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## A STUDY OF THE ISSUE OF JURISDICTION IN THE REALM OF CYBERSPACE

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### ABSTRACT

The term 'jurisdiction' refers to the authority granted to a court within a legal system to hear and resolve a case. The judicial system functions through entities known as 'courts,' and the foundational aspect of this operation is 'jurisdiction,' which legitimizes the court's decision as a valid 'judgment' to be executed in accordance with legal principles. Traditionally, the inquiry into jurisdiction requires a court to determine whether it possesses the necessary territorial, financial, or subject matter authority to address the case presented. However, the advent of the internet complicates the issue of 'territorial' jurisdiction, primarily because the internet transcends geographical boundaries. Consequently, there are no distinct borders within a nation, nor are there clear separations between different countries. The physical computer, which serves as a repository for information, has evolved into 'cyberspace,' where data is stored and exchanged via the 'web.' This raises the question: where exactly is the 'location' where this information resides?

**Keywords:** jurisdiction, cyberspace, data, web, computer

## **RESEARCH METHODOLOGY**

This project is a purely doctrinal project, that has used only secondary sources of information (more specifically reports for the most part, with the rare exception of some articles on the internet). Most of the secondary sources cited by me have been mentioned in the “Review of Literature”.

## **REVIEW OF LITERATURE**

### **1. Duggal Pavan, Cyberlaw: The Indian Perspective (Saakshar Law Publications, 2002):**

This extensive publication offers a thorough commentary on all aspects of India's inaugural Cyberlaw, The Information Technology Act, 2000. It also provides insightful commentary on the amended sections of four distinct laws that have been revised by the IT Act, 2000, including The Indian Penal Code, 1860, The Indian Evidence Act, 1872, The Bankers' Books Evidence Act, 1891, and The Reserve Bank of India Act, 1934. Furthermore, the book presents a current overview of the evolution of Cyberlaw trends in India, an analysis of various registered cybercrime cases, and pertinent judicial decisions.

### **2. Singh Yatindra, Cyber Laws: A Guide To Cyber Laws, Information Technology And Computer Software (Universal Law Publishing Co. Pvt. Ltd., 2011):**

The publication serves as an extensive resource addressing the myriad legal challenges that have emerged due to the extraordinary expansion of the internet. It encompasses both theoretical and practical insights related to technology-driven matters, along with the foundational legal principles applicable in these contexts. The first section of the book comprises 146 pages of detailed commentary, while the second section includes pertinent Acts, regulations, notifications, circulars, and more, spanning 276 pages. This work offers a comprehensive overview of the cyber law landscape in India. The content is thoroughly researched and articulated across thirteen succinct chapters.

### **3. Drucker Susan & Gumpert Gary, *Real Law @ Virtual Space* (Hampton Press, 1999):**

Lawmakers, service providers, consumers, and the judiciary are contending with the implications of liability and free expression arising from advancements in technology. The evolution of "cyberlaw" is taking shape through litigation and legislative efforts. Communication technologies are posing challenges to existing frameworks concerning speech, copyright, intellectual property, obscenity, sexual harassment, and jurisdictional matters. This edited collection examines current legal frameworks and investigates the issues that will necessitate legislative and judicial scrutiny as the law evolves, particularly in relation to communicative rights and responsibilities within the mediated environment of cyberspace.

### **QUESTIONS OF RESEARCH**

- 1) What are the perspectives from which we can view the matter of jurisdiction in the cyberspace?
- 2) What are the different tests used in America to ascertain jurisdiction in the vast cyberspace?
- 3) What is the Indian perspective on the issue of jurisdiction in the cyberspace?

### **OBJECTIVES OF THE RESEARCH PAPER**

- 1) To understand the perspectives from which we can view the matter of jurisdiction in the cyberspace.
- 2) To understand the different tests used in America to ascertain jurisdiction in the vast cyberspace, and to trace their evolution.
- 3) To understand the Indian perspective on the issue of jurisdiction in the cyberspace.

### **STATEMENT OF PROBLEM**

One of the most pressing and surmounting issues that legal professionals face today, is determining where jurisdiction lies in the cyberspace, which is increasingly turning into a tangled and un-navigable labyrinth. Ascertaining jurisdiction however, is easier said than done. There exist different perspectives through which one can view the issue of jurisdiction. There

also exist myriad tests to ascertain jurisdiction. These tests however have seldom been implemented in India.

## **HYPOTHESIS**

‘Prescriptive Jurisdiction’ and ‘Enforcement Jurisdiction’ are two of the most common points of view from which the issue of jurisdiction in the cyberspace can be examined. The minimum contacts Test, the purposeful availment test, the Zippo sliding scale test, and the effects test are all very effective tests, using which one can conveniently ascertain where the jurisdiction lies in the cyberspace.

## **INTRODUCTION**

It is a generally accepted fact that the matter of jurisdiction must be examined from one of two distinct viewpoints. These viewpoints are as follows:

- i. Prescriptive Jurisdiction:** This refers to a state's authority to establish its own laws concerning any issues it deems necessary. Generally, a State's prescriptive jurisdiction is boundless, allowing it to legislate on any matter regardless of its location or the nationality of the individuals involved.
- ii. Enforcement Jurisdiction:** This refers to the capacity of a State to enforce its laws is inherently reliant on the existence of prescriptive jurisdiction.

Nevertheless, the principle of sovereign equality among States dictates that one State cannot exercise its enforcement jurisdiction over individuals or events located within the territory of another State, regardless of the extent of its prescriptive jurisdiction. Thus, a State's enforcement jurisdiction within its own borders is typically absolute concerning all matters and individuals present there. Intellectual Property (IP) rights are subject to clear geographical limitations. When a trademark, patent, or copyright is registered, it serves to prevent others from infringing upon those rights within the jurisdiction of the registering State. This protection extends to individuals outside the State, prohibiting them from infringing those rights within the State's territory. The statutory framework, as upheld by the courts within that territory, recognizes and enforces this system. In addition to infringement cases, courts have also sought to safeguard trademarks and trade names of users within the territory in passing off actions,

thereby excluding those who attempt to misrepresent their goods as those of the rights holder.

In instances where goods are tangible and exchanged within a specific territory, the enforcement of relevant laws typically presents minimal challenges. However, an individual holding intellectual property rights that are protected in one jurisdiction may find it difficult to enforce those rights in a foreign jurisdiction where the infringer operates, particularly if the local laws do not recognize the activity as an infringement. This situation becomes even more complex in the realm of online transactions, especially when the products or services exist in a virtual format rather than a physical one. In a borderless digital environment, the transfer of products and services across international boundaries occurs almost instantaneously, exacerbating the issue.

For instance, consider a copyrighted song in MP3 format: the process may begin with the song being uploaded in one location, stored on a server in another, marketed on a website in a third country, purchased through a click-and-pay service in yet another territory, and ultimately downloaded in a different location. This entire transaction could constitute the sale of a pirated product, which inherently infringes upon the copyright of the song. The question then arises: do the courts in each of these jurisdictions possess the authority to address the dispute?

The concept of jurisdiction is fundamentally based on territoriality, both from the perspective of the court that can legitimately assert jurisdiction and from the standpoint of the applicable law in resolving disputes. It is important to note that the principles relevant to international transactions conducted via the internet may also be applicable to domestic transactions. The legal framework developed in the United States has had to address both international internet transactions and those occurring between states. Enforcement challenges are undoubtedly more intricate in the context of international dealings. Nevertheless, the principles employed by courts to establish or deny jurisdiction in both scenarios have remained largely consistent. In the case of *Banyan Tree Holding*<sup>1</sup>, the Delhi High Court addressed an inter-state jurisdictional issue rather than an international one. Notably, the plaintiff was a foreign entity that sought the jurisdiction of an Indian court to obtain an injunction against an alleged trademark infringement. The court predominantly adhered to the evolution of common law in the United States, the United Kingdom, and several other Commonwealth nations. India has yet to develop

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<sup>1</sup> *Banyan Tree Holding (P) Limited vs A. Murali Krishna Reddy & Anr.* CS (OS) No.894/2008

its own indigenous legal framework in this regard.

The challenges faced by nations in effectively regulating internet transactions that either originate or conclude within their borders arise from the inherent nature of the technology involved. While countries can attempt to enforce their laws within their defined physical, geographical, and political boundaries, the borderless nature of cyberspace, governed by rapidly evolving technology, presents numerous obstacles. Even the assumption that one can pinpoint the physical location of the computer initiating a transaction and the one receiving it can be circumvented or obscured by technological means.

The applicable law in this context is grounded in the principle of 'sovereign equality within international law.' In traditional dispute resolution between two nations, public international law is typically employed. However, when disputes arise between entities or individuals from different countries, private international law is utilized to seek resolution. In the realm of intellectual property rights (IPR) violations and cross-border infringements, a universal legal framework has yet to be established. The TRIPS Agreement does not serve as a comprehensive law in this domain, necessitating reliance on private international law.

In situations characterized by regulatory diversity and complex geographical facts, domestic courts are required to apply the law of a single state, disregarding the claims of other states that may assert jurisdiction based on the occurrence of some part of the disputed activity within their borders. By selecting the law of one state to govern the transaction or dispute, domestic courts effectively treat the activity as having transpired within that jurisdiction. This approach aligns with the foundational principle of sovereign equality within international law, which dictates that a state's authority to legislate or enforce laws is confined to its territorial limits. Jurisdictional questions frequently arise in disputes involving online activities, as the inherent lack of territorial clarity in the digital realm contributes to complex geographical scenarios.

Consequently, domestic courts must first establish the localization of the transaction before asserting jurisdiction. A critical consideration is whether these courts will create localization processes that inadvertently affect the international trade framework, particularly concerning the distribution of benefits and responsibilities under the TRIPS Agreement. The necessity for local courts to 'localize' transactions presents a significant challenge.

## TRACING THE EVOLUTION OF AMERICAN TESTS TO DETERMINE JURISDICTION IN THE CYBERSPACE

This section will examine the progression of legal standards in the United States, focusing on the 'minimum contacts' test, the 'purposeful availment' test, the Zippo 'sliding scale' test, and the 'effects' tests.

### i. Minimum Contacts Test:

In the United States, states assert jurisdiction over non-residents through their long-arm statutes, which must align with constitutional due process requirements. To establish personal jurisdiction over a defendant, a U.S. court engages in a two-part analysis. Initially, the court assesses the applicable state long-arm statute to determine if it allows for the exercise of personal jurisdiction. Subsequently, the court evaluates the principles outlined in the Due Process Clause of the U.S. Constitution. The establishment of personal jurisdiction under the Due Process Clause is contingent upon "the relationship among the defendant, the forum, and the litigation," as articulated in *Shaffer v. Heitner*<sup>2</sup>. Notably, physical presence in the forum is not a prerequisite for asserting personal jurisdiction over a non-resident defendant, as established in *Burger King Corp v. Rudzewicz*<sup>3</sup>.

The plaintiff is required to demonstrate that the defendant has intentionally directed its activities toward the residents of the forum state or has otherwise "purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws," as established in *Hanson v. Denckla*<sup>4</sup>. When a plaintiff's claim is connected to or arises from the defendant's interactions with the forum, the court is said to exercise "specific jurisdiction." For specific jurisdiction to be appropriately exercised under the Due Process Clause, the plaintiff must meet a two-part criterion.

Firstly, the plaintiff must establish that the defendant has sufficient "minimum contacts" with the forum in a constitutional sense. To satisfy the "minimum

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<sup>2</sup> 433 US 186 (1977)

<sup>3</sup> 471 U.S. 462

<sup>4</sup> 1958 U.S. 752

contacts" requirement, the plaintiff's claim must either arise from or be a result of the out-of-state defendant's contacts with the forum, or the defendant must have intentionally directed its activities concerning the plaintiff's claim toward the forum or otherwise availed itself of the privilege of conducting activities there. Secondly, for the court to exercise jurisdiction, it must determine, at its discretion, that doing so aligns with "traditional notions of fair play and substantial justice," as articulated in *International Shoe Co. v. Washington*<sup>5</sup>. This case has been recognized as serving "two related, but distinguishable, functions." The first function is to protect the defendant from the burden of litigating in a distant or inconvenient forum. The second function is to ensure that states do not "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."

Nevertheless, the traditional minimum contacts framework is confined to the category of cases most directly addressed by *International Shoe*, specifically long-range commercial transactions. It is not applicable to cases involving remote torts or goods that were transferred after purchase, nor to cases concerning internet defamation and other non-commercial transactions.

**ii. Purposeful Availment Test:**

The concept of purposeful conduct by the defendant was highlighted by the US Supreme Court in the case of *Hanson v. Denckla*. In this instance, a Florida court claimed jurisdiction over a Delaware trust company in a dispute regarding the appointment of property by a Florida resident, for which the Delaware company served as trustee. The settlor had relocated from Pennsylvania to Florida after the trust was established. However, the trust company had not engaged in any business activities in Florida, apart from routine correspondence with the settlor. The Supreme Court determined that the Florida court lacked jurisdiction, concluding that the trust company had not purposefully engaged in business within Florida, as its connection to the state was solely due to the settlor's unilateral move after the contractual relationship was formed.

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<sup>5</sup> 326 U.S. 310

In the case of *Burger King Corp v. Rudzewicz*, the Supreme Court ruled that physical presence within the jurisdiction of the forum court was not a prerequisite for establishing jurisdiction over a non-resident defendant. The court may exercise jurisdiction if the alleged injury is connected to actions by the defendant that are purposefully directed at residents of the forum state. The Court clarified that 'purposeful availment' cannot arise from random or fortuitous contacts made by the defendant within the forum state. The plaintiff must demonstrate that such contacts stemmed from the defendant's own actions that established a substantial connection with the forum state.

The defendant must have engaged in significant activities within the forum state or established continuing obligations with its residents. The Court noted that the two-decade relationship between the defendant and the plaintiff underscored the defendant's intentional affiliation with the forum state and the reasonable foreseeability of litigation occurring there.

In the case of *Cybersell, Inc. v. Cybersell, Inc.*<sup>6</sup>, the situation involved an Arizona corporation that marketed commercial services online under the service mark 'Cybersell.' This corporation initiated an infringement lawsuit against a Florida corporation that provided web page development services via the internet. As part of its promotional strategy, the Florida corporation designed a web page featuring a logo that read 'CyberSell' above an image of the Earth, accompanied by the tagline 'Professional Services for the World Wide Web,' a local telephone number, and a hypertext link that allowed internet users to introduce themselves. This link encouraged companies not currently online but interested in establishing a web presence to contact the Florida corporation via email for additional information. Arizona's long-arm statute enabled the court to assert personal jurisdiction over parties regardless of their location, to the fullest extent allowed under U.S. law.

The Court of Appeals determined that the actions of Cybersell FL (the Florida corporation) amounted to merely posting a largely passive homepage on the internet, utilizing the name 'CyberSell,' which Cybersell AZ (the Arizona corporation) was in the process of registering as a federal service mark. While it

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<sup>6</sup> 130 F.3d 414 (1997)

was evident that individuals from any location could access the homepage and learn about the services provided, the court found insufficient evidence to conclude that Cybersell FL had intentionally targeted its marketing efforts toward residents of Arizona.

Additionally, it was noted that the interactivity of the web page was restricted to collecting the browser's name and address, with no option for signing up for services, and no Arizona resident had engaged in such a sign-up. Furthermore, there were no financial transactions conducted over the internet involving Arizona. Consequently, the court ruled that the contacts established by Cybersell FL did not meet the criteria for 'purposeful availment.

### iii. The Zippo 'Sliding Scale' Test:

In the case of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*<sup>7</sup>, an attempt was made to expand the purposeful availment test. The plaintiff, Zippo Manufacturing, was a corporation based in Pennsylvania that produced cigarette lighters. The defendant, a California corporation, operated an internet website and news service, with its offices located solely in California. Individuals residing in other states were required to visit the website to subscribe to the defendant's news service by completing an online application. Payments were processed via credit card either online or over the phone. Approximately 3,000 subscribers of the defendant were residents of Pennsylvania, having contracted for the service by accessing the website and submitting the online application. Furthermore, the defendant had established agreements with seven internet service providers in Pennsylvania, allowing their subscribers to access the defendant's news service. The defendant faced a lawsuit in a Pennsylvania court for trademark dilution, infringement, and false designation. After reviewing the evolution of relevant legal principles, the District Court noted that the constitutional constraints on personal jurisdiction vary based on whether a court is asserting general or specific jurisdiction over a non-resident defendant. General jurisdiction allows a court to exercise personal jurisdiction over a non-resident defendant for activities unrelated to the forum when the defendant has engaged in 'systematic and continuous' activities within the forum

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<sup>7</sup> 952 F. Supp. 1119 (W.D. Pa. 1997)

state. In the absence of general jurisdiction, specific jurisdiction enables a court to assert personal jurisdiction over a non-resident defendant for activities related to the forum, provided that the relationship between the defendant and the forum meets the 'minimum contacts' standard established in *International Shoe Co. v. Washington* and subsequent cases.

The Zippo court observed that a three-part test has developed to assess the appropriateness of exercising specific personal jurisdiction over a non-resident defendant. This test requires that: (1) the defendant must establish sufficient 'minimum contacts' with the forum state, (2) the claim against the defendant must arise from those contacts, and (3) the exercise of jurisdiction must be deemed reasonable. In its analysis, the Zippo court categorized websites into three types: (i) passive, (ii) interactive, and (iii) integral to the defendant's business. The court determined that the defendant's website fell into the interactive category. As a result, it was concluded that the court possessed jurisdiction to adjudicate the case. The court's assertion that the constitutionality of personal jurisdiction is directly related to the nature and quality of the commercial activities conducted online has been likened to a 'sliding scale.'

According to the court's explanation, at one end of the spectrum are cases where a defendant actively engages in business via the Internet. If a defendant enters into contracts with residents of a foreign jurisdiction that involve the intentional and repeated transmission of computer files online, personal jurisdiction is appropriate. Conversely, at the other end are instances where a defendant merely posts information on a website accessible to users in foreign jurisdictions. A passive website that primarily provides information to interested parties does not justify the exercise of personal jurisdiction. The intermediate category consists of interactive websites that allow users to exchange information with the host. In these scenarios, the determination of jurisdiction hinges on the degree of interactivity and the commercial nature of the information exchange occurring on the website. The Zippo decision has been embraced by courts as it strikes a balance between an unregulated internet and one that is overly controlled. An owner of a passive website cannot reasonably be expected to anticipate legal action in multiple jurisdictions globally; however, an owner of an interactive website should be

prepared for such possibilities.

Furthermore, it implicitly endorses the safeguarding of local consumers' interests through local courts applying relevant local laws. Nonetheless, challenges have emerged in the application of the Zippo sliding scale test, which assesses a court's jurisdiction based on the "level of interactivity and commercial nature of the exchange of information" facilitated by the website. Courts have encountered difficulties in establishing the necessary degree of interactivity that would warrant jurisdiction. The mere capability to exchange files with users online has been deemed insufficiently "interactive" for a forum court to claim jurisdiction. In the case of *Millennium Enterprises Inc. v. Millennium Music L.P.*<sup>8</sup>, the Oregon district court opted not to assert jurisdiction over a South Carolina corporation that marketed products both offline and online. The court determined that more than just demonstrating the interactivity of the website was necessary. It required evidence that the defendant had engaged in transactions within Oregon and had established "deliberate and repeated contacts" with the state through the website, thereby indicating that they should have anticipated being summoned to an Oregon court.

**iv. The “Effects Test” and Intentional Targeting:**

The challenges associated with the implementation of the Zippo sliding scale test have led to the adoption of the 'effects' test. Consequently, courts have transitioned from a 'subjective territoriality' approach to an 'objective territoriality' or 'effects' test, whereby jurisdiction is established if it can be demonstrated that the defendant's website has tangible effects within the forum state. This implies that there must be some form of harm or injury inflicted upon the plaintiff within the jurisdiction of the forum state. Given the inherent nature of the internet, which allows for effects to be experienced across multiple jurisdictions, courts have embraced a more stringent interpretation of the 'effects' test, known as 'intentional targeting.' The 'effects' test was initially articulated in the case of *Calder v. Jones*<sup>9</sup>.

In this particular case, residents of Florida, who had minimal physical connections

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<sup>8</sup> 33 F. Supp.2d 907 (D. Or. 1999)

<sup>9</sup> 465 U.S. 783

to California, authored and edited a defamatory article in the *National Enquirer* about Jones, a prominent actress residing in California. The publication had a larger circulation in California than in any other state, and the content of the article was derived from sources within California. The Supreme Court, in a succinct opinion, affirmed jurisdiction, asserting that California was “the focal point both of the story and the harm suffered.” In reaching this conclusion, the Court sought to differentiate this case from a prior ruling that indicated that mere “foreseeability” of an impact in the forum does not suffice for establishing specific personal jurisdiction. The Court determined that the facts at hand exceeded mere foreseeability; the allegedly defamatory articles were disseminated in a manner that clearly indicated the defendants’ actions were “aimed at California.” The defendants were aware that their article would likely have a “potentially devastating impact” on the California plaintiff and that “the brunt of that injury” would be experienced by her in California, thus they could reasonably anticipate being subject to litigation in that state.

The opinion rendered by Justice Rehnquist in *Calder* is characterized by its brevity, necessitating a closer examination of the Court's reasoning and conclusions. Initially, the case centered on defamation, which fundamentally concerns the harm inflicted on an individual's reputation within the community. Consequently, the concept of "community" plays a crucial role in the definition of the tort. Furthermore, given that California is one of the jurisdictions mandating malice as a requisite element of libel in cases involving public figures, such as television actress Jones, the defendants in *Calder* were charged with acting "maliciously and with intent to injure, defame and disgrace" Jones, thereby causing her "to suffer humiliation and emotional and physical distress." Additionally, California law generally holds that any individual who plays a significant role in a defamatory publication bears liability. Moreover, Justice Rehnquist emphasized a detail overlooked by the California court: the *National Enquirer's* largest circulation was in California, where it sold 600,000 copies—double that of the next highest state. Lastly, defendant *Calder* not only edited the article prior to its publication but also declined to issue a retraction afterward. This distinctive combination of legal principles and factual circumstances led to a logical outcome.

It is also pertinent to mention that in establishing jurisdiction at the state level, the California Court of Appeal was required to differentiate this case from a previous ruling by the California Supreme Court, which determined that merely causing an effect in California does not suffice for jurisdiction. The court noted that the earlier case pertained to a contract dispute and did not involve an "intent to cause a tortious effect within the state." Consequently, it was determined that the author and editor had "expressly aimed" their tortious conduct at California, fully aware that the article would significantly affect the respondent, and they should have reasonably anticipated that the primary impact of that injury would be felt by the defendant in her home state.

### **The "Effects Test" as applied in the Yahoo! Case:**

The effects test established in *Calder* has yielded varied outcomes when applied. A notable case in which the effects doctrine was utilized is the Yahoo! case, adjudicated by a French court. In this instance, a French individual encountered Nazi memorabilia for sale on a webpage hosted by Yahoo! while browsing online. The sale of such memorabilia contravened French penal law. Although Yahoo! France did not host a similar page, the content was accessible on the US-hosted Yahoo! site to users in France. Consequently, LICRA, an organization dedicated to combating racism and anti-Semitism, along with the Union of Jewish Students in France (UJEF), initiated legal action against Yahoo! and Yahoo! France in French courts. The court mandated Yahoo! to restrict access to its US website from France to prevent local users from viewing the objectionable auction items.

It determined that this restriction was technologically feasible, having consulted various experts. The court dismissed Yahoo!'s claim that the order could not be enforced beyond French borders. By applying the effects test, the French court asserted its jurisdiction, concluding that Yahoo! had committed a wrongful act within France by allowing its users to engage in the sale of such items. Despite the website's global accessibility, the court found that it had inflicted harm on the two plaintiffs residing in France. The mere potential for users to download the objectionable content was not the sole factor in determining jurisdiction. The court also evaluated the broader impact on the French public, who could access Yahoo!'s

site and were specifically targeted. Ultimately, the court noted that Yahoo! displayed advertisements in French to visitors accessing the US-based server. France established a connection to the US-based Yahoo! server, indicating that Yahoo! aimed for its services to be accessible to individuals in France and sought to benefit financially from the traffic generated by visitors from France to its US website.

## ANALYSING THE INDIAN POSITION ON JURISDICTION IN THE CYBERSPACE

*Casio India Co. Limited v. Ashita Tele Systems Pvt. Ltd.*<sup>10</sup> involved a passing off claim in which the defendant operated a business in Bombay. The defendant successfully registered the domain name *www.casioindia.com*, with defendant no. 2 serving as the Registrar for this domain. The plaintiff asserted that it was a wholly-owned subsidiary of Casio Computer Ltd., Japan (Casio Japan), which holds the registered trademark 'Casio' in India, applicable to a wide range of electronic and other products. The plaintiff had also registered several domain names in India, including 'CasioIndiaCompany.com', 'CasioIndia.org', and 'CasioIndia.net'. Defendant No. 1 acquired these domain names while under a distributorship agreement with the plaintiff.

The learned single Judge, referencing the rulings in *Rediff Communication Ltd. v. Cyber Booth and Dow Jones & Co. Inc. v. Gutnick*<sup>11</sup>, concluded that "once access to the impugned domain name website could be had from anywhere else, the jurisdiction in such matters cannot be confined to the territorial limits of the residence of the defendant." The Judge further noted that a mere possibility of deception, where an average person might be misled or confused, was adequate to support a passing off action, and it was unnecessary to demonstrate that "any actual deception took place in Delhi." Thus, the accessibility of Defendant No. 1's website from Delhi was sufficient to establish the territorial jurisdiction of the Court.

Both *Casio and India TV Independent News Service Pvt. Limited v. India Broadcast Live Llc & Ors.* were rulings made by single judges that necessitated a thorough reconciliation. This opportunity arose in the case of *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy*. In this instance, the plaintiff was a Singapore-based company asserting its affiliation with a

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<sup>10</sup> 2003 (3) RAJ 506

<sup>11</sup> 1999 (2) BOM LR 860

group engaged in the hospitality sector. The plaintiff claimed to have utilized the word mark 'Banyan Tree' and the banyan tree device since 1994. Furthermore, it had maintained the websites 'www.banyantree.com' and 'www.banyantreespa.com' since 1996, both of which were accessible in India. The plaintiff's applications for the registration of the mark and the device were still pending.

In October 2007, the plaintiff discovered that the defendants, based in Hyderabad, Andhra Pradesh, had commenced a project named 'Banyan Tree Retreat,' which the plaintiff contended was deceptively similar to its own branding. The plaintiff invoked the jurisdiction of the Delhi High Court, arguing that the defendants' website 'www.makprojects.com/banyantree,' which promoted their products and services, was accessible in Delhi. The presence of the confusingly similar mark and device was likely to create significant confusion and deception among the public, leading to the passing off of the defendants' services as those of the plaintiff. Consequently, an injunction was sought. The Division Bench of the Delhi High Court, while addressing the referral order from the learned Single Judge, upheld the ruling in *India TV* and overturned the decision in *Casio*. The case was then remanded to the single judge for a determination on the preliminary issue of jurisdiction.

The responses provided by the Division Bench in *Banyan Tree* regarding the legal questions presented were as follows:

**Question (i):** In the context of a passing off or infringement action where the plaintiff does not conduct business within the jurisdiction of a court, under what conditions can it be asserted that the operation of a universally accessible website by the defendants grants jurisdiction to the court where the lawsuit is filed (referred to as 'the forum court')?

**Answer:** In a passing off or infringement action where the plaintiff is not engaged in business within the jurisdiction of a court and in the absence of a long-arm statute, to establish that the forum court possesses the authority to hear the case, the plaintiff must demonstrate that the defendant has 'purposefully availed' itself of the forum court's jurisdiction. This requires a prima facie showing that the defendant's activities through the website were intended to facilitate a commercial transaction with users of the site, and that the defendant's specific targeting of the forum state resulted in injury or harm to the plaintiff within that jurisdiction.

**Question (ii):** In a passing off or infringement case where the defendant is being sued based on the accessibility of its website in the forum state, what is the extent of the plaintiff's burden to prima facie demonstrate that the forum court has the jurisdiction to hear the case?

**Answer:** In accordance with Section 20(c) of the CPC, to establish that a portion of the cause of action has occurred within the forum state due to the defendant's internet activities, the plaintiff must demonstrate prima facie that the website in question, whether referred to as 'passive plus' or 'interactive', was deliberately aimed at consumers in the forum state for the purpose of commercial transactions. The plaintiff is required to articulate this claim and provide evidence to prima facie indicate that a commercial transaction was conducted by the defendant with a user of the website located in the forum state, which resulted in injury or harm to the plaintiff within that jurisdiction. It was determined that the mere existence of an interactive website does not suffice to render the defendant subject to the jurisdiction of the forum court. By applying the principle of intentional targeting, it was concluded that the plaintiff must demonstrate the defendant's intention to engage in a commercial transaction with the user of the website.

*Banyan Tree* addressed the matter of trap orders, specifically examining whether a single trap transaction could demonstrate that the defendant had intentionally engaged with the jurisdiction of the forum court. The ruling established that a solitary trap transaction does not constitute adequate evidence to prove that any part of the cause of action occurred within the court's jurisdiction. The plaintiff must demonstrate that the defendant has intentionally availed themselves of the forum court's jurisdiction by engaging in a legitimate commercial transaction with an internet user situated within that jurisdiction. A single trap transaction cannot fulfil this requirement, as it does not reflect 'purposeful' availment by the defendant. Instead, there must be a genuine commercial transaction between the defendant and another party, rather than one orchestrated by the plaintiff. If the evidence consists solely of a series of trap transactions, it is essential that these transactions be shown to have been obtained through legitimate means. The plaintiff aiming to establish jurisdiction based on such trap transactions must clearly assert this in the complaint and provide supporting documentation that prima facie demonstrates that the relied-upon trap transactions meet the aforementioned criteria.

The Karnataka High Court later referenced the *Banyan Tree* case in *Presteege Developers v.*

*Prestige Estates Projects Pvt. Ltd.*<sup>12</sup>, which involved a passing off action brought by Prestige Estates against Presteege Property Developers. The Single Judge noted that the defendant's construction activities were solely based in Kerala. It was further noted that, although online booking was available, the actual sales would not occur in Bangalore, which meant that this did not contribute to the cause of action for passing off. Even if the defendants were to misrepresent their property by leveraging the plaintiff's reputation, such actions would only transpire in Kerala. In a similar vein, the other defendant's service activities were found to be exclusively in Tamil Nadu. The court determined that to establish the level of activity engaged in by the defendants through their website, it was necessary to demonstrate the completion of a commercial transaction. Since the plaintiff failed to meet this requirement, the learned Single Judge concluded that the court in Bangalore lacked jurisdiction.

The current legal framework in India can be succinctly outlined. A plaintiff who does not benefit from the limited long arm provisions of either Section 134 of the Trade Marks Act, 1999, or Section 62 of the Copyright Act, 1957, will face challenges in convincing a court to assert jurisdiction over a defendant operating a website that allegedly infringes the plaintiff's intellectual property rights. This is contingent upon demonstrating that the defendant specifically targeted its interactive website at users within the forum state for commercial purposes and actually engaged in such transactions through the website. Moreover, a single transaction may not suffice to establish the defendant's 'purposeful' targeting of the forum state or their intent to reach specific customers within it. Evidence of a more consistent pattern of behaviour across multiple transactions must be presented to substantiate this claim. It can be contended that the criteria established in the *Banyan Tree* case may not adequately address issues arising in different factual scenarios or contexts, such as defamation or cyber pornography. However, since *Banyan Tree* does not encompass these situations, alternative tests will need to be formulated. Nonetheless, Indian courts must remain vigilant against excessively favouring local interests and strive for a balanced approach to find an equitable resolution in each case.

## CONCLUSION

In a situation that is equally unfamiliar to both a judge and a legislator, it is challenging to determine whether a common law or civil law approach should be prioritized. Advocating for

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the perspective of "learning through experience and time" would imply granting common law courts sufficient time to adjudicate a significant number of cases, thereby facilitating the application of their doctrine of stare decisis. However, this could jeopardize the harmonization process in the future. Conversely, endorsing a rigid set of rules that claims to be comprehensive carries the risk of undermining justice. As long as the desired harmonization remains unachieved and states do not legislate based on the aforementioned "model laws," the challenges faced by the courts will persist.

The critical question that emerges is this: in the absence of statutory and international frameworks governing cyber jurisdiction, to what extent can the application of private international law principles, as recognized across various legal systems, be deemed justified or practical? This inquiry encompasses two primary concerns: the inevitability of decisions made by municipal courts and the inadequacy of conflict rules in relation to cyberspace. It is essential to recognize that jurisdictional rules, like any other aspect of private international law, were developed to address the specific circumstances, political contexts, notions of justice, and intended social order of their time. No legal principle can remain universally applicable across different eras, even under similar conditions; thus, changes in time and context necessitate the adaptation or, in some instances, the replacement of outdated rules with new ones. Consequently, when any of the factors that influenced the creation of a rule undergoes transformation, the legal response must also evolve accordingly. The primary challenge lies in the attempt to apply existing private international law rules, which were designed for a "traditional politically divided real world," to this "new virtual world." The contemporary landscape is largely devoid of the elements that prompted the development of conflict rules. Therefore, the most viable solution appears to be the establishment of new rules that address the unique challenges posed by this modern environment that courts face today. In this context, a tailored approach may need to be developed, specific to each legal system and aligned with its constitutional framework and principles of fairness and justice, to assert jurisdiction over non-resident online users. Expecting or demanding that a municipal court adhere to an international jurisdictional norm while completely overlooking its own constitutional principles is undoubtedly imprudent.

It is clear that law, as a social science, cannot evolve as rapidly as the fields of science and technology. However, it is essential to strive for alignment with their advancements. This alignment can only be achieved if the law adapts in response to new scientific and technological

developments, advancing both on a specific, case-by-case basis and at a broader, overarching level. A singular model solution is insufficient to effectively tackle the issue at hand. The challenge of cyber jurisdiction requires a balanced input from all existing models, which must work together to enhance and support one another.

It is essential to recognize that prior to the adoption of any specific model or a combination of various models, the permanence of the internet and its capacity to enable and perpetrate illegal activities, along with the ensuing legal disputes, must be acknowledged. Consequently, it is imperative for each state to engage in all efforts aimed at harmonizing jurisdictional rules and to incorporate these rules into their domestic legislation, even in the absence of international consensus. This approach will guarantee that both parties involved in cyber litigation encounter a predictable legal forum, with defined legal repercussions, allowing them to make informed decisions based on prior knowledge.

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