JURISDICTION OVER CROSS-BORDER WRONGS ON THE INTERNET

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The internet presents challenges for private international law. One challenge relates to jurisdiction, which is traditionally based on territory. Transactions on the internet span many borders. When cross-border wrongs are committed they may lead to transnational litigation. This article examines the circumstances in which a court can exercise jurisdiction over a foreign defendant alleged to have committed a civil wrong over the internet. Section I examines the background to jurisdiction and the internet and sets the scope of the topic. Section II gives a brief summary of the internet and its applications. Section III examines jurisdictional rules in civil wrongs cases. The focus is on two sets of rules commonly applied around the globe: the service abroad provisions and the special jurisdiction provisions. Section IV aims to apply those jurisdictional rules to cases of wrongs committed on the internet. It advances general principles, applicable in cases of cross-border wrongs committed on the internet, relating to the place where a wrong is committed and the place where damage is suffered. Defamation has its own peculiarities and is discussed separately. The issue of whether a court can grant an injunction against a foreign defendant in respect of foreign conduct is explored. The article concludes (in Section V) that existing jurisdictional rules need not be amended in light of the internet, and offers general statements about how jurisdictional rules apply to wrongs committed on the internet.

I. BACKGROUND

Increasingly, cross-border contact between humans occurs through the internet. Inevitably such contact may result in the commission of wrongs. This article addresses the question: in what circumstances does a court have jurisdiction over a foreign defendant alleged to have committed a civil wrong on the internet? It does not deal with any question of discretion as regards the exercise of jurisdiction.

'Jurisdiction', in this article, refers to the original[1] competence of a domes-

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[1] ie non-appellate.

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tic court to adjudicate a civil case. The discussion concentrates on actions *in personam*. Jurisdiction is an aspect of a State's sovereignty[2] and is confined geographically.[3] Jurisdictional rules vary. Yet all States have rules that stem from the maxim *actor sequitur forum rei*.[4] Domicile as a jurisdictional connecting factor was developed in Roman law and maintained by civilian courts. English and other common law courts, taking a procedural approach, preferred to focus on physical presence at the time of service of process. At common law a court had no jurisdiction outside its territorial limits.[5] So when the defendant was abroad, and service of the writ was impossible, the defendant could be sued only in the place of his actual presence. *In personam* jurisdiction over defendants not connected with the court's territory is a recent innovation.[6] As international travel and trade increased, and progress in communications and transportation made the defence of a suit in a foreign tribunal less burdensome,[7] courts sought to exercise jurisdiction over nationals, wherever they were located, and ultimately over non-nationals. Thus they went beyond the sovereignty principle, exercising 'exorbitant jurisdiction'[8] over defendants that were not present or domiciled in the territory.[9] In England this was done in exceptional circumstances,[10] and courts viewed it with suspicion.[11] Over the years courts have shown greater liberalism in assuming competence over foreign defendants.[12] Related to this has been an increase in disputes over jurisdiction, as defendants resist being sued in foreign courts.

This article focuses on two sets of jurisdictional rules used in various States to vest courts with 'exorbitant jurisdiction' over foreign defendants. Underlying both is a recognition that civil jurisdiction is not merely an exercise of State power, but also a means of resolving private disputes. Hence the exercise of jurisdiction over a foreign defendant is based on the connection of the defendant or the elements of the dispute with the State concerned.[13]

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

[3] *Extra territorium jus dicenti, impune non paretur* (one who exercises jurisdiction out of his territory may be disobeyed with impunity): *Singh v The Rajah of Faridkote* [1894] AC 670, 683 (PC).

[4] The claimant must follow the forum of the thing in dispute. See R Phillimore *Commentaries upon International Law* (3rd edn Butterworths London 1879) vol 4 §891.

[5] *Lenders v Anderson* (1883) 12 QBD 50, 56; *Ingate v La Commissione de Lloyd Austriaco, Prima Sezione* (1858) 4 CB NS 704, 708 (CP); *Trower & Sons Ltd v Ripstein* [1944] AC 254, 262 (PC); *Pennoyer v Neff* 95 US 714, 722 (1877).

[6] P Nygh 'The Common Law Approach' in C McLachlan and P Nygh (eds) *Transnational Tort Litigation: Jurisdictional Principles* (Clarendon Press Oxford 1996) 21, 26.

[7] *World-Wide Volkswagen Corp v Woodson* 444 US 286, 294 (1980).

[8] Though note the dangers associated with using that term: *Hyde v Agar; Worsley v Australian Rugby Football Union Ltd* (1998) 45 NSWLR 487; [1998] NSWSC 451 on appeal (2000) 201 CLR 552, 570ff (HCA).

[9] C McLachlan 'An Overview' in McLachlan and Nygh above n 6 at 1, 10–11.

[10] AV Dicey *The Conflict of Laws* (Stevens & Sons London 1896) 237–9.

[11] *Singh* (above n 3) 684. The cautious approach adopted in the late 19th and early 20th centuries was due to the 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: L Collins *Essays in International Litigation and the Conflict of Laws* (Clarendon Press Oxford 1994) 227–30.

[12] Nygh above n 6 at 30.

[13] McLachlan above n 9 at 11.

'Foreign defendant' is really a short-hand expression. It is intended to catch: (i) a person who is not present in a State whose rules rely on presence for the purposes of jurisdiction; and (ii) a person who is not domiciled in a State whose rules rely on domicile for the purposes of jurisdiction. Only then is the court's exorbitant jurisdiction invoked. Generally, the mere placing of material online which is accessible in a State does not render the content-provider present or domiciled in that State.[14] For simplicity's sake, the assumption is that the proceeding is between a single claimant[15] and a single defendant.

In transnational litigation, jurisdiction is increasingly significant. Many cases tend to settle after determination of jurisdiction on the basis of lawyers' reasonable predictions of the likely outcome of the case in the court in which it will be tried.[16] Lawyers make these assessments based on perceptions of the strength of the opponent's case (as gauged from the jurisdictional skirmish) and the benefits or otherwise of the forum's procedures. The internet's expansive reach and accessibility makes jurisdiction particularly significant.[17] While jurisdiction is merely one of a series of obstacles that a claimant must overcome in transnational litigation,[18] it may decide whether and where the claimant sues. Sometimes, rather than an obvious defendant located abroad (eg the content-provider), the claimant may opt to sue, or complain about, a less obvious, but nevertheless wrongdoing, defendant (eg a user who added offensive content to the original website) located in the claimant's State. Internet service-providers, who are readily identifiable and may be liable for their subscribers' actions, are an obvious target.[19]

By 'wrong', this article refers to conduct whose effect in creating legal consequences is attributable to its being characterized as a breach of duty.[20] The focus should be on the event, rather than the response, though this has not always been the approach taken by private international law.[21] This article

[14] Cf *Pavlovich v Superior Court* 109 Cal Rptr 2d 909, 916 (CalApp 2001).

[15] In this article, which looks at common law jurisdictions generally, the term 'claimant' is used rather than 'plaintiff'.

[16] A Briggs *The Conflict of Laws* (OUP Oxford 2002) 2.

[17] 'Developments—Law of Cyberspace' (1999) 112 Harvard L Rev 1574, 1700.

[18] Others include identifying and locating the defendant, serving process on the defendant, resisting any anti-suit injunction or declaration of non-liability which the defendant seeks elsewhere, determining and proving the governing law, enforcing judgments against the defendant in a place where the defendant has assets, and of course the high costs of the litigation.

[19] A Hamdani 'Who's liable for cyberwrongs?' (2002) 87 Cornell L Rev 901, 903; *Godfrey v Demon Internet Ltd* [2001] QB 201 (QBD).

[20] P Birks 'The concept of a civil wrong' in D Owen (ed) *Philosophical Foundations of Tort Law* (Clarendon Press Oxford 1995) 31; A Burrows *The Law of Restitution* (2nd edn Butterworths LexisNexis London 2002) 457–8; J Edelman *Gain-Based Damages* (Hart Publishing Oxford 2002) ch 2.

[21] eg in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 474–81 (CA) the Court did not treat a claim for restitution arising from procuring breach of trust as a tort claim for jurisdictional purposes.

considers only private, civil wrongs, not wrongs under criminal or quasi-criminal law[22] or other laws.[23] English law recognizes common law civil wrongs (eg tort, breach of contract), equitable 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 article focuses on wrongs that are not related to any form of consent of the parties,[24] and is thus limited to the 'delict' or 'quasi-delict' wrongs familiar to civilian lawyers.[25]

Sometimes expressions such as 'internet wrongs', 'internet torts' and 'cyberwrongs' are used to refer to wrongs involving the internet.[26] However, it is best to relinquish such labels. In general, these are not unique to the internet. The mode of commission of wrongs generally plays no part in their classification. This article examines wrongs where a central aspect of the wrongful act or omission is the communication or dissemination of material over the internet. They appear to fall into several categories. First, there are misstatements which are published on a website or disseminated by an email, causing harm to victims who read and rely on them. This category would include negligent misstatements, misrepresentations, fraudulent misstatements (deceit), misleading or deceptive conduct, and false advertisements. Secondly, there are defamatory statements which are published on a website or disseminated by an email, causing harm to victims when the statements are comprehended by a third person. This category would include slander, libel and injurious falsehood (trade libel). The third category comprises intellectual property wrongs. Examples are infringement of trade mark by using a victim's trade-marked sign on the internet (eg 'cybersquatting'), passing off a victim's product as one's own when offering products for sale on the internet (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.[27] Cases of breach of confidence or disclosure of trade secrets, where the confidential information is imparted through the internet, fall into this category. The fourth category comprises cases of violation of privacy, wrongs which are generally not (yet) recognized in English common law countries. This would include intentional intrusions,[28] disclosures of

[22] eg dissemination of racist material, email stalking, dissemination of pornographic material, online gambling, computer fraud, and abuse.

[23] eg public, taxation, competition, banking, securities, migration, and family law.

[24] Hence it does not deal with the wrongs of breach of contract (or other contractual claims), breach of trust and breach of fiduciary duty.

[25] eg Scots law: *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.

[26] *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); Hamdani above n 19.

[27] ie including another website's protected key words in a website's code to increase the popularity of the website being accessed.

[28] eg interception of private emails, sending junk emails, using internet cookies to identify the website user.

private facts[29] and misappropriation.[30] The fifth category includes cases where access is gained to other computers through the internet, causing damage, eg hacking[31] (in some countries this is regarded as trespass to chattels), distribution of viruses, interception of emails. Often this conduct is criminally proscribed by legislation. In the sixth category are cases where the internet is used to create an annoyance for the victim.[32] With many wrongs the internet has a more remote connection. One example is product liability resulting from the sale of a defective product on the internet. Another example is procuring breach of contract by sending statements in an email or placing them on a website. A further example is a conspiracy which takes place by the parties discussing their ideas on the internet.

II. THE INTERNET

The internet is a large-scale international computer network which interconnects numerous groups of linked networks that follow certain software rules (protocols).[33] 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 can link to the internet.[34] The interconnection among networked computers is by the transfer of standard size bundles of information (packets).[35] 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 internet protocols and linked to the internet. Its use has increased exponentially.[36] It is not administered, [37] and exists and functions as a result

[29] eg placing indiscreet photos on a website.

[30] ie unauthorized use of a person's name or likeness or other personal information.

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

[32] eg 'email bombing' (defendant repeatedly sends an email to a particular victim's email address in order to consume system resources); 'email spamming' (defendant sends bulk junk emails to multiple victims); 'email spoofing' (ie defendant alters his email account's identity and engages in bombing or spamming); 'flaming' (electronic hate mail).

[33] *American Civil Liberties Union v Reno* 929 F Supp 824, 830 (EDPa 1996); P Gralla *How the Internet Works* (7th edn Que Publishing Indianapolis 2004) 11, 15–17. The basic pair of protocols shared by computers connected to the internet are: (i) Transmission Control Protocol (TCP), which includes rules on establishing and breaking connections; and (ii) Internet Protocol (IP), which includes rules for routing of information and rules for assigning a unique numeric address (IP address) to each networked computer, enabling other networked computers to identify and locate it within the shared address space. See AS Tanenbaum *Computer Networks* (4th edn Prentice Hall PTR New Jersey 2003) 436–7, 532 ff.

[34] Tanenbaum above n 33 ch 2; Gralla above n 33 at 36–41.

[35] HH Perritt Jr *Law and the Information Superhighway* (John Wiley & Sons New York 1996) §1.2.

[36] Particularly in the past decade.

[37] Though attempts are being made at international coordination of internet governance issues, eg International Chamber of Commerce *Issues Paper on Internet Governance* (ICC Paris 2004).

of the independent decisions by operators of computers and networks to use common data transfer protocols to exchange information.

The internet allows a computer connected to the network (online) to communicate and share information globally with any other computer connected to the network. Unprecedented numbers of people and devices are connected.[38] It is impossible to identify the internet's physical boundaries,[39] as it is inherently accessible from every country in the world. Once information is placed on the internet, it is usually open to all internet users anywhere.[40] In some cases access may be restricted and regulated by government[41] or may be limited by the content-provider to subscribers, registrants or specific users.[42] 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 and at the same time prevent the content from being accessed in specific legal jurisdictions.[43]

This geographic boundlessness creates difficulties in applying the rules of jurisdiction, which are territorial. Some say that internet communications do not take place in any territory but rather in a virtual or notional interactive environment[44] (cyberspace).[45] However, although cyberspace may appear borderless,[46] it is a fallacy to assert that internet activities do not take place in the physical world. 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 are located in one or more physical world legal jurisdictions.[47] Often the transactions take place beyond the borders of a particular nation State, involving actors from several States, and in that sense they are transnational.[48]

[38] *Dow Jones & Co Inc v Gutnick* (2003) 210 CLR 575, 597 [14] (HCA) (evidence of Dr Clarke, an internet expert).

[39] GJH Smith *Internet Law and Regulation* (3rd edn Sweet & Maxwell London 2002) [1-003], [1-001].

[40] *Gutnick* above n 38 at 618 [86].

[41] 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' (n 48) 1680–1; Cuba: Resolution 180/2003.

[42] *Gutnick* above n 38 at 617 [83].

[43] ibid 618 [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) the defendant was required to employ geographic filtering technologies 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.

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

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

[46] DR Johnston and DG Post 'Law and Borders—The Rise of Law in Cyberspace' 48 Stanford L Rev 1367 (1996).

[47] C Reed *Internet Law: Text and Materials* (Butterworths London 2000) [7.1.1].

[48] B Fitzgerald 'Casenote on *Dow Jones & Co Inc v Gutnick*: Negotiating "American Legal Hegemony" in the transnational world of cyberspace' (2003) 27 Melbourne UL Rev 590, 590–1.

This article focuses on the World-Wide-Web (WWW) and email, which are among the most popular internet applications.

The following is a brief outline of the steps involved in a simple exchange of information on the WWW. It is essential to understand this in order to apply the rules of private international law which look for factors connecting persons, things or acts with a territory. First, content (web page) is created by a person (content-provider). From his own computer, the content-provider transmits and places (uploads) the web page in a storage area (website) of a computer (server)[49] that runs server software and is operated by the content-provider or a third party (host).[50] A user connects to the internet (online) and, through client software (browser), requests and receives documents from remote servers.[51] Once the request for the transmission of the nominated web page has been issued, the browser uses the IP address to identify the remote server on which the relevant web page is stored.[52] The browser makes a TCP connection to the server, and requests the web page.[53] The server analyses the request. It 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 packet's address and performs computations to determine the most appropriate transmission route over which to send the packet to its destination. 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 user's server. The user's server responds to the request by delivering (downloading) a copy of the requested[54] web page to the browser, which the user can access and view on his screen.[55] The TCP connection is released.[56] If the web page is a file, the user may save it onto a disk.[57] The server's software communicates with the browser using protocols which instruct the browser how to format and display the page on the user's computer screen.[58] The user can access any web

[49] Smith above n 39 [1-003], [1-016].

[50] Gralla above n 33 132–3, 161–3.

[51] ibid 135–7. To request a particular web page stored on a server, the user may (i) type the uniform resource locator (URL) of the web page into his browser, which identifies the data transfer protocol to use (for WWW the protocol is http), the IP address of the server and the website and the path and file name, or (ii) more commonly, type the plain language address (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), or (iii) if he cannot easily identify the particular web page, 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, and this contains a URL for the web page.

[52] Gralla above n 33 at 23; Tanenbaum above n 33 at 615.

[53] ibid at 615, 618.

[54] Sometimes other unrequested websites may appear (pop-ups), though they can be filtered-out.

[55] ibid 618–19.

[56] ibid 615, 618.

[57] This step is colloquially called 'downloading', though technically downloading occurs beforehand on receipt of data.

[58] Perritt above n 35 §1.2.

page that is available except those to which access is restricted by password or subscription. Geographically, the electronic communications described in the example occur in one or a combination of the location of (i) the content-provider, (ii) the host server, (iii) the user's server and (iv) the user. Of course, in more complex situations there may be numerous content-providers, servers and users, spread throughout numerous locations.

In the transmission of an email, first, the sender composes a text message (which may include file attachments) and addresses it to the recipient using an email program. The sender connects to his own mail server and transmits to it the message as a stream of packets.[59] The message is temporarily stored 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 submits a request through mail client software to his mail server. The server responds by receiving the packets, recombining them as a message and sending the message to the recipient's computer. The recipient may then display the message on his computer screen. Geographically, the electronic communications described in the example occur in one or a combination of the location of (i) the sender, (ii) the sender's mail server, (iii) the recipient's mail server, and (iv) the recipient. Of course, in more complex situations there may be numerous senders, servers and recipients, spread throughout numerous locations.

III. JURISDICTIONAL RULES IN WRONGS CASES

In general, there are two relevant jurisdictional rules in wrongs cases: those focusing on the place where a wrong is committed, and those focusing on the place where damage is suffered. Each is addressed in turn.

A. Jurisdictional rules focusing on place of wrong

1. Service abroad provisions under rules of court

Where process has been issued, a court in a common law State will not have jurisdiction to entertain a claim *in personam* until that process has been duly served on the defendant.[60] Service within the jurisdiction poses no problems. Service abroad must be effected in the circumstances authorized, and in the manner prescribed, by the applicable service abroad provisions.[61] These are

[59] Gralla above n 33 90–3; Tanenbaum above n 33 592–4. The mail server is usually the sender's local internet service provider (ISP).

[60] FT Piggott *Service Out of the Jurisdiction* (William Clowes & Sons London 1892) lvii.

[61] *Dicey and Morris on the Conflict of Laws* (13th edn Sweet & Maxwell London 2000) [11R-001].

now contained in extraterritorial legislation.[62] In England,[63] statutory powers have been used to limit and define discrete situations where a court could give permission to 'serve abroad' on British subjects[64] and non-subjects.[65] After fusion, Order XI of RSC provided a complete and exhaustive code on service abroad,[66] the model being derived from the previous Chancery practice.[67] Since then, similar rules have been adopted by many common law countries and have evolved.

The English RSC first mentioned torts specifically in 1920[68] when a rule was enacted allowing service abroad in an action 'founded on a tort committed within the jurisdiction'. Until 1987 this was the only tort-related ground in RSC. The wording changed in 1987 and then in 2000 when CPR were introduced. The relevant limb now reads: 'a claim made in tort where the damage sustained resulted from an act committed within the jurisdiction'.[69] This article makes no distinction between claims 'made in tort'[70] and 'founded on a tort'.[71] However, as shall be seen later, one significant difference is between 'tort committed within the jurisdiction' and 'act committed within the jurisdiction'. 'Tort' in this context, is read broadly.[72]

The RSC were adopted throughout the British Empire. The rules of court in many common law countries now contain one or more of the following grounds on which a claimant can rely in order to serve abroad in a wrongs action:[73]

(i) proceeding is founded on a tort committed in the jurisdiction[74] (this remains the obvious basis for service abroad on a foreign wrongdoer);
(ii) proceeding is brought in respect of contravention of legislation committed in the jurisdiction;[75]
(iii) proceeding relates to the breach of an equitable duty within the jurisdiction;[76]
(iv) proceeding is brought in respect of a cause of action arising in the jurisdiction;[77] or

[62] Piggott above n 60 lviii–lxiii.
[63] Starting with the Common Law Procedure Act 1852 (UK) 15 and 16 Vict c 76.
[64] Section 18. [65] Section 19.
[66] *Re Eager; Eager v Johnstone* (1883) 22 Ch D 86, 87 (CA).
[67] *Maclean v Dawson* (1859) 4 De G & J 150, 45 ER 58; *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch D 239, 243.
[68] RSC 1920 Ord XI r 1(ee). [69] CPR r 6.20(8).
[70] The wording since 2000. [71] The wording between 1920 and 2000.
[72] A Briggs and P Rees *Civil Jurisdiction and Judgments* (3rd edn LLP London 2002) [4.39]; *Metall* (n 21) 437, 441; cf *Civil Procedure: The White Book Service* (Sweet & Maxwell London 2003) vol 1 [6.21.39].
[73] Other peripheral grounds are not dealt with in this article (eg where the defendant is a necessary and proper party).
[74] eg Supreme Court Rules (General Civil Procedure) 1996 (Vic) r 7.01(1)(i); Rules of Court (BC) r 13(1)(h).
[75] eg Federal Court of Australia Rules (Cth) r 8.01(b). [76] eg Rules of Court (Alta) r 30(q).
[77] eg Rules of the Supreme Court 1971 (NSW) r 10.1A(1)(a); Uniform Civil Procedure Rules 1999 (Qld) r 124(1)(a).

(v) proceeding is brought for an injunction to restrain or require conduct within the jurisdiction.[78]

Each ground focuses on substantially similar issues of location and this article treats them collectively. To apply any of these grounds, it is important to determine where the alleged wrong was committed, ie the *locus delicti commissi*, a concept which features in many countries' jurisdictional rules that are unrelated to service abroad,[79] and choice of law rules.[80] Although it would be sensible to apply criteria uniformly whatever the object of the inquiry,[81] there may be a danger in using choice of law cases to resolve jurisdictional questions and vice versa.[82] Choice of law is an entirely separate inquiry from jurisdiction, though one may affect the other and in some cases choice of law can defeat a claim similarly to jurisdiction.[83]

Historically the common law struggled to set an appropriate test for *locus delicti*. English courts expressed a need for great caution in allowing service abroad.[84] The application of the rules required care, as service abroad was necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service was to be effected, and prone to criticism by foreign lawyers. As a matter of international comity courts construed RSC narrowly and did not give leave to serve abroad unless the case was clearly within both the letter and spirit of Order XI.[85] In jurisdiction cases the search was 'for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned'.[86]

Competing theories, developed to determine the place of commission of a wrong,[87] were explained in the *Distillers* decision.[88] The first was: the 'tort' or 'cause of action' must be the whole cause of action, so that every part or ingredient of it occurred within the jurisdiction. The second was: the last

[78] eg Victorian Rules (above n 74) r 7.01(1)(k); British Columbia Rules (above n 74) r 13(1)(i). The conduct being any act that would amount to an infringement of the claimant's rights in the forum: *James North & Sons Ltd v North Cape Textiles Ltd* [1984] 1 WLR 1428, 1431–3 (CA).

[79] eg German Code of Civil Procedure §32.

[80] eg the 'double actionability' rule in *Boys v Chaplin* [1971] AC 356 (HL). cf the proposed EU Regulation on the Law Applicable to Non-Contractual Obligations ('Rome II'), Art 3(1), which looks at the place of damage rather than the place of the wrong.

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

[82] *David Syme & Co v Grey* (1992) 38 FCR 303, 314.

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

[84] *Dreyfus Brothers* above n 67 at 242–3.

[85] *Johnson v Taylor Bros & Co Ltd* [1920] AC 144, 153 (HL); *Kroch v Rossell & Cie SPRL* [1937] 1 All ER 725, 728 (CA); *George Monro Ltd v American Cyanamid & Chemical Corp* [1944] KB 432, 437 (CA).

[86] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 467 (PC).

[87] ibid 466; *Moran v Pyle National (Canada) Ltd* [1975] 1 SCR 393; (1973) 43 DLR (3d) 239; Webb and North above n 81.

[88] *Distillers* above n 86.

ingredient of the cause of action, the event which completes a cause of action and brings it into being, occurred within the jurisdiction. This is the US test which examines the place where the last event, necessary to make the wrongdoer liable, occurs.[89] In almost all cases damage to the claimant is the last ingredient, so that the place where a wrong is committed is the same as the place where damage is suffered.[90] The third was: the act of the defendant which gives the claimant his cause of complaint occurred within the jurisdiction. This reflects the general rule in civilian systems where a wrong is committed in the place where the wrongdoer acts.[91]

The Court in *Distillers* analysed the tests and decided that in determining whether 'a tort was committed within the jurisdiction' or 'a cause of action arose in the jurisdiction' 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?'.[92] The inquiry focuses on the substance of the defendant's act, not its consequence.[93] The place where damage is suffered, nearly always the last event completing the cause of action, should not by itself be the sole determinant of jurisdiction.[94] Understandably the Court chose a flexible interpretation, as during the period between 1920 and 1987 in England the only tort-related ground of service abroad was 'tort committed in the jurisdiction'. This test 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. Hence, it has gained acceptance in many common law countries, though the Court warned that this test would not provide a simple answer for all cases.[95]

The test has been applied frequently. 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;[96] the tort of inducing breach of contract was committed where the breach of contract took place;[97] and a bribe occurred at the place where the briber exercised

[89] *Restatement (Second) of Conflict of Laws* (American Law Institute Publishers St Paul 1971) §145.

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

[91] E Rabel *The Conflict of Laws* (2nd edn University of Michigan Law School Boston 1958) vol 2 303–4.

[92] *Distillers* (above n 86) 466–8. See also: *Jackson v Spittall* (1870) LR 5 CP 542, 552; *George Monro* n 85 440–1; *My v Toyota Motor* [1977] 2 NZLR 113, 116–17 (NZHC); *Castree v ER Squibb & Sons Ltd* [1980] 1 WLR 1248, 1252 (CA); *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd* [1983] Ch 258, 267, 272 (CA); *Metall* above n 21 443.

[93] *Voth v Manildra Flour Mills* (1990) 171 CLR 538, 567 (HCA).

[94] *Cordova Land Co Ltd v Victor Bros Inc* [1966] 1 WLR 793; *Distillers* above n 86.

[95] *Distillers* above n 86 at 468.

[96] ibid 469; *George Monro* above n 85 at 439.

[97] *Metall* above n 21 at 449.

influence over the decision-maker.[98] Many courts have emphasized the focus on the place of the defendant's act.[99]

Sometimes the cause of complaint is not necessarily an act but an omission, ie the failure or refusal of the defendant to do some particular thing. Although an omission has no place as such,[100] it is possible to localize the act of the defendant, in the context of which the omission assumes significance, and to identify that as the place of the cause of complaint.[101] 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 claimant a cause of complaint in law, is the failure to warn, which occurred where the product was marketed and sold.[102]

During the lifetime of RSC/CPR new technologies have been developed.[103] These enable content to be distributed internationally. The cross-border wrong involves an act that passes across space and/or time before it is completed.[104] Mindful of the pace of change, courts prefer technologically-neutral rules which do not require amendment for each innovation.[105] Concerned about the impact of cross-border communications, courts proceeded to give a broad reading to the 'tort committed within the jurisdiction' ground, holding that a tort occurs not where the communication originates but in the place to where the communication is directed. This approach is understandable, considering that the ground for service abroad was, at the time, worded with a focus on the place of commission and had to be moulded to fit new technologies. However, these cases, which predate the new 'damage suffered in the jurisdiction' ground, should now be treated with care. Courts tended to construe the place of commission very broadly in order to accommodate local claimants who had no other way of obtaining a remedy in the forum.[106]

Diamond and related cases are prime examples of this claimant-friendly tendency.[107] In the case of a negligent or fraudulent misrepresentation made

[98] *Arab Monetary Fund v Hashim* [1996] 1 Lloyd's Rep 589, 597 (CA).

[99] *Jackson* n 82 552; *Vaughan v Weldon* (1874) LR 10 CP 47; *Distillers* above n 86 467–8; *George Monro* above n 85 440, 441; *Metall* above n 21 437; *Voth* above n 93 567; *Buttigeig v Universal Terminal & Stevedoring Corp* [1972] VR 626; *MacGregor v Application de Gaz* [1976] Qd R 175.

[100] Cf Case C-256/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG* [2002] ECR I-1699 [34]–[35].

[101] *Voth* above n 93 at 567.

[102] *Distillers* above n 86 at 469.

[103] eg fixed and mobile telephones, telex, fax, radio, television (broadcasts, cable, satellite), and internet.

[104] *Voth* above n 93 567–8.

[105] eg *Gutnick* above n 38 at 630 [125].

[106] P Schlosser 'Product Liability' in McLachlan and Nygh above n 6 at 59, 78.

[107] *Original Blouse Co Ltd v Bruck Mills Ltd* (1963) 42 DLR (2d) 174, 181–2 (BCSC); *Diamond v Bank of London & Montreal Ltd* [1977] QB 333, 345–6 (CA); *The Albaforth* [1984] 2 Lloyd's Rep 91, 96 (CA); *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 122 ALR 279, 287–8 (FCA); *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539, 547–8; *Strike v Dive Queensland Inc* (1998) ATPR 41-605, [1997] FCA 1429; *Ramsey v Vogler* [2000] NSWCA 260 [36]–[48]; *Bray v F Hoffman-La Roche Ltd* (2002) 190 ALR 1; [2002] FCA 243 [147]; *Ennstone Building Products Ltd v Stanger Ltd* [2002] 1 WLR 3059, 3071–2, [2002] EWCA Civ 916 [48].

by telephone or telex, the tort was held to be 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.[108] The focus was not on the place from which it was sent. Defamation was said to be similarly committed in the place where the defamatory material was published and received, not where it was written or spoken.[109] A threat was considered to be made at the place where it was received by the victim.[110] Breach of copyright was committed by a television station at the place where the television programme broadcast was received,[111] and in the case of satellite television, at the place where the satellite signals were accessed.[112] Bearing in mind that courts have been wary of setting general rules for where a tort is committed, and preferred an incremental approach,[113] these cases indicate a trend towards localizing a wrong involving an element of cross-border communication at the place where the victim received the communication, and not where the wrongdoer initiated the communication.

Nonetheless, cases where the place of receipt of a statement differed from the place where it was acted upon have posed difficulties. One view, regarding statements that are directed from one place to another, is to look at the place to which a statement is directed, regardless of whether it is acted upon.[114] Admittedly, where a statement is received in one place and acted upon in another, the place where it is acted upon may be entirely fortuitous.[115] But in some cases the place where it is directed pales in significance to the place where it is acted upon.[116] In the internet context, such issues are set to multiply. A principle for determining where a wrong is committed that does not require a choice between place of receipt and place of consequential acting is preferable. Those issues should be left to the place of damage. The principles proposed below overcome this by examining the place where the defendant acted, disregarding the place of receipt or consequential reliance.

[108] ibid *Diamond* 345–6.

[109] Postcards: *Tozier v Hawkins* (1885) 15 QBD 650, 680; radio broadcast: *Jenner v Sun Oil Co* [1952] 2 DLR 526, 535, 537 (OntHCJ); television broadcast: *Pindling v National Broadcasting Corp* (1985) 14 DLR (4th) 391, 396 (OntHCJ); magazine: *Berezovsky v Michaels* [2000] 1 WLR 1004, 1012, 1018, 1026 (HL).

[110] *Norbert Steinhardt v Meth* (1961) 105 CLR 440, 442 (HCA).

[111] *Composers Authors and Publishers Assoc of Canada Ltd v International Good Music Inc* [1963] SCR 136, 143–4; (1963) 37 DLR (2d) 1, 8.

[112] *WIC Premium Television Ltd v General Instrument Corp* (2000) 266 AR 142 [18] (AltaCA).

[113] *Diamond* above n 107.

[114] *Voth* above n 93 at 568.

[115] ibid.

[116] eg *Morin v Bonhams & Brooks Ltd* [2004] 1 Lloyd's Rep 702 (CA), a choice of law case where it was held ([19]) that reliance was a continuum of activity, and the most significant aspect occurred where a purchase was made in reliance on false information.

2. Special jurisdiction provisions under Judgments Regulation and Conventions

International instruments now determine jurisdiction in respect of claims relating to civil or commercial matters brought in the courts of countries that are Member States of the European Union ('EU') and/or Contracting States to the European Free Trade Agreement ('EFTA').[117] The position in relation to defendants domiciled outside the EU or EFTA is still determined largely by the jurisdictional rules of the forum's national law.[118] In the case of English courts, these are the service abroad provisions. However, where the defendant is domiciled in a Member State of the EU or a Contracting State of EFTA, jurisdiction of courts in the EU or EFTA is determined solely by the rules of the Judgments Regulation, the Brussels Convention or the Lugano Convention.

The general rule is that a defendant should be sued in the courts of the Member State where he is domiciled.[119] There are some instances where he can be sued in the courts of other Member States. Special jurisdiction is conferred on a court other than the defendant's domiciliary court if one of the specified nexus tests, connecting the claim with the court's territory, is satisfied. These rules reflect the approach taken by domestic legislation of many continental European countries.[120]

One instance of special jurisdiction 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'.[121] 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 are not related to a contract.[122] There is a strong argu-

[117] Council Regulation (EC) 44/2001 of 22 Dec 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2000] OJ L12 ('Judgments Regulation') applies in the Member States of the European Union except Denmark. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 Sept 1968 (consolidation available at [1998] OJ C27/1) ('Brussels Convention') applies in the Member States of the European Union including Denmark. Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 Sept 1988 [1988] OJ L319/9 ('Lugano Convention') applies in all the Member States of the EU, including Denmark, as well as Iceland, Norway, and Switzerland. An international instrument applying also outside Europe was contemplated along similar lines (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 Oct 1999) but seems to have been abandoned for now, though there may be prospects for consensus on a modified draft (WE O'Brien Jr 'The Hague Convention on Jurisdiction and Judgments: The way forward' (2003) 66 MLR 491).

[118] Art 4(1) in the Judgments Regulation, Brussels Convention and Lugano Convention.

[119] Art 2(1) in the Judgments Regulation, Brussels Convention and Lugano Convention.

[120] eg French Code of Civil Procedure Art 46.

[121] Art 5(3) in the Judgments Regulation, Brussels Convention and Lugano Convention.

[122] Case 189/87 *Kalfelis v Schroeder Muenchmeyer Hengst & Co* [1988] ECR 5565, 5585 [17]; Case C-261/90 *Reichert v Dresdner Bank AG (No 2)* [1992] ECR I-2149 [19].

ment that that expression, which has an autonomous meaning,[123] corresponds with non-consent based wrongs and thus encompasses what English law regards as the categories of: common law wrongs; equitable wrongs where the effects of the breached obligation are independent of any undertaking entered into freely between the parties[124] (eg knowing assistance);[125] statutory wrongs; and wrongs which are recognized by some legal systems but not English law (eg breach of pre-contractual duty of good faith).[126]

The expression 'place where the harmful event occurred' is more problematic. The draftspersons preferred not to specify what that place was, and inserted a formula already adopted by Germany and France,[127] where a harmful event is regarded as occurring everywhere where either the wrongful act was done or its effects came into existence, thus potentially resulting in several *loci delicti* (in the modified sense of the expression).[128] Several decisions of the European Court of Justice ('ECJ') have considered the meaning of the expression 'place where the harmful event occurred'. In *Bier*,[129] the ECJ explained that the place where the harmful event occurred means 'both the place where the damage occurred and the place of the event giving rise to it'.[130] Where the places under the causal event limb and the damage limb differ, the claimant has a choice where to sue. Despite criticisms, the distinction now appears entrenched. The causal event limb has been construed more narrowly than 'the place where the tort was committed' in service abroad provisions. This was understandable as under Article 5(3) there was always an alternative: the damage limb, a ground that did not appear in service abroad provisions until later. This explains why a negligent misrepresentation was held to occur, for service abroad purposes, at the place where it was received and relied upon,[131] but for special jurisdiction purposes, where it was made or originated, regardless of the place(s) of receipt, reliance or loss.[132] And why defamation was held to occur, for service abroad purposes, at the place where the statement was received and comprehended,[133] but for special jurisdiction purposes, where the statement was made.[134]

[123] *Kalfelis* above n 122 5585 [16].
[124] Briggs and Rees above n 72 [2.143].
[125] *Casio Computer Co Ltd v Sayo* [2001] EWCA Civ 661 [16].
[126] Case C-334/00 *Tacconi v Heinrich Wagner Sinto Maschinenfabrik GmbH* [2002] ECR 7357 [27].
[127] Jenard Report on the Brussels Convention [1979] OJ C59/26.
[128] M Wolff *Private International Law* (2nd edn OUP Oxford 1950) §65.
[129] Case 21/76 *Bier v Mines de Potasse d'Alsace* [1976] ECR 1735.
[130] ibid [11].
[131] *Diamond* above n 107 345–6.
[132] *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.
[133] *Berezovsky* above n 109.
[134] Case C-68/93 *Shevill v Presse Alliance SA* [1995] ECR 415.

B. Jurisdictional rules focusing on place of damage

1. Service abroad provisions under rules of court

Due to technological advances, wrongs became more complex, multi-dimensional and multi-jurisdictional. Starting with England in 1987,[135] the distinction drawn in *Bier* in relation to Article 5(3) was carried over into RSC[136] and the rule was changed to give effect to the 'European standards' enunciated in *Bier*.[137] The revised English heads of service,[138] covered proceedings (a) brought in respect of damage suffered in the jurisdiction and caused by a tortious act wherever occurring,[139] and (b) brought in respect of damage suffered in the jurisdiction and caused by contravention of legislation wherever occurring.[140] The current wording of the second limb in England is: 'a claim made in tort where damage was sustained within the jurisdiction'.[141] Again, 'tort' is defined widely. Courts regarded the newly inserted 'damage suffered in the jurisdiction' ground as one that usually should be construed widely to enable residents to resort to their own courts more easily to sue tortfeasors for damage sustained in the jurisdiction as a result of tortious acts committed elsewhere.[142]

2. Special jurisdiction provisions under Judgments Regulation and Conventions

As discussed above, in *Bier* the ECJ explained that the place where the harmful event occurred means 'both the place where the damage occurred and the place of the event giving rise to it'.[143] Where the places under those two limbs differ, the claimant can choose where to sue.

The damage limb has been interpreted in several decisions. Damage arising from defamation was said, by the ECJ in *Shevill*,[144] to occur in the place where the victim's reputation was harmed by virtue of third persons reading and comprehending a publication. In relation to the place of damage, this is consistent with the results in service abroad cases such as *Berezovsky*[145] and *Gutnick*.[146] In all three cases the claim was confined to the damage to reputation suffered in the Court's territory. Damage from negligent misstatement was said to occur in the place where the misstatement was received and relied

[135] NSW and Ontario had enacted a separate 'damage suffered' ground earlier, but this was not as a consequence of *Bier*.
[136] *Metall* above n 21 437.
[137] Schlosser above n 106 77–8.
[138] Later adopted in much of the British Commonwealth.
[139] eg Victorian Rules above n 75 r 7.01(1)(j); Rules of Civil Procedure 1990 (Can) r 17.02(h).
[140] eg Federal Court of Australia Rules (Cth) r 8.01(c).
[141] CPR r 6.20(8).
[142] *Vile v Von Wendt* (1979) 103 DLR (3d) 356, 361–2 (OntHCJ); *Flaherty v Girgis* (1985) 4 NSWLR 248, 266–7 (NSWCA); *The 'Katowice II'* (1990) 25 NSWLR 568, 577 (NSWSC).
[143] *Bier* above n 129 [11].
[144] *Shevill* above n 134.
[145] *Berezovsky* above n 109.
[146] *Gutnick* above n 38.

upon.[147] This aspect does not contradict *Diamond*,[148] which dealt not with the place of damage but only with the place of commission of the tort. Damage from passing off was said to occur where the goodwill and reputation of the claimant was harmed.[149]

A difference between 'damage suffered in the jurisdiction' in the service abroad provisions and the damage limb in special jurisdiction provisions is the attitude towards consequential losses. When considering special jurisdiction, the inquiry into damage cannot extend too far. The ECJ explained[150] 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 occurs elsewhere those other courts do not have jurisdiction. Otherwise, there would be a perpetual preference for the claimant's forum.[151] So where loans to German companies were cancelled causing financial loss, the place of the damage was Germany, and not France, where the companies' parent was based. The ECJ further elaborated that the 'place where the harmful event occurred' could not be construed so extensively as to encompass any place where the adverse consequences (such as consequential financial damage), of an event which had already caused damage actually arising elsewhere, could be felt.[152] Hence, the damage limb of Article 5(3) is narrower than 'damage suffered in the jurisdiction' for the purposes of the service abroad provisions, as the former excludes consequential or secondary loss.[153] In fact, when construing that limb of Article 5(3), although the *Bier* Court used the word 'damage', one should not speak of damage at all, but rather of 'the effect of the harmful act', where the effect must be a direct one.

IV. APPLICATION OF JURISDICTIONAL RULES IN CASES OF CROSS-BORDER WRONGS COMMITTED ON THE INTERNET

A. Should the existing jurisdictional rules be changed?

Cyberlaw advocates recommend that the jurisdictional rules be changed in order to address the issues which emanate from the internet.[154] They claim that geographic boundaries are inapposite and archaic.[155] There is the risk of courts

[147] *Domicrest* above n 132 at 568.
[148] *Diamond* above n 107.
[149] *Mecklermedia Corp v DC Congress GmbH* [1998] Ch 40, 48.
[150] Case C–220/88 *Dumez France and Tracoba v Hessische Landesbank (Helaba)* [1990] ECR I-49, 80 [20]–[22].
[151] H van Houtte 'Securities' in McLachlan and Nygh above n 6 at 155, 167.
[152] Case C–364/93 *Marinari v Lloyds Bank plc and Zubaidi Trading Co* [1995] ECR 2719 [14].
[153] P Nygh 'Transnational Fraud' in in McLachlan and Nygh (above n 6) 83, 100–1.
[154] 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, Feb 2002).
[155] DR Johnson and DG Post 'The Rise of Law on the Global Network' in B Kahin and C Nesson (eds) *Borders in Cyberspace: Information Policy and the Global Information Infrastructure* (MIT Press Cambridge MA 1997) 3, 6–12.

following the 'Missouri rules': the Missouri party always prevails.[156] Content-providers fear exposure to global liability which could result in the internet being beyond the reach of the average citizen.[157] Jurisdictional rules cannot provide consistent and just outcomes or efficient solutions to transnational events on the internet and more radical legislative reform is required.[158] Perhaps the artificiality of attempting to localize internet conduct territorially means that jurisdiction should be determined by reference to the defendant's nationality[159] or the claimant's domicile?[160] Perhaps the internet should be declared a single jurisdiction subject to rules custom-made for its purposes?[161] Perhaps cyberspace should be treated as an international space, alongside Antarctica, outer space and the high seas?[162]

This article endorses the view that traditional rules can be applied to cases which arise in the online environment and that the internet is merely a natural extension of existing forms of communication technology, rather than a novel form requiring *sui generis* laws.[163]

Although the relatively new technology of the internet can be accommodated to traditional wrongs,[164] it seems difficult to apply to internet transactions the traditional localization principles, which require identification of the physical place where the relevant element of a transaction occurred. The likely result of localizing an internet transaction is that either the jurisdiction is 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.[165] Due to the intentional flexibility of the internet, ie the availability of every internet resource anywhere and everywhere, localization may often be a meaningless concept in this context.[166] Some have suggested that a different form of localization should be considered, eg based on the physical

[156] RW Hamilton and GA Castanias 'Tangled web: personal jurisdiction and the internet' (1998) 24 Litigator (ABA) 27

[157] DL Burk 'Jurisdiction in a world without borders' (1997) 1 Virginia JL & Technology 3.

[158] U Kohl 'Eggs, jurisdiction and the internet' (2002) 51 ICLQ 555, 557.

[159] D Menthe 'Jurisdiction in cyberspace: A theory of international spaces' (1998) 4 Michigan Telecommunications Technology L Rev 69.

[160] G Kaufmann-Kohler 'Internet: mondialisation de la communication—mondialisation des litiges?' in K Boele-Woelki and C Kessedjian *Internet—Which court decides? Which law applies?* (Kluwer Hague 1998) 89, 119.

[161] A Edeshaw 'Web services and the law: A sketch of the potential issues' (2003) 11 Intl JL & Information Technology 251, 272.

[162] 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.

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

[164] *Pro-C Ltd v Computer City Inc* (2001) 205 DLR (4th) 568, 574 (OntCA).

[165] C Reed (above n 47) [7.1.3].

[166] ibid [7.3.1.6].

location of the server used in the transaction. Another suggestion is a bright line rule limiting jurisdiction to the places of habitual residence of the parties to the action.[167]

Courts have grappled with every new form of technology by adapting the existing rules. The internet is no different. It is simply on a larger global scale. There is no need for reformulated jurisdictional rules to deal specifically with wrongs committed on the internet, as the existing service abroad provisions and special jurisdiction provisions are adequate and applicable. It is preferable not to replace the provisions in light of the internet, but rather to adapt their interpretation and application. The internet is constantly evolving. Internet-specific rules may need to be changed in the future to cater for new forms of technology and communications. Any complications arising from the application of territorial rules to increasingly mobile wrongdoers are neither new[168] nor unique to the internet context.

B. Application of jurisdictional rules to cross-border wrongs committed on the internet

The underlying problem of internet jurisdiction is that the ambit of a statement transmitted through the internet cannot be geographically restricted. It is accessible everywhere, unless there are password or subscription requirements. Similarly, in some cases there is no way of knowing to or from which place an email is sent (some email addresses are geographically-ambiguous), or who the sender is (some email users employ anonymizing technology, eg anonymous remailer). The problems are magnified because anyone can upload content or send an email, and anyone can download content or receive an email.

It is submitted that it is possible to distil some general principles to guide courts in applying both the service abroad and special jurisdiction provisions[169] in cases of wrongs committed on the internet, regardless of the means of access to the internet. The focus should remain on the manner of application of the existing jurisdictional rules, and not on the replacement or amendment of those rules. The following principles are not hard and fast rules, they provide guidance and aim to balance flexibility and the interests of the parties. Courts prefer not to express general statements about how to apply the jurisdictional rules.[170] On the other hand, uniform principles of interpretation are desirable in order to allay concerns about inconsistency of laws in a globalized world.[171] The principles can be used as a starting point from which to consider

[167] ibid.

[168] Location of wrongs committed on international flights or sea-voyages was discussed in Lord 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.

[169] Collectively the 'relevant exorbitant jurisdiction rules'.

[170] *Gutnick* above n 38 601 [28], 606 [43]; *Diamond* above n 107 346.

[171] LexisNexis—International Bar Association *Legal Survey* (2003) s 3.

the distinguishing factors of a particular case. The principles must address the underlying reason for jurisdiction, the effect on internet economic activity, and the importance of balancing the interests of claimant and defendant.

These principles are limited to jurisdictional rules. The test used for *locus delicti* in jurisdiction cases may differ from that used in choice of law cases. In jurisdiction cases the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the territory should be the determining factor.[172] For the purposes of jurisdictional provisions, there may be more than one *locus delicti commissi*, giving the claimant a choice of where to sue. However, the search for the applicable law should identify a single *locus delicti* for an issue.[173] That could be the place where the injury was inflicted.[174] It is not sensible to have more than one *locus delicti* in determining the *lex loci delicti*.[175] Also the threshold for *locus delicti* may be higher for jurisdictional purposes than for choice of law purposes, as there is often an alternative base of jurisdiction ('place of damage') whereas there is no alternative choice of law rule.

1. Where is the place of commission of the wrong?

The answer to this question would apply to the relevant exorbitant jurisdiction rules that look at the place of commission of the wrong, the act or the harmful event,[176] so that personal jurisdiction can be exercised under the service abroad provisions over a defendant who is not present or under the special jurisdiction provisions over a defendant who is not a domiciliary, despite the differences between the way these sets of provisions are worded.[177]

Wrongs committed on the internet pose a peculiar jurisdictional problem, as the place of commission of a wrong[178] can be potentially anywhere and everywhere. A content-provider faces the prospect of global liability emanating from his desktop. It is difficult to pinpoint the *locus delicti* on the internet, and hence it may be too easy to trigger jurisdiction, which often may be indeterminate at the outset.

It is submitted that, as a general principle, a wrong on the internet is committed, for jurisdictional purposes, in the place where the defendant

[172] *Distillers* above n 86 at 467.

[173] If at all—eg Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 11(2)(c) contains a choice of law formulation that does not look at *locus delicti*.

[174] Australian Law Reform Commission *Choice of Law* (Report No 58 1992) [50]–[59]. This recommendation has not been adopted. cf Rome II (above n 81) Art 3(1); *Donahue v Warner Bros* 194 F 2d 6, 22 (10th Cir 1952).

[175] Although different laws might apply to different issues: Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 12(1).

[176] eg where the cause of action arose, where the event giving rise to damage occurred.

[177] It would also apply in determining the place where the wrong occurred for the purposes of the draft Hague Convention (2001 version) Art 10(1)(a).

[178] Identified above as the place where, in substance, the defendant acts.

uploads the material onto the website or the place from which the defendant sends the email. The focus is on the defendant's act.[179] The act is the event that causes the damage. The defendant's act is the uploading of material to a website[180] or the transmission of an email. Generally, after that the defendant's conduct ceases. Any receipt of the material in a forum is the act of the retriever, who 'pulls' the information from a website or a mail server. The website-owner does not 'push' the information into that forum.[181] 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.

This approach 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 where to act was his own. The claimant should have the option of suing the defendant in the place of acting. The courts of that place have jurisdiction and the claimant can sue there for all his damage, wherever occurring. It would not be sensible to limit the claim 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'.[182]

It is easy to see how this applies to the CPR requirement of 'an act committed within the jurisdiction'.[183] If the act of uploading or transmitting takes place in England and results in damage, then even if there are other elements of the wrong which occur outside England, the facts fit within the provision. Further, in my submission, the principle applies in other countries whose courts still operate under the original form of RSC, which requires that the wrong (and not merely an act) be committed in the jurisdiction.

Courts have consistently said that a tort is committed where the defendant acts. They have preferred this to other tests, eg the place of the last event completing the cause of action, as those tests may generate a place that is quite fortuitous and should not be the sole determinant of jurisdiction.[184] Whether the defendant addresses his act to a particular person or country, or the world at large, is generally irrelevant. That concerns only where damage is felt, or the exercise of jurisdictional discretion, but not where the wrong is committed.[185] The defendant's act is the same, in the same place. For most wrongs, where some quality of the defendant's conduct is critical to the commission of the wrong, the place of the defendant's acting will be more important than

[179] In the case of an omission, the act of the defendant can be localized in the context of which the omission assumes significance.

[180] Explained above as the transmission and placement of a web page in the storage area of a server.

[181] As argued by defendant in *United States v Thomas* 74 F 3d 701 (6th Cir 1996).

[182] JC Ginsburg 'Private international law aspects of the protection of works and objects of related rights transmitted through digital networks' (GCPIC/2 WIPO 30 Nov 1998) 18.

[183] CPR r 6.20(8).

[184] *Distillers* above n 86 at 468.

[185] Cf *Bonnier Media Ltd v Smith* 2003 SC 56 [18]–[19] (CtSess).

where the consequences of the conduct are felt.[186] This approach works for the categories of wrongs committed on the internet identified above (though defamation, with its own complexities, is dealt with separately).

An online misstatement is committed at the place where the defendant places the statement online, ie where the statement originates, regardless of where it is accessed or displayed. In the internet context, a statement originates where it is disseminated by being uploaded to a website or the email is sent, and not where it is composed earlier. Similarly, misleading or deceptive conduct on a website or in an email takes place at the location of uploading or sending.[187]

Examining where the statement originates, rather than where it is received and relied on, is the approach taken in *Domicrest*[188] in relation to 'the place of the causal event' in the Judgments Regulation, Article 5(3). A series of judgments dealing with service abroad provisions appears to contradict *Domicrest*. The most famous is *Diamond*,[189] which purported to lay down general principles on the place where a tort is committed. However, it is submitted that *Diamond* is fundamentally ill-suited to the application of the service abroad provisions for wrongs committed on the internet.[190] It predates the addition of the 'damage suffered in the jurisdiction' ground of service abroad in England,[191] so understandably the court was claimant-friendly. Since the insertion of the 'damage suffered' ground, there is no longer an artificial need to overstate the width of the 'tort committed in the jurisdiction' ground, though many cases since then have ignored this and followed *Diamond*. Now there is an alternative head of service abroad in most jurisdictions which is generally construed widely. The scope of 'tort committed in the jurisdiction' should be correspondingly narrowed. The practical significance of the place of commission of the tort has diminished, though it still exists as a ground, and in some jurisdictions it remains the sole 'tort' ground. The fact that online statements[192] rarely meet the requirements set out in *Voth*[193] of being 'directed from one place to another' is an additional reason not to regard the place of receipt as the place of commission of the wrong.

Statutory intellectual property rights are territorial. They can be infringed only in the territory which grants them.[194] Where is the place of infringement,

[186] *Gutnick* (n 38) 606 [43].
[187] *Australian Competition & Consumer Commission v Hughes* (2002) ATPR 41-863; [2002] FCA 270 [78].
[188] *Domicrest* above n 132.
[189] *Diamond* above n 107.
[190] Though it may still be suitable for choice of law.
[191] As in most English common law jurisdictions.
[192] Particularly on websites, but also emails sent to recipients with an unknown location.
[193] *Voth* above n 93 at 568.
[194] *Nimmer on Copyright* (Matthew Bender 1982) vol 3 §17.02; H Laddie, P Prescott, and M Vitoria *The Modern Law of Copyright and Designs* (2nd edn Butterworths London 1995) [24.19]; *Copinger and Skone James on Copyright* (14th edn Sweet & Maxwell London 1999) vol 1 [22–49]; E Jooris 'Infringement of foreign copyright and the jurisdiction of English courts' [1996] EIPR 127, 140; cf J Fawcett and P Torremans *Intellectual Property and Private International Law* (OUP Oxford 1998) 164, 623.

when a right is infringed on the internet? An online intellectual property wrong is committed in the place where the defendant places infringing material online or sends an infringing email,[195] thereby exercising the claimant's protected exclusive rights. Statements from cases where the 'damage suffered' alternative is not available should be used with caution when applied to general jurisdictional rules, as courts faced with deciding where a wrong occurs tend to consider that a wrong occurs in both the place of transmission and the place of reception. Cases which predate the addition of the 'damage suffered in the jurisdiction' head offer little help. For example, a Canadian decision, that copyright is breached by a television station where the television programme is broadcast into,[196] should not be applied to the internet context. In my view, when assessing the liability of a content-provider, the focus should be on where the defendant's act of copying and disseminating the wrongful work occurs. Copyright decisions dealing with dual infringement on the internet are unhelpful in identifying where a content-provider commits the infringement. On that basis I would distinguish *SOCAN*.[197] Consideration of the place where the infringing work is viewed or heard should be limited to the exercise of jurisdictional discretion (essentially, a targeting test) or application of the 'damage suffered in the jurisdiction' ground. A series of cross-border trade mark infringement cases, though not dealing with the 'place where the tort is committed' head of service directly, sheds some light on the place of commission of a wrong on the internet.[198] Each decision involved a finding that the infringing use of a trade mark by a cybersquatter took place where the cybersquatter acted in operating and placing content on the website.[199] Although in non-internet cases trade mark infringement is said to occur where

[195] In some States lawmakers expressly reverse this principle, eg in China copyright is infringed at the computer terminal on which the claimant discovered the infringement: *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 Dec 2000) Art 1. In other States lawmakers expressly define jurisdiction in intellectual property wrongs over the internet, eg Australia and the US have agreed to confer jurisdiction on the courts of the place where the infringer or his ISP is located: Free Trade Agreement between Australia and the United States, the Exchange of Letters on ISP Liability.

[196] *International Good Music* above n 111 at 143–4.

[197] *Society of Composers, Authors and Music Publishers of Canada v Canadian Assoc of Internet Providers* (2004) 240 DLR (4th) 193, 214 [43] (SCC).

[198] Such cases arise less frequently following the adoption of the Uniform Domain Names Dispute Resolution Policy by the Internet Corporation for Assigned Names and Numbers (ICANN) and the enactment of the Anticybersquatting Consumer Protection Act 1999 (US) (15 USC §1125(d)) giving *in rem* jurisdiction over domain names.

[199] *Bensusan Restaurant Corp v King* 937 F Supp 295, 299 (SDNY 1996), affd 126 F 3d 25 (2nd Cir 1997); *Pro-C* (above n 164) 573–4; *New Zealand Post Ltd v Leng* [1999] 3 NZLR 219, 230–1 (NZHC); *800-Flowers Trade Mark* [2000] FSR 697, 705 (ChD); *800-Flowers Trade Mark* [2002] FSR 191, 220–1; [2001] EWCA Civ 721 [136]–[139]; *Euromarket Designs Inc v Peters and Crate & Barrel Ltd* [2001] FSR 288, 296; [2000] EWHC Ch 179; *V&S Vin & Sprit Aktiebolag AB v Absolut Beach Pty Ltd* (ChD 15 May 2001); *Australian Competition & Consumer Commission v Purple Harmony Plates Pty Ltd* [2001] FCA 1062 [35]; *Containerlift Services v Maxwell Rotors Limited (No 1)* (2004) 58 IPR 658 [45]–[46] (NZHC).

the trade mark owner's goodwill is harmed, website cases are different, perhaps 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.[200] Instead, in the case of websites displaying infringing marks, the wrong is committed where the website is created and/or maintained.[201] US cases suggest that an infringement also occurs in a forum if there is some conduct directed at the forum,[202] but in English common law countries this 'targeting' element is best left for the jurisdictional discretion. In patent cases too, it is the defendant's act that is crucial. A person uses an invention in the place where that person is located when he accesses the internet; the place of any remote host server, to which the person connects, is irrelevant.[203] The courts traditionally rejected matters that involved foreign intellectual property rights on the basis of lack of subject-matter jurisdiction or non-justiciability. These limitations (other than in respect of registration or validity of the rights) arguably do not apply in the context of the Judgments Regulation,[204] and should perhaps be discarded from the common law too, so that intellectual property rights should be treated as moveable.[205] The place of commission of an intellectual property wrong is where the defendant exercises the claimant's protected exclusive rights. A court in that place will find it difficult to reject jurisdiction, even if the source of the right is a foreign law,[206] and even if the relevant act of infringement was one of multiple acts of infringement in several territories.[207] But there may be greater basis for the court rejecting jurisdiction where it is asked to determine the validity of foreign intellectual property rights, a step which it is rarely appropriate for a foreign court to take.[208] This may have practical significance for patent litigation, as nearly every infringement proceeding involves issues of patent validity. Hence, the courts where the patent is registered are likely to have exclusive jurisdiction.

Computer access wrongs, such as hacking or spreading viruses, are committed in the place where the defendant uses his computer to access or infect another computer. Such wrongs commonly represent contraventions of legislation which sets out a broad territorial nexus.[209]

[200] *Citigroup Inc v City Holding Co* 97 F Supp 2d 549, 567 (SDNY 2000).

[201] *National Football League v Miller* 54 USPQ 2d (BNA) 1574 [2] (SDNY 2000); *American Network Inc v Access America* 975 F Supp 494, 497 (SDNY 1997); *Hearst Corp v Goldberger* 1997 WL 97097 [10] (SDNY).

[202] *Citigroup* (above n 200) 567.

[203] *Menashe Business Mercantile Ltd v William Hill Organisation Ltd* [2003] 1 WLR 1462; [2002] EWCA Civ 1702 [33].

[204] *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, 436 (CA).

[205] ibid 433–41; P Torremans 'Private international law aspects of intellectual property—Internet disputes' in L Edwards and C Waelde (eds) *Law and the Internet—A Framework for Electronic Commerce* (2nd edn Hart Publishing Oxford 2000) 225, 242.

[206] Though the court must apply that foreign law as the *lex loci protectionis*.

[207] Torremans above n 205 at 242.

[208] A Briggs above n 16 at 50.

[209] eg an Australian court has jurisdiction in a case of spam email if there is an 'Australian link'

The North American view is generally that the place of commission of a tort is where the last element takes place. This is usually the place where the claimant suffers loss. But this approach offers little assistance as there is no focus on where the defendant acts.[210]

2. Where is the place of damage?

The answer to this question would apply to the relevant exorbitant jurisdiction rules that look at place of damage, so that personal jurisdiction can be exercised under the service abroad provisions over a defendant who is not present or under the special jurisdiction provisions over a defendant who is not a domiciliary.[211] In my submission, although the two sets of provisions employ different verbs,[212] the same analysis applies for the purposes of localization of damage.

Although in theory it could be said that when a wrong is committed on the internet damage is suffered everywhere in the world,[213] courts have localized the place of damage. The earliest point in time at which damage manifests itself in a wrong involving communications is when the communication is complete. Before the message reaches the recipient, there can be no harm. But in some cases, even at that point there is no harm yet. For example, in a misrepresentation, there is no harm until the communication (which has been received) has been relied on, causing detriment to the victim. In wrongs which involve accessing a computer, rather than communication with a user of the computer, the damage is done (at the earliest) 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 differences between the special jurisdiction provisions and the service abroad provisions in their approach to consequential damages can be seen by considering misrepresentation scenarios.

In a case of a misrepresentation posted on a website or sent by email from State A, downloaded or received in State B by the victim, who acts in reliance on it in State B, both special jurisdiction provisions and service abroad provisions would agree that damage has been suffered in State B. The 'acting in reliance' may take the form of the outlay of money or entry into a contract. In my submission, it is the outlay or entry that is the acting, and not any prior decision to outlay or enter. There are more complex examples, such as where

(as defined in Spam Act 2003 (Cth) s 7), regardless of the place of commission of the contravention (s 14).

[210] eg *Alteen v Informix Corp* [1998] 164 Nfld&PEIR 301 (NfldSC); *Maritz Inc v CyberGold Inc* 947 F Supp 1328, 1331 (EDMo 1996); *Playboy Enterprises Inc v Chuckleberry Publishing Inc* 939 F Supp 1032, 1039 (SDNY 1996); *Cody v Ward* 954 F Supp 43 (DConn 1997).

[211] It would also apply in determining the place where the damage was suffered for the purposes of the draft Hague Convention (2001 version) Art 10(1)(b).

[212] eg place where damage 'is suffered', 'is sustained', 'occurs', 'is caused', or 'results'.

[213] C Reed above n 47 [7.1.3.5].

reliance leads not to the victim's acting but rather to his refusal to do something or his delay in doing something. In a case of a misrepresentation posted on a website or sent by email from State A, downloaded or received in State B by the victim, who acts in reliance on it in State C, both special jurisdiction provisions and service abroad provisions would agree that damage has been suffered in State C. If later the victim suffers consequential damages in State D, then service abroad provisions would recognise damage as being suffered in State D,[214] but special jurisdiction provisions would not. Other than issues relating to consequential damages, the same principles apply to determining place of damage for both service abroad provisions and special jurisdiction provisions.

So, as a general principle, the first point in time at which damage can be suffered from a wrong on the internet is when the material is accessed and downloaded from a website or an email is received. Importantly, damage is not suffered when the material is uploaded on a website or stored on a server (either as a website or as an email). No human can be said to be suffering damage at that stage. One should recall that 'downloading' is the process whereby the server responds to a request for a web page by delivering a copy of the requested web page to the browser, which the user can access. In some cases damage may be suffered as soon as the web page is delivered to the browser and is accessed by the user. For example, in a copyright infringement case, once a potential customer downloads a copyright work from the internet, the copyright-owner suffers damage through loss of sales. In other cases some further step needs to be taken in order for damage to be suffered. In a defamation case, a reader downloads the defamatory statement, reads and comprehends it, and then the victim suffers damage to his reputation. In a negligent misstatement case, the claimant downloads the material from the website or receives an email, and acts upon it to his detriment, at which point he suffers damage.

The jurisdiction of the courts of the place of damage should be limited. The claimant may sue only for his damage arising in that place. *Shevill*[215] should be applied by analogy to limit recovery in a State's courts to damage suffered in that State. Although it determined 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 to proceedings brought under service abroad provisions where the focus is damage.[216] It is sensible for both relevant exorbitant jurisdiction rules to take a congruous approach, by regarding the place of damage as the place where the content was downloaded or received, and limiting recovery to local damage. Stays may overcome any perceived consequential fragmentation of litigation. Although *Shevill* received

[214] eg *Challenor v Douglas* [1983] 2 NSWLR 405, 408–11; *Flaherty v Girgis* (1985) 4 NSWLR 248, 266–7.
[215] *Shevill* above n 134 [27]–[33].
[216] Art 10 of the draft Hague Convention (2001 version) contemplates this.

strong criticisms,[217] they were directed at the effect of *Shevill* specifically on European defamation policy, rather than at the broad idea of limiting damages to local loss.

One example where the *Shevill* limitation was applied to a wrong on the internet other than defamation is a French case.[218] Proceedings were 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 claimant chose not to sue in Spain, the country of domicile of the defendant, where the claim could extend to the claimant's entire worldwide loss. Rather, it chose to sue in France, relying on Article 5(3). The defendant challenged jurisdiction. The French appellate Court focused on the damage limb. The place where damage occurred was held to be France. Hence, the French Court had jurisdiction (*compéténce*) over the proceeding, but, the Court emphasized, only in so far as the claim related to damage suffered by the claimant in France.

Special jurisdiction provisions allow recovery of damage that directly results from the defendant's act. Damage under Article 5(3) extends no further. Extending the *Shevill* limitation to service abroad provisions would require the 'direct damage' principles associated with Article 5(3) to follow too, otherwise the limitation could be circumvented too easily by claimants.

Although often a claimant 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.[219] The corporation should be able to bring an action in each State where it (by itself or through its subsidiaries) suffers damage, as long as that damage is not too remote, 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.[220] 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 claimants, 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 wrong was committed (or alternatively where the defendant is relevantly present or domiciled).

Intellectual property comprises a bundle of exclusive rights protected in a territory. Damage from an intellectual property wrong is suffered where the exclusivity of the claimant's rights is undermined. There can be more than one place of damage. The right must be protected in the relevant forum in order for

[217] DW Vick and L Macpherson 'Anglicizing defamation law in the European Union' (1996) 36 Virginia J Intl L 933.

[218] *Castellblanch SA v Louis Roederer SA*, Cass civ 1ère, 9 décembre 2003, pourvoi nº 01-03.225.

[219] *GTE New Media Services Inc v Bellsouth Corp* 199 F 3d 1343, 1349 (DC Cir 2000).

[220] *Dumez* (above n 150) 80 [20]–[22].

jurisdiction to be exercised under this head. Where P's trade mark is misappropriated for use as a domain name (ie cybersquatting), P generally suffers damage to goodwill and reputation in the place(s) where he trades using that trade mark (often where he resides).[221] Where P's copyright is infringed, eg by distributing copyright material online, P generally suffers damage in the place(s) where he would have made profits from selling the copyright material which, now that it is available free online, customers are discouraged from purchasing.

Cases of damage suffered in the jurisdiction from contravention of legislation should be determined along similar lines to cases of damage suffered from other wrongs. This is more obvious with some statutory duties, which, when breached, amount to torts, at least for jurisdictional purposes.[222] An Australian court permitted service on a US resident operating a website that contained misleading information about obtaining Sydney Opera House tickets in breach of the Trade Practices Act.[223] Damage was suffered in Australia as Australians were misled by the website when they downloaded the information and attempted to buy tickets.[224]

Regarding 'damage suffered in the jurisdiction' as occurring potentially upon downloading or receipt of an email, achieves a sensible balance between the interests of claimant and defendant. It does mean that the defendant can be exposed to worldwide suits in relation to a statement which he places on the internet, and potential forum shopping. However, by placing the statement online in order to increase his exposure, he impliedly acquiesces in the increased risk that someone, in a place that he may not contemplate, will access the website. This is not excessively onerous, as the defendant faces a suit in that place limited to damage suffered locally, and a judgment from those courts is enforceable only if the defendant has assets there or, as a foreign judgment, in another place where the defendant has assets. Other than the defendant's domicile (in the case of the Judgments Regulation) or presence (in the case of service), the only forum where the claimant can seek compensation for his entire worldwide damage is the forum where the wrong was committed, ie where the defendant uploaded the material onto a website or sent an email.

The age-old practical problem of enforcement of foreign judgments is encountered, but is not unique to cases involving the internet. Shrewd defendants could take advantage of these principles and ensure that they operate, and keep all their assets, in a State whose courts and laws are lenient on

[221] *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).

[222] eg misleading or deceptive conduct in Trade Practices Act 1974 (Cth) s 52: *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507, 518–20 (FCA).

[223] *Australian Competition and Consumer Commission v Chen* [2002] FCA 1248 [4]–[5].

[224] *Australian Competition and Consumer Commission v Chen* (2003) 201 ALR 40; [2003] FCA 897 [46]–[61].

wrongdoers and deposit any moneys in a bank which has no branches in a hostile State.[225] If that State's courts uncooperatively refuse to recognize or enforce foreign judgments against the defendant, there is not much the claimant can do. The only solution presently available would be to apply international pressure to that State.[226] That is not to say that the jurisdictional principles set out above are deficient. Jurisdictional rules in themselves have not solved the enforcement problem in the past and cannot be expected to do so now.

3. Defamation

Defamation is a tort that is particularly vulnerable to creating multiplicity of jurisdictions. One commentator, frustrated with the application of defamation to the internet, even suggested that the internet should be a defamation-free zone.[227] However there is no need for total surrender.

Some of the principles outlined above on the application of the relevant exorbitant jurisdiction rules to wrongs generally extend to defamation.[228] Under the English CPR the search is for the place where the tortious act was committed. The tortious act by the defendant in defamation is the place of uploading. But in countries whose rules look at where the tort was committed, the place of the tort sould coincide with the place of the damage. Damage resulting from defamation is suffered where the claimant's reputation is harmed, ie the place where a third party downloads and comprehends the material, where the claimant can sue only for his local loss.[229] It is sensible to apply the same jurisdictional analysis to defamation as to other wrongs. It shares many features with other wrongs where communications can pass across space or time before completion or operation in a different country, eg misstatement.[230] Although there have been suggestions to focus on the place(s) of the claimant's residence, this may not necessarily be linked with the place(s) of his reputation.

When considering the place of commission of the tort under service abroad provisions, the place where the tort of defamation is committed is where the damage is suffered. This is due to the insistence of English common law that

[225] 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.

[226] The draft Hague Convention, in so far as it aims to deal with reciprocal recognition and enforcement of judgments, would be a step forward.

[227] 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.

[228] *Shevill* above n 134 [24]–[33].

[229] The effect of this limitation may be more apparent than real: DW Vick and L Macpherson 'Anglicizing defamation law in the European Union' (1996) 36 Virginia J Intl L 933.

[230] A Reed above n 163 at 98.

each publication of defamatory material founds a new and separate cause of action. The following discussion is confined to those English common law countries which look at the place where a tort is committed.[231] Ironically, England is no longer in that category, as its rules focus on the place where an act is committed, though some English cases since the introduction of CPR have not distinguished between the act of publication and the fact of publication.

In English common law countries, each time a defamatory statement is published a separate tort is committed. Publication occurs when the statement is conveyed to and comprehended by a third party and the claimant's reputation is harmed. Hence, it can be said that defamation is committed where the consequences of the conduct are felt and damage is suffered, ie the place of downloading.[232] So a defamation over the internet is committed in each territory where the defamatory material is viewed and downloaded by the user resulting in damage to the claimant's reputation in that territory.[233] But in this place of commission the suit is limited to the local torts (consistently with the *Shevill* limitation on damage). It is not the accessibility of the website or mail server, but the fact that the website or email is actually accessed and viewed or heard, resulting in harm to the claimant's reputation, that indicates that damage has been suffered and the tort has been committed.[234] The statement must actually be viewed by a human third party in order for defamation to be committed. It is insufficient for the statement to be stored in a computer.[235]

The focus is on damage to reputation. Reputation is harmed only when a defamatory publication is comprehended by the reader, listener, or observer.[236] Thus 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. The bilateral nature of publication underpins the long-established (if perhaps unfortunate)[237] English common law rule that

[231] eg Australia.

[232] *Gutnick* above n 38 at 601 [28].

[233] Australia: *Gutnick* (above n 38) 608 [48]; England: *Chadha v Dow Jones & Co Inc* [1999] Entertainment & Media L Rep 724, 732; [1999] EWCA Civ 1415; *Berezovsky* (above n 109) 1012, 1018, 1026 (HL); *Godfrey* (above n 19) 208–9; *Loutchansky v Times Newspapers Ltd* [2002] QB 783 [58]; *Harrods v Dow Jones* [2003] EWHC 1162 (QB); *King v Lewis* [2004] EWCA Civ 1329 [2]; *Richardson v Schwarzenegger* [2004] EWHC 2422 [19] (QB); Canada: *Bangoura v Washington Post* (2004) 235 DLR (4th) 564 (OntSCJ) [14]–[22]; 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]. See generally M Collins *The Law of Defamation and the Internet* (OUP Oxford 2001) [24.19], [24.21], [24.26].

[234] Cf Landgericht München I, Urteil vom 17 Oktober 1996, Az: HKO 12190/96, where a German Court assumed jurisdiction because world-wide accessibility of a defamatory statement on the internet meant that the injurious act was committed also in Germany.

[235] Cf *Bochan* above n 26.

[236] *Gutnick* above n 38 600–1 [26]–[27].

[237] Cf A Briggs 'The Duke of Brunswick and defamation by internet' (2003) 119 LQR 210.

every communication of defamatory matter founds a separate tort. The US-style 'single publication rule' has not been adopted. This makes defamation uniquely dependent on the reader, and makes its place of commission and damage dependent on the reader's place.

Defamation is not the only wrong involving comprehension by a third party. Passing off also requires there to be harm to the claimant's goodwill when a third party is confused or deceived in relation to the claimant's product. Breach of confidence requires disclosure of confidential information to a third party. However, these other wrongs are not subject to the same rule as defamation, that every communication founds a separate wrong at the place of the recipient.

Many of the service abroad cases of wrongs committed on the internet have involved claims in defamation, where the defendant was served in reliance on the 'damage suffered in the jurisdiction' head. Defamation cases are unique in that damage is sustained, and the tort is committed, simultaneously, at the place of publication of the defamatory material.[238] Publication occurs where the statement is seen, read, heard or received by another person,[239] and each publication founds a separate cause of action.[240]

In *Berezovsky*,[241] damage to two Russian businessmen's English reputations, resulting from defamation by a US publisher publishing a magazine in print and on a website, was held to have been sustained in England. The claimants sued in England only for the harm to their English reputations, and the court held that the place of commission of the tort was England, the place where the claimants suffered damage to their English reputations. That was the place where the defamatory material was published and received by readers.[242] The claimants chose to sue only in England, in respect of the English publications. Regardless of the questionability of their motives for thus limiting their suit,[243] when one looks at the damage to the claimants' English reputations apart from the rest of their worldwide reputations, the relevant torts were committed in England and the damage was suffered in England. Hence the English courts had jurisdiction and, due to the link between the torts and England, could not decline to exercise it.[244]

In *Gutnick*,[245] a businessman in Victoria sued a US publisher in a Victoria Court for defamation arising from an article published in an online magazine which was available to subscribers on the publisher's website. The claimant obtained leave to serve abroad on the basis that the claim was founded on libel

[238] *Pullman v Hill* [1891] 1 QB 524, 527; *Hebditch v McIlwaine* [1894] 2 QB 54, 61; *Bata v Bata* [1948] WN 366, 367 (CA).
[239] *Bata* above n 238 at 367.
[240] *Duke of Brunswick v Harmer* (1849) 14 QB 185, 189; 117 ER 75, 77.
[241] *Berezovsky* (above n 109).
[242] ibid 1012, 1018, 1026.
[243] ibid 1023–4.
[244] ibid 1013, 1017.
[245] *Gutnick* (above n 38).

committed in Victoria, and also the damage was suffered in Victoria regardless of where the tort was committed. The publisher appealed to the High Court. That court held unanimously that Victoria was not *forum non conveniens* and that the primary judge was correct in refusing to stay the proceeding.[246] Six judges held that, regardless of whether the tort was committed in Victoria, damage to reputation was suffered in Victoria so the Victoria Supreme Court had jurisdiction.[247] Six judges also held that in the case of material on a website, the place of commission of defamation is where the person downloads the material using a web browser, as that is when it is first available in comprehensible form and the damage is done to the claimant's reputation.[248] The claimant sued in Victoria only for the harm to his reputation in Victoria, and the court held that the place of commission of the tort was Victoria.[249] In relation to the statement downloaded by readers in Victoria, the place of commission of each tort represented by a defamatory publication was Victoria, the place of downloading. The claimant undertook to sue only in respect of his Victoria reputation, as he was not concerned with his reputation elsewhere.[250] A majority[251] explained that ordinarily defamation is located at the place where the damage to reputation occurs, ie the place of downloading. Consequently the place of commission of the defamation, for the purposes of service abroad provisions, is the place of damage, which is the place of downloading (where the claimant can sue for the damage to his local reputation only).

4. Injunctions to prevent potential damage

A court can grant an injunction against a local defendant, regardless of the extraterritorial operation of the injunction.[252] If the local defendant would harm only a particular territory, courts may try to limit the scope of the injunction to that territory.[253] The topic of injunctions to restrain foreign defendants from committing wrongs is more complex.

Where a wrong has been committed on the internet in a State, that State's courts have jurisdiction over the local or foreign defendant and can restrain further wrongs being committed, regardless of where the effects of the

[246] ibid 608 [48], 611–12 [65], 642 [163], 654[202].
[247] ibid 607 [46]–[47], 610 [56], 622 [102].
[248] ibid 606 [44], 621 [100], 652–3 [198]–[199].
[249] ibid 608 [48].
[250] ibid 595 [6].
[251] ibid 606 [44].
[252] *Attorney-General for England and Wales v Tomlinson* [1999] 3 NZLR 722 [21]–[24] (NZHC).
[253] 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 Limited (No 2)* (2004) 58 IPR 667 [14]–[15], [17], [22] (NZHC).

injunction will be felt.[254] Where a wrong has not yet been committed but is anticipated or threatened to be committed in the State, that State's courts have jurisdiction to grant an injunction and prevent the internet conduct (either under the service abroad provisions[255] or under the special jurisdiction provisions),[256] regardless of the fact that the injunction will operate beyond that State's borders.[257] Such extraterritorial reach is uncontroversial. This includes cases of defamation where the wrong (for the purposes of service abroad provisions) is committed in the place where the claimant's reputation is harmed.[258]

However, where a wrong has not yet been committed, but is anticipated or threatened to be committed outside the State and cause damage in various places including the State, any injunction which the court grants to disable the defendant's acts has an extraterritorial effect which may be unwarranted.[259] Above it was argued that the *Shevill* limitation (limiting recovery in a court of a State where damage was suffered to loss in that State) should be extended to both the special jurisdiction provisions and the service abroad provisions. There is an apparent inconsistency between the grant of a universal injunction and the principle that a court's jurisdiction should be limited to the damage suffered within the court's borders. For example, it would be inconsistent if a Singaporean court could grant an injunction to restrain a US defendant from advertising its product on a website (whether viewed in Singapore or elsewhere) because a claimant in Singapore might be misled and suffer loss, but on the other hand the Singaporean court could compensate the claimant only for his loss suffered in Singapore and not elsewhere, due to the *Shevill* limitation.

The inconsistency is more apparent than real. Injunctions are, by their nature, discretionary remedies. Factors which a court can consider in exercising its discretion include whether a local injunction will unduly restrain a foreign defendant from engaging in foreign conduct, and the significance of his local conduct in relation to the worldwide conduct. But that is at the merits stage. The jurisdiction stage of the inquiry should not be affected by such concerns. In that sense it differs from the jurisdiction stage of an inquiry about an already-committed wrong. Hence, there should be no difficulty in a State's

[254] *Re Burlands Trade Mark* (1889) 41 ChD 542.

[255] eg CPR r 6.20(2).

[256] Article 5(3): 'place where the harmful event…may occur.' This appears in the Judgments Regulation, not in the Conventions, though the Conventions have been construed as allowing courts to enjoin conduct.

[257] *British Telecommunications v One in a Million Ltd* [1999] 1 WLR 903 (CA); *Oggi Advertising Ltd v McKenzie* [1999] 1 NZLR 631 (NZHC); *New Zealand Post* (above n 199); *Bell Actimedia Inc v Puzo* (1999) 88 ACWS (3d) 1073 (FedCtTDiv) [50].

[258] eg *Dunlop Rubber Co Ltd v Dunlop* [1921] AC 367 (HL); *Tozier v Hawkins* (1885) 15 QBD 680.

[259] The jurisdiction to grant such injunction stems from the 'damage' limb of CPR r 6.20(8) or Judgments Regulation Art 5(3) by necessary implication.

court restraining foreigners from publishing wrongful material on the internet which will be accessible, and cause damage to be suffered, inter alia, in the State. In such a case the court may grant the injunction restraining publication and requiring removal of the material published, regardless of the extraterritorial effect of the injunction.[260] The *Shevill* limitation should not be applied to injunctions.[261] Injunctions to prevent potential damage associated with online conduct need not be limited to conduct connected geographically with the State, as in the internet context it is technologically difficult to impose territorial limits on the restraint to conduct.[262] But there must be some potential (not too remote) damage caused in the State. A State's court cannot enjoin foreign conduct where all the damage would be caused extraterritorially.[263]

Cases on this point are scarce, probably because claimants recognize that foreign defendants may not be deterred by a local injunction. Practical considerations, such as difficulties with extraterritorial enforceability[264] and gathering evidence, may dissuade claimants from applying for injunctions, while courts may be dissuaded from granting injunctions due to their perceived inability to enforce them (eg by an order for contempt).

In several cases courts shied away from granting an injunction. One example, *Macquarie*,[265] involved the placement of defamatory material on a website outside the Court's territory. The claimant sought an injunction to restrain publication. The Court was not prepared to require the foreign defendant to remove material from the website, as the effect would have been also to restrain extraterritorial publication. Once published on the internet, material could be received anywhere and the publisher could not restrict the reach of the publication.[266] The *Macquarie* decision has been criticized by commentators.[267] The Court may have thought that the question of existence of jurisdiction involved discretion. It does not. Discretion is involved only in the exercise of jurisdiction or the grant of the injunction. The court concluded that

[260] eg *New Zealand Post* above n 199, where the Court ordered the defendant to delete the words 'nz post' from any website, and did not feel constrained to limit the injunction to the territory of New Zealand.

[261] cf *Mecklermedia* above n 149 at 55.

[262] But it is not altogether impossible: *Speechworks Ltd v Speechworks International Inc* [2000] ScotCS 200 [27]; *Yahoo!* above n 42. One method of excluding conduct from a particular territory is by the website's server determining the location of the client through his IP address, and blocking 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.

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

[264] As acknowledged in *Chen* above n 224 [46]–[61]. Generally at common law an injunction is not enforceable outside the jurisdiction: *Marshall v Marshall* (1888) 38 Ch D 330 (CA). Perhaps it is time to reform this rule: *Pro Swing Inc v ELTA Golf Inc* (2004) 71 OR (3d) 566, 570 [9] (OntCA on appeal to SCC). cf the Judgments Regulation, under which any order of a Member State's court, including an injunction, is enforceable in all other Member States.

[265] *Macquarie Bank v Berg* (1999) Aust Defam Rep 53,035; [1999] NSWSC 526.

[266] ibid [11]–[15].

[267] R Garnett 'Are foreign internet infringers beyond the reach of the law?' (2000) 23 U New South Wales LJ 105, 123; U Kohl 'Defamation on the internet—a duty-free zone after all? *Macquarie Bank v Berg*' (2000) 22 Sydney L Rev 119.

the global reach of the injunction was decisive against its grant, without considering other factors. In any event, as this was a defamation case, the Court should have reasoned that the wrong would be committed in its territory, for the purposes of service abroad provisions, so the injunction would restrain local, not foreign, conduct (which, as we have seen, is uncontroversial).

V. CONCLUSION

A radical overhaul of jurisdictional rules is unnecessary. This article has sought to frame general statements about the application of jurisdictional rules to cross-border wrongs committed on the internet. The result is a series of principles that 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.[268]

The general principles can be summarized as follows. First, a wrongdoer may face a suit in respect of the wrong in the place where he uploads the material (or sends the email), as that is his place of acting, and the place where the wrong is committed. In that court the claimant can sue the wrongdoer for all his worldwide damage, but the wrongdoer cannot complain about this because he can choose where to upload his statement (or send the email). In addition, the wrongdoer may face a suit, in respect of some wrongs, in the place where the material is downloaded from the internet (or where the email is received), as that is the place where damage is suffered. Other wrongs (eg misstatement) generally require a further step to be taken before damage is suffered. In the case of defamation, the place where damage is suffered is also where the wrong is committed, for the purposes of service abroad provisions. 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 by making content accessible on the internet. In the court of the place of damage, the suit should be limited so that the claimant can sue the wrongdoer only for his local damage. But the claimant should be able to ask that court for an injunction to remove the content from the website, regardless of the fact that this will prevent users in other places from accessing the content. That question is left for the merits stage of the inquiry as to the grant of an injunction.

As more cases of cross-border wrongs committed on the internet are litigated before courts around the world, the jurisdictional picture will become

[268] cf B Fitzgerald above n 48 608–11.

clearer. The guidance provided by the principles outlined in this article aims to create consistency in the way courts reach their decisions. It also indicates that the existing jurisdictional rules can be applied to wrongs committed on the internet. Private international law is developed sufficiently to overcome the challenges posed by the internet.

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