

# THE CONUNDRUM OF INTERNET JURISDICTION AND HOW US LAW HAS INFLUENCED THE JURISDICTION ANALYSIS IN INDIA<sup>1</sup>

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**ABSTRACT** *This Article examines jurisdiction, in the sense of the competence of the courts from a US perspective in internet cases and compares this with the jurisdictional approach of the courts in India. Both the US and India are common law jurisdictions and since the US has been leading the technological internet revolution it is probably not surprising that Indian courts have been influenced by US legal approaches. At the same time, there are important legislative and constitutional differences in India, which makes it even more interesting to trace this influence in internet cases. The Article focuses on jurisdiction in tort (such as intellectual property and defamation) as well as contractual cases. The article contains a fine grained and conceptualised analysis of the latest case law and critiques some of the concepts, concluding that the “reasonableness” test should act as a filter to prevent jurisdictional overreach without narrowing the minimum contacts test.*

## I. INTRODUCTION

Traditional jurisdictional principles are now challenged by the increasingly complex commercial arrangements enabled by the internet which means that

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a person does not have to move across a border in order to communicate with a person in another state (whether by distributing products or by accessing them). A further evolution arises from cloud computing technologies which mean that files are hosted and processed in (frequently unknown, domestic or foreign) locations, with the consequence that files and communications are accessed online, but no longer downloaded to a specific user's computer (with a foreseeable location). One of the main advantages of cloud computing is the very fact that files can be accessed from many locations and are not controlled locally. Moreover, businesses do not always specifically target a jurisdiction to transact business and obtain commercially valuable benefits. For many digital content products businesses rely on online profiling of individual customers instead of a geographically based marketing strategy. All these technical developments have an enormous impact on jurisdiction in tort (such as intellectual property and defamation) as well as contractual cases.

In particular, the Article looks at the case law of the US and Indian courts, examining how judges have balanced jurisdictional considerations. The second section examines the general principles and legislation, by way of background in both jurisdictions and juxtaposes the different starting points in each jurisdiction. The third section hones in on the test of minimum contacts under US law, which has influenced the jurisdictional analysis for internet cases in India. The fourth section adds the reasonableness test and explains how this test has been neglected in the US but has also been included in the courts' analysis in Indian cases. The fifth section focuses on the application of jurisdictional principles in the US to internet cases showing the conundrum of balancing the interests of the parties in such cases and then delves deeper in the 2<sup>nd</sup> aspect of jurisdiction in internet tort cases which has seeped into the minimum contacts analysis: the effects doctrine, which has also been adopted by Indian courts and how this effects doctrine has developed into a targeting test. The sixth section focuses on sketching the case law in India in internet cases, analysing how the minimum contacts doctrine, the effects doctrine and notions of targeting have influenced the balance of factors before the Indian courts. Finally, the conclusion evaluates the approach to internet cases in both the US and India and argues that the reasonableness doctrine should introduce new ways of balancing the interests of the parties and speculates what this means for the analysis before Indian courts.

Both in India and the US, internet cases have been a challenge to the application of jurisdictional principles, as frequently conduct on the internet takes place simultaneously everywhere and nowhere in particular, leaving a

stark choice between the courts having almost unlimited jurisdiction (thus conflicting with other states) or no jurisdiction (leaving the claimant without redress for the injury). This problem becomes apparent in two of the most prominent doctrines applied in internet cases in both the US and India *Zippo* and *Calder v. Jones*. The article contains a fine-grained and conceptualised analysis of the latest case law and critiques some of the concepts, concluding that the “reasonableness” test should act as a filter to prevent jurisdictional overreach without narrowing the minimum contacts test.

## II. GENERAL PRINCIPLES AND LEGISLATIVE BACKGROUND

### A. The US: Constitutional Due Process Clauses and Long Arm Statues

The different states in the US have varying rules on the jurisdictional competence of their federal and state courts (laid down in so-called “long-arm” statutes, named after the image of a long-arm reaching out and pulling the defendant from his state to the court chosen by the plaintiff (the forum)). Each state’s long-arm statute determines the jurisdictional reach of the courts located in that state (both state and *federal* courts).<sup>2</sup> The federal courts are part of a unitary federal system as well as the state court system (diversity jurisdiction), thus conflicts of jurisdiction between federal courts are not a purely administrative question of allocating competence.<sup>3</sup> The ultimate framework for jurisdictional competence of the courts is the Due Process Clause in the US Constitution and it is through this lens that the US rules on jurisdiction must be viewed. The Due Process Clause is contained in the 5<sup>th</sup> Amendment<sup>4</sup> and 14<sup>th</sup> Amendment<sup>5</sup> to the US Constitution: “no-one shall be deprived of life, liberty or property without due process of law”.<sup>6</sup>

US law does not make a distinction between conflicts of jurisdiction between two sister states and international conflicts of jurisdiction between a US state or federal court, and a foreign state.<sup>7</sup> The general approach to jurisdiction in the US has two arms, one is to ensure fairness to a defendant

<sup>2</sup> *Daimler AG v. Bauman*, 2014 SCC OnLine US SC 19 : 134 S Ct 746, 771-2 : 571 US \_\_\_\_ (2014) (Justice Ginsburg).

<sup>3</sup> A.T. Von Mehren, D.T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, (1966) 79 Harvard Law Review 1121-1179, 1123.

<sup>4</sup> Federal Courts.

<sup>5</sup> State Courts.

<sup>6</sup> US Constitution.

<sup>7</sup> A.T. Von Mehren, D.T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, (1966) 79 Harvard Law Review 1121-1179, 1122.

in view of the inconvenience of defending an action in a foreign court, the other is to respect the sovereignty of other states (principle of non-interference under international law). While the internet has exacerbated these concerns, they are by no means new. The US Supreme Court found already in 1958:<sup>8</sup>

“As technological progress has increased the flow of commerce between States, the need for jurisdiction over non-residents has undergone a similar increase (...) But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.”

A plaintiff can always sue a defendant in the defendant’s domicile or place of residence and in *Pennoyer* the US courts have added the mere presence of the defendant in a state for service of process as another ground for assuming jurisdiction over an out of state defendant (“tag jurisdiction”).<sup>9</sup>

Moreover, a court is also competent, if the defendant voluntarily consents to the court’s assumption of jurisdiction, for example by participating in the process. However, outside four straightforward grounds<sup>10</sup> for assuming jurisdiction over a defendant, residence/domicile, presence, nationality and consent, there are specific federal statutes that provide for the jurisdiction of the US Federal Courts based on the (US) nationality of the plaintiff.<sup>11</sup> If none of these bases for jurisdiction applies, the courts will engage in a due process analysis to decide on jurisdiction.

The due process analysis is based on the test formulated in *International Shoe* where the US Supreme held that a plaintiff had to show that the defendant had “minimum contacts” to the forum state such that the assumption of

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<sup>8</sup> *Hanson v. Denckla*, 1958 SCC OnLine US SC 128 : 2 L Ed 2d 1283 : 357 US 235, 250-1 (1958).

<sup>9</sup> *Pennoyer v. Neff*, 24 L Ed 565 : 95 US 714, 733 (1877): requiring personal service of process in the forum State; *Burnham v. Superior Court of California*, 1990 SCC OnLine US SC 82 : 109 L Ed 2d 631 : 495 US 604 (1990).

<sup>10</sup> See also §421 (2) (a)-(e), (g) and (3) American Law Institute, Restatement of the Law Third Foreign Relations Law of the US, Jurisdiction (1987); A.T. Von Mehren, D.T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis* (1966) 79 Harvard Law Review 1121-1179, 1137-8.

<sup>11</sup> For example, in a civil claim arising on the basis of “international terrorism”, see Antiterrorism Act 18 U.S.C. §§2333 and 2334(a).

jurisdiction would not offend “notions of fair play and substantial justice”.<sup>12</sup> In this case the US Supreme Court found that a Delaware incorporated company with principal place of business in Missouri, which employed around 12 salesmen residing in the State of Washington who regularly solicited business in that state, using samples (only one shoe of a pair) and entertaining some sales rooms there and who were paid a commission, was present and doing business in Washington so that it was liable to pay contributions to the Washington State unemployment fund. The Court (both the majority Opinion<sup>13</sup> and the concurring Opinion<sup>14</sup>) found that International Shoe was essentially carrying on business in the State of Washington which made it reasonable for the courts to assume jurisdiction to determine its contributions to the unemployment fund, despite the fact that its business model was constructed in such a way that the contracts were concluded and orders fulfilled from Missouri. The due process doctrine established in *International Shoe* (minimum contacts and notions of fair play and substantial justice) is now the standard basis<sup>15</sup> for the jurisdictional analysis, including in internet cases in the US.

### B. India: Jurisdiction Framework Contained in Legislation

The courts in India face the same challenges of applying traditional common law principles to new technologies, as the courts in the US. As has been found in a decision by the State Consumer Disputes Redressal Commission, “the traditional common law principles of jurisdiction to the border less world of Internet transactions has proved to be very challenging, for the courts and tribunals. It is a technology evolution and a revolution in legal thinking (...).”<sup>16</sup>

However, the first notable difference to the US jurisdictional analysis in India is that jurisdictional principles are codified in different pieces of legislation. Primarily it is the Code of Civil Procedure 1908, but in addition (as *lex specialis*) Section 11, Consumer Protection Act, 1986; Section 62(2), Copyright Act, 1957; Section 134 (2), Trademark Act, 1999; and Section 13, Information Technology Act, 2000 also supplement the same.

<sup>12</sup> *International Shoe Co. v. State of Washington*, 1945 SCC OnLine US SC 158 : 90 L Ed 95 : 66 S Ct 154 : 326 US 310, 316 (1945).

<sup>13</sup> Mr Chief Justice Stone at 320.

<sup>14</sup> Mr Justice Black at 324.

<sup>15</sup> The minimum contacts ruling in the Headnote of West law had been cited 16925 times on 29 October 2018.

<sup>16</sup> *Spicejet Ltd. v. Sanyam Aggarwal*, First Appeal No. 515 of 2016 (State Consumer Disputes Redressal Commission, Punjab Chandigarh, 14 March 2017).

Dealing with the provisions in the Code of Civil Procedure 1908 first, a distinction can be made between suits in respect of wrongs to the person or wrongs to movable property which are determined at the place where the wrong was done or at the place where the defendant resides, carries on business or personally works for gain, according to Section 19 of the Code of Civil Procedure.

Next, Section 20, Code of Civil Procedure provides two basic procedural rules as connection factors to determine the competent court in cases of conflict (with variations explained in more detail below): (1) the place of the defendant and, alternatively, (2) the place where the cause of action arises (wholly or in part).

As to the first connecting factor relating to the defendant, this can be the place where the defendant(s) actually and voluntarily resides, or carries on business or personally works for gain. Thus, the first subset of the rule in Section 20 (a) contains three alternative connecting sub-factors related to the defendant, namely residence, carrying on a business or working for gain. The latter two connecting factors (carrying on business and personally working for gain) are less firmly entrenched and arguably can be more temporary and flexible than the first (residence). As will be seen in the discussion in the following sections, the flexibility of the “carrying on business” factor allowed the courts to import aspects of the US minimum contact analysis in internet cases and in particular raises the question whether one can carry on a business remotely without an establishment in the place of the Indian forum applying this rule (which the courts have found through the concept of targeting, i.e., a defendant can carry on business remotely in the forum state if he has targeted transactions remotely there).

As to the second connecting factor, the place where the cause of action, wholly or in part, arises, this has been defined to consist of a “bundle of facts which give cause to enforce the legal injury for redress in a court of law” and that “it must include some act done by the defendant [*in the forum*]<sup>17</sup> since in the absence of such an act no cause of action would possibly accrue or would arise”.<sup>18</sup> Thus there must be a link between the actions of the defendant and the place of the competent court. Furthermore, while it is sufficient that part of the cause of action arises in the forum state, this part must not be insignificant or trivial.<sup>19</sup> The cause of action connecting factor is also flexible as a principle and has led the courts to consider a variety of connecting

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<sup>17</sup> Added for clarification purposes by the author.

<sup>18</sup> *South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises (P) Ltd.*, (1996) 3 SCC 443.

<sup>19</sup> R. Matthan, *The Law Relating to Computers and the Internet* (Butterworths India, 2000) 24.

factors, not dissimilar to the US minimum contacts analysis (discussed in the following sections).

For claims brought in contract, the general rule on jurisdiction is that the courts in the place where the contract was accepted would be competent unless an exclusive jurisdiction clause provides otherwise. In respect of contracts concluded on the internet, remotely, Section 13 (3) of the Information Technology Act provides that an electronic (communication) record is deemed to be received at the place of the business of the addressee of that communication. This would mean that a contract was concluded, and jurisdiction arises at the place of business of the person who receives the acceptance of offer (communication of the acceptance).

Specifically for consumer contracts a claim can be brought in the court where either the claimant(s) or defendant(s) reside, carry on business, have a branch office, or personally works for gain or where the cause of action arises (as long as the dispute is a small claims dispute under a certain value).<sup>20</sup> This provision gives the claimant maximum flexibility in the sense that it relates to a number of different connecting factors, concerning both the claimant and the defendant.

An example for the contractual analysis is *World Wrestling Entertainment Inc. v. Reshma Collection*<sup>21</sup> the Delhi High Court found jurisdiction at the place of the buyer's residence, based on a contractual analysis, holding that online communications are instantaneous communications, and that therefore the contract would be concluded at the place where the acceptance is communicated.<sup>22</sup> Likewise, in *MD Air Deccan v. Shri Ram Gopal Aggarwal*<sup>23</sup> the claimants sued after they had lost their baggage after a flight and it was held that the courts at the place of the consumer's residence had jurisdiction. In this case, the air ticket had been booked through the internet and the ticket was sent to the claimant by email. The Court held that the booking was the offer and the email constituted the acceptance, as a consequence the contract had been concluded when the acceptance email was received at the consumer's place of residence.

However, in addition to the contractual analysis, Indian courts have taken a holistic view of internet cases and usually place the contractual analysis within the question of where the cause of action arose under Section

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<sup>20</sup> S. 11 of the Consumer Protection Act, 1986.

<sup>21</sup> 2013 SCC OnLine Del 3987.

<sup>22</sup> At para 22.

<sup>23</sup> *M.D. Air Deccan v. Shri Ram Gopal Aggarwal*, First Appeal No. FA/7/2007 (State Consumer Disputes Redressal Commission, Meghalaya, 7 December 2013).

20 Code of Civil Procedure and examine questions of interactivity and targeting<sup>24</sup> similar to the US Constitutional minimum contacts doctrine at the same time (see further below).

For example, in the case of *Spicejet Ltd. v. Sanyam Aggarwal*<sup>25</sup>, a flight cancellation case, the State Consumer Redressal Commission considered a number of factors under the question where the cause of action had arisen. It found that the contract had been concluded at the claimant's place of residence because this was where the email containing the airline ticket had been received and where the emails rescheduling/cancelling the flights had been sent. Further, payment for the flights had also been effected at the claimant's residence, so that it could be said that at least part of the cause of action arose there.<sup>26</sup>

Finally, Indian Law contains specific provisions on jurisdiction of the courts in copyright and trademark cases, which privilege the claimant and are therefore considered true long-arm provisions. Section 62 (2) of the Copyright Act 1957 and Section 134 (2) of the Trademark Act 1999 provide that the courts at the place where (at least one of) the claimants actually and voluntarily reside, carry on business or personally work for gain. Their impact would be that the claimant can sue at their "local" courts. But these provisions apply in addition to, and as an alternative to Section 20 Code of Civil Procedure and as we will see in Section 6 it is here that the courts have developed an approach analogous to the minimum contacts doctrine.<sup>27</sup>

### III. MINIMUM CONTACTS UNDER THE US DUE PROCESS OF LAW ANALYSIS- ORIGINS OF THE PRINCIPLE

The meaning of minimum contacts has been examined in the case law of US courts as the first leg of the due process analysis. The courts examine the defendant's contacts with the forum to assess whether he purposefully availed himself of the privilege of doing business in that state to such an extent that he should anticipate being sued there ("purposeful availment").<sup>28</sup>

<sup>24</sup> *World Wrestling Entertainment Inc. v. Reshma Collection* fn 21.

<sup>25</sup> See fn 16.

<sup>26</sup> At para 40.

<sup>27</sup> *Federal Express Corp. v. Fedex Securities Ltd.*, 2017 SCC OnLine Del 7906, para 12.

<sup>28</sup> *International Shoe Co. v. State of Washington*, 1945 SCC OnLine US SC 158 : 90 L Ed 95 : 66 S Ct 154 326 US 310, 321 (1945); *Hanson v. Denckla*, 1958 SCC OnLine US SC 128 : 2 L Ed 2d 1283 : 357 US 235, 253 (1958); *World-Wide Volkswagen v. Woodson*, 1980 SCC OnLine US SC 7 : 62 L Ed 2d 490 : 100 S Ct 559 : 444 US 286, 297 (1980); *Burger King Corp. v. Rudzewicz*, 1985 SCC OnLine US SC 126 : 85 L Ed 2d 528 : 105 S Ct 2174 : 471 US 462, 474-475, (1985).



The courts assess whether the defendant does business in the forum state by examining whether he has business contacts there<sup>29</sup> or whether he intended to transact with customers in that location.<sup>30</sup>

Furthermore, the courts have found jurisdiction in the so-called “stream of commerce” cases where a manufacturer or distributor of a product or component of a product was held to be able to foresee that the product might end up in the forum state and cause actionable harm there (especially in the case of famous, globally distributed products in product liability cases).<sup>31</sup> Moreover, the courts have found jurisdiction under the minimum contacts doctrine on the basis that the defendant intentionally targeted a tortious action into the forum state, in cases where the defendant could foresee that his intentional conduct would have actionable harmful effects in the forum (“effects doctrine”).<sup>32</sup>

Finally, US jurisdictional analysis places heavy emphasis on an intentional element of the defendant’s conduct- the defendant must, in some way, have targeted their conduct to the forum state,<sup>33</sup> albeit that different courts have put different emphasis on whether foreseeability *per se* is sufficient or whether something else is required (such as deliberately *aiming* his conduct or activities at the forum).<sup>34</sup> Thus an element of directing or targeting is part and parcel of the minimum contacts doctrine- this is important in particular for internet cases, as it limits (but not eliminates) the possibility that a completely fortuitous connection to the forum leads to a finding of jurisdiction.<sup>35</sup> But as we will see in the next sections the minimum contacts doctrine is

<sup>29</sup> *Hanson v. Denckla*, 1958 SCC OnLine US SC 128 : 2 L Ed 2d 1283 : 357 US 235, 251 (1958): “We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail.”

<sup>30</sup> *McGee v. International Life Insurance Co.*, 1957 SCC OnLine US SC 152 : 2 L Ed 2d 223 : 78 S Ct 199 : 355 US 220, 223 (1957) “It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.” (Mr Justice Black);

<sup>31</sup> S. Emanuel, *Emanuel Law Outlines: Civil Procedure* (25th Edition Wolters Kluwer 2015) 9, see *Asahi Metal Industry Co. v. Superior Court of California*, 1987 SCC OnLine US SC 17 : 94 L Ed 2d 92 : 107 S Ct 1026 : 480 US 102 (1987).

<sup>32</sup> *Calder v. Jones*, 1984 SCC OnLine US SC 58 : 79 L Ed 2d 804 : 465 US 783 (1984).

<sup>33</sup> *World-Wide Volkswagen v. Woodson*, 1980 SCC OnLine US SC 7 : 62 L Ed 2d 490 : 100 S Ct 559 : 444 US 286, 295-297 (1980), S. Emanuel, *Emanuel Law Outlines: Civil Procedure* (25th Edition Wolters Kluwer 2015); M. Geist, “Is There a There There? Towards Greater Certainty for Internet Jurisdiction” (2001) 16 Berkeley Technology Law Journal 1345-1406, 1385: describes foreseeability as the “core jurisdictional principle”.

<sup>34</sup> *Burdick v. Superior Court*, 233 Cal. App. 4th 8 (2015); (2016) 43 Western State Law Review 291-295.

<sup>35</sup> M. Sableman, M. Nepple, “Will the Zippo Sliding Scale for Internet Jurisdiction Slide into Oblivion?” (2016) 20 (1) Journal of Internet Law 3-6, 4; M. Geist, “Is There a There There?”

flexible and has thus led to confusing and inconsistent case law in respect of internet cases, which in some cases has led to a wide-jurisdictional reach of the courts and in some cases a denial of access to justice and concomitant uncertainty<sup>36</sup>.

#### IV. THE REASONABLENESS TEST

However, the potentially wide aspects of targeting can be compensated for and counterbalanced by the second leg of the due process analysis. The second leg of the due process analysis is an examination of whether the assumption of specific jurisdiction would comport with notions of fair play and substantial justice (“reasonableness test”). This test is not always applied in the jurisdictional assessment, in fact, it is not always explicitly discussed and in most cases, the courts seem to assume that the assertion of jurisdiction complies with notions of fair play and substantial justice. The purpose of the reasonableness test is to temper the heat of the jurisdictional analysis- in a metaphorical sense one could think of this test as a kind of “garam masala” - the beautiful mix of spices added at the end of cooking in some Indian dishes, to rebalance the flavours to the right balance before serving the dish.

In a similar vein, the test has the purpose of finding the right balance between conflicting jurisdictional interests. It weighs up (1) the plaintiff’s interest of having justice done<sup>37</sup> and obtain redress, (2) the inconvenience to the defendant of being hauled into a foreign court,<sup>38</sup> (3) the interests of the forum state in adjudicating the dispute,<sup>39</sup> (4) any conflict with the state in which the defendant is a resident, and (5) the practicality of hearing the

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Towards Greater Certainty for Internet Jurisdiction” (2001) 16 Berkeley Technology Law Journal 1345-1406, 1381-1385.

<sup>36</sup> A. Soo Yeon Anh, “Clarifying the Standards for Personal Jurisdiction in Light of Growing Transactions on the Internet” (2015) 99 Minnesota Law Review 2325-2362, 2326.

<sup>37</sup> *Mac Dermid Inc. v. Deiter*, 702 F 3d 725, 731 (2nd Cir 2012) citing *Chloé v. Queen Bee of Beverly Hills*, 616 F 3d 158, 173 (2nd Cir 2010).

<sup>38</sup> However, the burden to the defendant is only one of several factors, see for example *Mac Dermid Inc. v. Deiter*, 702 F 3d 725, 731 (2nd Cir 2012): “the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago”, citing *Kernan v. Kurz-Hastings Inc.*, 175 F 3d 236, 244 (2nd Cir 1999).

<sup>39</sup> See for example *McGee v. International Life Insurance Co.*, 1957 SCC OnLine US SC 152 : 2 L Ed 2d 223 : 78 S Ct 199 : 355 US 220, 223 (1957): “It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.” (Mr Justice Black)

dispute in the forum state (for example the location of witnesses<sup>40</sup> and the evidence,<sup>41</sup> or the expertise of the court to deal with disputes of this kind<sup>42</sup>).<sup>43</sup>

In some cases the courts have applied a seven-actor test: (1) the extent of a defendant's purposeful targeting of the forum; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.<sup>44</sup>

It is interesting to note here that the "reasonableness test" balances the interests of the parties with the suitability of the forum<sup>45</sup> (akin to elements of the *forum non conveniens* analysis) and with state interests (which is similar to the *comity* or *reasonableness* analysis). Its purpose, therefore, is to blend together, as in my "garam masala" metaphor, a variety of interests of different stakeholders to achieve the most harmonious balance. Frequently, however, the courts have drawn an inference that if the minimum contacts test is passed, that the suit is also reasonable and the courts tend to find that the forum state has an interest in applying its law to foreign defendants.<sup>46</sup>

The relevance of this second element of the due process analysis to internet disputes is that it fits with the argument of those who are concerned that the borderless nature of the internet leads to wide and conflicting assertions of jurisdiction which should be tempered by a reasonableness analysis. This reasonableness test could play a role in achieving this fairness analysis.<sup>47</sup> It

<sup>40</sup> See for example *McGee v. International Life Insurance Co.*, 1957 SCC OnLine US SC 152 : 2 L Ed 2d 223 : 78 S Ct 199 : 355 US 220, 223 (1957): "Often the crucial witnesses — as here on the company's defense of suicide — will be found in the insured's locality." (Mr Justice Black) and *Mac Dermid Inc. v. Deiter*, 702 F 3d 725, 731 (2nd Cir 2012).

<sup>41</sup> *Feldman v. Google Inc.*, 513 F Supp 2d 229, 247 (ED Pa 2007).

<sup>42</sup> *Feldman v. Google Inc.*, 513 F Supp 2d 229, 248 (ED Pa 2007).

<sup>43</sup> *Asahi Metal Industry Co. v. Superior Court of California*, 1987 SCC OnLine US SC 17 : 94 L Ed 2d 92 : 107 S Ct 1026 : 480 US 102, 114-116 (1987).

<sup>44</sup> *Burger King Corp. v. Rudzewicz*, 1985 SCC OnLine US SC 126 : 85 L Ed 2d 528 : 105 S Ct 2174, 2185 : 471 US 462, 479; *Panavision International Lp v. Toeppen*, 141 F 3d 1316, 1323 (9th Cir 1998).

<sup>45</sup> See also 28 U.S.C. §1404 (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

<sup>46</sup> See for example *CompuServe Inc. v. Patterson*, 89 F 3d 1257, 1268 (6th Cir 1996) or *Keeton v. Hustler Magazine Inc.*, 1984 SCC OnLine US SC 57 : 79 L Ed 2d 790 : 104 S Ct 1473 : 465 US 770, 776 (1984).

<sup>47</sup> R.M. Pollack, " 'Not of Any Particular State': *J. McIntyre Machinery Ltd. v. Nicastro and Non-specific Purposeful Availment*" (June 2014) 89 New York University Law Review 1088-1116, 1112-16.

examines the positions of both parties and their respective ability to obtain justice if they have to cross a border and the relevant state interests.

Additionally, US law recognizes the common law doctrine of *forum non conveniens*: §304 of the draft (2016) Restatement Fourth states that “a court in the US may dismiss a case if there is an available and adequate alternative forum and (...) the balance of private and public interests favour dismissal”.<sup>48</sup> Private interest considerations include convenience to the litigants such as access to sources of evidence, including witnesses and also the enforceability of any judgments resulting.<sup>49</sup> The public considerations relate to interests such as the courts’ workload, the need to apply foreign laws to the dispute and how localised the dispute is.<sup>50</sup> For a transfer between two US federal courts *forum non conveniens* has been codified.<sup>51</sup> However, the doctrine has continuing application to cases where the alternative forum is foreign and allows US courts to dismiss a case over which it has jurisdiction otherwise, even before it has decided on the issue of jurisdiction,<sup>52</sup> “when considerations of convenience, fairness and judicial economy so warrant”.<sup>53</sup> Under federal law, there is a requirement that the plaintiff has access to an available and adequate forum, where the parties will not be deprived of a remedy or treated unfairly.<sup>54</sup> Expiry of the limitation period in the alternative forum means that this condition is not fulfilled and *forum non conveniens* does not apply in such a case.<sup>55</sup> The US Supreme Court has also held on several occasions that ordinarily if a US court has jurisdiction, the plaintiff’s choice of forum should not be disturbed and that the defendant has a strong burden

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<sup>48</sup> Restatement of the Law Fourth – the Foreign Relations Law of the US Jurisdiction, Tentative Draft No. 2 (22. March 2016) §304.

<sup>49</sup> *Gulf Oil Corpn. v. Gilbert*, 1947 SCC OnLine US SC 46 : 91 L Ed 1055 : 330 US 501, 508 (1947).

<sup>50</sup> *Ibid.* at 509.

<sup>51</sup> 28 U.S.C. §1404(a) see fn 45 and *Atlantic Marine Construction Co. Inc. v. United States District Court for Western District of Texas*, 2013 SCC OnLine US SC 72 : 571 US \_\_\_ (2013) : 134 S Ct 568, 580 (2013).

<sup>52</sup> Restatement of the Law Fourth – the Foreign Relations Law of the US Jurisdiction, Tentative Draft No. 2 (22. March 2016) §304 Reporters’ Notes p. 127.

<sup>53</sup> *Sinochem International Co. Ltd. v. Malaysia International Shipping Corpn.*, 2007 SCC OnLine US SC 15 : 127 S Ct 1184 : 549 US 422, 432 (2007).

<sup>54</sup> *Piper Aircraft Co. v. Reyno*, 1981 SCC OnLine US SC 229 : 70 L Ed 2d 419 : 102 S Ct 252 : 454 US 235, 254 (1981); *Gulf Oil Corpn. v. Gilbert*, 1947 SCC OnLine US SC 46 : 91 L Ed 1055 : 330 US 501, 506-7 (1947).

<sup>55</sup> Restatement of the Law Fourth – the Foreign Relations Law of the US Jurisdiction, Tentative Draft No. 2 (22. March 2016) §304 Reporters’ Notes p.130 citing *Bank of Credit and Commerce International Ltd. v. State Bank of Pakistan*, 273 F 3d 241, 246 (2nd Cir 2001); *DiFederico v. Marriott International Inc.*, 714 F 3d 796, 801-2 (4th Cir 2013); *Fireman’s Fund Insurance Co. v. Thyssen Mining Construction of Canada Ltd.*, 703 F 3d 488 (10th Cir 2012); *Chang v. Baxter Healthcare Corpn.*, 599 F 3d 728, 736 (7th Cir 2010).

to rebut the presumption that the chosen forum should hear the case.<sup>56</sup> This deference to the plaintiff's choice of forum was never accorded to the same extent to non-US residents- in fact, the US Supreme Court has held in *Piper* that "a foreign plaintiff's choice of [a US court] deserves less deference".<sup>57</sup> But since the doctrine only applies if there is an alternative, available foreign court whose decision will be enforced in the US, it is less concerning than the doctrine of extraterritoriality in relation to its impact on foreign plaintiffs seeking redress before the US courts.

## V. INTERNET CASES: SUBSEQUENT JURISPRUDENCE ON TARGETING

The courts, when applying the "minimum contacts" test have almost consistently found that mere access to a website is not sufficient as a basis for finding personal jurisdiction, but that "something more" is required.<sup>58</sup>

This something more is the targeting approach under the minimum contacts doctrine discussed above, the defendant must have purposefully directed conduct towards the forum residents, in such a way that it can be said that "the defendant makes the choice to dive into a particular forum".<sup>59</sup> Defining this "something more" has proved to be highly elusive and has resulted in different, overlapping jurisdictional tests being applied to internet jurisdiction cases.

In tort cases concerning data "theft", privacy invasion and computer misuse (illegal access to and misuse of personal information), the question arises whether the location of the data, *i.e.* the place where the data is physically stored is relevant for the jurisdictional analysis. The courts have found jurisdiction on the basis that the defendant knew that the email servers she used and the confidential files she misappropriated were centrally hosted at her

<sup>56</sup> *Piper Aircraft Co. v. Reyno*, 1981 SCC OnLine US SC 229 : 70 L Ed 2d 419 : 102 S Ct 252 : 454 US 235, 255 (1981); *Sinochem International Co. Ltd. v. Malaysia International Shipping Corpn.*, 2007 SCC OnLine US SC 15 : 127 S Ct 1184 : 549 US 422, 430 (2007); *Gulf Oil Corpn. v. Gilbert*, 1947 SCC OnLine US SC 46 : 91 L Ed 1055 : 330 US 501, 508 (1947).

<sup>57</sup> *Piper Aircraft Co. v. Reyno*, 1981 SCC OnLine US SC 229 : 70 L Ed 2d 419 : 102 S Ct 252 : 454 US 235, 256 (1981), see also the discussion in Restatement of the Law Fourth – the Foreign Relations Law of the US Jurisdiction, Tentative Draft No. 2 (22 March 2016) §304 Reporters' Notes p. 131.

<sup>58</sup> *Cybersell Inc. v. Cybersell Inc.*, 130 F 3d 414 (9th Cir 1997).

<sup>59</sup> W.F. Patry, "Section 17:185 The Internet and Personal Jurisdiction Generally", *Patry on Copyright* (March 2017 Update Westlaw), see also *Qwest Communications International Inc. v. Sonny Corpn.*, 2006 WL 1319451 (W.D. Wash. 2006).

former employer's place in Connecticut.<sup>60</sup> As data is increasingly stored on remote cloud computing servers it is unlikely that defendants know where those are located, so that the courts are more likely to focus on the location of the plaintiff as the location of the injury, especially where the defendant was in direct contact with the plaintiff.<sup>61</sup>

The common approach of the courts is to insist on a degree of foreseeability and deliberate conduct to provide a connection with the forum state. One of the first US Supreme Court cases which elucidated this approach was *World-Wide Volkswagen Corpn. v. Woodson*<sup>62</sup> a personal injury case, where the defendants had driven a car across the USA and had an accident in Oklahoma, allegedly due to a defect in the car. The defendants, the distributor and the retailer of the Audi car, had sold the car in New York state and had no business contacts as such with Oklahoma. But the plaintiffs nevertheless filed their claim in Oklahoma and the US Supreme Court held by a majority<sup>63</sup> that theoretical foreseeability on the part of the defendants that someone might drive a car to Oklahoma and have an accident there (cars being inherently highly mobile consumer goods) was not sufficient for a finding of minimum contacts, and that the defendant's contacts with the forum must be more than fortuitous (fortuitous in the sense that this was where the harm happened). Under the US doctrine, the driving to Oklahoma would be regarded as a unilateral act of the plaintiffs, which cannot be imputed to the defendants.<sup>64</sup>

However, the US Supreme Court has held that for jurisdiction over a defendant to exist, the defendant need not have physically entered the forum state at any point- mere regular dealing and contractual relationships (including an express jurisdiction clause in a franchising contract) are sufficient.<sup>65</sup>

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<sup>60</sup> *Mac Dermid Inc. v. Deiter*, 702 F 3d 725, 730 (2nd Cir 2012) (computer misuse and misappropriation of trade secrets): "Deiter purposefully availed herself of the privilege of conducting activities within Connecticut because she was aware 'of the centralization and housing of the companies' e-mail system and the storage of confidential, proprietary information and trade secrets' in Waterbury, Connecticut, and she used that email system and its Connecticut servers in retrieving and emailing confidential files."

<sup>61</sup> *Microsoft Corpn. v. Mountain West Computers Inc.*, 2015 WL 4479490 (US District Court W.D. Washington 2015), p. 7: "Regardless of whether Defendants knew where Plaintiff's servers were located, Defendants admit that they knew Microsoft is located in Washington. Even though Defendants' contacts with Plaintiff were made remotely, they knew Plaintiff to be located in and operating out of the State of Washington." (copyright infringement action concerning allegations of the use of unlicensed software)

<sup>62</sup> 1980 SCC OnLine US SC 7 : 62 L Ed 2d 490 : 100 S Ct 559 : 444 US 286 (1980).

<sup>63</sup> With a strong dissent by three Judges: Justices Marshall, Blackmun, Brennan.

<sup>64</sup> At 295-298.

<sup>65</sup> *Burger King Corpn. v. Rudzewicz*, 1985 SCC OnLine US SC 126 : 85 L Ed 2d 528 : 105 S Ct 2174, 2185 : 471 US 462, 479.

“It is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.”

A much-cited first instance, 1997 US District Court case *Zippo*<sup>66</sup> established the parameters for internet cases by defining what intentional conduct and business contacts sufficient for the establishment of jurisdiction means. The case is a domain name dispute alleging trademark infringement and dilution brought by the manufacturer of *Zippo* lighters (based in Pennsylvania) against an internet news portal (based in California). *Zippo* set out a test distinguishing between merely passive websites which do no more than host information which can be accessed online at one end of the spectrum (no jurisdiction<sup>67</sup>) and fully interactive, fully e-commerce enabled websites which are virtual shopfronts allowing transactions to take place at a distance (jurisdiction would be proper if the defendant actively conducts business over the internet, thus establishing electronic contacts<sup>68</sup>). For the websites in the middle of the continuum, the degree of interactivity is decisive. Thus, the Court developed the so-called sliding scale which requires the court to assess the degree of interactivity of a website in order to see where on the scale the website is situated, based on the notion that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”<sup>69</sup> In the actual *Zippo* case, the Pennsylvania court found that it had jurisdiction since the defendant was doing business over the internet, allowing people to subscribe to its newsgroup services over the internet and 2% of its customers were resident in the forum state.<sup>70</sup>

*Zippo* has been preceded by cases where the courts had found *specific* personal jurisdiction grounded on (1) the defendant doing business in the forum over the internet and (2) regarding repeated electronic contacts with the forum as the “minimum” contacts required. For example, in *CompuServe Inc. v. Patterson*,<sup>71</sup> Mr Patterson, a lawyer based in Texas, distributed a software developed by him as shareware through *CompuServe*’s platform. The contract with *CompuServe* stipulated Ohio law as being applicable to the contract but had no express jurisdiction clause. When he alleged that *CompuServe* infringes his trademark/engaged in unfair competition,

<sup>66</sup> *Zippo Mfg. Co. v. Zippo Dot Com Inc.*, 952 F Supp 1119 (WD Pa 1997).

<sup>67</sup> See also *Bensusan Restaurant Corp. v. King*, 937 F Supp 295 (SDNY 1996).

<sup>68</sup> See also *CompuServe Inc. v. Patterson*, 89 F 3d 1257 (6th Cir 1996).

<sup>69</sup> At 1124-1125.

<sup>70</sup> At 1126.

<sup>71</sup> *CompuServe Inc. v. Patterson*, 89 F 3d 1257 (6th Cir 1996).

they quickly filed for a declaration that their product does not infringe *Mr Patterson's* rights, in their local courts in Ohio. The Court found jurisdiction on the basis that *Mr Patterson* had repeatedly uploaded his software to the platform of an Ohio based company, that he must have known that this company was in Ohio, it was an ongoing business relationship which had lasted for three years and that these repeated electronic contacts are sufficient for a finding that he purposefully availed himself of the privilege of doing business in Ohio.<sup>72</sup> It is peculiar that one of the supporting grounds for jurisdiction was that *Mr Patterson* had addressed email and correspondence to *CompuServe* in Ohio concerning his trademark/unfair competition infringement claims.<sup>73</sup> This is peculiar as it raises the question of how else would any plaintiff send a letter before action to the other party so that this ground always exists in any dispute.

The sliding scale test established in *Zippo* has been applied in a number of cases following it, which examined the degree of interactivity of a website and depending on where on the scale a case was held to sit, jurisdiction was either found<sup>74</sup> or denied.<sup>75</sup> Indications for a high degree of interactivity were held to be a website where users could affect an initial loan application, chat online with an employee of the bank and send an email where a response rate of an hour was guaranteed<sup>76</sup> or where customers could buy a fitness shirt (a fitness app) through the website, allowing for communication and inviting potential customers to contact the company<sup>77</sup> or where customers could select "Utah" from a drop down menu, indicating that the website was interacting with customers from that state.<sup>78</sup>

Insufficient interactivity was held to be a website that merely posts information about the defendant's products and contains a printable mail-order form, telephone number and email address, when orders were not taken through that website and there was no sign that the defendant conducts

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<sup>72</sup> At 1263-4, quoting *Burger King Corp. v. Rudzewicz*, 1985 SCC OnLine US SC 126 : 85 L Ed 2d 528 : 105 S Ct 2174 : 471 US 462, 474-75 (1985).

<sup>73</sup> At 1266.

<sup>74</sup> *Citigroup Inc. v. City Holding Co.*, 97 F Supp 2d 549 (US District Court SDNY 2000); *Sarvint Technologies Inc. v. Omsignal Inc.*, 161 F Supp 3d 1250 (US District Court ND Georgia 2015); *Zing Bros., LLC v. Bevstar, LLC*, 2011 WL 4901321, (US District Court Utah 2011).

<sup>75</sup> *David Mink v. AAAA Development, LLC*, 190 F 3d 333 (5th Cir 1999); *Best Van Lines Inc. v. Tim Walker*, 490 F.3d 239 (2nd Cir 2007); *Oldfield v. Pueblo De Bahia Lora, SA*, 558 F 3d 1210 (11th Cir 2009); *Millenium Enterprises Inc. v. Millenium Music LP*, 33 F Supp 2d 907 (United District Court Oregon 1999).

<sup>76</sup> *Citigroup Inc. v. City Holding Co.*, 97 F Supp 2d 549, 565 (SDNY 2000)

<sup>77</sup> *Sarvint Technologies Inc. v. Omsignal Inc.*, 161 F Supp 3d 1250, 1259 (US District Court ND Georgia 2015).

<sup>78</sup> *Zing Bros., LLC v. Bevstar, LLC*, 2011 WL 4901321, at \*3 (US District Court Utah 2011).



business through the internet<sup>79</sup> and the posting of allegedly defamatory comments on a feedback website about home removal businesses.<sup>80</sup>

Even though the 1997 *Zippo* has been described<sup>81</sup> as “seminal authority regarding personal jurisdiction based upon the operation of an Internet web site”. In recent cases<sup>82</sup> and literature,<sup>83</sup> it has also been described as obsolete, as contemporary websites are unlikely to be purely passive websites, only hosting information, but most websites allow for highly interactive communications and allow the defendant to conduct business transactions remotely:

“Virtually all websites, even those created with only minimal expense, are now interactive in nature. It is an extraordinarily rare website that does not allow users to do at least some of the following: place orders, share content, “like” content, “re tweet,” submit feedback, contact representatives, send messages, “follow,” receive notifications, subscribe to content, or post comments. And those are only interactions immediately visible to the user. In fact, most websites also interact with the user “behind the scenes” through the use of “cookies.”<sup>84</sup>

It is no understatement to say that the very essence of the internet is interactivity in communications, marketing and business conduct- which makes this an unsuitable factor for determining specific jurisdiction. It is also not

<sup>79</sup> *David Mink v. AAAA Development, LLC*, 190 F 3d 333, 337 (5th Cir 1999).

<sup>80</sup> *Best Van Lines Inc. v. Tim Walker*, 490 F 3d 239 (2nd Cir 2007).

<sup>81</sup> *Toys “R” US Inc. v. Step Two SA*, 318 F 3d 446, 452 (3rd Cir 2003).

<sup>82</sup> *Toys “R” US Inc. v. Step Two SA*, 318 F 3d 446, 452 (3rd Cir 2003); *Kindig It Design Inc. v. Creative Controls Inc.*, 157 F Supp 3d 1167, 1173-75 (US District Court Utah 2016); *Caiazza v. American Royal Arts Corpn.*, 73 So 3d 245 (District Court of Appeal of Florida 2011); *Hy Cite Corpn. v. Badbusinessbureau.com, LLC*, 297 F Supp 2d 1154, 1160 (W.D. Wis.2004); *Carlson v. Fidelity Motor Group, LLC*, 860 NW 2d 299, 305 (Wis. Ct. App. 2015).

<sup>83</sup> Justice S. Muralidhar “Jurisdictional Issues in Cyberspace” (2010) 6 *The Indian Journal of Law and Technology* 1-42, 15; K.A. Meehan “The Continuing Conundrum of International Internet Jurisdiction” (2008) *Boston College International and Comparative Law Review* 345-369, 357-358; H. Hestermeyer “Personal Jurisdiction for Internet Torts : Towards an International Solution” (2006) 26 *Northwestern Journal for International Law & Business* 266-288, 278; F. Fangfei Wang, *Internet Jurisdiction and Choice of Law : Legal Practices in the EU, US and China* (Cambridge University Press 2010) 70; M. Geist, “Is There a There There? Towards Greater Certainty for Internet Jurisdiction” (2001) 16 *Berkeley Technology Law Journal* 1345-1406, 1371; R.M. Pollack, “ ‘Not of Any Particular State’: *J. McIntyre Machinery Ltd. v. Nicastro and Non-specific Purposeful Availment*” (June 2014) 89 *New York University Law Review* 1088-1116, 1101; M. Sableman, M. Nepple, “Will the Zippo Sliding Scale for Internet Jurisdiction Slide into Oblivion?” (2016) 20 (1) *Journal of Internet Law* 3-6, 3; B.D. Boone, “Bullseye!: Why a ‘Targeting’ Approach to Personal Jurisdiction in the E-commerce Context Makes Sense Internationally” (2006) 20 *Emory International Law Review* 241-278, 257-8

<sup>84</sup> *Kindig It Design Inc. v. Creative Controls Inc.*, 157 F Supp 3d 1167, 1174 (US District Court Utah 2016) US (District Court Judge Jill N Parrish).

very sensible to merely focus on the nature of the website in “internet cases” and ignore the nature of the underlying dispute and basis of the claim (breach of contract, misleading online advertising, trademark infringement, privacy, defamation etc).<sup>85</sup>

Moreover, it is not necessarily clear why the degree of interactivity of a website is supposed to be decisive and not an assessment of the defendant’s conduct as a whole. Furthermore, if the defendant actively aims harm into the forum through the publication of defamatory contents i.e. the publication of information, classified as passive under the *Zippo* sliding scale, it does not make sense to focus on the degree of interactivity of the website. Conversely, a website can be highly interactive but target only local residents (such as the website of a local take-away restaurant for example).<sup>86</sup>

Therefore, *Zippo* has not clarified what the “something more” is, which is required to subject a defendant whose website can be accessed in the forum state. This means that there is a likelihood of highly inconsistent and uncertain case law.

*Pollack*<sup>87</sup> cites a number of US court decisions in which purchasers of vintage cars and paintings acquired on eBay sued sellers in their local jurisdiction- the courts came to different conclusions whether the buyers’ courts had jurisdiction<sup>88</sup> or not.<sup>89</sup>

Not all courts rely on *Zippo* and instead apply a multi-factor test to assess minimum contacts. In particular, the courts have decided the question of whether the defendant has minimum contacts in the sense of transacting business in manifold ways.<sup>90</sup> For example, some courts have held

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<sup>85</sup> M. Sableman, M. Nepple, “Will the Zippo Sliding Scale for Internet Jurisdiction Slide into Oblivion?” (2016) 20 (1) Journal of Internet Law 3-6, 4.

<sup>86</sup> See also *Kindig It Design Inc. v. Creative Controls Inc.*, 157 F Supp 3d 1167, 1173-75 (US District Court Utah 2016).

<sup>87</sup> R.M. Pollack, “‘Not of Any Particular State’: *J. McIntyre Machinery Ltd. v. Nicastro and Non-specific Purposeful Availment*” (June 2014) 89 New York University Law Review 1088-1116, FN 76.

<sup>88</sup> *Erwin v. Piscitello*, 627 F Supp 2d 855, 856 (E.D. Tenn. 2007): jurisdiction based on telephone calls and making use of the internet for business contacts directed at Tennessee; *Dedvukaj v. Maloney*, 447 F Supp 2d 813, 816-7 (E.D. Mich. 2006); jurisdiction based on transaction of business in Michigan through email messages and telephone calls, accepting the winning bids in the eBay auction, confirming shipping charges to Michigan and accepting payment and the degree of interactivity of the eBay auction website.

<sup>89</sup> *Boschetto v. Hansing*, 539 F 3d 1011, 1014 (9th Cir 2008): single eBay sale with buyer in California insufficient to establish jurisdiction over Wisconsin seller: “once the car was sold the parties were to go their separate ways”; *Hinners v. Robey*, 336 SW 3d 891, 893 (Ky 2011).

<sup>90</sup> K.D. Johnson, “Measuring Minimum Contacts over the Internet: How Courts Analyze Internet Communications to Acquire Personal Jurisdiction over the Out-of-State Person”

that a single negotiation process or entering into a single contract is sufficient where the communication was targeted at a particular state.<sup>91</sup> In *Deutsche Bank Securities Inc. v. Montana Board of Investments*<sup>92</sup> the New York Court of Appeals, for example honed in on the fact that the defendant (based in Montana) had initiated a new set of negotiations with the plaintiff (whose principal place of business in New York was known to the defendant) through instant messaging. Thus, the fact that the MBI had reached out to a New York investment bank was seen as sufficient for jurisdiction in New York. By contrast in other cases, the courts have held that there must be a course of business transactions targeted at a particular state and a single transaction is not sufficient.<sup>93</sup> Sometimes the courts examine fairness arguments in addition to the nature and quality of the contacts, considering the nature of the parties involved (protecting consumers and individual investors) as part of the minimum contacts analysis.<sup>94</sup> One specific emanation of the minimum contacts test will be discussed next.

In the seminal defamation case *Calder v. Jones*, the US Supreme Court<sup>95</sup> established the so-called *effects test*. In this case, a Californian entertainer brought an action for libel in California against the writer and the editor of a Florida based magazine, the National Enquirer.

In some ways the label given to the *Calder v. Jones* test is a misnomer, as jurisdiction under this test is not grounded on harmful “effects” within the forum state alone but on the defendant purposefully targeting their tortious conduct to the forum state, in such a way that the brunt of the harmful effects were caused there and this was foreseeable for the defendant (as the plaintiff lived and worked there and the magazine had its largest circulation in California).<sup>96</sup> The Court in *Calder v. Jones* concluded:

“the allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centred in California. The article was

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(2007) University of Louisville Law Review 313-333, 325-331.

<sup>91</sup> *Chloe v. Queen Bee of Beverly Hills*, 616 F 3d 158, 165-167 (2nd Cir 2010) (one shipping of a counterfeit bag to plaintiff’s lawyers in New York sufficient — as part of other contacts with New York which demonstrated a larger business plan directed at customers in New York).

<sup>92</sup> 850 NE 2d 1140 (NY 2006).

<sup>93</sup> *L.F. Rothschild v. McTamney*, 449 NE 2d 1275 (NY 1983); call by an individual investor to a New York stockbroker not sufficient for jurisdiction in New York; *Boschetto v. Hansing*, 539 F 3d 1011, 1014 (9th Cir 2008).

<sup>94</sup> *Dedvukaj v. Maloney*, 447 F Supp 2d 813, 822-3 (ED Mich 2006); *L.F. Rothschild v. McTamney*, 449 NE 2d 1275 (NY 1983).

<sup>95</sup> 1984 SCC OnLine US SC 58 : 79 L Ed 2d 804 : 104 S Ct 1482 : 465 US 783 (1984).

<sup>96</sup> At 1486.

drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered."<sup>97</sup>

Interestingly in *Calder v. Jones* the US Supreme Court held that 1<sup>st</sup> Amendment considerations should not influence the jurisdictional analysis but that questions of free speech should only be dealt with in the substantive law analysis.<sup>98</sup>

This analysis was applied in an early internet case, concerning cyber-squatting, *Panavision International LP v. Toeppen*.<sup>99</sup> Mr Toeppen registered multiple trademark protected brands of well-known businesses such as *Panavision* as generic top-level domain names, then allocated on a first-come, first-serve basis, with the intention of selling them to the trademark owner. The Court found that Mr Toeppen's acts were aimed at Panavision with its principal place of business in California and caused it to suffer injury there (trademark dilution)<sup>100</sup> the defendant did not merely register a domain name (while never leaving Illinois) he actively pursued a strategy to sell the domain name to the Californian company and this was sufficient for the Californian courts having jurisdiction.<sup>101</sup>

US courts have therefore moved to an intentional targeting test, which, however leaves open the question whether it is sufficient that the defendant foresees where the plaintiff will suffer the brunt of the harm (so in a defamation case this would be, for most people, the place where they have the focus of their life, *i.e.* where they have a reputation) or whether the defendant needs to actively target the *specific* forum state as such,<sup>102</sup> not just the defendant. This distinction becomes apparent in two internet defamation cases where jurisdiction was at issue.

In the first, *Young v. New Haven Advocate*<sup>103</sup> two Connecticut regional newspapers (some of whose articles were published online on their respective websites) had reported on a controversial and much-debated prisoner transfer programme which led to mostly black prisoners being sent south to Virginia and Mr Young was a prison warden in a Virginia prison and he claimed that he had been defamed in these newspaper articles as a racist.

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<sup>97</sup> At 1486.

<sup>98</sup> At 1487.

<sup>99</sup> 141 F 3d 1316 (9th Cir 1998).

<sup>100</sup> At 1321.

<sup>101</sup> At 1322.

<sup>102</sup> See also *Shrader v. Biddinger*, 633 F 3d 1235, 1240 (10th Cir 2011).

<sup>103</sup> 315 F 3d 256 (4th Cir 2002).

Based on *Calder v. Jones*, one would have expected the courts in Virginia to have jurisdiction as *Mr Young* lived and worked in Virginia, this was where he would have felt the brunt of the harm to his reputation and the plaintiffs were aware of both these factors. However, the US Court of Appeals for the 4<sup>th</sup> Circuit established a new “audience targeting” test. It declined jurisdiction on the basis that the articles were published in two regional newspapers targeted only at local readers in Connecticut and were therefore not aimed at an audience in Virginia and hence, not at the forum. The Court held that in internet defamation cases it was necessary to “manifest an intent to aim the websites or the posted articles at” the forum’s “audience”<sup>104</sup>, even though the reporters had made some phone calls and interviewed people on the phone in Virginia, one of the newspapers had two handful of subscribers in Virginia, and even though the story was centred around prisons in that state. The Court, on the facts, however, decided that the articles focused *more* on Connecticut than Virginia as it discussed the implementation of the policy there and its negative effect on the prisoners and their families.<sup>105</sup>

Arguably this argument is deeply flawed, as readers in Virginia, in a state likewise affected by the prison policy, would also have been interested in this debate and even though the articles were published in regional newspapers,<sup>106</sup> they would have found these articles through search engines and through republication on other internet sources.

The second case, *Burdick v. Superior Court*<sup>107</sup> concerns a claim for defamation made on the defendant’s Facebook wall. The Californian plaintiffs are medical scientists who ran a blog “Barefacedtruth.com” in which they exposed a skincare product as unsafe and defective. The representatives of the skin care company reacted with a campaign of harassment including allegedly defamatory statements on Facebook that associated the plaintiffs with fraud and domestic violence. The Californian courts declined to assert jurisdiction and found that the plaintiffs had failed to show that the Facebook post had been aimed or targeted at California, in particular, there was no evidence that the Facebook posts had been accessed in California.

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<sup>104</sup> 315 F 3d 256, 258-9 (4th Cir 2002).

<sup>105</sup> 315 F 3d 256, 263-4 (4th Cir 2002).

<sup>106</sup> From the case report, though it is not entirely clear whether there was evidence that the two articles complained of were in fact published online. Circuit Judge Michael states in his opinion that the plaintiff “alleged” that they were so published, but the evidence he adduces relate to printouts from the websites which do not contain the offending articles at 258.

<sup>107</sup> 233 Cal. App. 4th 8 (2015); (2016) 43 Western State Law Review 291-295.

The Californian Court, in particular, referred to the US Supreme Court decision in *Walden v. Fiore*.<sup>108</sup> The context of *Walden v. Fiore* is not internet related, the case concerns the seizure of cash from the plaintiffs in Puerto Rico and later action by a Georgia-domiciled US drug enforcement official at Atlanta airport suspecting the money to be the proceeds of crime. The plaintiffs then travelled to their destination in Las Vegas, Nevada, the money was eventually returned and they brought proceedings against the immigration official from Nevada. The US Supreme Court held that it was not sufficient for jurisdiction over a defendant that the defendant could foresee where the injury would fall (here the immigration official knew that the plaintiff were Nevada residents when conducting the search, and seizure of the money). The US Supreme Court held that the *tort itself* must be aimed at the forum *state* and declined jurisdiction.<sup>109</sup> Therefore the minimum contact analysis must focus on the defendant's contacts with the forum state itself, not the defendant's contacts with persons who reside in the forum state.<sup>110</sup> However, in *Walden*, the US Supreme Court distinguishes the case before it from defamation cases in that defamation requires publication of the libel to third parties and hence it is the publication in the forum state which may provide the link between the defendant and the forum state.<sup>111</sup> By contrast, none of the defendant's conduct at the airport in Atlanta linked him with Nevada: "the effects of [defendant's] conduct on [plaintiffs] are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction".<sup>112</sup>

These three cases show a trend to find that the defendant being able to foresee that the plaintiff would suffer the direct or indirect, effects of the harm in their state of residence is not sufficient to fulfil the purposeful availment test under the minimum contacts doctrine. In addition, the plaintiff must have actively aimed the tort into the forum state (for example by targeting a communication or publication there) such that it can be said that jurisdiction is based on the defendant's conduct (and not merely linking him to a plaintiff resident in the forum).<sup>113</sup> However, it should also be noted that *Walden* has not overruled *Calder v. Jones*, but distinguished it for publication/communication torts. Furthermore, the narrowing of the doctrine in *Calder v. Jones* in *Burdick* (in a state court) does not as such change federal

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<sup>108</sup> *Walden v. Fiore*, 2014 SCC OnLine US SC 55 : 62 L Ed 2d 516 : 134 S Ct 1115 : 571 US \_\_\_\_ (2013).

<sup>109</sup> At 1123-4.

<sup>110</sup> At 1122-3.

<sup>111</sup> At 1124.

<sup>112</sup> At 1125.

<sup>113</sup> W. Schildknecht, "Justice for J-Law? Specific Personal Jurisdiction Over Internet Torts in the Wake of *Walden v. Fiore*" (2016) 56 Santa Clara Law Review 1-32, 10-11.

law- thus it can be said that *Calder v. Jones* is good law and is applied to internet communication torts.

## VI. INDIAN CASE LAW

Developments parallel to the US can be observed in India. In one of the earliest cases, a dispute about cybersquatting in respect of which the claimant brought a passing off claim, (*Casio India Co. Ltd. v. Ashita Tele Systems (P) Ltd.*)<sup>114</sup> the Court found that it had jurisdiction based on the accessibility of the website to which the disputed domain name resolved. The defendant was a Mumbai-based business, but the claimant brought the claim in Delhi. The Court quoted the judgment in the *Gutnick case*, where the Australian High Court had found that the tort of defamation was committed at the place where the publication was accessed and read: “once access to the impugned domain name website could be had from anywhere else, the jurisdiction in such matters cannot be confined to the territorial limits of the residence of the defendant”.<sup>115</sup> Very early cases in the US also based internet jurisdiction on accessibility.<sup>116</sup>

However subsequent case law in India moved away from a test purely based on accessibility and, like in the US, developed a balanced targeting test based on interactivity, purposeful availment and reasonableness. Effectively the courts in India amalgamated the US jurisdictional tests (interactivity, effects test and reasonableness) into the Indian rules on jurisdiction and in particular the determination of where the cause of action had arisen or whether the defendant carried on business in the place of the forum.

Mr Justice S. Muralidhar wrote in his 2010 law review article: [the defendant’s actions] “must have resulted in some harm or injury to the plaintiff within the territory of the forum state. Since some effect of a website is bound to be felt in several jurisdictions given the nature of the internet, courts have adopted a ‘tighter’ version of the ‘effects’ test, which is ‘intentional targeting’.”<sup>117</sup>

<sup>114</sup> 2003 SCC OnLine Del 833.

<sup>115</sup> *Dow Jones v. Gutnick*, 2002 HCA 56, 58.

<sup>116</sup> See for example *Inset Systems Inc. v. Instruction Set Inc.*, 937 F Supp 161 (D. Conn. 1996) and *Maritz Inc. v. Cybergold Inc.*, 947 F Supp 1328 (ED Mo 1996) — see the discussion in Michael A. Geist “Is There a There There? Towards Greater Certainty for Internet Jurisdiction” (2001) 16 Berkeley Technology Law Journal 1345, 1361.

<sup>117</sup> Justice S. Muralidhar, “Jurisdictional Issues in Cyberspace” (2010) 6 The Indian Journal of Law and Technology 1-42, 15.

For example in the *India TV case*,<sup>118</sup> Mr Justice Sanjay Kishan Kaul pointed out, as a starting point, that ordinarily jurisdiction is exercised in the place where the defendants reside, carry on business or personally work for gain.<sup>119</sup> The claimant had a registered trademark in “India TV” and operated a popular news channel in Hindi from Delhi and the defendants, various US-based entities, had registered and used the domain name “indiatvlive.com”. The Court referred to the three-part test used by US courts established in *Cybersell Inc. v. Cybersell Inc.*,<sup>120</sup> namely that “(1) The non-resident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections; (2) the claim must be one which arises out of or results from the defendants forum-related activities; and (3) exercise of jurisdiction must be reasonable”.<sup>121</sup> Furthermore, Mr Justice Sanjay Kishan Kaul also referred to the finding of the *Zippo case*<sup>122</sup> that the likelihood that personal jurisdiction can be exercised over an out-of-state entity is proportionate to the degree of interactivity of the website.<sup>123</sup> He held that accessibility of a website in the forum state as such as insufficient to grant jurisdiction.<sup>124</sup> The Court held that India TV was targeted at India as it was a subscription channel, and its intention to purposefully avail itself of business in India was clear from several press releases it had issued.<sup>125</sup>

The issue of personal jurisdiction reached a larger bench in the landmark case of *Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy*<sup>126</sup> with the judgment given by Mr Justice S Muralidhar. This case concerned an action for passing off and a peculiar feature was that neither the claimant, (who was a Singaporean company) nor the defendant (who was an entity established in Hyderabad) was domiciled in the place of the forum (Delhi). The Court had to examine whether the cause of action arose in Delhi based on the website used by the defendant which used the claimant’s name (Banyan Tree) well-established in connection with spa hotels.

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<sup>118</sup> *India TV, Independent News Service (P) Ltd. v. India Broadcast Live, LLC*, 2007 SCC OnLine Del 960 : (2007) 35 PTC 177 : (2007) 2 MIPR 396.

<sup>119</sup> Para 1.

<sup>120</sup> See Fn 58.

<sup>121</sup> Paras 30, 45.

<sup>122</sup> Fn 66.

<sup>123</sup> Para 32.

<sup>124</sup> Paras 46, 48.

<sup>125</sup> Paras 49-50.

<sup>126</sup> 2009 SCC OnLine Del 3780.



In this case, the Court expressly overruled the earlier *Casio India Decision*<sup>127</sup> and held that in order to determine personal jurisdiction a combination of the *Calder v. Jones* effects test and the *Zippo* interactivity test should be used.<sup>128</sup> The Court stated that “since over the years, most websites are interactive to some degree, there has been a shift from examining whether the website is per se passive or active to examining the nature of the activity performed using the interactive website. The difficulty experienced with the application of the *Zippo* sliding scale test has paved way for the application of the ‘effects’ test.”<sup>129</sup> The Court explained that this meant that some effects of the website must be felt in the forum state, but that this in itself was not sufficient. In addition, there must be intentional targeting, as laid down in *Calder v. Jones*, where the defendant could have reasonably anticipated that the brunt of the harm would be felt in the forum state and where it could be said that the tort was aimed at the forum state.<sup>130</sup> The Court also referred to the *Step Two* US Court of Appeals Decision<sup>131</sup> in which a targeting test had been established which required a showing that the defendants “‘purposefully availed’ itself of conducting activity in the forum state, by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website”.<sup>132</sup> The Court adopted a purposeful availment test which required that “it would have to be shown that the nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user.”<sup>133</sup> Finally, it held that a lone “trap” transaction which the defendant entered was not sufficient to show such purposeful availment.<sup>134</sup>

*Super Cassettes Industries Ltd. v. Myspace Inc.* by contrast is a case where the Court distinguished *Banyan* on its facts by pointing out that the social networking site *myspace*, which allowed users to upload and download copyright infringing content was sufficiently interactive and specifically targeted at Indian users through geo-location tools, for the cause of action under Section 20 of the Civil Procedure Code to arise in India.<sup>135</sup>

In *Federal Express Corpn. v. Fedex Securities Ltd.*<sup>136</sup> the claimant was the US courier service based in Memphis, USA, operating multiple services

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<sup>127</sup> Para 38.

<sup>128</sup> Para 42.

<sup>129</sup> Paras 21-22.

<sup>130</sup> Paras 22-23.

<sup>131</sup> Fn 81.

<sup>132</sup> Para 26.

<sup>133</sup> Para 40.

<sup>134</sup> Para 57.

<sup>135</sup> 2011 SCC OnLine Del 3131: (2011) 47 PTC 49, paras 56-57.

<sup>136</sup> 2017 SCC OnLine Del 7906.

under the registered trademark “FEDEX”. The defendants were a number of B2B financial services providers established in Mumbai and using the FedEx name, against which use the claimant sought to obtain an injunction. On the question of whether the cause of action arose in Delhi, the Court relied on *Banyan* but found in the present case on the facts, as the defendant’s website was not specifically targeted at Delhi, but advertised the defendant’s services throughout India. In particular, there were no commercial transactions entered into by users in the place of the forum through the websites and thus, the court found that it did not have jurisdiction.<sup>137</sup> Finally a similar case concerning passing off, where the Delhi Court has denied jurisdiction was *Indovax (P) Ltd. v. Merck Animal Health*. Again, the Court found that no commercial transactions were targeted at the forum through the use of the website.<sup>138</sup> Similar to the US courts, in these last two cases, the Indian courts require active targeting of the *specific* place of the forum (e.g. Delhi as opposed to India as a whole).

Indian courts have mentioned the reasonableness test as part of their analysis, but of course the analysis under Indian law is not primarily based on a constitutional principle of due process as in the US, but on the questions raised by Section 20 of the Code of Civil Procedure, whether the defendant carries on business in the forum state or the cause of action arises there, wholly or partly. For example, in *India TV, Independent News Service (P) Ltd. v. India Broadcast Live, LLC* the Court stated that “whether the exercise of jurisdiction is reasonable” is part of the jurisdictional analysis<sup>139</sup>, but it is not entirely clear how the reasonableness standard is implemented within the Indian rules on jurisdiction.

Finally, concerning *forum non conveniens*, the common law in India recognises the principle of *forum non-conveniens*<sup>140</sup>, which consists of a two-step test; first, examining whether there is an alternative forum with jurisdiction which is appropriate in the circumstances and secondly, whether it is in the interest of justice that this alternative forum should deal with the case.<sup>141</sup> However, *forum non-conveniens* is only applicable

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<sup>137</sup> Paras 23-24.

<sup>138</sup> 2017 SCC OnLine Del 9393, paras 18-19.

<sup>139</sup> 2007 SCC OnLine Del 960 : (2007) 35 PTC 177 : (2007) 2 MIPR 396, para 47.

<sup>140</sup> *India TV, Independent News Service (P) Ltd. v. India Broadcast Live, LLC*, 2007 SCC OnLine Del 960 : (2007) 35 PTC 177 : (2007) 2 MIPR 396.

<sup>141</sup> *Horlicks Ltd. v. Heinz India (P) Ltd.*, 2009 SCC OnLine Del 3342, referring to the English House of Lords case of *Spiliada*, para 28: “The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice”, and also *India TV, Independent News Service*

as against a foreign forum, not between Indian courts and the same applies to anti-suit injunctions.<sup>142</sup> Furthermore *forum non-conveniens*, unlike the reasonableness test, is not part of the jurisdictional analysis, but is argued after the court has found that it is competent to hear the case.<sup>143</sup> Thus the jurisdictional analysis and the *forum non-conveniens* analysis are two distinct steps in the courts' reasoning.

## VII. CONCLUSION

The US jurisdictional tests are very flexible and malleable based on general principles which can be interpreted to suit new factual scenarios. This adaptability accommodates new business models and new communication technologies.

The internet has created a further dimension to the complexity of jurisdiction- in many cases internet communications or interactions are directed nowhere and everywhere at the same time. This is encapsulated in the paraphrase<sup>144</sup> of Gertrude Stein's phrase that there is "no there, there" on the internet- the jurisdictional analysis frequently does not result in an obvious "there". The challenges of internet jurisdiction will require careful balancing between the parties to ensure the interests of justice are served and a careful balancing between local and international interests.<sup>145</sup>

Operators on the internet may in certain instances not target a particular US state for business but at the same time target the whole of the US in an effort to maximize their reach and/or the numbers of sales. A similar phenomenon we have seen, of course in India as well, where plaintiffs have sued in a particular forum with the argument that website marketing was directed at the whole of India, including Delhi (*Federal Express Corp'n. v. Fedex Securities Ltd.* and *Indovax (P) Ltd. v. Merck Animal Health*).

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(P) *Ltd. v. India Broadcast Live, LLC*, 2007 SCC OnLine Del 960 : (2007) 35 PTC 177 : (2007) 2 MIPR 396, para 53.

<sup>142</sup> *Ibid.*, para 84.

<sup>143</sup> Curtailing the excesses of common law jurisdiction, *India TV, Independent News Service (P) Ltd. v. India Broadcast Live, LLC*, 2007 SCC OnLine Del 960 : (2007) 35 PTC 177 : (2007) 2 MIPR 396, para 25.

<sup>144</sup> *Digital Equipment Corp'n. v. Altavista Technology Inc.*, 960 F Supp 456, 462 (D Mass 1997) quoted in MA Geist's seminal article "Is There a There? Towards Greater Certainty for Internet Jurisdiction" (2001) 16 Berkeley Technology Law Journal 1345-1406, 1346: "the 'there' is everywhere there is internet access. The quote stems from G Stein's *Everybody's Autobiography* (Exact Change 1993) 298.

<sup>145</sup> Justice S. Muralidhar, "Jurisdictional Issues in Cyberspace" (2010) 6 The Indian Journal of Law and Technology 1-42, 30.

In some instances, this has led courts to assert jurisdiction widely and broadly, finding minimum contacts merely based on remote, internet-mediated contacts (*Patterson, Zippo, Panavision*). While interactivity is continued to be included as a criterion, courts both in the US and India have switched to the so-called effects test which examines whether the defendant's conduct was targeted at the forum state (*Banyan Tree*).

In the US, for communication torts, the courts have latched on the fact that the defendant's conduct was not actively directed at an audience in a specific forum, hence denying jurisdiction for this reason (*Young, Burdick*). This latest trend examined is a higher test- for minimum contacts, where plaintiffs must show that they targeted a particular state (not just knowing that the defendant is located in a particular state). This trend is also observable in the Indian common law jurisprudence, in passing off, trademark and copyright cases as discussed above.

However, this narrower targeting test encourages distribution and communication models which maximize access to a large audience or market, while at the same time avoiding direct contacts with a specific forum, and thus exposure to legal liability, thus disconnecting market entry opportunities from litigation risk, which seems an immoral disconnect- greater opportunities should be commensurate with greater liability risk. As the Court in *Dedvukaj v. Maloney* pointed out: "Internet forums such as eBay expand the seller's market literally to the world and sellers know that and avail themselves of the benefits of this greatly expanded marketplace. It should, in the context of these commercial relationships, be no great surprise to sellers—and certainly no unfair burden to them—if, when a commercial transaction formed over and through the internet does not meet a buyer's expectations, they might be called upon to respond in a legal forum in the buyer's home state. Sellers cannot expect to avail themselves of the benefits of the internet-created world market that they purposefully exploit and profit from without accepting the concomitant legal responsibilities that such an expanded market may bring with it."<sup>146</sup>

The targeting test which seems to be the standard test for assessing jurisdiction in internet cases has originated in the minimum contacts analysis to ensure due process for out-of-state defendants. It is based on the idea that it is the defendant's purposeful availment of conducting business in the forum state or directing tortious activities at residents in the forum state which subjects him to the power of the courts there. Thus, if a defendant targets an area wider and more inclusive than the place of the forum, courts should

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<sup>146</sup> *Dedvukaj v. Maloney*, 447 F Supp 2d 813, 820 (ED Mich 2006).

consider assuming jurisdiction if this wider area includes the place of the forum.

In this connection, it should also be pointed out that the targeting test is counterbalanced by the reasonableness test (2<sup>nd</sup> leg of the *Shoe* analysis) and subject to the notion of *forum-non conveniens* examined above. This test has the potential “to protect small-scale and part-time sellers from an over-inclusive doctrine of personal jurisdiction”<sup>147</sup> or in turn protect the interests of consumers or employees as claimants (or defendants) by balancing the ability of the parties to cross a jurisdictional border and defending the state’s interest to ensure public policy interests such as product safety or consumer protection legislation. However, as we have seen the “reasonableness test” is rarely used or only to further justify the outcome of the minimum contact analysis. Again, a similar trend can be observed in the case law of the Indian court, where the reasonableness test has been referred to (*India TV*) as a principle which is part of the balancing act, but little flesh has been put on its bones to date. Arguably, more active use of the multi-factor reasonableness analysis would yield better-balanced results. In Indian cases the reasonableness test could be used to balance the interests of both parties and the interests of the states in a way which goes beyond the analysis of the defendant’s contacts with the forum, which would create a presumption of jurisdiction which can be displaced by balancing the interests of the parties and states involved.

Comparing the case law in India and the US, it is noteworthy that the courts in India have been influenced by the US minimum contacts doctrine, but it is equally clear that some of the considerations for developing targeting tests are raised by the technology *itself* and therefore, courts all over the world are confronted with the same challenges, which may eventually lead to a novel form of international common law for assessing jurisdiction in the interests of justice. Thus, the courts in both jurisdictions examined have created a balance to ensure, on the one hand, that defendants who could not foresee that they would have to account for their actions in a foreign court are not dragged before a foreign court and, on the other hand, that defendants who infringe a claimant’s rights and legal interests remotely from a foreign location cannot do so without impunity, thus ensuring access to justice. This is a difficult balance to make and no doubt one which has to be further fine-tuned as technology evolves.

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<sup>147</sup> R.M. Pollack, “‘Not of Any Particular State’: *J. McIntyre Machinery Ltd. v. Nicastro and Non-specific Purposeful Availment*” (June 2014) 89 *New York University Law Review* 1088-1116, 1115.