Following the Right Lead: Gutnick and the Dance of Internet Jurisdiction

Mary Paterson

Jurisdiction and the Internet

As improving methods of travel and communication facilitated the shift from an agrarian to an industrial society, the common law courts increasingly faced interjurisdictional disputes. Although British paternalism dominated early cases in which courts assumed jurisdiction over people, property, and actions in distant lands, these cases and the imperial attitudes informing them were slowly replaced by more modest jurisdictional assertions based on a sense of comity.[1] The shift from an industrial society to an information-based society and the simultaneous growth of a global infrastructure based on satellite, telephone, cable, and cellular technologies have stretched jurisdictional doctrines in new ways, calling into question traditional methods of balancing the interests of nations in protecting and regulating their citizens. For example, the Internet allows people to broadcast defamatory statements to an international audience without setting a physical or, as some would argue, an electronic foot outside of their home forum. In such a situation, is it just for a foreign court to assume jurisdiction over the defendant who may have adhered to local law and been unaware of foreign law? On the other hand, is it just to refuse to exercise jurisdiction over a defendant who may have adhered to a local law that did not reflect the common attitude towards defamation, thereby leaving all reputations vulnerable to foreign attack? Canadian appeal courts have not yet addressed this jurisdictional question in the context of the Internet, although courts of all levels have struggled with the growth of interjurisdictional activity in contract and tort. However, as the Internet grows and its uses multiply, the courts will increasingly face the difficult jurisdictional issues raised by Internet activity. Thus, Canada must choose the approach it will apply.

The High Court of Australia addressed this choice in *Dow Jones v. Gutnick*.[2] Dow Jones published defamatory statements about Joseph Gutnick in *Barron's Online* on its subscription Web site. Gutnick brought an action against Dow Jones in Victoria, Australia, for damage to his reputation in Australia. Although Dow Jones urged the Court to adopt the single publication rule for finding jurisdiction over defamation on the Internet, a rule that exists in the United States, the Court rejected that rule, instead forging the different approach of focusing on the nature of the tort. It is this approach that Canadian courts should adopt.[3]

Current Canadian Law

One factor in choosing an approach to jurisdiction and the Internet is the existing jurisdictional law in Canada. Canadian courts have jurisdiction if the parties are served in the forum, if the parties submit to jurisdiction, or if the suit falls under a service *ex juris* rule and has a real and substantial connection with the jurisdiction. Even when the court has jurisdiction through one of these methods, the court can decline to hear the case based on the court's power to control its own process under the doctrine of *forum non conveniens*. This doctrine has been relaxed, making it easier for defendants to convince courts not to assume jurisdiction to compensate for the increasing breadth of service *ex juris* rules. The substantial connection test also restrains courts from asserting jurisdiction under service *ex juris* rules. The test derives from *De Savoye v. Morguard Investments Ltd.*,[4] in which the Supreme Court of Canada stated that provincial courts should enforce the judgments of other provincial courts where those courts assumed jurisdiction in an appropriately restrained manner consistent with order and fairness. According to the Court, order and fairness necessitated a substantial connection between the jurisdiction and some part of the suit. This requirement now extends to foreign judgments.[5]

The substantial connection test in *Morguard* does not explain what the jurisdiction must be connected with. The Supreme Court refers to the subject matter of the action, damages suffered, the defendant, and the subject matter of the suit. The Ontario Court of Appeal articulated eight factors, including the connection between the forum and the plaintiff's claim, the connection between the forum and the defendant, unfairness to the defendant, unfairness to the plaintiff, the involvement of other parties in the suit, the Court's willingness to enforce foreign judgments rendered on the same jurisdictional basis, whether the case is inter-provincial or international in nature, and global standards of comity and jurisdiction.[6] Both Courts focus on broad connections that balance parties' interests; this focus differs from the American due process approach, which constitution-

ally requires that the jurisdiction have some minimal contacts with the defendant, regardless of the other factors. Despite this difference, Canadian courts seem to look to American jurisprudence for assistance with jurisdiction over Internet activities.

The British Columbia courts are the first to have applied the substantial connection test to Internet activity. In *Braintech Inc. v. Kostiuk*,[7] the Court of Appeal addressed whether or not to enforce a Texas default judgment obtained by a British Columbia company against a British Columbia resident in a defamation suit. The defendant posted defamatory statements on an Internet bulletin board. Because the plaintiff traded its stock over the Internet, it claimed that its reputation was harmed in Texas, where people could read the comments and decline to purchase stock. The Court of Appeal refused to enforce the judgment, stating that Texas did not have a substantial connection with the suit. However, it relied heavily on American Internet cases, including *Zippo Manufacturing Company v. Zippo Dot Com Inc.*[8] In *Zippo*, the District Court of Pennsylvania stated that a court could not assert jurisdiction over a defendant where that defendant operated a passive Web site, because that defendant would not have sufficient contacts with the jurisdiction to satisfy the constitutional due process clause. The British Columbia Court of Appeal characterized the bulletin board as a passive site on which Kostiuk did not engage in commercial activity; as such, Texas did not have jurisdiction.

The adoption of the interactivity test is problematic for two reasons. First, the Canadian substantial connection test does not assess whether or not the foreign forum has assumed jurisdiction correctly under its own laws; rather, the test focuses on whether there is a substantial connection, as defined by Canadian jurisprudence, between the suit and the foreign jurisdiction. Therefore, American due process and minimal contacts cases cannot assist a Canadian court's assessment of substantial connection. Second, by relying on the interactivity test, the Court of Appeal has imported a defendant-oriented test based on the American Constitution into the Canadian context, contrary to the more balanced Canadian approach outlined above.

Some cases contradict *Braintech*'s adoption of *Zippo*; however, these cases also rely on American jurisprudence. In *Easthaven Ltd. v. Nutrisystem.com Inc.*,[9] the Ontario Superior Court of Justice specifically adopted *Panavision International v. Toeppen*,[10] a case in which the Court of Appeals for the Ninth Circuit used the effects test instead of the interactivity test. The *Easthaven* Court made the same error that was made in *Braintech*, using the American cases to refuse jurisdiction in Canada. However, in *Pro-C Ltd. v. Computer City Inc.*,[11] the Ontario Court of Appeal overturned a trial judgment relying on *Zippo* and *Braintech* in the trademark context. The Court of Appeal found that the American defendant had not used the trademark within the statutory meaning, and thus had neither infringed the mark nor caused any damage. Although the Court does not specifically reject the interactivity test, instead relying on a narrow interpretation of the *Trade-mark Act*[12] to find for the defendant, in *obiter*, the Court suggests that "it is much more sensible to apply tort principles to accommodate new technologies".[13] The Australian High Court applied precisely this approach in *Gutnick*.

Australian and American Approaches

In four concurring judgments, the Australian High Court rendered a unanimous decision that the proposed single publication rule was inappropriate, Victoria had jurisdiction over the defamation suit, and Victorian law applied to the case. Dow Jones argued that the Internet is a novel medium necessitating a new way of locating the place of the tort. The place of the tort is important in Australia, and in Canada, because service *ex juris* rules allow courts to take jurisdiction over torts committed in that jurisdiction, and because the place of the tort determines choice of law which affects a *forum non conveniens* decision. Thus, the location of the tort critically impacts whether or not the court has jurisdiction and whether or not that court will choose to exercise jurisdiction by rejecting a *forum non conveniens* argument.

Dow Jones argued that the Court should adopt the single publication rule[14] to assess the place of the tort in defamation suits. The single publication rule states that plaintiffs can bring only one claim for damage in all jurisdictions caused by defamatory statements, and that the place of publication is the place in which the material is first comprehensible. Therefore, the place of the tort in Internet defamation is the place at which the information is uploaded onto a server. If the server is the place of publication, then the law of that place governs the publication. Dow Jones argued that such a result is just, because the Internet is a passive medium such that the publisher has little control over the location of its readership, and that a single governing law leads to certainty and fairness. Under this rule, the defamatory statements in *Gutnick* were published on a New Jersey server, New Jersey law would apply, and Victoria would not have jurisdiction under the service *ex juris* rules or under a *forum non conveniens* analysis. Although the single publication rule has benefits,[15] Dow Jones conceded that where the location of the server was opportunistic, the Court could apply a different analysis to find the place of the tort.

The Court unanimously rejected this proposal. All judges except for Justice Kirby rejected the idea that the Internet is a novel medium. Justices Gleeson, McHugh, Gummow, and Hayne proceeded to reject the single publication rule because the rule was unclear, particu-

larly given the ambiguity of the exceptions for opportunistic or adventitious behaviour. Furthermore, these justices stated that the convenience of the poster of material must be balanced with the convenience of the plaintiff and the differing balances struck between free speech and protection of reputations in different nations. They stated, "Certainty does not necessarily mean singularity".[16] Finally, the Court pointed out that the development of the single publication rule from a jurisdictional doctrine to a doctrine governing choice of law occurred in the United States to satisfy the Sixth Amendment, a constitutional requirement that applied to criminal and not to civil matters. Justice Gaudron concurred with this analysis, adding the contention that the single publication rule was developed to prevent a multiplicity of suits and that estoppel doctrines were sufficient to protect parties from multiple suits. Justice Callinan concurred, stating that the adoption of the single publication rule would lead to "an American legal hegemony in relation to Internet publications",[17] because most servers are located in the United States.

Justice Kirby concurred in the result but not in the analysis. He alone concluded that the Internet was more than a mere extension of existing communications media, and that a change in the rules was required. However, he found that such a change was beyond judicial capacity. Not only did Justice Kirby rely on the long-standing history of defamation law including the multiple publication rule, but he also pointed to Australian legislation premised on the existence of the multiple publication rule. Furthermore, he stated that if a nation takes legislative initiative to deal with a problem, as Australia was doing at the time of the decision, then the judiciary does not have the capacity to remedy that same problem. Finally, Justice Kirby pointed to the flaws inherent in Dow Jones' proposed rule, including the ease of manipulation, the ambiguity of the exceptions, the difficulty that plaintiffs would have locating the server, the power imbalance in defamation actions that would accrue to the United States, and the lack of technological neutrality in the rule.

In adopting the multiple publication rule — a rule which states that every new publication of a defamatory statement, such that another reader or listener understands the statement, gives rise to a new claim — the Australian Court made an important statement about finding jurisdiction in Internet cases concerning torts and, through its lack of discussion, about the value of American jurisdictional jurisprudence. All members of the Court stated that when determining the place of the tort, courts should examine the factors in the context of the tort in question because the nature of the tort alters where that tort occurs. Therefore, in the case of defamation, the Court found that the tort arose when damage occurred or where the reputation was injured. In *Gutnick*, damage occurred in Victoria; therefore, the assertion of jurisdiction was appropriate. As both the majority and Justice Kirby pointed out, the nature of the tort reduces the number of jurisdictions in which litigants can bring a suit. For example, Gutnick could only claim damage in Victoria (the jurisdiction in which he lived), Israel (the jurisdiction in which he completed charitable works), and the United States (the jurisdiction in which he completed some business transactions). Only in these jurisdictions did Gutnick have a reputation to injure. Thus, the spectre of liability in every jurisdiction raised by Dow Jones, like most spectres, is fictitious.

Furthermore, the Court pointed out that issues of jurisdiction and choice of law must be decided separately. Although the Victorian Court might rightly assume jurisdiction over Gutnick's suit in its entirety, assuming that he claimed damage to his reputation in Israel and the United States as well, the Victorian Court could not correctly apply Victorian law to the entire suit. Rather, using the place of the tort as the place of damage to the reputation, the Victorian Court would apply Victorian, American, and Israeli law to assess the damage to Gutnick's reputation in the different nations. Thus, Gutnick would have succeeded in his Victorian claim and failed in his American claim. The inconsistent result does not point to an ineffective rule; rather it reveals a rule that is sensitive to the different values placed on free speech and protection of reputation in different countries. The inconsistent result is consistent with the principles of comity that inform jurisdictional principles in Australia and in Canada.

Not only did the Australian Court approach the jurisdictional issue through the lens of established torts, but it also failed to consider the jurisdictional tests developed in the United States. This omission, particularly given Dow Jones' discussion of the American due process guarantee[18] and the minimal contacts approach, at a minimum suggests that the Court thought the American jurisdictional approach to be irrelevant in the Australian context. Not only should Canadian courts follow the Australians in adopting a tort-based jurisdictional analysis, but they should also find the American jurisprudence to be irrelevant to Canadian law. Before such a proposition can be supported, however, I must explore the effects and the interactivity tests.

Both tests fit within the American jurisdictional framework found in the Fourteenth Amendment. Courts can assert general or specific jurisdiction under the long-arm statutes of each state. General jurisdiction exists where the defendant has continuous activities in the state, creating jurisdiction over all claims related to that defendant. This situation rarely arises in the context of the Internet. Specific jurisdiction exists where the defendant purposefully avails itself of the forum, where the claim arises as a result of the defendant's forum-related activities, and where the exercise of jurisdiction is reasonable. Many long-arm statutes allow jurisdictional assertions to the extent that the Constitution permits such an assertion. Therefore, the due process analysis is critical. In

International Shoe Co. v. Washington,[19] the United States Supreme Court established a two-part test for due process, requiring that the defendant have minimum contacts with the forum state, such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.[20] The flexibility of this standard "permits a court to respond to technical and social change and better protect the forum state's residents from novel issues that arise from new media such as the internet (*sic*)".[21] Generally, the courts assess the minimal contacts requirement through the lens of purposeful availment by the defendant. It is only at the stage of assessing reasonableness that the court considers factors such as the plaintiff's interest in obtaining convenient relief and the nation's interest in promoting a certain social policy. However, jurisdiction rarely founders on the reasonableness assessment, because modes of travel and communication, particularly within the United States, are relatively cheap and easy to access.[22] As a result, even where a plethora of factors support the assumption of jurisdiction, unlike a Canadian court, the American court will refuse such jurisdiction if the defendant does not have sufficient minimal contacts with the state.

In an attempt to analyse minimal contacts on the Internet, the District Court of Pennsylvania developed the interactivity test in *Zippo*. Under this test, the court analyses the activity level of a Web site and classifies it as a passive site, an active site, or an intermediate site. If the site is passive, such that the publisher merely places information on that site, then the foreign court cannot assert jurisdiction. If the site is active, such that the publisher solicits business from the foreign jurisdiction, enters into contracts with and delivers goods to the inhabitants of the forum, and generally conducts business there, then jurisdiction is appropriate. However, where the Web site is in between these two extremes, the court must look for "something more"[23] than just a Web site to found jurisdiction. As the Court in *Bensusan Restaurant Corp. v. King*[24] points out, this requirement for something more usually derives from the long-arm statute as well as the due process requirement.

The interactivity test, although still applied, has been severely criticized. First, "substantial technological improvements"[25] have practically eliminated the passive Web site. Therefore, the non-technology-neutral nature of the test renders it of little value in the long term. Furthermore, "passive" does not always equate to a lack of purposeful availment. In the case of defamation, a defendant could post defamatory material on a technologically passive site with the explicit intent of injuring the defamed person's reputation in a specific jurisdiction. Under the *Zippo* test, the defendant would escape liability. More problems arise in the intermediate category. The "something more" requirement simply forces courts to return to traditional cases to assess purposeful availment, rendering the *Zippo* test of little analytical value. Finally, the active Web site also fails to serve as an appropriate proxy for jurisdiction. As Michael Geist points out,

> While the active Web site may want to sell into every jurisdiction, the foreseeability of a legal action is confined primarily to those places where actual sales occur. The *Zippo* test does not distinguish between actual and potential sales.[26]

These failings in the *Zippo* test have caused some American courts and scholars to return to traditional approaches to jurisdiction.[27] One such approach is the effects test, which was first articulated by the United States Supreme Court in *Calder v. Jones*.[28] In *Calder*, the Court found that California courts could assume jurisdiction over a defamation suit, despite the fact that the defamatory newspaper was printed in Florida, because the defendant engaged in

> (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered — and which the defendant knows is likely to be suffered — in the forum state.[29]

The effects test is one example of the alternatives to the single publication rule found in the United States. However, some courts focused too heavily on the effects portion of the test, failing to strictly require the intent. Under this interpretation, the test "can be difficult to contain".[30] Such loose readings were rejected by the Ninth Circuit in *Panavision*, where the Court found jurisdiction to be proper under the effects test because the defendant, "as he knew [his conduct] likely would, had the effect of injuring Panavision in California where Panavision has its principal place of business".[31] The Ninth Circuit's use of the effects test in *Panavision* is interesting, because the same Court found the effects test to be inapplicable in *Cybersell* less than one year earlier.

In *Cybersell*, the Court considered both tests. The Court refused to apply the effects test, because the defendant in *Cybersell* did not purposefully avail itself of the forum. Instead, the Court used the interactivity test, characterized the offending Web site as a passive site, and refused jurisdiction. However, given that the effects test requires purposeful availment in the sense that actions must be intentional and expressly aimed at the forum state, the Court's finding of a lack of jurisdiction is consistent with the application of the effects test. The Court did not need to state that the effects test was inapplicable, but rather that it was not met.

The case that best reveals the confusion plaguing the effects and interactivity tests is *Revell v. Lidov*,[32] a case addressing a defamation claim. The Court of Appeals for the Fifth Circuit in December 2002 rejected the dichotomy between the effects test and interactivity test, stating, "Nor is the *Zippo* scale, as has been suggested, in tension with the 'effects' test of *Calder v. Jones* for intentional torts".[33] The Court found that both tests are facets of the purposeful availment criteria, and that most cases conclude that a Web site does not constitute purposeful availment unless it targets a particular jurisdiction or a particular person. However, the Court

admitted the possibility that a *Zippo* passive Web site could satisfy the effects test by intentionally availing itself of a forum.[34] Perhaps to escape this conundrum, the Court characterized the Web site as *Zippo*-interactive and then used the effects test to analyse whether or not jurisdiction was appropriate. In this case, the Court found that jurisdiction was not appropriate, because the defamatory article did not mention that the plaintiff lived in Texas, did not discuss the plaintiff's activities in Texas, and was not directed at Texas readers. Thus, the Court concluded that the article did not focus on Texas enough to purposefully enter that jurisdiction, despite the fact that the defamed person lived in Texas and had a reputation there.

This result is interesting in light of *Gutnick*, and in light of several comments made by the Fifth Circuit about the nature of defamation and the Internet. First, the Court in *Revell* stated that defamation is similar to other torts in response to the plaintiff's request that the Court reject *Zippo* on the basis of the unique nature of defamation. The Court added, "Defamation has its unique features, but shares relevant characteristics with various business torts".[35] This conclusion is similar to that found in *Gutnick* and *Pro-C*, both of which suggest that torts are similar enough to each other to provide a stable lens through which to analyse jurisdiction, while permitting small variations to take into account the idiosyncratic nature of each tort.

Furthermore, in some aspects, the effects test as it is applied in *Revell* is similar to the tort-focused approach adopted in *Gutnick*. Instead of focusing on the medium through which the tort is committed, the effects test looks for intentional actions expressly aimed at a particular forum causing harm in a jurisdiction that is reasonably foreseeable. The *Gutnick* approach examines the tort of defamation, and finds that the damage or effects of defamation are reasonably foreseeable in jurisdictions in which the plaintiff has a reputation. However, there are two differences between the effects test and the tort-focused approach. The effects test requires a high level of intent to meet the constitutionally entrenched defendant-oriented approach in the United States. The tort-focused approach allows more flexibility with respect to intent, so that jurisdiction is appropriate in a tort which does not require express aiming at a jurisdiction, but rather at a person, such as defamation. Thus, the tort-focused approach would not lead to the absurd result in *Revell*, where a plaintiff would have succeeded if the article defaming him included the name of the jurisdiction in which he resided, but failed because that one word was lacking. Instead of requiring an express mention or aim at the jurisdiction, the tort-focused approach recognizes that a reputation exists in the knowledge of other people, and that generally the people who hold that knowledge are also aware of the residence of the defamed person because those people have contact with the defamed person during that person's regular activities. Thus, the defamer targets the specific jurisdiction in which the reputation exists by targeting the reputation.

A Change of Direction: Following Gutnick's Lead

The second difference between the effects test and the tort-focused test in *Gutnick* illuminates the first reason supporting the Canadian choice of the *Gutnick* approach over the American effects or interactivity tests. This difference is that, at a fundamental level, the effects test and the tort-focused test begin their analysis from a different context. Both tests have at their centre a concern about jurisdiction. However, the effects test requires, rather arbitrarily, intentional action and damage, regardless of the nature of the activity in question. In essence, the effects test asks: Should we take jurisdiction over this defendant? The tort-focused approach places the jurisdictional question in the context of the dispute, asking: Should we take jurisdiction over this dispute between the plaintiff and the defendant? The distinction may seem trivial. The result is not. At a principled level, the courts exist to resolve disputes; therefore, focusing on the defendant rather than the dispute does not sit well with the fundamental purpose of courts. It is possible to argue that the defendant has the most at stake in the process; perhaps this is true in the criminal setting. However, in the civil setting, the dispute concerns who should bear the loss or the cost of the defendant's actions. Therefore, both parties have the same loss at stake. Jurisdictional rules recognize this difference between civil and criminal actions. Given that a judgment in a civil case will have an economically detrimental effect on the losing party, be that party the plaintiff or the defendant, predicating jurisdiction on the defendant's contacts with the jurisdiction is odd, particularly when a multiplicity of doctrines exist to address abuse of process by the plaintiff in his or her choice of the original forum.

The difficulty of focusing on the defendant rather than on the tort becomes apparent when courts take tests based on the defendant and developed in the context of one tort, and transfer those tests to another tort. For example, the interactivity test was developed in the context of trademark infringement. In this context, given that trademark infringement does not require intent to infringe, the passive/active dichotomy may act as a good proxy for purposeful availment of another forum. However, transferring this test into the defamation context, as occurred in *Barrett v. Catacombs Press*,[36] leads to troublesome results. In *Barrett*, the Court found that because the Internet activity in question was passive, the defendant had not purposefully availed himself of the jurisdiction.[37] As discussed above, in defamation, such logic is fallacious because targeting the reputation necessarily targets the jurisdiction in which the reputation exists. The same difficulty arises with the effects test, which

requires intentional actions expressly aimed at the forum state. This test more coherently addresses defamation, a tort that contains some element of intent, than it does a strict liability tort such as trademark infringement. If the courts had in the first instance focused on the tort in question and not on the defendant's relationship with the forum, the courts would have recognized the weaknesses inherent in both the interactivity and the effects tests.

Focusing on the tort instead of on the defendant's contacts has several benefits. First, it results in technology-neutral rules. Technology-neutral tests lead to greater certainty and more principled results because the court is not required to delve into the minutiae of technological developments to assess whether or not a test is met. For example, under the passive/active distinction, the court may be asked to assess whether or not and how the Web site used cookies, facts that are completely irrelevant to a defamation action. Furthermore, in an era where technology progresses as rapidly as it does today, a test developed in a case based on facts that occurred more than 18 months before the trial is already out of date. Secondly, focusing on the tort allows the court to articulate principles of jurisdiction more generally, because the analysis for each tort begins with the foundational principles of jurisdiction. A defendant-based approach assumes that the defendant must have contacts with the jurisdiction, without articulating why those contacts must exist. Thus, it is difficult to predict which contacts are sufficient because the original spirit or the underlying purpose of the test is lost or altered in the successive iterations of common law judgments. Not only does the tort-focused approach require such basic principles, but it also leads to greater clarity and predictability as a result.

The second reason for adopting *Gutnick* instead of an American approach is more pragmatic: The Australian approach to jurisdiction is similar to the Canadian approach. In Australia, a plaintiff can serve a foreign party under service *ex juris* rules; before that party can proceed with the case, it must prove to a court that the service was properly effected and that the claim falls within the service *ex juris* rules. At the same time, the defendant can present a *forum non conveniens* challenge to the proceeding. Not only does the Australian court use a similar *forum non conveniens* analysis based on the House of Lords decision in *Spiliada*,[38] but the court also takes a more balanced approach to jurisdiction than American courts, which are forced into a defendant-oriented position. Like Canadian courts, Australian courts assess the plaintiff's contacts with the forum, the nature of the claim, hardships to the plaintiff, and hardships to the defendant. The Federal Court of Appeal recognized this similarity in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*[39] by discussing the ratio of *Gutnick* in Canadian jurisdictional language. Justice Evans stated:

> [T]he Supreme Court of Victoria in *Gutnick*, *supra*, applied a real and substantial connection test to conclude that it was the appropriate forum for deciding a defamation action in respect of material uploaded onto the defendant's server in New Jersey and downloaded by end users in Victoria.

Thus, a Canadian appellate court recognized that the Australian approach is concordant with Canadian jurisprudence.

The Ontario Court of Appeal signalled a similar recognition in *Pro-C Ltd.*, and suggested a tort-based approach to jurisdiction on the Internet instead of relying on the effects and interactivity tests. There are cases adopting the interactivity test and the effects test in Canada; these cases make the error of using American tests to decide whether or not the Canadian substantial connection test is met without adjusting the tests to take into account the defendant-oriented bias built into the tests.[40] However, the fact that the courts misapplied the American case law does not lead to the conclusion that the tests could not be adjusted to take into account Canadian jurisdictional values. Such an adjustment would require rewriting the tests to conform to Canadian law and to eliminate the confusion between the effects and interactivity tests. If the courts are to rewrite the test, it makes more sense to start from a solid foundation than from a flawed and confused set of cases. Such a foundation is provided in *Pro-C Ltd.* The Ontario Court of Appeal refused to adopt the American cases because they were irrelevant to the trademark legislation in question. In so doing, and in its statements in *obiter*, the Court demonstrated sensitivity to the nature of the claim and the relationship between the claim and asserting jurisdiction. This case is consistent with the sentiments expressed in *Gutnick*, and provides some persuasive authority for adopting the Australian decision.

The final reason supporting a Canadian adoption of *Gutnick* is the similarity of Canadian and Australian tort law, particularly in the area of defamation. At the level of principle, both Australia and Canada emphasize the value of freedom of expression. Both also recognize that "A democratic society . . . has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited".[41] Furthermore, neither Canada nor Australia has adopted a single publication rule.[42] Therefore, an approach to jurisdiction in defamation cases predicated upon at least similar law, such as that used in *Gutnick*, better integrates with the Canadian balance between free speech and the protection of reputations than an American approach could do. At the level of doctrine, several pre-Internet cases in Canada addressing the problem of jurisdiction in cross-border defamation claims used a similar reputation-oriented approach to locate the tort of defamation. Instead of relying on the place of broadcast, as Dow Jones urged in *Gutnick*, the Ontario Court in *Jenner v. Sun Oil*[43] found it startling to think that "one may, while standing south of the border . . . , through the medium of modern sound

amplification, utter defamatory matter which is heard in a Province in Canada north of the border, and not be said to have published a slander in the Province in which it is heard and understood".[44] Justice McRuer clearly found that the tort was located where the reputation was damaged because the "tort consists in making a third person understand actionable defamatory matter".[45] This jurisprudence is consistent with the approach taken in *Gutnick*.

Areas for Further Research

Although the tort-based approach avoids the problems of technological bias and lack of principled analysis, it may create others, all of which must be examined more closely. Dow Jones complained that a tort-based approach would lead to any person on the Internet being liable in every jurisdiction for a particular action. First, the above discussion suggests that a torts-based approach is rigorous enough to eliminate overbroad jurisdiction. It is, perhaps, more rigorous than the international community requires, given the plaintiff focus of the Brussels Convention.[46] Coupled with common law doctrines preventing abuse of process, including those that prevent a multiplicity of actions, the torts-based analysis will lead to appropriate jurisdictional decisions. Furthermore, once a court assumes jurisdiction, there are many ways to express the comity that informs Canadian jurisdictional rules. For example, choice of law allows multiple laws to be applied to conduct, including the law of the defendant's jurisdiction. Also, local enforcement mechanisms for foreign judgments, particularly in Canada, require that the original court have assumed jurisdiction in a reasonable manner based upon a substantial connection with the case. Even if such jurisdiction is appropriately taken, Canadian courts can refuse to enforce a judgment based on public policy. Thus, laws that Canadians would view as deeply repugnant will not be enforced in Canada, and assets in Canada will be protected from unreasonable judgments. In the final analysis, Canada and Australia have decided that a balanced approach to jurisdiction is appropriate in non-Internet cases. In *Gutnick*, the Australian High Court applied that approach to the Internet with the knowledge that the multiplicity of safeguards protecting international respect for national sovereignty would also apply to judgments concerning torts on the Internet. Canadian courts, mindful of the same safeguards, the similarities between Australian and Canadian jurisdictional philosophies and defamation doctrines, should choose the same approach.

Other Works Consulted

Jurisprudence

1. *American Information Corporation v. American Infometrics Inc.* (2001), 139 F. Supp. 2d 696 (WL).
2. *Compuserve Inc. v. Patterson*, 89 F. 3d 1257 (6th Cir. 1996) (Lexis).
3. *GTE New Media Services Inc. v. Bellsouth Corp.* 199 F. 3rd 1343 (D.C. Cir. 2000) (Lexis).
4. *S. Morantz Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d. 537 (E.D. Penn 1999) (WL).
5. *Young v. New Haven*, 315 F. 3rd 256 (4th Cir. 2002) (Lexis).

Secondary Materials

1. Beatty, Patrick, "Litigation in Cyberspace: The Current and Future State of Internet Jurisdiction" (1999), 7 U. Balt. Intell. Prop. L.J. 127 (Lexis).
2. Celedonia, Baila H. & Joel Schmidt, "Internet Jurisdiction: The Global Issue of Liability for Trademark Infringement on the Web" (2002), 703 PLI/Pat 1041 (WL).
3. Cizek, Adam, "Traditional Personal Jurisdiction and the Internet: Does it Work?" (1999), 7 U. Balt. Intell. Prop. L.J. 109 (Lexis).
4. Dutta, Anindita, "*Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* Case Comment" (1998), 13 Berkeley Tech. L.J. 289 (WL).
5. Exon, Susan Nauss, "A New Shoe is Needed to Walk through Cyberspace Jurisdiction" (2000), 11 Alb. L.J. Sci. & Tech. 1 (Lexis).
6. Geist, Michael, "New Net laws reach beyond borders", *The Globe and Mail* (27 June 2002), online: http://www.theglobeandmail.com/servlet/ArticleNews/printarticle/gam/20020627/TWGEIS.
7. Gilman, Jeremey, "Personal Jurisdiction and the Internet: Traditional Jurisprudence for a New Medium" (2000), 56 Bus. Law. 395 (WL).
8. Kaplan, Carl S., "AOL Subscribers Can Be Sued in Virginia, Judge Rules" *Cyber Law Journal* (11 June 1999), online: http://karws.gso.uri.edu/Marsh/Scans/11law.html.
9. Phan, Tu, "*Cybersell Inc. v. Cybersell Inc.*", Case Comment (1999), 14 Berkeley Tech. L.J. 267 (WL).
10. Vartanian, Thomas P., "A U.S. Perspective on the Global Jurisdictional Checkpoints in Cyberspace" (2000), 610 PLI/Pat 861 (WL).

Notes:

[1] For example, the test for *forum non conveniens* shifted from showing that the plaintiff's choice of forum was "oppressive, vexatious, and abuse of process" in *Moreno v. Norwich Union Fire Insurance Society Ltd*, [1970] 16 D.L.R. (3d) 247, to showing that another forum was substantially more convenient and inexpensive in *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795 (H.L.), to showing that another forum was clearly more efficient or convenient in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1986] A.C. 460 (H.L.) [*Spiliada*].

[2] [2002] 77 A.J.L.R. 255 (H.C.A.) [*Gutnick*].

[3] Another choice that must be made is the choice of which law to apply once jurisdiction is asserted. For example, once the Australian Court chose to assert jurisdiction, it also had to choose whether to apply Australian or American law. In Australia, the assertion of jurisdiction depended on the place of tort, as it does in Canada pursuant to *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. The *Gutnick* Court found that enough factors supported the assertion of jurisdiction and the choice of Australian law. What would happen in Canada with respect to choice of law is a question separate from, although just as complicated as, the question of jurisdiction, and is beyond the scope of this paper.

[4] [1990] 3 S.C.R. 1077.

[5] *Moses v. Shore Boat Builders*, [1993] 106 D.L.R. (4th) 465 (B.C.C.A.) (B.C. enforces judgment from Alaska) and *USA v. Ivey*, [1996] 139 D.L.R. (4th) 570 (Ont. C.A.) (applies *Morguard* to foreign judgment).

[6] *Muscutt v. Courcelles*, [2002] 213 D.L.R. (4th) 577 (Ont. C.A.).

[7] (1999), 171 D.L.R. (4th) 46 (B.C.C.A.) [*Braintech*].

[8] 952 F. Supp. 1119 (D.C. Penn. 1997) [*Zippo*].

[9] (2001), 202 D.L.R. (4th) 460 (Ont. Sup. Ct.) [*Easthaven*].

[10] 141 F. 3rd 1316 (9th Cir. 1998) [*Panavision*].

[11] (2001), 204 D.L.R. (4th) 568 (Ont. C.A.) [*Pro-C*].

[12] R.S.C. 1985, c. T-13.

[13] *Pro-C*, *supra* note 11 at para. 16.

[14] The single publication rule is contained in §577A of the *Restatement (Second) of Torts* (1977), and is adopted by legislation or judicial decision in 27 American states.

[15] Lori Wood, in an article supportive of the single publication rule, cites several benefits of the rule, including preventing a multiplicity of suits and a multiplicity of claims, prevention of excessive damages through multiple suits, conservation of judicial resources, and more convenience and certainty for the parties involved. However, the benefits received through a reduction of the multiplicity of suits, as stated by the Australian High Court, can also be received through estoppel and *res judicata*. Furthermore, if the single publication rule as expressed by Dow Jones is adopted, the plaintiff would not be able to avail itself of the longest limitation period because the governing law would be that of the place of the server: Lori A. Wood, "Cyber-Defamation and the Single Publication Rule" (2001), 81 B.U.L. Rev. 895 (WL).

[16] *Gutnick*, *supra* note 2 at para. 24.

[17] *Ibid.* at para. 200.

[18] Discussed in *Gutnick*, *ibid.* at para. 187.

[19] 326 U.S. 310 (1945).

[20] Manton M. Grier, "Jurisdiction in Cyberspace" (2003) 14 S. Carolina Lawyer 20 (Lexis); David Bender, "Jurisdiction in Cyberspace" (2000) 590 PLI/Pat 27 (WL).

[21] Richard S. Zembeck, "Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace" (1996) 6 Alb. L.J. Sci. & Tech. 339 at 351 [Zembeck] (WL).

[22] Stephen J. Newman, "Proof of Personal Jurisdiction in the Internet Age" (2002), 59 Am. Jur. Proof of Facts 3d 1 (WL).

[23] *Cybersell Inc. v. Cybersell Inc.*, 130 F. 3rd 414 (9th Cir. 1997) at 418 [*Cybersell*] (Lexis); adopted in *ALS Scan Incorporated v. Digital Service Consultants Incorporated*, 154 L. Ed. 2d 773 (2003) (Lexis) and in *Toys "R" Us Inc. v. Step Two*, [2003] U.S. App. LEXIS 1355 (Lexis).

[24] 126 F. 3rd 25 (2d Cir. 1997) (Lexis).

[25] James P. Donohue, "Personal Jurisdiction" (2002), 1 Internet Law and Practice §9:14 at 1 (WL).

[26] Michael Geist, "Internet Jurisdiction: The Shifting Adjudicatory Approach", online: ISUMA http://www.isuma.net/v03n01/geist/geist_e.shtml.

[27] For example, Zembeck states, "Traditional legal notions do fit complex cyberspace questions once one realizes that both the actors and activities are real" (Zembeck, *supra* note 21 at 346). Ryan Yagura agrees, stating, "The Internet is basically a technologically advanced communications network and the courts should treat it similarly to other communications systems in their personal jurisdiction analyses". Ryan Yagura, "Does Cyberspace Expand the Boundaries of Personal Jurisdiction?" (1998) 38 IDEA 301 at 302 (WL).

[28] 465 U.S. 783 (1984) [*Calder*].

[29] *Panavision*, *supra* note 10 at 1321.

[30] Denis T. Rice, "2001: A Cyberspace Odyssey Through U.S. and E.U. Internet Jurisdiction over E-commerce" (2001) 661 PLI/Pat 421 at 516 (WL).

[31] *Panavision*, *supra* note 10 at 1322.

[32] [2002] U.S. App. LEXIS 27200 [*Revell*] (Lexis).

[33] *Ibid.* at 11.

[34] The Court states, "We need not decide today whether or not a '*Zippo*-passive' site could still give rise to personal jurisdiction under *Calder*, and reserve this difficult question for another time". (*Ibid.* at note 30).

[35] *Ibid.*

[36] [1999] WL 231356 (E.D. Pa. 1999) (WL).

[37] The Court also discussed the effects test and found that the defamatory statements addressed the plaintiff's national activities and not the activities that occurred in the forum in question.

[38] *Spiliada*, *supra* note 1.

[39] [2002] 4 F.C. 3 at para. 188.

[40] See, for example, *Braintech*, *supra* note 7 and *Easthaven*, *supra* note 9.

[41] George S. Takach, *Computer Law* (Toronto: Irwin Law, 1998) (QL). In Canada, see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. Also see comments in *Gutnick*, *supra* note 2.

[42] Philip H. Osborne, *The Law of Torts* (Toronto: Irwin Law, 2000) (QL). Note that there is some support for a one-publication rule in Canada. In Canada, the issue of multiplicity of claims is addressed through statute and common law by treating multiple parties publishing the same statement as joint tortfeasors.

[43] [1952] 2 D.L.R. 526.

[44] *Ibid.* at 529.

[45] *Ibid.*

[46] "The Brussels Regulation provides, among other terms, that the courts of a consumer's domicile have jurisdiction over a foreign defendant if the latter 'pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that member state [. . .] and the contract falls within the scope of such activities.'": Carole Aciman & Diane Vo-Verde, "Refining the *Zippo* Test: New Trends on Personal Jurisdiction for Internet Activities" (2002), 19 Computer & Internet Law. 16 at 20 (WL).