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Personal Jurisdiction for Internet Torts: Towards an International Solution?

*Holger P. Hestermeyer, LL.M.**

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live.

—John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1996).

W. Page Keeton defines a tort as “a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.”¹ But which court will provide the remedy when the tortious act and the injury it caused are separated by a border?

Information posted online is accessible worldwide and national courts have proven all too willing to assert jurisdiction for torts “committed” there. This has created the fear that posting information online exposes someone to the risk of being sued for a tort, such as defamation, trademark infringement, copyright infringement or unfair competition, in any foreign jurisdiction—too many fora are available for a dispute. The solution to the problem can only be found on the international plane.

Awareness of the risks of Internet jurisdiction has grown considerably in recent years. A study by the American Bar Association and the

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¹ Keeton also points out that the definition is both vague and inaccurate. See PROSSER AND KEETON ON THE LAW OF TORTS (W. Page Keeton ed., 5th ed. 1984).

International Chamber of Commerce, published in 2004, shows that 75% of North American companies surveyed cited Internet jurisdiction as a significant concern.² The prevailing insecurity about jurisdiction is heightened by the fact that national courts will often apply their domestic law and that each country's laws about the legality of Internet content vary considerably.³ Hence, people maintaining websites fear being sued for violations of a wide variety of national laws regulating content—from German competition laws to French criminal laws to the censorship laws of authoritarian regimes such as Saudi Arabia. Most contentious are cases in which one country seeks to ban Internet content when the very same content is considered to be protected as free speech across the border.⁴ Consider the highly publicized *Yahoo!* case, in which Yahoo! was sued in France because of auctions of Nazi memorabilia on Yahoo!'s American-based website—an act that is illegal in France but legal in the United States.⁵

² See American Bar Association [ABA] & International Chamber of Commerce [ICC], *Global Internet Jurisdiction: The ABA/ICC Survey* (Apr. 2004), <http://www.mgblog.com/resc/Global%20Internet%20Survey.pdf>. Interestingly, European companies showed less concern and more confidence in positive developments.

³ Several attempts have been made to harmonize laws concerning the Internet in at least some respects. While harmonization in the area of intellectual property law has been very successful (with the TRIPS Agreement, the World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17; 36 I.L.M. 65, available at http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf; the WIPO Performances and Phonograms Treaty, date of signing, Dec. 20, 1996, S. Treaty Doc. No. 105-17; 36 I.L.M. 76, available at http://www.wipo.int/clea/docs_new/pdf/en/wo/wo034en.pdf; and the domain name dispute resolution procedures of Internet Corporation for Assigned Names and Numbers [ICANN (UDRP)], available at <http://www.icann.org/udrp/udrp.htm>. See A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOKLYN L. REV. 605 (2002); see Holger P. Hestermeyer, *The Invalidity of ICANN's UDRP under National Law*, 3 MINN. INTELL. PROP. REV. 1 (2002)), harmonization in other areas lags behind. In cooperation with Canada and the United States the Council of Europe drafted the Cybercrimes Convention, which proscribes criminalization of certain computer-related offenses such as hacking, but also regulates procedural questions, e.g., jurisdiction for offenses under the Convention. Convention on Cybercrime, Nov. 23, 2001, ETS no. 185, (July 1, 2004), available at <http://conventions.coe.int/Treaty/en/Treaties/Word/185.doc>. As to Internet content the Convention is limited to regulating child pornography. Hate speech is not covered by the Convention. It was included in an additional protocol to enable the United States to sign on to the Convention. See Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, ETS no. 189, opened for signature Jan. 28, 2003, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>.

⁴ A commonly treated subject in this respect is hate speech. See, e.g., Helen Ginger Berrigan, *"Speaking Out" About Hate Speech*, 48 LOY. L. REV. 1 (2002). For a discussion of international law on hate speech, see Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1 (1996).

⁵ See, e.g., *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916

There are other areas of conflict, such as online gambling: In June 2003 Antigua and Barbuda requested the establishment of a World Trade Organization ("WTO") Panel, challenging numerous U.S. federal and state measures, including court cases, prohibiting the cross-border supply of gambling and betting services, primarily online, in violation of U.S. WTO commitments under the General Agreement on Trade in Services ("GATS").⁶ The WTO Appellate Body has now ruled that the United States was, indeed, in violation of its WTO commitments.⁷

As an introduction to the issue of Internet tort jurisdiction, Part I will recount the *Yahoo!* case, the most divisive case on the issue recently. Parts II and III will give an overview of the current law on Internet tort jurisdiction in two different legal systems: the United States and Germany. They will show that several recent cases in both countries have applied targeting approaches as advocated by Michael Geist and Rufus Pichler. However, insecurity remains and jurisprudence is far from consistent. Part IV will argue that insecurity about Internet jurisdiction could be reduced significantly if countries were to commit themselves in an international convention to abide by a targeting approach along with guidelines for relevant criteria. Such an international law approach would limit the risk for website hosts of being dragged into court anywhere in the world. Unfortunately, an opportunity to pursue such a regime during the negotiations at the Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters ("Judgements Project") has been lost with the collapse of those negotiations.

I. THE YAHOO! CASE

At the core of the much discussed case of *UEJF & LICRA v. Yahoo!, Inc. & Yahoo! France*⁸ is a conflict between the value preferences of two countries and the desire to have those values asserted in the national courts. Art. R 645-1 of the French Code Pénal prohibits the exhibition of Nazi

(1978) (striking down an ordinance making it a misdemeanor to disseminate material promoting and inciting racial or religious hatred, such as displaying swastikas).

⁶ For a list of the measures see the Panel Report, *United States-Gambling and Betting Services*, WT/DS285/R, ¶ 7.1 (Nov. 10, 2004); Request for the Establishment of a Panel, *United States-Gambling and Betting Services*, WT/DS285/2 (June 13, 2003).

⁷ See Appellate Body Report, *United States-Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005).

⁸ See *UEJF & Licra v. Yahoo! Inc. & Yahoo France*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, N° 00/05308 (Fr.), available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited Jan. 18, 2006) [hereinafter *Yahoo v. LICRA*].

propaganda,⁹ an act that is legal in the United States.¹⁰

Yahoo!, a California-based Internet Service Provider (ISP), operates an English-language website under the domain name "www.yahoo.com" offering, *inter alia*, auction sites, message boards and chat rooms.¹¹ On the geocities websites, hosted by Yahoo!, excerpts from the anti-semitic works *Mein Kampf* and *Protocole des Sages de Sion* appeared and Nazi memorabilia was offered for sale on Yahoo!'s auction site. None of the material in question was available on the website www.yahoo.fr, maintained by Yahoo! France, the French subsidiary of Yahoo!. However, that website contained a link to www.yahoo.com.

LICRA is an association combating racism and anti-Semitism; l'UEJF is the union of Jewish students of France. In April 2000 the two associations discovered that they could access the material in question in France. After LICRA had sent a cease-and-desist letter to Yahoo! in California, it filed a complaint, alleging violations of article R 645-1 of the French Code Pénal, in which l'UEJF joined. In an order dated May 22, 2000 the Tribunal de Grande Instance ("TGI") in Paris asserted jurisdiction under article 46 of the Nouveau Code de Procédure Civile,¹² reasoning that

⁹ The provision states that:

Wearing or exhibiting in public a uniform, insignia or symbol similar to the uniforms, insignia or symbols that were worn or exhibited either by members of an organization declared criminal in application of Art. 9 of the Statute of the International Military Tribunal annexed to the Treaty of London of 8 August 1945 or by a person found guilty by a French Court or International Tribunal of one or several crimes against humanity as provided by Art. 211-1 to 212-3 or the law No. 64-1326 of 26 December 1964 is punishable by the fine foreseen for 5th degree misdemeanors except where done for the needs of a film

CODE PÉNAL [C.PÉN.] Art. R 645-1 (Fr.) (translation by author).

¹⁰ None of the two policies is objectively superior to the other. Just like U.S. commentators criticize the insufficient protection of freedom of speech in France (*see, e.g.*, Elissa A. Okoniewski, *Yahoo!, Inc. v. LICRA: The French Challenge to Free Expression on the Internet*, 18 AM. U. INT'L L. REV. 295 (2002)), proponents of the French law retort that U.S. law does not protect the memory of the Jewish community against defamation and hatred, (*see, e.g.*, Valérie Sédallian, *Commentaire de l'affaire Yahoo! À propos de l'ordonnance du Tribunal de grande instance de Paris du 22 mai 2000*, JURISCOM, May 22, 2000, <http://www.juriscom.net/chr/2/fr20001024.htm>).

¹¹ For the background of the case *see* *Yahoo v. LICRA*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, N° 00/05308 (Fr.), available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited Jan. 18, 2006); Sungjin Kang, *Yahoo!'s Legal Battle in France and in the USA*, 29 LIEI, 195 (2002); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004). Note, however, that the background of the case described by the Ninth Circuit is incorrect, insofar as the court alleges that the American website www.yahoo.com targets U.S. users; also, the court seems to cite the original demand of the plaintiffs as the order itself.

¹² The provision reads: "Besides suing the defendant at his place of residence the plaintiff

the accessibility of the websites in question (via both the yahoo.com website directly and the yahoo.fr website through a hyperlink) caused harm in France.¹³ The TGI ordered Yahoo! to take all necessary measures to dissuade and remove any access on yahoo.com to auctions of Nazi memorabilia and all other websites condoning Nazism or contesting Nazi crimes. Yahoo! France was ordered to warn all users of the fact that pursuing their searches on yahoo.com might put them in violation of French law before using the link to yahoo.com.¹⁴

Yahoo! sought to have the TGI reconsider its order, arguing that its services under the .com domain were addressed to U.S. Internet users and that the technical means to fulfill its obligations under the May 22 order, i.e. the means to block viewers in France, did not exist.¹⁵ On November 20, 2000, after having received expert reports on the feasibility of compliance with the first interim order by Vinton Cerf, François Wallon and Ben Laurie, the TGI confirmed its order.¹⁶ The Court took note of Yahoo!'s arguments that its services, including its auction site, targeted mainly U.S. Internet users, particularly given the nature of the objects sold, the language and currency used and the payment options offered. The TGI also noted that Yahoo!'s servers were installed in the United States and the French order could not be enforced there, where it would conflict with the First Amendment of the U.S. Constitution. Nonetheless, the TGI was not convinced by these arguments. It reasoned that Nazi memorabilia would be of equal interest to French users and the mere visualization of such objects on the Internet was in violation of the *Code Pénal*. Significantly, the Court pointed out that Yahoo! knew it was addressing French Internet users with its offerings on the yahoo.com website, as the website displayed French-language commercials if accessed from France. The TGI also rejected Yahoo!'s argument that compliance with the order was impossible. This conclusion relied heavily on the expert report, which stated that 70% of the

can, at his choice, sue the defendant: . . . in tort matters in front of the court of the location of the tortious act or where the damage was suffered." (translation by author). NOUVEAU CODE DE PROCEDURE CIVILE [N.C.P.C.], Art. 46.

¹³ Yahoo v. LICRA, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, N° 00/05308 (Fr.), available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited Jan. 18, 2006).

¹⁴ There is some confusion in the French judgment concerning its scope. Taken literally, the Court orders to block all access to the offensive sites would seem to imply access from anywhere in the world. However, the Court's emphasis on the technical feasibility of blocking access to the sites from France only shows that the scope is much narrower and the Court meant to block access from France only.

¹⁵ See Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, November 20, 2000, N° 00/05308 (affirming the May 22 order) available at http://www.eff.org/legal/Jurisdiction_and_sovereignty/LICRA_v_Yahoo/20001120_fr_int_ruling.en.pdf (last visited Jan. 18, 2006).

¹⁶ *Id.*

IP addresses allocated to French Internet users could definitely be associated with a French access provider and thus be filtered (a technology used by Yahoo! to target the commercials to French users). For users with an unclear status a declaration of their locality could be required. Given that Yahoo! already used the relevant technology to target commercials to French users, the TGI concluded that no extravagant financial burden was required for compliance with the order. The technology, according to the experts, does not have too great an impact on the performances of the servers. Finally, Yahoo!'s argument that the technology was not trustworthy was also discounted by the TGI; after all, that would have meant that Yahoo! was deceiving its advertising clients who presumed that they were being accurately served by the technology permitting Yahoo! to target its advertising.¹⁷

Yahoo! largely complied with the French order. It undertook the relevant changes to the yahoo.fr website and amended its auction policy to prohibit items promoting, glorifying, or directly associated with groups such as the Nazis or those that violated Yahoo!'s hate-speech policy. However, some items, such as copies of *Mein Kampf*, were still available.

Yahoo! did not pursue an appeal against the order in France.¹⁸ Instead, it filed a complaint in the Northern District of California seeking a declaratory judgment that the French court orders are not enforceable in the United States.¹⁹ LICRA and l'UEJF had not yet asked a U.S. Circuit Court to enforce the French judgment, so they filed a motion to dismiss for lack of *in personam* jurisdiction. The District Court rejected the LICRA/l'UEJF motion, reasoning that the defendants had purposefully availed themselves of the benefits of California by sending a cease-and-desist letter to Yahoo!, using the U.S. Marshals Service to serve process and by requesting a French court to order that Yahoo! perform acts in California.²⁰ It granted Yahoo!'s motion for summary judgment, holding that enforcement of the French orders in the United States would violate the First Amendment.²¹

¹⁷ *Id.*

¹⁸ Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 169 F. Supp. 2d 1181, 1188 (N.D. Cal. 2001).

¹⁹ *Id.* at 1186.

²⁰ Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

²¹ Yahoo!, Inc., 169 F. Supp. 2d at 1189. In the discussion of the content of the French order the court seems to rely on an order to make all access to the offending sites impossible, not just access by French citizens. As stated in footnote 14, it is rather doubtful that this is what the French court meant. Unfortunately, the District Court dodges, or at least remains vague on, the real question at stake: does the First Amendment have an extraterritorial effect on the Internet, i.e., is it relevant under the First Amendment whether access of French users to a website is blocked or not. The answer in the case can only be avoided by the indirect domestic effect of the order. An enforcement of the judgment might require Yahoo! to

LICRA and l'UEJF filed an appeal that was decided by the Court of Appeals for the Ninth Circuit in August 2004. With one judge dissenting, the court reversed the District Court. The court held that personal jurisdiction can be obtained once the defendants ask a District Court to enforce the French orders. To this point, the court noted, LICRA/l'UEJF have not done so. The only possible basis for jurisdiction, the court concluded, would be that the defendants had purposefully availed themselves of the jurisdiction of California. To do so, LICRA's and UEJF's efforts must qualify as wrongful conduct targeted at Yahoo!. However, enforcing their legal rights under French law cannot constitute such conduct. Judge Brunetti, dissenting, argued that it would have been proper to exercise jurisdiction, as LICRA and UEJF deliberately sought action from Yahoo! in California, regardless of whether such action may be considered wrongful or not.²² However, the story did not end here. The case continued, with an en banc rehearing in the Ninth Circuit.²³

On January 12, 2006 the Circuit Court handed down its judgment.²⁴ By six votes to five it dismissed Yahoo!'s suit, i.e. it reversed and remanded the case to the District Court. Nevertheless, the outcome is unsatisfactory for those who hoped for a restriction of jurisdiction: Of the six judges in favor of dismissing the suit, only three held so on the basis of lack of jurisdiction. The other three judges considered the suit not ripe.²⁵ Thus, an eight-judge majority of the eleven-judge en banc panel held that the District Court had properly exercised jurisdiction. They reasoned that, in contrast to the original Ninth Circuit's holding, all intentional acts aimed at the forum

operate a filter in the United States preventing French users from accessing the websites in question. However small the administrative hassle to operate and fine-tune such a filter, it imposes a burden on speech in the United States and thus exerts a chilling effect. In its briefing to the en banc panel of the Ninth Circuit Yahoo! vaguely contended that the restriction of access of French Internet users would also restrict access by users in the United States. The majority of the en banc panel of the Ninth Circuit correctly identified this legal question. However, it did not have to rule on it, as three of the five judges considered the case not to be ripe. The dissent also discussed the issue. See *Yahoo! Inc. v. LICRA, l'UEJF*, No. 01-17424, 2006 U.S. App. LEXIS 668 (9th Cir. Jan. 12, 2006) (en banc).

²² *Yahoo! Inc. v. LICRA, l'UEJF*, 379 F.3d 1120 (9th Cir. 2004) (Brunetti, J., dissenting), *rev'd en banc*, No. 01-17424, 2006 U.S. App. LEXIS 668 (9th Cir. Jan. 12, 2006).

²³ Order, *Yahoo! Inc. v. LICRA*, 399 F.3d 1010 (9th Cir. 2005) (No. 01-17424).

²⁴ *Yahoo! Inc. v. LICRA*, No. 01-17424, 2006 U.S. App. LEXIS 668 (9th Cir. Jan. 12, 2006) (en banc).

²⁵ Those judges chiefly reasoned as follows: It is unclear whether the French court would hold Yahoo! in violation of the French orders after the voluntary change in Yahoo!'s policy. Also, it is unlikely that any penalty, if assessed by the French court, could ever be enforced in the United States. Furthermore, it is unclear whether First Amendment harm exists given that Yahoo! has either voluntarily complied with the French orders or the French order requires restricting access to French, but not to U.S., users. *Id.* at *3 (Fletcher, J. with Schroeder, J. and Gould, J. joined as to the entire opinion).

state causing a “jurisdictionally sufficient amount” of harm that the defendant knows is likely to be suffered in the forum state are relevant for the evaluation of jurisdiction—not just wrongful conduct. The same eight-judge majority then considered the three contacts of LICRA and UEJF with California. The cease-and-desist letter sent to Yahoo! before the lawsuit in France alone does not suffice as a basis for jurisdiction, as an opposite holding would discourage cease-and-desist letters and encourage filing lawsuits without first attempting to find an amicable solution. Nor does service of process, namely to commence the French lawsuit, and service of the French court’s orders suffice as a basis for jurisdiction or else U.S. citizens sued abroad could without further ado bring suit in the United States. However, considered in conjunction with the first two contacts, the fact that LICRA and UEJF had obtained two orders from the French court directing Yahoo! to take actions in California on threat of a substantial penalty was held to suffice for a finding of jurisdiction, even if only narrowly so. In the majority’s opinion this last act could potentially involve a penalty or at least cast some cloud on the legality of Yahoo!’s actions.²⁶

The minority of three judges who concurred in the judgment considered the exercise of personal jurisdiction over LICRA and UEJF as improper. They held that the defendants’ action was not expressly aimed at California since they sought French court orders directing Yahoo! to perform acts in France. Even though they knew that Yahoo! was based in California, their express aim was local and not directed towards California.²⁷ Furthermore, much like the original panel, they considered only wrongful conduct to give rise to jurisdiction in a non-commercial and non-contract case.²⁸ The minority went beyond that and rightly pointed to a contradiction in the majority’s assessment: The majority, despite its claim to the contrary, would expose a foreigner litigating a bona fide claim in a foreign court and receiving a favorable judgment to U.S. jurisdiction, as any foreign judgment arguably has an effect on the defendant at home.²⁹

The decisions have received wide attention and are bound to remain in the news for some time. The French court’s assertion of jurisdiction has at times provoked fierce criticism and has certainly done its part to heighten the already mentioned insecurity about the risks of Internet jurisdiction. However, the French court was right to assert jurisdiction. Even though

²⁶ *Id.* (Fletcher, J. with Schroeder, J., Gould, J., Hawkings J., Fisher, J., Paez, J., Clifton, J. and Bea, J. joined as to Parts I and II).

²⁷ *Id.* at *75 (Ferguson, J. with O’Scannlain, J., Tashima, J. concurring in the judgment).

²⁸ *Id.* at *88 (O’Scannlain, J. with Ferguson, J., Tashima, J. concurring only in the judgment).

²⁹ *Id.* at *99 (Tashima, J. with Ferguson, J., O’Scannlain, J. concurring in the judgment); *see also id.* at *88 (O’Scannlain, J. with Ferguson, J., Tashima, J. concurring only in the judgment).

Yahoo! maintained a separate website through a French subsidiary in France, it evidently also targeted French users with its English-language website. Why else would Yahoo! post French-language advertising on that site if its software identified a user accessing the site as French? Despite mentioning the use of this targeting technology, the Ninth Circuit failed to sufficiently recognize this when it stated, as a matter of fact, that Yahoo!'s U.S. website "targets users in the United States."³⁰ But the lessons the Yahoo! case teaches reach beyond the issue of jurisdiction to enforcement questions. First of all, the mere fact that a court in another country asserts jurisdiction does not imply that its judgment can ultimately be enforced. Second, where the other country turns out to be an important market, a company will often comply with the judgment whether it can be enforced or not.

II. INTERNET JURISDICTION IN THE UNITED STATES

To adjudicate an action seeking to impose a duty on somebody, courts in the United States need to have jurisdiction over that person. The same standard of jurisdiction applies for both interstate and international cases. Traditionally, grounds for jurisdiction include the consent of the defendant to jurisdiction, the defendant's domicile in the forum state, or the defendant's physical presence in the state as found by a process server.³¹ In *International Shoe Co. v. Washington*³² the Supreme Court updated the traditional rule by connecting personal jurisdiction to the constitutional guarantee of due process. The Court held that to assert personal jurisdiction over a defendant who is not present within the forum, due process requires that "he have certain minimum contact with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."³³ The new standard inspired states to pass so-called "long-arm statutes" extending jurisdiction over non-residents, in some cases to the farthest extent permissible under the Constitution.³⁴ In *Helicopteros*

³⁰ *Id.* at *3 (Fletcher, J., Schroeder, J., Gould, J., Hawkins J., Fisher, J., Paez, J., Clifton, J. and Bea, J.). The dissent equally fails to recognize this fact. *See id.* at *140 (Fisher, J. with Hawkins, J., Paez, J., Clifton, J., Bea, J. dissenting in part and concurring in part) (stating that "Yahoo! does not target specific users by initiating content directed solely at them." It also fails to take into account that Yahoo! already applies a form of the relevant technology when it stresses the cost of compliance with the French order.)

³¹ *See Pennoyer v. Neff*, 95 U.S. 714, 720 (1878); ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS 1-5 (1983).

³² *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³³ *Id.* at 316.

³⁴ *See, e.g., CAL. CODE CIV. PROC. § 410.10* (2005): "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"; WYO. STAT. ANN. § 5-1-107(a): "A Wyoming court may exercise jurisdiction on any basis not inconsistent with the Wyoming or United States constitution." Other states

*Nacionales de Colombia v. Hall*³⁵ the Supreme Court further refined the minimum contacts standard, distinguishing “general jurisdiction,” where the systematic and continuous activity of the defendant within the forum subjects the defendant to jurisdiction even for causes of action unrelated to the forum activity, and “specific jurisdiction,” where the defendant’s forum contacts are merely sporadic, but the cause of action arises from those contacts.³⁶ It is the question of specific jurisdiction that is at issue in Internet tort cases: which types of sporadic Internet “contacts” suffice to enable an American court to assert personal jurisdiction over those associated with the relevant website? The 1958 Supreme Court case *Hanson v. Denckla*³⁷ has been of particular importance for Internet cases. Chief Justice Warren wrote for the majority of the Court, concluding that in order to find the requisite minimum contacts there needs to be “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.”³⁸

Even though “purposeful availment” has been cited as a requirement for asserting *in personam* jurisdiction ever since, for the Internet, this test poses more questions than answers. A website content provider knows that the page is accessible world-wide. Does that mean that the content provider purposefully availed itself of conducting activities in every state from which the website can be accessed? In an early set of cases courts tended to answer this question in the affirmative and thus applied what could be called an accessibility test. In *Inset Systems, Inc. v. Instruction Set, Inc.*³⁹ a Connecticut Federal District Court recognized a Connecticut court’s jurisdiction over a trademark infringement action against a Massachusetts company, concluding that the Massachusetts company’s use of the Internet constituted the direction of its activities towards Connecticut.⁴⁰

enumerate grounds for jurisdiction. See, e.g., MASS. GEN. LAWS ch. 223A (2005); FLA. STAT. § 48.193 (2005). For further details see JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 138 (2nd ed. 1993). Federal courts exert jurisdiction over non-residents on the basis of the long-arm statutes of the state in which they sit. See FED. R. CIV. P. 4 (e), (k); STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK § 2.5 (1996); Melissa K. Cantrell, *The Taming of E-Health: Asserting U.S. Jurisdiction over Foreign Domestic Websites*, 103 W. VA. L. REV. 573, 582 (2001).

³⁵ *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1983).

³⁶ *Id.* at 415. The distinction was originally proposed in 1966 by von Mehren and Trautman in Arthur von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

³⁷ *Hanson v. Denckla*, 357 U.S. 235 (1958).

³⁸ *Id.* at 253. See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

³⁹ *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 153, 160 (D. Conn. 1996).

⁴⁰ *Id.* at 165; see also *Mariz v. Cybergold*, 947 F. Supp. 1328 (E.D. Mo. 1996); see Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet*

This broad approach changed in 1997, when the Federal District Court of the Western District of Pennsylvania decided *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*⁴¹ and pronounced a new standard for purposeful availment in Internet cases. Zippo Dot Com, a California Corporation, operated an Internet website under the domain “zippo.com” where it advertised a news service that could be ordered online.⁴² Its news service proved quite successful and managed to attract 3,000 Pennsylvania subscribers.⁴³ Unfortunately for Zippo Dot Com, Pennsylvania is also where Zippo Manufacturing, the maker of the famous lighters, is located. The lighter company sued Zippo Dot Com for trademark infringement and trademark dilution in a Pennsylvania court.⁴⁴

The District Court applied what would become known as the *Zippo* sliding scale. At the one end of the scale (providing for jurisdiction) are cases in which the defendant clearly does business over the Internet. The defendant enters into contracts with residents of the jurisdiction that involve the knowing and repeated transfer of files. Maintaining such an active site allows the assertion of jurisdiction.⁴⁵ At the other end of the scale (not providing jurisdiction) are situations in which the defendant merely posts information to a website. Such a passive website does not allow the assertion of jurisdiction.⁴⁶ The middle ground is occupied by “interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”⁴⁷ Interactivity would hence be one of the most important criteria moving a website towards the “active” side of the scale: allowing users to post or submit information, to query and respond to queries and, most important of all, to contract on the website. The Court held that Zippo Dot Com was doing business on the active website end of the spectrum and thereby purposefully availing itself of jurisdiction in Pennsylvania.⁴⁸ Other courts soon adopted the *Zippo* test.⁴⁹

Jurisdiction, 16 BERKELEY TECH. L.J. 1345, 1361 (2001) (criticizing the judgment, as this argument would allow every court to assert jurisdiction); Michael Traynor & Laura Pirri, *Personal Jurisdiction and the Internet: Emerging Trends and Future Directions*, 712 PLI/PAT 93, 100, 103 (2002).

⁴¹ *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

⁴² *Id.* at 1121.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1124.

⁴⁶ *Id.*

⁴⁷ *Zippo Manufacturing*, 952 F. Supp. at 1124.

⁴⁸ *Id.* at 1126.

⁴⁹ E.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *Mink v. AAAA Development LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *Soma Medical Int'l v. Standard*

After several years of success, however, the *Zippo* test has come under increasing criticism. One may properly wonder whether it is justified to hinge the assertion of personal jurisdiction on the interactivity of a website. After all, the interactivity of a website is a mere technical question of programming. Whether a site is interactive or not can be the random consequence of the skills of the website programmer and is not necessarily reflective of the intent and desires of the content provider.

In some areas, the standard of interactivity seems entirely misplaced. This is especially true in defamation actions. A website can be completely passive and yet deliberately seek to insult or harm the reputation of a person in another jurisdiction. On the other hand, it is unclear why the maintenance of an interactive website entails purposeful availment to the world at large. Consider the case of a local baker, whose website allows local residents to order bagels online, but whose advertisement could be considered indecent or obscene in a foreign jurisdiction. There is no reason why the interactivity with local residents should be taken as evidence that the baker purposefully availed himself of the foreign jurisdiction in which the website might be regarded as offensive.

Courts have implicitly,⁵⁰ and at times, explicitly,⁵¹ started to move away from the *Zippo* test. Some commentators have heralded this turn away from *Zippo* as a return to the constitutional standards of jurisdiction.⁵² This is somewhat incorrect, given that *Zippo* was an attempt to further define the constitutional standard of purposeful availment. In the absence of the *Zippo* test, a different refinement of that standard would be needed. The precedent of *Calder v. Jones* has proven to be particularly attractive.⁵³ In *Calder*, an entertainer residing in California brought a libel suit in California against the writer and editor of a Florida-based tabloid because of a story impugning the plaintiff's professionalism. The tabloid sold numerous copies in California. The Supreme Court held that a court can assert

Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999). For an attempt to organize the case law up until 2000 under the *Zippo* scale, see Markus Rau, „Minimum Contacts“ und „Personal Jurisdiction“ über auswärtige Gesellschaften im Cyberspace, RIW 761 (2000) (F.R.G.).

⁵⁰ Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998) (citing the effects test and stating that Toeppen's scheme to register trademarks as domain names constituted purposeful availment).

⁵¹ GTE New Media Serv. Inc. v. BellSouth Corp., 199 F.3d 1343 (D.C. Cir. 2000) (rejecting the interactivity argument by itself).

⁵² Note, *D.C. Circuit Rejects Sliding Scale Approach to Finding Personal Jurisdiction Based on Internet Contacts*.—*GTE New Media Services Inc. v. Bellsouth Corp.*, 199 F.3d 1343 (D. C. Cir. 2000), 113 HARV L. REV. 2128 (2000); Jason Green, *Is Zippo's Sliding Scale a Slippery Slope of Uncertainty? A Case for Abolishing Web Site Interactivity as a Conclusive Factor in Assessing Minimum Contacts in Cyberspace*, 34 J. MARSHALL L. REV. 1051, 1063 (2001).

⁵³ *Calder v. Jones*, 465 U.S. 783 (1984).

jurisdiction over a non-resident defendant when the defendant has expressly aimed his intentional and allegedly tortious actions at the forum state, knowing that the conduct would cause harm in there.⁵⁴ This effects test, alongside the *Zippo* test, has become one of the most commonly used jurisdictional tests for online torts.⁵⁵

A third standard advocated by Professor Geist is the “targeting test.”⁵⁶ It tries to establish the intent of the defendant by examining the steps taken to enter or avoid a jurisdiction and asserts jurisdiction only if the forum was targeted.⁵⁷ The factors to be taken into account in determining the intended targeted jurisdictions are a matter of much discussion, but given the wide variety of possible factual situations, it is questionable whether an exhaustive list of factors can be established. It seems plausible to look at the totality of the circumstances to determine which jurisdictions were targeted and to use an open-ended, illustrative list of criteria to mitigate the vagueness of the standard.

Courts have started to take targeting into account, often applying it side-by-side with other tests or blending them without acknowledging it. A good example of this approach is the 2003 case *Toys “R” Us v. Step Two, S.A.*⁵⁸ Step Two, a Spanish corporation, owns the trademark “Imaginarium” in Spain and franchises toy stores under that trademark in Spain and other countries, but not in the United States.⁵⁹ It also operates interactive Spanish-language websites under the domain name “imaginariurnet.com” and similar names, on which shoppers can buy goods by entering their credit card number, delivery address, and phone number.⁶⁰ The websites list the product prices in Euros and provide a contact phone number in Spain.⁶¹ Toys “R” Us, which owns similar ‘Imaginarium’ stores and the Imaginarium trademark in the United States, sued for trademark infringement.⁶² Toys “R” Us produced evidence of two U.S. sales with U.S.

⁵⁴ *Id.* at 789–90.

⁵⁵ See *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 543 (N.J. 2000); *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154, 1160 (C.D. Cal. 2000); *Millennium Enter. Inc. v. Millennium Music LP*, 33 F. Supp. 2d 907, 921–922 (D. Or. 1999); *Carefirst Of Maryland, Inc. v. Carefirst Pregnancy Ctr., Inc.*, 334 F.3d 390 (4th Cir. 2003) (applying a combination of *Zippo* and *Calder* and requiring intentional interaction with the state). See also, Amanda Reid, *Operationalizing the Law of Jurisdiction: Where in the World Can I Be Sued for Operating a World Wide Web Page?*, 8 COMM. L. & POL’Y 227, 238 (2003) (citing the effects test and the *Zippo* test as the two most commonly used tests).

⁵⁶ Geist, *supra* note 40, at 1380–86.

⁵⁷ *Id.*

⁵⁸ *Toys “R” Us v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003).

⁵⁹ *Id.* at 449.

⁶⁰ *Id.* at 449–50.

⁶¹ *Id.* at 450.

⁶² *Id.* at 448–49.

credit cards, both initiated by Toys “R” Us, originally shipped to a Toys “R” Us employee in Madrid and then forwarded to the United States.⁶³ Even though the Court cited *Zippo* as the seminal authority, it went on to state that a commercially interactive website by itself is insufficient to establish jurisdiction.⁶⁴ There must be evidence that the defendant purposefully availed himself “by directly targeting its web site to the state, knowingly interacting with the residents of the forum state via its web site, or through sufficient other related contacts”⁶⁵ which may be non-Internet related.⁶⁶ The court concluded that personal jurisdiction was lacking, first because there was no purposeful availment and second, applying the effects test, because the defendant did not knowingly seek to interact with U.S. residents.⁶⁷

U.S. courts have come a long way from simply asserting jurisdiction on the basis of the accessibility of the website within the forum. Nevertheless, there still is no certainty as to the approach U.S. courts take towards Internet jurisdiction. Three approaches seem to compete: the *Zippo* test, an effects test, and a targeting test, creating uncertainty for website hosts as to whether they can expect to be hauled into U.S. courts.

III. INTERNET JURISDICTION FOR TORTS IN GERMANY

German courts treat the question of personal jurisdiction under the heading of “local jurisdiction,” focusing on the local reach of the court. Generally, the German rules on local jurisdiction govern both the question of local jurisdiction within Germany as well as the question of international jurisdiction of the German courts. European integration has brought an additional set of rules. In deciding on their local jurisdiction in international cases, German courts now must first consider the applicable norms of Council Regulation (EC) No. 44/2001⁶⁸ or of the Lugano Convention.⁶⁹ As far as is relevant for the present discussion, these rules provide that a tortfeasor who resides in an EU Member State (or, for the Lugano Convention, an EFTA Member State) can be sued in the courts of any of

⁶³ *Id.* at 450.

⁶⁴ *Toys “R” Us*, 318 F.3d at 452–54.

⁶⁵ *Id.* at 454.

⁶⁶ *Id.* at 453.

⁶⁷ *Id.* at 455. For a recent discussion of Internet jurisdiction and the importance of *Zippo* as precedent see the *Symposium Personal Jurisdiction in the Internet Age* (with contributions by Allan Stein, Patrick Borchers, Wendy Perdue & Andrea Matwyshyn), 98 NW. U. L. REV. 409 (2003–2004).

⁶⁸ Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC) [hereinafter *The Regulation*] (superseding the Brussels Convention at art. 68).

⁶⁹ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 Sept. 1988, 1988 O.J. (L 319) 9.

three fora: the state in which he resides,⁷⁰ the place where the tortious act was committed, or the place where the injury was caused.⁷¹ Attempts to introduce special jurisdictional regulations for the Internet and adopt a “country of origin” standard, according to which a website would only be subject to the laws and jurisdiction of its country of origin have failed.⁷²

When the tortfeasor does not reside within the EU or the territory covered by the Lugano Convention, the German national rules for local competence apply. Section 32 of the *Zivilprozessordnung* (“ZPO”-Code of Civil Procedure) provides that “[f]or tort actions the court in the district of which the tort was committed is competent.”⁷³ The same jurisdictional rule is provided for with respect to violations of the *Gesetz gegen den unlauteren Wettbewerb* (“UWG”-Law against Unfair Competition) in section 14 paragraph 2.⁷⁴ Courts have clarified the provision by stating that the tort is committed both where the tortious act took place and where the relevant protected legal interest was hurt.⁷⁵

For Internet cases the risk of a broad interpretation is evident. Even though the location of the tortious act is either the location of the web-

⁷⁰ The Regulation, *supra* note 68, at art. 2.

⁷¹ *Id.* at art. 5 no. 3. See also DIETMAR CZERNICH ET AL., KURZKOMMENTAR EUROPÄISCHES GERICHTSSTANDS- UND VOLLKSTRECKUNGSRECHT, art. 5 para. 81 (2d ed. 2003).

⁷² Obviously, under such a standard websites would simply be relocated to the country with the most lenient regulations. See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (‘Directive on Electronic Commerce’), 2001 O.J. (L 178) 1 pmb1. paras. 5, 22, art. 1 para. 4 (discussing the country of origin principle, but not using it in the directive to regulate jurisdiction); see also Graham Smith, *Directing and Targeting—the Answer to the Internet’s Jurisdiction Problems?*, COMPUTER L. REV. INT’L (formerly COMPUTER UND RECHT INT’L) [CRI] 2004, 145, 148; M. Fallon & J. Meeusen, *Le Commerce Électronique, la Directive 2000/31/CE et le Droit International Privé*, 91 REV. CRIT. DR. INTERNAT. PRIVÉ 435, 471 (2002) (Fr.).

⁷³ Zivilprozessordnung [ZPO] [Code of Civil Procedure] § 32 (2003). Translation by author.

⁷⁴ See Wolfgang Büscher, in KOMMENTAR ZUM GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB [UWG] § 14 para. 2 (Karl-Heinz Fezer ed., 2005), LAUTERKEITSRECHT (limitation for people residing in or with a place of business in Germany). Note that the provision was formerly contained in *Gesetz gegen den unlauteren Wettbewerb* § 24 [hereinafter UWG].

⁷⁵ *Ort der tatbestandlichen Rechtsgutverletzung*. See Rufus Pichler, in HANDBUCH MULTIMEDIA-RECHT. RECHTSFRAGEN DES ELEKTRONISCHEN GESCHÄFTSVERKEHRS § 31 para. 54 (Thomas Hoeren & Ulrich Sieber eds., 2005); Thorsten Bettinger & Dorothee Thum, *Territorial Trademark Rights in the Global Village—International Jurisdiction, Choice of Law and Substantive Law for Trademark Disputes on the Internet* (pt. 1), 31 INT’L REV. INDUS. PROP. & COPYRIGHT L. 162, 170–72 (2000); NIKO HÄRTING, INTERNETRECHT 43 (1999), Helene Boriths Müller, *Internationales Zivilverfahrensrecht*, in RECHTSFRAGEN DER INFORMATIONSGESELLSCHAFT 288, 296 (Thomas Hoeren & Robert Queck eds., 1999). See also Büscher, *supra* note 74, § 14 para. 23.

server⁷⁶ or the location of the uploading of the relevant data by the tortfeasor,⁷⁷ the place where the legal interest is hurt could theoretically be anywhere since information on the Internet can be accessed from anywhere. Hence, German courts would have jurisdiction for any tortious claim connected with Internet content accessed in Germany.

Courts have had to face a similar problem in press defamation cases. Arguably, in those cases the harm is done wherever the defamatory statement is read, exposing any journal to liability in Germany simply because the journal happens to be read there. Germany's highest civil court, the *Bundesgerichtshof* ("BGH"-Federal Court of Justice), recognized the apparent danger of such loose attribution of jurisdiction. In 1977 it had to decide a defamation case in which the plaintiff sued an Austrian journal allegedly containing defamatory statements about him. The plaintiff had obtained an issue of the journal in Germany by mere happenstance and had then procured further issues via a German bookseller. The *Bundesgerichtshof* decided that these circumstances were not sufficient to assert jurisdiction. The Court concluded that jurisdiction only lies where the journal is distributed purposefully.⁷⁸ The standard resembles the "purposeful availment" standard of the U.S. Supreme Court's *Hanson* decision.⁷⁹ Transposed to Internet cases, a court could only assert jurisdiction where the person posting the website purposely made it accessible for the relevant jurisdiction.⁸⁰

The provision on jurisdiction for unfair competition cases⁸¹ has also been limited by the German courts. For anti-competitive behavior in press products, the provision theoretically opened up the choice amongst a number of jurisdictions, as those products are commonly distributed to numerous places. The majority of courts have held that not all jurisdictions to which the products have been purposefully distributed have jurisdiction. Rather, harm to a protected legal interest can only take place in markets

⁷⁶ THOMAS HOEREN, RECHTSFRAGEN IM INTERNET 381 (2003).

⁷⁷ *Contra* Pichler, *supra* note 7575, § 31 para. 123 (asserting that this cannot be the location of the tortious act).

⁷⁸ Bundesgerichtshof [BGH] [Federal Court of Justice] May 3, 1977, 1977 Neue Juristische Wochenschrift [NJW] 1590 (F.R.G.).

⁷⁹ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁸⁰ See Peter Mankowski, *Anmerkung*, 2002 COMPUTER UND RECHT [CR], 450 ff. In comparison with the United States, literature and court cases on Internet jurisdiction are relatively sparse in Germany. Part of the reason is that in Germany the Internet boom progressed rather slowly and later in time than in the United States. Another reason is that although Germany is a federal state, the competence for legislation on torts and contracts resides at the federal level. The decision on the proper forum within Germany is thus of comparatively less importance than in the United States.

⁸¹ UWG § 14 para. 2.

where the competition interests of the competitors actually clash.⁸² This requires the possibility for the anti-competitive behavior to have an effect on competition in the jurisdiction. Consider, for example, the case of an anti-competitive advertisement for a small corporation in a local journal. Even though the journal might be purposefully distributed to other jurisdictions, the advertisement only affects the local market and hence jurisdiction lies only in that market.⁸³

In the first cases in which the issue of Internet jurisdiction was raised, several German courts were willing to assert jurisdiction arguing merely that the relevant website can be accessed within their jurisdiction. In the mid-1990s the *Landgericht München I* ("LG"-Regional Court) and the *Landgericht Nürnberg-Fürth* ("Regional Court") asserted local jurisdiction under the old equivalent of UWG § 14 para. 2 for violations of the Competition Act on the sole basis of the accessibility of the offensive text in the district of the court.⁸⁴ Even though some courts referred to the "purposeful accessibility" standard stemming from press law, the criterion has not necessarily been applied to limit jurisdiction. In 1997 the *Kammergericht* ("KG"-Appellate Court, Berlin) relied on that criterion to assert jurisdiction in a dispute about the domain names "concert-concept.com" and "concert-concept.de," a dispute between a German company and a U.S. company with representation in Berlin. The dispute was based on the "right to the name,"⁸⁵ a German legal concept giving a person a right to his own name, rather than on trademarks. The assertion of jurisdiction was based on ZPO section 32. The *Kammergericht* merely stated that the domain name could purposely be accessed in Germany and the Court failed to engage in any further discussion of the point.⁸⁶ It seems that the Court's argument was that Internet content providers are well aware that they make content available world-wide and hence distribute it purposely to the whole world.⁸⁷ Other appellate courts have adopted a

⁸² See Oberlandesgericht [OLG] Karlsruhe/Freiburg [Court of Appeals] July 28, 1983, 1985 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 556, 557; Bundesgerichtshof [BGH] [Federal Court of Justice] June 30, 1961, 35 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 329, 334 (F.R.G.); Büscher, *supra* note 74, §14 para. 23; ADOLF BAUMBACH & WOLFGANG HEFERMEHL, WETTBEWERBSRECHT § 14 para. 15 (23rd ed., 2004).

⁸³ OLG Karlsruhe/Freiburg, 1985 GRUR 556, 557.

⁸⁴ Landesgericht [LG] München I [Trial Court], 1997 COMPUTER UND RECHT [CR], 155, 156; Landesgericht [LG] Nürnberg-Fürth [Trial Court], 1997 COMPUTER UND RECHT [CR] 415, 416.

⁸⁵ Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBL], as amended, § 12.

⁸⁶ See Kammergericht [KG] [Court of Appeals Berlin], 1997 COMPUTER UND RECHT [CR] 685. Accord Landesgericht [LG] Düsseldorf [Trial Court], 1998 NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNGS REPORT: ZIVILRECT [NJW-RR] 980.

⁸⁷ Birgit Bachmann, *Der Gerichtsstand der Unerlaubten Handlung im Internet*, 1998

similar line of reasoning. In November 2001, the *Oberlandesgericht München* ("OLG"—Appellate Court) asserted jurisdiction in a dispute concerning the domain names "literaturhaus.com" and "literaturhaus.org/.net" based on the right to the name arguing solely that the domain names were accessible in Germany.⁸⁸

Many commentators voiced their concern over such a broad assertion of local jurisdiction and discussed how a limitation could reasonably be achieved.⁸⁹ The most thorough treatment remains Rufus Pichler's extensive commentary on court competence in Internet matters published in 2000.⁹⁰ He advocates an objective test to evaluate whether a website has been made "purposely accessible" in Germany, examining whether Germany was targeted by taking account of such factors as the content of a website, its language, and the markets an advertiser on the website might hope to reach.⁹¹

In competition cases, a growing body of case law has since adopted such a limited approach, commonly basing it on the requirement of a clash of competition interests in the relevant forum. The first clear case in this direction was decided by the *Oberlandesgericht Frankfurt* at the end of 1998.⁹² At issue was the advertisement and offer for sale of pens on the Internet.⁹³ The defendant had also offered the pens at two trade fairs in Frankfurt. The Court held that the *locus* of an online tort is any place at which the homepage can purposely be accessed resulting in a clash of interests, which is the place at which the clash of competitive interests occurs.⁹⁴ Germany was a location of the tort in the case because the advertisement described the main export markets as "worldwide"—hence Germany was targeted. In reaching that conclusion the Court also

PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS [IPRAX] 179, 185.

⁸⁸ *Oberlandesgericht [OLG] München* [Court of Appeals], 2002 COMPUTER UND RECHT [CR] 449, 450 (critical comments by Mankowski, *supra* note 72). *See also* *Oberlandesgericht [OLG] Hamburg* [Court of Appeals], 2002 Computer und Recht [CR] 837, on the Council Regulation.

⁸⁹ *See, e.g.,* Christopher Kuner, *Internationale Zuständigkeitskonflikte im Internet*, 1996 COMPUTER UND RECHT [CR] 453; Bachmann, *supra* note 87; Thomas Schulte-Beckhausen, in *HANDBUCH DES WETTBEWERBSRECHTS* § 29 para. 9 (Wolfgang Gloy & Michael Loschelder eds., 2005).

⁹⁰ Pichler, *supra* note 75.

⁹¹ *Id.* at paras. 134–43. Note that the analysis has to take account of the specifics of the course of action in question, i.e., whether the court is faced with a defamation case, a trademark infringement case, or a competition case. *See also* Frank A. Koch, *Internationale Gerichtszuständigkeit und Internet*, 1999 COMPUTER UND RECHT [CR] 124; *see* Bettinger & Thum, *supra* note 75, for a thorough treatment of trademark law.

⁹² *Oberlandesgericht [OLG] Frankfurt* [Court of Appeals], 1999 KOMMUNIKATION & RECHT [K&R] 138.

⁹³ *Id.*

⁹⁴ *Id.*

considered the language of the homepage (English), the kind of goods offered, and other circumstances of the case, such as the company's presentation of the pens at trade fairs in Germany.⁹⁵

The *Oberlandesgericht Bremen* expanded on that holding in a case of wrongful advertising online in 2000.⁹⁶ The plaintiff requested the Court to assert jurisdiction on the basis that online advertisements were accessible anywhere, including Bremen. The Court, however, ruled that it had no jurisdiction on the basis of the old equivalent of UWG section 14 paragraph 2. It based its rejection of jurisdiction both on the "purposeful accessibility" criterion, as well as the requirement of a clash of competition interests in the relevant forum.⁹⁷ The global accessibility of a website alone was not considered sufficient to assert jurisdiction as this is a mere technical characteristic of the Internet. Instead, the Court concluded that to establish the markets in which the competition interests clash in online competition cases courts have to determine which recipients were targeted by the competitor, taking account of such factors as the content of a homepage, its design and the places where the relevant goods are offered.⁹⁸ This determination has to be made on a case-by-case basis.⁹⁹ The Court also suggested that a website could contain a disclaimer excluding certain markets.¹⁰⁰

Similar analyses of whether the *forum* was targeted by the defendant have now become commonplace in Internet competition cases. Thus, the *Oberlandesgericht Hamburg* held that online advertising of a washing machine by a defendant situated in Coburg, located 300 miles from Hamburg, fell into its jurisdiction.¹⁰¹ Customers in Hamburg were targeted because they could have accepted the offer by having the product delivered, despite the costs involved in doing so. The Court indicated that the case would have come out differently for the advertising of local services, such as the repair of washing machines.¹⁰² In yet another case, the *Oberlandesgericht Brandenburg* ruled that a small law firm in Heilbronn was not in concrete competition with a small law firm in Berlin, even if the defendant advertised its legal services online and offered legal advice

⁹⁵ *Id.*

⁹⁶ *Oberlandesgericht [OLG] Bremen [Court of Appeals], 2000 COMPUTER UND RECHT [CR] 770.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*; see Peter Mankowski, *Wettbewerbsrechtliches Gerichtspflichtigkeits- und Rechtsanwendungsrisiko bei Werbung über Websites*, 2000 *COMPUTER UND RECHT [CR] 763.*

¹⁰¹ *Oberlandesgericht [OLG] Hamburg [Court of Appeals], 2003 MultiMedia und Recht [MMR] 538.*

¹⁰² *Id.*

online.¹⁰³

In conclusion, German courts now apply a targeting approach in competition cases,¹⁰⁴ but they are still likely to rely on a mere accessibility test for other tort cases. The different treatment is due to the requirement of a clash of competition interests in the forum in competition cases which have been sufficiently concrete to limit jurisdiction. There is, however, no proper reason to treat other tort cases differently: the provider of allegedly defamatory content should be just as able to foresee which jurisdictions it will be exposed to as the provider of anti-competitive content. In those cases, too, it would be improper to assert jurisdiction if the forum was not targeted by the defendant. Courts could import a targeting test under the criterion of purposeful accessibility. However, to this day it remains uncertain whether they will do so.

IV. THE SOLUTION: AN INTERNATIONAL CONVENTION ON INTERNET JURISDICTION

As we have seen in the preceding sections, in both the United States and Germany there is still considerable uncertainty remains about Internet jurisdiction for tort actions. At times, courts assert jurisdiction for the sole reason that the website is accessible within the forum—sometimes disguising their approach as an application of a different standard. Such a mere effects test, without any targeting component, potentially exposes website hosts to liability anywhere in the world.

A targeting test would be a proper answer to the challenge of Internet jurisdiction: targeting is flexible enough to consider the particularities of each case, and it is technology-neutral. Thus it is open to future Internet developments. Targeting also enables website hosts to minimize exposure to foreign jurisdictions by inserting disclaimers that a website is not meant to target certain jurisdictions or by applying geo-filtering technology.¹⁰⁵ Of course, where the website host engages in repeated sales with a jurisdiction that is purportedly not targeted, courts could still assert jurisdiction under the test. Legal security for the website host could further be enhanced by providing a non-exhaustive list of factors to be weighed in deciding jurisdiction, such as the language of the website, the services or goods advertised, the markets in which the website host is active, the manner and content of the presentation,¹⁰⁶ modes of payment, the use of geo-location

¹⁰³ Oberlandesgericht [OLG] Brandenburg [Court of Appeals], 2002 MULTIMEDIA UND RECHT [MMR] 463.

¹⁰⁴ See also Büscher, *supra* note 74, §14 para. 25.

¹⁰⁵ Note, however, that there should not be a requirement to use such a technology to limit jurisdiction, as that would run the risk of destroying the specific advantages of the medium.

¹⁰⁶ See Smith, *supra* note 72, at 150, on the latter point with respect to defamation cases.

technology, disclaimers, and the top-level domain used, .com or .fr for example.¹⁰⁷

Of course, website hosts would only be secure if all countries agreed to adopt this test—if it would be included in an international convention. An obvious vehicle for achieving this international solution was the Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters. The Hague Conference on Private International Law commenced negotiations on that convention with the ambitious goal of a comprehensive convention on international jurisdiction and the enforcement of foreign judgements in 1992. During the negotiations, the United States sought to facilitate the enforcement of U.S. judgments abroad, whereas the European Union hoped to achieve a harmonization of jurisdictional rules and limitations to U.S. jurisdiction.¹⁰⁸ The first draft convention, adopted in 1999,¹⁰⁹ was not adapted to the needs of e-commerce, but announced that the Internet ramifications of the convention would be examined by a group of specialists.¹¹⁰ The draft convention's provision on torts provided that a plaintiff may bring an action in tort or delict in the courts of the state in which the act occurred or "in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State."¹¹¹ Where the action is brought in the courts of a state only on the basis that the injury arose there, those courts "shall have jurisdiction only in respect of the injury that occurred . . . in that State, unless the injured person has his or her habitual residence in that State."¹¹² Regarding the Internet, the provision suffers from the same shortcomings as the traditional jurisdictional tests in the United States and Germany. The defendant can reasonably foresee that content posted to the Internet can be read anywhere in the world such that the purported limitation of jurisdiction contained in the draft convention might prove hollow. This was also the criticism cited by the group of experts convened to examine the Internet ramifications of the draft convention.¹¹³ Sadly, the group fell short of

¹⁰⁷ See Büscher, *supra* note 74, §14 para. 26.

¹⁰⁸ See NIKLAS GANSSAUGE, INTERNATIONALE ZUSTÄNDIGKEIT UND ANWENDBARES RECHT BEI VERBRAUCHERVERTRÄGEN IM INTERNET, 167 ff. (2004), on the negotiations until 2003.

¹⁰⁹ Hague Conference on Private International Law [HCCH], Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Prel. Doc. No. 11 (Aug. 2000).

¹¹⁰ *Id.* at n.1.

¹¹¹ *Id.* at art. 10 ¶ 1.

¹¹² *Id.* at art. 10 ¶ 4.

¹¹³ HCCH, Summary of Discussions of Expert Meeting, *Electronic Commerce and International Jurisdiction*, at 8, Prel. Doc. No. 12 (Feb. 28, 2000) (prepared by Catherine Kessedjian). See Permanent Bureau, *Report of the Experts Meeting on the Intellectual Property Aspects of the Future Convention on Jurisdiction and Foreign Judgments in Civil*

proposing a solution. The documentation of the ongoing negotiations shows why no such proposition was made: national case law was regarded as too unsettled to make any clear, universal statements. Even the attempt to allow a defendant to avoid certain jurisdictions by taking “reasonable steps” to avoid acting in or towards those states failed, as the notion of what would constitute “reasonable” steps was still in flux.¹¹⁴ In the end, the unforeseeability of the impact of technological developments, such as the Internet, and the wide divergence of States’ rules on jurisdiction led to a breakdown of the negotiations. The objective of the project was scaled down to a convention on choice of court agreements in business-to-business cases¹¹⁵ and led to the Hague Convention on Choice of Court Agreements on June 30, 2005, which does not cover the question of torts committed on the Internet.¹¹⁶

Despite the collapse of the original Hague Judgments Project it is advisable to push for an international adoption of the targeting approach to Internet tort jurisdiction. It has to be conceded that any such approach would necessarily give deference to courts and to their evaluation of the case at hand, and it is foreseeable that member states’ courts will diverge on such questions as what constitutes “reasonable” steps to exclude a foreign jurisdiction. However, even the vague targeting approach would represent a considerable improvement over the current state of the law in which website hosts are still potentially exposed to liability in every jurisdiction based upon of the world-wide accessibility of their website.

and Commercial Matters, at 7, Prel. Doc. No. 13 (Feb. 1, 2001), for further criticism on the implications of the basis of jurisdiction for online intellectual property matters. See Annette Kur, *Immaterialgüterrechte in einem weltweiten Vollstreckungs- und Gerichtsstandsübereinkommen—Auf der Suche nach dem Ausweg aus der Sackgasse*, 2001 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, INTERNATIONALER TEIL [GRUR INT.] 908, on the particularities of intellectual property within the convention.

¹¹⁴ HCCH, Note on the Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *The Impact of the Internet on the Judgments Project: Thoughts for the Future*, ¶¶ 17–18, Prel. Doc. No. 17 (Feb. 2002) (submitted by Avril D. Haines for the Permanent Bureau).

¹¹⁵ HCCH, Draft Report, *Preliminary Draft Convention on Exclusive Choice of Court Agreements*, ¶¶ 4–6 Prel. Doc. No. 26 (Dec. 2004) (drawn up by Masato Dogauchi & Trevor C. Hartley).

¹¹⁶ HCCH, Convention on Choice of Court Agreements (June 30, 2005), available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.