Judicial Exercise of Personal Jurisdiction in the Online Fora: The Gordian Knott Unravelled

Ibrahim Ismail Muhammed*

ABSTRACT

From across the ocean a drummer in the clouds beats his drums and its melody reaches the shores of a distant land that forbids music, melody and sounds. On what basis can the drummer's action in the clouds be challenged by the foreign land? This is the analogy that explains best the war raging over who can exercise jurisdiction over activities in the clouds and a borderless internet as seen in a plethora of cases such as Yahoo! v. LICRA & UEJF. This war reached a crescendo in Google v. Equustek, where a worldwide civil injunction granted on Google by a regional court was affirmed. This paper seeks to explain, analyze and criticize the basis for the exercise of jurisdiction over online based activities by courts.

1.0 INTRODUCTION

One of the essential roles of the state is safeguarding the collective values and aspirations of the populace, at least when viewed from the social contract lens. For as Hegel argued, the state embodies and expresses the Volksgeist; which is the vehicle for the fulfilment of the collective will (and thereby of the individual will).[1] The duty of protecting such local values lies at the heart of the conception of political sovereignty as seen from the

* Final Year Student at the Faculty of Law, University of Lagos.

[1] G.W.F. Hegel, *Elements of the Philosophy of Right*(ed. A.W. Wood, 1991 [1821]), at 275

works of early western writers such as Bodin,[2] Hobbs[3] and Machiavelli[4].[5] Historically and theoretically territorial sovereignty has been ascribed two attributes: one internal, the founding the state's increasing power and prominence over local communities, whilst the other is external, which is establishing all states' equality and independence. To reconcile these two imperatives–to protect local values without encroaching on the territory of other states is the fundamental problem of state intervention on the Internet.[6] Since the exercise of jurisdiction must avoid the encroachment on other territories sovereignty and jurisdiction, as 'a state is, as a general matter, *prima facie* free to legislate or regulate with respect to persons or events beyond its territory, as long as doing so does not interfere with the same right of states that may have a closer connection to those persons or events.[7]

In the traditional analogue world, it is relatively easy for courts to determine the geographical locations of the persons, objects, and activities relevant to a particular case. The geography of the digital world of the Internet, however, is not as easily charted. Content providers may physically reside, conduct their business, and locate

[2] J. Bodin, *Les six livres de la République*(ed. C. Frémont, M.-D. Couzinet, and H. Rochais, 1986 [1576]);

[3] T. Hobbes, *Leviathan*(2005 [1651])

[4] N. Machiavelli, *The Prince*(transl. G. Bull, 1999 [1513])

[5] For commentaries on these authors and on modern conceptions of sovereignty see M.N. Shaw, *International Law*(5th edn, 2003), at 21-25; L. von Bar, *The Theory and Practice of Private International Law*(2nd edn, 1892), at 29; Yntema, "*The Historic Bases of Private International Law*", 2 Am J Comp L (1953) 297, at 305

[6] Thomas Schultz, "Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface" EJIL (2008), Vol. 19 No. 4, pp.799–839

[7] J.H. Currie, *Public International Law*(2001), at p.299

their servers in a particular location, yet their content is readily accessible from anywhere in the world. Furthermore, attempts to identify the location of a particular user over the Internet have proven extremely difficult, and many Internet users compound this problem by intentionally hiding their location. Traditional principles of international jurisdiction, particularly territoriality, are poorly suited for this sort of environment of geographic anonymity. Courts have struggled to develop a satisfactory solution, yet no progress has been made toward a uniform global standard of Internet jurisdiction.[8]

Therefore, this work shall examine the possible means in which courts have validly exercised jurisdiction over internet based actions. They are the minimum contact test, the sliding scale test, the effects test and the targeting approach. Each shall be analysed in turn before the case analysis of *LICRA & UEJF* v *Yahoo* and *Equustek* v *Google*[9] shall be made.

2.0 TESTS FOR DETERMINING PERSONAL JURISDICTION ON THE INTERNET

2.1 Minimum Contact Test

Although a precursor to the age of the Internet, the establishment of the Minimum Contact Test by the United States Supreme Court is the first recognisable attempt at shifting away from the traditional means of exercise of personal jurisdiction, where

[8] Kevin Meehan, *The Continuing Conundrum of International Internet Jurisdiction* (2008) 31 BC Int'l & Comp L Rev 345 at p.349

[9] *Equustek Solutions Inc. v Jack*, 2014 BCSC 1063

personal jurisdiction was only available against parties that were either present or were consented to the court's jurisdiction.[10] This test was formulated in the celebrated case of *International Shoe* v. *Washington.*[11]

The Supreme Court adopted a new test that focuses on whether a defendant's activities constitute "minimum contacts" with a forum state so that exercise of personal jurisdiction would be consistent with "traditional notions of fair play and substantial justice."[12] In Canada the language of choice is "real and substantial connection".[13] A minimum contact is determined if the defendant has been found to have purposefully availed itself of the benefits and protection of the law of the state and if the exercise of jurisdiction is fundamentally fair after considering some salient variables such the forum state's interest in adjudicating the dispute[14] the general burden on the defendant,[15] the plaintiff's interest in obtaining convenient and effective relief,[16] and the availability of an alternative forum.[17]

Whilst it is acknowledged that the Minimum Contact Test as formulated in *International Shoe* which involved a corporate defendant, it is important to note that later decisions have

[10]*Pennoyer v. Neff*95 U.S. 714 (1878)
[11]326 U.S. 310 (1945)
[12]Int'l Shoe Co., 326 U.S. at 316.
[13]*MorguardInvs. Ltd. v. De Savoye* [1990] 3 S.C.R. 1077
[14]*McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957)
[15]*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)
[16]*Kulko v Super. Ct. of Cal.*, 436 U.S. 84, 92 (1978)
[17]*Burger King Corp. v. Rudzewicz,* 471 U.S.at 477 (1985)

espoused and applied to cases involving individual defendants.[18] Thus, the Minimum Contact Test applies to all juristic personalities.

In *Asahi Metal Indus. Co. v Super. Ct. of Cal*,[19]The majority of the justices agreed that the court could not exercise personal jurisdiction over a Japanese corporation merely because it was aware that its products would end up in the forum, this was as a result of the forum being unreasonable.[20]However, there existed no consensus as to the standard to determine what constituted sufficient contact for the court to have reasonably exercised jurisdiction. In a court requiring 5 votes for a majority, there were four in support of Justice Brennan, four for Justice O'Connor and a single stand-alone vote by Justice John Paul Stevens.

The Court's split decision produced distinct approaches to what has come to be known as "stream of commerce" jurisdiction.[21] For Justice Brennan, it was *sine qua non* for the defendant to be aware that his product is being marketed in a forum and "As long as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise." However, for Justice O'Connor something more than awareness was required to constitute sufficient minimum contact.[22]

> Whether or not [the defendant's] conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value,

[18]*Kulko Cas*e, Supra at 18
[19] 480 U.S. 102 (1987)
[20]*Ibid* at 114
[21]*Ibid*
[22]Asahi Metal Indus. Co., 480 U.S. at 121–22

> and the hazardous character of the components. In most circumstances i would be inclined to conclude that a regular course of dealing that result in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the Forum State was a standard product marketed throughout the world.

Thus, she concluded by stating proper exercise of jurisdiction depends on whether a defendant purposefully established "minimum contacts" with a forum.[23].

Therefore, the targeting of the forum by the defendant is a necessary precondition for the exercise of jurisdiction by the forum state and examples of such deliberate actions were:

> …designing the product for the market in the State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.[24]

Several courts after Asahi have adopted the targeting analysis suggested by Justice O'Connor's plurality opinion,[25]whilst some other courts have adopted the opinion of Justice Brennan.[26]

It is submitted that irrespective of the divergence in opinions, the most suitable judgment for the purpose of determining jurisdiction over internet related activities and entities is that of Justice O'Connor. Reason being that the targeting framework

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[23]*Ibid* at 108–09

[24]*Ibid* at 112

[25]See *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 682–83 (1st Cir. 1992) (mere awareness that the product of a hot air gun manufacturer might end up in the forum state is insufficient for the exercise of personal jurisdiction); see also *Falkirk Mining Co.* v *Japan Steel Works, Ltd.*, 906 F.2d 369, 375–76 (8th Cir.1990) (finding the case "factually analogous" to Asahi, the court refused to exercise jurisdiction over defendant solely on the basis of selling parts into the stream of commerce)

[26]See *Dehmlow* v *Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Irving* v *Owens-orning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989).

modelled on Justice O'Connor in Asahi is not only workable but also essential in the E-commerce context.[27]

This is as a result of the internet being global in nature and should a party be subjected to a forums jurisdiction because they are aware that the content that they provide is accessible in the forum? Or would it still be fair to exercise jurisdiction over an entity after determining minimum contact when they exit another forum that has even more sufficient contact?

If the answer is to be in the affirmative then there is indeed a problem for such companies that seek to trade internationally and ISPs, such as Google and Yahoo, that are aware that their service is been accessed on a global scale. Thus, the use of the internet would be at its nadir.

Furthermore, courts and policy makers are likely to be biased when determining jurisdiction where harm has been experienced locally. For example a California Court held in a dispute between AOL and one of its customers that it had jurisdiction despite the existence of a forum selection clause between the parties that provided that all disputes are to be brought to Virginia courts.[28]

Another limitation of the minimum contact test is that all countries face the same concern of protecting its own citizens. Accordingly, while a country may wish to protect its own consumers by asserting jurisdiction over out-of-country entities, it would prefer that other countries not exert the same authority over its citizens and companies. Thus, Lawrence Lessig argues

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[27] Brian d. Boone, Bullseye!: Why a "targeting" approach to personal jurisdiction in the e-commerce context makes sense internationally. (2003)

[28] *Mendoza* v *AOL* (Cal. Super. Ct.) (unreported)

these competing policy priorities encourage countries to engage in a *quid pro quo* approach to jurisdictional cooperation.[29]

2.2 Sliding Scale Test

In *Inset Systems, Inc.* v *Instruction Set, Inc*[30], a Connecticut Federal District Court held that the mere posting of a website by itself constituted "minimum contacts" for the court to properly exercise jurisdiction.[31] Did Instruction Set's activity, the establishment of a website, properly bring it within the jurisdiction of Connecticut under that state's long-arm statute? From the court position, the website was a continuous form of advertising and advertising in traditional print ads was usually enough to confer jurisdiction. This court did not assess Instruction Set's actual activity on the Internet and the mere use of the Internet was sufficient for this court to establish jurisdiction.

Firstly, the analogising of website posting to print advertising has been criticized because, unlike the print media advertisers who can target a geographic audience by "simply making a website available on the Internet does not without more direct it to any particular locale."[32]

Thus, the Internet clouds matters provide an "all or nothing" environment in which either every jurisdiction is foreseeable or

[29]Lawrence Lessig, "Code and Other Laws Of Cyberspace" (1999) p.55
[30] 937 F. Supp. 161, 163 (D. Conn. 1996)
[31]*Ibid*, at p. 166
[32] Michael Traynor & Laura Pirri, *Personal Jurisdiction and the Internet: Emerging Trends and Future Directions*, 712 PLI/PAT 93, p.106 (2002).

none is foreseeable.[33] If the court was correct, every court, everywhere, could assert jurisdiction where a website was directed toward its forum.

Secondly, this was a negation of the principle that random or attenuated contacts do not confer sufficient jurisdiction to a forum[34]

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[35]

Furthermore, the decision would have stifled future Internet growth, as would-be Internet participants would be forced to weigh the advantages vis-à-vis the potential of being subjected to legal jurisdiction of every court where their content was accessible via the internet throughout the world. Other reasons to decide a wrong holding by the court stems for the court's own submission that Instruction Set, the defendant, did not maintain an office in Connecticut nor did it have a sales force or employees in the state.[36] Such erroneous rulings, in hindsight, were applied in multiple of cases within the United States and even in Canada due to the lack of alternative for an exercise of jurisdiction and a dearth of understanding of the Internet.[37]

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[33] Michael A. Geist, "Is There a There There - Toward Greater Certainty for Internet Jurisdiction", 16 Berkeley Tech. L.J. 1345 (2001) at p. 13. Available at: http://scholarship.law.berkeley.edu/btlj/vol16/iss3/6 (accessed at January 2017)

[34] *Burger King Corp. v Rudzewicz*, 471 U.S. 462, 475 (1985)

[35] *Ibid*

[36] 937 F. Supp. 161, 163 (D. Conn. 1996) at 162-163

[37] *Maritz, Inc. v. Cybergold, Inc,* 947 F. Supp. 1328 (E.D. Mo. 1996), *Alteen v. Informix Corp*[1998] N.J. No. 122 (Newf.)

In *Maritz, Inc.* v *Cybergold, Inc*,[38] the court noted the difference between online activities and physical activity[39] but still went on to follow the Inset Systems ruling.

In the wake of this difficulty and wrongful application of the minimum contact test, the test known as the "Sliding scale test", or the "active versus passive test" or the "Zippo test" was developed. This test was engineered to cater for the particularities of the internet and online related activities.

This test was formulated in the case of *Zippo Manufacturing Co.* v *Zippo Dot Com, Inc.*[40]This was a trademark infringement suit where Zippo Manufacturing, makers of tobacco lighters, sued Zippo Dot Com for obtaining registrations for several domain names such as "zippo.com," "zippo.net," and "zipponews.com." The plaintiff was based in Pennsylvania whilst the respondent was a California based news service. The Court based in Pennsylvania held that it had jurisdiction even though the respondent had no physical presence within its jurisdiction.[41] In getting to this conclusion the court distinguished between three broad categories of websites based on the level of their interactive and commercial characteristics. Thus, there exists on one end of the scale, websites categorised as being passive, whilst on the other end are websites that are declared to be active. A passive website does:

[38] 947 F. Supp. 1328 (E.D. Mo. 1996)

[39] "…the nature and quality of contacts provided by the maintenance of a website on the Internet are clearly of a different nature and quality than other means of contact with a forum such as the mass mailing of solicitations into a forum ....or that of advertising an 800 number in a national publication."

[40] 952 F. Supp. 1119 (W.D. Pa. 1997)

[41] *Ibid* at pp. 1119–21

> ...little more than make information available to those who are interested, which [are] not grounds for the exercise of personal jurisdiction.

Whereas an active website is declared to be one which has high level of interactivity between the users and the website and actively targets the forum court's jurisdiction through means such as advertisement and information collection. Thus, a website that merely provided information as to the content of its calendar and pricing has been held to be a passive website by nature several affirmative steps by residents would be necessary to bring any potentially infringing product into the state.[42] In *Benusan Restaurant* v *King*,[43] the court held that:

> ...the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York.

Whilst EBay or Jumia are websites that would be classified as active websites based on the Zippo test for they not only carry on business over the internet but also actively target a forum state and its individuals through tailored adverts.

Moreover, there exists the possibility of being classified as an interactive website on the sliding scale spectrum. Interactive websites are websites that are a mixture of passivity and activity and are websites that freely exchange information with the user regardless of the user's forum state but also do not reach the user's forum state through directed advertising or agreements with forum specific ISPs or network servers.[44]

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[42]*Benusan Restaurant Corp.* v *King*, 12 F 3d 2 (2d Cir. 1997)
[43]*Ibid*
[44]*Ibid* at pp. 1121-1123

Such interactive websites are to be analysed on a case by case basis by the court in order to determine the "level of interactivity and commercial nature of the exchange of information."[45] Only after an analysis of the websites nature would the court then rule on whether or not there exist sufficient grounds for the exercise of personal jurisdiction.

The Sliding Scale test, like an Abraham Tank used by the Army, appears to be invulnerable and a master stroke in solving the issue of jurisdiction over online based activities. For unlike any of the previous attempts or mediums for exercising jurisdiction, the sliding scale test focuses on the websites themselves. Thus, the intention of the parties and the borderless nature of the internet are given considerable cognisance.

However, a closer examination would prove that this judicial attempt at solving the jurisdiction dilemma though not without merits is not also without faults. For the Zippo test is easily applicable whenever a website is classifiable as either passive or active but the test falls short and runs quickly into trouble when a website is not on any of the extreme ends of the spectrum. In *Mink* v. *AAAA Development, L.L.C*,[46] the U.S. Court of Appeals for the Fifth Circuit readily adopted the Zippo test and held that the defendant's website, which contained information about both its products and services, was a passive website despite the fact that the site provided users with a printable mail-in order form, email

[45] *Ibid* at p. 1124
[46] 190 F.3d 333 (5th Cir. 1999)

addresses, and a toll-free number. Thus, the website was passive under the sliding scale test.

However, when it comes to handling websites categorized in the middle ground, the test fails and it too runs into the short comings experienced by traditional methods of applying jurisdiction vis-à-vis the internet. Reason being that the test runs into the problem of definitional ambiguity as to what is the "level of interactivity and commercial nature of the exchange of information" needed to determine that a website on the middle spectrum of the test can have jurisdiction properly exercised over it. In *Winfield Collection Ltd.* v. *McCauley*,[47] the court noted that;

> The distinction drawn by the Zippo court between actively managed, telephone-like use of the Internet and less active but 'interactive' websites is not entirely clear to this court. Further, the proper means to measure the site's 'level of interactivity' as a guide to personal jurisdiction remains unexplained.

Likewise in *ESAB Group, Inc.* v *Centricut, L.L.C.,*[48] the court categorically stated that

> ...merely categorizing a website as interactive or passive is not conclusive of the jurisdictional issue.

Other criticism lies in the fact that none of the cases that *Zippo* court cited to establish its sliding scale fail to make the rubric of interactivity any more intelligible because none of them relied on it in resolving personal jurisdiction.[49] Similarly, it has been argued that the sliding scale test rather than promoting the utility of the internet is actually "discouraging the adoption of interactive

[47] 105 F. Supp. 2d 746, 750 (2000)
[48] 34 F. Supp. 2d 323, 330 (D.S.C. 1999)
[49] Michael Traynor& Laura Pirri, *Personal Jurisdiction and the Internet: Emerging Trends and Future Directions*, 712 PLI/PAT 93, 114 (2002)

websites."[50] Furthermore, the increase in complexity of the internet since the ruling in the *Zippo* case has resulted in the fact that almost all websites now are "at least highly interactive, if not integral to the marketing of the website owners".[51]

Thus, it has been suggested that with all these shortcomings the sliding scale test may be only marginally useful given the lack of physical boundaries on the Internet).[52] It is this Author's opinion that the sliding scale test, whilst adding to the judicial approaches to determining jurisdiction, is not without flaws but should not be dispensed with, as it provides a certain and clear approach to determine the issue of personal jurisdiction when a website is at either ends of the sliding scale spectrum. Moreover, the ingenuity of the court should be applauded for the ruling came at a time when, prior to 1996, the majority of Internet-related decisions evidenced little genuine understanding of activity on the Internet as most courts were unconcerned with the jurisdictional implications of their rulings and instead favoured an analogy-based approach in which the Internet was categorized en masse just like real world transactions.[53]

2.3 Effects Test

The effect doctrine, as a means of obtaining personal jurisdiction over online parties in extraterritorial circumstances, is utilised by

[50] Michael Geist, supra note 48, at 1378.
[51] Denis T. Rice, *Problems in Running a Global Internet Business: Complying with the Laws of Other Countries*, 797 PLI/PAT 11, 52 (2004);
[52]Richard Freer & Wendy Collins Perdue, *CIVILPROCEDURE* 143 (3d ed. 2001)
[53]Michael Geist, *The Reality of Bytes: Regulating Economic Activity in the Age of the Internet*, 73 WASH. L. REv.521, 538 (1998)

a number of countries.[54] The effect test was formulated and applied around the same time as the sliding scale test was applied in *Zippo Manufacturing* v *Zippo Dot Com*.[55]

In *Calder* v *Jones*,[56] a California resident brought a suit to the California Superior Court against a Florida based defendant for alleged libellous publications. In deciding that the court had jurisdiction, the court relied on the fact that: "...the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California."[57] Moreover, the court distinguished from an action of "mere untargeted negligence," by the defendant and "intentional . . . actions . . . expressly aimed at California."[58]

Therefore, jurisdiction was proper and exercisable in the view of the court since the "effects" of the defendants conduct, although in Florida, was felt in California.[59]

The effects test unlike the Zippo sliding scale test puts primacy on the place of injury and not on the nature of the website to determine the level of contact the site actually has had with the forum state. This is evident in the decision of the Illinois Federal District Court in *Bunn-O-Matic Corp.* v. *Bunn Coffee Service*

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[54] Harold HongjuKoh, *International Business Transactions in U.S. Courts*, 261 RECUEIL DES COURS 1, 59 (1996), "According to commentators, the effects doctrine is now considered a valid basis of jurisdiction in countries ranging from Argentina, China, Cuba, Denmark, France, Germany, Italy, Japan, Mexico, Sweden and Switzerland"

[55] Supra at p. 54

[56] 465 U.S. 783 (1984)

[57] *Ibid* at p. 789

[58] *Ibid*

[59] *Ibid*

Inc,[60]where *Calder* v *Jones* was relied upon to assert jurisdiction over a defendant for a web posting in a trademark infringement case. This was despite the fact that the website would have fallen under a passive classification due to the fact that it was purely informational and did not sell any products or services directly.

Thus, the effects test can be seen to be more parochial in application than the Zippo sliding scale test as it focuses on the injury within the locality of the forum as against giving cognisance to the global nature of the internet.

Conclusively, the effects test, though suitable for individual and tortuous cases,[61] suffers a major flaw when it is to be applied when the defendant is a large corporation based in multiple forums, as determining where a larger, multi-forum corporation is "harmed" is a difficult prospect[62].

2.4 From Effects and Zippo, to a Targeting Approach

In *Cybersell, Inc* v. *Cybersell Inc*,[63] The court noted that the "effects" test does not "apply with the same force" to a corporation as it does to an individual because a corporation "does not suffer harm in a particular geographic location in the same sense that an individual does.[64]

Since *Cybersell* was decided, several courts have adopted this targeting approach in E-commerce legal disputes. In *Millennium Enterprises, Inc.* v. *Millennium Music, L.P*,[65] the Oregon District

[60] 46 U.S.P.Q.2d (BNA) 1375 (C.D. Ill. 1998)
[61] *Zumbro, Inc. v. Cal. Natural Prods.*, 861 F. Supp. 773, 782 (D. Minn. 1994)
[62] *Rice & Gladstone* (2003), pp.601, 629
[63] 130 F. 3d 414, 420 (9th Cir. 1997)
[64] *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414, p. 420 (9th Cir. 1997)
[65] 33 F. Supp. 2d 907 (D. Or. 1999)

Court in a trademark dispute refused to assert jurisdiction over a defendant based in South Carolina. The main ratio was that the website at issue was not aimed at consumers in the forum.[66] Furthermore, the court held that the middle ground of the Zippo scale, where fact-finding is necessary to determine the level of commercial interactivity, requires "deliberate action" aimed at the forum state consisting of "transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state."[67]

The court further stated that this "deliberate action" was the "something more" spoken of by Justice O'Connor in Asahi.[68]

The "something more" was discovered in *Rio Properties, Inc.* v *Rio International Interlink*,[69]where a Las Vegas casino sued a Costa Rican gambling operator for violating its trademark rights by posting a passive website using the marks that could be accessed by Nevada residents. The court found personal jurisdiction as a result of the defendants targeting of the forum of Nevada by running radio and print ads in the Las Vegas area.[70]

Thus in *Bancroft& Masters, Inc* v *Augustus Nat'l Inc*,[71] the US 9th Circuit elucidated further and went on to hold that the defendant must have:

1) Committed an intentional act; which was
2) Expressly aimed at the forum state; and

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[66]*Ibid* at p. 924

[67] Brian d. Boone, Bullseye!: Why a "targeting" approach to personal jurisdiction in the e-commerce context makes sense internationally at 23

[68] Supra note 77 at p. 915

[69]*Rio Properties, Inc v Rio International Interlink*, 284 F.3d 1007 (9th Cir. 2002)

[70]*Ibid* at p. 1020

[71]*Bancroft & Masters v Augustus National Inc* 223 F.3d 1082, 1087 (9th Cir.2000)

3) Caused harm that was largely suffered and which the defendant knows is likely to be suffered in the forum state.

Moreover, the Supreme Court of the United States has also had the opportunity to place the strict requirement that the defendant must have specifically targeted the forum.[72]

Significantly unlike the Zippo approach, "a targeting analysis [seeks] to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction."[73]

Similarly whilst the effects test focuses on whether the defendant could have foreseen the online activities impact on a forum state, the targeting analysis requires that a defendant actually and specifically aim online content into the forum.[74]

The targeting approach is best illustrated in the case of *Gutnick* v *Dow Jones*,[75] where Joseph Gutnick, a well-known Australian businessman/rabbi/philanthropist/politician sued the defendant for publication of an alleged defamatory portrait. Dow Jones was an American publisher of the online magazine BarronsOnline. Although the magazine was primarily addressed to U.S. citizens, a fair amount of subscriptions were made by Australians. Thus, they were aware that their publications would have an impact and be read by Australians, especially since it had a well-known Australian as portrait. Jurisdiction was held to be exercisable. Had Down

[72] *J. McIntyre Machinery Ltd v Nicastro* no. 09-1343 (U.S June 27, 2011)

[73] Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 389–91 (2002), at p. 418

[74] Carole Aciman & Diane Vo-Verde, *Refining The Zippo Test: New Trends On Personal Jurisdiction For Internet Activities*, Computer & Internet Law., Jan. 2002, at pp.16-19

[75] *Gutnick v. Dow Jones & Co. Inc.*[2001] VSC 305

Jones refused to sell subscriptions of BarronsOnline in Australia, the court may have concluded otherwise.[76]

Conclusively, the targeting approach reduces the number of possible jurisdiction and therefore makes the likely venue of litigation predictable whilst protecting the international standard of non-interference. However, the term targeting is vague and each case must be examined individually.

3.0 AN ANALYSIS OF THE *L'UNION DES ETUDIANTS JUIFS DE FRANCE ET LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME* V *YAHOO!* AND *YAHOO! FRANCE* V *LICRA & UEJF* CASE DECISIONS

3.1 Background

The First Amendment to the Constitution of the United States provides for the protection of free speech: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."

This provision is highly valued on the premise that freedom of expression is the cornerstone and is necessary to preserve a free society.[77] Thus, minimal limitations are prescribed.

Unlike the First Amendment, Article eleven of the Declaration of the Rights of Man and of the Citizen of 1789 states:

> [t]he free communication of thoughts and opinions is one of the most precious rights of man. Every citizen may,

[76] Thomas Schultz, "Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface", EJIL 19 (2008), 799–839 p. 19

[77] James E. Leahy, *The First Amendment, 1791-1991 Two Hundred Years Of Freedom* 108 (1991)

> accordingly, speak, write and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

Furthermore, Article Five[78] gives French public authorities the right to limit free speech by outlawing certain actions in the public interest, in order to avoid injury to society.

Thus, an active role is conferred in France on the government in limiting unlawful speech.

Yahoo! is a corporation with its principal place of business in Santa Clara, California. Yahoo! operates and provides services such as its search engine, an automated auction site, personal web page hosting services, and chat rooms.

It is Yahoo!'s auction site, which offers for sale many different types of items, that caused the corporation to be hurled into the Paris court. The site had on sale Nazi-related propaganda and memorabilia, the display and sale of which are illegal in France by virtue of French Penal Code R. 645-1.[79] The intent of the law is to protect French citizens, especially those of Jewish faith, from the memories of suffering endured by their nation and their people at the hands of Nazi criminals.[80]

The plaintiffs were The League against Racism and Anti-Semitism and The Union of French Jewish Students and together they brought a suit against the Corporations as a result of its failure to

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[78]See Declaration Of The Rights Of Man And Of The Citizen Art. 5 (Fr.1789), Available At Http://Www.Hrcr.Org/Docs/Frenchdec.Html

[79] Similar provisions are in Germany and Netherlands. See *Section 130(3) of the Federal Criminal Code of Germany*

[80]Okoniewski, Elissa A. "Yahoo!, Inc. v. LICRA: The French Challenge to Free Expression on the Internet." American University International Law Review 18, no. 1 (2002): 295-339 at pg 13, Calvin Peeler, The Politics of Memory: Reconstructing Vichy and the Past the French Chose to Forget, 19 WHITTIER L. REV. 353, 353 (1997).

stop the display and sales of the offensive articles. The defendant, Yahoo, whilst admitting that the articles violated French laws challenged the court's jurisdiction on the basis that they were offered for sale within the United States. Reasons being that it was available on the US targeted site which was protected by the First Amendment and was not available on the Yahoo France regional site. Thus, French citizens would have had to access the US domain through their own volition to be able to access the offending auction articles.

3.1.1 Analysis of the French Decision

On May 22, 2000, in deciding whether the court had jurisdiction over Yahoo, specifically Yahoo in Delaware and not Yahoo France, the court employed an approach that was analogous and identical to the "effects test". The court considered evidence of the harmful effects of the auction site in France and held that it was clear that users from the French territory may have access to pages containing auction of Nazi objects on Yahoo.com (U.S. site). The court, presided over by Judge Gomez, went on to recite the provisions of Article R.645-2 of the Criminal Code. Judge Gomez concluded that jurisdiction may be imposed by virtue of the harm being occasioned in France even though Yahoo's actions were probably unintentional.

Whereas while permitting these objects to be viewed in France and allowing surferes located in France to participate in such a display of items for sale, the Company YAHOO! Inc. is therefore committing a wrong in the territory of France, a wrong whose unintentional character is averred but which has caused damage

to be suffered by LICRA and UEJF…Whereas, the damage being suffered in France, our jurisdiction is therefore competent to rule on the present dispute under Section 46 of the New Code of Civil Procedure ...."[81]

Having determined that it had jurisdiction on the basis of the effects test, the court then went on to order a takedown order of all Nazi related items being sold on auction sites owned by Yahoo. This order was to apply to both Yahoo France and Yahoo in the United States.[82]

Moreover, the court on November 20, whilst delivering an interim order, appeared to have added a targeting analysis to its earlier use of the effects test by stating that Yahoo! was targeting French jurisdiction through advertisements. The court stated:

> Whereas YAHOO [sic] is aware that it is addressing French parties because upon making a connection to its auctions site from a terminal located in France it responds by transmitting advertising banners written in the French language ….[83]

However, the effects test was still the primary means the court utilised to determine jurisdiction but the use of the targeting method was employed more as an afterthought.

3.2 Critique of the French Decision

As noted above, an application of the effects test can lead to provincial results and this is was the result in the case. A provincial result is undesirable as courts would fail to take

[81] Pl.'s Compl. for Decl. Relief, ex. A, at 5, Yahoo! II (No. 00-21275)

[82] *Ibid*, at pp. 6-7

[83] Pl.'s Compl. for Decl. Relief, ex. B at 4, *Yahoo!, Inc. v. La LigueContre Le Racisme et L'Antisdmitisme*, 169 F.Supp. 2d. 1 181(N.D. Cal. 2001) (No. 00-21275), available at http://www.cdt.org/speech/intemational/001221yahoocomplaint.pdf accessed 2 December 2016)

cognisance of the global and extraterritorial nature suits relating to internet activities. Thus, whilst focusing on the harm and effects of the visibility of the Nazi memorabilia on the auction site in France, the court refused to recognise the fact that it was on Yahoos U.S web site.

Philippe Guillanton[84] stated:

> The point is whether we want to condemn the Internet to be closed in the same way that the media have traditionally been closed by frontiers ....This case could set a potentially dangerous precedent. . . .It is the first case where a judge in one country feels he is competent to decide over what actions he thinks an actor (in another country) should be taking…[85]

Lastly, the court did not consider the issue of enforceability.[86] Whilst this was not the issue for determination, it is important to note that in extra territorial suits the issue of enforcement may not be ignored for the courts orders would be fruitless if unenforceable in a foreign domain.

3.3 Analysis of the United States Decisions

After losing in the French court, Yahoo filed a complaint on December 21, 2000 in the Northern District Court of California, seeking a declaration that the French court's orders of May 22 and November 20 were not recognisable and enforceable.

The issue of jurisdiction now turned around as the question was how to assert jurisdiction over the two defendants, who admittedly were citizens of France, with no offices, assets or

[84] Director General of Yahoo France, (as he then was)

[85] Reuters, Yahoo Says French Ruling May Set Precedent, CNET NEWS.COM, available at http://news.cnet.com/news/0-1007-200-1930850.html (accessed December 5 2016)

[86] Pl.'s Compl. for Decl. Relief, ex. B at 4, Yahoo! II (No. 00-21275).

agents in the United States. Thus, no basis for general jurisdiction exists because LICRA and UEJF do not have the kind of continuous and systematic contacts with the forum state sufficient to support a finding of general personal jurisdiction.

The first court to hear the matter in the U.S. was the District Court in California which utilised the targeting approach and found that LICRA and UEJF had purposely availed themselves of the benefits of California by:

1. Sending a cease-and-desist letter to Yahoo;
2. Making use of the United States Marshals Service to serve court process from France; and
3. LICRA and UEJF's request to the French court that Yahoo! perform certain acts on its server and remove certain Nazi items from its website in California

All of this in the courts opinion constituted "express aiming" as provided in *Calder* v *Jones*[87] and *Bancroft & Masters, Inc*v *Augustus Nat'l Inc.*[88]

However, upon appeal to the 9th Circuit Court, the finding of personal jurisdiction over the defendants was upturned and reversed. The court interpreted the requirement of express aiming to be: "...satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."

Furthermore, the court cited a number of its past judgments and authorities.[89] Thus, for LICRA's and UEJF's litigation efforts against

[87] Supra at p. 70
[88] Supra at p. 84

Yahoo! to amount to "express aiming," those efforts must qualify as wrongful conduct targeted at Yahoo.[90]

Consequently, the court held: "...we cannot say here that the parties did anything wrongful, sufficient for a finding of "express aiming," in bringing this suit against Yahoo"

3.4 Critique of the United States Decision

The litigation in the U.S., like that of the French court showed the difficulty and importance of jurisdiction in a situation of extraterritorial dimension.

Yahoo, after losing in France, attempted to hurry the litigation by suing in the U.S. rather than waiting for LICRA & UEJF to sue for enforcement. This decision was unarguably premised on two factors. The first being that there was a running penalty that was time calculated, running against Yahoo and the other being that there was a need for Yahoo to protect its corporate name. Thus, even though the defendants had not sought an order of enforcement, it can be seen that fairness and equity necessitated the pre-emption suit by Yahoo.

Unfortunately, as stated by the 9th Circuit, there was no basis for the exercise of jurisdiction over the defendants by any American court since neither LICRA nor UEJF could have been said to have purposefully availed themselves of any benefit or conducted any wrong within the U.S.

3.5 Conclusion

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[89]*Rio Props, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002), *Metro. Life Ins.Co. v. Neaves*, 912 F.2d 1062 (9th Cir. 1990), *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257 (9th Cir. 1989)

[90]*YAHOO INC. v. LA LIGUE CONTRE LE RACISME*, No. 01-17424 CV-00-21275-JF at 10

Yahoo v *LICRA & UEJF*, both the French and US decisions, serve as a sad illustration of the inability of the litigation process, either in France or in the United States, to deal with the complex cultural and legal issues that arise when material posted lawfully on servers in one country violates the law when viewed by web surfers in another country.[91]

It is submitted that if the effects test is to be utilised as done in the Yahoo case globally, it would lead to the slowest ship in the convoy problem.[92]As information made available on the Internet would have to comply with the laws of the entire world, and the most restrictive law in the world – the 'slowest ship' – would thus be able to set the tone.[93]

Consequently, since effects can occur in several jurisdictions, an acceptance of the Yahoo decision would lead to uncertainty of enforcement, unpredictability of venues an entity can be hurled into court[94] and a general attack on the principle of non-intervention of another state's sovereignty.

4.0 AN ANALYSIS OF THE *EQUUSTEK SOLUTIONS INC* V *JACK & ORS*[95]DECISION

[91] Marc H. Greenberg, "A Return to Lilliput: The LICRA v. Yahoo - Case and the Regulation of Online Content in the World Market", 18 Berkeley Tech. L.J. 1191 (2003), available at: http://scholarship.law.berkeley.edu/btlj/vol18/iss4/6 (accessed May 2017)

[92]Zittrain, ' Be Careful What You Ask For: Reconciling a Global Internet and Local Law', in A. Thierer and
C.W. Crews (eds), Who Rules the Net? Internet Governance and Jurisdiction (2003), at 20

[93] Thomas Schultz, "Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface", EJIL 19 (2008), 799–839 page 15

[94] Kohl, "The Rule of Law, Jurisdiction and the Internet", 12 IJL &IT (2004) 365

[95]*Equustek Solutions Inc. v Jack*, 2014 BCSC 1063

4.1 Background

The Plaintiff, Equustek, manufactures networking devices that enable communication between complex industrial equipment from different manufacturers. The Plaintiff claimed that a former employee conspired with some individuals to manufacture a competing product with their own designs and trade secrets at the core. Furthermore, the claim of trademark infringement was levelled against the respondents for passing off the Plaintiff's logo and product name in the sale of the competing product.

Originally, the respondents conducted business in Vancouver but after losing the initial legal suit in June 2012, they now operate virtually and operate through a myriad of websites. These websites serve as an avenue for the advertisement and sale of the product and have been the subject of numerous court orders. However, the respondents still continue to create new websites and transact businesses.

The plaintiff sought an interim injunction against Google Inc. and Google Canada, a non-party respondent, from including websites owned by the respondents in the trademark suit in search results generated through Google's search engines. Additionally, the injunction sought was not to primarily apply to Google Canada's servers but Google worldwide, as evidence showed Google Inc's servers and not Google Canada's servers to be involved in the services that the plaintiff sought to cease.

4.2 Analysis of the Supreme Court of British Columbia Decision

On the issue of jurisdiction, Google submitted that the court does not have jurisdiction over either Google Inc or Google Canada as neither is present in British Columbia and because the application for an injunction does not relate to Google doing or having to refrain from doing any act within British Canada or Canada as a country.[96]

Whilst the Plaintiff submitted that the court has jurisdiction and that an injunction should be granted because Google's services are being used as tools to breach court orders.[97]

The court relied heavily on the Court Jurisdiction and Proceedings Transfer Act,[98]hereinafter CJPTA, in determining whether it had jurisdiction. The CJPTA provides for jurisdiction to be exercisable when there is "a real and substantial connection."[99] This is essentially a codification of the minimum contact test. Furthermore, section 10 of the CJPTA goes on to delimit and explain what a real and substantial connection means.

Moreover, the court concurred with Google that since the servers were not located within the forum section 10 (i) was inapplicable. However, section 10 (a) was held to be applicable. Section 10 (a) asserts that a real and substantial connection is established when an action: is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property.

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[96]*Ibid* at p. 3
[97] *Ibid*
[98] S.B.C. 2003, c.28
[99]*Ibid*, Section 3 (e)

The court found the provision to be applicable since this connecting factor establishes presumptive substantial connection and that "the plaintiffs (Equustek) seek to enjoin Google in order to enforce their proprietary rights."[100] Thus, the court disregarded the fact that majority of sales occurred outside of Canada since the application was for the protection of intellectual property rights that was protected in British Columbia.

Additionally, the court found section 10 (h), which provides that substantial connection to be satisfied when the suit "concerns a business carried on in British Columbia," to be an additional connecting factor.[101]

Thus, the subsidiary Google Canada, which markets Google Inc's services, was utilised to assert that Google Inc was a business within British Columbia and as such could not deny the court's jurisdiction.[102] In response Google cited the case of *Club Resorts Ltd v Van Breda*,[103] in submitting that the fact that a search is initiated in British Columbia does not equate to Google carrying on business in British Columbia. Furthermore, Google submitted that "some form of actual not virtual presence is required and cited LeBel J in Van Breda, who stated:

> Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active

[100] Supra, note 106 at p. 6
[101] *Ibid*
[102] *Ibid*, p.6 Para 29
[103] 2012 SCC 1, (2012) 1 S.C.R. 572

> advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction[104]

However, the court disagreed since the case at hand was distinguishable from Van Breda in the sense that it pertains to e-commerce and quoted LeBel J. to have additionally stated that: "...but the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction"

Furthermore, Google submitted to being a passive website that merely offered a platform for residents of British Columbia to search the internet. The explanation given was that the services were automatic in nature and Google was not active in the process.[105]

Nevertheless, the court disagreed and held that the websites were not passive information sites.[106]The websites were not passive since they anticipated requests and suggest potential searches. Additionally, the selling of advertisement to forum residents by Google was held to mean that Google was carrying on business in the forum. Finally, the court disagreed with Google's submission that its advertising services are separate from its search engine services since it is a veritable income source as the search services are free, the search results are intrinsically

[104]*Ibid*, Para 87
[105] Written submission of Google, Para 23
[106] Supra note 106, p. 10

tied to the adverts and the paid adverts are geared to particular users.[107]

4.3 Critique of the British Columbia Decision

In determining Jurisdiction, the court appropriately applied section 10 (a) CJPTA to hold that there was a need to protect the Intellectual Property rights of the Plaintiff protected within the forum.

However, on the application of 10(h), it must be stated that there exists the principle of separate corporate existence when activities of a parent company and its subsidiaries are to be examined. Thus, it has long been established that the activities of a subsidiary in a forum does not confer jurisdiction over the parent company.[108]Likewise, the existence of this separate corporate existence may only be pierced when the subsidiary is being utilised to perpetuate fraud or to hide away from contractual obligations.[109]

Therefore, the utilisation of Google Canada to subject the parent company, Google Inc, though appropriate based on the particular facts may be of doubtful rationale in another case. Based on the facts Google Inc could be said to have purposefully availed itself of a benefit from the forum jurisdiction through the marketing of paid advertisement services by the subsidiary Google Canada and

[107]*Ibid*, pp. 11-12

[108] *Cannon Mfg Co v Cudahy Packing Co.* (1925) 69 L.Ed. Adv. Ops 308, 45 Sup. Ct. Rep. 250; See 20 Illinois Law Review, 281 Henry W. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 Cal. L. Rev. 12 (1925)

[109]*Adams v Cape Industries*, 2010 UKHL (check citation)

the consummation of the contract between individuals of the forum and Google Inc.

Had the contracts been concluded between Google Canada and purchasers of the advertisement slots, the argument of separate existence should be appropriate.

Lastly, on the holding of the court that the business of paid advertisement and that of operating a search engine is intrinsically tied together, it is submitted that this is a concise holding especially when regard is given to the European Court of Justices holding in another case involving Google, *Google Spain SL & Google Inc* v *Agencia Espanola de Proteccion de Datos (AEDP) & Mario Costeja Gonzalez*.[110] The ECHJ stated:

> the activities of the operator of the search engine [Google] and those of its establishment situated in the Member State [Google Spain] concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.[111]

This conclusion is appropriate when consideration is given to the practice of tailored adverts been sent to users, the fact that the rate of users and success of the search engine dictates the cost of advert slots and adverts are linked to the searches.

4.4 Subsequent Appeals by Google

In 2015, the appeal by Google was heard in *Equustek Solutions Inc.* v. *Google Inc.*[112]

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[110] C-131/12
[111] *Ibid*, Para 56
[111] *Ibid*, Para 56
[112] 2015 BCCA 265

The Court of Appeal for British Columbia affirmed the decision by the Supreme Court of British Columbia and added its own reasons.

In upholding the ruling that Google does undertake business within the forum, the court upheld the targeted advertisement argument of the lower court and included the fact that Google gathers user information through "Googlebot" within the forum.[113]

Likewise, the Court of Appeal held that the business of being a search engine provider is tied to the advertisement and data gathering aspect of the business.[114]

Finally, the court did not agree with Google's submission that the lower court's ruling would lead to floodgate litigation. Firstly, this threat arises as a result of the nature of Googles business and not a fault in the law and that courts in exercising power of subjecting Google, must consider many factors aside that of territorial competence.[115]

Still dissatisfied with these rulings Google appealed to the Canadian Supreme Court, who on February 18, 2016 granted leave to appeal[116] and on June 28, 2017 affirmed the lower court's decision. For the purpose of the appeal, Google did not contest the issue of personal jurisdiction but its equitableness in light of the requirements of the principles of comity.

4.5 Conclusion

[113] *Ibid* p. 21, Para 54
[114] *Ibid*, p. 21, Para 55
[115] *Ibid*, Para 56
[116] *Google Inc. v. Equustek Solutions Inc.*, et al., 2016 CanLII 7602 (SCC)

In summary, though not referred to in clear cut terms, the courts have employed various means of determining jurisdiction over online entities to hold Google liable to jurisdiction. This was made all the more possible by virtue of the local CJPTA statute.

Therefore, it is expected that the Supreme Court of Canada would uphold the rulings of the lower court.