

DOW JONES & CO INC v GUTNICK*

NEGOTIATING 'AMERICAN LEGAL HEGEMONY' IN THE TRANSNATIONAL WORLD OF CYBERSPACE

BRIAN FITZGERALD†

[This case note provides an overview of the High Court's landmark decision in Gutnick, concerning defamation on, and jurisdiction over, the Internet. As well as providing a detailed analysis of the judgments and their impact on defamation law and cyberlaw, the case note considers the dominant role of the First Amendment to the United States Constitution in cyberspace. It calls for a negotiation of this dominance by American legal principle in cyberspace and argues for conceptualising a constitutionalism for transnational society implemented by national courts. While seeing the Gutnick decision as inevitable, the case note highlights the limitations enunciated by the High Court and explains how the decision will provide the platform for legal regulation that will allow the distributed nature of the Internet to prosper.]

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I BACKGROUND

Cyberspace is the epitome of the 'transnational'.¹ Never before have we seen a space in which individuals, corporations, communities, governments and other entities can exist within and beyond the borders of the nation state in such an

* (2002) 194 ALR 433 ('Gutnick').

† BA (Griffith), LLB (Hons) (QUT), BCL (Oxon), LLM (Harv); Barrister of the Supreme Court of Queensland and the High Court of Australia; Professor and Head, School of Law, Queensland University of Technology.

¹ Brian Fitzgerald, 'Software as Discourse: The Power of Intellectual Property in Digital Architecture' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 337, 353 fn 52.

instantaneous, contemporaneous or ubiquitous manner. At a conceptual level, the High Court's decision in *Gutnick*² provides an interesting background upon which to postulate a constitutionalism for transnational society or, more modestly, a constitutionalism for cyberspace. At the doctrinal level, the decision brings into play interesting questions of cyberlaw³ and defamation law.

There is sufficient litigation⁴ and academic writing⁵ dating from at least the mid-1990s to confirm that increasing use of the Internet has vigorously challenged traditional approaches to jurisdiction based on the territorial nature of sovereignty.⁶ Jurisdiction as a principle of public and private international law, operating in a context of reasonableness,⁷ brings an order to the regulation of transnational activities. It provides a coordination mechanism for determining the process of litigation.⁸ Without a concept of jurisdiction, any event, incident or thing could be litigated anywhere.

The advent of the Internet⁹ has presented the possibility of jurisdiction being available anywhere the Internet can be accessed. If a defamatory statement is made available on a website, jurisdiction may lie in all the countries where access to that website can be obtained. Such a result substantially weakens the power of jurisdictional rules to coordinate the litigation process adequately.

In order to re-establish and reinforce the traditional role of jurisdiction, United States courts have, from the outset of the Internet revolution, rejected the view that jurisdiction relating to Internet content was available anywhere the material could be accessed. Drawing on established doctrine rooted in the *United States Constitution*,¹⁰ United States courts explained that jurisdiction would have to be based on something more than mere accessibility, such as the interactive nature of the website (reaching out and touching the jurisdiction) or targeting of, and a

² (2002) 194 ALR 433.

³ On this term, see Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review* 501.

⁴ See generally Brian Fitzgerald and Anne Fitzgerald, *Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and Electronic Commerce* (2002) ch 5.

⁵ See, eg, David Johnson and David Post, 'Law and Borders — The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367.

⁶ The bases of jurisdiction pursuant to international law are territorial sovereignty (territorial principle), nationality (nationality principle), protection of nationals (passive nationality principle), protection of the state from outside events that may have an effect within the jurisdiction (protective principle) and universality of the crime (the universal principle): Louis Henkin et al, *International Law: Cases and Materials* (3rd ed, 1993) 1049.

⁷ *Yahoo! Inc v La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F Supp 2d 1181 (ND Cal, 2001) ('Yahoo!'); *Restatement (3rd) of Foreign Relations* § 403 (1987).

⁸ Michael Whincop, 'Choice of Law, Jurisdiction and the Internet: A Policy Analysis' (1999) *National Law Review* 10. See generally *Hilton v Guyot*, 159 US 113 (1895); *Hartford Fire Insurance Co v California*, 509 US 764 (1993); *CSR v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *Lipohar v The Queen* (1999) 200 CLR 485; Joel Paul, 'Comity in International Law' (1991) 32 *Harvard International Law Journal* 1.

⁹ For a definition of the 'Internet' and 'World Wide Web', see *Gutnick* (2002) 194 ALR 433, 452-4 (Kirby J).

¹⁰ If jurisdiction cannot be established on the basis of personal presence, domicile or consent then due process as guaranteed by the *United States Constitution* requires that a non-resident defendant have 'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice": *International Shoe Co v Washington*, 326 US 310, 316 (1945) (Stone CJ).

harmful effect within, the jurisdiction.¹¹ These cases dealt predominantly with disputes concerning litigants in different states of the United States, which are regarded as separate legal jurisdictions.

However, the issue is deeper than that. When European countries such as Germany (in the case of pornography) and France (in the case of auctions of Nazi memorabilia) acted to restrict accessibility to the content of United States websites because they offended local law, the cry of 'zoning the Internet' was heard. The argument was that in acting to restrict accessibility to material that was lawful at the point of uploading (country of origin), namely the United States, these countries had commenced a process of localising the open, distributed and transnational nature of the Internet.¹² This led some American scholars to argue that one of the fundamental constitutional principles of the Internet was the notion of free speech as embodied in the First Amendment to the *United States Constitution*.¹³

Then, late last year, the *Gutnick* decision emerged amidst a flurry of international media attention. Briefly, the facts were that allegedly defamatory content created in New York was uploaded to a server in New Jersey where it was available for access in the city of Melbourne, in the State of Victoria, in the country of Australia. The issue was whether the respondent could litigate his defamation action in the courts of Victoria, where the defamation law was stricter than in the United States. Was jurisdiction based on accessibility or something more? Was localising or zoning the Internet to be allowed?

The respondent's argument, which was accepted by the High Court, was that accessibility of the website in the case of defamation was sufficient to found

¹¹ *Zippo Manufacturing v Zippo.com*, 952 F Supp 1119 (WD Pa, 1997) ('Zippo'); *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, 243 F Supp 2d 1073 (CD Cal, 2003) ('MGM'); *Young v New Haven Advocate*, 315 F 3d 256 (4th Cir, 2003); *Pavlovich v Superior Court of Santa Clara County*, 29 Cal 4th 262 (2002); *Griffis v Luban*, 646 NW 2d 527 (Minn, 2002). See generally Fitzgerald and Fitzgerald, above n 4; Gaye Middleton and Jocelyn Aboud, 'Jurisdiction and the Internet' in Anne Fitzgerald et al (eds), *Going Digital 2000: Legal Issues for E-Commerce, Software and the Internet* (2000) 245; Mark Lemley et al, *Software and Internet Law* (2000) ch 9.

¹² The United States courts were accused of doing this in *Twentieth Century Fox Film Corporation v ICRAVETV* (Unreported, United States District Court for the Western District of Pennsylvania, Judge Ziegler, 28 January 2000). See also Michael Geist, 'ICraveTV and the New Rules of Internet Broadcasting' (2000) 23 *University of Arkansas at Little Rock Law Review* 223; Michael Geist, 'Is There a There There? Toward Greater Certainty for Internet Jurisdiction' (2001) 16 *Berkeley Technology Law Journal* 1345.

¹³ See generally Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999) 166–7, 186, cf 203–4; James Boyle, 'Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors' (1997) *University of Cincinnati Law Review* 177. See also David Johnson, *Volume Controls in Cyberspace? Hard First Amendment Questions in the Age of Electronic Networking* (1994) Electronic Frontier Foundation <http://www.eff.org/Censorship/cyber_first_amend_johnson.article>.

Some call for enforcement of the First Amendment in cyberspace. Some point out that the First Amendment is a local US ordinance — not applicable, for example, to those sued in England or Australia under lower standards applicable to defamation in those locales. But no one has yet come to grips with the hard question of how we will balance the community interests in imposing some limitations on speech against the desire to facilitate open communication over the Net.

jurisdiction. However, the Court explained that litigation would be futile in a jurisdiction in which the respondent did not have a reputation.¹⁴

The fact that the defamation law of Victoria was stricter in application meant that another dimension to this dispute was brought to the fore. At base, the appellant's argument was that since the content was lawful at the point of upload, namely the United States, the Internet as a form of transnational discourse should not be inhibited by localising judicial acts. Embedded in the appellant's argument was the idea that free speech is a fundamental constitutional principle without which the Internet will not flourish and that, therefore, it should not be obstructed.¹⁵ In essence, it was said that where the Internet runs so too should the First Amendment guarantee of free speech. Callinan J labelled the tenor of this argument 'American legal hegemony'.¹⁶

While the High Court rejected the appellant's argument, the likelihood of enforcing any future Australian judgment in favour of the respondent in the United States will be low if it offends the First Amendment.¹⁷ Due to the fact that the United States provides an enormous amount of content and infrastructure to the Internet world, it is hard to escape the fact that the 'the First Amendment is [more than] a local ordinance'; it is arguably a foundational principle.¹⁸ This point is reinforced by the fact that the writer of the allegedly defamatory article has now made a complaint to the United Nations Human Rights Committee, arguing that, as a result of the *Gutnick* decision, Australian law violates the guarantee of freedom of opinion and expression in art 19 of the *International Covenant on Civil and Political Rights*.¹⁹

¹⁴ *Gutnick* (2002) 194 ALR 433, 445, 447 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 448 (Gaudron J), 475 (Kirby J), 479 (Callinan J).

¹⁵ At first instance, Hedigan J remarked: 'I add that Mr Robertson briefly flirted with the proposition that cyberspace was a defamation-free zone, but did not develop it': *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (Unreported, Hedigan J, 28 August 2001) [20]. See also at [17]–[18].

¹⁶ *Gutnick* (2002) 194 ALR 433, 483. On the notion of hegemony see Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984); Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (2003).

¹⁷ See *Yahoo!*, 169 F Supp 2d 1181, 1192–3 (ND Cal, 2001) (Fogel J). See also *Bachchan v India Abroad Publications Inc*, 585 NYS 2d 661, 665 (1992) (Fingerhood J):

It is true that England and the United States share many common-law principles of law. Nevertheless, a significant difference between the two jurisdictions lies in England's lack of an equivalent to the First Amendment to the *United States Constitution*. The protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the *US Constitution*.

See also *Matusevitch v Telnikoff*, 877 F Supp 1 (DC, 1995); *Griffis v Luban*, 646 NW 2d 527 (Minn, 2002).

¹⁸ Cf '[I]n Cyberspace, the First Amendment is a local ordinance': John Perry Barlow, 'Leaving the Physical World' (Paper presented at the Conference on HyperNetworking, Oita, Japan, 1998) <http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/leaving_the_physical_world.html> (explaining the inapplicability of physical space norms in cyberspace). See also Johnson, above n 13.

¹⁹ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

II FACTS AND ISSUES

The appellant in *Gutnick* was Dow Jones & Co Inc ('Dow Jones'), which publishes the *Wall Street Journal* newspaper and *Barron's* magazine. Since 1996, Dow Jones has operated WSJ.com, a subscription news site on the World Wide Web. Those who pay an annual fee have access to the information found at the website. Those who do not pay a subscription may also have access if they register, giving a username and password. The information at WSJ.com includes *Barron's Online*, in which the text and pictures published in the current printed edition of *Barron's* magazine are reproduced.

The edition of *Barron's Online* for 28 October 2000, and the equivalent edition of the hard copy magazine which bore the date 30 October 2000, contained an article entitled 'Unholy Gains' written by William Alpert. In it, several references were made to Joseph Gutnick, suggesting improper business dealings and association with convicted tax evader and money launderer Nachum Goldberg. 305 563 copies of the magazine were sold, an estimated 14 in Victoria. At the time there were 550 000 online subscribers, an estimated 300 in Victoria. Gutnick alleged that part of the article defamed him and brought an action in the Supreme Court of Victoria against Dow Jones claiming damages. Gutnick lived in Victoria and was a well-known businessperson there, although he conducted business outside Australia (including in the United States) and had made significant contributions to charities in the United States and Israel. His claim was limited to damage suffered to his reputation in Victoria and he undertook not to bring any actions in other jurisdictions.

Dow Jones was served under what is called the 'extra-territorial' or 'long-arm' jurisdiction of the Supreme Court of Victoria. Rule 7.01 of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) provides:

- (1) Originating process may be served out of Australia without order of the Court where —
- ...
- (i) the proceeding is founded on a tort committed within Victoria;
- (j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring
- ...

Pursuant to the rules, Dow Jones entered a conditional appearance and sought an order for service to be set aside or that further proceedings in the matter be permanently stayed.

There were therefore three issues:

- 1 Did personal jurisdiction exist?
- 2 If so, what law should be applied (the choice of law question)?
- 3 Was Victoria a clearly inappropriate forum (the *forum non conveniens* question)?

III DECISION

At first instance, Hedigan J held that:

- publication had occurred in Victoria and therefore jurisdiction was established;
- Victorian law was the applicable law; and
- the Supreme Court of Victoria was not a clearly inappropriate forum.²⁰

The Victorian Court of Appeal refused leave to appeal, saying that it could find nothing wrong with the approach of Hedigan J.²¹ The High Court — Gleeson CJ, McHugh, Gummow and Hayne JJ writing a joint judgment, with Gaudron, Kirby and Callinan JJ writing separate judgments — also endorsed the approach of Hedigan J. In the High Court proceedings, a number of third parties who were concerned that Hedigan J's approach would serve to chill Internet publishing were granted leave to intervene.²²

A Gleeson CJ, McHugh, Gummow and Hayne JJ

The principal argument of Dow Jones was that articles were published on *Barron's Online* when they became available on the server which it maintained at South Brunswick, New Jersey in the United States.²³ Dow Jones argued

that it was preferable that the publisher of material on the World Wide Web be able to govern its conduct according only to the law of the place where it maintained its web servers, unless that place was merely adventitious or opportunistic. ... The alternative, so the argument went, was that a publisher would be bound to take account of the law of every country on earth, for there were no boundaries which a publisher could effectively draw to prevent anyone, anywhere, downloading the information it put on its web server.²⁴

Gleeson CJ, McHugh, Gummow and Hayne JJ noted that such an approach could still generate uncertainty as the words 'adventitious or opportunistic' were not clearly defined. Furthermore, their Honours explained that the convenience of the publisher is not the only consideration at stake: the law of defamation seeks to strike a balance between the interests of free speech and dissemination of information, and the individual's interest in his or her reputation. While their Honours were happy to acknowledge that publishers needed to be able to order their affairs with some 'predictability', they explained that 'certainty does not necessarily mean singularity.'²⁵

The joint judgment then went on to consider the law of defamation in greater detail, highlighting the bilateral nature of the tort:

²⁰ *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (Unreported, Hedigan J, 28 August 2001).

²¹ *Dow Jones & Co Inc v Gutnick* [2001] VSCA 249 (Unreported, Buchanan JA and O'Bryan AJA, 21 September 2001).

²² These included Amazon.com, Associated Press, CNN, Guardian Newspapers, The New York Times, News Ltd, Time, The Washington Post, Yahoo! and John Fairfax Holdings: *Gutnick* (2002) 194 ALR 433, 453 fn 96 (Kirby J).

²³ *Ibid* 438 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

²⁴ *Ibid* 438–9 (citations omitted).

²⁵ *Ibid* 439.

Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act — in which the publisher makes it available and a third party has it available for his or her comprehension.²⁶

The bilateral nature of publication underpins the long-established common law rule that every communication of defamatory matter founds a separate cause of action.²⁷

Gleeson CJ, McHugh, Gummow and Hayne JJ explained that the question of where publication occurs when the material is presented in a comprehensible form in more than one jurisdiction cannot be answered by uncritical application of rules focusing on where the tortfeasor acts, where he or she commits the last act of the event or adoption of what is known as a 'single publication rule'.²⁸ Under the single publication rule, as adopted in the United States in § 577A of the *Restatement (2nd) of Torts* (1977), only one action can be maintained in relation to any single publication. Their Honours explained that this rule was not part of Australian law and that any negative impact of a multiplicity of actions could be dealt with by common law principles such as *res judicata*, issue estoppel and what has become known as Anshun estoppel.²⁹

The appellant sought to emphasise the technological advance that the World Wide Web (and its backbone, the Internet) had introduced. In particular, the appellant stressed the difficulty of controlling the dissemination of material through this new technology, in contrast to radio and television which were limited to the range of the broadcast signal.³⁰ However, Gleeson CJ, McHugh, Gummow and Hayne JJ noted that through satellite broadcasting, radio and television were now disseminated very broadly and that the incredible power of the World Wide Web (facilitated by the Internet) to disseminate material did not narrow the scope for legal liability of publishing defamatory material.³¹ Their Honours commented further that:

In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact. However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.³²

The joint judgment also stressed that publication is not a singular event located by reference only to the conduct of the publisher and that in fact 'publication to numerous persons may have as many territorial connections as there are those to

²⁶ Ibid 440.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid 443.

³⁰ Ibid 444.

³¹ Ibid.

³² Ibid.

whom particular words are published.³³ In other words, wherever the Internet can be read, publication may occur.

In summarising their approach to publication, Gleeson CJ, McHugh, Gummow and Hayne JJ provided the following very clear and important statement of principle:

In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.³⁴

Their Honours thus rejected the argument that the Supreme Court of Victoria was a clearly inappropriate forum. They explained that service was duly executed under r 7.01(1)(j) of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) as Gutnick had alleged damage to his reputation in Victoria when the material was made comprehensible in Victoria, and that it therefore did not matter whether r 7.01(1)(i) was applicable.

Having found publication to have occurred in Victoria, according to an agreed approach to choice of law,³⁵ Gleeson CJ, McHugh, Gummow and Hayne JJ found that Victorian law was the governing law:

The place of commission of the tort for which Mr Gutnick sues is then readily located as Victoria. That is where the damage to his reputation of which he complains in this action is alleged to have occurred, for it is there that the publications of which he complains were comprehensible by readers. It is his reputation in *that state*, and only that state, which he seeks to vindicate. It follows, of course, that substantive issues arising in the action would fall to be determined according to the law of Victoria. But it also follows that Mr Gutnick's claim was thereafter a claim for damages for a tort committed in Victoria, not a claim for damages for a tort committed outside the jurisdiction. There is no reason to conclude that the primary judge erred in the exercise of his discretion to refuse to stay the proceeding.³⁶

Their Honours then considered some of the difficulties that may arise where injury has resulted from publication in several places and in doing so sought to

³³ Ibid.

³⁴ Ibid 445.

³⁵ Ibid 436. See also *Regie National des Usines Renault SA v Zhang* (2002) 187 ALR 1, 436–7 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ): in an action for a tort with a foreign element, the choice of law rule to be applied is that matters of substance are governed by the law of the place of the commission of the tort (*lex loci delicti*).

³⁶ *Gutnick* (2002) 194 ALR 433, 446 (emphasis in original).

explain the limits of their judgment. They explained that in such a case 'there may be some question whether the forum chosen by the plaintiff is clearly inappropriate' and '[i]f there is more than one action brought, questions of vexation may arise'.³⁷

In a very interesting statement, the joint judgment also anticipated the further development of defamation law to meet the challenges of Internet publishing:

a case in which it is alleged that the publisher's conduct has all occurred outside the jurisdiction of the forum may invite attention to whether the reasonableness of the publisher's conduct should be given any significance in deciding whether it has a defence to the claim made. In particular, it may invite attention to whether the reasonableness of the publisher's conduct should be judged according to all the circumstances relevant to its conduct, including where that conduct took place, and what rules about defamation applied in that place or those places. Consideration of those issues may suggest that some development of the common law defences in defamation is necessary or appropriate to recognise that the publisher may have acted reasonably before publishing the material of which complaint is made. Some comparison might be made in this regard with the common law developing by recognising a defence of innocent dissemination to deal with the position of the vendor of a newspaper and to respond to the emergence of new arrangements for disseminating information like the circulating library.³⁸

The notion of further developing defences to defamation to meet the challenges of Internet based transnational activity is considered in more detail below and provides a reconciliation point for the apparent chilling effect of the judgment.

Gleeson, McHugh, Gummow and Hayne JJ then moved on to explain that the effect of the judgment was limited in the following manner:

In considering what further development of the common law defences to defamation may be thought desirable, due weight must be given to the fact that a claim for damage to reputation will warrant an award of substantial damages only if the plaintiff has a reputation in the place where the publication is made. Further, plaintiffs are unlikely to sue for defamation published outside the forum unless a judgment obtained in the action would be of real value to the plaintiff. The value that a judgment would have may be much affected by whether it can be enforced in a place where the defendant has assets.³⁹

Their Honours thus concluded by reinforcing the limitations: the proposition that Dow Jones had to know every defamation law in the world from Afghanistan to Zimbabwe was said to be unreal when it was recalled that 'in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort.'⁴⁰

³⁷ Ibid.

³⁸ Ibid (citations omitted).

³⁹ Ibid 447 (citations omitted).

⁴⁰ Ibid.

B Gaudron J

Gaudron J agreed with the judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ, adding some comments regarding multiplicity of actions and the notion of a single publication rule. Her Honour explained that the single publication rule was designed to prevent a plaintiff bringing more than one action and that where a plaintiff complains of multiple and simultaneous publications by a defendant, the *forum non conveniens* questions should be disposed of by asking 'whether that court can determine the whole controversy and, if it cannot, whether the whole controversy can be determined by a court of another jurisdiction.'⁴¹

C Kirby J

In a judgment that engaged much more than any other with the technological innovations and social implications of the Internet, Kirby J explained that the vital question was where the cause of action arose, as once determined this would dispose of the three questions in issue. If publication occurred in Victoria then jurisdiction would be satisfied, Victorian law would apply and *forum non conveniens* arguments would be substantially weakened. Crucial to determining where the cause of action arose was the question of whether the law should be developed, adapted or changed to better facilitate Internet life.

Kirby J explained at a general level that the reasons why the Court might restrain from reformulating the common law (in deference to legislative action) were based on considerations such as certainty, economic stability, the retrospective nature of the decision, the need to consider social data further and ultimately that it is the legislature which is the primary law-making institution.⁴² On the other hand, his Honour offered reasons for action in the following way:

Despite these expressions of restraint, important reformulations of the common law have been made by this court, including in recent times. Some of these have had very great significance. They have reversed long held notions of common law principle. Sometimes they have been stimulated by contemporary perceptions of the requirements of fundamental human rights. In the present case, in support of its arguments, the appellant invoked the 'revolutionary' features of the technology that supplies the Internet. It submitted that those features permitted, and required, a reconsideration of the law governing the elements of the tort of defamation.⁴³

Kirby J then proceeded to define the Internet and the World Wide Web and to highlight the difficulty in controlling access to information in such a distributed network.⁴⁴ His Honour explained that the Internet provided a great new domain of information that served to enhance the knowledge and prosperity of the world

⁴¹ Ibid 449.

⁴² Ibid 451–2.

⁴³ Ibid 452 (citations omitted).

⁴⁴ Ibid 452–5. 'The nature of the Web makes it impossible to ensure with complete effectiveness the isolation of any geographic area on the earth's surface from access to a particular website': at 454.

generally.⁴⁵ The difficult question was whether the genius of the common law — its capacity to adapt principles of past decisions, by analogical reasoning, to the resolution of entirely new and unforeseen problems — would be invoked within the confines of judicial law-making to change the law.⁴⁶

Kirby J rehearsed the appellant's submission that a single publication rule locating publication at the point of uploading would meet the challenges of Internet technologies and then proceeded to look more deeply at the need for change. His Honour explained that he accepted a number of arguments about the 'new nature' or 'novel development' of the Internet. There was a need to formulate 'new legal rules to address the absence of congruence between cyberspace and the boundaries and laws of any given jurisdiction' in a similar vein to the *lex mercatoria* established in medieval times.⁴⁷ His Honour made clear the requirement of effective legal responses and remedies, referring to the *ICCPR* to highlight the need to adequately protect a person's reputation.⁴⁸ His Honour also highlighted the need to avoid chilling Internet publication in a world where local legal and cultural norms provide a variety of ways of protecting free speech and reputation,⁴⁹ stating the urgency for a new rule in the following terms:

To wait for legislatures or multilateral international agreement to provide solutions to the legal problems presented by the Internet would abandon those problems to 'agonizingly slow' processes of lawmaking. Accordingly, courts throughout the world are urged to address the immediate need to piece together gradually a coherent transnational law appropriate to the 'digital millennium'. The alternative, in practice, could be an institutional failure to provide effective laws in harmony, as the Internet itself is, with contemporary civil society — national and international. The new laws would need to respect the entitlement of each legal regime not to enforce foreign legal rules contrary to binding local law or important elements of local public policy. But within such constraints, the common law would adapt itself to the central features of the Internet, namely its global, ubiquitous and reactive characteristics. In the face of such characteristics, simply to apply old rules, created on the assumptions of geographical boundaries, would encourage an inappropriate and usually ineffective grab for extra-territorial jurisdiction.⁵⁰

However, Kirby J considered that the limits to 'judicial innovation' imposed in a parliamentary democracy prevented him from redeveloping the law in accordance with the appellant's submission.⁵¹ The fact that defamation laws were long standing,⁵² that law should be technology neutral,⁵³ that legislative amendment

⁴⁵ Ibid 455.

⁴⁶ Ibid 456.

⁴⁷ Ibid 460 (citations omitted). The *lex mercatoria* ('law merchant') comprised the customs and usages of merchants which were accepted into the common law of England by judicial recognition.

⁴⁸ Ibid 461.

⁴⁹ Ibid 462.

⁵⁰ Ibid 462–3 (citations omitted).

⁵¹ Ibid 464.

⁵² Ibid. This includes the notion that 'words must be communicated to a third party who comprehends them': at 464.

might be needed⁵⁴ and that the finding of publication at the point of uploading would mean United States law would predominate, thereby disentiing non-American plaintiffs of the benefits of their culture,⁵⁵ prevented change. In his Honour's view, the place of habitual residence of the plaintiff should also be taken into consideration.⁵⁶

Moving to dispose of the issues before him, Kirby J held that service had been duly executed under r 7.01(1)(j) of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) and rejected the appellant's argument that this rule had no application to torts committed in Victoria.⁵⁷ However, his Honour questioned whether such a rule was in accordance with principles of public international law requiring a substantial and bona fide connection between the subject matter of the dispute and the source of jurisdiction of a national court.⁵⁸

Kirby J then went on to hold that, because Victoria was where the tort had occurred, Victorian law was the applicable law. His Honour emphasised that as Gutnick's action was confined to damage to his reputation in Victoria and as he had undertaken not to bring proceedings in other jurisdictions, there could be little argument that Victorian law was the applicable law once it was accepted that publication had occurred in Victoria.⁵⁹ Furthermore, his Honour explained that it was not unreasonable for publishers to be required to give some consideration to the defamation laws of jurisdictions in which a potential plaintiff has a reputation.⁶⁰ While this might be problematic and serve to chill Internet publication in cases where a potential plaintiff has a reputation in many jurisdictions, his Honour noted that this could not be avoided under current choice of law rules.⁶¹

On the issue of whether Victoria was a clearly inappropriate forum, Kirby J explained that once it was held that publication occurred in Victoria this claim was 'knocked away'.⁶²

In concluding his judgment, Kirby J sought to further rationalise his counter-intuitive reasoning:

The dismissal of the appeal does not represent a wholly satisfactory outcome. Intuition suggests that the remarkable features of the Internet (which is still changing and expanding) makes it more than simply another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals. It is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression. But the human right to protection by law

⁵³ Ibid 465.

⁵⁴ Ibid.

⁵⁵ Ibid 467.

⁵⁶ Ibid.

⁵⁷ Ibid 457.

⁵⁸ Ibid 458.

⁵⁹ Ibid 473.

⁶⁰ Ibid 472.

⁶¹ Ibid.

⁶² Ibid 474.

for the reputation and honour of individuals must also be defended to the extent that the law provides.⁶³

But as his Honour explained, there were significant limits to what was decided:

The notion that those who publish defamatory material on the Internet are answerable before the courts of any nation where the damage to reputation has occurred, such as in the jurisdiction where the complaining party resides, presents difficulties: technological, legal and practical. It is true that the law of Australia provides protections against some of those difficulties which, in appropriate cases, will obviate or diminish the inconvenience of distant liability. Moreover, the spectre of 'global' liability should not be exaggerated. Apart from anything else, the costs and practicalities of bringing proceedings against a foreign publisher will usually be a sufficient impediment to discourage even the most intrepid of litigants. Further, in many cases of this kind, where the publisher is said to have no presence or assets in the jurisdiction, it may choose simply to ignore the proceedings. It may save its contest to the courts of its own jurisdiction until an attempt is later made to enforce there the judgment obtained in the foreign trial. It may do this especially if that judgment was secured by the application of laws, the enforcement of which would be regarded as unconstitutional or otherwise offensive to a different legal culture.⁶⁴

Ultimately, it was the international community and national legislatures that needed to usher in change in this dynamic area:

However, such results are still less than wholly satisfactory. They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself. In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair.⁶⁵

D Callinan J

Callinan J was not impressed by the argument that the Internet was something entirely different from pre-existing technology — in his Honour's view it was no more than a means of communication by a set of interconnected computers.⁶⁶ His Honour observed that publication occurred to generate profits and if Internet publication was contemplated, the broad reach of the Internet needed to be considered by the publisher. In this sense publishers needed to remember that infliction of damage occurs 'where the defamation is comprehended.'⁶⁷ Statements made on the Internet, his Honour explained, are no more or less localised

⁶³ Ibid 474–5.

⁶⁴ Ibid 475.

⁶⁵ Ibid (citations omitted).

⁶⁶ Ibid 478.

⁶⁷ Ibid 479.

than statements made in any other media⁶⁸ and if multinational businesses wish to enter national markets they know they do so subject to local legal requirements.⁶⁹ Furthermore, Callinan J explained that a rule deeming publication to have occurred at the point of uploading was open to manipulation and would weigh in favour of the defendant and, in particular, United States law.⁷⁰ The crux of his Honour's judgment was powerfully expressed in the following passage:

I agree with the respondent's submission that what the appellant seeks to do, is to impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony in relation to Internet publications. The consequence, if the appellant's submission were to be accepted would be to confer upon one country, and one notably more benevolent to the commercial and other media than this one, an effective domain over the law of defamation, to the financial advantage of publishers in the United States, and the serious disadvantage of those unfortunate enough to be reputationally damaged outside the United States. A further consequence might be to place commercial publishers in this country at a disadvantage to commercial publishers in the United States.⁷¹

His Honour concluded by saying that Victoria was clearly an appropriate forum for this litigation.⁷²

E Summary of the Decision

In summary, the High Court unanimously dismissed the argument by Dow Jones that the radically new and ubiquitous nature of the Internet required the Court to overturn settled law on the publication of defamatory material. All judges agreed, according to that settled law, that publication had occurred when the material was made comprehensible; that is, at the point of downloading. In doing so they rejected Dow Jones' argument for a single publication rule that would purport to bring certainty to Internet publishing by deeming publication to have occurred at the point of uploading or making available for access. Once publication in Victoria had been established, the fact that Gutnick lived in Victoria and was seeking damages for harm done in Victoria dictated the application of Victorian law as governing law and the rejection of any claim of *forum non conveniens*.

⁶⁸ Ibid. During argument Callinan J remarked: 'I do not understand that, Mr Robertson. In the past "The Times" newspaper would have gone to every colony in Australia. It might have got there rather late, but it would have gone to every colony in Australia, every province in Canada, it would have gone throughout the whole of that part of the world which was coloured red. I do not see the Internet as introducing anything particularly novel, you just get it more quickly': Transcript of Proceedings, *Dow Jones & Co Inc v Gutnick* (High Court of Australia, Callinan J, 28 May 2002).

⁶⁹ *Gutnick* (2002) 194 ALR 433, 480.

⁷⁰ Ibid 483.

⁷¹ Ibid.

⁷² Ibid 484.

IV IMPACT OF THE DECISION

A *Limits to the 'Spectre of "Global" Liability'*

The essence of the decision is that publication occurs wherever the Internet can be accessed. This immediately raises what Kirby J labelled the 'spectre of "global" liability'.⁷³ However, all the judges were quick to point out the limitations of their judgments. First, what they were deciding was limited to the scenario before them, in particular the fact that Gutnick lived in Victoria and was suing in Victoria for damage occurring in Victoria and had undertaken not to seek damages anywhere else. Second, the impact of their judgments would only be felt in a given defamation suit in jurisdictions in which the plaintiff had a reputation and would only be of value if the judgment could be enforced where the defendant held assets. In *Gutnick*, reputation in Victoria was present but doubts remain about the ability to enforce any future judgment in the United States for reasons of offending the First Amendment right to free speech.⁷⁴ Third, Internet publishers bear some responsibility for understanding the laws of countries where possible plaintiffs reside and possess reputations. Although the joint judgment clearly (and Kirby J implicitly) anticipated the development of a defence to Internet-based defamation that would acknowledge to some extent the 'reasonableness' of the action of the defendant, it appeared to limit such development to actions based on publication in more than one place.

B *Development of Defamation Law and Cyberlaw*

The *Gutnick* decision provides further definition to Australian cyberlaw on jurisdictional issues and stimulates debate about the further development of defamation law.

Matthew Collins has already responded to the joint judgment's invitation to adapt defamation defences to the ubiquity of cyberspace by proposing a model for an Internet publisher's 'reasonableness' defence. Such a defence would operate in cases where the publisher's conduct has all occurred outside the jurisdiction of the forum and the publisher can prove that

- 1 the publication would not have been actionable under the law of the forum in which the publisher's conduct took place had the material been published there; and
- 2 his or her conduct was reasonable in all the circumstances.⁷⁵

Reasonableness, Collins suggests, might be determined in light of whether the plaintiff has a substantial reputation in the forum, whether the publisher knew or ought to have known this, the steps taken by the publisher to ensure the publication was not actionable in the forum, the extent to which the publication occurred

⁷³ Ibid 475.

⁷⁴ *Yahoo!*, 169 F Supp 2d 1181, 1192–3 (ND Cal, 2001) (Fogel J).

⁷⁵ Matthew Collins, 'Defamation and the Internet after *Dow Jones & Co v Gutnick*' (2003) 8 *Media & Arts Law Review* (forthcoming). See also *Lukowiak v Unidad Editorial SA* [2001] EMLR 1043; Dan Svantesson, 'Learning from *Dow Jones v Gutnick* — A Model Addressing Internet Defamation' (unpublished paper, 2003).

in the forum and the extent to which the plaintiff is the subject of the publication.⁷⁶

Another approach is expressed in the 'Durban Principles', which were adopted at an International Bar Association meeting in South Africa in October 2002. They state that a court is competent to determine a claim in defamation arising from the content of an Internet posting if the court is in a forum which is any of the following:

- 1 the domicile of the claimant;
- 2 the domicile of the defendant; or
- 3 a forum to which both parties have consented and there is a reasonable nexus.

The Durban Principles further provide that the governing law should be the 'substantive law of the jurisdiction with the most significant connection to the Internet site' (usually where the editorial work is done) and that it shall be a complete defence to any claim to post, within 24 hours of receiving the complaint, notice that the complaint has been made and a link to the text of the complaint.⁷⁷

The Durban Principles appear heavily weighted in favour of the publisher and may not adequately acknowledge the interests of the plaintiff.⁷⁸

In terms of Internet jurisdiction cases more generally, the *Gutnick* decision suggests that the High Court of Australia and the United States superior courts of appeal are moving in different directions. Within a few days of the *Gutnick* decision, in *Young v New Haven Advocate*⁷⁹ the United States Court of Appeals for the Fourth Circuit decided on very similar facts that jurisdiction was not satisfied where the alleged defamatory material was accessed or read unless the offending website had 'targeted' the forum state. In order to better understand the diverging approaches, an appreciation of the United States approach to personal jurisdiction is required.

1 *United States Law on Personal Jurisdiction*

Under United States law, if jurisdiction cannot be established on the basis of personal presence, domicile or consent then due process as guaranteed by the *United States Constitution* requires that a non-resident defendant 'have certain minimum contacts with [the forum state] such that the maintenance of the suit

⁷⁶ Collins, above n 75.

⁷⁷ See generally Peter Bartlett, 'Jurisdiction on the Internet' (Paper presented at the 5th LAWASIA Business Law Conference, New Dehli, India, 12–13 June 2003) 10–11.

⁷⁸ See Kirby J's reference to the notion of 'habitual residence': *Gutnick* (2002) 194 ALR 433, 467. Some have talked in terms of balancing the interests of the country of origin and country of destination: see Margaret Radin, John Rothchild and Gregory Silverman, *Internet Commerce: The Emerging Legal Framework* (2002) 42–3.

⁷⁹ 315 F 3d 256 (4th Cir, 2003) ('*Young*'). See also *ALS Scan Inc v Digital Service Consultants Inc*, 293 F 3d 707 (4th Cir, 2002) ('*ALS Scan*'). Cf *Northwest Healthcare Alliance Inc v Healthgrades.com Inc* (Unreported, United States Court of Appeals for the Ninth Circuit, Judges Hall, Tashima and Rawlinson, 7 October 2002). On 28 April 2003 the United States Supreme Court refused to hear an appeal: *Healthgrades.com Inc v Northwest Healthcare Alliance Inc*, 155 L Ed 2d 826 (2003).

does not offend “traditional notions of fair play and substantial justice.”⁸⁰ This ‘long arm’ jurisdiction is of two kinds: general and specific.

General jurisdiction may be established where the defendant’s contacts are ‘continuous and systematic’⁸¹ and the exercise of jurisdiction satisfies traditional notions of ‘fair play and substantial justice.’⁸² If sufficient contact can be established, the defendant is subject to litigation on any matter including those not arising out of in-forum activity.⁸³ As the United States District Court for the Central District of California explained in the recent case of *MGM*, “[t]he standard for establishing general jurisdiction is “fairly high,” ... and requires that defendant’s contacts be of the sort that “approximate physical presence.”⁸⁴ For this reason the United States Supreme Court has upheld general jurisdiction only once.⁸⁵ Due to this reluctance to uphold general jurisdiction, it is not surprising that Internet jurisdiction cases have focused on establishing specific jurisdiction.

A defendant is subject to specific jurisdiction where the litigation arises out of or relates to the defendant’s actions within the forum. The primary principle is that an individual should not be subject to judgment in a jurisdiction in which he or she has no meaningful contact.⁸⁶

Under prevailing ... doctrine, specific jurisdiction is presumptively reasonable where: 1) a non-resident defendant purposefully avails itself of the privilege of conducting activities in the forum state, thereby invoking the protections of its laws; and 2) the plaintiff’s claims arise out of the defendants’ forum-related activities.⁸⁷

Two approaches have emerged from the case law to assess ‘purposeful availment’ in the Internet context:

- the *Zippo* sliding scale approach;⁸⁸ and
- the *Calder v Jones* ‘effects’ and ‘targeting’ approach.⁸⁹

In *Zippo*, the Court explained that a finding of jurisdiction was contingent upon the nature of the website and sought to employ a sliding scale test. A fully interactive website would found jurisdiction while a passive website used for

⁸⁰ *International Shoe Co v Washington*, 326 US 310, 316 (1945) (Stone CJ).

⁸¹ Factors to be taken into consideration in this analysis include whether the defendant is incorporated or licensed to do business in the forum state, has offices, property, employees or bank accounts there, pays taxes, advertises or solicits business, or makes sales in the state: see *Hirsch v Blue Cross, Blue Shield of Kansas City*, 800 F 2d 1474, 1478 (9th Cir, 1986) (Fletcher J); *Bancroft & Masters Inc v August National Inc*, 223 F 3d 1082, 1086 (9th Cir, 2000) (Schroeder J); *Amoco Egypt Oil Co v Leonis Navigation Co*, 1 F 3d 848, 851 fn 3 (9th Cir, 1993) (Boochever J); *MGM*, 243 F Supp 2d 1073, 1083 (CD Cal, 2003) (Wilson J).

⁸² *Ziegler v Indian River County*, 64 F 3d 470, 473 (9th Cir, 1995) (Farris J).

⁸³ *Perkins v Benguet Consolidated Mining Co*, 342 US 437, 447–8 (1952) (Burton J).

⁸⁴ 243 F Supp 2d 1073, 1083 (CD Cal, 2003) (Wilson J).

⁸⁵ *Perkins v Benguet Consolidated Mining Co*, 342 US 437, 447–8 (1952) (Burton J). Cf *Amoco Egypt Oil Co v Leonis Navigation Co*, 1 F 3d 848, 851 fn 3 (9th Cir, 1993) (Boochever J).

⁸⁶ *Burger King Corporation v Rudzewicz*, 471 US 462, 471–2 (1985) (Brennan J). See also *World-Wide Volkswagen Corporation v Woodson*, 444 US 286 (1980).

⁸⁷ *MGM*, 243 F Supp 2d 1073, 1084 (CD Cal, 2003) (Wilson J).

⁸⁸ See *Zippo*, 952 F Supp 1119 (WD Pa, 1997).

⁸⁹ See *Calder v Jones*, 465 US 783 (1984) (‘*Calder*’).

mere advertising (without more) would not.⁹⁰ In principle, to found jurisdiction the website has to reach out and touch the territory in question.

United States courts have also utilised the *Calder* 'effects' test to found jurisdiction. In essence, this test provides that where an act is done intentionally, has an effect within the forum state and is directed or targeted at the forum state, then jurisdiction will be satisfied. This approach was evidenced in *MGM*,⁹¹ where a Californian court assumed jurisdiction in a case relating to copyright infringement. One of the defendants in that case distributed, through a website, a software product known as Kazaa Media Desktop which was used to share digital entertainment such as music and film. The Court held that jurisdiction was established on the basis that the software had an impact or effect in California as it was the movie capital of the world and that the software had been targeted at California.⁹²

Both tests may well be satisfied by the same set of facts, as they were in *MGM*.

2 *Internet Jurisdiction in Defamation Cases: The United States Approach*

In *Young*,⁹³ two Connecticut newspapers allegedly defamed Young, the warden of a Virginian prison, through material uploaded to a website in Connecticut. The articles were critical of Connecticut's decision to house some of its prisoners in Virginian jails. Young began proceedings in Virginia and the District Court refused an application to dismiss the proceedings on the basis of lack of jurisdiction. On appeal, the Court of Appeals for the Fourth Circuit held that jurisdiction could not be established, referring to its previous decision in *ALS Scan*.⁹⁴ The Court noted that in *ALS Scan* it held that the *Calder* effects test 'in the Internet context requires proof that the out-of-state defendant's Internet activity is expressly targeted at or directed to the forum state.'⁹⁵ In *ALS Scan*, the Court concluded

that a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.⁹⁶

In *Young*, the Court added the following gloss:

When the Internet activity is, as here, the posting of news articles on a website, the *ALS Scan* test works more smoothly when parts one and two of the test are considered together. We thus ask whether the newspapers manifested an intent

⁹⁰ Sonal Mehta, 'Cyberlaw' (2002) 17 *Berkeley Technology Law Journal* 337, 348.

⁹¹ 243 F Supp 2d 1073 (CD Cal, 2003).

⁹² Ibid 1088-91 (Judge Wilson). Cf *Pavlovich v Superior Court of Santa Clara County*, 29 Cal 4th 262 (2002).

⁹³ 315 F 3d 256 (4th Cir, 2003). Cf *Amway Corporation v Procter & Gamble Co*, (Unreported, United States District Court for the Western District of Michigan, Judge Holmes Bell, 6 January 2000); *Blumenthal v Drudge*, 992 F Supp 44 (DC, 1998). For further discussion of these cases see Mehta, above n 90, 350-1.

⁹⁴ 293 F 3d 707 (4th Cir, 2002).

⁹⁵ *Young*, 315 F 3d 256, 262-3 (4th Cir, 2003) (Michael J) (citations omitted).

⁹⁶ 293 F 3d 707, 714 (4th Cir, 2002) (Niemeyer J).

to direct their website content — which included certain articles discussing conditions in a Virginia prison — to a Virginia audience. As we recognized in *ALS Scan*, ‘a person’s act of placing information on the Internet’ is not sufficient by itself to ‘subject ... that person to personal jurisdiction in each State in which the information is accessed.’ Otherwise, a ‘person placing information on the Internet would be subject to personal jurisdiction in every State,’ and the traditional due process principles governing a State’s jurisdiction over persons outside of its borders would be subverted. Something more than posting and accessibility is needed to ‘indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state,’ Virginia. ... The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.⁹⁷

The evidence showed that the material in question was aimed at a Connecticut audience and that ‘[t]he newspapers did not post materials on the Internet with the manifest intent of targeting Virginia readers.’⁹⁸ Therefore, the Virginian courts lacked jurisdiction to hear Young’s claim.

In another recent decision, *Griffis v Luban*,⁹⁹ the Supreme Court of Minnesota refused to enforce a defamation judgment obtained in Alabama regarding material uploaded to an Internet newsgroup from Minnesota. The Court held that while Luban’s statements were aimed at Griffis, a resident of Alabama, there was nothing to support the conclusion that they were ‘expressly aimed’ at the state of Alabama.¹⁰⁰

While the targeting approach has been popular with United States courts in recent times, the application of the *Zippo* sliding scale test — assessing the nature and interactivity of the website — to defamation cases is also still a possibility.¹⁰¹

In trying to reconcile the *Gutnick* decision with the United States case law, it may be suggested that as WSJ.com was a subscription website, targeting of the State of Victoria had occurred when subscriptions from that place were accepted; at least, on the *Zippo* sliding scale test, WSJ.com was more than a passive website. However, the High Court did not make a great deal of the subscription nature of the website and it is doubtful whether the decision would have been different had the website been a non-subscription site.

V TRANSNATIONAL CONSTITUTIONALISM¹⁰²

The *Gutnick* decision focuses our attention on regulation of the Internet and, in a broader sense, transnational space. While it is easy for us to acknowledge

⁹⁷ 315 F 3d 256, 262–3 (4th Cir, 2003) (Michael J) (citations omitted).

⁹⁸ *Ibid* 264.

⁹⁹ 646 NW 2d 527 (Minn, 2002). On 10 March 2003, the United States Supreme Court refused to hear an appeal in this matter: *Griffis v Luban*, 155 L Ed 2d 225 (2003).

¹⁰⁰ *Griffis v Luban*, 646 NW 2d 527, 535–7 (Minn, 2002) (Blatz CJ).

¹⁰¹ See, eg, *Revell v Lidov*, 317 F 3d 467 (5th Circ, 2002).

¹⁰² See Brian Fitzgerald, ‘An Emerging Liberal Theory of International Law and the Non-Enforcement of Foreign Public Laws’ (1995) 16 *Australian Year Book of International Law* 311; Brian Fitzgerald, ‘Trade-Based Constitutionalisms: The Framework for Universalizing Substantive International Law?’ (1996–7) 5 *University of Miami International and Comparative Law Review* 111, 113–30.

national and international legal and regulatory domains, conceptualising transnational space — an ever increasing ubiquitous space within, beyond and between borders — is more problematic. Who makes the law for this space and who implements it?

Transnational space is governed through an integrated network of international and national laws, entities and regimes. Conflict of laws or international litigation principles are very important in this space, as are contractually created dispute resolution mechanisms such as arbitration and mediation.¹⁰³

When national courts engage with the transnational, the difficult question becomes whether they are acting as agents of the national or transnational. Ask any national judge and the answer would most surely be that they are acting as agents or part of a national legal system.

A space known as transnational space, epitomised by life in cyberspace, is an integral part of social existence in the 21st century. While national courts will engage with this space, they may feel constrained to treat it as a consequence of national activity rather than existing in its own right. Theoretically, international treaties could be concluded to provide a constitutional structure for transnational space much like that in place in the European Union.¹⁰⁴ However, this prospect seems remote, as continuing difficulties in reaching agreement on the proposed *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* highlight.¹⁰⁵

In order to better facilitate social and economic existence in transnational society we are challenged to conceptualise a more subtle approach to this space. To put it boldly, national judges would be seen as agents for implementing a transnational constitutionalism.¹⁰⁶ Anne-Marie Slaughter has urged national judges to engage in a ‘transjudicial dialogue’ in order to build transnational legal principle.¹⁰⁷

¹⁰³ See generally Philip Jessup, *Transnational Law* (1956); Henry Steiner, Detlev Vagts and Harold Koh, *Transnational Legal Problems: Materials and Text* (4th ed, 1994); Andreas Lowenfeld, *International Litigation and Arbitration* (2nd ed, 2002).

¹⁰⁴ In this regard it will be interesting to follow the complaint now being taken by William Alpert — the writer of ‘Unholy Gains’ — to the United Nations Human Rights Committee in Geneva arguing that, as a result of the *Gutnick* decision, Australian law violates the guarantee of freedom of opinion and expression in art 19 of the *ICCPR*. In this instance we see an individual using existing international treaties to try to shape a transnational constitutionalism for cyberspace.

¹⁰⁵ See Hague Conference on Private International Law <<http://www.hcch.net/e/workprog/jdgm.html>>. See also Dan Svantesson, ‘Jurisdictional Issues in Cyberspace: At the Crossroads — The Proposed Hague Convention and the Future of Internet Defamation’ (2002) 18 *Computer Law & Security Report* 191.

¹⁰⁶ Graeme Dinwoodie, ‘A New Copyright Order: Why National Courts Should Create Global Norms’ (2000) 149 *University of Pennsylvania Law Review* 469; Trotter Hardy, ‘The Proper Legal Regime for “Cyberspace”’ (1994) 55 *University of Pittsburgh Law Review* 993.

¹⁰⁷ Anne-Marie Burley, ‘Toward an Age of Liberal States’ (1992) 33 *Harvard International Law Journal* 393; Anne-Marie Burley, ‘Law among Liberal States: Liberal Internationalism and the Act of State Doctrine’ (1992) 92 *Columbia Law Review* 1907; Anne-Marie Slaughter Burley, ‘International Law and International Relations Theory: A Dual Agenda’ (1993) 87 *American Journal of International Law* 205; Anne-Marie Slaughter, ‘Judicial Globalization’ (2002) 40 *Virginia Journal of International Law* 1103; Anne-Marie Slaughter, ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191. See also *Gutnick* (2002) 194 ALR 433, 462–3 (Kirby J).

If we are to negotiate American legal hegemony in transnational cyberspace, a view that completely rejects its presence seems the wrong starting point. The domination of cyberspace by the United States is historically evident and inevitable. The new beginning must start with our judges positing a notion of transnational society and exploring its constitutional structure and governing legal principles.

While such an approach may sound radical it could be implemented, in a basic way, through the process of judicial law-making and interpretation (at the statutory or common law level), which already acknowledges the presence of an international legal domain or space.¹⁰⁸ In fact what the High Court has suggested in *Gutnick* in terms of developing common law defences represents a step towards understanding and acknowledging transnational space and negotiating American legal hegemony. This approach allows principles of transnational law to be developed through a transjudicial dialogue.

The crucial question is whether free speech is an entrenched constitutional norm of transnational society and cyberspace. Many American lawyers would say 'yes' while many Australian lawyers would say 'no'. How do we reconcile such difference in a divided world? Slaughter's thesis is that democratic societies with market economies throughout the world tend to uphold a common approach to the rule of law.¹⁰⁹ It is that common approach that is the hallmark or foundation stone of constitutionalism in transnational society. Such a constitutionalism would tend to be segmented, as opposed to universal. A universal approach would require a rule that allows actions that are legal in the place of origin. Would this be acceptable?¹¹⁰

The more difficult questions will no doubt continue to animate discussion. The simple point is that *Gutnick* highlights the need to better understand the legal structure of transnational society. It also shows a willingness amongst judges to accommodate the transnational to some limited extent.

VI CONCLUSION

The *Gutnick* decision provides us with an opportunity to consider broader issues of transnational governance and explains the dilemmas of Internet jurisdiction. The clear message from the case is that the Internet is not simply a

¹⁰⁸ See *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Kruger v Commonwealth* (1997) 190 CLR 1; *Horta v Commonwealth* (1994) 181 CLR 183; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Kartinyeri v Commonwealth* (1998) 195 CLR 337. See also Bryan Horrigan and Brian Fitzgerald, 'International and Transnational Influences on Law and Policy Affecting Government' in Bryan Horrigan (ed), *Government Law and Policy: Commercial Aspects* (1998) 2; Brian Fitzgerald, 'International Human Rights and the High Court of Australia' (1994) 1 *James Cook University Law Review* 78.

¹⁰⁹ In argument before the High Court, Geoffrey Robertson QC remarked that '[e]very advanced country will or seems to treat aspects of speech as precious': Transcript of Proceedings, *Dow Jones & Co Inc v Gutnick* (High Court of Australia, Geoffrey Robertson QC, 28 May 2002).

¹¹⁰ This was highlighted during argument by Gaudron J who, in response to the proposition that comity should see actions judged by the law at the point of origin or upload, said: 'But comity surely, Mr Robertson, cannot just be restricted to the countries whose legal system we respect': Transcript of Proceedings, *Dow Jones & Co Inc v Gutnick* (High Court of Australia, Gaudron J, 28 May 2002).

domain of unilateral discourse and that publishers have a responsibility to inform themselves of local requirements, especially where harm is obvious. It invites lawyers from all parts of the globe to negotiate legal principle for a truly distributed and diverse Internet world.

In terms of cyberlaw, the decision highlights the divergence between Australian and United States law on Internet jurisdiction. The United States courts are clearly looking for the Internet actor or publisher to 'target' or 'interact' with the forum state, while the High Court in *Gutnick* was moved to favour the interests of the party being harmed by the act. The crucial question concerns the role jurisdiction is to play in cyberspace: how should this notion develop in the digital age to ensure a just and fair litigation system?

In terms of defamation law, the most interesting part of the decision is in inviting consideration of legal development that will better facilitate the ubiquity of Internet publishing. Technology or code¹¹¹ may well provide this capacity before the law. It has been suggested that Australia may become a haven for forum shoppers in the defamation area. However, our own publishers will need to be mindful when publishing in countries where freedoms relating to speech are more restrictive than at home. Ultimately, the ability to enforce judgments against assets will be a crucial issue.

In terms of transnational regulation, the decision highlights the need to better understand how cyberspace has opened us to a new life that is only partially rooted in territorial existence. While American product and power will be dominant in this space, a move to reconcile diverging legal thought might lead to better results in the end.

Gutnick was a decision that on the facts was inevitable, but the reasoning is circumscribed by many existing limitations. The way forward is to see this decision as providing a tremendous platform for further analysing, debating and formulating the legal structure of cyberspace. As Kirby J stressed, the Internet is a most powerful communication and knowledge network in the 21st century and we must be innovative in building a legal framework in which its distributed and ubiquitous nature can prosper.

¹¹¹ On this term, see Lessig, above n 3, 506 fn 15.