



Towards understanding personal jurisdiction in cyberspace

An overview of American try-out for internet cases

Understanding
personal
jurisdiction

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Abstract

Purpose – The purpose of this paper is to show that the internet together with cyberspace form an “everywhere and nowhere proposition” and to discuss numerous problems concerning legal issues, the most vital being confusion as to jurisdiction.

Design/methodology/approach – The research was based upon theoretical sources and empirical data.

Findings – It was found that a probable solution could be extracted from the US experience for all the nations coming under the virtual framework of cyberspace. Some hi-tech nations are facing this problem; and the USA is one of them. Even the USA – a large federal state – faces the jurisdictional problem and conflict as regards its own provinces; and the US courts, legal institutions and intellectuals are resorting to established principles of law – domestic or international. Decisions of US cases have been keenly observed to find out how the US courts and legal scholars have taken the help of traditional territorial tenets and precepts to resolve jurisdictional conflict. In many cases, US courts and legal scholars have shown their interest to adopt personal jurisdiction.

Originality/value – With the USA being a representative type of hi-tech nation, US attitude and practice could usher the way for all other upcoming hi-tech nations.

Keywords Internet, Legal theory, Laws and legislation, United States of America

Paper type Research paper

1. Introduction

Under international law, there are six generally accepted theories under which a state[1] may claim to have jurisdiction[2]. In the usual order of preference, they are Subjective Territoriality, Objective Territoriality, Nationality/personal, Protective Principle, Passive Nationality, and Universality. As a general rule of international law, even where one of the bases of jurisdiction is present, the exercise of jurisdiction must be reasonable (Brierly, see note 2). Subjective territoriality indicates – if an activity takes place within the territory of any state, then the concerning state has the jurisdiction to prescribe a rule for that activity. Objective territoriality is sought in the cases where the action takes place outside the territory of the forum state, but the primary effect of that activity is within the forum state. This is sometimes called “effects jurisdiction”. Nationality is the basis for jurisdiction where the forum state claims the right to prescribe a law for an offence based on the nationality of the wrongdoer. Passive nationality is a theory of jurisdiction based on the nationality of the



victim. Passive and Active nationality may be invoked together to establish jurisdiction because a state is more interested in prosecuting an offence when both the lawbreaker and the victim are nationals of that state. The Protective principle expresses the desire of a sovereign to punish actions committed in other places solely because it feels threatened by those actions. This principle is invoked where the "victim" would be the government or sovereign itself. This principle is not favoured as it can easily offend the sovereignty of another nation. The final basis of jurisdiction is universal jurisdiction, sometimes referred to as "universal interest" jurisdiction. Historically, universal interest jurisdiction was the right of any sovereign to capture and punish pirates. This form of jurisdiction extended to slavery, genocide and hijacking (air piracy)[3]. Universal jurisdiction traditionally covers only very serious crimes[4] In cyberspace, jurisdiction is the overlapping and overriding conceptual problem for both domestic and foreign courts. Cyberspace also embraces almost all of the traditional principles of conflicts-of-law and reduces them to absurdity including jurisdiction (Biegel, 1996). Jurisdiction in cyberspace requires unambiguous principles ingrained in international law. Only through these principles courts in all nations can adopt uniform solutions to questions of internet jurisdiction (Menthe, 1998). Universal jurisdiction may seem naturally extendable in the future to internet piracy, such as (Biegel, 1996) computer hacking and viruses etc. But this jurisdiction traditionally covers only very serious crimes. So it will be difficult to fit it to the minor types of cyber crime. If the current legal systems of different countries are to maintain effective and fair control over the internet, courts all over the world will have to make a plain move towards a solution of jurisdiction. As a hi-tech nation, the USA is facing the rush of the cases arising out of cyber activities .The USA follows the dual citizenship regarding their nation, which means that a US citizen is a citizen of federal status and at the same time, a citizen of provincial status. So, the jurisdictional conflict in cyber cases are very much likely to arise among/between the American states. Similar type of disagreement is prevailing among/between the sovereign states of the world. So the jurisdictional arrangement formulated by the American courts can show the way for all other sovereign countries. American practices show that it tries to adopt the personal jurisdiction whether active or passive depending upon the peculiarity of the cases. It has been perceptible that nationality/personal jurisdiction can be easily adapted with the cyber demand. So the aims of this article are:

- (1) to find out the nature of jurisdictional problem in internet cases;
- (2) to scrutinize the legal and constitutional framework of the USA for cyber jurisdiction;
- (3) to expatiate the American cases on cyber issues;
- (4) to find out the feasibility of personal jurisdiction for cyberspace; and
- (5) to scrutinize jurisdictional settlement in the American cases as a representative type of hi-tech nation the USA for tackling the ever-increasing jurisdictional conflict and confusion in cyber cases arising out of internet.

2. Internet technicality causes obscurity in cyber jurisdiction

The term jurisdiction indicates the authority of a court to entertain, hear, and finally decide a dispute. This ordinary proposition has been understood for the purpose of real world control since time immemorial. But this kind of connotation and related legal tenets has changed for the technological development. Law has been thought of as

territorial being the command of sovereign ruling over the territorial institution like state. But internet has created a new challenge for the state, the courts of law, and traditional legal principles including jurisdiction because almost all these has developed pursuant to the territorial necessity. So the defining border regarding the jurisdiction will definitely move to cover the internet issues. Internet is a very much new phenomenon bearing a long heritage of gradual development that took it outside the control of state entailing territorial monopoly. Internet is an interconnected system of networks that connects computers around the world via the TCP/IP protocol and provides a non-physical working place for the users. This place is known as cyberspace. The term “cyberspace” is sometimes treated as a synonym for the internet, but is really a broader concept. The term *cyberspace* emphasizes that it can be treated as a place. The US Supreme Court’s first opinion about the internet contains language that can be determined as acceptance of the legal metaphor of cyberspace as a place outside national boundaries. The expression of the court was significantly distinctive when it states that a unique medium consisting of certain tools located in no particular geographical location but available to anyone, anywhere in the world, with access to the internet that is known to its users as “cyberspace”[5]. Cyber jurisdiction can be used to refer the power to prescribe rules and enforce over the system operators or the users of a community existed in cyberspace. This is virtual space in the virtual world perceived as a place on the internet and is deemed to have been interdependent from governmental interference for their real space or territorial preference. As the legal environment of internet has no geographic boundaries, it establishes instantaneous communications avoiding territorial barrier of long distance. It facilitate anyone to access into the web site from any place of the world just by clicking the keyboard of the personal computer linking with the internet. So, application of the traditional tenets of law to the internet has been proved complicated. Even though the uneasy effort to fit age-old concepts of territorial jurisdiction to the new medium has led to lots of controversies. In light of the omnipresence of the internet, jurisdiction over it has been exposed as an “all or nothing” proposition. The penetration of the internet in all jurisdictions could subject users of the medium to jurisdiction anywhere. Therefore, a party could contend that transcendental presence on the internet means that a party has no physical presence anywhere and, thus s/he is outside of the scope of any jurisdiction. But upholding the jurisdiction over the parties is one of the preparatory functions for the courts of law in any country of the world. Conviction, acquittal, sentence of any type, fine, or any kind of penalty – these all are the subsequent initiatives to be taken up by the court. Being a different type of territory, the jurisdiction in cyberspace has become a matter of techno-legal controversies disgoring global hullabaloo. Many countries are trying to resolve this problem. It is the core issue to be solved because every step of the courts of law whether interpretation of law, any kind of order, or judgement of the court of law is depending upon it for its legality and binding capacity. The developing law concerning jurisdiction must address whether a particular event in cyberspace is controlled by the laws of the state or country where the web site is located, by the laws of the state or country where the internet service provider is located, by the laws of the state or country where the user is located, or perhaps by all of these laws. A number of commentators have articulated the view that cyberspace should be treated as a separate jurisdiction. In practice, this view has not been supported by the courts or addressed by lawmakers in many states. When adjudicating cases involving foreign nationals, the courts must harmonize several factors. The courts must consider the

procedural and substantive policies of other countries whose interests are affected by the court's assertion of jurisdiction. When extending jurisdiction in the international perspective, the courts must take up cautious measures with full concentration upon the domestic law and any type reservation. Above all, the principle of sovereign equality imposes a higher category of jurisdictional barrier in litigation involving foreign nationals.

3. Legal and constitutional overview of personal jurisdiction in the USA

The US courts do not possess authority over any person or things residing anywhere in the world. Before deciding a case, the court must determine whether it has "personal jurisdiction" over the parties. A person may not sue or may not be sued in a state (a province in the federal sense), unless that the concerning party has established a quantity of relationship with that forum state (USA) causing him to be sued there[6]. In the USA, the Due Process Clause of the Constitution's Fourteenth Amendment lays down the circumscribing of personal jurisdiction. If a party has substantial systematic and continuous contacts with the forum, a court may exercise jurisdiction over a party for any dispute, even one arising out of conduct unconnected with the forum[7] For example, a corporation or person can always be sued in its state (USA) of residence or, of citizenship or, of its principal place of business, regardless of place of commencement of occurrence[8] But in case of absence of physical presence of a party in the state (USA), or of systematic and continuous contacts with the state (USA), courts may exercise jurisdiction over a party for causes of action arising out of his contacts with the state (USA). Even the court can exercise jurisdiction over the activities take place outside the state (USA) explicitly intended to cause an effect within the forum state (USA)[9]. This "effects" theory proclaims that a state (USA) has authority to exercise judicial jurisdiction over an individual who causes effects in the state (USA) by an act done in another place in relation to any cause of action arising from these effects except the nature of the effects and of the individual's relationship with the forum state (USA) make the exercise of such jurisdiction unreasonable[10]. In this regard, the court of the forum state (USA) must look to the state's (USA) "long-arm" statute, which establishes the constitutional norms for the state (USA) to claim its authority to administer the conducts of non-citizens (including both Americans and foreigners). Long-arm statute varies largely from state (USA) to state (USA), e.g. Arizona grants the broadest possible liberty to its courts in the way that it will apply personal jurisdiction over a non-resident litigant to the maximum extent allowed by the federal constitution[11]. But New York gives a more restricted and specific power to its courts with its statute, which allows personal jurisdiction over those who conduct business or commit a tortuous act within the state of New York, and over those who commit an act outside the state (USA) that could reasonably be expected to have a tortuous effect within New York[12]. The federal courts have the equivalent of a long-arm statute of their own[13], providing three basic grants of jurisdiction. First, it authorizes federal courts to "borrow" the long-arm statute of the state (USA) in which the federal court locates[14]. Second, federal rule[15] authorizes federal courts to exercise grants of personal jurisdiction contained in federal statutes, such as the federal securities and anti-trust law, which have their own jurisdictional provisions[16]. And third, federal rule grants long-arm jurisdiction in an international context, within the limits of the Constitution, over parties to cases arising under federal law who are not subject to the jurisdiction of any particular state (USA)[17]. The concept of being able to have minimum contacts with the USA as a whole has profound implications for the internet jurisdiction international perspective. Users all over the world, without

establishing contact with any particular state (USA), could establish contacts with the USA as an entire country with nearly every track into cyberspace (Gooch, n.d.). In order to be subject to personal jurisdiction in a state that is not his domicile, a person must be qualified under the realm of the state (USA)'s "long-arm" statute and at the same time the state (USA)'s jurisdiction must be valid under the Due Process Clause of the Fourteenth Amendment. The US Supreme Court set the constitutional standard for jurisdiction in *International Shoe Co. v. Washington*[18]. Pursuant to the Due Process Clause, a non-resident defendant may not be sued in a forum unless it has first established sufficient "minimum contacts" with the forum state (USA) so that the initiation of suit does not go against "traditional notions of fair play and substantial justice"[19]. Moreover, the non-resident's "conduct and connection with the forum state (USA) must be such that he should reasonably predict to be called into court there"[20]. The courts can apply the discretionary power to decide what contacts are sufficient, according to "traditional notions of fair play and substantial justice"[21]. The courts roughly will hold the view that contacts are sufficient to satisfy due process only if the non-resident "purposefully availed" himself of the benefits of being present in, or doing business in, the forum state (USA)[22]. According to the Supreme Court in *Asahi Metal Industry v. Superior Court*[23], a connection sufficient for minimum contacts may arise through an action of the defendant purposefully directed towards the forum state (USA). Merely the placement of a product into the stream of commerce, without doing anything more, is not an act of the "defendant purposefully directed" towards the forum state (USA). But advertising or marketing in the forum state (USA) may fulfill the deliberate availment requirement. But there must be a clear proof that the defendant inclined to serve the particular market[24]. After exhaustion of the minimum contacts test, the court will consider reasonableness to exercise jurisdiction. In determining reasonableness, a court must:

- (1) weigh up the burden on the defendant to litigate in the forum state (USA),
- (2) consider the interest of the forum state (USA) in the matter,
- (3) ascertain the interest of the plaintiff in obtaining relief,
- (4) scrutinize the efficiency of the forum state (USA) in dispute settlement, and
- (5) look over the interests of several states (USA) in furthering certain fundamental social policies[25].

After the satisfaction about minimum contact and reasonableness the US courts of any particular state (USA) will exercise jurisdiction over a party in another state (USA) or country whose performance has rendered substantial effects in the forum state (USA) and constituted sufficient contacts with the forum state (USA) to satisfy due process. This jurisdictional test is ambiguous and wide as well, courts in every state of the USA may be able to exercise jurisdiction over parties anywhere in the world, based solely on internet contacts with the state (USA). The US courts apply the same "effects" test to foreign parties as to American parties. If minimum contacts exist, parties from other countries may be hailed into court in the USA just as parties from one state (USA) may be hailed into another[26]. This aspect of jurisdiction traditionally is subject to a "reasonableness" test[27]. According to the law regarding foreign relations of the USA[28], exercise of jurisdiction is generally reasonable in the following cases:

- (1) if the party is a citizen, resident, or domiciliary of the state (USA);
- (2) if the person, whether natural or personal, has consented to the exercise of jurisdiction;

- (3) if the person, whether natural or juridical, regularly carries on business in the state (USA);
- (4) if the person, whether natural or juridical, had carried on activity in the state (USA), but only in respect of such activity;
- (5) if the person, whether natural or juridical, had carried on outside the state (USA) an activity having a substantial, direct, and foreseeable effect within the state (USA), but only in respect of such activity; or
- (6) if the thing that is the subject of adjudication is owned, possessed, or used in the state (USA), but only in respect of a claim reasonably connected with that thing[29].

4. Passive and active web site: a demarcating line for personal jurisdiction

Actually passive or active web site has not been defined in any statutory provision or in any decision of the courts. But the opinion of the courts about different types of web site has made it apparent that the courts are to distinguish between the web site of general nature and the web site of specific nature. The linguistic expression and the intention of the courts expose that a web site available to all without any particular object and target is a passive one and a web site having purposeful object and target is an active one. The courts also observed that if the particular object and target are not clear from the web site, the interactivity among/between the plaintiff and the defendant will be considered to attain a decision affirming the active web site. It is clearly an issue of fact. So, here the courts have an extensive discretionary power. The US Supreme Court has hardly addressed the issue of personal jurisdiction in cyberspace[30]. The US Supreme Court has been very much static about the personal jurisdiction over the internet matters. It is not for the unwillingness of the Supreme Court, but for the rareness of cases goes up to this court. But lower courts of America are to explore the question of cyberspace jurisdiction. In most cases, the American courts reject the jurisdiction in general without considering the "contact basis" with the forum state (USA); rather they are apparently intended to exercise personal jurisdiction. It is shown that contact basis can be established in many ways through internet e.g. business transaction, effects of cyber activities, target of cyber activities. Some decisions of the courts advocate that a court may apply personal jurisdiction over a non-resident defendant whose sole contact with the forum state (USA) arose through the internet. Such kind of decision regarding personal jurisdiction on the basis of contact are available in so many cases[31]. In each of these cases, minimum internet contacts transgressed the margins of passive web site created merely for hosting a web site accessible to all from anyplace. In CompuServe, the defendant with full knowledge deliberately got business facility with an Ohio Corporation CompuServe. Minimum contact with the forum state (USA) was established for upholding personal jurisdiction[32]. In Zippo, the defendant's site called for participants to submit address information to receive a news service and so the site operators knowingly transacted business with residents of the forum state (USA), where the plaintiff had headquarter[33]. In Panavision, the defendant placed a deceptive web site, which was a part of a "trick" to induce the plaintiff to purchase the domain name from him, and as such had intentionally directed his actions towards the plaintiff's home state (USA)[34]. In Maritz, the defendant's site invited users to send and receive information about services it offered, and the defendant company had sent information to over 100 users in the forum state (USA)[35]. The court found jurisdiction that although defendant

contended for maintaining merely a “passive web site” employed to reach all internet users, regardless of geographic location[36]. Many other recent decisions asserted the notion that passive internet sites are not sufficient to maintain personal jurisdiction. Degree of interactivity is a vital factor to differentiate between the active and passive web site that assist to ascertain minimum contacts. This is very much variable in different cases. But it has been shown that the lack of purposeful business transaction, effects of cyber activities, unspecified target of cyber activities etc. make the web sites passive ones keeping the defendants outside the personal jurisdiction of court. All cases, regardless of success or failure of the plaintiff, aimed to bring the defendant within the purview of personal jurisdiction. This is the most significant inclination exposed from the American case law regarding cyberspace jurisdiction. In some cases, it has been held that simply creating and hosting a web site available to all do not subject a person to general jurisdiction everywhere in the USA[37]. Moreover, easy world-wide access to any site[38], plain erection of an advertising site on the Web[39], an open-access web site for ordering goods[40] have been recognized as the passive cyber web sites leaving the defendant beyond the purview of the personal jurisdiction for lacking “purposeful availment” or “target”.

5. Judicial decisions untied some knots about personal jurisdiction

The actions of site operators and all other users occur in “Cyberspace” rather than in a particular territorial area. So, they must be conscious about their online actions that may push them to the lawsuits in out-of-state (USA) courts. The US courts are facing the challenge of deciding whether to apply new jurisdictional rules to internet-related disputes, or to utilize traditional personal jurisdiction rules. Personal jurisdiction is a geographical restriction whereon a plaintiff has option to sue a defendant. This limitation prevents plaintiffs from suing defendants in jurisdictions where the defendant has no relationship to the forum and, therefore, could not be sued in that forum but for other reasonable grounds. The rationale that the courts use to determine the correctness of asserting personal jurisdiction over a non-resident web site operator will have great consequences on all web site operators in all jurisdictions. If web site operators are subject to jurisdiction in a foreign forum simply for maintaining a site, then the trepidation of litigation may cause individual operators to take out their web sites and may lead to a sharp decrease in web usage. However, for all these issues raised by internet-based disputes can be properly dealt with within the traditional personal jurisdiction framework. This was first established in *International Shoe v. Washington*[41] where the court stated that in order to be subject to the jurisdiction of a forum state (USA), there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State and thus inescapably he has attained the position of invoking the benefits and protections of its laws. So in this perspective, before finding that internet activity is sufficient to, satisfy the constitutional requirement of due process, and force the operator to appear in that jurisdiction’s court, primarily site operators must be purposefully benefited from the laws of the forum where the court is located. Many times the persons who play information/web site on the internet do not direct their communications at a particular community, and have little or no control over those who access into their web site for information, recreation or for other purposes. Common sense dictates that global access to such information should not be sufficient to subject individuals to lawsuits in any forum. Even though, it is a matter of fact that the cyber offences are increasing alarmingly and accordingly the courts are to twiddle with problems of jurisdiction; and

still this is a matter muddled in the conflict of legal principle and overlapping jurisdictional confusion. So the judicial endeavours of courts are leaning to the factual analysis depending on the nature of the activities, interactivity, target etc. for achieving the authority of personal jurisdiction that by this time achieved a considerable success to illuminate the obscurity prevailed owing to visual knots of cyber intricacy.

5.1 Commercialism and interactivity for personal jurisdiction

After the advent of internet the commerce has diverted as e-commerce disgorging a multi-dimensional aspect running into the legal conflict .The commercial nature of dispute and degree of commercial interactivity play a vital role for holding personal jurisdiction that will be exposed from the case law. The court in *Zippo Mfg. v. Zippo Dot Com. Inc.*[42], dealt with a cybersquatting case. The plaintiff sued an internet news service for trademark dilution, infringement and false designation for using the domain names “zippo.com”, “zippo.net”, and “zippo-news.com”. The court found that it was as commercial presence of that company. The court upheld the constitutional basis for the application of the personal jurisdiction. The court also observed that a passive web site that only made information available to interested users was not a ground for exercising jurisdiction. A web site that entered into contracts and knowingly and repeatedly transmitted computer files would be properly subject to personal jurisdiction. In cases where interactive web sites exchanged information with a user, the exercise of jurisdiction should be determined by examining the commercial nature of the exchange and the level of interactivity. Similarly, in *Panavision International v. Toeppen*[43], California was entitled to assert personal jurisdiction over an Illinois resident who infringed trademark on the internet. The court found sufficient contact to establish personal jurisdiction over the Illinois defendant because the “brunt of the harm” occurred in California, and the infringer knew that the trademark holder “would likely suffer harm” there. *Inset Systems, Inc. v. Instruction Set, Inc.*[44], is a case where Inset Systems, Inc. (“Inset”), a Connecticut corporation, discovered that Instruction Set, Inc. (“ISI”) a Massachusetts corporation, had infringed on its trademark by using the domain address INSET.COM and the telephone number 1-800-US-INSET. ISI moved to dismiss for lack of personal jurisdiction and improper venue. In order to determine jurisdiction the court had to satisfy the solicitation of business provision of Connecticut’s long-arm statute and determine whether ISI had sufficient minimum contacts with the forum state (USA) to support the exercise of personal jurisdiction. Inset contended that Connecticut’s long-arm statute conferred jurisdiction over ISI because of its internet advertisement and the availability of its 800 number. ISI’s advertising over the internet was solicitation of a sufficient repetitive nature to satisfy Connecticut’s long-arm statute. The court ruled that ISI had been advertising continuously over the internet to the over 10,000 access sites located in Connecticut. The court also ruled that internet advertising was not like hard-copy advertisements that had a limited reach and which were usually thrown away after use. Internet advertisements were persistent in nature allowing them to be accessed again and again by a large number of potential readers. The court held that because of the continuous availability of the advertisement on the internet the defendant was subject to Connecticut’s long-arm jurisdiction. In *State v. Granite Gate Resorts, Inc.*[45], jurisdiction in Minnesota was upheld over an offshore gambling operation whose internet proposal to Minnesotans clashed with Minnesota’s legal prohibition against gambling. The court of Appeals rejected the arguments put forward by the concerned gambling making body that placing it within the purview of jurisdiction in Minnesota

would unfairly make it subject to the vagaries of laws throughout the world. The court extended Minnesota's jurisdiction over the offshore internet operation because the gambling operators had, through its internet transmission into this state (USA), "purposefully availed themselves of the privilege of doing business in Minnesota". In *CompuServe, Inc. v. Patterson*[46], the commercial consideration was in question. In this case, the defendant deliberately did business with CompuServe, knowing that CompuServe was an Ohio corporation. Personal jurisdiction was accepted as regards the dispute arising out of contacts of business character with the forum state (USA) via internet. In *Bensusan Restaurant Corp. v. King*[47], the plaintiff, operator of the New York jazz club "The Blue Note", complained that the defendant had infringed on its rights by using its trademark. The defendant, owner and operator of a small club called "The Blue Note", in Columbia, Missouri, had created a web page, which allowed users to order tickets to attend the club's shows. The court had to decide whether the creation of a web site in Missouri containing a special (800) telephone number was an offer to sell to citizens in New York. The defendant argued the court lacked personal jurisdiction under New York's long-arm statute. He defended that all he had done was setting up a web site in Missouri aimed at Missouri residents. Furthermore, any tickets sold over the internet to users had to be picked up either at ticket outlets in Columbia, Missouri, or at the club on the night of the show. The court agreed finding that it took several affirmative steps to obtain access to the web site and use the information there. The court also ruled that there was no proof that the defendant had directed any infringing activity at New York. The court held that merely because someone can access information on the internet about an allegedly infringing product, it is not equivalent to a person selling, advertising, promoting or otherwise attempting to target that product in New York. Under "Due Process clause", in order that the court to exercise personal jurisdiction, it must be shown that the defendant had purposefully established minimum contact with the forum state (USA) so that the maintenance of the suit did not offend the traditional notions of fair play and substantial justice. The court ruled that the defendant's simple creation of a web site, that was available to any user who can find it on internet, was not an act of "purposeful availment" of the benefits of the state of New York. Creating a web site was similar to placing a product into the stream of commerce. The web site's effect may be felt nationally or even internationally, but only this without more, was not enough to establish an act that was purposefully directed towards the forum state (USA). In *McDonough v. Fallon McElligott, Inc.*[48], a Minnesota defendant had displayed plaintiff's photographs on the web without plaintiff's consent, in a manner of possible violation of California copyright and unfair competition laws. A federal court in California refused to exercise personal jurisdiction over the defendant simply because it maintained a web site. The court held that the fact that the defendant had a web site accessed by Californians was not enough by itself to establish jurisdiction. The court in *Pres - Kap, Inc v. System One, Direct Access, Inc.*[49] denied exercising jurisdiction over a consumer of an on-line airline ticketing service. The case involved a suit on a contract dispute in a Florida court by a Delaware corporation against its New York customer. Defendant, a travel agent, only contact with the forum state (USA) was accessing plaintiff's airline reservation system data-base by logging into plaintiff's computer located in Florida and forwarding rental payments to Florida. The court, upon the consideration the totality of the circumstances, decided that maintaining a suit against defendant would offend traditional notions of fair play and substantial justice. In *Millennium Enterprises, Inc., v. Millennium Music, Inc.*[50] two music companies with similar names battled over

trademark infringement on the internet in Oregon. An Oregon firm sued a South Carolina company for holding a federal trademark termed as the violation of the state and common law rights of the Oregon company. The Oregon Company made a single purchase from the South Carolina Company (USA) via the internet. It was the only merchandise sold in Oregon by the company. The court rejected this contact considering it as “nothing more than an attempt by plaintiff to manufacture a contact with this forum sufficient to establish personal jurisdiction”. The court declined to exercise jurisdiction over the South Carolina Company on the reason that it did not avail itself of the Oregon forum or purposefully engage in business at Oregon. The decision reflects that something more than merely a web site generating insubstantial sales in the forum state (USA) is necessary to establish jurisdiction in that state (USA). A federal case is very interesting as well as confusing in which commercial nature and interactivity were devaluated for not having related to the cause of action. Actually American courts are very much keen to maintain fair play and substantial notion of justice. They utilize little bit chance to avoid personal jurisdiction. Perhaps their attitude could be different to the parties (particularly defendant) who are citizens of other countries and violated the right of their citizens. The federal circuit found in *Graphic Controls Corp. v. Utah Medical Prods., Inc.*[51] that a Utah corporation’s activities, which included having an open-access web site for ordering goods, having an “800” number, having meetings in New York, are unrelated to the cause of action, and sending “cease and desist” letters to party in New York, did not constitute minimum contacts with New York. It is notable here that commercial nature and some sort of interactivity were present in this case but these were not connected with the cause of action. This is really microscopic observation of the court in holding the personal jurisdiction. Such confusing view was reflected in *Hearst Corp. v. Goldberger*[52] wherein the Southern District of New York held that creating an interactive commercial[53] web site, though inoperative during litigation, that was available to, and used by, New York residents was not in itself enough contact to subject a publisher to New York jurisdiction[54]. The District court found that exercising jurisdiction would violate traditional notions of fair play, and noted that the site operator did not purposefully direct his activities towards New York[55]. The Ninth Circuit court of Appeals in *Cybersell, Inc. v. Cybersell, Inc.*[56] took the same standing holding that the mere presence of a passive web site on the internet does not constitute the minimum contacts needed to subject a person to the jurisdiction of every court and that “something more”, either interactivity or purposeful direction, is needed to justify jurisdiction[57]. Interactivity or purposeful direction in the sense of commercial transaction or otherwise is definitely more a matter of fact rather than a matter of law that render the courts unlimited explanatory power in taking decisive measures. Under the rule set forth in *Cybersell*, a court would decide whether a web site creates minimum contacts by examining the degree of commercial character and interactivity of concerning transaction, and quantitative and qualitative aspect have to be scrutinized to measure the degree of commercial character and interactivity utilized in directing at the citizens of the forum state (USA). The more interactive a site is (i.e. the more exchange of information is possible between the site and the user), and the more commercial the site’s nature, the more likely a court is to find that contact exists between the site owner and the distant user[58]. Similarly, the more the site is directed, or designed to harm at the aggrieved entity or citizens in the forum, whether legal or natural, the more likely a court will be to find that purposeful availment has occurred[59]. Our purpose in this article is not to go for finding out the decision or the

settlement of the courts regarding the rights and liabilities of the parties, or coming across the success or the failure of the personal jurisdiction; but to scrutinize the attitude and psychological inclination of the courts to depend on the personal jurisdiction for trying cyber cases. The factual criteria or legal standard like passive web site, active or purposeful web site, commercial nature, interactivity, long-arm statute, and minimum contact etc. have been placed in deliberation for establishing personal jurisdiction for cyberspace.

5.2 Cyber defamation: target is a tool for personal jurisdiction

The American courts intend to rationalize the personal jurisdiction upon “target” basis in defamatory cases. To uphold the personal jurisdiction the American court frequently takes resort to the “target” as decisive factor. The concept of “targeting” has been placed at the core of many internet defamation cases, although the concept predates the internet. In *Burger King Corp. v. Rudzewicz*[60], a case decided before the internet became ubiquitous, the Supreme Court upheld long-arm jurisdiction because the foreign defendant purposely was “targeting” the residents of a foreign state. The same principle was applied in upholding long-arm jurisdiction in the defamation case of *Calder v. Jones*[61], wherein personal jurisdiction in California was upheld over two Florida residents who wrote a magazine article that defamed a resident of California, even though neither of the Floridians had any physical contact with California. The court reasoned that the authors knew that the “focal point” of the defamation, an actress, lived and worked in California and would bear the brunt of the injury from the defamation in that state (USA). Therefore, they could “anticipate being hailed into court in California to answer for the truth of their statements”. Since the “alleged wrongdoing intentionally was directed at a California resident, jurisdiction was proper over them on that basis”. This rationale has been adopted in many internet cases. In *EDIAS Software Int’l. v. Basis Int’l. Ltd.*[62], a New Mexico software company communicated libelous remarks about an Arizona distributor on the software company’s web site and in e-mail to its customers in Europe. The Arizona “target” sued in Arizona, and the court upheld jurisdiction over the New Mexico Company, even though the communications originated outside of the forum state (USA) and only were transmitted abroad. The court reasoned that Arizona could assert jurisdiction because it was the place where the “target” of the communication “felt the economic impact” of the defamatory statement. The Clinton impeachment imbroglio, which made new law in many contexts, also contributed to internet jurisdictional understanding. In *Blumenthal v. Drudge*[63], an internet political gossip columnist located in California was held subject to jurisdiction in the District of Columbia. White House official Sidney Blumenthal, a central character in the Clinton controversy, sued the gossip columnist who operated from a threadbare apartment in Los Angeles. The court held that the District of Columbia had personal jurisdiction because the distributor “targets” readers there “by virtue of the subject he covers”. Thus, the subject matter of the communications, rather than the location of the promulgator, was influential in upholding jurisdiction. Other courts have dredged up similar rationales to uphold their own jurisdiction over the internet. In *Telco Comm. v. An Apple A Day*[64], the posting of a defamatory press release on an internet site was sufficient to confer jurisdiction over an out-of-state (USA) party who “should have reasonably known that their press releases would be disseminated among the targets” outside the state (USA) of origin.

5.3 Minnesota initiative for personal jurisdiction: opening of a new era

The Attorney General's Office posted on the web a warning – “warning to all internet users and providers”[65]. The admonition states that persons outside of Minnesota who transmit information via the internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violation of criminal and civil laws of the state (USA). The wide-ranging aspects of internet jurisdiction have not bypassed Minnesota. Administrative decisions, case law, and even other settlements in this state (USA) have addressed the admonition in the issues of jurisdiction arising from internet use in the state (USA) or in other countries. In *State v. Granite Gate Resorts, Inc.*[66], jurisdiction in Minnesota was upheld over an offshore gambling operation, which was against the Minnesota's legal prohibition regarding gambling. The court extended Minnesota's jurisdiction over the offshore internet operation because the gambling operators had, through its internet transmission into this state (USA), purposefully availed themselves of the privilege of doing business in Minnesota. The territorial limitation[67] has not deterred extension of the reach of Minnesota courts over foreign users of the internet.

6. Conclusion

Debate of internet jurisdictional issues is a matter of traditional tactics and new strategies. Personal jurisdiction exercised over internet cases arising out of the “minimum contacts” concept are being decided relying on conventional considerations. Jurisdiction may be sustained by showing a large number of contacts, e.g. through calculating the number of “hits” on a web site from inside the territory of a state (USA). While a single transaction may not suffice, a well-traveled path of commerce may be sufficient. Similarly, the number of in-state (USA) participants in a particular “chat room” may be significant in deciding whether there are sufficient “in-state (USA) contacts” for jurisdictional purposes. The Minnesota Supreme Court has saluted the interest of the forum state (USA) in protecting Minnesota. Commenting on the long-arm laws, the court has noted that it is the most basic interest of our legislature to afford maximum protection to this state's (USA) residents injured by acts of nonresidents who only have indirect contacts with this forum[68]. Courts in this state (USA), therefore, are likely to extend jurisdiction as broadly as possible through personal jurisdiction. Moreover, the statutory restriction of long-arm jurisdiction over out-of-state (USA) defamation may pose a barrier to conventional claims of defamation. But the internet is a new and powerful instrument that may not be susceptible to the same type of conventional territorial limitations as existed formerly. Legislative changes may be necessary, coupled with creative judicial decision for keeping up with the rapidly advancing internet. Jurisprudence regarding the internet is moving rapidly in many different directions. The state of Minnesota has been near the forefront in extending the boundaries of jurisdiction over internet communications. It is likely to continue to do so as the frontiers advance. Whether that progression will tend to obliterate traditional jurisdictional limitations remains to be seen. Only time – and the internet – will tell. It is also notable that the US standard, whether federal and provincial, should not be accepted as a method of jurisdiction appropriate for all other countries[69] because the attitude of other sovereign countries towards jurisdiction is diversified; and the socio-economic and international-political capacity are not same. Every nation has an obligation to exercise moderation and restraint in invoking jurisdiction over cases that have a foreign element, and they should avoid undue infringement on the jurisdiction of other states[70]. Although countries are given great

discretion in deciding whether to exercise jurisdiction over conduct in other countries, international law dictates that a country exercising its jurisdiction in an overly self-centered way not only contravenes international law, but also can “disturb the international order and produce political, legal, and economic reprisals”[71]. Based on this traditional moderation, and the relatively high threshold of the “reasonableness” standard discussed above, it is difficult but not impossible that foreign nations will have the sort of long-arm power over citizens of other nations as states (USA) have over citizens of other states (USA) within the USA territory[72]. This is largely speculative because internet jurisdiction cases of international perspective are still rare; even though, nations have not hesitated to pass municipal laws conferring global jurisdiction for internet activities[73].

Notes

1. To avoid the confusion between the state of federal sense and the state of sovereign status, they are termed as state (USA) and the state, respectively.
2. J.L. Brierly, sixth edition edited by Sir Humphrey Wadlock (1963) the law of the nations, p. 222
3. *Jus cogens* “compelling law” means a peremptory norm of general international law from which no derogation is permitted. See Sweeney *et al.* (1998).
4. US Const. art. I, § 8, cl. 10 (granting Congress the right “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).
5. *Reno v. ACLU*, 117 S.Ct. 2329, 2334-35 (1997).
6. *Kulko v. Superior Court*, 436 US 84, 100-01 (1978), *Shaffer v. Heitner*, 433 US 186, 216 (1977).
7. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 US 408(1984) (holding that defendant’s contacts with Texas were insufficient to assert general jurisdiction because the contacts did not constitute continuous and systematic activity).
8. See Wright and Miller (1987). This basis of jurisdiction is generally recognized outside of the US as well. See Born (1996).
9. *Calder v. Jones*, 465 US > 783 (1983).
10. Section 37 of the Restatement has effectively been incorporated into some states’ laws. See, for example, Judicial Council Comment (9) to Cal. Civ. Proc. Code Ann. 410.10 (West, 1973).
11. *Uberti v. Leonardo*, 181 Ariz. 565, 569, cert. denied, 516 US 906 (1995).
12. It reads, in relevant part, “ . . . a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: (1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or (3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or (4). owns, uses or possesses any real property situated within the state. (c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section”. N.Y. Civ. Prac. § 302.

13. Federal Rule of Civil Procedure 4(k) (Rule 4(k)).
14. Federal Rule of Civil Procedure 4(k)(1)(A).
15. Federal Rule of Civil Procedure (Rule 4(k)).
16. Federal Rule of Civil Procedure 4(k)(1)(D).
17. Federal Rule of Civil Procedure 4(k)(2).
18. 326 US 310 (1945).
19. *Int'l Shoe Co. v. Washington*, 326 US 310 at 316.
20. *World-Wide Volkswagen v. Woodson*, 444 US 286, 297 (1980).
21. *World-Wide Volkswagen v. Woodson*, 444 US 286, 297 (1980).
22. *Burger King v. Rudzewicz*, 471 US 462, 475 (1985).
23. 480 US 102 (1987).
24. *Id.* From a policy standpoint, this might prevent prosecutions in cases where the provider did not know the location of the user, but would facilitate and encourage false identification of user location to circumvent laws. For example, a person in Minnesota (with strict laws regarding internet gambling) could use a dial-up connection to an internet Service provider in Canada before gambling at a site hosted by a server in Liechtenstein. The Liechtenstinian site operator could track the user back to Canada without knowing that the user was actually breaking the law. Operators of gambling sites could encourage users to uses such misleading dial-up connections.
25. *Id.* at 113 (eight of the nine Asahi justices agreed that, regardless of whether there are sufficient minimum contacts, exercising jurisdiction over the defendant in Asahi would be unreasonable).
26. This is evident from the Restatement (Third) of the Foreign Relations Law of the US § 402-03 (1987), which states that a nation may make laws with regard to: "conduct outside its territory that has or is intended to have substantial effect within its territory", subject to a reasonableness requirement. The Restatement (Third) of the Foreign Relations Law of the US is intended to reflect the international law consensus of all nations. See Wilske and Schiller (n.d.).
27. Restatement (Third) of the Foreign Relations Law of the USA, § 421.
28. Section 421 of the Restatement (Third) of the Foreign Relations Law of the USA,
29. *Id.*
30. For a thorough discussion of recent cases finding personal jurisdiction and not finding personal jurisdiction, see Cendali and Weinstein (1998).
31. *CompuServe, Inc. v. Patterson* 89 F. 3d 1257 (6th Cir. 1996), *Zippo Manufacturing v. Zippo Dot Com, Inc.* 952 F. Supp. 1119 (W.D. Pa., 16 January 1997), *Panavision International, L.P. v. Toeppen* 938 F. Supp. 616 (C.D. Cal., 1996), *Maritz, Inc. v. Cybergold*, 947 F. Supp. 1328 (E.D. Mo., 1996), *Inset Systems, Inc. v. Instruction Set, Inc.* 937 F. Supp. 161 (D. Conn., 1996), *Minnesota v. Granite Gate Resorts, Inc.* 65 USLW 2440, 1996 WL 767431 (D. Minn., 10 December 1996), *Calder v. Jones* 465 US 783 (1984), *Blumenthal v. Drudge* 992 F. Supp. 44 (D.D.C., 1998), *Telco Comm. v. An Apple A Day* 977 F. Supp. 404 (E.D. Va., 1997), *EDIAS Software Int'l. v. Basis Int'l. Ltd* 947 F. Supp. 413 (D. Ariz., 1996).
32. 89 F. 3d at 1263-68.
33. 952 F. Supp. at 1124-28.
34. 938 F. Supp. at 619-22.
35. 947 F. Supp. at 1329-32.
36. *id.* at 1333.

37. *Panavision International, L.P. v. Toepfen*, 141 F. 3d 1316 (9th Cir. 1998) (finding personal jurisdiction based on specific jurisdiction but not general jurisdiction because defendant's contacts, while purposeful and having an effect in the forum state, were not systematic and continuous); *Weber v. Jolly Hotels*, 977 F. Supp. 327, 333 (D.N.J., 1997) (and cases cited therein) (determining that an internet web site is insufficient to confer personal jurisdiction under a general jurisdiction theory when the information provided serves as an advertisement and not as a means of conducting business). But see *Mieczkowski v. Masco Corp.*, No. 5:96CV286, 1998 WL 125678, at *6 (E.D. Tex., 18 March 1998) (interactive web site that responds to consumer product inquires is sufficient without more to establish general jurisdiction).
38. 4340 U.S.P.Q.2d (BNA) 1826, 1828 (S.D. Cal., 1996).
39. *Benusan Restaurant Corp. v. King*, 937 F. Supp. 295 [SNDY].
40. *Graphic Controls Corp. v. Utah Medical Prods., Inc.*, 149 F 3d 1382, 1386 (Fed. cir. 1998).
41. 326 US 310 (1945).
42. 952 F. Supp. 1119 (W.D. Pa., 1997).
43. 938 F. Supp. 616 (C.D. Cal., 1996).
44. 937 F. Supp. 161 (D. Conn., 1996).
45. 568 N.W.2d, 715 (Minn., 1997) (Minn., 14 May 1998).
46. 89 F. 3d 1257 (6th Cir. 1996).
47. 937 F. Supp. 295 (S.D.N.Y., 1996).
48. 1996 Dist. LEXIS 15139, No: 93-4037, Slip op [S.D. Cal., 6 August 1996].
49. 636 So 2d 1351 [Fla. App., 1994], review denied, 645 So. 2d 455 [Fla., 1994].
50. 33 F. Supp. 2d 907 (D. Ore., 1999).
51. 149 F. 3d 1382, 1386 (Fed. Cir. 1998).
52. 130 F. 3d 414 (9th Cir. 1997).
53. The court noted that, had the site been operational when Hearst sued, jurisdiction would likely have been proper because business interactions would have taken place between the site operators and new York customers. *Hearst*, No. 96 Civ. 3620, 1997 WL 97097 at 11 (S.D.N.Y., 26 February 1997).
54. 130 F. 3d 414 (9th Cir. 1997). The court noted that, had the site been operational when Hearst sued, jurisdiction would likely have been proper because business interactions would have taken place between the site operators and new York customers. *Hearst*, No. 96 Civ. 3620, 1997 WL 97097 at *11 (S.D.N.Y., 26 February 1997).
55. *Id.*
56. 130 F. 3d 414 (9th Cir. 1997).
57. *Id.*, 130 F. 3d 414 at 418-20 (Florida company's creation of a passive web site with same name as a company domiciled in Arizona did not constitute purposeful availment of Arizona's laws; in dicta, court stated that more active site might have triggered jurisdiction).
58. *Cybersell* at 418-19.
59. *Panavision International, L.P. v. Toepfen*, 141 F. 3d 1316 (9th Cir. 1998). (defendant's creation of a web site with the domain name "panavision.com", as part of a plan to make the Panavision company pay for the right to use the domain name, constituted sufficient contacts with California for the purposes of a suit by the Panavision company, whose principal place of business was in California).
60. 471 US 462 (1985).
61. 465 US 783 (1994).

62. 947 F. Supp. 413 (D. Ariz., 1996).
63. 992 F. Supp. 44 (D.D.C., 1998).
64. 977 F. Supp. 404 (E.D. Va., 1997).
65. Sections 609.75, Subdivisions 2-3; 609.755(1) (1994). The complete text of the AG's memo can be found at its Web site: www.state.mn.us.ebranch/ag/memo.txt
66. 568 N.W.2d, 715 (Minn., 1997).
67. Minn. Stat. §543.19 subd. 1(d)(7).
68. *Hughes v. Cole*, 572 N.W.2d 747, 757 (Minn. App., 1997); *Howells v. McKibben*, 281 N.W.2d 154, 158 (Minn., 1979).
69. Wilske and Schiller (n.d.), p. 146, citing Convention on accession to the convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 9 October 1978, 18 I.L.M. 8, 21 (excluding "tag" jurisdiction).
70. Wilske and Schiller (n.d.), citing *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 17-53 (5 February).
71. Born (1987), citing von Mehren and Trautman (1966).
72. Wilske, supra, at 146-7.
73. Wilske, supra, at 123-4, 147.

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