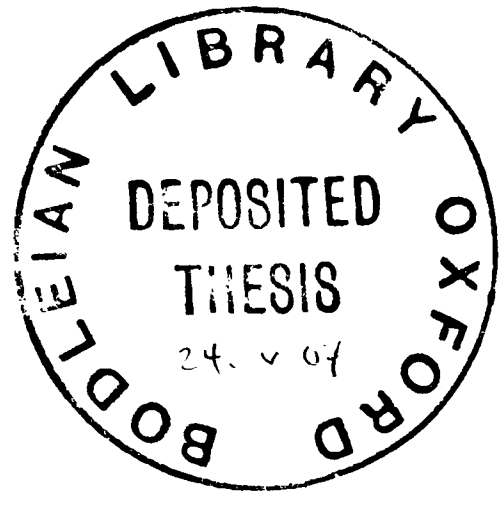
UNIVERSITY OF OXFORD
Faculty of Law

PRIVATE INTERNATIONAL LAW ASPECTS OF CROSS-BORDER WRONGS ON THE INTERNET

THESIS FOR THE DEGREE OF
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ABSTRACT

Private international law divides the world into territories, each with its own court system and laws. The internet presents challenges to this neat division. It is difficult to identify where an activity takes place on the internet. Wrongs on the internet leave many questions unanswered in transnational litigation. This paper addresses the private international law aspects of cross-border civil wrongs on the internet. Chapter A introduces the internet, and aims to simplify the technical issues. Chapter B asks which court has jurisdiction in a case of wrongs on the internet. The focus is on two sets of rules commonly applied around the globe: the service abroad provisions and the special jurisdiction provisions. The chapter aims to advance general principles applicable in cases of cross-border wrongs committed on the internet, as to the place where a wrong is committed, and the place where damage is suffered. The issue whether a court can grant an injunction against a foreign defendant in respect of foreign conduct is also explored. The exercise of jurisdiction under the service abroad provisions is discretionary. Chapter C examines the *forum (non) conveniens* discretion in the context of wrongs on the internet. It concludes that, of the US jurisdictional principles developed in internet cases, the sliding scale test should be treated with caution, but the effects test (targeting) should be a factor that is taken into account, in exercising the discretion. Chapter D asks which law applies to a wrong on the internet, concentrating on the divergent choice of law rules in tort in Australia, Canada, the UK and those proposed in the EU. The two chapters that follow consider wrongs to which the internet environment is particularly susceptible, and which deserve separate treatment: intellectual property infringements (Chapter E) and defamation (Chapter F). The final topic, recognition and enforcement of foreign judgments relating to wrongs on the internet, is the subject of Chapter G. The paper rejects the suggestions that new rules should be developed for wrongs on the internet, and concludes that the existing private international law rules are largely workable in the internet context, but require some flexibility in order to be adaptable.

The law is stated on the basis of materials available to me as at 15 June 2006.

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LIST OF ABBREVIATIONS

These abbreviations are in addition to those listed in OSCOLA Appendices A, B and C. (There are some further technical internet abbreviations which are defined in Chapter A).

Abbreviation	*Full name*
1995 Act	Private International Law (Miscellaneous Provisions) Act 1995 (UK)
A 2d	Atlantic Reporter (second series)
ABA Report	American Bar Association 'Jurisdiction in Cyberspace Project' empanelled under the title 'Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction', published as 'Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet' 55 Business Lawyer 1801 (2000)
ABLJ	American Business Law Journal
ACCC	Australian Competition & Consumer Commission
ACSR	Australian Companies and Securities Reports
ACWS (3d)	All Canada Weekly Summaries (third series)
ALR	Australian Law Reports
ALRC Report	Australian Law Reform Commission 'Choice of Law' (Report No 58, 1992)
Am Jur	*American Jurisprudence* (2nd edn Lawyers Cooperative Publishing Rochester NY 1990, 1995)
AR	Alberta Reports
ATPR	Australian Trade Practices Reports
AustDefamRep	Australian Defamation Reports
AustTortRep	Australian Tort Reports
BCCA	Court of Appeal of British Columbia (neutral citation)
BCLR	British Columbia Law Reports

Abbreviation	*Full name*
Briggs	A Briggs *The Conflict of Laws* (OUP Oxford 2002)
Briggs & Rees	A Briggs and P Rees *Civil Jurisdiction and Judgments* (4th edn LLP London 2005)
Brussels Convention	Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (consolidation [1998] OJ C27/1)
BTLJ	Berkeley Technology Law Journal
Boele-Woelki & Kessedjian	K Boele-Woelki and C Kessedjian (eds) *Internet – Which Court Decides? Which Law Applies?* (Kluwer Hague 1998)
BYIL	British Yearbook of International Law
Cornish & Llewellyn	W Cornish and D Llewellyn *Intellectual Property* (5th edn Sweet & Maxwell London 2003)
Cheshire & North	*Cheshire & North's Private International Law* (13th edn Butterworths London 1999)
Cal Rptr	Californian Reporter
CBR	Canadian Bar Review
CCLT	Canadian Cases on the Law of Torts
CLR	Commonwealth Law Reports
Collins	L Collins *Essays in International Litigation and the Conflict of Laws* (Clarendon Press Oxford 1994)
Cook	WW Cook *The Logical and Legal Bases of the Conflict of Laws* (Harvard University Press Cambridge Mass 1942)
CPR (3d)	Canadian Patent Reporter (third series)
Dicey & Morris	*Dicey & Morris on the Conflict of Laws* (13th edn Sweet & Maxwell London 2000)
DLR	Dominion Law Reports
Edwards & Waelde	L Edwards and C Waelde (eds) *Law and the Internet* (2nd edn Hart Publishing Oxford 2000)
ECJ	European Court of Justice

Abbreviation	*Full name*
E-commerce Directive	Directive 2000/3/EC on electronic commerce [2000] OJ L178/1
Eechoud	MMM van Eechoud *Choice of Law in Copyright and Related Rights* (Kluwer Hague 2003)
EFTA	European Free Trade Agreement
EMLR	Entertainment & Media Law Reports
ER	English Reports
EU	European Union
EWCA	England & Wales Court of Appeal (neutral citation)
EWHC	England & Wales High Court (neutral citation)
EWLC Report	Law Commission for England & Wales and Scottish Law Commission 'Private International Law – Choice of Law in Tort and Delict' (Law Com No 193, Scot Law Com 129, 1990)
EWLC Study	Law Commission for England & Wales 'Defamation and the Internet: A Preliminary Investigation' (Scoping Study No 2 2002)
Fawcett & Torremans	JJ Fawcett and P Torremans *Intellectual Property and Private International Law* (OUP Oxford 1998)
FCA	Federal Court of Australia (neutral citation)
FCR	Federal Court Reports (Australia)
F Supp, F Supp 2d	Federal Supplement (US) (first series, second series)
F 2d, F 3d	Federal Reports (US) (second series, third series)
Forouzan	BA Forouzan *TCP/IP Protocol Suite* (2nd edn McGraw Hill New York 2003)
Gralla	P Gralla *How the Internet Works* (7th edn Que Publishing Indianapolis 2004)
HKC	Hong Kong Cases
HLR	Harvard Law Review
ILPr	International Litigation Procedure

Abbreviation	*Full name*
IPR	Intellectual Property Reports
IR	Irish Reports
Jaffey	AEJ Jaffey *Topics in Choice of Law* (British Institute of International and Comparative Law London 1996)
Judgments Regulation	Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1
Kerly	*Kerly's Law of Trade Marks and Trade Names* (14th edn Sweet & Maxwell London 2005)
Lugano Convention	Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 [1988] OJ L319/9
McLachlan & Nygh	C McLachlan and P Nygh (eds) *Transnational Tort Litigation: Jurisdictional Principles* (Clarendon Press Oxford 1996)
MJIL	Melbourne Journal of International Law
MLJU	Malayan Law Journal Unreported
MULR	Melbourne University Law Review
NE 2d	North-Eastern Reports (second series)
Nfld&PEIR	Newfoundland and Prince Edward Island Reports
Nimmer	*Nimmer on Copyright* (looseleaf Matthew Bender Newark 2004)
NSWCA	Court of Appeal of New South Wales (neutral citation)
NSWSC	Supreme Court of New South Wales (neutral citation)
NSWLR	New South Wales Law Reports
NW 2d	North-Western Reporter (second series)
NY	New York Reports
NZLR	New Zealand Law Reports
OR	Ontario Reports
OUCLJ	Oxford University Commonwealth Law Journal

Abbreviation	*Full name*
Perritt	HH Perritt Jr *Law and the Information Superhighway* (John Wiley & Sons New York 1996)
QdR	Queensland Reports
Richardson & Garnett	M Richardson and R Garnett 'Perils of publishing on the internet: Broader implications of *Dow Jones v Gutnick*' (2004) 13 Griffith L Rev 74
Rabel	*Rabel on the Conflict of Laws* (2nd edn U Michigan L School 1960)
Reed	C Reed *Internet Law: Text and Materials* (2nd edn CUP Cambridge 2004)
Ricketson & Ginsburg	S Ricketson and JC Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn OUP Oxford 2006)
Rome II	Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II)
Savigny	W Guthrie (ed) *FC von Savigny's Treatise on the Conflict of Laws* (2nd edn T&T Clark Edinburgh 1880)
SASR	South Australian State Reports
ScotSC	Scottish Session Cases (neutral citation)
SCR	Supreme Court Reports (Canada)
SLR	Singapore Law Reports
SLRev	Sydney Law Review
Smith	GJH Smith *Internet Law and Regulation* (3rd edn Sweet & Maxwell London 2002)
Story	*Story's Commentaries on the Conflict of Laws* (7th edn Little Brown & Co Boston 1872)
Tanenbaum	AS Tanenbaum *Computer Networks* (4th edn Prentice Hall PTR New Jersey 2003)
TLR	Times Law Reports

Abbreviation	*Full name*
UNSWLJ	University of New South Wales Law Journal
UPLR	University of Pennsylvania Law Review
US	Supreme Court Reports (US)
USPQ 2d	United States Patents Quarterly (second series)
UTLJ	University of Toronto Law Journal
Vick & Macpherson	DW Vick and L Macpherson 'Anglicizing defamation law in the European Union' 36 Virginia J Intl L 933 (1996)
VicSCR	Supreme Court Rules (General Civil Procedure) 2005 (Vic)
VJTL	Vanderbilt Journal of Transnational Law
VR	Victorian Reports
VSC	Supreme Court of Victoria (neutral citation)
VSCA	Court of Appeal of Victoria (neutral citation)
WASC	Supreme Court of Western Australia (neutral citation)
WASCA	Court of Appeal of Western Australia (neutral citation)
WAR	Western Australian Reports
Westlake	N Bentwich *Westlake's Private International Law* (7th edn Sweet & Maxwell London 1925)
White Book	*Civil Procedure: The White Book Service* (Sweet & Maxwell London 2005)
WIPO	World Intellectual Property Organization
Wolff	M Wolff *Private International Law* (2nd edn OUP Oxford 1950)
WN (NSW)	Weekly Notes (New South Wales)
WWR	Western Weekly Reports (Canada)

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BACKGROUND

'Internet liability is... a vast field where the legal harvest is only beginning to ripen.'[1] The nature of the internet gives that liability an international character. This paper aims to explore the risk and prospects of litigation in a foreign court and/or under a foreign law in relation to a civil wrong committed through the internet. It addresses the following aspects of private international law:

(a) in what circumstances does a court have jurisdiction over a foreign defendant alleged to have committed a civil wrong over the internet?

(b) if it has jurisdiction in such a case, in what circumstances will a court exercise, or decline to exercise, jurisdiction?

(c) which law will the court apply when determining the merits of such a case?

(d) are there any particular problems of recognition or enforcement of judgments which arise in cases of wrongs committed over the internet?

Each question is dealt with in turn, though the issues overlap to some extent.

The topic of internet liability is of fundamental importance to contemporary private international law. At present the issues are very much alive and unresolved. There have been suggestions that the repercussions are profound. As one judge pondered: 'Does the

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[1] *Society of Composers, Authors and Music Publishers of Canada v Canadian Assoc of Internet Providers* (2004) 240 DLR (4th) 193 (SCC) [41].

concept of a legal discipline entitled 'the conflict of laws' have any meaning, now that in cyberspace national boundaries are almost irrelevant?'[2]

Internet use is increasingly prevalent and accounts for much cross-border contact between humans. Frequently, the communicators are mobile. Hence the risk of wrongs committed over the internet is great and the private international law issues in cross-border wrongs are significant.

Each of the world's jurisdictions has its own rules of private international law. In this paper it would be impossible to cover all of them. Instead the focus is on two countries – England and Australia, whose private international law rules are largely representative of many countries.

The policies which underlie the rules should be restated.[3] The universal aim is to have a judicial system that administers justice efficiently and effectively and has the confidence of the public. Some countries are closer to achieving this than others. Non-substantive laws (such as those dealing with court procedures and private international law) should cater primarily for the litigating parties and also for the wider public. The disputants seek certainty and predictability. Reducing the opportunity for the plaintiff to engage in forum shopping increases the certainty for the defendant of where he could face litigation. The efficacious conduct of proceedings and the sound administration of justice should be encouraged and promoted. These are expressly required under EU law,[4] and implicitly required at common law. The system must balance the interests of both parties,

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[2] Lord Mustill 'What are judges for?' (23rd FA Mann lecture 1999 unpublished) as cited in C McLachlan 'International litigation and the reworking of the conflict of laws' (2004) 120 LQR 580 fn 5.
[3] McLachlan (n 2) 581–2.
[4] Judgments Regulation recital (12); Case 21/76 *Bier v Mines de Potasse d'Alsace SA* [1976] ECR 1735 [11].

so that the elimination of forum shopping does not occur at the expense of the plaintiff having a right to sue in a place which is sufficiently connected with the dispute. Critics may argue that investing too much time and effort in resolving preliminary issues, such as jurisdiction, is an inefficient allocation of economic resources in court proceedings. But interlocutory hearings on these points are a reality, unless parties can predict the outcomes. The greater the certainty of the rules of private international law, the lower the transaction costs. Another factor which affects transaction costs is the potential for parallel proceedings in several countries. The closer the proximity between the rules, the more efficient the system. So in theory, the rules should, as much as possible, be of universal application. A consistent approach applied to all legal categories that have similar characteristics is preferred. Similarly, rules should be technologically-neutral; a rule which is technology-specific may become outdated very quickly. It is not the function of the legal system to discriminate between different methods of performing the one act. Adaptable rules encourage technological development, and do not stand in the way of international communications by internet and e-commerce. Finally, one additional objective within the EU context is freedom of movement,[5] and this will become more important on an international level as the world edges towards a global community. These are the policy standards which private international law rules should aim to address.

This paper focuses on the application of rules to wrongs. 'Wrongs' as a category appears more frequently now in common law literature. In law, a wrong is conduct whose effect in creating legal consequences is attributable to its being characterized as a

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[5] Eg of goods, labour, capital.

breach of duty.[6] As a general rule, a civil wrong is an event which, if it causes loss, is remediable by compensation.[7] The focus should be on the event (eg conduct), rather than the response (eg remedy), though this has not always been the approach taken by private international law.[8] The law of wrongs is concerned primarily with the type of conduct that should be regarded as wrongful. In many cases, it is the focus on the conduct that explains the true nature of a wrong, even though there may be other conditions to be satisfied (eg damage) before a proceeding can be maintained.[9]

This paper concentrates on private, civil wrongs. It considers only briefly wrongs in criminal or quasi-criminal law (eg dissemination of racist material, email stalking, dissemination of pornographic material, online gambling, computer fraud and abuse, cyberterrorism). In English law, there are common law civil wrongs (eg tort, breach of contract), equitable civil wrongs (eg breach of fiduciary duty, breach of trust, breach of confidence, dishonestly procuring or assisting a breach of fiduciary duty, and some forms of estoppel), and statutory wrongs (contravention of primary or delegated legislation). This paper focuses on wrongs that are not related to any form of consent of the parties. Hence the wrongs of breach of contract (or other contractual claims), breach of trust and breach of fiduciary duty are not addressed because consent is essential to their classification in private international law. The categories which are covered by non-consent based wrongs in common law countries essentially equate to 'delict' and 'quasi-

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[6] P Birks 'The concept of a civil wrong' in D Owen (ed) *Philosophical Foundations of Tort Law* (Clarendon Press Oxford 1995) 31; J Edelman *Gain-Based Damages* (Hart Oxford 2002) ch 2.
[7] A Burrows *The Law of Restitution* (2nd edn Butterworths LexisNexis London 2002) 457–8.
[8] Eg in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) 474–81 a claim for restitution arising from procuring breach of trust was not treated as a tort/wrong claim for jurisdictional purposes, though arguably a focus on characterizing the event should have led to that conclusion.
[9] GHL Fridman 'Where is a tort committed?' (1974) U Toronto LJ 247, 278.

delict' in civilian countries (including Scotland).[10] There is much debate as to whether a single category can adequately cover all wrongs or whether separate categories are required for the purposes of private international law rules.[11]

One can conjure up various hypothetical examples of wrongs involving the internet. Judges and commentators sometimes use expressions such as 'internet wrongs', 'internet torts', 'cyberwrongs' and 'cybertorts'.[12] However it is best to relinquish such labels. Many of these wrongs are not unique to the internet. The mode of commission of wrongs generally plays no part in their classification. For example, we do not see a category of 'telephone wrongs'. Yet there are some wrongs which can be said to be 'committed over the internet'. These are the focus of this paper. In these wrongs a central aspect of the wrongful act or omission is the communication or dissemination of material over the internet. However the communication or dissemination may have just as easily been committed using traditional means, such as telephone or television broadcasts. The difficulties posed by the internet, as a means of communication and dissemination, arise because the internet permits instantaneous communication to enormous numbers of users which often cannot be limited geographically. The aim of this paper is to discover whether this feature is significant so as to require changes to the principles of private international law. The wrongs which are addressed in this paper fall into several categories. The first four categories are traditional wrongs which happen to occur on the internet. In contrast, the final two are unique to the technology age.

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[10] *Gloag and Henderson on the Law of Scotland* (11th edn W Green & Son Edinburgh 2001) [31.01]; DM Walker *Delict* (2nd edn W Green & Son Edinburgh 1981) 3–8.

[11] Below 137.

[12] *Bochan v LaFontaine* 68 F Supp 2d 692 (EDVa 1999); MR Osinski 'Personal jurisdiction and internet torts' 80 U Detroit Mercy L Rev 249 (2003); A Hamdani 'Who's liable for cyberwrongs?' 87 Cornell L Rev 901 (2002); ML Rustad and TH Koenig 'Harmonizing cybertort law for Europe and America' 5 J High Technology L 13 (2005); AJ Sebok 'The indivisible borderlines of tort on the internet' in T Kono, CG Paulus and H Rajak (eds) *Selected Legal Issues of E-Commerce* (Kluwer Hague 2002) 57, 59.

First, there are false statements published on or through the internet, causing harm to victims who read and rely on them. This category would include misrepresentations or misstatements, misleading or deceptive conduct, false advertisements and passing off.[13] Second, there are defamatory statements published on or through the internet, causing harm to victims when comprehended by a third person. This category would include slander and libel. The third category comprises intellectual property wrongs. Examples are infringement of trade mark on the internet by using a victim's registered sign (and related to this is unfair competition, a wrong recognized in the US), breach of copyright by disseminating copyright material over the internet, and meta-tagging (including another website's protected key words in a website's code to increase the popularity of the website being accessed). Cases of breach of confidence or disclosure of trade secrets, where the confidential information is imparted through the internet, fall into this category.

Fourth, there is violation of privacy, a wrong generally not (yet) recognized in English common law countries.[14] This would include intentional intrusions (eg interception of private emails, using internet cookies to identify the website user[15]), disclosures of private facts (eg placing indiscreet photos on a website) and misappropriation (unauthorized use of a person's name or likeness or other personal information). Fifth, there are cases where access is gained to other computers through the internet, causing damage, eg hacking[16] (which may sometimes fit under the traditional wrong of trespass to chattels), distribution of viruses, interception of emails. Often this

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[13] In this context, passing off has characteristics which resemble false statements rather than to intellectual property wrongs.

[14] There is a proposal in Hong Kong to create a tort of unwarranted publicity, which would prohibit posting private facts on the internet: Law Reform Commission of Hong Kong 'Civil liability for invasion of privacy' (Report, 2004) [7.37]–[7.39].

[15] A US court found that web bugs and cookies may violate the Electronic Communications Privacy Act (*Re Pharmatrak Inc* 329 F 3d 9 (1st Cir 2003)).

[16] Programmers prefer to use the term 'cracking' instead.

conduct is criminally proscribed by legislation. The sixth category comprises cases where the internet is used to create an annoyance for the victim, eg 'email bombing' (repeatedly sending an email to a victim in order to consume system resources), 'email spamming' (sending bulk junk emails to multiple victims), 'email spoofing' (altering an email account's identity and engaging in bombing or spamming), and 'flaming' (electronic hate mail).

This paper does not consider the many wrongs with which the internet has a more remote connection. Where to draw the line is a matter of judgment. In my submission, product liability resulting from the manufacture and then sale of a defective product on the internet is too far removed, because in identifying where the wrong occurs there are more compelling places than the location of the communications. Other examples are procuring breach of contract by sending statements in an email or placing them on a website, or a conspiracy which takes place by the parties' email discussions about their ideas and agreement by email to take action, or an unlicensed seminar which promotes a financial advice website.

Before exploring the rules of private international law in detail, some understanding of the technical issues is vital and to this we now turn.

CHAPTER A:
INTERNET

1 WHAT IS THE INTERNET?

The internet is a large-scale international computer network which interconnects numerous groups of linked networks that follow certain sets of rules governing data communications at various layers (**protocols**).[1] It is characterized by the basic pair of protocols shared by all its constituent computers:[2]

(i) Transmission Control Protocol (**TCP**), which applies to the transport layer and includes rules on establishing and breaking connections;[3] and

(ii) Internet Protocol (**IP**), which applies to the network layer and includes rules for routing of information and rules for assigning a unique numeric address (**IP address**) to each networked computer, enabling other computers to identify it uniquely and universally so as to locate it within the shared address space.[4]

While the network is traditionally accessed by computer (whether directly connected to a network, or a personal computer connected through a modem), any device that offers digital communication, ie is capable of processing information reduced to binary digits (**bits**), (eg personal organisers, mobile telephones, pagers, television sets,

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[1] Forouzan 6. *American Civil Liberties Union v Reno* 929 F Supp 824 (EDPa 1996) 830–9 provides a helpful summary.
[2] Gralla 11, 15–17; Forouzan 32–4.
[3] Tanenbaum 532ff.
[4] Tanenbaum 436–7; Forouzan 89ff.

wireless fidelity), can link to the internet.[5] The interconnection occurs by the transfer of standard size bundles of information (**packets**)[6] in binary impulses and digital signals through connecting devices (eg **switches**, **routers**)[7] placed at the junctions between the networks and linked to the information sources by telecommunications connections (**pipes**).[8] Traditionally pipes are contained in telephone wires, though dedicated data cables and wireless connections are gaining acceptance rapidly. The communications can occur almost instantaneously, and can be directed either to specific individuals or to groups.

The internet originated as an experimental project for US military use. In a relatively short timeframe many thousands of other networks around the world adopted the protocols and linked to the internet. Its use has increased exponentially (particularly throughout the past decade). Its standards and protocols are administered technologically by various organizations,[9] but the internet itself is not regulated by government[10] though attempts are made to coordinate internationally internet governance and security issues.[11] It exists and functions through independent decisions by many separate operators of computers and networks to use the common protocols to communicate and transfer data.

The internet allows a connected computer (**online**) to exchange information on a global scale with any other computer connected to the network. Unprecedented numbers of people and devices are linked.[12] It is impossible to identify the internet's physical

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[5] Tanenbaum ch 2; Gralla 36–41.
[6] Perritt §1.2.
[7] Gralla 11, 31–3; Forouzan 74–9.
[8] Smith [1-006].
[9] Forouzan 12–13 gives examples.
[10] And *laissez faire* advocates (eg A Thierer and C Wayne Crews Jr (eds) *Who Rules the Net?* (Cato Institute Washington 2003)) seek to maintain this.
[11] International Chamber of Commerce *Issues Paper on Internet Governance* (ICC Paris 2004).
[12] Expert evidence in *Dow Jones & Co Inc v Gutnick* (2003) 210 CLR 575 (HCA) [14].

boundaries,[13] as it is inherently accessible from every country in the world. Information placed on the internet is usually open to all users anywhere.[14] In some cases access may be restricted and regulated by government[15] or may be limited by the content-provider to subscribers, registrants or specific users.[16]

Yet the nature of the internet makes it virtually impossible, or prohibitively difficult, cumbersome and costly, for a content-provider to place material on the internet which is accessible in some countries while at the same time to prevent the content from being accessed in specific legal jurisdictions.[17] New technology is being developed to allow a business to select its customers by reference to location, and to allow a customer to limit access to websites by reference to location.[18] But the internet's indiscriminate global accessibility is its primary benefit. Country-specific sites defeat the cross-border flow of services and information.[19] And the practical cost of locating and filtering all types of content to all countries simultaneously may be prohibitive, particularly for

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[13] Smith [1-001].
[14] *Gutnick* (n 12) [86].
[15] Eg Libya and Syria, which do not allow public access to the internet; Saudi Arabia, Yemen and the United Arab Emirates, which impose censorship: Human Rights Watch *The Internet in the Mideast and North Africa – Free Expression and Censorship* (Human Rights Watch Washington 1999) 1; China: 'Developments – Law of Cyberspace' 112 HLR 1574, 1680–1 (1999); Cuba: Resolution 180/2003.
[16] *Gutnick* (n 12) [83].
[17] Ibid [86]. However in *Ligue Contre la Racisme et L'Antisemitisme & L'Union des Étudiants Juifs de France v Yahoo! Inc & Yahoo! France* (TGI Paris, 22 mai 2000 et 20 novembre 2000, procédures n° 00/05308, 00/5309) geographic filtering technologies were required to be employed to identify website users and limit access to content in certain places: A Monopoulos 'Raising 'Cyber-Borders': The interaction between law and technology' (2003) 11 Intl JL & Information Technology 41–3. Some authors take the view that geo-location software solve territoriality on the internet: R August 'International cyber-jurisdiction: A comparative analysis' 39 ABLJ 531, 569 (2002). While content filters on the receiving-end implemented by governments have been mooted (T Gerlach 'Using internet content filters to create e-borders to aid in international choice of law and jurisdiction' 26 Whittier L Rev 899 (2005)), these could easily turn into censorship vehicles that curb human rights.
[18] E Clark, G Cho and A Hoyle 'Australia' in J Dumortier (ed) *International Encyclopaedia of Laws: Cyberlaw* (Kluwer Hague 2004) §671.
[19] GJH Smith 'Directing and targeting – the answer to the internet's jurisdiction problems?' 5 Computer Law Review International 145 (2004) 147.

internet publishers that are small businesses or individuals.[20] Hence, the issues associated with the global reach of the internet will remain. There are other practical problems with geographical tracing.[21] Website operators may be required to monitor the laws of every State constantly to determine which users to admit. Users may regard the technology which identifies their location as a violation of privacy. A State which blocks content may be accused of overreaching beyond its borders and censorship.[22] And even if blocking is required under the laws of one State, it might not be enforceable in other States.

This geographic boundlessness creates difficulties in applying the rules of jurisdiction that are territorial. Some say that internet communications do not take place in any territory but rather in a virtual or notional interactive environment[23] (**cyberspace**[24]). However, although cyberspace may appear borderless,[25] it is a fallacy to assert that internet activities occur outside the physical world. 'The internet redefines distance but does not cancel geography'.[26] The constituent elements of cyberspace, ie the human and corporate actors and the computing and communications equipment through which a transaction is effected, all have a real-world existence and location in one or more physical world legal jurisdictions.[27] Often the transactions take place beyond the

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[20] Ibid. A submission, based on expert evidence, which was accepted in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 (FCA) [283]–[284] (on appeal to FullCt) was that 'there is no effective way to limit such filters, or indeed any filter, to particular jurisdictions such as Australia'.

[21] PS Berman 'The globalization of jurisdiction' 151 UPLR 311, 386 (2002).

[22] J Zittrain 'Internet points of control' 44 Boston College L Rev 653, 675–9 (2003).

[23] C Walker, D Wall and Y Akdeniz (eds) *The Internet, Law and Society* (Pearson Essex 2000) 3.

[24] W Gibson *Neuromancer* (Gollancz London 1984) 51 first used 'cyberspace' to refer to the realm of communications networks that operate through computers.

[25] DR Johnston and DG Post 'Law and borders – The rise of law in Cyberspace' 48 Stanford L Rev 1367 (1996).

[26] M Castells *The Internet Galaxy* (OUP Oxford 2001) 207.

[27] Reed [7.1.1].

borders of a particular nation State, involving actors from several States, and in that sense they are transnational.[28]

2 TYPES OF INTERNET APPLICATIONS

New types of internet applications (and related protocols) are being developed constantly. Currently there are several internet applications that have widespread use, though predictions cannot be made about what applications will be popular in 10 or even 5 years.

The most important are WWW and email. They are the focus of this paper. World Wide Web (**WWW**)[29] is a remote information retrieval application that enables a client to access documents linked together from a remote server (**client-server model**).[30] It has the unique advantage of acting as a single point of access (**interface**), by virtue of its common protocols, into other applications that use different protocols, resulting in interoperability and flexibility. Electronic mail (**email**)[31] is a messaging application that enables the transfer of messages from a sender to one or more recipients.

Other popular applications include: Chat (eg internet relay chat, webchat, instant messaging),[32] a communication application that enables participants to converse in real-time on their screens; File transfer,[33] a remote information retrieval application that

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[28] B Fitzgerald 'Casenote on *Dow Jones & Co Inc v Gutnick*: Negotiating "American Legal Hegemony" in the transnational world of cyberspace' (2003) 27 MULR 590, 590–1.
[29] Gralla 127.
[30] Gralla 19; Forouzan ch 25. Its higher-level application protocol is hypertext transfer protocol (**HTTP**). See further G Held *Understanding Data Communications* (3rd edn Wiley Chichester 2000) 657–61; Forouzan ch 24.
[31] Gralla 89. It relies on simple mail transport protocol (**SMTP**) for outbound mail, post office protocol (**POP**) for inbound mail, internet message access protocol (**IMAP**) for retrieving messages, and multipurpose internet mail extensions (**MIME**) for encoding non-text data. See further Forouzan ch 22.
[32] Gralla 111. It uses point-to-point protocol (**PPP**).
[33] Ibid 185. It uses file transfer protocol (**FTP**). See further Held (n 30) 653–5; Forouzan ch 20.

enables the transfer of files between computers; News network (eg USENET),[34] a distributed message database that enables the display of messages and replies (postings) on a public bulletin board or a members-only forum on specific areas of interest (newsgroups); voice communications[35] which may yet overtake the ordinary telephone; and Peer-to-peer (P2P), a network on which peer nodes function as both clients and servers to the other nodes, rather than having fixed clients and servers, which enables the creation of a workspace where users can share files (file-sharing), messages or software.[36]

3 PLACING & ACCESSING MATERIAL ON WWW

In order to apply the rules of private international law which look for factors connecting persons, things or acts with a territory, it is essential to understand the steps involved in placing and accessing material on WWW.

First, content is created by a person (**content-provider**).

To simplify matters, the discussion focuses on a static document (**web page**) of data such as text, photographs, drawings or pictures created by a single content-provider. The law treats each web page as a separate published document, despite being accessible through other web pages.[37] Other types of content include audio-visual material. Some web pages are not static documents stored on a server, but rather dynamic interactive pages containing information that is constantly updated, sometimes by numerous content-providers (including users).[38] It is also possible for an item, transmitted from one

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[34] Gralla 107. It uses network news transfer protocol (**NNTP**).
[35] Using voice over internet protocol (**VOIP**).
[36] Gralla 225–7.
[37] *Buddhist Society of Western Australia Inc v Bristile Ltd* (2000) AustTortRep 81-548 (WASC), affd [2000] WASCA 210 [10] (special leave to appeal to the High Court refused).
[38] Tanenbaum 643ff.

computer to another, to be accessed, viewed and manipulated on its journey, even without the knowledge of the transmittor or recipient. Additional difficulties may arise in identifying and locating the contributors to, or the recipients of, wireless transmissions which are made available on websites (**simulcast**) or real-time audio and video transmissions (**webcast**; **streaming**) or transmissions among groups of recipients (**multicast**). Still, the basic principles should remain the same.[39]

The content-provider transmits and places (**uploads**) the web page in a storage area (**website**) of a computer (**web server**)[40] that runs **server software**. Often the computer system is operated by the relevant content-provider or a third party,[41] such as an internet service-provider (**ISP**), a commercial operator which offers subscribers online services, storage capacity and internet access. Typically the content-provider performs the transmission from his own computer at his location. But he may be able to control a remote computer to achieve uploading. Generally uploading takes place wherever the content-provider physically acts to transmit the web page. Web pages are stored at a particular website in such a way that they are accessible to users worldwide.

An internet **user** connects to his local internet access-provider (**IAP**) and when connected (**online**), he uses client software (**browser**) to request and receive documents via the internet from remote servers.[42] To request a particular web page stored on a server, the user may do one of three things.[43] He may type the uniform resource locator

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[39] C Huitema *Routing in the Internet* (2nd edn Prentice Hall New Jersey 2000) 271ff; Forouzan ch 14.
[40] Smith [1-003], [1-016]; Forouzan 432. The web server is sometimes also called a '**host server**' or a '**host**'.
[41] Gralla 132–3, 161–3. Confusingly, the third party is often also called a '**host**'.
[42] Gralla 135–7; Forouzan 431. In theory, the web client and the web server could both reside on the same physical computer; the expression '**remote**' denotes that the server is elsewhere.
[43] Gralla 128–9, 153–5.

(**URL**)[44] of the web page into his browser, which identifies the data transfer protocol to use, the IP address of the server and the website and the path and file name.[45] More frequently, he would type the plain language address[46] (**domain name**) of the website where the web page is stored, or the domain name of the main access point for a collection of websites for a particular organization (**home page**), which is translated into a URL (and the home page may be navigated in order to find a particular web page). If he cannot easily identify the particular web page, he may use the browser to navigate (**surf**) the web and click on a hypertext link (**hyperlink**), one of the many software links in the web's mesh that join web pages to each other,[47] and this contains a URL for the web page.

After the user activates the request, the remaining steps are communications which occur between programs through the network connections without any further human acts. Once the request for the transmission of the nominated web page has been issued, the browser either uses the IP address contained in the URL of the web page, or if the URL contains a domain name, then the browser translates (using a **name server**) the information stored in the URL into a primary identifier, being an IP address, and a secondary identifier, being a **port number**. These identify the remote server on which the relevant web page is stored and the program which it runs.[48]

The browser makes a TCP connection to that server, and requests the web page identified by the path and file information in the URL.[49] (So the browser is not only a

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[44] Smith [1-013]; Tanenbaum 622–5.
[45] Perritt §1.2.
[46] Smith [1-003].
[47] Ibid [1-004].
[48] Gralla 23; Tanenbaum 615.
[49] Tanenbaum 615, 618.

recipient of data but also, by the request, the sender of data. To that extent there is an exchange of data rather than merely a one-way transmission.) The server analyses the request. The following process is known as **packet-switching**.[50] The server breaks down the content into packets, each with a destination address attached to it. The server transmits the packets to a router which reads the address of each packet and performs computations to determine the most appropriate transmission route (often the shortest path) over which to send the packet to its destination (**routing**).[51] The router does not access the data portion of the packet, merely the address. The packets are forwarded from router to router until they reach the browser.[52] The packets which comprise a single web page may be routed either in sequential order or individually and independently,[53] and are reassembled at their destination as a single web page. The browser responds to the user's request by delivering (**downloading**) a copy of the requested web page, which the user can access and view on his screen.[54] (Sometimes other unrequested websites may appear (**pop-ups**), though they can be filtered-out.) Then the TCP connection is released.[55] If the web page is a file, the user may save it onto a disk.[56] The client and server software communicate through messages and files conforming to hypertext markup language (**html**) and http standards[57] and other protocols and document formats which underlie WWW. These instructions and tags instruct the browser how to format and display the page on a computer screen.[58] In this way the user can access any web

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[50] Held (n 30) 698–9.
[51] Huitema (n 39) 41.
[52] *Society of Composers, Authors and Music Publishers of Canada v Canadian Assoc of Internet Providers* (2004) 240 DLR (4th) 193 (SCC) [20].
[53] Forouzan 147.
[54] Tanenbaum 618–19.
[55] Tanenbaum 615, 618.
[56] This step is colloquially called 'downloading', though technically downloading occurs beforehand on receipt of data.
[57] Perritt §1.2; Gralla 141–51.
[58] Perritt §1.2.

page that is available online, except those to which access is restricted by password or subscription.

When the packets of data pass through a server, it is common for that server to automatically create a temporary copy of the data, which it stores. This is a **cache copy**. In case shortly afterwards that server receives other requests for the same web page, the cache copy allows the server to deliver that web page from its cache memory without having to process another request. Caching aims to speed up transmission and lower the cost. The cache copy is retained for a brief period only, because web pages frequently change so the cache copy may become outdated quickly.

Geographically, the electronic communications described in this process occur in one or a combination of the location of: (i) the content-provider and his computer; (ii) the web server, running server software; and (iii) the user, and his computer, running client software. Of course, in more complex situations there may be numerous content-providers, servers and users, spread throughout numerous locations. In fact, while broadcasting and publishing channel information from active transmitters to passive receivers, digital communications allow transmitters and receivers to swap roles at any and all points.[59] Still, in relation to an identified wrong committed through WWW it should be possible to determine which party acted as a transmitter and which acted as a recipient. In addition, mobile computing means that the places of the transmitter, recipient and the transmission medium (eg hosts, networks) may vary.[60] Yet the basic principle that the transmission of information (eg data, voice) requires a transmitter, a

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[59] FW Grosheide 'Experiences in the field of intellectual property' in Boele-Woelki & Kessedjian 35, 44.
[60] Huitema (n 39) 310–12; Forouzan ch 27.

recipient and a transmission medium linking them[61] remains true, and each of them has a physical world location even if it is temporary and difficult to identify and locate.

4 TRANSMISSION OF AN EMAIL

The following is a brief outline of the steps involved in the transmission of an email.[62] First, the sender composes a text message (which may include file attachments) and addresses it to the recipient using an email program. The sender makes a connection to his ISP and transmits his message as a stream of packets to the ISP, which operates a mail server.[63] The message is temporarily stored (**buffered**) in the server. Using routers, the server determines from the recipient's address one of several routes through which to send the message. The server transmits the packets via the internet. The journey may take several legs and the message may pass through several other servers. The recipient's server receives the packets and recombines them as a message. The recipient submits a request through mail client software to his ISP. The mail server operated by that ISP responds by sending the message to the recipient's computer. The recipient may then display the message on his computer screen. Once again, the communications to and from a server, and between servers, occurs automatically between computer programs without any human acts.

Geographically, the electronic communications described in this process occur in one or a combination of the location of: (i) the sender and his computer; (ii) the operation of the sender's mail server; (iii) the operation of the recipient's mail server; and (iv) the

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[61] Held (n 30) 75.
[62] See further *NTP Inc v Research In Motion Ltd* 418 F 3d 1282 (Fed Cir 2005).
[63] Gralla 90–3; Tanenbaum 592–4.

recipient and his computer. Of course, in more complex situations there may be numerous senders, servers and recipients, spread throughout numerous locations.

The remainder of this paper explores the application of the principles of private international law to cases of wrongs committed via websites or emails.

CHAPTER B:
PERSONAL JURISDICTIONAL RULES

1 PERSONAL JURISDICTION OF COURTS

The term 'jurisdiction', derived from *juris* (law) and *dictio* (pronounce),[1] has several meanings. In this paper it refers to the original competence of a domestic court to adjudicate a case. In the context of international law, adjudicative (or adjudicatory) jurisdiction is distinguished[2] from prescriptive jurisdiction (capacity of a State to make a rule of law) and enforcement jurisdiction (capacity of a State to enforce a rule of law).[3] Adjudicative jurisdiction forms a subset of enforcement jurisdiction,[4] but looks only at the role of the courts, not the other arms of government.

Generally jurisdiction is an aspect of a State's sovereignty.[5] The modern view, developed in the 17th century, is that sovereignty, and thus jurisdiction, is confined geographically:[6] *extra territorium jus dicenti, impune non paretur*[7] (one who exercises jurisdiction out of his territory may be disobeyed with impunity).

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[1] AD Gibb *The International Law of Jurisdiction in England and Scotland* (William Hodge & Co Edinburgh 1926) 1.

[2] Especially by Americans, who are influenced by the distinction drawn in the *Restatement of International Law* (American Law Institute Publishers St Paul 1987) §401.

[3] W Friedmann, OJ Lissitzyn and RC Pugh *Cases on Materials on International Law* (West Publishing Co St Paul Minnesota 1969) 440. C McLachlan 'International litigation and the reworking of the conflict of laws' (2004) 120 LQR 580, 596–7 distinguishes between judicial jurisdiction and enforcement jurisdiction, but both would relevantly come under adjudicative jurisdiction in this context.

[4] CL Blakesley, EB Firmage, RF Scott and SA Williams *The International Legal System* (5th edn Foundation Press New York 2001) 132.

[5] I Brownlie *Principles of Public International Law* (6th edn OUP Oxford 2003) 297.

[6] HH Perritt Jr 'Jurisdiction in Cyberspace: The Role of Intermediaries' in B Kahin and C Nesson (eds) *Borders in Cyberspace* (MIT Press Cambridge Massachusetts 1997) 164–5.

[7] *Singh v Rajah of Faridkote* [1894] AC 670 (PC) 683.

Jurisdictional rules vary. Yet all States have rules that stem from the maxim *actor sequitur forum rei* (the plaintiff must follow the forum of the thing in dispute).[8] This has implications for civil actions both *in personam* and *in rem*.

In Roman law, *in personam* jurisdiction was limited to the courts of the town(s) in which the defendant had his *origo* (citizenship by birth), *forum originis*, or his *domicilium* (continued residence or domicile), *forum domicilii*.[9] Concepts developed in later Roman law, eg *forum rei gestae* (the proper jurisdiction of the obligation)[10] and *forum delicti* (the place where the delict was committed), appear to have created additional bases for suing where the defendant was present or possessed property, rather than providing any meaningful alternative.[11] Domicile as a connecting factor was maintained by civilian courts. English courts, taking a procedural approach, whereby the rule of law was the rule of writs,[12] preferred to focus on the defendant's physical presence at the time of service of process. A plaintiff was required to find the defendant, effect service of the writ upon him, and then prove his case before a tribunal.[13] Consistently with the principle of sovereignty, at common law, a court had no jurisdiction outside its territorial limits.[14] As a leading US decision explained:[15]

> [E]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory... No state can exercise direct jurisdiction and authority over persons and property without its territory.

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[8] R Phillimore *Commentaries upon International Law* (3rd edn Butterworths London 1879) Vol 4 §891.
[9] Story §532; Savigny §355,II; Westlake 236.
[10] Story §537.
[11] Story §536; Westlake 239–40.
[12] WS Holdsworth *A History of English Law* (3rd edn Methuen & Co London 1923) Vol II 243.
[13] FT Piggott *Service Out of the Jurisdiction* (William Clowes & Sons London 1892) xxxviii.
[14] *Lenders v Anderson* (1883) 12 QBD 50, 56; *Ingate v La Commissione de Lloyd Austriaco, Prima Sezione* (1858) 4 CB NS 704; 140 ER 1269 (CP) 708; *Trower & Sons Ltd v Ripstein* [1944] AC 254 (PC) 262.
[15] *Pennoyer v Neff* 95 US 714, 722 (1877).

In personam jurisdiction over defendants outside the court's territory is a relatively recent innovation.[16] As international travel and trade increased, and progress in communications and transportation made the defence of a suit in a foreign tribunal less burdensome,[17] courts sought to exercise jurisdiction over their State's nationals, wherever they were located, and ultimately over some non-nationals. Courts went beyond the sovereignty principle, exercising 'exorbitant jurisdiction'[18] over foreign defendants.[19] In England this was done in exceptional circumstances,[20] and courts viewed it with much suspicion.[21] The cautious approach taken in the late 19th and early 20th centuries can be attributed to the perceived lack of comity entailed in asserting jurisdiction over a foreigner and fear of retaliation by foreign governments offended by an excessive claim of jurisdiction over their nationals.[22] In some cases a country considered the primary task of its courts to be the service of its own nationals and not, or only exceptionally, that of the citizens of foreign States.[23] But this other extreme also violates comity. French courts still seem to ignore conventional territoriality principles and purport to exercise personal jurisdiction whenever a French national sues a foreigner,[24] even if there is no connection between the cause of action and France.[25] The exercise of exorbitant jurisdiction often leads to criticism of one court by another.[26]

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[16] P Nygh 'The Common Law approach' in McLachlan & Nygh 21, 26.
[17] *World-Wide Volkswagen Corp v Woodson* 444 US 286, 294 (1980).
[18] Although that expression is criticized: (*Hyde v Agar* (1998) 45 NSWLR 487 (CA) 507, on appeal (2000) 201 CLR 552 (HCA) 570ff; Dicey & Morris [11-123] fn 18), in this paper it is used to distinguish the exercise of jurisdiction over persons not present (in the case of service abroad provisions) or domiciled (in the case of special jurisdiction provisions) in a territory, from the exercise of jurisdiction over locals.
[19] C McLachlan 'An Overview' in McLachlan & Nygh 1, 10–11.
[20] AV Dicey *The Conflict of Laws* (Stevens & Sons London 1896) 237–9.
[21] *Singh* (n 7) 684.
[22] Collins 227–30.
[23] Wolff 60–1.
[24] French Civil Code art 14 (see also art 15); Collins 207; RB Schlesinger *Comparative Law: Cases, Text, Materials* (4th edn Foundation Press New York 1980).
[25] G Walter and R Dalsgaard 'The Civil Law approach' in McLachlan & Nygh 41, 43–4.
[26] Eg *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 (HL) 631.

Over the years courts have shown greater liberty in assuming competence over foreign defendants, sometimes quite boldly.[27] Related to this has been an increase in disputes over jurisdiction, as defendants resist being subjected to proceedings in foreign courts. Despite the technological and communications advances, there remain advantages in defending 'at home'.

In transnational litigation, jurisdiction is increasingly significant as many cases settle before trial once jurisdiction has been determined. That determination may allow lawyers to predict the likely outcome of the case,[28] based on perceptions of the strength of the other party's case (as gauged from the jurisdictional skirmish) and assessment of the benefits or otherwise of the forum's procedures (eg costs rules, discovery). Due to the internet's expansive reach and accessibility to individual users, a jurisdictional determination has great influence on the substantive outcome of a dispute involving that medium.[29]

Establishing personal jurisdiction over a foreign defendant (and persuading the court to exercise it) is merely one of a series of obstacles that a plaintiff must overcome in transnational litigation. Others include identifying and locating the defendant,[30] serving process, resisting any application for an anti-suit injunction or a declaration of non-liability, determining and proving the governing law, enforcing judgments in a place where the defendant has assets, and of course the high costs of the litigation.

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[27] Nygh (n 16) 30.
[28] Briggs 2.
[29] 'Developments – Law of Cyberspace' 112 HLR 1574, 1700 (1999).
[30] Eg anonymous remailers, false email identities, false IP addresses, transportability of sites and mirror sites.

Jurisdiction, however, is significant in a party's decision whether and where to sue. The plaintiff may have a choice where to bring his action, in which case he may 'forum shop', choosing the court that best suits his interests.[31] (Similarly, a defendant may 'shop' for a place in which to perform his wrongful activity.) Sometimes, rather than an obvious defendant located outside the jurisdiction (eg a content-provider), the plaintiff may opt to sue an indirect, but nevertheless wrongdoing, defendant (eg a user who added offensive content to the original website) located within the jurisdiction. ISPs, who are readily identifiable and may be liable for their subscribers' actions, are prime targets.[32] They are necessary intermediaries for the dissemination of material on the internet.[33] The justifications for holding ISPs liable for their clients' misdeeds vary. In defamation an ISP that transmits or facilitates the transmission of defamatory material is itself regarded as having published the material.[34] In copyright, an ISP may infringe by storing a temporary copy of the copyright material on its server (caching) or by authorizing infringement of copyright works stored in files accessible by websites which it hosts.[35] And in criminal wrongs (especially obscenity and pornography offences), an ISP which fails to prevent the commission of an offence may be accused of aiding and abetting. However, increasingly the law affords defences for ISPs who act innocently as mere carriers of information.[36]

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[31] AS Bell *Forum Shopping and Venue in Transnational Litigation* (OUP Oxford 2003) ch 2.
[32] A Hamdani 'Who's liable for cyberwrongs?' 87 Cornell L Rev 901, 903 (2002).
[33] L Edwards 'Defamation and the internet' in Edwards & Waelde 249, 261.
[34] *Godfrey v Demon Internet Ltd* [2001] QB 201 (QBD) 208–9.
[35] *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1 [130].
[36] Eg E-commerce Directive arts 12–14, adopted in the UK in Electronic Commerce (EC Directive) Regulations 2002 (UK) (SI 2002 No 2013) regs 17–19.

For simplicity's sake, this paper assumes that the proceeding is between a single plaintiff[37] and a single defendant. Alternative jurisdictional rules may apply in multi-party litigation, especially where there are some defendants present or domiciled in the forum while others are foreign. Nevertheless, many of the conclusions of this paper can be applied to multi-party cases.

This paper focuses on two sets of jurisdictional rules (the '**exorbitant jurisdiction rules**') which are used currently in various countries to vest courts with exorbitant jurisdiction over foreign defendants, as exceptions to the universal maxim *actor sequitur forum rei.* Underlying both sets of rules is a recognition that civil jurisdiction is not merely an exercise of State power, but also a means of resolving private disputes. Hence a State's exercise of civil jurisdiction over a foreign defendant is based on the connection of elements of the dispute with that State.[38] Broadly speaking, each set identifies and locates the elements which make up the wrong and the damage.

(a) Service Abroad Provisions under Rules of Court

The first set of exorbitant jurisdiction rules are the 'service abroad' ('service outside the jurisdiction' or 'service *ex juris*') provisions. Service of originating process is a procedural mechanism in common law States which, while not creating jurisdiction over a defendant, is normally a precondition to its exercise.[39] A court will not entertain a claim *in personam* until process has been issued and duly served on the defendant, as that latter step perfects the exercise of jurisdiction.[40]

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[37] In this paper, which looks at common law jurisdictions generally, the term 'plaintiff' is used, rather than 'claimant'.
[38] McLachlan (n 19) 11.
[39] Dicey & Morris [11-003]; White Book vol 1 [6.17.2].
[40] Piggott (n 13) lvii.

(i) Service

In a State whose courts rely on service, a court has jurisdiction over a defendant present in the State's territory at the time of service, regardless of the defendant's domicile, residence or nationality.

Traditionally, presence was easy to determine. However, in the internet era, can presence be achieved without actually setting foot in a territory? Where a wrongdoer is not physically in a territory, he cannot be deemed 'present' in a territory[41] simply because material which he uploads is downloaded there[42] (let alone if it is merely accessible there without being accessed) or an email which he sends is received there.[43] This applies in assessing presence for the purposes of both the local court's jurisdiction and the foreign court's international jurisdiction. The fact that the wrongdoer uses routers through which content passes, or servers on which content is stored, in a territory does not establish his presence there either. The routers and servers are simply automatic machinery transmitting or storing packets[44] and may bear no relation to the location of the physical processes which occur.

This paper does not concentrate on jurisdiction by service on a person present in the territory or who submits to the jurisdiction of the territory's courts, as these bases of jurisdiction do not create any peculiar problems in relation to wrongs on the internet.

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[41] Below 292–8.
[42] Cf *Pavlovich v Superior Court* 109 Cal Rptr 2d 909 (CalApp 2001) 916.
[43] The ability to effect service by electronic means such as email (eg CPR r 6.2) does not change this conclusion.
[44] C Gringras *The Laws of the Internet* (2nd edn Butterworths London 2003) 405.

(ii) Service abroad

Where the defendant is absent from the territory at the time of service and does not voluntarily submit, any exercise of jurisdiction over the defendant's person is exorbitant. Service abroad may be effected on the defendant in the circumstances authorized, and in the manner prescribed, by the applicable service abroad provisions,[45] now contained in extraterritorial legislation.[46] Since fusion, the rules of court (starting with Order XI of RSC 1875) have provided a complete and exhaustive code on service abroad.[47] Similar rules have been adopted by many common law countries and have evolved. The rules typically set out a list of grounds for service abroad, and the court retains a discretion based on the principles of *forum (non) conveniens*[48] either to grant leave to serve abroad or to set aside service and stay the proceeding.

Early on, English courts expressed a need for great caution in allowing service abroad.[49] The application of the rules required care, as service abroad was necessarily *prima facie* an interference with the sovereignty of the foreign country where service was to be effected, and prone to criticism by foreign (especially civilian) lawyers. As a matter of international comity courts construed RSC narrowly and refused leave to serve abroad, in exercising their *forum conveniens* discretion, unless the case was clearly within both the letter and the spirit of Order XI.[50]

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[45] Dicey & Morris [11R-001].
[46] Originally, the Common Law Procedure Act 1852 (UK). See further Piggott (n 13) lviii–lxiii.
[47] *Re Eager; Eager v Johnstone* (1883) 22 ChD 86 (CA) 87.
[48] Below 103–7.
[49] *Société Générale de Paris v Dreyfus Brothers* (1885) 29 ChD 239, 242–3; ultimately reversed 37 ChD 215 (CA).
[50] *Johnson v Taylor Bros & Co Ltd* [1920] AC 144 (HL) 153; *Kroch v Rossell & Cie SPRL* [1937] 1 All ER 725 (CA) 728; *George Monro Ltd v American Cyanamid & Chemical Corp* [1944] KB 432 (CA) 437.

(iii) Service abroad in cases of wrongs

Initially, rather than deal with wrongs specifically, the English provisions allowed service abroad 'whenever any act… for which damages are sought to be recovered was… done… within the jurisdiction'.[51] Soon service abroad was confined to a person committing an act who was 'domiciled or ordinarily resident within the jurisdiction'.[52] This practically prevented actions from being brought in an English court for a tort committed abroad unless by an Englishman. Actions for a tort committed in England by a person ordinarily resident abroad could be brought only if he could be served while present in England.[53] Torts were first mentioned specifically in 1920[54] when a rule was enacted allowing service abroad in an action 'founded on a tort committed within the jurisdiction'[55] ('**tort committed ground**'). This was the only tort-related ground in RSC until 1987, when a 'damage' ground was added. When CPR were introduced in 2000, the 'tort' and 'damage' limbs were reconfigured. The previous 'tort' ground was replaced by: 'a claim made in tort where the damage sustained resulted from an act committed within the jurisdiction'[56] ('**act committed ground**'). As shall be seen later,[57] the difference between the phrases 'tort committed within the jurisdiction' and 'act committed within the jurisdiction' is significant.[58] On the other hand, no significance is attached in this paper to the distinction between claims 'made in tort' and 'founded on a tort'.

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[51] RSC 1875 Ord XI r 1.
[52] RSC 1883 Ord XI r 1(c).
[53] *Odgers on Civil Court Actions* (3rd edn Stevens & Sons London 1897) 30.
[54] RSC 1920 Ord XI r 1(ee).
[55] This was a revival of the power given by the Common Law Procedure Act 1852 but later taken away by RSC: Gibb (n 1) 40.
[56] CPR r 6.20(8)(b). For the complete provision, see below 39.
[57] Below 57ff.
[58] Cf White Book vol 1 [6.21.39].

There is growing acceptance of assimilating different classes of wrongs, for purposes of service abroad provisions. This follows the early advice of Rabel, who resorted to comparative law to form a category of tort broad enough to embrace all definitions that may be given to that term on the basis of a conscientious general system of law.[59] For these purposes, 'tort' encompasses any unlawful invasion of the interests of another person resulting in harm.[60] In private international law, in the jurisdictional rules of England[61] and of other countries which follow the service abroad model,[62] and in the choice of law rules,[63] 'tort' is given a wider meaning than it has in English domestic law. It covers other wrongs, in the sense of breaches of duty,[64] eg intellectual property wrongs[65] such as patent infringements,[66] that are not necessarily recognized as belonging to the traditional common law causes of action known as tort. In my submission 'tort', for the purposes of the service abroad provisions, is construed to include statutory contraventions, whether the remedy is conferred by common law[67] or by a statute which creates analogous rights.[68] Further, 'tort' is read with an international flavour,

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[59] Rabel vol II 233.
[60] Ibid 235.
[61] Briggs & Rees [4.42]; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) 437, 441; cf White Book vol 1 [6.21.39].
[62] Eg *Commonwealth Bank v White, ex p Lloyd's* [1999] VSC 262 [62]. Cf C Lockhart *The Law of Misleading or Deceptive Conduct* (2nd edn LexisNexis Butterworths Sydney 2003) [7.14], [11.67], who doubts that misleading or deceptive conduct in breach of the Trade Practices Act 1974 (Cth) is a 'tort'.
[63] Under the 1995 Act s 9(2) characterization is a matter for the courts of the forum. At common law 'tort' is determined in accordance with English rules of conflict of laws: *Metall* (n 61) 473–4, 480–1, where the court decided, relying on principles of English law, that claims founded on a constructive trust or procuring breach of trust were not tort claims.
[64] *Winfield and Jolowicz on Tort* (16th edn Sweet & Maxwell London 2002) [1.4].
[65] Below 191–2.
[66] *The Electric Furnace Co v Selas Corp of America* [1987] RPC 23 (CA) 30–1; *Unilever plc v Gillett (UK) Ltd* [1989] RPC 583 (CA); *Spotless Group Ltd v Proplast Pty Ltd* (1987) 10 IPR 668 (VicSC) 670; *Best Australia Ltd v Aquagas Marketing Pty Ltd* (1988) 83 ALR 217 (FCA) 220.
[67] Eg tortious damages for breach of statutory duty.
[68] Eg damages as compensation for a contravention (cf *Philip Morris Ltd v Ainley* [1975] VR 345, 348–9), but not where the statute confers a right of indemnity upon a person who has paid the compensation (*Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 (HCA) [14]).

encompassing acts which are not recognized as wrongful under English law, but are actionable elsewhere (eg violation of privacy[69]).

The English RSC were adopted throughout the British Empire. The rules of court in nearly all common law countries contain the basic ground for service on a foreign wrongdoer where the 'proceeding is founded on a tort committed in the jurisdiction',[70] which was the tort committed ground under the original RSC. Some countries' rules contain additional grounds which have a similar effect, and which, like the tort committed ground, focus on the location of the wrong. Examples are proceedings in respect of: (i) a contravention of legislation committed in the jurisdiction;[71] (ii) a breach of an equitable duty within the jurisdiction;[72] (iii) a cause of action arising in the jurisdiction;[73] and (iv) an injunction to restrain or require conduct within the jurisdiction.[74]

(iv) *Locus delicti*

To apply these grounds, it is necessary to determine where the wrong was committed, ie the *locus delicti commissi*. The *locus delicti* is not a concept exclusive to service abroad provisions. It features in many countries' jurisdictional rules that are unrelated to service abroad,[75] and in many countries' choice of law rules.[76] Although it would be sensible to

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[69] *Douglas v Hello! Ltd* [2003] EWCA Civ 139 [33].
[70] Eg VicSCR r 7.01(1)(i); Rules of Court (BC) r 13(1)(h).
[71] Eg Federal Court of Australia Rules (Cth) r 8.01(b).
[72] Eg Rules of Court (Alta) r 30(q).
[73] Eg Uniform Civil Procedure Rules 2005 (NSW) sch 6 para (a); Uniform Civil Procedure Rules 1999 (Qld) r 124(1)(a).
[74] Eg VicSCR r 7.01(1)(k); Rules of Court (BC) r 13(1)(i). The conduct being any act that would amount to an infringement of the plaintiff's rights in the forum: *James North & Sons Ltd v North Cape Textiles Ltd* [1984] 1 WLR 1428 (CA) 1431–3.
[75] Eg German Code of Civil Procedure §32.
[76] Eg the 'double actionability' rule in *Boys v Chaplin* [1971] AC 356 (HL). Cf 1995 Act s 11(2)(c); Rome II art 3(1).

apply criteria uniformly whatever the object of the inquiry,[77] there may be danger in using choice of law cases to resolve jurisdictional questions and vice-versa if different policy issues are at stake.[78] Choice of law is an entirely separate inquiry from jurisdiction, though one may affect the other and each may potentially defeat a claim.[79]

Historically the common law struggled to set an appropriate test for *locus delicti* in the jurisdictional inquiry. Throughout the years competing theories developed.[80] These were explained in *Distillers Co (Biochemicals) Ltd v Thompson*[81] ("***Distillers***").

The first was that the tort must be the whole cause of action, so that every part or ingredient of it occurred within the jurisdiction.

The second was that the last ingredient of the tort, the event which completes the tort and brings it into being, occurred within the jurisdiction. This corresponds with the US approach of examining the place where the last event, necessary to make the wrongdoer liable, occurs.[82] In almost all cases damage to the plaintiff is the last ingredient, so that the place where a wrong is committed is equivalent to the place where damage is suffered.[83] This is consistent with the theory of 'vested rights': the victim

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[77] PRH Webb and PM North 'Thoughts on the place of commission of a non-statutory tort' (1965) 14 ICLQ 1314, 1357.

[78] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 (HCA) [74]; *David Syme & Co v Grey* (1992) 38 FCR 303, 314. See below 160ff.

[79] Eg if the 'double actionability' rule is not satisfied then the claim cannot proceed in that court, regardless of the court having jurisdiction.

[80] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC) 466; *Moran v Pyle National (Canada) Ltd* [1975] 1 SCR 393; Webb & North (n 77).

[81] *Distillers* (ibid). There are other theories which were not mentioned in *Distillers*. One is that the plaintiff could elect, as the place of the tort, whichever of the forum of acting and the forum of the last event was most favourable to him: Cook 345; Wolff 501; M Lorenzen 'Tort liability and the conflict of laws' (1931) 47 LQR 483, 491–3. Another is that a tort is committed in the territory if any significant element of the tort has occurred there: *Grehan v Medical Inc and Valley Pine Associates* [1986] IR 528; W Binchy *Irish Conflicts of Law* (Butterworths Ireland 1988) 151–3.

[82] *Restatement (Second) of Conflict of Laws* (American Law Institute Publishers St Paul 1971) §145; *Otey v Midland Valley Railroad Co* 108 Kan 75 (1901); Rabel vol II 301–2.

[83] JH Beale *The Conflict of Laws* (Baker Voorhis & Co New York 1935) vol II §377.2.

should acquire an indefeasible right at the moment when all the elements of the tort action are existent and the cause of action is born.[84] But this is prone to create confusion between the locality of the tort taken as a whole, which is the focus of the inquiry, and the locality of the final element of the tort, namely damage.[85]

The third theory was that the act of the defendant which gives the plaintiff his cause for complaint occurred within the jurisdiction.[86] This is similar to the general rule in civilian systems that a wrong is committed where the wrongdoer acts.[87] The actor is entitled to rely on the laws of the State where he acts.[88]

The court in *Distillers*[89] analyzed the tests and decided that in determining where 'a tort was committed' or 'a cause of action arose' for the purposes of determining jurisdiction, the right approach is, when the tort is complete, to look back over the series of events constituting it and ask 'where in substance did this cause of action arise?' or 'where was the wrongful act, from which the damage flows, in fact done?'.[90]

The question is not 'where was the damage suffered?', though damage may be the gist of the action. Although the elements of a tort may require damage before it could be said that the tort was committed, the place of commission is determined retrospectively by looking at all the elements of the tort, examining the substance of the tort as a whole and localizing it. The rules inquire where the tort was committed, not completed.

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[84] Rabel vol II 303.
[85] Ibid.
[86] Lorenzen (n 81) 493.
[87] Rabel vol II 303–4.
[88] Ibid 304.
[89] *Distillers* (n 80).
[90] Ibid 466–8. See also: *Jackson v Spittall* (1870) LR 5 CP 542, 552; *George Monro* (n 50) 440–1; *My v Toyota Motor* [1977] 2 NZLR 113 (NZHC) 116–7; *Castree v ER Squibb & Sons Ltd* [1980] 1 WLR 1248 (CA) 1252; *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd* [1983] Ch 258 (CA) 267, 272; *Metall* (n 61) 443.

Ultimately in jurisdictional disputes 'the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor'.[91] As a general rule, the inquiry focuses on the substance of the defendant's act, not its consequence.[92] The place where damage is suffered, usually the last event completing the cause of action, should not by itself be the sole determinant of jurisdiction.[93]

Sensibly, the court in *Distillers* chose a flexibly-worded principle because between 1920 and 1987 in England (and most other common law countries) the only relevant ground of service abroad was the tort committed ground. On closer inspection, where the place of the defendant's act does not correspond with the place of damage, for many wrongs the former may be regarded as the place of commission. This is inherently reasonable, as the defendant is called upon to answer for his wrong in the courts of the country where he did the wrong.

The *Distillers* approach has gained acceptance in many common law countries, though as the court warned, it cannot provide a simple answer for all cases.[94] The test that was adopted seems applicable, regardless of the precise form of words taken by the service abroad provisions. In their application of the *Distillers* formulation, courts have held that: the breach of duty in the case of a defective product was the failure to warn of the product's dangerous nature, and the place of this negligent omission was where the product was sold without warning to the consumer;[95] the tort of inducing breach of

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[91] *Distillers* (n 80) 467.
[92] *Voth v Manildra Flour Mills* (1990) 171 CLR 538 (HCA) 567.
[93] *Cordova Land Co Ltd v Victor Bros Inc* [1966] 1 WLR 793; *Distillers* (n 80).
[94] *Distillers* (n 80) 468.
[95] Ibid 469; *George Monro* (n 50) 439.

contract was committed where the breach of contract took place;[96] and a bribe occurred at the place where the briber exercised influence over the decision-maker.[97]

Courts have emphasized the focus on the place of the defendant's act in determining the place where the tort, in substance, occurred:

> ...[I]n popular meaning, – for many purposes, in legal meaning, – ... 'the cause of action' [is] the act on the part of the defendant which gives the plaintiff his cause of complaint. In [the phrase 'cause of action which arose within the jurisdiction'] that is supposed to occur within the jurisdiction...[98]
>
> The words 'committed within the jurisdiction' [should be] limited to a wrongful act committed within the jurisdiction... The question is: Where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, even though damage may be of the gist of the action.[99]
>
> It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong.[100]
>
> [T]he court [should] look at the tort alleged in a common sense way and ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction (whether or not other substantial and efficacious acts have been committed elsewhere)... [T]he acts to be considered must be those of the putative defendant, because the question at issue is whether the links between him and the English forum are such as to justify his being brought here to answer the plaintiff's claim.[101]
>
> One thing that is clear from *Jackson* and *Distillers* is that it is some act of the defendant, and not its consequences, that must be the focus of attention.[102]

The cause of complaint may not be necessarily an act but the failure or refusal of the defendant to act. It makes no sense to speak of the place of an omission.[103] However, it is possible to localize the act of the defendant, in the context of which the omission

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[96] *Metall* (n 61) 449.
[97] *Arab Monetary Fund v Hashim* [1996] 1 Lloyd's Rep 589 (CA) 597.
[98] *Jackson* (n 90) 552; See also *Vaughan v Weldon* (1874) LR 10 CP 47; *Distillers* (n 81) 467.
[99] *George Monro* (n 50) 440–1. See also *Buttigeig v Universal Terminal & Stevedoring Corp* [1972] VR 626; *MacGregor v Application de Gaz* [1976] QdR 175.
[100] *Distillers* (n 80) 468.
[101] *Metall* (n 61) 437.
[102] *Voth* (n 92) 567.
[103] Cf Case C-256/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG* [2002] ECR I-1699 [34]–[35].

assumes significance, and to identify that as the place of the cause of complaint.[104] In *Distillers* the court said that in failure to warn cases the act (or omission) on the part of the seller, which has given the plaintiff a cause of complaint in law, is the failure to warn, which occurred where the product was marketed and sold.[105]

(v) Wrongs involving communication

During the lifetime of RSC/CPR new technologies have been developed, eg telephones (fixed, mobile), telex, fax, radio, television (broadcasts, cable, satellite) and most recently the internet. These enable content to be distributed internationally. Courts had to address cross-border wrongs committed through, what were at the relevant times, novel modes of communication. The wrong involves an act that passes across space and/or time before completion.[106] Mindful of the pace of change, courts prefer technologically-neutral rules which do not require updating for each innovation.[107]

Concerned about the impact of cross-border communications, courts proceeded to give a broad reading to the tort committed ground, holding that a tort occurs not where the communication originates but to where the communication is directed. In retrospect, this approach is understandable, considering that the tort committed ground was, for much of the time of the rapid technological advancement, the sole ground of service abroad, and had to be adapted to new technologies. However the cases that established this receipt-oriented construction of the tort committed ground and predate the damage ground[108] should now be treated with care. Construing the place of 'commission' broadly

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[104] *Voth* (n 92) 567.
[105] *Distillers* (n 80) 469.
[106] *Voth* (n 92) 567–8.
[107] Eg *Dow Jones & Co Inc v Gutnick* (2003) 210 CLR 575 (HCA) [125].
[108] Below 38ff.

accommodated local plaintiffs who had no other way of obtaining a remedy in the forum.[109] *Diamond v Bank of London and Montreal Ltd*[110] (***"Diamond"***) and its progeny[111] are examples of, what is in my submission, this implicit bias. In misrepresentation made by telephone or telex, the tort was held to have been committed at the place where the message was received and acted upon, wherever it was heard on the telephone by the receiver or tapped out by the telex machine in the receiver's office.[112] Courts ignored the place from which it was sent. Defamation was similarly committed in the place where the defamatory material was published and received, not where it was written or spoken.[113] A threat was considered to be made at the place where it was received by the victim.[114] Copyright was breached at the place where a television broadcast was received,[115] and in the case of satellite television, at the place where the satellite signals were accessed.[116] Bearing in mind that courts prefer incremental change rather than pronouncing general rules,[117] these cases indicate a trend towards localizing a wrong which involves an element of cross-border communication at the place of receipt, not the place of origin. Essentially judges looked at where the wrong was completed, and considered it deficient to have regard to where the communication was initiated, as no

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[109] P Schlosser 'Product Liability' in McLachlan & Nygh 59, 78.
[110] *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 (CA).
[111] *Original Blouse Co Ltd v Bruck Mills Ltd* (1963) 42 DLR (2d) 174 (BCSC) 181–2; *Diamond* (ibid) 345–6; *The Albaforth* [1984] 2 Lloyd's Rep 91 (CA) 96; *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 122 ALR 279 (FCA) 287–8; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539, 547–8; *Strike v Dive Queensland Inc* (1998) ATPR 41-605 (FCA); *Ramsey v Vogler* [2000] NSWCA 260 [36]–[48]; *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 [145]–[147]; affd (2003) 130 FCR 317 (FullCt); *Ennstone Building Products Ltd v Stanger Ltd* [2002] 1 WLR 3059 [48].
[112] *Diamond* (n 110) 345–6.
[113] Postcards: *Tozier v Hawkins* (1885) 15 QBD 650, 680; radio broadcast: *Jenner v Sun Oil Co* [1952] 2 DLR 526 (OntHCJ) 535, 537; television broadcast: *Pindling v National Broadcasting Corp* (1985) 14 DLR (4th) 391 (OntHCJ) 396; magazine: *Berezovsky v Michaels* [2000] 1 WLR 1004 (HL) 1012, 1018, 1026.
[114] *Norbert Steinhardt & Son Ltd v Meth* (1961) 105 CLR 440 (HCA) 442.
[115] *Composers Authors and Publishers Assoc of Canada Ltd v International Good Music Inc* [1963] SCR 136, 143–4; (1963) 37 DLR (2d) 1, 8.
[116] *WIC Premium Television Ltd v General Instrument Corp* (2000) 266 AR 142 (AltaCA) [18].
[117] *Diamond* (n 110).

wrong had been committed yet. Receipt completed the wrong, hence representing its commission.

The common denominator between the wrongs which focus on receipt is that their commission occurs through communication. But can wrongs as diverse as misrepresentation, defamation and copyright infringement be assimilated? It is submitted that defamation and intellectual property wrongs deserve special treatment, separately from other wrongs. As will be seen in later chapters, defamation is unique as each publication of defamatory material is a separate tort. Intellectual property infringements are unique due to the territoriality of the statutory rights. In the remaining categories of wrongs, the origin of the communications may be often an appropriate way of localizing the wrong. Nevertheless in each case the elements of the particular wrong must be analysed, and in some cases (eg misrepresentation) the elements might point strongly towards the place of receipt or intended receipt as the place where, in substance, the tort was committed.

There is an additional difficulty with focusing only on receipt. What if the communication (eg a misstatement) is received in one place but acted upon in another? One view is:

> A statement directed from one place to another place, where it is known or even anticipated that it will be received by the plaintiff, or where it ought reasonably to be expected that it will be brought to the attention of the plaintiff even if it is brought to attention in some third place, is considered to be made at the place to which it was directed, whether or not it was there acted upon. And the same would seem to be true if the statement is directed to a place from where it ought reasonably to be expected that it will be brought to the attention of the plaintiff, even if it is brought to attention in some third place.[118]

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[118] *Voth* (n 92) 568.

No doubt the place where the statement is acted upon may be entirely fortuitous.[119] But in some cases the place where it is directed pales in significance to the place where it is acted upon.[120] Such issues are destined to multiply on the internet. Although a similar approach to that taken for traditional means of communication has been applied to publications on the internet, it is clear that the global dissemination of information on the internet (especially websites) leads to a difficulty in localizing the statement in a particular territory.[121]

Can an analogy be drawn between a website and a statement 'directed' from one place to another? A principle for determining where a wrong is committed that does not require a choice between place of receipt and place of consequential acting (which itself is often further divided, eg between the place where an investor decided to act on the basis of the misrepresentation and the place where the transaction was carried out[122]) is preferable. Those issues should be left to the place of damage. The suggested principles[123] overcome this by examining primarily the place where the defendant acted and leaving the place of receipt or consequential reliance for consideration only where the elements of the wrong strongly suggest that that element was the substance of the tort.

(vi) Place of damage

Due to technological advances, especially in communications, wrongs have become more complex, multi-dimensional and multi-jurisdictional. Consequently, in the past two

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[119] Ibid.
[120] Eg *Morin v Bonhams & Brooks Ltd* [2004] 1 Lloyd's Rep 702 (CA). See further below 173ff.
[121] *Ward Group Pty Ltd v Brodie & Stone plc* (2005) 143 FCR 479 [40].
[122] H van Houtte 'Securities' in McLachlan & Nygh 155, 166–7.
[123] Below 56ff.

decades, many common law countries introduced provisions that focus on damage in the jurisdiction. This is in addition to the tort committed (or act committed) ground.

Starting with England in 1987, the distinction drawn in Case 21/76 *Bier v Mines de Potasse d'Alsace SA*[124] (“***Bier***”) in relation to art 5(3)[125] was carried over into RSC[126] and the rule was changed to give effect to the ‘European standards’ enunciated in *Bier*.[127] (Earlier NSW and Ontario had enacted a separate damage ground, though not as a consequence of *Bier*.) The revised English heads of service, later adopted in much of the British Commonwealth, covered proceedings brought in respect of damage suffered in the jurisdiction and caused by a tortious act wherever occurring.[128] The current English rule (of which the damage ground forms the first part) allows service abroad in cases in which:[129]

> a claim is made in tort where –
> (a) damage was sustained within the jurisdiction; or
> (b) the damage sustained resulted from an act committed within the jurisdiction.

Courts embraced the ‘damage suffered/sustained in the jurisdiction’ ground (‘**damage ground**’) of service abroad as a concept that should be construed widely to enable a resident to resort to his local court more easily to sue for local damage sustained as a result of a foreign tort.[130] As shall be seen, in some cases the construction was too

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[124] [1976] ECR 1735.
[125] Below 43ff.
[126] *Metall* (n 61) 437; *Newsat Holdings Ltd v Zani* [2006] 1 All ER (Comm) 607 [31]–[32].
[127] Schlosser (n 109) 77–8.
[128] Eg VicSCR r 7.01(1)(j); Rules of Civil Procedure (Ont) r 17.02(h). Some rules provide for proceedings brought in respect of damage suffered in the jurisdiction and caused by contravention of legislation wherever occurring: eg Federal Court of Australia Rules (Cth) r 8.01(c).
[129] CPR r 6.20(8).
[130] *Vile v Von Wendt* (1979) 103 DLR (3d) 356 (OntHCJ) 361–2; *Flaherty v Girgis* (1985) 4 NSWLR 248 (NSWCA) 266–7, appealed on other grounds (1987) 162 CLR 574 (HCA); *The ‘Katowice II’* (1990) 25 NSWLR 568 (NSWSC) 577; *Booth v Phillips* [2004] 1 WLR 3292 (QB) [36]–[45]. The ground may be invoked even if the action in respect of the damage is not a tort action as such: *Victorian WorkCover Authority v Orientstar Shipping Corp* [2004] VSCA 237 [7].

wide, eclipsing the injury limb of art 5(3) from which (at least in England) this ground had originated.

In summary, most States' service abroad provisions would catch a defendant who commits a wrong or a wrongful act in the State or where damage is suffered in the State from a wrong or a wrongful act which he commits elsewhere.

(b) Special Jurisdiction Provisions under Judgments Regulation and related Conventions

The second set of exorbitant jurisdiction rules are the 'special jurisdiction' provisions that have appeared since 1968 in several international (or rather, regional) instruments in countries that are members (Member States) of the European Union ('**EU**') or signatories (Contracting States) to the European Free Trade Agreement ('**EFTA**'). These European instruments (the Judgments Regulation,[131] the Brussels Convention[132] and the Lugano Convention[133]) provide self-contained rules on jurisdiction in cases concerning civil and commercial matters (which include the wrongs with which this paper is concerned) brought in the courts of the relevant States.[134] An international instrument applying also outside Europe (the draft Hague Convention) had been contemplated along similar

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[131] Judgments Regulation, which applies in the Member States of the EU (and soon will be extended to Denmark).
[132] Brussels Convention, which applies in all the Member States of the EU.
[133] Lugano Convention, which applies in all the Contracting States of the EFTA.
[134] The textual differences between the three instruments are sufficiently minor to allow the reasoning in cases on one instrument to extend to the others.

lines,[135] but the plan to apply it to a broad range of topics was abandoned[136] in favour of addressing choice of court agreements.[137]

The European instruments cover the field in relation to defendants domiciled in the EU or EFTA. The position in relation to defendants domiciled outside EU and EFTA remains governed largely by the jurisdictional rules of the forum's national law,[138] and in England these are the common law rules as modified by the service abroad provisions. The general rule is that a defendant should be sued in the Member State of his domicile.[139] The focus is on domicile, not residence, nationality or presence, though domicile is linked to residence of individuals or incorporation of companies.[140] Sending an email into a State or operating a website that is accessible (or even directed to) there is insufficient for domicile in the State.

This paper does not concentrate on jurisdiction by domicile in the territory or by entering an appearance in the territory's courts, as these bases of jurisdiction do not create any peculiar problems in relation to wrongs on the internet.

As an exception to the general rule, a defendant may be sued in a Member State other than his domicile where 'special jurisdiction' is conferred on that State's courts in the interests of due administration and justice.[141] Article 5 provides a list of nexus tests

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[135] The text of the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters Interim Text 20 June 2001, amending the preliminary draft convention adopted by the Special Commission on 30 October 1999.
[136] WE O'Brien Jr 'The Hague Convention on Jurisdiction and Judgments: The way forward' (2003) 66 MLR 491.
[137] Hague Convention on Choice of Court Agreements 2005.
[138] Article 4(1) in the Judgments Regulation, Brussels Convention and Lugano Convention.
[139] Article 2(1) in the Judgments Regulation, Brussels Convention and Lugano Convention.
[140] Civil Jurisdiction and Judgments Order 2001 (UK) (SI 3929/2001) sch 1 [9], [10].
[141] Case C-33/78 *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183 [7].

connecting the claim or the defendant with a State. If satisfied, the State's court has special jurisdiction, a form of exorbitant jurisdiction.

(i) Place where the harmful event occurred

One instance of special jurisdiction, in art 5(3), is that, in cases of 'tort, delict and quasi-delict', a defendant may be sued in 'the court for the place where the harmful event occurred or may occur'. Both expressions have a technical construction.

The expression 'tort, delict and quasi-delict' encompasses all actions which seek to establish the liability of a defendant in respect of a wrongful act and which do not fall within art 5(1) (the provision which deals with contractual claims).[142] There is a strong argument[143] that that expression, which has an autonomous European meaning,[144] corresponds with non-consent based wrongs and thus covers what English law regards as common law wrongs, equitable wrongs where the effects of the breach are independent of any undertaking entered into freely between the parties[145] (eg knowing assistance[146]), statutory wrongs, and wrongs recognized by some legal systems but not English law (eg breach of pre-contractual duties of good faith[147]). Equally, the expression 'matters relating to a contract' in art 5(1) may include some claims which would fall outside the

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[142] Case 189/87 *Kalfelis v Schroeder Muenchmeyer Hengst & Co* [1988] ECR 5565 [17]; Case C-261/90 *Reichert v Dresdner Bank AG (No 2)* [1992] ECR I-2149 [19]. Unusually, the Regulation has bundled together all torts into one category while breaking up contracts into several categories.
[143] Briggs 54.
[144] *Kalfelis* (n 142) [16].
[145] Briggs & Rees [2.145]. Intellectual property wrongs are included in 'tort, delict and quasi-delict': *Coin Controls Ltd v Suzo International* [1997] 3 All ER 45.
[146] *Casio Computer Co Ltd v Sayo* [2001] EWCA Civ 661 [16].
[147] Case C-334/00 *Tacconi v Heinrich Wagner Sinto Maschinenfabrik GmbH* [2002] ECR I-7357 [27].

realm of English contract law (eg some negligent misstatements could be regarded as torts in English domestic law but may fall within art 5(1) nonetheless[148]).

The expression 'place where the harmful event occurred' in art 5(3) is more problematic. It was inserted because of the high number of road accidents, and in the view of the authors of the instruments, the place of the accident is the place where the harmful event occurred.[149] So to the draftspersons that expression was clear and gave an obvious answer. The official explanation[150] was that the wording reflected a formula that had already been adopted by Germany[151] and France,[152] where a harmful event is regarded as occurring everywhere either where the wrongful act was done, ie where the actor engages in conduct, or where the effects of the conduct came into existence, thus potentially resulting in several different places.[153]

The ECJ has considered the meaning of the expression 'place where the harmful event occurred'. Its decisions follow the traditional European (in particular, German) rule, which is essentially one of elective concurrence of claims. In *Bier*,[154] the ECJ explained that the place where the harmful event occurred means 'both the place where the damage occurred [in this paper, "**injury limb**"] and the place of the event giving rise to it [in this paper, "**causal event limb**"]'.[155] Despite criticisms, that distinction appears entrenched. Where the places under the two limbs differ, the plaintiff has a choice where to sue. While *Bier* was concerned with the pollution of a river, the principle seems to

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[148] Case C-26/91 *Soc Jakob Handte GmbH v Soc Traîtements Mécano-chimiques des Surfaces* [1992] ECR I-3967. A misstatement on a website is unlikely to attract the application of art 5(1).
[149] Case 814/79 *Netherlands v Rüffer* [1980] ECR 3807, 3817.
[150] Jenard Report on the Brussels Convention [1979] OJ C59/26.
[151] Lorenzen (n 81) 492–3.
[152] Eg French Code of Civil Procedure art 46.
[153] Wolff 70; Rabel vol II 304.
[154] *Bier* (n 124).
[155] Ibid [11].

apply in other situations, such as where the wrong is committed by communication,[156] including the internet.[157]

(ii) Causal event limb

The causal event limb of art 5(3) has received a narrower construction than 'the place where the tort was committed' in the service abroad provisions, although the difference in language is not great. The explanation must be that while under art 5(3) there was always the 'injury limb' alternative, the damage ground did not appear in the service abroad provisions until later in their life after the courts had numerous occasions to interpret the provisions. The narrow reading of the causal event limb reflects the interpretation given by continental European national courts to the equivalent provisions in their codes, focusing on the place of the actor.[158]

This explains conflicting holdings that a negligent misrepresentation (where it is characterized as a wrong) was 'committed', for service abroad purposes, at the place where it was received and relied upon,[159] but had its 'causal event', for special jurisdiction purposes, where it was made or originated, regardless of the place(s) of receipt, reliance or loss.[160] And defamation was 'committed' where the statement was

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[156] Rabel vol II 318, who applied the German elective rule to letters, explaining that the court looks at both the place from which the letter was sent and the place where the letter was received.
[157] Gringras (n 44) 147, who compares infecting a computer with viruses and polluting a river.
[158] Lorenzen (n 81) 491.
[159] *Diamond* (n 110) 345–6.
[160] *Domicrest Ltd v Swiss Bank Corp* [1999] QB 548; *Alfred Dunhill Ltd v Diffusion Internationale de Maroquinerie de Prestige SARL* [2002] 1 All ER (Comm) 950, 956, 958, 962. The earlier approach, taken in *Minster Investments Ltd v Hyundai Precision & Industry Co Ltd* [1988] 2 Lloyd's Rep 621 (ChD) 624 was rejected: P Kaye *Law of the European Judgments Convention* (Barry Rose Chichester 1999) vol 2 1311–13.

received and comprehended,[161] but had its 'causal event' where the statement was initiated.[162]

The separation of the place of causal event from the place of the damage is a sensible means of allowing the plaintiff the alternative of suing in any of the places with which the wrong is sufficiently connected. On one view, forum shopping is not repugnant because there is a genuine connection between the facts of the case and whichever forum the plaintiff chooses. Even objectors to forum shopping would recognize that within the EU/EFTA community, with the greater harmonization of substantive laws, mutual trust and streamlined recognition and enforcement of judgments, the benefits of suing in one court over another are neutralized. From an external perspective, it may be observed that the EU/EFTA regional arrangement covers a relatively small geographic size and an area within which there is relatively high mobility, so in theory forum shopping within that region should not be as prejudicial as forum shopping on a global scale. However in practice, the diversity of laws, court systems and languages may mean that an Irish company sued in Latvia may have as valid reasons to contest jurisdiction as it would if sued in Brazil.

Once the plaintiff has chosen to sue in the place(s) of the wrongful act or the place(s) of the consequences and a court is 'seised', other European courts are barred from exercising jurisdiction.[163] This aims to avoid parallel proceedings. The EU aims to create a spirit of harmony and foster mutual trust between courts, so that other courts

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[161] *Berezovsky* (n 113).
[162] Case C-68/93 *Shevill v Presse Alliance SA* [1995] ECR 415, where the ECJ actually spoke of the place where the publisher was established, but it must have intended to mean the place where the statement was issued and put into circulation: Kaye (n 160) 1442–3. (cf Briggs 76). This follows the German approach of having one of the two elective places of defamation as the place from which the statement was sent: Rabel vol II 305.
[163] Judgments Regulation arts 27–28.

should have faith that the court first seised will properly dispose of the proceeding in accordance with the European instruments.[164] This regime makes it more likely that a wrong will not go unpunished, while allowing the defendant to focus his energy on a single set of proceedings. It achieves its object of efficacious conduct of proceedings, and is, at least on paper, the envy of courts outside the European club.

(iii) Injury limb

The injury limb has been interpreted in several decisions. In a multi-State damage case, this limb has the potential to permit the plaintiff to choose among many States' courts.[165] This limb is construed more narrowly than the damage ground of service abroad. Unfortunately, the ECJ, in its civilian-style judgments, has avoided laying down broad general principles. It is unlikely that the court intended its pronouncement on each of property damage,[166] economic loss,[167] and defamation[168] to be confined to cases on the respective topic.

In *Shevill*,[169] the damage arising from defamation was said to occur in the place where the victim's reputation was harmed by virtue of third persons reading and comprehending a publication.[170] This is consistent with the results in *Berezovsky v Michaels*[171] ("***Berezovsky***") and *Dow Jones & Co Inc v Gutnick*[172] ("***Gutnick***") in relation to the damage ground of service abroad. But there was not much scope for difference,

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[164] *JP Morgan Europe Ltd v Primacom AG* [2005] 2 All ER (Comm) 764 [36]–[56].
[165] Kaye (n 160) 1310–11.
[166] *Bier* (n 124).
[167] Case C–220/88 *Dumez France and Tracoba v Hessische Landesbank (Helaba)* [1990] ECR I-49.
[168] *Shevill* (n 162).
[169] Ibid.
[170] This follows the European approach of having one of the two elective places of defamation as the place where the statement was received and read: Rabel vol II 305.
[171] [2000] 1 WLR 1004 (HL).
[172] (2003) 210 CLR 575 (HCA).

because in all three cases the plaintiff's claim was confined to the damage to reputation suffered in the court's territory. In *Domicrest Ltd v Swiss Bank Corp*[173] (**"*Domicrest*"**), an English decision, the damage from negligent misstatement was said to occur in the place where the misstatement was received and relied upon. This aspect does not contradict *Diamond*,[174] which dealt not with the place of damage but only with the tort committed ground. In *Mecklermedia Corp v DC Congress GmbH* [175] the damage from passing off was said to occur where the goodwill and reputation of the plaintiff were harmed. A French court held that damage from broadcasts in breach of copyright occurred where the transmission was received.[176]

However, the difference between the damage ground of service abroad and the injury limb of special jurisdiction is the attitude towards consequential losses. When considering special jurisdiction, the inquiry into damage cannot extend too far. The ECJ explained in Case C–220/88 *Dumez France and Tracoba v Hessische Landesbank (Helaba)*[177] (**"*Dumez*"**) that it is only in the place where the immediate victim suffers direct harmful effects that the courts have jurisdiction. If any consequential or indirect loss ('ricochet' damage[178]) occurs elsewhere those other courts lack jurisdiction. Otherwise, there would be a perpetual preference for the plaintiff's forum.[179] *Dumez* concerned a joint venture between a German promoter and German subsidiaries of French companies. German banks advanced funds to the promoter, for the purposes of the joint venture, but the loans were cancelled. The French parents sued the German banks in

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[173] [1999] QB 548, 568.
[174] *Diamond* (n 110).
[175] [1998] Ch 40, 48.
[176] *Radio Monte Carlo v Syndicat Nationale de L'Edition Phonographique* [1991] ILPr 264 (Cour d'appel de Paris).
[177] [1990] ECR I-49 [20]–[22].
[178] Kaye (n 160) 1324ff.
[179] van Houtte (n 122) 167.

France, seeking recovery of the financial losses. The ECJ held that the damage produced direct consequences in Germany, but only indirect consequences in France so the French court lacked jurisdiction under art 5(3).[180] The injury limb refers only to the place where the direct harmful effects were suffered by the immediate victim.[181] The ECJ further elaborated in Case C–364/93 *Marinari v Lloyds Bank plc*[182] ("***Marinari***") that the injury limb could not be construed so extensively as to encompass any place where the adverse consequences (such as consequential financial loss), of an event which had already caused damage actually arising elsewhere, could be felt.[183] Significantly, the ECJ did not consider it relevant that damage (even mere consequential loss) was an essential ingredient of the pleaded wrong according to the relevant national law. Rather, art 5(3) applies in the abstract and localizes a wrong independently of the national laws of Member States.[184] In excluding consequential or secondary loss,[185] the injury limb of art 5(3) is narrower than the damage ground of service abroad.[186] In fact, when construing that limb of art 5(3), although in *Bier*[187] the ECJ used the word 'damage', it seems that one should not speak of damage at all, but rather of 'the [direct] effect of the harmful act'.[188] The distinction between direct and indirect loss has plagued the law for centuries. It is difficult to formulate broad principles, because facts and circumstances are so unique. But the distinction is vital, especially in a system which allows near-automatic recognition and enforcement of judgments. Without some cut-off point, a plaintiff,

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[180] *Dumez* (n 167) [13]–[14].
[181] Ibid [20]–[22].
[182] [1995] ECR I-2719.
[183] Ibid [14].
[184] A Briggs 'The uncertainty of special jurisdiction' [1995] LMCLQ 27, 28.
[185] P Nygh 'Transnational fraud' in McLachlan & Nygh 83, 100–1.
[186] *Booth* (n 130) [36]–[45].
[187] *Bier* (n 124).
[188] F Pocar 'Jurisdiction in matters relating to tort or delict and the operation of a branch, agency or other establishment' in P Stone (ed) *Civil Jurisdiction and Judgments in Europe* (Longman London 1998) 111, 113–14.

having suffered an injury, could 'manufacture' jurisdiction in a territory by outlaying money there, thus allegedly suffering losses.

In Case C-168/02 *Kronhofer v Maier*,[189] an Austrian domiciliary alleged that German investment managers induced him, by telephone, to purchase share options, and he suffered financial loss as a result. The Austrian court held that the causal event occurred when the investment took place, and not when the advice was communicated. This holding was not referred to the ECJ, but is inconsistent with *Domicrest*. The ECJ was asked whether the place where the resulting damage was sustained, in the case of pure financial loss, should necessarily extend to the place where the victim was domiciled and where his assets were concentrated. The answer it gave was clearly no, as art 5(3) does not speak of the plaintiff's domicile. Only the financial loss in question is considered, and not the loss to the entirety of the victim's assets (his 'wealth'). So the damage was sustained in Germany (the place where the options were purchased), not Austria (the place where the advice was received and acted upon).

In summary, art 5(3) would catch: (i) a defendant whose wrongful conduct in the State is an event that gives rise to damage; and (ii) a defendant whose conduct results in direct damage occurring in the State. This is narrower than the service abroad provisions which deal with wrongs.

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[189] [2004] ECR I-6009.

2 APPLICATION TO WRONGS ON THE INTERNET

Cyberlaw advocates recommend changing the jurisdictional rules in order to address the issues which emanate from the internet.[190] Johnson and Post's revolutionary article claimed that geographic boundaries are inapposite and archaic, and any efforts to determine 'where' events occur on the internet are misguided, if not futile.[191] The authors contended that cyberspace has no territorial boundaries, because the cost and speed of transmission is almost entirely independent of physical location of the machines.[192] Rather, communication occurs through the movement of individual electrons, which enter territories easily and undetectibly. The effects of online activities are not tied to geographically proximate locations, and cannot be governed satisfactorily by current territorially-based sovereigns. Cyberspace should be seen as a distinct place, having its own applicable law,[193] and sovereigns should defer to the self-regulatory judgments of the internet population.[194] Content-providers fear exposure to global liability, which could result in the internet being beyond the reach of the average citizen.[195] Courts have recognized the risk faced by a content-provider that 'its on-line content can be called up throughout the world and [that it could] be sued in foreign courts...'.[196] This raises concerns about courts following the 'Missouri rules': the Missouri party always prevails.[197] Participants in the internet are confused about what measures to take.

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[190] AD Haines 'The impact of the internet on the Judgments Project: thoughts for the future' (Hague Conference on Private International Law, Preliminary Document No 17, February 2002).
[191] DR Johnson and DG Post 'The rise of law in cyberspace' 48 Stanford L Rev 1367, 1370–8 (1996).
[192] Ibid 1370–8.
[193] Ibid 1378–81.
[194] Ibid 1393.
[195] DL Burk 'Jurisdiction in a world without borders' (1997) 1 Virginia JL & Technology 3.
[196] *Re the Maritim Trademark* [2003] ILPr 17 [2] (Landgericht Hamburg 2001).
[197] RW Hamilton and GA Castanias 'Tangled web: personal jurisdiction and the internet' 24 Litigator (ABA) 27 (1998).

Smith argues that, while in the offline context a business needs to take positive steps to interact with a foreign country, in the online context such interaction may occur by default.[198] Accordingly, this requires a change in the rules if we are going to embrace e-commerce and the free flow of information across borders. Further warnings are sounded that jurisdictional rules cannot provide consistent and just outcomes or efficient solutions to transnational events on the internet and more radical legislative reform is required.[199] Perhaps the artificiality of attempting to localize internet conduct territorially means that jurisdiction should be determined by reference to the defendant's nationality[200] or the plaintiff's domicile?[201] Perhaps the internet should be declared a single jurisdiction subject to rules custom-made for its purposes?[202] One recommendation is the development of a 'law cyberspace' along the same lines as *lex mercatoria*, at least to regulate online commercial transactions.[203] Alternatively, should cyberspace be declared an international or transnational space, alongside Antarctica, outer space and the high seas?[204] A more novel argument[205] is that a contact-based approach must yield to a conception of jurisdiction based on community definition, calling for a cosmopolitan approach which conceptualizes jurisdiction in terms of social interactions, so that ties to a community are required for the assertion of judicial power.

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[198] GJH Smith 'Directing and targeting – the answer to the internet's jurisdiction problems?' 5 Computer Law Review International 145 (2004) 145–6.
[199] U Kohl 'Eggs, jurisdiction and the internet' (2002) 51 ICLQ 555, 557.
[200] D Menthe 'Jurisdiction in cyberspace: A theory of international spaces' 4 Michigan Telecommunications Technology L Rev 69 (1998).
[201] G Kaufmann-Kohler 'Internet: mondialisation de la communication – mondialisation des litiges?' in Boele-Woelki & Kessedjian 89, 119; G Dinwoodie 'A new copyright order: Why national courts should create global norms' 149 UPLR 469, 475, 522 (2000).
[202] A Edeshaw 'Web services and the law: A sketch of the potential issues' (2003) 11 Intl JL & Information Technology 251, 272.
[203] I Trotter Hardy 'The proper legal regime for "Cyberspace"' 55 U Pittsburgh L Rev 993, 1021 (1994).
[204] E Longworth 'The possibilities for a legal framework for cyberspace – including a New Zealand perspective' in T Fuentes-Camacho (ed) *The International Dimensions of Cyberspace Law* (Ashgate Hampshire and UNESCO Paris 2000) 9, 38; B Fitzgerald, G Middleton and A Fitzgerald *Jurisdiction and the Internet* (LBC Sydney 2004) 156–9.
[205] PS Berman 'The globalization of jurisdiction' 151 UPLR 311, 321–2 (2002).

Not everyone shares this pessimism.[206] This chapter endorses the view that the existing exorbitant jurisdiction rules can be applied to cases which arise in the online environment. The internet is merely a natural extension of previous forms of communication technology, rather than a novel form requiring *sui generis* laws.[207] Courts have had to grapple with issues raised by intermediate communications since the time when messengers were used in most remote antiquity, and Roman law recognized declarations sent by a *nuntius* (transmitted through a person as an instrument).[208] In a contemporary context:

> Information placed by a website provider for access over the internet is sent by that person to others... just as a fax or letter or TV transmission is sent by its author, albeit that the information passively awaits access being made to it by web users.[209]

The relatively new technology of the internet can be accommodated readily to traditional wrongs.[210] Many of the wrongs committed on the internet fall within traditional categories (eg defamation, misrepresentation, intellectual property infringements). However there is validity in arguments that it is difficult to apply the exorbitant jurisdiction rules, which require localization, to a wrong committed via the internet. Those rules assume it will be possible to identify the physical place where the relevant element of a wrong occurred. Cyberspace itself is not a physical place.[211] The likely result of localizing an internet transaction is that either the jurisdiction is

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[206] J Goldsmith 'Against cyberanarchy' 65 Chicago L Rev 1239 (1998); cf D Post 'Against against cyberanarchy' 17 BTLJ 1371 (2000).

[207] A Reed 'Jurisdiction and choice of law in a borderless electronic environment' in Y Akdeniz, C Walker and D Wall (eds) *The Internet, Law and Society* (Pearson Essex 2000) 79; AR Stein 'The unexceptional problem of jurisdiction in cyberspace' (1998) 32 Intl Lawyer 1167; *Gutnick* (n 107) [38]–[39].

[208] Rabel vol II 317.

[209] S Dutson 'The Internet, the conflict of laws, international litigation and intellectual property' [1997] JBL 495, 496.

[210] *Pro-C Ltd v Computer City Inc* (2001) 205 DLR (4th) 568 (OntCA) [16].

[211] Nor should it be regarded fictitiously as a legal place: D Hunter 'Cyberspace as place and the tragedy of the digital anticommons' 91 California L Rev 439 (2003); cf MA Lemley 'Place and cyberspace' 91 California L Rev 521 (2003).

potentially that of every country in the world, or the jurisdiction is purely fortuitous, and has no obvious connection with the parties or the substantive transaction.[212] Due to the intentional flexibility of the internet, whereby resources are available anywhere and everywhere, localization may be a meaningless concept in this context.[213] Some have suggested that a different form of localization should be considered, eg based on the physical location of the server used in the transaction. But where the complaint is against a content-provider, the server is an irrelevant non-human intermediary in the internet communication and its location may bear no relation to that of the human actors. Another suggestion is a bright line rule limiting jurisdiction to the places of habitual residence of the parties to the action.[214] This would require a major shift from the *foci* in the existing jurisdictional rules on presence, domicile, wrongful conduct and damage.

Courts have grappled with every new form of technology by adapting the existing rules. The internet is another form of technology, though on a larger global scale. There is no need for reformulated jurisdictional rules to deal specifically with wrongs committed on the internet. The existing exorbitant jurisdiction rules are adequate and can be applied to such wrongs. Rather than replace them, it is necessary to adapt their interpretation and application.

The internet is constantly evolving. If internet-specific rules are formulated, they will almost certainly need to be modified later to cater for new forms of technology and communications. Any complications arising from the application of territorial rules to

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[212] Reed [7.1.3].
[213] Ibid [7.1.3.6].
[214] Ibid.

increasingly mobile wrongdoers are neither new[215] nor unique to the internet. What the internet may require, however, is greater precision than previously in the delineation between the rules focusing on wrongful acts and resultant damage.

The criminal law experience, where international cooperation against wrongdoers is more advanced than in the civil context, shows that traditional localization principles cannot be discarded even where rules are specifically formulated for the internet. For example, an international treaty on criminal wrongs on the internet[216] requires a determination of the place of commission of the offence.[217]

In civil wrongs, there is relative consistency of jurisdictional rules. It can safely be said that at least a third of all countries apply the service abroad provisions and/or the special jurisdiction provisions. Hence, it is submitted that there is no need for such a treaty covering jurisdiction, though for certain wrongs, eg defamation, a treaty harmonizing the substantive laws may be appropriate.[218] In any event, treaties take many years to implement and may become superseded technologically. Similarly, 'cybercourts',[219] initially embraced as the solution in international cases involving the internet,[220] would not assist in claims for wrongs, though they might play a useful role in contractual disputes where both parties submit to the jurisdiction of the tribunal.

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[215] Location of wrongs committed on international flights or sea-voyages was discussed in AD McNair *The Law of the Air* (3rd edn Stevens & Sons London 1964) 260–70, 281–3; L Duckworth *The Principles of Marine Law* (4th edn Pitman & Sons London 1930) 30–1.
[216] Council of Europe's Convention on Cybercrime (Budapest 23 November 2001 ETS 185).
[217] Article 22.
[218] Eg EWLC Study [4.54].
[219] Cf E Katsh and J Rifkin *Online Dispute Resolution* (Jossey-Bass San Francisco 2001); E Clark, G Cho and A Hoyle 'Online dispute resolution: Present realities, pressing problems and future prospects' (2003) 17 Intl Rev L Computers & Technology 7, 11–15.
[220] Trotter Hardy (n 203) 1052–3.

The underlying jurisdictional problem is that the ambit of a transmission through the internet cannot be restricted geographically.[221] A website is, *prima facie*, accessible everywhere, unless there are password or subscription requirements. Similarly, there may be no way of knowing the origin or destination of an email (some email addresses are geographically-ambiguous), or the identity of its sender (some email users employ anonymizing technology, eg anonymous remailer). The problems are magnified because anyone can upload or download content, or send or receive an email. The internet provides a unique flexibility, so that websites may be modified, relocated and redeployed easily and quickly in a country with lax regulation. It poses real challenges to States with more stringent laws on liability for communications, as regulatory agencies find it difficult or even impossible to enforce the laws. The result is that there is a move towards greater liberalization so that prohibitions are reduced to their lowest common denominator.[222]

It is submitted that it is possible to distil some general principles to guide courts in applying the exorbitant jurisdiction rules in cases of wrongs committed on the internet, regardless of the means of access to the internet. The principles which follow are not hard-and-fast rules. They provide guidance, aiming to balance flexibility and the interests of the parties. The focus should remain on the manner of application of the existing rules, which localize the elements of a wrong and damage, and not on the replacement or amendment of those rules. For example, in my submission, it is unnecessary to create new jurisdictional rules to cover cases where a 'website is accessed'[223] or to cover cases

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[221] The issues are discussed at length in S Biegel *Beyond Our Control? Confronting the Limits of Our Legal System in the Age of Cyberspace* (MIT Press Cambridge Massachusetts 2001).
[222] Reed [7.3.1].
[223] 'A category-specific legislative approach to the internet personal jurisdiction problem in US law' 117 HLR 1617, 1627 (2004).

where a cybersquatter had set up a website with a disputed domain name,[224] or to deny jurisdiction in all defamation cases which are based merely on website contacts with the forum.[225] The existing framework of exorbitant jurisdiction rules is capable of resolving disputes fairly and efficiently.

Doubts about the continuing suitability of the damage ground may be dismissed. A person who commits a wrong by placing content on a website has no practical means of control over the place of damage to the victim. Once material is uploaded, it is accessible everywhere unless access to the website is restricted to subscribers. (The content-provider could limit access by means of geo-filtering technology, but this is cumbersome and expensive to implement.) However, that does not necessitate the abandonment of the place of damage as a jurisdictional ground in cases of cross-border wrongs committed on the internet, to reduce the scope for global liability. As a jurisdictional rule, it is too entrenched and its removal is not feasible. Further, there is no rational distinction between wrongs on the internet and wrongs on other media. Why discriminate against one class of plaintiffs? For example, why should a plaintiff in a case involving television transmission be preferred to a plaintiff in an internet-related case? It is unrealistic to change the rules just for the internet. Dropping the 'damage' ground would leave the tort committed ground only, forcing the plaintiff to sue in the forum where the defendant acts, a place that the defendant may select to suit his interests. On the contrary, those common law States that have not yet adopted the damage ground[226] should be encouraged to do so, to enable their courts to give a more natural meaning to the place of commission of a wrong.

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[224] Ibid 1632.
[225] Ibid 1629.
[226] Eg New Zealand, Western Australia, Tasmania, British Columbia.

Courts prefer not to express general statements about how to apply the jurisdictional rules. Instead, they favour flexibility.[227] Yet uniform principles of interpretation are desirable in order to allay fears about inconsistency of laws in a globalized world.[228] The principles can be used at least as a starting point from which to consider a particular case. Concerns about losing flexibility are diminished, at least in the context of the service abroad provisions, by the retention of the *forum (non) conveniens* discretion.

3 PLACE OF THE WRONG

This section aims to set out general principles relating to the application of the exorbitant jurisdiction rules that focus on the place of the wrong.[229] Each of the act committed ground, tort committed ground and causal event limb is addressed separately.

In theory, each step in a transmission on the internet (eg in the case of a website these include uploading, communication with the server, and downloading) may occur in a separate country so the place of a wrong on the internet can be potentially anywhere and everywhere. A content-provider faces the prospect of global liability emanating from his desktop.

Coupled with the ease in which judgments are enforceable within the EU/EFTA region, the exposure to forum shopping could be great, particularly in 'receipt-oriented' wrongs,[230] eg trade mark infringement, passing off, defamation, misrepresentation, negligent misstatement and possibly some aspects of copyright.[231] It is difficult to

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[227] *Gutnick* (n 107) [28], [43]; *Diamond* (n 110) 346.
[228] LexisNexis – International Bar Association *Legal Survey* (2003) Section 3.
[229] The principles would also apply in determining the place where the wrong occurred for the purposes of art 10(1)(a) of the draft Hague Convention (2001 version).
[230] Smith [6-032].
[231] Ibid [6-033].

pinpoint the *locus delicti* on the internet, and hence indeterminate jurisdiction may be triggered unwittingly. On one view, a wrong on the internet is committed in all the places at which some element of the internet activity takes place. But as we have seen, a single internet communication may involve devices in numerous places communicating with each other, and to treat all these places as *loci delicti* would be to impose senselessly complicated procedural burdens on courts and parties.[232]

The aim, in formulating general principles, is to address the underlying reason for jurisdiction (a domestic court wishes to adjudicate only those cases that have some relation to its territory[233]), the wider effect which the principles may have on economic activity, and the importance of balancing the interests of the parties.

It is submitted that, as a general principle, a wrong on the internet occurs, for jurisdictional purposes, in the place where the defendant uploads the material onto the website or the place from which the defendant sends the email. This is no more than a default position and it is important to consider each type of jurisdictional rule separately.

(a) Place of the act

First, there are the English CPR, which contain the act committed ground.[234] These clearly focus on the place of the defendant's act, which, on the internet, is uploading to a website or sending an email. If the act of uploading or transmitting takes place in England and results in damage somewhere, then even if there are other elements of the wrong which occur outside England, the facts satisfy the provision.

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[232] Rabel vol II 321.
[233] The relation may be simply that the court has been chosen by the parties to resolve their dispute.
[234] CPR r 6.20(8).

(b) Place of the harmful event

Second, there is the causal event limb of the special jurisdiction rules which locates the 'event' that results in harm. Again, this focuses on the causative element of the wrong, which is generally the defendant's act of uploading or sending.

(c) Place of the tort

(i) Generally

Finally, there are the service abroad rules (eg in Australia) based on the original formulation of RSC, containing the tort committed ground. This is the category of jurisdictional rules that is the most difficult to apply. The *Distillers*[235] test asks 'where in substance did the tort occur?',[236] and courts have interpreted it generally as requiring a focus on the defendant's act[237] which causes the damage.

The defendant's act is the uploading of material to a website (the transmission and placement of a web page in the storage area of a server[238]) or the transmission of an email. Generally after that, the defendant's human conduct ceases.

Acting, in the field of wrongs, is ordinarily conceived as a physical human movement.[239] Uploading in the technical sense may involve several movements of data between computers located in different places, but in my submission the focus should be on the human act which initiates the transmission of the data so as to make it available to

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[235] *Distillers* (n 80).
[236] Above 32.
[237] In the case of an omission, the act of the defendant can be localized in the context of which the omission assumes significance: *Voth* (n 92) 567, citing as an example *George Monro* (n 50) 439, where the omission (failure to warn as to the nature of the goods) was treated as an aspect of the act of the defendant (sale of the goods).
[238] Above 14.
[239] Rabel vol II 312, 317.

others. In practice, it may be difficult to identify the place where the content-provider acted to upload the material or send the email. But the content-provider (or, where it is a body corporate, its controllers) must have been situated in some physical-world geographic location, and finding that location is a question of fact. Uploading or sending may take several steps in several countries, but it is the final human step before the material is disseminated through the internet which is the concern of the jurisdictional rules, as, in my submission, this is the substance of a communication-based wrong. Perhaps it is legitimate to consider the place of the preliminary steps (eg collection, compilation, editing) if the location from which the material was finally disseminated was clearly a sham designed to avoid jurisdiction in the place where the bulk of the human activity of the content-provider really occurred. This acknowledges the ability of operators to modify websites and relocate and redeploy materials easily and quickly in a country with lax regulation.

In my submission, for jurisdictional purposes, the defendant's 'commission' of a wrong generally comprises and ends with his act of uploading/sending. The remainder of the wrong is not the act of the content-provider. Between uploading and downloading the processes are by machines, not humans. Any receipt of the material in a forum is the act of the retriever, who 'pulls' the information from a website or mail server. The website-owner does not 'push' the information into that forum, though often an email sender can be said to 'push'. In some cases a defendant can induce a plaintiff to 'pull' information from a website, but that inducement is separate from the defendant's act of transmission. Plainly, mere availability of material on a website accessible online in a territory is no act at all, and cannot be regarded as the commission of a wrong so as to establish jurisdiction in that forum.

While supporting an interpretation of 'place of commission of a tort' which focuses on the defendant's act, this is merely a guiding principle and not a doctrine. In relation to each wrong, it is necessary to identify the jurisdictionally-significant facts which result in the 'commission' of the wrong and to assess where those facts occur. The use of the internet to perpetrate a wrong does not alter where the facts that constitute the commission of the wrong occur.

Nevertheless, there may be some results that would not have been expected if the wrong had been committed by traditional means of communication. For example, consider a misleading advertisement. While it may be that an advertisement by telephone or fax is regarded as made at the place of receipt, this may be impractical in the case of an advertisement on a website which is accessed in multiple countries. Hence the traditional receipt-based analysis of the place of commission of a wrong, in the case of a misstatement, may require reconsideration.[240] In other cases involving the internet, an analysis of the facts may point strongly in the direction of the place of the receipt or intended receipt as the place where, in substance, the tort was committed. For example, in a misrepresentation involving only two States, a court may decide that although the defendant acted by uploading in one State, all the other elements occurred in another State and in substance the tort was committed there. Another example is a trade mark infringement, where although the defendant acted by uploading in one State, the website targeted consumers in another State and so in substance the wrong was committed there.[241] So the general principles remain subject to analysis of the facts and circumstances of the particular case.

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[240] Above 36, below 63.
[241] Below 228ff.

The approach of focusing on uploading or sending is sensible because the defendant should face liability for his act in the place where he chooses to act. He cannot legitimately complain about this, because the choice of where to act was his own. The plaintiff should have the opportunity to sue the defendant in the place of acting. In some cases that is a choice that the plaintiff will make; in other cases that may be the only available forum. The courts of that place have jurisdiction and the plaintiff can sue there for all his damage, wherever occurring. There is no suggestion that in that place the plaintiff's recovery should be limited somehow. In the context of intellectual property wrongs, it has been said that it would not be sensible to limit a claim in the place of the wrong to damage suffered in that territory, because otherwise 'there will be no point in litigating in the one forum that is competent to hear the entire claim'.[242] In wrongs generally, the limitation of recovery to local loss[243] should apply only to claims in a place of damage, not in the place of the wrong.

Courts in English common law countries have said consistently that the place where a tort, in substance, is committed is the place where the defendant acts.[244] They have preferred this to other tests (eg the place of the last event completing the cause of action) which might generate a place that is quite fortuitous and should not be the sole determinant of jurisdiction.[245] There is a sharp contrast with US courts, which generally rely on the place of the last event, subject to satisfying the due process requirements. In many wrongs, whether the defendant addresses his act to a particular person or country or the world-at-large (even if it can be determined on the evidence) is irrelevant. That

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[242] JC Ginsburg 'Private international law aspects of the protection of works and objects of related rights transmitted through digital networks' (GCPIC/2 WIPO 30 November 1998) 18.
[243] Below 80.
[244] Above 34, even if they have differed on what constitutes the relevant act.
[245] *Distillers* (n 80) 468.

should concern only where damage is felt, and not where the wrong is committed.[246] The defendant's act is the same, in the same place. For a wrong where some quality of the defendant's conduct is critical to its commission, the place of the defendant's acting will be more jurisdictionally-significant than where the consequences of the conduct are felt.[247]

What of the common law States[248] that have not yet introduced the damage ground of service abroad? The broad construction traditionally given to the tort committed ground may be seen as alleviating the need to introduce a separate damage ground. But these States will become isolated from the remainder of the common law world, and their courts will be left no choice other than to construe 'commission of a tort' artificially widely so as to encompass damage. It is recommended that these States adopt a separate damage ground.

(ii) Misstatement

The elements of a misstatement are: a statement is made, it is communicated to the plaintiff, he relies and acts on its faith, and suffers a detriment. Without receipt by the plaintiff, there is no tort. However that does not mean that the place of receipt is necessarily the place of the tort. The facts must be analysed in each case.

Although in traditional modes of communication the courts preferred to focus on receipt, this may not be feasible in the context of a misstatement that is widespread through a website. Hence, as a starting point, it could be said that a misstatement is committed where it originates, as that is where the defendant acts. In the internet context,

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[246] Cf *Bonnier Media Ltd v Smith* 2003 SC 36 [18]–[19].
[247] *Gutnick* (n 107) [43].
[248] Above 56 n 226.

a misstatement originates where it is disseminated by being uploaded to a website or from where the email is sent.[249] The focus is on the defendant's act of submission of the material to the server for placement on a website. After that, the uploaded material is accessible to anyone who visits that website. Where the placement of material is the direct contribution of several persons located in several territories, then each of those territories could be a place where the misstatement is committed. The jurisdictional search should be for the most significant of these acts of contribution, as this would indicate where, in substance, the wrong was committed. The location of the server itself should not be relevant to the commission of the tort by the uploader. The server is a non-human intermediary between the acts and the damage. The server becomes relevant only when the tort is alleged to have been committed (or contributed to) by the operator of the server (eg ISPs). The statement does not originate earlier, where it is composed, as this is merely an act preparatory to the wrong.[250] However in some cases the misstatement may have been committed, in substance, where the website was accessed and downloaded, or where the email was received.[251] That is not to equate the place of commission with the place of damage. It is simply a recognition that the facts, particularly where there is evidence of targeting,[252] may point towards downloading, so the place of uploading plays a relatively minor role.

Examining where the statement originates, rather than where it is received and relied on, is the approach taken in *Domicrest*[253] in relation to the causal event limb in art 5(3). A series of cases,[254] though dealing with service abroad, appears to contradict

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[249] *ACCC v Hughes* (2002) ATPR 41-863 [78].
[250] Rabel vol II 311.
[251] Eg *ACCC v 1Cellnet LLC* [2004] FCA 1210 [10].
[252] Below 126ff.
[253] *Domicrest* (n 160).
[254] See n 111.

Domicrest. Can the differences between the approaches simply be attributed to the distinction between the texts of the provisions?

The most famous case is *Diamond*,[255] in which Lord Denning, purporting to lay down general principles on the place where a tort is committed, focused on the place of receipt, and even equated the rules for negligent misstatement with those for defamation. The *Diamond* line of cases would challenge the focus on the acts of uploading or sending. Rabel seemed to go even further, asserting that 'not the locality where a person operates, but that to which his operations are directed is material'.[256] But he admitted that in the field of wrongs by widely disseminated information, the only practical and theoretically justified solution is furnished by centring the tort in its most characteristic locality, which, in the case of periodicals, is the publisher and in the case of broadcasts, is the broadcasting station.[257]

One interpretation of *Diamond* is that misstatement is always committed at the place of receipt because damage is a pre-requisite to commission of the tort and damage coincides with receipt. It is submitted that such reasoning is fundamentally ill-suited for the application of the jurisdictional rules to wrongs committed on the internet. The reasoning can be distinguished on the basis that *Diamond* predates the addition of the damage ground of service abroad, so understandably the court aimed to accommodate the plaintiff by permitting him to proceed. Since the insertion of the damage ground, there is no longer a need to overstate artificially the width of the tort committed ground, though many cases have ignored this and followed *Diamond*. The alternative head now appears in most service abroad provisions and tends to receive a wide construction. At least in

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[255] *Diamond* (n 110).
[256] Rabel vol II 318.
[257] Ibid 322–3.

those States that have adopted the damage ground, the scope of the tort committed ground should be narrowed to correspond with its diminished practical significance. This is particularly so in England, where the tort committed ground was replaced with the act committed ground.[258] An additional reason not to regard the place of receipt as the place of commission of the wrong is that online statements (particularly on websites, but also emails sent to recipients with unknown locations) rarely meet the criteria set out in *Voth v Manildra Flour Mills*[259] ("***Voth***") of being 'directed from one place to another'.

While in defamation there may be good reason to regard commission as coinciding with damage,[260] misstatement is in a separate category. Although both torts involve communication, the focus of defamation is a communication to a third party which injures the plaintiff's reputation, whereas the focus of misstatement is generally a communication to the plaintiff himself. In defamation, it would not make sense to look at anything other than the place where the third party receives and comprehends the communication as the reputation is harmed simultaneously with the third party's comprehension. The answer is not so clear-cut in a misstatement. It is instructive that *Domicrest* was applied in recent decisions[261] on service abroad.[262]

An alternative interpretation of *Diamond* is that the court considered that the substance of the misstatement was, on the facts, the plaintiff's receipt rather than the defendant's act of sending. Hence it was legitimate to regard the misstatement as having been committed at the place of receipt. Each case should be judged on its facts and if

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[258] *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 (CA) [46].
[259] (1990) 171 CLR 538 (HCA) 568.
[260] Below 248.
[261] *ABCI v Banque Franco-Tunisienne* [2003] 2 Lloyd's Rep 146 (CA) [41]; *Newsat Holdings Ltd v Zani* [2006] 1 All ER (Comm) 607 [44].
[262] Under CPR r 6.20(8).

Lord Denning meant that in all cases the substance of a tort through communication will be aligned with receipt rather than sending, this is an unacceptable generalization.

(iii) Computer access wrongs

Computer access wrongs, such as hacking or spreading viruses, are committed in the place where the defendant uses his computer to access or infect the victim's computer. In my submission it is the defendant's act on his computer that is jurisdictionally-significant, even though the commission of the wrong also involves 'entering' the victim's computer. Such wrongs commonly represent contraventions of legislation (often with penal consequences) setting out a broad territorial nexus that, if satisfied, results in a contravention.[263] The breadth of the nexus often alleviates the need to inquire where the contravention occurred, even in the context of the application of the exorbitant jurisdiction provisions. Hence, questions of the precise place of commission arise infrequently.

A criminal hacking case, *R v Governor of Brixton Prison, ex p Levin*,[264] ("***Levin***") focused on receipt, rather than the place of the defendant's acting. The accused, a computer programmer, accessed a US bank's computer from Russia in order to divert funds into his own account. The US government sought his extradition from England. The accused challenged his committal to custody. One ground was that the English court lacked jurisdiction as the appropriation had taken place in Russia, where the computer keyboard was situated. The Court of Appeal considered offences relating to unauthorised

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[263] Eg spam is caught by the Australian legislation regardless of the place of commission of the contravention (s 14) if there is an 'Australian link', which is given a very wide definition in Spam Act 2003 (Cth) s 7. The corresponding US legislation (Controlling the Assault of Non-Solicited Pornography and Marketing (CAN SPAM) Act 2003 (US) (18 USC §1037)) provides a more vague territorial connector, prohibiting certain acts 'in or affecting interstate or foreign commerce'.

[264] [1997] QB 65 (CA), reversed on different grounds: [1997] 3 All ER 289 (HL).

modification of the contents of a computer and held that the acts of entering a password and other information on a keyboard in order to access the computer amounted to an instrument made in the place of receipt (ie the US) and not in Russia. Russia was simply the place where the accused operated his keyboard, but the keyboard was connected electronically with the US computer, and as he pressed the keys, his actions, as he intended, recorded or stored information for all practical purposes simultaneously on the magnetic disk in the US computer.[265] Hence the offence of forgery was committed in the US. The court said that the operation of the keyboard produces a virtually instantaneous result on the magnetic disk of the US computer, and it was artificial to regard the act as having been done in one rather than the other place. In having to choose one location, the court would choose the US location, rather than Russia. The accused's presence in Russia was far less significant than the fact that he was looking at and operating on disks located in the US. The essence of his activity was done at the destination.[266]

The decision in *Levin* should be viewed in context. First, the accused's conduct involved a monetary transfer system which, once accessed in one location, permitted the accused to gain unauthorised access to all locations connected to the system and withdraw funds from customers' accounts. Although there is no mention of the way in which the electronic communications occurred, it seems that unlike the internet the system was not intended to be accessible by any user around the world.

Second, this was a criminal case, and principles derived from criminal cases may not be appropriate to apply in civil cases. What they do indicate is that there are divergent views on the places where crimes are committed on the internet, particularly

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[265] Ibid [1997] QB 65, 80.
[266] Ibid 81–2.

where the legislation is silent as to its territorial scope.[267] The spectrum ranges from the place of the defendant's acting by sending emails[268] or uploading onto websites,[269] to the place where material is downloaded,[270] to the places of both uploading and downloading,[271] to the place where internet users interact with the website.[272] It may be observed that in criminal cases courts are reluctant, pragmatically, to acquit an offender within their territorial grasp, and are willing to embrace the proposition that an actor on the internet intends his acts to have world-wide effects and thus should reasonably foresee global jurisdiction.[273]

(iv) Statutory wrongs

Service abroad provisions may provide specifically for statutory wrongs. For example, an Australian court may entertain proceedings involving a breach of Australian legislation which is committed in Australia.[274]

Where the exorbitant jurisdiction provisions do not mention specifically a contravention of that country's statute, the contravention should be treated as a 'tort' in the broad sense where it results in a civil claim for damages. A breach of foreign

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[267] One would hope that legislatures learn from experience and expressly state their intention as to extraterritorial operation. However that is not always the case, eg Spyware Bill 2005 (Cth). Even if the legislation is expressed to operate extraterritorially, its enforcement on foreign territory may not be practical.

[268] *Director of Public Prosecutions (Vic) v Sutcliffe* [2001] VSC 43 [29], [61]–[62], [69], [88], [95].

[269] *APLA Ltd v Legal Services Commr (NSW)* (2005) 219 ALR 403 (HCA) [137], [140], [156].

[270] *US v Thomas* 74 F 3d 701 (6th Cir 1996) 709.

[271] *R v Perrin* [2002] EWCA Crim 747 [18], [33], [51]–[52].

[272] *State of NY v World Interactive Gaming Corp* 714 NYS 2d 844 (NYSC 1999) 849ff. See discussion in YF Lim *Cyberspace Law* (OUP Melbourne 2002) 25–6. An Australian court preferred not to consider the question where breaches of betting legislation occurred on the internet: *Sportodds Systems Pty Ltd v State of New South Wales* [2003] FCA 992 [42], [44].

[273] U Kohl 'The rule of law, jurisdiction and the internet' (2004) 12 Intl JL & Information Technology 365. See also *Liangsiriprasert v United States* [1991] 1 AC 225, 251; *Lipohar v R* (1999) 200 CLR 485 (HCA) [34], [37].

[274] Eg Federal Court of Australia Rules (Cth) r 8.01(b): 'breach of an Act' ('Act' is interpreted as an Act of the Commonwealth Parliament: *Acts Interpretation Act 1901* (Cth) s 38(1)).

legislation is not mentioned specifically, but in accordance with principle, *prima facie* there is nothing preventing a court hearing a civil damages claim for breach of a foreign statute under the court's tort committed ground. The same principles for locating the place of the statutory wrong should apply regardless of whether the statute is of the forum or of a foreign country.

The place of commission of a statutory wrong depends on the precise legislative provision.

One important example in the Australian context is the consumer protection part (Part V) of the Trade Practices Act 1974 (Cth). There is a general prohibition on misleading or deceptive conduct in trade or commerce,[275] which extends to **conduct engaged in outside Australia** by an Australian citizen, an Australian resident, an Australian corporation or a company which carries on business within Australia.[276] Applying the service abroad provisions, an Australian court has jurisdiction (a) where the contravention of the Act is committed in Australia by any defendant, or (b) where the contravention is committed outside Australia by a defendant to whom the Act specifically extends and damage is suffered in Australia. *Prima facie*, a Singaporean court would have jurisdiction in respect of a contravention of the Australian Act, for example, where the contravention was committed in Singapore by a defendant who is an Australian citizen. The Singaporean court may be unwilling to exercise jurisdiction, as it may perceive the Australian court as a more appropriate forum.

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[275] Section 52.
[276] Section 5(1).

'Carrying on business' in a territory generally connotes having a fixed place of business there.[277] Usually the presence of a subsidiary in a territory would not mean that a parent has a fixed place of business. However in this statutory context, the 'carrying on business' limb has been given a broad interpretation. It encompasses situations where a parent regards a subsidiary as part of a worldwide enterprise,[278] and even where there is no subsidiary or other place of business in Australia[279] but the company nevertheless conducts business with Australians.[280] Still, in my submission, a foreign company whose website is accessed by Australian consumers without any further contacts with Australia falls short of 'carrying on business within Australia'.[281] Access of its website may, in conjunction with other factors, such as sale of goods or services to Australian customers, constitute carrying on business in Australia.[282] Particularly where the website targets Australian consumers, the website operator may be said to carry on business in Australia.

Nevertheless, there may be no need to rely on the extending provisions, because courts have given a very wide reading to **conduct within Australia.**[283] In localizing conduct, the same rules have been applied as in relation to foreign torts.[284] A misleading

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[277] *Adams v Cape Industries plc* [1990] 1 Ch 433 (CA) 530.
[278] *Amalgamated Wireless (Aust) Ltd v McDonnell Douglas Corp* (1987) 16 FCR 238, 241.
[279] *Bray* (n 111) [63]; this issue was not addressed on appeal (ibid). Although this decision concerned a foreign corporation which had an Australian subsidiary, the court's statement appears to extend to cases where there is conduct without any subsidiary or agent in Australia.
[280] Through technological advances, this no longer requires the engagement of a local agent.
[281] *Gebo Investments (Labuan) Ltd v Signatory Investments Pty Ltd* (2005) 54 ACSR 111 [30]–[33].
[282] *Australian Wool Innovation Ltd v Newkirk (No 3)* [2005] FCA 1308 [34]. Also, in a proceeding brought by the Australian regulator against Vanuatu-based website operators, the Federal Court of Australia made orders, by consent, declaring that there were contraventions of Australian legislation by, inter alia, operating a financial business without a licence and making misleading statements: ASIC Press Release 05-302 (5 October 2005).
[283] *ACCC v Worldplay Services Pty Ltd* (2004) 210 ALR 562 (FCA) [81], affd (2005) 143 FCR 345 (Full Ct) [21].
[284] *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507 (FCA) 518–20. The representor knew and expected that the representation would be received in Australia. See further Lockhart (n 62) [1.31]–[1.35]. Surprisingly Lockhart expresses doubt that misleading or deceptive conduct is a 'tort': [7.14], [11.67].

statement has been held to occur where the statement is received.[285] For example a court held[286] that misleading statements originating in Queensland were made in NSW where they were received. This follows the *Diamond*[287] line of cases which relate to misrepresentation at common law. While this may appear to stretch the concept of conduct in a territory, a court may decide that having regard to all the elements of the statutory wrong, in substance, it was committed in the place where the statements were received. That is not a universal rule. In my submission, consistently with the interpretation of the exorbitant jurisdiction rules, where the statutory wrong is expressed in terms of a prohibition on conduct, the place of the substance of the statutory wrong should be primarily the place of the wrongdoer's conduct. A finding that conduct occurs abroad would not necessarily defeat a claim against the wrongdoer, as the extending provisions of the Act could apply. However, there may be a practical reason for a wide construction of conduct in Australia. In the case of overseas conduct, even if contravention is established, a claim for damages can proceed only with the written consent of the Attorney General.[288] Hence courts may be reluctant to limit the scope of conduct in Australia to acts of the defendant in Australia, as a finding that conduct takes place abroad requires governmental consent for any damages claim, adding an unnecessary layer of administrative complexity.[289]

In *ACCC v Chen*[290] ("***Chen***"), the Australian consumer protection agency brought a proceeding in an Australian court against a US defendant who operated a website that

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[285] *Paper Products* (n 111) 287–8; *Sydbank* (n 111) 547–8; *Delco Australia Pty Ltd v Equipment Enterprises Inc* (2000) 100 FCR 385 [25]–[27].
[286] *Ramsey* (n 111).
[287] *Diamond* (n 110) 345–6.
[288] Sections 5(3), 5(5).
[289] Cf D Meltz 'The extraterritorial operation of the Trade Practices Act – A time for reappraisal?' [1996] Trade Practices LJ 185, 201.
[290] (2004) 132 FCR 309 [30]–[31].

claimed to be the official website of, or affiliated with, the Sydney Opera House. The court permitted service abroad,[291] though it is not apparent which grounds were invoked. In considering the merits of the claim, the court found that the defendant breached the Act, as Australians were misled by the website when they downloaded information from the website and acted in reliance on it.

A later case[292] interpreted *Chen* as having decided that the representations were made in Australia at the time when the intended downloading in Australia occurred.

In my submission, the representations in *Chen* were not made in Australia. Hence service abroad was appropriately based on the damage ground rather than the tort committed (or the breach of Act committed) ground. There are several reasons. The prohibition in the Act is on 'misleading or deceptive conduct'.[293] The defendant was outside Australia. The court explicitly said that the conduct occurred abroad.[294] The misrepresentations were uploaded by the defendant in the US to servers in the US. The statements were downloaded by consumers in Australia.[295] The court said that the defendant's activities by misleading or deceptive conduct on the internet affected consumers in Australia and hence contravened the Act.[296] The Act applies to conduct overseas only if it is by an Australian citizen or resident, an Australian corporation or a company carrying on business in Australia. In my submission the defendant carried on business in Australia. His website was not merely available to Australian consumers – he

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[291] [2002] FCA 1248 [4]–[5].
[292] *Ward Group* (n 121) [40].
[293] Section 52.
[294] *Chen* (n 290) [49].
[295] Ibid [26], [29].
[296] Ibid [32].

actually conducted business with them by selling fake tickets. As the remedies sought were injunctions and declarations the Attorney-General's consent was unnecessary.

In a similar case,[297] service abroad was permitted in respect of breaches of the Act. The US-based defendant's conduct involved posting on websites material which was capable of being, and was in fact, downloaded in Australia and was designed to have an impact in Australia, and selling goods through internet transactions. In my submission, this decision also relied on the damage ground, and again the defendant was caught by the Act because it conducted business in Australia.

(d) North American approach

The North American view is generally that the place of commission of a tort is where the last element, usually damage, takes place. The court in *Distillers*[298] considered this approach, but preferred the test of where, in substance, the tort was committed. US and Canadian courts held that wrongs are committed at the place where the material is downloaded from the website, rather than where it is uploaded onto the website.[299] The courts essentially equated the place of damage with the place of commission, and concerned themselves with where damage occurred. One example is that regardless of the place of uploading, where an infringing trade mark was downloaded in the territory it amounted to a breach of the trade marks legislation in that territory.[300] Another is that a foreign defendant, who had placed fraudulent misrepresentations on his website that were accessed in the forum, was held to have committed the misrepresentations in the

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[297] *Australian Wool Innovation* (n 282) [22].
[298] *Distillers* (n 80).
[299] Eg *Maritz v Cybergold Inc* 947 F Supp 1328 (EDMo 1996) 1331; *Alteen v Informix Corp* [1998] 164 Nfld&PEIR 301 (NfldSC).
[300] *Playboy Enterprises Inc v Chuckleberry Publishing Inc* 939 F Supp 1032 (SDNY 1996) 1039.

forum.[301] Of course, the court's inquiry does not end there. In the US there is the additional requirement of due process,[302] and in Canada a real and substantial connection must be established.[303] These limiting factors mitigate against the broad jurisdiction for the forum's courts which otherwise would result from the application of the 'place of the last element' test. Localization of the damage, the element which often completes a wrong, is considered next.

4 PLACE OF DAMAGE

The objective of this part is to set out general principles relating to the application of the exorbitant jurisdiction rules that focus on the place of damage.

(a) Injury vs damage

Can the damage ground of service abroad and the injury limb of the special jurisdiction provisions be treated together? They differ in their approaches. The injury limb[304] focuses on the place where 'damage occurred',[305] while the CPR's damage ground speaks of the place where 'damage was sustained',[306] the Australian rules (based on the English RSC) contain a damage ground which focuses on the place where 'damage was suffered', and there are other rules which look at where 'damage arises' or 'damage results'. Admittedly the use of different verbs is significant, particularly in the extent to which consequential losses are considered.

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[301] *Cody v Ward* 954 F Supp 43 (DConn 1997).
[302] Below 109.
[303] *Burke v NYP Holdings Inc* (2005) 142 ACWS (3d) 589 (BCSC) [26] (on appeal to BCCA).
[304] And art 10(1)(b) of the draft Hague Convention (2001 version).
[305] *Bier* (n 124).
[306] CPR r 6.20(8)(a); *Batstone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd* [1996] CLC 1902 equated the damage ground in the CPR with the injury limb of art 5(3).

In order to formulate a general theory, a distinction should be drawn between what may be referred to as injury and damage. The injury limb of art 5(3) really focuses on the initial injury, or the direct harmful consequence of the causal event.[307] This differs from the damage ground of service abroad, which essentially focuses on the damage in its entirety.

To notice the distinction between injury and damage, Rabel posed a hypothetical question: where is the location of the effect of a tort when a plaintiff domiciled in Germany loses a law suit in a French court against a Spanish defendant due to perjury by that defendant in the witness box? Rabel answered that the injury can be said to occur in France, while all ensuing damages in Spain or Germany would have no influence on localization of the injury.[308] This helpfully demonstrates the European view, hence the influences on the interpretation of art 5(3) in ECJ decisions such as *Dumez*[309] and *Marinari*.[310] The distinction between injury (which is the focus of art 5(3)) and damage (which is the focus of the service abroad provisions) is material in some cases, while immaterial in others.

In my submission, the place where the victim experienced his injury or initial loss is common to all the different formulations (eg 'damage occurred', 'damage suffered', damage sustained'). Any divergence in approaches would occur only after this had been established. The various formulations overlap to an extent. They all include the place where the initial injury manifests itself. This paper looks to localize the initial injury which results from wrongs on the internet. That does not deny that there are real

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[307] *Marinari* (n 182) (submissions of Darmon AG).
[308] Rabel vol II 326.
[309] *Dumez* (n 167).
[310] *Marinari* (n 182).

differences between the formulations, particularly the extent to which they cover consequential losses. But the internet creates particular localization difficulties as regards the initial injury, and this is the focus of this paper. In the following discussion, the place of damage therefore refers to the place of initial injury.

(b) Damage from wrongs on the internet

Wrongs on the internet pose a peculiar jurisdictional problem, as the place of damage can be anywhere and everywhere the website is accessed or email is received. Regardless of the place of commission of the wrong there will nearly always be jurisdiction for the plaintiff's home courts under this ground. That is because generally the place of damage is an alternative basis of jurisdiction to the place of the wrong.[311] While traditionally in many cases damage coincided geographically with the wrongful act, in the context of wrongs on the internet there is a great likelihood that the place of damage and the place of the wrong will diverge. This is precisely the complexity that must be addressed.

Generally at least the initial injury occurs or is suffered or sustained by the plaintiff at the place where he is. For the defendant, this represents the prospect of global liability from the desktop. Content uploaded to a website by the defendant in one country may be downloaded by numerous persons in numerous countries, with no apparent limits. An email which the defendant sends to multiple addressees may be accessed by recipients around the world, including in some countries which the defendant may not have anticipated. It is too easy to trigger jurisdiction when damage is suffered globally, and there are potential problems of indeterminate jurisdiction.

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[311] Cf J Hörnle 'See you in court – but where?' (2005) 7(4) Electronic Business Law 10, 12, whose view is that to establish an arguable case, the plaintiff must demonstrate an infringement committed within the territory; but the rules require a *prima facie* case of a wrong, not necessarily committed locally.

Yet although in theory damage from a wrong on the internet may be suffered everywhere,[312] courts have localized the place of damage. In my submission, as a general principle, in wrongs involving communications, just as the place of the wrong requires some human act on the part of the defendant, the place of the damage requires some human act. That human act differs, depending on the wrong.

In misrepresentation, the human act is the plaintiff's reliance on the representation, which causes detriment to the plaintiff. In defamation, the human act is the third party's comprehension of the defamatory statement, as in that third party's eyes, the victim's reputation is diminished. Privacy is violated when the name or image of the victim are viewed or heard by a member of the public.[313] In breach of confidence, the human act is the exploitation or divulgence of the confidential information.[314]

Each of these will occur at the time when, or after, the material is downloaded or received. Hence, the place of downloading from a website or receipt of an email[315] will frequently, though not necessarily, coincide with the place of damage.

In copyright infringement by a content-provider, the human act relevant to damage is the downloading or receipt by potential customers, as that removes the incentive for customers to purchase the genuine copyright material, resulting in a loss of sales for the owner in the place where the customers are located. In the transmission of a virus by email, the human act is the victim's receipt of the email, and it is at that place that damage is suffered (or later, if the virus's harmful effects are triggered then). In hacking

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[312] Reed [7.1.3.5].
[313] In another era, it was said that the right of privacy is invaded where the plaintiff's name and x-ray picture first become public property: *Banks v King Features Syndicate* 30 F Supp 352 (SDNY 1939) 354.
[314] *Kitechnology NV v Unicor GmbH Plastmaschinen* [1995] FSR 765 (CA).
[315] *Internet Doorway Inc v Parks* 138 F Supp 2d 773 (SDMiss 2001) 777; *Cody* (n 301) 45–6.

through the internet, the human act which crystallizes damage is the connection of the victim's computer to the internet or operation of the relevant program. This is what enables the defendant to gain access to the plaintiff's computer, and the place of damage is the place where the computer is located at the time of intrusion, or later when, for example, data is removed from the computer or some function on the computer is disabled.

The completion of the communication, eg by downloading from a website or receipt of an email, may be sufficient in some wrongs for damage to manifest. One should recall that 'downloading' is the process whereby the server responds to an electronic request for a web page by delivering a copy of the requested web page to the browser, which the user can access.[316] So for example, in copyright infringement damage may be suffered as soon as the web page is delivered to the browser and is accessed by the user.

There are many wrongs where the completion of communication in itself is not yet a manifestation of damage. For example, in misrepresentation, it would be insufficient that the representation has been communicated from the defendant to the plaintiff. The plaintiff suffers damage only when he acts in reliance on the representation to his detriment, eg by outlaying money or entering into a contract. In any event, it is clear that damage is not suffered when the material is uploaded on a website, or is stored on a server (either as a website or as an email). At that stage, no person can be said to be suffering any injury, whether physical, property or economic.

So far we have looked only at initial injury. We have seen that the service abroad provisions look further, to consequential damage, regardless of where the initial injury

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[316] Above 16.

occurred. In contrast, art 5(3) looks at the place of only the initial injury or harmful effect.

For example, in misrepresentation, both special jurisdiction provisions and service abroad provisions would concur that damage has occurred or has been suffered or sustained where the victim acts in reliance on the misrepresentation. If later the victim suffers consequential damage elsewhere, that place would be recognized by the damage ground of service abroad, but not by the injury limb of special jurisdiction.

(c) Limitation on jurisdiction to local loss

It is submitted that the jurisdiction of the courts of the place of damage under both exorbitant jurisdiction rules should be limited. The plaintiff should be able to sue only for his damage arising in that place. This aspect of Case C-68/93 *Shevill v Presse Alliance SA*[317] ("***Shevill***") should be applied by analogy, and for ease of expression will be labelled the "***Shevill* limitation**". Although it was a case determining jurisdiction in defamation under the special jurisdiction provisions, there is no reason for its principle not to apply more broadly, to proceedings outside defamation, and even to proceedings brought under the service abroad provisions where the focus is damage.

There is nothing in the injury limb of special jurisdiction, or in the damage ground of service abroad, that compels a court to consider worldwide damage. Even in those service abroad provisions where the damage ground is expressed as 'damage is suffered *wholly or partly* in the jurisdiction'[318] there is nothing which denies the operation of the *Shevill* limitation. The expression 'wholly or partly' is intended to dispel any argument

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[317] [1995] ECR 415 [27]–[33].
[318] eg VicSCR r 7.01(1)(j).

that the court has no jurisdiction unless the entire damage was suffered in its territory. (In those countries where the damage ground does not say explicitly 'wholly or partly', those words might be implied anyway.[319]) It is a statement of the existence of the court's jurisdiction, but not of the extent of the jurisdiction. Where damage is suffered wholly in the territory, then the court has jurisdiction which encompasses the recovery of that damage, and there is no question of extent of damage. Where damage is suffered partly in the territory, then the court has jurisdiction, but the jurisdiction is limited to local loss. It is submitted that this is the interpretation that should be given to that ground particularly when applying it to wrongs on the internet,[320] even though it may have been assumed that damage suffered partly in the territory enables the court to hear a claim for global loss.[321]

Nor should the implication of a remedial limitation be regarded in the EU context as 'an illegitimate intrusion of convention law into the recognised retained procedural sphere of national legal systems'.[322] It is sensible for the exorbitant jurisdiction rules to take a congruous approach, by regarding the place of damage, generally, as the place of the human act (constituted by downloading or receipt of content, or some further step) and limiting recovery to local damage. Although it may be difficult as an evidentiary matter to segregate global losses by country, it is not an altogether impossible task, especially in the context of the special jurisdiction provisions where only the direct losses should be considered in each country. While the application of *Shevill* may appear to fragment litigation, there are procedural solutions, such as stays and anti-suit injunctions

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[319] *Metall* (n 61) 437.
[320] This is consistent with the acceptance, at first instance in *Metall* (n 61) 410, of the alternative argument in respect of the Lamitref warrants; on appeal the court did not deal with this issue.
[321] *Booth v Phillips* [2004] 1 WLR 3292 (QB) [45].
[322] Kaye (n 160) 1425; cf 1445–7.

(in the context of the service abroad provisions), *res judicata*, issue estoppel and *Anshun* estoppel, to prevent the same issue being subject to two or more separate judicial determinations.[323] The *Shevill* limitation was even contemplated in the draft Hague Convention.[324]

Admittedly *Shevill* has received strong criticisms.[325] The concern of two Scottish academics[326] was that European defamation policy, which strikes a different balance between reputation and free speech than does English law, could be crippled due to the proliferation of English libel suits in relation to non-English publications.[327] *Shevill* presented an opportunity for a person about whom a publication was disseminated throughout Europe to file suit in virtually every State in the EU. The court in *Shevill* thought that the limiting mechanism whereby only local damages could be recovered was sufficient, but the authors alleged that the court had underestimated the allure of English jury awards.[328] In fact, it is a popular practice for foreign litigants to have their case determined according to English defamation law, sometimes to the dismay of English courts which regard it as forum shopping.[329] These criticisms, while valid in relation to defamation,[330] do not taint the broad idea of limiting damages to local loss. Certainly reform of English substantive and procedural defamation law would be welcome,[331] with the balance to shift away from plaintiffs. Australian law reform has already resulted in the adoption of a US-style single publication rule,[332] and this would improve with a

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[323] *Gutnick* (n 107) [36].
[324] Article 10(5) of draft Hague Convention (2001 version).
[325] Eg P Carter 'Jurisdiction in defamation cases' [1992] BYIL 519.
[326] Vick & Macpherson.
[327] Ibid 936.
[328] Ibid 936–7, 944–9.
[329] *Berezovsky* (n 113) 1023–4 (Lord Hoffmann).
[330] Below 251.
[331] Eg below 250–7.
[332] Below 256–9.

rigorous exercise of the *forum (non) conveniens* discretion. But that does not deny that the *Shevill* limitation, confining claims to local damage, can remain and even extend to other wrongs.[333]

Shevill was also criticized by two English academics,[334] who regarded the decision as a radical departure from the common law. Their concern was that *Shevill* contradicts the common law's search for a specific place where the tort in substance was committed.[335] Yet the aspect to be adopted from *Shevill* is not its discussion of the causal event limb, but rather the limitations it places on the injury limb. Even critics of *Shevill* would admit that the common law permits more than one place of damage. The implication of *Shevill* is that there may be many places where damage may occur, but in proceedings in each such place the plaintiff's claim must be limited to local damage. This does not contradict the common law cases as it looks at the location of the damage, not of the wrong. In defamation cases, such as *Shevill*, a tort is committed, and damage is suffered, in every place where a statement is read, as each publication founds a separate tort. The authors need not worry that a person defamed by an Italian newspaper with circulation only in Italy could bring proceedings in England[336] – the special jurisdiction provisions would not allow that (nor, for that matter, would the service abroad provisions, had they applied in the EU context).

The *Shevill* limitation was applied to a wrong on the internet other than defamation in a French case, *Castellblanch SA v Louis Roederer SA*[337] ("***Castellblanch***"). A

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[333] eg copyright infringement: Ricketson & Ginsburg [20.05].
[334] A Reed and TP Kennedy 'International torts and *Shevill*: the ghost of forum shopping yet to come' [1996] LMCLQ 108.
[335] Ibid 115.
[336] Ibid 118–19.
[337] [2004] ILPr 41 (Cassation France).

proceeding was brought by a Champagne company in relation to infringement of its 'Cristal' trade mark by a Spanish company. The defendant advertised wines on its website under the name 'Cristal'. The plaintiff chose not to sue in Spain, the defendant's domicile, where the claim could extend to the plaintiff's entire worldwide loss. Rather, it chose to sue in France, relying on art 5(3). The Spaniard challenged jurisdiction. The French appellate court focused on the second limb of art 5(3), and held that France was the place where damage was sustained. Hence, the French court had jurisdiction (*compéténce*) over the proceeding, but, as the court emphasized, by application of *Shevill*, only insofar as the claim related to damage suffered by the plaintiff in France.

Imposing the *Shevill* limitation is a necessary compromise in multi-state damage from wrongs on the internet. The defendant commits a wrong in one country. Damage is suffered in several countries. The plaintiff has a choice. He can sue the defendant for all the global damage which he suffers in a single court – the court of the place where the defendant is present or domiciled or where he acted. This gives the defendant a 'home' advantage. Alternatively the plaintiff may sue the defendant in each place of damage, but recovery is limited to the extent of local loss.

Returning to consequential damages, it is only damage resulting directly from the defendant's act which is recoverable under the injury limb of special jurisdiction. That limb extends no further.[338] Courts applying service abroad provisions set a lower threshold of damage, which encompasses consequential losses.[339] The inquiry here differs from the inquiry regarding remoteness of damage in negligence, which looks at the probable consequences of a defendant's act and depends on reasonable

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[338] Above 46–8.
[339] cf *Newsat* (n 66) [49].

foreseeability.[340] For service abroad purposes, 'damage' is not limited to the damage which completed the cause of action.[341] For example, in *Challenor v Douglas*,[342] the plaintiff suffered physical injuries in the course of his employment in Queensland, and then adverse effects on his earning capacity in NSW. But the court said that damage encompasses injury or loss, whether direct, indirect or consequential, and whether by way of bodily injury or financial or economic loss. Similarly, in *Flaherty v Girgis*,[343] the plaintiff was injured in a car accident in Queensland, but was hospitalized in NSW, and the court held that damage is broader than injury, as it includes all the detriment, physical, financial, and social, which the plaintiff suffered as a result of the tortious conduct of the defendant. Consistently the view has been that the damage ground of service abroad comprehends the widest range of loss and harm which may fairly be contemplated, at least of the kind which may result from tort and be compensable in an action in tort.[344] On the face of it, extending the *Shevill* limitation to the service abroad provisions would require the more stringent principles of scope of damage associated with art 5(3) to follow too, otherwise the limitation could be circumvented too easily by plaintiffs. This would preclude courts from taking into account consequential losses under the damage ground of service abroad. Yet such drastic measures are not necessary, because, as highlighted recently,[345] there is nothing objectionable about the width of the interpretation given to the damage ground when regard is had to the *forum (non) conveniens* discretion. That discretion can eliminate cases where the damage, whether direct or consequential, has little or no connection with the forum. So under the damage ground, the court's

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[340] *Wagon Mound (No 1)* [1961] AC 388 (PC) 422–3; *Wagon Mound (No 2)* [1967] 1 AC 617 (PC) 641.
[341] *Booth* (n 130) [36]–[45].
[342] [1983] 2 NSWLR 405, 408–411.
[343] (1985) 4 NSWLR 248 (NSWCA) 266–7.
[344] *WorkCover v Orientstar* (n 132) [8].
[345] *Booth* (n 130) [37].

jurisdiction is limited to local losses, including consequential losses. The difference in scope between the damage ground of service abroad and the injury limb of special jurisdiction does not prevent the application of the *Shevill* limitation to both. The reconciliation between those jurisdictional rules is not a problem that is unique to wrongs on the internet.

Although often a plaintiff will find it easy to prove that he suffered damage in a State, this may be more difficult for a multinational corporation which complains of a general loss of profits or revenue.[346] Problems of localization of pecuniary damage where the victim's assets are dispersed over the world have plagued the law for years.[347]

The special jurisdiction provisions would allow the corporation to bring a separate action in each State where it (by itself or through its subsidiaries) suffers economic loss (that is where damage occurs), but its claim in that State must be limited to local damage. So a French multinational corporation whose German subsidiaries suffer loss can sue in Germany for the German loss.[348] If its Italian subsidiaries suffer loss, the multinational can sue in Italy for the Italian loss. But consistently with *Dumez* the multinational cannot sue in France for the aggregate foreign losses. It may be burdensome for a multinational which suffers loss in multiple States to bring separate actions for the relevant local damage. However there is no justification for allowing it, but not other types of plaintiff, to sue for the entire damage in its home State. If it wishes to sue for the whole worldwide damage, it must sue in the place where the defendant is domiciled or the place where the wrong was committed, which is where the defendant acted.

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[346] *GTE New Media Services Inc v Bellsouth Corp* 199 F 3d 1343 (DC Cir 2000) 1349.
[347] Rabel vol II 325.
[348] *Dumez* (n 167) [20]–[22].

Under the service abroad provisions, the multinational corporation could sue in the State where the subsidiary suffers a loss, in a suit limited to local loss by virtue of the extended *Shevill* limitation. Unlike the special jurisdiction provisions, the service abroad provisions would, *prima facie*, also allow the corporation to sue in its home State for the consequential economic losses (such as a loss of profits to the corporation resulting from harm done to its subsidiaries), recovering the whole worldwide damage. This would be subject to the *forum (non) conveniens* discretion, which would eliminate the proceeding if the connection between the facts and the State were not sufficiently proximate. The alternative way of seeking the entire worldwide damages would be to sue in the place where the wrong was committed, or alternatively, where the defendant was present at the time of service of process.

Multiple victims, or multiple damage, should be considered. Where a wrong causes damage to one plaintiff in country X and another plaintiff in country Y, then damage is suffered in each of X and Y so that its courts have jurisdiction over the claim, but only insofar as the claim relates to damage suffered in that country. Where a single victim suffers loss in multiple countries, the courts of each country have jurisdiction over the claim, though limited to damage suffered in that country. In order to recover the worldwide damage, the plaintiff would have to bring his action in the place where the wrong was committed, or alternatively where the defendant is domiciled (if in an EU or EFTA State) or present (if in a common law State).

Regarding 'damage suffered in the jurisdiction' as occurring potentially upon (or at some point after) downloading from a website or receipt of an email achieves a sensible balance between the interests of the parties. It enables a plaintiff to sue in a State other than where the defendant is domiciled or present, or where the defendant acted; but the

claim is limited to local damage. It does expose a defendant, who publishes on the internet, to worldwide suits and potential forum shopping. However by placing the statement online in order to increase his audience, he impliedly acquiesces in the increased risk that someone, in a place that he may not contemplate, will access the website. Arguably, this is not excessively onerous in practice, as: (i) a stay may be granted (in the service abroad context) if the court is a *forum non conveniens;* (ii) the defendant faces a suit in that place limited to damage suffered locally;[349] and (iii) a judgment from that court is enforceable only if the defendant has assets there (though, subject to certain criteria, it could be afforded recognition and enforcement elsewhere too). A defendant may still complain about the hassles of defending abroad, such as instructing foreign lawyers and preparing for a foreign trial, which impose a sufficient burden on the defendant even if the plaintiff's remedy in the foreign country is limited. Nevertheless, the option of suing in the place of damage must remain, as without it victims would be disadvantaged.

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[349] Though in cross-border defamation cases even a suit that is limited to local damage is bad enough for defendants if the suit is in England: Vick & Macpherson.

Case examples:

(i) A gives financial advice on a website, and sends a mass of emails ('spam'), encouraging investors to buy shares in company X. B accesses the website, reads the advertisement, and buys the shares. C receives the email and buys the shares. Unbeknownst to B or C, A owns many shares in X; A waits for the share price to rise and then sells them for a profit. When A sells the shares, the price drops and B's and C's investments fall in value. B and C sue A for misrepresentation by false advertising. The wrong, in relation to B, is committed in the place where A uploaded the advertisement to the website. The wrong, in relation to C, is committed in the place where A sent the emails. In respect of each victim, the place of damage is where the victim relied on the advertisement and acted upon it by purchasing the shares.

(ii) A, in State X, sends B, in State Y, an email under the guise of B's bank, asking B to respond with his internet banking details ('phishing'). B complies unwittingly and A uses the details to impersonate B ('identity theft'), access B's account in State Z and to withdraw funds from it. B sues A in deceit and for invasion of privacy by appropriating B's name or likeness and misappropriation. The 'act' was committed by A in State X. The wrong, in substance, may be regarded as being committed in State Y, as in that place B received A's email and responded with the account details, while the only element which occurred in State X was A's sending of the original email. The place of damage to B's economic interests is State Z, where B's account is located (as in this case B does not suffer any loss by simply receiving A's email).

(iii) A uses photos of B, without B's permission, to promote A's product in an online advertisement. B sues A for invasion of privacy by intrusion upon seclusion. The wrong is committed in the place where A uploaded the photos. The place of damage is the location of B at the time when the advertisement is viewed by the public (ie internet users), as that represents the intrusion on his personality.

(iv) A uses the internet to gain access to B's computer (eg by 'hacking', 'spyware', 'web tracking', 'web bugs', 'trojan horse'), discovers the confidential source code to B's program and, without authority, retrieves and places it on a website. B sues A for trespass to chattels ('cybertrespass'), breach of confidence, copyright infringement and invasion of privacy by publicizing private facts. In relation to trespass, the wrong is committed in the place where A accessed the internet and the places of damage to B are where B's computer was located and where the data were stored. In relation to breach of confidence, copyright infringement, and invasion of privacy, the wrongs are committed where A uploaded the source code and the places of damage to B are where B lost sales of his program by reason of the disclosure of the source code.

(v) A disseminates a virus in the form of a 'botnet' (malicious code program) by email. B receives the email and as soon as he opens it, his computer is infected and is disabled. B brings a proceeding against A in relation to the 'denial of service attack' under the relevant legislation, which identifies this as an offence but permits the bringing of civil claims. The wrong is committed in the place where A sent the email. The place of damage is where B's computer was located on receipt.

(vi) A repeatedly sends B hateful and threatening emails ('cyberstalking' or 'email flaming'). B sues A in various torts (eg assault, intimidation). The wrong is committed in the place where A sent the emails. Alternatively the court may regard B's receipt of the threats as being the substance of the wrong, so as to localize the wrong at the place of receipt. The place of damage is where B received and opened the emails.

As defamation and intellectual property wrongs are discussed in later chapters, case examples involving those wrongs are found in those chapters.

5 JURISDICTION TO GRANT INJUNCTIONS

A court which has jurisdiction over a defendant who is served when present in the territory (in the common law context) or who is domiciled in the territory (in the European context) can grant an injunction against the defendant regardless of the extraterritorial operation of the order.[350] An example in the context of wrongs on the internet is *New Zealand Post Ltd v Leng*[351] (***"NZ Post"***) where the New Zealand court granted a universal injunction against a defendant served in New Zealand, which required him to delete the words 'nz post' from any website which he operated. In determining whether an injunction should be granted, the court decided that the plaintiff's goodwill in New Zealand was sufficiently significant to justify an injunction framed without a geographic restriction, which inevitably had a global effect.[352] If the local defendant's actions would cause harm only in a certain territory, the court may try to limit the scope of the injunction to that territory, though this may make little sense in the context of a website.[353] The topic of injunctions against foreign defendants is more complex.

First, let us consider cases where the court has personal jurisdiction over a foreign defendant, in cases **other than wrongs** (ie by reason of a ground of service abroad or special jurisdiction other than one relating to 'torts' or 'damage'). So for example, a court in an EU Member State may have jurisdiction over a defendant domiciled in another Member State where the first State was the place of performance of a contractual

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[350] *Attorney-General for England and Wales v Tomlinson* [1999] 3 NZLR 722 (NZHC) 730.
[351] [1999] 3 NZLR 219 (NZHC).
[352] Cf G Austin 'Internet domain names, jurisdiction and the territorial nature of goodwill' (1999) NZBLQ 85.
[353] A New Zealand court enjoined New Zealand defendants from using a particular domain name in UK and Europe, regardless of the practical difficulty of blocking access to the website by users in those territories: *Containerlift Services v Maxwell Rotors Ltd (No 2)* (2004) 58 IPR 667 (NZHC) [14]–[15], [17], [22].

obligation.[354] Or a court may have jurisdiction over a defendant served abroad where the proceeding relates to a contract which stipulates a choice of that court's law.[355] In such cases, the court, having jurisdiction, can grant any remedy which its law permits (eg injunction to prevent a breach of contract). The defendant is within the reach of, and amenable to, the process of the court.[356] There is no reason why the court cannot grant an injunction against the defendant even if the injunction seeks to regulate conduct abroad. The traditional jurisdiction for granting anti-suit injunctions falls within this category, restraining a defendant over whom the court has jurisdiction from commencing or continuing to prosecute proceedings in a foreign court which are vexatious or oppressive.[357] While the court has jurisdiction to grant the extraterritorial injunction, in determining whether to exercise jurisdiction (the *forum (non) conveniens* discretion in the context of service abroad) the court may take into account its inability to monitor compliance with the injunction abroad.

Next, let us consider cases where the exorbitant jurisdiction rules for **wrongs** are invoked. Where, through the internet, a wrong is **committed in** a common law State, that State's courts have jurisdiction over the foreign defendant through the service abroad provisions. The same is true where a causal event occurs in an EU/EFTA State for the purposes of the special jurisdiction provisions. As the defendant is within the reach of the court, the court can restrain further wrongs being committed or caused,[358] regardless of

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[354] Judgments Regulation art 5(1).
[355] Eg CPR r 6.20(5)(c).
[356] *Kerr on Injunctions* (6th edn Sweet & Maxwell London 1927) 11; S Gee *Commercial Injunctions* (5th edn Sweet & Maxwell London 2004) [6.006]–[6.007]; *National Australia Bank Ltd v Dessau* [1998] VR 521 (FullCt) 522.
[357] *BAS Capital Funding Corp v Medfinco Ltd* [2004] 1 Lloyd's Rep 652 [202] (Ch).
[358] In some cases the court may be prepared to grant an injunction to indicate its disapproval of a past wrong and not necessarily to prevent future wrongs, eg *Chen* (n 290).

where the effects of the injunction will be felt.[359] Where a wrong (or causal event) has not yet been committed (or occurred) but is **anticipated or threatened in** a State, that State's courts have jurisdiction[360] to grant an injunction to prevent the conduct on the internet (respectively under the service abroad provisions[361] or under the special jurisdiction provisions), regardless of the operation of the injunction beyond that State's borders.[362] Such extraterritorial reach is uncontroversial. This includes cases of defamation where, for the purposes of service abroad, the tort is committed in the place where the plaintiff's reputation is harmed.[363]

The most complex set of circumstances arise where a wrong has not yet been committed or caused, but is **anticipated or threatened to be committed or caused outside** the State and result in **damage** in the State or in various places including the State. We must analyse separately whether the court has jurisdiction to grant an injunction to prevent damage, and the territorial ambit of the injunction. Traditionally, courts are reluctant to grant injunctions based on damage or threatened damage in the State,[364] and frequently they deny any jurisdiction to restrain foreigners from committing

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[359] *Re Burlands Trade Mark* (1889) 41 ChD 542; *Humane Society Intl Inc v Kyodo Senpakur Kaisha Ltd* [2006] FCAFC 116 [43].

[360] The Judgments Regulation art 5(3) wording is 'occurred or may occur'. While 'or may occur' does not appear in art 5(3) of the conventions, that provision has been interpreted as permitting a court to enjoin conduct. The service abroad provisions usually refer to damage 'suffered' or 'sustained', yet there is a strong argument that the use of the past tense does not preclude jurisdiction in respect of damage which is likely to be suffered or sustained in future; it would serve no purpose to require the plaintiff to wait until damage materialized before bringing his claim. See further the cases referred to in Briggs & Rees [4.43] fn 499.

[361] Eg CPR r 6.20(2). So an English court could grant an injunction restraining a Scottish defendant from infringing an English plaintiff's trade marks: *Re Burlands* (n 359).

[362] *British Telecommunications v One in a Million Ltd* [1999] 1 WLR 903 (CA); *Oggi Advertising Ltd v McKenzie* [1999] 1 NZLR 631 (NZHC); *NZ Post* (n 351); *Telecom Corp of New Zealand v Yellow Web Ltd* (unreported NZHC Potter J 14 April 1999); *Bell Actimedia Inc v Puzo* (1999) 88 ACWS (3d) 1073 [50] (FedCtTDiv).

[363] Eg *Dunlop Rubber Co Ltd v Dunlop* [1921] AC 367 (HL); *Tozier* (n 113). See further below 248.

[364] *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 (CA) 368–9; *Barrick Gold Corp v Lopehandia* (2004) 239 DLR (4th) 577 (OntCA) [73].

acts abroad.[365] Yet, in my submission, jurisdiction to grant such injunctions should be, and is, necessarily implied into the damage ground of service abroad or the injury limb of the special jurisdiction provisions respectively. So long as the court has subject-matter jurisdiction,[366] it may grant an injunction. There must be some anticipated potential damage in the court's territory[367] from accessing, not merely anticipated accessibility of, the foreign-operated website.[368] The defendant's residence or domicile abroad should not be regarded as a bar to granting the injunction, as his failure to comply with the injunction may result in the sequestration of his assets within the jurisdiction, and the onus is on the defendant to show that he has no assets within the jurisdiction.[369] In a recent case, an Australian court asked to grant permission to serve abroad did not see any problem with a claim for injunctive relief where the defendants' foreign conduct on the internet was intended, and likely, to damage the plaintiffs.[370]

An injunction which disables the defendant's acts with unlimited ambit would have an extraterritorial effect which may be unwarranted. In my submission, an injunction based on the damage ground or the injury limb must be limited geographically to the court's territory.[371] The court's jurisdiction should be limited to an injunction preventing loss within the court's borders. The *Shevill* limitation, which applies to claims in

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[365] *Badische Anilin und Soda Fabrik v Henry Johnson & Co* [1897] 2 Ch 322 (CA) 345, on appeal [1898] AC 200 (HL) 203.

[366] There is no subject-matter jurisdiction in relation to the validity or registration of foreign intellectual property rights (see below 196ff). It is no answer that equity grants the jurisdiction by acting *in personam* (*Penn v Baltimore* (1750) 1 Ves Sen 444) as the absence of subject-matter jurisdiction cannot be cured by personal jurisdiction: Briggs 48. A court may refuse to grant an injunction to restrain a defendant from infringing a foreign intellectual property right: *Plastus Kreativ AB v Minnesota Mining & Manufacturing Co* [1995] RPC 438, 447; *Griggs Group Ltd v Evans* [2005] Ch 153 [132], appeal dismissed on other grounds [2005] EWCA Civ 11.

[367] *'Morocco Bound' Syndicate Ltd v Harris* [1895] 1 Ch 534.

[368] *Playboy* (n 300).

[369] *Hospital for Sick Children (Board of Governors) v Walt Disney Productions Inc* [1968] Ch 52, 69, 71; *Humane Society* (n 359) [15].

[370] *Australian Wool Innovation* (n 282) [30], [32].

[371] *Mecklermedia* (n 175) 55.

damages, extends to injunctions. Any purported extraterritorial reach is beyond the court's jurisdiction and may be disobeyed.

In respect of wrongs committed by traditional means, it is not difficult to frame an injunction with a geographic limitation. For example, the defendant must ensure that any catalogue advertising his product does not mislead consumers in England, or the defendant must not publish his defamatory newspaper article in Australia, or the defendant must not broadcast a copyright work in Singapore.

On the internet, a wrong has no boundaries. Particularly in the context of websites, it is technologically difficult to impose territorial limits on the restraint to conduct.[372] Consider a US website operator who places a misleading advertisement on his website which is accessible around the world. A Singaporean plaintiff accesses the website, relies on it to his detriment, and sues in a Singaporean court in respect of the loss. While it may make sense for a Singaporean court to award damages which are limited to Singapore's territory, it would make little sense for the court to frame an injunction which requires the website operator in Singapore to remove the advertisement from his website. To obey this order, the defendant would need to remove the advertisements from his website altogether, in which case no one around the world could view them. If he ignores the order and retains the advertisements on the website, they will be seen by everyone around the world, including in Singapore. The court may grant an injunction which purports to operate globally but which the foreign defendant may choose to disobey to the extent it

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[372] But it is not altogether impossible: *Speechworks Ltd v Speechworks International Inc* [2000] ScotCS 200 [27]; *Ligue Contre la Racisme et L'Antisemitisme & L'Union des Étudiants Juifs de France v Yahoo! Inc & Yahoo! France* (TGI Paris, 22 mai 2000 et 20 novembre 2000, procédures n° 00/05308, 00/5309). One method of excluding conduct from a particular territory is by geo-filtering, so that the website's server determines the location of the client through his IP address and blocks access to the website if the client is in the territory. Of course, this is not foolproof as it is possible to alter an IP address to show location in a different territory.

operates outside the court's territory. Alternatively the court may decline to grant an injunction, on discretionary grounds, on the basis that it is impossible to frame an injunction which would prevent the precise damage that may be suffered in its territory. By doing so the court allows the wrong to be committed unrestrained. The plaintiff may nevertheless have a remedy in advance of the commission of the wrong, by seeking a universal injunction from the court of the place where the defendant is present or domiciled, or intends to act. The court in that place has jurisdiction to grant an injunction with extraterritorial effect.

Where it has jurisdiction, the court will consider whether to grant an injunction on the merits. Injunctions are, by their nature, discretionary remedies.[373] In exercising its discretion as to whether the grant of an injunction is just and convenient, the court can consider factors that include whether a local injunction would unduly restrain a foreign defendant from engaging in foreign conduct (this might indicate that the grant of an injunction would be 'overreaching'), the significance of his local conduct in relation to the worldwide conduct, and whether the injunction would extend to conduct on the internet that would not infringe laws in other countries.[374] This can be regarded as a test of proportionality, whereby the court would refrain from granting an injunction which is a disproportionate remedy compared with the potential damage.[375] The court may balance the plaintiff's rights which are endangered locally against the overall global conduct of the defendant on the internet, to decide whether an injunction is warranted, regardless of whether foreign laws match local law in the standards they impose on conduct on the

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[373] Gee (n 356) [2.033].
[374] Cf *RCA Manufacturing Co v Whiteman* 114 F 2d 86 (2nd Cir 1940).
[375] Eg WIPO 'Joint recommendation concerning provisions on the protection of marks, and other industrial property rights in signs, on the internet' (Publication 845, 3 October 2001) art 13.

internet.[376] Factors relating to the utility of the injunction are relevant only at the merits stage, and not in the court's jurisdictional inquiry.[377] While dissuading some courts, extraterritorial effect may even encourage US courts to grant an injunction. As one judge commented, an injunction may have a significant impact on foreign websites 'and thus materially advance a substantial [US] governmental purpose'.[378] The US's global influence increases the likelihood of obedience of a US injunction.

In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*,[379] the Australian court found that the defendants authorized internet users to engage in file sharing infringements of copyright and granted an injunction restraining the defendants from authorising 'users to do in Australia any of the infringing acts'. The court was anxious not to make an order which the respondents were unable to obey, or were able to obey only at the unacceptable cost of preventing the sharing of files which do not infringe the plaintiffs' copyright.[380] The court went on to explain that the defendants should be able to modify the file sharing system in a targeted way, so as to protect copyright without unnecessarily intruding on others' freedom of speech and communication, and this could be done by filtering. The court limited the injunction territorially as it had no jurisdiction to prevent external damage. The effectiveness of the territorial limit on the injunction was questionable, particularly in light of the evidence that there is no effective way to limit filters to particular jurisdictions such as Australia.[381]

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[376] Cf PE Geller 'Conflicts of laws in copyright cases: Infringement and ownership issues' 51 J Copyright Society USA 315, 352–3 (2004).
[377] *Helicopter Utilities Pty Ltd v Australian National Airlines Commission* (1963) 80 WN (NSW) 48 (NSWSC) 51; *Humane Society* (n 359) [14].
[378] *Universal City Studios v Reimerdes* 111 F Supp 2d 294 (SDNY 2000) 340; on appeal 273 F 3d 429 (2d Cir 2000).
[379] (2005) 220 ALR 1 (FCA) [521] (on appeal to FullCt).
[380] Ibid [520].
[381] Ibid [283]–[284].

While the current assumption is that ordinarily website access cannot be limited territorially, there is the possibility of prohibiting access to a website from certain geographically-identified IP addresses, though using anonymizers might disguise the territorial location. As technological measures are developed to prohibit access to a website from particular countries, it will become easier for courts to grant injunctions which are limited geographically in respect of websites.

Cases on extraterritorial injunctions are scarce, probably because plaintiffs recognize that foreign defendants may be undeterred by an injunction issued in a place where the defendants neither reside nor own assets. Practical considerations, such as the uncertain effect of the injunction abroad, may dissuade plaintiffs from applying for injunctions. Courts often cite extraterritorial enforceability[382] as a difficulty. Inability to 'enforce' an injunction extraterritorially discourages courts from granting injunctions, and is a relevant factor in exercising the *forum (non) conveniens* discretion. True, it may be futile for a court to find in contempt a person who disobeys an injunction outside its territory.[383] However an injunction, while not 'enforced' as such, may operate extraterritorially by creating a *res judicata*, so that its grant is not futile.[384] This should not involve adapting the injunction with 'academic niceties' to the vagaries of all the potential States concerned.[385] An injunction may be granted against ascertainable though

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[382] *Chen* (n 290) [45]–[61]; *Humane Society* (n 359) [25]. On treatment of foreign injunctions, see below 309ff.

[383] *Reebok Intl Ltd v McLaughlin* 44 F 3d 1387 (9th Cir 1995) 1393. Though a court can find a foreigner in contempt of an injunction if the foreigner engages in prohibited conduct in the court's territory: *Tele-Direct (Publications) v Canadian Business Online Inc* (1998) 83 CPR (3d) 34 (FedCtTrialDiv) [51].

[384] Cf *ACCC v 1Cellnet LLC* [2005] FCA 856 [15]–[16]. See also *Chen* (n 290) [57].

[385] Cf *National Fruit Product Co v Dwinell-Wright Co* 47 F Supp 499 (DCMass 1942) 504.

unnamed defendants.[386] The fear that a defendant will not obey an injunction is not a bar to its grant.[387]

In *Macquarie Bank v Berg*[388] ("***Macquarie***"), the plaintiff sought to enjoin a defamatory website. The court was not prepared to require the foreign defendant to remove material from the website, as the effect would have been to restrain extraterritorial publication, and the court considered that this would be beyond its power. The court feared that once published on the internet, material could be received anywhere and the publisher could not restrict the reach of the publication.[389] This decision has been criticized by commentators.[390] The court had jurisdiction, based on the damage ground of service abroad, to grant an injunction which was limited geographically to the court's territory, but the usefulness of a local injunction against a foreign website operator is doubtful. Nevertheless the court also had jurisdiction, which it disregarded, to grant a universal injunction by reason of the tort committed ground of service abroad. As this was a defamation case, the court should have reasoned that by publication through downloading the relevant wrong is committed in its territory, for the purposes of service abroad.[391] Defamation cases are unique in that the place of damage coincides with the place of the commission of the wrong. So the court had jurisdiction as the injunction would, uncontroversially, restrain local, not foreign, conduct.

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[386] *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 (Ch) [21].
[387] *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (HL) 574; *Humane Society* (n 359) [16].
[388] (1999) AustDefamRep 53,035; [1999] NSWSC 526.
[389] Ibid [11]–[15].
[390] R Garnett 'Are foreign internet infringers beyond the reach of the law?' (2000) 23 UNSWLJ 105, 123; U Kohl 'Defamation on the internet – a duty-free zone after all? *Macquarie Bank v Berg*' (2000) 22 SLRev 119.
[391] Below 249.

That was the conclusion in *Barrick Gold Corp v Lopehandia*.[392] Defamatory statements on a website (operated in another province) causing damage to an Ontarian company were published by a British Columbian resident, and the publications amounted to conduct in Ontario. The court faced a dilemma. Should the court throw up its hands in despair, citing the ineffectiveness of enforcement against internet transmissions around the world, and surrender the role of enjoining offending conduct to the courts in the territory where the originator of the communication is found? Or should the court at least protect against the impugned conduct re-occurring in its own jurisdiction?[393] In the end, the court decided that it had jurisdiction to restrain the defendant's publication in Ontario, and granted an injunction. Although the defendant was foreign, the injunction was nonetheless effective, as it could be 'enforceable' in British Columbia.[394]

There is at least a hint in the judgment that the Ontarian court might grant an injunction to restrain other wrongs which, while not committed in the province, have the potential to result in harm being suffered in Ontario. Such injunction would be limited in ambit to Ontario's territory.

In *Jameel v Dow Jones & Co Inc*,[395] the plaintiff sought to restrain internet publication of certain statements by a US publisher. The English court's view was that publication in England was insignificant, but an injunction may still be justified if there were a threat or a real risk of wider publication.[396] An injunction was rejected as re-publication was unlikely on the facts. The plaintiff did not ask for an injunction that went

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[392] (2004) 239 DLR (4th) 577 (OntCA).
[393] Ibid [75].
[394] Ibid [76]–[77].
[395] [2005] 2 WLR 1614 (CA).
[396] Ibid [74].

beyond England, having accepted a territorial limitation.[397] When the court said that it is unlikely that it would be able, or prepared, to formulate and impose an injunction against repetition of the defamation,[398] the court must have been referring not to its jurisdiction to grant an injunction (which, similarly to *Macquarie*, enabled the court to grant an injunction to prevent the commission of defamation in England) but to the proportionality inquiry at the merits stage, having regard to the fact that an English injunction might unduly restrain the foreign publisher from engaging in foreign conduct.. Courts should recognize their jurisdiction to grant injunctions against foreign wrongdoers in appropriate cases, sometimes with extraterritorial effect.

6 CONCLUSION

The exorbitant jurisdiction rules, based on geographical territories, are difficult to apply in cases of wrongs on the internet. The service abroad provisions relating to wrongs generally consider the place of commission of a wrong (or a wrongful act) and the place of damage. The two should be kept separate. Commission of a wrong focuses on the defendant's wrongful act, while damage focuses on harm to the plaintiff. While able to recover his global loss in the place where the wrong was committed, the plaintiff should be entitled to recover only his loss suffered locally in the place of damage. In the internet context, a wrong is generally committed at the place of uploading onto a website or sending an email, while damage is generally suffered at or subsequent to downloading from a website or receipt of an email. This general principle may be displaced in some cases, depending on analysis of the facts.

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[397] Ibid [72].
[398] Ibid [76].

The special jurisdiction provisions relating to wrongs have been interpreted as comprising two limbs – the causal event limb and the injury limb. There are differences between the service abroad provisions and the special jurisdiction provisions, particularly in the extent to which consequential damage is considered, where the special jurisdiction provisions are less generous. The plaintiff should be able to recover his global loss in the place of the causal event, but should be able to recover only his local loss in the place of damage. In the internet context, the causal event usually occurs at the place of uploading onto a website or sending an email, while damage is generally suffered at or subsequent to downloading from a website or receipt of an email. This is at least a useful starting point for analysing cases.

A court has jurisdiction to grant an injunction to restrain potential conduct where the conduct would be committed in its territory or where damage would be suffered in its territory. In the latter case, the remedy is limited to preventing local losses. However on the internet, a wrong may have no boundaries. At the merits stage, the court would consider the sensibility of granting a local injunction. Technological measures which prohibit access to a website from certain countries will enable courts to grant injunctions that are limited geographically in respect of websites.

CHAPTER C: JUDICIAL DISCRETION IN WHETHER TO EXERCISE JURISDICTION

1 NO DISCRETION UNDER SPECIAL JURISDICTION PROVISIONS

In contrast with service abroad, special jurisdiction brings with it no discretion to decline to exercise jurisdiction in favour of a more appropriate EU/EFTA court.[1] Where the natural forum is a non-EU/EFTA court, in isolated cases courts have exercised a *forum non conveniens* discretion.[2]

The ECJ recently concluded that such discretion is incompatible with the mandatory nature of art 2 of the Judgments Regulation,[3] and this reasoning in relation to general jurisdiction extends to cases where a court has special jurisdiction, including under art 5(3). Any criticisms that the reasoning is inappropriate under art 2 when the court of only one Member State is involved[4] do not apply to art 5(3) as, under that provision, the choice is clearly between two Member States' courts.

The dual causal event and injury limbs under art 5(3) leave open the prospect of widespread liability for wrongs on the internet. Courts may have jurisdiction in any place

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[1] Schlosser Report on the Brussels Convention [1979] OJ C59/71 [78]; *S&W Berisford v New Hampshire Insurance* [1990] 2 QB 631, 644–5; *Arkwright Mutual Insurance v Bryanston* [1990] 2 QB 649, 662–3.
[2] Eg *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72 (CA) 97–8, 103.
[3] Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383 [37]–[46]. Nevertheless the ECJ refused to rule out the existence of a limited discretion and English courts may continue to exercise that discretion in limited cases: E Peel 'Forum non conveniens and European ideals' [2005] LMCLQ 363, 374; A Briggs 'Forum non conveniens and ideal Europeans' [2005] LMCLQ 378, 382.
[4] Peel (n 3) 366; A Briggs 'The death of Harrods: Forum non conveniens and the European court' (2005) 121 LQR 535, 539.

where internet content is accessed and causes damage. There is no *forum non conveniens* discretion to stay a proceeding which has little relevance to the court's territory. The absence of a discretion seems intentional, as it corresponds with the attitude expected of courts in civil law States (which comprise the majority in the EU and EFTA). It seems that the discretionary exercise of jurisdiction would be foreign to European civilian lawyers, who regard the relevant provision conferring jurisdiction as already having struck an appropriate balance between the interests of plaintiff and defendant.[5] The drafters of the European instruments preferred certainty over a search for the most appropriate court. But in wrongs on the internet, certainty becomes uncertainty. For example, where a website misleads consumers around Europe, does it provide the defendant with any certainty to know that he might face suit in the 28 States where the injury limb of art 5(3) could be invoked potentially? Would he not prefer there to be a search for a single appropriate court, even if the determination of which court was appropriate were discretionary?

2 DISCRETION UNDER SERVICE ABROAD PROVISIONS

The exercise of personal jurisdiction under the service abroad provisions is discretionary. The discretion can be applied in deciding either whether to stay proceedings or whether to grant leave to serve abroad.[6] Stays may be sought even by persons served internally (ie within the jurisdiction) on the basis that the case has no connection with the territory.[7]

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[5] G Walter and R Dalsgaard 'The civil law approach' in McLachlan & Nygh 41, 46.
[6] Though usually applied in the context of an application to set aside leave already granted.
[7] Dicey & Morris [11-082].

The discretion is exercised on the basis of the *forum (non) conveniens* principle.[8] In England a local proceeding will be stayed:

> where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.[9]

This formulation, which aims for even-handedness between the parties while respecting international comity, has been adopted in many English common law countries. The discretion comprises two limbs – the 'natural forum' limb and the 'substantial injustice' limb. A defendant seeking a stay must establish that there is a foreign forum available for the trial of the action, which is clearly or distinctly more appropriate than the local court; and if he succeeds in establishing this, the onus shifts to the plaintiff to establish that it would result in substantial injustice to confine him to suing in the foreign forum. Equally, a plaintiff seeking permission to serve abroad (or justifying service that has taken place) must convince the local court that it is the appropriate court for the proceeding; and if he does this, the onus shifts to the defendant to establish that it would result in substantial injustice to require him to defend the proceeding in the local court.

In a tort case, the place where a tort is committed is *prima facie* presumed to be the natural forum, ie the most appropriate forum for the determination of the dispute.[10] This also reflects judicial tendencies[11] to decline to exercise jurisdiction on the sole basis of

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[8] Eg CPR r 6.20(2A). The exercise of the discretion where it would be a breach of contract to sue in the territory is not relevant in wrongs cases.
[9] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) 476.
[10] *The Albaforth* [1984] 2 Lloyd's Rep 91 (CA) 96.
[11] R Garnett, 'Casenote on *Dow Jones & Co Inc v Gutnick*: an adequate response to transnational internet defamation?' (2003) 4 MJIL 196, 202. This also reflects comparative regulatory advantage, ie the forum's court is better placed to apply its law: Richardson & Garnett 75–6.

the ground 'damage suffered in the jurisdiction',[12] but to exercise jurisdiction if the ground is 'wrong committed in the jurisdiction', because a forum in which a wrong is committed is presumed to be the appropriate one.[13] Courts in the place where damage was suffered are more vulnerable to forum shopping by the plaintiff, especially if one considers that the place of commission of the wrong is where the defendant acts, whereas the defendant may have no physical connection at all to the places where damage was suffered.

One cannot enumerate exhaustively the connecting factors taken into account and balanced in a wrongs case to establish what is the appropriate forum. In general they relate largely to procedural matters concerning the parties, the evidence, any parallel proceedings, the law governing the substance of the dispute and the enforceability of judgments.[14] The factors may include other considerations which weigh in favour of one court rather than another court hearing the proceeding. Substantial injustice, on the other hand, examines whether the plaintiff would be unable to have a fair hearing in the foreign court.

By way of comparison, in Australia a more plaintiff-friendly test was adopted for *forum (non) conveniens*. A court declines to exercise jurisdiction only if the local forum is so inappropriate that the continuation of the proceeding would be oppressive and vexatious to the defendant.[15] The party seeking the stay must establish that the Australian

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[12] Eg *Investasia Ltd v Kodansha Co Ltd* [1999] 3 HKC 515; *Reuben v Time Inc* [2003] All ER (D) 166 (CA) [14].

[13] Eg *Dow Jones & Co Inc v Gutnick* (2003) 210 CLR 575 (HCA); *Berezovsky v Michaels* [2000] 1 WLR 1004 (HL); Garnett (n 11) 201–2; *Albaforth* (n 10) 96; *Hyde v Agar* (1998) 45 NSWLR 487 (CA) 516, reversed on other grounds (2000) 201 CLR 552 (HCA).

[14] Collins 231–4.

[15] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 (HCA) 248; *Voth v Manildra Flour Mills* (1990) 171 CLR 538 (HCA). In some states the statutory formulation of *forum (non) conveniens* now requires this expressly, eg VicSCR r 7.05(2)(b).

forum is a clearly inappropriate one for the proceeding. Equally, the party seeking to justify service abroad must show why the Australian court is not a clearly inappropriate forum. Ostensibly this is in order to avoid a comparison between the Australian court and other fora, though some assessment of the foreign court is inevitable.

In Canada, the courts of common law provinces may, in their discretion, exercise jurisdiction where there is some 'real and substantial connection' other than as specifically identified by statute.[16] This is similar to the Canadian Supreme Court's approach to international jurisdiction for the purposes of recognition of foreign judgments,[17] an approach that other common law courts may wish to follow.[18] Moreover, a Canadian court will reject hearing a case which lacks a 'real and substantial connection' with the forum, notwithstanding the satisfaction of one or more of the service abroad provisions.[19] Canadian courts look for connecting factors that resemble the *forum (non) conveniens* factors.[20] For example, in *Easthaven Ltd v Nutrisystem.com Inc*,[21] a dispute between American and Barbadian parties, an Ontarian court declined to exercise jurisdiction as it perceived no real and substantial connection with Canada, let alone with Ontario.

The result of the exercise of the *forum (non) conveniens* discretion should be, in theory, that the court determines one forum where there should be a clear outright adjudication of the dispute. The focus is not on the resolution of the parties' dispute as a whole, but rather on the parts of the dispute which the plaintiff chooses to pursue. This

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[16] Eg Rules of Civil Procedure (Ont) r 17.03(1).
[17] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077.
[18] Below 299–300.
[19] *Burke v NYP Holdings Inc* (2005) 142 ACWS (3d) 589 (BCSC) [26] (on appeal to BCCA).
[20] *Muscutt v Courcelles* (2002) 60 OR (3d) 20 (OntCA).
[21] (2001) 202 DLR (4th) 560 (OntSCJ).

unfortunately means that in some international cases, most notoriously allegations of defamation, a plaintiff can structure his pleadings, confining the claims territorially, so as to show that a particular forum is appropriate.[22] The only weapon available to the defendant is to widen the territorial scope of the dispute in his defence (or any counterclaim) by showing that the dispute is essentially concerned with a different territory or with many territories. This cannot be done in defamation claims, where each publication is a separate tort and the plaintiff is perfectly entitled to sue for publications in a territory of his choice.

For completeness, the natural forum limb which is explored in this chapter forms part of not only the *forum (non) conveniens* test, but also the test for the grant of an anti-suit injunction.

3 EXERCISE OF DISCRETION IN CASES OF WRONGS ON THE INTERNET

This part seeks to formulate some general principles as regards the manner in which the *forum (non) conveniens* discretion ought to be exercised in cases of wrongs committed on the internet. It must be borne in mind that courts have warned against infusing too much law into the exercise of the discretion, and often in practice the exercise of the discretion is a matter of first impression of the trial judge not to be disturbed on appeal.

Although, where a wrong is committed on the internet, it may be difficult to localize some of the matters relevant to the exercise of the court's discretion, the task is not impossible.[23] A court in the place where the wrong was committed is unlikely to find that

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[22] Below 252.
[23] C Gringras *The Laws of the Internet* (2nd edn Butterworths London 2003) 156.

there is some other forum that is more appropriate. It is presumed that the natural forum is where the wrong was committed, which is generally the place where the defendant acted.[24] By bringing proceedings there generally the plaintiff cannot be accused of engaging in forum shopping.

In a place where damage was suffered, but where the wrong was not committed, a court exercising the discretion may well find that there are other more appropriate fora, including the place where the tort was committed, or other places where more significant damage was suffered. It is true that the defendant may have very little connection with the place of damage, or indeed with any other country.[25] But the defendant's personal connection with the forum cannot be given too great an importance in the exercise of discretion. As mentioned above, in relying on the 'damage suffered in the jurisdiction' ground, the claim (other than for an injunction) should relate to damage suffered only in that forum. The *Shevill* limitation would reduce the scope for the plaintiff engaging in forum shopping. It would be an important, though not conclusive, factor for courts of that forum in denying a stay. In addition, the likely application of the law of the place of damage[26] indicates that the exercise of jurisdiction by the courts at the place of damage is appropriate. If there is an alternative forum which is more appropriate than the place where damage was suffered, it is likely to be the place where the wrong was committed (where the claim may extend to worldwide losses), and a stay may be granted in favour of courts there. If there are several parallel proceedings in relation to a single wrong, where each proceeding relates to local damage, the court may sensibly stay a proceeding pending the determination of liability by another court which is first seised. Once

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[24] Above 104.
[25] Gringras (n 23) 155.
[26] Below 165.

liability has been established, the court may discharge the stay and proceed to determine the question of local damage.

The next sections examine whether, and to what extent, internet-specific factors should be taken into account in the exercise of discretion in cases of cross-border wrongs on the internet. So far, this question seems to have received little, if any, judicial attention in England and Australia so it is to US authorities that we must turn.

(a) US Minimum Contacts Test

Although US jurisdictional rules differ somewhat from the service abroad provisions, much can be gained from exploring case law in the US, where internet usage is widespread, and internet law and jurisprudence are most developed. US courts seek to provide fair and just results by conducting a meticulous analysis, evaluation and balancing of facts and interests[27] in a way that is not formalistic.[28] Other courts are likely to be influenced to some extent by the jurisprudence developed in the US courts, though the similarities between the jurisdictional rules in the US and other common law countries should not be overstated.[29] Most US cases address the allocation of jurisdiction between different States of the federation (so-called 'diversity of citizenship cases'), but in theory the same principles must apply in international cases. Practically, in an interstate case there is less at stake than in an international case, especially when the substantive and procedural law that is applied is federal. Although the US Supreme Court warned that great care is exercised when extending US notions of personal

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[27] U Kohl 'Eggs, jurisdiction and the internet' (2002) 51 ICLQ 555, 582.
[28] C McLachlan 'An Overview' in McLachlan & Nygh 1, 16.
[29] Cf R August 'International cyber-jurisdiction: A comparative analysis' 39 ABLJ 531, 553 (2002).

jurisdiction into the international field,[30] lower courts tend to make no distinction between foreign defendants from outside the state and foreign defendants from outside the US altogether.

US courts tend to apply specific tests in cases of wrongs on the internet.[31] These tests were developed in determining whether jurisdiction exists, rather than as part of the doctrine of *forum non conveniens* which forms part of US common law.[32] Nevertheless, in the US the inquiry into the existence of jurisdiction involves an explicit balance of interests, inevitably intruding into whether jurisdiction should be exercised. It is not surprising that parallels have been drawn between the US 'minimum contacts' analysis and the English common law *forum (non) conveniens* discretion.[33] Should the US tests therefore be applied in the exercise of that discretion in cases of wrongs committed on the internet? So far there are no decisions from English or Australian courts which have considered, let alone adopted, the US tests.[34]

In the US, as in other common law countries, adjudicative jurisdiction depends on service of process,[35] an aspect preserved from English law. A defendant may be served when present in the forum.[36] Where authorized by the State's 'long-arm statute',[37] service abroad can be effected on a defendant, whether outside the State or outside the US. Many States' long-arm statutes include a list of grounds for jurisdiction that

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[30] *Asahi Metal Industry Co v Superior Court of California, Solano County* 480 US 102, 115 (1987).
[31] For criticisms of the US courts' internet-specific rules, see: T Nguyen 'Cyberlaw - A survey of personal jurisdiction based on internet activity: A return to tradition' 19 BTLJ 519, 533ff (2004).
[32] *Restatement (Second) of Conflict of Laws* (American Law Institute Publishers St Paul 1971) §84.
[33] Cf *Neufeld v Oz-US Film Productions Pty Ltd* (2002 Cal App Unpub LEXIS 10577) 15.
[34] Though *Zippo* (discussed below 120ff) and targeting have been mentioned (in passing) in several cases.
[35] Am Jur vol 20 *Courts* §103; Am Jur vol 62B *Process* §§4, 12.
[36] Eg *Northern Light Technology Inc v Northern Lights Club* 236 F 3d 57 (1st Cir 2001).
[37] Am Jur vol 62B *Process* §175. The position is similar under federal law: ibid §§170, 177, 302, 303.

resembles the list of grounds in English common law service abroad provisions.[38] Examples in the tort field are: where the defendant commits a tort in the State;[39] where the defendant does or causes any act to be done, or consequences to occur, in the State resulting in an action for tort;[40] and where the defendant commits a tortious act outside the State that causes injury in the State, if he expects or should reasonably expect the act to have consequences in the State and derives substantial revenue from interstate and international commerce.[41] In contrast with *Distillers Co (Biochemicals) Ltd v Thompson*,[42] US courts generally approach the issue of localization of torts by looking at the place of the last element necessary to complete the tort.[43]

US courts' jurisdiction is subject to a unique constitutional requirement. The exercise of jurisdiction under the long-arm statute must satisfy the constitutional guarantee of 'due process'.[44] This requires the claim to have arisen out of sufficient 'minimum contacts' between the defendant and the forum,[45] such that the maintenance of the suit 'does not offend traditional notions of fair play and substantial justice'.[46] Persons should have a fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign. This is said to be satisfied where the defendant has 'purposefully directed' his activities toward residents of the forum or has 'purposefully availed' himself of the privilege of conducting activities in the forum,[47] and the litigation results from

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[38] *Restatement* (n 32) §27(1).
[39] Eg New York Civil Practice Law and Rules §302(a)(2). See generally Am Jur vol 20 *Courts* §108.
[40] Eg Michigan Compiled Laws §600.715(2). See generally *Restatement* (n 31) §36(1).
[41] Eg New York Civil Practice Law and Rules §302(a)(3)(ii); generally *Restatement* (n 31) §37; Am Jur vol 62B *Process* §193.
[42] [1971] AC 458 (PC).
[43] Above 31–2.
[44] Constitution (US) 14th Amendment.
[45] Am Jur vol 20 *Courts* §106.
[46] *International Shoe Co v Washington* 324 US 310 (1945).
[47] DT Rice and J Gladstone 'An assessment of the effects test in determining personal jurisdiction in cyberspace' 58 Business Lawyer 601, 605 (2003).

alleged injuries that arise out of, or relate to, those activities.[48] The minimum contacts test is a flexible test involving a reasonableness standard.[49]

In some States, rather than list the grounds, the long-arm statute provides that the court may exercise jurisdiction to the full extent allowed under the US Constitution,[50] collapsing the jurisdictional inquiry into a single step.

Where the foreign defendant has continuous and systematic general business contacts with the State, there may be general jurisdiction so the defendant may be sued on any claim, even if the contacts are unrelated to the claim.[51] (This is unknown in English common law countries.) Cross-border wrongs committed on the internet are unlikely to give rise to such jurisdiction, especially where a website is the defendant's sole contact with the forum, even if the website is used by forum residents.[52] The standard for general jurisdiction is 'fairly high' and 'approximate[s] physical presence'.[53] The alternative is specific jurisdiction under which the defendant's contacts with the State render him amenable only to a claim related to, or arising out of, those contacts.[54] Where the defendant does not have sufficient contacts with a State, but has enough minimum contacts with the US as a whole, there is an alternative basis for exercising federal personal jurisdiction.[55]

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[48] *Burger King Corp v Rudzewicz* 471 US 462, 472 (1985).
[49] Am Jur vol 62B *Process* §187.
[50] Eg California Code of Civil Procedure §410.10.
[51] *Helicopteros Nacionales de Colombia SA v Hall* 466 US 408, 414 (1984).
[52] *McDonough v Fallon McElligott Inc* 40 USPQ 2d (BNA) 1826 (SDCal 1996); *La Salle National Bank v Viro* 85 F Supp 2d 857 (NDIll 2000) 862.
[53] *Metro-Goldwyn-Mayer Studios v Grokster Ltd* 243 F Supp 2d 1073 (CalDC 2003) 1083–4.
[54] D Steuer 'The shoe fits and the lighter is out of gas: the continuing utility of International Shoe and the misuse and ineffectiveness of Zippo' 74 U Colorado L Rev 319, 325 (2003); *Helicopteros* (n 51) 414.
[55] *Graduate Management Admission Council v Raju* 241 F Supp 589 (EDVa 2003) 596–7.

The purposeful direction or availment analysis shares some common considerations with the inquiry by English and other common law courts as to *forum (non) conveniens*,[56] such as connecting factors and the appropriateness of exercising jurisdiction.[57] The next sections consider the internet-specific tests for purposeful availment developed by US courts,[58] though on occasion the appropriateness of purposeful availment to the online environment has been questioned.[59]

(b) Mere Accessibility

In early cases US courts were satisfied that mere accessibility of a website in the forum amounts to purposeful availment. An analogy was drawn between the placement of material on a website and a continuous advertisement purposefully directed towards residents of a forum.[60] The courts reasoned that if a content-provider interacts with every internet user who accesses the website, this must mean that the content-provider transmits advertising information to all internet users globally, and this must include users in the State. It was not considered necessary to determine whether in fact the website was actually accessed in the State.

Later cases show this reasoning to be defective as it fails to draw a distinction between accessibility of the website to all internet users around the world and actual accessing of the website (ie downloading) by a particular user or group of users. It is

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[56] McLachlan (n 28) 16.
[57] Above 105.
[58] Eg *Compuserve Inc v Patterson* 89 F 3d 1257 (6th Cir 1996) 1263.
[59] RA Rochlin 'Cyberspace, International Shoe and the changing context for personal jurisdiction' 32 Connecticut L Rev 653 (2000); Nguyen (n 30); cf Steuer (n 53).
[60] *Compuserve* (n 58) 1263; *Inset Sys Inc v Instruction Set Inc* 937 F Supp 161 (DConn 1996); *Maritz v Cybergold Inc* 947 F Supp 1328 (EDMo 1996). Indian courts rely on accessibility to assume jurisdiction over domain name disputes: P Duggal *Cyberlaw – The Indian Perspective* (Saakshar New Delhi 2002) 16. In *Casio India Co Ltd v Ashita Tele Systems Pvt Ltd* (2003 (27) PTC 265 (Del)), the Delhi High Court held that the accessibility of a website in Delhi is sufficient to invoke the court's jurisdiction.

only where the defendant's website is accessed by users in the forum that the defendant's conduct can be said to amount to purposeful availment in the forum so that the exercise of jurisdiction is appropriate. Broad assertions of jurisdiction based on accessibility were unnecessary, as a narrower finding of jurisdiction could have been based on the actual accessing (downloading) of the website by users in the forum and the suffering of damage there. Indeed, an assertion of jurisdiction based on mere accessibility of a website might violate the due process requirements of the US Constitution.[61]

Many civilian courts have also made broadbrush statements about accessibility giving rise to jurisdiction. Their willingness to seise jurisdiction in criminal or quasi-criminal proceedings on the basis of website accessibility (eg France,[62] Germany[63] and Italy[64]) may indicate their preparedness to adopt the same approach in civil suits. In civilian EU/EFTA States this attitude has filtered even to the interpretation of art 5(3), indicating a worrying trend,[65] when one considers the ease of mutual enforceability of judgments in that region.

In *Castellblanch SA v Louis Roederer SA*,[66] ("***Castellblanch***") a French plaintiff sued a Spanish defendant for advertising wines under the name 'Cristal' which was the subject of a trade mark. The French court held that the place where damage was

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[61] N Solovay and CK Reed *The Internet and Dispute Resolution* (looseleaf Law Journal Press NY 2004) §5.02.

[62] Accessibility in France of a website auctioning Nazi memorabilia gave the French court criminal competence over the website's Californian host: *Ligue Contre la Racisme et L'Antisemitisme & L'Union des Étudiants Juifs de France v Yahoo! Inc & Yahoo! France* (TGI Paris, 22 mai 2000 et 20 novembre 2000, procédures n° 00/05308, 00/5309).

[63] Accessibility in Germany of a website containing pro-Nazi material gave the German court criminal competence over the defendant, despite the foreign place of uploading: *Public Prosecutor v Töben* (Bundesgerichthof, Urteil vom 12 Dezember 2000, Az: 1 StR 184/00).

[64] Accessibility in Italy of a website containing defamatory material gave the Italian court criminal competence over the defendant, despite the foreign host and place of uploading: *Re Moshe Dulberg* (Cass Italy sez V, 27 dicembre 2000, 4741).

[65] Smith [6-032].

[66] [2004] ILPr 41 (Cassation France).

sustained was France, as the infringing website and advertisement were accessible to French internet users and this meant that the alleged harm to the French company's reputation and goodwill was 'neither virtual nor potential'. Consistently with *Mecklermedia Corp v DC Congress GmbH*,[67] the court looked at the place where the plaintiff's goodwill and reputation were harmed to determine where damage was sustained. But damage was assumed to be sustained from accessibility alone. In my submission, the court's conclusion, that mere accessibility resulted in damage without requiring proof that the website was downloaded and harm was actually suffered, was flawed. A preferable way of achieving the same outcome would be that the accessing of the defendant's website by users in France resulted in damage to goodwill and reputation. Admittedly the distinction is a fine one in the case of internet communications. With more traditional forms of advertisement (eg telephone sales, mailouts) where communication originated abroad, the receipt in France would have been clear. It seems that the plaintiff did not adduce evidence that the website was accessed (downloaded) in France. In contrast, accessibility does not require specific evidence, as websites are *prima facie* inherently accessible in every place in the world that has an internet connection, subject to any registration, subscription or password requirements. If accessibility is the threshold on which the court relies, all that is needed is evidence of a website and of the workings of the internet. From this automatically the court can infer accessibility in any place. Without actual accessing by downloading in France, there could be no damage suffered in France, just the potential for damage. In my submission, mere accessibility should not be enough. The court's conclusion in *Castellblanch* is

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[67] [1998] Ch 40, 48.

worrisome as the French judgment could be enforced throughout EU/EFTA without the enforcing court having an ability to question the basis of jurisdiction.[68]

A later French decision[69] indicates a narrowing of circumstances when a French trade mark is regarded as infringed by a foreign website: there can be no infringement where the products advertised on the website are clearly not available for purchase by French consumers.

A Scottish court, applying art 5(3), based jurisdiction on mere accessibility, yet also required more than a *de minimis* interest in the website by the territory's residents.[70] But rather than posing hypothetical questions about which users would be interested in certain websites, it is evidence of forum residents actually accessing by downloading that should compel the court to find that damage has been suffered and hence to exercise jurisdiction. At least some evidence of accessing should be fairly easy to obtain in time for a hearing on jurisdiction in the early stages of a proceeding. The court would not expect that preliminary evidence to be complete, but only sufficient to show that there is more than mere accessibility in the forum.

While no objection could be taken to the warning on Minnesota's website purporting to assert criminal jurisdiction over non-resident individuals who use the internet 'to cause a result to occur in Minnesota',[71] arguably its Attorney-General exceeded his mandate by filing lawsuits against foreigners in respect of false statements on websites accessible in the State. The Minnesota courts seem to have obliged and for

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[68] Eg Judgments Regulation arts 33, 35, 38, 41.
[69] *Hugo Boss v Cigaretten Fabriken GmbH* (Cassation France, chambre commerciale, 02-18381, 11 janvier 2005).
[70] *Bonnier Media Ltd v Smith* 2003 SC 36 [18]–[20].
[71] 'Developments – Law of Cyberspace' 112 HLR 1574, 1684 (1999).

example, in one action,[72] exercised jurisdiction over a Nevada company alleged to have infringed Minnesota laws by hosting a website which advertised a planned online gambling service, on the basis of the availability of the material to internet users including those in Minnesota. This encouraged Minnesota's Attorney-General to become an internet policeman. But why should jurisdiction be exercised over a foreign operator of a website who places material on the internet without any loss resulting in Minnesota?

Foreign courts that are asked to recognize or enforce judgments are unlikely to react kindly to such assertion of jurisdiction. (In the case of intra-EU/EFTA judgments there may be little they can do to prevent enforcement.) One Canadian example is *Braintech Inc v Kostiuk.*[73] The Canadian defendant had operated a website accessible around the world, including in Texas. In a default judgment, a Texan court found the defendant liable for transmitting and publishing defamatory information about the plaintiff in an internet 'chat room' (bulletin board or discussion group). The plaintiff brought enforcement proceedings in Canada. The Canadian court refused, holding that the Texan court did not have a sufficient basis for exercising *in personam* jurisdiction over the defendant. The availability of the website was a mere transitory, passive presence in cyberspace and did not constitute a real and substantial connection with, or presence in, Texas.

Publishing material on a website requires no deliberate action within the forum. Unlike newspaper, post, radio, television and other media containing advertisements and solicitations, many websites are not directed at a specific geographic area or market. To the contrary, advertising on the internet often targets no-one and everyone in any given

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[72] *State v Granite Grate Resources Inc* 568 NW 2d 715 (MinnApp 1997).
[73] (1999) 171 DLR (4th) 46 (BCCA) [62]–[65].

geographic location.[74] A website is not projected automatically to a user's computer without invitation, but instead the user must take affirmative action ('pull') to access either a passive or interactive website.[75] Although creating a website and permitting anyone to access it may be felt everywhere, without more it is not an act purposefully directed toward the forum.[76] It is inappropriate to look at abstract accessibility of a website in a forum to determine the existence or exercise of jurisdiction. It is only if a website was actually accessed (downloaded) in a forum and damage was suffered there, that the forum's courts may exercise jurisdiction legitimately. Even then the court might decide that the more appropriate forum is the place where the defendant acted by uploading the material to the website, or that there is some other focal point for the publication.[77] Access differs to accessibility. Mere accessibility of the website should not give a court jurisdiction, persuade it to exercise jurisdiction or dissuade it from so doing.

With the sophistication of internet caselaw in the US, focus on accessibility as a basis for the exercise of jurisdiction has proven to be a crude test which was short-lived. Nevertheless, legislatures and regulators frequently seize on accessibility of a website in the territory as sufficient for the application of laws. This can be seen, for example, in statutes which regulate the offers of securities and the provision of financial services,[78]

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[74] *Millennium Enterprises Inc v Millennium Music LP* 33 F Supp 2d 907 (DOre 1999) 914.

[75] Pop-ups appear without being pulled, but although they themselves may be uninvited, they are often part of a requested website. Pop-ups were considered in *Gator.com v LL Bean Inc* 341 F 3d 1072 (9th Cir 2003), which later settled and where a further appeal was dismissed because there was no longer a justiciable controversy 398 F 3d 1125 (9th Cir 2005).

[76] *Bensusan Restaurant Corp v King* 937 F Supp 295 (SDNY 1996) 301, affd 126 F 3d 25 (2d Cir 1997).

[77] Eg in defamation, if the single publication rule is adopted, the court might decide that another forum, which is the more obvious focal point for the publications, should entertain the claim.

[78] Reed [7.2.1].

and in policy statements by regulators administering those statutes.[79] An enterprise that advertises its services to potential customers in the State may be caught by the legislation, on the basis that the legislation aims to protect investors in the State from scams and frivolous offers of securities and financial services around the world. It is questionable whether a State has a legitimate claim to regulate advertisements which are merely accessible in the State but are not actually downloaded, so as to result in damage, in the State.[80] But from the regulator's perspective, the only means of preventing damage by downloading in the State is to regulate the accessible website, or else rely on the cooperation of a law enforcement agency in the State of uploading.[81] Clearly, once downloading has taken place, and damage suffered in a State, that State's regulator's power is invoked.[82] But it is unclear what powers a regulator can exercise in relation to a website prior to its downloading in the regulator's State. An approach that is gaining acceptance among regulators is to concede that where the online conduct is not targeted at the forum's residents no enforcement action will be taken.[83] This reflects the effects

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[79] UK: Financial Services Authority 'Treatment of material on overseas internet and world wide web sites accessible in the UK but not intended for investors in the UK' Guidance 2/98 (1998) [10]; US: Securities and Exchanges Commission 'Interpretation Re: Use of internet web sites to offer securities, solicit securities transactions, or advertise investment services offshore' (23 March 1998) release nos 33-7516, 34-39779, IA-1710, IC-23701, Intl release no 1125; Australia: Australian Securities and Investments Commission, Policy Statement 141 (2000) [141.5]; Canada: Canadian Security Administrators 'Trading securities using the internet and other electronic means' (National Policy 47-201) [2.2](1); this approach reflects the Canadian competition regulator's approach: Competition Bureau 'Staying "on-side" when advertising on-line: A guide to compliance with the *Competition Act* when advertising on the internet' (2001 draft) [5.1].

[80] Reed [7.2.1.3].

[81] Standing Committee of Attorneys General (Australia) 'Unauthorised photographs on the internet and ancillary privacy issues' (Discussion Paper, 2005) [139]–[142].

[82] In a proceeding brought by Australian Securities and Investments Commission against Vanuatu-based website operators, the Federal Court of Australia made orders, by consent, declaring that there were contraventions of Australian legislation by, inter alia, operating a financial business without a licence and making misleading statements: ASIC Press Release 05-302 (5 October 2005).

[83] UK: FSA (n 79) [15]–[17]; US: SEC (n 79) [III.A]; Australia: ASIC (n 79) [141.5]; Canada: CSA (n 79) 2.2(2); International Organization of Securities Commissions 'Report on securities activity on the internet' Report I 1998 [III.A.4], [IV.15]; Report III 2003 [Introd.7].

test.[84] In relation to criminal legislation (which is outside the scope of this paper), there is less flexibility and mere accessibility often results in a prosecution and conviction.[85]

(c) Sliding Scale Test

Since *Zippo Manufacturing Co v Zippo Dot Com Inc*,[86] ("***Zippo***") a strong line of US decisions at the federal appellate level[87] have held that, in determining whether to exercise jurisdiction in cases of wrongs committed through websites, fulfilment of due process should be assessed on a sliding scale (labelled the "***Zippo* continuum**"). *Zippo* was a cybersquatting case. A Pennsylvanian manufacturer of cigarette lighters that owned the registered trade mark 'Zippo' sued a Californian company that had acquired exclusive rights to use domain names with various forms of the name Zippo in them. The judge classified WWW activity into three categories.[88]

(A) The defendant clearly conducts business with residents of the forum over the internet through an 'active website'. The minimum contacts test is satisfied, and jurisdiction can be exercised.

(B) The defendant operates an 'interactive website', which permits the exchange of information between the defendant and users, including users in the forum, but does not involve the actual conduct of business. Further

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[84] Below 126ff.
[85] DS Wall (ed) *Cyberspace Crime* (Ashgate Dartmouth Aldershot 2003); M Hirst *Jurisdiction and the Ambit of the Criminal Law* (OUP Oxford 2003) 184–6; RG Smith, P Grabosky and G Urbas *Cybercriminals on Trial* (CUP Cambridge 2004) 48ff.
[86] 952 F Supp 1119 (WDPa 1997).
[87] In eight circuits: *Toys 'R' Us Inc v Step Two SA* 318 F 3d 446 (3rd Cir 2003) 452–4; *ALS Scan Inc v Digital Service Consultants Inc* 293 F 3d 707 (4th Cir 2002) 713–14; *Mink v AAAA Development LLC* 190 F 3d 333 (5th Cir 1999); *Neogen Corp v Neo Gen Screening Inc* 282 F 3d 883 (6th Cir 2002) 890; *Lakin v Prudential Securities Co* 348 F 3d 704 (8th Cir 2003) 710–12; *Cybersell Inc v Cybersell Inc* 130 F 3d 414 (9th Cir 1997); *Intercon Inc v Bell Atlantic Internet Solutions Inc* 205 F 3d 1244 (10th Cir 2000); *Gorman v Ameritrade Holding Corp* 293 F 3d 506 (DC Cir 2002) 513.
[88] *Zippo* (n 86) 1124.

analysis of the 'level of interactivity and commercial nature of the exchange of information that occurs on the website' is required before the jurisdiction question can be answered.

(C) The defendant merely makes information available on a 'passive website' which can be accessed by users in the forum but does not permit an exchange of information. The minimum contacts test is not satisfied, and jurisdiction cannot be exercised.

The Californian defendant's conduct fell within the first category, because it provided passwords to its website to 3000 Pennsylvanian residents and arranged internet access so that the Pennsylvanian residents could access the website.

The sliding scale test has been favoured by many US courts and featured in the ABA Cyberspace Project.[89] Should this test be considered as a factor in exercising the *forum (non) conveniens* discretion? It is submitted that the sliding scale test is not relevant to either limb of the discretion in wrongs cases. If a website was accessed in a particular forum and damage was suffered there, then, regardless of the website's quality, the courts of that forum have jurisdiction, albeit limited to local loss.[90] A court cannot determine the appropriateness of the exercise of jurisdiction simply by assessing whether a website is passive or interactive as regards forum residents.[91] Even if the website is passive, the fact is that its accessing caused damage in the forum.

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[89] ABA Report 1820–1, 1851–5.
[90] Above 80.
[91] *Hy Cite Corp v Badbusinessbureau.com LLC* 297 F Supp 2d 1154 (WDWis) 1160.

Not only is the sliding scale test irrelevant, but it is becoming increasingly difficult to apply. The *Zippo* continuum has been criticized (even branded 'obsolete'[92]) as providing little useful guidance for courts wrestling with jurisdictional problems based on internet activity. It is concerned only with websites, not other internet applications, although attempts have been made to apply it to newsgroup and mailing list cases.[93] It may be helpful with websites at the far ends of the spectrum, but provides little assistance with cases in the middle of the spectrum, resulting in incomplete analysis.[94] The 'interactive website' category of *Zippo* is the most difficult to apply, requiring an assessment of 'the level of interactivity and commercial nature of the exchange of information'. Websites are becoming increasingly sophisticated and over time there may be changing notions of what is regarded as interactive and what type of information is exchanged. At a basic level, all websites are interactive, as their use transmits packets of data back and forth between computers.[95] The *Zippo* test essentially allows courts to decide cases according to public policy,[96] being the court's perception of whether a defendant deserves to face suit in the forum.

The cases applying the *Zippo* continuum often examine arbitrary factors to determine a website's interactivity or lack of it. Courts are concerned to place limits[97]

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[92] RA Bales and S van Wert 'Internet web site jurisdiction' 20 John Marshall J Computer & Information L 21, 49 (2001).
[93] Below 125.
[94] Steuer (n 54) 321, 338–41 (citing *Dagesse v Plant Hotel NV* 113 F Supp 211, 222 (DNH 2000)). See also M Geist 'Is there a there there? Toward greater certainty for internet jurisdiction' 16 BTLJ 1345, 1375–81 (2001); cf *Stomp Inc v Neato LLC* 61 F Supp 2d 1074 (CDCal 1999) 1078.
[95] B Daughdrill 'Personal jurisdiction and the internet: Waiting for the other Shoe to drop on First Amendment concerns' 51 Mercer L Rev 919, 938 (2000).
[96] One way of viewing the policy question is 'who should have to absorb the cost of regulatory spillover effects?'. Regulating spillover effects refers to a situation where many states seek to regulate the same conduct, encroaching on each other: V Mayer-Schönberger 'The shape of governance: analyzing the world of internet regulation' 43 Virginia J Intl L 605, 665 (2003).
[97] *American Info Corp v American Infometrics Inc* 139 F Supp 2d 696 (DMd 2001) 702–3.

and require a further connection between the defendant and the forum.[98] The typical connecting factors are the ability to contact the website-owner and conduct transactions through the website, and whether the website advertises products. In fact, early US cases regarded all website advertising as amounting to purposeful availment. This included offering goods or services for sale to residents of the forum,[99] or directing advertising activities toward the forum and soliciting customers there on a continuing basis.[100]

A comparison has been made between an interactive website that generates sales and taking telephone or mail orders and shipping products, with the consequence that a seller seeking to avoid jurisdiction in a particular forum has the opportunity to refuse to satisfy orders from that place.[101] However this overlooks the major benefits of e-commerce over telephone or mail orders, such as the wide exposure of a website and the automation of online sales. The policy of the law should not impede these.

More recent cases indicate that maintenance of a website alone is not a sufficient form of advertising amounting to purposeful direction,[102] unless the website is designed to solicit business in a manner that exceeds traditional notions of advertising.[103] This gives little guidance. By placing material on a website, a business inevitably hopes to advertise its product to as wide an audience as it can possibly attract, to encourage potential customers to make contact, regardless of their place of residence, and to sell as many products as possible. Why should it make a difference how business is touted or how sales are concluded? If a wrong is committed against a resident of a forum and

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[98] *Starmedia Network Inc v Star Media Inc* 64 USPQ 2d (BNA) 1791 (SDNY 2001).
[99] *Compuserve* (n 58) 1263.
[100] *Inset* (n 60); *Zippo* (n 86).
[101] S Sherry 'Haste makes waste: Congress and the common law in cyberspace' 55 Vanderbilt L Rev 309, 373 (2002).
[102] *Millennium* (n 74) 914.
[103] *Miecvkowski v Masco Corp* 997 F Supp 782 (EDTex 1998).

damage is suffered there, that forum's courts should be able to exercise jurisdiction in respect of the claim for that damage regardless of the means of generating business. Also, a wrongdoer with a website that is not business-oriented at all may nevertheless cause great harm to users.

In respect of websites in the middle category of the *Zippo* continuum which advertise or promote a product, it is unrealistic to draw a line between, on the one hand, websites which are of a high-quality, commerciality and user-friendliness,[104] allowing the operator to be contacted and sales to be concluded online,[105] thus labelled 'interactive', and on the other hand, websites which are of low-quality, where sales are not concluded online but rather through other means, thus labelled 'insufficiently active'.[106] They all have the same goal – increased exposure to existing and potential customers. Subject to the discussion on the effects test,[107] it is unrealistic to argue that a website which advertises a product is intended to interact with the residents of one place more than other places.[108] Interactivity of a website does not mean that it is directed at a particular forum or persons.[109] It should not matter, and it is difficult to determine objectively, whether business is conducted on the website,[110] whether the website is commercial,[111] or whether

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[104] *GTE New Media Services Inc v Ameritech Corp* 21 F Supp 2d 27 (DDC 1998); *Tech Heads Inc v Desktop Service Center Inc* 105 F Supp 2d 1142 (DOre 2000).
[105] *Hurley v Cancun Playa Oasis International Hotels* 1999 US Dist LEXIS 13716 (EDPa); *Hasbro Inc v Clue Computing Inc* 994 F Supp 34 (D Mass 1997) 43; *Vitullo v Velocity Powerboats Inc* 1998 US Dist LEXIS 7120 (NDIll); *Carrot Bunch Co Inc v Computer Friends Inc* 218 F Supp 2d 820 (NDTex 2002) 826.
[106] *Scherr v Abrahams* 1998 US Dist LEXIS 8531 (NDIll); *Ty Inc v Clark* 2000 US Dist LEXIS 383 (NDIll); *Starmedia* (n 98); *Morantz v Hang & Shine Ultrasonics Inc* 79 F Supp 2d 537 (EDPa 1999); *Desktop Technologies Inc v Colorworks Reproduction & Designs Inc* 1999 US Dist LEXIS 1934 (EDPa); *Grutkowski v Steamboat Lake Guides & Outfitters Inc* 1998 US Dist LEXIS 20255 (EDPa); *Mink* (n 87).
[107] Below 126ff.
[108] *Neogen* (n 87); *Coolsavings.com Inc v IQ Commerce Corp* 53 F Supp 2d 1000 (NDIll 1999); *Edberg v Neogen* 17 F Supp 2d 104 (DConn 1998); *Hurley* (n 105).
[109] *GTE New Media Services Inc v Bellsouth Corp* 199 F 3d 1343 (DC Cir 2000) 1349.
[110] *Digital Equipment Corp v AltaVista Technology Inc* 960 F Supp 456 (DMass 1997); *Zippo* (n 86); *Park Inns Intl v Pacific Plaza Hotels* 5 F Supp 2d 762 (DAriz 1998); *Tech Heads* (n 104); *American Network Inc v Access America* 975 F Supp 494 (SDNY 1997); *Gary Scott Intl v Baroudi* 981 F Supp 714 (DMass 1997).
[111] TD Leitstein 'A solution for personal jurisdiction on the internet' 59 Louisiana L Rev 565, 585 (1999).

income is derived from the website.[112] Similarly, it is anomalous to regard some newsgroups and mailing lists as analogous to passive websites,[113] while regarding online bulletin boards, whereby any user may participate in an open forum by sending and receiving postings, as interactive.[114]

Where the sliding scale test could have some role to play, in relation to websites on one or other extreme of the sliding scale, that test has been eclipsed by the effects test.[115] Where the website is 'interactive' in the sense that it targets residents of the forum, this would dissuade a court from staying the proceeding. However it is difficult to prove that a website (as opposed to an email) targeted a particular place. Conversely, where a website is merely 'passive' in the sense that it is an advertisement accessible to whomever may find it,[116] that should not be a sufficient basis for exercising jurisdiction.[117]

US courts now recognize the need for 'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum.[118] That 'something more' might be the intention to direct activities or cause harm to a forum's citizen;[119] use of a server in the forum;[120] or contacting forum residents by email.[121] So the *Zippo* continuum has now blended into the effects test. Where there

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[112] *Starmedia* (n 98) [12]; Rochlin (n 59) 671–2.
[113] *Barrett v Catacombs Press* 44 F Supp 2d 717 (EDPa 1999) 728.
[114] *Revell v Lidov* 317 F 3d 467 (5th Cir 2002) 472.
[115] Below 126ff.
[116] *Bensusan* (n 76); *Enterprise Rent-A-Car Co v Stowell* 137 F Supp 2d 1151 (EDMo 2001); *ALS Scan v Wilkins* 142 F Supp 2d 703 (DMd 2001); *Cybersell* (n 87); *Caterpillar Inc v Miskin Scraper Works Inc* 256 F Supp 2d 849 (DIll 2003); *Millennium* (n 74) 921.
[117] Above 113.
[118] *Panavision International LP v Toeppen* 141 F 3d 1316 (9th Cir 1998); applied in Canada: *Easthaven* (n 21) 569–71.
[119] *Panavision* (ibid); *Telco Communications v An Apple A Day* 977 F Supp 404 (EDVa 1997); *Millennium* (n 74) 921–2.
[120] *Compuserve* (n 58) 1263; *Intercon* (n 87).
[121] *Maritz* (n 60) 1333; *Cody v Ward* 954 F Supp 43 (DConn 1997).

is extensive advertising on the website targeted particularly at forum residents, the website is at an extreme of the sliding scale, so the court is less likely to stay the proceeding. Equally, when a defendant sends an email to the far-reaches of the earth for pecuniary gain, he does so at his own peril and cannot subsequently claim that it is not reasonably foreseeable that he will be 'haled into court'[122] in a distant jurisdiction to answer for the ramifications of that solicitation.[123]

(d) Effects Test and Reasonable Steps

When applying the US minimum contacts analysis to intentional tort cases, an important consideration is the effect on the forum of the defendant's conduct. This doctrine (the **'effects test'**) was formulated in a US Supreme Court decision in the days when the internet was still in its infancy, and virtually unknown. In *Calder v Jones*,[124] (***"Calder"***) Floridian journalists wrote and edited a newspaper article that defamed a Californian actress. The court regarded California as the focal point both of the story and the harm suffered. The defendants' actions were aimed at California as they knew that the brunt of the injury would be suffered there. The court formulated a general principle that personal jurisdiction over a defendant is proper, ie minimum contacts are established, when the defendant's intentional tortious actions outside the forum expressly aimed at the forum have the effect of causing harm to the plaintiff in the forum, where the defendant knew or should have reasonably foreseen the likelihood of the plaintiff suffering harm. The

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[122] An expression US judges use frequently.
[123] *Internet Doorway Inc v Parks* 138 F Supp 2d 773 (SDMiss 2001) 779–80.
[124] 465 US 783 (1984).

greater the targeting or express aiming[125] at the forum, the more likely a finding of jurisdiction. The effects test assesses the degree of the defendant's targeting of a forum.

The effects test has found favour in the ABA Cyberspace Project[126] and has been applied in US cases to the online environment,[127] including a series of appellate decisions.[128] Courts exercised jurisdiction over a foreign cybersquatter who adopted as its domain name a word trade marked by a resident of the forum, knowing that, by forcing that person to pay settlement money[129] or by creating a high likelihood of confusion,[130] his actions would cause the plaintiff harm in the forum. Jurisdiction has been exercised over defendants who intentionally sent defamatory emails to residents in the forum,[131] or who placed defamatory postings on bulletin boards, with the actual[132] or constructive[133] intention of causing harm to the plaintiff in the forum by dissemination of the messages. In defamation cases, courts often assume that the target forum of a defamatory website posting is the place of the victim's residence.[134] Defendants who operated a website that rated a forum's medical service-providers and ranked the plaintiff poorly, harming its reputation in the forum, were held to be subject to the forum's

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[125] Cf C Aciman and D Vo-Verde in 'Refining the Zippo test: new trends on personal jurisdiction for international activities' 19 The Computer & Internet Lawyer 16 (2002).
[126] ABA Report 1820–1, 1827–9, 1841–5.
[127] Rice and Gladstone (n 47) 602.
[128] In five circuits: *Remick v Manfredy* 238 F 3d 248 (3rd Cir 2001) 258; *ALS Scan Inc v Digital Service Consultants Inc* 293 F 3d 707 (4th Cir 2002) 714–15; *Young v New Haven Advocate* 315 F 3d 256 (4th Cir 2002) 262–4; *Carefirst of Maryland Inc v Carefirst Pregnancy Centers Inc* 334 F 3d 390 (4th Cir 2003) 397–402; *Revell* (n 114) 472–6; *The Cadle Co v Schlichtmann* 2005 US App Lexis 2097 (6th Cir 2005) [9]–[13]; *Cybersell* (n 87); *Panavision* (n 118) 1321–2; *Northwest Healthcare Alliance Inc v Healthgrades.com Inc* 50 Fed Appx 339 (9th Cir 2002) 340–1; *Yahoo! Inc v La Ligue Contre la Racisme et l'Antisemitisme* 169 F Supp 2d 1181, 1194 (NDCal 2001); reversed, on other grounds: 379 F 3d 1120 (9th Cir 2004) 1124–5.
[129] *Panavision* (n 118) 1321–2; *Quokka Sports Inc v Cup Intl Ltd* 99 F Supp 2d 1105 (NDCal 1999); *Euromarket Designs Inc v Crate & Barrel Ltd* 96 F Supp 2d 824 (NDIll 2000); *Macconell v Schwamm* 2000 US Dist LEXIS 13850 (SDCal 2000).
[130] *Ford Motor Co v Great Domains Inc* 141 F Supp 2d 763 (EDMich 2001).
[131] *EDIAS Software International LLC v BASIA International Ltd* 947 F Supp 413 (DAriz 1996).
[132] *Blakey v Continental Airlines Inc* 751 A 2d 538 (NJSC 2000).
[133] *Telco* (n 119).
[134] *English Sports Betting Inc v Tostigan* 2002 US Dist Lexis 5012 (EDPa 2002).

jurisdiction, as the effects of their external conduct were felt in the forum.[135] In other US cases, a defendant directing unsolicited email advertising of its products (spamming) to an ISP in the forum,[136] and a defendant hacking into a plaintiff's server located in the forum in order to retrieve confidential information,[137] were each held to have targeted the forum. Also in Canada targeting a forum constitutes a real and substantial connection with the forum, by application of the effects test.[138]

The question whether the infringement of intellectual property rights in films or sound recordings amounts to targeting California has proven contentious. California perceives that it bears the brunt of injuries of any wrongs relating to the global entertainment industry. In *Pavlovich v Superior Court*,[139] there was an initial finding that publication outside California of trade secrets of a film copyright enforcement society amounted to targeting California, a state commonly known as the centre of the motion picture and information technology industries. This was reversed by a sharply-divided court.[140] Later, in *Metro-Goldwyn-Mayer Studios v Grokster Ltd*,[141] a copyright infringement proceeding relating to the facilitation of file-sharing, the court found that a foreign defendant targeted California as he was aware that many, if not most, music and video copyrights are owned by Californian companies.

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[135] *Northwest Healthcare Alliance Inc v Healthgrades.com Inc* 50 Fed Appx 339 (9th Cir 2002), cert den 538 US 999 (2002); cf *Hy Cite* (n 91).
[136] *Verizon Online Services v Ralsky* 203 F Supp 2d 601 (EDVa 2002).
[137] *DC Micro Development Inc v Lange* 246 F Supp 2d 705 (WDKy 2003) 712.
[138] J-G Castel and J Walker *Canadian Conflict of Laws* (5th edn Butterworths Toronto 2003) [11-32], cited in *Bangoura v Washington Post* (2004) 235 DLR (4th) 564 (OntSCJ) 570, a point which the appellate court did not consider necessary to address: (2005) 258 DLR (4th) 341 (Ont CA) [48]–[49].
[139] 109 Cal Rptr 2d 909 (CalApp 2001) 916.
[140] 127 Cal Rptr 2d 329 (CalSC 2002).
[141] 243 F Supp 2d 1073 (CalDC 2003) 1089–90 (the substantive proceeding was appealed to the Supreme Court: 125 S Ct 2764 (2005)); see also *Panavision* (n 118) 1321.

The due process requirement is easily satisfied through the effects test where a foreign defendant contacted the plaintiff in the forum by electronic means,[142] most notably, sending an email. But simply operating a website will not satisfy the effects test. Something is required beyond mere posting and accessibility. There must be some additional activity or wrongdoing that clearly shows the defendant expressly aimed his activity at the forum State.[143] It is insufficient if a defamatory article is placed on a website accessible in a forum or a famous trade mark is used in a website's domain name. Hence, a newspaper that targeted a local audience was held not to have targeted or focused on a foreign audience;[144] though in a globalized world where newspapers aim to increase their readership from anywhere, it is artificial to draw the line and determine the geographic focus of an online article.[145] Similarly, where a website has a strongly local character, it is unlikely to target other places.[146] Often it is impossible to show that a website is aimed expressly at a particular forum.[147] The plaintiff would rarely have sufficient evidence of the defendant's actual or likely state of mind in operating the website. Evidence of the mere making available of information online accessible to users does not establish a purposeful activity on the part of the operator, and if the plaintiff can show no more then jurisdiction will not be exercised.[148] The court assesses the level and nature of the exchange of information between the foreign defendant and the plaintiff located in the forum. But even if an activity is not directed at a particular state of the US,

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[142] *Cody* (n 121); *Resuscitation Technologies Inc v Continental Health Care Corp* 1997 US Dist LEXIS 3523 (SDInd); *EDIAS* (n 131); *Boudreau v Scitex Corp* 1992 US Dist LEXIS 9629 (DMass); *Internet Doorway* (n 123).
[143] MR Osinski 'Personal jurisdiction and internet torts' 80 U Detroit Mercy L Rev 249, 267 (2003) citing *Ford* (n 130).
[144] *Young* (n 128) 263–4.
[145] Cf *Revell* (n 114) 475–6.
[146] *Carefirst* (n 128) 401.
[147] *Griffis v Luban* 646 NW 2d 527 (MinnApp 2002) 535–6.
[148] *GTE* (n 109).

if it is directed at the US as a whole this may suffice.[149] The effects test is said to produce greater certainty of outcome in jurisdictional matters than the *Zippo* test,[150] though the two tests do not necessarily conflict[151] but may overlap.

Two forms of the effects test seem to have developed: a 'strict effects test' and a 'soft effects test'.[152] The strict effects test is satisfied where the defendant's conduct has a malicious and specifically-intended effect within the plaintiff's forum.[153] This is a high threshold, requiring the website operator to intend a particular effect to occur from use of the website. The soft effects test is satisfied where the defendant commits an act that harms the plaintiff, knowing that the plaintiff resided in the forum.[154] The wrongdoer must have a particular victim (or class of victim) in mind, whom he targets through the website, eg by cybersquatting (a type of trade mark infringement which encompasses intentional conduct[155]), by defaming the victim (though state of mind is not strictly required for this strict liability wrong), or by hacking into his computer. The typical cybersquatter, defamatory journalist or hacker frequently has a particular target or subject in mind. In those examples, evidence of the website, email or other internet link may be sufficient for an inference to be drawn about the wrongdoer's state of mind, leading to a finding that the wrongdoer knew that the plaintiff would suffer harm, or at least the harm was reasonably foreseeable, in the forum where the plaintiff resided (or in the case of defamation,[156] in the forum where the plaintiff had a reputation). It seems that placing material on a website which is directed generally at the forum's audience, without having

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[149] *Raju* (n 55) 596–9.
[150] Geist (n 94).
[151] *Revell* (n 114) 471.
[152] Rice and Gladstone (n 47) 608–15.
[153] Ibid 608.
[154] Ibid 612.
[155] *Ford* (n 130) 776.
[156] Garnett (n 11).

any idea who would be harmed, would satisfy neither formulation of the effects test in the US. The knowledge that is required must be more specific than 'knowing the reach that [the] information may have' or 'knowing that the information [being made] available is available to all and sundry without any geographic restriction' referred to in *Dow Jones & Co Inc v Gutnick.*[157] A broader formulation of the effects test would be for an electronic publisher to be subject to personal jurisdiction in a specific place to which the publisher intentionally sends his publication,[158] regardless of his intent about specific harm or specific persons as victims So targeting a forum, even if not a specific person or group within it, would suffice. However in many cases it is difficult to convey through a website an intention to target a specific territory. In my submission, targeting a specific person, a specific group or a specific territory, with the intention of (or being reckless as to) causing any harm, should suffice.

Admittedly, the effects test does not appear to be a suitable test for non-intentional wrongs, such as negligent misstatement. It must be shown that the defendant knew or should have reasonably foreseen the likelihood of the plaintiff, or an identifiable class of plaintiffs, suffering harm. Another limitation is that where the victim is a multinational enterprise, it may be difficult to show that it was targeted in a particular forum. Equally, where the wrongdoer is a corporation, it may be difficult to prove who was its controlling mind, and whether there was the requisite intention. While it is clear the intent and knowledge must be those of humans, in future, as humans use mechanical intermediaries,

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[157] (2003) 210 CLR 575 (HCA) [39].
[158] Perritt §12.5.

eg robots, to place material online, this mental state may become increasingly difficult to ascertain.[159] These problems did not exist in *Calder*,[160] which involved natural persons.

Related to the effects test is the question whether the defendant took reasonable steps to try to prevent a person or a class of persons in the forum from accessing the website. This was regarded as an important factor in both the ABA Cyberspace Project[161] and the draft Hague Convention.[162] In a sense, it is the converse of the effects test though the wrong may or may not involve intention. One would expect reasonable steps to include restricting access to a website by use of passwords, encryption or geographic targeting technology (which, though not foolproof, allows a website operator to determine the geographical location of users based on IP addresses).[163] Publishers should be able to decide the jurisdictions to which they wish to expose themselves.[164]

A website in a particular language or references to a particular country's currency are generally neutral for the purposes of both inquiries (effects test and reasonable steps).[165] People and funds are mobile. Payment methods in most developed countries are not indicative, as foreign as well as domestic payments can be accepted.[166] So one may find in Namibia a Finnish-speaker who accesses a Finnish online publication that originates in New York. A website which employs the Finnish language does not evidence an intention to target Finland alone, nor does it indicate reasonable steps to restrict website access by Namibians. Similarly, a website quoting prices in Ringgit,

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[159] Rice and Gladstone (n 47) 654.
[160] *Calder* (n 124).
[161] ABA Report 1820–1.
[162] Draft art 10(3) (2001 version).
[163] Bales and van Wert (n 92) 52.
[164] D Svantesson 'The "place of acting" defence – A model for cross-border internet defamation' [2003] Australian Intl LJ 172, 194–5.
[165] Cf *Stewart v Vista Point Verlag* 56 USPQ 2d 1842 (SDNY 2000) 1847; Rice and Gladstone (n 47) 653.
[166] Cf Kerly [23-061].

while having Malaysians as its primary audience, cannot be said to be necessarily specifically directed at Malaysia.

Good faith efforts to prevent access by users to a website or service through the use of disclosures, disclaimers,[167] software and other technological blocking or screening mechanisms should help insulate the content-provider from assertions of jurisdiction.[168]

The failure to block or screen should not be regarded necessarily as an indicator of targeting, as such technology is generally complicated, not foolproof, and expensive to implement.[169] Selecting a country top-level domain (eg '.uk' or '.au') might be some indication of an intention to conduct business locally as opposed to internationally. Describing one's business or activities as being restricted to a particular locale, or requiring the input by a customer of a mailing address in a certain area, can also serve to alleviate the assertion of extraterritorial jurisdiction.[170] Appropriate notices on websites which describe the intended recipients, or the non-intended recipients, may be more effective, as are websites which automatically reject users from unintended countries.[171] However this is prone to manipulation by wily users.

Although insufficient in themselves as determinants of jurisdiction,[172] in my submission both the effects test and the reasonable steps test should be applied as factors

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[167] Eg *Tech Heads* (n 104) 1152.
[168] In *ACCC v Worldplay Services Pty Ltd* (2004) 210 ALR 562 (FCA) [77], the court concluded that a pyramid selling website was not accessible to Australians where it was not available for downloading through Australian ISPs and steps had been taken to prevent the continued membership of Australian residents. This was not disturbed on appeal: (2005) 143 FCR 345 (FullCt).
[169] GJH Smith 'Directing and targeting – the answer to the internet's jurisdiction problems?' 5 Computer Law Review International 145 (2004) 150.
[170] Kerly [23-061].
[171] BB Sookman *Computer, Internet and Electronic Commerce Law* (looseleaf Thomson Ontario 2004) 11-81.
[172] Kohl (n 27) 563.

in assessing the appropriateness of the forum. The tests aim to strike a balance between the plaintiff's and the defendant's interests.

The effects test has a role to play in cases of wrongs where the defendant's state of mind is the intention to harm the plaintiff (the defendant knew that the plaintiff would suffer harm) or recklessness (the defendant should have reasonably foreseen the likelihood of the plaintiff suffering harm). The requisite state of mind is achievable in cases of positive conduct but conceivably also in cases of omissions. The reasonable steps test may be applied to any wrongs regardless of the wrongdoer's intention, though proof of reasonable steps may defeat an allegation of intention or recklessness as to harm, which are required for the effects test.

Where a defendant uses his website specifically to target a particular person (or group of persons) in a forum, knowing that the plaintiff (or the group) who resides or possesses a reputation in that forum may be affected, that weighs heavily in favour of the courts of that forum exercising jurisdiction over the defendant,[173] and other courts in fora targeted to a lesser degree (or not targeted at all) declining to exercise jurisdiction.[174] This is easier to prove where an email is sent to a person or persons in the forum. In some cases the group targeted may be as broad as all internet users in a particular State, though websites are rarely designed so as to be State-specific.

Conversely, a court should be reluctant to exercise jurisdiction over a defendant who took reasonable steps to avoid contact with a group of persons in the forum.

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[173] AR Stein 'The unexceptional problem of jurisdiction in cyberspace' (1998) 32 Intl Lawyer 1167, 1186; *Bonnier* (n 70) [18]–[20].

[174] In *Tracy v O'Dowd* [2002] Northern Ireland QB 6 the court stayed a defamation proceeding as the content of the website was clearly directed at a US audience and the proceeding was more closely connected with the US.

As Garnett explains,[175] the majority's view in *Voth v Manildra Flour Mills*,[176] that a statement from abroad could give rise to a tort committed in the forum only where it was directed at a recipient and intended to be acted upon there, may support the targeting analysis. At least it goes to defeat any argument that the defendant's state of mind, as evidenced by the form and content of the website or email, is wholly irrelevant.

A recent English appellate decision on defamation rejected targeting as a wholly irrelevant consideration.

In *King v Lewis* [177] ("***King***") the defendants submitted that in determining the most appropriate forum, in a case involving a cross-border defamation committed through the internet, the court should be more willing to stay proceedings where defendants did not 'target' their publications towards the forum.[178] The court rejected out of hand the defendants' submission on the basis that:[179]

> It makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has "targeted", when in truth he has "targeted" every jurisdiction where his text may be downloaded. Further, if the exercise required the ascertainment of what it was the defendant subjectively intended to "target", it would in our judgment be liable to manipulation and uncertainty, and much more likely to diminish than enhance the interests of justice.

It is submitted that the court should not have been so hasty to reject the submission. The intention of the defendant in 'targeting' the plaintiff's forum may be a relevant consideration for the court in exercising the natural forum limb of the discretion.

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[175] Garnett (n 11) 204, 206.
[176] (1990) 171 CLR 538 (HCA) 567–8.
[177] [2005] EMLR 4 (CA).
[178] Ibid [33].
[179] Ibid [34]. This reasoning has since been followed in *Richardson v Schwarzenegger* [2004] EWHC 2422 (QB) [30].

The court in *King* should have taken into account, as one relevant factor, the intention of the defendants, and asked whether their conduct in uploading defamatory statements onto a website in California was expressly aimed at England and, knowing the plaintiff's reputation in England, had the effect of causing him harm in England. Although on the facts the answer may well have been no, when placed against the other factors taken into account in the *forum conveniens* discretion, the court may still have reached the same result (of England being the natural forum) without necessarily ruling out consideration of that factor in an appropriate case in the future.

In conclusion, in exercising the *forum (non) conveniens* discretion a court should examine whether, in the case of an intentional wrong, the defendant's conduct on the internet targets a particular person or group in the forum, and whether the defendant has taken reasonable steps to avoid targeting that person or group.

Evidence that the website or email (through which the offensive material was communicated) targeted a person or group residing or having a reputation in that forum, for example by displaying strong links with the forum, should persuade a court in the forum to exercise jurisdiction. An email is likely to satisfy the targeting analysis, while a website rarely displays sufficient links with a particular forum so as to amount to targeting any forum.[180]

Conversely, evidence that the defendant took steps to avoid targeting a forum should dissuade a court in that place from exercising jurisdiction. Of course, this is only one factor to take into consideration in exercising the discretion.

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[180] Or perhaps it targets every forum?: Reed [7.1.3.4].

Case examples:

(i) A, in K-state, gives misleading advice on a website encouraging investors to buy shares in company X. Company X's shares are traded only on the exchange in L-state. A includes a disclaimer on his website, stating that the advice is limited to residents of K-state. A is unlikely to be seen as having targeted L-state, and L-state's court may decline to exercise jurisdiction.

(ii) A, in P-state, places music on a website, in contravention of B's copyright in Q-state. The music is sung in Q-state's distinctive language, and most of the speakers of that language reside in Q-state. A is likely to be seen as having targeted Q-state, and Q-state's court is likely to exercise jurisdiction.

4 CONCLUSION

The *forum (non) conveniens* discretion exercised in service abroad cases is a flexible tool to ensure that the otherwise mechanical operation of the jurisdictional rules does not cause injustice in specific cases.

Courts are keen to maintain the open-endedness of the discretion and mould it to particular fact situations. The appellate court in *Bangoura v Washington Post*[181] was invited, but declined, to consider which, if any, of the targeting test, the *Zippo* continuum, the country of origin approach, or a totality of circumstances approach, should be factors to take into account in determining 'real and substantial connection'. Statements of general principles are rare.

In the context of wrongs on the internet, courts should consider traditional factors, but also take into account some internet-specific considerations. Some of the jurisprudence developed in the multitude of US cases on the constitutional due process requirement is instructive.

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[181] (2005) 258 DLR (4th) 341 (Ont CA) [48]–[49].

Mere accessibility of a website in a State should not give the State's court jurisdiction, nor impetus to exercise jurisdiction. The sliding scale test is best left out of the equation, unless it points to a website on one or other extreme of the scale (in which case it is aligned with the effects test). The effects test, invoked when a website or email targets a person or group in the forum, is a useful factor in deciding whether to exercise jurisdiction in cases that involve intentional wrongs. So too is the converse inquiry whether the defendant has taken reasonable steps to prevent certain users from accessing the website. In the US, courts' application of the internet-specific tests is decisive in determining whether to exercise jurisdiction in the forum. But as always mechanical application may yield arbitrary results. Courts which take these factors into account in the balancing exercise should attach varying weights to these factors depending on the particular facts and circumstances.

CHAPTER D:
CHOICE OF LAW

1 BACKGROUND

If the court has jurisdiction, it may need to consider which law to apply. In common law countries, this becomes an issue only if pleaded.[1] In principle, foreign law should be applied only in order to do justice between the parties, or to protect or advance the interests of the foreign country.[2] In practice, the role of foreign law tends to diminish and its application is not as widespread as might perhaps be expected.[3] If the issue is not raised by the parties, or where no information is available about the foreign law, the court applies its local law (the *lex fori*) by default.[4] If the governing law is in issue, the court characterizes each issue in the case within one or more established legal categories. It applies the appropriate choice of law rule to the relevant category. This yields a particular legal system. Under common law principles, the content of foreign law must be proven by the parties as a matter of fact, using expert evidence from qualified foreign lawyers. Once the foreign law is ascertained, the court applies it.

Where the *renvoi* principle operates, rather than apply the domestic rules of a foreign law, the court may be referred by that law's choice of law rules to another system's laws (sometimes even back to the court's own law). Each legal system has its own rules for determining whether, and to what extent, *renvoi* should apply. In the

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[1] JH Beale *The Conflict of Laws* (Baker Voorhis & Co New York 1935) vol 3 1679.
[2] Jaffey 1.
[3] R Fentiman *Foreign Law in English Courts* (OUP Oxford 1998) 24.
[4] TM de Boer 'Facultative choice of law' (1996) 257 Recueil des Cours de l'Académie de Droit International 223.

following sections, the application of *renvoi* is considered in the context of each choice of law rule for wrongs.

Getting choice of law correct is vital for the parties, especially the defendant. If the court declines to enforce a foreign cause of action, the plaintiff is disadvantaged but has alternatives – he can sue elsewhere. But if the court declines to give effect to a foreign defence, this could subject the defendant to irremediable liability.[5]

Choice of law is distinct from jurisdiction.[6] Yet the two are interrelated.

In some instances, the governing law may influence whether a jurisdictional rule applies[7] or how the jurisdictional discretion is exercised.[8] Jurisdiction determines the forum, and therefore the *lex fori*. Characterization is done in accordance with the *lex fori*. Once issues are characterized, the *lex fori* selects the choice of law rules and decides the applicability of *renvoi*. The choice of law rule for some categories is the *lex fori* itself. One example is procedure, and its importance to the outcome of cases should not be underestimated, though the procedural category is shrinking gradually.[9] The *lex fori* may still play some role even where the choice of law rule directs the court to apply a foreign law. Every State requires its courts to apply the *lex fori* in displacement of a foreign

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[5] *Bradford Electric Light Co Inc v Clapper* 286 US 145, 160 (1932).

[6] *Dow Jones & Co Inc v Gutnick* (2003) 210 CLR 575 (HCA) [105]; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 (HCA) [10], [105]; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 (HCA) 41.

[7] Eg one permitted ground of service abroad, giving an English court jurisdiction, is a contract governed by English law: CPR r 6.20(5)(c). 'In the case of a tort, a finding that English law is applicable will invariably mean that one or both of the requirements in CPR r 6.20(8)(a) or (b) have been satisfied, at least to the standard of a good arguable case...': S Houseman 'The applicable law of misrepresentation claims' [2004] LMCLQ 426, 430–1.

[8] Governing law is one factor (with varying weight) that is examined in exercising the *forum (non) conveniens* discretion. As the defendants submitted in *Inter-Tel Inc v Ocis plc* [2004] All ER (D) 142 (QB) [17], 'it is clearly preferable that Arizona law should be applied by an Arizona court rather than an English court'.

[9] Eg *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (HCA); cf *Harding v Wealands* [2006] UKHL 32.

governing law, where to apply the foreign law would conflict with the State's public policy. This may be traced back to ancient times, when States were insular, and local law was identified with the interests of the social group.[10] Every legal system has mandatory rules which its courts must apply (as part of the *lex fori*) to override any inconsistent foreign governing law.

2 CHARACTERIZATION IN CASES OF WRONGS

Although in this paper wrongs are treated as a single category, the common law has traditionally differentiated between torts, equitable wrongs and statutory wrongs. It has also distinguished between wrongs, depending on the remedy, so that only torts which lead to compensation have been given consistently a separate characterization category with its own choice of law rule.

Wrongs other than compensatory torts were, for a long time, simply ignored. In my submission, there is no need for specialist characterization categories for different types of wrongs.[11] The general rules for tort, discussed in the next section, should apply to equitable wrongs that are independent of consent and to statutory wrongs, and also should make no distinction between types of remedy.

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[10] HE Yntema 'The historic bases of private international law' 2 AJCL 297 (1953).
[11] Cf E Peel 'Jurisdiction under the Brussels Convention' in F Rose (ed) *Restitution and the Conflict of Laws* (Mansfield Press Oxford 1995) 1, 47; A Briggs 'Jurisdiction under traditional rules' in Rose (ibid) 49, 58.

(a) Equitable wrongs

An example of an equitable wrong on the internet is the forwarding of a confidential email in breach of confidence.[12] The history of such wrongs can be traced to the Courts of Chancery. The distinction between these so-called equitable wrongs and wrongs redressable in the common law courts (torts), was of great importance before fusion of the two legal systems.[13] Nearly a century-and-a-half later, there is an academic movement[14] towards removing the substantive distinctions too, recognizing that the divergent courses historically taken by the two types of wrongs is outdated and both display many similarities.

Nevertheless, courts have found it difficult to characterize equitable claims.[15] It is rare to find a judgment which gives sufficient consideration to choice of law in equitable causes of action.

Until recently, equitable claims did not even feature as a characterization category.[16] The maxim 'equity acts *in personam*' led to the conclusion that where a court of equity has jurisdiction over a defendant, the court should apply the *lex fori*'s rules of equity operating on the conscience of the parties.[17]

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[12] It has been suggested that the correct characterization of breach of confidence is not as an equitable wrong but as a restitutionary claim for unjust enrichment: *Douglas v Hello! Ltd (No 2)* [2005] 3 WLR 881 (CA) [97], citing Dicey & Morris [34-029].
[13] Judicature Act 1873 (UK).
[14] Eg S Degeling and J Edelman (eds) *Equity in Commercial Law* (LBC Sydney 2005), a collection of papers from the 'Fusion: The Interaction of Common Law & Equity in Commercial Law' conference held at UNSW in 2004.
[15] ICF Spry *The Principles of Equitable Remedies* (6th edn LBC Sydney 2001) 40–1, cited in *Griggs Group Ltd v Evans* [2005] Ch 153 [113], appeal dismissed on other grounds [2005] EWCA Civ 11.
[16] Eg AH Robertson *Characterization in the Conflict of Laws* (Harvard University Press Cambridge Mass 1940).
[17] *Ewing v Orr-Ewing* (1883) LR 9 AC 34, 40.

In *Paramasivam v Flynn*[18] ("***Paramasivam***"), an Australian appellate court adopted the position that, subject to possible specified exceptions and qualifications, the *lex fori* should be applied to fiduciary and equitable obligations. The court assumed that, in exercising equitable jurisdiction, it could impose its own standards of conscience on the defendant. But this confuses jurisdiction with choice of law.[19] *Paramasivam* has been criticized strongly for its incomplete analysis.[20] With the sophistication of conflict of laws rules, forum law bias[21] is recognized as a parochial anomaly which is eventually to be eliminated.[22]

While some argue[23] that equitable claims should be characterized separately, attracting their own choice of law rule, there are sound policy reasons for placing equitable claims within traditional characterization categories such as breach of trust, breach of contract, and wrongs/torts.[24]

Not everyone shares this view. The English Court of Appeal recently characterized a director's breach of his equitable duty to the company as an aspect of company law rather than as a 'contractual obligation'.[25] Rather than focus on the origin of the duty, the court focused on the nature of the relationship between director and company. This gives little guidance on how other equitable duties may be characterized. A focus on the type of duty would see the duties owed by a trustee to a beneficiary characterized under trusts,

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[18] (1998) 90 FCR 489 (FullFedCt) 501–3.
[19] M Tilbury, G Davis and B Opeskin *Conflict of Laws in Australia* (OUP Melbourne 2002) 958–9.
[20] TM Yeo *Choice of Law for Equitable Doctrines* (OUP Oxford 2004) [8.48]–[8.50].
[21] ALRC Report [1.14]–[1.16].
[22] L Barnard 'Choice of law in equitable wrongs: a comparative analysis' [1992] CLP 474; TM Yeo 'Choice of law for fiduciary duties' (1999) 115 LQR 571; C McLachlan 'International litigation and the reworking of the conflict of laws' (2004) 120 LQR 580, 602.
[23] Barnard (ibid) 503–7; J Bird 'Choice of law' in Rose (n 11) 64, 92–6.
[24] Yeo (n 20) [8.62]–[8.69]; G Panagopoulos *Restitution in Private International Law* (Hart Oxford 2000) 86; R Stevens 'The choice of law rules of restitutionary obligations' in Rose (n 11) 180, 201.
[25] *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 (CA) [28], [56], [69].

the duties that stem from contract (eg solicitor's fiduciary duty to his client) characterized as contractual, and the residual duties, when breached, characterized as torts.

It would be sensible to extend the application of the tort choice of law rules to those equitable wrongs that are independent of consent.

(b) Restitution for wrongs

Historically, torts were seen as compensatory. Now it is recognized that the doctrine of 'waiver of tort' simply requires a plaintiff in a wrongs action to choose between the alternative remedies of compensation and restitution.[26] So, for example, a copyright owner, whose work was pirated, may seek the restitutionary remedy of account of profits instead of compensation for loss.

It has been argued by writers that claims in wrongs where restitution is sought should be characterized by reference to the wrong; that is, under tort, contract and also possibly equitable wrongs.[27] The few cases on restitution for wrongs in private international law have adopted, instead, a specialist restitutionary characterization, particularly in relation to restitution for equitable wrongdoing,[28] and sometimes no characterization at all.[29]

Nevertheless, it is theoretically more consistent to allocate characterization categories according to causal events (ie actions) rather than legal responses (ie remedies). Similar events should lead to similar choice of law rules. Otherwise on a single set of facts, characterization would depend on the precise way the plaintiff frames

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[26] A Burrows *The Law of Restitution* (2nd edn Butterworths London 2002) 462–3.
[27] Bird (n 23) 72; Stevens (n 24) 187–9.
[28] Panagopoulos (n 24) 82.
[29] A Briggs 'From complexity to anticlimax: Restitution and choice of law' [1996] Restitution L Rev 88.

his prayer for relief, and often the plaintiff need not elect a remedy until after liability has been established. The plaintiff could manipulate his claim in such a way as to fit within a different choice of law category (eg quasi-contract rather than tort[30]). There are also objections against accumulation of overlapping causes of action which allows a plaintiff to select the claims that involve favourable governing laws, while discarding others.[31]

In my submission, in characterization, an English or Australian court should take a broad internationalist view of legal concepts unfettered by domestic historical shackles.[32] A civil claim relating to wrongful conduct (whether stemming from common law, equity or statute) should be characterized under wrongs, regardless of the remedy sought or the categorization under English law or other laws.[33] At least in England, the basis for such characterization can be found in the statutory choice of law rule.[34]

(c) Statutory wrongs

Traditionally in common law countries private international law principles are based on common law legal categories. Statutes do not fit neatly. Nevertheless, where there are cross-border elements courts should characterize the claim by taking an international perspective, ignoring whether the claim stems from (domestic) statute or general law.

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[30] Cheshire & North 664–5.
[31] A Briggs 'Choice of choice of law?' [2003] LMCLQ 12.
[32] C Morse 'Torts in private international law: A new statutory framework' (1996) 45 ICLQ 888, 894.
[33] Cheshire & North 618–19; Panagopoulos (n 24) 84; Briggs (n 31) 32, 37. While restitution for wrongs may be a 'tort' for the purposes of choice of law, it is unlikely to come within the 'tort' jurisdictional rules, which tend to focus on damage (eg the English CPR r 6.20(8)).
[34] The 1995 Act, especially s 9(2). See further A Briggs 'Choice of law in tort and delict' [1995] LMCLQ 519, 521–2. In Australia the High Court recently accepted that a claim for indemnity in respect of a tort is a separate characterization category: *Sweedman v Transport Accident Commission* (2006) 224 ALR 625 (HCA) [25]. The restitutionary claim was for unjust enrichment, not wrongs.

Civil wrongs should be treated alike, whatever their origin. Hence, where a statute renders conduct or an omission wrongful and confers a right to bring a civil action in response, the rules that apply to choice of law in 'tort' cases should be applicable.

Although statutory wrongs may not fall squarely in the category of 'tort' for domestic law purposes,[35] so long as they create a civil right of action they are characterized as 'wrongs' for the purposes of private international law, with the choice of law rule for tort applying to statutory wrongs.[36] A statute applies if it forms part of either the *lex causae* or the mandatory rules of the *lex fori*.

An example of a statutory wrong on the internet is where a Malaysian broadcaster intends to publish on the internet the facts of a rape trial that is pending before the Australian courts, in contravention of Australian legislation. In a proceeding against the broadcaster seeking an injunction in Australia, if the governing law is Australian law, and the statutory wrong is created under Australian legislation, no difficulty arises. If, however, the proceeding is brought in Malaysia in relation to a statutory wrong created under Australian legislation, the proceeding fails where the governing law is Malaysian law or, say, Singaporean law, as the Australian statute does not form part of those laws.

If the governing law is Australian law, all of that foreign law is applied, including the relevant legislation,[37] subject to Malaysian overriding mandatory rules (whether

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[35] *Williams v Society of Lloyd's* [1994] 1 VR 274.

[36] *Pfeiffer* (n 9) [21]; Houseman (n 7) 432; ALRC Report [6.75]. Cf a breach of statutory duty which lies closer to public or regulatory law, which could not be treated alongside torts: Briggs 184.

[37] Cf US courts, which for many years refused to exercise jurisdiction in relation to foreign statutory wrongs, regarding them as penal, notwithstanding that a similar act would breach a US statute. Later courts were more willing to assume jurisdiction in civil statutory wrongs: AV Dicey *The Conflict of Laws* (Stevens & Sons London 1896) 667–8.

statutory or derived from common law),[38] the refusal of Malaysian courts to apply the foreign statute on the ground that to do so would involve the enforcement of foreign penal, revenue or other public laws, or the invocation of public policy (*ordre public*) to displace altogether a foreign law which violates Malaysian notions of fundamental justice.[39]

Application of a statute involves statutory interpretation. Often courts proceed to interpretation, without considering the conflict of laws issues.[40] In the absence of express legislative provision, a court cannot assume that a statute of the forum applies to every proceeding in the forum regardless of which law governs the substance of the dispute.[41] It is only after the choice of law issues have been resolved or determined statutorily that the court should turn to the substance of the claim and apply the relevant statutory provisions (be they local or foreign).[42]

The court interprets the statutory provisions and their scope to determine whether they apply to the particular facts and circumstances.[43] Generally there are public international law limits,[44] constitutional limits,[45] and statutory construction limits[46] to the

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[38] FA Mann 'Statutes and the conflict of laws' (1972-73) 46 BYIL 117, 135. For example, in Australia the consumer protection provisions of the Trade Practices Act 1974 (Cth) are regarded as mandatory rules: Nygh & Davis [22.13]; *Francis Travel Marketing Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 (NSWCA) 164.

[39] *Louks v Standard Oil Co of New York* 224 NY 99, 110–11 (1918); *Hall v National & General Insurance Co Ltd* [1964] VR 355, 367; *Pearson v Boliden Ltd* (2002) 222 DLR (4th) 453 (BCCA) [64]–[66].

[40] Tilbury et al (n 19) 861.

[41] A Briggs 'The international dimension to claims for contribution' [1995] LMCLQ 437, 438–9.

[42] In an Australian context, where the relevant statute is of the Commonwealth, there is a single law area of application with respect to federal jurisdiction, so no choice of law question arises: *Agtrack (NT) Pty Ltd v Hatfield* (2005) 218 ALR 677 (HCA) [5]–[11].

[43] Mann (n 38) 127; FA Mann 'The doctrine of international jurisdiction revisited after twenty years' (1984) 186 Recueil des Cours 9, 22; cf JHC Morris 'The scope of the Carriage of Goods by Sea Act 1971' (1979) 95 LQR 59.

[44] I Brownlie *Principles of Public International Law* (6th edn OUP Oxford 2003) 299–309. Cf Lorenzen 'The theory of qualifications and the conflict of laws' 20 Columbia L Rev 247, 269 (1920); FA Mann 'The doctrine of jurisdiction in international law' (1964) 111 Recueil des Cours 9, 36–62.

[45] *Union Steamship Co of Australia v King* (1988) 166 CLR 1 (HCA).

[46] *Odgers' Construction of Deeds and Statutes* (5th edn Sweet & Maxwell London 1967) 407–8.

extraterritorial operation of statutes. It is likely that, due to the ubiquity of the internet, the presumption against extraterritoriality of legislation would be more easily displaced when the subject-matter involves communications through that medium.[47]

In the context of regulation of conduct on the internet, Johnson and Post argue that there may be additional limitations to the operation of statutes, as the internet undermines the feasibility and legitimacy of laws based on geographic boundaries. A person has no notice when he 'enters' a State's regulatory space through conduct on the internet, and hence it is inherently unfair to subject him to that State's laws.[48] However although the internet presents challenges to sovereignty,[49] in most cases a State would not seek to regulate, by legislation with civil consequences,[50] internet content that is merely accessible in its territory without causing damage to its residents. A content-provider is obliged to comply with a State's laws so as not to cause damage there. In any event, on a practical level, regulatory risk-management strategies for content-providers, which guide the content-provider as to when it 'enters' a territory,[51] re-creates 'noticeable' national borders in cyberspace and address those concerns.

In conclusion, where a statute creates a wrong, the choice of law rules for wrongs should be applied just as they would in the case of wrongs created by general law.

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[47] *APLA Ltd v Legal Services Commr (NSW)* (2005) 219 ALR 403 (HCA) [40].
[48] DR Johnston and DG Post 'Law and borders – The rise of law in Cyberspace' 48 Stanford L Rev 1367, 1370–9 (1996).
[49] A Addis 'The thin state in thick globalism: Sovereignty in the information age' 37 VJTL 1, 46–7 (2004).
[50] On the other hand, criminal statutes often seek to catch merely accessible content due to the gravity of the potential damage to society.
[51] U Kohl 'The rule of law, jurisdiction and the internet' (2004) 12 Intl JL & Information Technology 365.

(d) Uniform characterization category for all non-consent-based wrongs

'Tort' is used in the context of private international law 'to denote not merely civil wrongs known to the common law but also acts or omissions which by statute are rendered wrongful in the sense that a civil action lies to recover damages occasioned thereby'.[52] So 'tort' is wider than common law torts, though the exact scope remains undefined.

In my submission, all non-consent-based wrongs have similar relevant characteristics. The wrongs involve breaches of a duty imposed by the operation of law, not by consent. Admittedly the duty may arise in different ways and the remedy sought may differ, but the analysis remains the same. A person has breached a duty owed to another and that other seeks redress by civil judicial proceedings. This warrants a single characterization category with a uniform choice of law rule following that of tort.

3 CHOICE OF LAW IN TORT

While tort has long been recognized as a characterization category, an appropriate choice of law rule has proven elusive. Many torts are, by their nature, accidents which happen in a particular place. Should the law of that place govern the claim? How does one balance the expectations of the plaintiff, that he can rely on his country's law when he suffers damage there, and of the defendant, that he should be entitled to rely on his own country's law when acting there?[53]

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[52] *Pfeiffer* (n 9) [21].
[53] Jaffey 96.

One social function of torts, fixing standards of conduct, emphasizes the law of the place of acting to determine wrongfulness. The other function, fixing measures of protection, suggests a focus on the law of the place of the damage to determine whether the damage was wrongfully inflicted so as to be actionable.[54]

A brief history is helpful. In Roman times a person was subject to his personal law, which depended on his *origo* and *domicilium*.[55] After the fall of the Empire, the law of the wrongdoer prevailed in wrongs.[56] It was only in medieval times that the principle of *lex loci delicti commissi* gained acceptance, so that the law of the place where an alleged wrong was done determined whether, under what conditions, to what extent, and with what consequences, the act constituted a cause of action.[57]

Lex loci delicti had great support in the US in the early 20th Century,[58] as evidenced by the First Restatement.[59] It was adopted in continental Europe and remains the preferred choice of law rule in many civilian systems.[60]

The combination of issues of jurisdiction and choice of law in this area began early on. Savigny, while flexible with his treatment of jurisdiction, insisted that choice of law must simply follow. He wrote that 'the forum at the place where the delict has been committed is subject to no doubt, according to positive laws and to practice...',[61] and 'in

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[54] EE Cheatham, HF Goodrich, EN Griswold and WLM Reese *Cases and Materials on Conflict of Laws* (4th edn Foundation Press Brooklyn 1957) 424.
[55] GC Cheshire Private *International Law* (3rd edn Clarendon Press Oxford 1947) 24.
[56] Ibid 26.
[57] Rabel vol II 235–7.
[58] HF Goodrich *Handbook of the Conflict of Laws* (4th edn West Publishing Co St Paul Minnesota 1964) 165–6; Rabel vol II 251.
[59] *Restatement of Conflict of Laws* (American Law Institute Publishers St Paul 1934) §§377ff.
[60] Rabel vol II 252; draft EWLC Report (Working Paper No 87 Consultative Memorandum No 62 1984) appendix; CGJ Morse 'Choice of law in tort: A comparative survey' 32 AJCL 51, 90 (1984); A Reed 'The Anglo-American revolution in tort choice of law principles: Paradigm shift or Pandora's box?' 18 Arizona J Intl & Comparative L 867, 919–20 (2001).
[61] Savigny §373,C.

[delicts] we must always have regard to the law of the place of the action, not to that under which the delict was committed'.[62] He favoured treating the *lex fori* alone as decisive, approximating civil wrongs to crimes.[63] Some authors regarded tort laws as of such an ethical and imperative nature that no country would ever apply the rule of another country, especially when it did not consider the act unlawful.[64]

Early English cases[65] applied the *lex fori*, though courts were prepared to allow the defendant to rely, in his defence, on 'whatever is a justification in the place where the thing is done'.[66]

It was not until the late 19th Century that English courts pronounced a general choice of law rule for foreign torts. In *Phillips v Eyre*,[67] the court said:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done.

This established the 'double actionability' rule which the English common law applied to determine choice of law in foreign torts. The rule combines the effect of the law of the country where the alleged tortious act was done (*lex loci delicti commissi*) and

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[62] Ibid §374,C.
[63] Wolff 489.
[64] Rabel vol II 237.
[65] *Blad's case* (1673) 3 Swan 603, 36 ER 991; *Dutton v Howell* (1693) 1 Show PC 24, 1 ER 17; *Mostyn v Fabrigas* (1774) 1 Cowp 161, 98 ER 1021.
[66] *Mostyn* (ibid).
[67] (1870) LR 6 QB 1.

the law of the country where the proceeding is heard (*lex fori*).[68] A combination of these effects can be seen in other countries' choice of law rules.[69]

In *Boys v Chaplin*[70] ("***Boys***") the House of Lords, in separate judgments, endorsed and refined the rule in *Phillips v Eyre*, but superimposed a flexible exception, stemming from the reasoning of Lord Wilberforce (which has since proven influential[71]). The exception is invoked so as to apply, to an issue in the proceeding, the law of the place which has the most significant relationship with the occurrence of the relevant events and the parties.[72] This settled the position as regards English common law.

The Privy Council, in *Red Sea Insurance Co Ltd v Bouygues SA*,[73] clarified that just as the flexible exception enables a plaintiff to rely on the *lex fori* if his claim would not be actionable under the *lex loci delicti*, conversely the exception can enable a plaintiff to rely exclusively on the *lex loci delicti* if his claim would not be actionable under the *lex fori*.[74] The exception could apply to more than one issue in a proceeding, or even to the whole case.[75] There is no reason why the exception might not result in the application of the law of a third State, displacing both *lex fori* and *lex loci delicti*, though there have been no cases in which the circumstances have required consideration of this possibility.

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[68] AV Dicey *The Conflict of Laws* (Stevens & Sons London 1896) 659; Savigny §374,C fn z2.
[69] US courts originally endorsed double actionability, though a greater emphasis was placed on *lex loci delicti*: Dicey (ibid) 667, 669; see *Slater v Mexican National Rly* Co 194 US 120 (1904) and *Western Union Telegraph Co v Brown* 234 US 542, 547 (1914) (Holmes J); Story §§558, 934. French courts applied *lex loci delicti* with a discretion to impose French public policy, while in Germany, public policy excluded foreign law insofar as it imposed, on a German national, greater liability than he would incur under German law: Wolff 493; Rabel vol II 247–8.
[70] [1971] AC 356.
[71] Though a *ratio* is difficult, if not impossible, to extract, so it cannot be said that there was a collective decision of the Law Lords.
[72] Ibid 391.
[73] [1995] 1 AC 190 (PC HK).
[74] Ibid.
[75] Ibid 207.

Local torts were never subject to double actionability, as they did not raise a question of private international law, regardless of any foreign element in the case.[76] Before the development of the flexible exception, double actionability would have yielded this result anyway, as an act done in England depends on English law for its wrongfulness and is governed by the *lex fori*, English law, which is also the *lex loci*. The development of the flexible exception rendered anomalous the rigid application of the *lex fori* to local torts.

As regards foreign torts, while double actionability with a flexible exception still represents the choice of law rule in common law countries such as New Zealand,[77] Hong Kong[78] and Singapore,[79] it is now of limited practical significance in England. In 1996 the common law rule was abrogated by statute[80] for all torts other than defamation and related torts.[81] The EWLC Report of 1990 urged reform of choice of law in tort, suggesting a *lex loci delicti* approach. The resulting enactment[82] modified the law reform proposals.

Defamation and similar wrongs were ultimately excluded from the scope of the reforms,[83] for fear of losing the 'not actionable under the *lex fori*' limb of double actionability.[84] Applying a *lex loci*-type rule would endanger free speech, the levels of protection of which vary around the world. Double actionability ensures that publishers

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[76] Cheshire (n 55) 372; RH Graveson *Conflict of Laws* (7th edn Sweet & Maxwell London 1974).
[77] *Containerlift Services v Maxwell Rotors Ltd (No 1)* (2004) 58 IPR 658 (NZHC).
[78] *Red Sea* (n 73).
[79] *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579 (CA); cf *Ang Ming Chuang v Singapore Airlines Ltd* [2005] 1 SLR 409 [50]–[51].
[80] 1995 Act s 10.
[81] Briggs (n 34) 520.
[82] 1995 Act Pt III. See further below 171ff.
[83] 1995 Act s 13.
[84] C Morse 'Torts in private international law: A new statutory framework' (1996) 45 ICLQ 888, 891–3.

enjoy the protections afforded by English law in English courts regardless of whether the statement was circulated later abroad.[85]

Reforms along similar lines to the EWLC Report were recommended in Australia in the ALRC Report of 1992, but were not implemented. Instead, the High Court took on the task of achieving reform.

Although originally supportive of double actionability,[86] the court discarded that concept in favour of *lex loci delicti*. In *John Pfeiffer Pty Ltd v Rogerson*[87] (“***Pfeiffer***”) *lex loci delicti* replaced double actionability as the choice of law rule in domestic inter-state cases, without any flexible exception. In *Regie Nationale des Usines Renault SA v Zhang*,[88] (“***Zhang***”) essentially a case regarding the exercise of jurisdiction,[89] *lex loci delicti* was adopted as the choice of law rule in international tort cases. While the court did not accept a flexible exception,[90] it acknowledged that in international cases considerations of public policy ‘should serve as a safety valve which would save a court from having to produce an unacceptable answer’.[91]

Neilson v Overseas Projects Corp of Victoria Ltd[92] (“***Neilson***”) did not shed much more light on the subject. One judge’s view was that in *Zhang* the court was invited to, but declined to recognize any exceptions, flexible or otherwise, to *lex loci delicti*.[93]

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[85] EWLC Report [3.32]–[3.33].
[86] *Breavington v Godleman* (1988) 169 CLR 41; *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.
[87] (2000) 203 CLR 503 (HCA).
[88] (2002) 210 CLR 491 (HCA).
[89] A Briggs ‘The legal significance of the place of a tort’ (2002) OUCLJ 133, 137–9.
[90] *Zhang* (n 6) [75], following *Pfeiffer* (n 9) [80].
[91] Briggs (n 89) 135. Cf A Gray ‘Flexibility in conflict of laws multistate tort cases: The way forward in Australia’ (2004) 23 U Queensland LJ 435.
[92] (2005) 221 ALR 213 (HCA).
[93] Ibid [243] (Callinan J).

Another seemed to recognize that public policy would sometimes play a role.[94] The Chief Justice simply reiterated the absence of a flexible exception,[95] and two other judges indicated their preference for certainty and simplicity.[96] Yet in a complex and unpredictable area such as tort, surrendering upfront any exceptions for the sake of certainty may be at the expense of the just resolution of particular disputes.

Canadian judges have taken a similar approach to their Australian colleagues. In *Tolofson v Jensen*,[97] ("***Tolofson***") the Canadian Supreme Court replaced the double actionability rule for intra-Canadian torts with *lex loci delicti*, without a flexible exception. Later *lex loci delicti* was extended to international cases; this time, unlike in Australia, subject to an exception which permits the application of the *lex fori*.[98]

Each of the leading cases on choice of law in tort, *Boys*, *Pfeiffer*, *Zhang* and *Tolofson*, involved a claim for personal injuries. While establishing clear rules on choice of law, their application to wrongs occurring by communications resulting in economic loss is far from obvious. The great diversity of wrongs and types of damage leads some jurists to the conclusion that one choice of law rule cannot fit all categories.[99] Seeking to frame a choice of law rule for all torts has been 'one of the most vexed questions in the conflict of laws'.[100]

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[94] Ibid [148] (Kirby J).
[95] Ibid [16] (Gleeson CJ).
[96] Ibid [93] (Gummow and Hayne JJ).
[97] [1994] 3 SCR 1022.
[98] *Wong v Wei* [1999] 10 WWR 296 (BCSC) [21]; *Wong v Lee* (2002) 211 DLR (4th) 69 (BCSC) [11]–[12], [32]; *Somers v Fournier* (2002) 214 DLR (4th) 611 (OntCA) [33]. These cases interpreted *Tolofson* as permitting an exception, to be used sparingly, for *lex fori* to displace *lex loci delicti*. It is unlikely that this exception would be extended to the application of the law of a third State, although there is no principle which prevents this.
[99] Eg Rome II. See further above 141ff.
[100] *Boys v Chaplin* [1968] 2 QB 1, 20 (Lord Denning MR).

The 20th Century witnessed a proliferation of new theories of choice of law in tort.[101] The most important of these is the proper law of the tort, 'the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation',[102] which has gained acceptance in the US.[103]

Choice of law for wrongs is still not entirely resolved, and new theories are advanced regularly.[104]

4 New Choice of Law Rules for the Internet?

For transnational activities over the internet, even a single wrongful act may have a connection with many countries, resulting in multiple lawsuits worldwide. A misstatement on a frequently-visited website or a widely-disseminated email virus could result in a string of proceedings. The common law choice of law rules in Australia and Canada, and the statutory and common law rules in England, require identification in one form or another of the place where the wrong occurred.

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[101] Cheshire (n 55) 371; JA Clarence Smith 'Torts and the conflict of laws' (1957) 20 MLR 447; *Babcock v Jackson* 191 NE 279 (NY 1963); B Currie *Selected Essays on the Conflict of Laws* (Duke University Press Durham 1963) 188–9. See also PE Nygh 'Some thoughts on the proper law of a tort' in British Institute of International and Comparative Law *Contemporary Problems in the Conflict of Laws* (Sijthoff Leyden/Boston 1978) 232; RA Leflar 'Choice-influencing considerations in conflicts law' 41 New York UL Rev 267 (1966); RA Leflar 'Conflicts law: More on choice-influencing considerations' 54 California L Rev 1584 (1966); O Kahn-Freund 'Delictual liability and the conflict of laws' (1968) 124 Recueil des Cours 1, 63ff; RA Leflar 'True 'false conflicts' et alia' Boston UL Rev 164, 165 (1968); A Ehrenzweig 'The *lex fori* – basic rule in the conflict of laws' 58 Michigan L Rev 637 (1960); DF Cavers *The Choice of Law Process* (U Michigan Press 1965) 121–2; Cook 345; E Frankenstein *Internationales Privatrecht* (Berlin 1926) vol II 362.

[102] J Morris 'The proper law of a tort' 64 HLR 881 (1951); J Morris 'Torts in the conflict of laws' (1949) 12 MLR 248, 252. See *Babcock* (n 105).

[103] *Restatement (Second) of Conflict of Laws* (American Law Institute Publishers St Paul 1971) §379.

[104] Eg J Walker '"Are we there yet?" Towards a new rule for choice of law in tort' (2000) 38 Osgoode Hall LJ 331, 355.

One could imagine numerous problems under these rules in determining the law applicable to the wrong. It is difficult to localize events that transpire on the internet.

One approach is to regard localization on the internet as involving a choice between a country of origin rule and a country of destination rule, with targeting considered an intermediate solution.[105] This would take targeting beyond its role of a factor to be considered in the exercise of the jurisdictional discretion. Also, many wrongs involve no targeting.

Burnstein argues that *lex loci delicti* is not a sound choice of law regime for cyberspace.[106] His criticism is that in transnational cyberspace, the place of the wrong might be any of the States that have computers connected to the internet. There is no *locus delicti*, as the place of the wrong is cyberspace itself. Even a proper law approach (such as that adopted in the Second Restatement), which has been applied in several cases of wrongs on the internet,[107] may not be capable of providing solutions to problems involving the internet.[108]

Burnstein recommends a new choice of law regime for transnational cyberspace,[109] and offers three potential solutions:[110]

(a) unification of choice of law rules;

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[105] GJH Smith 'Directing and targeting– the answer to the internet's jurisdiction problems?' 5 Computer Law Review International 145, 147–9 (2004).
[106] MR Burnstein 'Conflicts on the net: choice of law in transnational cyberspace' 29 VJTL 75, 93 (1996).
[107] Eg *Wainright's Vacations LLC v Pan American Airways Corp* 130 F Supp 2d 712 (DMd 2001); *Wells v Liddy* 186 F 3d 505 (4th Cir 1999) cert den 528 US 1118 (2000); *Isuzu Motors Ltd v Consumers Union* 12 F Supp 2d 1035 (CDCal 1998); *Hitchcock v Woodside Literary Agency* 15 F Supp 2d 246 (EDNY 1998); *Ellis v Time Inc* 26 Media L Rep (BNA) 1225 (DDC 1997); *Yahoo! Inc v La Ligue Contre la Racisme et l'Antisemitisme* 169 F Supp 2d 1181 (NDCal 2001); rev'd on other grounds 379 F 3d 1120 (9th Cir 2004).
[108] Burnstein (n 106) 94.
[109] Ibid 95.
[110] MR Burnstein 'A global network in a compartmentalised legal environment' in Boele-Woelki & Kessedjian 23, 27.

(b) unification of a substantive internet law; and

(c) recognition of the internet as a separate jurisdiction.

In the absence of (b), unification of substantive law, he suggests solution (a), the adoption of a multilateral treaty on choice of law.[111] This is the least radical approach. It reflects the position which EU States took in relation to contractual obligations[112] and intend to take in relation to non-contractual obligations.[113] He explains that we should avoid an overly-flexible set of rules, such as the Second Restatement, which chooses the law according to 'most significant relationships', 'relevant contacts' and 'centers of gravity'. While the prevailing US approach is flexible, the non-geographical nature of the internet makes it an awkward way of handling choice of law in internet disputes.

Reidenberg believes that the set of rules for information flows imposed by technology and communication networks form a *lex informatica*, which policymakers should recognize as a useful extra-legal instrument to achieve objectives that otherwise challenge conventional laws.[114] He simply asks that courts should appreciate how the internet works and take into account the underlying flexibility and ubiquity of the internet.[115]

In a similar vein, Bowrey considers that while an applicable law may be found for established categories of wrongs or for new categories created by legislation, the true picture of whether there is legal recourse for an actionable wrong will depend on internet

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[111] Burnstein (n 106) 113.
[112] Rome Convention on the law applicable to contractual obligations [1980] OJ L266/1.
[113] Rome II.
[114] JR Reidenberg 'Lex informatica: The formulation of information policy rules through technology' 76 Texas L Rev 553, 555–6 (1998).
[115] Ibid 576–9, 583.

cultures and not simply legal principles.[116] These offer no solutions for which of alternative national laws applies.

There are many others who share the view that existing choice of law rules are inadequate to deal with the unique problems posed by the internet. A recurring concern is that as a result of applying the concept of localization to an internet transaction, the applicable law is potentially the law of every country in the world, or is purely fortuitous and has no obvious connection with the parties or the transaction.[117]

It is true that usually the choice of law rules have been cast in the context of wrongs that involve physical contact, such as motor vehicle collisions. Nevertheless, the correct approach to choice of law in tort has been the subject of much debate and the consensus appears to be that there should be, at least as a starting point, some significance attached to the place of the wrong.

In my submission, the existing choice of law rules can be applied to wrongs on the internet. It is possible to localize wrongs on the internet. Both the defendant's conduct in uploading or sending and the plaintiff's damage at or after downloading or receipt involve human acts which occur in the physical world. The geographic routes of transfers of packets of data between connected computers are largely irrelevant. Humans stand behind the technology.

The ubiquity of the internet increases the risk that courts will resort to their traditional 'homing' instinct in matters of choice of law.[118] Clear guidelines should be

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[116] K Bowrey *Law and Internet Cultures* (CUP Cambridge 2005) 12.
[117] Reed [7.1.3], [7.1.3.5], [7.1.3.6].
[118] PB Carter 'The Private International Law (Miscellaneous Provisions) Act 1995' (1996) 112 LQR 190, 193.

developed to determine the place of a wrong on the internet, so that courts are not tempted simply to resort to their own territorial law without further investigation. The guidelines suggested in the following section relate to existing choice of law rules, alleviating any need for internet-specific legislation.[119]

5 APPLICATION OF EXISTING RULES TO WRONGS ON THE INTERNET

(a) Lex loci delicti

Lex loci delicti is the choice of law rule in Australia and Canada. It also forms part of double actionability, which remains the choice of law rule in many common law countries. Many theories have been advanced on how to identify the place of commission of a wrong. Most academics and judges admit that very difficult questions are involved.[120] Fridman mentioned several alternative candidates for the *locus delicti*:[121] the place of the defendant's act, the place where the defendant's act reacted on the plaintiff, the place where the damage was suffered by the plaintiff, the place where the defendant could have expected that damage might occur, the place where the last act or event required to substantiate a cause of action took place and the place where all the necessary ingredients of the tort occurred. Judicial and public policy are crucial determinants, as the scope of the place of commission could interfere with the rights and

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[119] Existing statutory provisions (eg Electronic Communications Act 1999 (Cth) s 14) that determine where electronic communications take place are limited, typically, to contractual transactions, and do not extend to wrongs: Reed [7.1.3.1].
[120] Dicey & Morris [35-136].
[121] GHL Fridman 'Where is a tort committed?' (1974) U Toronto LJ 247, 252.

obligations of a foreigner, and could involve the court exercising powers beyond its territorial confines.[122]

The localization of a wrong has received a great deal of attention in the law relating to jurisdiction, but has arisen less frequently in the context of choice of law.[123] There are several reasons for this. Many cases settle once the jurisdictional battle has been fought. In common law countries, choice of law becomes an issue only if raised by a party, otherwise the court applies the *lex fori* by default. Once jurisdiction has been determined, litigants may prefer that the court apply its own law rather than attempt to comprehend foreign legal principles.

The place of a wrong for the purposes of determining the *lex loci delicti* differs from the place of a wrong for the purposes of determining jurisdiction. The two inquiries involve different policy considerations,[124] but not so as to apply policy to determine the outcome of each individual case.[125] The question in jurisdiction is 'which court should hear the claim?'. When examining the degree of connection between the cause of action and the territory[126] there may be several answers. In contrast, the application of a choice of law rule should yield a single result for each issue in the proceeding, as there must be only one applicable law and hence one place where a tort is committed.[127]

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[122] Ibid 249.
[123] PE Nygh and M Davies *Conflict of Laws in Australia* (7th edn LexisNexis Butterworths Sydney 2002) [22.6].
[124] Fridman (n 121) 252.
[125] Ibid 253–4.
[126] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC) 467.
[127] *Cheshire & North's Private International Law* (12th edn Butterworths London 1992) 553; *Dicey & Morris on the Conflict of Laws* (12th edn Sweet & Maxwell London 1993) 1509–10. These passages have been removed from later editions.

On closer inspection, jurisdiction too admits only one *locus delicti*. The *Distillers*[128] interpretation of the tort committed ground of service abroad is that there should be a single place where in substance the tort was committed.[129] The choice given to the plaintiff of where to sue arises because there is the alternative damage ground,[130] and this may admit more than one answer. This elective approach, which appears in the exorbitant jurisdiction rules, while appropriate for jurisdiction,[131] is inappropriate for choice of law.[132] The parties cannot choose which of two alternative laws to apply.

This raises a difficult question. If the defendant's wrongful acts in one State cause damage to be suffered in another State, where is the wrong committed for the purposes of choice of law?

Rabel considered that application of the laws of both the place of the defendant's act and the place of damage have some merit. In his view, a person doing part of the tortious acts in the State, or acting from abroad but effecting an injury in the State, sufficiently deserves to be subjected to the responsibility established in the State.[133] This can be extrapolated to the conclusion that the laws of the State where the person acts and the laws of the State where the person effects an injury are both appropriate to be applied to the tort. The standards of responsibility of both the State of acting and the State of damage are relevant, and a sound international distribution of the administration of justice allows several States to concur in the suppression of tort.[134] The Australian High Court

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[128] *Distillers* (n 126).
[129] Above 31–3. Cf *Moran v Pyle National (Canada) Ltd* [1975] 1 SCR 393, 409; *Grehan v Medical Inc and Valley Pine Associates* [1986] IR 528.
[130] Above 38–9.
[131] Cf Rabel vol II 306.
[132] Cf ibid 332–3.
[133] Rabel vol II 306.
[134] Ibid.

left room for both approaches: the *lex loci delicti* should be the law of the place in which a person acts or is exposed to risk of injury.[135]

There is merit in localizing the *locus delicti* where the defendant acted. This would be consistent with the application of *Distillers* to the tort committed ground of service abroad.[136] There is support for this view, which developed before wrongs became complex and transnational. It is the unlawfulness of the defendant's actions that is the essence of a wrong.[137]

In its origins, the conflict of laws recognized that persons are bound by the laws of each territory in which they act.[138] A person owes his obedience primarily to the law of the country in which he is present when he acts, and that law can claim to determine the legality of his actions, to the standards of which he has to elevate his behaviour.[139] The law of the place where the defendant acted is the only law competent to characterize the defendant's behaviour and its justifiability.[140] A State may regulate conduct on its soil, and should concede a corresponding power to all other States.[141] Intentional and negligent torts are subjected most conveniently to the law of the place where tortious acting at a distance is completed, even when an injury ensues only at another place.[142]

On the other hand, there are more compelling reasons to apply the law of the place of the damage, particularly in cases of wrongs on the internet. This result too can be

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[135] *Pfeiffer* (n 9) [75].
[136] *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) 446; *Voth v Manildra Flour Mills* (1990) 171 CLR 538 (HCA) 567; Nygh & Davies (n 123) [22.6].
[137] Fridman (n 125) 259; in *Koop v Bebb* (1951) 84 CLR 629 (HCA) 644 the majority even referred to the *lex loci delicti* limb of double actionability as *lex loci actus*.
[138] HE Yntema 'The historical bases of private international law' 2 AJCL 297, 306 (1953).
[139] Rabel vol II 252.
[140] Wolff 494–5, 502.
[141] Ibid 254.
[142] Ibid 334.

reached by application of *Distillers*. While it is appropriate as a matter of principle in both jurisdiction and choice of law inquiries to ask where in substance the wrong is committed, one cannot ignore the existence in the service abroad provisions of the alternative damage ground, and the absence of that alternative ground in choice of law. L*ocus delicti* may be the same for both jurisdictional and choice of law purposes in some cases, but may differ in others. *Lex loci delicti* provides that flexibility. It is not intended to be a rigid rule.

The search for the place where in substance the wrong was committed can lead to the place of damage. In the context of wrongs on the internet, this is the place where the plaintiff experienced his initial injury. The various jurisdictional formulations of place of damage (eg place where damage is suffered, sustained, occurred or arose)[143] should not necessarily be transposed into the choice of law analysis.

Unlike the jurisdictional inquiry, in applying the *lex loci delicti* choice of law rule there is no alternative damage ground. A single law needs to be identified – there cannot be an election. Application of the law of the place of the damage maintains an important balance between the interests of the plaintiff and the defendant. If the plaintiff suffers damage in a particular State, then the defendant should comply with the laws of that State in relation to that damage. Accepting the premise that it is unfair that conduct should be subjected to a law whose intervention could not be foreseen, the defendant accepts the risk of being held to the standards of the law of a place where he causes damage. The defendant already benefits from a jurisdictional concession – a suit for worldwide damage may be heard only in the place where he is present or domiciled, or where he acted.

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[143] Above 75.

A primary underlying basis for wrongs is remedial – the avoidance of damage. The law of the place of damage is most relevant to setting the relevant legal standards and should thus be the law of the wrong.[144] This approach accords with the weight of American authority on *locus delicti*, namely that the place of a wrong is the place of the injury.[145] The Canadian Supreme Court also acknowledged this.[146] It follows the recommendation made by the Australian law reform body.[147] Rome II advocates an approach based on the place of damage.[148]

In my submission, as a general guiding principle, the place of the wrong on the internet for the purposes of *lex loci delicti* is the place of direct damage, ie injury; the subsequent events (eg causing consequential losses) do not produce significant local connections.[149]

In wrongs involving communication, the place of damage is not necessarily the place of receipt. Determining the place of damage requires locating the relevant human act.[150] The proposition is often stated that where the tort involves communication, the tort is committed where the communication is received.[151]

It is true that defamation is committed at the place where the defamatory statement is published.[152] However, can this be extended to other wrongs committed through

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[144] Richardson & Garnett 85.
[145] M Hancock *Torts in the Conflict of Laws* (University of Michigan Press 1942) 174. See *Donahue v Warner Bros* 194 F 2d 6 (10th Cir 1952) 22: '[W]here the act or omission complained of and the injury occur in different places, the place of wrong, the *locus delicti*, is the place where the injury was suffered, rather than the place where the act or omission occurred'.
[146] *Tolofson* (n 97) [1049–50.
[147] ALRC Report [50]–[59].
[148] Article 3(1).
[149] Rabel vol II 323.
[150] Above 78.
[151] Dicey & Morris [35-086]; B Fitzgerald, G Middleton and A Fitzgerald *Jurisdiction and the Internet* (LBC Sydney 2004) 15 fn 77; Richardson & Garnett 85–89; *Inter-Tel* (n 8) [17].
[152] Below 248; Dicey & Morris [35-136].

communication?[153] In *Diamond*,[154] an analogy was made between defamation and misrepresentation. This cannot be taken as a general statement that a tort through communication is always committed at the place of receipt.[155]

The application of *lex loci delicti* can be demonstrated through examples. The simpler cases are of damage in a single State. If the defendant acted by sending an email in Australia and caused loss only in Australia, then the wrong was committed in Australia and the court applies Australian law. If the defendant acted by uploading to a website in Australia and caused loss only in Singapore, then it is likely that for choice of law purposes, the court will regard the wrong as committed in Singapore and apply Singaporean law. The same result should be achieved regardless of which court hears the claim, so long as the choice of law rule is *lex loci delicti*, and regardless of the basis for the court's jurisdiction: eg a Canadian court basing its jurisdiction on the defendant's presence in Canada, or an Australian court basing its jurisdiction on the defendant's acts in Australia.

If the defendant acted in Canada and caused damage to one plaintiff in Australia and to another plaintiff in England, then it is likely that, for choice of law purposes, the court will regard the wrong vis-à-vis the one plaintiff as committed in Australia and the wrong vis-à-vis the other plaintiff as committed in England. These are essentially two separate cases of damage in a single State, and a court will apply Australian law and English law respectively as the *lex loci delicti.*

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[153] PRH Webb and PM North 'Thoughts on the place of commission of a non-statutory tort' (1965) 14 ICLQ 1314, 1347; *Armagas Ltd v Mundogas SA* [1986] 1 AC 717 (HL) 740.
[154] *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 (CA) 345–6.
[155] Above 65–66.

A true multi-state damage case is more complex. For example, assume the defendant acted in Canada and caused damage to a single plaintiff partly in Australia, partly in Singapore and partly in England. First, consider a claim brought in an Australian court under the damage ground of service abroad. Extending the *Shevill*[156] limitation beyond defamation, the jurisdiction should be limited to local loss, so the court would consider only damage in Australia and would apply Australian law as the *lex loci delicti*. The court will not be concerned with whether damage was also caused elsewhere, because the court's jurisdiction does not extend to foreign losses. Even though there may be several places of damage this is not a choice or election among them. The election is made by the plaintiff at the jurisdiction stage. Once he has chosen the court, the matter of which law to apply is a question for the court, and not a selection by the plaintiff.

Let us now consider a claim for global loss. This may be brought in a place where the defendant is present (in the common law context) or domiciled (in the European context) or where he acted, under the tort committed (or act committed) ground of service abroad or the causal event limb of special jurisdiction. Let us take the above example and assume that the suit is heard in a Canadian court, where the choice of law rule is *lex loci delicti*. First, the court could divide the claim into three – the claim for damage in Australia will be governed by Australian law, the claim for damage in Singapore will be governed by Singaporean law and the claim for damage in England will be governed by English law. However generally at common law *dépeçage* is not available – there must be only one applicable law which governs the entire wrong; fragmentation of a wrong (and hence the *lex loci delicti*) into separate parts is impermissible. Second, the court could decide that there are compelling reasons to apply Australian law instead of

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[156] Case C-68/93 *Shevill v Presse Alliance SA* [1995] ECR 415.

Singaporean or English laws because the plaintiff suffered the majority of his damage in Australia. Third, if there is an available exception the court may decide that it is more appropriate to apply Canadian law, as the law of the place where the defendant acted. This might be the best solution in cases where there is multi-state damage and it is difficult to locate one State of damage whose law should be applied in preference to the others. The exception may also operate in respect of a particular issue in the proceeding, achieving the same effect as *dépeçage*.[157]

As we have just seen, the general principles which focus on the place of damage may not be appropriate in every case. The function of an exception to *lex loci delicti* is to displace the general rule where there are compelling reasons to apply a different law by reason of the connections between the wrong and that law.

Unfortunately, under the Australian and the Canadian formulations of *lex loci delicti*, there is no exception which permits the application of a more appropriate law. In Canada, *lex loci delicti* may be displaced by an exception which the courts have interpreted as limited to the application of *lex fori*,[158] though no occasion seems to have arisen yet which considered the application of the law of a third State. In Australia, although the High Court denied there is an exception to *lex loci delicti*, public policy considerations might be invoked,[159] yet these could operate to apply only the *lex fori*.

In my submission, the application of *lex loci delicti* should be subject to an exception which can be invoked to displace the *lex loci delicti* where there is another law which is more closely connected with the wrong and which the court considers more

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[157] *Wong* (n 98) [21].
[158] Ibid; *Tolofson* (n 97) 1062; *Somers* (n 98) [32]–[47].
[159] *Zhang* (n 6) [60], [73], [75]–[76], [121]–[124].

appropriate to apply in the circumstances to achieve justice between the parties. An exception which offers this flexibility is available in countries such as Singapore and New Zealand, where double actionability with a flexible exception remains the common law choice of law rule. At present, neither the Australian nor the Canadian formulation of *lex loci delicti* tolerates a flexible exception. It is submitted that a rigid *lex loci delicti* rule is inappropriate and a flexible exception is required to operate in certain cases where the *lex loci delicti* should be displaced in favour of another law, which may sometimes be the *lex fori* and may sometimes be the law of a third country. In Australia and Canada, achieving reform of the choice of law rule will require reconsideration by an appellate court or legislative intervention.

The exception is appropriate not just in the case of wrongs on the internet. The internet is a fertile ground for generating circumstances which demonstrate the need for the exception. Opponents of the exception might argue that a rigid *lex loci delicti* offers certainty which the exception may erode. However the exception will not result in the application of the law of any country at all. The exception may point to the law of one or other of the places of damage or to the law of the place of the defendant's act, and all of these laws should be reasonably foreseeable to a potential wrongdoer on the internet as laws which he may need to obey. Further examples demonstrate the usefulness of the exception. Where the wrong did not result in damage, only in a gain to the defendant which the plaintiff seeks to disgorge, the exception could permit the application of the law of the place of the gain. Where a minor initial injury occurred in a fortuitous place but significant consequential losses were suffered in another place which the defendant should have foreseen, the exception could permit the application of the law of the place where the consequential losses were felt.

Finally, as for the applicability of *renvoi*, recently the Australian High Court gave its view on the long-standing debate,[160] and explained that when a court applies 'the law of the place of the wrong' it actually applies the entire law of the place of the wrong, including its choice of law rules.[161] After all, this is what a court in that place would apply.[162]

For example, when an Australian court applies *lex loci delicti*, and the *locus delicti* is China, the Australian court must apply the entire Chinese law on the subject, including choice of law rules relating to wrongs.

If the Chinese choice of law rule is also *lex loci delicti*, then conceptually no problem of *renvoi* arises – it is simply Chinese substantive law that applies. A difficulty would arise if the application of *lex loci delicti* by a Chinese court and by an Australian court led to different places, a conclusion which may arise in practice given the flexibility of the concept of *locus delicti*. The Chinese court may consider that a focus on the place of acting is imperative, while the Australian court may prefer to focus on the place of damage. Or the Chinese court may be willing to apply a flexible exception whereas the Australian court may not.

If Chinese choice of law rules look at a connecting factor other than the place of the wrong, eg habitual residence of the parties, then the Australian court must also apply that other connecting factor, which may direct the Australian court to apply Chinese law,

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[160] Between proponents of *renvoi*, eg EN Griswold 'Renvoi revisited' 51 HLR 1165, 1182 (1938); A Briggs 'In praise and defence of renvoi' (1998) 47 ICLQ 877 and opponents, eg Cheshire (n 55) 387, citing Cook 329; JD Falconbridge 'Torts in the conflict of laws' (1945) 23 Canadian Bar Rev 309, 312; EWLC Report [3.56]; ALRC Report [4.11]–[4.12].

[161] *Neilson* (n 92) [11], [13], [102], [171], [271].

[162] The arguments that compel against application of *renvoi* in contract (that by choosing a law the parties must have meant the domestic law) are absent in wrongs.

Australian law, or some third country's law.[163] The possibility that this may result in a further application of that law's choice of law rules does not detract from the need to consider Chinese law in its entirety.[164]

(b) 1995 Act

The 1995 Act applies to foreign and local torts. The general rule in s 11(1) of the 1995 Act is not much easier to apply to the internet than *lex loci delicti*. That is because the general rule is, in effect, *lex loci delicti*,[165] though with a formulation not previously used by the courts in formulating a choice of law rule in tort: 'The applicable law is the law of the country in which the events constituting the tort or delict in question occur'. Section 11(1) is intended to deal with situations where all the events arise in the one place, so it does not assist in cross-border wrongs.

In relation to wrongs committed across State boundaries, s 11(2) contains three specific rules. The first, dealing with personal injury, would rarely, if ever, apply in the internet context.[166]

The second, which deals with property damage, requires the application of the law of the place where the property was when it was damaged. This could possibly arise in an internet context, eg where a person hacks into another's computer and causes damage to hardware and software.[167] The *situs* of the property when it was damaged may be obvious in some cases. The location of the hacked computer, which is the property adversely affected or 'damaged', can be easily identified (though the location of the

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[163] Ibid [13], [102].
[164] Ibid [134].
[165] Dicey & Morris [35-079].
[166] C Gringras *The Laws of the Internet* (2nd edn Butterworths London 2003) 159 fn 251.
[167] Reed [7.1.3.5].

hacker is often difficult to ascertain). Where the hacker taps into a network of computers spread throughout several countries, it would be sensible to identify the central computer where the data processing occurs or where the controllers administer the network. In applying the second rule, the timing of damage is essential. Damage occurs on the internet at the time of downloading, receipt, or in some cases later (eg when a misrepresentation is acted upon).[168]

It is the final, residual category, which is the most relevant to wrongs on the internet. Section 11(2)(c) looks at the 'country in which the most significant element or elements of the events [constituting the tort or delict in question] occurred'. This concept was used in preference to the law of the place where the tort was committed.[169] No special treatment was considered necessary for economic torts, nuisance, misrepresentation or torts on or over territorial waters or the high seas. Unlike paragraphs (a) and (b) of s 11(2), which clearly focus on injury or damage, paragraph (c) does not mention injury, damage or loss.

In a wrong on the internet, a rule requiring the court to consider the place in which 'the most significant elements of the events occurred' gives little more guidance than the place where in substance the wrong was committed. At least the statutory rule expressly permits the court to separate a wrong into its elements, and to determine which are most significant. In cross-border wrongs obviously it is easier to localize the component elements of a wrong rather than the entire wrong. The common law *locus delicti* looks at the wrong as a whole, and difficulties arise when different elements occur in different

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[168] Above 78–80.
[169] EWLC Report [3.7].

places. The statutory test, more flexibly,[170] requires identification and then localization of the most significant elements (or ingredients[171]) of the wrong.[172] This is similar to Rabel's view, as regards a single tort committed by partial acts in several countries, that the most characteristic part of the tortious activity should prevail in localizing the tort; not just some part of the corporal movements of the wrongdoer but the most characteristic element of the entire cause of action should indicate which is the decisive place and the law best qualified to govern it.[173]

The *locus delicti* for the purposes of *lex loci delicti* is often the place where the damage is suffered. In my submission, consistently with this, the most characteristic element of the wrong is often the damage to the plaintiff. There is force in Jaffey's suggestion[174] that under s 11(2) paragraph (c), as under paragraphs (a) and (b), the law of the country where the loss occurs should normally be *prima facie* the governing law, and that what makes elements significant is their bearing on what is the appropriate law.

The Court of Appeal in *Morin*[175] gave guidance on how to apply s 11(2)(c) to a claim in misrepresentation. The plaintiff in England received a catalogue in the mail from an English company. One car advertisement appealed to him. It announced a car auction in Monaco by the English company's Monegasque subsidiary. The plaintiff travelled to Monaco and purchased the car at auction. The car proved to be faulty. The plaintiff sued both companies in England alleging negligent misstatement. The elements

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[170] *Protea Leasing Ltd v Royal Air Cambodge Co Ltd* [2002] EWHC 2731 (Comm).
[171] Dicey & Morris [35-085].
[172] *Morin v Bonhams & Brooks Ltd* [2004] 1 Lloyd's Rep 702 [16].
[173] Rabel vol II 317.
[174] Jaffey 116.
[175] *Morin* (n 173).

of that tort are the negligent making of an incorrect statement by the defendant on which the plaintiff reasonably relies and incurs loss.

According to the court, although the plaintiff received the misleading catalogue in England, his continuing reliance and any loss that he suffered outside the jurisdiction by reason of his successful bidding at the auction were all part and parcel of one and the same cause of action in tort.[176] There was a continuum of reliance and loss, and the single tort which was alleged had to be viewed overall for the purposes of s 11(2)(c). The most significant elements were the plaintiff's reliance and loss, represented by his presence and successful bidding at the auction and his resulting commitment to buy the car at the bid price. Because these occurred in Monaco, the tort was governed by Monegasque law.[177]

Application of the previous cases (eg *Distillers* and *Diamond*) may have pointed to England as the place of commission of the tort. However, the court rejected the adoption of the common law process for determining the *locus delicti*, as it is undesirable to import the precise nuances of old law into the 1995 Act.[178]

How does *Morin* affect the analysis of s 11(2)(c) in the internet context? One thing seems clear – there is no particular importance placed on the defendant's acting. The court declined to examine the hypothetical situation of a claim solely against the English parent company as sender in relation to the misstatements in the catalogue, but it doubted

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[176] Ibid [15].
[177] Ibid [19], [22].
[178] Ibid [18].

that even such a claim would have its most significant element in England.[179] The court obviously regarded the place of reliance and damage as being of absolute importance.

Asked to consider what would have been the position if the plaintiff had remained in England and bid by telephone, the court indicated that the balance of significant elements under s 11(2)(c) might have shifted geographically from Monaco to England.[180] The court did not expand on this, but probably considered that if the plaintiff had stayed at home, all his reliance and loss would have been in England, the place of the making and receipt of the representation, reliance and acting. Hence, if the plaintiff, from England, had entered bids onto an online auction website, in my submission, England would have been the place where the most significant elements had occurred.

It is helpful to illustrate the principles by way of an online misrepresentation example.

Suppose that a sender in State A emails a false statement to an addressee in State B, and the addressee receives it in State B, relies on it in State C and suffers loss as a result in State D. *Morin* suggests that, out of the elements of a misrepresentation, where there is a continuum of reliance, that is the most significant element (pointing to State C), regardless of where the statement is sent (State A) or received (State B; *Diamond* may have pointed to this, but should be ignored in the context of s 11[181]), or the place of the loss (State D; in *Morin*, reliance and loss coincided). It seems that, in misrepresentation, it is the plaintiff's acting in reliance that is most significant.[182]

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[179] Ibid [20].
[180] Ibid [21].
[181] Houseman (n 7) 429.
[182] *Voth* (n 136).

In other wrongs (eg spreading viruses), identification of the place of damage may often lead to a determination of the place where the most significant elements occurred. For some wrongs on the internet, damage materializes at the point of downloading or receipt, while for other wrongs damage materializes later.

Once the applicable law has been determined in accordance with s 11, the court will determine whether that law should be displaced under the exception in s 12. That provision requires the court to assess whether, in relation to one or more issues, there is another country whose law has a more significant relationship with the occurrence of the wrong and the parties. This should operate in exceptional circumstances only. For example, an applicable law could be displaced where it yields a result that is purely fortuitous.

The exception in s 12 requires consideration and a balancing of connecting factors. One would expect that in the internet context, there could be some internet-specific connecting factors such as: (a) targeting, which would point to a connection with the target State, and reasonable efforts, which would point away from a connection with the relevant State;[183] (b) reasonable foreseeability that the defendant's conduct could have harmful consequences outside his country (eg sending a group email to recipients around the world), which would point away from a connection with the State where the defendant acted;[184] (c) the loss which is the subject of the plaintiff's claim as a proportion of the total global loss which the defendant caused; (d) whether the places of uploading/sending or downloading/receipt were fortuitous (eg the defendant uploaded web pages through a portable device while connecting to the internet during international

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[183] See further above 126ff.
[184] Jaffey 117.

transit); and (e) the place where any consequential loss was suffered in reliance on the wrongful communication (eg whether the misstatement encouraged website users to take actions in a particular country, such as booking a hotel during a sporting event).

In the above hypothetical example of misrepresentation on the internet (with the sender in State A emailing the addressee in State B, etc), the starting point would be the law of State C, the place of acting in reliance, but an assessment of the factors may result in the application of another law. For example, (i) the law of State B, if the sender targeted the addressee in that State, or (ii) the law of some other State, if the addressee was merely passing through States B, C and D when he was downloading, reading and acting on the message, or if the sender sent the misrepresentation to multiple recipients around the world, encouraging them to take certain action in a particular State other than C. There may be instances where the addressee relied on the sender's misrepresentation in State C and this caused loss to another person, who is the plaintiff, in State D; arguably then the wrong and the parties have a more significant relationship with State D than State C.

Let us consider some examples of the application of ss 11 and 12. These examples highlight general principles but are not to be applied rigidly as each case depends on its circumstances. Cases of damage in a single State are simpler. If the defendant acted by sending an email in England and caused damage only in England, then s 11 will point to English law and there is little reason to displace it under s 12. If the defendant acted by uploading to a website in England and caused damage only in France, then it is likely that s 11 will point to French law and there is little reason to displace it under s 12. If the defendant acted in France and caused damage only in England, then it is likely that s 11 will point to English law and there is little reason to displace it under s 12.

If the defendant acted in England and caused damage to one plaintiff in France and to another plaintiff in Germany, then it is likely that under s 11 French law will apply to the claim by the French plaintiff and German law will apply to the claim by the German plaintiff. These are two cases of damage in a single State.

Multi-State damage is more complex. Consider a case where the defendant acted in France and caused damage to a single plaintiff partly in England and partly in Germany. The claim brought in England should be limited to local loss under the *Shevill* limitation resulting in the likely application of English law under s 11. In a multi-State damage case, an English court could hear a claim for global loss only if the defendant is present or domiciled in England or if he acted in England (under the tort committed ground of service abroad or causal event limb of special jurisdiction). Consider a case where the defendant acted in England and caused damage to a single plaintiff partly in France and partly in Germany. The English court has several options. First, the court could divide the plaintiff's claim into two – damage suffered in France will be governed by French law, and damage suffered in Germany will be governed by German law. The rule of displacement in s 12 allows for *dépeçage* – different laws may apply to different issues in a case.[185] Here the use of *dépeçage* is not to divide a wrong into its constituent elements, each with a different applicable law, which would be impractical; rather it is to divide the claim into separate wrongs – one is a wrong resulting in damage in France, and the other is a wrong resulting in damage in Germany. Second, the court could decide that under s 12 France has a more significant relationship with the occurrence of the wrong and the parties than Germany or England because the plaintiff suffered the majority of his damage in France, so that French law should apply to the entire claim. Third, the court

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[185] Jaffey 106–7.

could decide that under s 12 England has a more significant relationship with the occurrence of the wrong and the parties than both France and Germany, because England is the place where the defendant acted, so that English law will apply to the entire claim and displace both French and German laws. This might be the best solution in cases where there is multi-state damage and it is difficult to identify one State of damage whose law should be applied in preference to the others.

Where ISP liability is concerned, the claim against the ISP should be considered separately from the claim against the underlying wrongdoer, whether or not the wrongdoer is a party to the proceeding. Assume that the wrongdoer sent an email from State A, and the ISP operated the wrongdoer's mail server in State B. Often the law which governs the claim between the plaintiff and the wrongdoer and the law which governs the claim between the plaintiff and the ISP will be the same – the law of the place where the plaintiff suffered loss. However that may not be necessarily so. The exception in s 12 includes within the list of connecting factors 'factors relating to the parties',[186] and this implicitly condones the application of different laws between different parties to the one proceeding. In particular, the operator of the server may argue that it is unfair to hold it liable according to standards in the sender's State, if these are higher than the standards in the operator's State.[187] So there could be one law which applies to the claim by the recipient against the sender and another law which applies to the claim by the recipient against the operator of the server.[188]

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[186] 1995 Act s 12(2).
[187] Jaffey 121.
[188] Dicey & Morris [35-096]; cf Cheshire & North 660.

Regardless of the potential for its application under the rule of double actionability with a flexible exception,[189] and the merit of *renvoi* in this field generally, the drafters of the 1995 Act, which replaced the common law rule, evidently considered *renvoi* to be inappropriate for torts. The 1995 Act specifically excludes *renvoi*: the applicable law as determined under the Act excludes any choice of law rules forming part of the law of the relevant country.[190]

(c) Rome II

Rome II is an attempt to codify the choice of law rules in the EU for 'non-contractual obligations'. From an English perspective, this translates into non-consent based wrongs, unjust enrichment and some other miscellaneous obligations. The Regulation is intended to sit alongside the Judgments Regulation and the Rome Convention (which will become a Regulation). The rationale is to limit forum shopping further and to create a level playing field, whereby EU States will apply uniform principles to reach a choice of substantive law that will govern a non-contractual obligation.

The European Commission released a draft in 2003.[191] The European Parliament suggested amendments in 2005.[192] In 2006 the Commission considered the Parliament's suggested amendments, and released a revised draft.[193]

A few months later, the Council announced that it had agreed a text, broadly reflecting the Commission's most recent proposal, which the Council would forward to

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[189] cf *Neilson* (n 92) [108] which seems to have ignored this.
[190] 1995 Act s 9(5). This exclusion appears to apply (perhaps unintentionally) only to s 11, not s 12.
[191] COM (2003) 427 final, 2003/0168 (COD).
[192] TA-PROV (2005) 284.
[193] COM (2006) 83 final, 2003/0168 (COD).

the Parliament for a second reading.[194] It is to this most recent draft that references will be made. Assuming the Parliament will endorse the new draft, doubts linger about the constitutional validity of Rome II. It appears the UK intends to adopt the Regulation.[195]

Rome II covers a large scope of obligations and contemplates separate choice of law rules for each relevant category: 'torts and delicts',[196] intellectual property wrongs[197] and unjust enrichment.[198] Originally, violations of privacy or rights relating to the personality were given a separate choice of law rule, but this category of wrongs was removed, and there is a specific exclusion.[199]

As regards torts, the focus in art 3(1) is on the place where 'damage occurs'. (This is consistent with the Parliament's draft, though in the Commission's proposal it was 'the place where damage arises or is likely to arise', and in the Commission's explanatory document to its previous draft, the Commission used that interchangeably with 'damage suffered'.) The focus on damage achieves results that are similar to the application of *lex loci delicti* and s 11 of the 1995 Act. A balance is struck between the parties' interests. While it may be easier for a plaintiff to convince a court to apply his law rather than the defendant's law, the defendant may take comfort in knowing that the *Shevill* limitation operates to ensure that a suit in a place of damage is limited to local loss. A claim for global loss may be made only in the country where the defendant is present or domiciled or where he acted.

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[194] 9143/06 and 9409/06.
[195] Recital (22).
[196] Article 3.
[197] Article 8.
[198] Article 9A.
[199] Article 1.2(h).

Article 3(1) is more prescriptive than *lex loci delicti*. It specifically disregards the country in which the event giving rise to the damage occurred, ie the place of the causal event. It considers only the direct injury, ignoring indirect consequences, which follows the approach the ECJ has taken in construing the special jurisdiction provisions.

There is no special mention of the internet. The Parliament recommended a revised Recital 12, which localized publications on the internet at the place where they are principally directed, having regard to various factors. This was not adopted. In general, damage from a wrong on the internet is suffered no earlier than the place of downloading or receipt, though in some cases, where damage is not immediate, one must look to a later point in space and time to identify that damage has occurred to the victim.[200] One example where damage and receipt do not coincide is a negligent misstatement where the place of loss is where the plaintiff acts in reliance on a statement, and not where he receives it.

In my submission, art 3 could be improved.

First, art 3 gives no guidance how to determine the applicable law in cases of multi-state damage. Multi-state damage should be addressed expressly, with a provision enabling the court to divide the claim among the different places where damage was suffered or to apply one law which is most closely connected with the wrong.

It seems that the Commission envisaged a division among places of damage. The Explanatory Memorandum to the original draft[201] stated that where damage [arises] in several countries 'the laws of all the countries concerned will have to be applied on a

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[200] Above 76–9.
[201] COM (2003) 427 final 11, 2003/0168 (COD).

distributive basis, applying what is known as "*Mosaikbetrachtung*" in German law'. This corresponds with *dépeçage*. Criticisms may be made that this may have the unfortunate consequence of dividing a claim into the different places of damage, with each fragment governed by the law of the place of the respective damage. The criticisms may be answered. Where the damage is suffered by a different plaintiff in each country, these are really proceedings for several wrongs which merit the application of a different law for each wrong. Where the damage is suffered by a single plaintiff in several countries, the court may decide to invoke the exception so that a single law which is most closely connected with the wrong applies instead of a multitude of separate laws.

Second, in the case of a wrong which is actionable without proof of damage, or even without damage occurring at all, art 3 should expressly permit the consideration of the hypothetical 'where would damage be likely to occur from the wrong?'.

Third, while art 3(3) provides an exception from the general rule, where it is clear from all the circumstances of the case that the obligation is manifestly more closely connected with another country, the latter part of that provision continues, giving an example of a closer connection where there is a pre-existing relationship between the parties (the Council's draft has dropped the Commission's recommendation for consideration of the expectations of the parties). The Parliament's previous draft contained a longer list of factors which have been discarded. In my submission determination of a closer connection should be left entirely up to the relevant court. Listing factors may suggest to the court that others may not be taken into account.

Fourth, in many cases it may be inappropriate to apply the exception in art 3(2), which provides that where the plaintiff and defendant habitually reside in the same

country, that country's law should govern. Courts may be reluctant to use the exception in art 3(3) as a way out. From the explanatory materials, it seems that the Parliament and the Commission considered the application of art 3(2) in traffic accidents but not in other wrongs. Article 3(2) could lead to unexpected results when applied to wrongs on the internet. For example, an English resident sends another English resident a catalogue for car auctions in Monaco. The recipient relies on the catalogue, travels to Monaco and bids successfully at an auction for a car, which later proves faulty. Should English law apply as the law of the habitual residence of the plaintiff and defendant? If the law of the country of habitual residence is more appropriate to apply than the law of the place of damage, this can be achieved through the flexible exception in art 3(3).

Finally, art 20 excludes *renvoi*. This should be reconsidered. It is an issue on which none of the European legislative bodies seems to have focused. As an Australian court demonstrated recently,[202] when applying a foreign law in the context of non-consensual obligations it is sensible to have regard to that law in its entirety, including its private international law rules.

The difficulties with Rome II are surmountable. Refinement is necessary. Some cyberlaw advocates may lament Rome II as a missed opportunity for creating a specific choice of law rule for wrongs on the internet. Yet, as in the field of wrongs generally, it is preferable to retain flexibility, sometimes at the expense of certainty.

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[202] *Neilson* (n 92).

6 CONCLUSION

After decades of debate on conflict of laws principles in the field of wrongs, consensus remains elusive on fundamental questions such as characterization, choice of law rules and *renvoi*. As regards choice of law, recently the pendulum has swung back towards *lex loci delicti*. In Australia and Canada, the search is for the law of the place of the wrong. In general, a balance between the interests of the parties is achieved if the wrong is localized at the place where damage was suffered. In the internet context, that generally means downloading/receipt or a later point. In cases of multi-state damage, a flexible exception can be used to apply a law which has a closer connection with the wrong, perhaps the law of the place of the defendant's acting. The absence of a flexible exception in Australia and Canada is unfortunate and should be reconsidered at an appellate or legislative level.

In the UK, the search is for the law of the State in which the most significant elements of the wrong are committed, subject to displacement in exceptional circumstances. The law applicable to a misrepresentation is the law of the place of acting in reliance. In other wrongs, the most significant element may be the damage. Sensibly, the legislation allows an exception whereby the law of the place with a closer connection may be applied. A damage-focused approach is also enshrined in Rome II, though there is room for improvement.

A uniform general approach to choice of law for wrongs on the internet will produce certainty for the parties and the broader judicial system, while retaining flexibility for tailoring to specific situations.

CHAPTER E:
INTELLECTUAL PROPERTY WRONGS

1 TERRITORIALITY

The grant of statutory intellectual property rights was originally seen as an aspect of a State's exclusive sovereign power over its subjects.[1] Later it came to be regarded as an aspect of a State's exclusive sovereign power in respect of its territory.[2] Hence the assertion that statutory intellectual property rights are territorial.[3] The State, by legislation, creates and confers, on an owner, exclusive rights in respect of the State's territory. The most significant exclusive rights are copyright (rights to exploit works and other related subject-matter in the territory[4]), trade marks (rights to use a sign in the trade of goods or services in a territory[5]) and patents (an inventor's monopoly which has effect throughout a territory[6]).

The implications of territoriality are significant. An intellectual property right affects only activities in the territory for which the right is granted.[7] It has no extraterritorial operation.[8] It must follow that an intellectual property right may be infringed only in the State where the right is granted and protected. The infringement

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[1] Copyright Act 1709 (UK) (Statute of Anne) was held to have given protection to British authors only: *Jeffreys v Boosey* (1854) 4 HLC 815, 970.

[2] Copyright Act 1842 (UK) was held to have given protection to an author of a book first published in the UK whether the author was at the time of publication a British resident or not: *Routledge v Low* (1868) LR 3 HL 100, 118.

[3] *Atkinson Footwear Ltd v Hodgskin International Services Ltd* (1995) 31 IPR 186 (HCNZ) 189–91; *Tyburn Production Ltd v Conan Doyle* [1991] Ch 75.

[4] Eg Copyright Act 1968 (Cth) ss 36(1), 101(1), 132(6).

[5] Eg Trade Marks Act 1995 (Cth) s 120(1).

[6] Eg Patents Act 1990 (Cth) s 13(3) and the definition of 'patent area' in sch 1.

[7] Cornish & Llewellyn [1-30].

[8] C Wadlow *Enforcement of Intellectual Property in European and International Law* (Sweet & Maxwell London 1998) [1-18]–[1-20]; Nimmer vol 4 §17.02.

occurs where a person exercises the exclusive statutory right without the owner's authority. Damage from infringement of an intellectual property right is suffered in the State where the right is granted and protected.[9] A court in the State where infringement occurs has jurisdiction to hear claims relating to infringement. As the right affects only activities undertaken within the territory of the State of infringement,[10] the applicable law would appear to be the law of the State of infringement. Although there is an argument that a right granted in one State may be infringed in another State, this is unlikely to have any practical legal consequences outside any international arrangements,[11] though the choice of law question should be investigated nevertheless.[12]

Territoriality is inherent in copyright legislation, which defines copyright as the exclusive right to do certain restricted acts in a territory. It is infringed by another party doing those acts, without authority, in that territory,[13] and damage is suffered in that territory, eg through the loss of sales. So British copyright legislation operates only in Britain and can be infringed only by acts performed in Britain.[14] Doing those acts outside Britain (as opposed to authorizing outside Britain the commission of those acts in Britain) does not infringe British copyright law.[15] Trade marks are rights registered on a national register. Legislation conferring rights on owners of registered marks is limited in scope territorially. The law of the country of registration decides to whom the mark is granted,

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[9] Cf BB Sookman *Computer, Internet and Electronic Commerce Law* (looseleaf Thomson Ontario 2004) [11.14(b)].
[10] Cornish & Llewellyn [1-30].
[11] Fawcett & Torremans 601.
[12] Dicey & Morris [35-029].
[13] An infringement of copyright occurs when the defendant does, in the territory, any act comprised in the copyright (eg Copyright, Designs and Patents Act 1988 (UK) ss 1, 2, 16; Copyright Act (Cth) ss 36(1), 101(1)).
[14] *Def Lepp Music v Stuart Brown* [1986] RPC 273 (ChD); *Jonathan Cape Ltd v Consolidated Press Ltd* [1954] 1 WLR 1313 (QBD); *James Burrough Distillers v Speymalt Whisky Distributors* [1991] RPC 130 (ScotSC).
[15] *Copinger and Skone James on Copyright* (15th edn Sweet & Maxwell London 2005) vol 1 [7-80], [22-115]; *Robert Stigwood Group Ltd v O'Reilly* 530 F 2d 1096 (2d Cir 1976) 1101.

the content of the mark, and whether the mark is infringed. A mark can be infringed only in its country of registration.[16] That is the extent of the exclusive rights.[17] So Australian trade marks legislation operates only in Australia and can be infringed only by acts in Australia. A patent is a monopoly right granted in respect of a patent area and has effect throughout that area,[18] while outside that territory it has no force or effect and cannot be violated.[19]

Although intellectual property rights are granted in one State, international and regional conventions may afford the owner of the rights protection in other States. In respect of copyright, such reciprocal arrangements have existed for over a century and are recognized almost universally. Copyright arises automatically upon the creation of a work or other relevant subject-matter, without the need for registration. A person who owns copyright in a State that is a party to the Berne Convention[20] is entitled to receive protection (under the principle of 'national treatment'[21]) in every other State that has adopted that Convention. The principle of national treatment allows owners of rights protected by the Convention to claim, in every contracting State, the same protection that that State affords to its own nationals. As a consequence, there is a view of some merit that copyright should be regarded not simply as a right created under one State's national law (*droits acquis*) but as an array of parallel rights which are created simultaneously

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[16] Nimmer vol 4 §17.02.
[17] Trade Marks Act 1994 (UK) s 9(1); *LA Gear Inc v Gerald Whelan & Sons Ltd* [1991] FSR 670; *Waterford Wedgwood plc v David Nagli Ltd* [1998] FSR 92.
[18] Patents Act 1977 (UK) ss 60, 132(2)–(4); Patents Act 1990 (Cth), s 13(3), definition of 'patent area' in sch 1.
[19] Rabel vol II 295.
[20] Berne Convention for the Protection of Literary and Artistic Works 1886 (828 UNTS 221), as revised in Paris in 1971 (1161 UNTS 3).
[21] Article 5.

under the laws of all States that are parties to the Berne Convention (*droits indépendants*).[22]

One consequence of the principle of national treatment is that issues of choice of law are avoided. The owner, a national of State A, sues in relation to an infringement of his right in State B under the law of State B, and enforces the reciprocal local right which arises in State B, rather than enforcing his original right in State A. There is debate as to whether the principle of national treatment is itself a choice of law rule.[23] It would be neater if the principle generated a uniform answer in respect of a single intellectual property right which could apply in all courts. But there is no guidance as to how this principle fits with territoriality. Is a different law applicable in each place where protection is sought under the national treatment principle? Is the applicable law the *lex loci protectionis* or the *lex fori*? The principle seems to assist only in cases concerning infringement within a court's territory, but not in cases concerning the infringement of rights in another State.[24]

Trade marks and patents require registration in each State in which the proprietor wishes to receive protection. Regional arrangements in the EU in relation to Community Trade Marks[25] and Community Patents[26] allow for a single registration to take effect throughout the entire Community. Registration in one Member State results in automatic protection in all others. In each of those States there is a separate right protected, so State-based rights are not replaced with a single pan-European right. Outside the EU

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[22] Eechoud 99.
[23] W Gorsheide 'Experiences in the field of intellectual property' in Boele-Woelki & Kessedjian 35, 38; Eechoud ch 4; Ricketson & Ginsburg [20.11].
[24] Gorsheide (ibid) 37.
[25] EC Trade Mark Regulation [1994] OJ L11/1.
[26] EC Patent Convention [1989] OJ L401/1.

there is still the requirement of registration of the trade mark on the State's local register.[27] When a trade mark is registered in several States, it could be said to create simultaneously a series of parallel rights for the owner under the laws of those States.

It is clear that territoriality faces great challenges in the internet age.[28] The remainder of this chapter is devoted to private international law aspects of infringements of statutory[29] intellectual property rights on the internet. Non-infringement issues, such as validity, registration or transmissibility, are left to one side. Nor is this chapter concerned with infringements of contractual rights in relation to intellectual property (eg assignments, licences). Those are governed by the *lex contractus*.[30] The chapter focuses on the infringement of copyright by communicating protected material on the internet or copying protected material from the internet, and the infringement of trade marks by using a protected sign on the internet.[31]

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[27] A trade mark registered under the Madrid System of international registration of marks is deemed to be registered in each of the 77 member countries of the Madrid Union, to the extent it does not refuse protection: Madrid Agreement on the international registration of marks 1891 and Madrid Protocol 1989: Kerly ch 7. International protection would be automatic if substantive trade mark laws were harmonized, as proposed by WIPO 'Draft Revised Trade Mark Law Treaty' (14th Session 2005).

[28] GG Letterman *Basics of International Intellectual Property Law* (Transnational Publishers New York 2001) 328.

[29] Passing off is a common law wrong, rather than a statutory wrong, and is more similar to misrepresentation. See below 220–1.

[30] P Torremans 'Private international law aspects of IP– internet disputes' in Edwards & Waelde 225, 243ff.

[31] There are also cases on the localization of patent infringement on the internet: *Menashe Business Mercantile Ltd v William Hill Organisation Ltd* [2003] 1 WLR 1462 (CA) [33]; *NTP Inc v Research In Motion Ltd* 418 F 3d 1282 (Fed Cir 2005).

2 JURISDICTION

(a) Personal Jurisdiction

An English court's personal jurisdiction in civil and commercial matters is determined under the Judgments Regulation.[32] As a general rule, a defendant should be sued in his Member State of domicile.[33] Therefore, an English court has jurisdiction where an English domiciliary infringes an intellectual property right, regardless of where it was granted. A court having personal jurisdiction over the defendant should hear the claim even if it relates to the infringement of a foreign right under a foreign law in a foreign territory.[34] Under art 2 of the Judgments Regulation this should be the end of the matter.[35] There is no *forum (non) conveniens* discretion.[36] The only limit to jurisdiction is where the registration or validity of another EU State's registrable or depositable intellectual property right is in issue, giving the other EU court exclusive jurisdiction, and compelling the English court to decline jurisdiction.[37]

Where the claim is against a defendant domiciled in another State of the EU, the English court may have special jurisdiction.[38] Intellectual property wrongs fall within 'matters relating to tort, delict or quasi-delict' for the purposes of the Judgments Regulation.[39] The characterization is not precise. An infringement of copyright, trade

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[32] Intellectual property cases clearly fall within civil and commercial matters, and so come within the Judgments Regulation art 1(1): *Pearce v Ove Arup Partnership Ltd* [1997] 2 WLR 779 (ChD) 784.
[33] Article 2.
[34] Rabel vol II 295; Nimmer vol 4 §17.03.
[35] *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403 (CA); Torremans (n 30) 232.
[36] Above 102.
[37] Article 22(1); *Coin Controls Ltd v Suzo Intl (UK) Ltd* [1999] Ch 33; *Fort Dodge Animal Health Ltd v Akzo Nobel NV* [1998] FSR 222 (CA) 242. Subject-matter jurisdiction is discussed below 196ff.
[38] Eg under art 5(3).
[39] *Fort Dodge* (n 37) 242.

mark or patent is not exactly a tort in the common law sense,[40] but rather an infringement of a statutory right with statutory remedies (often involving an election between damages and an account of profits).[41] Intellectual property wrongs could even have criminal repercussions. At the other extreme, some infringements are wholly innocent. This has led some courts to express doubt that infringements of statutory intellectual property rights are torts in the domestic sense. In any event, the category of 'tort' for private international law purposes is created not by common law but by statutory instrument (for each set of exorbitant jurisdiction rules). Hence, art 5(3) can be relied on.[42]

The two limbs of art 5(3)[43] do not, in practice, provide alternative fora as they would in respect of other wrongs. The causal event limb requires that the event which causes the damage occur in England. This is satisfied where an infringement of an intellectual property right occurs in England. By definition, only British intellectual property rights can be infringed in England, and British intellectual property rights can be infringed only in the UK, not by an act overseas.[44] Acts of infringement that occur outside a State are not actionable under the State's laws.[45]

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[40] *Def Lepp* (n 14) 276.
[41] Cornish & Llewellyn [2-28].
[42] Fawcett & Torremans 150.
[43] Case 21/76 *Bier v Mines de Potasse d'Alsace SA* [1976] ECR 1735 should be applied to intellectual property infringements, although perhaps a special definition of the 'place of the harmful event' is required: Fawcett & Torremans 152–6, 168–9.
[44] *Def Lepp* (n 14); *James Burrough* (n 14); *Molnlycke v Proctor & Gamble (No 4)* [1992] RPC 21 (CA); *Waterford* (n 17) 102; *Griggs Group Ltd v Evans* [2005] Ch 153 [129], appeal dismissed on other grounds [2005] EWCA Civ 11; E Jooris 'Infringement of foreign copyright and the jurisdiction of English courts' [1996] EIPR 127, 140. cf Fawcett & Torremans 164, 623 where the authors divide the discussion into 'A UK right is infringed in England' and 'A UK right is infringed abroad'. A UK right can be infringed only in the UK. There are some extensions to this, eg under the Copyright, Designs and Patents Act 1988 (UK) s 27(3) an infringing copy includes an article copied outside the UK but imported into the UK. See Jooris (ibid) 128. However this is a wrong that is not relevantly committed on the internet. See also H Laddie, P Prescott and M Vitoria *The Modern Law of Copyright and Designs* (2nd edn Butterworths London 1995) [24.19]; *LA Gear* (n 17) 674.
[45] Nimmer vol 4 §17.03.

The injury limb requires that the direct damage occur in England. By definition, only infringements of British intellectual property rights can result in damage in England and damage in England can result only from infringements of British rights. So both limbs lead to England.

Where the claim is against a defendant domiciled outside the EU, the claimant must rely on service under the rules of court. The English court has jurisdiction over a defendant served in England, subject to any subject-matter jurisdictional limitations.[46] A defendant who is not present in England must be served abroad.[47] Intellectual property wrongs are regarded as 'torts' for the purposes of the service abroad provisions,[48] even if not for domestic purposes.[49] (Territoriality might mean that if there is no match between the place of infringement and the place of protection of the right, then there is no 'tort'[50].)

The English service abroad provisions (r 6.20(8)) contain two grounds. The act committed ground is satisfied where the defendant exercises in England the plaintiff's exclusive (British) statutory right, ie an infringement occurs in England. By definition, only British intellectual property rights can be infringed in England. The damage ground again requires an infringement of a British intellectual property right. Even where it has jurisdiction, for example by service on a defendant present in England, an English court would be likely to stay a proceeding relating to infringement of a foreign intellectual

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[46] Below 196ff.
[47] Under CPR r 6.20(8).
[48] *The Electric Furness Co v Selas Corp of America* [1987] RPC 23 (CA) 30–1; *Unilever plc v Gillette (UK) Ltd* [1989] RPC 83 (CA); *Spotless Group v Proplast* [1987] 10 IPR 668 (SCVic) 670; *Best Australia Ltd v Aquagas Marketing* (1988) 83 ALR 217 (FCA) 220; A Dufty, J Lahore and J Garnsey *Patents, Trade Marks and Related Rights* (looseleaf LexisNexis Butterworths Sydney 2004) [67,010]; J Lahore *Copyright and Designs* (looseleaf LexisNexis Butterworths Sydney 2004) [34,095].
[49] White Book vol 1 [6.21.39].
[50] Ibid, citing *Def Lepp* (n 14).

property right on the basis of *forum (non) conveniens*.[51] The place of the wrong is presumed to be the natural forum.[52] The court may view the place where the foreign right was granted as a more appropriate forum,[53] and regard itself as unable to rule on foreign commerce by the standards of that foreign place.[54]

However there are greater complexities which the above conclusions disguise. There may be parallel rights in more than one State by virtue of international conventions or by virtue of multiple registration. These may be illustrated through examples.

Strictly speaking, Indian copyright cannot be infringed in England. But where actions have taken place in England which a copyright-owner regards as infringing his Indian copyright, he can rely on *droits indépendants* arising under the principle of national treatment in the Berne Convention to allege that his corresponding British copyright has been infringed by acts in England. Similarly, French trade marks cannot be infringed in England. But where actions have taken place in England which the owner regards as infringing his French trade mark, he can rely on the Community Trade Mark to sue for infringement in England.

Outside the EU, parallel trade marks can exist only where there are multiple registrations. If an owner has registered a trade mark in the UK, US and Australia in relation to the same subject-matter (eg 'Nike'), and actions have taken place in England which the owner regards as infringing all those marks (eg a cybersquatter registers the domain name 'www.nike.com' and uses that website to sell shoes around the world),

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[51] JAL Sterling *World Copyright Law* (Sweet & Maxwell London 2003) [3.27]; Briggs 50.
[52] *The Albaforth* [1984] 2 Lloyd's Rep 91 (CA).
[53] *Plastus Kreativ AB v Minnesota Mining & Manufacturing* [1995] RPC 438, 447.
[54] Rabel vol II 298.

there is a separate infringement of the trade mark law of each State where Nike is registered as a trade mark.

In my submission, the international infringement of the trade marks should be regarded as involving the same cause of action, and should be localized in England, the place of the cybersquatter's acting. Aggregation of separate territorial infringements is advocated by Fawcett & Torremans.[55] Although it may appear novel, it is gaining acceptance, at least in Europe,[56] and perhaps also in Australia[57] and the US.[58] This may be indicative of changing attitudes towards the reconciliation between intellectual property and private international law, which for many years had taken separate courses.[59]

Multiple infringement of rights granted in several States rests uneasily beside jurisdictional rules that require localization within a State. Jurisdiction based on the tort committed or act committed ground (or the causal event limb) covers only acts of infringement committed or threatened within the territory of the State.[60] Where a court's jurisdiction is based on the damage ground (or the injury limb), the court has jurisdiction only in respect of the damage suffered within the territory of the State.[61] This is the result of territoriality, rather than of any analogous application of *Shevill*.[62] In contrast with

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[55] Fawcett & Torremans 135–7.
[56] Dicey & Morris [35-029]; Sterling (n 51) [3.27]; Cornish & Llewellyn [2-72]; cf C Gringras *The Laws of the Internet* (2nd edn Butterworths London 2003) 278–9.
[57] R Finkelstein 'Protection of intellectual property in cyberspace: Jurisdictional issues' [2001] Intellectual Property Forum 8, 14; B Fitzgerald, G Middleton and A Fitzgerald *Jurisdiction and the Internet* (LBC Sydney 2004) 75–6.
[58] GB Dinwoodie 'A new copyright order: Why national courts should create global norms' 149 UPLR 469, 537 (2000); GB Dinwoodie 'International intellectual property litigation: A vehicle for resurgent comparativist thought' 49 AJCL 429, 440–2 (2001), hinting that a single publication rule may be appropriate in intellectual property cases.
[59] Gorsheide (n 23) 35.
[60] Fawcett & Torremans 161–2.
[61] Ibid 167–8.
[62] Cf ibid 161–2, 167–8.

other wrongs, it is only when the court's jurisdiction is based on domicile or presence of the defendant, that it can adjudicate in relation to all the damage caused to the plaintiff from those intellectual property infringements around the world.[63]

In order to address these complexities, it is essential to locate the place of infringement and the place of damage.

Once the place of infringement and the place of damage have been determined, they must be matched to the place or places where the relevant rights are protected by grant, under the conventions or multiple registration. So, unless there are parallel rights protected in both States, an infringement in one State (eg Russia) of a right protected only in another State (eg Swedish trade mark) cannot arise or, if it can arise, cannot have any legal consequences. As with other wrongs, localization of the infringement and damage on the internet presents challenges, but some solutions are offered.[64]

(b) Subject-Matter Jurisdiction

It is often said that a court's jurisdiction is limited in cases which concern foreign intellectual property rights. In England and Australia, this limitation is derived from the common law. It is reflected in one way or another in US law[65] and civilian systems.[66] Originally that limitation was based on the distinction between 'transitory' and 'local' actions (in the US, known as the 'local action rule'[67]). Historically courts could try

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[63] Nimmer vol 4 §17.02.
[64] Below 217ff.
[65] *Vanity Fair Mills v T Eaton Co* 234 F 2d 633 (2d Cir 1956) 646; *Sterling Drug v Bayer AG* 14 F 3d 733 (2d Cir 1994).
[66] Though with some exceptions. Some countries take a more expansive view of personal jurisdiction in the context of intellectual property rights, eg Japanese patent law, which permits a patentee to sue in his own domicile or in the place where the patent infringement occurs, regardless of the source of the patent: PD Trooboff 'Intellectual property' in McLachlan & Nygh 125, 127.
[67] Trooboff (ibid) 126.

actions relating to foreign transactions that were transitory (in that their facts could have occurred anywhere), but not actions relating to foreign transactions that were local (in that their facts could have occurred only in a particular place) as they had to be determined by a jury in that foreign locality.[68]

Local venues were abolished by statute in the 19th Century.[69] Nevertheless, in relation to foreign land, the distinction between transitory and local actions was later cited with approval in *British South Africa Co v Companhia de Moçambique*,[70] ("***Moçambique***") where it was held that disputes relating to foreign land could be adjudicated only by the courts of the place where the land was situated. The court explained the universal principle that suits *in rem* in respect of immovable property should be brought where the property is situate. As the sovereign had the exclusive power to grant or revoke title to land in the sovereign's territory, the sovereign should have exclusive power to adjudicate disputes relating to that title.

An early Australian High Court judgment on patent infringement[71] extended the *Moçambique* rule to intellectual property, which, by analogy with land, was regarded as an immovable created through the exercise of sovereign power. A later Australian High Court decision accepted the 'strict territoriality of patents' and added that 'no action could be maintained in England for an infringement of an Australian patent, or in Australia for an infringement of an English patent'.[72]

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[68] *Doulson v Matthews* (1792) 4 Durn & E 503, 504, 100 ER 1143.
[69] Judicature Act 1873 (UK).
[70] [1893] AC 602 (HL) 621.
[71] *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479 (HCA) 496–7.
[72] *Norbert Steinhardt & Son Ltd v Meth* (1961) 105 CLR 440 (HCA) 443–4.

Courts regarded themselves as lacking subject-matter jurisdiction to hear disputes relating to foreign intellectual property rights,[73] as the courts of the State where the monopoly rights were granted were better equipped to assess the rights and the dispute from an economic and social perspective.[74] As with land, the sovereign's exclusive power to grant the rights in respect of its territory brought with it exclusive power to adjudicate over those rights. Having personal jurisdiction over the parties could not cure a lack of subject-matter jurisdiction.[75]

Although it has been pointed out that the extension of the principle to intellectual property was not justified,[76] an English court, in *Tyburn Production Ltd v Conan Doyle*[77] ("***Tyburn***"), approved of the Australian cases and considered that it could not entertain disputes relating to foreign intellectual property rights on the basis of the local/transitory distinction.[78]

Perhaps the limitation was not strictly a jurisdictional one, but rather a condition of justiciability or admissibility,[79] so that claims relating to foreign rights were non-justiciable or non-admissible. What non-justiciability means is not entirely clear,[80] but it

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[73] *Def Lepp* (n 14); *Molnlycke* (n 44); *Waterford* (n 17) 102.
[74] *Plastus Kreativ* (n 53) 447; *Chiron Corp v Organon Teknika Ltd (No10)* [1995] FSR 325, 338 (PatCt).
[75] *ITSI TV Productions Inc v California Authority of Racing Fairs* 785 F Supp 854, 864 (EDCal 1992); *David Syme & Co Ltd v Grey* (1992) 38 FCR 303.
[76] *Moçambique* (n 70) was decided on a point of substance (whether an English court could give an effective judgment) and not on a point of procedure. The Australian cases were not directly concerned with the infringement of foreign intellectual property rights – one case was concerned with the validity of rights, while the other was concerned with threats to bring proceedings for infringement.
[77] [1991] Ch 75; see also *Def Lepp* (n 14) 276.
[78] *Tyburn* (ibid) 170.
[79] *Tyburn* (n 78). Cf *'Morocco Bound' Syndicate Ltd v Harris* [1895] 1 Ch 534; *Potter* (n 68) 494, 496–7, 510; *Norbert Steinhardt* (n 72) 443.
[80] A Briggs 'Two undesirable side effects of the Brussels Convention' (1997) 113 LQR 364, 366. There are two facets to non-justiciability in international litigation. The first is a matter which is more appropriately dealt with by the municipal courts of another State, a question of private international law. The second is a matter on which no State's municipal court should pass judgment, a question of public international law.

is likely to arise where there is a potential breach of comity.[81] In truth, both the local/transitory distinction and the justiciability principle embody the unwillingness of the courts, as a matter of policy, to adjudicate over matters relating to a right granted by a foreign sovereign, as this would represent a court overstepping its boundaries.[82]

A recent decision has been hailed as an overdue relaxation of strict territoriality in intellectual property. In *Pearce v Ove Arup Partnership Ltd*[83] (“***Pearce***”), it was held that an English court, having personal jurisdiction over an English-domiciled defendant and his Dutch-domiciled co-defendants, had jurisdiction to try an action for the infringement of a Dutch copyright alleged to have occurred through the construction of a building in the Netherlands. (In the event copyright had not been infringed.)

As *Pearce* concerned States within EU/EFTA, it is important to review how the European instruments (the Judgments Regulation and related conventions) operate.

Article 22(4) of the Judgments Regulation[84] overrides the general domicile-based rule and confers exclusive jurisdiction, in disputes concerning the registration or validity of a registrable or depositable right (such as patents, trade marks and designs, but not copyright), on the courts of the Member State that granted the right. The exclusivity is limited to proceedings where the validity or registration of a right are genuinely in issue.[85] The European instruments offer no express guidance as regards aspects of

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[81] *Griggs* (n 44) [72]–[79].
[82] PB Carter ‘Foreign copyright laws not justiciable’ (1990) 61 BYIL 400, 401; Trooboff (n 67) 153.
[83] [2000] Ch 403 (CA).
[84] The equivalent provision in the Brussels Convention and the Lugano Convention is art 16(4).
[85] Kerly [19-038]–[19-039].

intellectual property other than registration and validity, most importantly infringement and enforcement.[86]

The approach taken in *Pearce* was as follows. First, the court must determine whether art 22(4) applies. If it applies, then a court in the State where the right was granted has exclusive jurisdiction over the proceeding, and courts in other States have no jurisdiction. Article 22(4) is the only relevant subject-matter limitation in the Judgments Regulation. If it does not apply, then, as the Judgments Regulation contains no other express limitations on jurisdiction, its ordinary rules apply. The jurisdictional limitation in art 22(4) is confined to cases involving issues of validity or registration of foreign registrable intellectual property rights.[87] So English courts would not hear a patent infringement case where the validity of a French patent was in issue.[88] Where the proceeding concerns infringement but not registration or validity, the jurisdictional limitation does not apply[89] and a court of a Member State has jurisdiction over a defendant domiciled in that State[90] or where the infringement occurred or damage was suffered in that State.[91]

As copyright is not a registrable right, art 22(4) did not apply in *Pearce* and the court had jurisdiction over the English-domiciled defendants and the Dutch-domiciled co-defendants despite the copyright's foreign origins. Article 22(4) could potentially fragment proceedings which involve registrable and non-registrable rights. Eg an action concerning both trade mark validity and passing off, which are frequently grouped

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[86] Trooboff (n 67) 154.
[87] *Griggs* (n 44) [132]–[140].
[88] Kerly [19-038]; *Coin Controls* (n 37).
[89] Case 288/82 *Duijnstee v Goderbauer* [1983] ECR 3663.
[90] Article 2(1).
[91] Article 5(3).

together, would be split up – one court could hear the passing off claim and another court might have exclusive jurisdiction over the trade mark claim.[92]

It is unclear what are *Pearce*'s consequences (if any) for jurisdiction at common law. The court did not discuss the common law position, but concluded simply that 'the *Moçambique* rule does not require the English court to refuse to entertain a claim in respect of the alleged infringement of Dutch copyright'.[93] The court neither approved nor disapproved of *Tyburn* (which had confirmed the common law limitation a decade earlier). It must be remembered that in civil and commercial matters the common law jurisdiction of English courts over defendants domiciled outside the EU also stems from the Judgments Regulation.[94] There are two interpretations of *Pearce*. One view is that *Pearce* left the common law limitation intact, so that the common law limitation forms part of 'the law of that Member State' for the purposes of the Judgments Regulation[95] and overrides the application of any national laws on personal jurisdiction such as the English service abroad provisions. The other view,[96] which I submit is correct, is that the scope of both the common law limitation and the art 22(4) limitation is identical in respect of the intellectual property rights to which they both apply (being registrable or depositable rights, such as trade marks and patents); as regards copyright this means that the common law limitation applies only to issues of validity. In the absence of any validity or

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[92] In practice these issues arise often in the Netherlands where patentees sue for infringements of foreign patents in plaintiff-friendly courts, seeking a pan-European injunction from a single set of proceedings: JJ Brinkoff 'Between speed and thoroughness: the Dutch 'kort geding' procedure in patent cases' [1996] EIPR 499.

[93] *Pearce* (CA) (n 35) 445.

[94] Article 4(1).

[95] Article 4(1).

[96] *Pearce* (CA) (n 35) 436; Torremans (n 30) 227; GW Austin 'Copyright infringement in New Zealand's private international law (2000) 19 New Zealand ULRev 1, 8–9. See also *Pearce* (ChD) (n 32); *Coin Controls* (n 37); *Fort Dodge* (n 39).

registration issues, there is no work left to be done by either art 22(4) or the common law limitation.

The effectiveness of the European instruments must not be impaired by incompatible national procedural rules.[97] The common law limitation, whatever its derivation, may be such a national rule. Although the European instruments set out to unify and codify the rules on personal jurisdiction, and there are arguments that any existing domestic rules regarding subject-matter jurisdiction are left intact, it is clear that the instruments address, and in my submission operate as an exhaustive code in respect of, the topic of subject-matter jurisdiction in intellectual property proceedings. The drafters intended there to be no limitation to jurisdiction (either personal or subject-matter) other than that which is expressly stated in art 22(4). So it is likely that an English court considering this issue in the common law context will decide that the only limitation on jurisdiction in intellectual property cases is that expressed in art 22(4).

There are good reasons to limit the scope of the common law limitation (at least in England, but also in other common law countries) to issues of registration or validity of intellectual property rights. It was imposed in the days before the doctrine of *forum (non) conveniens* was well developed,[98] and now has lost much of its relevance. The consequence of double actionability was that an infringement of a foreign right could not, by definition, be actionable as a tort under English law and hence the first limb (actionability under the *lex fori*) could not be satisfied. It had been assumed that actions for infringement of foreign intellectual property rights are automatically doomed to

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[97] Case 288/82 *Duijnstee v Goderbauer* [1983] ECR 3663, 3675.
[98] *Griggs* (n 44) [87].

failure,[99] until it was confirmed that the flexible exception could be used to apply a foreign law.[100] In any event , the 1995 Act abrogated the common law choice of law rule and clearly permits the application of a foreign law.[101] Like other forms of personal property, intellectual property rights should be treated as movable.[102]

It is even less clear whether *Pearce* will impact on the exercise of jurisdiction in other common law countries. If *Pearce* purported to narrow the scope of the common law limitation, then this is a long overdue reinterpretation of the early Australian High Court decisions. In my submission, art 22(4) is, for registrable or depositable rights, a statutory formulation of the common law limitation, so that even in Australia the scope of the limitation should not extend beyond registration and validity. Of course, Australian law would require a High Court decision (or legislation) to overturn the precedents, perhaps in contemporary recognition that land has a uniqueness which intellectual property rights do not have and intellectual property rights are not truly immovables.[103]

In any event, even if an English or an Australian court has personal and subject-matter jurisdiction at common law in a proceeding involving foreign intellectual property rights, the court may decide to stay the proceeding. If the claim is only for infringement, then there should be no particular objection to exercising jurisdiction. However the court would clearly decline to hear a case which concerns, directly or indirectly, the registration or validity of foreign intellectual property rights. For example, it cannot be expected to

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[99] Dicey & Morris [35-029].
[100] *Pearce* (CA) (n 35) 488.
[101] Dicey & Morris [35-031].
[102] *Pearce* (CA) (n 35) 433–41; Torremans (n 30) 237–42; Fawcett & Torremans 136–7.
[103] *Griggs* (n 44) [111], [115], [118], [119].

weigh up the relative importance or genuineness of an invalidity claim even in the context of an infringement proceeding.[104]

In conclusion, the foreign origin of an intellectual property right does not remove the court's jurisdiction to adjudicate infringement disputes. The willingness of courts to look beyond their boundaries and punish infringements of foreign intellectual property rights will certainly continue, as the increasing use of the internet leads to cross-border infringements.

(c) In Rem Jurisdiction Over Domain Names

In many cases involving the internet, it is not practical to exercise personal jurisdiction over the defendant. For example, it may be impossible to identify or locate the defendant. Particularly in cybersquatting cases (ie trade mark infringement through the operation of a website with a domain name that contains a trade marked expression[105]) it may be difficult to apply ordinary personal jurisdiction principles to punish wrongdoers. Cybersquatting has the potential to cost the trade mark owners dearly in lost revenue. For example, Porsche was unable to use the 'www.porsche.com' domain name because a foreign cybersquatter had registered it first.

In the US the solution was to enact amendments to the trade mark legislation in the form of the Anticybersquatting Consumer Protection Act 1999 (US).[106] This creates an *in rem* cause of action against a domain name which is registered or used with the requisite bad faith intent to profit, and overcomes difficulties in establishing personal jurisdiction

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[104] Briggs 50; Austin (n 96) 13.
[105] It is operation of the website, rather than mere registration of the domain name, which constitutes use of a mark so as to constitute trade mark infringement and passing off.
[106] Inserting a new §43(d)(2)(A) into the Lanham Act (15 USC §1125(d)(2)(A)).

over the registrant himself. The threshold for bad faith is low, so that virtually any trade mark infringement is covered.[107]

The *in rem* action against the domain name may be brought only as a last resort if the registrant is outside the reach of personal jurisdiction; the action may not be brought concurrently with an *in personam* proceeding against the registrant.[108] The action should be brought in the US judicial district in which the registrar, registry, or other authority registered or assigned the domain name, but not in other judicial districts.[109] The domain name, as the subject of the action, embodies a deemed property interest capable of standing as a *res* for *in rem* jurisdiction, whose *situs* is deemed to be the place of the domain name registrar.[110]

The ingenuity of the Act is the conferral of jurisdiction in a situation where the common law would deny it. In the absence of such legislation, the mere fact that a domain name is registered through a company that carries on business in a State would not give the domain name physical existence in the State and the State's courts would refuse to exercise jurisdiction.[111] The Act may enable a US court to deprive a foreigner of a domain name even where the domain name's registration or assignment is the sole link with the US, and all other elements (eg domicile of the registrant, place of use of the website) are foreign. The potency of this legislation is appreciated when one considers

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[107] *Harrods Ltd v Sixty Internet Domain Names* 302 F 3d 214 (4th Cir 2002).
[108] *Alitalia Linee Aeree Italiane SpA v casinoitalia.com* 128 F Supp 2d 340 (EDVa 2001) 343–7.
[109] *Mattel Inc v barbie-club.com* 310 F 3d 293 (2d Cir 2002).
[110] AJ Grotto 'Due process and in rem jurisdiction under the Anti-cybersquatting Consumer Protection Act' 2 Columbia Science & Technology L Rev 3, 6 (2001); BK Sadasivan 'Jurisprudence under the in rem provision of the Anticybersquatting Consumer Protection Act' 18 BTLJ 237, 241 (2003). Previously there was disagreement as to whether domain names constitute property: *Network Solutions Inc v Umbro Intl Inc* 529 SE 2d 80 (Va 2000); *Kremen v Cohen* 99 F Supp 2d 1168 (NDCal 2000).
[111] *Easthaven Ltd v Nutrisystem.com Inc* (2001) 202 DLR (4th) 560 (OntSCJ) 569.

that many of the websites around the world, especially those ending in the popular '.com', are registered through a US-based registrar.

The Act achieves the aims of combating foreign cybersquatters. Although they may be able to avoid the personal jurisdiction of the US court, their domain name is subject to US jurisdiction, and US law is applied.[112] The US court can make orders in respect of the registrar requiring the deregistration and surrender of the domain name. In *Heathmount AE Corp v technodome.com*,[113] a claim was brought in a court in Virginia by a Canadian-based theme park operator against two domain names registered (in Virginia) by a Canadian artist. The US court clearly had no personal jurisdiction over the artist, but it had jurisdiction over the domain names and was prepared to exercise it. Controversially, the court said that one reason for exercising jurisdiction was that Canada lacks similar legislation.[114]

The Act has a global impact. By registering a domain name with a US registrar, a foreigner implicitly submits his domain name to the jurisdiction of the US courts, even if that registration is his sole connection with the US.[115] The foreign website operator is not required to have minimum contacts with the US. This is often regarded by foreigners as a violation of their home country's sovereignty.[116] If the subject of the proceeding were land, there would be no doubt that the courts of the place where the land is situated have *in rem* jurisdiction over the title to the land, and can make orders which bind the registrar of titles. If the subject of the proceeding were a company, there would be no doubt that

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[112] *Barcelona.com Inc v Excelentisimo Ayuntamiento de Barcelona* 330 F 3d 617 (4th Cir 2003) 619.
[113] 106 F Supp 2d 860 (EDVa 2000), affd 22 Fed Appx 344 (2d Cir 2002).
[114] Ibid [20]–[21].
[115] *Caesars World Inc v caesars-palace.com* 112 F Supp 2d 502 (EDVa 2000); *Cable News Network LP v cnnews.com* 162 F Supp 2d 484 (EDVa 2001); *Harrods* (n 107).
[116] Sadasivan (n 110) 252–5.

the courts of the place where the company is incorporated have *in rem* jurisdiction in respect of the status of company, and can make orders which bind the registrar of companies. So too with domain names, which although intangible, are capable of having a status (of registration).

Under the Act, the courts of the place where the domain name is registered have *in rem* jurisdiction over the entitlement to the domain name, and can make orders which bind the domain name registrar. The Act's expansive reach is merely a consequence of the prevalence of domain name registrars located in the US.

3 CHOICE OF LAW

The consequence of the principle of territoriality is that an intellectual property right is granted in respect of a territory, can be infringed only in that territory, and its infringement must be governed by that territory's law. The governing law is the law of the country for which protection is sought (*lex (loci) protectionis*).[117] It is also the law of the place of the infringement (*lex loci delicti*),[118] which, in Australia and Canada, is the choice of law rule applicable to wrongs. If rights granted in a State are infringed, then the plaintiff would seek protection in that State, under that State's law. The equation between *lex protectionis* and *lex loci delicti* applies in intellectual property wrongs, though it is disputed for other aspects of intellectual property.[119]

As with jurisdiction, there are complexities in cases of parallel rights arising from international conventions or from multiple registration. The country for which protection

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[117] Eechoud 95.
[118] Wadlow (n 8) [1-19].
[119] Eechoud 105–6.

is sought could be the country where the right is granted, or protected by treaty or registration.

For example, where actions have taken place in England which the owner regards as infringing his French trade mark, he can rely on the Community Trade Mark to allege in an English court that there has been an infringement of a parallel right in England, and the court would apply British trade mark law (or rather, apply the Community instrument as part of British law). Where actions have taken place in the US which the owner regards as infringing his British copyright, he can rely on the Berne Convention to allege in a US court that there has been an infringement of a corresponding right protected in the US, and this would be governed by US law. It is this type of case that Fawcett & Torremans must have in mind where they discuss choice of law under headings such as 'a UK right is infringed abroad' and 'a foreign right is infringed in England'.[120] Territoriality does not permit taking these headings too literally.

In the UK, choice of law for wrongs generally is determined according to the 1995 Act. The Act does not specifically mention intellectual property wrongs, nor *lex protectionis*. The general rule (s 11) is to apply the law of the place where the events constituting the tort or delict in question occur. Due to territoriality, the place where the events constituting an intellectual property wrong occur must coincide with the place where the intellectual property right is granted or otherwise protected. So the infringement of British copyright is governed by British copyright law. If the claim relates to a French intellectual property right, then French law is the law of the place where the infringing event occurs, and the law under which the rights are protected, the

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[120] Fawcett & Torremans 600–606.

allegation being a French infringement of a French right.[121] If that claim were brought before an English court, the court should have no qualms about applying a foreign law to intellectual property wrongs, just as it may sometimes apply a foreign law to disputes concerning other wrongs. US courts do this too.[122] This is not an instance where the English court can rely on the fictitious presumption that the content of French law is identical to English law.[123] The application of the foreign law achieves the same substantive result as if the proceeding had been commenced in the foreign court (though there may be procedural and evidentiary discrepancies). This factor alone may weigh heavily in the English court's exercise of discretion (where it is available), leading to a stay. The rule of double actionability subject to a flexible exception still represents the law in some common law States, though in England it was abrogated in the 1995 Act. Although originally it was considered that double actionability would result in the automatic failure of proceedings for infringement of foreign intellectual property rights,[124] it was later explained that the flexible exception could operate to apply the foreign law as the *lex loci delicti*.[125]

There is an exception in s 12, where there is a closer connection with another place.

In addition, the applicable law is subject to any mandatory rules intended to protect the social and economic interests of England.[126] Examples are ensuring that foreign monopoly rights are not too broad so as to infringe English competition policy and defences relating to fair use. British intellectual property legislation in itself may have

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[121] Cheshire & North 640.
[122] Eg *World Film Services Inc v RAI Radiotelevisione Italiane SpA* 1999 US Dist LEXIS 985 (SDNY) [26].
[123] *Mother Bertha Music Ltd v Bourne Music Ltd* [1997] EMLR 457 (ChD).
[124] *Def Lepp* (n 14) 276; *Griggs* (n 44) [129].
[125] *Pearce* (CA) (n 35) 488.
[126] 1995 Act s 14(4).

been intended by the Parliament to protect the social and economic interests of England.[127] But these laws do not exactly qualify as mandatory rules of the *lex fori*. While an English court is mandated to apply British intellectual property laws to infringements of intellectual property rights granted under those laws,[128] regardless of whether those rights are also protected (and have been infringed) elsewhere, it is not required to apply local laws to infringements of foreign intellectual property rights.

The internet obviously presents challenges to choice of law in intellectual property wrongs. Although multinational infringements of intellectual property rights can occur through more traditional means of communication, the internet greatly raises the prospect of cross-border infringements. Territoriality of intellectual property rights appears inconsistent with the internet's borderlessness. As with other wrongs, the *lex loci delicti* and the 1995 Act have the potential to lead to the laws of numerous places where the protected material is disseminated on the internet.

Some scholars say that in the internet context, new choice of law rules should be developed. Theories have been developed for intellectual property in cyberspace.[129] One proposal is that 'courts should decide international copyright cases not by choosing an applicable law, but by devising an applicable solution... [being] free to decide an issue in an international case using different substantive copyright rules that reflect not only a single national law, but rather the values of all interested systems (national and international) that may have a prescriptive claim on the outcome'.[130] Except in the most

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[127] Richardson & Garnett 84.
[128] Dicey & Morris [35-028]–[35-029].
[129] Austin (n 96) 4, 15–16; A Reindl 'Choosing law in cyberspace: Copyright conflicts on global networks' 19 Michigan J Intl L 799 (1998).
[130] Dinwoodie (n 58)149 UPLR 469, 475–6.

obvious infringements (which usually do not end up in court anyway) this formulation would baffle a court.

Ginsburg, a US expert, suggests that the law applicable to determine the existence and scope of copyright protection, as well as remedies, should be the law of the forum, as long as that State is also: (a) the State from which the infringing acts originated; or (b) the State in which the defendant resides, is domiciled, is a national, or maintains an effective business establishment.[131] It is acceptable to apply the law of the State of origin to infringements in that State, but that State's law is limited territorially and cannot conventionally apply to infringements occurring elsewhere.[132] Underlying Ginsburg's ideas is her radical rethinking of territoriality altogether.[133] However, the domestic policy foundations of copyright laws have their supporters.[134]

Another suggestion for transcending the difficulties is through a systematic international code of intellectual property and a focus on judicial remedies.[135] There are also calls for a new treaty which reflects the European rules relating to satellites and cables,[136] although the analogy between satellite broadcasts and internet transmissions may be strained,[137] particularly when it is demonstrated that internet communications involve packets travelling simultaneously in more than one direction.

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[131] J Ginsburg 'Global use / territorial rights: Private international law questions of the global information infrastructure' 42 J Copyright Society USA 318, 338 (1995).
[132] Austin (n 96) 16–17.
[133] J Ginsburg 'The cyberian captivity of copyright: Territoriality and authors' rights in a networked world' 15 Santa Clara Computer & High Technology LJ 347 (1999).
[134] GW Austin 'Copyright across (and within) domestic borders' in CF Rickett and GW Austin (eds) *International Intellectual Property and the Common Law World* (Hart Oxford 2000) 105, 118–21.
[135] PE Geller 'International intellectual property, conflict of laws and internet remedies' [2000] EIPR 125, 130.
[136] R Fentiman 'Conflicts of law in cyberspace' in *Multimedia and the Internet: Global Challenges for Law* (International Federation of Computer Law Associations Brussels 1996) 28; Letterman (n 28) 328.
[137] PE Geller 'Conflicts of laws in copyright cases: Infringement and ownership issues' 51 J Copyright Society USA 315, 350–1 (2004).

Eechoud suggests that in determining the consequences of intellectual property infringements, as in all wrongs, the applicable law should be: (i) the law chosen by the parties; or (ii) in default of choice, the law of the place where both the victim and the wrongdoer habitually reside; or (iii) if they reside in different places, the law most closely connected to the relationship between the wrongdoer and the victim.[138] Where use occurs in one place, the closest connection is presumed to be with the place of use. Where use occurs in several places, the closest connection is presumed to be the place where the victim has his place of habitual residence or principal place of business, where that is also a place of use; otherwise, the closest connection is where the wrongdoer has his habitual residence or place of business, where that is also a place of use. Eechoud's approach is a novel way of addressing wrongs. Recognizing the difficulties associated with localization, the place of the wrong (unauthorized use of the exclusive intellectual property right) plays only a subordinate role. Eechoud applies a different choice of law test to the question whether infringement is unlawful. In her view, the *lex protectionis* governs questions of the existence, scope and duration of the intellectual property right.[139] However the territoriality of intellectual property rights traditionally requires the *lex protectionis* to coincide with the *lex loci delicti*, and, so long as the *locus delicti* can be determined, this should be the law applicable to all aspects of intellectual property infringements.

In respect of the internet, Eechoud narrows down the number of laws that qualify as *lex protectionis*.[140] She explains that the places of use that matter are where the owner's

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[138] Eechoud 213–21.
[139] Ibid 210–13.
[140] Ibid 222.

effective capacity to exploit the copyright is injured.[141] Her preferred approach is to look at the place where the wrongdoer intends the information to be received.[142] She acknowledges that activities directed at a large number of States will require compliance with numerous laws, which in practice means a requirement to adhere to the strictest norms.[143] Such fragmentation of laws to govern a single act of infringement is undesirable. In my submission, if one acknowledges the equivalence between the *lex loci delicti* and the *lex protectionis*, it is preferable to focus on a single *locus delicti*.

Admittedly, territoriality does not fit well with the ease with which protected material is disseminated around the world, resulting in infringements of intellectual property rights using the internet. However, as with other areas in the field of wrongs, it is possible to apply the existing choice of law rules, which require localization, to cases of wrongs on the internet.

Intellectual property wrongs are consistent with the general approach to choice of law. For the purposes of *lex loci delicti*, the *locus delicti* is often the place of the damage,[144] even though for the purposes of jurisdiction the focus is on the defendant's act.[145] The application of the 1995 Act also often points to the place of the damage as the place where the most significant elements of the wrong occurred. Rome II also distinguishes between the general rule that the *lex protectionis* (and therefore the *lex loci delicti*) applies to an intellectual property wrong[146] (leading to the place of the damage), and the exception that the law of the place of the defendant's acting applies to

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[141] Ibid 223.
[142] Ibid 224.
[143] Ibid 225.
[144] Above 165.
[145] Richardson & Garnett 84.
[146] Article 8(1).

infringements of certain industrial property rights.[147] Unlike the elective approach to jurisdiction, it is necessary to determine a single law to govern an infringement.

In an Australian proceeding for local damage (for example, where the court's jurisdiction is based on the damage ground of service abroad and the *Shevill* limitation applies), the infringement is of an intellectual property right protected in Australia (whether by grant, registration or treaty) and Australian law applies regardless of where the acts of infringement took place. In an Australian proceeding for multi-state damage (for example, where the court's jurisdiction is based on the defendant's presence in Australia), the infringement is of an intellectual property right protected in several States (whether by grant, registration or treaty) and in the absence of *dépeçage* which would allow the respective application of each separate place of damage,[148] where a flexible exception is available the court would apply either the law of the State where the damage was most significant, or the law of the place where the defendant acted (ie from where the infringement originated[149]).

Later, this chapter[150] explores how to find the place of the defendant's acting and the place of damage in relation to an intellectual property infringement on the internet.

4 Recognition & Enforcement of Judgments

As intellectual property rights are territorial, ordinarily an infringement of a right protected in a State is adjudicated in that State's courts in accordance with that State's laws. In the past, it was clear that only a court of the *situs* of an immovable was

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[147] Article 8(2).
[148] Ricketson & Ginsburg [20.15].
[149] Ibid [20.16]–[20.17].
[150] Below 217ff.

competent to adjudicate[151] and a judgment relating to the immovable, from any other court, was not recognized, even if the action were *in personam*. Nevertheless, courts now do exercise subject-matter jurisdiction at least in some cases involving infringement of foreign intellectual property rights.[152]

Should courts recognize and enforce foreign judgments relating to intellectual property?[153]

It is clear that a foreign judgment which rules on the validity or registration of British intellectual property rights should not be recognized by an English court. The foreign court should never have proceeded. Validity and registration are matters best left to the court of the State which granted the rights, as it is equipped to handle the delicate balance of economic and social interests struck in that State. The answer is the same whether under the Judgments Regulation,[154] or at common law.[155] But validity and registration are separate questions from infringement.

A judgment of the court of State A in relation to infringement of intellectual property rights protected in State B should be recognized and enforced in State B. (This should be distinguished from the question – 'should an intellectual property right protected in State A be also protected in State B?', as that depends on international treaties such as the Berne Convention.) There is no real reason to deny recognition and enforcement, so long as jurisdiction was properly assumed.

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[151] *Re Trepca Mines Ltd* [1960] 1 WLR 1273 (CA) 1277.
[152] *Pearce* (CA) (n 34) 444.
[153] See further Wadlow (n 8).
[154] Article 35(1) provides an exception to recognition of a Member State's judgments in breach of the exclusive jurisdiction provisions, which include art 22(4).
[155] *Rey v Lecoutourier* [1908] 2 Ch 715, affd [1910] AC 262 (HL), holding that a French judgment on the ownership of a trade mark could not affect title to the equivalent British trade mark, since French courts had no jurisdiction to determine what ought to be the entries in the register of trade marks in the UK.

For example, had the English court in *Pearce* found that Dutch copyright had been infringed, the English judgment should have been enforceable in the Netherlands under the Judgments Regulation. And the actual outcome of the English proceeding, a judgment finding that Dutch copyright had not been infringed, should operate as *res judicata* (under the Judgments Regulation) in the Netherlands. Equally a US judgment finding that British trade marks (or even French trade marks) had been infringed should be enforceable in England, so long as the usual requirements for recognition and enforcement are satisfied.

Similarly, a judgment of the courts of State A in relation to infringement of intellectual property rights protected in State A should be recognized and enforced in State B. In the common law context, frequently State A would be the natural forum for the dispute. In the European context, there would be no permissible ground to second-guess the courts of State A by withholding recognition or enforcement.

For example, in *Bonnier Media Ltd v Smith*[156] the Scottish court found the Greek defendant liable for infringement of a British trade mark and gave judgment accordingly. That Scottish judgment should be enforceable under the Judgments Regulation in Greece, and in other EU States outside Britain. And in *Ahava (USA) Inc v JWG Ltd*[157] the Israeli court enforced US judgments (which even included an injunction) in relation to infringements of US trade marks.

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[156] 2003 SC 36.
[157] Israeli District Court, Jerusalem, Judge B Okun, proceeding 003137/04, 10 October 2004.

5 PLACE OF INFRINGING ACT ON THE INTERNET

The borderless nature of the internet has come into sharp conflict with the territorial operation of intellectual property rights. As a communication medium, the internet facilitates multinational infringements of intellectual property rights. So much so that the internet has been described as 'the most inflamed issue in current intellectual property',[158] and the related 'issues of private international law and procedure remain acute and plans for dealing with them proliferate'.[159]

The difficulty that the internet creates in intellectual property, as with other wrongs, is determining where exactly the wrongful acts take place. But a determination of the place of the infringement is essential in order to determine jurisdiction and choice of law. While related to the place where the intellectual property right is granted, the search for a place of infringement is a separate quest. If both coincide, the claim is actionable.[160]

Some despise the artificiality involved in the choice of localizing infringements either at the point of origin or at the point of reception, and suggest alternative approaches, eg asking where, in practice, relief may be seamlessly and coherently enforced.[161] However, this begs the question. In my submission, consistently with other wrongs, it is possible to distil general guiding principles as regards the place where an infringement occurs on the internet.

As far as copyright infringement is concerned, this paper concentrates on 'direct infringement', whereby the wrongdoer does an act comprised in the copyright, without

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[158] Cornish & Llewellyn [19-52].
[159] Ibid [19-58]. Yet traditional territoriality may also provide some welcome simplicity: Austin (n 126) 26.
[160] Fawcett & Torremans 152–63, 244–9, 606–11, 620–4.
[161] PE Geller *International Copyright Law* Rel 7 Int-53, cited in Sookman (n 9) [11-184].

authority. Once direct infringement has occurred, further dealings with the infringing copies or articles may result in 'indirect infringement'[162] (in the British legislation, this is known as 'secondary infringement'[163]). In the internet context, direct infringement may be by the content-provider or by an end-user, where, in each case, the relevant wrongdoer performs the wrongful act (in Australia, both of these are regarded as 'primary infringement'[164]). This should be contrasted with cases where the defendant authorizes[165] an infringement by another person (in Australia, this is known as 'secondary infringement'[166]), or where the defendant impliedly contributes to, or is vicariously liable for, an infringement by another person (in the US, this is known as 'secondary infringement'[167]). As can be seen, to label infringement 'direct', 'indirect', 'primary' or 'secondary' has different meanings in different legal systems.

(a) Infringement by Content-Provider – Place of Uploading or Sending

First, let us consider the situation where a claim is brought for intellectual property infringement against a content-provider. In my submission, generally an intellectual property wrong is committed by a content-provider on the internet in the place where he uploads infringing material onto a website[168] or sends an infringing email,[169] thereby

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[162] Lahore (n 48) [34,000].
[163] Copyright, Designs and Patents Act 1988 (UK) ss 22–26. See further Cornish & Llewellyn [11-29].
[164] Lahore (n 48) [34,498].
[165] Copyright, Designs and Patents Act 1988 (UK) s 16(2); *ABKCO Music & Records Inc v Music Collection International Ltd* [1995] RPC 657 (CA) 660. Aiding and abetting an infringement and a conspiracy to infringe may result in criminal liability: *US v Griffiths* [2004] FCA 879; affd (2005) 143 FCR 182 (FullCt).
[166] Lahore (n 48) [34,514].
[167] *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 125 S Ct 2764, 2776 (2005).
[168] Lawmakers may expressly reverse this principle, localizing copyright infringement at the victim's computer: *Interpretation of Several Issues Relating to Adjudication of and Application of Law to Cases of Copyright Disputes on Computer Networks* (Adjudication Committee of the Supreme People's Court of China, 1144th meeting, 21 December 2000) art 1. Or they may expressly define jurisdiction in intellectual property wrongs over the internet, eg Copyright Act 1968 (Cth) Pt V div 2AA.
[169] *Woolworths Ltd v Olson* (2004) 63 IPR 258 (NSWSC) 344, 346.

exercising the plaintiff's protected exclusive rights which are protected in that place.[170] This, in effect, adopts a country of origin rule.[171] While the initiation of communications may be easy to identify in a website or an email, in other internet applications a more careful analysis is necessary.[172]

Due to territoriality, there is a requirement that the intellectual property right is protected by grant or international agreement in the place of uploading or sending in order to constitute an infringement there. The absence of a requirement of protection would be absurd as a person could be sued in a country whose laws he has not contravened and on the basis of a law which is foreign to the courts of that country.[173]

Eventually, in future, a successful challenge to territoriality could sever the tie between protection and infringement. So long as territoriality remains a requirement, the place of infringing act or damage must coincide with protection for legal consequences to arise in that place.

Consider an example involving copyright. A, acting in Thailand, publishes copyright music from B's new CD by uploading onto a filesharing website ('**cyberpiracy**'). B's CD has copyright protection in the place where he created the music, Canada, as well as in other countries that are parties to the Berne Convention. Many internet users access the website, download the music, and B experiences a loss of sales of CDs throughout the world. B sues A for infringement of copyright. The wrong

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[170] This is challenged by A Christie and E Dias 'The new right of communication in Australia' (2005) 27 SLRev 237, who argue that 'making material available on the internet' occurs at every location where a computer is capable of accessing the internet, and 'electronic transmission on the internet' occurs at the server from which the work may be downloaded.
[171] Cheshire & North 636.
[172] Ricketson & Ginsburg [20.23].
[173] JN Adams 'Industrial property in a globalised environment: Issues of jurisdiction and choice of law' in Rickett & Austin (n 134) 251, 260.

is committed in Thailand, the place where A uploaded the music to the website. Copyright is protected there by virtue of the principle of national treatment, and in a Thai suit B can invoke Thai copyright laws in respect of his music, claiming the same copyright protection that Thailand affords its own citizens. Thailand is a party to the Berne Convention. If, instead, A had acted across the border in Laos, which is not a party to the Berne Convention, then B would not have received reciprocal copyright protection. B's recourse against A would be to sue in a place of damage (which is where B experienced a loss of sales, for example Canada or another contracting party to the Berne Convention) in respect of the local damage. B could also have recourse against internet users for 'dual infringement'.[174]

Consider an example involving trade marks. B, a multinational company, registers a trade mark in relation to a particular sign, in the UK, US, Japan, Russia and Australia. A, acting in Mexico, creates a website which displays reproductions of B's trade marked sign. The place of acting, through uploading, is Mexico. The sign is not registered as a trade mark in Mexico, so the trade mark cannot be said to be infringed in Mexico. In the places where it is registered, no act of infringement by A takes place. (Unlike with international copyright based on the Berne Convention, there is no international arrangement enabling a trade mark owner to receive protection in other countries, though there is a regional arrangement in the EU, and the Madrid Union is an international system of registration which operates in 77 states).

B's recourse against A would be to sue in a place of damage (which is where B experienced a loss of goodwill) in respect of the local damage. Alternatively, B could rely on the tort of passing off, and allege that the wrong occurred in the place where the

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[174] Below 231ff.

representation was made by A, while the damage occurred in the place where B experienced a loss of goodwill.

If instead A had acted in France, the trade mark could be said to be infringed in France, as registration of the UK trade mark confers the status of a Community Trade Mark (and is thus protected in each other Member State). In the context of the Judgments Regulation it could also be said that France satisfies the causal event limb of art 5(3), which has an autonomous interpretation, even though A's acts do not constitute a wrong under French internal law.[175]

A series of cross-border trade mark infringement cases, while not addressing questions of private international law, sheds light on the place of commission of an intellectual property wrong on the internet. Such cases are decided by courts less frequently following the adoption of the Uniform Domain Names Dispute Resolution Policy by ICANN[176] and the enactment of the US anticybersquatting legislation.[177] Use, in the course of trade, of a domain name identical to (or containing) a registered trade mark can amount to infringement of the trade mark and passing off.[178] However, whereas trade marks relate to territorial use, domain names do not – they are accessible globally even if they are registered in a domain with a territorial indicator (such as '.uk' or '.au').[179]

The relevance of the cross-border trade mark cases is the explanation by courts of where 'use' of a sign as a trade mark occurs in e-commerce. The consensus is that where

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[175] Wadlow (n 8) [2-94].
[176] The Internet Corporation for Assigned Names and Numbers.
[177] Above 204ff.
[178] Kerly [23-018].
[179] D Harvey *Internet.law.nz – Selected Issues* (LexisNexis Wellington 2003) [3.8.2].

a mark is uploaded to a website in Country A, the mere accessibility of that website in Country B does not mean that the sign is 'used' as a trade mark (resulting in infringement) everywhere in the world (including Country B). In my submission, another proposition, implicit in the cases, is that consistently with other wrongs, an intellectual property wrong on the internet is committed at the place of uploading or sending.

Even in the US website cases are treated differently from non-internet cases (where it is often said that trade mark infringement occurs where the trade mark owner's goodwill is harmed). It has been suggested that this is because a finding that infringement takes place literally where the mark is viewed could result in jurisdiction in many countries around the world in every infringement case involving a website.[180] This may be a justification in the US, where generally wrongs are regarded as committed at the place of damage.

In English common law countries, the justification must be that, as with other wrongs, the commission generally requires an act by the defendant; viewing of a website by users is insufficient. US courts agree that the wrong of infringement by the operation of a website displaying an infringing mark is committed where the website is created and/or maintained,[181] or where the infringing domain name is used on a website,[182] hence the place of uploading.

In *NZ Post*,[183] Mr Leng, a New Zealand resident, was accused of, inter alia, trade mark infringement. He operated a website under the domain name 'nzpost.com', hosted

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[180] *Citigroup Inc v City Holding Co* 97 F Supp 2d 549 (SDNY 2000) 567.
[181] *National Football League v Miller* 54 USPQ 2d (BNA) 1574 (SDNY 2000) [2]; *American Network Inc v Access America* 975 F Supp 494 (SDNY 1997) 497; *Hearst Corp v Goldberger* 1997 WL 97097 (SDNY) [10].
[182] *Alitalia Linee Aeree Italiane SpA v casinoitalia.com* 128 F Supp 2d 340 (EDVa 2001) 348.
[183] *New Zealand Post Ltd v Leng* [1999] 3 NZLR 219 (NZHC).

by a computer in the US. In granting an interim injunction preventing Mr Leng from using the domain name, the New Zealand court held that it had personal jurisdiction and could enforce the injunction against Mr Leng. In essence, this was a predictable outcome, based on the ancient principle in *Penn v Baltimore*.[184]

The court, having jurisdiction over Mr Leng through service on him while present in the territory, could grant an injunction to compel him to stop using the domain name as he was infringing New Zealand trade mark laws. This was a personal obligation of Mr Leng, which the court could enforce, even though the underlying subject of the personal rights and obligations was a foreign-registered domain name, in respect of the registration of which the court had no subject-matter jurisdiction.[185]

The court further justified its exercise of jurisdiction in relation to a website registered abroad on the basis that the website was under Mr Leng's control[186] and he used the website to conduct business in New Zealand.[187] This was not a case where the website was merely accessible in New Zealand without anything more. Nor was the court concerned solely with where the website was accessed so as to harm the plaintiff's goodwill. Mr Leng's act of infringement took place in New Zealand, the place where he operated and placed content on his website.

Contrast this with another New Zealand case, *Containerlift Services v Maxwell Rotors Ltd (No 1)*.[188] The British plaintiffs had registered the 'containerlift' trade mark in Europe but not in New Zealand. They sued New Zealanders, who operated the domain

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[184] (1750) 1 Ves Sen 444.
[185] See also *ACCC v Purple Harmony Plates Pty Ltd (No 3)* (2002) 196 ALR 576 (FCA) [33]–[36]; *National Australia Bank Ltd v Dessau* [1988] VR 521 (FullCt) 522.
[186] See also *ACCC v Purple Harmony Plates Pty Ltd* [2001] FCA 1062 [35].
[187] *NZ Post* (n 183) 230–1.
[188] (2004) 58 IPR 658 (NZHC).

name 'containerlift.com', in passing off (in relation to the plaintiffs' European and UK reputation) and for breach of fair trading legislation. The New Zealand court had jurisdiction by virtue of service in New Zealand.[189] For the purposes of determining choice of law in relation to the passing off claim, the court assumed that the wrong was committed outside New Zealand, and that double actionability was satisfied. For the purposes of determining whether the fair trading legislation applied, the court seemed to suggest that the conduct took place in New Zealand.[190]

In my submission, both wrongs were committed in New Zealand, the place where the defendants acted by operating the website with the infringing name. Passing off, which is akin to misrepresentation, is generally committed in the place where the defendant acts by misrepresenting, not where the goodwill is damaged.[191] The common law would direct the court to apply the *lex fori* to a local tort, not double actionability. (There was no claim in relation to registered trade marks. The *lex protectionis* was European and did not coincide with the place of the wrong – New Zealand).

In *800-Flowers Trade Mark*,[192] a British company, in the business of acquiring alphanumeric telephone numbers and licensing their use, opposed an application by a US florist to register the service mark '800-FLOWERS' in the UK, as it corresponded to a phone number owned by the British company. One ground of opposition was that the florist did not have an unconditional intention of using the mark in the UK. The florist pointed to its website which had the domain name '1-800 FLOWERS' and argued that

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[189] Ibid [18].
[190] Ibid [45]–[46].
[191] *Intercontex v Schmidt* [1988] FSR 575 (Ch) 578.
[192] [2000] FSR 697 (ChD); on appeal [2002] FSR 191 (CA).

access to this website was available from anywhere in the world, and so the name was used in the UK, among other places.

The English court distinguished between useability and actual use, and held that the mere accessibility of the website globally did not mean that the law should regard the name as being used in trade everywhere in the world. Even if website use amounted to use in 'omnipresent cyberspace', the service which the florist performed was performed wholly in the US and not in the UK.[193]

By implication, the mere accessibility of a website in a place does not mean that the wrong of trade mark infringement is committed in that place by simply displaying the trade marked words on the website; use requires an active step to be taken by the defendant.[194] In France, the availability of the advertised products to French consumers will lead a court to conclude that a French trade mark is infringed, so mere accessibility is insufficient.[195] In contrast, German courts regarded a website advertisement, which incorporated a German trade marked sign, as constituting an infringing act within Germany simply by its accessibility in Germany without anything further.[196]

In *Euromarket Designs Inc v Peters and Crate & Barrel Ltd*,[197] a US plaintiff sought summary judgment in an English court against an Irish defendant for trade mark infringement in relation to the words 'Crate & Barrel', the domain name for the Irish defendant's website. The judge held that the words had not been used in the UK.

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[193] [2000] FSR 697, 705.
[194] [2002] FSR 191, 220–1.
[195] *Hugo Boss v Cigaretten Fabriken GmbH* (Cassation France, chambre commerciale, 02-18381, 11 janvier 2005).
[196] *Re the Maritim Trademark* [2003] ILPr 17 [2] (Landgericht Hamburg 2001). cf *Estee Lauder Cosmetics Ltd v Excite Inc* (Landgericht Hamburg 2000), discussed in R Mann 'Sale of keywords: Trademark violation, unfair competition or proper e-advertising?' [2000] EIPR 378.
[197] [2001] FSR 288.

Despite the global accessibility of websites, use of a sign on a website should not be regarded as use in every country in the world. Rather the internet could be likened to a powerful super-telescope enabling users to visit the Irish defendant's store in Ireland.[198]

The telescope analogy is not entirely accurate. A user cannot view the entire web and focus using a telescope; rather only those web pages that have been specifically requested can be viewed.[199] In any event, the conclusion is that a passive website does not amount to use of a trade mark so as to constitute infringement.[200]

It is submitted that, when applied by analogy with private international law analysis, these cases suggest that an intellectual property wrong is not committed where the website is accessible, but rather where the wrongdoer acts, and in the case of the content-provider of a website, this is where the material is uploaded.[201]

A US court expressed this in *Bensusan Restaurant Corp v King*,[202] holding that a trade mark infringement was committed outside the State, where the defendant's acts (authorizing and creating a website, using trade marked words on the site and creating a hyperlink to the trade mark owner's website) were performed outside the State. Before any injury was suffered in the State, it would take several affirmative steps for a resident in the State to obtain access to the website and utilize the information.[203]

The general proposition is that an infringement through a website occurs at the place of uploading, where there is some human conduct by the infringer. However, in the

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[198] Ibid 296.
[199] Kerly [23-023], [23-055].
[200] See also *Pro-C Ltd v Computer City Inc* (2001) 205 DLR (4th) 568 (OntCA) [14]–[15]; *V&S Vin & Sprit Aktiebolag AB v Absolut Beach Pty Ltd* (ChD 15 May 2001).
[201] Cf defenders' arguments in *Bonnier* (n 156) 36, 43–4.
[202] 937 F Supp 295 (SDNY 1996), affd 126 F 3d 25 (2d Cir 1997).
[203] Ibid 299.

context of service abroad, a determination of the place where the tort, in substance, was committed,[204] mandates a consideration of all the elements of the tort, and although often commission coincides with the defendant's acting, in some cases there may be more significant factors. Hence for the purposes of trade mark law, targeting consumers who are resident in a State may indicate that the substance of a trade mark infringement should be localized there. The infringement through 'use in trade' of the sign on the internet requires an analysis of the facts of use as a whole, starting from uploading by the wrongdoer, to downloading by the consumers and the resulting loss of goodwill to the plaintiff. While generally a trade mark infringement occurs where a website is created and/or maintained, or where the infringing domain name is used on a website (ie the place of uploading), it is legitimate to have regard also to conduct directed at residents of a country through the internet (targeting) as a relevant consideration in determining whether a trade mark was used in trade in that country. In fact, it has been said that where the defendant's infringing acts target, or expressly aim at, a specific forum, the focus on the place of uploading is displaced[205] and the targeting results in a wrong committed in the target State.[206] Targeting a territory, for example where the owner or the relevant consumers reside, amounts to use of a trade mark in that territory.[207] This approach places the onus on the wrongdoer not to target a place where he wishes to avoid suit. Many trade mark lawyers take the view that if a foreign website is aimed at, or intended to be used by, local consumers and there is evidence that local consumers have

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[204] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC).
[205] *Citigroup* (n 180) 567.
[206] *Society of Composers, Authors and Music Publishers of Canada v Canadian Assoc of Internet Providers* (2004) 240 DLR (4th) 193 (SCC) [77]. An early trade mark case held that sending envelopes containing trade marked signs from State A to State B constitutes use of the mark in State B: *RJ Reuter Co Ltd v Muhlens* [1954] Ch 50, 82–3.
[207] Kerly [23-035].

purchased goods bearing a mark through the foreign website,[208] then use in the course of local trade will have been established.[209] Moreover, it may mean that the tort is committed in the target State, for the purposes of the exorbitant jurisdiction provisions.

The next two cases show a tendency to focus on 'targeting' in order to determine whether a trade mark has been used in a territory.

In *Kabushiki Kaisha Yakult Honsha v Yahudo Group Holdings Ltd*,[210] the defendant operated, from Taiwan, the website 'www.hk-yakudo.com', a phonetic adulteration of 'Yakult'. It was alleged that the defendant used the 'Yakult' trade mark registered by the plaintiff in Hong Kong. The Hong Kong court agreed that as a matter of fact Hong Kong internet users were intended to be at least one section of the target audience, as the website promoted a Hong Kong company, emphasized that the company used Hong Kong as a base for its international market, and used the letters 'hk' in the domain name.[211] The judge was less certain whether objective aiming of the website at Hong Kong customers constituted use of the trade mark in Hong Kong, considering, among other matters, that the website did not facilitate the conduct of transactions.[212]

In *Ward Group Pty Ltd v Brodie & Stone plc*,[213] an Australian company, which owned the Australian trade mark Restoria and marketed hair products under that name, sued British companies which owned a trade mark of the same name in the UK and marketed similar hair products there. The allegation was that the British companies had

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[208] This may be evidence of particular purchases or that sales are likely to occur due to the relative low price of the product advertised on the website compared with the price when purchased by alternative means.
[209] Kerly [23-060].
[210] [2004] 239 HKCU 1.
[211] Ibid [100].
[212] Ibid [99], [101], referring to Kerly [23-060].
[213] (2005) 143 FCR 479.

sold products to website operators who advertised the products for sale on websites that were accessible around the world, including Australia, and hence the British companies had (through the actions of the website operators) engaged in trade mark infringement and passing off. This was not a cybersquatting case, as the allegation related to the materials displayed on the website rather than the domain name. The court expressed a clear view that the uploading of a sign on a foreign website accessible in Australia, without more, did not amount to use by the website operator of the mark in each country where the mark was downloaded.[214] If the website were directed or targeted at a particular country (and even more so if it was directed or targeted at particular persons in that country) the website operator could be said to be using the website in that country when the sign was downloaded by users in that country.[215] Presumably also the tort committed ground would be satisfied in the target country. On the facts there was no evidence that the website targeted Australian consumers, despite its listing of Australia as one of the countries in the 'drop down' country box, and its quotation of Australian dollars as one of the currencies used for an indicative conversion of the product prices.[216] The only evidence of downloading in Australia was by agents of the Australian plaintiff who, as 'trap purchasers', accessed the websites in Australia under disguise and purchased the products using the facility on the website. The court was prepared to accept that the purchasers' downloading of the order and the subsequent delivery of the products involved uses of the Restoria mark by the website operator in Australia.[217] Yet,

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[214] Ibid [43].
[215] Ibid [43].
[216] Ibid [37].
[217] Ibid [44].

as these were the sole examples of use in Australia, the plaintiff was regarded as having consented to the uses and hence no infringement had occurred.[218]

The focus on targeting is reflected in an international instrument[219] which gives guidance on the place where a trade mark is used on the internet. Use of a mark on the internet constitutes use in a State only if the use has a commercial effect in the State.[220] Circumstances relevant to whether use has a commercial effect in a State include: conducting business in the State in relation to products which are identical or similar to those for which the mark is used on the internet, the level and character of commercial activity of the user in relation to the State, the connection of an offer of products on the internet with the State, the connection of the manner of use of the mark on the internet with the State, and the relation of the use of the mark on the internet with an intellectual property right in that mark in the State.[221] In terms of private international law, this final factor is decisive, given the territoriality of intellectual property rights. Only if the mark is so 'used' in a State can there be an infringement under that State's law.[222]

In summary, in general placing material on a website in a State or sending an email from a State or perhaps targeting the residents of a State, amounts to acting in that State, and hence that State is the place where the intellectual property right is infringed by a content-provider.[223]

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[218] Ibid [53].
[219] WIPO 'Joint recommendation concerning provisions on the protection of marks, and other industrial property rights in signs, on the internet' (Publication 845, 3 October 2001).
[220] Ibid art 2.
[221] Ibid art 3.
[222] Ibid art 6.
[223] In *Carpoint SpA v Microsoft Corp* (Tribunale di Roma, sez I civile, 9 marzo 2000) the Italian court held that a US company's use of a word, in a domain name, that was trade marked in Italy, did not constitute a causal event in Italy. It is unclear why art 5(3) of the Brussels Convention was relevant in a suit against a US-domiciled defendant.

Case example:

A used B's trade marked word as a domain name for A's website ('cybersquatting'), and B's trade marked logo features on A's website. A also agreed with C, a search engine, that users searching for B's product will be directed to A's website ('metatagging'). B sues A and C for trade mark infringement. A committed a wrong where it uploaded the trade marked material, so long as the trade mark is registered there. However if A's website is directed or targeted at a different country, the wrong may be regarded as committed in the target country. C committed a wrong where it uploaded the metatags to be included in users' searches. The places of damage to B are where internet users accessed the website or search engine and were misled by the use in trade of the material or metatags which are trade marked in those places so as to result in harm to B's reputation and goodwill.

(b) Dual Copyright Infringement by User – Place of Downloading or Receipt

On the internet there are multiple infringements and infringers of copyright. Each time a website is accessed, separate copies of the material are made, for example in the content-provider's computer, in intermediate places during the transmission process between the content-provider and the server, in the server, in intermediate places during the transmission process between the server and the point of access, and in the user's computer.[224] At least some of these exceed *de minimis* copying.[225] This means that a user could become liable unwittingly. When a user browses and selects a web page which is retrieved (downloaded) a temporary copy of that web page is made on the random access memory of the user's computer.[226] (These are not necessarily infringing copies.[227]) There is the potential for 'dual infringement' – once when material is uploaded to the website and again when material is downloaded from the website.[228] Each is an act of direct infringement, and in the Australian context, each constitutes

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[224] Sterling (n 51) [13.38]–[13.39].
[225] L Longdin 'Shall we shoot the messenger now and then? Copyright infringement and the on-line service provider' in Rickett and Austin (n 134) 63, 82.
[226] *MAI Systems Corp v Peak Computer Inc* 991 F 2d 511 (9th Cir 1993) 518.
[227] Eg Copyright Act 1968 (Cth) s 43A.
[228] *Holyoak and Torremans on Intellectual Property Law* (3rd edn Butterworths London 2001) 544–6.

primary infringement.[229] The plaintiff may choose to sue the uploader, the downloader or both, depending on various factors, including their respective identifiability, location and assets. There may be others involved or concerned in the infringements, against whom it may be easier to litigate, eg a distributor of software that allows filesharing and promotes its use to infringe copyright.[230]

As copying also occurs at the server, its operator could also be alleged to be involved in the infringement. Many copyright owners would prefer to sue the ISP – an easily identifiable person who, by facilitating use of the internet is often accused of authorizing infringement. In anticipation of litigation against ISPs, many countries have amended their copyright laws so as to provide a defence to ISPs when acting as conduits.[231] Since the introduction of such statutory defences and common law defences,[232] ISP liability has diminished.

In *Universal Music Australia Pty Ltd v Cooper*,[233] the defendants infringed copyright in sound recordings by operating a website which contained unauthorized 'hyperlinks' to music files. The owner of the website infringed copyright directly in making copies of the sound recordings[234] and indirectly in authorizing the infringement of copyright by users who downloaded from his website and by the operators of the remote websites linked to his, despite disclaimers that his website simply contained links and not actual music files.[235] The ISPs which hosted the website authorized the infringements by

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[229] Lahore (n 48) [34,498], [34,514].
[230] *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 125 S Ct 2764 (2005).
[231] Eg E-commerce Directive arts 12 (mere caching), 13 (caching) and 14 (hosting).
[232] *SOCAN* (n 206) [101].
[233] (2005) 150 FCR 1.
[234] Ibid [56].
[235] Ibid [87]–[88], [100].

internet users who downloaded the files.[236] In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*,[237] the defendants' authorization of infringement by internet users contravened Australian copyright legislation, as there was an authorization of the doing of the infringing acts both within Australia and outside Australia. Whether the remedy granted against the defendants should take into account the authorization of foreign infringements is a question that will be decided separately.[238]

In contrast with a content-provider's liability, the (dual) infringement by a user is committed in the place of downloading. Where liability of an internet intermediary is at issue the wrong is committed where the intermediary makes the relevant copy.

(c) Infringement by Content-Provider – Place of Downloading or Receipt

Several views contradict the general principle that in cases of content-provider liability the infringing acts occur in the place of uploading or sending. First, there are cases which predate the addition of the damage ground of service abroad, when courts gave a very wide reading to the tort committed ground particularly in cross-border transmission cases.[239] Cases from that era, eg a Canadian decision that copyright was breached by a television station where the television program was broadcast into,[240] should be treated with caution.

Even in recent times court prefer to 'hedge their bets' in cases involving communication. Often when deciding where an intellectual property wrong occurs, in the

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[236] Ibid [130].
[237] (2005) 220 ALR 1 (FCA) [388] (on appeal to FullCt).
[238] Ibid [51].
[239] *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 (CA).
[240] *Composers Authors and Publishers Assoc of Canada Ltd v International Good Music Inc* [1963] SCR 136, 143–4; (1963) 37 DLR (2d) 1, 8.

abstract, courts consider that a wrong occurs in both the place of transmission and the place of reception,[241] and perhaps also every intermediate step in between.[242]

In *Society of Composers, Authors and Music Publishers of Canada v Canadian Assoc of Internet Providers*[243] (***"SOCAN"***), the Canadian Supreme Court's task was to determine who should compensate musical composers and artists for their Canadian copyright in music downloaded without authority by internet users in Canada. The real culprits were the foreign operators who uploaded the copyright works onto websites, but they were difficult to identify and prosecute. Users who downloaded the works in Canada, infringing Canadian copyright through dual infringement,[244] were an indeterminate group. It was easier to sue the ISPs, who facilitated downloading. The copyright owners sought to impose liability for royalties on the Canadian ISPs irrespective of where the material was uploaded. The relevant infringements were by communicating works to the public through telecommunication, and authorizing such acts. Ultimately, the ISPs, relying on statutory defences for mere intermediaries or conduits in internet communications, were exonerated.

At first instance, the Copyright Board had concluded that an internet communication occurs at the time the work is transmitted from the host server to the end user because at that point the music files are made available on the internet openly and without concealment, with the knowledge and intent that they be conveyed to all who might access the internet. That finding was not contested on appeal. The Board's view was that an internet communication resulting in content-provider liability occurs in

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[241] *SOCAN* (n 206) [43].
[242] *National Football League v PrimeTime 24 Joint Venture* 211 F 3d 10 (2d Cir 2000) 12–13.
[243] (2004) 240 DLR (4th) 193 (SCC).
[244] Above 231ff.

Canada only if it originates from a server in Canada, except perhaps if the content-provider intends to communicate it specifically to recipients in Canada.

In the Supreme Court, the minority adopted this test, whereas the majority found it too rigid and mechanical. The majority held that Canadian copyright was infringed by a communication which originated in Canada (a country of origin test), and by a communication which originated outside Canada but was received in Canada (a country of destination test).[245] In either case a Canadian court could exercise copyright jurisdiction. The legislative reach of Canadian copyright law is confined to Canada as copyright law is territorial, reflecting the implementation of a web of interlinking international treaties based on the principle of national treatment.[246] In the majority's view, Canadian jurisdiction exists and Canadian copyright law applies to communications between Canada and a foreign place if there is a real and substantial connection between the communication and Canada. To conform with territoriality, which requires an act in Canada to infringe Canadian copyright, the majority took a broad view of an infringing act. The relevant connecting factors include the places of the content-provider (which is where uploading takes place), the host server, the intermediaries and the end-recipient (where downloading takes place).[247] Origination or receipt of a transmission from or to Canada is generally sufficient.[248]

It is submitted that the majority's decision is too broad. Other wrongs are not said to be committed in each place where an element of the wrong occurs. Intellectual property infringement should be no different. Consistently with other wrongs, the

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[245] *SOCAN* (n 206) [44].
[246] Ibid [56], citing D Vaver *Copyright Law* (Irwin Law Toronto 2000) 14.
[247] Ibid [61].
[248] Cf ibid [63].

starting point for the place of commission of a wrong should be to focus on the defendant's place of acting, and the only human act involved in a website on the part of a content-provider is uploading. While transmission is an act of the defendant, receipt cannot be said to be such an act. (In some cases of trade mark infringement, the content-provider's wrongful act may be seen as extending to a forum whose residents are targeted by the website.[249])

This analysis of the place of acting is relevant to both infringement by content-providers, who act at the place of uploading, end-users who act at the place of downloading and intermediaries (eg ISPs) who act at the place where they operate the server. *SOCAN* was really concerned with the dual infringement by ISPs.

According to the minority in *SOCAN*, Canadian courts can exercise copyright jurisdiction in a case involving the internet only if the host server is located in Canada. In my submission this is correct if limited to cases of infringement by ISPs. The focus, in determining the place of infringement, is human acting and an ISP acts where it operates and maintains the server. But in cases of infringement by others, the location of the server is irrelevant. Infringement by a content-provider occurs at the place where the content-provider places material onto a website. Once the content-provider has sent the material to the host server, the material (in the form of packets) may travel around many routers, some of which are spread around the globe, until it is requested and received by a user. The host server is merely a computer which stores the material and converts it into packets. Its place is not relevant in determining infringement by content-providers or users.

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[249] *ABKCO* (n 165) 660. See further above 228ff.

In my submission, the facts in *SOCAN* warrant the following conclusions. The foreign content-providers uploaded the music files onto websites abroad. Their conduct outside Canada could not infringe Canadian copyright law (which confers exclusive rights only in Canadian territory), though the principle of national treatment means that their conduct in say, Mexico, results in an infringement of the corresponding Mexican copyright law. Nevertheless, damage from the infringement could result in Canada, as copyright was protected in Canada, and copyright owners in Canada suffered a loss of sales. This would give Canadian courts jurisdiction in respect of the local loss. The fact that the copyright material was downloaded by users in Canada did not mean that the foreign content-providers committed acts of infringement in Canada. The Canadian users who downloaded the music files from websites in Canada were committing dual infringements of copyright in Canada at the time of downloading, giving Canadian courts jurisdiction on the ground of a wrong committed in the territory. The places of any intermediaries (eg ISPs) were irrelevant to the question of location of the infringements by the content-providers or the recipients. An infringement by an ISP which operates a server occurs at the place where the ISP maintains the server, and if this is in Canada then the Canadian courts have jurisdiction. To the extent that an ISP is alleged to have infringed copyright indirectly by authorizing or acquiescing in the recipient's infringing conduct, the ISP was committing a wrong in the place where it failed to prevent the recipient's wrongful conduct (the omission being localized by reference to an act), namely the place of downloading.

The *SOCAN* majority opinion reflects Geller's view that on the internet a telecommunication is interactively effectuated among multiple and possibly mobile

points in cyberspace.[250] He worries that the public policies of the international intellectual property regimes would be undercut if infringement were localized in some supposed originating or source country. That would enable a party to operate from a 'pirate haven' and upload works from the least protective country possible.[251] His preference is to locate infringement in the place of reception, as that is the place where the transaction is incoming relative to that country.[252] But this dismisses the importance of focusing on the infringing conduct in determining the place of infringement. As with other wrongs, the focus should be on where the defendant's acts of copying and disseminating the wrongful work occur. Different types of wrongdoers act in different places. For jurisdictional purposes, the place where the infringing work is viewed or heard is relevant to a recipient's dual infringement. In the case of infringement by a content-provider, it is relevant as regards jurisdiction only under the damage ground of service abroad or the injury limb of special jurisdiction or in the exercise of the *forum (non) conveniens* discretion, but not in applying the tort committed ground or causal event limb. The infringing content-provider is not immune from suit by operating in a 'pirate haven'. He can be sued as an alternative in a place of damage, being a place where the right infringed is protected. Focusing on the place of uploading or sending as the place of infringement by content-providers has support, at least in the copyright sphere.[253]

Eechoud resists a technical definition of the place of the wrong.[254] She says that on the internet, the possible initiation of the act of communication could be either the place

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[250] Geller (n 135) 350–1.
[251] Ibid 351; Ricketson & Ginsburg [20.24].
[252] Ibid 339, 352.
[253] Fawcett & Torremans 158–61, 248–9; *Godfrey v Demon Internet Ltd* [2001] QB 201, 203.
[254] Eechoud 217.

of uploading, from where the protected material was introduced into a network for the purpose of further distribution via servers, or the place where the server itself is located. She argues that a technical definition could fast become obsolete, or could lead to a manipulation by defendants, or, in the case of the location of the server, could be accidental.[255] Eechoud prefers to look at the place where the initiative for using the work and the organization of exploitation of it originate. She gives, as an example, Ginsburg's proposal[256] that the place of uploading is the place of initiation of the infringement which is where the content-providing infringer devised its plan to make the work available over digital media. While in my submission it is the further step of uploading that should be the place of the wrong, if that place is not genuinely where the defendant acted there is justification in considering the places of earlier steps such as the place where the defendant devised its plan. Nevertheless, the common element in my submission and Eechoud's is the focus on a human act by the wrongdoing content-provider.

6 PLACE OF DAMAGE

Generally damage occurs in the territory where the possibilities for the right-owner to exploit his intellectual property right are diminished.[257] In contrast with other forms of property (eg real and tangible personal property), it is not the property right itself that is affected.[258]

Damage from an infringement of copyright is essentially the loss of profits as a result of unauthorized copying, or the harm to reputation as a result of the infringement of

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[255] Ibid.
[256] JC Ginsburg 'The private international law of copyright in an era of technological change' (1998) 273 Recueil des Cours 239.
[257] Eechoud 217.
[258] Hence the 1995 Act s 11(2)(b) does not apply.

moral rights. Damage from an infringement of a trade mark is essentially the reduction in goodwill that results in the place where the mark was used.

It is difficult to determine where the damage from an infringement on the internet is suffered. However, a determination of the place of the damage is relevant for jurisdiction and choice of law. Although it should coincide with the place where the intellectual property right is granted, the place of damage must be assessed separately.[259]

To locate damage from an intellectual property wrong on the internet it is necessary to consider the particular wrong. Where a trade mark is misappropriated for use as a domain name (ie cybersquatting), the proprietor generally suffers damage to goodwill and reputation in the place(s) where he trades using that mark (often coinciding with where he resides).[260] Where copyright is infringed, by distributing copyright material online, the owner generally suffers damage in the place(s) where he would have made profits from selling the copyright material, which, by virtue of it becoming available freely, customers are discouraged from purchasing.[261] Often these are places where the protected material is accessed and downloaded. But the downloading could take place elsewhere.

In *Cable News Network LP v gosms.com Inc*[262] an Israeli company downloaded copyright material from the website of a US news service and distributed it by mobile phone around the world. This included the US, where the material was protected. The New York court held[263] that the infringement took place at the location of the servers (which were outside New York), but that harm was suffered in New York because

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[259] Fawcett & Torremans 163–9, 249–52.
[260] *Hasbro Inc v Clue Computing Inc* 994 F Supp 34, 43 (D Mass 1997); *Ford Motor Co v Great Domains Inc* 141 F Supp 2d 763, 771 (EDMich 2001).
[261] *Graduate Management Admissions Council v Raju* 241 F Supp 589, 592–3 (EDVa 2003).
[262] 56 USPQ 2d (BNA) 1959 (SDNY 2000).
[263] Ibid [9]–[10].

customers were deceived there. In my view, the infringement (of the news service's corresponding Israeli copyright, by virtue of the principle of national treatment) took place in Israel, where the defendants acted by downloading the copyright material and disseminating it by mobile phone), while the place of damage was the US where the plaintiff experienced a loss of revenue.

That is not to say that every place where an infringing website is merely accessible is necessarily a place of damage.[264] Nor can it be said that damage is always suffered at both the points of uploading and downloading.[265]

Territoriality requires that the place of damage coincide with the place where the intellectual property was granted and/or is protected.[266] As explained above, intellectual property comprises a bundle of exclusive rights protected in a territory.

For the purposes of the injury limb of art 5(3)[267] and the damage ground of service abroad, damage from an intellectual property wrong is suffered where the exclusivity of the plaintiff's rights is undermined. That place must be the place where those rights are protected by sovereign grant (eg creation, original registration) or through an international arrangement (eg the Berne Convention, parallel registration).

Fawcett & Torremans doubt whether damage in intellectual property infringements must necessarily occur where the right is protected.[268] They suggest alternatives for the place of damage: the State where the intellectual property right is situated, the State where the intellectual property right is infringed, or the State where direct economic loss

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[264] Cf Sterling (n 51) [3.30].
[265] Ibid.
[266] Jooris (n 44) 140 (though this was disputed in Fawcett & Torremans 164).
[267] Ibid.
[268] Fawcett & Torremans 164–7, 250–1.

was suffered. But the territorial operation of intellectual property ultimately leads to the same place – where the intellectual property right is protected.

Those authors focus on the European context. In an international context the situation may be different. The authors deny[269] that the damage resulting from an infringement of an intellectual property right protected in State A must necessarily be suffered in State A. Their reasoning is that the right may have its *situs* elsewhere, or the right may be infringed elsewhere, or the plaintiff may suffer economic loss elsewhere. But a court in State A is unlikely to be convinced. The authors wish to ensure that both limbs in art 5(3) have a part to play in intellectual property wrongs.[270] In my submission the limbs can provide the plaintiff with alternative fora as long as the intellectual property right is protected in both those fora.

Wadlow suggests that the place of damage should always include the place where the infringement actually took place.[271] The overlap is therefore covered by both limbs of the exorbitant jurisdiction rules. Presumably that author would not seek to limit the place of damage to the place of infringement, though he does not elaborate on where else the damage may occur. Yet, there is a distinction between the two limbs which can be observed in the internet context.

Let us consider again the previous example of A, in Thailand, who uploads onto a filesharing website copyright music from B's new CD. The CD has copyright protection in the place where B created the music, Canada, as well as in other countries that are parties to the Berne Convention. Many internet users access the website, download the

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[269] Ibid 164–6, 249–52.
[270] Ibid 168–9.
[271] Wadlow (n 8) [2-92].

music, and B experiences a loss of sales of CDs throughout the world. B sues A for infringement of copyright. The wrong is committed in Thailand, the place where A uploaded the music. Copyright is protected there by virtue of the principle of national treatment under the Berne Convention.

In my submission, each State where internet users accessed the website is a place where B suffers damage and under the law of each State, B may recover the damage suffered in that State relating to the copyright protected under that State's law (in Canada – by creation of the original copyright material there; in other States – by virtue of national treatment under the Berne Convention).

The other earlier example involved B, a multinational company, which registers a trade mark in relation to a particular sign, in the UK, US, Japan, Russia and Australia. A, acting in Mexico, creates a website which reproduces B's trade marked sign. The place of acting, through uploading, is Mexico. As the sign is not registered as a trade mark in Mexico, the mark cannot be said to be infringed in Mexico. However, in my submission, B suffers damage in each State where internet users access A's website and are confused from the appearance of B's sign, so long as the mark is registered or otherwise protected in that State.

7 CONCLUSION

Intellectual property rights are territorial. A right granted by a State's sovereign can be infringed only by conduct in that State, and can cause damage only in that State. This has implications throughout private international law. Nevertheless the multinational scope of some intellectual property rights makes it necessary to identify the place of infringement and the place of damage in order to apply the relevant exorbitant

jurisdiction rules and the choice of law rules. In the internet context, localization is difficult but not impossible so as to require new rules. The infringing act is committed by a content-provider generally in the place of uploading onto a website or sending of an email. Nevertheless, a trade marked sign used on a website may be regarded as being 'used in trade', and hence the infringement committed, in a country whose residents the website targets. 'Dual infringement' of copyright by an internet user occurs generally in the place of downloading from a website or receipt of an email. Damage from an infringement occurs where the owner suffers a loss of goodwill or sales. The corollary of territoriality is that there can be no legal consequences in the place of the wrong or the place of the damage unless the intellectual property right is protected there.

CHAPTER F: DEFAMATION

The tort of defamation, when committed on the internet, is particularly vulnerable to creating multiplicity of jurisdictions and governing laws. One frustrated commentator even suggested that the internet should be a defamation-free zone.[1] However there is no need for total surrender, as, in my submission, the existing private international law principles are adequate to address defamation on the internet. That is not to deny that substantive defamation law would benefit from reform and harmonization.

1 JURISDICTION

Which court has jurisdiction when a defamatory statement is published through the internet?

Without encountering difficulties as to where the defamation occurs, a court in a common law country has jurisdiction over a defendant who is served in its territory, and a court in the EU/EFTA region has jurisdiction over a defendant domiciled in its territory. The remaining parts of this section consider the complexities encountered in the application of the exorbitant jurisdiction rules.[2]

The assumption in this chapter is that the defamation proceeding is brought against the original publisher (ie the content-provider). Frequently, however, intermediate

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[1] D Svantesson 'Jurisdictional issues in cyberspace: At the cross-roads – The proposed Hague Convention and the future of internet defamation' (2002) 18 Computer L & Security Report 191, 195. Cf G Chan Kok Yew 'Internet defamation and choice of law in *Dow Jones & Co Inc v Gutnick*' [2003] Singapore J Legal Studies 483, 509–11, who does not accept this approach.

[2] The *forum (non) conveniens* discretion may be exercised by a court where a defendant is served not only abroad, but also within its territory.

publishers (eg ISPs[3]) might be sued in addition to, or instead of, the original publisher. Under the service abroad provisions, the focus is on the place of publication so the jurisdictional question is answered in the same way, regardless of whether the defamation suit is brought against the original publisher or an intermediary. Under the causal event limb of the special jurisdiction provisions, there is a need to focus on the place where the relevant defendant acted.

(a) Service abroad provisions

(i) English CPR – place of act

In contrast with many service abroad provisions in the common law world, the English rule[4] contains an act committed ground rather than a tort committed ground. Consistently with other wrongs, the tortious 'acts' involved in defamation can be said to be committed in the place where the defendant engages in human activity.

In my submission, the 'act' of publication on the internet is, in the context of a website, the defendant uploading the defamatory statement or, in the context of email, the defendant sending the defamatory message. In the place of acting, the plaintiff can sue to recover his entire worldwide loss. The place of uploading or sending is the place where the tortious 'act' is committed.

The court in *King v Lewis*[5] ("***King***") may have even alluded to this when it mentioned that since the relevant websites were controlled in the US, 'it must be at least problematic whether [any injunction sought under the 'injunctions' ground of service

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[3] *Godfrey v Demon Internet Ltd* [2001] QB 201.
[4] CPR r 6.20(8)(b). There is also an alternative limb relating to damage: r 6.20(8)(a).
[5] [2005] EMLR 4 (CA) [2].

abroad[6]] could be said to require or prohibit anything being done within [England].' Then the court went on to hold that under r 6.20(8)(b) the tortious acts were committed in England. Should there not be consistency between things 'being done' within the jurisdiction under r 6.20(2) and 'acts committed' in the jurisdiction under r 6.20(8)(b)? Surely an 'act' is something 'done'.

Litigants often gloss over this and regard the 'act' of publication (ie physical steps involved in publishing material) and the 'fact' of publication (ie the state or fact of material being available to the public) as synonymous, both coinciding in time and place. Generally, courts too have failed to distinguish between these concepts.[7] So in practice, English courts construe the location of the tortious 'act' or the 'damage' in the same way as they (and other common law courts) had construed the place of commission of the 'tort', to which we now turn.

(ii) Other service abroad provisions – place of tort

In other countries, such as Australia, the service abroad provisions look at the place where the 'tort' is committed. The common law[8] traditionally treats each publication of a defamatory statement as the commission of a new and separate tort.[9]

The reasoning behind this principle may appear somewhat misconceived,[10] but it has survived for over one and a half centuries, having been recently reaffirmed by

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[6] CPR r 6.20(2).
[7] An important distinction in defamation: M Hall 'The place of publication of an internet libel' (2003) 3 OUCLJ 119, 122.
[8] The modern US legal system is excluded from the expression 'common law' in this chapter.
[9] *Duke of Brunswick v Harmer* (1849) 14 QB 185, 189. Canadian courts modified the rule, holding that a successful suit against a distributor or vendor of a defamatory publication bars a later suit against the editor or publisher: *Thomson v Lambert* [1938] SCR 253.
[10] A Briggs 'The Duke of Brunswick and defamation by internet' (2003) 119 LQR 210.

appellate courts in England[11] and Australia.[12] A defamatory statement is published when it is conveyed to a third party and the plaintiff's reputation is harmed.

Hence, for the purposes of service abroad provisions, the tort of defamation is committed at the place where the statement is published, in the sense of being received, read and comprehended by a third party. The comprehension by a third party, whether it be a reader, listener or observer, who is familiar with the plaintiff, automatically results in harm to the plaintiff's reputation.[13] Publication is not a unilateral act on the part of the publisher alone, but rather a bilateral act in which the publisher makes it available and a third party comprehends it. Uniquely, the commission of defamation depends on the third party, and the place of commission and the place of damage depend on the third party's location. That is not necessarily the same place as where the defendant acts. Although there is merit to suing the defendant in the place of his acting,[14] so long as defamation focuses on publication it cannot be said that under the tort committed ground, the 'tort' is committed at the place of the defendant's acting. As Rabel explained: 'a person who slanders another over the telephone does not commit defamation in the telephone booth but rather where his words are heard'.[15] The place of receipt by the third party is also where the plaintiff suffers harm to his reputation as a result of defamation. Hence, the place of commission and the place of damage, which represent two separate grounds of service abroad, coincide. In applying Case C-68/93 *Shevill v Presse Alliance*

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[11] *Berezovsky v Michaels* [2000] 1 WLR 1004 (HL).
[12] *Dow Jones & Co Inc v Gutnick* (2003) 210 CLR 575 (HCA) [25]–[28], [92], [191]–[192].
[13] Ibid [26]–[27].
[14] According to one author, the plaintiff always has the option of suing there: RE Brown *The Law of Defamation in Canada* (2nd edn Carswell Toronto 1994) 375 fn 188.
[15] Rabel vol II 318.

SA[16] (***Shevill***') by analogy to the service abroad provisions[17], at that place the plaintiff should be able to sue only for his local loss.

Defamation shares many features with other wrongs where communications can pass across space or time before completion or operation in a different country, eg misstatement.[18] Also, admittedly defamation is not the only wrong involving comprehension by a third party. Passing off requires there to be harm (to the plaintiff's goodwill) when a third party receives and comprehends a statement and becomes confused or deceived in relation to the plaintiff's product. Breach of confidence requires disclosure of confidential information to a third party. However these are not subject to the common law rule, unique to defamation, that every communication founds a separate wrong at the place of the receipt.[19] Only in defamation do the place of harm and the place of commission necessarily coincide.

How do the principles apply to the internet? Publication occurs, and hence defamation is committed, at the location of each third party user who downloads the material or receives an email and comprehends the defamatory contents.[20] At that point the plaintiff suffers damage to his reputation in that territory.[21] It seems that for the purposes of the tort committed ground, only the fact of publication matters.

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[16] [1995] ECR 415.
[17] Above 80ff. See also *Jameel v Dow Jones & Co Inc* [2005] 2 WLR 1614 (CA).
[18] A Reed 'Jurisdiction and choice of law in a borderless electronic environment' in Y Akdeniz, C Walker and D Wall (eds) *The Internet, Law and Society* (Pearson Essex 2000) 98.
[19] In that sense, defamation is unique among the wrongs: Hall (n 7) 122–3.
[20] M Collins *The Law of Defamation and the Internet* (2nd edn OUP Oxford 2005) [25.27], [25.30], [25.34]. cf DJB Svantesson '"Place of wrong" in the tort of defamation: Behind the scenes of a legal fiction' (2005) 17 Bond LRev 149.
[21] *Gutnick* (n 12) [28].

There have been numerous decisions from common law courts which have reached this conclusion.[22] Litigants now accept, without question, that a defamatory statement on the internet is published in each territory where the statement is downloaded and viewed by the user resulting in damage to the plaintiff's reputation in that territory.[23]

In the most famous case, *Dow Jones & Co Inc v Gutnick*[24] ("***Gutnick***"), a Victorian businessman sued a US publisher in a Victorian court for defamation arising from an article published in an online magazine which was available to subscribers on the publisher's website. The plaintiff obtained leave to serve abroad on the basis that the claim was founded on libel committed in Victoria and/or in respect of damage suffered in Victoria. The publisher appealed to the High Court. Six judges held that, regardless of whether the tort was committed in Victoria, damage to reputation was suffered in Victoria, so the Victorian Supreme Court had jurisdiction.[25] Six judges also held that in the case of material on a website, the place of commission of defamation is where a user downloads the material, as that is when it is first available in comprehensible form and the plaintiff suffers damage to his reputation.[26] In relation to the statement downloaded

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[22] Australia: *Gutnick* (n 12) [48]; *Airways Corp of New Zealand Ltd v PricewaterhouseCoopers Legal* [2002] NSWSC 138; England: *Chadha v Dow Jones & Co Inc* [1999] EMLR 724 (CA) 732; *Berezovsky* (n 11) 1012, 1018, 1026; *Godfrey* (n 3) 208–9; *Loutchansky v Times Newspapers Ltd* [2002] QB 783 [58]; *Harrods Ltd v Dow Jones & Co Inc* [2003] EWHC 1162 (QB); *King* (n 5) [2]; *Richardson v Schwarzenegger* [2004] EWHC 2422 (QB) [19]; Canada: *Imagis Technologies Inc v Red Herring Communications Inc* (2003) 15 CCLT (3d) 140 (BCSC) [16]; *Bangoura v Washington Post* (2004) 235 DLR (4th) 564 (OntSCJ) [14]–[22], reversed on appeal but not on this point: (2005) 258 DLR (4th) 341 (Ont CA) [50]; *Barrick Gold Corp v Lopehandia* (2004) 239 DLR (4th) 577 (OntCA) [74]–[76]; *Wiebe v Bouchard* 2005 BCSC 47; *Burke v NYP Holdings Inc* (2005) 142 ACWS (3d) 589 (BCSC) [29] (on appeal to BCCA); New Zealand: *University of Newlands v Nationwide News Pty Ltd* (2004) 17 Procedure Rep New Zealand 206 (NZHC); Hong Kong: *Investasia Ltd v Kodansha Co Ltd* [1999] 3 HKC 515; Malaysia: *Lee Teck Chee v Merrill Lynch International Bank Ltd* [1998] 110 MLJU 1; [1998] 4 Current LJ 188, 194–5. Cf Singapore: *Goh Chok Tong v Tang Liang Hong* [1997] 2 SLR 641 [33], [67], [78].

[23] *King* (n 5) [2].

[24] (2003) 210 CLR 575 (HCA).

[25] *Gutnick* (n 12) [46]–[47], [56], [102].

[26] Ibid [44], [100], [198]–[199].

is the most appropriate to try the single publication. For the exercise of discretion to have a genuine impact in channelling the action to the one court which is genuinely the most appropriate in respect of the 'single publication', the single publication rule would need to be adopted by other countries, and Australian courts would need to adopt a more balanced *forum (non) conveniens* test.[70]

(v) Conclusion

In summary, plaintiffs have a choice in service abroad. The tort of defamation is committed, and damage is suffered, in the place where the third party downloads or receives the material, this being the place of publication. There the plaintiff can sue only for the harm to his local reputation. Usually plaintiffs are content to confine their suit to the place of publication.

In addition, under CPR an English court should have jurisdiction, even if publication is outside England but the tortious 'act' by the defendant in uploading or sending the defamatory statement is performed in England.

(b) Forum (non) conveniens discretion

While the commission of defamation or the suffering of damage in a State is sufficient to give its courts jurisdiction under the service abroad provisions, the exercise of jurisdiction is discretionary.[71]

The *forum (non) conveniens* discretion is exercised by balancing various factors. Yet there is a presumption that the place where a tort is committed is the natural forum.[72]

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[70] Eg the formulation from *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) 476.
[71] M Collins (n 20) [25.17], ch 26.
[72] *The Albaforth* [1984] 2 Lloyd's Rep 91 (CA) 96.

As observed above,[73] defamation is committed where the statement is published to, and comprehended by, a third party. Therefore, the natural forum should be presumed to be the place of publication.

Where a claim relating to multinational defamation is confined to publications in England, the natural forum is presumed to be England. That was the court's conclusion in *King*.[74] So in cases where a plaintiff confines his suit to local publications which are 'committed' in the forum, the court is unlikely to stay a proceeding on the basis of *forum (non) conveniens*. It is clear that a court will not decline to exercise jurisdiction in a suit limited to statements published in its territory.[75] The plaintiff has the power, in framing his pleadings, to determine in advance the outcome of the court's exercise of the discretion. This makes the discretion largely redundant as a control mechanism to reject cases which are insufficiently connected with the forum.

An Australian court exercising the discretion asks itself whether it is a clearly inconvenient forum.[76] In *Gutnick* the High Court unanimously rejected the assertion that Victoria was *forum non conveniens*.[77] It had no other option. The plaintiff confined his claim to publications by downloading from the website in Victoria. The torts were committed in Victoria. Victorian law applied. In the absence of evidence of substantial injustice, these connecting factors sealed the fate of the stay application.

In England and most other common law countries the *forum (non) conveniens* discretion is exercised by the court asking whether there is a more appropriate forum.[78]

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[73] Above 248.
[74] *King* (n 5) [27].
[75] *Gutnick* (n 12).
[76] Above n 69.
[77] *Gutnick* (n 12) [48], [65], [163], [202].
[78] Above 103.

In *Berezovsky*, the Russian-based plaintiffs sued the US publisher in England only for the harm to their English reputations, and the court held that the torts were committed in England, the place of publication to readers and of damage to the plaintiffs' English reputations.[79] The plaintiffs had chosen to sue only in England, in respect of the English publications, even though on a global basis the US publications were far more significant. Regardless of the questionability of their motives for limiting their suit,[80] when one separates the damage to the plaintiffs' English reputations from the rest of their worldwide reputations, it cannot be doubted that the torts the subject of the proceeding were committed in England and the relevant damage was suffered in England. This established a strong link with England such that the English court could not decline to exercise jurisdiction.[81]

While the Canadian rules on jurisdiction also contain service abroad provisions and a *forum (non) conveniens* discretion, their application is different to the English and Australian approaches.

Burke v NYP Holdings Inc[82] ("***Burke***") was a defamation suit in a British Columbian court brought by a local sportsman against a New York publisher, in relation to a newspaper column that appeared on a website criticizing the player's off-field conduct. The court explained that the determination of jurisdiction involves a two-step test.

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[79] *Berezovsky* (n 11) 1012, 1018, 1026.
[80] Ibid 1023–4.
[81] Ibid 1013, 1017.
[82] *Burke* (n 22).

First, the court asks whether there is *jurisdiction simpliciter* in the sense of a real and substantial connection between the forum and the defendant or the subject-matter.[83] A tort committed in the forum, while satisfying a service abroad provision, does not conclusively establish *jurisdiction simpliciter.*[84] The court still needs to find a real and substantial connection, by analysing various factors.[85] The second question (*forum non conveniens*) is whether there is another forum that is more appropriate.[86] So there are two separate occasions for the court to assess the contacts between the forum and the proceeding. It seems that both questions involve the balancing of similar factors. In *Burke*, the court's view was that the column was published, so the defamation was committed, in British Columbia when the website was accessed there.[87] There was a real and substantial connection as it was foreseeable that the column would be relevant to residents of British Columbia, the incident took place there and the witnesses resided there.[88] On that basis the court concluded that there was *jurisdiction simpliciter.* To an English or Australian observer, these are factors which would be relevant to the exercise of the *forum (non) conveniens* discretion, after jurisdiction had been established. Next, the court asked whether New York is a more appropriate forum. In answering this question, the court looked at factors which included the same factors which it considered when analysing *jurisdiction simpliciter*,[89] plus additional factors. For example, the court considered that the worldwide accessibility of the internet meant that it was reasonably foreseeable that the content would follow the player to where he resided.[90] Mere

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[83] Ibid [24].
[84] Ibid [26].
[85] *Muscutt v Courcells* (2002) OR (3d) 20 (OntCA).
[86] Ibid [25].
[87] Ibid [29].
[88] Ibid [29].
[89] Ibid [32].
[90] Ibid [33].

accessibility of the website should not be a factor in the analysis.[91] The court also regarded the difference in defamation laws between the US and Canada as a relevant juridical advantage.[92] However according to the *Spiliada* formulation, a difference between substantive laws is an impermissible consideration.[93]

In *Bangoura v Washington Post*,[94] a Guinean UN diplomat sued a US publisher in an Ontarian court in relation to defamatory[95] newspaper articles published in the US which appeared in print and online. At the time of publication the diplomat lived in Kenya and then Quebec. It was not until three years after publication that the plaintiff settled in Ontario. The trial judge dealt with service abroad, real and substantial connection and *forum non conveniens*, and decided that the Ontarian court had jurisdiction and should exercise it.

The appellate court considered only the question of real and substantial connection. The plaintiff's brief residence in Ontario, the minimal distribution of the print articles in Ontario and the fact that the only accessing of the online article in Ontario was by the plaintiff's lawyer, resulted in a finding that the plaintiff had not suffered significant damage in Ontario.[96] This, and the plaintiff's failure to limit his claim to local damage (which, in any event, the court found to be negligible), led the appellate court to distinguish *Gutnick*.[97] The trial court's decision was overruled. The plaintiff's

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[91] Above 113ff.
[92] *Burke* (n 22) [37]–[38].
[93] *Spiliada* (n 70) 482.
[94] (2005) 258 DLR (4th) 341 (Ont CA).
[95] The claim was 'dressed up' as a negligence and tortious interference case, but was essentially a libel case: ibid [17]–[18].
[96] Ibid [23].
[97] Ibid [44]–[45].

by Victorian users, the place of commission of each tort represented by a defamatory publication was Victoria, the place of downloading.

As the court acknowledged,[27] internet publishers run a risk of being sued in multiple countries. The decision led to vehement criticisms by many cyberlaw advocates, particularly in the US. However the reasoning is inevitable when one considers that the focus of defamation (as understood in Australian and English law) is damage to reputation, which occurs each time and in each place a statement is downloaded. It was the harm to the victim's reputation in Victoria which led to the existence of jurisdiction and the court's willingness to exercise it.[28] Even US courts consider that publication occurs at the place of downloading,[29] though the due process requirement acts as a filter.[30] While alternative connecting factors, eg the place of residence of the victim,[31] have been suggested as more appropriate to localize defamation, these cannot gain acceptance as long as harm to reputation remains the essence of the commission of the tort. The victim may have a reputation in many places regardless of where he resides.

Clearly there must be downloading, not mere accessibility, for publication to occur. The statement must be viewed or heard by a human third party in order for defamation to be committed. It is insufficient for the statement to be stored in a computer or on a server.[32] It is not the accessibility of the website or email, nor the fact of its access or

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[27] Ibid [192].
[28] Cf J Zittrain 'Be careful what you ask for: Reconciling a global internet and local law' in A Thierer and C Wayne Crews Jr (eds) *Who Rules the Net?* (Cato Institute Washington 2003) 13.
[29] Eg *Lofton v Turbine Design Inc* 100 F Supp 2d 404 (NDMiss 2000) 409.
[30] M Collins 'Defamation and the internet after *Dow Jones & Co Inc v Gutnick*' (2003) 8 Media & Arts L Rev 165, 177–8.
[31] *Gutnick* (n 12) [134] (Kirby J).
[32] Cf *Bochan v La Fontaine* 68 F Supp 2d 692 (EDVa 1999); *Bristile Ltd v The Buddhist Society of Western Australia Inc* (2000) AustTortRep 81-548 (WASC), affd [2000] WASCA 210.

receipt,[33] but the comprehension of its defamatory contents by a third party, which results in harm to the plaintiff's reputation. That is the ingredient necessary to indicate that damage has been suffered in a particular place, and simultaneously that the tort has been committed there.[34]

(iii) Confining claims to publications in the forum

As each publication constitutes a separate tort, a plaintiff suing for defamation in the court of a common law State must plead the States where the publications the subject of his claim were made.[35] If relying on the tort committed ground or damage ground of service abroad, the plaintiff must confine his claim to defamatory publications in the forum, and seek compensation for harm suffered in that forum. Service abroad may then be effected in reliance on either ground. Both grounds are satisfied when publication of defamatory material occurs in the forum,[36] by the statement being seen, read, heard or received by a third party[37] (though, in my submission, the act committed ground, in contrast with the tort committed ground, should be reserved for uploading or sending, rather than publication by downloading or receipt).[38] If relying on the defendant's presence in the territory, in practice, plaintiffs tend to confine their claims to defamatory publications in the forum, though this is not a requirement.

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[33] Cf Rabel vol II 319, who, in relation to letters, preferred to focus on delivery, rather than reading, as that way time and place would be evidenced easily.
[34] Cf Landgericht München I, Urteil vom 17 Oktober 1996, Az: HKO 12190/96, where a German court assumed jurisdiction because worldwide accessibility of a defamatory statement on the internet meant that the injurious act was committed also in Germany.
[35] *Hewitt v ATP Tour Inc* [2004] SASC 286 [45]–[47].
[36] *Pullman v Hill* [1891] 1 QB 524, 527; *Hebditch v McIlwaine* [1894] 2 QB 54, 61; *Bata v Bata* [1948] WN 366 (CA) 367.
[37] *Bata* (ibid) 367.
[38] Above 246.

In *Gutnick*, the plaintiff sued in Victoria only for the harm to his Victorian reputation.[39] He was not concerned with his reputation elsewhere and undertook not to sue elsewhere.[40] The court held that Victoria was the place of commission of the tort and the place of the damage.[41] In *Berezovsky v Michaels*[42] ("***Berezovsky***"), damage to two Russian businessmen's English reputation, resulting from defamatory statements published by a US publisher in a magazine and on a website, was held to have been sustained in England. This is despite the tiny proportion of worldwide publications of the magazine and the website represented by the English publications. Similarly, in *Investasia Ltd v Kodansha Co Ltd*,[43] damage to the reputation of the plaintiffs in Hong Kong, resulting from the appearance of articles by the Japanese defendant in print and on a website, was held to have been sustained in Hong Kong.

The opportunities for forum shopping are obvious. The plaintiff, taking advantage of the common law's insistence that each publication founds a separate tort,[44] confines his suit to publications in the forum. By framing his proceeding by reference to local publications, the plaintiff establishes that there has been a local tort through the occurrence, in the territory, of a significant (more than negligible[45]) publication of *prima facie* defamatory matter concerning the plaintiff. That necessarily means that the damage is sustained locally so the local courts have jurisdiction with regard to that local tort.[46] So the plaintiff guarantees the court has and will exercise jurisdiction by limiting his suit to

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[39] *Gutnick* (n 12) [28].
[40] Ibid [6].
[41] Ibid [48].
[42] [2000] 1 WLR 1004 (HL).
[43] [1999] 3 HKC 515.
[44] *Duke of Brunswick* (n 9) 189.
[45] *Kroch v Rossell & Cie SPRL* [1937] 1 All ER 725 (CA) 729; *Jameel* (n 17) [50], [69]–[70].
[46] *Chadha* (n 22) 732.

local publications. It is submitted[47] that the practical outcome is the same as that in *Shevill*.[48]

(iv) Single publication rule

The common law's treatment of each publication as founding a separate action[49] is challenged by transnational communications. The modern US law of libel has found a way of overcoming the hurdles by adopting a 'single publication rule'.[50] This forms part of the common law, but in many states of the US, has been confirmed by statute.[51] The publications of a defamatory statement give rise to a single cause of action for libel, which accrues at the time of the original publications. As to a particular published matter, only one action for damages can be maintained in one state, all damages suffered in all states can be recovered in that one action, and the judgment bars any other action for damages between the same parties in any other state.[52]

The rationale was explained in *Ogden v Assoc of the US Army*.[53] The previous principle (which still represents the law in England and Australia), that every copy of the same libel was a separate tort, had originated at a time when the conditions for dissemination of printed publications were different. Since then modern typesetting machines and printing presses greatly increased circulation. To say that every sale or delivery of a copy of a publication gives rise to a new cause of action may seem logical

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[47] A position supported in White Book vol 1 [6.21.40].
[48] Above 80.
[49] *Duke of Brunswick* (n 9) 189.
[50] Cf Canada, which does not have a single publication rule: Brown (n 14) 391–4, 1170–2; *Carter v BC Federation of Foster Parents Assoc* (2005) 257 DLR (4th) 133 (BCCA) [20].
[51] Uniform Single Publication Act 1952 (US). L Wood 'Cyber-defamation and the single publication rule' 81 Boston UL Rev 895, 899–900 (2001) cites a majority of states that have adopted this legislation.
[52] See also *Restatement (Second) of Torts* (American Law Institute Publishers St Paul 1977) §557A.
[53] 177 F Supp 498 (DC 1959).

from a purely technical standpoint, but to adhere to this doctrine would be to sacrifice reality to strict technical logic.

Initially the single publication rule was intended to streamline litigation within a state, rather than inter-state litigation. In its original formulation, the rule 'did not cross a state line', so that the entry into a new state would create at least one new and distinct cause of action.[54] This presented difficulties in multi-state publications, particularly as not all states had recognized the single publication rule.[55] In a landmark decision, *Keeton v Hustler Magazine Inc*,[56] ("***Keeton***") the US Supreme Court confirmed that all publications of a defamation in a state give rise to only one cause of action with extraterritorial effect vis-à-vis other states in the US.

Publishers favour the single publication rule as it removes the risk of separate defamation suits in 50 different states. Only one suit is permitted. Defamation victims take consolation in their ability to choose the forum for that single suit.[57] The operation of the single publication rule in the internet context has been confirmed.[58] There seems no reason not to extend the rule to international cases, though the difficulty is that the prohibition on parallel suits cannot be enforced effectively in respect of countries which do not recognize the rule.

In my submission, in the age of global mass communications, adopting a single publication rule is sensible. The arguments in favour of such a rule existed before the internet, but the internet gives urgency to the need for reform. Without the rule, even few

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[54] WL Prosser 'Interstate publication' 51 Michigan L Rev 959, 964–5 (1953).
[55] AB Hanson *Libel and Related Torts* (American Newspaper Publishers New York 1969) vol 1 [76]–[77].
[56] 465 US 770, 777–8 (1984).
[57] Contrary to what the court had been informed in *Hewitt* (n 35) [58], under US law it is not necessary to sue in the place where the statement is composed.
[58] *Firth v State of New York* 775 NE 2d 463 (NYAppCt 2002); see also Wood (n 51).

instances of downloading in a State may be sufficient to give jurisdiction to the courts of that State. The plaintiff's confinement of his suit to local publications usually prevents the court from exercising its *forum (non) conveniens* discretion to thwart the plaintiff's forum shopping. The potential exists for a multitude of defamation suits in different States, each relating to the publications in that State. That proliferation of litigation benefits no one, and may embarrass the courts if inconsistent judgments are awarded.

In *Berezovsky*, the House of Lords was asked to consider the single publication rule in transnational defamation. The defendant advocated an approach of treating the entire publication – whether by international newspaper circulation, trans-border or satellite broadcast or internet posting – as giving rise to one cause of action, and asking whether it has been proven clearly that this all-encompassing action is best tried in England. The Lords, by majority, rejected that submission,[59] because the result of such a principle would favour defendant publishers. Similarly, in *Gutnick* the High Court of Australia firmly rejected a challenge to the view that each publication on the internet founds a separate tort.[60] The unshakable faith of those ultimate appellate courts in the long-established common law principle has been criticized elsewhere.[61]

Australian legislators have recently enacted laws which depart from the traditional English position, adopting a rule similar to the US single publication rule. The uniform defamation legislation allows only one proceeding (and bars any later proceedings) against each publisher in relation to a defamatory matter, regardless how many

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[59] Ibid 1012–13.
[60] Kirby J suggested that he might consider a single publication rule which did not place the single publication at the location of uploading: ibid [138].
[61] Briggs (n 10).

publications have occurred.[62] The legislation is limited in scope to domestic cases,[63] so in an international context, the position remains that each publication gives rise to a separate tort.

While *Keeton* may be praised for eliminating concurrent defamation proceedings in the US and reducing them to one, it spawned other problems. The chosen court in the single suit rules on all the damage suffered by the plaintiff in the 50 states, regardless of how small the fraction of publications in that court's territory. In *Keeton,* a New York plaintiff sued in a New Hampshire court in respect of a national publication by a California-based publisher, although only a small fraction of publications were made in New Hampshire. New Hampshire was chosen as it was the only state which had a limitations statute that permitted recovery by the plaintiff.

The US Supreme Court did not object to the suit being heard in New Hampshire.[64] That state's courts had jurisdiction under the single publication rule[65] and could apply that state's laws so as to allow the plaintiff to recover in respect of nationwide damage.[66] Perhaps the court's motivation was that the defendant was a corporate publisher, rather than an individual. While the single publication rule seeks to centralize proceedings for defamation in a single court, the selection of that court is left entirely up to the plaintiff and may bear no relation at all to the forum's real connection with the defamation. This

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[62] Defamation Act 2005 (Vic) s 11, and its equivalent state counterparts.
[63] Section 11 determines which state or territory law applies in the case of publication in Australia (an 'Australian jurisdictional area'), but makes no mention of a non-Australian law applying where publications are more closely connected with a place outside Australia. As the Explanatory Memorandum acknowledges the common law's treatment of each publication as a separate tort, presumably the legislators are content for this to remain the position vis-à-vis international defamation.
[64] Ibid 778– 9.
[65] Uniform Single Publications Act 1952.
[66] *Keeton* (n 56) 781.

has caused concerns in the context of internet defamation.[67] While the problem could be solved by restricting recovery to local loss (by analogy with *Shevill*), that would be inconsistent with the US formulation of the single publication rule.

Australia's single publication rule avoids the *Keeton* trap by applying the law of the state or territory 'with which the harm occasioned by the publication as a whole has its closest connection'.[68] Presumably that expression requires the measurement of relative harm to reputation among the various Australian states and territories. It may be observed that the way the media are organized in Australia ensures that generally a celebrity (whether a businessperson, an entertainer, a sportsperson or a politician) tends to have the greatest reputation in his home state or territory.

The new legislation adopting a single publication rule is limited to domestic cases. If Australia were to adopt the single publication rule in international cases, then in theory the exercise of discretion could be used to stay proceedings where the Australian court is not the most appropriate to try the single publication. There are two difficulties. First, unless the alternative foreign forum also adopted the single publication rule, inconsistent outcomes could result. For example the Australian court may regard itself as most appropriate to rule on a global publication, while the foreign court may regard itself as most appropriate to consider a claim limited to the plaintiff's English reputation. Second, the test used by an Australian court for *forum (non) conveniens*[69] means that it is more than likely to regard itself, rather than the alternative foreign court, as the one court which

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[67] GM Kalow 'From the internet to courts: Exercising jurisdiction over World Wide Web communications' 65 Fordham L Rev 2241, 2266–8 (1997).
[68] Defamation Act 2005 (Vic) ss 11(2), (3).
[69] An Australian court asks whether it is a clearly inappropriate forum (*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 (HCA); *Voth v Manildra Flour Mills* (1990) 171 CLR 538 (HCA)) rather than whether there is a more appropriate forum.

connection with Ontario was at least as remote as the connection in *Jameel v Dow Jones & Co Inc*[98] (“***Jameel***”) between the plaintiff and England.

Returning to England, *King*[99] was an action in an English court brought by an American plaintiff against what were, in essence, US defendants, relating to defamatory statements placed on websites originating from California. One defendant contested the court's exercise of jurisdiction. His view of the dispute was that it was entirely a US case from first to last, so he was understandably aggrieved at facing suit in England.

As the plaintiff confined his claims to damage to his reputation in England, the court refused to stay the proceeding. It adopted ‘a robust approach to the question of forum: a global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant’.[100] Although the court emphasized that the search for the most appropriate forum still requires an analysis of the parties' connections with different fora, the narrow scope of the proceeding (limited to English publications and reputation) was determinative.

The court in *King* warned against placing too much reliance on the presumption of natural forum. The more tenuous the plaintiff's connection with England (and the more substantial any publication abroad), the weaker this factor becomes.[101] This is especially so in a worldwide publication that occurs through the internet. It is rare for English courts to find that the connection with England is tenuous.[102] In *King* the court paid only

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[98] *Jameel* (n 17) [70].
[99] *King* (n 5).
[100] Ibid [31].
[101] Ibid; *Berezovsky* (n 11) 1032.
[102] Eg *Lakah Group v Al-Jazeera Satellite Channel* (unreported 24 May 2002), where an English court refused service abroad in a defamation action by an Egyptian resident in France against a Qatari television network and an Egyptian reporter; the sole connection with England was that the reporter interviewed the plaintiff in England. Service was later effected in England: [2003] EWCA Civ 781.

lip-service to its own warning. Yet it would be difficult to find a case with a weaker connection with England. Even in *Richardson v Schwarzenegger*,[103] which concerned statements made in the context of the Californian election, there was closer connection with England.[104] So can blatant forum-shoppers be stopped?

In *Jameel*,[105] the court's view was that the disproportionately minor number of defamatory publications in England meant that any success for the plaintiff would be a small amount of damages by way of vindication. Having regard to the relative costs, the claim was an abuse of process.[106] Although the defendant's challenge was based on procedural grounds rather than jurisdiction, the court explained that, in the context of the service abroad provisions, there had not been a real and substantial tort in England, so that the English court may not have had jurisdiction.[107] Clearly claims will be rejected if a plaintiff has no reputation at all in the forum.[108] A relatively small proportion of publications in the forum may save the plaintiff, and, as can be seen from contrasting *King* with *Jameel*, where to draw the line becomes very much a matter of subjective judgment.[109]

In the meantime, a defendant could find himself exposed to multiple actions in different countries in relation to the multiple publications arising each time and in each place the defamatory material is downloaded. It would give him little comfort to know that each suit is limited to local publications. The costs of defending multiple

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[103] *Richardson* (n 22).
[104] Ibid [24].
[105] *Jameel* (n 17).
[106] Ibid [69].
[107] Ibid [70].
[108] *Kroch* (n 45) 729.
[109] *Schapira v Ahronson* [1999] EMLR 735 (CA); *Chadha* (n 22) 732.

proceedings are enormous. And there may be no prospect of mounting a successful jurisdictional challenge in any of the claims.

Courts have tried to calm concerns by publishers about exposure to global liability, explaining that the person about whom an article is written does not necessarily have a reputation in every country,[110] and proceedings in a place where the statement is downloaded are limited to damage to reputation in that place alone. But concerns about the effects of global publication remain. In the view of the Law Commission,[111] the only solution to the global risk associated with publishing on the internet is an international treaty, accompanied by greater harmonization of the substantive law of defamation.

Still, in practice, if a famous star's reputation is tarnished in multiple places, he is likely to sue either: (i) in the place where the publisher is present (in the context of common law States), to recover entire worldwide loss; or (ii) in one or two places of damage which have limited substantive defences (eg England), then to use the results of those proceedings to refute the veracity of the defamatory statement to the entire world.[112] If he stubbornly decides to sue in places where he suffers damage, he would be unlikely to commence an action in every place around the world where he has some reputation (as damages in some places would be minor), but rather choose the places where, for example, he sells most records or has most fans. It seems reasonable that the publisher should defend proceedings in those States.

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[110] Eg *Gutnick* (n 12) [53]–[54].
[111] EWLC Study [4.54].
[112] As Mr Berezovsky advertised after winning in the English action.

(c) Special jurisdiction provisions

Article 5(3) of the Judgments Regulation[113] comprises the causal event limb and the injury limb.[114]

In *Shevill*,[115] the ECJ, seeking consistency among classes of wrongs, extended that two-pronged approach to defamation.[116] In my submission, there is a neat way of applying these limbs to defamation on the internet. The causal event limb is satisfied in the place of uploading, as it is the uploading process of the defendant (equivalent to the publisher's issue and circulation of a newspaper in *Shevill*[117]) which was the event that results in damage. A court in that place has jurisdiction over the global loss. The injury limb is satisfied in the place of downloading by internet users, as that is where the victim's reputation is harmed when users read and comprehend the statement.[118] The court in that place has jurisdiction only over the local loss.[119]

Shevill received strong criticisms.[120] The main objections were that *Shevill* gave writers, journalists and publishers little guidance, it is procedurally uneconomic to bring suit far from the place of the journalist's investigation,[121] it allows for harassment rather than vindication, the ECJ underestimated the financial value of an English forum to a libel suit,[122] and the decision promotes forum shopping.

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[113] Judgments Regulation.
[114] Case 21/76 *Bier v Mines de Potasse d'Alsace SA* [1976] ECR 1735.
[115] *Shevill* (n 16).
[116] Ibid [23].
[117] Ibid [24]. In my submission, this is what the ECJ meant when it said 'the place where the newspaper publisher is established'.
[118] Ibid [29]. This follows the European approach of having one of the two elective places of defamation as the place where the statement was received and read: Rabel vol II 305.
[119] *Shevill* (n 16) [30].
[120] Vick & Macpherson 974–5.
[121] Ibid 986.
[122] Ibid 987.

These practical criticisms are well-founded and perhaps when the time comes for amending the European instruments, defamation claims should be given their own separate rule in the special jurisdiction provisions, involving a US-style single publication rule.[123]

The prospects of the UK adopting such a rule are slim, given the political power wielded by the British tabloid press. The UK, which has liberal publishing laws when compared with other European States, would be reluctant to require a British tabloid to defend in another EU State. On the other hand, centralizing defamation in one forum would be consistent with the approach taken in art 5(1) of focusing on the place of the 'principal obligation'.[124] Admittedly it would run contrary to the ECJ's aims of achieving certainty and there are concerns that a test which looks at where the main harm was suffered might require a court to undertake a substantial factual inquiry before deciding jurisdiction.[125] In the absence of the single publication rule, it is sensible to limit jurisdiction to local loss.

Case example:

From state W, A publishes a defamatory statement about B on a website ('cybersmearing'). Internet users in states X, Y and Z access the statement, and B suffers harm to his reputation in each of those states. B sues A in state X in relation to the publications in state X. The wrongs are regarded as being committed in state X and the courts in state X have jurisdiction and are prepared to exercise it. The same result would follow, *mutatis mutandis*, in respect of a suit in state Y or state Z. If B sued A in state W, it could be said that the 'act' was committed there, but the 'tort', which is intrinsically connected with the harm to B's reputation, was not.[126] Nevertheless B could sue A in state W if A is present there (if W is a common law country) or is domiciled there (if W has adopted the European rules).

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[123] Cf Hall (n 7) 121.
[124] Vick & Macpherson 988–90.
[125] *Shevill* (n 16) [52] (opinion of Advocate-General Lèger); Vick & Macpherson 976.
[126] The English CPR focus on the place of the 'act', while service abroad provisions in other common law countries focus on the place of the 'tort'.

2 CHOICE OF LAW

Multinational defamation has always caused problems for litigants, which the internet magnifies. Potentially any country in the world can be the place of the wrong.[127] This is a concern in both jurisdiction and choice of law. The jurisdictional treatment of defamation is relevant to its choice of law treatment, and vice-versa.

Although it is always open for the plaintiff to rely on the rebuttable presumption that the content of foreign defamation law is identical to the local law,[128] there will be cases where the court is confronted with the question which law to apply. Does defamation on the internet require special choice of law rules? In my submission, the magnifying factor of the internet, when compared with defamation by broadcasting, etc[129] does not warrant special treatment. Although the internet permits access to many more materials and by many more users than do traditional modes of communication, mere accessibility of a defamatory statement in a State cannot amount to publication, or presumed publication, there.[130] The existing choice of law rules must be applied. This section considers the application of the *lex loci delicti commissi* (the rule in Australia and Canada), the double actionability rule (used in England) and Rome II (which is intended to apply in the EU). The EU's E-commerce Directive is mentioned briefly.

US cases offer little assistance here. Most US courts search for the proper law of the tort.[131] This requires balancing various factors in defamation cases which involve

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[127] PE Nygh and M Davies *Conflict of Laws in Australia* (7th edn LexisNexis Butterworths Sydney 2002) [22.9].
[128] *Hewitt* (n 35) [77]–[79].
[129] Eg *Macquarie Bank v Berg* (1999) AustDefamRep 53,035; [1999] NSWSC 526 [22].
[130] U Kohl 'Defamation on the internet – a duty-free zone after all? *Macquarie Bank v Berg*' (2000) 22 SLRev 119; Hall (n 7) 122.
[131] For a brief summary, see Chan (n 1) 495.

more than one state.[132] The factors include: localizing the plaintiff's domicile and his principal activity to which the defamation relates; the publisher's domicile or incorporation; the defendant's main publishing office; the principal circulation; and the places where the statement emanated, where it was first seen and where it caused the greatest harm. Potentially these factors may yield an even wider array of applicable laws than the choice of law rules considered in this section, though the tendency to focus on the place of damage usually leads to the application of the law of the domicile of the victim.

(a) Lex loci delicti

In considering how to apply the *lex loci delicti* in defamation cases, one thing is clear from *Gutnick*. If the plaintiff's case is limited to publications in Australia, Australian law (or more accurately, the law of the relevant state or territory in Australia) will apply. The reason is that each publication is a separate tort, and as the Australian publications are committed in Australia, the *lex loci delicti* is Australian law. In the internet context, publication takes place where the third party downloads, accesses and comprehends the material from a website, or receives and comprehends an email.[133] Hence, in *Gutnick*, the place of commission of defamation was treated identically for jurisdictional and choice of law purposes. In fact the court combined its conclusion on choice of law with its conclusion not to stay the proceeding on the ground of *forum non conveniens*, despite the distinction between the two issues.[134] The plaintiff sought to vindicate his reputation in

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[132] Perritt §12.12.
[133] Dicey & Morris [35-137], citing Fawcett & Torremans 678; C Gringras *The Laws of the Internet* (2nd edn Butterworths London 2003) 126; H Kronke 'Applicable law in torts and contracts in cyberspace' in Boele-Woelki & Kessedjian 65, 68–9; L Edwards 'Defamation and the internet' in Edwards & Waelde 249, 256–7.
[134] Chan (n 1) 487–8.

Victoria and confined his claim to Victorian publications.[135] The court characterized the tort as committed by publication in Victoria, and decided that damage was suffered in Victoria and that this founded jurisdiction in Victoria, forming the basis for application of the law of Victoria (the place of accessing and downloading) and not the law of New Jersey (the place where the defendant acted). Limiting defamation claims to the local publications leads to a swift dismissal of the question of a foreign governing law, as there is little to merit the application of a different legal system.

What if the plaintiff sues in Australia in relation to defamation which originates in Australia but is received around the world? Or in relation to defamation which originates abroad and is received around the world, including Australia? For jurisdictional purposes, torts are committed in every place around the world where the publication was accessed resulting in harm to the plaintiff's reputation. Next, let us consider choice of law. Logically, in this situation of plurality of acts, every partial activity is subject to its own localization. This would create, for a defendant who publishes a defamatory statement that is accessed in numerous countries, a potential liability under a corresponding number of laws. The court would apply a separate local law to each publication, and assess damages separately for each territory. These are unsound complications.[136] Although Australian courts are familiar with applying the laws of several states and territories in cases of domestic interstate defamation where the divergence in laws is not too great,[137] this might cause great confusion in an international context. A single law is desirable. But which law?

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[135] *Gutnick* (n 12) [48].
[136] Rabel vol II 314.
[137] Eg *Carleton v Australian Broadcasting Corp* (2003) AustTortRep 81-685 (ACTSC).

The starting point should be that the *lex loci delicti*, the law of the place where the defamation is committed, is the law of the place of publication in respect of each separate publication. The *Distillers*[138] approach requires the *locus delicti* to be the place where, in light of all the circumstances, the substance of the events which give rise to the claim have occurred.[139] In considering publications in numerous States, this approach would produce several answers, so that a State's law applies to the extent the claim relates to publications in that State. Practically, some other solution must be identified.

One solution, which carries favour in the US in international cases, is to apply the *lex fori*. US courts show a reluctance to apply any defamation law other than their own, citing constitutional reasons.[140] They reject, on the basis of public policy, the application of any other law. However the *lex fori* has little to give it merit, and in Australia in the absence of express constitutional freedoms of speech, it would be difficult to justify. The justifications for applying Australian law diminish if the Australian defamation represents only a fraction of the material read worldwide.

An alternative, where the publications emanate from a single location, is to apply that law as the law of the place where the defendant acted. This ties choice of law to the defendant's conduct. The court would look for one legal system by which the defendant's conduct can be governed, to decide whether the defendant's act is justifiable.[141] However, unacceptably to plaintiffs, that approach would be weighted in favour of publishers. Concerns could arise where the law of the place of uploading or sending has liberal or non-existent defamation laws and was chosen deliberately by a

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[138] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC).
[139] Dicey & Morris [35-137].
[140] *Ellis v Time Inc* 26 Media L Rep (BNA) 1225 (DDC 1997) [13].
[141] Wolff 503.

defendant in order to circumvent defamation laws.[142] It is similarly unattractive to provide a substantive defence to a publisher who acts reasonably and lawfully in his home State.[143] A rule of private international law must balance the interests of the parties without relying on substantive law to do its work. Another solution, applying the law of the place of the server, could be manipulated also.[144] In my submission, the server's location is irrelevant in wrongs on the internet (except for wrongs alleged to have been committed at the server-level by an ISP in maintaining the server), as the focus must be on human acts. On the other hand, an approach which focuses solely on the place of the plaintiff's habitual residence would be skewed in favour of victims, and that would be unacceptable from the publishers' perspective. Can a compromise be reached?

The way to overcome such difficulties is the retention of flexibility. Unfortunately in Australia and Canada the prospects for a flexible exception to *lex loci delicti* are bleak.

The Australian High Court opted for *lex loci delicti* without a flexible exception.[145] While the court left open the possibility that considerations of public policy 'should serve as a safety valve which would save a court from having to produce an unacceptable answer',[146] this may support the application of Australian law in some cases, but this would be on a haphazard and unprincipled basis and could not permit the application of the law of a third country. In *Gutnick*, the court tempered its statements on applicability

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[142] Dicey & Morris [35-137].
[143] This defence was suggested in D Svantesson 'The "place of action" defence – A model for cross-border internet defamation' [2003] Australian Intl LJ 172, 187ff.
[144] Chan (n 1) 507.
[145] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 (HCA) [75], following *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (HCA) [80].
[146] A Briggs 'The legal significance of the place of a tort' (2002) OUCLJ 133, 135.

of the law of the place of downloading with 'ordinarily',[147] suggesting potential flexibility.[148] But in practice there is little scope for any diversion from downloading.

Canadian courts recognize an exception to the choice of law rule, but have interpreted it as permitting the displacement of *lex loci delicti* only with *lex fori*. Though there may be good policy reasons to do so, the current authorities in Australia and Canada provide little scope for a court declining to apply the law of the place of the third party's downloading or receipt, and instead applying a different law. The defamation may have an overwhelming closer connection with a different country, eg the plaintiff's habitual residence. Or the majority of the publications might have occurred elsewhere resulting in the greatest loss to the plaintiff's reputation.[149] In any event, even with a flexible exception an Australian or Canadian court may not have applied the foreign law, instead declining to hear the proceeding on the basis that the court is an inappropriate forum.

In cases where the plaintiff confines his claim to harm to reputation in a particular territory, the position is straightforward. Richardson & Garnett maintain that defamation on the internet should be governed by the law of the place where the injury to reputation is experienced.[150] It is true that ordinarily it should be reasonably foreseeable that downloading and consequential damage to reputation will occur within a deemed 'place' of publication.[151] However in the few cases where the injury to reputation is spread over many countries, this test may be unworkable.

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[147] *Gutnick* (n 12) [44].
[148] Richardson & Garnett 77–9.
[149] Cf A Gray 'Flexibility in conflict of laws multistate tort cases: The way forward in Australia' (2004) 23 U Queensland LJ 435.
[150] Richardson & Garnett 80.
[151] Ibid.

In cases where the plaintiff sues (in a single suit) in respect of harm to reputation in several States but in one of those States there is a disproportionately high number of publications, then in my submission it is appropriate to apply the law of that State. However it could be misleading to look for a place where the majority of material was downloaded while ignoring the other places where downloading occurred to a lesser extent.[152] How would the relative proportions of damage be determined?[153] For example, where a defamatory article concerning an English popstar is posted on a website, do the one million downloads in Australia cause greater damage than the three million downloads in India because the star generates greater revenue from sales in Australia? In my submission, the assessment of relative proportions may assist where there is one country where the plaintiff's loss is significantly more (in monetary terms, as that will be the form of compensation sought) than in other countries. However the relative proportions analysis is unhelpful where it is not possible to identify a place where the loss is so great that it overshadows the losses elsewhere.

In the few defamation cases that remain where it is difficult to decide among numerous laws that potentially apply, Chan's proposal may advance matters. Chan has developed a sophisticated tiered approach,[154] which concentrates on: (i) the place of the plaintiff's habitual residence (at least where the plaintiff is an individual); (ii) the place of the damage to the plaintiff's reputation; and (iii) the place of downloading. This will provide some certainty to litigants. In the above example of the English popstar, it is likely that English law, as the law of his habitual residence, would apply. The defendant cannot seriously object to Chan's first two factors. A defendant who publishes about an

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[152] Cf Dicey & Morris [35-137].
[153] Chan (n 1) 503.
[154] Ibid 514–18.

international celebrity should be mindful of the places of the celebrity's habitual residence and reputation. (However for some celebrities the places of habitual residence and reputation may be difficult to identify, and only one country's law should be applied even where numerous countries fit those descriptions. The Australian law reform body's suggestion of 'residence'[155] instead of 'habitual residence' may assist.) As for downloading, the publisher should be aware of the global potential of worldwide publication, especially through the internet, and so should bear the risk of using this powerful tool.

The publisher may decide to take a calculated risk in relation to some places, where the potential damages are not too great, and not to take the risk in relation to other places. It is often argued that an internet publisher has to choose between publishing in compliance with the laws of every State and not publishing at all.[156] This should be put in perspective. The victim will not necessarily have a reputation in every State. Even if he enjoys a reputation in numerous States, the reputation will not necessarily be harmed in every State through the accessing of the publication. Even if there is multi-state damage, the plaintiff's claim in each State should be limited to local damage. It is only in the place of the publisher's presence (where the service abroad provisions apply) or domicile (where the special jurisdiction provisions apply) that the entire worldwide damage can be claimed.

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[155] ALRC Report [6.55], [6.57].
[156] Eg criticisms of *Gutnick* (n 12) in Hall (n 7) 125–6.

Chan's approach does not strictly follow a *lex loci delicti* rule. Its implementation may be achieved through an exception if one is available. The absence of a flexible exception in Australia and Canada creates a gap in the law which should be addressed.[157]

(b) Double actionability / Lex fori

In England, the 1995 Act does not apply to defamation and similar wrongs.[158] The common law choice of law rules remain.

It is rare for plaintiffs to plead a foreign defamation. But if the defamation is committed abroad, the court applies the double actionability test,[159] requiring the application of rules which are the common denominator between the *lex loci delicti* and the *lex fori*, subject to a flexible exception. That largely eliminates defamation claims that are not actionable both abroad and in England.

The application of double actionability may have the potential for huge practical difficulties in cases involving defamatory internet publications.[160] The defendant may be required to plead defences under numerous laws of places where his publication was accessed and proceedings are underway. The complexities may be reduced through the flexible exception. So other than where a claim is eliminated outright, the relief offered to the defendant by double actionability[161] is minimal in defamation.

In practice, most defamation claims in English courts are for torts committed in England alone. By confining their claim to publications in England, plaintiffs rely on the

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[157] Above 168–9.
[158] Section 13.
[159] Above 151–2.
[160] M Collins (n 20) [27.22], though these difficulties may be alleviated in practice by the flexible exception and jurisdictional principles: ibid [27.28]–[27.29].
[161] Dicey & Morris [35-137].

traditional rule that each publication of defamatory material constitutes a separate tort. This maximizes their chances of having the claim heard by an English court, as the court is likely to decide that it has jurisdiction and, where the discretion operates, that it is a *forum conveniens*. At common law, torts committed in England attract the application of the *lex fori*,[162] English law. This dismays particularly US defendants who lament the loss of their entrenched constitutional freedoms.

There are three responses. First, freedom of expression is protected under the Human Rights Act 1998 (UK), though it is not as broad as the freedoms in the US Constitution. Second, even if the English court applies US law, it may decide that the English limitations on freedom of speech are mandatory rules which prevail over any broader freedoms expressed in US law. An English court applying US law is not bound to apply the US Constitution as the supreme law to the extent it conflicts with mandatory rules of the forum. Third, an English judgment which disregards US constitutional freedoms would not be afforded recognition in the US.[163]

(c) Rome II

Previous drafts of the Rome II Regulation contained in art 6 a choice of law rule for 'violations of privacy and rights relating to the personality', a rather oddly formulated expression which encompasses what are defamation claims in English law. This area of substantive law exhibits great disparity among the EU States, with some looking at the place of the publisher's headquarters or the place where the statement was published, others (including England) looking at the place where the statement was distributed to

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[162] *Szalatnay-Stacho v Fink* [1947] KB 1.
[163] Below 316–7.

third parties, while a few focus on the place where the victim enjoys a reputation, presumed to be his habitual residence.

The discord between the Parliament and the Commission regarding the correct approach was so great that the Commission's revised proposal abandoned art 6 and excluded violations of privacy and personal rights by the media from the ambit of Rome II. The Council's revised draft carried through these changes, though the exclusion has been reformulated: 'non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation'.[164] At least this reduces the uncertainty associated with the Commission's proposal, which distinguished between violations committed by 'the media', which would not come within the Regulation, and violations by others, which ostensibly would be governed by the general rule in Rome II. In the internet era, when each user may be regarded as a publisher, it is difficult to delineate the media.

As regards proceedings in English courts, had art 3(1) applied in defamation claims, the result would be consistent in a defamation claim limited to publications in the forum (which is currently governed by the *lex fori*), but a claim where publication occurred abroad (which is currently governed by double actionability with a flexible exception) could yield divergent results, as double actionability may not necessarily be consistent with the law of the place of harm to the victim's reputation.

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[164] Article 1.2(h).

(d) E-commerce Directive

The E-commerce Directive[165] may also have an effect on defamation claims in EU courts. While not embodying a choice of law rule in respect of defamation, the Directive may create additional substantive rules, the application of which depends on the origin of the statement.

The Directive aims to enable Europeans to take full advantage of the opportunities afforded by e-commerce, without consideration of borders.[166] It addresses the legal uncertainty as regards which national rules apply to information society services, and the extent to which a Member State may control services originating from another Member State.[167] The Directive expressly provides that it neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of courts; and the freedom to provide information society services as established by the Directive overrides any inconsistent provisions of the applicable law.[168]

The Law Commission, in its study on the interaction between defamation and the internet,[169] considered the possibility that the Directive, which seeks to apply country of origin rules, could result in implicit changes to choice of law rules, despite the express denials. It does appear that defamation could be covered within the scope of the Directive, as defamation law is ostensibly a requirement laid down in Member States' legal systems applicable to information society providers or information society

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[165] E-commerce Directive, applied in the UK by the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No 2013).
[166] Ibid Recital (3).
[167] Ibid Recital (5).
[168] Ibid Recital (23), art 1(4).
[169] EWLC Study [4.37]-[4.49].

services.[170] This would compel each State to ensure that internet services provided from its territory comply with its defamation laws,[171] and that the State's law does not restrict the freedom to provide information services from another EU State, except to the extent necessary to ensure compliance with the State's public policy. This is not a choice of law rule. The applicable law is still determined under the usual choice of law rules.

Nevertheless, the effect of the Directive is to impose additional mandatory rules in a case where a service provider is established in a State and provides services from there to other Member States. If the applicable law is the law of the State from which services are provided, the Directive has negligible impact. If the services are provided from a State but a different State's law is applicable, then the defamation law of the first State has overriding effect. This means that an English court considering a claim relating to English users accessing a defamatory website uploaded by a service-provider in Belgium may have to apply Belgian defamation principles, except to the extent necessary to ensure compliance with English public policy. For example, English public policy would not permit the application of Belgian defamation law to the extent to which it impinges on freedom of the press.

3 CONCLUSION

So far the highest level decision in a common law court directly addressing jurisdiction and choice of law in relation to wrongs on the internet, *Gutnick*, has been in the context of defamation. As regards jurisdiction, the law in Australia and England is clear. For the purposes of the service abroad provisions, defamation is committed, and damage is

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[170] E-Commerce Directive art 2(h).
[171] Ibid art 3(1).

suffered, at the place of publication. That is where the third party views and comprehends the material. On the internet, that means downloading from a website or receipt of an email. There is scope for arguing that the focus in the English CPR on the 'act' relates to uploading to a website or sending an email. The damage ground of service abroad, which relates to downloading or receipt, is invoked more frequently. In that place, the plaintiff should be able to claim only for his local loss. In practice a plaintiff serving abroad often limits his claim to local loss, so as to overcome allegations that his suit is brought in a *forum non conveniens*. If serving on the defendant while present in the jurisdiction, there is no geographic limitation on recovery.

For the purposes of special jurisdiction, the causal event occurs at the place where the defendant uploads the material, while the injury occurs where the third party downloads it (and in that place recovery is limited to local loss). The plaintiff always has the option of recovering all his worldwide damage in the place where the defendant is domiciled.

Choice of law is problematic in those countries that rely on the *lex loci delicti* (Australia, Canada; and as a component of double actionability in England). The search should be for a single *locus delicti*. This is ordinarily the place where the statement is published and the plaintiff suffers harm to his reputation. Where there are several places, it may be appropriate to look at the relative proportions of publications. Where there are numerous publications in numerous countries, ultimately the victim's habitual residence, reputation, and places of downloading may prove to be decisive.

CHAPTER G: RECOGNITION AND ENFORCEMENT OF JUDGMENTS

1 BACKGROUND

Adjudicative jurisdiction is related to sovereignty[1] and both have been limited traditionally to a State's geographic boundaries. The corollary is that to enforce judgments outside a State's borders would violate the sovereignty of another State.

In ancient times, the widespread principles of *jus commune* and the law of nations involved mutual assistance between courts and giving effect to foreign decrees.[2] A few centuries ago, with the advent of the theory of sovereignty and the rise of nationalism, States began to assert the right to review and examine foreign decrees and judgments. The courts of one State refused to assign the same meaning or value to justice meted out by the courts of another State, perhaps due to historically deep traditions of nationalistic pride and self-protectionism.[3]

Over the years, some courts have exhibited greater willingness to allow the enforcement of foreign civil judgments within their boundaries against their own citizens. This indicates a positive move towards greater international mutual trust and harmony.

A foreign judgment has no direct operation in a State, nor any inherent right of recognition or enforcement. Nevertheless, many States acknowledge the benefits of

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[1] Above 20.
[2] A Ehrenzweig *A Treatise on the Conflict of Laws* (West Publishing Co St Paul Minnesota 1962) 161.
[3] BA Caffrey *Enforcement of Foreign Judgments* (CCH Sydney 1985) 38.

recognition of foreign judgments, as necessary for the principle of finality. Resources are conserved by preventing relitigation in cases that had already been finally determined elsewhere.

Enforcement is a further step to recognition, requiring some other explanation. A foreign judgment is enforceable in a State only insofar as it satisfies that State's conditions for enforcement. The strictness of the conditions imposed varies according to which theory has been adopted as the basis upon which that State's courts are prepared to enforce foreign judgments. The 'comity' theory[4] suggests that a State's court has power to adjudicate and enforce only within that State's territory, so any enforcement of a foreign judgment would be, not as a matter of obligation, but merely as a concession for reasons of utility and convenience, showing respect for a foreign sovereign. The 'reciprocity' theory[5] suggests that international law requires equal treatment of judgments rendered by the enforcing forum and by the original forum. The 'vested rights' theory[6] suggests that a judgment rendered by a competent foreign court over persons or property within its territory creates a vested right which is entitled to universal recognition and enforcement. The 'obligation' theory[7] suggests that a legal obligation arises when a court delivers judgment for the payment of money between the parties themselves, and that obligation (or debt) should be given effect in every other State which wants to participate in the international community.

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[4] *Geyer v Aguilar* (1798) 7 Term Rep 681, 696–7; 101 ER 1196, 1204–5 (KB).
[5] Caffrey (n 3) 50–3.
[6] Ibid 53–6.
[7] *Russell v Smyth* (1842) 9 M&W 810, 819; 152 ER 343, 347; *Williams v Jones* (1845) 13 M&W 628, 633; 153 ER 262, 264–5; *Goddard v Gray* (1870) LR 6 QB 139, 149–50; *Schibsby v Westenholz* (1870) LR 6 QB 155, 159.

This last theory has prevailed in English common law countries as the theoretical underpinning of the enforcement of foreign judgments.[8] Nevertheless, comity also plays some role, as recognition and enforcement of foreign judgments enables the society of nations to function.[9] In Canada, the basis for recognition and enforcement is neither a matter of absolute obligation, nor a matter of mere courtesy and goodwill, but the recognition which one nation allows within its territory for the governmental acts of another nation, having regard to international duty and convenience and the rights of the recognizing nation's citizens or of other persons who are under the protection of its laws.[10] This test, which provides for recognition and enforcement when the foreign court has properly and appropriately exercised jurisdiction, is a modern theory of comity, perhaps approaching reciprocity.[11]

In common law States, in general, a foreign judgment that is recognized creates *res judicata*. If there is a local proceeding which raises the same issues, recognition allows a party to plead the foreign judgment as having determined the controversy finally and conclusively. Recognition may be challenged on certain grounds. Enforcement of foreign judgments is not automatic. In common law States, unless statute provides for direct enforcement, the successful party is required to commence an action *in personam* for the sum due under the foreign judgment. The party resisting enforcement may invoke various bars. If none of the bars to recognition and enforcement applies, the court makes an order enforcing the judgment so that the party can execute the judgment and recover amounts owing by the judgment debtor as though it were enforcing a local judgment.

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[8] Ibid.
[9] *Adams v Cape Industries plc* [1990] Ch 433 (CA) 552.
[10] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 1096–8.
[11] Cheshire & North 406.

Statute may allow the enforcement of judgments from certain prescribed States by mere registration, with the onus placed on the other party to resist enforcement.

Among courts of States that participate in EU/EFTA, there is a facilitated method of recognition and enforcement, creating a regional 'common market' in judgments.[12] The Judgments Regulation[13] and related conventions create a scheme whereby a judgment of one State's court receives automatic recognition and enforcement in any other State upon registration of the judgment in the enforcing State. The judgment need not be against a domiciliary. Many of the traditional bars are removed. For example, to be enforceable, the judgment need not be a money judgment or a final judgment. A judgment of one State's court in a case of wrongs on the internet can be easily enforced in another State under the European instruments.

A further European initiative encouraging cooperation between administrative agencies in the field of consumer protection[14] may prove, in practice, more useful at preventing intra-European wrongs on the internet than the cross-border enforcement of court judgments.

This chapter concentrates on the issues that arise in relation to judgments in proceedings for wrongs on the internet. The recognition and enforcement of foreign judgments at common law is a cumbersome process. The age-old problems (both legal and practical) associated with enforcing foreign judgments, which are encountered by plaintiffs seeking redress for wrongs on the internet, are not unique to the internet. A

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[12] The aim of the draft Hague Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 2001 (since abandoned) had been to create a similar 'common market' globally.
[13] Articles 32–56.
[14] Council Regulation (EC) 2006/2004 of 27 October 2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws [2004] OJ L364/1.

shrewd defendant may take advantage of the jurisdictional principles by operating his website, and holding his assets, in a State whose courts and laws are lenient on wrongdoers.[15] If that State's courts uncooperatively refuse to recognize or enforce foreign judgments against the defendant, and that State's law enforcement agencies refuse to assist, there is little the plaintiff can do. A suit in a place of damage and a judgment from a court of that place will be futile if the defendant has no assets there. The only solution presently available[16] is to apply international pressure to that State. This is not a criticism of the jurisdictional principles; they cannot be expected to solve the enforcement problem. There are great benefits in a meaningful system of recognition and enforcement. International organizations may try to harmonize the recognition and enforcement rules.[17] Indeed, within Europe, the momentum seems to be growing for the extension of and simplification of the enforceability of judgments.[18]

These difficulties raise concerns about the commerciality of enforcing foreign judgments. One author said that the internet makes it difficult to turn 'a judgment supported by jurisdiction into meaningful economic relief'.[19] This refers to the typical situation where although the plaintiff succeeds in establishing jurisdiction in his home forum over the absent foreign wrongdoer and the court gives a (default) judgment, there may be little the plaintiff can achieve with that judgment, at least without the entire exercise proving prohibitively expensive. It is true that the sums involved may not justify

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[15] GB Delta and JH Matsuura *Law of the Internet* (looseleaf 2nd edn Aspen Law & Business New York 2003) §3.05 urges defendants to incorporate an internet business separately from the rest of the business operation in order to shield assets from worldwide liability.

[16] Despite its broad original aim, the Hague Convention's scope is limited to exclusive jurisdiction clauses.

[17] Organization for Economic Cooperation and Development 'Guidelines for protecting consumers from fraudulent and deceptive commercial practices across borders' (2003) 16 recommends the development of effective cross-border consumer redress systems, including the improvement of international arrangements for the mutual recognition and enforcement of judgments.

[18] C Coteanu *Cyber Consumer Law and Unfair Trade Practices* (Aldershot Ashgate 2005) 149–50.

[19] HH Perritt 'Will the judgment-proof own cyberspace?' 32 Intl Lawyer 1121, 1123 (1998).

commencing a proceeding in relation to a wrong on the internet, obtaining a default judgment against the absent foreign wrongdoer and then seeking to enforce that judgment against the wrongdoer in the wrongdoer's State. Yet sometimes the award, at least in its deterrent value, may outweigh the transaction costs and the practical difficulties. In the context of widespread wrongs such as file-sharing infringements of copyright, while a successful judgment against an infringer may deter others to an extent, realistically it will not lead to a culture shift which significantly reduces reccurrence of infringements.[20] Conversely, a global operator who has been found to have infringed a State's laws may decide to comply voluntarily with a judgment, despite the judgment's unenforceability in other States where he operates or keeps assets, simply because of his desire to operate internationally and maintain his global goodwill.[21] Economics is a recurring theme, which plagues not only private international law, but litigation generally.

In anticipating difficulties with the recognition and enforcement of judgments, victims and regulators may choose to bring proceedings not against the real wrongdoer, but instead against some other person who is implicated in the wrong. Intermediaries (eg ISPs) may be easier to locate, less itinerant, and situated in a territory where it is easier to enforce a judgment, and have deeper pockets, than the real culprits. There may be actions against internet users who have engaged or participated in wrongdoing by downloading and possessing wrongful material.[22] In some industries, self-regulatory schemes have been implemented to alleviate the necessity for curial proceedings.[23]

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[20] *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 (FCA) [351] (on appeal to FullCt).
[21] PS Berman 'The globalization of jurisdiction' 151 UPLR 311, 387 (2002).
[22] L Edwards 'Pornography and the internet' in Edwards & Waelde 275, 291.
[23] Reed ch 9.

Lessig has suggested an overhaul of the system of recognition and enforcement of judgments, so that each State would promise to enforce on servers within its territory the regulations of other States, in exchange for having its own regulations enforced in those other States.[24] Traditionally the common law has not embraced reciprocity. While it may be willing to take the step of relying on reciprocity in the recognition and enforcement of foreign judgments, in my submission, to ask one country to apply and enforce the municipal laws of another cannot be reconciled with sovereignty.

A less radical way of streamlining the recognition and enforcement procedure in common law States would be to expand the concept of 'international jurisdiction' at common law, as recommended in the next section. While this change may have merit generally, it would be particularly welcome in cases of wrongs on the internet.

2 JURISDICTION OF THE FOREIGN COURT

At common law, one requirement for the recognition of a foreign judgment is that the adjudicating court had competent jurisdiction over the judgment debtor. Recognition of foreign judgments is closely intertwined with jurisdiction.

The way that an English court assesses whether the foreign court had jurisdiction is by requiring a certain correlation between the legal obligation of the defendant and the right of the foreign court to issue its judgment.[25] Although 'it is legitimate to infer that the criterion by which the competence of an English Court is tested must also be adopted

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[24] L Lessig *Code and Other Laws of Cyberspace* (Basic Books New York 1999) 55.
[25] GC Cheshire *Private International Law* (3rd edn Clarendon Press Oxford 1947) 779.

when the inquiry relates to the competence of a foreign Court',[26] in practice the tests are far from identical.

In enforcement, the English court determines whether the foreign court had jurisdiction, in an international sense ('international jurisdiction'), according to the principles of private international law as understood in England.[27] That is not assessed in the same way as the English court would assess its own jurisdiction,[28] nor as the foreign court would assess its own jurisdiction (what could perhaps be termed a 'jurisdictional double *renvoi*'). In theory a foreign judgment could be recognized in England despite the foreign court having lacked domestic jurisdiction under its own law;[29] in practice a foreign appellate court would often correct the jurisdictional error of the court below. The result of the different approach to recognition of foreign judgments[30] is that English and other common law courts claim for themselves wider jurisdictional grounds than they are prepared to concede to foreign courts, though the ambit of their jurisdiction is tempered by its discretionary exercise.

International jurisdiction depends simply on the judgment debtor's presence (or residence[31]) in the foreign court's territory or his submission to that court (eg by

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[26] Ibid.
[27] Ibid 778–9.
[28] As to the assessment by a court of its own jurisdiction, see above ch B.
[29] *Pemberton v Hughes* [1899] 1 Ch 781 (CA) 790–2. cf Judgments Regulation art 35.
[30] *Re Trepca Mines Ltd* [1960] 1 WLR 1273 (CA) 1280–2; *Société Co-op Sidmetal v Titan International Ltd* [1966] 1 QB 828 (QBD) 846–7; *Sharps Commercials Ltd v Gas Turbines Ltd* [1956] NZLR 819 (SC) 823; *Crick v Hennesy* [1973] WAR 74 (SC) 76. But see *dicta* in *Re Dulles' Settlement (No 2)* [1951] Ch 842, 851 (Lord Denning MR).
[31] *State Bank of India v Murjani Marketing Group Ltd* (unreported, 27 March 1991, CA).

appearance).[32] If either of these is satisfied, the English court accepts that the foreign court had jurisdiction.

Let us put jurisdiction by submission (ie 'consensual jurisdiction') aside. What remains, jurisdiction by presence (or residence), is a fragment of 'connected jurisdiction' – jurisdiction where there is a connection between the forum and the parties and/or the dispute.[33] The asymmetry between this and the principles for determining an English court's own jurisdiction can be seen immediately. English courts assess their own jurisdiction by looking at service in England (in essence, 'general connected jurisdiction') or service abroad (in essence, 'special connected jurisdiction'), and asking whether there is a more appropriate forum than the English court. But in assessing whether a foreign court had jurisdiction, the English courts have not adopted an equivalent of the service abroad provisions nor of the *forum (non) conveniens* discretion.

This section challenges the absence of 'special connected jurisdiction' and discretion in the common law's determination of 'international jurisdiction'.[34] It is submitted that, in reliance on reciprocity, a foreign court's exercise of 'consensual' or 'connected' jurisdiction as determined under English jurisdictional principles should be recognized by English courts, while a foreign court's exercise of jurisdiction beyond 'consensual' or 'connected' jurisdiction should not be recognized.[35]

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[32] *Emanuel v Symon* [1908] 1 KB 302 (CA) 309; *Adams* (n 9). US courts also accept domicile or incorporation as bases of international jurisdiction: Uniform Foreign Money-Judgments Recognition Act 1962 §5(a), which remains under the Uniform Foreign Country Money-Judgments Recognition Act 2005.
[33] J Hill 'The exercise of jurisdiction in private international law' in P Capps, M Evans and S Konstadinidis (eds) *Asserting Jurisdiction: International & European Legal Perspectives* (Hart Oxford 2003) 39, 50.
[34] Below 298ff.
[35] Cf Hill (n 33) 55–6.

(a) Expanding Presence

During his presence in a territory, a person is deemed to accept the civil and criminal jurisdiction of its courts.[36] That is the principle of territorial dominion.[37] Hence English courts justify their civil jurisdiction over any person (whether a local or a foreigner) who is present in England when served with process. A corporation cannot easily shift its presence. Individuals, on the other hand, may have only a fleeting physical presence in a territory, yet this suffices, because while a person is present in a territory, he is subject to its laws and is amenable to the process of its courts.[38] Despite counterarguments that casual presence is not a desirable basis of jurisdiction,[39] a presence of any duration is sufficient.[40]

'Presence' in a territory is determined physically. An individual is present where his body is located. A corporation is present where it or its representative carries on business at or from a definite and fixed place.[41]

What is the position of an individual or a corporation that is not physically present in a territory, but has made contact with the territory through the internet? Can there be 'constructive' presence?

In the US the position is malleable, as the constitutional due process test requires minimum contacts which may be established through implied consent based on a person's virtual contacts with a forum.[42] Some US cases promote an expanded notion of presence.

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[36] *Adams* (n 9) 517–19.
[37] Cheshire (n 25) 781.
[38] *Adams* (n 9) 519.
[39] Cheshire & North 409.
[40] JG Collier *Conflict of Laws* (3rd edn CUP Cambridge 2001) 111.
[41] *Adams* (n 9) 530–44.
[42] R August 'International cyber-jurisdiction: A comparative analysis' 39 ABLJ 531, 548 (2002).

One appellate court commented abstractly that a person who places material on a website is present in every place where the website is accessed.[43] This is too broad as a general proposition and, in any event, is too radical to be adopted in English common law countries. US cases have rejected mere accessibility as a basis of exercising jurisdiction.[44]

US law may offer guidance as regards the presence of a corporation in a territory through a fixed place of business. US courts frequently ask 'when do internet contacts amount to conducting business in a territory?'. After all, *Zippo Manufacturing Co v Zippo Dot Com Inc*[45] ("***Zippo***") formulated a test in which a court clearly had jurisdiction over a website through which business was conducted in the forum. The website must allow for contracts to be concluded with residents of the forum.[46] The ability of residents to download forms through the website, and to submit questions relating to products, are further indicia.[47] In fact, a website that facilitates real time transactions between a foreigner and residents of the forum enables the foreigner to have contacts with the forum to a degree that a traditional enterprise could never approach.[48] The business conducted must involve the exchange of money; a free-to-air website, such as a telephone directory, merely provides a search tool and does not amount to conducting a business.[49]

While in English law the question whether constructive presence can found international jurisdiction has not been considered, the question whether submission to jurisdiction may be implied has been considered. The principle at common law is that an

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[43] *Pavlovich v Superior Court* 109 Cal Rptr 2d 909 (CalApp 2001) 916.
[44] *Bensusan Restaurant Corp v King* 937 F Supp 295 (SDNY 1996), affd 126 F 3d 25 (2d Cir 1997).
[45] 952 F Supp 1119 (WDPa 1997) 1124. See further above 120ff.
[46] *Digital Equipment Corp v AltaVista Technology Inc*, 960 F Supp 456 (DMass 1997) 465–6.
[47] *Hsin Ten Enterprises USA Inc v Clark Enterprises* 138 F Supp 2d 449 (SDNY 2000) 456.
[48] *Gorman v Ameritrade Holding Corp*, 293 F 3d 506 (DC Cir 2002) 512–13.
[49] *GTE New Media Services Inc v Bellsouth Corp* 199 F 3d 1343 (DC Cir 2000) 1350.

agreement to assent to the jurisdiction of a foreign court must be express; it cannot be implied from a party's conduct.[50] There are statements to the contrary, that when appointing an agent to conduct business in a foreign country on his behalf, the principal impliedly agrees to submit to the jurisdiction of the courts of that country in respect of transactions conducted there by the agent.[51] These appear incorrect.[52] It is even less compelling to hold that by transacting on the internet a website operator submits to the jurisdiction of the customers' courts, even though the operator may sell more products to those foreign customers through a website than he could ever hope to sell as a merchant displaying his wares by travelling through their country.

In the 1920 Act on the enforcement of foreign judgments,[53] s 9(2)(b) states that a person who carries on business regularly through an agent in a place is considered to be present there. That statute accepts constructive 'presence'. It is likely that the agent must be a person (individual or body corporate) and not merely an electronic communication or possessing a virtual presence in cyberspace. Section 4(2)(a)(v) of that Act provides that where an individual or a corporation has an office or place of business in a foreign country, the courts of that country have jurisdiction over proceedings in respect of a transaction effected through that office or place of business. The office or place of business must be a physical, tangible one, not merely a virtual point of contact.

This conclusion corresponds with the interpretation of 'branch, agency or other establishment' in art 5(5) of the Judgments Regulation. According to the ECJ in Case

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[50] *Vogel v RA Kohnstamm Ltd* [1973] 1 QB 133, following *Singh v Rajah of Faridkote* [1894] AC 670 (PC) and *Emanuel* (n 32).
[51] *Blohn v Desser* [1962] 2 QB 116, 123–4.
[52] Briggs & Rees [7.42].
[53] Administration of Justice Act 1920 (UK).

33/78 *Somafer SA v Saar-Ferngas AG*,[54] this requires a place of business which has the appearance of permanency, eg the extension of a parent body, has a management and is materially equipped to negotiate business with third parties, alleviating the need for third parties to deal with the parent.

The fact that a supplier's website appears (temporarily) on the customer's computer will not suffice to create a branch of the supplier in the customer's State. The supplier has no physical premises or staff in the territory and the equipment (ie the computer) is used only temporarily and in any event belongs to the customer. Even if the supplier's website is stored on a server in the territory, the absence of staff who have the authority to contract with customers (that function being performed by software) means that there is no branch, agency or other establishment.[55] It would appear that a website operator's provision of internet services into a territory is, by itself, generally regarded as insufficient to constitute the operator's business establishment, or in my submission his presence, in the territory.[56]

In *Gebo Investments (Labuan) Ltd v Signatory Investments Pty Ltd*[57] ("***Gebo***"), an Australian court considered whether a company's physical extraterritorial acts which result in business communication through the internet with persons in Australia, could be regarded, by reason of receipt, as carrying on business in Australia for the purposes of

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[54] [1978] ECR 2183.
[55] Reed [7.2.1.1].
[56] This is consistent with the approach taken to regulation of banking (Commission Interpretative Communication, Freedom to Provide Services and the Interest of General Good in the Second Banking Directive [1997] OJ C209/6–7); financial services (C Reed 'Managing regulatory jurisdiction: Cross-border online financial services and the European Union single market for information society services' 38 Houston L Rev 1003, 1016 (2001)) and income tax (OECD Model Tax Convention on Income and Capital, as adopted by the Australian Taxation Office Tax Determination 2005/2 'Income tax: does a resident of a country with which Australia has a Tax Treaty, have a permanent establishment solely from the sale of trading stock through an internet website hosted by an Australian resident internet service provider?').
[57] (2005) 54 ACSR 111 (FCA).

company law. The court did not consider the internet to be unique, so the question could apply equally to other modes of communication.[58] Carrying on business traditionally involves acts within the territory that amount to, or are ancillary to, transactions that make up or support the business.[59] It had never been suggested that someone who posts letters addressed to another country carries on business in that other country. Technological advances which facilitate access to websites by anyone in Australia with internet facilities did not alter these principles. These principles require some physical activity in Australia through human instrumentalities, being activity that itself forms part of the course of conducting business.[60]

In my submission, it is highly artificial to conclude that conducting business through a website amounts to presence in the customer's territory. As often happens, where the wrongdoer is not physically in a territory, and his website is accessed or his email is received in the territory, the wrongdoer is not 'present' in the territory, for the purposes of assessing the foreign court's international jurisdiction (or for the purposes of serving process in the territory[61]). If sued in the foreign court, the wrongdoer may be advised not to appear to defend the proceedings but instead rely on his absence from the forum (the foreign territory) to resist any attempt at recognition or enforcement of the default judgment elsewhere (eg his place of residence). Further, a content-provider should not be deemed to be present in the location of an intermediary (eg ISP) whose services are used to upload the content to the website, nor the location of the server which hosts the website.

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[58] Ibid [30].
[59] Ibid [31].
[60] Ibid [33].
[61] Above 26.

The concept of 'presence', as understood in light of existing authorities, may not be adequate to deal with cases involving the internet. The common law rules on jurisdiction are capable of judicious expansion to meet the changing needs of society.[62] However, it would be artificial to expand 'presence' to include wrongdoing in cases where a wrongdoer is not physically located, nor has any fixed place of business, in a territory, and his sole contact is through the internet. Moreover, even if a content-provider was deemed to be present temporarily in a territory by virtue of committing a wrong on the internet, that cannot found international jurisdiction as presence is determined at the time when proceedings are commenced, and not when the cause of action arises.[63]

Submission is the other recognized basis of international jurisdiction. The common law does not accept implied submission: a person should not be deemed to have agreed to submit to the territory's courts.[64] While it could be argued that a person who uses a computer in a territory to commit a wrong on the internet, or who targets a territory through the internet, impliedly agrees to submit to that territory's courts, it is preferable not to deem agreements where there is no indication of consent by the wrongdoer.[65]

Deeming of both presence and submission could be criticized as fictitious. The greater the scope for activities to be done through the internet, the less of a fiction it becomes. Many of the acts and transactions, which, at the time of *Adams v Cape Industries plc*,[66] could be done only through physical presence in a territory, now can be performed remotely through the internet.[67] Furthermore, if targeting is taken into account

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[62] Dicey & Morris [14-075].
[63] *Singh* (n 50); *Rousillon v Rousillon* (1880) 14 ChD 351; *Emanuel* (n 32); cf *Schibsby* (n 7) 161; *Mattar v Public Trustee* [1952] 3 DLR 399 (AltaApp) 405; *Gynoyor v Sanjeko* [1971] 5 WWR 381 (AltaSC) 382–4.
[64] Above 293–4.
[65] *Vogel* (n 50).
[66] [1990] Ch 433 (CA).
[67] *Pavlovich* (n 43) 916.

in exercising jurisdiction, then perhaps it should be considered in determining international jurisdiction. Targeting through a website is analogous to, and may even give a website operator a superior foothold in the target country than, physical presence. Nevertheless, it would be difficult to show that websites, often designed to have international appeal, target a particular country. Rather than expanding 'presence' or 'submission' fictitiously, targeting (an internet-specific factor) could be taken into account in an approach for determining international jurisdiction which relies on reciprocity.

(b) Expanding international jurisdiction

In the internet age, a person may commit wrongful acts or cause damage in places around the world in which he has never set foot. Nonetheless, the damage is done. It would not be fair to allow such a person to escape punishment on the basis that he was not physically present in the territory where the victim suffered loss. That would give defendants freedom to wreak havoc with impunity.

One way of striking a balance is by generally regarding the place of the wrong or a place of damage as having a sufficient claim to exercising jurisdiction over the wrongdoer. English courts already take this into account when determining their own jurisdiction. This would be an expansion of international jurisdiction to take account of reciprocity. It is a preferred alternative to fictitiously expanding 'presence' or 'submission'.

It is submitted that the private international law principles should be modified so as to recognize a foreign court's international jurisdiction over a wrongdoer who commits a wrong in that territory, or who causes damage in that territory.

This modification relies on reciprocity, which, traditionally, English lawyers vehemently resisted in the recognition of judgments. One editor summed up the sentiment: 'No English judgment or English writer of authority sanctions the doctrine of reciprocity'.[68] On the other hand, reciprocity is widely accepted in civilian countries.[69]

While reciprocity in recognition of foreign judgments has found little support in England and Australia, in Canada it was contemplated several decades ago. A Canadian scholar considered that it was 'sound' to extend reciprocity in recognition of foreign judgments, especially in tort.[70] In his view, it was 'desirable that the courts of the place where the tort was committed...should have jurisdiction (discretionary it is true, wisely), and that any judgment arising from the new jurisdiction should be enforceable everywhere'.[71] He argued that reciprocity should be used as a positive and enabling rule in relation to international jurisdiction.[72] Another author, foreshadowing the Canadian Supreme Court's position, acknowledged that a discretion was necessary to mitigate against the hardship that reciprocity by itself might foster.[73]

Adopting reciprocity would expand international jurisdiction so as to apply, as regards the adjudicating forum, the tort committed (or act committed) ground or the damage ground of service abroad. The enforcing court would give reciprocal treatment to the foreign judgment based on the equivalent of the service abroad provisions.

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[68] F Pollock 'Notes' (1896) 12 LQR 302.
[69] Eg German courts cannot recognize a foreign judgment if the foreign court did not have jurisdiction pursuant to German law principles, or if otherwise reciprocity is not assured: German Code of Civil Procedure §328. See also Japanese Code of Civil Procedure §200.
[70] GD Kennedy '"Reciprocity" in the recognition of foreign judgments' (1954) 32 Canadian Bar Rev 359, 379.
[71] Ibid.
[72] GD Kennedy 'Recognition of judgments in personam: The meaning of reciprocity' (1957) 35 Canadian Bar Rev 123, 131–2.
[73] J Blom 'Case note on Morguard Investments Ltd v De Savoye' (1989) 68 Canadian Bar Rev 359, 366.

Ahava (USA) Inc v JWG Ltd[74] ("***Ahava***") shows how reciprocity can be applied in the internet context. JWG, an Israeli company, had infringed Ahava's US-registered trade mark by offering on its website (uploaded in Israel and hosted on an Israeli server) products in respect of which Ahava had an exclusive distribution right in the US. JWG would mail the products to customers, including many in the US. Proceedings for trade mark infringement were brought in a US court.[75] JWG defended these on the merits, arguing that its sales on the website were protected by US laws on commercial free speech. The judge found that JWG had infringed Ahava's trade mark and issued preliminary injunctions, which later, by default, became permanent. Then, curiously, by letter, JWG denied having submitted to the jurisdiction of the US court. JWG did not attend a subsequent hearing and the judge ordered JWG to comply with the court's ruling or else face a hefty fine and ordered JWG to pay Ahava damages and costs. Having been awarded these judgments, but unable to enforce them in the US due to a lack of assets of JWG in the US, Ahava succeeded in enforcing the permanent injunction and the monetary judgment in Israel.

The Israeli court gave detailed reasons for its enforcement order. One issue was whether the US court had jurisdiction over JWG. In Israel, the civilian principle of reciprocity applies, so that an Israeli court regards a foreign court as having jurisdiction if, in a converse situation, the Israeli court would have had jurisdiction under Israeli principles. So a foreign judgment is unenforceable if it was given by a court that did not have jurisdiction according to the private international law of Israel.

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[74] Israeli District Court, Jerusalem, Judge Okun, proceeding 003137/04, 10 October 2004.
[75] *Ahava (USA) Inc v JWG Ltd* 250 F Supp 2d 366; 279 F Supp 2d 219; 286 F Supp 2d 321 (SDNY 2003).

JWG argued that it had neither any representation nor an address in the US, and that its conduct took place entirely in Israel. Its only foray into the US was that US residents, from their own locations, ordered products on its website. JWG argued that in a converse situation, an Israeli court could not seise jurisdiction over a defendant in relation to advertisements occurring on a website operated from outside Israel, hence, the Israeli court, in reciprocity, should not enforce the US judgment where the sole activity was in Israel.

Viewed through common law eyes, JWG's initial appearance in the US court and defence of the claim on its merits should have resulted in a conclusion that JWG had submitted to the US court. However, the Israeli judge did not address this. Rather, the judge regarded JWG's activities as not limited to Israeli territory. JWG mailed or couriered products to the US, connecting it with the receipt of the product at the destination.[76] There was no doubt that JWG's website was targeted or directed at an audience of consumers who reside in the US. The website was in English, the prices were stipulated in US dollars, there was material regarding US tax treatment, and much of JWG's efforts were directed to marketing abroad, specifically to the US market.

In a notional converse case where a US court applied Israeli jurisdictional principles, this would be sufficient for service abroad (in Israel) on the basis of an act or omission within the territory (the US), or on the basis of an injunction as regards something done or anticipated to be done in the territory (the US). Targeting consumers in a territory using a website may indicate that a trade marked sign which is featured on that website is 'used', infringing the trade mark.[77] Often a website does not target any

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[76] *Ahava* (n 74) [17].
[77] Above 228ff.

State specifically. Here, however, the court had no difficulties in finding that JWG's activities were intentional and directed towards the US clientele. The court concluded that as the US court had jurisdiction for the purposes of Israeli private international law, the US injunction and monetary judgment should be recognized and enforced in Israel (it is unclear whether the US-imposed penalty component was also enforced).

A historical overview is helpful in understanding why the treatment by English courts of their own jurisdiction differs to their treatment of foreign courts' jurisdiction.

Until the 19th Century, English courts' jurisdiction was based solely on the defendant's presence in England at the time of service, so there was no need to develop a sophisticated theory of jurisdiction.[78] Westlake[79] had explained that, since the introduction of the service abroad provisions, cases should show some disposition to admit the forum of an obligation as a ground of international jurisdiction. He pointed to two cases[80] which indicated that a foreign judgment could be enforced even though the judgment debtor was not present in the foreign country and had no property there, but the contract was to be performed in that country.

Only a few years later, the Privy Council expressed doubt that the service abroad provisions could be applied in assessing a foreign court's international jurisdiction.[81] The outcome was that it was not sufficient for international jurisdiction that the cause of action had arisen in the foreign country.[82] A distinction was drawn between English courts' jurisdiction and foreign courts' international jurisdiction. On further analysis,

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[78] AV Dicey *The Conflict of Laws* (Stevens & Sons London 1896) 370.
[79] Westlake 401–2.
[80] *Schibsby* (n 7) 161; *Rousillon* (n 63), 357.
[81] *Singh* (n 50).
[82] Cheshire (n 25) 789–90, citing *Singh* (n 50) 684 and *Phillips v Batho* [1913] 3 KB 25 (CA) 30.

perhaps all the Privy Council had decided was that the defendant's presence in a State, at the time when the relevant obligation was incurred in that State, was by itself not sufficient to give jurisdiction to that State's court.[83]

In the century since that decision, reciprocity has been rejected as a basis of international jurisdiction, apart from in matrimonial causes[84] and in *dicta* of Lord Denning,[85] though some legislatures have shown a willingness to adopt it.[86]

The service abroad provisions have existed for many years. They appear entrenched. The world is moving towards greater mutual recognition and enforcement of judgments, on a regional level (eg in Europe) and perhaps even on an international level. There is great potential, in the internet era, for cross-border wrongs. Judgments should be afforded foreign recognition to ensure that wrongdoers are brought to justice.

In my submission, it is time to revisit the anomaly that English courts regard foreign courts' international jurisdiction in terms which do not mirror English court's own adjudicative jurisdiction. An English court should recognize that a foreign court has jurisdiction where the service abroad provisions would be satisfied on a reciprocal basis in the foreign country, even if the judgment debtor was not present (or resident) in that country and did not submit to the jurisdiction of that country's courts. The court should look at whether the service abroad provisions would have applied in a notional reciprocal situation.

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[83] Dicey (n 78) 379–82.
[84] *Travers v Holley* [1953] P 246 (CA).
[85] *Dulles* (n 30) 851.
[86] Eg *Malaysia-Singapore Airlines Ltd v Parker* (1972) 3 SASR 300.

In considering whether to recognize a US judgment, the English court could ask 'was there a tortious act committed in the US, or was damage from a tortious act sustained in the US?'. In relation to the damage ground of service abroad, consistently with the *Shevill* limitation, the English court would recognize a judgment from a foreign court only to the extent that it relates to local damage in that foreign country. Reciprocity in international jurisdiction requires the application of a *forum (non) conveniens* test. If the foreign court is seen as an appropriate forum, then the English court should regard the foreign court as having had jurisdiction and having been permitted to have exercised it.

Canadian courts realized the discrepancy between assessing their own adjudicative jurisdiction and foreign courts' international jurisdiction, and decided that they would assess the jurisdiction of foreign courts in the same way as Canadian courts assess their own jurisdiction, by asking whether the defendant has a real and substantial connection with the forum. The Canadian Supreme Court discarded the received English principles and held that courts in one province should give full faith and credit to judgments of another province so long as that foreign court properly or appropriately exercised jurisdiction in the action.[87] This would be met where the foreign province had a real and substantial connection with the claim or the parties. It seems that searching for a real and substantial connection involves essentially the same factors as determining the natural forum.[88] The Canadian jurisdictional inquiry involves both an analysis of 'real and substantial connection' and *forum non conveniens*, with largely similar considerations.[89]

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[87] *Morguard* (n 10) 1098–110.
[88] Ibid 1110.
[89] Above 105.

The 'real and substantial' test has been applied to foreign (non-Canadian) judgments too.[90] One example in the internet context is *Braintech Inc v Kostiuk.*[91] A US plaintiff sued a Canadian defendant in a Texan court for publishing defamatory statements on an internet bulletin board. The Texan court exercised jurisdiction over the defendant based on the ground of committing a tort in Texas (by virtue of mere accessibility of a website), and gave default judgment. The plaintiff successfully brought enforcement proceedings in Canada.

On appeal, it was held that the Texan judgment should not have been enforced as there was no real and substantial connection with Texas so that the Texan court lacked jurisdiction. The defendant's only connection with Texas was the passive posting on an internet bulletin board and there was no evidence that this caused damage to reputation in Texas. A mere possibility that someone in Texas might have reached out to cyberspace to bring the defamatory material to a screen in Texas was insufficient.[92] A real and substantial connection with a forum requires more than accessibility in the forum of material on the internet. There was insufficient connection with Texas to give the Texan court jurisdiction. The same conclusion would be reached through reciprocity. Accessibility of the bulletin board did not amount to the commission of a wrong in Texas, so the reciprocal service abroad provisions did not apply and the Texan court did not have international jurisdiction.

Another example involving the internet was *Old North State Brewing Co v Newlands Services Inc.*[93] The judgment creditor sought to enforce a North Carolina

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[90] *Beals v Saldanha* [2003] 3 SCR 416.
[91] (1999) 171 DLR (4th) 46.
[92] Ibid [62]–[65].
[93] (1998) 58 BCLR (3d) 144 (BCCA).

judgment in Canada. The Canadian court recognized the jurisdiction of the foreign court as it was clear that the action brought in North Carolina had a real and substantial connection with that state. The Canadian defendant portrayed itself as a company that operated internationally rather than just domestically by virtue of various acts, including internet advertising.

Following the Canadian example, it would be sensible for English and Australian courts to consider the natural forum (the nearest concept these courts have to the 'real and substantial test'; both aim to balance connecting factors) in determining international jurisdiction in enforcement proceedings.[94] This would either confirm or deny that the exercise of jurisdiction by the adjudicating court was appropriate.

What better concept to use to determine the appropriateness of a foreign court than the first limb of the *Spiliada* formulation of the *forum (non) conveniens* test? This is even preferable to the Canadian 'real and substantial connection' wording.[95] The English *forum (non) conveniens* test would be well suited to determining international jurisdiction, by assessing the appropriateness of the foreign court. As Briggs explained,[96] it would be elegant and rational for an English court to recognize a foreign judgment on the basis that the foreign court was the natural forum for the plaintiff to prosecute his cause of action.

There should be no objection to the English court assessing what is the natural forum in an international sense, even if the foreign court has already decided that it is the

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[94] A Briggs 'Which foreign judgments should we recognise today?' (1987) 36 ICLQ 240; A Briggs 'Foreign judgments: More surprises' (1992) 108 LQR 549; Cheshire & North 422.
[95] Briggs (n 94) 108 LQR 549.
[96] Briggs (n 94) 36 ICLQ 240, 250.

natural forum.[97] While it may mean that English defendants who would not have bothered turning up to answer a foreign claim would have to take such claims more seriously, in many cases the natural forum will be clear to all parties. (Though admittedly, in borderline cases, an English defendant will have the unenviable task of weighing-up his risks of appearing and not appearing, which may be difficult to calculate even after obtaining legal advice.) A plaintiff who goes to the trouble of suing in (what the English court regards as) the natural forum should be entitled to enforce a judgment from that court in England.[98]

In Australia the *forum (non) conveniens* test is applied differently. It focuses on the Australian court, by asking whether the Australian court is a clearly inappropriate forum.[99] Therefore it can be less readily moulded to examining foreign courts.

While *Spiliada* has been rejected outright by the High Court on several occasions, it may be sensible, at least for the purposes of assessing whether a foreign court had jurisdiction, to adopt the *Spiliada* formulation of the *forum (non) conveniens* test. The natural forum would be determined by asking whether the foreign adjudicating court was a more appropriate forum. The *Spiliada* test seems to be a reasonable intermediate point between the Australian test for adjudicative jurisdiction (which asks whether the Australian court is a clearly inappropriate forum) and the US test for recognition of judgments (which asks whether the foreign court is a 'seriously inconvenient forum for the trial of the action').[100] However, the operation of two different *forum (non)*

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[97] Ibid 253–4.
[98] Ibid 255.
[99] Above 105.
[100] Uniform Foreign Money-Judgments Recognition Act 1962 §4(b)(6) *Uniform Laws Annotated* (West Publishing St Paul Minnesota 1986) vol 13 269. This section remains unchanged in the Uniform Foreign Country Money-Judgments Recognition Act 2005.

conveniens tests would contradict the mirror image between adjudicative and international jurisdiction.

The discussion above is not limited to cases of wrongs on the internet. Reform of the rules on international jurisdiction is desirable regardless of the context in which the dispute arises. Litigation of wrongs on the internet particularly would benefit from a reform of the antiquated principles. In those cases, greater reliance may be placed on the foreign court's exorbitant jurisdiction rules rather than the defendant's presence or domicile in the territory (which are easily manipulable). Where the suit is brought in the natural forum, the court's decision should be afforded recognition. The natural forum is likely to be where the defendant acted, or where damage was suffered (the suit there being limited to local damage). To counter any specific problems associated with the ubiquitous nature of the internet, specific tests such as the effects test[101] could be applied in determining the natural forum. Such tests may be considered by Canadian courts in determining a real and substantial connection.[102] A consideration of 'targeting' or 'reasonable efforts' should allay any fears that international jurisdiction could be established in any place where a website is accessible on the internet. Where a court satisfies the relevant tests to become the natural forum, recognition of its judgments is highly justified.

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[101] Above 126ff.
[102] The appellate court in *Bangoura v Washington Post* (2005) 258 DLR (4th) 341 (Ont CA) [48]–[49] was invited, but declined, to consider this.

3 TREATMENT OF FOREIGN INJUNCTIONS

To prevent the commission of a wrong on the internet, the plaintiff may seek an injunction. While, in many cases an injunction has a territorial limitation,[103] a court may grant a remedy which purports to bind the defendant's conduct outside the court's territory.[104] Extraterritorial injunctions to prevent wrongs on the internet are increasingly common. After all, an injunction requiring the removal of material from a website has effect globally – wherever the website is accessible.

The rule at common law is that, while any type of judgment may be recognized, only monetary judgments are enforceable.[105] This is also the position under reciprocal enforcement legislation in common law countries,[106] including the US,[107] though not under the Judgments Regulation.[108] In Canada, courts have begun to question the common law rule.[109]

How are foreign injunctions treated at common law? For example, an Australian court may grant an injunction requiring the defendant to remove material from a website which is uploaded in England. Or, more traditionally, an Australian court may grant an anti-suit injunction commanding a defendant not to continue with English proceedings.

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[103] RW White 'Enforcement of foreign judgments in equity' (1979–82) 9 SLRev 630, 639.
[104] Ibid 640. Above 90ff.
[105] *Sadler v Robins* (1808) 1 Camp 253; 170 ER 948; *Airbus Industrie GIE v Patel* The Times 21 May 1996 (QB).
[106] Eg Foreign Judgments Act 1991 (Cth) – although there is scope for regulations which extend enforcement to non-monetary judgments, no such regulations have been made; Administration of Justice Act 1920 (UK).
[107] Uniform Foreign Money-Judgments Recognition Act 1962 §1(2), which remains unchanged in the Uniform Foreign Country Money-Judgments Recognition Act 2005; see Perritt §§12.9, 12.11.
[108] Article 32.
[109] JG McLeod *The Conflict of Laws* (Carswell Calgary 1983) 622; *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 1098; *Pro Swing Inc v ELTA Golf Inc* (2004) 71 OR (3d) 566 (OntCA) [9]; on appeal to SCC.

Here we are concerned not with whether the Australian court has jurisdiction to grant the injunction, but how the injunction will be treated in England.

The defendant, being subject to the jurisdiction of the Australian court, is obliged to obey the injunction wherever he is, and if he fails to obey it, the Australian court may find him in contempt. However, what are the plaintiff's options if the defendant is in England, outside the Australian court's jurisdiction?

Let us first consider the effect at common law of a foreign (eg Australian) monetary judgment in England. The Australian judgment is recognized in England automatically as long as none of the bars to recognition (including public policy) applies. The consequence is that the Australian judgment creates a *res judicata* in England, the issues treated as having been determined finally by the Australian court. In order to obtain payment of the monetary sum, the successful party must commence a proceeding in the English court for an English judgment based on the debt created by the foreign judgment. The *res judicata* created by recognition of the foreign judgment means that the English court need not go behind the debt to inquire about the matters leading to the Australian court's decision. The judgment creditor may then enforce the English judgment against the judgment debtor's estate.

An Australian injunction is also a judgment that may be recognized in England automatically if it satisfies the requirements for recognition. If so, it creates a *res judicata* in any subsequent English proceedings on the same subject-matter. The plaintiff can use the recognized Australian injunction in English proceedings either offensively, for example in obtaining an English injunction on the same subject-matter (one reason for doing so is that an English court will not find a defendant in contempt for breach of an

Australian injunction[110]), or defensively, for example in defending a proceeding for a declaration of non-liability brought by the defendant in England.

On that basis, it is recognition, not enforcement, of a foreign injunction that gives it effect in England. It is true that at common law only monetary judgments are enforceable and foreign injunctions are unenforceable.[111] That is because there is nothing to enforce. Recognition of the foreign injunction is all the plaintiff seeks. The common law rule may not prevent the plaintiff from obtaining an adequate remedy. Academic discussion about the enforcement of a foreign court's injunction which purports to bind the defendant's conduct outside that foreign court's territory[112] is essentially about recognition, not enforcement, of the foreign injunction.[113] Enforcement of the injunction is unnecessary for obtaining an English injunction. All that is needed is the recognition in England of the Australian injunction, thereby creating a *res judicata*. As the issues are already regarded as having been determined, the defendant is unable to contest those issues in the English proceeding, and the English court would proceed summarily to grant an injunction on similar terms to the Australian injunction. Further, the procedure for obtaining an English injunction in reliance on the Australian injunction is by commencing subsequent English proceedings, which is also the way in which a foreign monetary judgment would be enforced to obtain an English judgment debt. So in practice the restriction on enforcement of non-monetary judgments may mean little.

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[110] *Patel* (n 105). Cf enforcement in a domestic setting: KD Kerameus 'Enforcement of non-money judgments and orders in a comparative perspective' in JAR Nafziger and SC Symeonides (eds) *Law and Justice in a Multistate World* (Transnational Publishers New York 2002) 107.
[111] *Patel* (ibid).
[112] White (n 103) 640.
[113] Ibid. By 'might be refused enforcement on the grounds of public policy', White must have meant 'might be refused recognition'.

There are various bars to recognition, including violation of public policy. A foreign injunction drawn too broadly may violate the public policy of the forum. In the context of wrongs on the internet, a court may view a foreign injunction requiring the removal of material from a website as too onerous on a website operator, especially if the basis for the foreign order for removal of the material was a harsh law which is peculiar to the foreign State.

In practice, the utility of the injunction may be questionable, especially where there are diverse legal systems. Consider an example where a Russian rogue sends phishing emails to Australian recipients, misleading them into sending him their banking details. An Australian court, basing its jurisdiction on the damage ground, may grant an injunction which purports to prevent the rogue from sending misleading emails from anywhere in the world to Australian recipients. If the rogue continues to send the emails from Russia, any attempt to seek an injunction in the Russian courts may be met with difficulties. Will the Australian injunction be recognized in Russia, creating a *res judicata*? Are there public policy considerations preventing a Russian court from granting an injunction? If injunctions are not within the Russian court's armory, which remedy will be granted?

The uncertainty surrounding the effect of the injunction on a foreign wrongdoer greatly reduces the value the injunction. As a consequence, a wrongdoer may be undeterred even if the courts of ten foreign States have granted injunctions against him to prevent harm occurring in those States or even to prevent global harm. He can be confident that in his home State he is immune.

In this connection, the topic of remedies for cybersquatting deserves special mention. Domain names are maintained by a registrar, who is easy to locate. If the defendant's registration of a domain name is cancelled or transferred, the plaintiff is vindicated. These are non-monetary judgments which achieve their desired effect even without recognition or enforcement abroad. Revocation of a domain name excludes the defendant from the internet by removing the IP address from routers.[114] This may have serious economic consequences,[115] and acts as a deterrent. The US Anticybersquatting Consumer Protection Act[116] allows a court in the registrar's home district to exercise *in rem* jurisdiction over the domain name, regardless of the location of the person registered as owner. This achieves what traditional rules of recognition and enforcement of personal judgments have not achieved and alleviates the need to seek the extraterritorial enforcement of a judgment.

The *in rem* regime may be useful in cybersquatting cases, as the registrar may be forced to revoke the registration of a domain name. Other wrongs on the internet, eg defamation, copyright infringement, cannot be remedied so easily.

Where damage is caused, the victim would seek compensation from the wrongdoer or accomplices, eg intermediaries (though ISP liability is diminishing), yielding a monetary judgment. Where the wrong is anticipated, an injunction can be given by a court only if it has personal jurisdiction over the potential wrongdoer. The monetary judgment or injunction may be of limited practical value. There have even been proposals for attachment of domain names, or requiring users of the internet to post a

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[114] Perritt (n 19) 1139.
[115] Ibid 1133, 1161.
[116] Above 204.

bond which would be available for redress of wrongs they commit on the internet.[117] In my submission, an international treaty on recognition and enforcement of foreign judgments would be a more useful objective in ensuring justice is served on wrongdoers generally, not just in relation to the internet.

4 PUBLIC POLICY

A foreign judgment that contradicts the enforcing country's public policy is denied recognition. This is a bar to recognition of judgments from any country, whether at common law, under the registration statutes, or under the Judgments Regulation and related conventions. Public policy is a protective device which allows courts to give effect to the dictates of the public interest in this context by refusing to recognize foreign judgments which offend against the forum's views of justice, legality or morality.[118] Public policy is difficult to define. It changes through time, economic and societal needs.[119] Clearly a mere difference between the substantive law or policy, or the rules of private international law, of the adjudicating and enforcing courts is not a sufficient reason for refusing to recognize a foreign judgment.[120] One would expect that as the world edges towards a global community, especially in the internet age, it is less likely that one State's courts would regard another State's laws as sufficiently abhorrent so as to infringe public policy. In extreme cases, courts may be justified in considering the differences between their laws and foreign laws to be so fundamental so as to refuse recognition of a foreign judgment.

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[117] Perritt (n 19) 1123.
[118] Ibid.
[119] Caffrey (n 3) 212.
[120] AC Freeman *A Treatise of the Law of Judgments* (5th edn Bancroft-Whitney Co San Francisco 1925) §1496.

In my submission, two universally-recognized public policy norms are particularly pertinent in cases of wrongs on the internet: freedom of speech and the protection of intellectual property.

(a) Freedom of speech and respect for privacy

The internet is said to be a tool for advancing international communications, fostering openness in many closed jurisdictions, permitting freedom of speech and promoting democracy.[121] Lessig argues that there is a fundamental constitutional principle of free speech that applies to the internet,[122] though he approaches it from a US perspective only.

In my submission, one aspect of public policy, at least in Western democracies, is the encouragement of communications, whether domestic or international, and whether through the internet or other modes. The practical importance of the public policy exception to the recognition of foreign judgments has increased with the advent of the WWW, and it is most likely to be invoked in defamation cases.[123] Judgments (including universal injunctions) the effect of which is to stunt internet communication, or to amount to censorship or other abuses of human rights,[124] are contrary to this aspect of public policy and should therefore be denied recognition.

Many States have adopted human rights principles into their constitutions or bill of rights statutes. A court in such a State would refuse recognition of a foreign judgment

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[121] G Grainger 'Freedom of expression and regulation of information in cyberspace: Issues concerning potential international cooperation principles' in T Fuentes-Camacho (ed) *The International Dimensions of Cyberspace Law* (Ashgate Hampshire and UNESCO Paris 2000) 71, 105, 111–15.
[122] Lessig (n 24) 166–7, 186.
[123] American Law Institute 'Recognition and enforcement of foreign judgments: Analysis and proposed federal statute' (proposed final draft 2005) 77–80.
[124] AL Collins 'Caging the bird does not cage the song: How the International Covenant on Civil and Political Rights fails to protect free expression over the internet' 21 John Marshall J Computer & Information L 371 (2003).

that infringes a basic human right protected in that State. The principles are ingrained in the State's public policy, and a failure by a foreign court to respect them is more fundamental than a mere difference between substantive laws.

One fundamental principle is the freedom of communication and expression. In the US that freedom is entrenched constitutionally, and is pleaded frequently as a defence in defamation proceedings. The freedom of expression in other countries tends to be more limited. This can cause friction. A US court may refuse to recognize an English judgment finding that defamation has occurred, where the US court takes the view that the statement is part of the free flow of ideas and opinions protected by free speech laws that form part of US public policy. In *Matusevich v Telnikoff*,[125] the US court, following other US decisions, held that an English defamation judgment would be antithetical to the First Amendment constitutional protection of free speech accorded in the US, and refused recognition on public policy grounds. The court was not concerned that the proceeding was between two English residents and had no connection with the US. To an outside observer it is not obvious that the international threshold (in the form of the public policy bar to recognition of foreign judgments) should be placed at the same level as the domestic threshold (in the form of the constitutional protection). Nevertheless, English libel standards, which differ from US libel standards, are seen as repugnant to the public policy of the US, and are denied recognition on that ground. This difference in standards has worried some commentators.[126]

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[125] 877 F Supp 1 (DDC 1995), certified question answered 347 Md 561, 702 A2d 230 (MdAppCt 1997), affd 159 F3d 636 (DCCir 1998). See also *Bachchan v India Abroad Publications Inc* 154 Misc 2d 228 (NYSC 1992) [235].

[126] D Svantesson 'The "place of acting" defence – A model for cross-border internet defamation' [2003] Australian Intl LJ 172, 184–5.

Another fundamental human right is the guarantee of respect for private and family life. This may conflict with the freedom of expression. For example, an Australian court may refuse to recognize a US judgment denying that defamation has occurred, as US free speech laws may be contrary to Australian public policy, which places more value on the protection of reputation.

Is the public policy exception sufficiently wide to encompass a violation of freedom of expression and violation of the right of privacy? The public policy exception in the Judgments Regulation (and conventions) is very narrow,[127] and may not cover some of the matters which would fall within the public policy exception in common law systems[128] or *ordre public* in civilian systems. In my submission these are such fundamental human rights that foreign judgments which purport to limit them illegitimately should not be recognized.

A clash of policies on the internet occurred in the *Yahoo!* saga. The French court ordered Yahoo! to remove advertisements of Nazi memorabilia from its US auction websites or make the sites inaccessible to French users, as in France it was illegal to trade in Nazi memorabilia.[129]

Yahoo! applied to the US court for a declaration that the French orders were unenforceable in the US. The US court agreed on the basis that the French judgment chilled Yahoo!'s First Amendment rights in the US.[130] In the US freedom of speech is

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[127] Jenard Report on the Brussels Convention [1979] OJ C59/26, 44; Schlosser Report on the Brussels Convention [1979] OJ C59/71, 128. cf Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935.
[128] Cheshire & North 497.
[129] *Ligue Contre la Racisme et L'Antisemitisme & L'Union des Étudiants Juifs de France v Yahoo! Inc & Yahoo! France* (TGI Paris, 22 mai 2000 et 20 novembre 2000, procédures n° 00/05308, 00/5309).
[130] *Yahoo! Inc v La Ligue Contre la Racisme et l'Antisemitisme* 169 F Supp 2d 1181 (NDCal 2001) 1194; reversed, on other grounds: 379 F 3d 1120 (9th Cir 2004).

guarded zealously,[131] and that country's enduring influence over the internet ensures that other countries' attempts at regulation are frequently demonized as 'censorship' and pressure is applied to remove the regulatory controls.

Richardson & Garnett highlight that the internet community has certain common values, including a very high regard for freedom of speech and debate.[132] What may be considered reasonable speech in the internet age may well be radically different from what was previously acceptable. A balance should be struck with the right to privacy.

In my submission, at least a minimum level of free speech should be seen as an inherent part of the internet, forming part of public policy that can be applied in determining whether to recognize foreign judgments. Setting that minimum level is a complex and value-laden question which is beyond the scope of this paper.

(b) Protection of intellectual property

Another public policy norm relates to intellectual property. Most States protect intellectual property rights, to varying degrees. This can be seen in the widespread adoption of international treaties on intellectual property. Although the levels of protection differ between domestic laws, it is arguable that there is an irreducible core of intellectual property protection which all courts should uphold.

To the extent that there are universally recognized protections of intellectual property rights, such as the Berne Convention,[133] the WIPO Copyright Treaty[134] and the

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[131] Eg the essays in A Thierer and C Wayne Crews Jr (eds) *Who Rules the Net?* (Cato Institute Washington 2003).
[132] Richardson & Garnett 81.
[133] Berne Convention for the Protection of Literary and Artistic Works 1886 (828 UNTS 221), as revised in Paris in 1971 (1161 UNTS 3).
[134] WIPO Copyright Treaty 1996 (CRNR/DC/94 20 December 1996).

TRIPS agreement,[135] judgments from States that are parties to a relevant treaty should be consistent with that treaty and should be denied recognition by other State parties if inconsistent. The universality of the protections also suggests that this denial of recognition should extend to judgments from States which are not parties to the treaty, such as renegade States that refuse to adopt intellectual property protections at all.

It can be said that there is an international public policy which underlies the treaty regime of intellectual property,[136] and a court which disregards this regime can expect its judgment to be rejected by other countries' courts. It is the essential core of protections that is of fundamental importance, and not the detail. It is not open to a court to refuse recognition merely because it disagrees with the adjudicating court's interpretation of a treaty. For example, a judgment which denies that any material on the internet is protected by copyright or a judgment that condones cybersquatting clearly contradict the fundamental protections of intellectual property and may be denied recognition on the basis of public policy. On the other hand, it would be illegitimate to deny recognition to a judgment merely on the basis that the court misconstrued the requirements for 'use' adopted by WIPO.[137]

These universal treaties play a further role. Where a State's court gives a judgment to enforce an intellectual property right granted in that State, the judgment should generally be enforceable elsewhere. Particularly where issues of registration or validity of the intellectual property right led to the judgment, great respect should be shown as

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[135] Trade Related Aspects of Intellectual Property Rights Agreement 1994 (1869 UNTS 299).
[136] PE Geller 'International intellectual property, conflicts of laws and internet remedies' [2000] EIPR 125, 129.
[137] WIPO 'Joint recommendation concerning provisions on the protection of marks, and other industrial property rights in signs, on the internet' (Publication 845, 3 October 2001).

those issues are reserved for the granting State's courts.[138] The only public policy reason to deny recognition to a foreign intellectual property judgment enforcing a foreign right is where the right to be enforced gives such a broad monopoly that it would contravene the recognizing State's competition laws. To the extent they correspond with international norms (such as the treaties), intellectual property rights should be entitled to a universal exemption from infringing any country's anti-trust laws.

The *Ahava* decision hints at public policy considerations in the enforcement of foreign judgments relating to intellectual property wrongs. JWG argued that the US judgment infringed Israeli public policy and therefore should be denied recognition. The Israeli judge decided that protection of goodwill in the US was no violation of Israeli public policy, and moreover Israeli public policy incorporates the principle against passing off.[139] JWG pointed to the fact that its actions did not infringe any Israeli trade marks so an Israeli court should not place restraints on its conduct. This was rejected on the basis that JWG engaged in parallel importing into the US, and that a balance had to be struck between freedom to conduct business and consumer protection according to US law. A foreign law that restricts parallel imports cannot be said to violate Israeli public policy if it is intended to protect trade marks albeit foreign-granted.[140] This forms part of the universal norms of protection.

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[138] Above 196ff.
[139] *Ahava* (n 74) [12].
[140] Ibid [13]–[14].

5 CONCLUSION

There are several aspects of the recognition and enforcement of judgments that may cause difficulties when applied to judgments involving wrongs on the internet. At common law, when the enforcing court assesses the jurisdiction of the adjudicating court, one criterion is the judgment debtor's presence in the latter court's territory. Perhaps this requirement may need to be modified, generally, by relying on a nexus connection which is not limited to presence. The internet gives this reform added impetus, as it introduces new ways of 'entering' a territory which do not rely on physical presence but care must be taken not to expand 'presence' so it becomes a fiction. Instead of expanding 'presence', it is preferable to achieve reform through a shift towards reciprocity. This involves treating the service abroad provisions as providing a foreign court with international jurisdiction in an equivalent hypothetical case. The *forum (non) conveniens* discretion should also play a part.

While not precisely a question of enforcement, courts should preserve the utility of a foreign worldwide injunction by granting similar orders locally.

It may be timely to clarify some of the bars to recognition and enforcement generally, not just in relation to the internet. Public policy, a bar to recognition, has two aspects that are particularly relevant to wrongs on the internet. A minimum threshold of freedom of speech is inherent in the internet. The protection of intellectual property rights is also an essential and universally-recognized norm.

CONCLUSION

The internet does not warrant a radical overhaul of private international law. This paper has sought to frame general principles to aid in the application of the existing rules on jurisdiction, choice of law and the recognition and enforcement of judgments to cross-border wrongs committed on the internet. The resulting principles can be applied generally, without too much difficulty and without requiring in-depth assessment of the underlying technological framework. The more widely these principles are applied by courts, the closer we will be to achieving common legal principles to govern a just and fair transnational litigation system for an increasingly transnational society.[1]

One common thread that runs throughout this paper is that generally a wrongdoer should face proceedings for global loss in the place where he acts by uploading or sending, and for local loss in the place where he causes damage, this being usually after his content is downloaded or received. His liability will be assessed, generally, by the law of the place of damage, but in a multi-state damage case it may be more appropriate to apply the law of the place of the defendant's acting. The benefits of a global audience bring with them the responsibilities of compliance with the laws of all countries where the content may be accessed and cause loss.

The general principles can be summarized as follows.

The simplest way of suing a wrongdoer is in his country of domicile (if the European instruments apply) or where he is present (if the common law rules apply).

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[1] Cf B Fitzgerald 'Casenote on *Dow Jones & Co Inc v Gutnick*: Negotiating "American Legal Hegemony" in the transnational world of cyberspace' (2003) 27 MULR 590, 608–11.

Outside these places, the application of the exorbitant jurisdiction rules must be analyzed.

A wrongdoer may face a suit in respect of the wrong in the place where he acts by uploading material or sending an email. The plaintiff may recover worldwide damage.

Alternatively, a wrongdoer may be sued in the places where the plaintiff suffers injury (under the special jurisdiction provisions) or damage (under the service abroad provisions). On the internet, this would occur at or after downloading or receipt. Due to the ubiquity of the internet, the place of downloading could be potentially any place where there is internet access.

By choosing to use the internet the wrongdoer is deemed to be aware of its global reach, and just as he receives the benefits of wider circulation of his content, he is exposed to a corresponding risk of proceedings for a wrong committed by making content accessible on the internet. The defendant may take solace in the limitation of the suit in a place of damage to the recovery of local loss.

Where the court has a discretion whether to exercise jurisdiction, the defendant may seek a stay of the proceeding on the ground that there is some other more appropriate court (eg if it appears obvious that the plaintiff engaged in forum shopping). Equally that court may require the plaintiff to seek discretionary permission to serve abroad. Whether the defendant's website is passive or active, or whether he advertises or conducts business through his website, should not be relevant to whether there is a more appropriate forum.

If the defendant targets users in a forum or specifically invites them to interact with him, the forum's court will be likely to exercise jurisdiction. Conversely, if in disseminating information on the website the wrongdoer takes reasonable steps to ensure

that the website is not accessed in that forum (eg by disclaimer, encryption, password), the forum's court will be likely to grant a stay.

The existing jurisdictional machinery (the exorbitant jurisdiction rules and *forum (non) conveniens* discretion) can be relied on to support these conclusions and strike the appropriate balance between the parties.

The analysis of choice of law differs to jurisdiction. The alternative jurisdictional grounds, place of the wrong and place of the damage, are absent. The focus of *lex loci delicti* is generally on the place of the damage, based on the remedial function of tort law. In multi-state damage cases it may be appropriate for an exception to operate so as to apply the law of the place of the defendant's acting. The absence of a flexible exception to *lex loci delicti* in Australia and Canada should be reconsidered, but this is not an internet-specific reform. Each of the 1995 Act and Rome II contains an exception, and this may assist in a multi-state damage case, or where one country is targeted by a website.

Intellectual property wrongs follow the general pattern, though their uniqueness derives from the territorial operation of intellectual property statutes. Online trade mark cases indicate that a trade marked sign is not 'used' in any place where the website is merely available; a sign on a website is 'used' at the place of uploading; and where the website targets consumers in a particular country, a sign can be said to be 'used' in the target country.

In defamation, where each publication is treated as a separate tort, the place where damage is suffered is also where the wrong is committed, for purposes of service abroad provisions, leading to a claim for damages for local loss only. Online publishers need not

fear: this does not endorse 'mere availability' as a basis for exercising jurisdiction. If a renowned star suffers loss to reputation from a website, although potentially he can sue in every country where he suffers loss, the suit is limited to damage to reputation in that country. In order to recover all the worldwide damage in one court he must sue in the place where the publisher is domiciled (if within the EU context) or present (if under the common law rules). In practice if he suffers loss in multiple places, he is likely to sue: (i) either in the place where the publisher is domiciled/present (to recover entire worldwide loss); or (ii) in one or two places which have limited defences (eg England) and then he could use results of those proceedings to show that world that the publication really was not true. If he stubbornly decides to sue separately in several places where he suffers damage, it would be unlikely that he would sue in every place around the world where he has a reputation (as damages in some places would be tiny), so he is likely to choose the few places where his reputation is most significant. It seems reasonable that the publisher should defend proceedings in those States. As with other wrongs, defamation should be treated alike whether committed online or through traditional modes of communication.

Finally, it may be time to reassess international jurisdiction, when considering the recognition and enforcement of judgments at common law, perhaps through a wider concept of 'presence', or through a shift towards reciprocity.

Any reforms suggested in the paper are not the result of the internet, though the internet may bring into light deficiencies in the law and may hasten the pace of change. As more cases of cross-border wrongs committed on the internet are litigated in courts around the world, the picture will become clearer. The guidance provided by the principles outlined in this paper aims to create consistency in the way courts reach their decisions. It also indicates that the existing principles on jurisdiction (including

discretion), choice of law and recognition and enforcement of judgments can be applied to cases of wrongs committed on the internet. Private international law is developed sufficiently to overcome the challenges posed by the internet.

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