private contracting on a global basis and enforced by a combination of the system operators ultimate right to banish unruly users and the users ultimate right to migrate to other on-line service providers ⁽²⁾.

The effectiveness of any judicial machinery rests on rules and regulations. A court must have jurisdiction, in order to hear a case and render an effective judgement.

In general term jurisdiction refers to – “A government’s general power to exercise authority over all persons and things within its territory”.

(I). PRINCIPLES OF JURISDICTION FROM THE US PERSPECTIVE

In Zippo Mfg. Co. V. Zippo Dot Com. the court said....

Enter the Internet, a global " 'super network' of over 15,000 computer networks used by over 30 million individuals, corporations, organizations, and educational institutions worldwide." . . . "In recent years, businesses have begun to use the Internet to provide information and products to consumers and other businesses." The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages.

(A) History and Development of basis of Jurisdiction in the USA

Jurisdiction is defined as – “power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties” (Blacks Law Dictionary 6th ed. 1990)

It is the power of a court to hear and determine a case. Without jurisdiction, a court’s judgement is ineffective and impotent.

Advances in the technology have made the carrying of business at both national level and international level very easy. Among all the different modes of communication that mankind has developed, Internet is the latest one. It is easier to use and cheaper in cost. One can send and receive messages in no time from any corner of the globe. These attributes of Internet have ignored the geographical boundaries and distance. Now, whenever the transactions take

place at international level there are very fair chances that problems of conflict of law may arise. The reason is that with the change of country, the law also changes. Moreover, nations also have differences of opinion because their culture, systems and moral values also differ. The fact that the page on the World Wide Web (WWW) can be exercised by anyone and from anywhere can give rise to many legal issues.

According to the U.S. Constitution, the lawsuits can be brought either in a state or federal court. Irrespective of this general rule, the important point is that, the state in which the court is located must have a long-arm statute which will allow the court to assert jurisdiction over non-residents. Although these statutes will differ from state to state, the *Fifth and Fourteenth Amendments* of the U.S. Constitution ⁽³⁾ lay down the outer limits for the courts while asserting jurisdiction. This means that before asserting jurisdiction over the non-resident defendant the court has to comply with the provisions laid down in Fifth and Fourteenth Amendments Due Process Clause.

In the United States the law of jurisdiction evolved from three jurisdictional concepts. They are ⁽⁴⁾:

- in personam (personal jurisdiction)
- in rem
- prescriptive jurisdiction

- 1.) In personam/personal jurisdiction can be defined as the exercise of judicial authority over an individual/legal entity.
- 2.) In rem jurisdiction can be defined as the exercise of judicial authority over property, real/personal located in the state, which asserts its jurisdiction.
- 3.) Prescriptive jurisdiction is the exercise of state authority to regulate local conduct, transactions and activities.

Before moving further it is worth mentioning that the United States has not codified the law of jurisdiction. Due to this, courts (mainly supreme courts) have 'evolved' the concepts to measure the legitimate exercise of judicial power over the parties to the litigation ⁽⁵⁾.

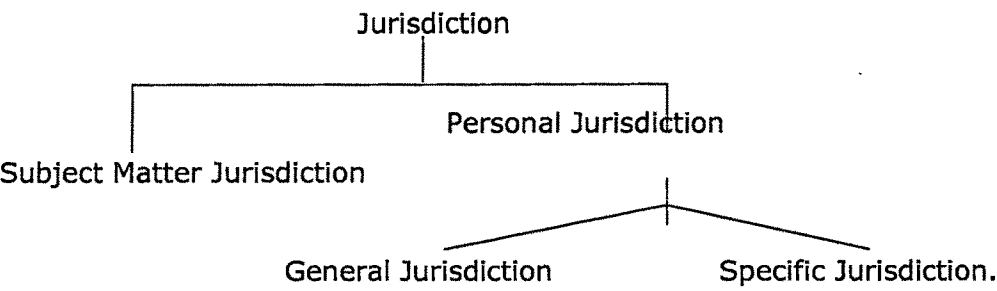
Under the U.S. law, the central standard for determining jurisdiction is '*minimum contacts*', and '*purposeful availment*', which means, whether foreign defendant is having sufficient contacts with the forum state so as to justify the courts exercise of power. This justification comes from the next subsidiary question, i.e. whether the exercise of jurisdiction over the foreign defendant is '*reasonable*' and does not violate the due process clause of fourteenth amendment of the U.S. Constitution. In view of above, it is necessary to study the history of the development of the American law of jurisdiction.

The overriding principle is that the area of law is mainly, unprincipled, because the terms that govern the jurisdiction in the U.S. such as '*contacts*', '*reasonableness*', and '*fairness*' are not capable of objective measurements. These terms, in fact reduce the law to what the judges say it will be in any given case based on metaphysical principles or subjective preferences.

From very early times, courts in the U.S. have tried to evolve different methods for determining which law would be applicable when there is conflict of law situation. However none of these has been considered to be the universally acceptable method. The very *First US Restatement*, laid down in the year 1934, mentioned some simple mechanical rules for choosing what law to apply in case of inter-jurisdictional litigation ⁽⁶⁾. In such cases the substance of the claim will determine the application of the rule. For e.g. in a wrong related to '*torts*' the first restatement provided that the law of the place of the wrong will be applicable. Thus the last event necessary to make a wrongdoer liable for the alleged tort would be considered.

Later on with the passing of time these rules were modified by the *Second Restatement* in the year 1971, whereby a rule was laid down, that when faced with a choice between jurisdictions, the courts should apply the law of the jurisdiction with the most significant relationship to the litigation ⁽⁷⁾. For e.g. in '*tort*' cases the second restatement will ask the courts to consider, the place of injury, domicile of the parties, etc.

(B). Kinds of Jurisdiction



Subject Matter Jurisdiction

It is the cause, the object, and the thing in dispute. The authority of a court to decide a particular type of case is called subject- matter jurisdiction and is set by the federal or the state Constitution, or by the state statutes of a state.

Personal Jurisdiction

Personal Jurisdiction is concerned with the power of the court to decide a case between the parties. For a court to exercise jurisdiction there must be a statutory or common-law source of jurisdiction, which does not surpass the limitations imposed by constitutional due process. Personal Jurisdiction may be: 1). General or 2). Specific

General Jurisdiction equates to ‘continuous and systematic contacts’ with the forum, whether or not the contacts are related to suit. It would allow the forum to assert jurisdiction for any cause of action. Specific Jurisdiction may arise from even a few contacts with the forum related to the suit. It would permit the forum to assert jurisdiction only to adjudicate a dispute to which the contacts are related ⁽⁸⁾.

(C). The Principles of Personal Jurisdiction

Now to understand how the courts are grappling with the exercise of personal jurisdiction over out-of-state defendant for his activities over the Internet, it is

worth discussing the evolution of personal jurisdiction in compliance with Due Process Clause of 14th Amendment and the states long-arm-statutes. (*Due process means, notice and an opportunity to be heard*). The Due Process Clause does not confer jurisdiction on the courts, but it lays down the outer limits of the permissible jurisdiction. It permits courts to exercise personal jurisdiction only over a defendant who has sufficient contacts with the forum such that it would reasonably anticipate being haled into court there. This means that before the court exercises its jurisdiction over an out-of-state defendant, it must comply Due Process Clause of 14th Amendment. Secondly the legislature of each state grants the power to its courts to exercise jurisdiction over out-of-state defendant through long-arm statute. Long-arm-statute got its colorful name because of its primary purpose to reach out of state and call non-resident defendants into the forum state to defend the lawsuit.

The traditional law of Personal Jurisdiction in the United States is reflected in the landmark decision of the US Supreme Court in **Pennoyer v. Neff 95 US 714 1877**. In the year 1877 Pennoyer laid down the fundamental principle that "...every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory and no state can exercise direct jurisdiction and authority over persons and property without its territory"⁽⁹⁾. Thus, by virtue of this decision states had exclusive jurisdiction over the person and property within its borders. A state had no jurisdiction over the person and property outside its borders. Due to this the laws of one state could not infringe the laws of another state because that other state is also a sovereign power.

During those days, if court wanted to assert personal jurisdiction over a person, it can only be done if he was physically present in the state. The court, in order to obtain 'in rem' jurisdiction over a non-resident owned property located within the state, must attach the property before the judgment is delivered and further by finding that the plaintiff had satisfied the requirements of the forum states formality of service of process (i.e. by publishing the notice of litigation). In those days the liability of the non-resident was very much limited to the value of the attached property. Thus, the state had no authority over persons and things that are physically located outside its territory. Not only this, the

defendant by virtue of 14th Amendment can claim that assertion of jurisdiction violated the Due Process Clause. This was an alternative ground provided by the 14th Amendment where by he can dispute the jurisdiction of foreign states. Pennoyer case curtailed the authority of the state to physical boundaries of the state. This mode of jurisdiction laid down clear rules and it worked well during an economic period where litigation often did not cross state boundaries ⁽¹⁰⁾.

However, off late during 18th and early 19th centuries, the federalist model of jurisdiction upon which Pennoyer was founded no longer reflected political and commercial reality. The expansion of the United States international commerce after the world wars and the increasing ease of travel across state lines created problems when states could not assert jurisdiction over entities that established connections with the state. The interstate movement of goods and persons compelled the states to provide a way for their citizens to sue non-residents in local courts. Unfortunately *Pennoyer* theory could not stand the test of time, as it had the effect of prohibiting the states from exercising personal jurisdiction over persons and things physically located outside its territorial limits. Due to this, and to keep pace with the changing needs of the society, the states started to enact long-arm-statutes ⁽¹¹⁾, which permitted the local courts to exercise personal jurisdiction over non-residents provided the exercise of jurisdiction did not violate the 14th Amendment of the U.S. Constitution. Now the test of jurisdiction was not the physical presence of property within the state, but rather the fluid test, which lay down, whether the exercise of jurisdiction outside the boundaries of the state offended the Due Process rights protected by 14th Amendment. Due to this, the jurisdictional test was reduced to the niceties of factual assertions. Thus, states now wanted to give its citizens an option to sue non-residents in local courts.

The impact if these changes could be seen in a landmark judgment of **Hess v. Pawloski 274 US 325 1927** in which the United State Supreme Court upheld a Massachusetts statute, deeming that non-residents using the roads of Massachusetts consented to be sued in that state ⁽¹²⁾.

The 18th and 19th century brought changes in commerce due to which the states could not assert jurisdiction over the entities that established connections with the state. The *Hess* decision accommodated the reality of the growing interstate movement of persons and goods and the social cost of motor vehicle accidents.

In the year 1945, the U.S. Supreme Court answered this problem in the historical judgment of **International Shoe v. Washington 326 US 1945** in which the Supreme Court undercut the first principle laid down in *Pennoyer* that the proper exercise of jurisdiction was limited to cases where the person was served with process while he was physically present in the forum state ⁽¹³⁾. The court held that a state may sue a non-resident foreign corporation provided the corporation has 'minimum contacts' with the forum state and provided that exercise of jurisdiction does not violate the 'principles of fair play and justice'. This case at least for legal persons, replaced the requirement of 'physical presence' with the requirement of 'regular and systematic activities' within the forum state. Corporations are legal fictions, and hence they lack physical presence as per the interpretation of the court in the *Pennoyer* case. A state court does not violate due process by exercising jurisdiction over a non-resident corporation that has significant business within the state though incorporated elsewhere. Thus this case permits the exercise of jurisdiction in light of the "virtual" presence of a defendant within a state ⁽¹⁴⁾.

International Shoe is important in two aspects. It initiated the principle of minimum contacts in the Supreme Court and it analyzed the distinction between specific and general jurisdiction. Historically, personal jurisdiction could only satisfy Due Process if the foreign defendant was present within the jurisdiction or consented to jurisdiction. The Supreme Court departed from its previous decision by stating that, even if defendant is not physically present within the state at the time when wrongful event took place, the suit can be successfully maintained provided, there must be certain minimum contacts by the defendant with the forum state so the traditional principles of fair play and substantial justice are not violated. This minimum level of contacts (i.e. sufficient enough not to offend "traditional notions of fair play and substantial justice") will very much depend upon the level and severity of contacts with the

forum. With the passage of time this test has been modified to include even *individuals* and not just corporations (*Hanson v. Denckla* 357 US 235 1958). This case demonstrates how the US courts keep pace with the changing technological development.

Subsequently in the year 1977, in a case of **Shaffer V. Heitner 433 US 1977** the U.S. Supreme Court undercut the second principle laid down in *Pennoyer*. This case deviated with the distinction between the personal and in rem jurisdiction and made an attempt to unify the law of jurisdiction by using the 'minimum contacts' standard in all cases where non-residents contested the exercise of jurisdiction. Hence, location of the property alone in the forum state did not satisfy the 'minimum contact' test. Rather, the non-resident property has to bear a relationship to the lawsuit. Thus the U.S. Supreme Court by this case cleared the mist that was gathered around 'in rem' jurisdiction and personal jurisdiction by making it clear that there must be certain relationship between non-residents property and lawsuit ⁽¹⁵⁾.

However in the year 1980, the Supreme Court in its landmark judgment of **World-Wide Volkswagen V. Woodson 444 US 1980** limited the application of the 'minimum contacts' test. In that case, a New York Volkswagen dealer sold a car to New York residents. The New York couple relocated to Oklahoma where they met with an automobile accident that injured the wife and child. The purchaser filed a suit in Oklahoma under its long-arm-statute claiming defective automobile design. The Supreme Court held that the defendant corporation did not have minimum contacts with the state of Oklahoma because they limited their sales, advertisement and business within the New York only. The sole fact that the product sold was readily movable in commerce did not subject the defendants to the jurisdictions of courts outside the area of where they conducted business. The court held that, foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. This does not mean that foreseeability is wholly irrelevant, but the foreseeability that is critical to Due Process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the Forum State are such that he

should reasonably anticipate being haled into court there ⁽¹⁵⁾. This case draws an important line to limit the breadth of 'minimum contacts' test and stops its general language from covering any non-resident defendant.

KINDS OF PERSONAL JURISDICTION:

There are two kinds of personal jurisdiction:

- 1). General, and
- 2). Specific

Principles Of General Jurisdiction.

It permits a court to exercise personal jurisdiction over a non-resident defendant regardless of whether the subject matter of the case is related to the defendant's connection with the forum state ⁽¹⁶⁾. General jurisdiction arises when the defendant engages in 'continuous and systematic' contacts with the forum state in which case the plaintiff can sue the defendant in the forum state even though the alleged activities are not in anyway related to the defendants activity in the forum state. Thus according to general jurisdiction principle the defendant must have continuous and systematic contact with the forum state. In absence of this the court cannot assert jurisdiction over defendant.

In *International Shoe*, 326 U.S. at 318. the court said:

...General personal jurisdiction, which enables a court to hear cases unrelated to the defendant's forum activities, exists if the defendant has "substantial" or "continuous and systematic" contacts with the forum state This is a fairly high standard in practice.

In the year 1984, the U.S. Supreme Court in landmark case of **Helicopters Nacionales de Columbia V. Hall 466 US 1984** contracted the concept of 'minimum contacts' and held that the state of Texas did not have jurisdiction over a Colombian corporation becoze the contacts between the State of Texas and foreign corporation were *inadequate*. The Supreme Court held that as the litigation did not arise out of Helicols activities in Texas, there were no

systematic and continuous contacts with the Texas, and therefore jurisdiction cannot be asserted.

Principles Of Specific Jurisdiction.

Specific Jurisdiction arises when the relationship between the defendant and the cause of action falls within the minimum contacts analysis as laid down in *International Shoe* test ⁽¹⁷⁾. As per the concept of '*minimum contacts*', certain contacts are necessary between the forum state and the activities of the defendant with respect to which the action is initiated. The jurisdiction of the forum state would arise even though the contacts of defendant are minimum. The only requirement is that, they must be substantial and further the defendant ought have anticipated being sued there.

Thus, where the defendant is not having continuous and systematic contacts with the forum state sufficient to subject him to general jurisdiction, then the following three-part test is applied to determine whether the defendant has "minimum contacts" with the forum:

- (1) The nonresident defendant must have purposefully directed his activities with the forum/ resident thereof; or must have performed some act by which he purposefully avails himself of the privilege of conducting activities in the forum, and thereby invoking the benefits and protections of its laws;
- (2) the claim must arise out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

1. Purposeful direction.

Accordingly, when a defendant targets a particular forum, a he may be called to answer his or her actions in that forum. A good example, to that is in a landmark case of **Calder v. Jones, 465 U.S. 783 (1984)** ⁽¹⁸⁾ wherein the

Supreme Court addressed the '*effects principle*'. In this case the court asserted its jurisdiction on the principle that when the defendant knew that her action would be injurious to the plaintiff, then she must reasonably anticipate being sued into the court where the injury occurred. The '*effects*' cases are of particular importance in cyberspace because conduct in cyberspace often has effects in various jurisdiction. Thus, the defendant, who had published a story concerning a forum resident, could reasonably foresee being haled into court in the forum. Another good '*effects*' case is *Keeton V. Hustler Magazine* 465 US 770 1984. This case dealt with allegedly libelous statements made in Hustler magazine. The plaintiff brought the action in New Hampshire, despite not being a resident of New Hampshire ⁽¹⁹⁾.

2. Purposeful availment

At the outset it is worth mentioning that the two most important legal principles on jurisdiction in the US are '*purposeful availment*' and '*minimum contacts*'. These two principles constitute the foundation of the law of jurisdiction in the US. These two principles have been applied individually as well as together depending upon the factual aspects of the case law. These two principles complement each other in substance and in their results on applicability, and are also very similar to the legal theory of "cause of action" as we have in India. These legal concepts are well settled and have stood the test of time. Simply stated, the concept of '*purposeful availment*' is that a person, by conducting activities within a state, enjoys certain benefits and privileges of that state and with these privileges, certain obligations also arise which bears nexus with the activities within the state which require the person to answer litigations in that state. A principal theory advanced to justify that a nonresident defendant has had sufficient minimum contacts with a forum relates to whether or not the defendant has purposefully availed himself or herself of the benefits of doing business in the jurisdiction. Parties who reach out beyond one state and "create continuing relationships and obligations with citizens of another state" are subject to regulations and sanctions in the other state for consequences of their activities.

The notions of 'fairness and substantial justice' as laid down in International Shoe case were more specifically addressed forty years later in a landmarks case of **Burger King V. Rudzewicz, 471 U.S. 462, 473 (1985)** ⁽²⁰⁾. In this case the court expanded on the factors it first considered in International Shoe to determine whether a finding of personal jurisdiction offends the principles of 'fairness and substantial justice'. The court made the clear difference between the general and specific jurisdiction. The court also coined a new term 'purposeful availment' to serve as the litmus test for specific jurisdiction. In this case the court specifically held that, if a defendant intentionally/purposefully directs his activities toward the forum, then it is "presumptively not unreasonable" to require the defendant to submit to the burdens of litigation in that forum. The Court further stated that an individual's contract with an out-of-state party *alone* could not establish the minimum contacts to support jurisdiction. The Court identified telephone calls and mail into the forum state in addition to other factors, such as choice of law provisions in a contract as a basis for exercising jurisdiction over the nonresident. The court further held that contacts that are simply random or fortuitous do not provide adequate basis for the exercise of personal jurisdiction.

3. Stream of commerce

In a related theme, in **Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)**, the Court adopted a foresee ability analysis. The foresee ability is not that the product might find its way to the forum, but that the defendant's conduct and connection with the forum are such that the defendant "should reasonably anticipate being sued into court there" ⁽²¹⁾. The Court went on to say that there were two reasons for the need for minimum contacts to satisfy due process concerns:

- 1). It protects the defendant against the burdens of litigating in a distant or inconvenient forum.
- 2). And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

In 1987, two years after the Burger King decision, the court handed down its decision in **Asahi Metal Industry Co. V. Superior Court 480 US 1987** the court gave a leading judgment to date on the '*stream of commerce doctrine*'⁽²²⁾. In this case the court refused to assert jurisdiction over a Japanese company whose defective tire valve was swept into the stream of commerce while making its way to California. The Court, relied heavily on the Burger Kings factors, *yet reached a different result*. It was held that, the mere foreseeability that the stream of commerce may carry a product into the forum was not sufficient to confer jurisdiction over the defendant without additional conduct on the part of the defendant. The court illustrated several types of "additional conduct of the defendant" like advertising or marketing a product, with specific reference to the forum state that might be suitable to allow a court to assert personal jurisdiction.

Thus, the court clarified that the act of introducing a product into the stream of commerce knowing that it might end up in any jurisdiction cannot support the assertion of personal jurisdiction over the products manufacturer. The court corrected a line of lower court cases, the progeny of World-Wide Volkswagen Corp. resting jurisdiction on the foreseeability that a product would end up in a particular jurisdiction. It went on to say – "to have minimum contacts, under specific jurisdiction Due Process analysis, a defendant needs to have done more than passive act. There is a need for additional conduct."

It is found by this decision, that though it is based on unusual facts, it protected product manufacturers, domestic and foreign, from risk of being subject to suit anywhere in the United States, simply by engaging in commerce. This decision will go a long way in protecting the so-called defendants who have sold their products in foreign states. Think it other way round; if the defendants were asked to answer in forum state just becoze they have sold their products via stream of commerce. It will affect the creditability of net.

4. Consent to jurisdiction.

As personal jurisdiction is a right that can be waived, parties can agree to submit to the jurisdiction of a particular court.

5. Fundamental fairness issues

Once it is found that the defendant has purposefully directed his or her activities to the forum state or has purposefully availed himself or herself of the privilege of conducting activities in the forum, the Court must consider fairness issues. In *Burger King*, the Court laid down five jurisdictional "fairness factors" to determine whether or not due process is satisfied. These factors are:

- (1) The inconvenience to the defendant of defending in the forum;
- (2) The forum state's interest in adjudicating the dispute;
- (3) The plaintiff's interest in obtaining convenient and effective relief;
- (4) The interstate judicial system's interest in efficient resolution of interstate conflicts; and
- (5) The shared interest of the states in furthering substantive social policies.

The fairness factor has become an even more important consideration than ever relating to exercise of jurisdiction over nonresident defendants. In *CoreVent*, the court held that even if a defendant's activities were sufficient to meet the purposeful availment test, they might not be sufficient to satisfy the fairness question.

Thus it can be seen that courts have expanded and contracted the contacts test over the period of time, perhaps to keep pace with changes in science and technology. The important question that arises is that whether this tests, can be made applicable to Internet?

(D). Nature of Internet

We believe in the geographical limitations while dealing with disputed case because concepts of jurisdiction are principally based on notions of physical presence within a jurisdiction. In such circumstances it is important to make sure that we are not forgetting the nature of Internet while dealing with personal jurisdiction issues.

In ***American Civil Liberties Union v. Reno***, 929 F. Supp. 824 (E.D. Pa. 1996), the parties agreed on a pretrial statement of facts describing the nature of the Internet. Among the facts that describe the nature of the Internet and thereby describe the difficulties in using traditional concepts of geographically based jurisdiction are these:

1. The Internet is a network of networks.
2. Some networks are "closed" networks, not linked to other computers or networks. But, many others are connected to other networks, which permits each computer in any network to communicate with computers on any other network in the system.
3. From its inception, the Internet was designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and having the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable.
4. Messages between computers on the Internet do not necessarily travel along the same path. The Internet uses "packet switching" communication protocols that allow individual messages to be subdivided into smaller "packets" which are sent independently to the destination and are then automatically reassembled by the receiving computer.

There are another three facts about the impact of Internet on traditional thinking about jurisdiction: -

The *first* is that the Internet is "indifferent to the physical location of the machines [between which information is routed], and there is no necessary connection between an Internet address and a physical jurisdiction." (Johnson and Post, "Law and Borders--The Rise of Law in Cyberspace," 48 *Stanford Law Review* 1367, 1371 (1996)). This means that the Internet permits interactions between persons who do not know each other's physical locations. Only a "location" consisting of the "net address" of the computer is important.

Second, and related to the first, the Internet often uses "caching," the process of copying information to servers so that future trips to a Web site will be less time consuming. In order to better manage packet traffic, Internet servers are often designed to store partial or complete duplicates of materials from frequently accessed sites. This process is essential to the speed of the operation of the Web. *The Internet user will never know the difference between the cached materials and the original.* The materials displayed on the user's machine will appear to come from the original source, whether they are actually transmitted from there or from a cache.

Third, one of the real values of the Internet is the hyperlink, which allows the connection of one Web site to another, regardless of location. While one Web site may be within the jurisdiction of a court, will its operator be liable, for example, for defamatory statements contained on a nonresident second site that is linked to the first? Or can the fact that the second site has been linked to the first cause a court to conclude that it has jurisdiction over the nonresident second site?

(E). Traditional Jurisdictional Concepts Applied To The Internet

For exercising jurisdiction over the non-resident defendant who is operating a web site, the court must find whether defendant is purposefully availing the privileges of doing the business in the forum jurisdiction. Further the court must also see that defendant has purposefully directed his activities to the forum jurisdiction. Doing this will entitle the court to assert jurisdiction over the defendant. However, it must be understood that Internet does not consider geographical limits, and these principles of jurisdiction, which are based on geographical limits doesn't, apply to Internet because of its specific nature. Under such circumstances, court has to face a novel problem on jurisdiction while it tries to apply traditional principles of jurisdiction.

The problem with this analysis is that given the nature of the Internet, it is not meaningful to say that an actor could structure his or her conduct to avoid a given jurisdiction. The structure of the Net is such that there is often no real

means of avoiding contact with a specific jurisdiction, except to stay off the Internet completely.

The main problem with the Internet is its specific features, whereby there are virtual contacts between the multiple parties who reside in different nook and corner of the globe. Now, in disputed cases if one party wants to sue another one then the question arises is, where can he sue?

Traditional requirements covers two areas:

First, the place where the defendant resided, and

Secondly, where the cause of action arises.

However when a person is on Net both this requirements cannot be meet with. Even very small transactions on the net can give rise to difficult jurisdictional question. For e.g. Mr. A from India downloads a document through net and makes payment through credit card. Now when he downloads the document he found that it was incomplete. He wants to sue the owner of the site. But the owner is in America. The site is located on the server in New Zealand. The question that arises is, where does the defendant reside? Such issues have cropped up in very short time period after the net has arrived. Due to this we find confusion in the courts decision also... In such circumstances it is worth examine the case laws relating to Internet jurisdiction. While discussing the myriad of case laws on the internet jurisdiction we can divide the list of the case laws under different headings, like "Advertising on the net", E-Mail Transactions"" "Active-Passive websites", Defamation ' etc. While discussing each of the case laws we will see how the courts in US wrestles to keep law growing according the changing technology.

(F). Legal Implications of Advertisements made on Internet

The United States Courts have shared different opinions on whether jurisdiction can be exercised solely on a non-resident defendant just becoze he has advertised on Internet? Do the court need something more like contractual relationship.etc. In some cases one can find that advertising on the net itself is

enough to create jurisdiction, while in other cases the court has asked for something more.

There are only a few cyber-jurisdiction cases, and they share contradictory opinions. They hold for and against permitting the assertion of personal jurisdiction on essentially the same facts. In a growing number of cases, jurisdiction is asserted based solely on the existence of an Internet site advertising products or services. Of those, only some hold that an Internet presence in the state, without more, is sufficient to satisfy the jurisdictional and constitutional tests.

A landmark judgement on this point is of **CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)**. It is rightly said that LONG ARE OF THE LAW HAS REACHED INTO CYBERSPACE.... Growth in technology is producing growth in lawsuits resulting from Internet transaction. The result of conducting business in 'Cyberspace' may be the lawsuits in the "real world" as some people now call it. Just where are you subjecting yourself as a result of your on-line activities? (23) Mr. Patterson got into a dispute with CompuServe over some software that CompuServe was distributing with a name and function that is similar to his software.

Once the court found that it had jurisdiction it went further to see whether following tests were met:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state.

Second, the cause of action must arise from the defendant's activities there.

Finally, the acts of the defendant must have substantial connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

Individually, the acts of placing a product into the stream of commerce (Ashai) or making a single contract with a resident (Burger King) may not be enough to establish personal jurisdiction. Patterson not only made contracts in Ohio and made his product available in the forum, but he also used an Ohio company to distribute his product and made sales to Ohio residents. Thus the defendant's

activities were something more than a Passive participation in the market place. Thus there were clearly sufficient contacts with Ohio to satisfy the court to assert its jurisdiction. The lower court ruled in favour of Patterson, but in appeal the judgment get reversed and it was held that 'electronic contracts' are sufficient to give a state personal jurisdiction over someone conducting such an on-line business.

An important feature of this case is that, the courts statement about what it does not hold. The court plainly stated that it did not consider whether Patterson would be subject to suit in any state where his software was purchased or used. However, if Patterson had targeted a state for sales, and had repeated and continuous contacts then jurisdiction over Patterson would have been asserted. The court in the instance case considered whether a party from a third state could sue Patterson in Ohio. Finally court did not hold that Compuserve might sue a regular subscriber for non-payment of the service in Ohio regardless of the subscriber's residence. This language has been interpreted to suggest passive use of the web will not confer jurisdiction in the service's home state, yet active use of the online service for e.g. solicitation and advertisement of products may increase the likelihood of being subject to jurisdiction. Courts that follow this interpretation will be more likely to conform to due process analysis and a proper Internet framework will emerge.

Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) is the first federal case for deciding whether an advertisement posted on a web site is sufficient to confer jurisdiction over an out-of-state defendant ⁽²⁴⁾. The court in this case held that advertising through Internet was purposefully directed towards the forum state. Plaintiff in the instance case is the Connecticut Corporation and defendant is Massachusetts Company. The case involved a trademark dispute over a registered trademark called 'INSET' which is owned by plaintiff. The defendant operated a web page and registered the Domain name 'inset.com'.

The long-arm statute of the state provided that:-

"... every foreign corporation shall be subject to suit in this state on any cause of action arising ...out of any business solicited in this state... If the corporation

has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within the state..”

The court stated that the defendant directed its activities on the Internet to all states. It held that defendant was subject to the jurisdiction in Connecticut because its advertisement activities were purposefully directed to Connecticut.

It is submitted that, in the instance case the court did not even bother to rationalize its findings of personal jurisdiction on some other purported additional contacts. The court simply stated that personal jurisdiction is proper when a defendant advertises on the Internet. In *Inset* and *Martiz*, courts totally fail to recognise the growth of traditional principles of personal jurisdiction since *World-Wide Volkswagen*. In finding personal jurisdiction the courts rely solely on the maxim that a defendant can be haled into court if it “purposefully availed itself of the privilege of doing business in the forum state” (*Hanson v Denckla*) to such an extent that it should reasonably anticipate being held responsible there (*World wide Volkswagen*). This amounts to nothing more than reasonable foreseeability on part of the defendant. The Supreme Court of the United States rejected this type of foreseeability as the standard for personal jurisdiction in the *Asahi* decision. The Supreme Court stated – “A defendants awareness that the stream of commerce may or sweep the product into the Forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state. The courts in *Martiz* and *Inset* are asserting personal jurisdiction over passive Web sites in contravention to established personal jurisdiction principles.

Thus the ruling of the court suggests that advertisement over net covers jurisdiction in any state or country where it could be accessed. Perhaps the court should have insisted on the presence of some other factor in addition to those it relied upon for giving judgment. The court came to the conclusion that advertisement via Internet was a solicitation of repetitive business and satisfied ‘purposeful availment test’. In making this determination the court relied upon a statistic that the defendants online advertising could theoretically reach as many as 10000 Internet users in Connecticut alone. It is noteworthy that

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similar commercial situation was there in case of Pres Kap. But the court recognized the special nature of online transaction.

It is found after going through the case law that the judgment is fair enough. The court has responded to the changing technology. However it is felt that mere placing of a WebPages over net must not be the sole ground for the court to exercise jurisdiction over the defendant. The court must look for the continuous contacts or some sort of systematic activity on the net by the defendant. This we will find in the cases to come.

In **Martiz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996)** the US District Court reached the similar conclusion the way it had given in case of 'inset.com'. The court came to the conclusion that it had jurisdiction over a California defendant in a trademark infringement case where the defendants only contacts with the state was through its California based website, which was accessible in Missouri ⁽²⁵⁾. In the instant case defendant had established the website in order to develop an e-mail mailing list, which it planned to make available to advertisers, for a fee. Those who accessed the site could register to receive information on areas of interest. The site had been accessed more than 300 times from Missouri, and the defendant had transmitted information to Missouri registrants more than 100 times. The court found that the defendant's actions had caused a tortuous injury in Missouri.

The court acknowledged difficulties in applying analogies to mail and telephone cases to answer Internet jurisdiction questions, yet used the cases anyway:

"Because the internet is an entirely new means of information exchange, analogies to cases involving the use of mail and telephone are less than satisfactory in determining whether defendant has "purposefully availed" itself to this forum. Unlike use of the mail, the Internet, with its electronic mail, is a tremendously more efficient, quicker, and vast means of reaching a global audience. By simply setting up, and posting information at, a website in the form of an advertisement or solicitation, one has done everything necessary to reach the global Internet audience..."

Surely, the mere creation of a Web site that solicits sales, as noted above, is not sufficient for personal jurisdiction under Due Process. In the instance case the court however found that there were additional contacts with the state. By allowing Missouri residents to access the Cyber gold Web site the court found that the company had "transmitted" information to potential enrollees in Missouri. The court said that- "the information transmitted is clearly intended as a promotion of Cybergold upcoming service and a solicitation for Internet users, Cybergold potential customers. This factor suggests that the defendant is purposefully availing itself to the privilege of conducting activities in Missouri". The District court argued the fact that Cybergold reached out into the forum state by "transmitting" information to its residents was sufficient. Cyber gold, according to the court, did more than passively solicit sales; it took affirmative steps to enter Missouri ⁽²⁶⁾.

The US courts have issued divergent opinions on whether jurisdiction can be based solely on the Internet presence, without any contractual relationship between plaintiff and defendant. In some cases the court have held that advertisement on the Internet is enough to create jurisdiction, while in other cases it has reached to opposite conclusions.

In a landmark judgement **Bensusan Restaurant Corporation V. King 937 2nd Cir.1997**) it was held that personal jurisdiction couldn't be exercised over the defendant ⁽²⁷⁾. The issue in the case was whether the State of New York can exercise personal jurisdiction in a trademark dispute over a non-resident defendant who has published a website to promote his business and that the web site is inactive and hosted outside the New your but accessible to New York residents through Net? It was held that state of New York cannot exercise personal jurisdiction over a non-resident business owner in a trademark infringement action when the non-resident's business name applies to a club located in the non-resident's state, the non-resident did not explicitly target New York customers and the contact with New York consisted solely of making available on the Internet a promotional website disclaiming any association with a New York business of the same name and accessible to anyone having Internet access. The court further held that a forum state might exercise

personal jurisdiction over a non-resident if the non-resident maintains continuous and systematic contacts with the forum state or purposefully targets the forum state for financial gain.

In addition, even if the contacts test is met, the maintenance of the cause of action must not offend traditional notions of fair play and substantial justice. Here, defendant King owned and operated a club called the "Blue Note" in the State of Missouri. He created a website to promote his club, list his schedule of events and provide information about how to buy tickets to shows. The web site specifically stated that his club had no relationship with the famous "The Blue Note" club in New York. New York residents, as any person in the world having access to the Internet, could access King's web site and read his promotional material. However, access to his website was not uninvited or direct; rather the New York resident was required to take affirmative steps to find the web site by conducting an Internet search. The defendant did not target New York residents and neither sold tickets nor provided services in New York. Thus the court found that any burden must rise to a constitutional level making litigation "so gravely difficult and inconvenient" that the party is at a "severe disadvantage" in comparison to his opponent. The court noted that inconvenience is alleviated by modern means of communication and transportation or request for change of venue.

Internet activity usually involves a web page, e-mail, or posting a message to bulletin board. Although any type of action may arise from cyberspace activity-advertising and solicitation of business, trademark and copyright infringement, and torts, including defamation, appears to be the most common causes of action arising from cyberspace interaction. From the cases that we have discussed, solicitation of business is likely to result in a contact sufficient for personal jurisdiction if the action arises from that solicitation. On the other hand, it is found that courts are not uniform in determining whether mere advertising is sufficient.

It is worth mentioning here that under the International Shoe test, defendant did not maintain continuous and systematic contacts with the state of New

York. However under the Burger King test, defendant did not purposefully target the State of New York to generate business and he did not avail himself of the benefits of New York. Defendant could not reasonably have anticipated having to litigate in the State of New York simply because he created and published a passive web site advertising his club. A contrary result would place defendant in the position of having to subject himself to the courts of any jurisdiction having Internet access. Additionally, defendant disclaimed any association with the plaintiff's Club; thus there was no attempt on the defendant's part to create confusion in the minds of New York consumers. Thus publishing a passive web site on the Internet to advertise a business does not automatically provide a basis to establish personal jurisdiction in any state where the web site can be accessed regardless of the physical location of the web site. For a forum state to exercise personal jurisdiction over the non-resident web site owner, the non-resident defendant must do something more than publish a passive web site; he must purposely target and reach into the forum state for financial gain.

It can be seen that, even though the net has become one of the fastest growing of all media, courts are yet to evolve consistent rulings over confusing aspects such as jurisdiction. Time will tell what further is required to bring about certainty in interpreting the principles of jurisdiction.

(G). Legal Implications of Active/Passive Websites

Before discussing case laws on Active/Passive sites it is important to understand what amounts a site to be Active or Passive. An Active site is one, which allows the person who is accessing that site to enter information. For e.g. to file an on-line application. It is also known as Interactive site. A Passive site is one, which allows the person who accesses that site to read only, i.e. one cannot interact in any way. It is considered as a 'posting' of information, lacking interaction and is typically an advertisement on the web.

To determine whether the court has jurisdiction with respect to Internet transaction, a new doctrine has been coined. The courts will try to find out

whether the site is active or passive. Thus if the defendant company/individual has attempted to solicit his business, or he has accepted credit cards, or has done any sale transactions or had sufficient number of hits, then that web site will be deemed to be 'active' and the principle requirement of 'minimum contact' test would be satisfied. As opposite to this, if the defendants web page merely contains an information and there is no solicitation of business, the website will be deemed to be 'passive' and the court cannot assert its jurisdiction. A classic example would be of *Bensusan v. King*, as discussed earlier. As Internet has its peculiar characteristics, at times it becomes difficult for the court to apply territorial based principles over transactions done via Internet. At times the courts have to struggle in asserting whether they have jurisdiction over the out of state party whose contacts are solely related to Internet. Due to this, there is no uniformity in the courts decisions. One can find contradictory judgments even though the facts of the disputed cases are similar. In spite of that, a sliding scale framework based on the traditional minimum contact analysis is developing as the principle analysis that courts use to access personal jurisdiction in Internet related cases.

A landmark case on sliding scale and active/passive site, ever developed by US court is ***Zippo Manufacturing Co. V. Zippo Dot Com Inc.* 952 F. Supp. 1119 (W.D. Pa. 1997)**. This sliding scale framework is based on the premise that ". The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet ⁽²⁸⁾. In the instance case the court held that there are three different categories of Internet activity on the Zippo sliding scale:

Doing Business Category: At this end of the spectrum, the defendant clearly conducts business over the Internet and has repeated contact with the forum state in question, such that an exercise of jurisdiction over that defendant is proper.

Interactive Category: This is the middle ground between the doing business category and passive website category. This position of the spectrum is "occupied by interactive websites where a user can exchange information with the host computer". In this category, "the exercise of jurisdiction over the

defendant is determined by examining the level of the interactivity and commercial nature of the exchange of information that occurs on the website”.

Passive Website Category: At this end of the spectrum, the defendant operates a website that is passive in nature in the sense that the website does nothing more than post information on the Internet that users can access. At this end of the sliding scale the exercise of jurisdiction over the defendant is not proper.

It was in this case that purposeful availment was found based on the defendants interactive website. The defendant in the instance case is maintaining the website called ‘zippodot.com’, ‘Zippo-net’, and zipp-news.com’. He also provides Internet news service to its subscribers. About 2% of its subscribers lived in Pennsylvania. In addition to that defendant had entered into agreements with seven Internet service providers.

The court held that a sliding scale be adopted for purpose of determining whether or not jurisdiction was appropriate and introduced the new word of an “interactive” website to jurisdictional jurisprudence. In this case the court held that the exercise of jurisdiction is determined by the level of interactivity and the commercial nature of the information that occurs on the website. Also in case of *Martiz v. Cyber gold* jurisdiction was found where users were encouraged to add their address to a mailing list that basically subscribed the user to the service. The court found that 131 Missouri residents had visited the interactive web page, sufficient for finding jurisdiction.

Again in **Millennium Enterprise Inc. v. Millennium Music 33 F 1999** the court adopting the Zippo sliding scale framework found that the website fell into interactive category, but after further analysis ultimately found jurisdiction lacking. The court stated that becoze there was no evidence that Millennium Music never purposely availed itself to suit in Oregon. Simply becoze the website was interactive was not enough to justify a finding of jurisdiction, the court required deliberate action by the defendant to the forum state.

This is a great step forward towards the proper interpretation of jurisdictional concepts. If the courts are exercising their jurisdiction over the non-resident

defendants just on the basis of interactive web page a time may come that people will stop advertising their products on Net.

Another Internet advertisement case with a bit of twist is of **Minnesota v. Granite Gate Resorts, Inc., 1996 W.L. 767432 (D. Minn. 1996)** the court did find sufficient number of contacts within the state. In the instant case, the attorney general of Minnesota brought an action against defendant who is the owner and operator of a Nevada gambling establishment. The defendant had established "Wager Net" on the net. The site provided betting service. To avail this service one would have to establish an account and that Wager Net could submit any disputes regarding the account to the courts in the user's home state or to the courts in the country of Belize. After filing the action, the defendant moved to dismiss based on lack of personal jurisdiction. It was found that 248 computers from within Minnesota had accessed the Web site within a two-week period. The court held that the defendants were subject to the jurisdiction of Minnesota courts. The court held:

"...here the defendants crossed Minnesota borders through Internet advertisements and solicited business for their gaming venture. If our attorney general cannot hail them into our court, then the citizens of Minnesota will not have an adequate Consumer Protection remedy."

Minnesota Court of Appeals affirmed the lower court's determination that non-resident defendant was subject to personal jurisdiction in Minnesota based on Internet advertisements for an up-coming Internet gambling service. The appeals court noted that advertisements placed on the Internet were analogous to broadcast and direct mail solicitations; activities which, under the Minnesota long-arm statute, are sufficient for an exercise of personal jurisdiction. Moreover, the placement of Internet advertisements in this case, indicated the defendant's clear intent to solicit business from markets, which included Minnesota ⁽²⁹⁾. In order to reasonably anticipate being hailed into court under the Doctrine of Minimum Contacts, there must be some acts by which the Defendant purposefully avails itself of the privileges of conducting activities within the forum state, thus involving the benefits and protections of its laws . . . In this case, the acts of Wager Net consisted of placing its ad on the Internet

24 hours, 7 days a week, 365 days a year. Thus the court found that defendants had sufficient number of contacts with the state.

However it is found that the decision is very harsh. It imposes a very heavy burden on the web sites. It must be understood that some liability has also to be placed upon netizen who visits the website. The entire burden cannot be put upon the websites alone. It is found that a declaration on the website as in this case is sufficient enough to oust the courts of the place to which defendant applied. However in cases where defendants website issues a fraud declaration only for the sake of it but consciously attracts netizen from all over then no benefit ought to be given.

In another classic example of *Zippo* sliding scale (doing business properly category) and *Inset rationale* is **Telco Communications v. An Apple a Day C.A.No 97 1997** in which the Virginia plaintiff sued the Missouri defendant for defamation in Internet press releases due to which the plaintiffs stock prices suffered. The Virginia long-arm-statute allows the plaintiff to sue the defendant's non-residents whose extraterritorial actions results in injury within Virginia. The statute only requires that the defendant must conduct his business regularly or must have engaged himself in any persistent course of conduct, or derives benefit from goods sold or services rendered within the Commonwealth. The court concluded that posting a web site in an attempt to advertise and solicit business, was sufficient "to serve as an analogue for physical presence" for purposes of the Virginia long-arm statute. Adopting the reasoning of *Inset Systems, Inc. v. Instruction Set, Inc.*, the court stated that posting a web site advertisement or solicitation constituted a "persistent course of conduct." Further, because the defendant's web site was accessible to Virginia residents 24 hours a day, such activity was "regular" within the meaning of the long-arm statute ⁽³⁰⁾.

Technology brings along with it new way of doing old crimes. Defamation when committed via Internet is both tort and criminal wrong. The court by awarding judgment against defendant showed its wisdom. Moreover it also shows how US courts are making their efforts to keep pace with changing technological

development. It is learnt that the judgment is fair enough and will go a long way in meeting the technological changes. It is found that the cases where the Web has been used only as an advertising medium rather than a medium for consummation of commerce, poses difficulty for the courts while deciding where the jurisdiction exists. At time the courts have focused on the number of times its residents contacted the site.

In a case of **Weber V. Jolly Hotels C.A.No96 1997** the court found personal jurisdiction improper. The plaintiff in the instance case was the resident of New Jersey. He booked the hotel room with the defendant and Italian hotel operator, through Massachusetts's agent. The plaintiff, while staying at the defendant's hotel incurred a physical injury and filed a suit against the defendant in New Jersey court. The defendant maintained advertisement on the website and thus the plaintiff sought to establish general personal jurisdiction. The court while dealing with the case looked to the due process limitations. Analogizing the present case to instances, which involve advertisements placed in "national publications", the court concluded that Internet advertising, by itself, was not sufficient to confer personal jurisdiction upon a defendant. Court noted that, finding of "general" jurisdiction, requires the defendant's activity with the forum state to be "continuous and substantial;" a threshold requirement not established in this case. Indeed, the court observed "that advertising on the Internet is not tantamount to directing activity at or to purposefully availing oneself of a particular forum"⁽³¹⁾. Thus, the court held that no sufficient "minimum contacts" were established becoze the plaintiffs travel agent was not the sole agent for the hotel and neither the defendant nor the travel agent had specifically targeted New Jersey to solicit business.

In the instance case court rightly asked for something more than mere putting a web page on the net. Cases like this reminds the court of their limitations that they should not violate due process clause.

Not always that the court will held jurisdiction proper on the basis of advertisement on the web page. At time there are contrasting views also. In case of **Hearst Corp. v. Goldberger 1997 WL 97097**, the US district court of

New York held that personal jurisdiction was lacking under the New York long-arm statute. In the instance case the plaintiff a New York resident brought a trademark infringement suit against the New Jersey defendant for his use of the domain name and website, "esqwire.com". The defendant used his website to advertise legal office networking service. The court found that the defendant had not transacted business in New York because his business was not yet operational and further held that he had not committed any tort in New York because he was not physically present in the state, as required by the New York law. New York law requires the plaintiff to establish that defendant had regularly solicited business. The court found that this requisite was not met as the defendant never sold any product in New York. Since the requisite were not established the court did not consider the case appropriate for jurisdiction even if the harm was caused within the state.

(H). Other Internet Jurisdiction Cases

The whole trouble with Internet jurisdiction is the presence of multiple parties in various parts of the world who have only a virtual nexus with each other. Then, if one party wants to sue the other, where can he sue? Traditional requirements generally encompass two areas – firstly, the place where the defendant resides, or secondly, where the cause of action arises. However, in the context of the Internet, both these are difficult to establish with any certainty. Lots of technological and legal issues have cropped up due to Internet transactions. Considering the lack of physical boundaries on the Internet is it possible to reach beyond the geographic boundaries to haul the defendant into its court for the conduct in cyberspace? Lets us discuss some landmark cases.

In **Cybersell, Inc. v. Cybersell Inc., 130 F. 3d 414 (9 th Cir. 1997)** the issue was, whether a federal court in Arizona may exercise personal jurisdiction over a non-resident Florida corporation that maintains a Web site available to anyone on the Internet in a lawsuit brought by an Arizona citizen based on trademark infringement under facts showing that the Florida Corporation did not derive any income from Arizona? The court held negatively. It stated that, in an Internet case involving the exercise of jurisdiction over a non-resident,

"the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." The court said that "something more" was required than the mere advertisement of a name on a Web page. Further the Court went on to say that if the nonresident's Web site is "passive" and if the nonresident does not do "something more" to target the residents of a particular forum, then the forum state lacks the authority to exercise personal jurisdiction over the nonresident defendant ⁽³²⁾.

In case of **Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998)** the Defendant Toeppen, an Illinois resident, was an individual who "attempts to profit from the Internet by reserving and later reselling or licensing domain names back to the companies that spent millions of dollars developing the goodwill of the trademark." Toeppen had registered, as his Internet domain name, Panavision's trademark, as well as the trademarks of numerous other well-known companies. When Panavision later attempted to establish a web site using its own trademarked name, it was prevented from doing so by Toeppen's prior registration. Rather than acquiesce to Toeppen's extortionate demand for \$13,000 to release the domain name, Panavision sued in California for trademark infringement. The California court held that jurisdiction was "proper because Toeppen's out-of-state conduct was intended to, and did, result in harmful effects in California." It reasoned that "Toeppen allegedly registered Panavision's trademarks as domain names with the knowledge that the name belonged to Panavision and with the intent to interfere with Panavision's business. Toeppen expressly aimed his conduct at California," which is Panavision's principal place of business ⁽³³⁾.

Panavision is not an Internet case. Nothing happened over the Internet. The Court of Appeals' discussion of Cybersell is totally inappropriate. Panavision stretches the nature of a state's power to exercise personal jurisdiction over nonresidents. It expands the concept of "purposeful availment" non-intuitively to include any activity capable of harming a resident of the forum state. Clearly, the District and Appellate Courts disliked Toeppen, the "cyber pirate," engaged in extorting money from major corporations. But the holding may have

unexpected consequences. It gives states wide-reaching authority to exercise jurisdiction over non-resident defendants. Under *Panavision*, corporate residents "feel" harm where they have headquarters and forcing individuals to litigate in a foreign forum against financially more powerful corporations is reasonable. Courts have dismissed cases for lack of jurisdiction in several cases involving on-line issues. Some of these cases display a healthy concern for the fact that, if jurisdiction is too readily asserted in cyberspace, it may threaten the development of what promises to be the most democratic medium that the world has ever known.

In a similar case, the Arizona federal court in **EDIAS Software International, L.L.C. v. BASIS International Ltd. 947 F. Supp. 413 (D. Ariz. 1996)** established jurisdiction in a defamation action ⁽³⁴⁾. In the instance case a New Mexico company, terminated its distribution agreement with plaintiff, an Arizona company, and sent customers and plaintiff's employees e-mails explaining why agreement was terminated. Plaintiff sued for defamation based on the e-mails. The court found that defendant had established minimum contacts by entering into a contract with an Arizona company and having carried on a relationship that involved visits to Arizona and phone calls, faxes and letters being sent to Arizona. The defamation was aimed at Arizona and the connections were related to the claim. Defendant purposefully availed itself of the benefits of transacting business in Arizona and directed its allegedly defamatory statements specifically at an Arizona company. This produced contacts sufficient to give notice that Arizona was a likely forum for litigation.

As opposed to *EDIAS*, where the defendant visited the forum state, the Indiana federal court in **Resuscitation Technologies, Inc. v. Continental Health Care Corp. LEXIS 3523 (S.D. Ind. 1997)** had to resolve jurisdiction based more strongly on on-line communications. Multiple communications across state lines—e-mail, phone, and fax—were enough to satisfy an Indiana federal court that direct communications, rather than those involving third parties, were at issue in jurisdiction over the defendant. The court focused not on "who started it," but on the level of Internet activity involved. It opined, "One or two inquiries about some Indiana goods or services would not support local

jurisdiction." In this case, however, a continuing and long-term relationship was contemplated. As a consequence, the e-mail messages were numerous and continuous over a period of months. Citing *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* for its "intended object" analysis, the court found that the initial Internet solicitation and e-mail response, and the ensuing communications were focused on Indiana and showed that the defendant's "intended objects" of the contacts were "to transact business and develop the business" in Indiana. Furthermore, the plaintiff's cash-poor status made it more difficult to travel for litigation. The court made a policy decision to adjudicate disputes involving small, in-state companies seeking capital so that such companies would not have to fear litigation in other states.

It is worth mentioning over here that similar to *CompuServe*, this court did not overvalue the electronic contacts, but rather seemed to base its decision on a bundle of other factors. The factors included signed agreements, meetings, faxes, and, particularly, the contemplation of a long-term relationship to transact business in the forum state. However, the court's weighing of the ability of poor plaintiffs to litigate outside the state is pure protectionism and highly problematic as a legal rule on the international level. It would mean that every destitute Third World plaintiff who sued an American company would always have the home court advantage.

United States v. Thomas 74 F3d 1996 is probably the first cyberspace case where the effects principle was invoked. Even though this case is a domestic one, it is important because it addresses some of the issues arising in international cross-border cases. The defendants in the instance case operated a computer bulletin board system from their home in California. They loaded on their bulletin board images depicting bestiality, oral sex, incest, etc. Access to the files was limited to members who were given a password after they paid a membership fee and submitted a signed application form that requested the applicant's age, address, and telephone number. An undercover agent was accepted as a member. When the agent downloaded explicit material in Memphis, Tennessee, the defendants were indicted in federal court in Tennessee on several criminal violations.

The defendants challenged the venue in Tennessee, claiming that the criminal act the transportation of the material did not occur in Tennessee, but in California. The Sixth Circuit concluded, "the effects of the Defendants' criminal conduct reached the Western District of Tennessee, and that district was suitable for accurate fact-finding." Accordingly, the court found that venue was proper in that judicial district.

In **Smith v. Hobby Lobby Stores** 968 F wd 1997, a case resembling *World-Wide Volkswagen* and *Asahi*, a wrongful death action was brought against a store that sold an artificial Christmas tree, which allegedly caused a fatal house fire. The store filed a third party complaint against the manufacturer, a foreign corporation ⁽³⁵⁾. The Court dismissed the manufacturer for lack of personal jurisdiction, noting that even if the manufacturer's advertisement was in a trade publication that is published on the Internet, the manufacturer did not contract to sell goods or services to any citizens in Arkansas over the Internet site and any Internet posting is an insufficient contact with the State.

The Court took this opportunity to discuss the impact of the Internet on the issue of personal jurisdiction. Approving the analysis the courts in *CompuServe* and *Zippo* used, this Court applied the "sliding scale" method of determining sufficient contacts to confer jurisdiction and found that the defendant's Internet activity was not a sufficient basis to exercise jurisdiction. It would have been clearly out-of-bounds for the judge to base jurisdiction on a Web site that was probably never even accessed by Arkansas citizens.

In **Digital Equipment Corp. v. AltaVista Technology, Inc.**1997 WL, the Massachusetts federal court used a moderate approach to find jurisdiction based on more than a contract; in dicta, it took a more expansive approach on the issue of jurisdiction based on Web site advertising alone. The court in the instance case rejected the argument that the defendant's advertising was only general, and not directed toward Massachusetts's residents. The court went on to say that the Web site was integral to the contract with the Massachusetts Company and to the cause of action. The court stated:

"I cannot ignore the fact that the medium through which many of the significant Massachusetts contacts occurred is anything but traditional; it is a site in cyberspace, a Web site . . .

The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps "no there there," the "there" is *everywhere* where there is Internet access. When business is transacted over a computer network via a Web site accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere. Under a "due process" analysis, the court found that the claim arose out of Massachusetts through the contract and subsequent maintenance of the Web site. It also determined that the defendant purposefully availed itself of Massachusetts by violating the plaintiff's rights with a Web site that it knew would "plainly . . . attract Massachusetts residents." Finally, the exercise of jurisdiction was reasonable because the defendant's travel would not be overly burdensome, Massachusetts had an interest because the trademark infringement occurred there, the venue was convenient to the plaintiff, and the parties had agreed to a choice-of-law provision.

Despite the court's concern over possible worldwide jurisdiction, it set a dangerous precedent. Obviously, the court overlooked the fact that resolutions to such complex problems are not simply black or white. Compromise solutions, as evidenced by other court decisions, are possible between the extremes of permitting worldwide jurisdiction based solely on Internet advertising, and denying jurisdiction in forum states other than where the defendant is physically located. A hint of international jurisdictional issues central to this analysis was present in *State v. Granite Gate Resorts, Inc.* However, Granite Gate Resorts was litigated too soon for international issues to arise; the defendants were preparing to operate their computer service from Belize, but they had not yet done so at the time of suit.

Although such issues were not directly resolved, this court and others have expanded their jurisdictional reach into cyberspace. The cases demonstrate approaches that move toward a rule calling for jurisdiction over a defendant in all states based on the accessibility of the defendant's Web site by users in all states. If this rule were adopted internationally, a defendant would be subject to the jurisdiction and differing laws of every State worldwide

(I). Analysis

In general parlance courts while applying rules of personal jurisdiction to cyberspace have asked for "something more" than mere electronic contacts to support an exercise of jurisdiction. In addition to Internet contacts, at times it is felt that there must be some act on the part of defendant, which is purposefully directed towards the forum state. Though, at times courts have conferred jurisdiction in the absence of any connection beyond a website, this is unlikely to be sustained in the long run. At times it may not be possible to enforce the decisions of such a nature, particularly when the site owner is in a hostile country, or in a jurisdiction that simply refuses to recognize the jurisdiction of the court issuing the original decree.

As we have seen by the case laws referred earlier the existing body of law on in personam jurisdiction based on net contacts is inconsistent at several levels. Fundamentally, the method of analysis of the significance of contacts via net is still unclear. The court in Zippo analyzed the defendant's contacts by looking at the number of Pennsylvania residents using the defendants Internet service. In Granite Gate the court looked at the number of Minnesota residents accessing defendants website and the frequency of use by several Minnesota based web gamblers. Other courts have referred to the number of times the defendants website was "accessed" by the forum states residents or the number of Internet users in the state.

It is submitted that the issue cannot be solved by any objective standard as to contact, but rather requires an analysis of both the quality and quantity of Internet contacts. This would involve the examination of several important

factors such as the number of hits a website receives, the number of forum state citizens accessing the site. However, an evaluation cannot stop at this. All hits are not of equal weight for jurisdictional purposes, so courts and commentators need to develop a hierarchy of different types of Internet contacts in order to evaluate the totality of a defendant's contacts with a forum.

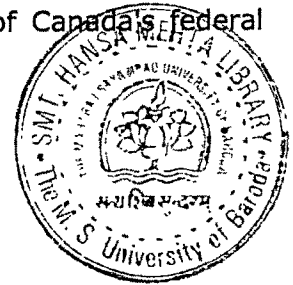
(II). BASIS OF COURTS JURISDICTION FROM CANADIAN PERSPECTIVE

(1). Introduction

The Internet is an increasingly important communication tool. Existing law enforcement machinery of the world is not able to answer all the legal issues that have arisen from the use of it. Moreover, the unique characteristic of Internet, like its decentralised nature, no central control and easy to use makes the application of traditional legal principles difficult to apply. Traditional rules relating to jurisdiction are based on the notion of geographical boundaries. But Internet communications are not geographically dependent. The very origin of an e-mail message may be unknown. Website information cannot be confined to a target audience, but is disseminated to a global market. It may affect individuals belonging from different nations, all of which have their own particular laws on jurisdiction.

While discussing issues relating to courts' jurisdiction over cases arising from internet use, extensive reference will be made to selected American judgments because the U.S. companies are at the forefront of internet technology, and its courts have already had many occasions to deal with internet-related jurisdiction problems. These judicial decisions will definitely influence Canadian courts. The issue of courts' jurisdiction over internet-related activities has now become a constitutional issue. There has been and still is much debate as to whether Internet use and content should be regulated and, if so, how and by whom. Since the Internet is a medium of communication, which virtually knows

no boundaries, its regulation within Canada is raising challenging constitutional questions, which will have to be resolved in the context of Canada's federal structure.



(2). Regulating the Internet

The Internet has been described by the U.S. Supreme Court as an "international network of interconnected computers" ⁽³⁶⁾. Although the Internet is first and foremost a means of communication, it knows no territorial limits. This characteristic is fundamental to the issue of legislative jurisdiction. Canada is a federal state administered by a Constitution that specifies a division of powers between the national and provincial governments. The Government of Canada has prescriptive jurisdiction over most areas of legal concern in electronic commerce ("e-commerce"), including tax, intellectual property, banking, and privacy. Securities and gaming, however, are regulated provincially. Provinces also have jurisdiction over provincially incorporated companies, which comprise the majority of incorporations in Canada.

Whether the Internet and e-commerce in general are matters of federal or provincial jurisdiction has not been conclusively decided. Statutory interpretation and government practice, however, suggest that both likely fall under federal jurisdiction.

By virtue of Section 92(10)(a) of the *Constitutional Act, 1867*, the federal Parliament has exclusive legislative jurisdiction over "works" and "undertakings" connecting one province with another and which relate to transportation or communication ⁽³⁷⁾. This two-fold jurisdiction extends to inter-provincial communication infrastructures ("works"). It also extends to organizations or enterprises involved in inter-provincial communication ("undertakings"). On that basis, courts have confirmed Parliament's exclusive jurisdiction to regulate works and undertakings relating to television communication and telephone communication ⁽³⁸⁾. The nature of the Internet as an interprovincial and international communications system posits a strong argument in favour of

federal jurisdiction over related works and undertakings - notwithstanding the possibility that Internet telephony and Web broadcasting, for example, may also fall under traditional federal regulatory scrutiny. Federal jurisdiction could in theory extend to matters relating to the management and operation of Internet works and undertakings, or to Internet content. In practice, initiatives directed at the development and regulation of the Internet in Canada has proceeded without a formal jurisdictional determination, and has primarily been federal. Federal initiatives thus far indicate that the Canadian government is interested in promoting rather than regulating electronic commerce and the Internet. Courts have also held that Parliament has, by virtue of its peace, order and good government ("POGG") power, a broader legislative jurisdiction over the entire field of communication by radio ⁽³⁹⁾. There is academic support for the proposition that Parliament also has, under its POGG power, exclusive legislative jurisdiction over the entire field of television communication.

Thus, a well-built argument can be made that Parliament is vested with exclusive legislative jurisdiction to regulate works and undertakings which are an integral part of the internet communication system, not unlike Parliament's jurisdiction over works and undertakings relating to telephone communication. Once this principle is recognized then, on the basis of existing jurisprudence, the scope of Parliament's jurisdiction can be said to extend to matters, such as labour relations, which form an essential part of the management and operation of those works and undertakings. Parliament, therefore, has jurisdiction to regulate the content of communications by Internet, just as its jurisdiction over undertakings related to television extends to the regulation of the content of television programs.

(3). Courts Jurisdiction in Internet Disputes

Before considering courts jurisdiction over internet activities, it is important to review the bases on which courts generally may assert their competence, and the circumstances in which they will yield to the competence of the courts in another state. Adjudicative jurisdiction in Canada is broadly similar to that in United States law. In Ontario, for example, an originating process may be

served on an extraterritorial defendant, without leave, where a breach of contract or tort has been "committed in Ontario" or where damages have been "sustained in Ontario", among other enumerated categories. Ontario, as other provinces, also permits its courts to assume jurisdiction on matters not named in the statute, where a connection exists between the action and the forum. The breadth of this discretion is constrained by two doctrinal thresholds, one positive and one negative. The positive threshold requires that there be a "real and substantial connection" between the cause of action and the jurisdiction. The negative threshold requires that the jurisdiction in question not be *forum non conveniens*, and functions as a test of the appropriateness of one jurisdiction over other possible jurisdictions. It is probable, although somewhat unclear, that these thresholds are more demanding than the statutory criteria outlined above. The statutory criteria for service may also be seen as expositive of the "real and substantial connection" requirement.

Competence over civil disputes

Courts first of all assert jurisdiction in civil matters on the basis of the geographical location of the parties. The primacy of *in personam* or personal jurisdiction is reflected in both civil and common law regimes, which provide that the defendant's residence in the jurisdiction confers authority to its court in the absence of any other connecting factor between the territory and the dispute ⁽⁴⁰⁾. It has long been obvious, however, that this limited basis for competence is not enough. Human interaction has never respected state borders. With the rise of international commerce and communication tools that transcend state boundaries, states have by necessity or design expanded the grounds for their courts' competence. This has led to courts regularly asserting jurisdiction over defendants outside their territory.

a. Personal jurisdiction under Canadian law

The grounds for competence over extra-territorial defendants differ from province to province, but all rest on a notion of a "real and substantial connection" to the jurisdiction of the court ⁽⁴¹⁾. The following are the statutory

grounds for Canadian courts asserting competence over extraterritorial defendants in civil disputes. The business activities which gave rise to the litigation were conducted in the province;⁽⁴²⁾

- (1) a tort or delict was committed in the province;⁽⁴³⁾
- (2) damages from a tort were sustained in the province;
- (3) contractual obligations were to be performed in the province;⁽⁴⁴⁾
- (4) the parties to a contract specified that the courts of the province would have competence over any disputes arising from it; a contract specifies that disputes are to be governed by the laws of the province;
- (5) in a dispute over support or custody or the effects of marriage, one of the spouses or children is domiciled or resident in the province;⁽⁴⁵⁾
- (6) the dispute concerns real property or goods situate in the province .

As well, every province has a provision of law conferring discretionary power on its courts to take competence in circumstances where there is some other "real and substantial connection" other than those specifically identified by statute. The ability of courts to adjudicate disputes is thus only limited by judicial creativity; constitutional restraints and the knowledge that courts in other provinces and states may refuse to enforce judgments by courts, which have improperly asserted jurisdiction. This has led the Supreme Court of Canada to emphasize the need for "order and fairness" in determining appropriate forum, and to caution Canadian courts against over-reaching.

b. Personal jurisdiction under U.S. law

As discussed earlier the exercise of determining whether a U.S. court is competent to hear a dispute resembles that used by Canadian courts, but is complicated by the overlay of the Due Process Clause of the 14th Amendment of the Constitution⁽⁴⁶⁾.

As in Canada, the starting point for jurisdiction over parties to a dispute is their presence in the forum. A court may assert "general" jurisdiction where the defendant is domiciled in the state or has "continuous and systematic" activities there. Otherwise, a court must find grounds for "specific" jurisdiction. This

requires a finding of sufficient contact between the forum and the non-resident defendant. The court then must analyze whether the exercise of its jurisdiction is consistent with "traditional notions of fair play and substantial justice" ⁽⁴⁷⁾. This is sometimes cast in terms of the reasonable expectation of the parties of having their disputes litigated in the particular forum. One test often used to determine specific jurisdiction in the U.S. is the application of the "purposeful availment" test ⁽⁴⁸⁾. Under this rule, the court analyzes whether the defendant has deliberately taken the opportunity to conduct activities in the forum and thereby obtain the benefits of the domestic law. If so, and assuming the exercise of jurisdiction is otherwise reasonable and fair, the court will be competent to hear a dispute arising from those activities. The purposeful availment test, and other rules used to establish specific jurisdiction, do not require that a defendant have a physical presence in the forum. In the words of the U.S. Supreme Court, the defendant's conduct and connection with the forum must only be such that he "should reasonably anticipate being haled into court there".

As the grounds for assuming competence have increased, so too have disputes over forum. Defendants sued in foreign courts more and more frequently attempt to bring the case back to their own domestic forum. Under the *forum non conveniens* principle, a court may stay or dismiss a suit if it is persuaded that there is another forum that is more closely connected to the events giving rise to the suit, or otherwise better suited to adjudicate the issues. Although all Canadian jurisdictions recognize the principle of *forum non-conveniens*, the rules respecting its application are not elaborated in any detail in governing legislation. Art. 3135 of the Quebec *Civil Code*, for example, says simply that a court may decline jurisdiction "if it considers that the authorities of another country are in a better position to decide." Provisions in common law statutes are equally concise.

Like the United States, Australia and other federal states, Canada has arranged for the reciprocal enforcement of judgments given by provincial courts within its borders. Assuming a foreign court has exercised jurisdiction legitimately, Canada normally follows the principle of comity and voluntarily submits to the

jurisdiction of friendly nations and enforces foreign judgments in exchange for the promise of similar treatment. Given the changing nature of Internet jurisdiction law, and the ease with which less cooperative nations (the so-called 'Internet paradises') can be used as e-commerce domiciles, the enforceability of Canadian and foreign judgments is likely to be a key issue in future Canadian jurisprudence on e-commerce.

(4). Competence over Internet disputes: The American experience to date

The increasing use of the medium, and the broad rules governing personal jurisdiction in both civil and common-law provinces, make Internet related disputes inevitable. In due course Canadian courts will have to wrestle with such issues as whether operating a website constitutes "carrying on business" in a particular province; whether a New Brunswick seller of products advertised over the Web is amenable to prosecution under consumer protection laws in B.C. and whether a Quebec court can compel a non-resident defendant to make his website comply with the requirements of provincial language laws.

In the absence of clear rules and regulations the courts may turn to American case law when faced with these questions. Whether guidance will be obtained may depend on how soon it is sought. Prior to the mid-nineties, there were very few decisions by U.S. courts on competence over Internet disputes. Since 1995, there has been a true explosion of cyberspace litigation. American courts have used various tests to determine whether they have jurisdiction over Internet disputes. Some courts have simply applied traditional rules, while others have tried to devise new tests to accommodate the peculiarities of the medium. Cases like *Inset Systems v. Instruction Set Inc.*, *Cybersell Inc. v. Cybersell*, *Bensusan Restaurant Corp v. Burger King* etc. are some examples of how the US courts are trying to grapple with the new situation.

(5). Conclusion

Existing rules are not necessarily conclusive authority in respect to legislative

jurisdiction to regulate the Internet, which is in some respects a wholly new and unique means of communication. We can therefore expect to see in the future important constitutional litigation concerning legislative jurisdiction to regulate the Internet. It is submitted that, on the basis of existing authority, Canadian courts are likely to conclude that Parliament has exclusive legislative jurisdiction over works and undertakings relating to the Internet. Recognition of exclusive federal jurisdiction over works and undertakings forming an integral part of the Internet communication system would still allow the Provinces to enact legislation, which incidentally affects the Internet.

Given the difficulties already encountered by American courts, it is appropriate to ask whether traditional forum principles may be adapted to Internet disputes, or whether special rules should be developed for such jurisdictional conflicts. Traditional rules have proved appropriate for some cases such as *Bensusan*. Where litigation centers on a defendant's activities in a single, specific, geographical location, the use of the internet for advertising purposes should not defeat the usual rules relating to evidence of damage within a forum and the defendant's intent (or lack of intent) to target a specific market. The use of the Internet in such cases is incidental, and its unique qualities should not alter the usual jurisdictional principles.

These rules may be inadequate, however, when the impugned activity occurs primarily in cyberspace. A website posting may have no particular effect in any particular place. The application of traditional rules in these circumstances may result in a too broad jurisdiction, based on the notion that a defendant should be compellable in the courts of any jurisdiction where citizens may use the Internet. Some courts have attempted to adapt accepted jurisdictional rules by differentiating between active and passive websites. It seems reasonable that a website operator who has targeted a specific market by referring to a particular forum, or by selling services on-line to customers, should be subject to the jurisdiction of the courts of the forum. There are, however, two problems with the test as so far formulated by the U.S. courts.

First, the level of "interactivity" deemed sufficient to trigger jurisdiction is

minimal. Should the mere fact of including a toll-free number on a website confer jurisdiction on the courts of every forum from which the number may be used? Does the posting of a message in English necessarily connote an attempt to target a North American market? Should not a greater degree of intent to reach a specific market be required?

A second and greater problem is the willingness of courts to equate the interactivity of a website with its use by parties in a particular forum. This is unfair in that it may be impossible to know who has used a website, or to control access from any given place. The importance conferred on the number of hits from users in the forum shows a basic misapprehension about the anonymity afforded by cyberspace. It is also a departure from the traditional rule requiring a defendant to do something to trigger competence of the courts within a specific jurisdiction.

In considering whether traditional rules on jurisdiction may be used for Internet disputes, it is important to remember that the *forum non-conveniens* test as currently applied by Canadian courts may not always afford the same protection as the due process requirements of the 14th Amendment of the U.S. Constitution. The Canadian test focuses on the relative merits of two or more forums, whereas the American test addresses the unfairness that may result if a party is forced to defend in a foreign jurisdiction. Canadian courts tend to engage in a balancing exercise, while U.S. courts must consider procedural guarantees.

Given these potential difficulties, the case law, which will emerge from the Canadian courts on their jurisdiction over Internet disputes, should be closely monitored. A failure by the courts to account for the unique nature of the internet may greatly hamper the internet's commercial use, since the application of traditional rules without modification may lead to the assertion of jurisdiction grounded in very minimal contacts with the forum. It is submitted that in determining jurisdiction, Canadian courts should more specifically, consider the following guidelines:

- Courts should avoid a blanket rule equating the possibility of access to a website from the domestic forum as sufficient grounding by itself for jurisdiction. The posting of a website should accordingly not, by itself, constitute "doing business" in any jurisdiction that has access to the web.
- Courts must also see whether the use of the Internet is truly central to the dispute, or whether it is merely incidental. If it is just incidental then jurisdiction should be found having regard to traditional factors, and should not be unduly influenced by the far-reaching effects of the Internet.
- Even where use of the Internet is central to a dispute, there should be a careful examination of other factors, which would, in its absence, trigger against the jurisdiction of a particular court.
- Canadian courts might usefully adopt the distinction by American courts of the passive versus active website, on the basis that a high degree of interactivity may show the defendant's willingness to avail itself of the laws in a particular jurisdiction.
- If this test is used, however, care must be taken to ensure that the interactivity is significant.
- Courts must also be careful to distinguish between the defendant's acts in cyberspace, and those of other Internet users. The calculation of "hits" from a particular jurisdiction may be a legitimate gauge of the parties' jurisdictional expectations in some cases; where, for example, website activities can reasonably be expected to be monitored by its operator. Courts should recognise that such monitoring is neither always feasible nor reasonable.

If it appears that courts are taking jurisdiction too readily over Internet disputes, consideration may be given to incorporating an explicit fairness requirement in the *forum non conveniens* test, similar to that afforded by the 14th Amendment of the US Constitution.

The growth of the Internet raises great practical challenges for lawyers. The law and the skills of those who practice it must grow with the development of cyberspace. While specific legislation in this area may be premature, it may have to be considered in future if traditional rules cannot be adapted to this medium. If traditional rules do prove inadequate, the federal and the provincial and territorial governments could adopt uniform legislation. Both Parliament

and provincial legislators constitutionally appear to have a role in regulating Internet use and content. Perhaps the Federal Court of Canada and provincial courts would both adopt uniform rules. The Federal Court of course has jurisdiction across the country now, but harmony with and among provincial statutes would be desirable. The harder question is perhaps whether a rule applying only in Canada would be helpful. Canadian rules would not prevent foreign courts from exercising jurisdiction inappropriately over Canadian residents and enterprises, nor would it ensure Canadians fair and reasonable recourse against foreign Internet users. Yet the Canadian market is for many purposes the most important one for Canadian businesses and consumers. Being able to deal within the country with confidence in the jurisdictional rules would be help to Internet trade, and people might choose to deal with identifiably Canadian sites as a result of this confidence. It is also possible that a well-crafted set of jurisdictional rules might inspire other countries to follow suit. The Uniform Law Conference should try to cooperate with international efforts to study and resolve jurisdictional issues, but if Canadian law is needed, the limits to such lawmaking should not deter the Conference from making the effort.

(III). BASIS OF JURISDICTION OF COURTS FROM INDIAN PERSPECTIVE

Effective legal machinery can be identified on how properly rules and regulations are drafted by legislators and more importantly how precisely principles of jurisdiction are laid down. A court must have jurisdiction, venue , and appropriate service of process in order to hear a case and render an effective judgement.

In India there is only one set of courts, which administers at national, as well as, state laws. The Constitution has, by Article 247, clothed Parliament with power to provide for the establishment of additional courts for the better administration of laws made by Parliament and of any existing laws with respect

to a matter enumerated in the Union list. The courts in India are generally controlled by the states. The courts and other tribunals are under the superintendence of the High Court in the territorial jurisdiction of which they function. The officers of the courts are appointed by the states. In the case of High Courts and the Supreme Court the appointment is made by the president. There is no distinction between Civil Courts and Commercial Courts. All disputes of a civil nature, including commercial causes, are triable by civil courts. For certain types of disputes, *e.g.*, industrial or pertaining to landlord and tenant or accidents, there are some special tribunals.

(A). Jurisdiction of Civil courts in India

Jurisdiction of civil courts in India can be broadly classified in the following three categories:

- Pecuniary
- Subject matter
- Territorial

Pecuniary jurisdiction means jurisdiction based upon monetary limits. The eligibility of civil courts to entertain suits is dependant on the value of suits. When a case is filed, a claim is made. Each such claim is valued in monetary terms. Depending on the value of the claim, the court, which would be competent to entertain the case, is determined. If the claim is below Rs. 1,00,000, the appropriate court to be approached is the Civil Judge (Junior Division). If it is more than Rs. 1,00,000, the Civil Judge (Senior Division) should be approached. Every case should be filed in the court of the lowest grade competent to try it. For *e.g.* a suit valuing above Rs 5 lakh in Delhi would have to be filed in the Delhi High Court and a suit up to Rs 5 lakh in the District Courts.

Jurisdiction with reference to the subject matter means that jurisdiction for certain subject has been exclusively vested in a particular court. For *e.g.* a petition for winding up of a company can be filed only in the concerned High Court.

As for our discussion, we are concerned with territorial jurisdiction. Before proceeding further it must be understood that territorial jurisdiction is subject to pecuniary and subject matter jurisdiction.

According to the Code of Civil Procedure 1908 (CPC), a suit for any immovable property (i.e. land, building etc) is required to be filed in the court within whose jurisdiction the property is situated (*Sec. 16 CPC*).

Further as per the proviso to Section 16 of the C.P.C a suit for relief or compensation for wrong to immovable property, held by or on behalf of the defendant, where the relief sought can be obtained entirely through his personal obedience, can be filed in the court having jurisdiction over the place where the property is situated or where the defendant actually and voluntarily resides, or carries on business, or personally works for gain. Where the immovable property is situated within the jurisdiction of different courts, the suit may be instituted in either of the said courts (*vide S.17 CPC*).

Where it is not certain as to within whose jurisdiction out of two or more courts any immovable property is situated, any of the said courts, if satisfied that there is ground for uncertainty, may adjudicate the same (*S.18 CPC*).

Therefore, disputes between the parties relating to immovable property, arising through the Internet or otherwise, do not present any difficulty as to the jurisdiction of the civil court to entertain and resolve the suit which as discussed above depends upon the location of the immovable property, subject to one exception as stated above.

According to S.19 of CPC, compensation for wrong done to a person or to a movables, if the wrong was done within the jurisdiction of one court and the defendant resides, or carries on business or personally works for gain, within the jurisdiction of another court, a suit can be filed at the option of the plaintiff, in either of the courts having jurisdiction over the said places. The following examples will explain the provision more clearly:

- 1). A, residing in Jaipur, beats B in Calcutta. B may sue A either in Calcutta.
- 2). A residing in Delhi, publishes in Bombay statements defamatory of B, B may sue A either in Bombay or in Delhi.

Subject to the aforesaid principles suits are required to be instituted in either of the following courts (S.20 CPC):

- Where the defendant or each of the defendant actually and voluntarily resides, or carries on business, or personally works for gain, at the time of the commencement of the suit; or
- In a case where the defendants resided at different places, the place where any of the defendants at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain, provided that in such case either the permission of the court is given or the defendants who do not reside, or carry on business, or personally works for gain, in such place as aforesaid, acquiesce in such institution expressly or impliedly by their conduct; or
- Where the cause of action wholly or in part arises.

Where the defendant is a corporation, which includes a company within its ambit, the following two provisions are provided in CPC (explanation to S. 20 of CPC):

- Where a corporation has its sole or principal office at particular place, the courts within whose jurisdiction such office is situated, would also have jurisdiction even if the defendant does not actually carry on business at that place. By legal fiction, it is provided that it shall be deemed that the corporation is carrying on business at the place where the sole or principal office is located. Where cause of action arises at the place where subordinate office of the corporation is located, courts at such place would have jurisdiction and not the principal place of business.

The following examples will help in understanding the applicability of the above legal provision:

1). A is a tradesman in Calcutta. B carries on business in Bombay. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Bombay, where B carries on business.

2). A resides at Simla, B at Calcutta and C at Delhi. A, B, and C being together at Vadodara, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Vadodara where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the court.

Thus, for civil disputes, which may arise between the parties, the legal principles of civil law to find out the jurisdiction depends, upon the location of immovable property, or the place where the wrong is done, or the place of the residence or business or gainful work of the defendant, at the time of the commencement of the suit, or where the cause of action arises.

Since plaintiff is the aggrieved party who files the suit, the law gives him the option to choose the place of suing from the stipulated alternatives wherever provided in law. On the other hand, since the defendant would have to defend himself, jurisdiction based on residence and works are to his convenience. However, 'cause of action' is based on the principle that the place of dispute or where the state of facts which entitle a party to take legal action arise, being connected with the transaction in question, also must have jurisdiction.

(B). 'Cause of action' – Its applicability to Internet cases

No provision in the CPC defines the term 'cause of action'. It is nothing but, a concept, which the courts have explained time and again. Simply stated, 'cause of action' means the fact or facts, which gives a person a right to seek judicial relief. It is a state of facts, which would enable a party to maintain action and give him the right to avail a judicial remedy. 'Cause of action' means the whole

bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to succeed in the suit. 'Cause of action' also includes the circumstances forming the infringement of the right or the occasion for the action. It does not however comprise of every piece of evidence, which is necessary to prove each fact, but it is every fact, which is to be proved. It is a settled legal principle that even if a small part of cause of action arises in a place, the doors of the court having jurisdiction over such a place are open for the plaintiff to bring an action. The law does not require that considerable part of the cause of action must arise in a place to give jurisdiction to the court in that place. The place where the cause of action arises depends upon the facts and circumstances of each case.

Based on the principle of cause of action, the courts in India also have jurisdiction over foreigners. For example, where in a transaction the cause of action has arisen in India, say at Delhi, wholly or in part, the courts in Delhi would have jurisdiction whether the defendant is a resident of India or anywhere in the world.

(C). Jurisdiction of courts and the Information Technology Act 2000

The whole problem arises when there are transactions through Internet between parties coming from various parts of world and has virtual nexus. Under such circumstances if one party wants to sue another, then the question arises as to where can he sue? Traditional principles covers two areas – firstly, the place where the defendant resides, or secondly, where the cause of action arises. However, in the context of the Internet, both these are difficult to establish with certainty.

Some of the provisions of the IT Act, 2000 lays down the provisions as to the place of jurisdiction in disputes arising out of, or in connection with the internet. Since cause of action depends upon the place or places from where the parties communicate, interact, operate and transect with one another sub sections (3),

(4) & (5) of section 13 of the IT Act, 2000 will be attracted for determining the place of cause of action. The above-mentioned provisions are discussed below:

S.13 (3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business and is deemed to be received at the place where the addressee has his place of business.

S.13 (4) The provisions of sub section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub section (3).

S.13 (5) For the purpose of this section, --
If the originator or the addressee has more than one place of business, the principal place of business shall be the place of business.
If the originator or the addressee does not have a place of business his usual place of residence shall be deemed to be the place of business.
'Usual place of residence', in relation to a body corporation means the place of business.

Thus from the above provisions it is clear that the place of dispatch and the receipt of electronic records and communications can be agreed upon between the interacting parties. However, where there is no agreement, it has to be presumed, that the electronic record has been dispatched at the place where the originator has his place of business, and shall be deemed to be received at the place where receiver has his place of business. Where either or both of them do not have a place of business, the usual place of residence shall be considered as the place of business. For a company, the usual place of residence shall be the place where it is registered.

The above-mentioned provisions can be better understood by the example:

- A and B enter into an agreement that the place of dispatch of electronic records by A shall be Los Angeles and the place of receipt by B shall be

New Delhi. In such kind of agreement, the law will consider such places as the places of dispatch and receipt of electronic records, irrespective of the fact that the originator has in reality dispatched an electronic record from New York and the receiptant has received the same at Toronto. But, if there is no agreement as discussed above then the *places of business* of A and B shall be considered as the places of dispatch and receipt of electronic records between them respectively. If A has more than one place of business, then his principal place of business shall be considered as the place of business. However, if he does not have any place of business, his usual place of residence shall be considered as the place of business.

Since cause of action in Internet transactions depends upon the transactions between netizens, which is mainly through dispatch and receipt of electronic records, the abovementioned provisions of IT Act 2000 will be applicable.

It could be said that the aforesaid sub-sections (3), (4) and (5) of section 13, being deeming provisions, shall apply only for the purpose of the IT Act. Whereas for the application of the concept of cause of action under our civil law, only the places from where the parties actually interact by dispatch and receipt of electronic records shall be considered in all cases. This is still an unsettled thing and we have to wait till the High court and the Supreme Court takes any final decision.

One of the interesting provisions of the Act seems to be section 75, which contemplates the application of the IT Act for offences or contraventions committed outside India. Whether such a provision can at all be accepted *prima facie* has been a question of great debate and anxiety. Section 75 of the IT Act reads as under:

S. 75. Act to apply for offences or contravention committed outside India – (1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to offence or contravention committed outside India by any person irrespective of his nationality.

(2) For the purpose of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involved a computer, computer system or computer network located in India.

The debate concerns the extra-territorial application of the offence and whether such application can at all be permissible within the law of criminal jurisdiction. The wording of the section is such that it almost brings the whole world within the jurisdiction of the Indian court. In such case the question that arises is can the Indian court exercise such a wide jurisdiction. To understand the concept behind this section, we need to understand the 'consequence' or 'effect' theory, which has achieved good success in other leading jurisdictions around the world apart from India itself. The principle is that where an act is done abroad and the criminal effect is produced here, the crime is taken to be committed here. This theory has been described as the consequence theory. Somewhat same principle, we can find in section 179 of Code of Criminal Procedure. The section contemplates cases in which the thing done and its consequences happen in two different areas of jurisdiction and provides that in such cases the offence constituted by the act and the consequence may be inquired into or tried in either of the two areas. Thus if the jurisdiction for cross border killing or conspiracy or false representation is accepted, then with the Internet giving a much wider and global scope of committing crimes (the consequence of which can be almost anywhere in the world), providing for a global jurisdiction to tackle crime is in itself not a new phenomena but merely an extension to 'effect' theory. The net seems to provide us with dimensions across and beyond the territorial borders and section 75 has been put in the IT Act to tackle such situations, which could not have been contemplated hitherto. To tackle cross-border killings, law was made. Now to tackle cross-border crimes through wire, law has been made.

Thus, the new concept of cyber jurisdiction is being contemplated not just by India but many other states and has been effectuated as of necessity due to the peculiarity of the Internet, which permits initiation of the crime from any part of the world with its consequences effect in any part of the world without any

barriers. Section 75 of the IT Act, in such situations, could do well in giving the Indian courts the required jurisdiction once the accused comes or is brought within physical boundaries of the country.

(D). Applicability of Foreign judgments in India

As legal disputes between the parties in the cyber world, are likely to give rise to litigation in foreign countries, the provisions with respect to the applicability of foreign judgments in India and judgments of Indian courts on foreigners, will naturally play an important role.

Indian Civil Procedure Code provides that a foreign judgment is conclusive on matters directly adjudicated upon between the parties. But the same would have no applicability in India if a court of competent jurisdiction has not pronounced it, or it has not been delivered on the merits of the case. Further, it will have no applicability where it appears ex-facie to be founded on an incorrect view of international law, or a refusal to recognize the law of India in cases where such a law is applicable, or where the proceedings are in violation of the Principles of Natural Justice, i.e., where a fair hearing is not granted or the proceedings are in violation of the Principles of Natural Justice, i.e. where a fair hearing is not granted or the proceedings are biased, or where the foreign judgment sustains a claim which is in breach of any Indian law (Sec. 13 CPC).

(E). ANALYSIS AND CONCLUSION

Now if we analyze the principles of jurisdiction of USA and India we find there are major differences. In United States, there is no codification of the law of jurisdiction. It means that the basis on which the US court can assert its jurisdiction over the defendant is not in codified form. Due to this, courts (mainly the supreme court) have evolved the concepts to measure the legitimate exercise of judicial power over the parties to the litigation. The two most important legal principles on the jurisdiction in the U.S are of 'minimum contacts' and 'purposeful availment'. These two principles constitute the

foundation of the law of jurisdiction in USA for finding jurisdiction in a particular place or certain places in legal disputes between the parties, especially when the defendant is a non-resident of the forum state. These two principles have been applied individually as well as together, depending upon the factual matrix of particular cases. These principles complement each other in substance and in their results on applicability, and are also very similar to the legal theory of "cause of action" as we have in India. These two doctrines are being applied by the U.S. courts to decide disputes arising, directly or indirectly, out of or in connection with the Internet. In many of the states in the U.S., there are also 'long arm' legislations by which courts of the respective states can assume jurisdiction over respondents who are non-residents, subject to the satisfaction of the stipulated conditions, based in essence on the aforesaid legal concepts of 'purposeful availment' and 'minimum contacts'. The courts have also applied the 'effects test' in certain cases. In India also section 179 of the Code of Criminal Procedure deals with somewhat same aspects. The section covers the cases in which the thing done and its effect happening in two different areas of jurisdiction and provides that in such cases the offence constituted by the act and the consequence may be inquired into and are tried in either of the two areas. A case of *Mobarak Ali Ahmed v State of Bombay* AIR 1957 SC 857 illustrates the same principle. Mr. A at Karachi was making representations to the complainant at Bombay, through letters, telegrams and telephone talks, sometimes directly to Mr. B and sometimes through a commission agent. Mr. B parted with money in good faith of these representations from Karachi. Hence, the entire offence took place at Bombay and not merely one ingredient of it, (which was 'consequence' of the false representation), namely, the parting with the money by Mr. B. It was held by the supreme court of India that the offence will be triable both at the place from where the false representations were made as well as where the parting of the property took place.

However when we talk of Internet things change suddenly, because Internet does not respect geographical boundaries. In such case it is worth comparing section 75 of the IT Act, which contemplates the application of the IT Act for offences or contraventions committed outside India and the 'long arm' statutes of USA. Section 75 of the IT Act is rightly drafted to give long arm effect.

However it is qualified with one principle which is laid down in sub-section 2 of section 75 which says - (2) For the purpose of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involved a computer, computer system or computer network located in India. Thus for the application of section 75 of the IT Act prior requirement is that the offence involves the use of a computer, computer system or computer network located in India.

Further, the Code of Civil Procedure 1908, basis territorial jurisdiction on two principles, i.e. –first, the place of residence of the defendant, and second, the place where the cause of action arises.

The task of the inventors is to develop new technologies. On the other side, there are criminals who use those technologies for commission of more advance crimes. Legislatures, Executive and Judiciary are trying to control such crimes. It is a circle, and in between, it is the society who suffers. Society suffers sometimes with terror- as a new invention springs up, then with distrust- when the invention is used for anti-social activities and then with the hope as the law will catch hold the wrongdoers. As the wheels of justice become operational, such unsociable activities though cannot be eradicated fully are forced to reduce. To think that cybercrimes could be fully curbed- is fighting against reality, against the inevitable, that it cannot be removed/curbed fully. Indian legislators have taken a great step forward by enacting the IT Act 2000. Now it's a time for its proper implementation.

Footnotes

1. Extending Personal Jurisdiction to Acts in Cyberspace – by Dane Steffenson
2. Extending Personal Jurisdiction to Acts in Cyberspace – by Dane Steffenson
3. See- "Choice of law Theory and Background"
www.hewm.com/choiceco.htm

4. Personal Jurisdiction See- www.unc.edu/courses/pre2000fall/law357c/cyberprojects/sp.../PersonalJurisdiction.htm
5. See-Law of Jurisdiction - www.lex2k.org/index/html.
6. See- "Choice of law Theory and Background" www.hewm.com/choiceco.htm
7. See- "Choice of law Theory and Background" www.hewm.com/choiceco.htm
8. Internet use and Personal Jurisdiction: Have Mouse, Will Travel? By- Stephen D Jones (Ohio Bar Association Annual Convention Computer Law Committee Seminar)
9. See-Law of Jurisdiction - www.lex2k.org/index/html.
10. See-Law of Jurisdiction - www.lex2k.org/index/html.
11. Today almost all states in the US have "long-arm" statutes, which allow the state to exercise jurisdiction over an out-of-state defendant. The name long-arm comes from the purpose of these statutes, which is to reach into another state and exercise purpose of these statutes, which is to reach into another state and exercise jurisdiction over a non-resident defendant.
12. As the technology in the US developed Pennyoyer principle became obsolete. This case brought a novel issue involving a non- resident motorist who caused personal injury in another state.
13. The minimum contacts analysis developed by the Supreme Court in International Shoe Co. v. Washington to address this increased mobilization was effective in recognizing the realities of a more connected, mobile America and, at the same time, ensuring that a party would only be hailed into court in jurisdictions in which that party significantly interacted with. See- www.unc.edu/courses/pre2000fall/law357c/cyberprojects/spring01
14. It was in this case, that, US Supreme court created a "minimum contacts" test for states to use as a basis for exercising jurisdiction over an out-of-state defendant. In this case the states office of unemployment compensations sued International Shoe Co. for back contributions. International Shoe is a Company who is incorporated in the state of Delaware and who has its principle place of business in Missouri. The Company had no sales office in the state and has no management within Washington. However the company does had 13 sales persons who show samples and solicit orders within the state. The issue was, whether under these facts, Washington can assert jurisdiction consistent with Due Process. The court stated that to the extent that a corporation enjoys the privilege of conducting activities within a state, it also enjoys the protections and benefits of that state. Since these privileges may also give rise to obligations, which may arise out of the activities within the state, it would not throw an undue burden on the defendant if he is called to answer the suit.
15. See- Law of Jurisdiction - www.lex2k.org/index/html.
16. Personal Jurisdiction See- www.unc.edu/courses/pre2000fall/law357c/cyberprojects/sp.../PersonalJurisdiction.htm

17. Personal Jurisdiction See- www.unc.edu/courses/pre2000fall/law357c/cyberprojects/sp.../PersonalJurisdiction.htm
18. The "forum effect test" was originally introduced in the Calder case. By virtue of this test if a court finds that the defendant committed an intentional act with the knowledge that the act would adversely affect the plaintiff in a particular forum, then an exercise of personal jurisdiction over the defendant in that particular forum is enough to satisfy the purposeful availment prong of the due process analysis. See- www.unc.edu/courses/pre2000fall/law357c/cyberprojects/sp.../PersonalJurisdiction.htm
19. Hustler magazines only contacts with the forum were the 10000 to 15000 copies of its magazine were sold every month. This led the court to the conclusion that Hustler's contacts with New Hampshire could not be considered to be random or isolated
20. This case is the example of the principle that a defendant with the expectation that it will have further contact with the forum residents. The court emphasized on the real approach which recognizes that a 'contract' is 'ordinary but an intermediate step serving to tie up prior business negotiations with future consequences' which are the real object of the business transactions. See- The Two Extreme Jurisdiction Over Cyberspace – by Christopher Doran
21. The U.S. Supreme Court decided that defendant's contacts should be such that he would "reasonably anticipate being haled into court there." The court also held "minimum contacts" as a threshold question to determine whether maintaining suit offended "traditional notions of fair play and substantial justice". The court went on to say that the primary concern in any Due Process analysis (asserting jurisdiction) is the burden on the defendant in litigating in a foreign forum. The court found foreseeability of being haled into specific court significant in determining the defendant's burden. The court also enumerated a non-exhaustive list of other factors that courts should consider. (See- Dane Steffenson- Extending Personal Jurisdiction to Acts in Cyberspace. Published in Law and Internet-Georgia State University College Law)
22. Principle laid down in Worldwide Volkswagen was broadened and clarified in this case. The court in the instant case clarified the stream of commerce analysis. It said that the principle refers to putting items in the flow of goods knowing that they will travel between different states or countries before ultimately reaching the consumer. Thus the concept that something more is needed beyond a single "foreseeable" contact, is also echoed here.
23. For detail facts of the case see: Long Arm of Law Reaches Far Into Cyberspace – by David Loundy. Published in the Chicago Daily Bulletin Aug.8,1996 pg.6
24. The Two Extreme Jurisdiction Over Cyberspace – by Christopher Doran
25. In cases like this, the courts have held that personal jurisdiction exists over a defendant whose sole contacts with a state are through the posting of a passive website on the internet (see – Personal Jurisdiction www.unc.edu/courses/pre2000fall/law357c/cyberprojects/sp.../PersonalJurisdiction.htm)

26. This case demonstrates the failing of the Zippo analysis. The "middle ground" chosen, as exemplified by the Martiz case, is virtually identical to the "passive Web sites" as found in the Bensusan, McDonough and Hearst cases. Defining the creation of a Web site as transmitting into the State is a total fabrication of the additional contacts necessary for personal jurisdiction. Where the Bensusan, McDonough and Hearst courts found it contrary to Due Process when a Web site is the sole bases for jurisdictions, the Martiz court has declared that having a worldwide accessible Web site demonstrates a purposeful availment of the privileges of doing business in the forum.

27. See – Personal Jurisdiction - www.unc.edu/courses/pre2000fall/law357c/cyberprojects/sp.../PersonalJurisdiction.htm). In the instance case the plaintiff Bensusan is the New York Corporation, who owns and operates a jazz club located in the New York City known as 'Blue Note'. The Blue Note is a Federally registered trademark and Bensusan owns all the rights in that trademark. Defendant, King is a Missouri resident who owns and operates a small club also named "The Blue Note" located in Colombia, Missouri. King created a website on the net to promote his club. The site posted general information about the club, upcoming events, and ticketing information. The ticketing information gave the names and addresses from where one can purchase the tickets from Colombia. One can also book the tickets, but they have to collect their tickets from the hall where the show will be performed. Further the website also contained a disclaimer that King's club was not associated with the 'The Blue Note' club located in New York which belonged to plaintiff. Bensusan filed an action against King in United State District Court for trademark infringement and unfair competition. The New York statute had personal jurisdiction over the non-resident defendants provided,

- the non-resident has committed the tort within the state.
- a non-resident has committed a tort outside the state but the injury has caused within the state.

28. The Two Extreme Jurisdiction Over Cyberspace – by Christopher Doran (See- www.Stetson.edu/courses/computerlaw/papers/cdoranf97.htm) (Expired link)

29. (See- Personal Jurisdiction on the Internet. By – David G Post. www.clig.org/DPost/jcases/html)

30. (See- Personal Jurisdiction on the Internet. By – David G Post. www.clig.org/DPost/jcases/html)

31. (See- Personal Jurisdiction on the Internet. By – David G Post. www.clig.org/DPost/jcases/html)

32. (See- Personal Jurisdiction on the Internet. By – David G Post. www.clig.org/DPost/jcases/html)

33. (See- Personal Jurisdiction on the Internet. By – David G Post. www.clig.org/DPost/jcases/html)

34. See- Dane Steffenson- Extending Personal Jurisdiction to Acts in Cyberspace. Published in Law and Internet-Georgia State University College Law)

35. Establishing Personal Jurisdiction for Internet Transactions by Joan C. Henry www.law.stetson.edu/course/computerlaw/papers/jheneryf97.htm
 36. See, P. HOGG, *Constitutional Law of Canada*, (Carswell, Toronto, 1992), at pp. 565 et seq. - www.law.ualberta.ca/alri/ulc/current/ejurisd.htm
 37. *Westcoast Energy Inc. v. Canada (National Energy Board)*, S.C.C., n°25259, March 18, 1998, at p. 30.
 38. *Re Regulation and Control of Radio Communications in Canada*, [1932] A.C. 304 (P.C.); *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141
 39. See, for example, D. MULAN and R. BEAMAN, "The Constitutional Implications of the Regulation of Telecommunications", (1973) 4 *Queens L.J.* 67, at p. 71. The Ontario Court of Appeal concluded likewise in *Re C.F.R.B. and Attorney-General for Canada*, [1973]
- This principle was adopted by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and upheld subsequently in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289. In the latter decision, the Supreme Court of Canada wrote that the "real and substantial connection" test is grounded in constitutional values. See also J.-G. Castel, *Canadian Conflict of Laws* 4th ed. (Butterworths, Toronto, 1997) at pp. 52 et seq.
40. Art. 3148, al. 2 C.C.Q. and secart. 10(h) of the Draft Uniform Jurisdiction Act. Rule 17.02(p) of the Ontario Rules of Civil Procedure simply provides that extraterritorial service may be affected without leave on any person "carrying on business in Ontario".
 41. Art. 3148, al. 3 C.C.Q., rule 17.02(g) of the Ontario Rules of Civil Procedure and secart. 10(g) of the Draft Uniform Jurisdiction Act.
 42. Art. 3148, al. 3 C.C.Q. and rule 17.02(h) of the Ontario Rules of Civil Procedure. Art. 3148, al. 3 C.C.Q. and secart. 10(e) of the Draft Uniform Jurisdiction Act. Rule 17.02(f)(iv) of the Ontario Rules of Civil Procedure similarly provides that an out-of-Province defendant may be served without leave in an action arising from a "breach of contract. committed in Ontario", which presumably implies that contractual obligations were to be performed there.
 43. Art. 3148, al. 4 C.C.Q.; rule 17.02(f)(iii) of the Ontario Rules of Civil Procedure; and secart. 3(c) of the Draft Uniform Jurisdiction Act. Arts. 3152 and 3154 C.C.Q.; rules 17.02(a), (b), (c), (d) and (e) of the Ontario Rules of Civil Procedure and sarts. 10 (a), (b), (c) or (d) of the Draft Uniform Jurisdiction Act.
 44. For a more complete discussion of the rules governing forum in the U.S. and their impact on dispute related to the internet, see Barry Sookman, "Personal Jurisdiction and the Internet: If you put material in Cyberspace, Where can you be sued?", a paper presented at the Computer and Cyberspace Law Convention at the University of Dayton School of Law in July 1997.
 45. *International Shoe Co. v. Washington*, 326 U.S. 310.
 46. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286.
 47. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462; *CompuServe Inc. v. Patterson*, *supra* at note 6; *California Software Inc. v. Reliability Research, Inc.*