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An Analytical Framework on Regulatory Competence over Online Activity

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Abstract

This thesis examines the application of traditional jurisdictional doctrines to online activity. It analyses not only to what extent, and why, the Internet challenges existing principles allocating regulatory competence, but the factors which shape, and must shape, the regulatory responses to these challenges, in an attempt to create an analytical framework within which the search for viable solutions can begin.

The overarching argument made in this thesis is that the keys to viable future Internet regulation are deeply embedded in past and present regulation and that we cannot simply look for the most efficient legal solutions, regardless of how they fit within existing laws. This would be inconsistent with the law's basic function to answer the need for certainty and predictability. Building upon this fundamental premise, it is further argued, and shown, that an understanding of the public law - private law dichotomy within the existing jurisdictional framework, as well as its deeply entrenched status, is essential for appreciating the severity of the jurisdictional problems caused by the Internet and actual and likely regulatory responses to them. It is argued that this explains why both sets of rules have consistently accommodated transnational online activity differently, giving rise to different problems - problems which ultimately touch upon fundamental legal notions, such as formal justice, the rule of law or obedience to law which cannot but set further outer parameters of the search for solutions to the jurisdictional problems triggered by the Internet.

The thesis considers the law up to 30 November 2002.

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Published Articles

The following articles, which to varying degrees build upon the discussion in the thesis, were published during the candidature:

'The Horror-Scope for the Taxation Office: The Internet and its Impact on 'Residence'" (1998) 21 *University of NSW Law Journal* 436-451.

'Legal Reasoning and Legal Change in the Age of the Internet - Why the Ground Rules are still Valid' (1999) 7(2) *International Journal of Law and Information Technology* 123-151.

'Defamation on the Internet - A Duty-Free Zone After All? *Macquarie Bank Ltd & Anor v Berg*' (2000) 22 *Sydney Law Review* 119-140.

'Injunctions v Damages (The Age of the Internet) Old Battle of Remedies Revisited' (2001) 11 *Journal of Law and Information Science* 160-182.

'Yahoo! - But no Hooray! for the international online community' (2001) 75 *Australian Law Journal* 411-416.

'Eggs, Jurisdiction and the Internet' (2002) 51 *International and Comparative Law Quarterly* 555-582.

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Chapter 1: Introduction

1. Jurisdiction and the Internet

1.1. The Egg Story

A long time ago[1] hens did not lay white or brown eggs but eggs in primary colours: red, yellow and blue. Since, depending on the colour of the eggs, their taste and quality varied, the farming industry split into red, yellow and blue industries catering for different markets. Those industries which dealt with the respective eggs became over the years highly competitive. And what was initially no more than a common understanding, namely, that hens laying red eggs belonged to the red industry, while hens laying blue and yellow eggs belonged to the blue and yellow industries, turned over the years into customary egg law, with each industry having its clearly demarcated area of competence. As it happened, due to interbreeding, some hens normally laying, for example, red eggs would very occasionally lay purple eggs or orange eggs. Also on occasion, some hens would stop altogether from laying eggs of a primary colour, but would lay orange, purple, brown or green eggs. These eggs and hens presented a problem, albeit not a severe one, as they remained very much the exception. Hens laying blue eggs were kept apart from hens laying red eggs and from those laying yellow eggs. Nevertheless, solutions to these problematic eggs and hens had to be found. On occasions the red, blue or yellow industries would unilaterally declare, but only after close analysis and in accordance with their own complex rules about subtle colour variations, known as conflicts-of-egg law, that the hen or egg in question belonged to its industry or to one of the other industries. These decisions were generally but not always accepted by the other industries. In respect to particularly big hens and eggs there was a consensus at the higher farming level about the rules on who had a right to the hens and eggs. Again, these rules were equally complex and occasionally gave rise to arguments, but all in all the hen industry lived in peace and harmony for a long time.

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[1] This story was inspired by the article by Tony Bradney, 'Law Schools and the Egg Marketing Board' (2001) 22 *SPTL Reporter* 1.

And then something happened, what can only be called a miracle of nature. Hens could suddenly be fertilised through the air. While this was in itself not a problem and indeed made breeding hens so much easier and produced stronger, healthier hens with better, bigger and tastier eggs, the hen industry was in deep shock. Sure enough, the number of discoloured eggs increased drastically and, with it, the burden on the industries to work out which hen or egg belonged to whom. But not only that, the frequent interbreeding produced totally new colour variations, meaning that the traditional rules had to be further and further refined, leading to what must have seemed totally arbitrary results. The teams of colour experts increased. Universities taught whole degrees on hens and eggs and colours. Research on how to optimise and improve the solutions to questions of which industry could have which hen or egg, was booming. Meetings between the red, blue and yellow industries took place frequently and yes, they did agree on further common rules, even in relation to the small eggs, for working out which one belongs to whom. Of course, every industry was very concerned about its own interest, none wanting to surrender too many eggs or hens to the others. In an attempt to mitigate the uncontrolled and uncontrollable interbreeding they built high walls around their hen farms, but to no avail. They also resorted to keeping eggs and hens which they knew belonged to one of the other industries, which then caused more arguments and even reprisals. But one fact stubbornly remained: there was a constant relentless increase in non-primary coloured eggs, and their relative proportion to primary coloured eggs rose and rose. And these eggs were hardly distinguishable from one another in terms of quality or taste. It took the farming industry a long time to acknowledge its system of dividing the non-primary coloured eggs had broken down. Then some even questioned whether it made still sense to divide eggs according to colour at all. But they were laughed at. The industries, though, finally and grudgingly admitted to themselves that they were wasting time, effort and money to try and distinguish between eggs that could not really be distinguished. They had to find a new and more efficient way of distributing control over these difficult eggs. Some suggested a new industry dedicated entirely to these eggs. Unfortunately, what happened between then and the time when all eggs became brown or white remains a mystery.

History repeats itself. Today it is no longer the issue which non-primary coloured egg belongs to which hen industry; the issue is which transnational event or activity belongs to, or should be regulated by, which State. Today it is not customary egg law or conflicts of egg law but the jurisdictional rules under international law and the conflicts of law rules which determine whether it is France or Japan or Australia which has an entitlement to regulate a particular transnational event which is not quite French, Japanese or Australian but a bit of each. And today it is not a miracle of nature which has thrown the traditional rules into disarray and questions their viability, but a miracle of science, the Internet. The number of transnational events is not only skyrocketing but gives rise to colour variations not known before. Finally, today there have been calls for a new legal regime entirely dedicated to these 'difficult' events.

1.2. Aims of the Thesis

In 1996 David R. Johnson and David Post published their highly influential article 'Law and Border - The Rise of Law in Cyberspace'[2] in which they argued convincingly that '[g]lobal computer-based communications cut across territorial borders,... undermining the feasibility - and legitimacy - of laws based on geographic boundaries.'[3] Their central assertion was that the traditional rules allocating regulatory competence (ie. jurisdictional rules) based on geographic location are entirely incompatible with, and thus not transferable to, the transnational Internet and should be replaced by regulation which treats cyberspace as a distinct and independent place.[4] The ideas had many followers, even initially amongst governments:

> 'The idea that cyberspace should be presumptively self-governing has resounded in thoughtful scholarship. It has also colored federal policy regarding electronic commerce. A 1997 Presidential Directive, which heralded the dramatic withdrawal of the United States government from significant portions of Internet administration, instructs federal agencies to

[2] David R Johnson and David Post, 'Law and Borders - The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1357.
[3] Ibid 1367.
[4] Ibid 1378, where the authors argue that '[m]any of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of Cyberspace as a distinct "place" for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the "real world." '

> "recognize the unique qualities of the Internet, including its decentralised nature and its tradition of bottom-up governance.'"[5]

Yet, the legal developments which have taken place since then are a far cry from Johnson and Post's assertion and prediction, with States having consistently refused to treat the Internet as beyond their regulatory competence and assumed this competence by applying existing territorially-based rules. The debate has moved on from the question of w*hether* States should regulate the transnational Internet to the questions of *h*ow it can be done.

This thesis examines where and why Johnson and Post went wrong and consequently seeks to identify the determinative factors which shaped, shape and will shape the regulatory solutions to the transnational Internet. More specifically, it examines the traditional rules on jurisdiction in the context of online activity. Firstly, it asks whether and, if so, to what extent the traditional allocation of regulatory competence on the basis of territory is incompatible with the transnational Internet. Secondly, it considers how any such incompatibility is and will be resolved. While in addressing this second question, this thesis, unlike Johnson and Post, does not proffer a magic solution, it does seek to identify the parameters within which solutions must be found. So the analysis is more than a post-mortem of past legal events; the thesis' overarching canon is that the keys to finding viable solutions to the jurisdictional conundrum are deeply embedded in past and present regulation. Ultimately, the thesis seeks to identify the factors that are, will and should be determinative of the answers to the question as to when States can assert jurisdiction or regulatory competence over online activity.

1.3. Methodology of the Thesis

Consistent with this canon, this thesis seeks to find answers to the above questions by examining mainly case law, both recent cases dealing with jurisdiction in the online context as well as pre-Internet jurisdictional cases, but also some legislative developments. By relying on past decisions to find answers

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[5] Neil Weinstock Netanel, 'Cyberspace Self-Governance: A Skeptical View From Liberal Democratic Theory' (2000) 88 *California Law Review* 395, 398 (footnotes omitted).

to present problems, the thesis' style appears to fall broadly within the tradition of legal formalism, within which legal analysis is

> 'a restrained, relatively apolitical method of analysis... [which] combines two characteristics: the willingness to work from the institutionally defined materials of a given collective tradition and the claim to speak authoritatively with this tradition.'[6]

It is based upon the underlying assumption that

> 'the distinctive rationality of law is imminent in the legal material on which it operates... [and] is characterized by the working out of implications of law from a standpoint internal to law.'[7]

In other words, the thesis is built upon a belief that legal doctrines display 'impersonal purposes, policies, and principles'[8] the recognition of which is capable of yielding to determinative solutions to legal problems unlike the 'open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.'[9] This thesis explores the impersonal policies and principles underlying the jurisdictional doctrines which the online phenomenon challenges.

Whatever the advantages of legal formalism may be in terms of yielding legal traditions against which present problems and solutions can be evaluated, one potential danger to which it gives rise is illustrated by the egg story. Submerging oneself within the very legal rules which are problematic means that it is easy to lose sight of the wider problem, that is to fail to see the wood for the trees, and to become what Milgram, albeit in a different context, called an obedient person, in this case an uncritical lawyer:

> 'One ... mechanism [resulting in an adjustment in the person's thinking which undermines his resolve to break with the authority] is the tendency of the individual to become so absorbed in the narrow technical aspect of the task that he loses sight of its broader consequences. The film *Dr.*

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[6] Roberto Unger, 'Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561, 565; see also Ernest J Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) 22f, where the author defends legal formalism as embodying 'a profound and inescapable truth about law's inner coherence' and employs it to explain the internal dimensions of private law.
[7] Unger, ibid 564.
[8] Ibid.
[9] Ibid.

> *Strangelove* brilliantly satirized the absorption of a bomber crew in the exacting technical procedure of dropping nuclear weapons on a country.'[10]

Given the complex and technical nature particularly of the jurisdictional framework in respect of private matters, it is very easy to lose sight of the broader implications of individual rules as well as of the legal framework as a whole. This thesis seeks to retain a consciousness of these wider implications while not sacrificing the detail in the legal analysis. The intermittent use of analogies is intended to help to provide this wider perspective.

In the context of technicalities, frequently it seems to be perceived that legal discussions of new technological phenomena require a thorough understanding and analysis of the technical processes underlying the phenomenon, and that these technicalities are in some ways determinative of the legal questions seeking answers. This requires two responses. Firstly, the discussion in this thesis implicitly rejects both assumptions, and more or less explicitly defends the proposition that it is generally not the technical processes per se which are legally decisive,[11] but rather the relative functionality which these processes enable and how that functionality compares to previous equivalent processes. Having said that, there are some technical aspects of the Internet which have proved peculiarly problematic in the jurisdictional context and these will be discussed in terms of their *effects* as and when the need arises.

Given that the thesis examines the issue of jurisdiction in the transnational context, it was felt appropriate to base the analysis on a cross-selection of cases and legislative instances from various States. While in so far as the thesis discusses customary international law on jurisdiction such an international perspective is pivotal, in the context of private international law, which consists largely of national law, it may appear less crucial.[12] However, the online

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[10] Stanley Milgram, *Obedience to Authority* (London: Tavistock, 1974) 7, discussed in more detail in Chapter 4 (2.2. Actual Notice and the Effectiveness of Law)

[11] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 14f: 'The affidavit... attempted to trespass on to the area of the legal conclusion as to how and when, for the purposes of the law of defamation in relation to the Internet, publication took place...[They] are illuminating ... in addressing the technical process whereby a document finds its way from one computer to another via the World Wide Web... However, the appreciation of... the technologies ... cannot dominate the question of publication for the law of defamation.'

[12] But for international treaties on private international law.

phenomenon has clearly given the movement of comparative law a strong new impetus, with judges, legislators and academics now routinely taking note of similar online legal developments in other States. Apart from this justification, States by themselves, including Australia and with the exception of the US, have so far generated too few cases to distill underlying trends capable of generalizations. Given the proliferation of case law on jurisdiction in the US and the fact that it invariably informs judicial and legislative debates elsewhere, it has also strongly been relied upon this thesis. Yet, the discussion is by no means limited to US jurisprudence and also examines recent French, German, British, European, Canadian and Australian case law and legislation. The array of cases and legislative instances which this thesis uses to crystallise the arguments is in many ways random in terms of their provenance and was dependent mainly on availability - which by no means weakens and indeed strengthens the arguments as it shows similarities of legal trends in different States with very different legal traditions. It is also not intended to achieve comprehensiveness.

Similarly, the particular legal context within which the jurisdictional question arose is not restricted in this thesis. It considers cases concerning intellectual property, contract, torts and various types of criminal conduct, with the focus of course being only marginally on the substantive regulation and always on the nexus required to attract the substantive regulation or the adjudication of the dispute within the forum. Again, this randomness in terms of the subject-matter is essential for the arguments presented in this thesis to highlight the generic jurisdictional problems to which the Internet gives rise, their underlying reasons, and the similarities of the legal responses to them within broader categories.

1.4. Outline of the Thesis

This thesis is not structured so as to reflect jurisdictional doctrines or concepts such as adjudicative jurisdiction or legislative jurisdiction,[13] but rather around arguments within which various jurisdictional doctrines are analysed. These arguments proceed from the general to the specific, starting in the first substantive

[13] Michael Akehurst, 'Jurisdiction in International Law' (1972-73) 46 *British Yearbook of International Law* 145.

chapter from an overarching analysis which uses jurisdictional problems induced by the Internet as no more than an example, to focusing in the last substantive chapter on one particular jurisdictional nexus which provides a narrow context to illustrate the preceding more general arguments. The substantive chapters of the thesis are divided into three parts, with the first two (**C**hapters **2** and **3**) examining general concerns in the context of online jurisdiction but which are by no means peculiar to the jurisdictional debate. The following two (**C**hapters 4 and 5) explore what makes the Internet problematic in particular in respect of jurisdiction, while the last one (**C**hapter 6) seeks to bring the arguments together by reference to one narrow jurisdictional concept and its varying interpretation in private and public law. **E**ach chapter is preceded by a short note which places it within the thesis.

Chapter **2,** entitled **'L**egal **R**easoning and **L**egal **C**hange' examines the factors that shape legal change generally. It is argued that the evolutionary nature of legal change and the conservative approach to legal reasoning is not, as is often argued, a weakness of law, but rather reflects one of its essential functions which is to provide certainty and predictability. Thus it is a fallacy to search for the most efficient possible legal solution regardless as to how easily that solution fits into existing legal structures and doctrines – a mistake committed by many writers in respect of Internet-induced legal problems. The approach taken by the US judiciary to the issue of whether or not it has adjudicative jurisdiction over a foreign online content provider is used to illustrate this argument about conservatism. This shows that even a drastically new phenomenon like the Internet which gives rise to qualitatively and quantitatively new legal problems may be accommodated within existing legal doctrines.

Chapter **3**, entitled **'T**he **E**volution of **J**urisdictional **R**ules' builds upon the above argument in a number of ways. Firstly, it corroborates it by showing how jurisdictional doctrines both in private and public law have incrementally evolved over the last century to accommodate increasing transnational activity. This shows that the Internet is in many ways less radically new than may appear and is in fact no more than the temporary pinnacle of globalisation, which has long exerted pressure on the rules allocating regulatory competence. Secondly, by introducing

the comparison between jurisdictional assertions in private and public law, this discussion shows that the need for incremental adjustment to legal rules cannot entirely account for how these rules will actually evolve. This is highlighted by the divergent responses of jurisdictional doctrines in respect of private and public law. Thirdly, it also illustrates, by reference to US private international law, the limits of incremental legal change, when it leads to such fine-tuned legal rules which cannot accommodate demands of formal justice, or the requirement to treat like cases alike. So the need for certainty and predictability may at times shape rules which cannot deliver the very objective which inspired their change, thus becoming self-defeating. The alternative 'might-over-right' approach is taken in respect of public or criminal matters. This chapter illustrates the varying detrimental legal effects of seeking to hold on to a legal criterion, ie. physical location, which is becoming increasingly archaic – while logically possible, it becomes increasingly inefficient and unfair, whatever route is chosen.

While the earlier chapters have, in the course of the wider argument, touched upon the question of why the Internet is not easily reconcilable with traditional jurisdictional doctrines, this question moves centre-stage in **C**hapter **4**, entitled '**C**onstructive and **A**ctual **N**otice', while again looking at the issue of predictability. It focuses on the territorial indeterminacy of the Internet, which entails that online actors frequently do not know which law space they have entered and thus to the laws of which State their conduct exposes them. **A**s this is highly problematic in terms of upholding the rule of law as well as ensuring compliance with law, it is argued that judges have sought to avoid that result by requiring that an online actor must have objectively intended to enter the law space before he or she can be made legally accountable. Yet it is also shown that while the objective intention test is the overarching test which explains jurisdictional developments both in respect of private and public law, the answers to that question vary greatly and consistently between private and public law. In the latter case, very little positive evidence is required to find in its favour. This then finally raises the question as to what underlies the public-private law distinction and to

what extent an understanding of that dichotomy helps to explain the jurisdictional dilemma caused by the Internet and the legal responses to it.

This is done in **C**hapter **5**, entitled 'The **P**ublic-**P**rivate **L**aw **D**ichotomy'. The starting point of the discussion is the question of why the Internet is jurisdictionally more problematic than the equally global telephone. The simple answer is that it is not the transnationality of the Internet per se which is troublesome, but rather its combination with its high functionality which enables the type of conduct that in the past has attracted varying degrees of State regulatory intervention. It is further argued that to the extent to which the Internet facilitates conduct which in the past was regulated through public or criminal law, it is particularly threatening. This is because the jurisdictional framework in respect of public law is not only very poorly equipped to deal with transnational conduct, but also because the inefficiency of public law is prima facie far more threatening than anything comparable in private law. The central problem lies in the paradox that the more a State makes the regulation of a particular activity a priority, the more uncooperative other States will be in respect of its enforcement and thus the more problematic it is to achieve its effective regulation in the transnational context and, by implication, in the purely domestic context. This then explains why States in fear of underregulation (rather than overregulation) have made extremely wide jurisdictional claims in the public or criminal law context. This chapter shows the adverse effects of the lack of co-operation not only on the efficiency of State regulation but on the doctrinal developments seeking to counteract that inefficiency.

Finally, **C**hapter **6**, entitled '"**P**ublication" on the Internet - **A Mi**crocosm' focuses on one jurisdictional nexus - namely the nexus of 'publication' - which is employed both in the private and public law context, to illustrate the arguments, made in the previous chapters, which are formative in shaping the legal solutions to Internet-induced jurisdictional challenges. This chapter provides a perfect opportunity to compare very recent Australian case law dealing with the tort of

online defamation[14] with an equally recent English case dealing with the crime of online obscenity. Both cases struggled with the concept of publication and how it should be applied online. The decisions both in their similarity and divergence corroborate the arguments advanced in this thesis.

1.5. Significance of the Thesis

The issue of jurisdiction in the context of the Internet is clearly very topical, with judges and legislatures around the globe struggling to deal with the transnational nature of online conduct. And indeed, as will be argued below, the problem of jurisdiction can by no means be seen as disconnected from the debate of online regulation as a whole and even from State regulation as such. So it is certainly of great practical relevance, particularly in view of the number of online users and the proliferation of e-commerce, especially in B2B transactions. The United Nations Conference on Trade and Development (UNCTAD) noted in its 'E-Commerce and Development Report 2002' that by the end of 2002 a staggering 655 million people worldwide were expected to use the Internet and that by 2006 e-commerce would represent 18 percent of worldwide business-to-business and retail transactions.[15] Having said that, there is an enormous amount of literature on the issue, ranging from hundreds of journal articles, to studies by governments,[16] private organisations[17] and international organisations.[18] In this frenzy of activity, it is very difficult, to say the least, to make an original contribution to the debate. So the question is how this thesis can hope to make a worthwhile contribution.

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[14] As this thesis discusses the law up to 30 November 2002, it does not consider the High Court judgment in Dow Jones & Company v Gutnick [2002] HCA 56, at http://www.austlii.edu.au, decided on 10 December 2002 which will be considered in the conclusion.

[15] United Nations Conference on Trade and Development (UNCTAD), *E-Commerce and Development Report 2002 (Executive Summary)* (UNCTAD/SDTE/ECB/2 (Sum), United Nations, New York and Geneva, 2002) 1.

[16] For an early Australian example see Australian Competition & Consumer Commission, *The Global Enforcement Challenge: Enforcement of Consumer Protection Laws in a Global Marketplace*, Discussion Paper (1997), at http://accc.gov.au; for a more recent example see Gareth Griffin, *Censorship in Australia: Regulating the Internet and other Recent Developments*, Briefing Paper 4/2002, at http://parliament.nsw.gov.au; Minister for Communications, Information Technology and the Arts, *Six-Month Report on Co-Regulatory Scheme for Internet Content Regulation - January to June 2001* (February 2002), at http://www.dti.gov.au

[17] See eg. American Bar Association (ABA), *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* (2000), at http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html.

[18] Most notably the Hague Conference on Private International Law and the Organisation for Economic Cooperation and Development (OECD), but also the International Chamber of Commerce and the World Intellectual Property Organisation (WIPO).

The answer must lie in the particular and, hopefully, relatively novel perspective which this thesis offers on a familiar subject-matter. This perspective is fairly narrow, despite the fact that the thesis does not restrict the analysis to one particular substantive regulation, eg. contract law, or one particular aspect of jurisdiction, such as personal jurisdiction. By criss-crossing jurisdictional and substantive law categories the thesis aims to identify the generic problems and common themes underlying all jurisdictional problems as well as systemic differences in the legal responses. This very insistence that such criss-crossing within the private and public law categories is possible, is of more than academic interest and should be of practical significance in that it allows parallels to be drawn between subject-matters which have previously been perceived as distinct. By the same token, it also shows that there are some essential and deep-seated differences between the responses to jurisdictional problems in private and public law, which would make cross-referencing between cases of different categories entirely inappropriate. If anything, this comparison between jurisdictional responses in private and public law is what this thesis contributes to the online jurisdictional debate, where more often than not focus on narrow legal categories is preferred to more generalised analyses.

Furthermore, there is a dearth of literature seeking to place the current jurisdictional debate within a broader jurisprudential context. This thesis attempts to show how an understanding of the impact of general law concepts, such as *stare decisis*, formal justice, the rule of law, obedience to law and the private-public law distinction, on novel jurisdictional problems may enrich the discussion. In fact, this thesis is as much about regulation per se as it is about online regulation and about what cyberlaw might teach us.[19]

[19] In sense this thesis falls in the footpath of the highly influential article by Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review* 501.

2. Definition of Terms and Delimiting the Scope of the Thesis

2.1. Jurisdiction

The central concept of this thesis is the concept of jurisdiction which, given its varying meaning in varying contexts, deserves further clarification. The term 'jurisdiction' derives from the Latin *juris dictio*, meaning the 'administration of justice'.[20] In Roman times, it acquired the meaning with which it tends to be associated today, namely the legal power, right or authority to regulate.[21]

In the purely domestic context, this usually refers to the right or competence of one State authority, such as a court, *vis*-à-*vis* another authority or organ of the same State, to take action in respect of a particular matter, as defined for example by constitutional law. This thesis is not concerned with this municipal meaning of jurisdiction, but rather with its meaning in the transnational context where it refers to the right of a State (or its organs) *vis*-à-*vis* other States to regulate certain conduct. This though does not imply that other States may not enjoy concurrent regulatory competence. It should be noted that the term 'jurisdiction' in the transnational context is also at times used to refer to the physical territory or domain of a State, as opposed to its regulatory competence.[22] In this thesis it will be clear from the context in what sense the term is employed.

As the primary meaning of 'jurisdiction' in the transnational context is 'regulatory competence', the rules of jurisdiction determine which State has the right to regulate which conduct, or which egg belongs to whom. The rules of jurisdiction, while prima facie always in operation, only become interesting when a matter is transnational, ie. not of purely domestic concern.[23] 'The right to regulate' refers to three types of regulation: the right to legislate, the right to adjudicate and the right to enforce. The legal sources of these rights depend on the nature of the law or

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[20] Ivan Shearer, 'Jurisdiction' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law - An Australian Perspective* (Melbourne: OUP, 1997) 161, 161.
[21] Ibid.
[22] For the varying meanings of 'jurisdiction' see also *Lipohar* v R (1999) 168 ALR 8, para 78f.
[23] A matter is of purely domestic concern by virtue of the territoriality principle which is of course a principle of jurisdiction.

cause of action in question. If it is private, private international law, as defined by State law and any treaty on private international law, furnishes the legal source of the right. If it is public, the rules of jurisdiction, as defined by customary international law, are ultimately the legal source of the right. This may be expressed schematically.

Table 1 Schematic Overview of Jurisdiction

	Legislative Jurisdiction	Adjudicative Jurisdiction	Enforcement Jurisdiction
Other interchangeable terminology used generally and in this thesis	subject-matter jurisdiction prescriptive jurisdiction	judicial jurisdiction jurisdiction of the courts curial jurisdiction	executive jurisdiction
Private Law governed by rules of Private International Law or Conflicts of Law[24]	choice of law	eg. jurisdiction in rem or in personam	strictly territorial but enforcement of foreign judgments
Public Law governed by the rules of jurisdiction under Public International Law	largely overlap as the court which has adjudicative jurisdiction always applies its own law (no choice of law) bases: territoriality principle, nationality principle, universality principle, protective principle, passive personality principle		strictly territorial and no enforcement of foreign judgments

While this overview of jurisdiction is, as far as private international law is concerned, rather uncontroversial, the same cannot be said in respect of public law where there is certainly disagreement as to the appropriate systematization. For example F.A. Mann, one of the most eminent jurisdiction lawyers, treats adjudicative jurisdiction as a sub-category of enforcement jurisdiction.[25] While this appears logical in so far as exercising adjudicative jurisdiction tends to be done in furtherance of the enforcement a law, it is not consistent with what enforcement jurisdiction tends to be associated with, namely the power to be able to positively give effect to a law, rather than merely adjudicate it regardless of whether the

[24] In the thesis the terms 'private international law' and 'conflict of laws' are used interchangeably, although this practice is not universally supported: Gerfried Mutz, 'Private International Law' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 330, 331.

[25] F A Mann, *Studies in International Law* (Oxford: Clarendon Press, 1973) 128. He appears to have revised his opinion later in F A Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) 186 *Recueil des Cours* 9, 67 where he states: 'The international jurisdiction to adjudicate is... not a separate

eventual court order can be enforced or not. For this reason the above systematization follows what is possibly the more commonly held view of international jurisdiction, distinguishing between the three types of jurisdiction,[26] while acknowledging that adjudicative and legislative jurisdiction overlap significantly. This has the advantage of enabling more easily a comparison to be drawn to private international law and is also justifiable given that the difference in the systematization is generally of no more than academic interest. Even international lawyers who view adjudicative jurisdiction as part of enforcement jurisdiction hold that the 'assumption of the power to adjudicate a dispute... may be judged by the same principles as are applicable to an exercise of legislative (prescriptive) jurisdiction.'[27] Beyond this general overview, more specific definition of particular jurisdictional concepts will be given in the following chapters in so far as and when the need arises.

An in-depth analysis of the difference between public law and private law will be provided in Chapter 5, which also shows that these concepts do not lend themselves to clear-cut definitions. Nevertheless, for present purposes as a working definition, public law should be understood to refer to the criminal, administrative and fiscal laws of States, that is laws imposing obligations the individual owes to the State itself and in respect of which the State may take coercive action to enforce them.[28] Private law, on the other hand, encompasses the law dealing with the obligations which persons owe to each other, such as contract law, torts law or intellectual property law.[29]

Also, the term 'State' is frequently used in this thesis, where it should be clear from the context whether it is used to refer to the territory of a State on the one hand or to the State, as the sum total of its institutions or as embodied in one of its

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type of jurisdiction, but merely an emanation of the international jurisdiction to legislate.' See also Shearer, above n 20, 164.

[26] Akehurst, above n 13. Bernand H Oxman 'Jurisdiction of States' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 277, 277f.

[27] Shearer, above n 20, 164; Mann (1973), above 25, 128f.

[28] Sir Robert Jennings and Sir Arthur Watts (eds), Oppenheim's *International Law* (9th ed, London: Longham, 1992) vol 1, 466 (n 3) , 473 (n 39).

[29] Oxman, above n 26, 278.

institutions[30] on the other hand. This latter view focuses on States as acting subjects, which:

> 'mobilize armies and declare wars..., run health services and systems of agricultural subsidies and railway systems... The acts and movements in the physical world that are involved in all this are of... acts human beings...[which] are imputed to the state as the single organised reference point behind the myriad of human actings.'[31]

Generally, given that this thesis concentrates on jurisdiction in the transnational context, it treats States within a federation, such as the US or Australia, as independent States, but is conscious of the fact that at times decisions of disputes involving States within a federation are guided by considerations which are inapplicable in the transnational context.[32]

In this thesis the term '*Internet*' is used interchangeably with the World Wide Web which is only one of the services the Internet offers. This circumscribes the ambit of this thesis in that it does not evaluate of how far existing jurisdictional concepts are challenged by other services such as email, chat-rooms or discussion groups which would certainly be worth further exploration.

2.3. Jurisdiction and Substantive Regulation

This thesis is concerned first and foremost with the issue of jurisdiction and is not prima facie a critique of substantive regulation. To evaluate whether a State has adjudicative, legislative or enforcement jurisdiction is to ask whether there is a sufficient nexus or connection between a given set of facts on the one hand and the State on the other.

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[30] As to the relationship between State and law, the thesis broadly follows Kelsen's view according to which the State is the personification of the national legal order, that is a corporate entity comprising the main organs of government organized through public law. Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1946) 181ff. See also Neil MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999) 18ff on the varying views of the relationship between State and law.

[31] MacCormick, ibid 21.

[32] This applies both in the private as well as in the criminal context; see eg. *Regie National des Usines Renault SA* v *Zhang* [2002] HCA 10, at http://www.austlii.edu.au, and *Lipohar* v *R* (1999) 168 ALR 8, para 99f.

Yet, as the nature of the nexus required not only depends on the type of jurisdiction in issue but also frequently on the substantive law in question,[33] the thesis cannot but reflect upon the suitability of the substantive law in question in respect of the online world. Indeed, as will become particularly clear in Chapter 6, the jurisdictional nexus is often an integral part of the substantive law, so much so that an adjustment of the connection to suit the online world may have a significant impact on the substantive rights and obligations of online actors.

Yet, even when the jurisdictional analysis is not bound hand and foot to a specific legal context,[34] it would of course be fallacious to underestimate its impact on substantive regulation of online conduct. As jurisdiction concerns the right and power to regulate, it is concerned with the very foundations or supporting pillars of any State regulation. So, further reflecting on the significance of the topic of this thesis, the resolution of jurisdictional issues in respect of online conduct is in many ways a pre-condition for tackling the regulation of online activity per se. The inability to find jurisdictional solutions may, for example, lead to abandoning the traditional type of regulation in favour of self-regulation. It also has major ramifications for the regulation of equivalent offline conduct, given that it is problematic in terms both of a law's credibility and effectiveness if conduct prohibited offline can be carried on with impunity online. This shows that the significance of any discussion of jurisdictional doctrines goes far beyond the narrow doctrinal context and indeed even to the heart of notions such as statehood and State sovereignty.

2.4. Jurisdiction and State Sovereignty

As the concepts of jurisdiction and State sovereignty are two concepts deeply intertwined, some commentary about their relationship and about the much debated threat by the Internet to State sovereignty cannot legitimately be avoided.[35] The discussion of this topic within this thesis is largely restricted to the

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[33] Typically, the right to serve process out of jurisdiction in Australia varies depending on the nature of the dispute in question. See for example s.10.1A of Supreme Court *Rules 1970 (NSW).*

[34] See for example the approach taken to adjudicative jurisdiction in the US, as discussed in Chapter 3.

[35] Johnson and Post, above n 2; Henry H Perritt, 'Cyberspace and State Sovereignty' (1997) 3 *Journal of International Legal Studies* 155; Henry H Perritt, 'The Internet as a Threat to Sovereignty? Thoughts on the

following remarks partly because it was felt that any further discussion would go beyond the scope of this thesis.

F.A. Mann described the relationship between sovereignty and jurisdiction as follows:

> 'International jurisdiction is an aspect or an ingredient or a consequence of sovereignty (or of territoriality or of the principle of non-intervention, - the difference is merely terminological)... To put it differently, jurisdiction involves both the right to exercise it within the limits of the State's sovereignty and the duty to recognize the same right of other States.'[36]

If the relationship between jurisdiction and sovereignty was merely one-way, meaning that States have a certain amount of regulatory competence by virtue of their sovereignty, any loss of jurisdiction by a State over certain conduct would leave its sovereignty untouched. Yet, generally jurisdiction is not just seen as a consequence but also as an attribute of sovereignty[37] - a view which entails that a change of jurisdiction may very well impact on the sovereignty of the State. What then, one may ask, does sovereignty actually mean? The problem is that the term has been much used and abused; it has to 'serve as a juridical cover to mere power politics'[38] and as a rhetorical device by politicians and government officials. Despite this, it is still a central concept within international law, according to which:

> 'Sovereignty is traditionally understood to represent the... supreme power of command inherent in the concept of the State... It concerns in the first place the internal legal order of each State...'[39]

This internal dimension of sovereignty requires that States refrain from interfering in the domestic affairs of other States:

Internet's Role in Strengthening National and Global Governance (1998) 5 *Indiana Journal of Global Legal Studies* 423; Jack L Goldsmith, 'The Internet and the Abiding Significance of Territorial Sovereignty' (1998) 5 *Indiana Journal of Global Legal Studies* 475; Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Book, 1999) Chapter 14.

[36] Mann (1984), above n 25, 20.

[37] Helmut Steinberger, 'Sovereignty' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 397, 413, where the author states that '[e]xclusivity of jurisdiction of States over their respective territories is a central attribute of sovereignty.'

[38] Ibid 397.

[39] Santiago Torres Bernnardez, 'Territorial Sovereignty' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 487, 491. The external dimension of sovereignty is 'the external independence with regard to the liberty of action outside its borders... In consequence of its external independence a state can... manage its international affairs according to discretion.' Jennings and Watts, above n 28, 382.

> 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusivity of any other States, the functions of a State.'[40]

Against this background, it is not surprising that the Internet is perceived to present a serious challenge to the exercise of sovereignty (although it does not diminish sovereignty as a legal status),[41] given that it exerts pressure on the size of the portion of the globe within which States are capable of exercising jurisdiction to the exclusion of outsiders.[42] As will be shown throughout this thesis, the online phenomenon drastically reduces the purely domestic sphere within which States enjoy the internal independence international law envisages.[43]

While the reduction of the sphere within which States can enjoy their sovereignty does not necessarily shake on the understanding of sovereignty per se, it clearly does make it a less meaningful concept. And as the Internet is not the first phenomenon to have that effect, and as economic globalisation and advances in military technology have equally diminished the significance of physical location and territory, some have argued that it is inevitable that

> 'sovereignty over territory will disappear as a category from the theory of international society and from its international law... international society will find itself liberated at last to contemplate the possibility of delegating powers of governance not solely by reference to an area of the earth surface.'[44]

The problem with such predictions is that they largely reflect the aspirations of their authors. There is no reason why it could not be supposed that sovereignty, being a dynamic condition,[45] could not reinvent itself in new circumstances. Whatever the

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[40] *Island of Palmas (The Netherlands v United States)* (1928) Reports of International Arbitral Awards 2, 829, 838.

[41] Steinberger, above n 37, 404.

[42] Lawrence Tschuma, 'Hierarchies and Governance: Competing Regulatory Paradigms in Global Economic Regulation' (2000) (1) *Law, Social Justice and Global Development*, at http://elj.warwick.ac.uk/global/issue/2000-1/, where the author describes both the internal as well as external dimension of sovereignty and the impact of information technology on these notions.

[43] This development is of course not unprecedented see eg. Robert McCorquodale and Raul Pangalangan, 'Pushing Back the Limitations of Territorial Boundaries' (2001) 12 *European Journal of International Law* 867, 879: '[T]he exclusive territorial sovereign power of the state is being diminished and states are increasingly being shown to be unable to control the activities of transnational corporations.'

[44] P Allcot, *Eunomia: A New Order for a New World* (1990) 329. See also, McCorquodale and Pangalangan ibid.

[45] Saskia Sassen, 'The Impact of the Internet on Sovereignty: Unfounded and Real Worries' in Christoph Engel and Kenneth H Keller (eds), *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values* (Baden-Baden, 2000) 195, 196, at http://www.mpp-rdg.mpg.de/pdf_dat/sassen.pdf, where the author distinguishes between the Realist's and Liberal's understanding of sovereignty.

outcome of that debate, it seems certain that the pre-Internet age will at some point in history be judged as fundamentally different to the post-Internet age:

> 'The Internet has neither changed the central position of the nation state in world politics nor the classic power games. Yet, it further strengthens existing restrictions on the possible actions of nations and promotes the creation of a global civil society. Both will in the long term affect the position and actions of the nation state. It is not going to disappear, but it will change.... The Internet, like the invention of the printing press, is likely to deeply change culture, society and politics, yet its long-term effects are as unpredictable as the effects of the printing press at the time of the first books.'[46]

With this rather open outlook on the future of sovereignty, let us finally turn to the topic of regulation and self-regulation.

2.4. Regulation and Self-Regulation

This thesis evaluates whether traditional State regulation can be transplanted to the transnational Internet, rather than asking whether, for example, self-regulation could successfully supplant traditional regulation. Yet, even if the validity of this conservative starting point, as defended in Chapter 2, is accepted, the broader question as to the role which self-regulation can and should play within online governance is of significance. This is particularly so given that self-regulation, while unlikely to entirely transplant traditional State regulation, already provides a successful complementary form of online regulation, as for example in the form of the use of filtering soft-ware or digital rights management technology or online alternative dispute resolution forums.[47] Part of its success in respect of the online

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[46] Karl Kaiser, 'Wie das Internet die Weltpolitik verandert' (2001) 3 Deutschland – Zeitschrift fuer Politik, Kultur, Wirtschaft und Wissenschaft 40, 45 (translation by author).

[47] For a comprehensive discussion of a variety of these self-regulatory mechanisms see Elizabeth G Thornburg, 'Going Private: Technology, Due Process, and Internet Dispute Resolution (2000) 34 U.C. Davis Law Review 151; Elizabeth G Thornburg, 'Fast Cheap and Out of Control: Lessons from the ICANN Dispute Resolution Process' (2002) 6 Journal of Small and Emerging Business Law 191; see also Julia Hornle, 'Online Dispute Resolution in Business to Consumer E-Commerce Transactions' (2002) (2) Journal of Information, Law and Technology, at http://eli.warwick.ac.uk/jilt/02-2/hornle.html; Henry H Perritt, 'Dispute Resolutions in Cyberspace: Demand for New Forms of ADR' (2000) 15 Ohio St J on Disp Resol 675, at http://www.kentlaw.edu/perritt/publications; OECD, Legal Provisions Related to Business-To-Consumer Alternative Dispute Resolution in Relation to Privacy and Consumer Protection DSTI/ICCP/REG/CP(2002)1/FINAL (17 July 2002) at http://www.oecd.org; American Bar Association, Addressing Disputes in Electronic Commerce - Final Report and Recommendations of the American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution (August 2002), at http://www.law.washington.edu/ABA-eADR/documentation/docs/FinalReport102802.pdf; Hague Conference on Private International Law, The Impact of the Internet on the Judgments Projects: Thoughts for the Future, Prel Doc No 17 (2002) submitted by Avril D Haines, at http://www.hcch.net/e/workprog/jdgm.html, 15, 17.

world is due to the fact that it is far less encumbered by traditional jurisdictional concepts, thus yielding often cheaper and more effective remedies.[48] For these reasons it seems clear that an analysis of the marriage or co-habitation of the traditional jurisdictional frameworks and self-regulation paper requires further debate, a discussion, however, which would have gone beyond the scope of this thesis.

In this context, mention should be made of what has become one of the most influential texts in respect of online regulation, namely Lawrence Lessig's Code and Other Laws of Cyberspace,[49] based on his earlier paper The Law of the Horse: What Cyberlaw Might Teach.[50] The core idea which Lessig conveys in these texts is that the Internet and its technical and functional characteristics are not static and that they may change and be changed to achieve what direct regulation could not achieve as efficiently; direct law which threatens sanction after the prohibited event, is only one of the means to change undesirable behavioural patterns: code (or architecture), market and norms are alternative routes.[51] This is not to say that code will necessarily be used as a tool for self-regulation. As the Internet is a man-made environment and thus its architecture is particularly conducive to alterations, governments may seek to alleviate their regulatory problems through making more or less transparent prescriptions for the Internet's architecture. The discussion in the following chapters shows how Lessig's treatise on code and regulation is relevant in the specific context of jurisdiction, as well as some of the shortcomings of his analysis.

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[48] That is not to say that there are not also serious problems with some of these mechanisms, see Thornburg, ibid. See also Henry H Perritt 'The Internet is Changing the Public International Legal System' (2000) 88 *KY* Law *Review* 885, para V, at http://www.kentlaw.edu/perritt/publications/88KYL.Rev.htm, where the author argues that a private ordering of online conduct (such as alternative dispute resolutions or credit card backs) can overcome the jurisdictional hindrances to traditional types of regulation.

[49] Lessig, above n 35.

[50] Lessig, above n 19.

[51] The ideas Lessig so eloquently outlines are not new. See Lessig, above n 19; James Boyle, 'Foucault in Cyberspace: Surveillance, Sovereignty, and Hard-Wired Censors' (1997) 66 *University of Cincennati* Law *Review* 177, at http://www.law.duke.edu/boylesite/foucault.htm.

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Chapter 2: Legal Reasoning and Legal Change in the Age of the Internet

1. Introduction

This chapter sets the scene for the discussions in the following chapters by seeking answers to the question as to where solutions to the myriad legal problems caused by the Internet can be found. The discussion does not seek to find these solutions, but merely the approach which should be taken to finding them. To do this, the discussion starts off by attempting to categorise the types of legal problems to which the Internet has given rise in terms of their impact of traditional legal frameworks. While the jurisdictional challenge caused by the Internet then provides this chapter with a specific working example and introduces the substantive issues explored later in this thesis, the arguments apply beyond this relatively narrow context and indeed even beyond the Internet context. Yet, the jurisdictional context supplies an excellent backdrop for the argument because it has provoked some of the most extreme assertions as to where the law is heading based upon entirely inappropriate legal reasoning. In that it serves well to reveal the pitfalls of certain legal argumentation and certain assumptions as to the extent to which legal change is possible. This chapter advocates for the necessity of incremental legal change and conservative legal argumentation and, more specifically, rejects that the solutions to Internet-related jurisdictional problems lies in a new cyberjurisdiction.

The arguments and predictions as to how much the Internet, which has changed our lives so drastically,[1] will change our laws, vary. Yet, many have expressed a belief in the need for drastic, even revolutionizing, legal changes, reminding one of those egg farmers who advocated that a distribution system based on colour should be abandoned in favour of a start from scratch. One legal commentator expressed his view for the need for radical legal change as follows:

> '[i]n this age of cyberspace and global connectivity, reliance on statutes and stare decisis simply cannot keep up with a rapidly evolving technological

[1] Described in *American Civil Liberties Union v Reno* 929 F Supp 824, 830ff (ED Pa 1996).

> environment. Traditional law [such as lex mercatoria], then, might condemn rules regulating conduct in cyberspace to perpetual obsolescence.'[2]

While many of the arguments for a total rejuvenation of law in the Internet age are not only attractive but also compelling, sceptical instinct suggests that the legal revolution will not come, at least not in the foreseeable future. This seems increasingly confirmed by the growing body of traditional law being applied or sought to be applied to the online world, with the voices for the radical rejuvenation of law becoming decidedly fainter.

This chapter explores why this legal revolution has not happened and is not going to happen and why the more adventurous the legal argument the more it is doomed. The discussion does not set out to look at the merit of the substantive arguments advanced to support the need for drastic legal reforms (which are often in themselves coherent and persuasive), but rather takes a bird's eye perspective on the arguments and the various approaches to legal argumentation. Arguments on the new Internet-related jurisdictional issues provide an example of these differing approaches. By exposing the flaws in the approaches favoured by the legal revolutionaries, the validity of their conclusions is undermined. On a more constructive side, this chapter advocates the need for a conservative approach to Internet-related legal issues, including jurisdictional questions, and seeks to justify the cautious method of argumentation employed in the following chapters.

Most often, the issue of legal argumentation is a non-issue, that is, when new legal issues call for solutions the proper method of legal argumentation is assumed and not raised to a conscious level. This is although most would acknowledge that the right approach to legal argumentation is decisive in increasing the likelihood of reaching a viable conclusion:

> 'some methods ... work better than others. Some yield conclusions that do not stand the test of further situations; they produce conflicts and confusion; decisions dependent upon them have to be retracted or revised. Other

[2] Matthew R Burnstein, 'Conflicts on the Net: Choice of Law in Transactional Cyberspace' (1996) 29 *Vanderbilt Journal of Transnational Law* 75, 110. See also Joel R Reidenberg, 'Governing Networks and Rule-Making in Cyberspace' (1996) 45 *Emory Law Journal* 911. Robert Reilly, 'Mapping Legal Metaphors in Cyberspace: Evolving the Underlying Paradigm' (1998) 16 *Journal of Computer and Information Law* 579.

> methods are found to yield conclusions which are available in subsequent inquiries as well as confirmed by them.'[3]

Normally, new legal questions are argued conservatively or in the words of Australia's Justice Deane, 'by the staple processes of legal reasoning, namely, induction and deduction from earlier decisions and settled rules and practices.'[4] But in relation to the Internet it has been contended that *stare decisis* cannot possibly yield appropriate legal solutions.[5] Indeed, even Justice Deane acknowledged the possibility that there may be rare cases:

> 'in which those processes... are inadequate in a developing area of the law or in which a court... concludes that the circumstances are such that it is entitled and obliged to reassess some rule or practice in the context of the current social conditions, standards and demands and to change... the direction of the development of the law.'[6]

What Justice Deane and others left unanswered is the question as to the alternatives to the 'staple processes of legal reasoning' which will provide sound justifications in those 'rare cases'.[7] In fact, are there any? In this chapter it is contended that the concept of *stare decisis* in its widest sense and the 'staple processes of reasoning' are a necessary aspect of law which cannot be abandoned even in the face of the most challenging new social and economic phenomenon. A clean slate approach is never an option. Legal revolutionists not only fail to appreciate this essential aspect of law, but also the active role law plays in shaping society which in turn facilitates incremental legal change.

2. The Impact of the Internet on Regulation

2.1. The Qualitatively New Legal Issues

[3] John Dewey, 'Logical Method and Law' (1924) 10 *Cornell* Law *Quarterly* 17, 19.
[4] *Dietrich* v *The Queen* (1992) 177 CLR 292, para 4 (Deane J); see also *Jaensch* v *Coffey* (1984) 155 CLR 549, 599-600 (Deane J). More recently *Brodie* v *Singleton Shire Council* [2001] HCA 29, para 19ff on *stare decisis.*
[5] Burnstein, above n 2.
[6] *Dietrich* v *The Queen* (1992) 177 CLR 292, para 4 (per Deane J).
[7] In *Jaensch* v *Coffey* (1984) 155 CLR 549, 600, Justice Deane seems to partly retract from his initial comment that adherence to precedents may in rare cases not be appropriate, when he said that '[e]ven in such a case, however, the distinction between judicial and legislative functions should never be forgotten and any reassessment of the content of relevant rules should be approached with due regard to *existing authority* and *established principle*.' (emphasis added)

Before turning to the issues of legal argumentation and legal change generally and specifically in the Internet context, this part outlines the broad impact the Internet has had on law and its implications. The problems the Internet has created for regulation may be broadly divided into two categories, the qualitatively and the quantitatively new legal issues which are addressed respectively.

First, the technical design of the Internet allows people to interact in genuinely new ways and engage in new activities. These give rise to a myriad of genuinely new legal issues. For example, the process of linking on the World Wide Web is an entirely novel phenomenon. One of the legal issues which it raises is whether or not the linking from one website to the inner webpage of another website constitutes copyright infringement.[8] The use of domain names, which are a new system of addresses, has given rise to the legal issue whether they should be treated like trademarks and, if so, how the different allocation bases can be made compatible.[9] Yet another new legal problem arises from the potential to download goods, formerly only available in the physical medium, from the Internet, such as software. For taxation purposes should these be classified as goods or services?[10] A prominent new jurisdictional issue is whether the accessibility of a foreign website provides a sufficient nexus to justify the assertion of jurisdiction over the foreign entity or person behind the site. These problems reflect a common aspect of regulation, namely that

> '[l]egal rules and principles commonly contain not only normative determinations about what ought or ought not happen under certain circumstances, but also background factual assumptions about the nature of the world.'[11]

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[8] See for example, *The Shetland Times Ltd v Wills* [1997] FSR 604, (1997) SLT 669 (Scot); *Ticketmaster Corp v Tickets.com Inc* (2000) US Dist LEXIS 12987 (CD Cal 2000), affirmed in (2001) US App LEXIS 1454 (9th Cir 2001).

[9] Note, for example, Charlotte Waelde, 'Trade Marks and Domain Names: What's in a Name?' in Lilian Edwards and Charlotte Waelde (eds), Law and *the Internet – A Framework for Electronic Commerce* (2nd ed, Oxford: Hart Publishing, 2000) 133, 135ff. Graham J H Smith, *Internet Law and Regulation* (3rd ed, London: Sweet and Maxwell, 2002) 76f.

[10] Sandra Eden, 'Taxation of Electronic Commerce' in Lilian Edwards and Charlotte Waelde (eds), Law and *the Internet – Regulating Cyberspace* (Oxford: Hart Publishing, 1997) 151, 165ff, see also 175, where the author discusses the additional issue whether payment for downloaded goods should be classified as trading income or royalty income.

[11] Fredrick Schauer, 'Free Speech and the Demise of the Soapbox' (1984) 84 *Colombia Law Review* 558, 558.

The factual assumptions upon which the jurisdictional basis of territoriality could rely were that entry into particular jurisdictions generally required a deliberate effort and indeed a deliberate effort in respect of each jurisdiction. However, the design of the World Wide Web is such that the simultaneous entry into every single jurisdiction is the default option and that online content providers have to make a positive effort not to enter particular States, if they want to avoid such entry.

2.2. The Quantitatively New Legal Problems

The importance of the background factual assumptions upon which legal rules are based is also illustrated by the second category of Internet-related legal problems. These stem from that aspect of the Internet which allows people to engage in the same activities they could have engaged in before, yet with much greater efficiency. These problems do not raise genuinely new legal issues in the strict sense and at first 'seem wholly unremarkable'.[12] Yet, their ordinariness is deceptive as they question the efficacy of some legal regimes which have relied upon the impracticability of engaging in certain conduct which the Internet has removed. The Internet has again the effect of rebutting some of the factual assumptions upon which certain legal rules rely. For example, in relation to defamation law, it has been said that:

> 'there is nothing very new... [about online defamation], which is, formally, true - but the problems of traditional publishing and defamation are so multiplied when applied to a forum as large, as accessible, as cheap and as transnational as the Internet, that is not hard to see why there is a perception that the law of libel has been transformed by its application to the new electronic highway.'[13]

The law of copyright has to some extent relied upon the factual assumptions that reproduction will lead to a loss of quality and that the marginal costs of reproduction and distribution will outweigh the benefits achieved by infringement.[14]

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[12] I Trotter Hardy, 'The Proper Legal Regime for "Cyberspace"' (1994) 55 *University of Pittsburgh* Law Review 995, 999.

[13] Lilian Edwards, ' Defamation and the Internet' in Lilian Edwards and Charlotte Waelde (eds), Law and *the* Internet – Regulating Cyberspace (Oxford: Hart Publishing, 1997) 183, 184.

[14] Eric Schlachter, 'The Intellectual Property Renaissance in Cyberspace: Why Copyright Law could be Unimportant on the Internet' (1997) 12 *Berkeley Technology Law Journal* 15, 19f. Some wonder whether copyright protection may in the distant future be replaced by contractual arrangements. Hector MacQueen, 'Copyright and the Internet' in Lilian Edwards and Charlotte Waelde (eds), Law and *the Internet – A*

However, in the digital age an unlimited number of perfect copies can be made and distributed at minimal cost. In relation to taxation, it has been said:

> '[t]he Internet currently does not present new or difficult problems for transfer pricing... However, the growth of the Internet is making some of the more difficult transfer pricing problems more common...The speed, frequency, anonymity and integration of exchanges over the Internet will place great pressure on the transactional methodologies and comparability principles.'[15]

This sort of quantitative, rather than qualitative, problem also affects the debate on jurisdiction. The jurisdictional regimes under private and public international law have placed reliance on the fact that physical distance provides a disincentive for the average consumer and business to engage in international transactions and that therefore most retail and even business-to-business transactions are normally localized within one territory. If the Internet turns transnational conduct and transactions from being the exception to being the norm (because it is as easy and cheap to interact with a geographically remote area than with one that is physically close), current jurisdictional regimes may prove unworkable.[16] One of the reasons why the traditional colour-based division of eggs was seriously challenged lay in the drastic increase of the non-primary coloured eggs, and not just in the new colour variations. This jurisdictional concern is sometimes expressed in terms of the greater practical difficulties in enforcing a legal right vis-à-vis an overseas party than vis-à-vis a party in the same jurisdiction. Some of these greater practical difficulties are the higher costs of pursuing the action, the longer delays, the greater lack of familiarity with the foreign legal system, possible language difficulties, the time differences and the differences in custom.[17] These new practical difficulties are of particular concern to consumers, but also online vendors, especially those who are in the physical world essentially local

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Framework for Electronic Commerce (2nd ed, Oxford: Hart Publishing, 2000) 181, 223. See also, P N Grabosky and Russell G Smith, *Crime in the Digital Age* (Leichhardt, NSW: Federation Press, 1998) 111.

[15] Australian Tax Office (ATO), *Tax and the Internet*, Discussion Report of the ATO Electronic Commerce Project (August 1997), at http://www.ato.gov.au/printcontent.asp?doc=/content/Businesses/ecommerce_Intro.htm , 63.

[16] This issue is further explored in Chapter 3.

[17] Australian Competition and Consumer Commission, *The Global Enforcement Challenge, Enforcement of Consumer Protection Laws in a Global Marketplace,* Discussion Paper (1997), at http://www.accc.gov.au/docs/global/front.htm, 31.

businesses and who may not have the resources to defend actions in several overseas locations.

2.3. The Need for, and Extent of, Legal Change

As the above examples demonstrate, many areas of law are affected by both the 'qualitative' and 'quantitative' legal problems. As a matter of general assessment two points should be made in relation to them. First, it appears that the qualitative problems have an immediate bearing upon the law, in the sense that they give rise to novel disputes and conflicts which require relatively immediate adjustments of the law, with some legal change being inevitable. On the other hand, the quantitative problems have a more distant and diffuse impact upon the law in the sense that they do not lead to disputes which are in any obvious way novel. Paradoxically, while their long term impact on the law is potentially more fundamental because they attack the very roots of certain legal regimes, ostensibly no legal change is required. At least the judiciary would be hard pressed to find any valid reason for distinguishing such online cases from existing offline cases.[18] Yet this is not to say, as some have, that these problems should not 'result in calls for new or revised legislation.'[19]

Secondly, it also seems that the jurisdictional problems, both qualitative and quantitative, deserve special attention because their impact is not limited to any discreet area of law, but affects the very power of States to prescribe, adjudicate and enforce, that is the very foundation upon which discrete areas of substantive regulation are based. Not surprisingly, the jurisdictional challenges in the Internet era have, more than any other Internet-related legal issue, led to extreme view points on the extent of legal change required. These are reflected in the differing decisions on which legal metaphors[20] and analogies are appropriate to solve the problems. Some hold that the Internet is just another communication tool, with

[18] See for example, the Australian defamation case *Rindos v Hardwick* (Unreported, No 1994 of 1993, SC of Western Australia, 31 March 1994). This is unless the defamation is defined in respect of particular communication media, as in the case *It's In The Cards, Inc v Fuschetto* 535 NW 2d 11 (1995), where the court decided that to include within the definition of 'periodical' in the defamation statute network bulletin boards would be to indulge judicial legislation.
[19] Hardy, above n 12, 1000.
[20] Reilly, above n 2, 583ff.

analogies to physical publication and distribution channels or existing communication facilities being appropriate. They yield to the natural 'temptation to analogize new electronic media to existing technology for which ...[one has] already models to rely upon.'[21] Other disagree.[22] They say that the Internet requires a whole new approach. In search of the right analogies these writers go either much further back in legal history or turn to non-State or international law. For the governance of the Internet they propose models such as lex mercatoria,[23] admiralty law,[24] or the law applying to common resources such as Antarctica, Outer Space or the High Seas.[25] They state that the Internet is more than a quantitative step in the evolution of information technology and thus requires more than a mere adjustment of the law. A failure to appreciate, they say, is to repeat the mistake made in the past for example by those who assumed that printing was just a technological replacement of writing and thus failed to realise that printing was qualitatively different from writing, much less easily controlled, and raised fundamentally new legal issues.[26]

The next parts will attempt to show how these extremely different conclusions are arrived at by reference to the qualitatively and quantitatively new jurisdictional problems respectively. Before turning to the process of argumentation in this specific context, some general comments on legal reasoning are made, firstly, to illustrate the extent to which the analysis is valid across States and legal systems

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[21] Reilly, above n 2, 583. For example, in *Maritz, Inc* v *Cybergold, Inc* 947 F Supp 1328 (ED Mo 1996) the court used the analogy to postal mail to hold that the defendant was transmitting its advertising into Missouri and thus was subject to the jurisdiction of the Missouri court. See also Allan R Stein, 'The Unexceptional Problem of Jurisdiction in Cyberspace' (1998) 32 *The International Lawyer* 1167; Dan L Burk 'Jurisdiction in a World Without Borders' (1997) 1 *Virginia Journal of Law and Technology* 1522, at http://vjolt.student.virginia.edu/.

[22] David R Johnson and David Post, 'Law and Borders – The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367, 1374, in which the authors criticise those who treat 'the Net as a mere transmission medium that facilitates the exchange of messages sent from one legally significant geographic location to another.'

[23] Burnstein, above n 2, 108; Reidenberg, above n 2, 929; Hardy, above n 12, 1019; Johnson and Post, ibid 1389; Joel P Trachtman, 'Cyberspace, Sovereignty, Jurisdiction and Modernism' (1998) 5 *Indiana Journal of Global Legal Studies* 561, 580; Aron Mefford, 'Lex Informatica: Foundations of Law on the Internet' (1997) 5 *Indiana Journal of Global Legal Studies* 211.

[24] Burnstein, above n 2, 103.

[25] Burnstein, above n 2, 110. Reilly, above n 2, 583. Henry H Perritt 'The Internet is Changing the Public International Legal System' (2000) 88 *KY Law Review* 885, para V.B, at http://www.kentlaw.edu/perritt/publications/88KYL.Rev.htm.

[26] Reilly, above n 2, 581.

and, secondly, to show how law normally reacts to and accommodates new social or economic phenomena.

3. Legal Reasoning and Legal Change

3.1. Legal Reasoning

The following analysis cannot, and does not pretend to, do justice to an area of legal theory as broad and problematic as legal reasoning or legal change. Rather, on a much more modest level, it attempts to lay some basic foundations for the discussion of Internet-related jurisdictional issues in the next part. Legal reasoning is very simply the process of argumentation:

> '[l]egal reasoning may be analyzed not as a stage in a physical or social process but as a process itself, the process of argument. Argumentation describes, in general, the act or process of forming reasons, drawing conclusions, and applying them to a situation under consideration.'[27]

The process of legal argumentation is employed by all those who have to be able to justify their decisions or actions against some legal standards, [28] be it at national or international level. At the national level this standard may be fairly readily ascertainable from statutes, regulations or decided cases. In contrast, it has been argued that the absence of clearly defined international standards means that:

> '*international law*... does not easily lend itself to brilliant argument by counsel. Instead it has to be assessed as a common pattern of state practice with great care and considerable pedantry. International lawyers have to engage in a time consuming search for bits of state practice, to collect them under some systematic headings and then to draw very modest conclusions as to their common denominator based on *opinio juris*.'[29]

While there is no doubt some truth in this argument, it ignores the existence of fairly clear and precise statements of international law in treaties and it also draws an unjustified conclusion from the difficulty of ascertaining the legal standard to the

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[27] Kent Sinclair, 'Legal Reasoning: In Search of an Adequate Theory of Argument' (1971) 59 *California Law Review* 821, 824.

[28] Neil MacCormick, 'The Artificial Reason and Judgement of Law' in Aulis Aarnio and Neil MacCormick (eds), *Legal Reasoning* (New York: New York University Press, 1992) vol 1, 167, 167.

process of argumentation once that standard has been ascertained. International law may not lend itself to brilliant argument by counsel, but of necessity and as a matter of practical experience it cannot but lend itself to legal argumentation.

Related to the question of who engages in legal reasoning, is the issue as to the extent to which any meaningful discussion on legal reasoning must be forum-specific, which is important in this context, as it determines the relevance of the analysis to the process of argumentation in jurisdictions which do not share the common law tradition. Most analyses of legal reasoning are forum-specific.[30] They focus on the process of argumentation in a particular segment of the domestic law process, such as judicial reasoning at first or at the appellate level,[31] in jurisdictions following a particular tradition. The fact that legal argumentation occurs wherever legal actors need to justify their conduct or their decisions against a legal standard does not necessarily entail that a particular method of reasoning will constitute good argumentation regardless of the legal traditions of the forum. It is clear that differences in substantive regulation mandate that there will be differences in what constitutes good reason in different jurisdictions. However, that does not mean that the methods of reasoning are essentially different:

> '[t]hat there are...differences of national style, tradition and canons of argumentative elegance need not be disputed,...[but s]o far as legal systems include rules which it is mandatory to apply in every case to which they clearly refer, observance of the requirements of deductive logic is a necessary element in legal justification. That is an analytic truth.'[32]

Thus whether extracted from statute or case law, a rule applicable to certain situations must be applied when a situation of that type arises. Nevertheless differences exist in the actual process of establishing the applicable rules: common law, as opposed to statute, relies on the judge's ability to extract mandatory rules

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[29] Karl M Meessen, 'International Law Limitations on State Jurisdiction' in Cecil J Olmstead (ed), *Extra-Territorial Application of Laws and Responses Thereto* (Oxford: ESC Publishing Limited, 1984) 38, 39 (emphasis in the original).

[30] Some commentators have expressly stated that their analyses of legal reasoning apply to all legal arguments or have a wider bearing beyond the particular context selected. See, for example, Sinclair, above n 27, 834f; Robert S Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common-Law Jurisdictions' (1978) 63 *Cornell Law Review* 707, 709f. Note also Dewey, above n 3, 24, where the author comments on the common origins of all legal argumentation.

[31] For example, Summers, ibid. For an analysis of lawyer's reasoning see Julius Stone, *The Legal Systems and Lawyer's Reasoning* (Stevens, 1964).

[32] MacCormick, above n 28, 170.

from cases and tends to favour a more pragmatic disposition 'proceeding more cautiously case by case, never generalising a principle further than present need, always distrusting the pursuit of any principle to its ostensibly 'logical' conclusions.'[33] This, coupled with the power and even obligation of common law judges to overrule a pre-established rule in certain circumstances,[34] appears to cater for greater flexibility of the law and for greater judicial activism in common law jurisdictions.[35] In terms of legal reasoning, it seems to provide for the acceptability of bolder arguments in common law courts than in courts of jurisdictions relying on codified law. These differences suggest that there may be a greater need for legislative activism in civil law jurisdictions in response to the emergence of the Internet.

3.2. Judicial Reasoning - Continuity and Change

How does the law change and respond to social and economic change? To what extent is and should legal reasoning be responsive to non-legal considerations? The assertion that all legal reasoning is deductive in nature presupposes the existence of a mandatory rule clearly applicable to certain facts. However, it provides little guidance on how cases are and should be argued, decided and justified where there is no clearly applicable rule or where there are conflicting rules and on how choices between them are and must be made.[36] This problem applies especially to cases arising out of radically new phenomena, such as the Internet, because existing rules were not designed with the particular phenomenon in mind. What considerations are and should be taken into account when such very novel cases call for decisions? It has been argued that:

> '[e]specially in times of dynamic social or economic change, a style of judging which confines itself to deductive/subsumptive reasoning from pre-established rules or precedents may appear unattractive compared with more forward looking, goal-oriented types of reasoning. What makes a

[33] MacCormick, above n 28, 171.
[34] See text accompanying n 6.
[35] Judicial activism is of course not unknown in civil law jurisdictions. For example the German Constitutional Court (Bundesverfassungsgericht) has been extremely active and influential since its inception in 1951. Friedrich Karl Fromme and Hermann Dornhege, '"Die Entscheiding is unanfechtbar" Das Bundesverfassungsgericht' (1997) 6 Deutschland – *Zeitschrift fuer Politik, Kultur, Wirtschaft* und *Wissenschaft* 24.
[36] Cf Sinclair, above n 27, 839, who argues against the proposition that in penumbral cases deduction has 'at the most a trivial role to play; only after the real issue in the analysis has been decided...is a conclusion...deducible.'

> decision right is not how it matches up to some postulated norm of rightness, but its potentiality to contribute to some improvement in the state of affairs now or in the future.'[37]

Such a forward-looking approach, where decisions are]udged by reference to their consequences alone without regard the quality of the decision apart from its consequences,[38] is attractive in that it is explicitly intended to facilitate change. Yet, it is also fraught with danger, partly because it relies on an ability to accurately predict the future. More importantly, adopting an unqualified 'logic of prediction of probabilities rather than one of deduction of certainties'[39] does not sit easily with the need to maintain continuity of the law and thus legal and social stability and certainty. If law was ever-changing in immediate response to an ever-changing society without looking backwards, there would be no law at all. The 'rule of law' implies some adherence to legal tradition and some commitment to the concept of *stare decisis*. If a rule was ever-changing there would not be a rule and law could not fulfill its basic function, namely to 'answer to the need for certainty, predictability, order and safety.'[40] That aspect of law often mistakenly gives rise to the complaint, that '[o]nly the *L*aw resists and resents the notion that it should ever change its anticipated ways to meet the challenge of a changing world'.[41] In fact, resistance to change is an essential element of law because, as a commentator noted in the context of international law:

> 'there would be no point in having rules of international law if those rules were, at least, potentially in a continuous state of flux. Indeed, the essence of obligation and the purpose of law would seem to be an ability to control both present and future behaviour.'[42]

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[37] MacCormick commenting on Dewey in Aulis Aarnio and D Neil MacCormick (eds), Lega*l* Reasoni*n*g (New York: New York University Press ,1992) vol 2, xii.

[38] This approach has sometimes been coined the pragmatic approach as opposed to the principled approach to argumentation: P S Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law (1980) 65 *I*owa Law Rev*i*ew 1249. For a criticism of either approach see Neil MacCormick, 'On Legal Decisions and Their Consequences: From Dewey to Dworkin' (1983) 58 *N*ew Yor*k* Univers*i*ty Law Rev*i*ew 239, 239f.

[39] Dewey, above n 3, 26.

[40] Vilhelm Aubert, Torstein Eckhoff (eds), Cont*i*nu*i*ty and Deve*l*opmen*t* *I*n Law and Soc*i*ety (Scandinavian University Press, 1989) 76.

[41] Fred Rodell, Woe Unto You, Lawyers!, cited in Reilly, above n 2, 589. On the resistance of international law to change see for example, Robert McCorquodale and Raul Pangalangan, 'Pushing Back the Limitations of Territorial Boundaries' (2001) 12 *E*uropean *J*ourna*l* o*f* *I*nternatio*n*a*l* Law 867, where the authors argue that the approaches in international law dealing with territorial boundaries are trapped within an outdated nineteenth-century framework.

Yet, stability and certainty cannot be achieved by attempting to squeeze a new phenomenon into an old jacket: 'to claim that old forms are ready at hand that cover every case... is to pretend to a certainty and regularity that cannot exist in fact. The effect of that pretension is to increase practical uncertainty and social instability.'[43] Nevertheless, the conscious regard to the past is crucial to ensure a smooth and predictable transition from the old to the new. The apparent conflict between the need to acknowledge pre-established rules and the need to facilitate change in view of changing social and economic conditions is largely illusory in so far as it affects legal reasoning. Any ruling concerning a new phenomenon, which every new case is to a greater or lesser extent, tends to be justified by both present and future oriented

> 'consequentialist arguments showing the acceptability or unacceptability of... [it] one way or the other having regard to their consequences and by [back-ward looking] arguments of coherence and consistency showing how... [it] can fit within the existing relevant body of law, ie, can fit with the legal system as already authoritatively established.'[44]

This explains how the law can be both static and dynamic, how it changes, yet at the same time continues on its old path. It also shows that successful legal reasoning must be governed by an appreciation of the essentially incremental development of common law; incremental in the sense that past rules are always a necessary (but not exclusive) consideration in arriving at a new ruling. And the same applies to the customary international law in respect of which it has been said, that 'although these shared understandings apply generally to all State behaviour, they are not static, but instead undergo subtle modifications as the international system evolves.'[45]

3.3. Legislative Justification - Change and Continuity

It may be objected that legal reasoning must be informed by pre-existing rules only in the judicial context. Legal arguments for the need of new legislation or treaties,

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[42] Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999) 49 (emphasis in the original).
[43] Dewey, above n 3, 26.
[44] MacCormick, above n 28, 175.
[45] Byers, above n 42, 19.

for example in the Internet context, need not be restricted by existing anachronistic rules, that is, the very rules the abolition of which is argued for. Suffice to say that although the legislature is not generally bound by pre-established rules,[46] and is, and indeed must be, strongly present and future oriented, it still owes respect to the past. Legislative reforms take as their starting point existing statutes (or their absence) which in turn were the outcome of reforms of even older statutes. Furthermore, these reforms must fit, in terms of coherence and consistency, within the established legal system, similar to judicial pronouncements.[47] And although the legislature's power to make sweeping legal changes (which also build on the foundation of the existing law) is vastly greater than that of the judiciary, it has to be exercised fairly rarely and with self-restraint if certainty and predictability, and ultimately social and economic stability, are to be retained: Too much change in the law 'does not simply result in bad law; it results in something that is not properly called a legal system at all.'[48] While principles of legal reasoning – of the process of justification of conduct or decisions against a pre-existing legal standards - do not strictly apply to arguments for legislative reform, they still must be guided by an appreciation of the law's inherent orientation to the past. For the purpose of this discussion, the difference in terms of legal reasoning between the legislature and the judiciary who is expressly bound by pre-established legal standards may be viewed as no more than a matter of degree;[49] with the legislature being able, and no doubt under a duty, to emphasise that side of the coin which looks to present and future social and economic conditions. However,

> 'it will be found that many of the sorts of reasons given for legislative decisions by legislators are not essentially different from those given by

[46] Obvious exceptions are rules contained in constitutions and of international law.

[47] Even though the legislature can make the old fit the new, often the clear aim of legislative reform is to make the new fit the old. Note also Byers, above n 42 , 9, where the author notes that '[l]egitimacy in international law is derived at least partly from internal coherence.'

[48] Lon Fuller, *The Morality of* Law (New Haven and London: Yale University Press, 1969) 39, where the author mentions seven other criteria which, he argues, are essential for law to be law; discussed in M Ethan Katsh, 'Cybertime, Cyberspace and Cyberlaw' (1995) *Journal of Online* Law, http://www.wm.edu/law/publications/jol/95_96/katsh.html, para 34ff. It is though arguable that law is law even if it is does not satisfy these eight substantive values, although it would not be 'fair' law. For more on the rule of law see Chapter 4.

[49] There are of course important differences between legislative and judicial law-making. First, judicial law-making 'is subordinate law-making. Parliament can override judicial decisions, while judges cannot override what Parliament does... Secondly, Parliament can legislate on its own initiative, while the court can only make law when an appropriate case is brought before it...Thirdly, Parliament's law-making powers are vastly more extensive than those of the courts.' P S Atiyah, Law and *Modern Society* (Oxford: OUP, 1983) 131. But note, in some jurisdictions, such as the US, legislation may be invalidated by the judiciary on the basis that it is inconsistent with the Constitution.

> judges. Fairness, justice, the rights of individuals, the public interest, all these enter significantly into political as well as judicial law-making.'[50]

The above discussion was intended to make the fairly uncontroversial point that legal reasoning must be guided by a recognition of any legal regime's inherent resistance to change, in particular major change, and of the essentially incremental nature of legal change, with new layers of law imposed over the old. What follows is a discussion of the methods of argumentation employed to resolve the new Internet-related jurisdictional disputes, which will be evaluated in light of the general comments made in this section.

4. The Jurisdictional Challenge

4.1. Is a Website Enough? - Two Schools of Thought

In the following analysis, the merits of the substantive arguments in favour of one position or another towards the resolution of the new Internet-related jurisdictional issues are only of secondary concern, although some evaluation is inevitable. Of primary concern at this point are the paths the arguments follow and their underlying assumptions.

One genuinely new jurisdictional question is whether the accessibility of a foreign website provides sufficient justification for an assertion of jurisdiction over the foreign entity behind the site.[51] This issue has been considered by courts across the globe, but most frequently by US courts, and has also attracted a large amount of attention by legal scholars and government agencies.[52] A comparison between the way some academics, in particular in relatively early commentaries, have argued the issue and the starkly contrasting way most judges have dealt with it, is instructive in terms of displaying the differences of the approaches and their relative merits.

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[50] Ibid 134.
[51] The difference between adjudicative, prescriptive and enforcement jurisdiction need not be considered here.
[52] For the most comprehensive summary of these see American Bar Association (ABA), *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* (2000), at http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html.

A typical early academic school of thought, of which Johnson and Post are prime examples,[53] starts out by arguing that the Internet shows no regard for territorial boundaries. Therefore, it continues, the logical consequences of letting existing territorially-based jurisdictional rules apply to conduct occurring within cyberspace are that:

> 'assertions of law-making authorities over Net activities on the ground that those activities constitute "entry into" the physical jurisdiction can just as easily be made by any territorially-based authority. If Minnesota law applies to gambling operations conducted on the World Wide Web because such operations foreseeably affect Minnesota residents, so, too must [by logical implication] the law of any physical jurisdiction from which those operations can be accessed.'[54]

From there, it is argued, given that, according to existing jurisdictional rules, 'no physical jurisdiction has a more compelling claim than any other to subject these events exclusively to its laws', these rules must be abandoned in cyberspace and traditional substantive regulation, such as the regulation of professional activities, and speech, should be let to evolve as a distinct law of cyberspace.[55] This argument, based on the logical consequences of adopting existing territorially based jurisdictional rules in the Internet context, has been supported by numerous scholars[56] and indeed in some way it is so compelling that it is hard to see how anyone could rationally ignore it.

While one substantive criticism may be that its conclusion lacks practical merit,[57] in fact courts presented with Internet-related jurisdictional disputes have not voiced this criticism. Indeed some judges seem to have expressly affirmed the validity of part of the argument. For example, in the 'first published international case

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[53] Johnson and Post, above n 22.
[54] Johnson and Post, above n 22, 1374; see also Burnstein, above n 2, 81f.
[55] Johnson and Post, above n 22, 1379.
[55] Burnstein, above n 2; Reidenberg, above n 2; Mefford, above n 22; Paul Nitschke and Lynden Griggs, 'Banking on the Internet – Reformulation of the Old or Adoption of the New' (1996) 7 *Journal* of Law and *Information Science* 223; Franz C Mayer, 'Recht und Cyberspace' (1997) *Humboldt Forum Recht*, at http://www.rewi.hu-berlin.de/online/hfr/3-1997/Drucktext.html; but cf Trachtman, above n 22; Graham Greenleaf, 'An Endnote on Regulating Cyberspace: Architecture vs Law?' (1998) 21 *University of New South* Law *Journal* 593.
[57] How can parties to online transactions order their affairs according to new norms and doctrines which still need developing? Where and how will these norms be enforced? How long shall governments wait for the rise of responsible law-making institutions within cyberspace? What shall domestic courts do in the meantime when confronted with Internet disputes?

addressing multijurisdictional issues in cyberspace'[58] *Playboy Enterprise Inc* v *Chuckleberry Publishing Inc* the judge said that the defendant

> 'cannot be prohibited from operating its Internet site merely because the site is accessible from within one country in which its product is banned. To hold otherwise would be tantamount to a declaration that this Court, and every other court throughout the world, may assert jurisdiction over all information providers on the global World Wide Web... [which] would have a devastating impact on those who use this global service.'[59]

But, although courts appear to agree that the accessibility of a website cannot justify an assertion of jurisdiction over the entity behind the site, they have nevertheless found ways to hold onto existing geographically based jurisdictional rules. Furthermore, in *People* v *Lipsitz*, the court stated that:

> 'although Internet transactions might appear to pose novel jurisdictional issues, traditional jurisdictional standards have proved to be sufficient to resolve all civil Internet jurisdictional issues raised to date, refuting the view of [some who]... believe a new body of jurisprudence is needed...'[60]

So how are courts able to justify why they have a compelling claim to subject foreign online entities to their jurisdiction and/or laws, despite their apparent support for the validity of the argument that an assertion of jurisdiction based on the accessibility of a website is not rationally defensible? The answer is simple: they have the benefit of making their principled decisions in the finely textured context of actual cases. This factual context allows them to draw distinctions between different cases involving online conduct. The distinctions US courts have come up with have taken several forms. On the question of the court's right to hear a matter, distinctions have been drawn between passive and interactive websites,[61] between commercial and non-commercial websites,[62] between on going communications and isolated contacts,[63] between parties who had no other

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[58] Stephan Wilske and Terasa Schiller, 'International Jurisdiction in Cyberspace: Which States May Regulate the Internet?' (1997) 50 *Federal Communications Law Journal* 117, 134.
[59] *Playboy Enterprise Inc v Chuckleberry Publishing Inc* 939 F Supp 1032, 1039f (SD NY 1996) (quotation marks omitted); see also *Digital Equipment Corp v Altavista Technology Inc* 960 F Supp 456, para III.B (D Mass 1997).
[60] *People by Vacco v Lipsitz* 174 Misc 2d 571, 578 (NY, 1997)
[61] *Zippo Manufacturing Co v Zippo Dot Com Inc* 952 F Supp 1119 (WD Pa 1997); *Patriot Systems Inc v C-Cubed Corp* 21 F Supp 2d 1318 (D Utah 1998) and *Smith v Hobby Lobby Stores Inc* 968 F Supp 1356 (WD Ark 1997).
[62] *Cybersell Inc v Cybersell Inc* 130 F3d 414, 418 (9th Cir 1997).
[63] *CompuServe Inc v Patterson* 89 F3d 1257 (6th Cir 1996).

significant offline contact with the jurisdiction and those who had, [64] or between conduct that must be presumed to be inherently targeted or was actually targeted towards a particular jurisdiction and conduct that was not targeted at all.[65] On the issue of whether foreign online entities can be subjected to the domestic laws the making of distinctions has also helped to avert the collapse of jurisdictional rules. For example,[66] in *Playboy Enterprise Inc* v *Chuckleberry Publishing Inc* the court stated that although 'the Internet deserves special protection as a place where public discourse may be conducted without regard to nationality... this special protection does not extend to ignoring court orders and injunctions.' [67]

These distinctions are born out of, and informed by, the *backward-looking* imperative of reconciling the ruling with existing jurisdictional principles as well as the *forward-looking* imperative of averting the consequences of either saying that the accessibility of any website justifies an assertion of jurisdiction, or indeed the opposite. The consequences of the first option 'would [be to] eviscerate the personal jurisdictional requirement'[68] and also raise 'the possibility of dramatically chilling what may well be "the most participatory marketplace of mass speech that ...the world...has yet seen"'.[69] On the other hand not asserting jurisdiction over any entity simply because they use the Internet would allow those entities 'to insulate themselves against jurisdiction in every state, except in the state (if any) where they are physically located.'[70] While both of these options are theoretical possibilities within the existing US jurisdictional regimes, the legal, social and economic implications of either are too far-reaching, too revolutionary, to be acceptable.[71] Effectively, the two extreme options have marked the outer boundaries within which courts have established different groups of 'website'

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[64] *Heroes Inc v Heroes Foundation* 958 F Supp 1 (DDC 1996).
[65] *EDIAS Software International LLC v BASIS International Ltd* 947 F Supp 413 (D Ariz 1996); *Panavision v Toeppen* 141 F 3rd 1316 (9th Cir 1998); *Bensusan Restaurant Corp v King* 937 F Supp 295 (SDNY 1996).
[66] See also *US v Thomas* 74 F3d 701(6th Cir 1996). In that case the defendants, operating a computer bulletin board in California, were prosecuted in Tennessee, because they knew that one of the jurisdictions in which their files were being accessed (which could not occur without their approval) was Tennessee.
[67] *Playboy Enterprise Inc v Chuckleberry Publishing Inc* 939 F Supp 1032, 1040 (SD NY 1996).
[68] *McDonough v Fallon McElligott Inc* 40 USPQ 2d (BNA) 1826, 1829 (SD Cal 1996).
[69] *Digital Equipment Corp v Altavista Technology Inc* 960 F Supp 456, para III.B (D Mass 1997).
[70] *Digital Equipment Corp v Altavista Technology Inc* 960 F Supp 45, para III.E.3.e (D Mass 1997).
[71] See for example *Hearst Corp v Goldberger* No 96 CIV 3620, para I/I. C (SD NY 1997).

cases. Taking the middle path, courts have taken the view that some websites, rather than no or every website, justify an assertion of jurisdiction.

To what extent the various distinctions drawn in these cases are indeed valid and viable will not be addressed here. More important at this stage is the realisation that the law can evolve despite the most compelling arguments that it cannot. Actual cases not only provide a tool to achieve this, but also illustrate the potential pitfalls of legal argumentation based on over-simplified, too generalised factual premises and idealized standards. Although Johnson and Post admit that 'Cyberspace is not a homogenous place'[72], they close their eyes to the fact that online conduct is not a uniform phenomenon, even in terms of its alleged territorial insensitivity, which inherently defies the process of distinguishing behaviour and events upon which regulation in the physical world relies. Of course, not all traditional points of differentiation and classification are easily transferable to the online world; some have to be revised or even discarded in favour of new or more subtle ones. But that does not mean that every website is as much here as it is there.

Another and more fundamental reason why the judges in the above example were able to make the law evolve lies simply in the fact that the law has constantly evolved in the past in response to a changing world. While it seems that the Internet is totally new and unprecedented, in fact it is no more than the epitome of a long-standing development towards greater economic globalisation; and these developments have not gone unnoticed by the law:

> 'the personal jurisdiction problems posed by virtual commerce and Internet telepresence are in many ways the culmination of a long evolution of legal doctrine occasioned by changing technology. Traditionally, jurisdiction over the person was premised on the physical presence of the individual in the forum... [i]ncreased physical mobility due to automobiles and other modern transportation placed this jurisdictional basis under severe strain...As a response to the imminent collapse of jurisdiction based on physical presence, the Supreme Court configured new rules upon a kind of "virtual" presence.'[73]

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[72] Johnson and Post, above n 22, 1379.
[73] Burk, above n 21, para 25, 26. See also Bradley A Slutsky, 'Jurisdiction Over Commerce on the Internet' (1997), at http://www.kslaw.com/library/articles.asp?123.

Thus, it appears that as long as the law has continuously evolved in the past, the need for drastic legal changes, even in view of apparently revolutionary technological developments, is significantly reduced.

4.2. Conservatism - A Mere Result of the Judiciary's Limitations?

That the law can evolve is one thing, but whether it should is another. It may be argued that the courts' moderate and incremental approach in these cases is typical of judicial reasoning and reflects the restraints to which courts as adjudicator are subject. Therefore, it may be argued that these cases do not provide insights for the process of argumentation generally, nor specifically for the need for legislative reform.[74] In relation to the question of whether the existence of a website is enough to assert jurisdiction, it could be objected, first, that courts have never had to deal directly with that question and thus with the consequences arising out of an attempt to answer it. Secondly, it could be objected that even if they had to deal with the question their concern to make a pragmatic decision designed to achieve justice in the particular circumstances of the case makes them blind to the possible impact of their decision in the future. Thirdly, it may be objected that even if they recognised the consequences of adopting existing jurisdictional doctrines in relation to the Internet, they have no choice but to uphold them. These objections will be addressed now.

The first objection to the moderate judicial approach may be that judges had the luxury of some indicators which supported their arguments for or against jurisdiction and never had to directly answer the 'pure' question of whether the existence of a foreign website can justify the assertion of jurisdiction over the entity behind the site. Indeed, some judges are at pains to stress that the case before them does not raise this question. For example, in *Digital Equipment Corp v Altavista Technology Inc* the judge said:

> '[w]hile this case raises some of the concerns, they are not, in the final analysis, dispositive. There is no issue of inconsistent regulation suddenly imposed on Web users without notice. There is no issue of parties being

[74] Atiyah, above n 49, 130ff.

> haled into the courts of a given jurisdiction solely by virtue of a Web-site, without meaningful notice that such an outcome was likely. Nor is there a great risk of chilling the Internet's "participatory marketplace" by affirming jurisdiction here... This case does not reach the issue of whether any Web-activity, by anyone, absent commercial use, absent advertising and solicitation of both advertising and sales, absent a contract and sales and other contact with the forum state... would be sufficient to permit the assertion of jurisdiction over a foreign defendant.'[75]

It should be noted that it is misplaced to say that the judiciary has had the luxury of indicators or distinctions allowing them to make decisions according to traditional jurisdictional concepts, as if these were necessary and pre-existing. While the distinctions mentioned above are no doubt based in reality, they are nevertheless the result of judges' creativity. By creating them, judges have rejected the validity of even asking the 'pure' question of whether a website can justify an assertion of jurisdiction. This question is based upon a decision to treat all websites as a uniform phenomenon, a decision judges have implicitly not approved. When courts have decided not to exercise jurisdiction as, for example, in Bensusan Restaurant Corporation v King it was because indicators pointing in favour of jurisdiction in other cases were absent rather than because the courts rejected the validity of the distinctions drawn.[76] No judge to date has attempted to answer the question of whether the existence of any website is enough to assert jurisdiction. Furthermore given the far reaching consequences of asking the question, as outlined above,[77] it is questionable whether it ever will or should be asked.

Secondly, it may also be objected that a judge's concern to make a pragmatic decision designed to achieve justice in the particular circumstances of the case makes him or her blind to the possible impact of the decision in the future.[78] And, it may be argued, this shortsightedness, which is to some extent applicable to any judicial decision, may have particularly grave consequences where the currency of existing legal doctrines is profoundly challenged by social and economic change,

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[75] Digital Equipment Corp v Altavista Technology Inc 960 F Supp 456, para III.B (D Mass 1997). See also Heroes Inc v Heroes Foundation 958 F Supp 1, para II.A.1.b (DDC 1996).
[76] Bensusan Restaurant Corporation v King 937 F Supp 295, para II.C (SD NY 1996), where the court distinguished rather than rejected the decision in CompuServe Inc v Patterson 89 F3d 1257 (6th Cir 1996) where online contacts with Ohio were sufficient to found personal jurisdiction over a Texas resident.
[77] See text accompanying n 68-71.
[78] Atiyah, above n 38, 1251.

such as the existing jurisdictional rules in relation to cyberspace. Again, this objection is at least partially unmerited. Although some judges no doubt fail to appreciate the consequences of their decisions,[79] the very choice they have to make between two (or more) potentially applicable legal propositions is affected by comparing the consequences of adopting either. Taking the above example, judges have rejected the legal propositions that no website or every website justifies an assertion of jurisdiction, in favour of the proposition that some websites justify it, precisely because the future impact of the last proposition is more acceptable in terms of promoting legal stability, and thus social and economic stability, than the others. Again, the judgment in *Playboy Enterprise Inc* v *Chuckleberry Publishing Inc* illustrates this. In explaining her choice to extend the application of the old injunction to the Internet, the judge said that, although the Internet deserves special protection,

> 'this protection does not extend to ignoring court orders and injunctions. If it did, injunctions would cease to have meaning and intellectual property would no longer be adequately protected. In the absence of enforcement, intellectual property law could easily be circumvented through the creation of Internet sites that permit the very distribution that has been enjoined. Our long-standing system of intellectual property protections has encouraged creative minds to be productive. Diluting those protections may discourage that creativity.'[80]

While the capacity of judges to correctly evaluate the relative viability of alternate legal propositions in the long run is limited, which incidentally is not peculiar to the judiciary, it must be remembered, that

> 'actors in the legal process are not called upon to decide truths for all time, rather they must deal with a selection of competing legal positions in a limited context, though the outer boundary of relevant concerns may be vague... Since no immutable conclusions are to be drawn, there is every justification for accepting the most rational solution available at the time.'[81]

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[79] See for example *Inset Systems Inc* v *Instruction Set Inc* 937 F Supp 161 (D Conn 1996), where the court held that advertising via the Internet is solicitation of a sufficient repetitive nature to justify assertion of jurisdiction over the out-of-state defendants. See also *Maritz Inc* v *CyberGold Inc* 947 F Supp 1328 (ED Mo 1996). These decisions have frequently been criticised for being too expansive. See eg. Wilske and Schiller, above n 58, 158ff. They were also rejected in *Zippo Manufacturing Co* v *Zippo Dot Com Inc* 952 F Supp 1119 (WD Pa 1997) and *Bensusan Restaurant Corp* v *King* 937 F Supp 295 (SD NY 1996) and many other cases, where the judges insisted on 'something more' than the mere accessibility of the site in the State.

[80] *Playboy Enterprise Inc* v *Chuckleberry Publishing Inc* 939 F Supp 1032, 1041 (SD NY 1996).

[81] Sinclair, above n 27, 856.

Even supposing judges were attempting to decide immutable truths for all times, how could they then be responsive to the peculiarities of the particular time? They would have to reject any proposition which is in some way reflective of the particular background against which it is made. The result of this would be broad and vague statements of law which could not answer the basic need for certainty that law is there to answer. In summary, it appears, that judicial reasoning is not only not inherently short-sighted but also that a certain level of shortsightedness is a necessary aspect of law.

Finally, it may be objected that judges have no power to reject existing jurisdictional rules, even if they were persuaded of their inappropriateness in relation to the Internet. The judge in *Hearst Corp* v *Goldberger* seemed to confirm this restriction when he said that although

> 'some commentators.. believe a new body of jurisprudence is needed ...[on] the question of personal jurisdiction and the Internet...[u]nless and until Congress... enacts Internet specific jurisdictional legislation, however, the Court must employ... existing jurisdictional statutes... and analogize to presently existing, traditional, non-Internet personal jurisdiction case law.'[82]

However, this limitation on judicial power can be overemphasized, as the judiciary does have the power and the obligation to limit or expand the application of existing rules if the context of the case demands it. Thus indirectly judges do pass judgment on the viability of the rules themselves. For example, in *Playboy Enterprise Inc* v *Chuckleberry Publishing Inc* an Italian company was alleged to have breached a 15 year old injunction prohibiting it from distributing its 'Playmen' glamour magazine in the US by reason of the fact it was put on its Web site and so became accessible from the US. The judge rejected the argument by the Italian company that the injunction does not apply to the new medium of the Internet. She could have held the reverse, which was a clearly available possibility under the law. This would have amounted to saying that the Internet is such a radically new medium for publication and distribution that the old court order and implicitly the law upon which it was based cannot validly be applied to it. Indeed, courts could have, within their legitimate power, adopted the legal propositions either that no, or

[82] *Hearst Corp v Goldberger* No 96 CIV 3620, para II (SD NY 1997).

that every, website justifies an assertion of jurisdiction, both of which would indirectly amounted to a rejection of the viability of existing law in the online world. They decided not to. This shows that the judiciary often has considerable power to indirectly reject existing rules if social and economic change renders them outdated, and also that they tend to resist such a rejection especially if it would lead drastic legal changes.

The above discussion indicates that the moderate and incremental approach adopted by the judiciary cannot be attacked simply by saying that judges inevitably submitted to inherent judicial limitations and thus had no choice but to decide the way they did.

4.3. The Best Solution versus The Least Disruptive Solution

But asserting that this moderate, tradition-bound approach cannot be rejected as typically judicial, does not necessarily mean that it is good generally. Should not the preoccupation with legal tradition give way to a preparedness to effect as much or as little legal change as is called for by an unbiased assessment of the feasibility of existing legal rules in changed circumstances? Johnson and Post answer this question in the positive. Like many other scholars, they simply ask the question whether there is a better way to deal with the new phenomenon of the Internet than by using the existing jurisdictional regime (and there always is). Coming back to the earlier discussion of legal reasoning generally, their approach resembles very closely the one which states that subsumptive reasoning from pre-established rules should be discarded in favour of a more forward-looking, goal-oriented type of reasoning. Johnson and Post's goal is to come up with the best and most efficient regulatory model available which is no doubt a worthy goal, but, as also noted above, not easily reconcilable with the need for legal stability. As Johnson and Post start out by rejecting the past jurisdictional regime (apart from trying to retain existing broad regulatory objectives)[83] they become blind to the distinctions judges can rely on to save those regimes. Judges are in some way

[83] Johnson and Post, above n 22, 1400f: 'We can reconc*ile* the new law created in this space with current territoriality based legal systems by treating it as a distinct doctrine.' (emphasis added).

much less ambitious. They have asked whether existing rules can cope with the new phenomenon of the Internet, regardless of whether they are the theoretically best possible rules. While this question seems inferior and more timid than the one above, its strength lies in its insistence on legal continuity. It reflects the law's resistance to anything but incremental change. Indeed, to the extent to which the judiciary is an integral part of the legal regime, to view its decision in favour of the most moderate, tradition-bound position as a matter of choice is in some way illusory; it could not but search for the least disruptive legal solution available.

And this search is not peculiar to the judiciary. Even the legislature does not freely inquire into and choose the best possibly regulatory option, regardless of the regulatory tradition and regardless of the extent of legal change the implementation of that option would require. The legislature's resistance to major change, despite its best efforts to effect change, is illustrated by the complaints which have surfaced frequently in relation to cyberspace regulation.

> '[e]ven the Clinton Administration's present effort to develop a vision for the information infrastructure... remains captive to sectoral thinking and reactive tendencies... [S]ome of the most time-consuming projects, like privacy and intellectual property remain focused on territorial borders and the transposition of status quo interests to cyberspace.'[84]

These reactive tendencies are also exhibited in legislators' preferences in regards to the type of regulatory approach. In the US, governments have launched into the new field of cyberspace

> 'with a wide range of regulations, both of speech, and behavior... The examples are many, and growing...In the main, however, these are direct regulations of cyberspace... It is government trying to affect behavior, by threatening punishment ex post. It is old style regulation moved to cyberspace.'[85]

Whatever the flaws of these regulatory attempts, they clearly illustrate how tradition-bound even the legislature is and how it aims to reinvent the status quo of

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[84] Reidenberg, above n 2, 923, where the author compares the narrow US approach with the omnibus approach taken to regulation in the European Union. But even in relation to the EU approach the writer notes, at 924, that it 'tends to preserve important, yet evaporating, foundations based on territorial principles and subject matter distinctions.'

[85] In the earlier version, at 28, of Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review* 501.

existing regulation. And the reason for this, as suggested above, is not simply a failure, owing to incompetence or lack of insight, to rise to the challenge, but lies in the very nature and function of law as a shield against instability and uncertainty.

So far the analysis has established how judges have been able to resurrect apparently doomed jurisdictional principles and to let the law evolve even in view of drastic social and economic changes. It has also been argued that their search for the least disruptive ruling to new jurisdictional problems is not the result of judicial shortcomings, but rather symptomatic of any legal regime's general resistance to major change. Accepting this as a fact of life, it may be concluded that legal argumentation which searches for the best regulatory options regardless of the regulatory tradition, while instructive through its exaggeration of the shortcomings of existing rules, is unlikely to yield realistic and viable solutions.

5. Legal Change and Law as an Engine of Change

5.1. The Floodgate Argument

The above analysis shows how law responds to social and economic change and how this must inform arguments for legal change in the Internet age. Yet one important aspect of law, namely law as an engine of change, has not yet been mentioned. In this part, two arguments against the viability of current jurisdictional regimes in the Internet will be assessed, with a view of establishing that law can respond with incremental changes to seemingly non-incremental social and economic changes partly because it plays an active (although not necessarily proactive) role in shaping society.

The new quantitative burden which traditional jurisdictional regimes are subjected to gives rise to a typical floodgate argument. This is that the relatively complex jurisdictional regimes are tailored to an environment where most conduct and transactions are localised within one territory and thus become unsustainable in an age, such as the digital, where transnational conduct is becoming the norm rather than the exception. This means that the judiciary's attempt to preserve traditional jurisdictional regimes is futile because these regimes will not be able to cope with

the many disputes arising out of the millions of transnational transactions which occur on the Internet.

This new quantitative jurisdiction-related problem has not attracted as much attention as the qualitative one.[86] Nevertheless, it appears that the potential for a great increase in transnational disputes has featured as the factual background against which genuinely new jurisdictional issues are discussed. For example, Johnson and Post argue against the legal proposition that the existence of a website is sufficient to assert jurisdiction, not simply by appealing to the logical implication it entails (i.e. that every website was potentially subject to every jurisdiction world-wide). But this theoretical implication is evaluated in light of the actual fact that there are millions of websites around brewing endless transnational disputes. This leads to the conclusion that:

> 'Cyberlaw will evolve to the extent that it is easier to develop this separate law than to work out the end*l*ess conflicts that the cross-border existences here will generate... without a usable body of law to deploy against it, a law of cyberspace will emerge as the simpler way to resolve the inevitable, and *repeated*, conflicts that cyberspace will raise.'[87]

It cannot be denied that a great increase in transnational conduct and transactions adds another dimension to the debate on the adequacy of traditional jurisdictional principles. Supposing there were a total of 11 websites world-wide, any heated debate on the issue of whether or not an assertion of juris*d*iction can be based on the mere existence of a website would be hard to imagine. In the greater scheme of things it would matter little whether or not all or any of these 11 websites are subject to the jurisdiction of every state. Yet, even if one accepts that the amount of actual online activity is relevant to deciding how to resolve jurisdictional disputes, is Johnson and Post's vision of a flood of endless and repeated jurisdictional conflicts demanding, even forcing, radical legal changes justified? And are judges merely burying their heads in the sand, when their rulings on

[86] But see for example, Burnstein, above n 2, 83; Hardy, above n 12, 996ff.
[87] Lawrence Lessig, 'The Zones of Cyberspace' (1996) 48 *Stanford* Law *Review* 1403, 1407, commenting on Johnson and Post's argument for a separate law for cyberspace.

Internet-related jurisdictional questions are not substantially informed by this floodgate argument?[88]

Although there has no doubt been a general increase in jurisdictional disputes, appeals to floodgate arguments seem unjustified, especially in relation to those areas of law which provide yardsticks according to which people order their affairs, such as commercial law, as opposed to those areas of law which primarily come into operation only after the relevant event or conduct occurred, such as torts and criminal law.[89] Particularly in the world of commerce, law does not merely respond to behaviour, but also directly shapes it:

> 'greatest weight should be given to outcomes in the way of probable behavioral changes in respect of novel ruling, in those areas where it is particularly likely that people will explicitly ground their actions in the law as it is laid down.. [such as tjax law, insurance law, and conveyancing... [I]n such fields in which people and companies are expected to act after informing themselves, or being professionally advised, about the law, it is highly probable that the outcomes of rulings on the law will be behavior that either conforms to it or takes advantage of the opportunities offered by it or otherwise adjusts affairs and practices to allow for it.'[90]

The effect of any legal ruling in these areas of law is to preempt many similar disputes. Decided cases are turned into risk management strategies designed to minimize a business' or consumer's exposure to the same costly conflicts. For example, it has been said that:

> '[f]inancial institutions and merchants should reevaluate the trade-offs between an enhanced multi-jurisdictional marketing and transnational presence against the impact such presence may have on jurisdictional defenses. Participants in electronic commerce can take steps to minimize the risk of jurisdiction in a foreign forum by use of disclaimer or otherwise conveying intended geographic limitations of the entity's service area and by limiting the interactive nature of their electronic contacts with forum residents, limiting their non-Internet contacts with the forum, and as an extreme measure, restricting access via the forum or by forum residents.'[91]

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[88] Courts tend to refer to the number of Internet users worldwide or the speed and efficiency of the Internet, if at all, in their introduction as a matter of the general background, without making this quantitative aspect an expressly stated reason for deciding one way or another. Eg. *Playboy Enterprises, Inc Chuckleberry Publishing Inc* 939 F Supp 1032, 1036 (SD NY 1996); *American Civil Liberties Union* v Reno 924 F Supp 824, 830ff (ED Pa 1996).

[89] But even in those areas the threat of ex post sanctions is intended to have some deterrent effect and to actively influence behavioural choices.

[90] McCormick, above n 37, 254.

[91] Thomas *P* Vartanian, Robert H Ledig, Lynn Bruneau, *21st Century of Money, Banking & Commerce* (Washington DC: Fried, Frank, Harris Shriver & Jacobson, 1998) 623.

Whether these strategies are desirable or not is not the issue at this point, but will be discussed further in Chapter 4. What is noteworthy here is the interactive relationship between law and commercial reality. As law is changing in response to a new commercial phenomenon, this phenomenon in turn responds to the law. This mutual adjustment of, or the closing of the gap between, law and commercial reality transforms a situation which might initially appear to require radical changes in the law into one which can be dealt with by adjustments of the law. This may be illustrated by the situation of consumers in the global electronic marketplace. As long as existing jurisdictional regimes are inefficient in dealing with transnational consumer disputes, it is unlikely that many of these disputes will occur because consumers are likely to be discouraged from entering into transnational transactions (with a high enough value to prima facie justify litigation) in the first place.[92] Nevertheless as some disputes arise, they put pressure on the applicable law. If the law governing these transactions adjusts by, for example, becoming simpler and more efficient,[93] consumer confidence in electronic commerce will rise resulting in more transactions which in turn will put pressure on the legal regime to change yet again. While this description of incremental legal changes in response to commercial changes and vice versa is no doubt oversimplified, it does serve to show the falsity of viewing the relationship between law and commercial reality as simply one-way, as well as the corresponding arguments for radical legal change based on this assumed one-way relationship.[94]

This description of the impact of law (and of its deficiencies) on consumer behaviour also proves that one should not too hastily accept generalised arguments to the effect that the Internet has removed all the factual assumptions

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[92] OECD, *Measuring the Information Economy 2002* (2002), at http://www.oecd.org/sti/measuring-infoeconomy, esp Ch 4, 68f, where it is noted that '[a]vailable statistics show that Internet sales are mainly domestic.' Specifically in relation to Australia, the report notes: 'In Australia, 50% of adults purchasing over the Internet buy only from Australian Web sites, 32% only from overseas Web sites and 18% from both.'

[93] In the consumer context, this means for example, the provision of cheap dispute resolutions mechanisms such as Alternative Dispute Resolutions, see Chapter 1 (n 46 and 47).

[94] For example, those who argued that the law of copyright will require drastic changes in the age of the Internet or otherwise the creation of copyright material will be stunted have already been proved wrong by the flexibility of owners of copyright material in adjusting to the new medium of the Internet and in making up for the legal shortfalls: Schlachter, above n 14. See also Yockai Benkler, 'Internet Regulation: A Case Study on the Problem of Unilateralism' (2000) 11 *European Journal of International Law* 171, 174, where the author discusses the dynamic nature between regulation and the structure of the network subject to regulation.

upon which jurisdictional regimes have relied. For example, although the Internet seems to make transnational transactions as easy and cheap as domestic transactions, in fact the uncertainties and costs in case of dispute mean that for all but the most low value transactions, geographic distance is still an important consideration. This is a factual assumption upon which jurisdictional regimes can still rely.

5.2. The Futility Argument

Indeed, some background factual assumptions which the Internet has threatened are being reinvented within the new space. In the jurisdictional context one of those assumptions is the existence of clear, recognisable territorial borders, which do not appear to be even capable of existence in cyberspace. As legal regimes attempt to subsume cyberspace within them, physical boundaries are being superimposed on this space which is said to be inherently insensitive to geographic location. In *Playboy Enterprise Inc* v *Chuckleberry Publishing Inc* the judge ordered the defendant to refuse subscriptions from US customers in relation to its password protected Internet service. She also said that its free Internet service must be shut down or made compliant with the injunction by requiring users to:

> 'acquire free passwords and user IDs in order to access the site. In this way, users residing in the United States can be filtered out and refused access. [Footnote] If technology cannot identify the country of origin of e-mail addresses, these passwords and user IDs should be sent by mail. Only in this way can the Court be assured that United States users are not accidentally permitted access to Playmen Lite.'[95]

By making this order and recommendation the judge effectively said that she was not impressed by the futility argument that laws based on geographic boundaries are not feasible on the Internet,[96] The defendant must choose between the alternatives of either making its website sensitive to geographic borders or stop its activity altogether. Within the first alternative the defendant can rely on online or

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[95] *Playboy Enterprises, Inc* v *Chuckleberry Publishing Inc* 939 F Supp 1032, 1045 (1996).

[96] For example, Johnson and Post, above n 22, 1372: 'efforts to control the flow of electronic information across physical borders - to map local regulation and physical boundaries onto Cyberspace - are likely to prove futile, at least in countries that hope to participate in global commerce.'

offline devices to achieve a geographic filtering system. As the need for offline communication reduces the convenience and speed of Internet transaction, the judge's ruling in effect created a strong incentive for the defendant to manipulate the architecture of the website so as to make it recognise territorial boundaries. This aspect of the ruling in *Playboy Enterprise Inc v Chuckleberry Publishing Inc* highlights two further points. Firstly, the Internet is not a static technical phenomenon incapable of changing in response to outside pressures and incapable of adjusting to regulatory objectives. As a man-made facility the Internet is far from being immutable. Lessig argues that it is wrong to assume:

> 'that the nature of cyberspace is fixed – that its architecture and the control it enables, cannot be changed – or that government cannot take steps to change this architecture... Cyberspace has no nature; it has no particular architecture that cannot be changed. Its architecture is a function of its design... The code can change, either because it evolves in a different way, or because government of business pushes it to evolve in a particular way.'[97]

Secondly, substantive regulation need not be discarded if the law is capable of addressing the underlying factual assumptions upon which substantive rules rely and which are threatened by the Internet. This approach to Internet regulation, which often entails a manipulation of the Internet's architecture, has already been advocated and adopted in relation to several regulatory concerns. The German *Teleservices Data Protection Act (1997)* aims to protect privacy on the Internet by requiring 'the design and selection of technical devices to be used for teleservices ...[to be] oriented to the goal of collecting, processing and using either no personal date at all or as few date as possible.'[98] In Australia, and many other States, the use of technology to protect copyright material was bolstered by legislative reforms which introduced 'civil and criminal remedies against the commercial dealing in decoding devices... which have only a limited commercially significant purpose other than an illegal circumvention of encoded copyright material.'[99] One of the

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[97] Lessig, above n 85, 506; Joel R Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules Through Technology' (1998) 76 *Texas Law Review* 553.

[98] Section 3(4) of *Teleservices Data Protection Act*; contained in Art 2 of *Information and Communication Services Act (1997).* See also Greenleaf, above n 56, 13.

[99] Department of Communications, Information Technology and the Arts, 'Copyright Reform and The Digital Agenda' (1998) 28 *Copyrights – The Newsletter of the Intellectual Property Branch,* at http://www.dca.gov.au/, 4.

merits of such an approach lies in the fact that it allows existing regulation to be substantially retained. (Indeed, some argue that regulation through Code is too effective.) Another merit of regulation through Code (but which is also problematic and further addressed in Chapter 4) lies in the fact that it frequently does not create regulatory choices for individuals and individuals need not even be conscious of the existence of the regulation:

> 'Code is an efficient means of regulation.... One obeys these laws as code not because one should; one obeys these laws as code because one can do nothing else. .. In the well implemented system, there is no civil disobedience. Law as code is a start to the perfect technology of justice.'[100]

In summary, the floodgate arguments fail to take account of the active, albeit sometimes negative, role law may play in the marketplace and of the interactive relationship between regulation and the market. The futility argument, on the other hand, fails to take account of the interactive relationship between regulation and the Internet's characteristics and that law can play a proactive role in shaping the Internet of the future. As the Internet's architecture responds to market pressures,[101] it can also be made to change in response to regulatory pressures. Both failures ultimately yield conclusions according to which drastic legal changes appear necessary, when in fact the regulatory gaps may be substantially smaller than anticipated.

6. Conclusion

This chapter does not say that the Internet poses no serious challenge to existing regulatory regimes; nor does it say that no legal change, even substantial legal change, will be necessary to deal with these challenges. It does not claim that legal scholars who warn about the dangers of transplanting existing regulation to the Internet do not have a very important and valid point to make. Neither does it say that judges can do no wrong and have not made serious mistakes when confronted with Internet-related legal issues. Finally, it should not be understood as a fatalistic resignation to an immutable legal machinery with a life and a will of

[100] Lessig, above n 87, 1406.

its own. So what does this chapter say? It is a defence of cautionary legal argumentation in particular in relation to legal issues arising out of a phenomenon as revolutionary as the Internet, which is echoed in the words of Justice Buckwalter in *ACLU* v *Reno*, displaying a typically conservative judicial attitude:

> 'the unique nature of the medium cannot be overemphasized in discussing and determining the vagueness issue. This is not to suggest that new technology should drive constitutional law. To the contrary, I remain of the belief that our fundamental constitutional principles can accommodate any technological achievements, even those which, *presently* seem to many to be in the nature of a miracle such as the Internet.'[102]

This defence is based on an assessment of the nature of legal change generally and in the specific context of Internet-related jurisdictional problems. It also demonstrates the continuing validity of established legal methodology and of the concept of *stare decisis* in a rapidly changing world.

Once it is appreciated that drastic legal change does not fit squarely with the law's function to promote social and economic stability and certainty, it is clear that one cannot simply search for the best regulatory option, no matter how such an option fits into an existing legal framework. Correspondingly, there is an intrinsic value in holding onto existing legal rules and structures as far as possible, beyond the substantial value which the particular rule expresses and which may be less persuasive in new social and economic conditions. Thus legal argumentation must focus on retaining, reshaping and redesigning rules, searching for ways in which these can be preserved. No doubt these ways can be more easily discovered in the practical context in which the legal rule operates and in which its actual defects and strengths are more easily discernible. Focus on this practical context will also reveal how urgent the need for more substantial legal change really is. The likely success of arguments that the Internet should be regulated one way or another may be assessed by asking whether there are any less disruptive alternatives.

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[101] Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), ch 4, where the author argues that e-commerce creates pressure on the architecture of the Internet to enable identification which in turn may be exploited by regulators for other purposes.

[102] *American Civil Liberties Union v Reno* 929 F Supp 824, 864 (ED Pa 1996).

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Chapter 3: The Evolution of Jurisdictional Rules

1. Introduction

This chapter examines the incremental developments of jurisdictional rules in private and public law in response to increasing globalisation of activity. This serves a number of purposes within this thesis. Firstly, it corroborates the argument made in the previous chapter as to how legal rules respond to new phenomena and shows that the Internet is in many ways less radically new than may appear. It certainly is no more than the temporary pinnacle of globalisation which has long exerted pressure on the rules allocating regulatory competence. Secondly, it shows that the need for incremental adjustment to legal rules, as discussed in the previous chapter, cannot entirely account for how these rules will actually evolve, highlighted by the divergent responses of jurisdictional doctrines in respect of private and public law. Thirdly, the evolution of the jurisdictional rules in respect of private matters especially, illuminates the limits of incremental legal adjustments, when they lead to such fine-tuned rules, relying on such subtle factual variations, that overall consistency and formal justice as well as efficiency cannot be achieved. In other words the need for certainty and predictability may at times shape rules which cannot deliver the very objective which inspired their change, thus requiring more radical legal change. The questions this chapter raises are, firstly, why the Internet is in fact generally jurisdictionally problematic (any more so than previous transnational communication media) and, secondly, why the legal responses to the jurisdictional challenge vary in respect of private and public law. These questions are explored in subsequent chapters.

In one of Lessig's early treatises on 'code' or real-life constraints and its relevance for Internet regulation he argued against Johnson and Post's contention for the necessity of a new jurisdiction of cyberspace.[1] Yet, nevertheless he could not but

[1] Lawrence Lessig, 'The Zones of Cyberspace' (1996) 48 *Stanford Law Review* 1403. David R Johnson and David Post, 'Law and Borders - The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367.

express his scepticism about the continued viability of the existing jurisdictional framework.

> '[t]he alternative [to Cyberlaw] is a revival of conflicts of law; but conflicts of law is dead - killed by a realism intended to save. And without a usable body of law to deploy against it, a law of cyberspace will emerge as the simpler way to resolve the inevitable, and repeated, conflicts that cyberspace will raise.'[2]

This chapter explores what Lessig meant when he so casually and cruelly said: 'killed by a realism intended to save' and concludes that this statement is, if not accurate in its generality, so at least a more than appropriate warning. The quote suggests that Lessig does not doubt, unlike Johnson and Post, the logical possibility of applying a traditional jurisdictional regime to cyberspace but seems rather concerned with its ability, due to its complexity, to handle the kind and number of cases it is expected to handle[3] - and this is precisely what will be examined here.

This chapter examines this concern by following the incremental legal developments of jurisdictional principles from the middle of the 20th century to the present day which is intended to show both the adaptability of legal rules in response to changing circumstances and, more specifically, to increased mobility and globalisation (which, of course, started long before the online phenomenon), as well as the problem arising from this continual adaptation. Where rules have become too sophisticated, relying on far too fine factual differences, they can neither provide consistent, and thus just, outcomes, nor efficient solutions to the ever increasing number of transnational events. In other words, the very imperative of legal continuity at times shapes legal rules which are too sophisticated to provide a solution to the very problem which inspired them, therefore paradoxically creating a need for a more radical legal reform - a problem which, as will be shown, increasingly affects doctrines of private international law. But that such development and its accompanying inefficiencies are in some ways not an inevitable product of legal adjustment to increasing transnationality of activity is

[2] Lessig, above n 1, 1407. This quote has already been noted in the context of the 'floodgate argument' in Chapter 2.

highlighted by the development of jurisdictional rules in the criminal context, where questions of fairness and prima facie legitimacy are always strongly tempered by the notion of 'might is right' - a high price to pay for efficiency.

This chapter introduces the comparison between the jurisdictional rules of private law and public law. The discussion will demonstrate that there are not only many parallels in the doctrinal developments in respect of private and public law (which Mann commented on by saying 'so remarkable and striking a coincidence is likely to be the symptom of a deep-rooted doctrinal link'[4]), but also significant differences in the legal responses to the Internet. While the reasons for the similarities in the doctrinal developments will become clear, the basis for the differences lies in the nature of the public-private law dichotomy and its jurisdictional treatment which is explored in depth in Chapter 5. For the purposes of this discussion it is sufficient to outline these differences and explain the alternative legal routes which may be taken in response to the online phenomenon, as well as their respective strengths and weaknesses.

Yet, whatever route is chosen, the analysis highlights that one fundamental basis underlying all jurisdictional Internet-induced challenges lies in the fact that the Internet makes the location of activity - as a criterion for distinguishing to which State(s) the activity 'belongs'[5] - more and more difficult to administer - not impossible, as Johnson and Post assert, but difficult. The online phenomenon no doubt further undermines the viability of territorially dividing events between States, which is the very function of jurisdictional rules. We are reaching a point where such division is as non-sensical as dividing non-primary coloured eggs between primary coloured industries.[6] And this is a problem which defies easy answers or quick fixes.

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[3] Lessig seems more concerned about the quantitative rather than the qualitative type of legal problem caused by the Internet, as discussed in Chapter 1.

[4] F A Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours* 1, 18f.

[5] The terminology of 'belonging' has been used by some in the jurisdictional context, for example, ibid 44f, where Mann argues that public international lawyers should, just like their private counterparts, 'ask whether the legally relevant facts are such that they "belong" to this or that jurisdiction.'

[6] The Internet has challenged many other traditional bases of division or categories, with a prominent example being the traditional distinction between goods and services, relied upon in contract and intellectual property law. The arguments advanced in this chapter to some extent also apply to these other traditional divisions.

2. The Internet, Jurisdiction and Formal Justice

2.1. The Dual Effect of the Internet on Transnational Activity

The jurisdictional rules under public international law and the national rules of conflicts of laws are the rules which determine which State has the right to prescribe its law, adjudicate a dispute and enforce its law in respect of which transnational event. The international rules deal with public matters such as criminal, administrative and revenue matters (the big eggs), while the conflict of law rules determine the outcomes in private or civil matters (the small eggs).[7] These regimes turn a blind eye to the facts that the events are transnational and ideally make one State, rather than all those affected, legally responsible for it.[8] Indeed, it seems a reflection of their shortcomings when two or more States simultaneously assume the right to regulate the person or activity in question, which is not infrequently the case.[9] And although the international rules of jurisdiction in particular deal poorly with concurrent and conflicting claims of jurisdiction[10] (which, as will be seen, are often resolved by the strict territorial limits of enforcement jurisdiction[11]), it is beyond doubt that their ultimate purpose is the same as that of

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[7] International law also applies to private law even if only to the extent that it does not impose any limitations upon States on how to deal with these matters. There is disagreement on the extent to which international law does impose substantive limitations, which is discussed in detail in Chapter 5. See also eg. Ivan Shearer, 'Jurisdiction' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law - An Australian Perspective* (Melbourne: OUP, 1997) 161, 165; Mann, above n 2, 291; Michael Akehurst 'Jurisdiction in International Law' (1972-73) 46 *British Yearbook of International Law* 145, 177.

[8] This assertion does not entail exclusive jurisdiction. In private matters, there is generally a choice of fora available to the plaintiff. But once proceedings are started in one forum, doctrines such as *lis alibi pendens* (civil law countries) or *forum non conveniens* (common law countries) or the availability of anti-suit injunctions have developed to ultimately prevent concurrent jurisdiction. See eg. Australian Law Reform Commission, *Legal Risk in International Transactions*, Report No 80 (1996) para 6.55-6.57.

[9] See, for example, Mann, above n 4, 50f: 'It would no doubt be desirable if the principle of exclusivity would come to be accepted for the purpose of jurisdiction, if, in other words, by common consent jurisdiction in respect of a given set of acts were exercised by one State only.' Akehurst, above n 7, 192, where he comments in the context of global restrictive business practices that the number of States claiming jurisdiction should be as small as possible. For a defence of concurrent regulation in respect of public matters see: William S Dodge, 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism' (1998) 39 *Harvard International Law Journal* 101.

[10] Bernand H Oxman 'Jurisdiction of States' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 277, 282.

[11] David J Harris, Cases and *Materials on International Law* (5th ed, London: Sweet & Maxwell, 1998) 265, stating that custody of a person tends to be decisive in resolving conflicting claims. The same sentiment is echoed in G Fitzmaurice, 'The General Principles of International Law considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours* 209. But see also Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed, London: Longham, 1992) vol 1, 457: 'Usually the coexistence of overlapping jurisdiction is acceptable and convenient; forbearance by states in the exercise of their jurisdictional powers avoids conflict in all but a small (although important) minority of cases' and Mann, above n 4, 48: '[I]nternational lawyers know that the remedy again lies in a policy of tolerance, reasonableness and good faith.'

private international law, namely to provide effective regulation while avoiding conflicts and interference as well as protecting individuals from being exposed to multiple and conflicting obligations.[12]

Bearing this objective in mind, the question is why the Internet has changed anything at all and what its effect is on the current jurisdictional regimes. As indicated above, one of the profound effects of the Internet in relation to the issue of jurisdiction is that many online transnational events are much more multicoloured than transnational events previously.[13] The fact that every website can be accessed anywhere means that many websites affect a high number of States to such a degree as would give them a prima facie stake or interest in them and certainly an interest in regulating them. In that sense many online events are often not merely transnational but multinational.

This is illustrated by the case of *LICRA & UEJF v Yahoo! Inc & Yahoo France*[14] where the Tribunal de Grande Instance de Paris ordered Yahoo! Inc to prevent surfers in France from accessing Nazi artefacts via its website, yahoo.com. The court was unimpressed by Yahoo! Inc's argument that the site was located on a server in California and intended for an American audience; nor was it persuaded by the fact that YahooIInc, through its French subsidiary, provided a site tailored to French surfers. It simply held that the harm caused by yahoo.com, regardless of which jurisdiction was targeted, was suffered on the territory of France. And, of course, in saying this the court was factually perfectly right, that is, yahoo.com did and does affect France. However, that is not to say that the French Court was or should be legally entitled to order what it did. On the basis of where the harm was suffered, many other States might have asserted the right to regulate yahoo.com, which would be the equivalent to every hen industry grabbing the multicoloured

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[12] Oxman, above n 10, 278. This is also to some extent reflected in the emerging non *bis in idem* principle in the EC: Christine van den Wyngaert, Guy Stessens, 'The International Non Bis In Idem Principle: Resolving Some of the Unanswered Questions' (1999) 48 *International and Comparative Law Quarterly* 779.

[13] Of course, an online interaction, such as a contract, between two persons in different States does not generally involve more jurisdictions than its offline equivalent would.

[14] 20 Nov 2000 (Tribunal de Grande Instance de Paris), at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf, an unofficial English translation at http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html.

egg. This would compromise the very objectives of the jurisdictional rules as much as it would break the egg.

2.2. The Requirement of Formal Justice or Consistency

So to accommodate these new multinational events within the existing jurisdictional framework, the rules allocating regulatory competence have to be fine-tuned to be effective vehicles for choosing the worthiest amongst all the potential claimants. And indeed, the evolution of jurisdictional rules, particularly in respect of private matters, has been a process of refinement. The problem arising out of this is that ever-refined jurisdictional rules make it increasingly difficult to make valid or rationally defensible distinctions between transnational events. The more decisions, as to whether a particular transnational event belongs to this State or that, rely on subtle differences the more likely it is that they become arbitrary. This is inconsistent with what would universally be regarded as a fundamental principle of justice, namely overall consistency or the requirement to treat like cases alike, and different cases differently. Briefly, one may distinguish:

> 'between specific conceptions of justice and the concept of justice. The difference is that the concept of justice is abstract and formal; the requirement of formal justice is that we treat like cases alike, and different cases differently, and give to everyone his due; what various conceptions of justice supply is different sets of principles and/or rules in light of which to determine when cases are materially similar and when they are materially different; what is each person's due.'[15]

What is illustrated below is that the desire to provide fair and just results is, at least in the context of private transnational events, increasingly producing principles and doctrines which are so subtle and complex that formal justice or consistency cannot be retained. Or to put it another way, it is often difficult to explain and defend why cases which seem and are *in fact* very similar are *in law* treated as materially different. The jurisdictional rules and principles increasingly rely on minor factual differences to justify a materially different treatment in law. As consistency goes, arbitrariness comes, which is problematic beyond the practical problems to which it gives rise, such as the inability of individuals to order their affairs in

[15] Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: OUP, first published 1978, 1994) 73 (footnotes omitted).

accordance with the law. It seems beyond argument, as MacCormick puts it, that it is:

> 'a fundamental principle that human beings ought to be rational rather than arbitrary in the conduct of their public and social affairs (spontaneity and a kind of arbitrariness have a welcome part to play in private activities and relations...). To somebody who disputes that principle with me, I can indeed resort only to a Humean argument: our society is either organized according to that value of rationality or it is not, and I cannot contemplate without revulsion the uncertainty and insecurity of an arbitrarily run society, in which decisions of all kinds are settled on somebody's whim or caprice of the moment...'[16]

Before turning to examples of jurisdictional rules to see to what extent this concern about formal justice is justified, two matters need to be mentioned. Firstly, the arguments below are not intended to assert that the decisions by individual judges or new legislative measures are based on unsound reasons or irrationality; generally judges have paid conscious regard to the requirement of overall consistency. The argument advanced is that the rules are such that they cannot possibly yield certain and consistent results. In illustrating this, the focus shall not be on decisions which have in retrospect been regarded as wrong (which of course will always occur). Rather, it is argued that even when judges get it right and apply the right rules to the right cases, the case law as a whole often proves them wrong.

Secondly, it should also be mentioned that the process of refining rules and principles to allow the law to respond to new circumstances occurs all the time. Sometimes this refinement may be minor and sometimes it may be radical. While generally the refined rules are functioning well, there are innumerable examples in legal history when the refined product, although born out of a desire to accommodate the modern reality, in fact cannot do that. The evolution of the negligence action and its inadequacy in relation to car accidents is a prime example of a modernised legal doctrine which proved to be inefficient to deal with the very scenario out of which it was born: 'Truly, if the highway created the

[16] Ibid, at 76f. See also Hans Kelsen, *General Theory of Law and States* (Cambridge, Mass: Harvard University Press, 1946) 14, where he states '"Justice" in this sense means legality: it is "just" for a general rule to be actually applied in all cases where, according to its content, this rule should be applied. It is "unjust" for it to be applied in one case and not in another similar case. And this seems "unjust" without regard to the value of the general rule, the application of which is under consideration.'

negligence law of the 19th century, the highway of the 20th has doomed it to eventual oblivion.'[17] Yet, the question, of course, is whether there is any alternative to the fine-tuning of rules. As will be seen, jurisdictional questions in respect of transnational criminal activity have in many ways been resolved differently from equivalent problems in private law. But even that approach is not without serious weaknesses.

3. The Evolution of Jurisdictional Rules in Private Cases

3.1. Pre-Internet Refinements

The refinement process of jurisdictional rules in the private sphere is best illustrated - given the great number of cases decided in recent years - by the legal developments in the US in respect of adjudicative jurisdiction.[18] There, the question of whether a court can assume personal jurisdiction over a defendant and adjudicate a dispute has moved from a simple inquiry, relying on relatively clear cut objective facts, into a much more elaborate balancing approach, often depending on subjective value judgments. While most of these developments were in response to the increase of transnational interactivity long before the Internet era, the online phenomenon has added yet another layer of subtleties.

The turning point in the US came in 1945 when the US Supreme Court in *International Shoe Co* v *Washington,*[19] in recognition of the increased mobility of

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[17] John G Fleming, *The Law of Torts* (9th ed, Sydney: LBC Information Services, 1998) 25. In the context of jurisdiction, for example, the technique of statutory interpretation which dominated conflicts of law for five centuries was ultimately abandoned because it 'had become so complicated with divergent scholastic distinctions... that confused masters left their readers more confused.': Hessel E Yntema, 'The Historic Bases of Private International Law' (1953) 2 *American Journal of Comparative Law* 297, 304. Also discussed by F.A.Mann, 'The Doctrine of International Jurisdiction Revisisted After Twenty Years' (1984) 186 *Recueil* des Cours 9, 27.

[18] While most of the case law has developed in response to disputes arising between residents of states within the US rather than truly transnational disputes, and while they are preoccupied by the 14th Amendment of the US Constitution requiring 'due process', neither of these two aspects distracts from the fact that these decisions constitute a response to the ever increasing cross-border activity with which this paper is concerned. Moreover, of course, the requirement of due process or procedural fairness is nothing peculiar to the US.

[19] 326 US 310 (1945). For a comprehensive summary of the cases since then with special focus on online cases, see American Bar Association (ABA), *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* (2000), at http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html. See also Sam Puathasnanon, 'Cyberspace and Personal Jurisdiction: The Problem of Using Internet Contacts to Establish Minimun Contacts' (1998) 31 *Lloyola of Los Angelas Law Review* 691 and Allan R Stein, 'The Unexceptional Problem of Jurisdiction in Cyberspace' (1998) 32 *The International Lawyer* 1167, 1169ff, where the author describes the move from the territorail basis of jurisdiction to the 'neo-territorial'basis.

society, abandoned the requirement that the defendant must be physically present in the jurisdiction for the court to assume jurisdiction in personam.[20] Although this may not appear to be such a major step, in fact it was. It meant that courts would exercise adjudicative jurisdiction even in the absence of enforcement jurisdiction (or 'power' as Johnson and Post call it) which had previously been ensured through making the presence of the defendant a pre-requisite for adjudicative jurisdiction. While one may speculate to what extent this shift was facilitated by, or accelerated, greater comity between States reflected in a greater willingness to recognise and enforce foreign judgements,[21] it seems such change would have been unacceptable in the absence of at least the possibility of reciprocal enforcement.[22] This, as will be seen,[23] may at least partly explain the continued insistence of enforcement jurisdiction as a pre-requisite for the assumption of criminal adjudicative jurisdiction.

The new test merely required the defendant to have certain 'minimum contacts' with the forum, so much so that the maintenance of suit would not offend 'traditional notions of fair play and substantial justice'.[24] It built upon the 'presence' requirement by saying that the term merely symbolises the activities of a corporation in the forum,[25] which in turn meant that whether there were sufficient

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[20] *Pennoyer* v *Neff* 95 US 714 (1887), where it was held that a State could not subject non-residents to the jurisdictions of its courts unless they were served with process within its boundaries. The court also listed other bases of jurisdiction such as the defendant's voluntary appearance or the existence of his or her property within the jurisdiction.

[21] Note *that International Shoe* Co v *Washington* 326 US 310 (1945) concerned not a truly transnational dispute but an intra-state dispute in respect of which the reciprocal enforcement of judgments was far more likely.

[22] In *Hilton* v *Guyot* 16 S Ct 139, 202f (1895) the US Supreme Court established that comity demands the enforcement and recognition of foreign judgments provided certain prerequisites are satisfied, such as a full and fair trial before the foreign court, the voluntary appearance of the defendant and existence of reciprocity. See also Jeremy Maltby, 'Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts' (1994) 94 *Columbia Law Review* 1978.

[23] See below and discussion on the different treatment of foreign public/criminal law/judgments in Chapter 5.

[24] *International Shoe* Co v *Washington* 326 US 310, 316 (1945). In *Shaffer* v *Heitner* 433 US 186 (1977) it was held that all assertions of jurisdiction, whether specific or general, had to meet the 'minimum contacts' tests. The focus in this discussion is only on specific jurisdiction, that is where the facts of the dispute arise out of the defendant's contacts with the forum. 'General jurisdiction' describes assertions which are valid regardless of the claim because of the substantial contacts of the defendant with the forum. See ABA, above n 19, 66.
Note also, that to establish 'minimum contacts' you have to show that the 'contacts related to the cause of action... create a 'substantial connection' with the forum state...': *McGee* v *International Life Insurance* Co 355 US 220, 223 (1957).

[25] *International Shoe* Co v *Washington* 326 US 310, 316f (1945). Under the common law of Australia the legal position is comparable in that the initiating process may be served against a corporate defendant incorporated outside the jurisdiction if it has a presence in Australia, which in turn is determined by reference to whether the corporation is carrying on business in Australia.

minimum contacts depended on 'the quality and nature of the activity in relation to the fair and orderly administration of the laws...'.[26] The rejection of the traditional criterion of actual presence allowed personal jurisdiction to be imposed by courts upon defendants who, although having substantial contact with the forum jurisdiction, were formerly beyond the court's reach simply because they were not physically present in the forum at the time of the suit.[27] While it seems that the court abandoned the 'territoriality test', under the motto '[g]eography is not the touchstone of fairness',[28] in fact the territoriality test, albeit a more intangible version, remained:

> 'increased physical mobility due to automobiles and other modern transportation placed this jurisdictional basis under severe strain, as did disputes over "virtual" entities such as corporations that have no physical situs...As a response to the imminent collapse of jurisdiction based on physical presence, the Supreme Court configured new rules based upon a kind of "virtual" presence.'[29]

Or another commentator describes the effect of the new test as follows:

> '[t]his broader sovereign claim may be described as 'neoterritorialist.' Jurisdiction continued to be tied to place, but was measured by a more complex relationship with the defendant than simply the location of his body.'[30]

As the new 'minimum contacts' test was very broad, not to say vague, it is not surprising that it was further refined in 1958 in *H*anson v *Denckl*a, when it was held that an act is required 'by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'[31] So the former test, looking at the presence of the defendant, had now become a test focusing on the objective intentions of the defendant, which requires, unlike the presence test, an interpretation and evaluation of the defendant's action by the judge hearing the case. This seems to be echoed in the comment by Warren CJ in *H*anson, that 'the requirements for

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[26] *International Shoe Co v Washington* 326 US 310, 319 (1945).
[27] But for a few exceptional scenarios, above *n* 20.
[28] *Green v Mason* 996 F Supp 394, 396 (1998).
[29] Dan L Burk 'Jurisdiction in a World Without Borders' (1997) 1 *Virginia Journal of Law and Technology* 1522, para 25f, at http://vjolt.student.virginia.edu/.
[30] Allan R Stein, 'The Unexceptional Problem of Jurisdiction in Cyberspace' (1998) 32 *The International Lawyer* 1167, 1170.
[31] *Hanson v Denckla* 357 US 235, 253 (1958).

personal jurisdiction over nonresidents have evolved from the rigid rule... to the flexible standard.'[32] But while both *International Shoe* and *Hanson* 'assumed that a defendant had at some time been physically present in the forum state... [and attempted] to overcome the traditional perceived lack of authority to insist a defendant not "caught" within the state return to it to defend a lawsuit...',[33] the ever increasing reality was that defendants had never been physically present in the forum despite substantive interaction with it.

So again the 'purposeful availment test' was refined by a holding that it should not be taken too literally.[34] It became sufficient that the defendant in some way through his actions connects or affiliates himself with the forum and thereby invokes the benefits of the forum's law, or targets it.[35] As the jurisdictional breadth became more expansive, the safeguards against excessive jurisdiction became also more elaborate. So in *World-Wide Volkswagen Corp* v *Woodson* the Supreme Court decided that even if minimum contacts were present, the court may decline to exercise personal jurisdiction if it would not be reasonable, taking into account considerations such as the burden on the defendant, the forum State's interest in adjudicating the disputes, the plaintiff's interest in obtaining convenient and effective relief, the shared interest of the several States in furthering fundamental substantive social policies.[36] So the jurisdictional inquiry was now a two-stage inquiry, with both parts requiring a substantial balancing act by judges. And to the extent that, for example, the latter tests depends on an evaluation of vague notions, such as 'convenient or effective relief', a 'State's interest' or 'fundamental substantive social policies', the peculiar predicaments and views of the judge hearing the case must come into play. Commenting on these US developments, Mann stated in 1964:

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[32] *Hanson v Denckla* 357 US 235, 251 (1958).
[33] ABA, above n 19, 41f.
[34] ABA, above n 19, 43.
[35] ABA, above n 19, 43ff.
[36] *World-Wide Volkswagen Corp v Woodson* 444 US 286 (1980). In Australia, matters like these would be taken into account at the *forum non conveniens* stage of inquiry. Note also that the issue as to what extent the weighing of these considerations is inimical to achieving consistency and formal justice was addressed by Brennan J in *Ocean Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 238f, where he rejected a broad *forum non conveniens* test on the ground that it was inimical to the rule of law to repose too wide a discretion in judges to determine the appropriate place of trial. See Brian R Opeskin, 'The Price of Forum Shopping: A Reply to Professor Juenger' (1994) 16 *Sydney Law Review* 14, discussed in more detail in Chapter 4.

> '[a] perusal of American decisions indicates a tendency to abandon a purely territorial test and to substitute for it a flexible and largely discretionary notion based upon the degree of connection.' [37]

Yet, this tendency of swapping rigidity and certainty for flexibility and vagueness, fuelled by the desire to let substance rather than form be determinative (at a time substance and form no longer coincided), had far from reached its climax.

3.2. Post-Internet Refinements

Against this legal background the online revolution occurred; it seemed to make the 'targeting' analysis nonsensical as every website seems to target every jurisdiction.[38] Thus further refinement of the test was imperative if jurisdictional rules were to be meaningful. This refinement has come in the form of a sliding scale, or spectrum, where the likelihood that personal jurisdiction will be exercised depends on the level of interactivity and the commercial nature of the online exchange of information.[39] The greater the level of interactivity that actually occurs with the forum or the site allows for, the more likely it is that personal jurisdiction over the defendant behind the site will be assumed.

From an outsider's perspective these jurisdictional refinements seem like a Chinese whisper with the final test bearing little, if any, resemblance to what was said at the start; or how does the test of interactivity of a site relate to the tests of 'presence' or 'purposeful availment' or even the latest 'targeting' tests? This has been acknowledged by US commentators:

> '[c]ourts clearly are convinced that the nature of a defendant's web site is relevant to the jurisdictional issue, but a failure to articulate why it is relevant makes it difficult to determine where the jurisdictional line should be drawn in cases that fall between the *Zippo*'s two extremes [ie. actual and repeated interaction with the forum and a passive site merely posting information] '[40]

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[37] Mann, above n 4, 46.

[38] This explains some early 'wrong' decisions which have applied the targeting approach without making allowance for the fact that every website prima facie targets every jurisdiction. See, for example, *Inset Systems Inc* v *Instruction* Set *Inc* 937 F Supp 161 (D Conn 1996), *Halean* Products *Inc* v Beso *Biological* 43 USPQ (BNA) 1672 (1997) and *Maritz Inc* v *Cybergold Inc* 947 F Supp 1328 (ED Mo 1996). For academic or judicial criticism see *inter alia* ABA, above n 19, at 58f; Peter Brown, 'US Courts Use Internet to Assert Jurisdiction Over Foreign Defendants' (1997) *Law Journal* Extra , at http://www.lix.com/internet/p6courts.html; *Hasbro Inc* v *Clue Computing Inc* 994 F Supp 34 (D Mass 1997); *Hearst Corp* v *Goldberger* (1997) WL 97097 (SDNY 1997).

[39] ABA, above n 19, 60f, established in *Zippo Manufacturing Co* v *Zippo* Dot *Com Inc* 952 F Supp 1119, 1124 (WD Pa 1997).

[40] ABA, above n 19, 63.

Going even further, one may question why the interactive nature of a site should at all be relevant to whether a court does or does not have jurisdiction over a defendant. Assuming its validity, a site which is highly interactive in its design would appear to subject its provider to the personal jurisdiction of every court. But US judges have not defied rationality when finding that the interactivity of a site is relevant to the jurisdictional inquiry. The decisions, but for a few,[41] are sound in themselves. The analysis, starting from the premise that the defendant is subject to the adjudicative jurisdiction of a forum which he or she chose or objectively intended to have contacts with, means that:

> '[t]he sponsor of a passive website has no way to control which fora she is "connected to" by the site. On the other hand, the site sponsor who does business electronically knows or can take reasonable steps to discover the location of the party with whom she is interacting.'[42]

The problem though remains that there is vast room for disagreement on the precise amount and nature of interactivity required, whether it must be actual interactivity or merely potential interactivity (ie. interactivity of the site per se), whether the interactivity must be encouraged or can be presumed to be encouraged in the absence of contrary evidence and what the effect, if any, is on discouraging the interactivity, and how an evaluation of these matters varies depending on the content of the site and the dispute in question. And judges have disagreed and disagreed strongly, [43] with the result that the 'current hodgepodge of case law is inconsistent, irrational and irreconcilable.'[44] Some have explained this hodgepodge on the basis of a lack of clarity of the law:

> 'the lack of clarity in lower court opinions in the U.S. simply reflects the lack of clarity in a doctrine that is highly fact specific...'[45]

This seems to imply that, provided the doctrine is clarified, the problem is resolved. But is it not rather the highly fact-specific nature of the doctrine (as opposed to its

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[41] See above n 38.
[42] ABA, above n 19, 64.
[43] For an excellent review of the case law and its many inconsistencies see *Millennium Enterprises Inc* v *Millennium Music LP* 33 F Supp 2d 907 (D Or 1999).
[44] *Millennium Enterprises Inc* v *Millennium Music LP* 33 F Supp 2d 907, 916 (1999) citing Howard B Stravitz, 'Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce' (1998) 49 *SCL Review* 925, 939.
[45] ABA, above n 19, 57.

lack of clarity), its make-up of innumerable variables[46] and its dependence on judges juggling and evaluating innumerable facts, that makes it highly likely that different judges will come to different conclusions in respect of similar cases? Even if the interactivity test was further refined, by for example asserting that only actual interaction with the forum was relevant, a suggestion made in some more recent cases,[47] this would only resolve a limited number of inconsistent cases. This would still leave the question of how much actual interaction is needed and how this may vary according to the content of the site, its commercial nature, the dispute in question or the extent of other contacts. So again there is plenty of room for different evaluations and again it would be difficult to consistently determine where the jurisdictional line should be drawn in cases that fall between *Zippo*'s two extremes. The real problem lies not in the lack of clarity of the test per se, but in its highly fact-specific nature and its reliance upon an evaluation of fine factual differences, so much so that, ultimately and unavoidably, decisions depend on the judge hearing the case. Thus decisions are arbitrary, as arbitrary as deciding whether a dark brown egg is a shade more red or yellow or blue.[48] Consistency on an overall level is not easily or at all attainable; final results cannot be predicted with any certainty, which may incidentally also explain why so many more online jurisdictional cases have reached courts in the US than in other jurisdictions with more clear cut tests.

But given that the US developments are born out of a desire to move the law along within an increasingly transnational environment, it is not surprising that it has not been alone in adopting the interactivity test as part of the targeting approach in response to the online phenomenon.[49] For example, the recently adopted *EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in*

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[46] A holistic substance approach, taking into account various variables, has frequently been advocated. See, for example, Edward Brodsky, 'Solicitation Via the Internet; Jurisdiction' (1997) *New York Law Journal*, at http://www.ljextra.com/internet/0611irsolic.html; Uta Kohl 'Defamation on the Internet – A Duty Free Zone After All? Macquarie Bank Ltd & Anor v Berg' (2000) 22 *Sydney Law Review* 119.

[47] *Millennium Enterprises Inc* v *Millennium Music LP* 33 F Supp 2d 907,922f (D Or 1999); *GTE New Media Services Inc* v *Bellsouth Corp* 199 F3d 1343,1350 (D Co 2000).

[48] Given that adjudicative jurisdiction in these cases in not exclusive, in fact courts are not trying to establish that they have a stronger claim than other courts, let alone the strongest claim, but rather that there is a basis for their jurisdiction upon which not every other court could establish adjudicative jurisdiction.

[49] Contrast the claim made in ABA, above n 19, 65.

Civil and Commercial Matters[50] introduces this test in the EC. It substitutes Art 13(3) of the *Brussels Convention*:[51]

> '[i]n proceedings concerning a contract concluded by a ...consumer, jurisdiction shall be determined by this Section ... if it is:
> (3) any other contract for the supply of goods or... services, and (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising and (b) the consumer took in that State the steps necessary for the conclusion of the contract.'

with the new Art 15 (1):

> '[i]n matters relating to a contract concluded by a... consumer.. jurisdiction shall be determined by this Section... if:
> (c) ...the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, *by* any means, *directs* such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.'[52]

The effect of this new section is that a consumer can bring an action at home, namely in the jurisdiction of the place where he is domiciled,[53] provided the online activity by the foreign content provider was directed or targeted at the consumer's jurisdiction. Although the new test does not refer to the interactivity of a site, the Explanatory Memorandum to the proposed Regulation states:

> '[t]he concept of activities pursued in or directed towards a Member State is designed to make clear that point (3) applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country will not trigger the protective jurisdiction.'[54]

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[50] *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Official Journal L 012 , 16/01/2001 P. 0001 - 0023; in force since 1 March 2002.

[51] *EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968, Brussels).*

[52] Emphasis added.

[53] See Art 16 (formerly Art 14): 'A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts of the place where the consumer is domiciled. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled...' (emphasis added).

[54] *Explanatory Memorandum to Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM(1999) 348final (14 July 1999) 16. See also Council of Europe, *Joint Council and Commission Statement on Articles 71 and 72, 15 and 73* (14 December 2000), at http://register.consilium.eu.int/pdf/en/00/st14/14139eno.pdf, 5: 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State... a contract must also be concluded within the framework of its activities.'

While there are as yet no Internet-related cases exploring the ambit of the new Article, the EC appears to broadly follow the US route. Even the Hague Conference on Private International Law in respect of its negotiations of the new convention on jurisdiction and foreign judgments in civil and commercial matters toys with the same idea.[55] If adopted, it would give rise to similar problems in respect of consistency as are prevalent in the US. In stark contrast, the general rule in both instruments, namely that the defendant shall (or may) be sued in his place of domicile (or residence),[56] is a clear-cut, easily applied principle, comparable to the traditional rule before the *International Shoe* case in the US. And it is at least questionable whether the 'consumer' exception is indeed helpful.

In summary, the desire by US courts to provide substantively just outcomes has translated into the need to pursue an increasingly meticulous, highly fact-specific, case-by-case analysis which threatens certainty and predictability of the law and, with it, the requirement of formal justice. Curiously, the harder States try to accommodate the online phenomenon by refining the law, the more self-defeating the task becomes: the more refined the rules are, the harder it is to ensure overall consistency.

3.3. Efficiency

Note that, despite appearances, the directing test is, in view of the European Commission, not following the US targeting test see Amended Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2000) 689final, Official Journal 27 February 2001, C62 E/243, para 2.2.2. Which approach the European Court of Justice will adopt remains to be seen. See also Frederic Debussere, 'International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?' (2002) 10 International Journal of Law and Information Technology 344, 357ff.

[55] See Art 7 'Contracts concluded by consumers' ('directing' test); adopted by the Special Commission of the Hague Conference on Private International Law on 30 October 1999. For the latest version of the interim text see Hague Conference of Private International Law, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference (2001). See also Hague Conference of Private International Law, Electronic Commerce and International Jurisdiction, Prel Doc No 12 (2000) submitted by Catherine Kessedjian, 6f. All above documents can be found at http://www.hcch.net/e/workprog/jdgm.html.

[56] See Art 2 of EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters: '...persons domiciled in a Member State shall... be sued in the courts of that Member State.'; Art 3 of Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: '...a defendant may be sued in the courts of the State where that defendant is habitually resident.' On the difference between these two articles see Hague Conference of Private International Law, Report of the Special Commission, Prel Doc No 11 (1999) submitted by Peter Nygh and Fausto Pocar, at http://www.hcch.net/e/workprog/jdgm.html, 38f.

An added complication is the sheer number of transnational actions and thus actual and potential disputes. This aspect has already been examined in Chapter 2, where it was first described as a quantitative legal problem to which the Internet gives rise, which was further addressed in the context of refuting the floodgate argument. This part does not seek to undo the arguments made previously but rather point out why incremental legal developments may not always further efficiency; or in other words, why the solution to the qualitative legal problem may not solve, and indeed may worsen, the parallel quantitative legal problems.

In the Internet context, the rising number of transnational events and the decrease in their commercial value makes it an imperative to have a more, and not less, efficient legal framework in place. Unfortunately, efficiency is not something that necessarily goes hand in hand with highly refined legal doctrines, however fair and just they may be. Efficiency would demand simple legal rules which can be applied with ease so that outcomes can be predicted with certainty and disputes can be avoided or resolved quickly. Consumers or businesses should not as a rule be better off by bearing the loss arising, for example, from a breach of contract or copyright by a foreign online party than by invoking jurisdictional rules in order to enforce their legal rights and obligations. Yet this may not be far from the truth. For example, the Australian Competition & Consumer Commission, in its early report on the viability of traditional consumer protection laws in a global market place, concluded that the traditional legal remedies for the global marketplace are inadequate as they do not provide consumers with quick, effective, inexpensive and easily accessed remedies.[57]

The impact of this efficiency imperative on the viability of a legal doctrine is well illustrated by the above-noted rise and fall of the negligence action in relation to car accidents. This incident in legal history also shows that the sophistication of a doctrine can become problematic when the number of cases which attracts its operation increases drastically. So the very virtues of the negligence action,

[57]Australian Competition & Consumer Commission, *The Global Enforcement Challenge: Enforcement of Consumer Protection Laws in a Global Marketplace,* Discussion Paper (1997), at http://accc.gov.au, 29.

namely its all encompassing broadness and its fairness, reflecting subtle fault variations, contributed to its partial downfall:

> 'the wisdom of discarding strict liability for highway accidents seems less obvious today since the advent of the motor car than it was in the days of more tranquil traffic a century ago... Subsequent experience... far surpassing the wildest fears, has seriously challenged the claim of fault liability as an adequate solution.'[58]

While the negligence action generally is still alive and kicking, the vast and increasing number of motor accidents has meant that, at least in relation to this area, it had to be abandoned or supplemented by compulsory third party car insurance and no-fault compensation:

> 'without liability insurance the tort system would long ago have collapsed under the weight of the demands put on it and been replaced by an alternative, and perhaps more efficient, system of accident compensation.'[59]

The question in relation to the Internet is not whether, but when, the number of transnational events will tip the scale in favour of a fresh approach to deciding on regulatory competence. At the moment, although there has no doubt been an increase in transnational interactivity, there are still certain factors which limit the number of transnational interactions, especially those which are legally significant.[60] One reason for the potentially limited geographical reach of online communications is that State territories remain not only co-extensive with legal systems but also, albeit much more loosely, with language, cultural, social, political and religious communities, which make overseas sites or products less relevant or interesting, or even intelligible, than home-grown ones. Of course the legal uncertainties of transacting with someone beyond one's home territory are also discouraging. The risk of entering unknown legal territory inherent in going global may be too great to justify the contact, with the result that it may be avoided.[61] Online traders who do not make any deliberate attempt to territorially restrict their

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[58] Fleming, above n 17, 25.
[59] Fleming, above n 17, 13.
[60] OECD, *Measuring the Information Economy 2002* (2002), at http://www.oecd.org/sti/measuring-infoeconomy esp Ch 4, 68ff, where it is shown that the majority of Internet sales are still domestic rather than international and that the inhibitors of Internet commerce range from concerns about security of payment and the possibility of redress to the perceived unsuitability of the type of business to electronic commerce and logistical problems.
[61] There is certainly evidence that consumers are discouraged from engaging in online transactions by legal uncertainties. See, for example, James Catchole, 'The Balance between Technology and the Law' (March 2001) Computer *&* Law 32, 32. See also ibid 70.

sites, may achieve such restriction indirectly from restricted territorially offline advertising of their sites. Given the enormous number of sites, mere web presence and reliance on search engines and links on other sites is generally insufficient to bring a site to the attention of an audience or a substantial audience. Thus many online businesses have to invest significantly in offline advertising to ensure that their site is visited and most do this not globally but nationally or even only locally:

> '[a] World Wide Web advertisement does an advertiser little good unless consumers can find the advertisement... Many advertisers submit descriptions of their site to ...search engine and indexes...incorporate their site's address in their company letterhead or product packaging... include the site's address in print, radio, and television advertising... [and] many advertisers refine their promotion by targeting specific markets.'[62]

Also, individuals look up sites of businesses or institutions they have come across in their offline existence, which is often the most effective indirect advertising of websites and which explains why brick and mortar businesses have frequently been more successful online than pure online businesses.[63] This also means that online communications are no more international than offline conduct. Restricting sites territorially may not just be a matter of limited resources but also a deliberate policy of restricting the reach of the business in view of a limited distribution network for goods. As the Internet is no more than a medium for communicating information and information only (however potent or valuable that may be), many legally significant transactions are more conveniently effected locally, especially if they relate to the sale of physical or perishable goods. The tyranny of distance in relation to physical goods and services cannot be eradicated by the Internet.

Having said that, it seems inevitable that transnational interaction will further increase and with it the pressure on finding more efficient solutions to deciding which event belongs to whom. While the harmonisation of jurisdictional rules would be a step forward from the current plethora of national regimes, it will only be small, even insignificant, progress if the harmonised rules themselves provide for a broad, highly fact-specific test reliant upon vague notions, for example, of

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[62] Christopher W Meyer 'World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?' (1997) 54 *Washington* and *Lee Law Review* 1269, 1282 (footnotes omitted) , para II.B.1. See also Tony Dawe 'Trust the postman to deliver e-results', *The Times* (UK), E-Business Briefing, 12 June 2001, 4.
[63] Clive Mathieson, 'Seeing off the dot-coms', The Times (UK), IT Plus/*Law*, 8 March 2000, 44.

reasonableness. A discouraging example is the *EC Convention on the Law Applicable to Contractual Obligations (1980, Rome)* which provides in Art 4 for a 'vague and open-ended test',[64] namely that a contract shall be governed by the law of the country with which it is most closely connected.

4. The Evolution of Jurisdictional Rules in Public Cases

The refinement process has also occurred in respect of the jurisdictional rules under international law, as applicable to public or criminal matters.[65] This is most apparent in the evolution of the territoriality principle. Given the intended comparison to the above analysis, two matters are worth mentioning to start with. As noted in the introduction, in respect of criminal or public matters, adjudicative and legislative jurisdiction coincide: '[i]f the court has jurisdiction, it applies its own law; if the lex fori applies, then the court has jurisdiction.'[66] Thus any inquiry into the adjudicative jurisdiction of a State court assumes greater significance, as it will also of necessity determine whether the domestic law is applicable to the accused.[67] This, in addition to the criminal nature of the action, makes consistency and predictability even more imperative. This issue of certainty of legal rights and obligations relates to the second point. Given the nature of international law, in particular customary international law, which largely relies on State practice,[68]

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[64] Bradford L Smith, 'The Third Industrial Revolution: Law and Policy for the Internet' (2000) 282 *Recueil* des Cours 229, 329. Yet, it may also be argued that the generality of the 'closeness test' is a virtue and not a vice, particularly in the online world where businesses are often small and unsophisticated and more likely to be able to handle a test to which common sense can frequently yield the correct legal answer.

[65] The phrase 'criminal matters' is used to refer not just to matters which are criminal in the technical sense, but to all those matters in relation to which State authorities take coercive actions to achieve compliance with the law.

[66] Akehurst, above n 7, 179. In domestic law this is, inter alia, reflected in the universal principle that the courts of one country will not enforce the penal laws of another country, as discussed in depth in Chapter 5. See also Matthew Goode, 'The Tortured Tale of Criminal Jurisdiction' (1997) 21 *Melbourne University Law Review* 411, 412.

[67] This overlap of the two categories has meant that the jurisdictional rules are discussed sometimes as part of prescriptive/legislative jurisdiction (see, for example, Mann, above n 4; Jennings and Watts, above n 11; s.402 *US Restatement (Third) of Foreign Relations Law (1986)* and sometimes as part of adjudicative/judicial jurisdiction (see, for example, Akehurst, above n 7).

[68] Some States are likely to be more influential in shaping certain rules than others. On how customary international law develops in Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999) 40f. Oscar Schlachter, 'New Custom: Power, *Opinio Juris* and Contrary Practice' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (The Hague: Kluwer, 1996) 531, 537f: 'The more powerful the economy, the greater the presence of its government and nationals in international transactions. Trade, foreign investment, and the technical know-how emanate disproportionately from the advanced economic powers; they carry with them, as a rule, the political views of their respective States, together with social attitudes bearing on international relations. Moreover, for these reasons the affluent States are objects of attention by others. Their views and

ascertaining clearly defined rules has notoriously been difficult in many areas, not the least in relation to jurisdiction:

> '[m]uch of the law relating to jurisdiction has developed through the decisions of national courts applying the laws of their own states. Since in many states the courts have to apply national law irrespective of their incompatibility with international law, and since courts naturally tend to see the problems which arise primarily from the point of view of the interests of their own state, the influence of national judicial decisions has contributed to the uncertainty which surrounds many matters of jurisdiction and has made more difficult the development of a coherent body of jurisdictional principles.'[69]

Bearing these almost conflicting considerations in mind, the following discussion can do no more than demonstrate a trend (rather than clearly reformulated rules) - a trend away from rigidity and relative certainty towards flexibility and greater uncertainty. This trend will be illustrated mainly by reference to instances of State practice, which in themselves of course do not necessarily reflect customary international law, but which go far to show that jurisdictional rules under international law have in many ways been under the same pressures, and driven towards similar refinements, as the rules in respect of private matters. However, there is a marked difference in respect of the responses to recent online developments, in that there is little evidence of States taking a refined balancing approach to jurisdiction over transnational criminal activity.

4.1. Pre-Internet Refinements

The territorial principle, the primary basis of jurisdiction under international law,[70] means that a State has the right to regulate persons, matters and events within its territory.[71] This is reflected in the common law notion that criminal jurisdiction is territorially limited and that all crime is - must be - local.[72] While the territoriality

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positions are noticed and usually respected. Their official legal opinions and digests of State practice are available along with international law treatises that influence professional opinion and practical outcomes.'

[69] Jennings and Watts, above n 11, 457. On the need for consistency for establishing 'state practice', an element of customary international law, see Donald W Greig, 'Sources of International Law' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law - An Australian Perspective* (Melbourne: OUP , 1997) 63f.

[70] Jennings and Watts, above n 11, 458.

[71] This maxim dates back at least to Ulricus Huber, *De conflictu legum diversarum in diversis imperiis* (1684), reiterated by Justice Story in *The Apollon* 9 Wheat 362, 370 (1824). See Mann, above n 4, 24ff.

[72] Goode, above n 66. Note, that common law jurisdictions have always strongly favoured the territorial basis of jurisdiction, unlike civil law jurisdictions, which have traditionally more relied upon the nationality principle.

principle seems to provide a fairly clear cut test, its simplicity is deceptive. It begs the questions as to what exactly can be said to occur or to be within the territory of a State sufficiently as to give a State territorial jurisdiction over it. The answers have become more expansive over time so as to 'catch' foreign activity which may have a significant effect on the State's territory as well as generally to avoid situations where transnational crime would go unpunished.[73] Again this refinement process started long before the Internet, in response to greater transnational interactivity.

At international level,[74] the critical decision in respect of the territoriality principle came in 1927 with the *Lotus* case[75] when the Permanent Court of International Justice decided that a State may try and punish a person whose acts abroad cause injury within its territory. Interestingly, the terminology used by Judge Moore in that case, is reminiscent of the term of 'symbolic' presence used in the *International Shoe* case:

> 'it appears to be now universally admitted that, where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction.'[76]

The fiction of the constructive presence of the offender or constructive location of the crime within the territory is based upon the injurious effects of the conduct originating abroad within the territory. This has become known as the objective territoriality principle.[77] Its counterpart is the subjective territoriality principle according to which a crime occurs in a State when it is commenced within the State but completed or consummated abroad.[78] These two principles broadly

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[73] Goode, above n 66, 414.
[74] Of course, there is a wealth of decisions concerning this topic at the national level. For an excellent overview of how common law courts have sought to accommodate transnational crime within the territoriality principle and how they have manipulated this principle see eg. Goode, above n 66.
[75] *France v Turkey* (1927) PCIJ Reports, Series A, No 10.
[76] *France v Turkey* (1927) PCIJ Reports, Series A, No 10, 73 (emphasis added).
[77] Harris, above n 11, 278. This notion has also been labelled the 'terminatory theory', as opposed to the 'initiatory theory', in Glanville Williams, 'The Venue and Ambit of the Criminal Law' (1965) 81 *Law Quarterly Review* 518.
[78] Harris, above n 11, 278.

correspond to the 'country of origin' basis of jurisdiction (subjective territoriality principle) and the 'country of destination' basis of jurisdiction (objective territoriality principle), referred to in the Internet related jurisdictional debate,[79] and show that in the past these two approaches have run side by side in respect of criminal jurisdiction.

The Permanent Court clearly redefined the territoriality principle by abandoning the requirement that the offender must be physically in the territory or that the causative act must have occurred there for there to be a valid territorial claim, in favour of a nexus, which merely required the offender's act to affect the territory.[80] In other words, it allowed for a result-oriented jurisdictional claim.[81] This, no doubt, was more attuned to modern conditions which exposed States frequently and substantially to the effects of conduct by absent actors. Yet, while the holding appears to adopt a very broad test, the circumstances of the case significantly circumscribed its ambit. First of all, the case concerned the *physical* effects on the territory of conduct originating abroad: the French steamer Lotus collided with a Turkish steamer (ie. Turkish 'territory') killing eight Turkish sailors and passengers.[82] And secondly, the effect of the misconduct was a constituent element of the offence: the death of the sailors occurring on Turkish territory was a necessary ingredient or 'constituent element' of the charge of manslaughter under Turkish law. While the Permanent Court seemed at times to use the terms 'effects' and 'constituent element' interchangeably, it also stated:

> 'offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.'[83]

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[79] Hague Conference on Private International Law, *The Impact of the Internet on the Judgments Projects: Thoughts for the Future*, Prel Doc No 17 (2002) submitted by Avril D Haines, at http://www.hcch.net/e/workprog/jdgm.html, 8ff. Graham J H Smith, *Internet Law and Regulation* (3rd ed, London: Sweet & Maxwell, 2002) 532f, where the author discusses the country of origin and country of receipt approach.

[80] Strictly speaking, the Lotus case concerns only the constructive location of conduct, rather than the constructive location of the offender, within the territory. The offender has been deemed to be within the territory of a State when, for example, he owns property there, conducts business there or when there is an agent or employee within the territory. See Jennings and Watts, above n 11, 458f.

[81] Goode, above n 66, 415f, which is entirely consistent with the evolution of the 'territorial theory' of criminal jurisdiction at common law.

[82] The example most often referred to is when one shoots across the border, injuring or killing another person in that State.

[83] *France v Turkey* (1927) PCIJ Reports, Series A, No 10, 23.

It then went on to say

> 'that the effect is a factor of outstanding importance in offences such as manslaughter, which are punished precisely in consideration of their effect...'[84]

So while in this case the effect of the conduct was a constituent element of the crime, the court also seemed to require that this must be the case for there to be territorial jurisdiction.[85] Due to the globalisation of commercial activity, especially after World War II, the requirement of a physical effect and, to a lesser extent, the requirement of the effect constituting an element of the criminal offence, came under pressure. As will be seen though the latter requirement is, depending on the definition of the offence, often very easily fulfilled, meaning that the objective territoriality principle frequently provides an extremely broad basis of jurisdiction.

Nevertheless the initial further expansion of the territoriality principle, and thus of the breadth of jurisdictional claims, came in the form of the effects doctrine which merely focuses on the effects of the criminal activity in the territory regardless of whether a constituent element of the crime occurred on it. This expansion occurred in various contexts but the most high-profile cases were the US anti-trust cases, which caused much controversy particularly in the 1970s and early 1980s. The controversy arose mainly because US courts enforced US antitrust law[86] against foreign companies in relation to activities which took place in foreign States on the basis that the effects of those activities were felt in the US. There was a storm of protest by many States against the excessive extra-territorial exercise of criminal jurisdiction by the US and its attempt to impose its economic policy on other States. This was followed by various blocking and claw-back legislation designed to defeat the outcome of the decisions.[87] Of relevance to this discussion is that the 'effects' upon which US courts relied to claim jurisdiction over acts occurring abroad were certainly not physical effects: they were economic effects, particularly

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[84] *France v Turkey* (1927) PCIJ Reports, Series A, No 10, 24.
[85] See also discussion in Mann, above n 4, 85ff.
[86] Mainly based on the *Sherman Antitrust Act (1890)*).The most influential case, in which the effects doctrine received its classic formulation, is *US v Aluminium Company of America* 148 F 2d 416 (1945) (the Alcoa Case).

the effects on US foreign commerce. One objection to the effects doctrine was that generally the relevant offending activity took place outside the US,[88] and thus jurisdiction could not be justified on the ground that 'a constituent element of an act forbidden by antitrust law has occurred on that State's territory...'[89] While there is room for arguing that the effect is in fact a constituent element of the charge of anti-competitive behaviour,[90] it seems that if there is no requirement that the effect must be physical (regardless of whether the effect is also a 'constituent element' of the crime), the number of States potentially entitled to claim jurisdiction on the basis that the foreign activities had an economic or other intangible effect spirals. In a world where the actions of large companies in one jurisdiction regularly have an effect across the globe,[91] limitations on the kind of effect required to assert jurisdiction are necessary to prevent innumerable overlapping and conflicting claims by all those States affected.

So support for the 'effects' doctrine has, both inside as well as outside the US, gone hand in hand with support for certain limitations on its application. The disagreement has been on the kind of limitations, on whether the effects must be 'actual' or 'intended' or 'substantial' or 'direct' or all of these,[92] and when these are fulfilled. What all these limitations have in common is their objective, namely to prevent an unreasonable exercise of jurisdiction or an 'undue encroachment of a jurisdiction more properly appertaining to... another State.'[93] This notion of reasonableness is captured in s.403(1) of *US Restatement (Third) of Foreign Relations Law (1986):*

> 'a state may not exercise jurisdiction... with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.'

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[87] A V Lowe (ed), *Extraterritorial Jurisdiction - An Annotated Collection of Legal Materials* (Cambridge: Grotius Publications Ltd, 1983) 79ff.
[88] See, for example, *US* v *General Electric Co* 82 F Supp 753 (1949).
[89] Akehurst, above n 7, 195, commenting on Mann, above n 4, 103.
[90] Akehurst, above n 7, 195f, where he convincingly argues that the economic effects of restrictive business practices are in fact a constituent element of the offence.
[91] A most obvious recent example is Microsoft and its world-wide dominance in the field of operating systems.
[92] Akehurst, above n 6, 199ff. See also s.402(1)(c) of *US Restatement (Third) of Foreign Relations Law (1986)* and Comment d.
[93] *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Judgment)* [1970] ICJ Reports 3, 105 (emphasis added).

But what is unreasonable? To some extent what is reasonable must *be* in the eye of the beholder. And although s.403(2) expressly defines the factors which must be evaluated to decide whether the assumption of jurisdiction would be reasonable, many of these factors are as broad and dependant on value judgments as the term they seek to define: the extent to which the activity has a *substantial, direct or foreseeable effect* upon the territory, the *character* of the activity and the degree to which the *desirability* of regulation is *generally accepted*, the existence of *justified expectations*, the *importance* of regulating the activity and the *consistency* with *traditions of the international system* and the *interests of other States* in regulating the activity, and finally the *likelihood* of conflicting regulations.[94] Indeed Lowenfeld, who wrote these provisions, noted that 'our aim is reasonableness, not certainty.'[95] As an attempt to provide for a fair and balanced division of regulatory power this approach is praiseworthy. Certainly, there has been high-profile academic, governmental and judicial support for such a flexible holistic analysis and balancing act.[96] Mann, for example, argued:

> '[p]erhaps public international lawyers should now discard the question whether the nature of territorial jurisdiction allows facts to be made subject to a State's legislation. Rather they should ask whether the legally relevant facts are such that they *"belong"* to this or that jurisdiction.'[97]

And after initial hesitation as to whether the territorial principle in its simplicity is perhaps after all 'preferable to a more elaborate and refined but also more hazardous, version'[98] he goes on to pre-empt critics of the flexible test:

> '[i]t may be said that the test.. would substitute vagueness for certainty. This would be formidable criticism if the principles of jurisdiction in fact were at present defined with certainty. But the simplicity of Huber-Storyan teaching is deceptive. The question, for instance, where a crime or tort is committed is subject to so much doubt that no certain answer can be suggested in any but the clearest cases; nor has the territorial test led to much certainty in the field of trade practices or taxation.'[99]

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[94] This echoes the balancing test advocated by Judge Choy in *Timberlane* Lumber Co v *Bank of America* 549 F2d 597 (1976), 611-12. For a discussion of a not dissimilar list see Goode, above n 66, 443f.

[95] Andreas F Lowenfeld 'Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for their Interaction' (1979) 163 *Recueil* des Cours 311, 329. See also Dodge, above n 9, 137.

[96] In the *Nottebohm* Case *(Liechtenstein* v *Guatemala)* [1955] ICJ Reports 4, the International Court of Justice applied the principle of a 'genuine link' in the nationality context. See also Lowe, above n 87, 94 (Australian support of the balancing of interest test, provided it is not applied by the judiciary), 108f (Canadian approval of a balancing of interests approach), 207ff (European Community commenting on the balancing of interests approach, arguing that it should also be applied at the rule-making stage).

[97] Mann, above n 4, 45.

[98] Mann, above n 4, 43.

[99] Mann, above n 4, 50.

But the fact remains that a more elaborate refined version of the territoriality principle is a yet more hazardous and uncertain basis of jurisdiction (albeit rationally more satisfactory) than its cruder predecessor. This increased uncertainty is illustrated by the protests against the US anti-trust approach, which were not based on the substantive unfairness of the effects doctrine but rather on what the US regarded as falling within it, that is on the interpretation of what is a 'reasonable' exercise of jurisdiction. Some States expressly rejected the effects doctrine because of its inherent uncertainty.[100]

The validity of this argument seems to be confirmed by the relatively recent US anti-trust judgment of *Hartford Fire Ins Co v California* where the US Court held Court held that international comity, or in other words the test of reasonableness and the notion of 'comparative interest balancing', should only come into play if there is a 'true conflict between domestic and foreign law.'[101] The judgment, which is generally viewed as the return to a more expansive, less refined effects doctrine, has been applauded on a number of grounds,[102] one of which is its positive effect on legal certainty:

> '[t]he task of identifying, explaining, and weighing the comparative regulatory interests of different nations in any given international transaction is virtually impossible for courts and private litigants... [T]he assumption that... [these] rules enhance the predictability of international transactions by identifying a single national regulatory regime... seems completely belied by the ex post and inexact nature of the various interest balancing rules for selecting a single applicable law. It typically would be far more predictable and less burdensome for an international transaction to comply with the regulatory regimes of multiple nations so long as that prospect is known beforehand and accounted for when the transaction is structured.'[103]

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[100] For example, the United Kingdom, see Submission of the British Attorney General to the House of Lords in *In re Westinghouse Electric Corporation Uranium Contracts Litigation* in Lowe, above n 87, 170. But *cf* Akehurst, above 7, at 208 (on the UK attitude to the effects doctrine).

[101] *Hartford Fire Ins Co v California* 509 US 764, 798 (1993).

[102] Eg. Dodge, above n 9. See also Hannah L Buxbaum, 'The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation' (2001) 26 *Yale Journal of International* Law 219.

[103] Philip J McConnaughay, 'Reviving the "Public Law Taboo" In International Conflict of Laws' (1999) 35 *Stanford Journal of International* Law 255, 257.

It is perhaps even more noteworthy that at least one Australian State has expressly endorsed the effects doctrine in its widest ambit, in response to offline transnational crime.[104] Section 10C of *Crimes Act 1900 (NSW)* provides as follows:

(1) If:
  (a) all elements necessary to constitute an offence against a law of the State exist (disregarding geographical considerations), and
  (b) a geographical nexus exists between the State and the offence,

the person alleged to have committed the offence is guilty of an offence against that law.

(2) A geographical nexus exists between the State and an offence if:
  (a) the offence is committed wholly or partly in the State (whether or not the offence has any effect in the State), or
  (b) *the offence is committed wholly outside the State, but the offence has an effect in the State.*[105]

This approach sits comfortably with the view of the High Court of Australia which recently, albeit in response to an intra-federation offline case, has shown, firstly, a clear willingness to reconsider jurisdictional rules in view of increasing transnational crime:

> '[t]rans-jurisdictional commerce and intercourse, whether with the Australian Federation or international, is now accomplished with such speed and facility, that for many purposes jurisdictional boundaries are irrelevant. They remain relevant for purposes of criminal law, but there is every reason to apply the law in a manner which accommodates the reality...'[106]

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[104] There are some other statutory provisions which implicitly endorse the effects doctrine, such as s.252 of *Crimes Act 1958 (Vic):* 'It is immaterial that the conduct of a person constituting an offence under this Division occurred outside Victoria, so long as the person intended by that conduct - (a) to cause public alarm or anxiety in Victoria; or (b) to cause economic loss in Victoria through public awareness of the contamination.'

[105] Emphasis added. This section was introduced by the *Crimes Legislation Amendment Act 2000* and was 'intended to overcome the limitations placed on the operation of the existing provisions in... Catanzariti's case.' New South Wales, *Second Reading Speech*, LC Hansard Extracts - 52nd Parliament of NSW, 7048, at http://www.parliament.nsw.gov.au. In *R* v *Catanzariti* (1995) 65 SASR 201, which concerned a conspiracy in South Australia to cultivate cannabis in the Northern Territory, the judge held that the accused had not committed an offence in South Australia on the basis that the object of the conspiracy was to breach a foreign criminal law. In holding so, the judge avoided earlier amendments in relation to jurisdiction which had been introduced in a number of Australian States in response to *R* v *Thompson* (1989) 169 CLR 1. In that case the accused was alleged to have killed to women but where the Crown could not prove whether the crime occurred in the ACT or NSW. For a comprehensive discussion see Goode, above n 66, 416f and 457ff.

[106] *R v Lipohar* (1999) 168 ALR 8, para 37 (Gleeson J), cf para 186ff , where Kirby J agrees with the majority that the elements of the crime occurred outside the State, but disagreed with them that, despite this, the South Australian Court could assert criminal jurisdiction.

Secondly, the majority was also in agreement that the requisite nexus between the State and the criminal acts, at least in the intra-federation scenario, need not be too taxing and that an expansive view on competence is appropriate:

> '[t]he requirement of nexus should be liberally applied. A real connection with the jurisdiction will suffice. The object of the conspiracy was to cheat Collins Street out of a particular receipt. In that sense the immediate victim... was [a] company incorporated in South Australia.'[107]

Callinan J defends this test on the basis that

> 'the conceptual difficulties associated with the designation of overt acts as the agreement or parts of it can be avoided by the adoption of such a test. It is, as a test, no less exact than many which common law courts are regularly called upon to apply...'[108]

It is submitted that the problem with this wide test is hardly its uncertainty, given that those engaged in transnational conduct can predict that most connections (unless minimal) made with other States will expose them to their laws; rather the problem is (comparable to that associated with the unrestricted effects doctrine) its breadth and thus the regulatory burden it imposes on transnational actors. The question addressed now is what impact, if any, the Internet has had on the evolution of the territoriality principle and its interpretation.

4.2. Post-Internet Halt

Although it is too early to finally conclude on the impact of the Internet on jurisdictional doctrines under national and international law, it is already apparent that the 'country of destination' approach to jurisdiction, both in the form of the effects doctrine and the objective territoriality principle, has been wholeheartedly endorsed by States. Their prominence is not surprising given that they are tailor-made for the online environment where the effects of any conduct are prima facie territorially unlimited and, consequently and more importantly, where the effects are often the only nexus of a foreign actor or act with the territory seeking to regulate it. What is to some extent surprising is that the restrictive effects doctrine would provide a far more moderate basis of jurisdiction in the online world than the

[107] R *v Lipohar* (1999) 168 ALR 8, para 123 (Gaudran, Gummow, Hayne JJ).
[108] R *v Lipohar* (1999) 168 ALR 8, para 269 (Callinan J).

objective territoriality principle because it requires that the online activity is targeted at the State in question. Yet, States, with very few exceptions, have not endorsed that moderate approach and either relied upon the mere effects of the foreign online activity on their territory or simply argued that a constituent element of the crime occurred within their territory.

In the US, which has consistently been concerned about online gambling,[109] an early example of its approach to jurisdiction is supplied by the *Statement the Minnesota Attorney General on Internet Jurisdiction*:

> 'Persons outside Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota Courts for violations of state criminal and civil laws.'[110]

While this is somewhat ambiguous as to the basis of jurisdiction, the Statement goes on to say:

> 'Minnesota's general criminal jurisdiction statute provides... [that a] person may be convicted and sentenced under the law of this State if the person: (1) Commits an offence in whole or part within this state [objective or subjective territoriality principle]; or... (3) Being without the state, intentionally causes a result within the state prohibited by the criminal laws of this state [effects doctrine]'[111]

Although the effect in Minnesota must be intentionally caused, there is nothing to suggest that by merely providing an online gambling service, you may not be held to have intended to cause an effect in Minnesota regardless of whether your service was targeted at Minnesota or not. Having said that, US jurisprudence on criminal jurisdiction varies from that of other States in one critical respect: it distinguishes between adjudicative and subject-matter jurisdiction[112] and approaches adjudicative jurisdiction in a way substantially similar to the approach taken in private transnational disputes, relying on the same 'minimum contacts' test

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[109] Most recently involving a British company providing online gambling services in *US v American Sports Ltd* 286 F 3rd 641 (2002).

[110] Minnesota Attorney General, *Statement of Minnesota Attorney General on Internet Jurisdiction*, at http://www.imls.edu/cyber/docs/minn-ag.html .

[111] Ibid.

[112] *People v World Interactive Gaming Corp* 714 NYS 2d 844 (1999). For a critique of that distinction see F A Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) 186 *Recueil des Cours* 9, 33 (n 47).

and 'purposeful availment' test.[113] This test then imports, like in private law, a requirement that the defendant must have targeted the State although generally not much evidence appears to be required to prove this. So in *State of Minnesota v Granite Gate Resorts Inc* the court simply stated that the defendants' 'clear effort to reach and seek *potential* profit from Minnesota consumers provides minimum contacts of a nature and quality sufficient to support... personal jurisdiction.'[114]

Yet, even in respect of subject-matter or legislative jurisdiction US courts seem not entirely insensitive to the potential problems caused by asserting jurisdiction over a foreign content provider in the absence of targeting, or intentionally caused effects. In *People v World Interactive Gaming Corp*[115] a New York court held that it could enjoin an Antiguan corporation and its Delaware parent company, legally licensed to operate a casino in Antigua, from offering gambling opportunities to Internet users in the State of New York. The court held that the activities of their New York customer were sufficient to hold that its actions were within the territory: 'the act of entering the bet and transmitting information from New York via the Internet is adequate to constitute gambling activity within the New York state.'[116] So the court relied upon the fact that a constituent element of the offence, ie. the actual gambling, occurred in New York (that is upon the objective territoriality principle). Indeed, it went further and made an attempt to show that the connection between the defendant's action and the State of New York was in fact quite substantial. The court argued that the effects of the defendant's action on New York state territory were both intended and substantial:

> '[a] computer server cannot be permitted to function as a shield against liability, particularly in this case where respondents *actively targeted* New York as the location where they conducted many of their allegedly illegal activities.'[117]

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[113] See, for example, *State by Humphrey v Granite Gate Resorts Inc* (1996) WL 767431, 6 (DC Minn 1996), confirmed in *State of Minnesota v Granite Gate Resorts* Inc 568 NW 2d 717, 718ff (1997). In *Shaffer v Heitner* 433 US 186 (1977) the US Supreme Court held that all assertions of jurisdiction have to meet the 'minimum contracts' test.

[114] *State of Minnesota v Granite Gate Resorts Inc* 568 NW 2d 717, 720 (1997) (emphasis added).

[115] 714 NYS 2d 844 (1999)

[116] *People v World Interactive Gaming Corp* 714 NYS 2d 844, 860f (1999).

[117] *People v World Interactive Gaming Corp* 714 NYS 2d 844, 860 (1999) (emphasis added).

In comparison to other non-US online jurisdictional cases this holding seems moderate and quite restrained, which is all the more surprising given the past criticism of the US for its expansive extra-territorial jurisdictional claims.

An example of the Australian approach to jurisdiction is supplied by the Australian Securities and Investments Commission, which in its policy statements on 'Offers of securities on the Internet' and 'Electronic prospectuses' states that it does not intend to regulate foreign online offers, invitations or advertisements of securities if they are not targeted at persons in Australia, contain a meaningful disclaimers, have no or little impact on the Australian market and there is no misconduct.[118] While at least to some extent this test is informed by whether or not the effects of the foreign activity on Australia were intended and how substantial they are (ie. the restricted effects doctrine), this cannot disguise the fact that jurisdiction may simply be asserted on the basis of misconduct, a most tenuous basis, which means that the mere accessibility of the site in Australia can supply the required nexus. The commentary in the policy statement expressly states that an offer of securities is made in Australia and thus subject to Australian securities regulation:

> 'if it is received in Australia. This mean that the Law may apply to offer or invitation of securities on an Internet site accessible from Australia irrespective of where the offeror is located.'[119]

Another example of an expansive view of jurisdiction is the French Yahoo decision, where no attempt was made to justify why the relevant activity 'belonged' to France anymore so than to every other State. The Paris court in *LICRA & UEJF* v *Yahoo! Inc & Yahoo France* held that Yahoo!Inc, a company incorporated in the US, with its principal place of business in California, must take all necessary measures to dissuade and render impossible any access from French territory via yahoo.com (primarily aimed at a US audience) to a Nazi artefact auction service or any other site or service that constitutes an apology of nazism or a contesting of Nazi

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[118] Australian Securities and Investments Commission, *Offers of Securities on the Internet*, Policy Statement 141 (10 February 1999, reissued 2 March 2000), PS 141.5, 141.14, 141.16; and *Electronic Prospectuses*, Policy Statement 107 (18 September 1996, updated 10 February 2000), PS 107.102, at http://www.cpd.com.au/asic/ps .

[119] Australian Securities and Investments Commission, *Offers of Securities on the Internet,* Policy Statement 141 (10 February 1999, reissued 2 March 2000), PS 141.10.

crimes.[120] While it may be asserted that the case was a private one (it was based on Art 808 and Art 809 of *French New Code of Civil Procedure*, which allows a French court to issue an injunction to stop a manifestly illegal disturbance) and thus should not properly be discussed under criminal jurisdiction, it may equally be argued that in substance it was a criminal matter[121] and must thus be informed by the limits on jurisdiction imposed by international law. This issue will be more fully addressed in Chapter 5. The Paris court simply based its assertion of jurisdiction on the fact that by

> 'permitting the visualisation in France of these objects and eventual participation of a surfer established in France in such an exposition/sale, Yahoo! Inc... committed a wrong on the territory of France.'[122]

It appears that Justice Gomez based jurisdiction on the fact that a constituent element of the offence took place on French territory, that is the exhibition of the offending material. Alternatively, when he noted that as 'the harm is suffered in France, our jurisdiction is therefore competent', he appeared to rely on the pure effects of the foreign activity on French territory.[123] This by itself does not give France any stronger a claim to regulate Yahoo! Inc's activities than any other States which could rely on precisely the same effect on their territory. In the later judgment the Court appears to seek to strengthen its case by noting that in fact yahoo.com was aimed 'at a French audience since it responds to a connection to its auction site from a computer located in France by dispatching advertising banners in French.'[124] While this may prove an intentional effect on France, it does not at all reflect on whether the effect on France was substantial. In the recent criminal prosecution of Yahoo! Inc and its CEO, Timothy K, in respect of the same

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[120] 22 May 2000 (Tribunal de Grande Instance de Paris) an unofficial English translation at http://www.gyoza.com/lapres/html/yahen.html; confirmed in 20 Nov 2000 (Tribunal de Grande Instance de Paris) at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf, an unofficial English translation at http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html.

[121] The actual illegality consisted of a violation of the French Criminal Code, which makes the distribution of the Nazi material illegal. This, in addition to the onerous injunctive as well monetary relief granted (Yahoo! Inc was ordered to comply with the injunction within three months, after which time it would incur a penalty of 100,000 Francs for every day of delay), creates room for arguing that the judgment was in fact a penal judgment. This was, amongst other things, argued by YahooIInc in its complaint which it filed on 21 December 2000 in the US District Court, Northern District of California (complaint No.C00-21275, at http://pub.bna.com/eclr/21275.htm) and in which it sought declaratory relief that the French orders were neither recognisable nor enforceable in the United States. Its criminal character seems also to be assumed in the discussion in ABA, above n 18, 83.

[122] 22 May 2000 (Tribunal de Grande Instance de Paris) 7, where Judge Gomez heard the case in an emergency hearing.

[123] 22 May 2000 (Tribunal de Grande Instance de Paris), 7.

[124] 20 Nov 2000 (Tribunal de Grande Instance de Paris) 4.

subject-matter, the Paris court took a similarly robust approach to jurisdiction, although more explicitly:

> '[c]oncerning media, advertising is one of the constitutive elements and even the essential characteristic of the offences created... by the [relevant] law... For the present case, providing at the public's disposal an online auction of Nazi objects, which can be seen and received on French territory and to which the Internet users can gain access because of the simple existence of a computing link "search" inviting him to search, characterises the advertising element necessary to constitute the offence of apology of war crimes and this is so, whether the Internet user was specifically targeted by the owner of the website.[125]

This is a pure constituent element approach by which the Court implicitly endorses the legitimacy of worldwide simultaneous jurisdiction for online content providers based upon mere accessibility.

A slightly less extreme conclusion was reached by the German High Court in December 2000 when it decided that foreigners may be prosecuted in respect of their online activities, even if they originate abroad.[126] This case concerned the Australian citizen, German-born Frederick Toben, who had published in Australia anti-semitic material on his homepage entitled "Adelaide Institute".[127] In his publications mass murder committed by Germans during World War II is denied and presented as a Jewish myth and backed by alleged research and scientific proof, in violation of German criminal law. The court asserted jurisdiction on the basis of the objective territoriality principle, arguing that a constituent element of the crime had occurred in Germany, consisting in the real capability of the online material to disturb the public peace in Germany.[128] The German court seemed to make an attempt to show why Germany may have a stronger claim than other jurisdictions to apply its criminal laws to Toben's publication. It argued that, given

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[125] R v *Timothy K* and *Yahoo Inc* 26 Feb 2002 (Tribunal de Grande Instance de Paris) No 0104305259, at http://www.foruminternet.org/telechargement/documents/tgi-par2002/0226.pdf, 10. The trial date is set for the beginning of 2003.

[126] BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *Neue Juristische Wochenschrift* (NJW) 624.

[127] Toben had already been ordered to remove the relevant material by the Australian Human Rights and Equal Opportunities Commission on the basis that it is contrary to the *Racial Discrimination Act 1975 (Cth): Jeremy Jones and Member of the Committee of Management of the Executive Council of Australian Jewry v Frederick Toben* (5 October 2000), available http://www.hreoc.gov.au. On 17 September 2002 the Federal Court of Australia in *Jones v Toben (including explanatory memorandum)* [2002] FCA 1150, at http://www.austlii.edu.au, reaffirmed the order.

[128] BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *NJW* 624, 627.

Germany's history, there is objectively a special link between the material in question and German territory, which justifies assertion of jurisdiction.[129] It also reasoned, given the focus of the site on Germans and German history, that German surfers, in particular, belonged to the intended and actual addressees of the site.[130] Although these arguments have some persuasive power, the holding does not sit easily with the fact that the topic of the site, namely World War II, is of almost universal interest and that the online publication was in English. Also there was in fact no evidence that, apart from the investigating police officers, anyone in Germany had actually accessed the site.[131] Indeed, it has even been questioned whether this Australian site by a self-appointed historian from a dubious institute was at all capable of having the effect in Germany required for the commission of the offence in question.[132] Was it capable of undermining the general population's or the Jewish community's trust in the public order? Given that the answer to this question can only be negative, it is tempting to accept the argument that the case was first and foremost designed to set an example and demonstrate publicly the unacceptability, whether offline or online, of radical right wing views.[133]

The above cases, despite their slight variations, illustrates that States have tended to need very little to find in favour of a nexus justifying criminal jurisdiction over online activity. Frequently, the mere accessibility of the site in question is found to establish that an element of the crime has occurred on the territory. Given that the transnationality of the Internet essentially presents the same kind of challenge to territorially-based doctrines of criminal jurisdiction as it does to those of private international law, one question is why the legal responses vary and why the doctrinal developments in criminal jurisdiction have not gone down the refinement path. While this question will be examined in Chapter 5, at this stage the common denominators of the above decisions may help to throw some light unto their underlying reasons and foreshadow some of the later conclusions.

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[129] BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *NJW* 624, 628.
[130] BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 NJW 624, 626f.
[131] BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *NJW* 624, 625.
[132] Irini E Vassilaki, 'Anmerkung' (2001) 4 *Computer und Recht* 262, 265.
[133] Ibid, 265.

4.3. The Common Denominators

4.3.1. The Acceptability of Concurrent Jurisdiction

What is in most of the above judicial authorities conspicuous by its absence, is any reference to the laws of other States, the potential of conflicting regulation or overregulation. Certainly there is nothing even resembling the balancing approach advocated in the anti-trust context and the *US Restatement (Third) of Foreign Relations Law (1986)*. The closest the decisions come to acknowledging the existence of foreign law, is by discounting it as irrelevant. For example in *People v World Interactive Gambling Corp* the court actually stated that '[i]t is irrelevant that Internet gambling is legal in Antigua.'[134] The question is why there has been this apparent indifference to the laws of other States, with courts treating the cases as almost purely domestic matters.

The answer may be found in the online case which did spark some real controversy, namely the CompuServe incident in Germany in 1995 when:

> 'CompuServe blocked access to 200 chat groups for fear of prosecution under Bavaria's obscenity laws. Because CompuServe did not have the technology to ban the groups only to its 220,000 customers in Germany, it had to ban the groups worldwide, suspending access to four million subscribers in 147 countries.'[135]

The outrage was based upon the fact that here Germany indirectly imposed its moral standards across the globe. And this is precisely why recent jurisdiction decisions are much more acceptable. In none of them did the courts require an end to the provision of gambling services or Nazi items or propaganda everywhere, but just in their own area of competence. And the courts decided this and could decide this, because content providers are in practice able to restrict the effect of the orders to a territorially delimited area. Indeed, the French court went to some

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[134] *People v World Interactive Gaming Corp* 714 NYS 2d 844, 859. See also *US v American Sports Ltd* 286 F 3rd 641 (2002) where it was held irrelevant whether gambling was legal in Britain and *R v Yahoo! Inc/ Timothy K* 26 Feb 2002 (Tribunal de Grande Instance de Paris) No 0104305259, 10, where the court stated that it is irrelevant whether the publication is criminal in the country of origin.

[135] John F McGuire, 'When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany' (1999) 74 *New York University Law Review* 750, 769 (footnotes omitted). The Chief Executive of CompuServe was on appeal acquitted of the indictment of distributing child pornographic material: Judgment of 17 Nov 1999 -20 Ns 465 Js 173158/95 (AG Munchen I) at

trouble to verify the practical feasibility of its order.[136] And although the New York court rejected the respondent's argument that it unknowingly accepted bets from New York residents, it seems likely that it would have accepted it if the casino's software, intended to filter out New York residents, had been less prone to circumvention by New York gamblers.[137] Thus, the judgment is in line with the French judgment in requiring the providers of certain content to make their sites territorially sensitive. Provided that each State only claims jurisdiction over a site as far as it affects the State's territory and not more, conflicting claims cannot arise and therefore there is no need to consider the laws of other States. This in turn makes the holding of the US court in *Yahoo! Inc* v *LICRA*, that the French order was inconsistent with the First Amendment to the US Constitution and thus not enforceable in the US, highly questionable, given that the French order never purported to affect what Yahoo! Inc would release to its US customers.[138]

So, the development of technical means of territorially restricting sites facilitates the possibility of concurrent jurisdiction where States can apply their laws to online conduct without unduly encroaching upon other States. States have not protested against recent assumptions of jurisdiction because, unlike the German CompuServe case, they do not preclude concurrent regulation. For example, when the New York court asserted that the gambling activity was legal in Antigua, it implied that Antiguan law was in fact also applicable to the activity. The problem with concurrent, even if non-conflicting, jurisdictional claims is the potentially unbearable burden they impose on individuals, which in the Internet context may be the obligation to comply with the laws of every State.

Yet this concern, although often voiced, has not been realized: States have not taken action in respect of foreign online activity as readily as might have been

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http://www.computerundrecht.de/1672.html. See also Oliver Zander, 'Recent Developments in German Internet Law' (Oct/Nov 2000) *Computer & Law* 36, 36.

[136] 11 August 2000 (Tribunal de Grande Instance de Paris) at http://www.gyoza.com/lapres/html/yahen8.html, where the Paris court ordered the set-up of a three-member panel of experts to comment on the feasibility of ordering YahooInc to prevent French surfers from accessing neo-Nazi material. The finding of the panel formed the basis of its November judgment.

[137] *People v World Interactive Gaming Corp* 714 NYS 2d 844, 861.

[138] *Yahoo! Inc* v *LICRA* 169 F Supp 2d 118, para 13-15 (ND Cal 2001), where the court also states that it is irrelevant whether Yahoo! Inc was technically capable of complying with the order given. It appears that the

expected. Given the vast amount of online activity, the number of cases, at least reported cases, in which States have actually assumed jurisdiction over foreign online activities is astonishingly small. This seems paradoxical, particularly in view of the wide breadth of jurisdiction claimed by States in respect of public or criminal matters. The answer lies in another common denominator of the above decisions.

4.3.2. Insistence on Enforcement Jurisdiction

In all of them, the regulating State had some actual power over the foreign provider at least to the extent of ensuring that he/she would answer the charges. For example, in *People* v *World Interactive Gaming Corp*, the Antiguan company was a wholly owned and controlled subsidiary of World Interactive Gaming Corp, a Delaware company, which in turn had corporate offices in the forum State, ie. New York. In the recent case of *US* v *American Sports Ltd* the US successfully pursued an online gambling business originating from the UK, given that one of the defendant companies was a New Jersey Corporation and that the businesses had US bank accounts.[139] In the French Yahoo case, Yahoo! Inc, a Delaware company, had a French subsidiary, Yahoo France.[140] However, it may be noted that the Paris court did not allow for the orders against Yahoo! Inc to be enforced against its French subsidiary, and it even acknowledged the enforcement difficulties arising out of this.[141] And finally, the German judgment arose out of a case in which, following his arrest in Germany, Toben had been sentenced to ten months' imprisonment for distributing revisionist leaflets in Germany.[142] So in the decided cases, the regulatory right asserted was backed by might. The insistence of enforcement power in the criminal context can be explained by the facts, firstly,

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order purports to affect what action Yahoo! Inc takes or does not take in the US. For the earlier decision on personal jurisdiction see *Yahoo! Inc* v *LICRA* 145 F Supp 2d 1168 (ND Cal 2001).

[139] *US* v *American Sports Ltd* 286 F 3rd 641 (2002) which concerned the US government's in rem forfeiture action against the funds, proceeds from the illegal gambling activities, in the US bank account.

[140] Although the Paris court (like the courts in the other examples) never expressly acknowledged that this was the trigger for its assumption of jurisdiction, it would explain why other foreign online culprits have not been sued or prosecuted. See Lyombe Eko, 'Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation' (2001) 6 *Communication Law and Policy* 445, 472f: 'Though other online auction sites, such as e-Bay, display and auction memorabilia from Hitler's Third Reich, Yahoo! was sued because it had a French subsidiary...'.

[141] 20 Nov 2000 (Tribunal de Grande Instance de Paris) 4,18. In the next chapter it will be explained why the Paris court nevertheless pursued the action.

[142] BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *NJW* 624, 625; although it seems that at the time of the ruling, Mr Toben had returned to Australia. See 'Holocaust Denier Not Impressed by Ruling' *Frankfurter Allgemeine Zeitung* (English edition) 13 December 2000, at http://www.faz.com.

that States will not generally enter a default judgment against an absent accused[143] and, secondly, that criminal law and judgments are never enforced abroad.[144]

The frequent lack of enforcement jurisdiction in respect of online conduct has no doubt played a significant role in keeping a lid on the number of cases where States could, and would, otherwise have asserted jurisdiction. This may also explain why States, on those fairly rare occasions when in possession of enforcement power, have not been too concerned about the limits of their legislative/adjudicative jurisdiction under international law. It is telling that of all the instances of State practice mentioned above, the only reference to the requirements of international law is made in the German judgment.[145]

The fact that enforcement jurisdiction is important (albeit not critical)[146] for the effective exercise of adjudicative/legislative jurisdiction in respect of transnational criminal activity makes the subjective territoriality principle (ie. the country of origin approach) infinitely more attractive than the effects test or the objective territoriality principle. Given that jurisdiction is based upon the fact that the activity originated from the State's territory, it invariably goes hand in hand with enforcement jurisdiction, as the person responsible for the acts is within the State's reach. The application of the subjective territoriality principle is illustrated by the Canadian Internet Holocaust denial case (which, however, is arguably a private rather than a public or criminal case[147]). Ernst Zundel was alleged to have violated s.13 of *Canadian Human Rights Act* by publishing his views, through his US employee, on a website known as the 'Zundelsite' located in California. Jurisdiction was based not on the effects, one way or another, of the US site on Canadian territory, but

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[143] Shearer, above n 7, 171. *Lipohar* v R (1999) 168 ALR 8, 26. R v *Manning* [1999] 2 WLR 430, 444: 'The English courts had jurisdiction subject to two conditions: that the defendant was physically present before the court (a matter that cannot be affected by construction of the statute) and that he had completed the crime, as defined, within England and Wales.'

[144] Akehurst, above n 7, 235.

[145] BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *NJW* 624, 628.

[146] See discussion in Chapter 4 (2.2. Actual Notice and Effectiveness of Law)

[147] The claim was brought by the private complainant, Sabina Citron, parallel to the complaint filed by the Mayor's Committee On Community And Race Relations in respect of discriminatory practices under s.13(1) of Canadian Human Rights Act which, when proven 'on a preponderance of evidence' (a civil standard of proof), entitles the complainant to 'corrective' remedies rather than giving rise to criminal penalties: *Citron* v *Zundel* (No 4) (2002) 41 CHRR D/274, para 38, para 295ff, at http://www.chrt-tcdp.gc.ca. For a detailed discussion on the difference between private and public see Chapter 5.

rather on the control Zundel asserted over the content of the site and thus by reference to Zundel's relationship to the webmaster, Dr. Ingrid Rimland.[148] In other words it was based upon the fact that Zundel in Canada caused the offending site to be published. Similarly, in the clearly penal case of *People* v *World Interactive Gaming Corp* the allegations against both defendants by virtue of New York penal law were at least partly founded upon the fact that the 'activity was transmitted from New York. Contrary to the... allegation of an Antiguan management company managing GCC, the evidence also indicates that the individuals who gave the computer commands operated from WIGC's New York office.'[149] In short, the State from which the activity in substance originated was New York.

Yet, just because the country of origin principle does not suffer from the same enforcement difficulties as the country of destination principle,[150] does not mean, as the cases above show, that States are prepared to surrender jurisdiction based upon the latter principle. This is even more the case in respect of certain types of crimes, which brings us to the third common denominator of the above decisions.

4.3.3. Lack of International Consensus: Moral and Cultural Values

All the above cases were concerned with controversial activities even in States which tolerate them, such as unlicensed gambling or the publication of Nazi propaganda. Yet, while controversial they concern activities in respect of which there is no international consensus as to whether and, if so, how to regulate them. For example while hate speech is tolerated in the US[151] and a criminal offence in France and Germany,[152] Canada and Australia have gone the middle way and

[148] *Zundel* v *Canada* 175 DLR (4th) 512 (1999) para 62-66. For the final decision and an overview of the case history see *Citron* v *Zundel* (No 4) (2002) 41 CHRR D/274..
[149] *People* v *World Interactive Gaming Corp* 714 NYS 2d 844, 850f (1999).
[150] The Tribunal in *Citron* v *Zundel* (No 4) (2002) 41 CHRR D/274, para 295-302, commented on the likely enforceability of the order and responded to the contention that mirror sites can easily defeat the order by noting that the order not only serves the purposes of prevention and elimination of discriminatory practices but also has a significant symbolic value. Approved in *Jones* v *Toben (including explanatory memorandum)* [2002] FCA 1150, para 111.
[151] *Brandenburg* v *Ohio* 395 US 444 (1969). The fact that the advocacy of racist theories is protected under the First Amendment to the US Constitution does not mean that the ideas themselves received judicial approval but rather that it was perceived that market-forces can more effectively deal with them. See David Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) 549.
[152] R 645-2 of *French Criminal Code* and ss.130 and 131 of *German Criminal Code*.

created a private cause of action in respect of it.[153] The approaches to the regulation of these activities reflect the States' national moral values and cultural identities.[154] So, in as much as the criminalisation of hate speech in France and Germany is consistent with their identity shaped by World War II, the US obsession with free speech - at times at the expense of other human rights - is deeply embedded in the fact that 'the United States was a nation born of dissent and distrust of government institutions.'[155] In other words, these cases invariably concern issues which are not only reflective of national values but in fact go to the very heart of the State's identity and throw a deep shadow over other concerns, such as overregulation of content providers and its implications for e-commerce or fairness to the individual and interstate relations.

5. Conclusion

Comparing the evolution of jurisdictional doctrines in respect of private and public law, it becomes apparent that in both fields the long arms of States have become longer with increasing globalisation. Yet, there are also important differences between the approaches, both of which have pros and cons. [156]

The first approach, as exemplified by the US decisions on adjudicative jurisdiction, seeks to provide fair and just results and therefore involves a meticulous analysis, evaluation and balancing of facts and interests. The doctrinal adjustment in response to the Internet clearly seek to accommodate the risks associated with too broad jurisdictional assertions. The pitfall of this approach is that the decision-making process becomes more and more refined as jurisdiction is based upon even subtler 'colour' variations, which makes it harder, if not impossible, to ensure consistency and thus fairness and justice. So in terms of regulatory solutions to the

[153] Section 13(1) of Canadian *Human Rights Act* and s.18C of *Racial Discrimination Act 1875 (Cth).*
[154] For other examples see Smith, above n 79, 525ff.
[155] Laura R Palmer, 'A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo' (2001) 26 *Yale Journal of International Law* 179, 205, where the author provides a comparison between the German and US approaches to free speech and their backgrounds.
[156] Note the differences are one of degree. As considerations of enforcement jurisdiction have influenced the outcome in private matters (see, for example, the Australian case of *Macquarie Bank Limited & Anor v Berg* [1999] NSWSC 526 discussed in depth in Chapter 6) so is, of course, the very existence of, for example, the effects doctrine in international law evidence that jurisdiction may be asserted even in the absence of enforcement power and that fairness demands that States can regulate activity by which they are substantially affected.

transnational Internet, it is vital to appreciate that better rules are not necessarily to be found in the most refined and all embracing, well balanced rules and that at times legal principles which are not overtly sensitive to all the various interests at stake but clear cut and thus capable of providing certainty and predictability, may in the final analysis be more just and desirable. It seems likely that with the steady rise in transnational activity, highly refined jurisdictional rules will be sidelined in favour of, and become fall-back/niche options to, more easily administered mainstream solutions.

The second approach, as exemplified by recent jurisdictional claims in respect of criminal matters, is less concerned about fair and just results but more about protecting existing public interests, and thus involves a readiness to find a basis for asserting jurisdiction when its exercise is likely to be effective; in other words holding on to the eggs in one's possession. So in some ways the lack of doctrinal developments in response to the Internet in respect of criminal jurisdiction, is in terms of its propensity to provide certain and predictable outcomes superior to those in private law. It could be argued that there is greater consistency and predictability in the context of criminal jurisdiction simply because without enforcement power, jurisdiction it is unlikely to be asserted. Furthermore it seems, that, when there is enforcement jurisdiction, States will exercise adjudicative jurisdiction (especially in respect of online activity which is contrary to its fundamental moral and cultural values) not only when the effects on the territory are intended and/or substantial, but upon the most tenuous basis. This blanket application of the effects doctrine/objective territoriality principle, tempered by the strict limits of enforcement jurisdiction seems more conducive to providing formal justice and therefore justice overall than the highly sensitised approach, driven by concerns of substantive justice, favoured in the private matters.

Yet, the 'might over right' approach is of course not without weaknesses which are similar to those of an exclusive country of origin approach, given that neither gives effective jurisdiction to the State most affected by the activity. This means that when a State has no enforcement jurisdiction there is little it can do, even in respect of online activity which has a significant effect on its territory. This clearly

disadvantages States with a smaller online presence. It also means the effectiveness of existing equivalent offline regulation is severely compromised. Secondly, basing jurisdiction largely on might rather than right, origin rather than destination, encourages online content providers to minimize regulatory compliance cost by avoiding a presence, for example through a subsidiary, in targeted jurisdictions,[157] opting instead for regulatory havens analogous to tax havens and flag ship States. Last but not least, there is something decidedly regressive about 'a legal doctrine which sanctions the test of physical power... [It is] retrograde and parochial in character and should be firmly rejected.'[158]

Ultimately, this chapter highlights that allocating regulatory competence on the basis of location of person, things or conduct is becoming increasingly difficult to the extent that location has ceased to be a significant natural confinement of person, things and conduct. In other words, as colour ceased to be a useful concept in distinguishing between eggs, so does location gradually pass its use-by-date as a criterion for distinguishing between conduct. Indeed, contemplating the egg story, one cannot help but wonder whether a fairly radical overhaul of allocating regulatory competence is not the only sensible solution to deal with the innumerable multi-coloured events. The traditional type of solutions to these events arose because they were exceptional; if non-primary coloured eggs had been as common as primary coloured eggs right from the outset it seems inevitable that an industry dedicated to them would have developed alongside the other industries. Furthermore the traditional solutions to these 'difficult' events also build upon and reflect that exceptional nature, simply by subjecting them to a special analysis. So it may be argued that once transnational events are commonplace, possibly as common as territorially limited events (which is not to say that this *is* the case) squeezing them into a system designed to handle the one-off occurrence is highly inefficient. Yet, however inefficient the current jurisdictional regimes may be, given the resistance of law to anything but incremental change, as was illustrated in the

[157] This means that companies such as e-bay which operate from one territory only are in a more favourable position than companies such as Yahoo! Inc which have set up subsidiaries in their targeted markets which comply with the relevant laws.
[188] F A Mann, 'Conflicts of Laws and Public Law ' (1971) 132 *Receuil* des Cours 107, 121.

previous chapter, a radical overhaul of jurisdictional rules is likely to be a long-term process.

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Chapter 4: Constructive Notice and Actual Notice

1. Introduction

This chapter looks at the issue of predictability of legal obligations on the transnational Internet from yet another angle. In the previous chapters it was argued firstly that the imperatives of legal certainty and predictability necessitate an evolutionary development of law even if confronted with a radically new phenomenon and secondly that the consequential fine-tuning of rules based upon an increasingly inappropriate criterion, as has occurred in the private law context, makes it more and more difficult to achieve overall consistency and thus threatens the very certainty it is designed to maintain. For the most part the previous chapters have not sought to explain why exactly the Internet has created such unprecedented pressure upon jurisdictional rules, but have taken the new legal developments in response to the Internet at face value and sought to explain them from a jurisprudential perspective. What the characteristics of the Internet are which make it jurisdictionally so problematic is explored in the following chapters. This chapter focuses on the territorial indeterminacy of online conduct, and the problems it creates for the predictability of legal consequences of online behaviour. Do or can individuals know the location of those with whom they are interacting and thus foresee the exposure to legal rules of the relevant State? It will be shown how this issue has critical consequences both in terms of upholding the rule of law and of securing efficient legal rules.

In 'Law and Borders - The Rise of Law in Cyberspace'[1] Johnson and Post argue that the Internet undermines the feasibility and legitimacy of laws based on geographic boundaries. Their argument has several strands, one of which is based on the sign-post function of State boundaries, that it can be 'perceived by the one who crosses it'[2]:

> '*Notic*e. Physical boundaries are also appropriate for the delineation of "law space" in the world because they can give notice that the rules change

[1] David R Johnson and David Post, 'Law and Borders - The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1357.
[2] Ibid 1379.

> when the boundaries are crossed. Proper boundaries have signposts that provide warning that we will be required, after crossing, to abide by different rules, and physical boundaries - lines on the geographic map - are generally well-equipped to serve this signpost function.'[3]

They argue that given '[I]ndividuals are unaware of the existence of those borders as they move though virtual space'[4], State borders no longer fulfil their function of warning individuals that they have entered a new regulatory space, which in turn makes it inherently unfair to subject them to the laws applicable in that space:

> '[h]aving a noticeable border may be a pre-requisite to the establishment of any legal regime that can claim to be separate from pre-existing regimes. If someone acting in any given space has no warning that the rules have changed, the legitimacy of any attempt to enforce a distinctive system of law is fatally weakened. No geographically-based sovereign could plausibly claim to have jurisdiction over a territory with secret boundaries.'[5]

This argument about the lack of notice has frequently been echoed in the academic literature on the legal implications of the global Internet often by reference to the territorial indeterminacy of the Internet,[6] and its correctness seems self-evident in that individuals surfing the Internet indeed often do not know, and have little opportunity to find out, which State they have 'entered'. Yet, at the same time, it is clear that States across the world have prescribed and applied laws to the online world. The critical issue this raises, and which this chapter addresses, is whether States, in subjecting foreign online providers to their substantive laws and adjudicative processes, have been insensitive to Johnson and Post's argument about the absence of notice in cyberspace and thus undeterred by arguments based on fairness and legitimacy. To do this, this chapter first explores the relevance of notice within law generally, and then proceeds to analyse to what extent it exists in cyberspace and is incorporated in legal rules purporting to apply to online conduct. In practical terms this chapter deals with the risk management question of whether online actors can protect themselves against unpleasant legal

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[3] Ibid 1370.
[4] Ibid 1375.
[5] Ibid 1379, fn 33.
[6] Sanjay S Mody, 'National Cyberspace Regulation: Unbundling The Concept of Jurisdiction' (2001) STJIL 365; Dan L Burk 'Jurisdiction in a World Without Borders' (1997) 1 *Virginia Journal of Law and Technology* 1522, para 14ff, at http://vjolt.student.virginia.edu/; see also *ACLU* v *Reno* 929 F Supp 824, 859ff (ED Pa 1996).

surprises, as well as of how they may reduce the potential regulatory burden arising from going online to an acceptable level.

Before turning to the role of notice within law generally, let us briefly examine Johnson and Post's argument. They assert that because in the online world there are no borders corresponding to the State borders in the physical world, individuals do not know which regulatory space they have entered and thus cannot predict their legal exposure. The prima facie validity of this argument depends on whether online conduct, or more specifically the publication of a website, attracts 'jurisdiction everywhere' or 'jurisdiction anywhere'. Is the problem that the law of *every* State *does* apply to every website or online conduct or is it that the laws of *any* State *could* apply to it and content providers cannot know which one or ones in particular? Both arguments raise issues relating to notice, albeit of different kinds.[7] The first interpretation, namely that online content providers are subject to the laws of every State, creates certainty as to constructive notice, as to what content providers ought to know, ie. the relevant laws of every State[8] and in fact totally eliminates the notice problem Johnson and Post envisage. Some argue that that world-wide jurisdiction is the price you pay for going online.[9] Yet, this argument seems untenable simply because it is unrealistic. Most content providers, not being

[7] The Internet creates yet another problem relating to notice which is the problem of identifying and locating wrongdoers. This is an extension of the problem relating to constructive notice: to the extent to which online actors are unable to locate those with whom they are interacting and thus predict their legal exposure, they also have problems to make them legally accountable once a dispute arises. This problem is illustrated by recent online defamation cases *Totalise plc* v *Motley Fool Ltd and Another* [2001] 4 EMLR 750; *Airways Corporation of NZ Ltd* v *Pricewaterhouse Coopers Legal &* Anor [2002] NSWSC 138 (8 March 2002); *Godfrey* v Demon *Internet Ltd* [2001] QB 201. See also discussion of problem in Graham J H Smith, *Internet Law and Regulation* (London: Sweet & Maxwell, 3rd ed, 2002) 242ff.
Rarely does is this difference acknowledged see eg. Dow Jones & Company v Gutnick M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au, 25f.

[8] See eg Hague Conference on Private International Law, *The Impact of the Internet on the Judgments Projects: Thoughts for the Future*, Prel Doc No 17 (2002) submitted by Avril D Haines, at http://www.hcch.net/e/workprog/jdgm.html, 18, noting: 'In addition to the problems faced with regard to identifying where the "act or omission" causing the injury occurred and where the injury "arose", a defendant would have difficulty, given the nature of the Internet, in proving that it was not "foreseeable"... that someone would be able to pull up the content of his or her web page in any country. Either every jurisdiction is foreseeable or no jurisdiction is foreseeable...'

[9] For example, Clive Gringas, *The Laws of the Internet* (London: Butterworth, 1997) 116: 'The Internet's advantages include that there is little increase in marginal cost to distribute throughout the world. If it is useful information, the global reputation of the provider will increase; if it is defamatory information, the global reputation of the victim will decrease. That this is somehow 'unfair' or 'prejudices the Internet, does not take into account that one cannot expect to reap the rewards from global distribution without bearing its risks.' (emphasis in the original). See also eg. *Young* v *New Haven Advocate* 187 F Supp 2d 498, 508f (WD Vir 2001): '[T]he defendants argue that it would be unfair to subject them to worldwide jurisdiction simply because they placed information on the Internet... Again, this court disagrees.'

resource-rich multinational companies, would be hard pushed to have *actual notice* of the laws of two jurisdictions, let alone the laws of all jurisdictions. To expect them to know and comply with the laws of all States would be unrealistic[10] and create ineffective laws and discredit the legal systems as a whole. Nevertheless the question remains as to what judges and legislatures have made of this proposition. As was shown in the previous two chapters, at least in respect of transnational private law, the proposition of 'jurisdiction everywhere' has been firmly rejected both on doctrinal and policy grounds.[11] On the other hand, the jurisdictional approach taken in respect of public or criminal law often seems to come very close to endorsing world-wide simultaneous jurisdiction on the basis of mere accessibility.

The second interpretation of Johnson and Post's argument, according to which the laws of any State(s) *could* apply to online conduct and content providers cannot know which one or ones in particular, also raises problems in terms of notice, but this time of the constructive type, referred to by Johnson and Post: because online providers do not know the location of those with whom they are interacting or who interact with their site they may inadvertently be exposed to the laws of those persons' jurisdictions, laws about which they could not have known. This argument is based upon the factual assumption that content providers do not and cannot know the location of those with whom they are interacting and the legal assumption, that regardless of whether they do or could know, they would be exposed to the laws of that State. To what extent these assumptions are justified will be analysed below. It may already though be foreshadowed that the online phenomenon creates problems both in terms of foreseeability of legal exposure as well as in terms of the regulatory burden arising from having to know and comply

[10] In rare instances it would also be logically impossible for content providers to comply with the laws of two or more States. Such situations occur when the law of one State requires what the law of another State forbids. Generally, the conflicts, most likely to arise, are where one State imposes a more stringent duty than another State, which means that content providers can comply with both laws by complying with the more stringent one.

[11] See Chapter 2 where it was argued that such assertion would be doctrinally unsound. See also *McDonough v Fallon McElligott, Inc*, 40 USPQ 2d (BNA) 1826, 1829 (SD Cal 1996) where the Court stated: 'Because the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists.' Recently affirmed in *ALS Scan Inc v Digital Services Consultants Inc* (4th Cir No 01-1812, 14 June 2002). But note Haines, above n 8, 17, noting that the proposal to prohibit any jurisdictional assertion based solely on the accessibility of an Internet site with nothing more, was rejected in the second expert group meeting in Ottawa.

with the laws of multiple, even if not all, jurisdictions. Both these problems, but in particular the latter, can only be addressed in an efficient way either through legal harmonisation or through territorial zoning of online conduct.

2. Notice within Law Generally

2.1. Constructive Notice and the Rule of Law

In most legal systems there is a maxim to the effect that 'ignorance of the law is no defence': regardless of whether or not you actually knew, or were conscious, of the legal consequences of your actions you may be held legally accountable for them. This appears a fair maxim in that it prevents individuals from relying on their ignorance in avoiding responsibility for their actions and, by implication, rewarding the ignorant while punishing the knowledgeable. At the same time it creates an incentive for individuals to familiarise themselves with their legal obligations. While this is fairly uncontroversial, this maxim cannot be seen in isolation from another feature of any legal system which seeks to uphold the rule of law. This feature is that individuals are generally not held accountable for their actions unless they are on constructive notice of the legal consequences which attach to alternative courses of conduct.

The rule of law may broadly be defined as a political ideal, according to which 'people should obey the law and be ruled by it'.[12] For people to obey the law, according to Raz,

> 'the law should be such that people will be able to be guided by it... the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it.'[13]

So, as a matter of fairness and fundamental justice, the maxim that ignorance of the law is no defence goes hand in hand with the requirement that there must not be secret laws and that a legal system should be such as to allow individuals the

[12] Joseph Raz, 'The Rule of *Law* and its Virtue' (1977) 93 *Law Quarterly Review* 195, 196.
[13] Ibid 198.

opportunity to find out about the rules and to make informed decisions whether to comply with them or take the risk of sanctions for non-compliance. So what does this entail for legal rules and a legal system? From a practical point of view it certainly entails that individuals have access to relevant legal resources. The House of Lords referred to this requirement in *Fothergill* v *Monarch Airlines Ltd*:

> '[e]lementary justice... demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.'[14]

Yet, access to the law by itself is of little use if the substance of law, its application or currency is unclear. In such circumstances individuals would be prevented from ascertaining what legal consequences would attach to potential courses of action. So Raz persuasively argues that the rule of law also requires that:

> '(1) *All laws should be prospective... and clear.* One cannot be guided by a retroactive law. It does not exist at the time of action... If it is to guide people... its meaning must be clear. An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it. (2) *Laws should be relatively stable.* They should not be changed too often. If they are frequently changed people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it is. But more important still is the fact that people need to know the law not only for short-term decisions...but also for long-term planning. Stability is essential if people are to be guided by law in their long-term decisions.'[15]

These requirements of prospectivitity,[16] relative clarity and stability of law not only ensure that the law and thus the lives of those governed by it are predictable, but are expressions of the extent to which the legal system respects human dignity and autonomy, which 'entails treating humans as persons capable of planning and plotting their future.'[17] In other words the requirement that individuals should prospectively be able to take notice of the relevant legal rules, are not mere

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[14] *Fothergill* v *Monarch Airlines* [1981] AC 251, 279. See also McMahon, 'Improving Access to the Law in Canada' [1999] *Computerisation of* Law Resources 3, at http://ww.austlii.edu.au.
[15] Raz, above n 12, 198f.
[16] Where law is applied retrospectively, this is often justified by recourse to arguments based on natural law. See eg. H L A Hart, *The Concept of* Law (2nd ed, Oxford: Clarendon Press, 1994) 208: 'It is in this form that Natural Law arguments were revived in Germany after the last war in response to the acute social problems left by the iniquities of Nazi rule and its defeat.' See also Deryck Beyleveld, Richard Kirkham, David Townend, 'Which Presumption? A Critique of the House of Lord's Reasoning on Retrospectivity and the Human Rights Act' (2002) 22 *Legal Studies* 185, esp 190f.
[17] Raz, above n 12, 204.

niceties or pretty decorative touches attaching to legal systems, but reflect fundamental values which most States, and in particular Western democratic society, claim to treasure.

So for the purposes of this discussion the overall question is to what extent individuals acting on the global Internet can order their affairs with relative legal certainty, given their exposure to laws of multiple, and potentially all, jurisdictions.[18] Or put differently, to what extent do States make allowances for the possibility that an individual could not have known that his or her online behaviour entailed legal consequences in the particular State? Johnson and Post's argument is to the effect that, because individuals do not have factual notice of where their conduct occurs, of where the party interacting with them is located, they cannot possibly have constructive notice of which State law is applicable to them. But is this the case?

Before turning to that question, it is worth mentioning another related implication of the requirement of prospective notice of legal rules which shows the wider context within which the issue analysed in this chapter falls. This aspect is not concerned with the issue of fairness to individuals but rather the effectiveness of law generally. It looks at the notice requirement not from the perspective of those subject to the law, but rather from the perspective of those seeking to enforce it. It highlights that while, as a matter of fairness, individuals should not be exposed to the laws of which they have not had at least c*onstructive* notice, the effectiveness of direct regulation ultimately depends on the majority of those to be affected by them having a*ctual* notice of the relevant rules.

2.2. Actual Notice and the Effectiveness of Law

[18] For an article which considers the rule of law in the context of jurisdiction see Brian R Opeskin, 'The Price of Forum Shopping: A Reply to Professor Juenger' (1994) 16 *Sydney Law Review* 14 where Opeskin argues that legal rules which encourage forum shopping sit uneasily with the rule of law as they do not promote predictability. He also refers to the exposition of a system of conflicts of law shaped by the rule of law by Savigny in FC Von Savigny, *Private International Law: A Treatise on the Conflict of Law* (first published 1848, 2nd Guthrie trans, 1988) 69ff, 120.

A rule of law is effective, in the sense of achieving the purpose[19] which it is designed to achieve, if it is conformed to. Such conformity need not be 100 per cent, but generally an effective rule of law is one which 'is obeyed more often than not.'[20] Yet, how do you achieve obedience or conformity to a particular rule?[21]

As Lessig points out, regulators are frequently more successful in achieving a desired outcome not by having recourse exclusively, or at all, to prohibitive rules backed by ex post sanctions, but by using indirect laws which affect other possible constraints in the form of social norms, the market and the architecture within which the to-be regulated conduct occurs.[22] An advantage of such indirect legal responses to a perceived problem is that the prohibitive rules are either unnecessary or face an environment within which conformity is already largely established.[23] One of the examples Lessig uses to illustrate this is that of a government wanting people to use seatbelts. It may do so by making it an offence not to use a seat belt (direct regulation), educating the public on the benefits of seat belts (ie. influencing social norms), subsidising insurance companies to give better rates to seat belt wearers (ie. influencing the market) or by mandating automatic seat belts (ie. influencing architecture).[24] Interestingly for this discussion, one problem (or advantage as the case may be) of regulating conduct indirectly is transparency, or rather the lack of it. As Lessig notes:

> '[t]he state has no right to hide its agenda. In a constitutional democracy its regulations should be public. And thus, one issue raised by the practice of indirect regulation is the general issue of publicity. Should the state be permitted to use non-transparent means when transparent means are available?'[25]

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[19] Note that Raz distinguishes between direct and indirect purposes, arguing that only the realisation of the direct purposes is inextricably linked to conformity to the rule of law. Raz, above n 12, 207.

[20] Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1946) 39: 'Efficacy of law means that men actually behave as, according to the legal norms, they ought to behave, that the norms are actually applied and obeyed.'

[21] In this chapter the terms 'conformity' and 'obedience' are used interchangeably denoting behaviour which is in accordance with the law, or, in psychological terms, with the 'abdication of initiative to an external source.' Stanley Milgram, *Obedience to Authority* (London: Tavistock, 1974) 114, where he also highlights the differences in the meaning of obedience and conformity.

[22] Lawrence Lessig, Code and *Other Laws of Cyberspace* (New York: Basic Book, 1999) 90ff.

[23] A question which may be worth further exploration is whether, in what circumstances and why direct regulation may be the most appropriate regulation. The discussion here is based upon the assumption that direct regulation will still play some part in the future regulation of the online world.

[24] Lessig, above n 22, 93f. See also below n 180.

[25] Ibid 98.

He then goes on to say:

> '[i]ndirectly... the government can achieve regulatory ends, often without suffering the political consequences that the same ends, pursued directly, would yield. We should worry about this. We should worry about a regime that makes invisible regulation easier.'[26]

Lessig's analysis shows that the effectiveness of indirect regulation, that is regulating the relevant market, social norms and architecture, does not depend on the visibility of the law and at times even positively benefits from its invisibility, however controversial.[27] In other words, conformity may be achieved in such instances without individuals having actual notice of the content or even the existence of the relevant laws, with their choices between possible alternative courses of action being directed one way or another by market forces, social norms and architecture.

As much as visibility of the law is not a pre-requisite for the effectiveness of indirect regulation, it is essential for direct regulation, which is not surprising given that in these cases the law is not channelled through an external order such as the market or social norms, but is sought to impact on conduct directly. As will be shown now, whatever theory one may advance why people obey direct regulation and thus how to ensure its effectiveness, they all build, as a minimum pre-requisite, upon the actual visibility of, and familiarity with, the law amongst those whose conduct is sought to be affected by it. Such actual notice of legal rules is even more indispensable if non-legal constraints such as the market cannot be relied upon, or shaped, to achieve a desired behaviour.

The traditional Austinian, and probably still most commonly held view,[28] is that the fear of sanctions (or in Bentham's terminology the fear of pain[29]) provides the

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[26] Ibid 99.

[27] Ibid 96, citing as an example the Reagan administration's indirect strategies to reduce the number of abortions.

[28] Johnson and Post appear to share this view: 'Law-making requires some mechanism for law-enforcement, which in turn depends on the ability to exercise physical control over, and impose coercive sanctions on, law-violators.' Johnson and Post, above n 1, 1369. See also Christopher Reed, *Internet Law: Text and Materials* (London: Butterworths, 2000) 252: 'Laws which are unenforceable have two major defects; not only do they fail to deal with the mischief which the law seeks to remedy, but the knowledge that they are unenforceable weakens the normative force of other laws.' In the context of businesses, the widely held law-as-price theory suggests that businesses obey or do not obey the law (and are justified in doing so) depending purely on

necessary inducement for obedience - so not the actual sanction being applied, but the threat of it. Clearly, this can only work if individuals have notice about the nature of the sanction and in what circumstances it may arise:

> '[t]his punishment then... in order to produce its effect must in some manner or other be announced: Notice of it must in some way or other be given, in order to produce an expectation of it, on the part of the people whose conduct it is meant to influence.'[30]

In other words, the effectiveness of the law in question depends on publicising the content of the rule in question as well as the sanctions for the breach of it, so that individuals are not only conscious of the legal consequences that may attach to certain conduct, but also know how they can avoid being subjected to it. If this theory holds true, an immediately obvious problem in the online context is the territorially limited reach of the State's enforcement power, which would mean that foreign online actors have, in the absence of, for instance, market forces, no motive to comply with laws which cannot be enforced against them. But, of course, this concern only exists if obedience is in fact only or largely based on the fear of a likely sanction being imposed in the case of non-compliance.

Many eminent legal philosophers and legal sociologists[31] have disputed that people obey law because of sanctions. For example, Hart argues that sanctions are:

> 'required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall.'[32]

So he suggests that obedience to the law is generally voluntary, based upon, for example, a cost-benefit analysis,[33] a disinterested interest in the welfare of others

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whether conformity or violation, as the case may be, would be profitable to the firm. For a criticism of this view see Cynthia A Williams, 'Corporate Compliance with the Law in the Era of Efficiency' (1998) 76 *North Carolina Law Review* 1265.

[29] H L A Hart, Essays on Bentham (Oxford: Clarendon Press, 1982) 109, 127ff (where he also refers to the prospect of a reward for compliance as a possible motive for obedience).

[30] J Bentham, edited by H L A Hart, *Of Laws in General* (London: Athlone Press, 1970) 134. The expectation aroused in the would-be offender must be that in the event of his failing to conduct himself in the manner required the infliction of pain on him is probable or likely: Ibid, 132.

[31] For example, Eugen Ehrlich in Kelsen, above n 20, 24ff.

[32] Hart, above n 16, 198 (emphasis in the original).

[33] It may be argued that would-be violators engage in a cost-benefit analysis when they weigh the likelihood of sanctions against the benefit arising to them from non-compliance.

or a respect for the rules themselves.[34] This last motive, namely that the idea of law itself furnishes a motive for lawful conduct,[35] seems to be captured by what Austin calls habitual obedience.[36] Kelsen also, although doubting that it provides the only motive for obedience, [37] seems to acknowledge its relevance when he states:

> '[i]n all probability, however, the motives of lawful behavior are by no means only the fear of legal sanctions or even *the belief in the binding force of the legal rules.*'[38]

But what does the belief in the binding force of legal rules as a motive for obedience actually entail? In experiments Milgram carried out, he showed that, firstly, individuals may voluntarily obey a command in the absence of sanctions and concurrent moral beliefs and secondly, that they do so (at least to a large extent) because the command comes from what they perceive to be a legitimate authority:[39]

> 'wherever possible, society tries to create a sense of voluntary entry into its various institutions... Wherever people will comply with a source of social control under coercion (as when a gun is aimed at them), the nature of obedience under such circumstances is limited to direct surveillance. When the gunman leaves, or when his capacity for sanction is eliminated, obedience stops. In the case of voluntary obedience to a legitimate authority, the principal sanction for disobedience comes from within the person. They are not dependent upon coercion, but stem from the individual's sense of commitment to his role.'[40]

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[34] Hart, above n 16, 197.

[35] Kelsen, above n 20, 40, notes though at 15: '[t]here are hardly any norms whose purport appeals directly to the individual whose conduct they regulate so that the mere idea of them suffices for motivation'

[36] J Austin, edited by H L Hart, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1954) 198: 'The bulk of the given society are in a habit of obedience or submission to a determinate and common superior...' (emphasis in the original); But note DA Freeman '*Milgram's Obedience to Authority - Some Lessons for Legal Theory*' [1979] 1 *Liverpool Law Review* 45, 54: 'Austin does not deny this essential element of legitimacy: his habit of obedience is recognition that coercive commands will fail if the commander does not also command broad social acceptance. Yet few would deny that the concept of authority is insufficiently delineated in Austin's theory.'

[37] Kelsen, above n 20, 24. He also averts to what Lessig would call market forces, saying that a person may pay his or her debts based on the fear of a commercial sanction in the form of a loss of credit rather than because of a fear of legal sanction for non-payment; or what Lessig would call social norms, saying that lawful behaviour might be induced by moral or religious beliefs which may require the same conduct as that required by the legal rule.

[38] Ibid (emphasis added).

[39] Milgram, above n 21, 138f, also at 8: 'it is a fundamental mode of thinking for a great many people [that] once they are locked into a subordinate position in a structure of authority' that they comply with the demands made by that authority.'

[40] Ibid 140f.

Critically, '[i]t is the appearance of authority and not actual authority to which subjects respond.'[41] For the purposes of this discussion this insight is instructive as it suggests that voluntary obedience may be achieved by giving individuals notice of the relevant legal rules, making them familiar with the content of the law. However, in the Internet context what may (in terms of achieving conformity) be problematic, as far as rules originating from foreign States are concerned, is whether individuals believe that the foreign rule (albeit obligatory in that State) is also obligatory in respect of them, quite regardless of whether a State has in fact the legal right to require compliance. This concern is exacerbated if, as some suggest, the existence of a sanction leads to the recognition that obedience to the rule is obligatory,[42] given that in the international context the availability of sanctions (ie. enforcement jurisdiction) frequently does not go hand in hand with legitimate extensions of legislative or adjudicative jurisdiction.[43] Again, this concern is only of significance to the extent to which perceived legitimacy of the regulation (and its possible dependence upon the existence of sanctions) indeed triggers obedience.

Without having to reach a conclusive answer to the question of why people obey laws, the following may be concluded. Firstly, while the effectiveness of indirect regulation of conduct (through regulating the market, social norms or architecture) does not depend on those whose conduct is intended to be affected, having notice of the legal rules, the visibility and actual notice of legal rules, amongst those who are to be affected by them is essential for direct regulation. It is a minimum prerequisite for their effectiveness, that is for widespread conformity. The need for such visibility and familiarity is based (depending on which theory one adopts) on the need to induce a fear of sanctions, which presupposes that sanctions are

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[41] Ibid 140.

[42] Freeman, above n 36, 53. But contrast Goodhart, *English Law and the Moral Law System* (London: Stevens & Son, 1955) 17: 'it is because a rule is regarded as obligatory that a measure of coercion may be attached to it; it is not obligatory because there is coercion.'

[43] This concern is implicit in Raz' critique of Austin's definition of law in Joseph Raz, *The Concept of a Legal System* (Oxford, Clarendon Press, 1970) 14f: 'Of course Austin knows that 'in many cases the positive law of a given independent community imposes a duty on a stranger'. He explains the difficulty by introducing the concept of partial or limited membership in a society. A stranger is a partial member in so far as he is susceptible to the sovereign's power. Instead of saying that only commands addressed to subjects are law, it would be more precise to say that a command *is law only if it is* addressed *to people who are likely to suffer the prescribed sanction, in case this should* become necessary.'(emphasis added, footnotes omitted)

available, or, alternatively, on the need to trigger what may be called habitual obedience, which presupposes that those who are to be regulated by the rules regard them as obligatory for themselves. Neither may such presupposition be taken for granted in the international context of the Internet. Thus, because foreign online actors may lack motives for compliance, even if they have actual notice of the relevant obligation, questions arise as to the governability of the Internet by direct regulation. More specifically, it raises questions as to what extent States, in attempting to regulate transnational online conduct effectively, can and should rely on indirect regulation and whether and, if so, how States can achieve compliance with direct regulation abroad. These questions, for reasons of scope, will not explicitly be addressed in the following discussion.

The above discussion highlights that, for direct regulation to meet the requirements of fairness and effectiveness, both constructive and widespread actual notice of the rules amongst those subject to them are minimum pre-requisites. The following discussion will analyse to what extent these two pre-requisites are satisfied in the transnational environment of the Internet: do States take sufficient account of the fundamental requirement that individuals should only be subjected to laws, exposure to which they could have predicted? The answer to this question touches upon the issue as to whether individuals do *actually* have notice of these laws and, if so, whether they *actually* comply with them more often than not. So if an individual cannot even be said to be on constructive notice of the relevant law, it is unlikely (although not impossible) that he or she would have actual notice of it. Of course, this does not mean that constructive notice of legal rules ensures that individuals are actually aware of them.

3. Constructive Notice and Jurisdiction over Online Conduct

In the transnational context the question of which law is applicable to what conduct is answered in respect of private matters by the national regimes of private international law and in respect of public matters by the jurisdictional rules of public international law. As these regimes vary, they will be addressed separately below, but, before that, it should be recalled that any jurisdictional rule 'is an odd creature

among laws. It never tells what the result will be, but only where to look to find the result.'[44] So although jurisdictional rules by themselves comment little on the merit of the substantive rules and legal regimes in question, unpredictable regulatory competence cannot but blemish any legal regime as a whole. If jurisdictional rules as applied to the Internet are such that online actors cannot know where to look to find out about the legal consequences of their actions, then the most well-balanced and just substantive national legal rules cannot but be tainted. The predictability of a legal system must be judged by its weakest link.

3.1. Private Law

Transnational private conduct is governed by the national rules of private international law which stipulate various factors that sufficiently connect particular conduct with the State so much as to justify the application of forum procedural and/or substantive law. While these rules vary depending on the type of dispute and between States, there is nevertheless one almost universally accepted overarching concern all principles of private international law have in common, and that is 'to meet the reasonable expectations of the party or parties to the transaction.'[45] So the principles of private international law do not merely take into account the reasonable expectations of the parties, but meeting those expectations is in fact their very objective: predictability or foreseeability is a cornerstone of private international law. The 'reasonableness' qualification to the 'expectations' means that it does not matter what the parties actually subjectively expected but rather what they reasonably or objectively should have expected or foreseen, ie. constructive rather than actual notice of the relevant legal

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[44] Brainerd Currie, *Selected Essays in the Conflict of Laws* (Cambridge: Cambridge University Press, 1963) 170.

[45] *P* N Nygh, *Conflicts of Law in Australia* (6th ed, Sydney: Butterworths, 1995) 33. See also the relatively recent case of *John Peiffer Pty Ltd* v *Rogerson* [2000] HCA 36, para 87 where the High Court Of Australia favoured as the governing law in intrastate torts disputes the *lex loci delicti* principally because it gives effect to the reasonable expectations of the parties.
This objective is clearly reconcilable with most theories advanced for conflicts resolution such as the vested or acquired rights theory, according to which the forum court merely recognises as legal fact rights which are already acquired by the person in the foreign State. Similarly, under the local law theory, according to which the forum always only enforces its own law, foreign law may be taken account of, for reasons of social expedience and practical convenience. Yet, it is far less easily reconcilable with theories dominant in the US which have focused on respective governmental interests and thus not surprisingly have been criticised as being unpredictable, favouring the forum and flawed in principle for focusing on State interests rather than parties' rights. Ibid 24ff; J G Collier, *Conflict of Laws* (3rd ed, Cambridge: Cambridge University Press, 2001) 385. This approach has not been endorsed in Australia: *McKain* v *R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 38f.

consequences.[46] Saying that the rules of private international law are intended to meet the reasonable expectations of the parties does not of course mean that they are successful in doing so. How successful they are, particularly in the online environment, will be discussed below by reference, for reasons of scope, mainly to the rules of adjudicative jurisdiction.[47] Yet, already it can be asserted that to the extent to which they are successful (meaning being in accordance with what parties ought reasonably have known, foreseen or expected), Johnson and Post's concern based on lack of notice is unfounded at least in respect of transnational private law and disputes.

3.1.1. Foreseeability and Contractual Choice

If online actors can choose the law or court of a particular State (to the exclusion of those of other States) to which they wish to be subject, in anticipation of a possible dispute, it can hardly be said they have no prior warning of the legal consequences of their actions in the event of a dispute or where to look to find the result. Such choice is available and routinely used in respect of contractual relationships in the form of choice-of-law or choice-of-forum clauses.[48] The national regimes of private international law do not just supply these clauses (as well as implied choices) with their prima facie validity, but generally treat them with respect. So parties enjoy, but for a number of varying exceptions, autonomy in terms of choosing the forum

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[46] But note Larry Kramer, 'Rethinking Choice of Law' (1990) 90 Columbia Law Review 277, 336, where the author argues that 'the existence of "reasonable expectations" is not an objective question... [but] masks normative judgments reflecting what a court believes the parties ought to expect.' It is of course beyond doubt that what is reasonable is not unconnected with time and place and the cultural, social and political climate of the day which the judge seeks to reflect in his/her determination.

[47] The question of whether a court is competent to adjudicate a dispute is highly important, even though the court may not apply the law of the forum to the dispute. See Andrew Beech, 'Discretion in the Exercise of Jurisdiction: Recent Developments' (1989) 19 Western Australian Law Review 8, 21 where the author argues that beyond the practical burden on one of the parties of having to litigate abroad, the place of litigation often affects significantly the substantive outcome of the case given (1) the application of forum law to procedural matters eg. quantification of damages, (2) the application of forum choice of law rules (3) the potential exposure to forum mandatory laws irrespective of the applicable law according to ordinary choice of law principles. See also Michael C Pryles, 'Internationalism in Australian Private International law (1989) 12 Sydney Law Review 96, 106, in which the author also refers to the homeward trend of judges, ie. 'a natural tendency on the part of judges and lawyers to prefer their own laws and legal institutions to those of foreign countries.' The Law Reform Commission, Choice of Law, Report No 58 (1992) 1.13-1.15.

[48] In addition contracts may also include arbitration clauses which appear popular at least amongst US Internet businesses: Elizabeth G Thornburg, 'Going Private: Technology, Due Process, and Internet Dispute Resolution' (2000) 34 UC Davis Law Review 151, 179ff. Cf Julia Hoernle, 'Online Dispute Resolution in Business to Consumer E-commerce Transactions' (2002) 2 Journal of Information, Law and Technology, at http://elj.warwick.ac.uk/jilt/02-2/hornle.html

in which they wish the case to be heard,[49] for example in Australia by virtue of the rules of the respective courts,[50] in the EC by virtue of Art 23 of *EC Regulation* on *Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [hereafter *EC Regulation*][51] and in the US as stated in s.32 of *Restatement (Second) of Conflict of Laws (1971)*.[52] In terms of notice, the legal recognition of these clauses means that the law does not merely rely on the reasonable expectations of the parties (constructive notice) but recognises what can be presumed to be their actual expectations.[53] Indeed, the parties' presumed familiarity with the chosen law (whether procedural or substantive) has been advanced as one justification for respecting their choice,[54] which incidentally explains why in situations where the bargaining power is unequal and the weaker party is forced to agree to substantive or procedural laws with which he or she is not familiar, contractual autonomy has frequently been restricted.

Given the certainty those clauses prima facie provide it is not surprising that they have been embraced by Internet businesses.[55] If goods sold online are not merely sold to customers from certain States but sold worldwide, such clauses prima facie remove the need for determining, learning and complying with the law of all customers.[56] But as foreshadowed above, such clauses do not provide absolute certainty, given that their validity is subject to exceptions even in States such as

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[49] For equivalent positions in respect of choice-of-law or prescriptive jurisdiction see: Australia: *BHP Petroleum Pty Ltd v Oil Basin Ltd* [1985] VR 725; EC: Art 3 of *EC Convention on the Law Applicable to Contractual Obligations (1980, Rome)* [hereafter *Rome Convention*]; US: ss.186-187 of *US Restatement (Second) of Conflicts of Law (1971)*.

[50] Australia eg. s.10.1A (1)(h) of *Rules of the Supreme Court of NSW (1970)*: 'originating process may be served outside Australia... where the proceedings are proceedings in respect of which the person to be served has... agreed to submit to the jurisdiction of the Court'.

[51] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; *Official Journal L 012 , 16/01/2001 P. 0001 - 0023*; in force since 1 March 2002. In England, unless the *EC Regulation* applies, R 6.15 of *Civil Procedure Rules*, according to which service out of jurisdiction maybe permitted in respect of a contractual dispute, if the contract contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract. In *British Aeropace plc v Dee Howard Co* [1993] 1 *Ll R* 368 it was held that in such cases the proceedings are brought as of right.

[52] See also Comment 'e. Consent before action brought' to s.32.

[53] The Law Reform Commission, above n 47, 8.4.-8.5 making the observation in the context of the contractual freedom to choose the law rather than the forum.

[54] Ibid. *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277. The neutrality of the chosen law has been advanced as another justification: *British Controlled Oil Fields v Staff* [1921] WN 319.

[55] Thornburg, above n 48, 179.

[56] Thornburg, above n 48, 180.

the US known to strongly embrace party autonomy.[57] The very existence of these exceptions, combined with the fact that they significantly vary between national laws,[58] entails that online providers, trying to minimise risk, need after all to be aware of the law relating to 'party autonomy' of the State of their customers and thus their location,[59] which is precisely what the availability of contractual pre-determination seeks to redress. Thus, it is perhaps not surprising, that it has been argued that e-commerce demands even broader party autonomy in this area:

> 'one of the principal values of e-commerce to the global economy is that it enables parties to improve productivity by "creating" economic efficiencies.... If courts refuse to honour parties' freely negotiated ... clauses, they will insert an added level of uncertainty and risk into otherwise relatively efficient transactions.'[60]

Furthermore, it is not surprising that some States such as Canada and the US have eagerly upheld such clauses in online contracts and clickwrap agreements, where customers indicate consent to the agreement by clicking on an 'I agree' icon.[61] Finally, even Art 4 of the proposed *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* [hereafter *Hague Convention*],[62] which deals with choice of forum clauses, seeks to limit severely the grounds for challenging the validity of such clauses[63] and at least one proposal

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[57] American Bar Association (ABA), *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* (2000), at http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html, 72f, 86-89.

[58] For an excellent overview of the varying exceptions, apart from the consumer exception, see Hague Conference of Private International Law, *Choice of Court Agreements in International Litigation: Their Use and Legal Problems to which they give rise in the Context of the Interim Text*, Prel Doc No 18 (2002) submitted by Avril D Haines, at http://www.hcch.net/e/workprog/jdgm.html.

[59] Indeed, if one considers what would be regarded as exorbitant bases of asserting jurisdiction, such as the temporary presence of the defendant (common law jurisdictions) or the location of his/her assets (civil law jurisdictions) within the territory, online content providers would need to be aware even of the laws of States which are for all intents and purposes unconnected with the transactions and the parties.

[60] Bradford L Smith, 'The Third Industrial Revolution: Law and Policy for the Internet' 2000 (282) *Receuil des Cours* 229, 332. See also International Chamber of Commerce, *Jurisdiction and Applicable Law in Electronic Commerce* (6 June 2001), at http://www.iccwbo.org/home/statements_rules/statements/2001/jurisdiction_and_applicable_law.asp; But cf Michael Geist, 'Is There a There There? Towards Greater Certainty for Internet Jurisdiction' (2001) 661 *PLI/Pat* 561, 605, arguing that 'the presence of such a clause should only serve as a starting point for analysis'.

[61] Geist, above n 60, 604, citing eg. *Kilgallen v Network Solutions Inc* 99 F Supp 2d 125 (D Mass, 2000). For a most recent case where a forum selection clause in a clickwrap agreement was held enforceable see *Hugh v McMenamon* 204 F Supp 2d 178 (D Mass 2002) and where it was held not enforceable see *Thompson v Handa-Lopez* 998 F Supp 738 (1998), discussed in ABA, above n 57, 151.

[62] For the latest version of the interim text see Hague Conference of Private International Law, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference* (2001), at http://www.hcch.net/e/workprog/jdgm.html. Note that Art 4 of *Hague Convention* only applies to B2B transactions. B2C transactions are discussed in more detail below.

[63] For an analysis of the section and of the extent to which it boosts party autonomy see Haines, above 58.

makes the national law of the court chosen by the parties for most purposes the arbiter of their validity.[64] This means that online contracting parties can predetermine and predict the validity of their clauses by reference to the law of their chosen court and need not be aware of the location of those with whom they are interacting to determine the legal consequences of their actions. Despite this, even Art 4 is subject to a number of exceptions, most notable the consumer contract,[65] which means that courts other than the chosen court may determine the validity of the forum selection clause and assume jurisdiction over the online business.[66] The question is whether this entails that online parties and in particular businesses may after all be subjected to laws of States of which they could not have had prior notice.

3.1.2. Foreseeability in the Absence of Actual or Valid Contractual Choices

While contractual autonomy offers predictability in the online world and dispenses with the need for determining and complying with the laws of the State of co-contractors, contractual parties at times fail to make such a choice, at other times their choice is not enforced and finally in many disputes where there is no pre-existing relationship, such as tortious and intellectual property disputes,[67] such choice is simply not available. So, for example, many States restrict contractual autonomy in consumer contracts in an attempt to redress the unequal bargaining power of the parties.[68] While there are arguments why the online world shifts the bargaining power in favour of the consumer and thus makes the traditional

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[64] See Art 4(1) of *Hague Convention* and fn 24 (cf Art 4(4) and fn 27, 28) in Interim Text, above 62. Haines, above n 58, 14ff, 17, where the author persuasively argues why the substantive validity issues that can be addressed by any court other than the chosen court must be reduced. See also Hague Conference of Private International Law, *Choice of Court Agreements in International Litigation: Their Use and Legal Problems to which they give rise in the Context of the Interim Text*, Prel Doc No 11 (1999) submitted by Peter Nygh and Fausto Pocar, at http://www.hcch.net/e/workprog/jdgm.html, at 42.

[65] Article 4(5), 7, 8, 12 of *Hague Convention*.

[66] But note that one of the 'consumer contract' options proposed for *Hague Convention* would allow contractual parties to avoid the consumer jurisdiction provisions by entering into a 'jurisdiction agreement' (ie. choice-of-forum clause) in conformity with the Convention, but giving State Parties at the same time the option of opting out and adopting a more consumer friendly regime: see Alternative B, Variant 1 in Interim Text, above n 62, 9; See also recommendations made in ABA, above 57, 22f.

[67] See eg. ABA, above n 57, at 127: 'Contractual choice plays no role in intellectual property piracy cases. In these cases, infringement is a relatively pure tort, and the claimant and respondent have no prior relationship in which choice of forum or law can be expressed.'

[68] See eg. ABA, above n 57, 32ff.

restrictions on party autonomy less compelling,[69] the focus here shall only be on the issue as to what extent the retention of the consumer exception is at all reconcilable with the rule of law that the legal consequences of one's actions should be predictable. This issue is of course also critical in respect of all those situations where contractual autonomy is not an option at all.

There are innumerable examples of mandatory consumer protection laws restricting contractual autonomy. For example, in Australia s. 67 of *Trade Practices Act (Cth)* provides that the Act applies where Australian law would have been the *proper law* of the contract but for a term that the proper law should be the law of some other state.[70] The *EC Directive* on *Distance Selling* provides that a consumer may not waive the rights conferred on him or her by the *Directive* and that the protection granted to the consumer shall apply if there is a *close connection* between the contract and the territory of a Member State.[71] In the US, contractual choices will be disregarded if they are 'unreasonable' or the application of the chosen law would be contrary to a fundamental policy of a forum with a materially greater interest in the issue than the chosen state and the *proper law of the contract* would have been the forum law.[72] While these statutes appear to only override choice-of-law clauses, they have been held also to require that choice-of-

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[69] Denis T Rice, '2001: A Cyberspace Odyssey Through U.S. and E.U. Internet Jurisdiction Over E-Commerce' (2001) 661 *PLI/Pat* 421, 454, see also 449f: 'To the extent that the Internet is both limiting the ability of a seller to confine its market and, consequently, dramatically widening the options available to buyers, the presumption of inequality in business-to-consumer transactions is called into question and therefore, the policy reasons for refusing to enforce contractual choice of forum and law clauses in that context are correspondingly weak.' Also, online businesses are frequently small businesses the bargaining power of which can hardly be compared to that traditional transnational businesses run by multinational companies. See eg. Australia's Yellow Pages eBusiness Report, *The Online Experience of Small and Medium Enterprises (SMEs)* (30 July 2002) which identifies a significant growth in the number of SMEs using eBusiness in areas such as online ordering and payments. For arguments for and against the retention of the consumer exception to party autonomy see also Hague Conference of Private International Law, *Electronic Commerce and International Jurisdiction*, Prel Doc No 12 (2000) submitted by Catherine Kessedjian, at http://www.hcch.net/e/workprog/jdgm.html, 6ff, and Haines, above n 17, 10.

[70] Another example form Australia is s.8 of *Insurance Contracts Act 1984 (Cth)* which provides that the Act applies to all contracts the proper law of which would, but for an express provision to the contrary, be the law of an Australian State or Territory.

[71] Article 12 of *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumer in respect of distance contracts* which gives consumers transparency rights, cancellation rights and rights as to the period within which the contract must be performed.

[72] Sections 187(2) of *Restatement (Second) of Conflicts of Laws (1971); State ex rel Meierhenry v Spiegel* 277 NW 2d 298 (SD 1979), *Aldens v Miller* 610 F2d 538 (9thCir 1979). But *Carnival Cruise Lines* 499 US 585 (1991) where it was held that a forum selection clause in a consumer contract is valid provided it is reasonable, discussed in ABA, above n 57, 35f, 87ff. For more recent cases see n 61.

forum clauses are overridden.[73] An example of where a choice-of-forum clause is expressly overridden in the name of consumer protection is the recent *EC Regulation* which disregards these clauses if the online business directs its commercial or professional activities to the Member State of the consumer's domicile or to several States including that Member State, and the contract falls within the scope of such activities.[74] The issue for the purpose of this discussion is whether the application of these mandatory laws is foreseeable. Clearly, the application of mandatory laws in disregard of contractual choice suggests that the contracting parties did not *actually* expect them to be applicable given that it would have made the inclusion of a contractual choice largely pointless.[75] But could they and thus ought they have known?

It may be argued that the connecting factors attracting the operation of mandatory laws are in substance such that a business, prima facie conscious of the existence of mandatory laws, ought reasonably to expect them to apply if the business activities,[76] giving rise to the contract, are *closely* connected with the jurisdiction of the consumer.[77] So for example, the proper law test, which is frequently the connecting factor to justify the application of mandatory rules,[78] has been interpreted as the law of the place with *the closest and most real connection* with the contract[79] which requires:

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[73] *Akai Pty* Ltd v *The People's Insurance Co* Ltd (1996) 141 ALR 374 (esp joint judgment by Toohey, Gummow and Gaudran JJ), discussed in Belinda Bell, 'Proper Law - Ignoring the Contract? A Note on Akai Pty Ltd v The People's Insurance Co Ltd' (1997) 19 *Sydney Law Review* 400, 410. *See also The Hollandia* [1983] 1 AC 565, *Agro Co of Canada* Ltd v *The 'Regal Scout'* (1983) 148 DLR (3rd) 412; cf *Vimar Seguros y Reaseguros SA* v *M/V Sky Reefer* 115 S Ct 2322; 132 L Ed 2d 462 (1995). If they had not that effect, the parties to the contract could bring the action in the chosen forum which would only apply the mandatory foreign law if it was applicable by virtue of its own choice of law rules. Beech, above n 47, 22.

[74] Article 15(3), but note Art 17.

[75] Note choice of law clauses may be upheld except in so far as inconsistent with the mandatory law. *See* ABA, above n 57, 88, discussing Art 5 of *Rome Convention*.

[76] The circularity of the argument is addressed by Kramer, above n 46, 337, where he argues that 'reasonable' means no more than a view 'widely shared' and 'it is widely shared mostly because it has been observed in the past. There is nothing natural or prelegal about this expectation. In an earlier era, when the applicable law turned on nationality, people undoubtedly had different expectations.'

[77] This, of course, given the lack of uniformity of connecting factors attracting the application of mandatory laws across the globe, is a generous interpretation of the legal status quo. For online businesses to know for certain when they may be exposed to the mandatory laws of the States of actual and would-be customers they have to know the very laws which they seek to exclude. Generally, particularly in the online context the retention of mandatory laws largely reduced the utility of contractual choice and even of those above mentioned reform efforts which make only the private international law of the chosen forum determinative in respect of the contract and dispute in question.

[78] Above n 70 and text accompanying n 72.

[79] Under common law: *Robinson* v *Bland* (1760) 2 Burr 1077 [97 ER 717]; *Mount Albert Borough Council* v *Australasian Temperance and General Mutual Life Assurance Society* [1938] AC 224; *Bonython* v *The*

> 'many matters... be taken into consideration. Of these, the principal are the place of contracting, the place of performance, the places of residence or business of the parties, respectively, and the nature and subject matter of the contract.'[80]

So a contract with a consumer would be closely connected with the consumer's jurisdiction, if negotiated, entered into and performed in the consumer's jurisdiction, but would not be closely connected if negotiated, formed and performed in the jurisdiction of the business, as when the consumer travels to the foreign State to buy the product. By the same token, a consumer contract which is the result of commercial activities directed at the consumer's domicile creates a close link between the contract and the consumer's domicile. The idea is that a business which creates close contacts with a jurisdiction giving rise to contractual relationships with consumers and thus reaps benefits from that that State ought reasonably to expect that it cannot avoid its procedural and substantive laws designed to protect its consumers.

What is less apparent from these tests, but may nevertheless be taken as an implicit assumption, is that the business need not only form close connections with, or direct its activities towards, the consumer's jurisdiction, but also has to do so knowingly. In the traditional offline world such knowledge is inevitable given that a business seeking a market for its products in a State would need to take conscious and significant steps to effectively reach that market, ranging from advertising to providing points of contact for entering into contracts to setting up delivery mechanisms in that State. Given this, it is not surprising that this mental element is rarely expressly referred to as a precondition for legal accountability. Exceptionally, it is clearly acknowledged in the US jurisprudence on the issue of whether a US court has adjudicative jurisdiction over a foreign defendant (whether interstate or intrastate) in the absence of a contractual choice. It only has if there is:

Commonwealth (1950) 81 CLR 486, [1951] AC 201; *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50; US: s.188 of *Restatement (Second) of Conflicts of Law (1971);* EC: Art 4 of *Rome Convention.*

[80] *Re United Railways of the Havana & Regal Warehouses Ltd* [1960] 1 Ch 52, 91. US: s.188(2) of *Restatement (Second) of Conflicts of Law (1971;* Contrast EC: Art 4(2) of *Rome Convention creates a*

> '[a]n act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'[81]

So a business which purposefully reaps legal and economic benefits from a forum cannot expect to avoid litigation in it. This is for example illustrated by the case of *CompuServe v Patterson*[82] where Patterson, the foreign defendant, argued that the Ohio Court had no jurisdiction to hear the claim. This argument was rejected given that 'he was on notice that he had made contracts, to be governed by Ohio law, with an Ohio-based company.'[83] The 'purposeful availment' concept most overtly stipulates that a defendant can only be subjected to the adjudicative process of a State if he or she knowingly or purposefully made contacts with it.

Yet while the connecting factors attracting mandatory consumer protection laws are less overt in that respect, it is submitted that the consciousness of having made a connection with a State, forms a necessary element in respect of these tests too. Indeed, it is submitted, beyond the sphere of mandatory laws, whether in the context of adjudicative or prescriptive jurisdiction and whatever the nature of the dispute, the connecting action which attracts the laws of a State must be knowingly made.[84] So, for example s. 52 of *Trade Practices* Act *1974 (Cth)*, dealing with misleading and deceptive conduct, it is submitted, assumes that the business consciously engages 'in trade or commerce' in Australia.

As such knowledge or consciousness cannot be taken for granted in the online world, it is vital that that it is recognised as a necessary precondition for exposure to the laws or court processes of any State. Only if that is done, can online actors be said to be on constructive notice of the foreign laws and only then will their reasonable expectations in view of their actions in the relevant jurisdiction be the

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presumption that the State which is most closely connected with the contract is the State 'in which the party who is to effect the performance which is characteristic of the contract has... his habitual residence.'

[81] *Hanson v Deckla* 357 US 235, 253 (1958), discussed in ABA, above n 57, 41f, where it is also argued that in substance the law in Europe and Japan are comparable.

[82] 89 F3d 1257 (6th Cir. 1996)(emphasis added).

[83] 89 F3d 1257, 1264 (6th Cir 1996).

[84] Admittedly, this requirement may entail the unfortunate consequence that in respect of certain disputes, such as contractual disputes, no law can be held to govern the disputes, as neither parties knowingly connected with a State.

touchstone of liability. Finally only then can Johnson and Post's argument that the application of traditional regulation to the Internet is illegitimate and unfair because of the lack of notice online, be contradicted. This is because online actors would not be exposed to the laws of jurisdictions with which they did not consciously form a connection and thus in relation to which they could not have predicted their legal exposure. This is what the rule of law requires and what the ABA in its report on jurisdiction clearly recognises:

> '[b]oth personal and prescriptive jurisdiction should be assertable over a web site content provider... [by a foreign state if he or she] *target*s that state and the claim arises out of the content of the site; or a dispute arises out of a transaction generated through a web site or service... that... is interactive and can be fairly considered *knowingly* to engage in business transactions there.'[85]

Both the 'targeting' and 'interactivity' tests, as will be shown below, rely upon the presumed and actual knowledge of the content providers respectively. The final issues to be considered are whether such knowledge has been considered relevant in determining their legal accountability in the online world and when online actors can and have been said to knowingly 'connect' with a State.

3.1.3. The Internet and The Objective Intention

It has been suggested above that online actors do not necessarily know with which State they form a close or other connection sufficient to subject them to the laws of that State and thus be on constructive notice of its law. Indeed, can they ever know?[86] Given that the anonymity of online actors, in terms of their identity generally[87] and their location more specifically, is the default option on the Internet online actors prima facie do not know with whom they are interacting and thus with which State they make a connection. As users cannot rely on email addresses and

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[85] ABA, above n 57, 21. Note that this proposition presupposes the that the State of origin, that is the State where the content provider is habitually resident, may also assert jurisdiction. This is widely accepted as legitimate.

[86] This question is irrelevant in those situations where a valid contractual choice has been made, and presupposes that the mere accessibility of a website is not sufficient to assert jurisdiction.

[87] Depending on the legal context, different aspects of a person's identity need to be known. So while in the jurisdictional context, the location of the person needs to be ascertained, in the context of obscenity it is the age of the person. *Reno v American Civil Liberties Union* 521 US 844, 876 (1997) where the US Supreme Court held that the Communications Decency Act 1996 was unconstitutional inter alia because there was no existing technology to effectively identify minors. See also discussion in *American Civil Liberties Union v Reno* 929 F Supp 824, para 90ff (1996). Generally see Reed, above n 28, 120ff.

the URLs as geographical indicators of the location of the person or business behind the site, so neither can content providers prima facie know the location of their users.[88] Yet, they have nevertheless been held to be subject to the laws of foreign States, which in turn suggests that the mental element has not been considered a necessary prerequisite for exposure to foreign law. But is this really the case?

To start with, there are two options when online actors can be said to knowingly form the requisite connection (whatever that may be) with a forum: either they actually know the location of those with whom they are interacting or, in the absence of actual knowledge, they can be said to reasonably know with whom they are interacting. Importantly, both these options have variously, and more or less consciously, provided one underlying rationale for legal developments seeking to accommodate online conduct within private international law. So the first option of actual knowledge most overtly underlies the Zippo interactive versus passive test[89] (which builds upon the above discussed 'purposeful availment' test) and the recent shift of focus from potential to actual interactivity,[90] in deciding whether a court has personal jurisdiction over a foreign defendant. What is in some ways even more noteworthy is that this test has also been applied outside the US and outside the context of adjudicative jurisdiction, as for example in the English trade mark case of *Euromarket Designs Inc v Peters*[91] to decide whether a mark

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[88] John Rothchild, 'Protecting the Digital Consumer: the Limits of Cyberspace Utopianism' (1999) 74 *Indiana Law Journal* 895, 930ff; Geist, above n 60, 612f. For an early technical discussion of the issue of identity/location on the Internet see *CSIRO, The Internet Report* (1997) prepared by Philip McCrea and Bob Smart, 90-125, esp 123f noting that the primary way of locating computers engaged in Internet activities is through IP number which underlie URLs and explaining how they may be traced from URLs. John R Mathiason and Charles C Kuhlman, 'An International Communication Policy: The Internet, International Regulation & New Policy Structures' (1998), at http://www.intlmgt.com/portfolio/ITSpaper.html, where the authors compare telephone numbers to Internet addresses. Similarly, in *800-Flowers Trade Mark* [2000] FSR 697, 700, the judge stresses that websites and email addresses do not like traditional phone numbers reveal the location of the person associated with the number. The same no longer holds true for freephone numbers.

[89] *Zippo Manufacturing Co v Zippo Dot Com Inc* 952 F Supp 1119 (WD Pa 1997) and for example *S Morantz Inc v Hang & Shine Ultrasonics Inc* 79 F Supp 3d 537 (1999) where the court was preoccupied with the level of interactivity of the site per se rather than with the actual interaction with forum residents.

[90] For example: *Millenium Enterprises Inc v Millenium Music LP* 33 F Supp 3d 907, 923 (1999) and *ALS Scan v Wilkins* 142 F Supp 2d 703 (2001). Carole Aciman, Diane Vo-Verde, 'Refining the Zippo Test: Trends on Personal Jurisdiction For Internet Activities' (2002) 19 *Computer and Internet Lawyer* 16.

[91] [2000] ETMR 1025. Dawn Osborne, 'Jurisdiction on the Internet - not such a barrel of laughs for Euromarket!' (2000) August/September *Computer and Law* 26.
Note, that in respect of Art 15(1)(c) of *EC Regulation*, the very existence of a contract with a consumer from a particular State has been argued to provide evidence that the trader directed his activities towards that State.

offending a local trade mark was 'used' in the State. The basis for its significance is that websites which are interactive to the extent of allowing the user to enter into contracts with the service provider in the process of which the user gives his or her credit card data, telephone number, and possibly the physical delivery address, clearly allows the service provider to know the location of those with whom he or she actually interacts.[92] The same holds true for subscription websites if the subscriber is required to provide payment details or other location identifying data.[93] This in turn means that the content provider knowingly connects with the jurisdictions of its co-contractors or subscribers. While it has been predicted that the rise of digital payment methods may in future remove all territorial indicators,[94] there are equally strong reasons to suspect that online businesses will continue to require reliable evidence of the location of the customers, to estimate the risk involved for example in case of a dispute.[95]

Unlike such interactive sites, a passive site prima facie allows no knowledge of a surfer's location. Similarly, the interactivity of a site per se does not provide a content provider with a knowledge of the location of all those who access a site but

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For a critique of that view see Frederic Debussere, 'International Jurisdiction over E-Commerce Contracts in the European Union: Quid Novi Sub Siole?' (2002) 10 *International Journal of Law and Information Technology* 344, 357ff, where the author argues that this would make the directing test redundant. This is arguably not the case given that in some situations a consumer may enter into a contract because he had knowledge of the relevant goods through a passive website which would not trigger the operation of Art 15(1)(c).

[92] *Park Inns International v Pacific Plaza Hotels Inc* F Supp 2d 762 (D Ariz 1998) where the defendant accepted online hotel reservations from forum residents. The reverse occurred in Euromarket Designs Inc v Peters [2000] ETMR 1025 where the defendant had never entered into a contract with anyone from the UK and thus was held not to have used the mark in the course of trade in the UK. Brian E Doughdrill 'Personal Jurisdiction and the Internet: Waiting For the Other Shoe to Drop on First Amendment Concern' (2000) 51 Mercer Law Review 919, esp 940f; Richard A Bales and Suzanne Van Wert, 'Internet Jurisdiction' (2001) 20 John Marshall Journal of Computer and Information Law 21, 44ff.

[93] For example Zippo Manufacturing Co v Zippo Dot Com Inc 952 F Supp 1119 (WD Pa 1997), American Network Inc v Access America/Connect Atlanta Inc 975 F Supp 494 (SDNY 1997), Thompson v Handa-Lopez 998 F Supp 738 (WD Rex 1998), discussed in ABA n 57, 150. Note Haines, above n 17, 7 where the author refers to the possibility that 'users... could give one address as their billing address, but may access the software products or services from any location in the world that they can get access to the Internet.' While this is certainly a possibility, it is neither very likely and thus critical nor peculiar to the Internet.

[94] Haines, above n 17, 8. See also International Chamber of Commerce, *Jurisdiction and Applicable Law in Electronic Commerce* (6 June 2001), at http://www.iccwbo.org/home/statements_rules/statements/2001/jurisdiction_and_applicable_law.asp, where it is stated that in future customers may increasingly 'purchase goods or services that are digitally transmitted, and pay with digital cash or any other payment mechanism that does not identify the purchaser.'

[95] Digital signatures, which currently contain too little information to be very valuable, may for example include reliable information as to location: Jane Kaufman Winn, 'The Hedgehog and the Fox: Distinguishing Public and Private Sector Approaches to Managing Risk for Internet Transactions' (1999) 51 *Administrative Law Review* 955, 971f (also generally on private risk management in the electronic market place).

do not engage in further interaction with the content provider,[96] or do engage in interaction without providing information as to their physical location. Thus even though an interactive site may have a significant number of hits from residents of a particular State, this does not mean that the content provider actually knows about this connection. This then raises the issue whether content providers of the innumerable sites which are either passive or which are interactive but not to the extent of overcoming the anonymity of users,[97] cannot and should never be exposed to the procedural process or substantive laws of foreign States.[98] In these cases jurisdiction over foreign sites has been asserted not on the basis of the content providers' actual knowledge but on the basis of their presumed knowledge: looking at all the circumstances can they reasonably know with whom they are interacting or who is most likely to access their sites? Typically, the subject-matter or content of the online publication allows inferences as to which State the online publisher intended to reach or towards which it directed or targeted its site.[99] In the US defamation case of *Blakey* v *Continental Airlines Inc*[100] the court stated whether jurisdiction may be asserted depends on 'whether the harassment was expected or intended to cause injury in... [the forum].'[101] Similarly in *Atl*een v

[96] For example, Advanced Software Inc v Datapharm Inc (1998) US Dist LEXIS 22091, 13: 'it should be of no consequences that a site is interactive unless it is shown that people within the forum state have utilized the interactive features of the site... the fact that it has interactive potential is irrelevant. As with the tango, it takes two to interact.'

[97] This would for example apply to the online equivalent of newspapers, sites merely advertising off-line businesses and sites offering non-commercial services eg. Friends United, or sites set up by cybersquatters offering nothing at all. Note in terms of the disputes most likely to arise in respect of these sites are defamation and intellectual property disputes where a passive site can be as damaging as the most highly interactive site. Note Haines, above n 17, 21: 'When one looks at various cases dealing with such things as defamation, libel and intellectual property disputes, many countries have exercised jurisdiction in cases in which the website was essentially "passive."'

[98] It may be assumed that the State of origin has always a legitimate regulatory power over the content provider. The problem in respect of passive sites or sites of low interactivity is captured by Geist, above n 60, 594: 'If the target is unable to sue locally due to strict adherence to the passive versus active test, the law might be seen as encouraging online defamatory speech by creating a jurisdictional hurdle to launching a legal claim.'

[99] For example *Quokk*a Sports Inc v Cup International Ltd 99 F Supp 2d 1105, 1112 (ND Cal 1999), where the court noted: 'The content of the americacup.com website reflected the defendents' intention to target the U.S. market.' The targeting test has most wholeheartedly been endorsed in the US to decide the issue of personal jurisdiction, accompanied by significant academic support eg. Gregory J Wrenn 'Cyberspace is Real, National Borders are Fiction: the Protection of Expressive Rights Online Through Recognition of National Borders in Cyberspace' (2002) 38 Stanford Journal of International Law 97. But see also s.15(1)(c) of *EC Regulation* adopting the 'directing' test, discussed in the previous Chapter.

[100] 751 A 2d 538 (2000), following *Calder* v Jones 465 US 770 (1984), in which the effects test was first formulated in the US.

[101] 751 A 2d 538, 555 (2000). Cf English 'malicious falsehood' case *Level* 8 v Abbas (unreported, 6 July 1999), discussed by Laurence J Cohen, 'E-Libel and Proportionality' (2000) 1 E-Journal 12. In that case Justice Jacob refused to exercise jurisdiction given, firstly, that there was no evidence that anyone had accessed the site in the UK, and, secondly, that even if they had, they would not necessarily have made the connection with Mr Abbas and even if they did, he would not suffer any significant or appreciable damages as

Informicx Corp[102] a Canadian Court asserted jurisdiction over a US defendant in an action for false and misleading statements brought by the defendant's Canadian shareholders. Despite the passive nature of the site, the defendant could reasonably foresee that shares would be purchased by Canadian investors relying on the company's online information. The same applies to cybersquatters who can be presumed to know that their sites have an effect in the jurisdictions of their victims' place of business.[103] The content of the site was also decisive in the two English trademark cases *800-Flowers Trade Mark*[104] and *Euromarket Designs Market* v *Peters Ltd*[105] in relation to both of which Justice Jacob held that the content providers could not be said to have intended to reach the UK market. He stated:

> 'the mere fact that websites can be accessed anywhere in the world does not mean... that the law should regard them as being used everywhere in the world. It all depends on the circumstances, *particularly the intention of the web site owner and what the reader will understand if he accesses the site.*'[106]

Clearly what Justice Jacob refers to is the objective intention of the content provider as evidenced by the site and the surrounding circumstances. It is noteworthy that the absence of this objective intention or presumed knowledge in these cases meant that the connection, otherwise sufficient to establish jurisdiction, ie in the form of an advertisement in the UK, was held not to be established.

Ultimately it could be argued that this objective intention or presumed knowledge of the content provider provides (or at least should provide) the overall test for deciding whether online content providers should be subjected to the laws of a particular State or not. It may be inferred from the actual interactions of the content provider with residents from a State, where the content provider knew their

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a result of the publication. This is a case where the content of the injurious site in the surrounding circumstances could not be said to be aimed at the UK.

[102] [1998] CarswellNfld 105; criticised in Geist, above n 60, 579f, and in Haines, above n 17, 21.

[103] One of the earliest cybersquatting cases *Panavision International LP* v *Toeppen* 938 F Supp 616 (1996), affirmed 141 F3d 1316 (9th Cir 1998).

[104] [2000] FSR 697, confirmed on appeal [2001] EWCA Civ 721.

[105] [2000] ETMR 1025.

[106] 800-*Flowers Trade Mark* [2000] FSR 697, 705 (emphasis added), discussed in Smith, above n 7, 256f, and Euromarket *Designs Inc* v *Peters* [2000] ETMR 1025, 1031.

location, and/or from the content and purpose of a site in light of the surrounding circumstances. It also depends on measures taken by content providers to actively show a willingness (positive targeting) or unwillingness (negative targeting) to reach a particular State.[107] Such measures which are frequently employed by online businesses[108] and designed to overcome the geographic indeterminacy of online conduct, include disclaimers and various forms of location-sensitive screening of users which may either be based on technological measures or self-declarations by users.[109] The weight accorded to these risk-management strategies, and thus their effectiveness in precluding exposure to the laws of an otherwise targeted State, invariably depends on their reliability in relation to that State.[110] In respect of a site which would be regarded as objectively intended for residents of a particular jurisdiction, an online content provider will not escape such conclusion if the measures taken by him or her to restrict access to those residents are unreliable and mere tokens. For example, a disclaimer stating that the material must not be viewed in jurisdictions where it is prohibited.[111] Such a disclaimer is even less relevant if the content provider knowingly engages in, and encourages, interactions contrary to the disclaimer. This occurred in the US case of *Euromarket Designs Inc v Crate & Barrel Ltd*[112] where, although the website contained a disclaimer saying 'Goods Sold Only in Republic of Ireland', it

> 'allowed users to select the United States as part of both their shipping and billing addresses, the fields in which users entered their... addresses were organised for a United States-format address, *ie.*, city, state, zip code, and there was evidence that the company sold to at least one person in the forum state through its web site.'[113]

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[107] Such measures may be taken for either commercial or legal reasons or both. Note that the significance of such measures appears to have been rejected in respect of Art 15(1)(c) of EC Regulation. For the European Parliament's view see EC OJ 17 May 2001, C 146/98 (Amendment 37) and its rejection by the European Commission see *Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM (2000) 689final, Official Journal 27 February 2001, C62E/243.

[108] ABA, above n 57, 99.

[109] For an overview of available measures see Geist, above n 60, 609ff, and Rice, above n 69, 454ff.

[110] Rothchild, above n 88, 940, arguing that the 'legal effect of these opt-out efforts may vary depending on whether they are effectively implemented.'

[111] See *Macquarie Bank v Berg* [1999] NSWSC 526, discussed in depth in the Chapter 6. Cf *Tech Head Inc v Desktop Service Center Inc* 105 F Supp 2d 1142, 1152 (D Ore 2000), where the court noted that the use of a disclaimer that the website operator will not sell products or provide services outside a certain may limit operator's exposure to foreign laws. It is clear though that there must not be conduct contrary to the disclaimer. See eg. *Euromarket Designs Inc v Crate & Barrel Ltd* 96 F Supp 2d 824, 829 (ND Ill 2000).

[112] 96 F Supp 2d 824 (ND Ill 2000).

[113] Smith, above n 7, 353. Note that the foreign defendant only added the statement 'Goods Sold Only in the Republic of Ireland' after the suit was filed in the US: *Euromarket Designs Inc v Crate & Barrel Ltd* 96 F Supp 2d 824, 829 (ND Ill 2000).

The same reasoning applies to unreliable screening or blocking mechanisms. So it may be argued that the US court was justified to exercise jurisdiction over the Canadian company iCraveTV[114] which provided an online real-time television service and employed a screening mechanism which was supposed to exclude all but Canadian users:

> '[t]he first step required the potential user to enter their local area code. If the area code was not a Canadian area code, the user was denied access to the service. This approach was viewed, with some justification, as rather gimmicky since iCraveTV's own Toronto area code was posted on the site.'[115]

Given that the screening device could very easily be circumvented and indeed, that iCraveTV appears to have more or less consciously encouraged such circumvention, the weight given to it in deciding iCraveTV's objective intention as to who it intended to reach, could only be minimal.[116] These cases show that the legal effectiveness of disclaimers and blocking mechanisms in rebutting what may in all circumstances be presumed to be the content provider's intention depends on their likely actual effectiveness.[117] While in the above cases, they were not likely to be effective, there is certainly a legal trend encouraging the use of reliable risk-management strategies which dates back to one of the earliest high-profile Internet cases, *Playboy Enterprises Inc v Chuckleberry Publishing Inc* where the judge held that the foreign defendant must prevent access to its Italian site from the US.[118]

Also noteworthy in this context is the latest version of the *Hague Convention* which provides that a defendant cannot be sued in a foreign court 'where the defendant has taken reasonable steps to avoid entering into or performing an obligation in that State' (in the case of contracts),[119] or 'to avoid concluding contracts with

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[114] *Twentieth Century Fox Film Corp v ICRAVETV* (2000) US Dist Lexis 1013 (WD Pa 28 Jan 2000), where the US court granted a temporary restraining order against iCraveTV. Later iCraceTV reached a settlement with the broadcasters, sports leagues and movie studios both in the US and Canada whereby it agreed to cease its webcasting activities; discussed in Geist, above n 60, 567f.

[115] Geist, above n 60, 568.

[116] Geist, above n 60, 624, basing the same conclusion on the 'targeting' argument.

[117] Rothchild, above n 88, 939f.

[118] 939 F Supp 1032, 1040 (1996): "[W]hile *Tattilo* may continue to operate its Internet site, it must refrain from accepting subscriptions from customers living in the United States.'

[119] Art 6(3) of *Hague Convention*.

consumers habitually resident in the State' (in the case of consumers contracts)[120] or 'to avoid acting in or directing activity into that State' (in the case of torts).[121] Whether or not the steps are reasonable, it is submitted, depends on whether they can reasonably be considered to negate what could otherwise be presumed to be the online actor's intention in light of all the circumstances. The legal encouragement of such measures (apart from encouraging their technological proliferation) most overtly reflects the recognition of the requirement that laws must be such as to allow online actors to be capable of planning and plotting their future with relative legal certainty.

The above discussion demonstrates that the answers which judges and law reformers have given to jurisdictional questions in the online world have clearly been informed by an awareness of the requirement of foreseeability of legal consequences. It was argued that generally the rules of private international law require that exposure to the procedural and substantive laws of a State depends on whether the requisite connection with the State was knowingly made. This argument is in fact substantiated by the jurisdictional developments which have taken place in the context of the online world, where the issue of whether the exposure to the laws of a State was knowable or foreseeable has moved centre-stage. The basis for the prominence of this issue principally lies in the rejection that the mere accessibility of a site can by itself provide the foundation for adjudicative or substantive jurisdiction - a position which would remove any foreseeability problem.[122] Yet, once that position is rejected, online content providers do face the problem of predicting to the laws of which State they may be exposed. It has been argued that that problem has been addressed, by making the objective intention of online actors the touchstone of legal accountability - an intention which is evidenced by any actual knowing interactions with forum residents, by the content of the site and the surrounding circumstances as well as by any risk management strategies adopted by the content provider to target, or avoid making contacts with, a State. This then squarely contradicts Johnson and

[120] Art 7(3) of *Hague Convention*. Note also Kessedjian, above n 69, 6 where the option of a system built upon the self-identification which later binds the consumer, and its possible misuses is discussed.
[121] Art 10(3) of *Hague Convention*.
[122] See text accompanying fn 8 and 9.

Post's argument that, firstly, online actors do not know which law space they enter and, secondly, that regardless of such knowledge they be subjected to the laws of such State.

While there are some instances when the issue of foreseeability seems not to have informed the legal arguments and conclusions,[123] the discussion shows that it can, and in fact generally does, and indeed must, occupy a central place in the 'private' jurisdictional discourse. This then brings us to the question of whether the accountability to foreign public law is equally predictable.

3.2. Public Law

3.2.1. Imperfect Harmonisation and Absence of Choice

A State's right to subject persons and conduct to their public law is delimited by the jurisdictional rules of public international law. Thus in contrast to the multitude of varying national legal regimes governing transnational private relations and interactions, the reach of a State's public law is defined at international level and thus in principle uniform across the globe. This would appear to entail that online actors could determine their potential exposure to the laws of a State without specific reference to the particular laws of that State and that in terms of predictability or foreseeability regulation of online conduct through public law is infinitely superior than the private ordering of transnational conduct. Yet, unfortunately, this is not the case for a number of reasons.

Firstly, while public international law indeed governs the ambit of State's public law, in fact these jurisdictional rules are mainly created through State practice in the form of national court decisions. National courts in turn, as was already suggested in the previous Chapter, frequently make decisions as to the width of their competence, being preoccupied by local policy, without reference to

[123] Haines, above n 17, 19. For a recent case see eg. *Gorman* dba Cashbac*krealty.com* v *Ameritrade Holding Corp* (DC Cir, no 01-7085, 14 June 2002) where it was held that the District of Columbia may assert general jurisdiction over a foreign defendant whose Web site enables it to form binding contracts with district residents.

international law[124] and with little regard to the need for harmonised and internationally respected parameters.[125] Furthermore, unless those decisions seriously affect the national interests of other States, as in the anti-trust context, protest by other States against wide assumptions of jurisdictions clearly violating established principles is unlikely.[126] In other words, the prima facie existence of an international jurisdictional regime hardly serves to pre-empt inconsistencies of jurisdictional assertions and the fragmentation of legal principles between States[127] and thus makes it doubtful whether the public ordering of online conduct is from the outset better positioned to comply with the rule of law requirement of predictability than the private ordering.

Such doubts are aggravated by the fact that the international jurisdictional regime is by no means designed to first and foremost reflect the interests and reasonable expectations of respective individuals comparable to the concern of private international law regimes. Rather it is designed to maintain an orderly system between States allowing them to promote the welfare within their own territory without interference from other States, that is:

> 'protect the independence and sovereign equality of States... by balancing each State's interest in exercising jurisdiction to advance its own policies

[124] A typical example is the recent Australian decision of *Lipohar* v R (1999) 168 ALR 8, 48 where the judges, when *in obiter* referring to the issue of international jurisdiction, at most acknowledged international comity, as opposed to legal limits set by international law; discussed in more detail in Chapter 5 (3.3.1. Public Law: Restrictions and Wide Claims)

[125] Sir Robert Jennings and Sir Athur Watts (eds), Oppenheim's *International* Law (9th ed, London: Longham, 1992) vol 1, 45, noting that 'in many states the courts have to apply their national laws irrespective of their compatibility with international law.' Karl M Meessen, 'International law Limitations on State Jurisdiction' in Cecil HJ Olmstead (ed), *Extraterritorial Application of* Laws and Responses *Thereto* (Oxford: ECS Publishing Limited, 1984) 38, 39. Note also much criticised dictum in *France* v *Turkey (the* Lotus case*)(*1927) PCIJ Reports, Series A, No 10, 19: 'far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable'; discussed in more detail in Chapter 5 (3.3.1. Public Law: Restrictions and Wide Claims)

[126] Michael Akehurst, 'Jurisdiction in International Law' (1972-73) 46 *British Yearbook of International* Law 145, 169 and 187 . Note also Comment 'd.' to s.402 of *US* Restatement *(Third) of Foreign Relations* Law *(1986)* stating that *the* controversy over the effects doctrine has been generally limited to jurisdictional assertion based on economic effects particularly through competition laws.

[127] A typical example is the difference in approach to adjudicative and legislative jurisdiction in the US on the one hand and England and Australia on the other hand. While the US approach to adjudicative jurisdiction resembles its approach to adjudicative jurisdiction in private cases, in England and Australia it depends upon the existence of prescriptive jurisdiction and the physical presence of the accused in the territory. *Lipohar* v R (1999) 168 ALR 8, 31f, 36f.

> with each State's interest in avoiding interference with its policies resulting from the exercise of jurisdiction by foreign States.'[128]

That these interests of States are not necessarily reconcilable with the expectations of those they subject to their regulatory control is perhaps most clearly apparent in the principle that individuals cannot generally contract in or out of the public ordering of a State, as they can in respect of private law.[129] So in the context of US anti-trust law being applied extra-territorially one commentator noted:

> '[v]oluntary submission clauses would not make US jurisdiction more palatable. Foreign recipients of US goods or technologies admittedly often 'agree to comply' with US export control regulations. But private companies cannot, as a rule, restrict the jurisdiction of their sovereign state by a private contractual obligation.'[130]

In that sense all public laws are of a mandatory character and can never benefit in terms of constructive notice from party autonomy.[131] So whether the regulation of online conduct through public law is consistent with the rule of law depends on whether exposure to it is foreseeable, which in turn depends on whether foreseeability is an integral part of the jurisdictional rules determining the legal accountability or the right to assert regulatory control. This question will be examined now.

3.2.2. Foreseeability and the Territoriality Principle

Public international law recognises several bases upon which States may rely to prescribe law and apply it in respect of persons, property and conduct. As discussed in the previous Chapter, the primary basis is the territoriality principle,

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[128] Bernard H Oxman, 'Jurisdiction of States' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 277, 278.

[129] Philip J McConnaughay, 'Reviving the "Public Law Taboo" in the International Conflicts of Law' (1999) 35 *Stanford Journal of International Law* 255, 280 , where the author refers more recent US cases where private parties to international transactions appear to have been allowed to contractually opt out of otherwise applicable US public law (see also discussion in Chapter 5 , text accompanying n 134.)

[130] Luzius Wildhaber, 'The Continental Experience' in Cecil HJ Olmstead (ed), *Extraterritorial Application of Laws and Responses Thereto* (Oxford: ECS Publishing Limited, 1984) 63, 66.

[131] The Law Reform Commission, above n 47, 8.27. But see *R v Harden* [1963] 1 QB 8, where the court refused to exercise jurisdiction in a criminal case because the accused had agreed with his victims that certain documents were deemed to be received by the accused in New Jersey when they were received by the Jersey post office; discussed in Matthew Goode 'The Tortured Tale of Criminal Jurisdiction' (1997) *Melbourne University Law Review* 411, 418f. This decision which has frequently been criticised, it is submitted, is wrong.

which allows States to assert regulatory control over persons and matters within their territories. While the existence of the territoriality principle is entirely unchallenged, its boundary areas eg in form of the effects doctrine, are controversial.[132] Similarly accepted at their core and contentious around their edges are the other bases of jurisdiction,[133] that is the nationality principle which gives States the right to regulate its nationals,[134] the protective principle which allows States to assert jurisdiction to protect their national security[135] and the universality principle which gives States jurisdiction in respect of offences against the international community.[136]

The question which needs to considered for this discussion is to what extent these principles incorporate a mental element as a pre-requisite for legal accountability. In other words, are States entitled to assert regulatory control over persons even if they could not have predicted such exposure? One commentator seeking to refute Johnson and Post's argument about the absence of notice on the Internet states:

> '[m]ore fundamentally, the critics' argument wrongly imports a notice requirement for prescriptive jurisdiction... But, international law does not in fact require a state to satisfy a reasonableness standard in exercising prescriptive jurisdiction.'[137]

While one may question whether the existence of notice and the requirement of reasonableness are necessarily related, a more fundamental concern is the assertion that international law condones States acting in disregard of the rule of law, by subjecting individuals to their laws in situations when they could not have known about or expected such exposure. Such sentiments have been expressed

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[132] See Chapter 3. See also Rosalyn Higgins, 'The Legal Bases of Jurisdiction' in Cecil J Olmstead (ed), *Extraterritorial Application of Laws and Responses Thereto* (Oxford: ECS Publishing Limited, 1984) 3, 5ff.

[133] A basis which is even at its core controversial is the passive personality doctrine according to which a State may assert jurisdiction simply on the ground that harm has been suffered by its nationals.

[134] Problematic is, for example, whether subsidiary and parent companies which are incorporated in different States, can fairly be treated for jurisdictional purposes as nationals of either State. This question arose in the context of anti-trust cases.

[135] See eg. Akehurst, above n 126, 157ff.

[136] Australia: *Polyukhovich* v Commonwealth (1991) 172 CLR 501, 562ff, 658ff; *Kruger* v Commonwealth (1997) 190 CLR 1, 70ff, 159. Most recently the ambit of universal jurisdiction was considered in Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) ICJ 14 February 2002, at http://www.icj-cij.org/. Note commentary by Ryszard Piotrowicz,' Immunities of Foreign Ministers and their Exposure to Universal Jurisdiction' (2002) 76 *Australian Law Journal* 290.

[137] Mody, above n 6, para II.B.

before[138] and are prima facie consistent with the view that only States, not individuals, are the subjects of public international law. Yet, they sit very uneasily, and in fact are entirely inconsistent, with the stronghold the protection of human rights and dignity has held within international law since WW2. So how does international law on jurisdiction take account of the need for notice or foreseeability of legal exposure?

One reason why the territoriality principle developed as the main organising principle for allocating regulatory control is that territory or physical distance was and is, albeit to a lesser extent, determinative of our behaviour, with whom we interact and whom it affects, and is by implication critical in the formation of social, cultural and political communities:

> 'it enables the integration of the State's human constituents to take place through its attachment to the soil... and provides a solid basis for the powers of control and coercion... [but] it must be admitted that in recent decades the material function of territory has... been affected by the impact of such new phenomena as fast communications, sophisticated weaponry and integrated economic regions.'[139]

When physicality or location delimits and is determinative of human behaviour, whether individually or collectively, making it a basis for regulatory competence makes sense *inter alia* because of its simplicity and transparency for all concerned: 'In practice,... the [territorial] rule was adopted because it was thought that it would be easy to apply and would produce certainty of result.'[140] So a factor which certainly favoured the emergence of the territoriality principle as the main organising principle of allocating regulatory control, was the high degree of foreseeability of legal consequences which it could produce in a human environment constrained by physical distance. Yet saying this does not of course show that the foreseeability of legal consequences is also incorporated within the territoriality doctrine as a pre-requisite for legal exposure.

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[138] Karl M Meessen, 'International Law Limitations on State Jurisdiction' in Cecil J Olmstead (ed), *Extraterritorial Application of Laws and Responses Thereto* (Oxford: ECS Publishing Limited, 1984) 38, 39: 'as regards state jurisdiction, those factors listed in *Timberlane* and *Mannington Mills* that are exclusively related to the protection of the individual... are rather unlikely to form part of international law proper.'

[139] Santiago Torres Bernardez, 'Territorial Sovereignty' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 487, 487f.

[140] Goode, above n 131, 415. This point also underlies the discussion in the previous Chapter.

When the foreseeability of legal exposure is unproblematic and can be taken for granted (as it would be when the relevant action is clearly located within, and in all ways connected with, one territory only) there is no reason to decide upon whether it is a necessary pre-requisite for legal exposure. Such a decision is only required when its existence is doubtful. This existence was doubtful , in the pre-Internet age, in the context of the application of US anti-trust law to conduct occurring outside US territory. There the territoriality principle was pushed to its very boundaries, with jurisdiction being based on the economic effects of foreign activities by foreign companies on US territory. In Johnson and Post's terminology, US competition law was applied to foreign actors who never entered US law space and crossed its borders and the only thing to transit US borders were the economic effects of their actions. In terms of foreseeability this was problematic (apart from asserting jurisdiction on a novel basis[141]) because the activities of large companies frequently trigger economic effects which to varying degrees may be felt by all States,[142] making it prima facie difficult to predict which State has a right or would in fact assert regulatory competence. Yet, whatever criticism one may mount against the effects doctrine, the foreseeability problem was tackled from the onset. In the seminal *Alcoa* case the judges held that jurisdiction could only be asserted in respect of foreign activities which were subjectively intended to affect the US and actually affected the US.[143] Later it was even more squarely addressed, and in a way which is reminiscent of the above argument, with respect to the 'objective intention' connection required to attract the private law of a State:

> '[t]he requirement of subjective intention to affect American trade or commerce was soon replaced by the objective tests of foreseeability of that effect. (See *US* v *General Electric Co.*, 82 F. Supp 157 (1949)). This is reflected in the U.S. Department of Justice's *Antitrust Guide for International Operations* (1997) which... states that "when foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they took place".'[144]

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[141] In *US* v *Aluminium Company of America* and *others* 148 F 2d 416, 443 (1945) (the *Alcoa* case) this expansion was justified by the following and later much disputed statement: '[I]t is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends...'

[142] *Akehurst*, above n 126, 195. A typical recent example is the collapse of *Enron* plc.

[143] *US* v *Aluminium Company of America* and others 148 F 2d 416, 444 (1945).

[144] A V Lowe (ed), *Extraterritorial Jurisdiction - An Annotated Collection of Legal Materials* (Cambridge: Grotius Publications Limited, 1983) 3.

This requirement of the foreseeability of the effects appears to have survived all later US developments, including the rise[145] and fall[146] of the 'balancing test' or 'reasonableness' test, with the current position permitting jurisdiction over foreign activity only if it was intended to, and did produce, substantial effects in the US.[147]

The following seeks to establish how the issue of foreseeability has been dealt with in regulating online conduct through public law. Given, as already foreshadowed in the previous chapter, the objective territoriality principle has been more prominent than the effects doctrine requiring intended and substantial effects, the question is whether foreseeability of legal exposure or constructive notice of legal rules has nevertheless been paid due regard.

3.2.3. The Internet and the Objective Intention

The crux of the problem in respect of the public regulation of online conduct is of course the same as that in respect of private regulation, namely that online actors do not prima facie know the location of those with whom they are interacting and thus do not know which State they 'enter' and by implication could not foresee the law to which they may be exposed. The question is to what extent States have been sensitive to this fact comparable to the position in private law and made the application of their public laws contingent upon the foreseeability of such exposure. To answer this question let us return to some of the judicial and statutory instances discussed in the previous chapter.

When US courts have stuck to their doctrinal precedent requiring as a foundation of criminal jurisdiction that the foreign conduct was intended to, and did produce, actual effects in the territory, the problem of foreseeability of legal exposure online has been squarely addressed. So for example, in the early consumer protection

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[145] This test was introduced by *Timberlane Lumber Co v Bank of America* 549 F 2d 597, 614-15 (1976) and required the court to also take into account in deciding jurisdiction a number of factors, including'... the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect'; followed in *Mannington Mills v Congoleum Corp* 595 F 2d 1287, 1294ff (1979) and reflected in s.402)(1)(c) and 403(2)(a) and (d) of *US Restatement (Third) of Foreign Relations Law (1986).*

[146] *Hartford Fire Ins Co v California* 509 US 764 (1993).

[147] ABA, above n 57, 82.

case of *State* v *Granite Gate Resorts Inc*, the Minnesota court assumed adjudicative jurisdiction over the foreign defendant stating

> 'the computer hits on Defendants' Web sites... along with the fact that the Court has determined that WagerNet's mailing list include Minnesota residents, are more than sufficient evidence that Defendants have made a direct marketing campaign to the State of Minnesota. Therefore, it is not unforeseen nor unreasonable to Defendants to be required to come to Minnesota to defend themselves...'[148]

So the court relied upon actual and intended interactions which the content provider made knowingly with Minnesota residents, to show that exposure to the Minnesota court process was foreseeable.[149] This approach is of course reminiscent of the test applied in respect of private law.[150] and is praiseworthy for its capacity to yield to fair and foreseeable results.[151] Yet, it must be remembered, unlike the US, most States would require as a precondition for a prosecution the actual presence of the offender in the territory and not merely 'minimum contacts'. This then raises the question what approach the US adopts in respect of subject-matter jurisdiction which even in the absence of a prosecution being brought may be threatening in its own right.[152]

When it comes to subject-matter or prescriptive jurisdiction a lesser threshold seems to be sufficient. In *People* v *World Interactive Gaming Corp* it was held that New York Penal Law applies provided a constituent element of the offence occurred in the State, or in this case 'the act of entering the bet and transmitting

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[148] (1996) WL 767431, 7, affirmed on appeal State v *Granite Gate Resorts Inc* 558 NW 2d 715 (1997).

[149] The court also referred to the fact that the defendants kept track of who accessed their sites and recorded the IP numbers and URLs of those accessing their site which gave them some idea as to the location of their surfers: *State* v *Granite Gate Resorts Inc* (1996) WL 767431, 8.

[150] Indeed, to a large extent US courts apply the same principles to public prosecutions as those governing personal jurisdiction in private cases. But note comments *State* v *Granite Gate Resorts Inc* (1996) WL 767431, 10: 'Minnesota through the Attorney General seeks to regulate solicitation that comes to its state via phone lines hooked up for Internet users. The Courts do not view the contacts the same as what is necessary for a private litigant to pursue a case as compared to the situation in which the state seeks to regulate solicitations within its borders.'

[151] ABA, above n 57, 139: 'The concept of "targeting" in a jurisdictional sense rests on the facts that (a) a party can fairly (as a due process matter) be held to have intended the effects which have occurred in a particular forum as a result of its actions; and (b) those effects can be a proper basis for subjecting the party to jurisdictional consequences in that forum. While targeting has been a traditional basis for making jurisdictional determinations, the advent of the Internet... have caused that basis to become more prominent because... it has become even a more useful and fairer basis...'

[152] Ivan Shearer, 'Jurisdiction' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International law: An Australian Perspective* (Melbourne: OUP, 1997) 161, 163f: 'it may be argued... that the mere assertion of an inadmissible prescriptive power is contrary to international law, in so far as it may put persons or entities in fear of possible enforcement and thus inhibit their lawful freedom of action.'

the information from New York via the Internet.'[153] As it happened, 'the respondents actively targeted New York as the location where they conducted many of their allegedly illegal activities'[154] but this seems not to have been vital to the assumption of subject-matter jurisdiction. The question is whether the objective territoriality principle accommodates the requirement of foreseeability online? In this case the constituent element required to occur on New York territory, that is placing and transmitting the bet, would generally provide the content provider with the knowledge of the gambler's location based on payment data. But is this always the case?

In the *Yahoo* case the French court was not oblivious to the notion of foreseeability, despite the fact that in the initial judgment in May 2000, Justice Gomez justified France's competence on the basis that Yahoo! Inc, by permitting the online visualisation in France of the objects in question, 'has committed a wrong on the Territory of France, a wrong, the unintentional nature of which is apparent'.[155] This argument was then somewhat modified in the November judgment:

> 'while it may be accurate that the site "Yahoo Auctions" in general is intended principally to internauts based in the United States given the nature of the objects put on sale, the methods of payment provided, the terms of delivery, the language and the currency used, the same is not true of the sites auctioning objects representing symbols of the nazi ideology which might interest and are accessible to any person who wishes to go to them, including French people...'[156]

Here the court in fact imputes to Yahoo! Inc an intention to offer the Nazi objects for sale world-wide including France - an intention which the court infers from the nature of the objects being of interest outside the US. This intention, in the court's mind, was further evidenced by the fact that YahooIInc provided online advertising which was sensitive to the location of surfers, with surfers accessing the auction

[153] NYS 2d 844, 850 (1999). In such instances the effect of the foreign conduct on the territory in question may be very insubstantial.
[154] 714 NYS 2d 844, 850 (1999).
[155] 22 May 2000 (Tribunal de Grande Instance de Paris); an unofficial English translation at http://www.gyoza.com/lapres/html/yahen.htm.
[156] 20 Nov 2000 (Tribunal de Grande Instance de Paris) at http://www.iuriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf; an unofficial English translation at http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html, 5.

site from France being sent banners in French.[157] So far from saying that the Yahoo! Inc's intentions are irrelevant, Justice Gomez holds that anyone offering Nazi-memorabilia for sale can be presumed to realise that it is of interest world-wide and thus objectively intends world-wide distribution which makes world-wide jurisdiction foreseeable. In the recent private criminal prosecution brought against the Yahoo! Inc, Timothy Koogle, on the basis of the continued online accessibility of Nazi-items from Yahoo! Inc's auction site from French Territory,[158] the court reinforced the importance of intention. It argued that, for jurisdictional purposes, although advertising was a constituent element, and indeed the essential characteristic, of the crime in question and an element which had occurred in France:

> 'the factual circumstances of the advertising must reveal the intention of the publication... there is no reprehensible advertising if it results from independent and posterior circumstances foreign to the intention of its author.'[159]

The court then seems to assume that the accessibility of the Nazi objects from a computer in France reflects the provider's objective intention to advertise the said objects on French territory,[160] thus justifying the prosecution in France. Similarly, in the German *T*oben judgment the court justified the assumption of jurisdiction by arguing not only that a constituent element of the crime had occurred in Germany,[161] but also that Toben had intended this. The court reasoned that by putting the holocaust denials on the Internet, he intended to published his assertion world-wide and thus also in Germany. Also, given the content of the site, it was objectively intended in particular for a German audience[162] So both the *Y*ahoo and *T*oben cases seem to suggest that whatever conduct formed the constituent element of the offence justifying jurisdiction must be intentional in

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[157] 20 Nov 2000 (Tribunal de Grande Instance de Paris) 19.

[158] 26 February 2002 (Tribunal de Grande Instance de Paris) No 0104305259, at http://www.foruminternet.org/telechargement/documents/tgi-par2002/0226.pdf. The trial date is set for the beginning of 2003.

[169] 26 February 2002 (Tribunal de Grande Instance de Paris) No 0104305259, 10.

[160] But note that the court later states that 'Arguments which evoke the French nationality of the victim or the fact that the litigious website is emitted from the United States and targets an American public are therefore inoperative in the present case.' 26 February 2002 (Tribunal de Grande Instance de Paris) No 0104305259, 10.

[161] In this case, this was the the real capability of the online material to disturb the public peace in Germany: BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *Neue Juristische Wochenschrift (NJW)* 624, 626f.

respect of the particular territory - a requirement which appears to be easily satisfied.

Finally, returning to Australian policy in respect of the sale of securities, the Australian Securities and Investment Commission (ASIC) will not assume a right to regulate foreign online sites which advertise securities provided *inter alia* they are not targeted at persons in Australia, have not a significant impact in Australia, there is a meaningful jurisdictional disclaimer and no misconduct.[163] Perhaps this statement illustrates better than any of the previously discussed judicial examples, the different way in which foreseeability of public regulation as opposed to private regulation is accommodated. Clearly, ASIC assumes the power to regulate foreign online sites offering securities on the basis of misconduct only, regardless of whether the site was intended for/targeted at Australia or its impact on Australia, that is a site which is merely accessible in Australia.[164] This appears to suggest that content providers may be exposed to Australian securities law whether they could have known about it or not. It is submitted that States accommodate the foreseeability requirement by much more readily embracing the proposition that a content provider intended world-wide publication or dissemination and thus should have foreseen world-wide jurisdiction or 'jurisdiction everywhere'. This, as was argued above, is entirely unproblematic in terms of foreseeability or constructive notice: online sellers of securities need to know the laws of every jurisdiction. A similar approach, it is submitted, underlies the above judicial reasoning in the *Yahoo* and the *Toben* cases where the defendant/accused were said to have intended to reach a world-wide audience including France or including Germany.

Yet, as was also argued above, world-wide jurisdiction is problematic in terms of actual notice creating an unbearable regulatory burden on content providers which in turn encourages legal disobedience and inefficient laws. So the readiness of States to assert jurisdiction over merely accessible websites with little more has not merely spurred the development, but ultimately builds upon the availability, of

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[162] BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *NJW* 624, 627.
[163] Australian Securities and Investments Commission (ASIC), *Offers of Securities on the Internet*, Policy Statement 141 (10 February 1999, reissued 2 March 2000), PS 141.5, at http://wwww.cpd.com.au/asic/ps.

effective location-sensitive screening mechanisms.[165] The mechanisms are the only way of making the regulatory burden manageable for online businesses as they allows them to territorially limit their online conduct and thus their exposure to public laws of innumerable jurisdictions. The imperative of having such measures in place is clearly expressed in the Australian policy statement on online offers of securities:

> '[i]n order not to target persons in Australia... the offeror must... take a variety of precautions designed to exclude subscriptions being accepted from persons in Australia and to check that the precautions are effective... Examples of precautions are not sending notices to, or not accepting applications from, persons whose telephone numbers, postal or electronic addresses or other particulars indicate that they are applying from Australia... It is not acceptable to only use precautions that place the responsibility on the applicant. For example, it is not enough to simply ask an applicant whether they are applying from Australia.'[166]

This statement seems to confirm that in the absence of location-sensitive mechanisms a site may be presumed to target Australia, which is quite unlike the position in respect of private law where generally evidence of positive targeting in form for example of actual contacts is required.[167] So, as the jurisdictional threshold in respect of public law is much lower than for private law, the need for making sites territorially sensitive is greater.

These conclusions are supported by the other cases discussed above, such as the French *Yahoo* decision, which clearly sends out the signal to the online community, that setting up subsidiaries which provide online services tailored to, and targeting, one jurisdiction eg. yahoo.fr targeting France and yahoo.com

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[164] Ibid PS 141.8, where an interpretation is adopted which is clearly inconsistent with the express words of the initial statement in PS 141.5.

[165] See discussion in Chapter 3 on how zoning of online content allow for the operation of concurrent law and prevents conflicting regulatory claims. Already in 1996 *Playboy Enterprises Inc* v *Chuckleberry Publishing Inc* 939 F Supp 1032, para III.B (SDNY 1996) firmly puts the onus on content providers to find means to resurrect borders in cyberspace: 'While this Court has neither the jurisdiction nor the desire to prohibit the creation of Internet sites around the globe, it may prohibit access to those sites in this country. Therefore, while Tattilo may continue to operate its Internet site, it must refrain from accepting subscriptions from customers living in the United States.'

[166] ASIC, above n 163, PS 141.14.

[167] Cf ABA, above n 57, 114: 'securities solicitation rules in the U.S., U.K., and a number of other countries, attempt to distinguish between inadvertent contacts with a resident of the country from abroad (not regulated) and systematic efforts to target consumers in that country (which may be regulated).' But see also ABA, above n 57, 113f where it is noted that existing data protection laws are triggered regardless of whether the collector of data targeted the territory or not.

targeting the US, is not sufficient to avoid regulatory claims made by States not positively targeted.[168] Again, the conclusion implicitly reached was that in the absence of effective screening mechanisms (in this case to exclude French surfers from the auction service) targeting may be assumed. The need for a reliable screening mechanism was also underlined in *People* v *World Interactive Gaming Corp*:

> 'this Court rejects respondents' argument that it unknowingly accepted bets from New York residents. New York users can easily circumvent the casino software in order to play by the simple expedient of entering an out-of-state address.'[169]

With these words, the Court acknowledges both the importance of making the requisite connection knowingly and the need for screening mechanisms to be reliable. Jurisdictional disclaimers by themselves will not provide such reliability.[170]

In summary, one may conclude that constructive notice or the foreseeability of legal exposure within the online world is a concern which has as clearly been acknowledged in respect of public law as in respect of private law. The only difference is that, when it comes to public law, there has been a greater readiness to find an objective intention of the content provider to conduct activities within a State simply by putting material online, which is problematic not in terms of constructive notice but in terms of actual notice of legal rules. Also, whether such an approach is desirable in terms of encouraging global e-commerce and of forging stronger links between States is questionable. Yet, in terms of upholding the rule of law and requiring foreseeability of laws, it can hardly be argued that States are insensitive to these concerns of elementary fairness. Indeed as was argued above, States have a strong self-interest in making exposure to their laws foreseeable, given that such constructive notice is a minimum pre-requisite for ensuring voluntary obedience upon which States largely rely. To some extent, of

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[168] This appears to be the case at least as far the 'com' domain is concerned.

[169] (1999) NYS 2d 884, 851. Similarly, legal responsibility for a site cannot be removed by the inclusion of a disclaimer on the site where the evidence points to a contrary conclusion: *Citron* v *Zundel (No 4)* (2002) 41 CHRR D/274, at http://www.chrt-tcdp.gc.ca, para 44.

[170] See also ASIC, above n 163, PS 141.14 and 141.15. Cf *State* v *Granite Gate Resort Inc* (1996) WL 767431, 10: 'The Minnesota Attorney General brings this lawsuit in an attempt to enforce Minnesota's gambling laws and consumer protection law. The primary relief the Attorney General seek is an injunction. They ask for Defendants to either stop sending advertisements to Minnesota computer users or to state in the

course, a radically new phenomenon such as the Internet cannot but create uncertainty as to how existing doctrines will be interpreted and applied. The above cases and policy statements clarify these matters. Indeed, one may speculate whether the purpose of judgments like the *Yahoo* and Toben cases,[171] which stood little chance of being enforceable, is anything other than to put content providers around the world on notice about French or German law in respect of extremist right wing speech and jurisdictional principles generally. Their function as test cases flagging to the online community the law and when exposure to it is likely, is perhaps most clearly reflected in the fact that the French court in May 2000 ordered the publication of an abstract of the order to be pronounced in five daily or weekly newspapers chosen by the plaintiff.[172] No doubt, the very same reason prompted the civil plaintiffs to ask the French court in the Timothy Koogle prosecution to publish any future judgments in four French newspapers, one newspaper of a Member State of the European Union, in the European and American editions of the New York Times and Wall Street Journal as well as on the yahoo.com and yahoo.fr websites.[173]

Coming back to Johnson and Post's concern about the lack of notice on the Internet, the above discussion suggests that, in general, online actors are only exposed to laws of States which they knew or ought to have known they had 'entered'. The question of what an individual ought to have known or can be presumed to have intended has been addressed more or less explicitly both in the field of private regulation and of public regulation. The answers given though vary. In the private regulatory field the act of merely going online is rarely viewed as evidence of an intention to enter all jurisdictions; in the public regulatory field frequently little or no further evidence is required.

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advertisement that their services are void in Minnesota.' (emphasis added). See also discussion in ABA, above n 57, 114.

[171] 20 Nov 2000 (Tribunal de Grande Instance de Paris) 5: 'the eventual difficulties of execution of our decision on the territory of the United States... cannot of themselves justify... a preliminary objection based on lack of competence of the court.'

[172] 22 May 2000 (Tribunal de Grande Instance de Paris) 4.

[173] 26 February 2002 (Tribunal de Grande Instance de Paris) No 0104305259, 3.

4. Actual Notice: Harmonisation or Territorial Zoning

4.1. Harmonisation of Substantive Law - the Ultimate Solution

Ultimately the reason for the need to know with whom you are interacting online, and for making the exposure to the laws of a State foreseeable, lies in the simple fact that laws vary between States. Harmonisation of substantive law would mean that the legal consequences of interacting with someone from State A are the same as interacting with someone from State X, Y and Z, which, in terms of predicting the legal consequences of one's actions, makes it unnecessary to locate those with whom you are interacting online - an outcome comparable to that achieved by contractual autonomy.[174]

Yet, harmonisation of laws would have another advantage beyond efficient predictability of legal consequences in the online world. It relieves those subject to the regulation of the burden of having to know different sets of national law, however predictable such exposure may be even in the online world. Even contractual autonomy cannot overcome this problem and merely shifts this burden to the weaker contractual party (eg. the consumer) who would invariably be forced to agree to different choice of law and forum clauses with different co-contractors. Of course, given the existence of mandatory laws affecting private disputes and the mandatory nature of all public/criminal laws, this burden of having to know, and comply with, varying sets of national laws, is however generally a problem for online businesses and content providers: '[it] creates confusion and increases the cost of compliance because the merchant is required to be familiar with the mandatory rules of each jurisdiction.'[175] As was argued above, this regulatory burden is too high for most online businesses, a notion captured in the term 'overregulation'. To put it differently, the step from constructive to actual notice is too steep.[176]

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[174] Rice, above n 69, 453.
[175] Rice, above n 69, 453.
[176] Possibly with the exception of traditional resource-rich multinational companies and their online equivalents such as Yahoo or Amazon. This problem has existed to some extent before the Internet; see Jeremy Maltby, 'Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts' (1994) 94 Columbia Law Review 1978, 2008, where the author argued in relation to small international publishers

4.2. Voluntary Zoning by Content Providers

This leaves content providers, short of avoiding online conduct altogether, with two options. One which has already been referred to above is to territorially limit or zone online services, an option often adopted by well-established reputable online service providers. Such zoning can take various forms ranging from tailoring a site to a particular jurisdiction and jurisdictional disclaimers (which is likely to be effective to exclude the private law of other States) to more or less elaborate screening mechanisms (required to exclude the public law of other States). So providers use their knowledge of the location of their would-be customers or surfers not to engage in the too costly task of attempting to comply with all the laws of the respective jurisdictions, but to exclude some of them:

> 'Expedia, a leading online travel site, asks users to indicate their home jurisdiction prior to using the service. If the users indicate the U.S. as their home jurisdiction, they remain at the Expedia.com site. If the users lists Canada as their home jurisdiction, they are transferred to Expedia.ca, a Canadian-specific site. If the users lists Mexico as their home jurisdiction, the site advises them that Expedia is unable to provide service at the present time due to regulatory constraints.'[177]

This means that Expedia need only have actual notice of, and comply with, the laws of the US and Canada. What is noteworthy about the implementation of these zoning strategies is that they are largely voluntary and not even based on the threat of sanctions which are often no more than a remote possibility. This is illustrated by the *Yahoo* case (which is an example where a content provider chooses positive compliance rather than negative compliance through zoning). Even though the Paris Court expressly stated that its order could not be enforced through its French subsidiary and although it was very improbable at the time that a US court would hold the French order enforceable (confirmed later[178]) Yahoo! Inc attempted to comply with the French order not by implementing the French

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confronted with multiple libel standards: 'Without the requisite economies of scale, they will almost certainly produce a single edition, which will have to comply with the most restrictive libel laws.'

[177] Geist, above n 60, 608 (footnotes omitted). This is with the argument advanced in Chapter 2 that not only is the Internet shaping incremental legal change, but that law is also shaping the Internet. See also Saskia Sassen, 'The Impact of the Internet on Sovereignty: Unfounded and Read Worries' in Christoph Engel/Kenneth H Keller (eds), *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values* (Baden-Baden 2000) 196, at http://www.mpp-rdg.mpg.de/pdf_dat/sassen.pdf, where the author argues that '[w]e cannot take its 'seamlessness' as a given simply because of its technical properties.'

[178] *Yahoo! Inc v LICRA 145* F Supp 2d 1168 (2001) and 169 F Supp 2d 1181 (2001).

screening mechanism but by changing its auction guidelines and removing certain Nazi-related literature from its auction site.[179] One may speculate whether this was an instance where both market forces and social norms induced obedience: Yahoo! Inc, as a reputable business, did not want to be seen to condone Nazi-propaganda.[180]

Whatever the reasons, this behaviour is desirable in terms of ensuring the effectiveness of national laws. However, its negative spin-offs are either the territorial fragmentation of the Internet (by those content providers who opt for zoning) or the provision of 'harmonised' content which complies with the lowest common legal denominator (by those content providers who opt for compliance).[181]

4.3. State Zoning at the Country of Destination

The second option online businesses may adopt being faced with their incapacity to known the law of various 'predictable' jurisdictions is to take the risk of non-compliance, particularly given that, at least in the context of criminal or public law, the risk of being exposed to the foreign sanctions for non-compliance is fairly minimal.[182] Indeed, there is no doubt that this option is very popular. As this severely threatens the effectiveness of domestic regulation, Lessig's prognosis is that States will increasingly rely on code or compulsory territorial zoning:

> '[e]ach state would promise to enforce on servers within its jurisdiction the regulations of other states for citizens from those other states, in exchange for having its own regulations enforced in other jurisdictions. New York would require that servers within New York keep Minnesotans away from

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[179] See *Yahoo! Inc* v *LICRA* 169 F Supp 2d 1181, 1186 (2001). The actions of Yahoo! Inc in effect lead to the de facto harmonisation of different legal standards.

[180] This may also explain why the case was brought to start with, given that it was always highly unlikely that a US court would enforce the French orders. See also *Citron* v *Zundel* (No 4) (2002) 41 CHRR D/274, para 300: 'Any remedy awarded... will inevitably serve a number of purposes: prevention and elimination of discriminatory practices is only one of the outcomes flowing from an Order... There is also a significant symbolic value in the public denunciation of the actions that are the subject of this complaint. Similarly, there is the potential educative and ultimately larger preventative benefit that can be achieved by open discussion of the principles enunciated in this or any Tribunal decision.'

[181] In the recent constitutional challenge of the US Child Online Protection Act (COPA) the same issue arose in the context of the states within the US. The question was whether the Act's reference to 'contemporary community standards' in judging online content harmful to minors provides too broad a standard which effectively requires content providers to look as a legal guide to the most puritan of communities in the US. While the Supreme Court rejected that argument the judges addressed this valid concern by arguing that community standards in respect of the speech covered by the Act varied little or that the Act refers to a national 'contemporary community standard.' *Ashcroft* v *ACLU* 122 S Ct 1700 (2002).

[182] Apart from those relatively few instances when in respect of serious offences extradition is sought and granted.

> New York gambling servers, in exchange for Minnesota keeping New York citizens away from privacy-exploiting servers. Utah would keep EU citizens away from privacy-exploiting servers, in exchange for Europe keeping Utah citizens way from European gambling sites... An ID, or certificate-rich, Internet would facilitate international zoning and enable this structure of international control.'[183]

Under this regime of reciprocal enforcement of zoning, online businesses which would not voluntarily restrict their sites to users from certain jurisdictions would be compelled under their domestic law to avoid entering into certain law spaces. Yet, how realistic is this solution? The Californian Court showed very little inclination to enforce the French 'code' order,[184] which some may argue is due to the absence of a reciprocal arrangement between France and the US. What would the US get in return? But considering the sorry state of affairs of reciprocal enforcement of foreign judgments in respect of private disputes and even more so in respect of public matters, one wonders where Lessig gets his certitude from. Lessig's sophisticated model of reciprocal zoning in the country of origin has so far found comparatively little favour with many States relying on the cruder model of zoning in the country of destination; it is estimated that:

> 'at least 20 countries significantly restrict Internet access; many of them are engaged in cat-and-mouse struggles over web-access... Thus, Singapore and the United Arab Emirates force all Internet traffic through a single gateway. The Singapore Broadcasting Authority since 1996 has regulated access to content by licensing both domestic websites and ISPs. The ISPs must install "proxy server" which will filter out content deemed objectionable by the government. The service providers are required to block access to sites that the government considers to undermine public security, racial and religious harmony or public morals.'[185]

Such zoning, apart from raising questions as to its effectiveness,[186] has generally not found much favour in States of the Western democratic tradition. Typically,

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[183] Lessig, above n 22, 55f.

[184] *Yahoo! Inc v LICRA* 169 F Supp 2d 1181 (2001), stating that it 'may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.'

[185] Rice, above n 69, 453. See also Kristina M Reed, 'From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce' (2000) 13 *Transnational Lawyer* 451. See also Smith, above n 7, 529, on the attitude to blocking in the EU. A more co-operative approach is evident in the context of privacy protection, where the Safe-Harbour provisions designed to solve conflicts between EU and US standard in cases where companies do not voluntarily comply with the more stringent EU standards. See Haines, above n 17, 9.

[186] Marc D Goodman and Susan Brenner, 'The Emerging Consensus on Criminal Conduct in Cyberspace' (2002) 10 *International Journal of Law and Information Technology* 139, 213; Online Policy Group Inc, 'Why

Principle 1 of Council of Europe's *Draft Declaration on Freedom of Communication on the Internet* states:

> 'public authorities should not through general measures, including measures such as filtering, deny access by the public to information and other communications on the Internet, regardless of frontiers. Neither should intermediaries, such as service providers, exercise or be obliged to exercise prior control of content which does not emanate from them.'[187]

Having said that, the Australian regime set up by the *Broadcasting Services Amendment (Online Services) Act 1999 (Cth)*[188] provides an example of less invasive and thus more acceptable zoning at the country of destination. Under this regime complaints about offensive material on the Internet can be made by members of the public to the Australian Broadcasting Authority (ABA)[189] which, with the help of the National Classification Board,[190] may then investigate and classify that material as RC and X-rated (illegal and highly offensive material such as violent or child pornography) or R-rated (such as common pornography).[191] Depending on the classification, the material is prohibited entirely (RC and X-rated) or may require an adult verification mechanism to prevent access by minors (R-rated). To enforce any such prohibition or condition, Internet Service Providers (ISPs) or Internet Content Hosts (ICHs)[192] are obliged to prevent publication after notification by the ABA or face sanctions.[193] Material hosted in Australia must be taken down by the relevant ICH.[194] However, when it comes to prohibited material hosted overseas, that is the vast majority of sites accessible in Australia, ISPs

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Blocking Technology Can't Work', at http://www.onlinepolicy.org/research/blockcantwork.shtml; cf Shanthi Kalathil, Taylor C Boas, *The Internet and State Control in Authoritarian Regimes: China, Cuba, and the Counterrevolution* (Washington: Carnegie Endowment for International Peace, 2001), at http://www.ceip.org/files/Publications/wp21.asp. Reed, above n 184.

[187] Council of Europe, *Draft Declaration on Freedom of Communication on the Internet* (Strassbourg, 8 April 2002) 3.

[188] Schedule 5 of *Broadcasting Services Act 1992 (Cth)*.

[189] Sch 5, ss. 22-25 of *Broadcasting Services Act 1992 (Cth)*; note that the ABA can also investigate matters on its own initiative: Sch 5, s.27 of *Broadcasting Services Act 1992 (Cth*.

[190] Sch 5, ss. 3, 30 of *Broadcasting Services Act 1992 (Cth*.

[191] For a definition of 'Prohibited Content' see Sch 5, s. 10 of *Broadcasting Services Act 1992 (Cth*. Note that prohibited content in relation to Internet content hosted outside Australia does not include any R-rated content: s. 10(2) of *Broadcasting Services Act 1992 (Cth*.

[192] For a definition of ICHs and ISPs see Sch 5, s.3 of *Broadcasting Services Act 1992 (Cth*.

[193] A graduated range of sanctions includes sanctions and incentives to be developed by the industry in Codes of practices, formal warnings by the ABA, fines and court orders directing ISPs to cease providing services.

[194] Sch 5, ss. 30, 37 of *Broadcasting Services Act 1992 (Cth)*.

have to take reasonable (ie. 'technically and commercially feasible'[195]) steps to block access to them,[196] unless there is a registered industry code of practice which provides for 'recognised alternative access-prevention arrangements',[197] which might include the 'use of regularly updated Internet content filtering software' or 'the use of a "family-friendly" filtered Internet carriage service.'[198] Three such codes were registered by the time the Act entered into force on 1 January 2000.[199] These outline the obligations of ISPs and ICHs in Australia, in particular in relation to their role in assisting parents to supervise and control children's access to Internet content, in assisting in the development and implementation of Internet filtering technologies as well as in ensuring that customers have the option of subscribing to a filtered Internet carriage service.[200] So not only is the whole regime complaints-driven, but also its ultimate effectiveness is dependant upon the individual end-user. Thus it is unlikely to achieve the level of effectiveness of compulsory blocking by intermediaries, let alone of traditional censorship. And this, of course, means that in terms of substantive regulation, the online phenomenon has triggered a substantial change. The reasons why such change is acceptable, contrary to the arguments made out in Chapter 2 of this thesis, will be explored further in the following chapter.

Generally speaking though, zoning at the State of destination (whether compulsory or voluntary) appears, surprisingly, less harmful in terms of preserving the Internet as a transnational market-place of goods, services and ideas, to the voluntary

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[195] Sch 5, ss. 40(2), 48 of *Broadcasting Services Act 1992 (Cth)*.

[196] Sch 5, s. 40(1) of *Broadcasting Services Act 1992 (Cth)*. This was subjected to widespread criticism. See for example: Censorship Stories Archive, *Newswire* (Australia) , 12 May *1999*, at http://newswire.com.com.au:8008/apcweb/news.nsf/Web/Censorship. See also, 'Can the ABA afford to control the net?', *Newswire* (Australia) , 12 May *1999*, at http://newswire.com.com.au:8008/apcweb/news.nsf/Web/Censorship. Richard Garnett, '*Regulating Foreign-Based Internet Content: A Jurisdictional Perspective*' (2000) 6 *University of New South Wales Law Journal*, at http://www.autlii.edu.au/au/journals/UNSWLJ/2000/8.html, 1.

[197] Sch 5, s.40(4) and (5) of *Broadcasting Services Act 1992 (Cth)*. In relation to overseas material, the ABA may also notify local or foreign law enforcement agencies: Sch 5, s. 40(8) of *Broadcasting Services Act 1992 (Cth)*.

[198] Sch 5, s. 40(6) of *Broadcasting Services Act 1992 (Cth)*.

[199] Minister for Communications, Information Technology and the Arts, *Six-Month Report on Co-Regulatory Scheme for Internet Content Regulation - January to June 2001* (February 2002) 1, *9*.

[200] The codes are available at http://www.aba.gov.au/internet/industry/codes/index.htm. Content Code 2 specifically deals with ISP's obligation in relation to access to content hosted outside Australia. For a discussion of the regime see: Gareth Griffith, *Censorship in Australia: Regulating the Internet and other Recent Developments* (Briefing Paper 4/2002), at http://www.parliament.nsw.gov.au, pt 5; Angela Pratt, *Net Regulation in Australia - A Summary of the New Regulatory Process*, CLP Project, Institute of Social Change & Critical Inquiry , University of Wollongong (2001), at http://www.uow.edu.au/arts/cmc/publications/clp_project.pdf.

zoning put in place by prudent content providers. One reason for that is that for a State to block access to online material or encourage the use of filtering software, it must be illegal under the State's law, in contrast to private screening where access is frequently prevented on the off-chance that such accessibility may expose the content provider to the local procedural and substantive law and the off-chance of non-compliance with such law. That means that there is every possibility that the inaccessible content is commercially valuable and legally compliant. Indeed, the very fact that the business opts for screening suggests that it is a prudent law-abiding business, the kind which should be encouraged. This is compounded by the fact voluntary zoning is generally far more drastic than State enforced zoning at the destination. In the former the content provider tends to prevent access to its services to all but one or two jurisdictions while the latter leaves open access to all but one jurisdiction.

Global legal harmonisation would make the rebuilding of territorial boundaries either by online actors or States largely unnecessary.[201] Individuals could predict their legal obligations with certainty, and compliance with it would be no more onerous than legal compliance in the domestic context. States would benefit from harmonisation in that they could rely on other States to take actions against local wrongdoers for wrongs which also affect the former State. This would provide a far more subtle and efficient enforcement of laws than the crude screening mechanisms employed currently, as well as overcome the general problem of enforcing public or criminal law against foreign wrongdoers. Unfortunately, legal harmonisation of law is notoriously difficult to achieve, even for example within the relatively culturally and politically homogeneous States of Western Europe or of the Australian Federation:

> '[i]t has taken decades to achieve a modest consensus about the merits of international mutual assistance in furtherance of combating drug traffic and money laundering. Even in those nations characterised by agreement in principle, the actual implementation can be difficult... Similar problems exist in relation to international copyright regulation and banking arrangements.'[202]

[201] But for non-legal considerations as for example in respect of delivery of physical goods which may still favour a territorially limited market.
[202] P N Grabosky and Russell G Smith, *Crime in the Digital Age* (Leichardt, NSW: The Federation Press, 1998) 10.

Yet, there are certainly some signs that the Internet has provided the legal harmonisation movement with new impetus.[203] A most prominent example in the public field is the *Convention on Cybercrime* which opened for signature in November 2001 and criminalises a number of more or less universally condemned computer-directed activities, such as hacking, child pornography and copyright-related activities.[204] Harmonisation becomes far more problematic where there is no universally endorsed view which applies to a vast array of matters, such as obscenity, hate speech,[205] political speech, consumer protection or defamation.[206] In respect of these areas the harmonisation and clarification, at least, of the jurisdictional rules would already be a big step ahead.[207] Yet, as long as no progress in made in the harmonisation of substantive law, it is inevitable that Code, as Lessig calls it, will be used more or less successfully both by private actors and public agencies to draw territorial boundaries into cyberspace.

5. Conclusion

There is no doubt that Johnson and Post identify in their notice argument a core requirement for the maintenance of the rule of law as well as for the effectiveness of law per se. Only if individuals can predict the legal consequences of their actions, is it fair to subject them to those consequences and is it possible that individuals will adjust their behaviour in order to comply with the relevant legal

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[203] For a comprehensive overview for the state of affairs of the harmonisation of criminal law affecting cyberspace Goodman and Brenner, above n 186, 139.

[204] Convention on Cybercrime (Council of Europe), at http://conventions.coe.int. Indira Carr, Katherine S Williams, 'Cyber-crime and the Council of Europe: Reflections on a Draft Convention' (2001) 4 *International Trade Law and Regulation* 93, 94 where the authors comment that it would have been desirable to leave copyright-related offence to be dealt with by a separate protocol given that they are not universally endorsed. See also Goodman and Brenner, above n 186, 188ff, where they also discuss the *Proposal for an International Convention on Cyber Crime and Terrorism* put forward by the Center for International Security and Co-operation.

[205] For example, Laura Leets, 'Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?' (2001) 6 *Communication Law and Policy* 287. Note also that initially it was sought possible to accommodate hate speech within the Cybercrime Convention: 'Council of Europe Cyber-Crime Treaty Attacked by ISPs' (2001) 4 *World Internet Law* Report 33, 34.

[206] Goodman, Brenner, above n 186, 177ff, 212f. where the authors seem optimistic as to likelihood of finding a global legal consensus on criminal online activity in particular in respect of crimes targeting property, but much less so in respect of what they coin 'crimes against morality'.

[207] Richard Garnett, 'Regulating Foreign-Based Internet Content: A Jurisdictional Perspective' (2000) 6 *University of New South Wales Law Journal*, at http://www.autlii.edu.au/au/journals/UNSWLJ/2000/8.html, 1, suggesting that an international treaty providing for a universally applicable choice of law rules in Internet cases is more realistic than the harmonisation of substantive law.

rules. Similarly, Johnson and Post are right in arguing that the territorial indeterminacy of the Internet makes it prima facie difficult to know, or be on notice of, the law space you have entered through your online conduct and thus predict the legal consequences of your actions. It must though be stressed again that this argument is only valid if the proposition that online conduct exposes you to jurisdiction everywhere is rejected. The discussion in this paper was premised upon this rejection.

Principally, where Johnson and Post go wrong is in their assumption that the law does not insist upon constructive notice of exposure to the legal rules as a pre-requisite for such exposure. The above discussion cites evidence for this foreseeability requirement both in the field of transnational private and public regulation, and identified it particularly in the judicial search for the objective intention of the content provider. In the private law context evidence of this intention was found in the actual interactions with forum residents, in the content of the site in the surrounding circumstances and any territorial disclaimer or screening mechanism implemented by the content provider. While in the field of public regulation, merely going online was also not held to be evidence of an objective intention of the content provider to enter all law spaces, generally only very little more was required to establish the requisite intention. One question this raises and which will be explored in the following chapter, is why judiciaries and the legislatures across the globe appear to approach what is essentially the same jurisdictional challenge consistently differently in public law and private law.

What emerges from the discussion is what is in many ways more problematic than the issue of constructive notice that is the issue of actual notice of legal rules. So even if exposure to the laws of a particular State or a number of States is foreseeable, the burden of determining and ultimately complying with the rules is too high for most online content providers. Furthermore, particularly in respect of public law being never enforceable abroad, many content providers have prima facie little incentive to restrict the availability of their sites to certain jurisdictions, which in turn threatens the efficacy of territorial rules. States have responded to that threat in various ways such as by taking symbolic actions against foreign

violators eg. the Yahoo case and relying on market forces and moral code to induce legal compliance, or by resorting to Code ie. blocking mechanisms within their borders.

Ultimately the only choice in respect of regulating the Internet is between territorial and regulatory zoning of cyberspace and harmonisation of legal rules. So one option is to re-erect territorial borders in cyberspace through screening mechanisms by providers and States. In the absence of such zoning or of effective zoning, the other option is either actual or de facto legal harmonisation. De facto legal harmonisation occurs through content providers seeking to comply with multiple laws by adopting the most restrictive standard or alternatively through the most permissive standards being set by those content providers who with impunity can flaunt the law.[208] No doubt the ideal option lies in actual legal harmonisation. But as with all ideals, it remains far removed.

[208] Goodman, Brenner, above n 186, 213, stating: 'It is true that the essentially-irresistible proliferation of the Internet will lead to some eroding of national moral proscriptions, some leveling in the definitions of crimes against morality, because it is more difficult for nations to maintain stringent standards of moral interdiction when their citizens are exposed to the permissive standards in force elsewhere.'

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Chapter 5: The Public-Private Law Dichotomy

The previous chapters have shown that the jurisdictional responses to the same Internet-induced challenges vary significantly between private and public law. This chapter seeks to explore the reason for this divergence in an attempt to isolate further factors which must inform the debate on regulatory competence. The starting point in this chapter is the question of why the Internet is jurisdictionally more problematic than the equally global telephone. The answer is that it is not the transnationality of the Internet per se which is troublesome, but rather the combination of that transnationality that its high functionality which enables the type of conduct that in the past has attracted varying degrees of State regulatory intervention. But even that itself would not cause much concern, if the allocation of regulatory competence was not as State-centred as it is in respect of high-priority regulation, that is State regulation through public law. The central argument made in the chapter is that regulatory responses to the Internet-induced jurisdictional challenges must be understood in the context of the legal paradox that the more a State makes a particular activity a regulatory priority, the more uncooperative other States will be in respect of its enforcement. This chapter shows the adverse effects of this paradox, not only on the efficiency of State regulation in the Internet era, but on the doctrinal developments seeking to counteract that inefficiency. The perspective on regulatory competence adopted in this chapter is - perhaps more strongly than in any of the previous chapters - that of the regulator.

1. Mere Transnationality?

1.1. Introduction

In 'Law and Borders - The Rise of Law in Cyberspace'[1] Johnson and Post made an attempt to explain why the Internet is jurisdictionally so problematic. One strand of their argument, namely that relating to notice, was analysed in the previous

[1] David R Johnson and David Post, 'Law and Borders - The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367.

Chapter where it was shown that their concern, while legitimate, is overstated because reasonable foreseeability of legal exposure is regularly made a pre-requisite for liability in respect of online conduct. Yet, the previous Chapter identified another, related dilemma, namely that of actual notice. Beyond the problem of notice, Johnson and Post attribute the Internet-induced jurisdictional dilemma to three further factors:

> 'The rise of the global computer network is destroying the link between geographic location and: (1) the power of local governments to assert control over online behavior; (2) the effects of online behavior on individuals or things; (3) the *legitimacy* of a local sovereign's effort to regulate global phenomena.'[2]

These factors have been touched upon in the previous discussion and without going into further detail, it is clear that Johnson and Post have again overstated their case. From the discussion in Chapter 2 and Chapter 3, it is apparent that the courts, in particular in private disputes, are not only able to distinguish, but also insist on distinguishing, between the effects of different online activities felt on their territories. This is in turn has allowed them to argue that in respect of some, but not all, sites, their assumption of jurisdiction is legitimate. Also, given the increasing availability of territorial screening mechanisms, the effect of regulation can now be limited to the territory of the regulating State. Finally, the problem of power or enforceability seems to affect private law less so than public law, given that in respect of former, there is always the possibility of asking a foreign court to enforce the judgment.

Having said that, there is no expression more habitually used in the legal debate concerning cyberspace than the term 'global', which is almost invariably used to avert to the Internet's profound effect on law and regulation. The question is, what exactly is it that makes the Internet more global than, say, the telephone?[3] The answer is less obvious than would appear, especially in view of the realisation that the Internet is in many ways no more global than other communication media. For

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[2] Ibid 130 (emphasis in the original).

[3] Most discussions on the jurisdictional implications of the Internet do not explore why the Internet is jurisdictionally more problematic than traditional transnational media. For a notable exception: American Bar Association (ABA) *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* (2000) at http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html, esp 5ff.

example, if one wanted to compare the extent to which various media are global by reference to the extent to which the human actors, through those media, engage in transnational communications, the Internet is certainly nothing new or unique. Dispersion of both the physical infrastructure and actors across the globe is, to a greater or lesser extent, also typical for other media such as the telegraph, the telephone and television, in particular satellite or cable television.[4] Broadly, they all allow for communications over large distances. For example, the total numbers of people connected world-wide to the telephone network is one billion,[5] while 'only' 605 million people are connected to the Net.[6] And although it may be argued that the Internet is still in its very early days and the number of people connected to it is expected still to rise exponentially, it must be remembered that 'the Internet... via personal computers and modems since the 1980s have piggybacked on the voice lines and networks put in place for the telephone.'[7] Even M-Commerce, defined as buying and selling of goods using wireless devices such as mobile telephones,[8] relies on the existence of the mobile phone network, thus suggesting that the number of phone users, whether on fixed lines or wireless, is likely to exceed the number of Internet users even in the future. Yet, the Internet nevertheless seems more 'global' and more jurisdictionally problematic than the telephone.

This chapter explores what makes the Internet more 'global' than the telephone, and argues that the Internet's transnationality cannot by itself explain its impact on the law relating to jurisdiction, in isolation of its functionality and the type of conduct it facilitates. One fundamental reason why the Internet has been jurisdictionally so challenging is that it allows for greater variety of conduct and

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[4] Henry H Perritt, 'Cyberspace and State Sovereignty' (1997) 3 *International Legal Studies* 155, 158ff, where the author compares the Internet to other global communication media. See also Paul Levinson, *The Soft Edge - A Natural History and Future of the Information Revolution* (London: Routledge, 1997) 154f, on the growth of cable television in the US. Volker Balda and Volker Schmits, 'Fernsehen ohne Grenzen auf dem Weg zur Konvergenz' (1998)7 Computer und *Recht* 421, where the authors discuss the EU regulation of the increasingly transnational TV.

[5] Michael Salmony, 'Mulitmedia - Chancen und Illusionen - Eine kritische Betrachtung' in Michael Lehmann (ed), *Internet- und Multimediarecht (Cyberlaw)* (Stuttgart: Schaffer-Poeschel Verlag, 1997) 1, 20.

[6] Nua Ltd, *How Many Online?* at http://www.nua.com/surveys/how_many_online (September 2002); see also United Nations Conference on Trade and Development (UNCTAD), *E-Commerce and Development Report 2002 (Executive Summary)* (UNCTAD/SDTE/ECB/2 (Sum), United Nations, New York and Geneva, 2002) 1, where it is stated that the number of Internet users worldwide is expected to reach 655 million by the end of 2002.

[7] Levinson, above n 4, 63.

[8] UNCTAD, above n 6, 5, also noting that 'growth in the number of mobile telephone users world-wide has exceeded fixed lines, expanding from 50 million to almost one billion in 2002.'

transactions than traditional transnational media - conduct to which regulation attaches and in particular regulation through the public law, which is very poorly equipped to deal with transnational conduct. It will be argued that the existing jurisdictional framework structurally embodies the policy that the greater a State's interest in the regulation of activity the less cooperation it can expect from other States and the greater are the territorial restrictions on its regulatory attempts.

This insight is significant because it explains, on the one hand, why the Internet is generally legally and, more specifically, jurisdictionally problematic and on the other hand, why States have consistently approached the same jurisdictional challenge entirely differently in respect of public law and private law (as shown in Chapters 3 and 4) and finally why discussions which fail to appreciate that distinction[9] and treat private cases the same as public cases, in disregard of their disparate well-trodden paths,[10] are misguided and unlikely to yield realistic solutions.[11]

This chapter is divided into three parts. In the remainder of this part, the argument that it is the combination of transnationality and content which makes the Internet problematic in jurisdictional terms, and indeed in law generally, will be illustrated through the use of the analogy of a virus. Part 2 then examines how far online communications are superior to communications though traditional media and why these communications, quite apart from their transnational character, cannot easily be accommodated within traditional legal frameworks. Part 3 then moves on to the public-private dichotomy and examines not only the underlying basis for that

[9] Johnson and Post, above n 1, where the authors draw no distinction between, on the one hand, defamation and copyright law and fraud and anti-trust law on the other hand. For notable exceptions see Graham Smith, *Internet Law and Regulation* (3rd ed, London: Sweet & Maxwell, 2002) where the author dedicates a separate chapter to 'Prohibited and Regulated Activities'; Henry H Perritt, 'The Internet is Changing the Public International Legal System' (2000) 88 *KY Law Review* 885, para V, where the author briefly addresses the public-private dichotomy; Richard Garnett, 'Regulating Foreign-Based Internet Content: A Jurisdictional Perspective' (2000) 6 *University of New South Wales Law Journal*, at http://www.autlii.edu.au/au/journals/UNSWLJ/2000/8.html; Pierre P 'Jurisdiction Over the Internet: A Canadian Perspective' (1998) 32 *The International Lawyer* 1027.

[10] This is consistent with the argument in Chapter 2 on the resistance of law to radical change.

[11] This may affect the choice of legal analogies in legal argumentation. The Internet has frequently been compared in law to the telephone and sometimes the regulation of telephone communications are expressly extended to online conduct. See eg. s. 13(1) of Canadian *Human Rights Act* : 'it is a discriminatory practice for a person or a group acting in concert to communicate telephonically... any matter that is likely to expose a person ... to hatred...', applied in *Zundel* v Canada 175 DLR (4th) 512 (1999), para 51-61. It is not argued here that this is necessarily inappropriate but rather that it may be inappropriate.

dichotomy but also the drastic implications of the categorisation in the area of jurisdiction, which explains why the transnationality of conduct regulated traditionally through public law is far more problematic than that regulated through private law, and this is why the starting points in the legal argumentation in jurisdictional disputes vary significantly in respect of private and public matters and, not surprisingly, give rise to very different resolutions.

1.2. The Virus Analogy

The use of analogies, as conceptual tools, is deeply embedded in reasoning generally and legal reasoning in particular.[12] Its virtue has been succinctly described by Paul Levinson, a media theorist, who, justifying the well-known analogy of the effect of the Internet to a global village, said:

> '[The] notion of the global village is itself of course a rear-view mirror, or an attempt to understand the new world of electronic media via reference to the older world of villages. But indeed, what *is* a metaphor, if not a rear-view mirror that seeks to make the new more explicable by attaching it to something we feel we already know, inside out.'[13]

Yet, while analogies can be very helpful to explain new phenomena by reference to the known, most analogies suffer weaknesses and the one exploited below is no exception. To appreciate it, it is important to realise that comparing a highly infectious lethal virus to the Internet is intended to do no more than indicate the severity of the problem the Internet presents to regulators, rather than comment in any way on the usefulness and merit of the Internet in general.

So how then does a virus help to explain the jurisdictional conundrum caused by the Internet and why its global character is so problematic? What makes a virus

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[12] See Chapter 2 and see, for example, Kent Sinclair, 'Legal Reasoning: In Search of an Adequate Theory of Argument' in California Law Review (ed), *Essays in Honor of Hans Kelsen* (South Hackensack (NY): Fred B. Rothman & Co, 1971) 821, 828ff, on the use of analogies in law.

[13] Paul Levinson, *Digital McLuhan - A Guide to the Information Millennium* (London: Routledge, 1999) 175. The comparison of a new phenomenon and its legal consequences with disease is not new. For example, the spread of the Mafia has been compared to cancer, and the carrier of that disease is said to be migration. Also frequently analogies have been made between technological and the biological world, see for example James Boyle, 'A Politics of Intellectual Property: Environmentalism for the Net' (1997) at http://www.law.duke.edu/boylesite, where the author argues that there are similarities between the code embedded in computers, and the genetic information embedded in humans, so much so that 'in each case, strings of code are subject to intellectual property rights granted in the belief that they will inspire further innovation and discovery': Further see George Dyson, *Darwin Among the Machines* (London: Allen Lane, 1998) 123f, where the author defends, for example, the analogy between the origins and complexity of software and living organisms.

dangerous? The danger posed by viruses depends on a combination of two things: on its nature or effect and on the ease by which it is transmitted. As to the first point, the danger of a virus depends on its nature and what effect it has on humans. Does it affect you at all; does it make you feel slightly unwell, or seriously unwell or does it even kill you? Does it give you a cold or rabies or Aids? The second aspect relates to the infectiousness of the virus. Is it easily transmitted and how is it transmitted? Is it transmitted through air or through blood or through water? But it is only a particular type of combination of these two factors which turns a virus into a monstrosity. For example, a virus that is easily transmitted but has only a slight effect on your health is relatively harmless. Equally, a virus that kills but is not easily transmitted and thus fairly rare is, on an overall public scale, similarly harmless. The really dangerous virus is a virus which kills an*d* is easily transmitted. From the perspective of regulators, the Internet seems the technological equivalent of HIV. The Internet allows for a combination of potent content and great ease of transmission. Neither of these two factors is by itself a novelty or even legally problematic; it is the com*bi*nat*i*on of these two factors which presents the real challenge.

Firstly, what is in the context of a virus the transmission medium, such as air, water or blood, is in the online environment the Internet itself, that is the medium of communication, which 'transmits' information. The nature of the transmission medium largely determines whether the virus is easily transmitted, potentially highly infectious or not. Comparing the Internet to previous 'transmission media', the Internet seems analogous to air, to be highly diffuse as content can travel very easily and almost instantaneously anywhere. But whether and to what extent a virus will spread and take advantage of the diffusive transmission medium depends also on the virus itself. So many viruses cannot spread through air at all. Similarly, in the Internet context, physical goods cannot be spread through the Internet and whatever can take advantage of the online transmission medium must be information-based. This then raises questions as to the significance of information-based exchanges generally and to what extent and how they have been regulated in the past. Part 2 of this chapter will explore this question after an examination of the functionality and transmission potential of the Internet.

Even if it is accepted that the Internet is a highly diffuse transmission medium, allowing for a wide variety of information-based exchanges, this would matter little if online communications were comparable to a virus which gave you no more than a common cold. So the question is whether the types of communications possible over the Internet are like killer viruses and, if so, why. Are online communications more 'dangerous' to regulators than telephone conversations or television programs or letters? The answer to this question can only be found in an evaluation of the legal framework or background against which online communications are set, and of the ease with which this framework can accommodate online activity. This will be done in Part 3 of this chapter, which shows that to the extent to which online activity is the type of activity traditionally regulated in particular by public law, the transnationality of the Internet is highly threatening to regulators as it frequently moves the conduct beyond their effective control.

Finally, there is a one further aspect which makes a virus more or less threatening and which has also proved problematic in respect of online regulation. This is knowledge, or the ability to know or to make a diagnosis. The ability to accurately and easily establish how a virus spreads or whether someone has been infected or is likely to be infected, certainly helps in dealing with it. It makes the virus and its consequences predictable, which allows for the ability to control it. And even in this respect, it may be argued, the analogy between a virus and the regulatory effect of the Internet is valid. If there is one aspect of the Internet which is constantly hampering efforts to effectively transplant traditional regulation to online activities it is its 'undiagnosibility'. The epistemological problems relating to online activity constantly affect its regulation. As was shown in Chapter 4, in the area of jurisdiction, the problem of notice, that is the difficulty of ascertaining the identity and whereabouts of online actors, creates problems both in terms of retrospective law enforcement as well as prospective legal compliance.

2. The Internet within Media Evolution

2.1. The Internet - High Functionality at Minimal Cost

2.1.1. The Evolution of Communication Media

As part of this chapter's objective is to show that a fundamental cause of the challenges created by the Internet to the traditional allocation of jurisdiction and traditional State regulation lies in its facilitation of a wide range of communicative activity (along a regulatory spectrum which includes many traditionally highly regulated communications), it is useful to start off by identifying those features of the Internet which set it apart from traditional communication media. This will involve some diversion into media theory, albeit rather cursory and no more than necessary to place the Internet within the evolution of communication media.[14] The emphasis will not be on the technical properties of the Internet, but rather on its functionality and the legal implications of that functionality. What this part once more reinforces, is that the Internet, albeit novel in many ways, falls neatly within the evolution of media and thus is perhaps less radically new than suggested in some legal arguments.

The type of activities which are possible over the Internet are manifold, extending from the most mundane private exchanges between individuals to the most sophisticated large scale operations by governments, businesses and other organisations. The multitude and variety of these communications and their effects on society as a whole have once been aptly described in the Australian context:

> 'A major shift in the way we live and learn and work has begun in Australia... [S]tudents now use computers at home and school to research projects; governments supply information and services online, so that citizens needn't leave home to lodge forms or to get the help they want;... people do banking... electronically; businesses offer their goods and services for sale on websites; friends and family members keep in touch with each other over long distances, by sending email messages;... students do university degrees and professional training online; people interested in film, books,

[14] In legal discourse generally little attempt has been made to place the Internet within existing media. For a notable exception Perritt, above n 4, where the author reviews some previous communication media to explain in how far the Internet is different.

> hobbies - anything - can meet like-minded people from around the world in chat rooms to share their interest.'[15]

Yet, while such descriptions of online activities are a valuable reminder of the practical effects of the Internet, they offer little by way of pinpointing its peculiar characteristics which have triggered that very effect. What makes the Internet so novel, so unlike any other communication media?

As Levinson persuasively argues, all communication media have one thing in common and that is that they allow for the 'voice of absent people' to be heard across space or time:

> 'media tend to extend communication either across space or time... Thus, paintings on cave walls...convey their messages across millennia, but travel nowhere in space... In contrast, the alphabet on papyrus or paper.. is a space-extending medium par excellence.'[16]

So the Internet, like previous communication media, whether in the shape of paintings, writing or photography or the radio, telephone or television, allows nothing more or less than communication between people in distant places or different times. And indeed, if one analyses the functionality of the various services offered over the Internet such as e-mail, chat-rooms, the world wide web or discussion groups, one cannot help but notice that these services are not intrinsically new and without a historical equivalent:

> '[N]o technological breakthrough or invention is so unprecedented as to not be relatable to some earlier, less technological mode of human communication - indeed, to some mode of organization fundamental to all life, or the universe itself.'[17]

One may for example compare the medium of one-to-one email to the previous media of letters and telegraphs.[18] The relatively passive act of surfing the Net may be compared to the relatively passive act of reading a book or listening to the radio or watching television and by the same token, publishing on the web is comparable

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[15] Ministerial Council for the Information Economy, *Towards an Australian Strategy for the Information Economy* (July 1998) at http://www.noie.gov.au. For an excellent overview of the general effect of the Internet see *ACLU* v *Reno* 929 F Supp 824, 830ff (ED Pa 1996).

[16] Levinson, above n 4, 49f, 60: 'Humans, without the most primitive media of octographic writing, communicate across space via speech and time via memory.'

[17] Levinson, above n 4, 80. For a description of the various modes of communications on the Internet see *ACLU* v *Reno* 929 F Supp 824, 8304ff (ED Pa 1996).

[18] Levinson, above n 4, 50.

to publishing in print or television broadcasting. Receiving messages as a member of a discussion group or of a newsgroup is not dissimilar to being a subscriber of a newspaper or journal. While it may be argued that online all these communications take place with much greater speed and at a far lower cost, their intrinsic character seems hardly novel. And yet, the novelty of the Internet seems beyond argument. What makes the Internet novel and how does it fit into the long line of communication media?

An explanation of the development of ever more sophisticated communication media was proffered by Levinson who has applied a Darwinian perspective to media evolution,[19] which he captured in the following:

> 'Once upon a time, the only way we could look out of walls, necessary for our protection from climate and people alike, was to make holes in the walls. But these small holes resulted in our being rained on... So, we invented the window. This information technology allowed us the protection of the wall from rainy, cold conditions even as we looked outside: the window was a wall... that acted, informationally but not physically, like a hole. An therein was its great advantage. But the advantage - like the advantage of all things evolutionary, and all things technological - was not without drawback. For as the window greatly enhanced comfortable perception from the inside out, it also enhanced easy perception from the outside in. The window brought the Peeping Tom... we can evaluate the tradeoff, and perhaps invent and bring to bear new technologies, remedial media, which improve the balance, if ever so slightly, in out favour.'[20]

Of course, the answer and happy ending was the curtain.[21] Every new medium may be understood as a remedial medium[22] which 'preserve[s] and continue[s] the extensional breakthroughs of the past, while retrieving the elements of the

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[19] Levinson, above n 4, 31. See also Werner Faulstich, 'Mediengeschichte' in Werner Faulstich (ed), *Grundwissen Medien* (Munchen: Wilhelm Fink Verlag, 1994) 19, 28f, where the author identifies four phases in the development of communication media beginning with the oral culture (until 1500), to the printed culture (1500 to 1900), to the electronic mass media dominated by visual media (1900 to 2000) and finally to more individualised and interactive electronic multi-media substituting earlier media (from 2000). Dyson, above n 13, where Dyson compares the Internet to a sentient being which changes under evolutionary pressure. Harold D Lasswell, 'The Structure and Function of Communication in Society' in Wilbur Schramm (ed), *Mass Communications* (2nd ed, Urbana: University of Illinois Press, 1960) 117, 187f.

[20] Levinson, above n 4, 6.

[21] Levinson, above n 4, 113.

[22] Levinson, above n 4, 60: 'I termed the powerful tendency to bring media ever more fully into human consonance "anthrophotropic" ... - the humanly selected evolution of media towards ever more human function.' The author also refers Donald T Campbell's work on evolutionary epistemology, ie. the analogies between the evolution of biological organisms and the evolution of human knowledge. This thesis on media is supported by Salmony, above n 5 ,16: 'Anstatt dessen bewegt er sich in einer Welt am Bildschirm, die der echten Welt viel ahnlicher ist, und kann sich somit eher wie gewohnt -menschengerechter -verhalten.'

naturally human communicative world that were lost.'[23] The Internet fits into this evolution in that it offers extended communications which are more consonant (than any previous media) with the 'initially enjoyed...balanced though unextended communication environment... [limited by] eyesight, earshot, and memory'.[24] This subconscious striving towards ever more sophisticated media which allow communication unimpeded by space, time and memory while at the same time having all the characteristics of natural communication, is reflected in analogies of the Internet with a 'never-ending world-wide conversation'[25] or by the often used image of the global village.[26] And in these analogies also lies the explanation why the Internet is remarkable.

Unlike any previous communication media which retrieved some properties of natural communication, the Internet combines an unprecedented number of them[27] and in that it is like a letter, radio, TV, telephone, a book, a newspaper, a photo, a film, a painting all at once. This, incidentally, explains why comparison between the Internet and all these media, which frequently occurs in legal arguments, is both valid and invalid: valid, to the extent that the Internet retains many of the advantages of previous media;[28] invalid, to the extent that it does much more than each previous medium by itself. The Internet is a mu*lti*-me*dia* communication medium;[29] offering the hitherto greatest functionality. This makes it a qualitatively new communication medium and just as the radio was more than the telegraph or the telephone without wires,[30] so is the Internet more than a duplication of previous

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[23] Levinson, above n 4, 61, see also Werner Faulstich, above n 19, 35 on media development in the electronic age: 'von den auditiven Medien (Telephon, Schallplatte, Horfunk) zu den (audio-)visuellen Medien (Foto, Film, Fernsehen) und dann von diesen optischen Einzelmedien zu den mulitfunktionalen und mulitmedialen Medienverbünden (Video, Computer, Neue Medien).'

[24] Levinson, above n 4, 61.

[25] *ACLU* v *R*eno 929 F Supp 824, 883 (ED Pa 1996), followed by the assertion that '[t]he Government may not... interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.'

[26] Levinson, above n 4, 129, mentioning McLuhan, who coined the phrase and famously said: 'the new electronic interdependence recreates the world in the image of a global village'. See also Mike Meire, Marc Meire and Peter Glaser, *Onl*ine-*Uni*versum (Dusseldorf: Metropolitan Verlag, 1998) 11f, noting how the Internet realises the myth of the global village.

[27] This aspect, as will be seen, below gives rise to categorisation problems.

[28] It does not retain all, which helps to why it will not entirely replace existing media, such as books or photographs.

[29] Faulstich, above 19, 38, states that 'multimedia' is characterised, firstly, through the combination of text, graphic, sound, pictures and motion pictures as the new source of information and, secondly, through the capability of interactivity. For the different ways the term 'multimedia' is used see Salmony, above n 5, 2f.

[30] Levinson, above n 4, 81: 'once radio was understood to be far more than a telegraph or telephone without wires, its political consequences were quickly grasped by government.'

technology with some added benefit. What are these properties and functions which meet within the Internet and which make communicating online more natural, and thus superior and novel? The following analysis focuses only on those properties of the Internet which are significant for this discussion and shows by way of example how it retains properties already retrieved by previous media and retrieves other properties which were 'lost' in the media evolution. It goes on to foreshadow the legal consequences triggered by this development.

2.1.2. The Functionality of the Internet

Instantaneous Oral and *Visual Communication*

Communication over the Internet is fast, almost as fast as natural communication, where both at visual and audio level the receipt of the information corresponds to the time information is sent. At this unextended natural level, at the very time when words are spoken or a view presented the words are heard and the view is perceived. This instantaneous link was severed primarily through the medium of writing which allowed communication to be extended over time and space but in the course of which the instantaneous character of natural communication was lost. This immediacy of communication was remedied by later media such as telex, the telephone, the fax, the radio or television:

> 'Telephone, radio, television... are latecomers [in comparison to the telegraph] in this party of eradicating distance, any distance on Earth, via the instantaneous transport of information at the speed of light.'[31]

But communication at the natural level is not just immediate; it is also both visual and oral. It relies on the communication of words, noises, gestures, facial expression, colour, shapes and movements. Some of these properties remained 'lost' in media which retrieved the instantaneous character of natural communication. For example, the telephone, being suitable for the instantaneous exchange of oral communications, cannot transmit visual information.[32] The fax has reverse capabilities, although it also cannot transmit movement. The web, on the other hand, whose main currency was initially text, has increasingly become a

[31] Levinson, above n 4, 127.

multimedia medium, offering text, graphics, pictures, sounds and animation and thus appealing to audio and visual senses.[33] In that it is similar to television, which has remedied the non-visuality of the radio and the non-audible aspects of the newspaper or fax. So how does the Internet 'improve' on television?

The very virtue of television is also its shortcoming, namely its immediacy, the fact that it is the media alternative to fleeting speech.[34] The short-lived character of natural communication was first overcome by writing which allowed communication over time, unimpeded by the shortcomings of memory.[35] The fleetingness of television has partly been remedied by the video recorder.[36] Yet even the VCR is inherently unsuitable for the communication of written text, the ideal conduit of ideas and abstract thinking. The Internet, on the other hand, is and this very capacity to provide for the instantaneous communication of written text,[37] which is 'preserved' over time on websites and searchable archives, is part of its attraction. But even more importantly, the Internet 'remedies' the intrinsically passive character of both television and radio while retaining their nature as a mass medium.

Interactive One-to-Many Communication

Communication at the natural level includes both the monologue, which involves a speaker and a passive listener, and the exchange between two or more persons where any of them can both impart and receive information. An interactive communication medium is one which makes it easy for the participants to do the latter. The most obvious examples of traditional instantaneous and interactive communication media are the telegraph or the telephone, which 'empowered creators and receivers at the same time.'[38] The Internet provides similar interactivity through services such as chat rooms or emails or online telephony and

[32] Levinson, above n 4, 59, where the author argues that the telephone fills the 'acoustic' hole created by the photograph and the telegraph which both operated in the realm of sight.
[33] Levinson, above n 4, 64.
[34] Levinson, above n 4, 106. Of course, broadcast TV is also limited in terms of its spatial extension.
[35] Levinson, above n 4, 105.
[36] Levinson, above n 4, 109ff, but also by cable and satellite TV which also allow you to order films.
[37] Levinson, above n 4, 75.
[38] Levinson, above n 4, 75.

thereby retains the extensional breakthroughs of these traditional interactive media. Yet, does it go beyond this?

Traditional passive media such as books, newspapers, magazines, the radio or television are superior to traditional interactive media in one critical respect: they can reach simultaneously a mass audience and thereby retrieve a characteristic of natural communication, namely the 'inherent one-to-many capacity of speech and hearing.'[39] The retrieval of this capacity though came at a price, literally speaking:

> 'Radio took the form it did because the receipt of electron-magnetic carrier waves with an electronically encoded "passenger" - the voice or sound - proved to be a lot less expensive than the transmission.'[40]

This economic asymmetry is even more pronounced in respect of television and the publishing industry,[41] which made it very costly to be a 'speaker' and cheap to be a 'listener'. The Internet now has drastically shifted that balance in favour of the 'speaker'. If one had to single out a characteristic of the Internet which is more profound in its impact than any other, it is that mass communication is now available to the masses.[42] Online, a simultaneous mass audience may be reached through the simple publication of a website or the setting up of a discussion group. Never before was it so relatively easy to become a publisher, for whatever purpose, with a potential audience of millions. So in fact the nature of traditional mass media which, based on the prohibitive costs of transmitting information, allowed a few to communicate to the masses,[43] has been overcome by the Internet, which effectively has become a many-to-many communication medium. And unlike the traditional mass media, the Internet also offers interactivity as an added bonus. One precondition of the Internet's suitability as a mass media for the

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[39] Levinson, above n 4, 78.

[40] Levinson, above n 4, 79, nut note John Naughton, *A Brief History of the Future - The Origins of the Internet* (London: Phoenix, 2000) 7, where the author states: 'It was possible... to obtain a licence to operate your own short-wave radio station. And all over the globe people held such licences which enabled them to sit in their back rooms and broadcast to the whole world.'

[41] Levinson, above n 4, 75;

[42] In *ACLU* v *Reno* 929 F Supp 824, 843f (ED Pa 1996): 'unlike traditional media, the barriers to entry as a speaker on the Internet do not differ significantly from the barriers to entry as a listener. Once one has entered cyberspace, one may engage in the dialogue that occurs there... The Internet is therefore a unique and wholly new medium of worldwide human communication.'

[43] This was also initially based upon the scarcity of broadcast resource which limited the amount of TV which could be broadcasted. This limitation has now been overcome by cable and satellite TV which facilitate the broadcasting of many more channels and triggered the explosion of more specialised channels, ie. narrowcasting.

masses is clearly its easy and cheap functionality, which, although assumed in the above discussion, deserve further discussion.

Cost and Ease of Use

Speech, the spoken word, is the most basic communication medium of all and indeed it is a

> 'medium so fundamental to our humanity that it seems odd to call speech a medium at all. All undamaged humans speak. Children need not go to any school to learn the essentials of spoken communications. It costs nothing to speak - talk is cheap indeed...'[44]

The same holds true at an even more profound level for unextended communication at the visual level where light is the medium which allows for the communication of visual information. The Internet retrieves properties of unextended communication in that it allows for communications which are cheap and easy. Although communication over the Internet is neither gratis, and while it does not make skill entirely redundant, relative to its functionality, and compared especially with traditionally cost and skill intensive mass communication media, the Internet is cheap and easy to use. This, as noted above, overcomes the traditional economic asymmetry of the radio, television or print which makes it cheap and easy to receive information, but very expensive and hard to transmit it:[45]

> 'But the most important differentiating characteristics of the Internet is its extremely low barriers to entry. Because it uses underlying physical communication infrastructure, a new Internet enterprise need not build a radio transmitter, string wire, or lay a cable. All it takes to be an Internet publisher is a $2,000 personal computer and a $12.95 per month subscription to an Internet Service Provider.'[46]

Given the public availability of computers connected to the Internet in libraries, Internet cafes and universities as well as their accessibility in work places, this cost is for many even lower.[47] Once this cost hurdle, however low that may be, has

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[44] Levinson, above n 4, 63.

[45] Levinson, above n 4, 62f, on radios: 'the high expense of transmitting carrier waves, in contrast to the relatively low cost of receiving them, frustrated the use of Marconi's invention as a telephone without wires for the populace.' Wilbur Schramm (ed), *Mass Communications* (2nd ed, Urbana: University of Illinois Press, 1960) 201, on the cost of mass media.

[46] Perritt, above n 4, 161. Levinson, above n 4, 152.

[47] But the existence of the 'digital divide' discussed in Bradford L Smith, 'The Third Industrial Revolution: Law and Policy for the Internet' (2000) 282 *Recueil des Cours* 229, 441ff: 'Internet access at present is markedly

been overcome, becoming an online publisher, whether on the World Wide Web, in discussion groups or chat rooms, requires only minimal computer expertise.

2.1.3. The Snowball Effect

The combined effect of the above properties not only helps to explain why the Internet is a 'communicative' advance on any previous communication media but also why it has become such a success and ultimately a viable communication medium which has been given the stamp of approval by millions of users: 'At every turn, the impact of every medium is subject to an audience of human appraisal, expressed not only in ideas but in the behavior of utilizing a medium or not.' [48]

Yet, there is a further aspect of the Internet which goes towards explaining its sheer size. The Internet is, as previous communication media have been, subject to the paradox that its success depends upon, and increases with, it being successful. In other words, the more people use it and communicate through it, the more attractive it becomes, and the more people will use it.[49] When only a handful of individuals had access to email, gaining access to e-mail made little sense; e-mail became an infinitely more useful tool with the rise of its very user base:

> 'A network externality occurs when the utility that a given user derives from [a] good depends upon the number of other users who are in the same 'network'... Or, put another way, as the size of network and the amount of nodes within the network increase, the overall value of the network increases... If a railroad serves only a small number of stations, railroad users obtain only a limited value from the service. On the other hand, the greater number of stations served by the railroad, the more value consumers will derive from the service.'[50]

This snowballing effect is by no means inevitable. That new media and its uses are constantly subject to an audience of human appraisal has recently been illustrated by the collapse of dot.com companies: their success partly depended upon the

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uneven. In September 1999, Latin America, the Middle East, and Africa collectively accounted for less than 4 per cent of the world's 201 million Internet users. Canada, the United States, and Europe accounted for almost 80 per cent.'

[48] Levinson, above n 4, 10.

[49] A recent example of this snowballing effect is Microsoft's dominance in the field of operating systems which has led to its monopoly and eventually to the litigation by the US Justice Department. For an analysis of this phenomenon see Teague I Donaghey, 'Terminal Railroad Revisited: Using the Essential Facilities Doctrine To Ensure Accessibility to Internet Software Standards' (1997) 25 *AIPLA Quarterly Journal* 277.

[50] Ibid, at 287f (footnotes and quotation marks omitted).

Internet being widely adopted as a vehicle for consumer transactions.[51] If this had occurred companies could have been profitable and also further reduced their unit costs, which would have encouraged more companies as well as more consumers to transact online. A similar snowballing effect would have had to occur in respect of consumer confidence. The existence of this paradox as well as the new functionality of the Internet, have a number of legal ramifications which will now be outlined in generic terms.

2.2. Legal Ramifications of Functionality

2.2.1. Information-based Commodities

To describe the Internet as a communication medium appears to do insufficient justice to the profound impact it has already had upon society and to its still lingering massive economic, political and social potential; and yet, the Internet can transmit nothing but information. The value of this apparent misnomer lies in highlighting the power of both information and communication media, a power which has driven society *ab initio*. As the spread of reliable information via the press stimulated the Scientific Revolution and later the Age of Discovery, [52] so might World War II not have happened without the mass propaganda tool of the radio.[53] While this phenomenal impact of information and media may be self-understood for media theorists, lawyers across the field have rarely had to face up to this with as much urgency as forced upon them by the Internet, which is said to have triggered the third industrial revolution[54] and which makes the term 'information economy' more appropriate than ever.

For lawyers the realisation that the Internet is no more than a means to transmit information, is significant in bringing home the truth more clearly than ever before,

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[51] Robert J Kaufmann, Bin Wang, 'The Success and Failure of Dotcoms: A Multi-Method Survival Analysis' (2001) University of Minnesota, Management Information System Center, at http://misrc.umn.edu/workingapapers/fullpapers/2001/0109_092501.pdf, where the authors state: '[i]n the current study, network externalities that reflect whether a Dotcom firm has achieved a critical mass in its market can make the difference between success and failure for an Internet firm.'

[52] Levinson, above n 4, 9.

[53] Levinson, above n 4, 86.

[54] Smith, above n 47, 242: 'the Internet is at the heart of a third industrial revolution. It is a revolution founded fundamentally on three advances in technology - computing power based on the integrated circuit; advanced software...and a high bandwidth telecommunications network'

that the value of many commodities lies in the information they represent rather than their traditional physical manifestation, ie. the medium through which their intangible value is communicated. This makes them *prima facie* suitable for transmission or exchange over the Internet.[55] Examples of commodities which can ultimately be reduced to pure information are money, newspapers, books, CDs, securities or any picture but also services such as banking services, education, any professional advice whether legal, medical or accountancy. The medium is not the message after all. Even the exchange of commodities which are not information-based, such as cars, wheat, bombs or cleaning services, is often attended by a significant amount of purely informational exchanges. So, the sale of a car may be attended by advertising, negotiations of the terms, the conclusion of the agreement, the exchange of money, a dispute and its resolution - and for all these the Internet may become the transmission vehicle.

2.2.2. Medium-Specific Regulation

The second interrelated legally significant insight sparked by the Internet is that the regulation of many of these information-based commodities and informational exchanges has relied, more or less explicitly, upon the nature of their traditional transmission medium.[56] For example, copyright law has heavily relied upon the need to have a physical manifestation of the protected work whether in the medium of a CD, book or picture.[57] Similarly, taxation law has relied upon the fact that the physical nature of many commodities and the expense of advertising these commodities made their exchange or distribution over large geographic areas not viable for all but a few large corporations and required middlemen, both

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[55] This is not to say that on the Internet there is simply an exchange of 'pure' information or ideas without some physical externalisation, as argued by some commentators. See for example John Perry Barlow, 'Selling Wine Without Bottles: the Economy of Mind on the Global Net' (Electronic Frontier Foundation) at http://www.eff.org/Publications/John_Perry_Barlow/HTML/idea_economy_article.html, 2, where the author argues 'as information enters Cyberspace, the native home of Mind, these bottles [ie. physical manifestation of ideas] are vanishing. ... Even the physical/digital bottles to which we've become accustomed... will disappear as all computers jack in to the global Net... Once that has happened, all the goods of the Information Age... will exist either as pure thought or something very much like thought.'

[56] In addition the law might also have been restricted to a particular medium, which does not necessarily entail, but makes it more likely, that it relies on specific characteristics of a medium. This aspect has also been examined in Chapter 2 in the context of the quantitative or qualitative legal problems caused by the Internet. Richard Keck, 'Developing an Intuitive Understanding of the Behavior and Legal Treatment of Information Assets' (2001) 605 PLI/Pat 771, explaining the different properties of physical and intellectual assets.

[57] This made copying not only expensive but was also accompanied by a loss of quality. See Barlow, above n 55.

of which provided convenient leverage points.[58] The censorship of films, news, pictures and novels has relied upon the fact that mass-media, such as TV, cinema, newspapers and books made it expensive to transmit information and thus created a few gatekeepers or intermediaries, which could easily be regulated.[59] Money laundering regulation has relied upon the fact that large amounts of cash are not easily transportable and thus money launderers seek the help of local banks to transfer their illegitimate proceeds, and that local banks could relatively easily be regulated.[60] This phenomenon of regulation relying upon the peculiar nature of a communication medium is also apparent in legal categories such as 'goods' and 'services' and the problems created when information-based 'goods' suddenly shed their physical skin.[61] In the US, a similar problem is encountered on a far more fundamental level, namely the regulation of commodities vis-à-vis the regulation of free speech. When does an informational exchange stop falling within constitutionally protected freedom of expression and start falling within tightly regulated economic activity?[62] Many of these problems reflect what Lessig calls regulation through constraints of real space code or architecture or nature.[63] Not only are these constraints of real space an independent source of regulating behaviour, but also regulation through law, as another source of constraints, relies and builds upon real space constraints. In other words, traditional regulation of the media, in the widest sense, has relied upon and exploited the architecture and constraints of traditional communication media. It has relied upon the loss of quality attending the copying of music, the expense attending TV broadcasting or

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[58] Australian Tax Office (ATO), *Tax and the Internet*, Discussion Report of the ATO Electronic Commerce Project (August 1997) 56f, commenting on the disintermediation: 'The power of the Internet to link consumers directly with producers can be lethal to this midriff bulge of "middlemen", whose sale, royalties, commission, profits, and personal incomes figure prominently in the composition of several of Australia's key tax bases.' See also Smith, above n 47, 251f; Henry H Perritt, 'Jurisdiction in Cyberspace: the Role of Intermediaries' in Brian Kahin and Charles Nesson (eds), Borders *in Cyberspace: Information Policy* and *Global Information Infrastructure* (Boston: MIT Press, 1997); on disintermediation in privacy context: Peter P Swire, 'Of Elephants, Mice and Privacy: International Choice of Law and the Internet' (1998) 32 *The International Lawyer* 991.

[59] Levinson, above n 4, 134; see also Schramm, above n 19, 175.

[60] ABA, above n 3, 142, discussing choke points and the US *Bank Secrecy Act* which imposes substantial duties of investigation and reporting on money and payment processing intermediaries.

[61] ATO, above n 58, 60f. This has also been problematic in the intellectual property law, contract law and consumer protection law context.

[62] Daniel A Farber, 'Expressive Commerce in Cyberspace: Public Goods, Network Effects and Free Speech' (2000) 16 *Georgia State University* Law Review 789; Richard C Ausness, 'The Application of Product Principles to Publishers of Violent or Sexually Explicit Material' (2000) 52 *Florida* Law Review 603.

[63] Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard* Law Review 501.

newspaper publication or the difficulty attending the secret movement of large amounts of cash.

The Internet has so forcefully triggered or reinforced these insights because it allows for the exchange of such an unprecedented wide spectrum of commodities which previously appeared to be tied up hand-and-foot to a particular medium. The Internet's cheap high functionality, its immediacy as well as permanency, its visuality as well as its audibility, its interactivity as well as non-linearity have 'freed' many such commodities and their exchanges from their traditional medium, from TV, radio, CDs, books, letters, newspapers, catalogues, magazines, telephone, cinema, cash, posters, photographs or the word of mouth, and overcome their inherent limitations. This is captured in the commonly used term 'convergence'.[64] By 'inheriting' communications from a multitude of traditional media as well as transforming them in the process, the Internet has also inherited the regulatory interests which have traditionally attached to these communications.[65] Thus as the spectrum of possible online communications is great and varied, treating the most trivial information the same as economically or politically highly value information, so are the regulatory interests equally great and varied, ranging from private interests in the protection of property or reputation to public interests in the protection of revenue, internal and external security and financial and economic stability:

> 'As cyberspace grows to encompass ever-increasing areas of human thought, interaction, and commerce, it regularly comingles with the sorts of

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[64] Well described, for example, in Joel R Reidenberg, 'Governing Networks and Rule-Making in Cyberspace' (1996) 45 Emory Law Journal 911, 915f: 'the GII also undermines substantive legal sovereignty. Governance has relied historically on clear distinctions and borders in substantive law. For example, telecommunications law has been distinct from financial services law, and intellectual property law has been distinct from privacy law... Designers of information products can, to a certain extent, package their work to pick and choose legal protection.' See also Meire, Meire and Glaser, above n 26, 17ff; R S Metzger 'Communications Convergence' (2001) 18 Computer and Internet Lawyer 1 and National Office for the Information Economy (NOIE), Convergence Review - Final Review (10 May 2000) at http://www.noie.gov.au/projects/framework/Foresight/convergence/index.htm, 11, where convergence is defined as 'service sector restructuring enabled by digitalisation.'

[65] See for example the Western Australian case of *Mickelberg* v *6PR Southern Cross Radio Pty Ltd* [2001] WASC 150, where the question was whether the simultaneous audio-streaming of a radio station's program via its website amounts to a 'broadcast' for the purposes of s.206 of Broadcasting Services Act 1992 (Cth). This case also shows that there is often uncertainty whether the new online medium can be compared to the old one in question. For a discussion and criticism of the case see Matthew Collins, The Law of Defamation and the Internet - Update 5/2002, at http://mattcollins.com.au/oupupdate52002.htm. See also earlier Australian media release: Department of Communications, Information Technology and the Arts, Video and Audio Streaming (21 July 2000) 073/00, at http://www.dcita.gov.au.

> "real world" activity, ranging from product sales to criminal conspiracy, commonly subject to state regulation.'[66]

This explains why the Internet has spurned so many regulatory activities across so many legal fields and why a common theme underlying much of this activity is how to extend existing regulation to it: either make it less media specific or create Internet-specific regulation designed to achieve the same regulatory objectives as shaped traditional media regulation.[67] The underlying foundation for this activity is that prima facie there seems to be no good reason why the Internet should occupy a special status and why online communications should not be treated legally the same as similar communications through traditional media. This has been assumed, or used as an argument, in favour of regulation on innumerable times.[68] For example, the *Broadcasting Services Amendment (Online Services) Act 1999*, as discussed in the previous chapter, providing for a framework of censoring online content accessible in Australia, has been justified on the ground that it simply treats online communication the same as traditional communication:[69] it broadly applies existing Australian classification guidelines for films.[70]

Having said that, it is already clear from the regulatory history of pre-Internet media that transplanting the regulation of one medium to another is not always appropriate and indeed done. So the typology Siebert offered of media systems in

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[66] Neil Weinstock Netanel, 'Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory' (2000) 88 *California Law Review* 395, 400.

[67] This approach is prima facie consistent with the argument advanced in Chapter 2 on the resistance to legal change and the need for incremental legal change.

[68] Joshua G Urquhart, 'Transnational Securities Fraud Regulation: Problems and Solutions' (2000) 1 *Chicago Journal of International Law* 471, 476, where the authors notes in respect of the applicability of US securities antifraud laws to the Internet: 'Although much of the law is undecided, the tentative consensus is that the United States is beginning to treat the Internet expansively as a non-unique form of communication.' In early Internet cases it was infrequently unsuccessfully argued that existing law does not apply to Internet. See, for example, *United States v Thomas* [1996] 2 ILR (P&F) 22. More recently in Australia: *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 20: 'I add that Mr Robertson [counsel for the defendant] briefly flirted with the proposition that cyberspace was a defamation-free zone, but did not develop it. Nor shall I.'

[69] Commonwealth of Australia, Second *Reading Speech*, Senate, 21 April 1999, 3957 (Senator Ian Campbell) at http://www.aph.gov.au, noting that the bill will 'enact a regime ... that is commensurate with the regulation of conventional media, while ensuring that regulation does not place onerous or unjustifiable burdens on industry and inhibit the development of the online economy.' But note: Commonwealth of Australia, Second *Reading Speech*, Senate, 24 May 1999, 5205 (Senator Dee Margetts) at http://www.aph.gov.au: 'The fundamental problem with this bill is that it seeks to treat the Internet as though it were just an extension of existing broadcasting media. In fact, it is different in a number of ways which make this approach to regulation unlikely to work.'

[70] *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*. For more recent developments in see Gareth Griffith, *Censorship in Australia: Regulating the Internet and other Recent Developments* (Briefing Paper 4/2002) at http://www.parliament.nsw.gov.au.

relation to the press[71] did not necessarily reflect the regulatory approach of the same State for broadcasting:

> 'While the work of Siebert *et al* is focused predominately on the press, their work ... is helpful in identifying historical trends. However, it is necessary in this connection to differentiate between the printed and broadcast media. The social responsibility model has significantly informed the development of public-service broadcasting and the rather heavier regulation of broadcasting in general than is found in relation to the press.'[72]

Different types of media may justify different approaches to regulation, despite the fact that the content communicated is similar. This raises the issue as to what considerations may impact on the question as to whether and how to extend existing media regulation to online activity.

2.2.3. Existing Regulatory Objectives v the Chilling Effect

There is one prevailing theme which runs through Internet-related case law and legislative activity, which is often referred to as the possibility of a chilling effect on Internet communications, or in the reverse, the desirability of helping to snowball valuable online activities – two sides of the same coin, which was explained above. The latter desire has, in the commercial sphere, driven the extension of existing

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[71] Fred S Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the* Press (Chicago: University of Illinois Press Urbana, 1956) According to this typology, there is the correlation between regulatory approaches to the press and particular forms of government, identifying four approaches: authoritarian, totalitarian, libertarian and social responsibility. See also Fred S Siebert 'Communications and Government' in Wilbur Schramm (ed), *Mass Communications* (2nd ed, Urbana: University of Illinois Press, 1960) 219, where he distinguishes between the government as a restrictive agency, as a regulating agency, as a facilitating agency and as a participating agency. See also Everette E Dennis 'Internal Examination: Self-Regulation and the American Media' (1995) *13 Cardozo Arts and Entertainment law Journal* 697, commenting on how a de-facto system of accountability, along the lines of the social responsibility theory, has shaped the US press. For an attempt to create a typology in respect of the Internet see Lyombe Eko, 'Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation' (2001) 6 *Communication Law and Policy* 445. For an analysis of the different approaches to regulation generally see, for example, Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1946) 242: 'The national legal order can regulate human behavior in very different respects and to very different degrees. It can regulate different subjects matters and can, by doing so, limit more or less the personal freedom of individuals... The question of the proper extent of this limitation... is answered in a different way by different political systems. Liberalism stands for the utmost restriction of the material sphere of validity of the national legal order, especially in matters of economy and religion.'

[72] Mike Feintuck, *Media Regulation, Public Interest and the Law* (Edinburgh: Edinburgh University Press, 1999) 42. See also Levinson, above n 4, 151, where the author notes that in the US, despite its strong tradition of free expression, the regulation of TV and radio was justified on the basis of 'scarcity of broadcast bands as a public resource..., penetration of broadcast programs into unsuspecting homes and cars... and the direct appeal that images and sounds in contrast to printed words make to our emotions...' The judiciary recently commented on the differential legal treatment of mass communication media in *ACLU* v *Reno* 929 F Supp 824, 873f (ED Pa 1996). See also Commonwealth of Australia, Second *Reading Speech*, Senate, 24 May 1999, 5205 (Senator Dee Margetts) at http://www.aph.gov.au.

facilitating regulation to online activity,[73] given that it would increase commercial certainty, predictability and thus consumer and business confidence.[74] On the other hand, the potential of chilling online communications has put a cautionary note upon many of the attempts to extend existing *prohibitive* regulation, whether private or public, to the online world.[75] Typically in *Digital Equipment Corp v Altavista Technology Inc* the court stated:

> 'To impose traditional territorial concepts on the commercial uses of the Internet... raises the possibility of dramatically chilling what may well be the most participatory marketplace of mass speech... the world... has seen... As a result courts have been, and should be, cautious in applying traditional concepts.'[76]

While the possibility of the chilling effect is not always sufficient to reject the application of traditional law to the online world, at times it is. For example, in the US case of *Cyberspace Communication Inc v Engler* the plaintiffs were granted an injunction to enjoin amendments to the Michigan Statute which added criminal prosecutions against using the Internet to disseminate sexually explicit materials to minors, *inter alia* on the ground that

> 'virtually all Internet speech was available everywhere,,, and [the] chilling effect on Internet communications outside of Michigan greatly outweighed any putative benefit inside Michigan.'[77]

The court referred to a chilling effect peculiarly arising from the transnational nature of the Internet[78] which is caused by the 'spillover effects' of State regulation:

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[73] H L A Hart, *The Concept of Law* (2nd ed, Oxford: Clarendon Press, 1994) 27f: 'Legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not... Instead, they provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create... structure of rights and duties within the coercive framework of the law.'

[74] One of the earliest universal initiatives was the clarification of contractual principles in the online context. See, for example, the *UNCITRAL Model Law on Electronic Commerce (1996).*

[75] Note that is not always the case given that sometimes the very absence of prohibitive regulation chills online communication because, for example, of insufficient consumer confidence. On the types of regulation impacting on consumer confidence see National Office for the Information Economy (NOIE), *Improving Confidence, Trust and Security*, at http://www.noie.gov.au/projects/confidence/Improving/index.htm.

[76] *Digital Equipment Corp v Altavista Technology Inc* 960 F Supp 456, para III.B (*D Mass 1997*). See also *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 16: 'One of the submissions was the proposition that the imposition of liability on the basis of the place of publication occurring in the place of downloading would have a serious "chilling effect" on free speech, leading to an increase in the number of actions... It was put that information providers would become more cautious if this occurred thus reducing the uninhibited communication and circulation of information to an exceptionally low level.' In Europe this cautionary approach is perhaps best reflected in statement by Council of Europe: Group of Specialists on On-Line Services and Democracy, *Draft Declaration on Freedom of Communication on the Internet* (Strasbourg, 8 April 2002)

[77] *Cyberspace Communication Inc v Engler* 55 F Supp 2d 737, 738 (Ed Mich 1999).

[78] The chilling effect is of course not always due to the transnational aspect of the Internet. It may result from the fear of the loss of anonymity: *Doe v 2TheMart.Com Inc* 140 F Supp 2d 1088 (W *D* Wash 2001) where the

> '[B]ecause cybertransmissions appear simultaneously in every state, each prescribing its own rules, a content provider fearful of incurring liability will have to modify its transmissions to satisfy the law of the most restrictive state... One state's comparatively stricter regulation deprives other states' residents of the benefit of, for them, lawful content.'[79]

The alternative is the territorial segmentation of the Internet, described in the previous chapters,[80] which of course also chills the worldwide online conversation. The transnational spillover effects of State regulation may present a justification for not applying existing regulation to the Internet and implicitly abandon traditional regulatory approaches, which occurred in the above mentioned case of *Cyberspace Communication Inc* v *Engler*[81] and in the Australian case *Macquarie Bank* v *Berg*[82], discussed in the next chapter.

The above discussion shows why the Internet has attracted so much regulatory activity in such a great variety of regulatory fields and why much existing media regulation in the widest possible sense is challenged by online communications simply because it relies on special attributes of existing media, such as their physical attributes or their intermediaries, which are not present in the online world. Furthermore the discussion identifies the competing factors which have informed the debates on how to regulate online activity. On the one hand, prima facie there seems to be no reason why existing laws should be abandoned in respect of online activity. Yet, on the other hand, the extension of existing regulation is always weighed against its potential to chill online activity. Not to throw out the baby with the bath water requires a fine balancing act. The difficult question is how that compromise is and should be struck.

While the answer must at least partly be dependent upon the specific legal contexts at hand, the following discussion seeks some answers to it in the

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court refused to enforce a subpoena to an ISP seeking the identification of all persons who posted messages anonymously partly because it would chill online communications.

[79] Sanjay S Mody, 'National Cyberspace Regulation: Unbundling the Concept of Jurisdiction' (2001) 37 *Stanford Journal of International Law* 365, para II.C; Johnson and Post, above n 1; Jack Goldsmith 'Unilateral Regulation of the Internet: A Modest Defence' (2000) 11 *European Journal of International Law* 135.

[80] The availability of territorial screening mechanisms means that these spillover effects are increasingly becoming less problematic. Se Chapter 3 (4.3.1. The Acceptability of Concurrent Jurisdiction) and Chapter 4 (4. Actual Notice: Harmonisation or Territorial Zoning).

[81] *Cyberspace Communication Inc* v *Engler* 55 F Supp 2d 737 (Ed Mich 1999).

[82] *Macquarie Bank Ltd & Anor* v *Berg* [1999] NSWSC 526.

traditional jurisdictional framework. In this context it is worth noting that the foregoing discussion on the functionality of the Internet and the resulting legal problems would largely be valid even if the Internet was a purely domestic phenomenon. The transnational character adds another layer of complications to many regulatory problems. The following discussion examines the jurisdictional frameworks dealing with these added complications and shows how the jurisdictional framework 'institutionalises' a hierarchy of legal norms upon a differential treatment of law is based. This ultimately severely limits the real choices States have about the retention of certain regulation in the online environment.

3. The Public-Private Dichotomy in the Jurisdiction Context

3.1. The Context

As the Internet has inherited a myriad of regulatory interests or objectives and as online activity is not restricted to national borders, the question addressed now is to what extent does the jurisdictional framework help or hinder States to achieve these myriad regulatory objectives in respect of online activities within their borders.

It is clear that the transnationality of the Internet challenges different States in different ways.[83] So, for example, for authoritarian regimes such as China and Cuba, which have traditionally placed tight restrictions on freedom of expression, especially political expression, and which are built upon a 'state hegemony over the distribution of information and ideologies',[84] the threat of the Internet lies in its suitability for this kind of communication:

> '[P]ublic access to ICTs [information and communication technologies] may facilitate a "demonstration effect," whereby exposure to outside ideas and images of transitions in other countries spurs a revolution of rising expectations and the eventual overthrow of the authoritarian regime. Alternatively, use of e-mail, Internet chat rooms, bulletin boards, and the

[83] Piere Trudel, 'Jurisdiction over the Internet: A Canadian Perspective' (1998) 32 *The International Lawyer* 1027, 1029, where the author argues that States have shown a 'weak interest ...with respect to a large number of legal issues related to cyberspace'.

[84] Shanthi Kalathil and Taylor C Boas, 'The Internet and State Control in Authoritarian Regimes: China, Cuba, and the Counterrevolution' (2001) *Carnegie Endowment for International Peace*, at http://www.ceip.org/files/Publications/wc21asp, 6

> World Wide Web may contribute to "ideational pluralism" and a more gradual liberalization of the public sphere in authoritarian countries.'[85]

For western democracies, on the other hand, the threat of the Internet tends not to flow from its capabilities as a means for political advocacy, given that in these States regulation of political expression has traditionally been fairly minimal and generally facilitating.[86] But for the liberal western State the Internet presents a challenge in so far as it frustrates its role in protecting moral or cultural values or consumers. 'Some states worry about attacks on their cultural identity, while others are more apprehensive about loss of control over their economic future.'[87] The following argues that at least part of the reason for these varying regulatory problems lies in the private-public law dichotomy, as it embodies, firstly, a hierarchy of norms[88] reflective of a State's relative regulatory priorities and, secondly, the policy in relation to jurisdiction that States must be absolutely self-sufficient in respect of their public law - a policy which is entirely anachronistic in the Internet age.

The discussion is predicated on an understanding that although public law and private law can be defined generically, in substance they are 'supplied with content by the culture of a given time and place.'[89] And given that the inquiry does not go beyond law, it does not set out to, and cannot, reach substantive conclusions on what matters should or should not fall within the public or private sphere either on moral or political grounds:

> 'Just as it is an error to try and derive substantive conclusions from formal analyses so is it an error to regard descriptive analytical theories as yielding substantive concepts like Rechtsstaat in its ideological, or substantive sense...'[90]

For the same reasons, the inquiry will not, or only in passing by way of illustration, answer the question why particular activities and communications, that fall within

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[85] Ibid 3, but they also refer to more indirect causes why the Internet may present a challenge to authoritarian regimes.
[86] There are of course notable exceptions, such as the regulation of hate speech in Germany and France, as discussed in Chapter 3.
[87] Trudel, above n 83, 1027. See also Smith, above n 9, Ch 12.
[88] For other hierarchy of norms, ie systematisations of norms, see, for example, Kelsen , above n 71, 123ff.
[89] John Henry Merryman, 'The Public Law-Private Law Distinction in European and American Law' (1968) 17 *Journal of Public Law* 2, 15.

either category, do so given a particular political order. In other words, the question addressed is, *if*, rather w*h*en, a legal norm falls within the public or private category, what does it say about the norm within the legal system within which it exists and what does it entail in the transnational context?

Before turning to this, as a matter of background, one cannot but mention that the public-private dichotomy, its purpose,[91] content[92] and continued usefulness,[93] has attracted a great wealth of literature within the domestic context. This is partly due to the fact that for a long time it has been central to civil law systems where 'public law' and 'private law' are:

> 'terms of legal art... [that] have been built into a systematic conceptual legal structure that... limits and directs the thinking of the legal scholars who perpetuate it, provides the parameters of judicial interpretation and application of laws, precedents and legal transactions and, in a word, dominate the entire legal process.'[94]

In contrast, the distinction has not traditionally been prominent within the domestic sphere of common law jurisdictions:[95]

> '[c]onceptions of public law and private law have never figured greatly in the history of the common law. They have no methodological significance, no jurisdictional consequences and no ideological relevance...'[96]

Yet, although in common law system there is still no such overarching systemisation of law,[97] it has still infiltrated legal analysis in different contexts.[98]

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[90] Neil MacCormack, *Questioning Sovereignty* (Oxford: OPU, 1999) 43.

[91] Gyula Eorsi, *Comparative Civil (Private) Law* (Budapest: Academiai Kiado, 1979) 85, where the author traces origins of dichotomy. See also Hans W Baade, The Operation of Foreign Public Law (1995) 30 *Texas International Law Journal* 429, 432ff.

[92] See for example, Robert H Mnookin, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 *University of Pennsylvania Law Review* 1429, 1430 '[T]he very activities that are labelled private by liberal Democrats are considered public by conservative Republicans and vice versa. These differences can be dramatically exposed by asking for the dimension of the "public" and the "private" spheres in the realm of sexual expression and in the pursuit of economic goods.'

[93] Kelsen, above 71, 207; Merryman, above n 89 and Gyula Eorsi, above n 91,87f.

[94] Merryman, above n 89, 18.

[95] Merryman, above n 89; Baade, above n 91, 435f.

[96] Merryman, above n 89, 19.

[97] The closest equivalent is probably distinction between civil and criminal law; see *Atcheson v Everitt* (1775) I Cowp 382, 391, where Lord Mansfield said 'there is no distinction better known that the distinction between civil and criminal law'.

[98] L Harold Levinson, 'The Public Law/Private Law Distinction in the Courts' (1989) 57 *George Washington Law Review* 1579;. Ernest J Weinrib, The Idea of Private Law (Cambridge, MA: Harvard University Press 1995); Mnookin, above n 92, 1429, 1492, where the author states that: private sphere is often made to describe the 'cluster of activities that are [or should be] presumptively outside the legitimate bounds of government coercion and regulation.'[98] The State enters this sphere merely as a 'manager' given that it has a monopoly on enforcement (or physical violence) within its territory and the power validate private norms.

Whether, and to what extent, the dichotomy as it exists in the domestic context overlaps with the public-private dichotomy which underlies jurisdictional questions in the transnational context is beyond the scope of this discussion.[99]

This part primarily focuses on existing jurisdictional doctrines, disconnected from the online phenomenon. Yet, as a matter of providing a factual context, it is useful to recall two recent cases, the *LICRA & UEJF v. Yahoo! Inc & Yahoo France*[100] [hereafter *Yahoo*] and *R* v *Toben*[101][hereafter *Toben*]. The focus in this discussion is whether the *Yahoo* case is a public case and thus should be treated the same as the very similar *Toben* case.

On 20 November 2000 Judge Jean-Jacques Gomez of the Tribunal de Grande Instance de Paris, sitting in the *Yahoo* case, affirmed his earlier order against Yahoo! Inc to take all necessary measures to prevent surfers in France from accessing via yahoo.com the Nazi artefact auction service or any other site that constitutes an apology of Nazism or a contesting of Nazi crimes. The action was brought by LICRA,[102] an association dedicated to combating racism and anti-semitism, and UEJF,[103] another watchdog in respect of neo-nazi activities. It was based on Art 808 and Art 809 of the *New French Code of Civil Procedure*, which allows a French court to issue an injunction to stop a 'manifestly illegal disturbance' or nuisance. The disturbance was manifestly illegal on the basis that the publication or distribution of the Nazi memorabilia constitutes a violation of the

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[99]Note that the terminology 'public' and 'private' is also freguently used to distinguish between publicly open parts of the Internet and privatised computer networks: Saskia Sassen, 'The Impact of the Internet on Sovereignty: Unfounded and Real Worries' in Christoph Engel and Kenneth H Keller (eds), *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values* (Baden-Baden, 2000) 195, 196, at http://www.mpp-rdg.mpg.de/pdf_dat/sassen.pdf. Saskia Sassen, 'Digital Networks and Power' in Mike Featherstone and Scott Lash (eds), Spaces of Culture - *City, Nation, World* (London: SAGE Publications Ltd, 1999) 49. This discussion is not concerned with this understanding of the dichotomy. Neither is it concerned with the meaning of 'private' as describing the sphere which needs no law or regulation at all: Perrit, above n 10, para II. Finally, the discussion also does not comment on the legitimacy of international private legislatures such as the Hague Conference on Private International Law or other private standard-setting agencies. See, for example, Antonio F Perez, 'The International Recognition of Judgments: the Debate between Private and Public Law Solutions' (2001) 19 *Berkeley Journal of International Law* 44.

[100] 22 May 2000 (Tribunal de Grande Instance de Paris) an unofficial English translation at http://www.gyoza.com/lapres/html/yahen.html; confirmed in 20 Nov 2000 (Tribunal de Grande Instance de Paris) at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf, an unofficial English translation at http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html.

[101] BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *Neue Juristische Wochenschrift* (NJW) 624.

[102] La Ligue Contre La Racisme et L'Antisemitisme (The League against Racism and Anti-Semitism)

[103] L'Union Des Estudiants Juifs De France (The French Jewish Students Union)

French Criminal Code. Yahoo! Inc was ordered to comply with the injunction within three months, after which time Yahoo! Inc would incur a penalty of 100,000 Francs for every day of delay. In addition it was also ordered to pay to each plaintiff 10,000 Francs in damages. After the US court refused to enforce the order[104] and Yahoo failed to comply with it, a criminal prosecution was instigated in France against Yahoo!Inc and its CEO.[105]

One month later, in December 2000, the German High Court decided that foreigners could be prosecuted in Germany for hate speech published on the Internet on a foreign server if the publication had the potential to threaten or disturb the public peace in Germany.[106] The judgment arose out of a prosecution against the Australian citizen Frederick Toben who had published in Australia, on his homepage entitled 'Adelaide Institute', articles in which the mass murder committed by Germans during World War II is denied and presented as a Jewish myth. Such publications are prohibited in Germany pursuant to §130 of *German Penal Code* and punishable by imprisonment.

The obvious parallel between these two cases is that both the French and German courts assumed jurisdiction over a foreigner in respect of online activities originating abroad. The second parallel is the very subject-matter of the cases, namely the publication or distribution of Nazi propaganda. The difference between them is the form of the action, with the French being a civil action and the German judgment resulting from an appeal of a criminal prosecution. As minor as that difference may appear, as will be shown below, it potentially entails profound consequences for any jurisdictional analysis and for the ability to enforce the obligation in the transnational context and, by implication, for the ability to effectively regulate the activity in the domestic scene. This then brings us to the public-private dichotomy informing jurisdictional competence and its underlying basis.

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[104] *Yahoo! Inc v LICRA* 169 F Supp 2d 118 (ND Cal 2001).
[105] *R v Timothy K and Yahoo Inc* 26 Feb 2002 (Tribunal de Grande Instance de Paris) No 0104305259, at http://www.foruminternet.org/telechargement/documents/tgi-par2002/0226.pdf, 10, where the court decided that it had jurisdiction over the accused. The trial date is set for the beginning of 2003.
[106] BGH, Urt. V. 12.12.2000 - 1 *StR* 184/00 (LG Mannheim), reproduced in (2001) 8 *Neue Juristische Wochenschrift* (NJW) 624.

3.2. Does the Public-Private Dichotomy exist in the Jurisdictional Context?

3.2.1. Public International Law: Public Law

Questions of jurisdictional competence in the transnational arena are answered by reference to rules of public international law and private international law. While the very terminology suggest a dichotomy, this is misleading, at least in so far as

> '[t]he terms "private" and "public" international law ...seem to indicate an opposition within the international legal order, although public international law is simply international law, the adjective 'public' being completely superfluous, while private international law is, at least normally, a set of norms of national law characterized by the subject-matter of legal regulation.'[107]

Yet, while misleading in so far the sources of the rules are concerned, it is nevertheless indicative of the matters which the respective jurisdictional rules deal with, with public international law being principally concerned with public matters and private international law with private matters.

This segregation was borne out of the gradual conceptual separation of conflicts of law from the 'law of nations' or *jus gentium.*[108] The 'law of nations' had historically 'comprised what is [today] called public international law and... conflict of laws.'[109] This conceptual separation of public international law and private international law was spurred by two 19th century developments: positivism and the rise of the

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[107] Kelsen, above n 71, 245f. See generally on the relationship: F A Mann, 'Conflicts of Laws and Public Laws' (1971) 132 *Recueil* des *Cours* 107; F A Mann, 'The Doctrine of International Law' in F A Mann, *Studies in International* Law (Oxford: Clarendon Press, 1973) 1; F A Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) 186 *Recueil* des *Cours* 9; F A Mann, *Further Studies in International* Law (Oxford: Clarendon Press, 1990).

[108] Gerfried Mutz, 'Private International Law' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International* Law (1987) vol 10, 330, 330; Mann (1973), above n 71, 16ff, tracing the history of conflicts of law and the doctrine of jurisdiction under public international law.

[109] B. A. Wortley, 'The Interaction of Public and Private International Law Today' (1954) *Receuil* des *Cours* 239, 247 (footnotes omitted). But private international law existed long before public international law see Hessel E Yntema, 'The Historic Bases of Private International Law' (1953) 2 *The American Journal of Comparative Law* 297. The seamlessness of private and public international law is reflected in the statement by Ulricus Huber (1684), reproduced in Mann (1973), above n 107, 18f: '1.The laws of every sovereign authority have force within the boundaries of its state and bind all subjects to it, but not beyond. 2. Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily. 3. Those who exercise sovereign authority so act from comity that the laws of each nation, having been applied within its own boundaries, should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects. ' See also: R.H. Graveson, *Comparative Conflict of* Laws (Oxford: North-Holland Publishing Company, 1977) Vol 1, 17, where the author comments that the definition of the 'the law of nations' in the middle of the 18th century comprised 'a wider concept than public international law in its modern form... [including] the law merchant and a good deal of private law.'

concept of the 'sovereign territorial State' in Europe. The positivist understanding of law, according to its intellectual fathers Bentham and Austin, meant that only law which was based on the commands of a sovereign and enforceable by a sovereign's coercive sanctions was true law. The supreme sovereign came in the form of the territorial State, and so law which was based on the commands of the State and enforced by municipal courts, such as that part of the 'laws of nations' which dealt with the 'private' affairs of individuals, fitted the positivist's definition of true law.[110] Yet, law which purported to bind the State, or the absolute sovereign itself, was clearly an entirely different animal and possibly no more than 'morality'.[111] And this of course applied to all the customary rules which purported to govern the relationship of States vis-à-vis each other and which came to be known as 'international law', even though law improperly so-called.[112] Critical for this discussion is that these developments triggered the exodus of the individual as a subject of international law:

> '[I]t became more plausible than ever before to treat international law as, in the main, the law governing sovereigns in their relations with each other... [T]he individual was rarely ever treated as a subject of international law, but essentially, as a subject of his own supreme law-giver...'[113]

With the individual not being a subject of international law, so were his or her private relations, whether national or transnational, a matter to be regulated by the State only and by reference only to municipal law.[114] To put it another way, international law was 'relegated' to impose limitations upon a State in its intercourse with other States only in so far as it concerned 'obligations owed to the State itself, and not with its jurisdiction to define, adjudicate and enforce the obligations of private persons to each other.'[115]

Today most of the *raison d'être* for the initial separation of private international law and public international law have disappeared. Even taking a positivist

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[110] Yntema, above n 109, 305ff.
[111] Wortley, above n 109, 251.
[112] Graveson, above n 109, 16, where the author notes that positivist rejected international law as law 'because of the absence of the necessary political relationship of superior and inferior and the lack of a sanction.'
[113] Wortley, above n 109, 251.
[114] Ibid.
[115] Bernard H Oxman, 'Jurisdiction of States' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 277, 278.

understanding of law, 'there exists a common consent of the community of states that the rules of international conduct shall be enforced by external power'[116] - that is external to the State in default, as for example through actions of the UN Security Council. Also, the concept of the '"classical", supposedly absolute sovereignty'[117] of States has been abandoned in favour of a definition of sovereignty as a 'legal status within but not above international law.'[118] Also, it is clear that 'international law may act *per* se upon individuals, who become, to that extent, subjects of international law.'[119] As international law has become more 'private', conduct traditionally categorised as 'private' has assumed a far greater public role. Long gone is the day

> 'when private property, private wrongful conduct, and private contract were indeed separated intellectually, legally, sociologically, and in many ways, economically and politically, from the activities of the state... We live in a day when multinational and other huge agglomerations of so-called private power are tightly intermeshed at all levels with more traditional sovereigns.'[120]

In view of these jurisprudential, economic and political developments and in view of the critics of the conceptual separation of public and private international law,[121] which are clearly 'two branches...[that] have grown from the same tree',[122] the question arises whether and, if so, to what extent the pre-occupation of public international law with public matters in the jurisdictional context has lessened:[123] does it extend to transnational private matters? This question has frequently been

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[116] Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed, London: Longham, 1992) vol 1, 10. Hart, above 73, 213.

[117] Helmut Steinberger, 'Sovereignty' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 397, 402, where the author describes how the traditional ruler was not responsible, as of law, for his exercise of public power to a higher secular authority to whom his act might be appealed. Jennings and Watts, above n 116, 12: 'There is similarly acceptance that the rules of international law are the foundation upon which the rights of states rest, and no longer merely limitations upon states' rights which, in the absence of a rule of law to the contrary, are unlimited.'

[118] Steinberger, above n 117, 408.

[119] Jennings and Watts, above n 116, 17.

[120] P B Carter, 'Rejection of Foreign Law: Some Private International Law Inhibitions' (1984) 55 *British Yearbook of International Law* 111, 120f (citing Macneil). See also Merryman, above n 89, for a critique of distinction. Eorsi, above n 91, 87f, commenting on change of boundaries in the domestic context.

[121] See esp Wortley, above n 109, and Andreas F Lowenfeld, 'Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for their Interaction' (1979) 163 *Recueil des Cours 311.* See also generally Michael C Pryles, 'Internationalism in Australian Private International Law' (1989) 12 *Sydney Law Review* 96.

[122] Lowenfeld, above n 121, 321.

[123] The proliferation of international human rights law shows that there are clear inroads to the traditional principle that international law is only concerned with States rather than individuals.

debated, with views differing widely. For example, Shearer asserts that international rules on jurisdiction are not restricted to public matters:

> 'Most attention has been given by international law to criminal jurisdiction, since this tends to have a more public character. Civil jurisdiction is subject to the same principles, but state practice has been less clearly expressed, especially in respect of anti-trust laws.'[124]

Similarly, Brownlie argues that:

> 'there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens.'[125]

Finally, Mann asserts:

> 'Even in the field of litigation between private persons it would be a mistake to believe that, once its [adjudicative] competence is established, the court is necessarily free to proceed as its own law prescribes and that the doctrine of legislative jurisdiction ceases to operate.'[126]

He goes on to state that even in respect of civil matters, international law imposes a 'test of closeness of connection'.[127] The problem is that there are at least as many commentators who assert the opposite.[128] Such inconsistency, coupled with the inconclusive nature of state practice, makes the argument that public international law imposes no limits on private international law more persuasive. Having said that, there is a substantial and growing body of international law in the form of treaties which deal with private international law matters.[129] But far from proving the general assertion that 'the distinction between private and public law is not applicable to international law'[130] this merely validates the assertion in respect of treaty law on jurisdiction, as opposed to customary international law on jurisdiction, which continues to impose restrictions on States only in respect of public matters.[131]

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[124] Ivan Shearer, 'Jurisdiction' in Sam Blay, Ryszard Piotrowicz, Martin Tsamenyi, *Public International Law - An Australian Perspective* (Melbourne: OUP, 1997) 161, 165. See also Henry H Perritt, The Internet is Changing the Public International Legal System' (1999-2000) 88 *KY. Law Review* 885, para II.B: 'Public international law circumscribes the legitimate exercise of state power to regulate private conduct and to decide private disputes, through rules of jurisdiction, choice of law and judgement recognition.'

[125] Ian Brownlie, *Principles of Public International Law* (4nd ed, Oxford: Clarendon Press, 1990) 299.

[126] Mann (1973), above n 107, 131.

[127] Mann (I973) , above n 107, 134.

[128] Mann (1973), above n 107, 60f (see esp n 1 & 2); Mutz, above n 108, 340; Michael Akehurst 'Jurisdiction in International Law' (1972-73) 46 *British Yearbook of International Law* 145, 222.

[129] See in particular Hague Conventions on Private International Law, at http://www.hcch.net.

[130] Kelsen, above n 71, 245.

[131] Jennings and Watts, above 116, 6f, 488ff.

The debate as to whether jurisdictional rules under customary international law are or are not restricted to public law is due to the fact that it has been silent, rather than expressly permissive, on State jurisdiction in respect of private matters and that its rules have evolved out of disputes between States concerning criminal cases in the technical sense and in the broader sense:

> 'involving the enforcement of general public law of the state claiming to exercise jurisdiction... [such as] laws of a primarily economic or social content... as those relating to monopolies and trade practices, where the observance of the law is ensured by coercive action taken by state authorities.'[132]

The common nature of these disputes goes some way towards describing the content of 'public law' under international law.

3.2.2. Private International Law: Private Law

Since public international law does not as a rule concern itself with the question of jurisdiction in private matters, so is 'public law' excluded from the analysis within private international law. This finds expression both in the refusal by courts to allow for their own public law to be replaced and their unwillingness to enforce a foreign public law judgement.[133] This is so even if it runs counter to the normal choice of law rules or the express election by the parties.[134] The non-enforcement rule of foreign public law tends to be phrased as follows:

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[132] Jennings and Watts, above 116, 466.

[133] At times States have gone even further and expressly prohibited defendants from complying with the foreign order based on foreign public law: *British Nylon Spinners v Imperial Chemical Industries* [1953] Ch 19. The Law Reform Commission, *Choice of Law*, Report No 58 (1992) para 8.15: 'The English courts have on occasion refused to enforce contracts the object of which is to break the laws of a friendly foreign country... It did not matter that the foreign law was undoubtedly a penal law.' In *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301, the House of Lord refused to enforce a contract which required the doing of an act which required the commission of a crime in a foreign State. Also note that the enforcement must be distinguished from the recognition of foreign public law where the foreign public law supplies a datum for the application of domestic private or private law or is determinative of a preliminary matter: Baade, n 91, 447ff. See for example *Williams & Humbert v W & H Trade Marks* [1986] 2 WLR 24, where the House of Lords held that the principle that a country could not collect its taxes outside its territory could not stop the English court from recognising, without considering the merits, the compulsory acquisition laws of a foreign State and acknowledge the changes of title to property which came under the control of that State.

[134] Note, there have been some isolated cases where parties were allowed to indirectly contract out of a State's public law: R v *Harden* [1963] 1 QB 8, see Chapter 4 ('3.2.1. Imperfect Harmonisation and Absence of Choice'). Philip J McConnaughay, 'Reviving the "Public Law Taboo" in the International Conflicts of Law' (1999) 35 *Stanford Journal of International Law* 255, 280 , where the author criticises more recent US cases where private parties to international transactions were allowed to contractually opt out of otherwise applicable

> 'courts have no jurisdiction to entertain an action... for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State.'[135]

Furthermore, in the case of *United States of America* v *Inkley*, Justice Purchas LJ approved the proposition that 'the enforcement of public law ... [is] the general umbrella under which both penal and revenue suits are embraced'[136] noting that it was supported by a number of authorities. This seemingly innocuous statement must be seen against an era in which Dicey (who was highly influential in English constitutional law and conflicts of law) maintained that the rule of law mandates that the State must be subject to the same law and courts as private individuals, which negated the importance of the conceptual division between private and public law and provided the basis for the traditional common law resistance to the existence of 'public' and 'private' law.[137] This is even today reflected in the terminology which refers to 'penal' and 'revenue' and other 'public' law rather than simply and only to 'public law'.[138]

So private international law, like public international law, draws a clear distinction between public and private law; and that this dichotomy is the same dichotomy in both legal regimes may be inferred from the fact that judges in private international law cases have relied upon international law as a justification for the non-enforcement of foreign public law. For example, in *Huntington* v *Attrill* the New York Supreme Court said that the question must be 'whether a statute of one State, which in some aspect may be called penal, is a penal law *in* the *international*

US public law on the basis of potential underregulation. It may though be argued that the cases the author discusses all concerned private causes of actions created by the relevant US securities law.

[135] Lawrence Collins (ed), *Dicey and Morris on Conflict of Laws* (13th ed, London: Sweet and Maxwell, 2000) vol 1, 89. McConnaughay, above n 134, 267 'Judicial analysis concerning the applicability of public law, in contrast, traditionally ends where conflicts analysis begins: If the court determines that the forum's public law applies... it does not proceed further to consider the parties' expectations or some other nation's possible superior interest in the transaction or issue.'

[136] *US* v *Inkley* [1989] QB 255, 264, see also discussion in *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 41f.

[137] Baade, above n 91, 435ff. See also F A Mann, 'Prerogative Rights of Foreign States and the Conflict of Laws' in F A Mann, *Studies in International Law* (Oxford: Clarendon Press, 1973) 492, 493, where the author states '[i]t would be surprising if in England, where the distinction between public and private law is not accepted, foreign public law were treated differently from foreign private law... Nevertheless, in a more specific form even English judges have expressed... the dictum that no country ever takes notice of the revenue laws of another.' (quotation marks omitted)

[138] Baade, above n 91, 435.

sense, so that it cannot be enforced in the courts of another state'[139] So a common definition of 'private' and 'public' under public and private international law can be presumed.

3.2.3. Irrelevance of the Dichotomy in Borderline Cases

It may be argued that the public or private status of a law is often irrelevant, as even a law characterised as private may not be enforced, on the basis of the broad public policy exclusionary rule:

> 'English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law.'[140]

So, for example, US courts routinely refuse to enforce foreign libel judgments on the basis that to enforce them would be repugnant to the public policy with regard to freedom of expression.[141] Yet, although this rule provides an 'exclusionary' alternative and thus to some extent blurs the boundaries between public and private,[142] it certainly does not undermine the public-private dichotomy generally. Indeed, the public policy exclusionary clause has been treated as a measure of last resort,[143] rather than an easy alternative for hard cases not dismissed by the 'foreign public law' rule.[144] Determining legal consequences on the basis of the

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[139] *Huntington* v *Attrill* (1892) 146 US 657 (emphasis added). Similarly, on appeal, the Privy Council noted: 'Their Lordship cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court...' *Huntington* v *Attrill* [1983] AC 150, 155.

[140] Collins, above n 135, 81.

[141] Jeremy Maltby, 'Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts' (1994) 94 *Columbia* Law *Review* 1978, 2008ff. See also ABA, above n 3, 92. A typical example: *Yahoo! Inc* v *LICRA* 169 F Supp 2d 118 (ND Cal 2001).

[142] See below discussion of Justice Staughton in *AG of New Zealand* v *Ortiz* [1982] QB 349, who argued that there was no principle to the effect that foreign public laws should never be enforced and that the better approach was to consider each individual case to determine whether there was a special ground of public policy which require non-enforcement.

[143] States differ in their readiness to invoke this rule. US courts have not hesitated to invoke it in the free speech context: Kyo HO Yum, 'The Interaction Between American and Foreign Libel Law: US Courts Refuse to Enforce English Libel Judgments' (2000) 49 *International and Comparative Law Quarterly* 132.

[144] William E Holder, 'Public Policy and National Preferences: The Exclusion of Foreign Law in English Private International Law' (1969) 17 *International and Comparative Law Quarterly* 926, 926, where the author notes that while the rule offers great flexibility, it is an 'unruly horse' that cannot provide the predictability and certainty concrete rules do. *Richardson* v *Mellish* (1828) 2 Bing 229, 252, 130 ER 294, 303: '[i]t is a very unruly horse and when once astride it you never know where it will carry you.'

dichotomy is prima facie far more attractive than any determination based upon public policy.[145] For example, asserting that a foreign law or its application is contrary to the public policy of the forum State holds the potential for embarrassment and straining relations between States,[146] unlike a principled refusal to enforce it on the basis that it is penal or public: the first refusal is based on an evaluation of the substance of the foreign law while the second only involves a 'neutral' assessment of its character.[147] Finally, although this 'public policy' exception means that the private-public dichotomy is at times of little practical relevance, in the vast majority of cases it is not: the public policy exception is the exception that proves the rule.

3.3. The Ramification of the 'Public' or 'Private' Status

3.3.1. Public Law: Restrictions and Wide Claims

The fact that customary international law on jurisdiction imposes no limitations on private international law,[148] except by defining its boundaries, means that States are free to regulate transnational private matters as they please.[149] This is in stark contrast to the limitations international law imposes on the jurisdictions of States in respect of public law.

What sort of restrictions are these and how do they influence States' behaviour? As outlined in Chapter 4,[150] for States to legitimately exercise adjudicative/legislative jurisdiction in transnational criminal cases, it needs to be supported by one of the bases international law recognises, such as the territoriality or the nationality principle. This view is consistent with the belief that

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[145] Collins, above n 135, 81: '[i]n the conflict of laws it is even more necessary that the doctrine should be kept within proper limits, otherwise the whole basis of the system is liable to be frustrated.'; Holder, above 144, 928, arguing that 'the operation of public policy tends to be a negation of the co-operation of national institutions which lies at the base of effective enforcement of foreign prescriptions.' In contrast, the exclusionary rules on foreign public law merely define the outer boundaries of conflicts of law.

[146] *Moore v Mitchell* 30 F 2nd 600, 604(1929).

[147] For support of this argument see Thomas B Stoel, 'The Enforcement of Foreign Non-Criminal Penal and revenue Judgments in England and the United States' (1967) 16 *International and Comparative Law Quarterly* 663, 670. Mann (1971), above n 107, 183.

[148] Not even to the extent of requiring the existence of a body of conflict of law rules: Akehurst, above 128, 230.

[149] Mutz, above n 108, 330: '[t]here is no legal order over and above the various national legal systems governing transborder relationships between individuals...', although, for example, international human rights law may affect the substantive rights.

'[t]he existence of the State's right to exercise jurisdiction is exclusively determined by *public international law*'.[151] Yet it is inconsistent with the view expressed by the Permanent Court of International Justice in the *Lotus* case where it denied that:

> 'international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory and [only]... as an exception to this general prohibition, it allowed States to do so in certain specified cases.'[152]

In other words, the court held international law does not provide the foundation of a State's exercise of jurisdiction, but only puts certain limits on States' otherwise unfettered inherent freedom to exercise its jurisdiction beyond its borders.[153] While this view has frequently been criticised[154] and probably would not be expressly supported by States, it is noteworthy why the court favoured this position:

> 'This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States.'[155]

And in this respect, little seems to have changed since 1927. The discussion in previous chapters shows that States assert criminal jurisdiction on the basis of the most tenuous connections, generally without triggering any complaint by other States. The discussion in the previous chapters also highlighted that States routinely fail to acknowledge that international law is in fact determinative of the issue of criminal jurisdiction.[156] The closest they tend to come to acknowledging it is to refer to the demands of 'international comity', which is 'neither a matter of absolute obligation... nor of mere courtesy and good will'[157] and certainly generally not 'used as a synonym for international law.'[158]

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[150] See Chapter 4 '3.2.2. Foreseeability and the Territoriality Principle'.
[151] Mann (1973), above n 109, 4 (emphasis in the original).
[152] *France* v *Turkey* (1927) PCIJ Reports, Series A, No 10, 19.
[153] Ibid.
[154] Mann (1973), above n 109, 26.
[155] *France* v *Turkey* (1927) PCIJ Reports, Series A, No 10, 19.
[156] See in particular Chapter 3 (' 4. The Evolution of Jurisdictional Rules in Public Cases').
[157] *Yahoo! Inc* v *LICRA* 169 F Supp 2d 1181, 1192 (ND Cal 2001), citing *Hilton* v *Guyot* 159 US 113, 163f (1895), approved recently in obiter in Australia in *Lipohar* v R (1999) 168 ALR 8, 34.
[158] Akehurst, above n 128, 216. See also Griffin B Bell, 'International Comity and the Extra-territorial Application of Anti-Trust Laws' (1977) 51 *Australian Law Journal* 801, 803: 'comity is more than a legal principle. It is the expression of a civilised human being and a humane Government - a policy of courtesy, of restraint, of civility, and of concern and sympathy for those with which we deal.'

What is perhaps strange is that the very judges who treat international law with such a cavalier attitude when it comes to extending their own public law to foreign activities, feel bound hand and foot by international law prohibiting them from enforcing the public law of another State. They almost invariably assert that public international law informing the boundaries of private International law, *requires* the non-enforcement of foreign public law or judgments[159] and this is a rule which they most strictly observe. In the leading case of *Huntington* v *Attrill* the US Supreme Court asserts:

> 'The question whether a statute of one state... is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends ... [on] its purpose...'[160]

In the more recent case of *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* the High Court of Australia stated:

> '[T]he right or interest asserted in the proceedings is to be classified as a governmental interest. As such, the action falls within *the rule of international law* which renders the claim unenforceable.'[161]

Yet, the view expressed in the German Judgment of 22 March 1983 would appear to be more consistent with international law:

> '[a]ccording to public international law a State is in principle under no duty within the limits of its sovereignty to tolerate the performance or execution of acts of sovereignty by another State...or by way of judicial assistance to render facilities; on the other hand public international law does not prohibit such tolerance or co-operation; it makes them available to States. Extreme diffidence is being displayed by States particularly where the execution within their own sphere of sovereignty of foreign criminal judgments or the collection of foreign revenue claims are concerned.'[162]

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[159] Note generally no distinction is made between private/public *l*aw and private/public *j*udgment*s*.; although Stoel, above n 147, argues that the enforcement of foreign judgments is less problematic than the applying a foreign public law.

[160] *Huntington* v *Attrill* 146 US 657 (1892) 664 (emphasis added); *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40, where the Australian High Court noted that '[t]he principle that domestic courts will not enforce a foreign penal or public law is sometimes described as a rule of public international law, and, at other times, as one of private international law.' Cf Stoel, above n 147, 668, mentioning a number of reasons, including very practical considerations.

[161] *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 46f (emphasis added); *AG of New Zealand* v *Ortiz* [1984] AC 1, 24 (Lord Denning): '"public laws"... will not be enforced by the courts of the country to which it is exported, or any other country, because it is an act done in the exercise of sovereign authority which will not be enforced outside its own territory.' See also Mann (1990), above n 107, 359f: 'The State which outside the confines of its own sovereignty pursues penal, tax or other public claims invokes its sovereign rights within the territory of the forum. Even the institution of legal proceedings implies the assertion that the plaintiff State is entitled to prosecute its public rights in the forum.' (emphasis in the original)

[162] BVerfGE 63, 343, 361, discussed and rejected in Mann (1984), above n 107, 37. See also Jennings and Watts, above n 116, 490.

International law is not prohibitive but permissive as far as the State is concerned where enforcement of a foreign public law is sought, that is, it merely does not require a State to enforce foreign public law. As Lord Moulton in *Cotton* v *The King* pointed out: 'There is no accepted principle in international law to the effect that nations should recognise or enforce the fiscal laws of foreign countries.'[163] This view has also been tentatively reflected by the assertion of common law commentators that although the rule is:

> 'framed in terms of lack of jurisdiction... [in fact] it is the foreign State which has no international jurisdiction to enforce its law abroad, and the English court will not exercise its own jurisdiction in aid of an excess of jurisdiction by the foreign State.'[164]

Why courts will not aid an excess of jurisdiction by a foreign State,[165] will be explored further below. At this point, it is significant to note that States choose to perpetuate the 'public law taboo'[166] in private international law, although there is no external order which obliges them to do so.

The consequences of this public law taboo in private international law can only be fully appreciated once it is clear what is behind the 'public law' label. Having said that, the effectiveness of regulation of transnational activity which is entirely dependent upon the chance existence of enforcement power cannot but be severely compromised. This then also suggests that the very wide 'public law' claims made by States are not so much made des*pite* the legal restrictions but *b*ecause of them, in particular because of the public law taboo in conflicts of law: because a State cannot hope for cooperation by other States in enforcing its laws

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[163] *Cotton* v *The King* [1914] AC 176, 194.

[164] Collins, above n 135, 90, approved in *Re State of Norway's Application (Nos 1* and *2)* [1990] 1 AC 723, 808. See also Holder, above n 144, 930 and s.483 of *US Restatement (Third) of Foreign Relations Law (1986)* on the recognition and enforcement of tax and penal judgments which states: 'Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.' And Comment a: 'Nonrecognition not required but permitted.', see also Baade, above n 91, 483, where the author argues that a state 'can, if it so wishes, consent to the use if its judicial machinery for the collection of the tax.' This position would appear to be the same one as is applicable in relation to the recognition of foreign acts of State. Werner Meng, '*R*ecognition of Foreign Legislative and Administrative Act' in *R*udolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) vol 10, 348, 349: 'If a State... exercises [excessive extra-territorial] jurisdiction..., another State is nevertheless free to recognize this sovereign act if no third State's rights are violated.'

[165] Although it would appear that if the forum State consented to the enforcement of the foreign public law, the claim brought by the foreign State was not excessive.

[166] Note this terms was coined by in Lowenfeld, above n 121, 322ff.

in respect of activity that impacts on its territory, it attempts (at least on those occasions when it has enforcement power) to compensate for this by 'resort[ing] to its own legal system and, in particular, its own courts for the purposes of making the conduct of foreigners in foreign countries conform to its own command.'[167] This means that the State can then indirectly enforce its public law abroad.

3.3.2. Private Law: Generosity and Restrained Claims

If, as was argued above, customary international law on jurisdiction imposes no limitations on private international law and gives States a free reign in respect of adjudicative and legislative jurisdiction, there would be no reason why States could not legitimately make exorbitant regulatory claims in respect of private law. Yet, as the discussion in the previous chapters has shown, States have responded to online private scenarios with relative restraint. Why is this the case? The reason for this is perhaps the same as the reason why States in respect of private matters are prepared to apply foreign private law to give effect to the actual or reasonable expectations of the parties, as embodied in an express election by the parties[168] or in the indicative rules governing the relationship:

> 'There is no sacred principle which pervades all decisions, but when the circumstances indicate that the internal law of a foreign country provides a solution more just, more convenient and more in accord with the expectations of the parties than the internal law of England, the English judge does not hesitate to give effect to the foreign rules.'[169]

So the rationale for private international law is no longer found in high-minded notions such as comity and showing respect for sovereign states,[170] or as one commentator puts it 'the general spirit of cultural solidarity.' Instead, much more down-to-earth considerations such as conveniences and the interests of the litigants are said to provide its foundations:

> 'the application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England, or any other sovereigns, to show courtesy to other states. It flows from the impossibility of otherwise

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[167] Mann (1973), above n 107, 127f.
[168] Provided, of course, they do not offend the public policy of the forum State. Kelsen, above n 71, 137.
[169] Peter North and JJ Fawcett, *Cheshire and North's Private International Law* (13th ed, London: Butterworths, 1999) 32 (emphasis added). This rational, although reconcilable with the vested rights or local law theory of private international law, does not sit easily with the governmental interest analysis.
[170] Akehurst, above n 128, 217f, dating back to Huber, Joseph Story and Savigny.

> determining whole classes of cases without gross *inconvenience* and *injustice to litigants*, whether natives or foreigners.'[171]

Yet, the inconvenience or injustice done to the litigants, however great, matters little when it comes to public law which, if forum public law, may be applied even if expressly excluded by the parties, and, if foreign public law, will not be applied even if the parties have elected it or the choice of law rules point towards its applicability. In other words, the generosity or indifference which the jurisdictional regime under international law shows towards private law and its corresponding tightness towards public law, is mirrored by the rules of private international law.

The inescapable inference to be drawn from this is that the existence or non-existence of international law restrictions has little impact on the relative restraint exercised by States in respect of regulatory competence.[172] Despite restrictions, assertions of regulatory competence tend to be much broader in respect of public matters than private matters which are not subject to international restrictions. Indeed, it is telling that the legal restraint and 'generosity' in private international law is no longer even said to be based on 'good neighbourhood notions' such as comity, but appears to be driven by purely practical factors.

This attitude of relative mutual cooperation also prevails in respect of enforcement jurisdiction in private matters. And this is although prima facie, under international law, the difference between the private or public nature of the law or dispute is less marked in respect of enforcement jurisdiction. In either case 'a State... may not exercise its power in any form in the territory of another State.'[173] International law prohibits 'a State from engaging in *public* acts on the territory of another State'[174] without the latter State's consent. A 'public act' is one which is 'by its nature, an act which only the officials of the local State are entitled to perform, as opposed to an act which *private* individuals may perform'[175] and this would include any action

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[171] Graveson, above n 109, 21, quoting Dicey.
[172] The same appears to be true in respect of comity.
[173] *Netherlands* v *United States of America (Island of Palmas Case)* (1928) 2 RIAA 831 and *France* v *Turkey (The Lotus Case)* (1927) PCIJ Reports, Series A, No 10, 18.
[174] Steinberger, above n 117, 413 (emphasis added).
[175] Akehurst, above n 128, 146f (emphasis added), discussing also another basis upon which an act may be classified as 'public', ie. the purpose of the act.

taken by a State on the territory of another for the enforcement of a private judgment. Yet, of course, in respect of private causes of actions States routinely enforce foreign private law indirectly by applying foreign private law to the dispute heard at home or directly by enforcing foreign judgments. This willingness to apply foreign law and enforce foreign judgments means that the effectiveness of State law is prima facie intact even in respect of transnational activity, given that it is not dependant upon the entirely fortuitous existence or non-existence of enforcement power.[176]

Again, and especially given the comparison to public law, the relative regulatory restraint shown by States in respect of adjudicative and legislative jurisdiction in private matters seems inextricably linked to the relative preparedness by States to enforce foreign private law. Because there is this willingness, States neither need to over-extend their private laws to foreign activity to protect private interests nor would such over-extension be conducive to the foreign State being willing to enforce the forum judgement. So restrained regulatory claims and mutual co-operation appear to go hand in hand, with either being a pre-condition for the other.

3.3.3. Mirror Images

The legal ramifications of the status of a law as 'private' or 'public' under private and public international law are twofold. Firstly, both legal systems rely on the classification of a law as private or public not merely as an incidental question going towards the substantive analysis of a case, but rely on it at the most fundamental level: it provides the very threshold which determines whether the normal principles of public or private international law apply or not. Secondly, on the substantive level, both legal systems are consistent in subjecting public laws or acts of States to restrictions while being relatively generous in private law cases. These restrictions have been described as mirror images of one another:

> '[I]n the last few decades, the subject [ie. the extraterritorial status of public law]... has stood under the shadow of what is loosely called extraterritorial

[176] Of course, the practical difficulties and cost associated with bringing an action abroad or seeking the enforcement of a judgment in a foreign court are, as least in the consumer context, major obstacles

> jurisdiction: the outward reach of the public law of specific countries, and limitations imposed by international law, "comity", or self-restraint on such assertions of jurisdiction... the mirror image of this phenomenon... is the treatment of such assertions of extraterritorial jurisdiction by the "target" state.'[177]

A similar sentiment seems to be the basis of Justice Devlin's comments in *Bank voor Handel en Sheepvaart NV v Slatford* that 'English courts will not enforce it [foreign public law] since they will treat it as having no extra-territorial effect.'[178] The mirror image is imperfect,[179] in that the 'target' or forum State would not enforce a foreign public law or judgment under private international law, regardless of whether or not the exercise of legislative or adjudicative jurisdiction by the foreign State was in breach of public international law. By the same token, the forum State could enforce it under public international law, even if there was an excessive assertion of jurisdiction by the other State. Having said that, the combined effect of both private and public international law may most aptly be described as complementary as in their combination they ensure that the reach of the public law of a State is strictly limited by its inability to enforce it or have it enforced abroad.[180] But why is there such a restrictive regime in relation to public law? To answer this question one needs to examine the dichotomy and its basis. This will be done now by focusing primarily on private international law and the rule against the enforcement of foreign public judgments.

3.4. Spectrum of Interests and the Public-Private Dichotomy

3.4.1. The Nature and Value of the Dichotomy

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[177] Hans W Baade, above n 91, 431.

[178] Bank voor Handel en Sheepvaart NV v Slatford [1953] 1 QB 248, 257.

[179] Despite this and because of this, it is very rarely that both issues are raised in respect of the same case. One of the rare examples when questions relating to both areas were raised at the same time is the controversy surrounding the US anti-trust cases. Here the US was accused of exercising excessive jurisdiction under international law over foreign companies in respect of their foreign activities and the courts of other States refused to enforce US judgments (or parts of them) against these companies. As many of the actions were brought by private individuals, they sought to enforce them aboard on the basis that they were merely private cases. Generally, States tend not to seek enforcement of their public laws in foreign States and even less so when they know that the foreign States views its exercise of jurisdiction as excessive under international law. Also, if they do and the foreign States refuse to enforce the judgment, these latter States need not be concerned about the effects of the excessive exercise of jurisdiction. Having said that, even the threat of enforcement actions, without actual enforcement power, may restrict the freedom of actions of companies and thus is potentially excessive.

[180] Mann (1971), above n 107, 121, where he states: '[f]inally, it is necessary to protest against a legal doctrine which sanctions the test of physical power. Such an approach involves a return to the statute theory and to territoriality.' See also discussion in Chapter 3 ('4.3.2. Insistence on Enforcement Jurisdiction')

In view of the highly decisive role the public-private dichotomy plays in the jurisdictional context it is curious how resistant these terms have proved to definition. While some definitions of 'public law' as 'prerogative rights',[181] claims *'jure imperii'*,[182] 'assertions of central or local government'[183] or 'political law'[184] have been suggested, no definition has ever proved quite satisfactory or practicable. Mann summarises this oddity as follows:

> 'It would be of considerably greater value if it were possible to suggest an accurate and comprehensive definition of the rights which come within the scope of these descriptions. But at no stage of the historical development and in no country have lawyers succeeded in satisfactorily determining what is meant by 'public law' ... and what comes under the heading of 'private law' ... Yet the inability of the human mind and vocabulary to explain and contain cases by an all embracing form of words does not disprove the reality of a distinction which... must be considered as indispensable...'[185]

It may be argued that the inability to adequately define 'private law' and 'public law' is not due to shortcomings of the human mind or vocabulary but rather due to the nature of the dichotomy itself. The dichotomy is superimposed upon laws and imposes categories upon what is in fact a spectrum or continuum of interests. It is an evaluation of laws rather than being pre-existing in legal reality. Ultimately it seems that the public-private categorisation is nothing but an abbreviation of the legal consequences which attach to the classification, that is, that this foreign law shall be enforced and this law not, or that this law shall not be subject to jurisdictional restraints and this law shall.[186] The definition of 'public law' proffered by Lowenfeld, as 'the kind of law that would not... be applied (directly or under a judgment) by the court of another State',[187] although seemingly entirely unhelpful,

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[181] Mann, above n 137, 499f.
[182] Mann, above n 137, 499f.
[183] *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 42: 'The expression "public laws" has no accepted meaning in our law... It would be more apt to refer to "public interests" or, even better, "governmental interests" to signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government.'
[184] Mann (1971), above n 107, 183, commenting on the rejection of public law as 'political law' in *Regazzoni* v *K.C Sethia (1944) Ltd* (1958) AC 301.
[185] Mann, above n 137, 500. See also Jennings and Watts, above 116, 489: '[t]he distinction... although very widely adopted in the present context and of undoubted value, is on analysis less easy to define than at first sight might appear.' Martin Davies, Sam Ricketson and Geoffrey Lindell, *Conflicts of Laws - Commentary and Materials* (Sydney: Butterworths, 1997) 233, referring to the 'inherent and treacherous difficulties associated with the distinction between private and public.' See also Carter, above n 120, 120f.
[186] This seems to support the argument that the private-public dichotomy has quite different meanings in different contexts.
[187] Lowenfeld, above n 121, 324. Mann, above n 137, 492f.

in fact reflects this true nature of the categories and of the dichotomy itself.[188] It also validates the argument that the dichotomy is logically unnecessary.[189] By implication, attempting to answer the question whether a law is enforceable or not by ascertaining whether the law is a public or private law makes no sense. By the same token, to say that foreign public laws are unenforceable is as much a tautology as saying that trespassing is prohibited. This is what seems to underlie the dissatisfaction with the private-public dichotomy as an analytical tool generally[190] and the resistance of common law systems to the dichotomy itself and their preference for narrower categories such as 'penal' or 'revenue' laws, which epitomise the kinds of law which fall within the far 'public' end of the spectrum.

From a practical point of view, the cases which are most problematic and which have given rise to disputes are not the cases which fall within the outer ends of spectrum, but those which occupy the middle ground. The problem arises because the classification of these cases can only partly be informed by comparison to the cases which fall within the far ends of the spectrum, precisely because they cannot be compared to the clearly 'public' or clearly 'private' laws. By analogy, if one had a big-egg little-egg dichotomy to impose different prices, what happens to the medium-sized egg? As it is neither big nor little, firstly, its categorisation into one or the other group clearly does not precede the analysis but is its outcome. Comparison to the big or little eggs will offer some guidance with respect to those eggs which tend more towards the big end or the little end of the spectrum. Yet, the comparison fails in the very middle ground where the similarity to big eggs or little eggs is equal. There, the classification must depend on an evaluation of whether the medium-sized egg justifies the higher or lower price, namely an evaluation of the consequences attaching to the classification. The final decision to classify the middle-sized egg as big or little is then identical to its consequence, namely that it is sold at the higher or the lower price.

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[188] For the sake of convenience, the terminology 'public law' and 'private law' will nevertheless be used in this discussion.

[189] Mann (1971) above n 107, 116, where the author starts his discussion of public law by stating that '[n]o attempt will be made to define public law.'

[190] H. Lauterbach, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 *British Yearbook of International Law* 220, 240, where the author notes that the distinction between acts *jure gestionis* and acts *jure imperii* has 'proved to be impracticable and productive of uncertainty.'

While the above arguments will be substantiated below, at this point it is useful to refer to the remarks by Justice Staughton in the case of *AG of New Zealand* v *Ortiz* which illustrate some of the problems associated with the public-private dichotomy. Firstly, he rejects the generalisation of public law claims as, for example, foreign prerogative rights on the ground that there is a spectrum of cases which do not neatly correspond to the 'public law' category :

> 'The kinds of law which would be comprised in such a wide class are so many and so various, that some should properly be enforced in this country while others perhaps should not.'[191]

Secondly, his misconceived attempt to break that link by holding that some foreign public laws should be enforceable was on appeal rejected.[192] Nevertheless, his comments are useful in that he identifies the real or substantive question which should be addressed in respect of all foreign law, which is not whether a law is 'public' or 'private', but rather whether it should not be enforced on public policy grounds:

> 'It is a better solution, in my judgment, to follow the treatment of Halsbury, Cheshire and North and the Restatement, considering each individual case whether there is any special ground of public policy which requires the law in question not to be enforced here.'[193]

Issues of 'public policy', as noted above, normally only figure in respect of private law, the enforcement of which may be denied on the ground that it would be contrary to the fundamental public policy of the forum to do so.[194] Nevertheless Justice Staughton's attempt to extend this rule in reverse to certain public matters, by saying that they should be enforced if the forum's public policy demands it,[195]

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[191] *AG of New Zealand* v *Ortiz* [1982] QB 349, 371.
[192] *AG of New Zealand* v *Ortiz* [1984] AC 1.
[193] Although he appears to limit the validity of this test to public law cases which are neither penal nor revenue case. *AG of New Zealand* v *Ortiz* [1982] QB 349, 371 : 'I can thus detect no support in the English cases for a category of foreign public law.' Mann (1971), above n 107, 183, where the author argues: 'Moreover, it may well be that some and perhaps all of the decisions which proclaim the maxim could have been founded upon the demands of public policy.'. See also Holder, above n 144, 929: 'a wide range of choice of law rules operate as judicially created substitutes for public policy... Among these substitutes, and crystallising into concrete rules, would be included: non-recognition of penal and revenue laws...'
[194] So one could argued that the public law-private law spectrum is split into non-enforceable public law, non-enforceable private law and finally enforceable private law
[195] *AG of New Zealand* v *Ortiz* [1982] QB 349, 371: '[i]f the test is one of public policy, applied to the foreign law in question in this particular case, there is in my judgment every reason why the English courts should

seems a logical extension of an understanding of the 'public policy' exception as providing answers for the middle ground or grey area between clearly unenforceable and clearly enforceable law. Indeed, the public policy exception may be viewed as the legal acknowledgement that there is a spectrum of laws which the public-private dichotomy can, or for that matter any other dichotomy could, only uneasily accommodate.

In summary, the task of finding an all embracing definition of public law and private law, which can pin-point the characteristic which all public laws, in contrast to all private laws, have in common is an impossible undertaking because the public-private dichotomy is superimposed upon a spectrum of laws where laws along the spectrum are only more or less public or more or less private. [196] A case in the middle ground, classified as public, is likely to have more in common with a case in middle ground, classified as private, than the clearly public cases. In *AG (UK) v Hei*nemann *Publishers Australia Pty Ltd* the judges, although coming to the same conclusion, differed in their view on whether the foreign law was not enforceable on the ground that it sought to protect a foreign public interest or on the ground that it was a private cause of action but the enforcement of which was contrary to the public policy of the forum.[197] These ambiguities of the boundary between 'public' and 'private' are unavoidable and a necessary consequence of the creation of a legal polarisation in respect of a continuum of laws and actions.

But saying that the categories of 'public law' and 'private law' defy all-inclusive definitions is neither to say that they are empty concepts nor that the dichotomy does not serve a purpose. On a formal level it illustrates the tendency of law, spurred by the need for certainty and predictability, to favour categories over an

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enforce section 12 of the Historic Articles Act 1962 of New Zealand.' See also *Lorentzen* v *Lydden & Co Ltd* [1942] 2 KB 202.

[196] McConnaughay, above n 134, 259, where the author implicitly acknowledges the existence of a spectrum by arguing that '[t]he private/public dimension essentially measures the externalities likely to result from non-compliance with or repeal of the law. The greater the externalities, the more likely the law should be classified as public.'

[197] *AG (UK)* v *Hei*nemann *Publishers Australia Pty Ltd* (1988) 165 CLR 30 contrast the joint judgment by Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ to the judgment by Brennan J. Note also that the New Zealand Court of Appeal in *AG for the UK* v *Wellington Newspapers Ltd* [19888] 1 NZLR 166 also held that the enforcement of the law in question, although a private law, was contrary to public policy; discussed in Mann (1990), above n 107, 358f.

undivided spectrum. In other words, while substantively in respect of all foreign law it may be more accurate to ask whether there are any public policy grounds for or against its enforcement, greater certainty and predictability is achieved by creating divisions such as non-enforceable penal or revenue law, on the one hand, and enforceable contract or torts law on the other.[198] Yet, no matter how valuable, the creation of these categories comes at a price, which lies in their inevitably blurred boundaries, and these categories thus themselves give rise to some uncertainty.[199] On a substantive level the dichotomy externalises that, on the most general level, laws are not equal and a different evaluation attaches to different laws. The dichotomy embodies a perspective according to which laws are evaluated and placed somewhere along a spectrum and ultimately within a category.

The questions which have so far been left unanswered, are why some laws are classified as public and others as private, what is the perspective giving rise to, or the criterion underlying, the evaluative ordering of law along a public-private spectrum? This may be gleaned from the instances when States have enforced foreign laws and when they have not.

3.4.2. The Criteria for Assessment

All Law is Public Law but Some Law is More Public Than Others

Scholars discussing the private-public dichotomy tend, at some point, to grapple with Lenin's comment that '[a]ll law is, of course, public'.[200] Although few would agree with the ideological basis for his comment, that the interest of the collectivity ought to take precedence over that of individuals and that private property and liberty of contract impede social progress,[201] few could quarrel with the comment in so far as it reflects that even private law fulfils a public function and is ultimately for the good of the community at large: '[i]f it were not, the application of private law

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[198] Note that even in respect of the broad 'public policy' exclusionary rule there has been a temptation to categorise cases coming under it, see Davies, Ricketson and Lindell, above n 185 , 276.
[199] See *AG of New Zealand v Ortiz* [1984] AC 1, where Lord Denning held the statute was unenforceable on the ground that it was a public law and Lord Ackner on the ground that it was a penal law.
[200] Lowenfeld, above n 121, 21; Merryman, above n 89, 11f, where the author explains the ideological background of the claims that 'all law is public law', on the one hand, and 'all [bourgeois] law is private law' on the other hand.
[201] Merrymann, above n 89, 13.

would not be entrusted to organs of the State.'[202] This fact has also been acknowledged by the judiciary, as for example in *Huntington* v *Attrill*, where the Privy Council started off by making the following remark:

> 'All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard violations of statute law as offences against the State....'[203]

Yet although, in this case the statute for the regulation of trading companies was clearly in the interest of the whole community, that certainly did not entail the conclusion that it was public law. How then have judges drawn a distinction between private and public or enforceable and non-enforceable law?

The body of case law on the enforcement of foreign judgments suggests that there are three criteria which are relevant in establishing the status of a law as one which is or is not enforceable: (1) w*h*o brings the actions; (2) w*h*ose cause of action is it and (3) *wh*o benefits from the remedy?[204] These criteria, it is suggested, are indicators which in their combination reflect the relative substantive interest which a State has in the regulation of an activity. In some clear cut cases, all indicators point in the same directions. So a clearly public law is one which is not only enforced by the State in the particular instance but the nature of the law is such that its enforcement is a prerogative of the State, with the benefit of the enforcement flowing to the State. On the other hand, a clearly private law is one which is not only enforced by a private individual in the particular instance but typically enforceable by private individuals who seek reparation or compensation

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[202] Kelsen, above n 71, *207*.
[203] *Huntington* v *Attrill* [1893] AC 150, 157.
[204] Similar criteria were considered determinative in respect of substantive scope of the *Hague Convention* on *Jurisdiction* and *Foreign Judgments in Civil* and *Commercial Matters*. See Hague Conference of Private International Law, *Report of the Special Commission*, Prel Doc No 11 (1999) submitted by Peter Nygh and Fausto Pocar, at http://www.hcch.net/e/workprog/jdgm.html, 35f: 'Paragraph 3... further clarifies the meaning of "civil and commercial matters". The characterisation of the claim cannot be made to depend merely on whether a government... *or* any other person acting for the State is a party... *[criteria 1]* [T]he Convention will apply to disputes involving government parties, if the disputes contains the following core criteria:
the conduct upon which the claim is based is conduct in which a private person can engage; *[criteria 2]*
the injury alleged is injury which can be sustained by a private person; *[criteria 2]*
the relief requested is of a type available to private persons seeking a remedy for the same injury as the result of the same conduct. '*[criteria 3]*

for their loss or damage sustained. The cases, which have invariably come before courts are the cases where these formal criteria point in opposing directions, ie. the cases which are only more or less public or private.

In these cases judges often stress that it is the substance that matters and not the form. For example in the *AG (UK)* v *Heinemann Publishers Australia Pty Ltd*, it was said:

> 'For the purposes of the principle of unenforceability under consideration the action is to be characterized by reference to the substance of the interest sought to be enforced, rather than the form of action.'[205]

Or in *US* v *Inkley*, the Court of Appeal noted:

> 'that the fact that in the foreign jurisdiction recourse may be had in a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced in this country.'[206]

Of course by saying that, the judges implicitly acknowledge that the formal criteria, such as the private nature of the action, are prima facie relevant, albeit in the particular case inconsistent with the substance of the action. If these formal criteria were of no relevance whatsoever, why even mention them?[207] Indeed, the form and substance issue seems to coincide with what is generally referred to as 'direct and indirect' enforcement. Finally, the issue of form versus substance has also figured in the context of public international law, where it has been argued that:

> '[a]n act by one State in the territory of another is forbidden... if it is, *by its nature*, an act which only officials of the local State are entitled to perform, as opposed to an act which private individuals can perform. For instance, collecting taxes is something which can be done only by public officials, not by private individuals...'[208]

But even if the act by its nature does not fall within the public category, it may still constitute a usurpation of the sovereign powers of the other State

> 'by reason of *the purpose* for which the act is done. For instance, a State is normally allowed to seek information in the territory of another State...; but if

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[205] *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 46.
[206] *US* v *Inkley* [1989] 1 QB 255, 265; see also *Huntington* v *Attrill* [1893] AC 150, 155, and Mann (1971), above n 107, 176f.
[207] North and Fawcett, above n 169, 109, where the authors state: '[t]he rule that no action lies to recover foreign taxes is not affected by the identity of the claimant or by the form in which the action is brought.' By stating this, they implicitly acknowledge that the identity of the claimant and the form of the action are prima facie criteria for ascertaining its public or private character.
[208] Akehurst, above n 128, 146 (emphasis added).

> the information is sought for the purpose of enforcing the first State's revenue laws, the inquiry is contrary to international law.'[209]

It seems that this juxtapositioning of the nature and purpose of an act reflects the above mentioned difference between form and substance, in that an act, law or action may be in its nature or form one which private individuals can perform, yet its substance or purpose in the particular case is to do what is normally reserved to the State. Coming back to private international law, the question judges invariably had to address was whether the 'form' or 'nature' of the action before them coincided with the 'substance' or 'purpose' behind it. The issue now addressed is what lies behind the above-mentioned formal criteria and by implication what is the 'substance' judges have looked for when the form was misleading.

Public versus Private Complainants

In *Huntington v Attrill*, which concerned the statutory liability of directors of companies to the creditors of the companies for certain debts incurred by the them, the Privy Council stressed that what matters is who brings the action:

> '[F]oreign tribunals do not regards these violations of statute law as offences against the State, unless their vindication rests with the State itself... [or with] an official duly authorised to prosecute on its behalf...'[210]

Similarly, Justice Fox in *Ayres v Evans* noted in the context of a revenue case, that the non-enforcement rule applies to cases 'where the revenue authority, or some person acting in its interest or on its behalf, seeks to enforce the revenue liability as such.'[211] In other words, if the complainant is the State or its nominee then the law is not enforceable; if it is a private individual then prima facie it is. The relevance of the public or private character of the complainant appears to be reflected in those instances where both the State and a private individual have a cause of action in respect of the same event. In *Raulin v Fischer*, which concerned a civil intervention by the injured party in a criminal prosecution, provided for under French law, Justice Hamilton held that the suit by the private party, unlike the

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[209] Akehurst, above *n* 128, 147 (emphasis added).
[210] *Huntington v Attrill* [1893] AC 150, 158f. See also Mann (1971), above *n* 107, 175.
[211] *Ayres v Evans* (1981) 56 FLR 335, 337.

prosecution by the State, was not subject to the non-enforcement rule.[212] In the context of public international law, it also has been argued that the question of who is behind the enforcement of a law should determine whether or not the jurisdictional restrictions under international law are relevant. The issue arose in the context of US anti-trust regulation, and in particular in respect of the *Sherman Act (1890)* which, in addition to providing for offences prosecutable by the State, also gave private parties a right to enforce the legislation, recovering damages for their injuries. The debate as to how to classify these actions was answered by Akehurst in the following way:

> 'For the purpose of determining the limits of jurisdiction permitted by international law, it is submitted that a suit by the injured party is similar to a private action in tort for damages, and that a suit by the Department of Justice is similar to a criminal prosecution. In form a suit by the Department of Justice resembles a suit by the injured party, but in substance it is a public prosecution... for vindication of public right and for redress and prevention of public injury. The Department of Justice is not subject to the rules which limit the *locus standi* of private plaintiffs and some of the orders... are orders which would never be made in proceedings brought by a private party.'[213]

While the decisions made in the above cases may be, and often are, rationalised not on the basis that the claimant was public or private but rather that the formal or substantive cause of action was public or private (that is the second criterion) the significance of the public or private status complainant is confirmed by those cases where both the form and substance of the cause of action point towards the private end of the spectrum and yet the action is classified as public. This occurred in the *AG (UK)* v *Heinemann Publishers Australia Pty Ltd*. Although the action, brought by the UK government against a former employee of its intelligence service, rested on a breach of his duty of confidence and of his employment contract, with no other public cause of action underlying this private cause of action, the High Court of Australia noted:

> 'to concentrate on the private law character of the causes of action ... is to overlook the appellant's central interest in bringing the action. That interest is to ensure the continued secrecy of the operation of the British Security

[212] *Raulin* v *Fischer* [1911] 2 KB 93, despite the fact that there was only one judgment in this case..

[213] Akehurst, above n 128, 191. See also Hannah L Buxbaum, The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation' (2001) 26 *Yale Journal of International Law* 219, 261, where the author notes that the court in one of the antitrust cases viewed 'the direct involvement of the UK government in the litigation' as an indicator of the 'public' nature of the dispute.

> Service... [which] has a responsibility to protect the national security of the United Kingdom...'[214]

So even though the cause of actions pointed towards enforceability, the identity and character of the complainant, ie ultimately the British Security Service whose purpose is the maintenance of national security, led to the opposite conclusion.

Last but not least, the importance of the public or private character of the complainant seems further confirmed by a simple review of a selection of cases which dealt with the question of the non-enforcement of foreign law which indicates that in most cases where the foreign State was a party to the proceedings the law was held to be unenforceable,[215] in contrast to those cases where the State was not a party to the proceedings.[216]

Yet, there is not always a correlation between the public or private status of the complainant and the legal conclusion that the law is or is not enforceable. This is because the formal status of the claimant has at times been inconsistent with who the claimant in substance represents. For example, as mentioned in *Huntington v Attrill*, foreign States regard actions by private individuals, ie 'a member of the public in the character of a common informer... as an actio popularis pursued, not in the individual interest, but in the interest of the whole community',[217] that is as a public action. Similarly, in *Peter Buchanan Ltd* and *Macharg v McVey* the Supreme Court of Ireland did not allow the claim by the liquidator of a Scottish company, appointed in Scotland, to recover moneys extracted from a company by its sole shareholder, as the whole object of the suit was to collect tax for a foreign revenue.[218] It was irrelevant that the action was formally brought in the name of the Scottish company, because the substance was:

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[214] *AG (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 46.
[215] *Government of India v Taylor* [1955] AC 493; *United States v Harden* 41 DLR 2d 721 (Can 1963); *Brokaw v Seatrain UK Ltd* [1971] 2 QB 476 (where the US government was brought in as claimant through an interpleader summons); *AG of New Zealand v Ortiz* [1984] AC 1; *AG (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.
[216] *Huntington v Attrill* [1893] AC 150; *Connor v Connor* [1974] 1 NZLR 632; *Ayres v Evans* (1981) 56 FLR 335.
[217] *Huntington v Attrill* [1893] AC 150, 158.
[218] *Peter Buchanan Ltd and Macharg v McVey* [1955] AC 516.

> "The foreign revenue instead of courting certain defeat by suing here in its own capacity resorts to bankruptcy proceedings in its own country... and the creditors' assignee seeks to enforce his claim here.'[219]

Yet, identifying who the complainant in substance represents is not without problems, as for example in those instances where the person 'claims property or moneys part only of which will go to satisfy foreign revenue claims',[220] that is in a situation where the claimant seems to represent both the State as well as individuals. The same applies to those situations where a State has created special incentives for private litigants to seek redress for their own injury, in order to also vindicate the public interest, as is most notoriously known in the US anti-trust context.

> 'A private litigant acts as a private attorney general if the litigant asserts a cause of action not only to obtain compensation, but also to vindicate important public interests... [encouraged] by statutory mechanisms.' [221]

Finally, the search for the representative character of the claimant does not easily accommodate those actions brought by foreign States which have not been rejected on the 'public law' ground:

> 'In all modern legal orders, the State... may have rights *in rem* and rights *in personam*, nay any of the rights and duties stipulated by "private law" ... The fact that a legal relationship has the State for one of its parties does not necessarily remove it from the domain of private law.'[222]

A case in point is *Kunstsammlung zu Weimar* v *Elicofon* where both the East German Government and the West German Government were parties to a dispute relating to the ownership of two Albrecht Durer paintings, which was heard and determined by the US Court of Appeals, finding in favour of East Germany.[223] Can a State ever act in a private capacity? While this question is to some extent

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[219] Peter Buchanan Ltd and *Macharg* v *McVey* [1955] AC 516, 530.

[220] *Ayers* v *Evans* (1981) 56 FLR 335, where the court held that the actions was not one for the enforcement of a revenue law. See also *Scottish National Orchestra Ltd* v *Thomson's Executors* [1969] SLT 325. P Str J Smart 'International Insolvency and the Enforcement of Foreign Revenue Laws' (1986) 35 *International and Comparative Law Quarterly* 704.

[221] Buxbaum, above n 213, 233 (footnotes omitted).

[222] Kelsen, above n 71, 202. On the law governing contracts between States and foreign private person see Mann (1990), above n 107, Chapter 9.

[223] *Kunstsammlung zu Weimar* v *Elicofon* 536 F Supp 829 (EDNY 1981) affirmed in 678 F2d 1150 (2nd Cir 1982). Note *Kunstsammlung zu Weimar* represented the interests of the German Democratic Republic. *Williams & Humbert* v *W & H Trade Marks* [1986] 2 WLR 25, where shares in the plaintiff companies were held by the Spanish State. The House of Lords concluded that the companies merely recovered property to

answered by the next criterion, it will be shown that the answer creates more problems than it solves.

Public versus Private Cause of Action

The commonly acknowledged criterion for determining the public or private nature of the dispute is the formal or substantive nature of the cause of action, and indeed in many ways the public or private nature of the complainant or of the remedy may not be seen as separate criteria, but as informing the search for the public or private nature of the cause of action. The Privy Council in *Huntington* v *Attrill* stated the criterion as follows:

> 'A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed.'[224]

In other words laws which are in their nature enforceable by the State will be prima facie unenforceable abroad, while laws which are in their nature also enforceable by individuals may be enforced by the foreign court. Suits which are in their nature in favour of the State are those for the enforcement of criminal and tax law, exchange control and export restriction as well as confiscatory legislation:[225] only officials of the State, as opposed to private individuals, are entitled to seek their enforcement. In *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* this was referred to by the remark that 'the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers *peculiar* to government.'[226] This incidentally explains the definition of public rights as 'prerogative rights'. These rights or causes of action can be contrasted to private causes of action, such as those based on contract, torts or property law, the enforcement of which is not a prerogative of the State.[227] So while the previous criterion looks at who actually seeks the enforcement of the law, the focus of this criterion is with whom in principle its enforcement rests.

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which they were entitled before the expropriation degrees and thus did not constitute their indirect enforcement.

[224] *Huntington* v *Attrill* [1893] AC 150, 157.

[225] Mann (1971), above n 107, 172.

[226] *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 42 (emphasis added), criticised in Mann (1990), above n 107, 358f, referring to the case as 'one of the most unfortunate decisions ever rendered by a supreme tribunal'.

[227] See Akehurst, above n 128, 146ff, where the author refers to this as acts which can by their nature be done only by public officials, such as the collection of taxes.

It comes as no surprise that the body of cases dealing with the enforcement of foreign law seems to consist almost entirely of cases where either foreign States or individuals rely on private causes of actions,[228] such as property, contractual or tortious claims.[229] Yet these 'indirect enforcement' attempts are of little avail, if the formal cause of actions masks what is in substance a public cause of action:

> 'no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches of lex fori, ought to be admitted in the Courts of any other country.'[230]

So in *United States of America* v *Inkley* it was held that the whole purpose of the civil suit on a US appearance bond was 'to ensure, so far as it was possible, the presence of the executor of the bond to meet justice at the hands of the state in a criminal prosecution'[231] and as such it involved the peculiar assertion of sovereign authority. In *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* action for breach of contract and breach of confidentiality masked 'an exercise of a prerogative of the Crown, that exercise being the maintenance of national security.'[232] Similarly, a German court of appeal refused to enforce a private claim based on subrogation by a Dutch bank against a taxpayer whose tax debts it had guaranteed and discharged, on the ground that the subrogation could not turn the tax claim into one of private law.[233]

In contrast there are those claims made by States which are enforceable because they are in form and substance not claims peculiar to government, such as the above mentioned case of *Kunstsammlung zu Weimar* v *Elicofon*.[234] Yet, the dividing line between those instances where the State acts like a mere private

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[228] For exceptions see *Municipal Council of Sydney* v *Bull* [1909] 1 KB 7; *Brokaw v Seatrain UK Ltd* [1971] 2 QB 476; *AG of New Zealand v Ortiz* [1984] AC 1.
[229] *AG (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 (contract and duty of confidence), *Bank voor Handel en Sheepvaart NV v Slatford* [1953] 1 QB 248 (conversion).
[230] *Huntington v Attrill* [1893] AC 150, 156.
[231] *United States of America v Inkley* [1989] 1 QB 255, 265.
[232] *AG (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 46.
[233] IPRspr 1958/1959 No 61 (25 November 1959), discussed in Mann (1984), *above n* 107, 43f.
[234] *Kunstsammlung zu Weimar v Elicofon* 536 F *Supp* 829 (EDNY 1981) affirmed in 678 F2d 1150 (2nd Cir 1982).

contractor and when it acts in a role peculiar to government is fine and not helped by the fact that:

> '[I]n modern times the State, and organs of the State, have become involved in a wide and diverse range of day-to-day commercial, quasi-commercial, and social activities - from the fact that, for example, State or local authority provision of services in return for direct or semi-direct payment has become commonplace.'[235]

These activities give rise to laws and actions the public or private character of which is inherently ambiguous. In this middle ground the public-private dichotomy cannot but break down. For example, in *Municipal Council of Sydney* v *Bull* the Council failed to recover a contribution imposed by a local statute in return for improvements made to the street in which the defendant owned property, on the basis that the claim was in substance a tax claim.[236] This law might also validly have been classified as one of private law which allowed the State, comparable to any other service provider, to recover payment for a service rendered. This is precisely what was held in the Canadian case of *Weir* v *Lohr*, in which the Canadian Health Insurance Commission's claim to an outstanding debt on the hospital accounts, on the basis of subrogation, succeeded.[237] Similarly this criterion of the nature of the cause also fails to provide a satisfactory test for, and explanation of, decisions in the borderline scenario where both public and private claims underlie the formal cause of action.[238]

Public versus Private Payment

While the criteria discussed above look at *who* is behind the action, as a matter of fact and prerogative, this last criterion focuses on the outcome of the action. While overlapping with the other two criteria, it has frequently informed the search for the true nature of a dispute. Again the remarks in *Huntington* v *Attrill* provide a good starting point:

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[235] Carter, above n 120, 117.
[236] *Municipal Council of Sydney v Bull* [1909] 1 KB 7. For a discussion see Michael Mann, 'Foreign Revenue Laws and the English Conflict of Laws' (1954) 8 *International and Comparative Law Quarterly* 465, 467ff.
[237] *Weir v Lohr* (1967) 65 DLR (2d) 717.
[238] *Ayers v Evans* (1981) 56 FLR 335, where not all, but only 60%, of the outstanding debt of the appellants was due to the foreign revenue authorities.

> 'The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protections of its revenue or other municipal laws, and to all judgments for such penalties.'[239]

It is illuminating that while the Privy Council, on the one hand, seemed to adopt a broad definition of penalty, which includes taxes,[240] it, on the other hand, rejected its wide definition as including any payment which 'bears no relation to the actual loss or damage sustained by the party to whom the action is given;... is punitive in its nature and is inflicted upon grounds of public policy.'[241] It is irrelevant that the provisions of the statute were

> 'penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial.'[242]

What is critical in evaluating the nature of the payment is whether it is recoverable at the instance of the State. This has been confirmed on a number of occasions.[243] And in *Government of India* v *Taylor*[244] Viscount Simonds expressly extended this principle to the characterisation of taxes, when he rejected a distinction between penal and non-penal taxes and noted:

> 'the essential characteristic... of a penal action is that it should be an action on behalf of the government or the community..., an apt description as it seems to me, of a suit to recover taxes.'[245]

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[239] *Huntington v Attrill* [1893] AC 150, 157 (emphasis added). See also *Government of India v Taylor* [1955] AC 491, 506, the leading case on the exclusion of foreign revenue law, where the House of Lords said: 'upon the assumption which must be made, that the decision in *Huntington v Attrill* was correct, it was conceded that it must cover not only penalties strictly so-called but also any tax which could be regarded as penal or confiscatory.'

[240] *Government of India v Taylor* [1955] AC 491, 506f.

[241] *Huntington v Attrill* [1893] AC 150, 153, but note 156: 'the expression "penal" and "penalty," ...are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether eligible by the State in the interest of the community, or by private persons in their own interest.'

[242] *Huntington v Attrill* [1893] AC 150, 159.

[243] *Loucks v Standard Oil Co of New York* 120 NE 198 (1918). See also Carter, above 120, 114: '[w]hether a law is penal depends primarily upon its purpose. The principal criterion is as to whether the main thrust of the law is the infliction of punishment at the instance of ,or on behalf of, the State, or is the award of compensation.' Collins, above n 135, 93. For a more recent reinforcement of this position see Hague Conference of Private International Law, *Report of the Special Commission*, Prel Doc No 11 (1999) submitted by Peter Nygh and Fausto Pocar, at http://www.hcch.net/e/workprog/jdgm.html, 31: 'Likewise, the fact that the damages awarded are exemplary or punitive does not deprive the proceedings of a civil or commercial chracter, as long as the benefit of those damages goes to the plaintiff and not to the State.'

[244] *Government of India v Taylor* [1955] AC 491.

[245] *Government of India v Taylor* [1955] AC 491, 506f.

Both penalties and taxes have in common that they are imposed:

> 'as an exercise of governmental might providing a monetary imposition for the benefit of the State. Emphasis must be placed upon the involuntary nature of the imposition... for no objection has been made to foreign governments recovering a contract debt.'[246]

Given the above discussion of those cases which disguise public claims behind ostensibly private causes of actions, the answer to the question of whether the payment was a non-contractual payment in favour of central or local government[247] has equally depended upon an examination of the underlying substantive nature of the payment. Yet, this substantive analysis encounters difficulties in similar instances as those encountered in respect of the cause of action, such as when the due payment only goes partly towards satisfying a non-contractual debt to the State, that is when the action serves dual purposes.[248] By the same token, the nature of the payment may be inherently ambiguous, as for example a compulsory but quasi-contractual payment due to the State for services rendered.[249] Indeed, the test focusing on the nature of the payment cannot explain the distinction drawn between enforceable exemplary damages[250] and non-enforceable treble damages awards,[251] the latter of which is provided for by US anti-trust legislation. Although both of these payments are clearly penal in the wider sense, rather strictly compensatory for injuries suffered (which was rejected as an irrelevant consideration in *Huntington v Attrill*) they are recoverable not at the instance of the

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[246] M Mann, above n 236, 466.

[247] The same question also arises in the constitutional context where it is frequently necessary to distinguish between taxes and charges for services rendered.

[248] *Ayers* v *Evans* (1981) 56 FLR 335, where not all, but only 60%, of the outstanding debt of the appellants was due to the foreign revenue authorities.

[249] *Municipal Council of Sydney* v *Bull* [1909] 1 KB 7; *Weir* v *Lohr* (1967) 65 DLR (2d) 717. More recently in the Canadian case of *US* v *Ivey* (1996) 139 DLR (4th) 570, the US government was held to be entitled to recover the expenses for remedial measures undertaken by the *US* Environmental Protection Agency on the defendant's waste disposal site.

[250] *SA Consortium General Textiles* v *Sun and Sand Agencies Ltd* [1978] QB 279, 299f.

[251] *British Airways Board* v *Laker Airways Ltd* [1984] 1 QB 142, 163: 'Parliament has said that if judgment is recovered in that action it will not be enforced here. Parliament has also said that the defendants, if they pay under any such action, shall be entitled to recover back the penal element from the plaintiff.' See also *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 (Cth)* which stipulates that where an order has been made under that Act prohibiting the enforcement of a foreign antitrust judgment, an Australian defendant may take proceedings in Australia to recover from the foreign plaintiff any amount which has been recovered under that foreign antitrust judgment, including the non-punitive first third of treble damages. See also Commonwealth of Australia, *Australia-United States Relations: The Extraterritorial Application of United Sates Laws*, Joint Committee on Foreign Affairs and Defence (Canberra, 1983) 14: '[t]he treble damages remedy is penal in its purpose and effect.'

State but by private individuals and therefore they both would appear to fit the description of an enforceable private payment.

3.4.3. The Underlying Basis: Governmental Resources

The fact that the three criteria can neither reconcile inconsistent cases nor provide easy answers in the grey area is unavoidable and illustrates the difficulty arising from the superimposition of a dichotomy on a spectrum of laws and actions which are only more or less public or private. Yet, this cannot detract from the fact that all three criteria do in fact inform the debate on whether a law is private or public. But why should it matter who seeks a law's enforcement, whose prerogative it is to do so and to whom the benefit flows? What do these criteria embody?

The expense of pursing an action suggests that the complainant, whether an individual or the State, has a substantial interest in the law's enforcement.[252] To make the enforcement of a law the prerogative of the State[253] embodies the further evaluation that the type of regulation or type of activity the law seeks to regulate is of such significance that its systematic enforcement should rest with the State and its 'tax-funded, monopolistic governmental agencies.'[254] So the State diverts its scarce resources from other useful activities to pursue the enforcement of a legal obligation,[255] rather than leaving the enforcement of a law within the discretion of private individuals who may or may not have the incentive or the resources to enforce it.[256] This decision externalises the relative interest of the State in the regulation, which is reflected in the terminology the High Court adopted in *AG (UK)* v *Hei*nemann *Publishers Australia Pty Ltd* to identify non-enforceable foreign laws:

> 'It would be more apt to refer to "public interest" or, even better, *"governmental interests"* to signify that the rule applies to claims enforcing the *interests* of a foreign sovereign...'[257]

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[252] Randy E Barnett, 'Forewords Four Senses of the Public Law - Private Law Distinction' (1994) 9 *Harvard Journal of* Law and *Public Policy* 267, 269.
[253] Note that the regulation of very few activities appears to be inherently the prerogative of the State. These would appear to include taxation and national defence.
[254] Barnett, above n 252, 269.
[255] Barnett, above n 252, 269. 270
[256] It may also be the case that the 'harmful' conduct does not cause sufficient harm to specific individuals to create a sufficient incentive to incur the cost of law enforcement: Barnett, above n 252, 269.
[257] *AG (UK)* v *Hei*nemann *Publishers Australia Pty Ltd* (1988) 165 CLR 30, 42 (emphasis added).

The regulated activities may cause so much harm[258] or, in the case of taxation, are so essential for the functioning of the State as to warrant the regulatory intervention by, and burden upon, the State. In contrast in respect of private law it is up to injured private parties to seek or not to seek a law's enforcement; and although even there:

> '...the State is.. present,... it is present only as arbiter of the rights and duties which exist between one of its subjects and another. In public law the State is not only arbiter, but also one of the parties interested.'[259]

While the State may also on occasion be one of the interested parties in private suits, it does not assume the regulatory responsibility and burden for the enforcement of private law in general. And this provides an explanation why contractual obligations owed to States have been enforced by foreign tribunals.[260] Also, when the State is owed money under a contract as opposed to a penalty, the State, in terms of the benefit arising from the enforcement, is exactly in the same position as private parties. The payment will compensate it for services rendered, rather than increase its tax base; it will go towards 'commutative justice, a correcting justice which gives back to one what has been taken away from him, or gives him a substantial substitute, and [not] distributive justice...'[261]

The above analysis helps to explain, and is further illustrated by, the US anti-trust litigation initiated by private parties. In these instances the US State had a substantial interest in enforcing US anti-trust law against foreign companies, yet not substantial enough to merit its systematic attention. So it created mechanisms

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[258] Barnett, above n 252, 268f, where the author distinguishes between 'public harm' and 'private harm'.
[259] Kelsen, above n 71, 202; Merryman, above n 89, 11, where the author notes that in civil law systems this restrictive role of the State in respect of private rights was enshrined through the codification of private rights: 'The civil codes were thought of as serving a kind of constitutional function. Private law was the area of the law in which the sole function of government was the recognition and enforcement of private rights.'
[260] The analysis is consistent with two recent decisions of the European Court of Justice, in which the court had to decide whether a university is a body governed by public law and what a 'body governed by public law' is generally. See Regina v HM Treasury, Ex parte University of Cambridge Case C-390/98, Agorà Srl v Ente Autonomo Fiera Internazionale di Milano, Excelsior Snc de Pedrotti Bruna and C v Same Joined Cases C-223/99 and C-260/99. In the latter case, the court decided that a body was not one governed by public law if it offered services on the market place, bore the economic risks of its activities itself, there being no mechanism for offsetting financial losses, and operated in a competitive environment.
[261] Roscoe Pound, 'Public Law and Private Law' (1939) 24 Cornell Law Quarterly 469, 471.

and incentives for private litigants to act as private attorney-generals, share their enforcement and supplement governmental resources:[262]

> 'A private litigant acts as a private attorney general if the litigant asserts a cause of action not only to obtain compensation, but also to vindicate important public interest... [encouraged by] statutory mechanisms, such as fee shifting, that are implemented to promote litigation. The goal of developing such mechanisms, and thereby encouraging private litigation, is to deter unlawful behavior by supplementing the government resources devoted to enforcement.'[263]

The standard availability of treble damages awards is of course another incentive for private parties to take over the enforcement of anti-trust law and thereby relieve the burden upon the State.[264] This explains why they are treated differently from exemplary damages, the availability of which is not designed to encourage private litigation to supplement government resources.[265]

These 'private' anti-trust actions which have given rise to clashes on issues of jurisdictional competence, with other States viewing 'the lawsuit initiated by a private attorney general... simply as a vehicle for the improper assertion abroad of the United States' domestic policy',[266] are instructive on a number of grounds. Firstly, they highlight the direct correlation between a State's relative interest in particular legal regulation and its decision to devote government resources to its systematic enforcement. Secondly, they confirm the existence of a spectrum of governmental interests, as reflected in a spectrum of enforcement approaches,[267] and the difficulty of evaluating and categorising the laws or actions which reflect an

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[262] Buxbaum, above n 213, 223, where the author notes that private attorney-generals are used in a number of areas, beyond the antitrust context, such as environmental law and securities regulation.
[263] Buxbaum, above n 213, 223f (footnotes omitted). Commonwealth of Australia, above n 251, 14.
[264] Commonwealth of Australia, above n 251, 14: 'The treble damages remedy is penal in its purpose and effect. Private antitrust suits serve to supply an ancillary force of private investigators to supplement the Department of Justice's law enforcement.' This is also apparent from requirement that the injury suffered must of the type the antitrust laws are designed to prevent and not be too remote from the anti-trust violation alleged, which seeks to weed out cases that serve only the private goal of the litigant. Buxbaum, above n 123, 224.
[265] John G Fleming, *The Law of Torts* (9th ed, Sydney: LBC Information Services, 1998) 271f '"exemplary or punitive" damages focus not on injury to the plaintiff but on outrageous conduct of the defendant, so as to warrant an additional sum, by way of penalty, to express the public's indignation and need for deterrence or retribution.'
[266] Buxbaum, above n 213, 225.
[267] The decision not to prosecute may also have been informed by a consideration of the difficulty of its enforcement against the foreign company. This fact explains why public claims are often brought in the disguise of private causes of action.

intermediate governmental interest.[268] Finally and most importantly, they illustrate that in terms of jurisdiction, the greater a State's interest in the regulation of an activity (the more it invests in, or creates incentives for, its systematic enforcement) and the more an action is designed to benefit the State by helping it to discharge its assumed regulatory responsibilities, the more likely it is to be classified as 'public' and thus subject to the restrictions both under public and private international law.[269] The paradoxical but undeniable truth is that 'it is precisely in those spheres where a State has the greatest interest in having its law enforced by foreign courts... that its law is least likely to be enforced.'[270]

Let us now return to the *Yahoo* case. In the *Yahoo* case the complainants, LICRA and UEJF, were private associations, relying on a private cause of action, a nuisance action, and ostensibly protecting private interests, in this case Jewish interests. One may though query whether and to what extent their indirect role in the enforcement of the French Criminal Code was positively encouraged and fostered by the French State.[271] Indeed, the fact that no parallel criminal prosecution was brought, at least at the time,[272] against Yahoo! Inc, comparable to the *Raulin v Fisher* scenario, may be used in favour of arguing that LICRA and UEJF were replacing the role of the State, supplementing government resources. Given that the existence of the nuisance action depended on the *manifest* violation of the French Criminal Code, rather than simply being a separate cause of action arising from the same event, the possibility of a criminal prosecution was clearly an

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[268] This incidentally also makes the above proposition in Akehurst, above n 128, 191, that anti-trust actions should be classified as private, if brought by private litigants, problematic when a State creates extra incentives for private parties to supplements its own role and resources. But contrast this to the case of *Raulin v Fischer* [1911] 2 KB 93, where the private relief was granted in addition to the criminal prosecution and thus cannot be seen to supplement resources.

[269] It should come as a surprise that the Draft Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters temporarily included antitrust claims. For an explanation and critique of this proposal see William S Dodge, 'Antitrust and the Draft Hague Judgments Convention' (2001) 33 Law and Policy in International Business 363. In the latest draft anti-trust claims are excluded: Art 1(2)(i) of Interim Text of the Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters in 'Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference' (June 2001) at http://www.hcch.net/e/workprog/jdgm.html.

[270] Akehurst, above n 128, 221, see also 235.

[271] One relevant factor would be whether LICRA and UEJF are funded wholly or partly government funded.

[272] *R* v *Timothy K* and *Yahoo Inc* 26 Feb 2002 (Tribunal de Grande Instance de Paris) No 0104305259, at http://www.foruminternet.org/telechargement/documents/tgi-par2002/0226.pdf, 10. The trial date is set for the beginning of 2003.

option.[273] Yet, it did not occur at the time. which also raises the question whether the absence of parallel criminal prosecutions in any way influenced the course and outcome of the private nuisance action. In this context, an evaluation of the US anti-trust proceedings seems aptly relevant:

> '[F]luctuations in enforcement patterns reveal similar shifts in the focus on public and private values. During periods in which a larger percentage of private lawsuits are "follow-ons" to public enforcement actions, the private value of compensating the victim takes precedence over the public deterrent value; conversely, when more private suits are initiated independent of government action, the emphasis is on the public role of the litigant in bringing to light antitrust violations that would not otherwise have been prosecuted.'[274]

So the question is not just whether the action was encouraged by the State through the creation of incentives not available, for example, in respect of private actions not based on violations of criminal law, but whether the Paris court focused more upon the public role of the litigants than the actual injury suffered by them. Certainly the comment by Justice Gomez that the activity in question constituted 'an offence against the collective memory of a country profoundly wounded by the atrocities committed by... the Nazi criminal enterprise against its citizens'[275] suggests that he looked far beyond the injuries suffered by the plaintiffs. Furthermore looking at the Court orders against YahooIInc it is certainly striking that LICRA and UEJF were each awarded merely 10,000 Francs in damages, in contrast to the injunction issued against YahooIInc which carried a penalty for non-compliance of 100,000 Francs *per* day. The level of the penalty seems to confirm that Justice Gomez was more concerned about upholding the provisions of the Criminal Code than remedying a private wrong, conscious, of course, that no public prosecution would see to that. This would mean that LICRA and UEFF were in substance stepping into the shoes of the State, making the action one for the enforcement of a public law and thus not enforceable abroad.

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[273] 20 Nov 2000 (Tribunal de Grande Instance de Paris) at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf, an unofficial English translation at http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html, 4: 'the mere visualisation in France of such objects constitutes a violation of article R-6456 of the Penal Code.' Although, of course, it must be remembered that the standard of proof is more difficult to satisfy in criminal matters than in private matters.

[274] Buxbaum, above 213, 224f (footnotes omitted). See also Salil K Mehra, 'Deterrence: The Private Remedy and International Antitrust Cases' (2002) *Columbia Journal of Transnational Law* 275.

[275] 22 May 2000 (Tribunal de Grande Instance de Paris) an unofficial English translation at http://www.gyoza.com/lapres/html/yahen.html, 6.

3.5. The Paradox

The above discussion sought to establish that there is an evaluative ordering of law, as embodied through the public-private dichotomy. The relative position of the law on the public-private spectrum depends not on w*hat* activity the law seeks to regulate or the substance of the law but rather on w*ho* seeks to regulate it; it depends upon the relative interest of a State in its regulation, as externalised by its decision whether, and to what extent, to dedicate government resources to ensure its systematic enforcement. While at the private end of the spectrum, the State leaves the enforcement of rights and obligations to the more or less ad hoc decisions of individuals,[276] at the public end of the spectrum it assumes the responsibility and burden of systematic regulatory control.[277]

The discussion also showed that this evaluative ordering which occurs in the domestic sphere, has profound implications for the regulation of transnational activity whether under private international law or the jurisdictional regime of customary international law. The paradox here is that the greater a State's interest in the regulation of an activity, the more it invests in it, and the more the action is designed to benefit the State in the discharge of its assumed regulatory function, the more likely will be the conclusion that it is a public law. And this status of a law as public law entails not fewer but greater restrictions under public international law and not more (as common sense would suggest) but less cooperation by other States in its enforcement.[278] Some have sought to justify the latter anomaly:

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[276] On the increasing involvement of the State in private law see: Jean-Phillippe Robe, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order' in Gunther Teubner, *Global Law Without a State* (Aldershot: Dartmouth, 1997) 51: 'Whilst initially the states, as military organizations, had little to do with the creation of law by civil society, they found it beneficial to respond to merchants' needs by providing them this service... [T]he state, as a consequence of its acquisition of a monopoly over physical violence within the national territory, has been in a position to define strictly protected property rights... and to enforce contracts.' There are many traditional private rights, the protection of which is strengthened by the imposition of criminal liability. The US *Digital Millennium Copyright Act*, for example, creates the offence of trafficking and conspiring to traffic in copyright circumvention devices, with which the Russian company ElcomSoft and its programmer Dmitry Skylarov were charged. See http://www.eff.org/IP/DMCA/US_v_Elcomsoft

[277] Pound, above n 261, 470f, where the author already in 1939 states that 'public law is eating up private law... the legal adjustment of relations involved in trade, finance, banking, industry, transportation, public utilities, and the like, are "a penetration of public law into the domain of private law"'. See also Lowenfeld, above n 121, 325, on the growth of public law.

[278] This is not to say that there is no cooperation between States in respect of criminal matters generally. For recent 'online' examples of extensive co-operation see Art 23-35 of *Convention on Cybercrime* (Council of Europe), at http://conventions.coe.int, and Art 10 of *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (A/Res/54/263 of 25 May 2000, entered into force on 18 January 2002). See also Swire, above n 9 ,1043ff. The conclusion reached above is that the current jurisdictional framework in its very structure embodies the policy of non-cooperation.

> 'In criminal cases, the State is both a party - granted standing to prosecute by statute - and the adjudicative forum - given jurisdiction to decide criminal cases brought by the State against alleged criminals. Because one State cannot validly involve the other's interest as a party on redressing an injury, States do not enforce one another's criminal laws.'[279]

The question is why not, given that it is the foreign State that asks for a helping hand or, as one writer puts it, 'humbly and simply' requests a favour,[280] and thus clearly consents to the cooperation.

This refusal by a State to co-operate in the enforcement of foreign public law is, at least ostensibly, not based on an evaluation of the potential harm it may suffered as a result of the enforcement.[281] Rather the question is who will benefit from it. So the court in *US* v *Inkley* stated that although the characterisation of the foreign law,

> 'is to be determined according to the criteria of English Law... the category of the right of action, ie. whether public or private, will depend on *the party in whose favour it is created*, on *the purpose of the law or enactment in the foreign state on which it is based*...'[282]

Indeed, one may at least wonder whether foreign public law is not enforced precisely because it benefits the foreign States.[283] But whether this is the case or

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[279] *Lipohar* v *R* (1999) 168 *ALR* 8, para 107, citing with approval Brilmayer, *An Introduction to Jurisdiction in the American Legal System* (1986) 321.

[280] Criticised in Mann (1971), above n 107, 169, where the author also argues that courts do not have the power to comply with the request and also that the very request constitutes an 'infringement of local sovereignty'. Mann (1984), above n 107, 42: 'No judge is able or entitled to allow such a claim to proceed and thus to permit an excess of international jurisdiction. Such permission can only be given by the sovereign authority itself and almost everywhere presupposes a treaty and legislation. A judge who would take it upon himself to forego his sovereign's right of jurisdiction would prejudice him greatly: he would be deprived of the opportunity to secure reciprocity of treatment.'

[281] But note: Buxbaum, above 213, 263: 'The way in which countries compete for regulatory control over international commerce, however, is highly nationalistic...'; Niall Ferguson, *The Cash Nexus: Money and Power in the Modern World 1700-2000* (London: Allen Lane, 2001), 26f: 'money at the immediate disposal of the state treasury is usually more limited than the costs of war; and the history of finance is largely the history of attempts to close that gap... After many centuries during which the cost of warfare was the biggest influence on state budgets that role was usurped in the second half of the twentieth century by the cost of welfare.'; Baade, above n 91, 497, where the author argues for the enforcement of foreign public law but states: 'Nevertheless, two considerations militate against the judicial enforcement of foreign-country tax claims in the absence of treat or of authorizing statute. First, history has shown that revenue laws have been used for religious and racial discrimination; for the furtherance of social policies and ideals dangerous to the security of adjacent countries; and for the direct furtherance of economic warfare .' (quotation marks omitted);
See also ' Recent Cases' (1964) 77 *Harvard Law Review* 1327.

[282] *US* v *Inkley* [1989] 1 QB 255, 265 (emphasis added). Unusually, in *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 44f, concluding that the 'material concerning the operations of the British Security Service ...might well sustain a finding that the publication is in the Australian public interest.'

[283] See n 281, where the commentaries appear to suggest that there is a justified perception that any benefits flowing to the foreign State may potentially backfire as far as the forum State is concerned.

not and what in the final analysis underlies the dichotomy need not be answered here.

What is important is the realisation how deeply entrenched this dichotomy and its legal ramifications are within the jurisdictional frameworks. The restrictions on public law have not only harmed the State subjected to the restriction but generally not benefited, and even at times harmed, the State insisting on and enforcing the restrictions.[284] For example, to be seen to condone the evasion of foreign tax law cannot contribute towards the moral authority of the forum's own tax collecting agency:

> 'Why is it unlawful in Canada to evade local taxes and yet perfectly legitimate to refuse to pay foreign taxes? How can the public policy of Canada be invoked to protect tax dodgers when our own legislative bodies impose similar taxes?'[285]

This underlines how strongly States feel about the strict territorial limits of the enforcement of public law and how unlikely any softening of this position will be in the future.[286]

Last but not least, the discussion on the cases which raised the issue of whether or not the foreign law in question is enforceable or not is instructive in terms of reflecting on all those instances when a foreign State would not even attempt to ask for the cooperation of the courts of other States and when by implication the effectiveness of its laws entirely depends on its ability to enforce it at home. Given the strictness of the rule against the non-enforcement of foreign public law, the decided cases have invariably been hard cases which, of course sets them apart from the majority of clear-cut cases, with the *Tob*en case being a classical instance. This raises *inter alia* the question whether and, if so, how States can effectively enforce their public laws at home when transnational interactivity affecting a multitude of public laws drastically increases, which is precisely the

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[284] It certainly is harmful to States collectively as it encourages the evasion of tax *and* penal law as well as other regulatory law. A R Albrecht, 'The Enforcement of Taxation under International Law' (1953) 30 *British Yearbook of International Law* 454, where the author argues against the non-enforcement rule in respect of taxation. Cf Baade, above n 91, 497,

[285] Carter, above n 120, 117, citing with approval Castel, *Canadian Conflict of Laws* (1975) vol 1, 64. See also *Williams and Humbert Ltd* v *W & H Trade Marks (Jersey) Ltd* [1986] AC 368, 428.

effect of the Internet, the reasons for which were explained in Part 2 of this chapter.

3.6. The Implications of the Dichotomy for the Regulation of the Internet

3.6.1. Introduction

The above discussion highlights why any increase in the incidents of the type of transnational conduct which States have traditionally subjected to their public laws cannot but be deeply threatening. For the purposes of this thesis, this insight that States are left to fend on their own to implement their 'high-priority' laws, is significant, because it helps to explain why, as outlined in Chapters 3 and 4, courts and legislatures have consistently responded to one and the same challenge differently in respect of transnational online activity, depending on the private or public nature of the law or dispute. While the private international law regime encourages moderation in the regulatory claims because the reciprocal application and enforcement of foreign law and judgments means that exorbitant claims are both unnecessary and counterproductive, the jurisdictional framework applicable to public law is not endowed with similar co-operative arrangements and thus provides no in-built incentives for moderation. This is compounded by the fact that activity is regulated through public law precisely because it is perceived as requiring the systematic enforcement by the State. The combination of these factors means that States, on the relatively rare occasions when they can enforce their public law in respect of online activity at home, will not indulge in the luxury of a sensitive balancing act performed regularly in determining the adjudicative or legislative jurisdiction of States in the private law sphere.

On a broader level, the above discussion is also informative for the discussion in Part 2 of this chapter, which sought to explain the cause of the regulatory frenzy triggered by the online phenomenon and the competing factors which regulators seek to accommodate. It was argued that the Internet, due to its high and cheap functionality had inherited a myriad of regulatory interests and that regulators are

[286]Cf Baade, above n 91, 494ff, where the author is more optimistic as to the likely future cooperation between States in respect of their public laws.

routinely presented with the challenge of balancing their urge to simply extend existing regulation to the online world against the possibility of chilling online communications. How regulators strike the balance between these factors cannot but lie at least partly in the public-private dichotomy as well as its attendant jurisdictional paradox.

The following discussion seeks to make more explicit some of these connections by returning once more to the question whether the mere accessibility of a website within a territory provides a sufficient connection with the State to make its assumption of adjudicative or prescriptive jurisdiction legitimate.[287] The focus this time is on the substantive considerations underlying the varying answers which have been given to that question. The main argument made is that legal developments in respect of private matters are strongly influenced by concerns of overregulation, in contrast to those in respect of public matters, which are spurred by concerns of underregulation. In other words, the Johnson and Post dilemma - that because the effects of every site are equally felt in every jurisdiction 'no physical jurisdiction has a more compelling claim than any other to subject these events exclusively to its law'[288] - is viewed from entirely different, even oppositional, angles in respect of public law and private law. And these different perspectives are explicable by reference to the dichotomy as well as its jurisdictional ramifications. So Johnson and Post's argument is again too simplistic. Their approach of treating trademark, copyright and defamation law on the same level as the regulation of professional activities, fraud and anti-competitive behaviour[289] is defensible in terms of highlighting the jurisdictional problems common to various regulatory fields. Yet it is inappropriate not to distinguish between the varying laws for the purposes of evaluating the severity of the problem posed and anticipating likely regulatory solutions.

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[287] While the question to which State has a right to regulate which online activity fits within the context of this thesis, it would be worth exploring to what extent the private-public dichotomy also inform the answers to other regulatory problems caused by the Internet. For example, to what extent does the public-private dichotomy inform the issue as to whether intermediaries, such as ISPs or Online Portals, such as Yahoo! Inc, are subject to, or immune from, liability? While this question is beyond the ambit of this dissertations, it illustrates that an appreciation of the public-private dichotomy is potentially significant beyond the relatively narrow context of this thesis.

[288] Johnson and Post, above n 1, 1376.

[289] Johnson and Post, above n 1.

3.6.2. More Compelling versus Not Less Compelling Claim

As discussed in the previous chapter, States have responded to the Johnson and Post dilemma differently depending on the public or private nature of the claim. In private law the mere accessibility of a site has generally not been held to provide a sufficient link to justify the assumption of adjudicative or legislative jurisdiction, as illustrated most clearly by the doctrinal developments in the US in respect of personal jurisdiction.[290] On rare occasions, the judiciary seems even to have followed Johnson and Post's broad conclusion that any website or online publication, even if there was evidence pointing to more than its mere accessibility in the forum, is as much here as there and thus cannot provide any court or law with a superior claim than any other.[291] These cases though remain the exception. Having said that, courts have been cautious about the extension of existing private law to the online environment and assumed regulatory competence only if they had a more compelling claim to do so than other (although not necessarily all other) jurisdictions. This more compelling claim may be established by reference to activities which positively targeted the territory, as evidenced by actual interaction with residence or as evidenced by the nature of the site in the surrounding circumstances. Courts have consistently insisted on a nexus greater than one which would have been in existence in every other jurisdiction.

This is despite the fact that such insistence often has the substantive effect of denying individuals rights they would have enjoyed in the offline world. An early case in point, which has been consistently followed,[292] is Bensusan Restaurant Corp v King[293]. In that case Bensusan Restaurant Corp, a New York corporation and owner of the New York jazz club called "The Blue Note", brought an action against Richard King, who owned and operated a small club in Missouri, also called "The Blue Note", alleging that King infringed its trademark by promoting his club on the Internet. The site contained information about the club generally as

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[290] See Chapter 3 (3.2. Post-Internet Refinements)
[291] *Macquarie Bank Limited & Anor v Berg* [1999] NSWSC 526, as discussed in depth in Chapter 6.
[292] Eg. *GTE New Media Services Inc v BellSouth Corp* 199 F3d 1343 (2000); *Millennium Enterprises Inc v Millennium Music LP* 33 F Supp 2d 907, 916 (1999), where the court provides a long list of examples of cases which followed it. See also discussion in Chapter 2 (4.2. Conservatism - A Mere Result of the Judiciary's Limitations?)
[293] *Bensusan Restaurant Corp v King* 937 F Supp 295 (SD NY 1996).

well as about events and tickets. The court dismissed Bensusan's claim for lack of personal jurisdiction on the ground that it was merely accessible in New York and no more. Yet, under the existing test a New York court has personal jurisdiction over the defendant in the case of a trademark infringement provided there was 'an offering for sale of even one copy of the infringing product in New York even if no sale results...'[294] A website such as King's, with a telephone number to order tickets, cannot but fall within this test; and to argue, as Justice Stein did, that a New York resident would have to take affirmative steps to obtain the tickets would apply equally to an interactive site.[295] This is not to say that his reasoning was wrong, but merely to show that in fact he adjusted the test to the online world by narrowing it, by holding that certain activities, which previously would have amounted to targeting a State, do not amount to that in the online world. By doing that he deprived Bensusan of a right it would have enjoyed according to the pre-Internet test; and this was not merely the right to have the claim heard in the New York court, but also Bensusan's substantive right not to have its trademark infringed, given that the court's refusal to exercise adjudicative jurisdiction was based on the fact that no infringement had occurred in New York, which was the basis of Bensusan's substantive claim.[296] Here the courts adjusted an existing doctrine to the online world by narrowing it. This narrowing, which is perhaps most obvious in the doctrinal developments in the US on personal jurisdiction,[297] has been justified by the reference to the potential chilling effect of online communications of any broader claims.

In contrast, in respect of public law, States have merely required a claim not any less compelling than that of any other State to assume jurisdiction, which frequently has meant that the mere accessibility of the site within the territory provides a sufficient territorial nexus. Typically, in the Yahoo case, Justice Gomez

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[294] *Bensusan Restaurant Corp v King* 937 F Supp 295, para II.A (SD NY 1996).
[295] *Bensusan Restaurant Corp v King* 937 F Supp 295, para II.A (SD NY 1996).
[296] For a similar UK case see *Euromarket Designs Inc v Peters* [2000] *ETMR* 1025, where the High Court held that an Irish website, alleged to have infringed the plaintiff trademark in the UK, related purely to the shop in Ireland and was not used in the UK in the course of trade in goods.
[297] As the 'targeting' test when applied to the online world is too broad, entailing that every site is targeted at every jurisdiction, it was narrowed by the interactive-passive test, with courts now also refusing to exercise personal jurisdiction on the sole basis of an interactive site, generally requiring actual contact with forum residents: *Millennium Enterprises Inc v Millennium Music LP* 33 F Supp 2d 907, 916 (1999) and see discussion in Chapter 3 (3.2. *Post-Internet Refinements*).

when justifying the court's competence by saying the harm caused by Yahoo! Inc's activities is suffered in France, made no attempt to show that actual harm had been suffered in France.[298] It is submitted that he did not consider this necessary because he regarded the mere accessibility of the sites in question, ie. 'permitting the visualisation' as opposed to the actual visualisation, as constituting sufficient harm.[299] Accordingly, the assumption of jurisdiction is legitimate, even if the site is neither subjectively nor objectively targeted at the relevant territory, which would take it beyond mere accessibility and actual access more likely. The 'not-less-compelling claim' approach is also clearly evident in s.21(3) of *Financial Services and Markets Act 2000 (UK)* according to which jurisdiction to regulate investment advertisements may be assumed '[i]n the case of a communication originating outside the United Kingdom... if the communication *is capable* of having an effect in the United Kingdom.'[300] So there is no need to prove that the communication had in actual fact, or was likely to have an effect within the UK.[301]

Finally the 'not less compelling claim' approach is also manifest in the 'negative targeting' requirement, which entails that in the absence of steps taken by the foreign content provider to avoid contact with residents from a State, targeting is presumed.[302] For example the US Securities and Exchange Commission noted that

> '[w]hen offerors implement adequate measures to prevent U.S. persons from participating in an off shore Internet offer, we would not view the offer as targeted at the United States and thus would not treat it as occurring in the United States for registration purposes... We would generally not consider an offshore Internet offer made by a non-U.S. offeror as targeted at the United States, if [t]he Web site includes a prominent disclaimer making it clear that an offer is directed only to countries other than the United States... [and t]he Web site offeror implements procedures that are

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[298] 22 May 2000 (Tribunal de Grande Instance de Paris) an unofficial English translation at http://www.gyoza.com/lapres/html/yahen.html, 7.

[299] See also 20 Nov 2000 (Tribunal de Grande Instance de Paris) at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf, an unofficial English translation at http://www.gigalaw.eom/library/france-yahoo-2000-11-20-lapres.html,4. This is confirmed by his acknowledgement that the site was principally directed at US surfers, although also of interest to and accessible by other surfers, including residents of France.

[300] Emphasis added.

[301] Another example of an 'aggressive approach to jurisdiction' is referred to in ABA, above n 3, 110, where it is stated that the *Child Online Protection Act* (COPPA) seeks 'to control all web site operators, foreign or domestic, who interact with American children.'

[302] See also discussion in Chapter 4 (3.2.3. The Internet and the Objective Intention).

> reasonably designed to guard against sales to U.S. persons in the offshore offering.'[303]

Similarly, the Australian Securities Investment Commission relies on negative targeting as, for example, in its Policy Statement on 'Offers of Securities on the Internet'[304] where it states:

> '[w]e do not intend to regulate offers, invitations and advertisement of securities that are accessible in Australia on the Internet if... the offer, invitation or advertisement is not targeted at persons in Australia; ... contains a meaningful jurisdictional disclaimer;... has little or no impact on investors in Australia; and there is no misconduct.'[305]

It goes on to outline that foreign offerors avoid targeting persons in Australia if they 'take a variety of precautions reasonably designed to exclude subscriptions being accepted from persons in Australia and to check that the precautions are effective...'[306] The requirement of negative targeting means that a web site which is merely accessible in a State, that is one which, although not positively targeted at their residents, does not take specific measures to exclude them either, may be subject to that State's law. So in respect of the public law of States, rather than narrowing traditional jurisdictional tests, States have resolved any ambiguities as to their application to the online world by applying them in the broadest possible fashion. The question is what are the substantive factors which help explaining these systemic different approaches to jurisdiction in private and public law.

3.6.3. Overregulation versus Underregulation

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[303] Securities and Exchange Commission, *Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore*, Release Nos 33-7516, 34-39779, IA-1710, IC-23071, International Series Release No 1125 (23 March 1998).

[304] Australian Securities and Investments Commission, *Offers of Securities on the Internet*, Policy Statement 141 (10 February 1999, reissued 2 March 2000)

[305] Australian Securities and Investments Commission, *Offers of Securities on the Internet*, Policy Statement 141 (10 February 1999, reissued 2 March 2000), PS 141.5.

[306] Australian Securities and Investments Commission, *Offers of Securities on the Internet*, Policy Statement 141 (10 February 1999, reissued 2 March 2000), PS 141.14. In *ASIC v Matthews* {2000] NSWSC 392, para 9, where Stephen Matthews attempted to evade the orders of the Federal Court of Australia requiring him to stop publishing securities reports on the Internet, by transferring them from an Australian server to a New Zealand server, changing only the country domain from au. to nz. In terms of jurisdiction, the NSW Supreme Court did not hesitate to find in favour of it, given that the transfer was 'to enable what had been happening in Australia to continue to happen on the New Zealand site.' So here Matthew, in order to comply with the Australian court order, would have had to take positive precautions to exclude Australian residents from accessing his New Zealand site. Australian Securities and Investments Commission, *Investment Advisory Services: Media, Computer Software and Internet Advice*, Policy Statement 118 (3 March 1997, reissued 12 January 2000), PS 118.56 to 118.59.

The substantive consideration that underlies the moderate approach in respect of jurisdiction in private law is clearly the concern about chilling the online environment or, in short, the fear of overregulation:

> 'the imposition of broad territorial concepts of personal jurisdiction on the commercial uses of the Internet has dramatic implications, opening the Web users up to inconsistent regulations throughout fifty states, indeed, throughout the globe... The possibility of such overreaching jurisdiction raises the specter of dramatically chilling what may well be the most participatory marketplace of mass speech that the country – and indeed the world has yet seen... Business offering products through the Internet, particularly small businesses, might forego this efficient and accessible avenue of commerce if faced with the litigious nightmare of being subject to suit in every jurisdiction...'[307]

The validity of this concern seems self-evident and indeed particularly so in respect of public law, where the threat of more severe sanctions may potentially have a far greater potential for chilling effect than the threat of the remedies flowing from breaches of private law. The question is why the concern of overregulation has proved far less persuasive, rather than more persuasive, in respect of public law.

To start with, even in respect of public law, the possibility of overregulation has been acknowledged. For example, the Australian Security and Investments Commission in one of its recent Policy Statements, notes:

> '[i]f every regulator sought to regulate all offers, invitations and advertisement for financial products that were accessible on the Internet in their jurisdiction, the use of the Internet for transactions in financial products would be severely hampered. Such a stance would also conflict wit the Federal Government's goal in respect of electronic commerce...'[308]

Despite this, States have opted for the more expansive jurisdictional approach, which prima facie increases the regulatory burden on content providers.[309] While the reasons for the different approaches in private and public law have not been

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[307] *Millennium Enterprises Inc* v *Millennium Music LP* 33 F Supp 2d 907, 923 (1999) (footnotes omitted).

[308] Australian Securities and Investments Commission, *Offers of Securities on the Internet*, Policy Statement 141 (10 February 1999, reissued 2 March 2000), PS 141.8. See also *American Civil Liberties Union* v *Reno* 929 F Supp 824, 872f (1996).

[309] The French Yahoo judgment, for example, sends out a message that companies cannot avoid the heavy regulatory burden simply by setting up subsidiaries in States, with each being legally responsible only to their targeted State.

addressed by either judges or legislatures, Justice Connolly in *State by Humphrey* v *Granite State Resorts Inc* at least acknowledged that this difference exists:

> 'Minnesota through the Attorney General seeks to regulate solicitation that comes to its state via phone lines hooked up for Internet users. The Courts do not view the contacts the same as what is necessary for a private litigant to pursue a case as compared to the situation in which the state seek to regulate solicitations within its borders.'[310]

The reasons why courts do not view the same contacts the same in respect of private and public law are essentially twofold.

Firstly, focusing on the type of conduct or activity regulated through public law, there is generally no real issue of overregulation. In the context at least of criminal activity, it is made subject to regulation by the State, precisely because it is perceived as so harmful as to require its systematic regulation by the State. Chilling or deterring those communications is the very object of the regulation. Not to extend public law to merely accessible sites on the Internet would fail to reflect the perceived harm flowing from these activities. For example, it seems hardly objectionable to attach criminal sanctions to a site distributing child pornography regardless of whether or not there is evidence that someone actually accessed the site in the jurisdiction. The only concern here can be underregulation and not overregulation.

This is perhaps best illustrated by the role manufactured contacts by the aggrieved party have played in private and public law. In private law, contacts with the forum which were manufactured by the plaintiff for the purpose of exposing the defendant to the court process in the plaintiff's jurisdiction, have been held not to provide by themselves a sufficient nexus to assert jurisdiction:

> 'Only those contact with the forum that were created by the defendant, rather than those manufactured by the unilateral act of the plaintiff, should be considered for due process.'[311]

So in *Cybersell Inc* v *Cybersell Inc* the District Court of Arizona, concluding that it had no personal jurisdiction over the defendant, stated *inter alia:*

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[310] *State by Humphrey v Granite Gate Resort Inc* (1996) WL 767432 (Minn Dist Ct) 10.
[311] *Edberg v Neogen Corp* 17 F Supp 2d 104,112 (D Conn 1998).

> 'While those contacts are not entirely local they aren't in Arizona either. No Arizonan except Cybersell AZ [the plaintiff] "hit" Cybersell FL's web site. There is no evidence that any Arizona resident signed up for Cybersell FL's web construction services. It entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona... *The only message it received over the Internet from Arizona was from Cybersell, AZ.*'[312]

In public law, on the other hand, manufactured contacts have regularly been held to provide sufficient evidence for establishing the jurisdictional nexus. Typically,[313] the court in *US* v *Thomas* had to consider whether the Western District of Tennessee was the proper venue for hearing the indictment against Mr and Mrs. Thomas for 'knowingly using and causing to be used a facility... of interstate commerce... for the purpose of transporting obscene, computer-generated materials... in interstate commerce.'[314] The evidence which supported the conclusion that the offence was committed by the defendant in Western District of Tennessee was the fact that the service offered by the defendants had been accessible by an undercover government agent, with no evidence that it in fact had been accessed by residents.[315] Similarly, in the *Toben* case, the assumption of jurisdiction was based on the mere accessibility of Toben's Homepage 'Adelaide Institute', in Germany. It was expressly noted that there was no evidence whether residents in Germany had either been contacted by Toeben in order to 'push' the sites in question to them or had actually accessed the sites.[316] The fact that the investigating police officers could access the site was the only substantive evidence supporting the prosecution case.[317] Manufactured contacts by the complainant in the forum only show that the site is accessible, and not whether in fact it is accessed or likely to be accessed by forum residents; they show that the site may potentially cause harm but not whether the site has actually caused harm

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[312] *Cybersell Inc v Cybersell Inc* 130 F 3d 414, para II.B. (9th Cir 1997) (emphasis added)
[313] But note analysis in Chapter 3 (4.2. Post-Internet Halt) by the New York court in *People v World Interactive Gambling Corp* 714 NYS 2d 844, showed that the effect of the gambling site on the territory went, and was required to go, beyond its mere accessibility in the State of New York, comparable to the approach taken in private cases.
[314] *US v Thomas* 74 F3d 701, 706 (6th Cir 1996).
[315] *US v Thomas* 74 F3d 701, 709f (6th Cir 1996).
[316] BGH, Urt. V. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *Neue Juristische Wochenschrift* (NJW) 624, 625.
[317] BGH, Urt. V. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *Neue Juristische Wochenschrift* (NJW) 624, 626f.

or is likely to cause harm in the State.[318] This highlights that in respect of activities regulated by public or criminal law, frequently the focus is on the very possibility of harm, which is perceived as harmful in itself, as well as on the underlying conduct which, by itself, quite regardless of whether it is communicated to anyone else, is often perceived as reprehensible.

The essential problem with this is that, beyond a small core activities universally condemned, such as child pornography, as discussed in the previous chapter, States have very different views of what is reprehensible and what is not, and thus what amounts to overregulation or underregulation. This means that what is in the eyes of one State a justifiable extension of their public laws to the Internet, creates from the perspective of another State an unjustifiable regulatory burden on foreign content providers. The archetypal example is the distribution of nazi propaganda, as discussed in Chapter 3, which from the German and French perspective, in contrast to the US perspective, could not possibly be overregulated and only be underregulated. Furthermore, it is in respect of these activities which are not universally criminalised that the concern of underregulation is severely exacerbated by the jurisdictional ramifications of the dichotomy.

This brings us to the second substantive reason why regulators need not be to concerned about the possibility of chilling online conduct in respect of activities regulated by public law in so far as jurisdiction is concerned. Overregulation is at best a remote theoretical possibility in respect of public law, given that the public status of a law or cause of action entails not more but less cooperation by other States. Again, Justice Connolly in *State by Humphrey* v *Granite Gate Resort Inc* recognised this when he approved the Attorney General's argument:

> 'The Attorney General argues that if they cannot bring a Consumer protection action in Minnesota, they will not be merely inconvenienced, but they will be completely unable to pursue their cause of action on behalf of Minnesota consumers... If our courts are not open, the State will be without a remedy in any court and the consumer protection act will be rendered useless... Here the Defendants crossed the Minnesota borders through

[318] For a recent case discussing related matters see *The People of the State of Illinois* v *Ruppenthal* (2002) WL 1049711, 2, where the defendant unsuccessfully argued that 'although he intended to commit a sexual act with a child, he committed no crime by speaking words of solicitation to an adult', ie. the detective.

> Internet advertisements and solicited business for their gaming venture. If our Attorney General cannot hail them into our Court, then the citizens of Minnesota will not have an adequate Consumer Protection remedy'[319]

As in the vast majority of cases (disregarding multinational companies) only one single State has effective enforcement jurisdiction over the online content provider which tends to be the State of his or her residence; the vast bulk of activity within the prima facie scope of States' public laws remains beyond their enforcement powers. While, as was discussed in the previous chapter, there may be other reasons, apart from the threat of enforcement actions, why subjects obey the law,[320] there is no doubt that the online phenomenon severely curbs the ability of States to enforce their public laws when voluntary obedience is absent, which in the online context it not infrequently is. In short, underregulation is the reality and this actual underregulation of online content threatens to dilute the efficacy of comparable regulation of offline content.[321] This creates a dilemma for States: in so much as they try to compensate for the loss of regulatory control in public matters by making wide jurisdictional assertions when they have enforcement powers, they at least in principle overregulate most content providers with far fewer resources than traditional international enterprises. For these it then becomes less possible to comply with the law of the various States, which in turn exacerbates the problem of actual underregulation.[322]

4. Conclusion

This chapter sought to explain the divergent responses in public and private law to the same Internet induced jurisdictional challenges, as discussed in the previous chapter, and thus to isolate further factors which must form part of an analytical framework on regulatory competence. The argument advanced in this chapter was

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[319] *State by Humphrey v Granite Gate Resort Inc* (1996) WL 767432 (Minn Dist Ct) , 11.
[320] See discussion in Chapter 4 (2.2. Actual Notice and the Effectiveness of Law)
[321] Smith, above n 9, 519. Commonwealth of Australia, *Broadcasting Services Amendment (Online Services) Bill 1999 - Explanatory Memorandum* (1999) 6, at http://www.aph.gov.au, on content hosted abroad: 'A consultancy... concluded that blocking by service providers of non-hosted material (such as material sourced from overseas) may be ineffective. An option would be to do nothing about the control of objectionable online content emanating from overseas. However, given that the majority of online material is sourced overseas, this would undermine confidence in the proposed regulatory regime' and, of course, in the regulatory regime generally.
[322] This problem overlaps to some extent with the discrepancy between constructive and actual notice, discussed in Chapter 4 (4.1. Harmonisation of Substantive Law - the Ultimate Solution).

that an understanding of the public-private dichotomy, which embodies a hierarchy of regulatory priorities, as well as the attendant jurisdictional paradox, must inform any debate on acceptable legal solutions to problems arising from the transnational nature of the Internet. More specifically, it was argued that the application and enforcement of foreign private law, that is the institutionalised cooperation, creates less need for exorbitant claims of adjudicative and legislative jurisdiction as well as providing an incentive for moderation. The reverse is the case in respect of public law.

This argument was placed within the broader inquiry as to why the Internet is more 'global', or jurisdictionally more problematic, than the equally transnational telephone. The answer to that question, it was submitted, does not lie in the transnationality of the Internet per se, in the same way as the relative danger of a virus is not just dependant upon its infectiousness. So the regulatory and jurisdictional conundrum caused by the Internet is also not just reducible to its transnationality, but is rather founded upon the combination of its transnationality and cheap high functionality, which attracts a myriad of regulatory interests. In so far as the Internet allows for activity traditionally subject to the public law of States, its transnationality is particularly worrisome because the current jurisdictional framework is very poorly equipped to accommodate the effective regulation of such cross-border activity. Indeed, it was argued that the universally endorsed public law taboo in private international law shows how private international law embodies the policy that the more the regulation of an activity is a priority to the foreign State, the less cooperation it can expect in relation to its enforcement. The repercussion of this in respect of the Internet is a loss of regulatory control in respect of matters which are not universally condemned. And this is something which leaves no Internet-enabled State unaffected, not even an Internet power house such as the US, in relation to which it was noted as early as 1996 that '40% or more, of content on the Internet originates outside the Untied States.'[323]

[323] *American Civil Liberties Union v Reno* 929 F Supp 824, 848 (ED Pa 1996).

This chapter, like the previous chapters, does not offer a solution to the problem presented, although implicitly an obvious solution seems to present itself. If States principally opened up public regulation to the reciprocal enforcement regime available in respect of private law, it would not just be beneficial in terms of ensuring its efficacy, but also encourage more moderate adjudicative and legislative claims. So whether a State has the right to regulate activity would be less dependant upon the issue of might. More critically, it would mean that the online world could be regulated effectively even without international legal harmonisation. States could retain their peculiar national political, social and cultural values, albeit in respect of an Internet which is less open and more territorially fragmented than the present Internet. This Internet could take the form Lessig envisages when he says '[e]ach state would promise to enforce on servers within its jurisdiction the regulations of other states... in exchange for having its own regulations enforced in other jurisdictions.' [324] But how likely is such an opening up? How likely is it that, for example, the US (currently not enforcing foreign defamation judgments even if they have no impact at all on communications on US territory[325]) would enforce Chinese restrictions on political speech in return for China enforcing US criminal law on copyright circumvention devices? How likely was it that a US court would hold the French order against Yahoo! Inc enforceable in the US, despite the fact that it did not touch upon free speech in the US? As likely as large scale harmonisation of national laws. This reinforces two further important points made in this chapter. Firstly, the restrictive treatment of public law is deeply entrenched in the current jurisdictional framework and unlikely to change fundamentally in the foreseeable future, as foreshadowed by the restricted scope of the Draft Hague Convention.[326] Secondly, the restrictive treatment is not based upon the potential harm suffered by the State insisting on the restriction. So the mere fact that the US would not be harmed by enforcing the French court order over Yahoo! Inc has little impact on its preparedness to do so.

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[324] Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Book, 1999) 55, discussed in Chapter 4 (4.3. State Zoning at the Country of Destination).
[325] See Chapter 6 (n 148).
[326] See above n 269.

A more realistic answer which perhaps emerges from the above discussion is that States are, and will be, forced to realign their public-private law dichotomy and shift away from public regulation to private regulation and indeed to self-regulation.[327] Given the inherent and grave limitations imposed on public law in the transnational context, it would appear that it is frequently as efficacious, if not more efficacious, to regulate the undesirable activity through private law or self-regulatory mechanisms.[328] This public-private shift has already started, as evidenced in the acceptability of privately administered filtering software under the Australian blocking regime,[329] and will no doubt continue for some time to come.

[327] The pressure for a shift from traditional private regulation through public machinery such as the court system to private self-regulatory mechanisms is already well-documented: Perritt, above n 124, para V.
[328] Barnett, above n 252, 272. The issue of efficiency has been addressed, albeit in a different context, in Lessig, above n 323, eg 95: '[t]he regulator selects from among these various techniques according to the return from each - both in efficiency and in the values that each might express.'
[329] See Chapter 4 (4.3. State Zoning at the Country of Destination).

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Chapter 6: "Publication" on the Internet - A Microcosm

1. Introduction

This final substantive chapter draws together, by reference to the legal concept of publication, the arguments which are formative in shaping the legal solutions to Internet-induced jurisdictional challenges, made in the previous chapters. This is designed to provide a microcosm within which the force of the relevant factors - that is the need for incremental legal change, for simple and easily applied legal rules and for foreseeability of legal exposure as well as the public or private character of the law - can be clearly illustrated. The legal concept of publication seems to provide a particularly apt example to do this as it is not only capable of describing much of current online activity but also as it is a legal concept and jurisdictional nexus employed frequently, both in private and public law. This makes it ideal for highlighting the similarities in the challenge posed by the Internet to private and public law, and the similarities as well as differences in the chosen legal response.

In 'Law and Borders - The Rise of Law in Cyberspace'[1] Johnson and Post not only argue that the effects of online activity per se are felt everywhere but felt everywhere to the same degree, with the consequence that no State can make out a stronger claim than any other State:

> '[n]or are the effects of online activities tied to geographic proximate locations. Information available on the World Wide Web is available simultaneously to anyone with a connection to the global network. The notion that the effects of an activity taking place on that Web site radiate from a physical location over a geographic map in centric circles of decreasing intensity, however sensible that may be in the nonvirtual world, is incoherent when applied to Cyberspace.'[2]

While this argument has already been discussed in various contexts in previous chapters, this final chapter analyses it by reference to the legal concept of publication: is anything put on the Internet is 'published' everywhere and, if so, what are the consequences? And indeed, the concept of 'publication' appears to

[1] David R Johnson and David Post, 'Law and Borders - The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367.

be the archetypal example[3] showing the validity of Johnson and Post's argument given that it appears to be an all-or-nothing concept, hardly capable of accommodating grades: either material is published on the World Wide Web, and then it is published everywhere to the same degree, or it is not. That online content seems to be 'published' wherever it can be accessed - which is everywhere - is reflected in the remarks made by Justice Jacob who, although content to conclude that a domain name is not necessarily 'used' in a legal sense in every jurisdiction in which the site can be accessed, could not see the same to be true for the concept of 'publication':

> '[s]o I think that the mere fact that websites can be accessed anywhere in the world does not mean, for trade mark purposes, that the law should regard them as being used everywhere in the world... In other fields, publication on a web site may well amount to a universal publication, but I am not concerned with that.'[4]

This chapter challenges the understanding of publication as an all-or-nothing concept in the legal context and shows how the technical meaning attached to the concept, at least in private law, is capable of distinguishing between different online publications for jurisdictional purposes - in other words while some online publications are 'publications' in the legal sense in the territory, others are not. Although such understanding of the concept is not at all endorsed in the public or criminal law sphere this is clearly not because it is inherently impossible, but is rather linked to the nature of public law, the lack of co-operation between States in respect of transnational crime as well as the acceptability of concurrent jurisdiction. The chapter focuses on the factors leading to the adopted meaning of publication in public and private law, as well as the potential problems arising from such adoption; it shows within the microcosm provided by the concept of 'publication' the workings of the factors discussed in the previous chapters.

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[2] Ibid 1375.

[3] It is archetypal also in the sense that the Internet is particularly well suited to publishing. On 'E-Commerce and the Publishing Industry' see United Nations Conference on Trade and Development (UNCTAD), *E-Commerce and Development Report 2002 (Executive Summary)* (UNCTAD/SDTE/ECB/2 (Sum), United Nations, New York and Geneva, 2002) 1,8f (and Ch 7 of the Full *Report*). See also *ACLU* v *Reno* 929 F Supp 824, 837 (ED Pa 1996): 'The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information. When information is made available, it is said to be "published" on the Internet. Publishing in the Web simply requires that the "publishers" has a computer connected to the Internet and that the computer is running W3C server software.'

What amounts and should amount legally to a 'publication' is examined in the private law context mainly by reference to two important Australian online defamation cases, *Macquarie Bank Limited & Anor* v *Berg* [1999] NSWSC 526 [hereafter *Macquarie Bank*] and *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 [hereafter *Gutnick*]. While this context might appear relatively narrow, the underlying problem discussed is generic and applicable to many private causes of action in the online context. As counsel for the plaintiff in *Gutnick* argued in response to the defendant's argument:

> '[T]here is another problem and it is even more acute than the one your Honour... has identified and that is that this is a law that they want to change for all causes of actions emanating through the publication on the Internet. It is not confined to defamation. It would include breach of contract over the Internet, breach of copyright, injurious falsehood, passing off, probably breach of section 52 of the *Trade Practices Act 1999*...'[5]

This analysis is then contrasted to the meaning of 'publication' adopted in the public law context in the recent English Court of Appeal case of *R* v *Perrin* [2002] EWCA 747 [hereafter *Perrin*] which considered the criminal liability under English legislation in respect of an obscene publication originating from the US.

2. Private Law: A Defamatory Online "Publication"

2.1. Two Australian Internet Defamation Cases

2.1.1. *Macquarie Bank Limited & Anor v Berg* [1999] NSWSC 526

In *Macquarie Bank* Justice Simpson of the Supreme Court of New South Wales dismissed Macquarie Bank's application for an interlocutory injunction to restrain Charles Berg from publishing defamatory material on the Internet. The plaintiffs, Macquarie Bank Ltd and Andrew Downe, and the defendant, Charles Berg, had not been on good terms for some time. For a period before December 1997 Berg had worked for Macquarie Bank Ltd, a relationship which ultimately resulted in still

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[4] 800-Flowers Trade Mark [2000] FSR 697, 705. Recently approved in Scotland in *Bonnier Media Ltd* v *Greg Lloyd Smith* and *Kestrel Trading Corporation* (1 July 2002) Court of Session (Scotland), at http://www.scotcourts.gov.uk/opinionsv/dru2606.html, para 19, 20. Cf Johnson and Post, above n 1, 1367f.

[5] *Dow Jones & Company* v *Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au , 28, see also 32.

unresolved litigation commenced by Berg in the Industrial Relations Commission of NSW and the Federal Court of Australia. Since January 1999 a document headed 'Letters From Charles Berg', together with other material pertaining to the relationship between the parties as well as the litigation, appeared on the Internet on a site located at www.brgvsmbl.com. But the present case arose from the publication of material on a site located at www.macquarieontrial.com. and which has been accessible at least since May 1999. The material makes 'serious allegations against the plaintiffs... there are thumbnail sketches of a number of individuals apparently involved in the engagement between MBL and the defendant, and these are not only critical of some of those individuals, but are illustrated by reference... to notable characters from the world of entertainment.'[6] Justice Simpson acknowledged that 'the material on the site conveys imputations defamatory of each plaintiff.'[7] While the material, which most likely originated from the defendant, was accessible from anywhere in the world including from NSW, it was 'reasonably clear' that the defendant at the time of hearing was not present in NSW and that any acts done by him that resulted in the publication were done in the United States of America.[8] In other words, *Macquarie Bank* concerns online material hosted overseas - a scenario which is the most likely for a relatively small jurisdiction such as Australia.[9]

The judge, after deciding that the court had the discretionary power to 'restrain conduct occurring or expected to occur outside the territorial boundaries of the jurisdiction',[10] decided not to exercise that power for three reasons. First, she was not persuaded of the merits of an order 'the effectiveness of which is solely dependant upon the voluntary presence, at the time of his selection, of the person against whom the order is made.'[11] Second, the nature of the Internet is such that making the order 'would exceed the proper limits of the use of the injunctive

[6] *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 526, at http://www.austlii.edu.au, para 24.
[7] *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 5.
[8] *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 7.
[9] The estimated number of online users in a particular country may be taken to also approximately reflect the relative density of website hosted within that country. As of February 2002 it has been estimated that of a total of approximately 569 million online users worldwide, there were 'only' 10.6 million users in Australia. Nua Ltd at http://www.nua.com/surveys/how_many_online/index.html.
[10] Macquarie *Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 8.
[11] Macquarie *Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 11.

power'[12] of the court. Given that it would be impossible for online publishers to restrict the geographic reach of his or her publication, any prohibition on the publication based on NSW law would mean that the publication would have to cease entirely even in those jurisdictions in which it may be legitimate. Thus to restrain the publication would be to 'superimpose the law of NSW relating to defamation on every other state, territory and country of the world'[13] and thus illegitimately interfere with any right to publish such material, the defendant may have 'according to the law of the Bahamas, Tazhakistan (sic), or Mongolia'.[14] And third, a long standing line of authority demands that interlocutory injunctive relief in defamation cases be granted with great caution because of the danger of unduly pre-empting the resolution of the legitimate issues and unduly interfering with the fundamental public interest in freedom of speech and freedom of information.[15] The most compelling factor, according to the judge, that militated against making the order of an interlocutory injunction concerned the nature of the Internet itself, that is, the second reason, to which this discussion is restricted. The decision could have comfortably and quietly rested on the other two grounds but in particular the last ground, which restricts the remedy of injunctive relief to very rare, exceptional cases.[16]

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

In Gutnick Justice Hedigan of the Supreme Court of Victoria refused to grant the defendant a stay or dismissal of the proceeding, rejecting its argument that the Court lacked jurisdiction over the defendant or, alternatively, that the Court should decline jurisdiction on the basis of forum non conveniens. In that case, the plaintiff Joseph Gutnick, a 'prominent business identity with a reputation in philanthropic, sporting and religious circles'[17] who lived in Victoria with its business headquarters in Victoria,[18] brought a claim against the defendant, Dow Jones & Co Inc, the US

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[12] *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 14.
[13] *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 14.
[14] Ibid. There is no place called Tazhakistan, but only Tajikistan and Kazakhstan.
[15] *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 16. See also *Chappell v TCN Chanel Nine Pty Ltd* (1988) 14 NSWLR 153, 163f.
[16] *Church of Scientology of California Incorporated v Reader's Digest Services Pty Ltd* [1980] 1 NSWLR 344.
[17] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, at http://www.austlii.edu.au, para 1.
[18] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 115.4.

publisher of *Barons Magazine* and *Barrons OnLine* (www.wsj.com) in respect of an article which contained a large photograph of the plaintiff and a number of statements defamatory of the plaintiff. The plaintiff, however, only relied on one of them, namely the allegation he had been involved in financial dealings in Victoria with a convicted money launderer.[19] The defamation claim was based upon a small number of the total 305,563 paper copies sold of the relevant edition in Victoria and the fact that *Barrons OnLine*, a subscriber website, although primarily aimed at US investors, had 1700 Australian subscribers of which several hundred were from Victoria [20] of which 'probably in excess of 300'[21] had accessed the site and viewed the article.

The court decided that it had adjudicative jurisdiction given that the online defamatory publication of the magazine had in fact occurred in Victoria and not in the place where the web server of the site was located, in this case New Jersey, US.[22] The judge also concluded that even if no publication for defamation purposes had occurred in Victoria, some damage to reputation could reasonably be presumed given that it was not contested that the downloading of the Internet publication did occur in Victoria. This then would provide an alternative valid basis for service outside Australia and thus for the jurisdiction of the court.[23] Finally, Justice Hedigan rejected the contention that Victoria was a *forum non conveniens:*

> 'The State of Victoria is both the appropriate forum and convenient forum for the disposition of the litigation... Many of the defendant's claimed difficulties are more imagined than real, but, at the end of the day, the most significant of the features favouring a Victorian jurisdiction is that the proceeding has commenced by a Victorian resident conducting his business and social affairs in this State in respect of a defamatory publication published in this State, suing only upon publication in this State and disclaiming any form of damages in any other place.'[24]

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[19] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 97, 105, 110.
[20] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 1f.
[21] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 32.
[22] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 6: Even if the court had not found in favour of publication in respect of the Barrons Online, the hard copies sold in Victoria would have been sufficient to find in favour of a publication in Victoria.
[23] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 80f. Section 7.01(1)(j) of Supreme Court *(General Civil Procedure) Rules 1996 (Vic):* 'originating process may be served out of Australia without order of the Court where... the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring.'
[24] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 130.

While *Gutnick* most explicitly highlights the significance of the location of an online publication for defamation purposes, *Macquarie Bank* illustrates the fatal legal consequences of the assumption that online material is published everywhere. Both these matters will be addressed now.

2.2. The Significance of the Location of the Publication

2.2.1. Jurisdiction, Forum Non Conveniens and Choice of Law

Before turning to the question what the legal concept of 'publication' means and by implication where something can be said to be published generally and in cyberspace more specifically, it is vital to understand its significance in the transnational defamation and private international law context as a basis for highlighting to what extent the Internet challenges it as a jurisdictional nexus.

The publication of defamatory material is the essence of the tort of defamation. Without a publication no wrong has been committed.[25] In the context of a transnational defamation, the potential of which has been greatly increased by the Internet, the issue is often not just whether there was a publication per se, but rather *where* it occurred.[26] The answer to this question may be critical for the determination of the question of adjudicative and legislative jurisdiction, upon which establishing liability and obtaining effective relief may depend. More specifically, the location of the publication is critical for establishing the *lex loci delicti* which is of critical relevance to jurisdiction, forum non conveniens and choice of law. This is nowhere better illustrated than in *Gutnick*, where the determination of the question whether the Supreme Court of Victoria had adjudicative jurisdiction depended on whether the foreign defendant had validly been served in the US with the originating process, which in turn depended on establishing that 'the proceeding is founded on a tort committed within Victoria... [or] is brought in respect of damage suffered wholly or partly in Victoria...'[27] While

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[25] *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524; *Bata v Bata* (1948) WN 366.

[26] A further and related issue which will not be addressed in detail in this paper is when a publication occurs which is critical in relation to limitation periods: *Loutchansky v The Times Newspaper Ltd & Ors* [2001] EWCA Civ 1805, para 51-72.

[27] Section 7.01(1)(i) and (j) of *Supreme Court (General Civil Procedure) Rules 1996 (Vic).*
This approach has been abandoned in England to achieve consistency with the rules applying in the EC according to which jurisdiction may be asserted over a foreign tortfeasor 'in the courts for the place where the

in this case damage had undisputedly been suffered in Victoria[28] and thus it was not strictly speaking necessary to establish that the tort had been committed in Victoria,[29] Justice Hedigan nevertheless decided to pursue the issue of whether the requisite publication had occurred in Victoria, given that the answer would also be critical in deciding whether the Victorian court should decline jurisdiction on the basis of *forum non conveniens.*[30] In arguing that Victoria was not a *forum non conveniens* Justice Hedigan relied on the recent House of Lord's judgment in *Berezovsky v Michaels* [hereafter *Berezovsky*] where Lord Steyn stated:

> 'where it is held that a court has jurisdiction on the basis that an alleged tort had been committed within the jurisdiction of the court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the court... is the most appropriate court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed with a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum.'[31]

That at times such exceptional circumstances can occur is shown by the case discussed by Justice Hedigan, *Wyatt v Forbes Inc and Anor,*[32] where although the defamatory publication occurred in England, all other facts of the case related to

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harmful event occurred or may occur.' Art 5(3) of *EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [hereafter EC Regulation]. In *Handelskwekerij Bier v Mines de Potasse* [1978] 1 *QB* 708, 731 the European Court of Justice held that the harmful event takes place either where the defendant misconducted himself or where the claimant suffered damage, rather than where the tort occurred.

[28] In the appeal to the High Court Dow Jones *& Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au, 5ff (45f for the plaintiff's view) it becomes clear that the foreign defendant strongly contested the location of the tort within Victoria as the basis for asserting jurisdiction mainly because it also entailed that the subject-matter jurisdiction or governing law, namely the *lex loci delicti*, would also be Victorian law rather than US law.

[29] Cf commentary David Rolph, 'The Message, Not the Medium: Defamation, Publication and the Internet in Dow Jones & Co Inc v Gutnick' (2002) 24 *Sydney Law Review* 263. Note that under s.12.2(e)(ii) of *Supreme Court Rules (ACT)* 'the Court may allow service of an originating application outside the Commonwealth if... the action is founded... on a tort committed within the Territory.' There is no additional basis such as the location of the damage.

[30] *Section* 7.05(2)(b) of *Supreme Court (General Civil Procedure) Rules* 1996 *(Vic):* 'Without limiting paragraph (1), the Court may make an order under this Rule on the ground... that Victoria is not a convenient forum for the trial of the proceeding.' For an in-depth discussion of the Australian test see Richard Garnett, 'Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?' (1999) 23 *Melbourne University Law Review* 30.

[31] *Berezovsky v Michaels* [2000] 1 WLR 1004, 1013, citing Goff LJ in *Cordoba Shipping Co Ltd v National State Bank Elizabeth (The Albaforth)* [1984] 2 Lloyds Report 91, 96 (followed also in *Schapira v Ahronson* [1999] EMLR 735).

[32] *Wyatt v Forbes Inc* (Unreported, Moreland J, 2 December 1977).

Texas.[33] This then made the English court, despite the publication in England, a *forum non conveniens*. Yet, exceptionally these cases remain and thus in most cases the existence of the defamatory publication in the jurisdiction is a 'weighty factor'[34] in deciding whether a court is the appropriate forum.

Last but not least, the question of where the defamatory publication occurred is also relevant to the choice-of-law inquiry. While this was not directly in issue in *Gutnick*, Justice Hedigan's conclusion on adjudicative jurisdiction would also be determinative of legislative jurisdiction. He commented 'that since I have determined that the article is published in Victoria, then Victorian law should apply, wherever the case is tried.'[35] While it is highly doubtful whether a US court would have applied the defamation law of Australia,[36] Justice Hedigan's statement reflects the new common law position in Australia in respect of choice of law in torts cases. In the recent case *Regie National des Usines Renault SA* v *Zhang*[37] the High Court extended its recent ruling in *John Pfeiffer Pty Ltd* v *Rogerson*[38] from intra-state cases to international cases,[39] rejecting the traditional double-actionability approach in favour of the *lex loci delicti* test which, as Justice Kirby pointed out, is the test favoured by most States.[40] The *lex loci delicti* test makes the location of the tort the critical element in deciding the applicable law, which in the case of defamation entails deciding upon the location of the defamatory publication. To the extent to which the Internet allows for simultaneous publication in multiple States, the *lex loci delicti* test will yield in defamation not to one but multiple *lex loci delicti* - a situation which has its precedents in traditional intra-state

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[33] Gutnick *v* Dow Jones & Co Inc [2001] VSC 305, para 120-122. See also *Chadka & Osicom Technologies Inc v* Dow Jones and *Co Inc* [1999] EWCA 1415.
[34] Gutnick *v* Dow Jones & Co Inc [2001] VSC 305, para 110.
[35] Gutnick *v* Dow Jones & Co Inc [2001] VSC 305, para 127 and para 115(9) for the defendant's argument. See also *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts at http://www.austlii.edu.au, 5ff, 19ff.
[36] *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts at http://www.austlii.edu.au, 54.
[37] [2002] HCA 10, at http://www.austlii.edu.au.
[38] (2000) 172 ALR 625.
[39] The traditional test applied in Australia and England was the double actionability test, according to which 'the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done.' *Phillips v Eyre* (1870) LR 6 QB 1, 28f. The effect of the test was to preclude claims in respect of foreign torts being successful in circumstances in which they would not be successful if committed at home. Richard Garnett, 'Are Foreign Internet Infringers beyond the Reach of the Law?' (2000) 23 *University of New South Wales Law Journal* 105, 113f.
[40] *Regie National des Usines Renault SA v Zhang* [2002] HCA 10, para 127.

publications in federations such as Australia,[41] but which is certainly a problem exacerbated in the online world and bound to give rise to practical difficulties in terms of determining liability and defences according to various laws in respect of the same publication (at least in respect of individuals with a reputation in more than one territory).[42] The plaintiff in *Gutnick* avoided any such problems by restricting his claim to the publication in Victoria. Under the EC rules and their interpretation by the European Court of Justice, the Victorian court in *G*utnick would not have had any choice but to restrict the judgment to the injury to the plaintiff's reputation in its own territory only, which in turn means that multiple suits in respect of one statement made become also a real possibility.[43]

Briefly, in summary, the location of the tort, while of primary relevance to the inquiry as to the applicable law, is also frequently, but not necessarily,[44] determinative at the earlier inquiries into jurisdiction and *for*um non con*ven*i*e*ns.

2.2.3. The Location of the Wrong: Publication or Defamatory Publication?

One of the reasons why the *lex loci* de*licti* test was finally adopted in Australia as the source of substantive law was because it was seen to promote the highly prized quality of certainty in the law.[45] It is said to go with the trend according to which 'activity-related connections are increasingly thought to offer a more stable and predictable criterion for choice of law.'[46] While this is no doubt correct, the *lex loci* de*licti* test, or any other test relying upon the location of the wrong, brings its own problems in that it requires the wrong to be located. The *Gutnick* case shows

[41] For example, *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181; *Allsopp v Incorporated Newsagencies Co* Ltd (1975) 26 FLR 238; *Comaico Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1; *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 106 FLR 183.

[42] Cf Rolph, above n 29, 275f.

[43] *Shevill v Presse Alliance SA* Case C-68/93 para 30-33, [1995] 2 WLR 499, where it was also held that the plaintiff can only recover damages for the harm done in all jurisdictions in either the defendant's domicile or in the State where the publisher is established, which more often than not is the same place.

[44] There is, of course, always the possibility, as in *Regie National des Usines Renault SA v Zhang* [2002] HCA 10, that a court has jurisdiction and will exercise it, even though the lex loci delicti test supplies as the applicable law a foreign law.

[45] *Regie National des Usines Renault SA v Zhang* [2002] HCA 10, para 65f, 130f.

[46] *Regie National des Usines Renault SA v Zhang* [2002] HCA 10, para 65, quoting Walsh, 'Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Product Liability Claims' (1997) 76 Canadian Bar Review 91, 109f. A notable exception is Art 4(2) of *EC Convention on the Law Applicable to Contractual Obligations (1980, Rome)* which creates a presumption that the State which is most closely connected with the contract is the State 'in which the party who is to effect the performance which is characteristic of the

that that is often more easily said than done, particularly in the online context. In the field of defamation, one of the initial questions that needs to be answered is whether the search is for the location of the publication, or for the location of the publication where it is defamatory of the plaintiff. In other words, can the wrong only occur in places in which the plaintiff enjoyed a reputation?

As a matter of practicalities, the risk of being exposed to multiple proceedings in online defamation disputes is more theoretical than real, because a plaintiff is not likely to sue in a jurisdiction in which he enjoyed no reputation and thus suffered no harm to his reputation by virtue of the publication.[47] Yet what is the legal position? Is the location of the harm a factor limiting, for example, the venues available to the plaintiff? Generally it appears to be taken into account in determining whether the court should decline jurisdiction on the basis of *for*um non con*veni*ens.[48] It is less clear whether, at the earlier stage, the location of the reputation is relevant in deciding whether a court has jurisdiction over a foreign defendant. Can the originating process, for example, be served outside of Victoria on the basis only of the publication having occurred in Victoria, even if the plaintiff did not enjoy any reputation, or only a negligible one, in Victoria? Does the rule that the tort must have been committed within the State mean that it is sufficient that the publication occurred in Victoria? Or must the publication have been defamatory in Victoria, which presupposes that the plaintiff enjoyed a reputation in Victoria? Given that the location of the harm suffered is a separate basis of jurisdiction in Victoria, it may be argued that the rules seem to envisage the location of the tort absent the harm or damage as supplying a separate nexus, making the location of the publication per se decisive. On the other hand, this may be said only to apply to torts where the harm or damage suffered can be seen as truly separate from the tortious act. The defamatory character of the publication

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contract has... his habitual residence.' In other words the Article does not look to the location of contract but to the location of one of the contractual parties to determine the proper law of the contract.

[47] *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts at http://www.austlii.edu.au, 31f.

[48] See notes 32 and 33 and accompanying text. But note also the online defamation case of *Kitakufe v Oloya Ltd* (1998) ACWSJ LEXIS 84447, para 11f, where the Ontario Court dismissed the defendant's motion for a stay of proceedings despite the fact that 'access on the Internet was limited to two people in Ontario and only to parts of the newspaper other than the page where the article occurred', and that the article merely repeated what Canadian newspapers had previously reported. Thus it was very doubtful whether the plaintiff suffered any damage by virtue of the Ugandan online article in Canada.

(which depends upon the plaintiff's reputation in the location) however, seems as integral to the defamation action as the publication itself.[49] In that sense, it is questionable whether one can refer to the 'defamatory potential' of the publication in terms of damage suffered disconnected from the tort itself. This suggests that the tort of defamation can only have been committed in Victoria if there was a publication in Victoria and this publication was defamatory of the plaintiff in Victoria. This approach is the one adopted in the EC, where the European Court of Justice in *Shevill* v *Presse Alliance SA* in respect of Art 5(3) of the *Brussels Convention*,[50] which provides that the plaintiffs can sue 'in matters relating to tort...in the courts for the place where the harmful event occurred,' stated:

> 'the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim's reputation... [because it is] territorially best placed to asses the libel committed in that State and to determine the extent of the corresponding damage.'[51]

While this argument highlights the advantage of requiring that the publication must be defamatory in the territory of the adjudicating court, it is noteworthy that the *EC Regulation*, unlike the corresponding rules, for example, in Victoria or NSW, does not distinguish between the location of the tort and the location of the damage suffered as two separate bases of jurisdiction. But even if this means that the courts in Victoria or NSW would have jurisdiction, it is likely that they would decline to exercise jurisdiction if the plaintiff had not suffered any harm in the jurisdiction. Equally, the law of States in which the plaintiff suffered no harm would also be disregarded at the applicable-law stage.

2.2.3. World-Wide Publication and Its Legal Consequences

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[49] The fact that defamation, or more specifically libel, is actionable per se without requiring the proof of damages (John G Fleming, *The Law of Torts* (9th ed, Sydney: LBC Information Services, 1998) 600f) does not mean that damage to the reputation need not have occurred, but rather that there is a presumption of damage (*Ratcliffe v Evans* [1892] 2 QB 524, 529) once the tort has been established, namely that the publication was defamatory.

[50] *EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (1968, Brussels), now replaced by the identical Art 5(3) of *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Official Journal L 012 , 16/01/2001 P. 0001 - 0023; in force since 1 March 2002.

[51] *Shevill v Presse Alliance SA* Case C-68/93, para 29f (emphasis added).

If the location of the harm to the plaintiff serves as a factor limiting a defendant's legal exposure to procedural and substantive foreign laws, it may be argued that the location of the publication per se is less consequential and that the proposition that an online publication is published everywhere is not problematic. There are several problems with this argument.

The first problem is that the location of the publication, in contrast to the location of the harm, is prima facie within the control of the defendant, for which he or she can be held legally responsible. Under common law, the harm caused by the defamatory character of the publication may be entirely unintended by the defendant.[52] In other words, under common law, liability for defamation is justified not on the basis that the defendant intended to harm the plaintiff but on the basis that it was within the defendant's control to publish or not to publish, or to publish here but not there. The proposition that only the location of the harm should be determinative of exposure to liability entails and requires a change in that common law position - to the effect that the defendant needs to have intended the harm caused to the plaintiff's reputation, comparable to the malice requirement in the US; because otherwise it would lead to the unacceptable situation that the defendant would be exposed to the laws of jurisdictions which he or she could not have reasonably foreseen. Yet, whether such a change is desirable is highly doubtful as it would certainly curtail the number of successful defamation actions and thus shift the balance too far in favour of publishers.

Secondly, the location of the harm cannot always limit the risk of being sued in multiple jurisdictions or in respect of harm alleged to have been done in several jurisdictions. Where a plaintiff enjoys a world-wide reputation, or a reputation in several States, the location of the reputation and harm clearly does not serve well as a concept which would limit the number of venues available to the plaintiffs, as well as laws applicable to the case. In such circumstances, the concept of

[52] Fleming, above n 49, 596, 599f. Contrast to the US position where at least in respect of pubic figures, the plaintiff must prove that the statement was made with actual malice, that is with the knowledge that it was false or with reckless disregard of whether it was false or not: Jeff Sanders, 'The Extraterritorial Application of the First Amendment to Defamation' (1994) 19 *North Carolina Journal of International Law and Commercial Regulation* 515, 519.

'publication' can only remain a useful jurisdictional criterion and limiting factor if every site is not presumed to be published everywhere.

The third problem is illustrated by *Macquarie Bank*, in which the issue of publication and its location never explicitly surfaced. Yet, Justice Simpson felt compelled to refuse what is often the most valuable remedy to a defamed plaintiff, namely an injunction, because, as she argued, the effect of the injunction could not be limited to NSW: there are 'no means by which material, once published on the Internet, could be excluded from transmission to or receipt in any geographical area.'[53] The underlying assumption of this argument is that a website is 'published' in every State, because the injunction would only take effect where the site is published. If the material in question was not published in other States, the injunction would only take effect in NSW and thus there would have been no reason to be concerned about superimposing NSW law on the rest of the world.

One may argue that the assumption that a website is published everywhere would also make an award of damages problematic, although Justice Simpson did not share that view:

> 'It may be that, if and when the defamation proceedings come to hearing, a judge will conclude that the publication is defamatory, is not protected by any of the defences available under NSW law, and is so serious as to result in a large award of damages.'[54]

Would an award of damages not similarly 'superimpose the law of NSW relating to defamation on every other state, territory and country of the world'? Of course, an award of damages is ostensibly something the NSW court does within its own territory without interfering with other jurisdictions - but so is an injunction if appropriately framed. Yet, the judge refused to frame the injunction for it to apply merely to NSW because it would have meant turning a blind eye to, what she claimed to be, the reality that you cannot in actual practice limit the effect of such an injunction to NSW. But could one limit the effect of an award of damages to NSW in the absence of means available to the online content provider to publish

[53] *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 12.
[54] *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 25.

here but not there? Online content providers would have no option but to make their sites compliant with all the laws, even the most scurrilous, of every jurisdiction in order to avoid potential damages claims. Would such insistence by a State on compliance with its law compelled via an award of damages not similarly fetter online publishers' rights to publish material in other States where such publication is entirely legal? It is tempting to justify the adjustments foreign online content providers make to avoid an award of damages in NSW on the basis that they are entirely voluntary adjustments[55] for which the NSW court, acting purely within its own territory, is not responsible and cannot be reproached on extra-territoriality grounds; in contrast to a grant of an injunction where the effect of the court order on the content provider's behaviour is more direct and more obviously extra-territorial. Yet while tempting, the distinction is certainly not real. Generally, an award of damages, just like an injunction, would inhibit online publication by raising fears of potential exposure to the procedural and substantive laws of multiple jurisdictions. Indeed, the fear of having to pay substantial damages may be more threatening than a fear of being forced to simply modify the content of one's website in compliance with an injunction. Furthermore, it has been persuasively argued that given that:

> '[i]nformation on a website remains accessible and capable of multiple republication unless the content is removed or altered... the defendant could find himself or herself subject to further suit for continuing breaches in respect of the same website.'[56]

So, if one accepts that a site is 'published' in every State, allowing a claim for damages would be at least equally problematic than granting an injunction in terms of superimposing one's defamation standards on the rest of the world, which in turn would lead to the inescapable conclusion that traditional defamation law cannot be applied to the World Wide Web. This conclusion seems hardly acceptable, not the least because it could not rationally be restricted to defamation law but would prima facie apply to any national law restricting online content.

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[55] The fact that these voluntary adjustments would likely be made by respectable online content providers also shows that the assertion of subject-matter jurisdiction by itself is potentially a powerful influence on behaviour and needs to be subject to restrictions. In relation to voluntary compliance, see discussion in Chapter 4 on obedience to law (2.2. Actual Notice and the Effectiveness of Law)

[56] Garnett, above n 39, 126.

It may of course be contended that the problem with Justice Simpson's argument is not so much the assumption that a site is automatically published everywhere, but the clearly mistaken view that content providers cannot restrict their sites to certain States,[57] and thus by implication that the injunction cannot be limited to a certain geographic territory. So, it may be argued, only in the absence of territorial restrictions, will a site be 'published' everywhere. This would leave content providers with two options: either accept exposure to the adjudicative and legislative jurisdiction of all States,[58] or territorially restrict their sites. This may be justified in respect of some truly transnational content providers, but unjustifiably burdensome for most local content providers with often much fewer resources than traditional publishers.

In short, for the reasons discussed above, the proposition that a website is published in every single jurisdiction is troublesome because it undermines the role of the concept of 'publication' in the defamation context generally, and as a jurisdictional concept more specifically. But far more controversially, it creates an environment where every site prima facie enters the 'law space' of every State unless the site is territorially restricted, a legal consequence which is hardly reconcilable with the preservation of the Internet as an open network. But does the law and, in particular, the traditional concept of publication really yield such a result?

2.3. 'Publication' Online

2.3.1. 'Publication' – Place of Origin versus Place of Destination

The problem with Justice Simpson's implicit reasoning that anything put on the Web is published everywhere is that it would have committed her to an identical decision even if Berg had been present in NSW and hosted his site on a server located in NSW.[59] The Internet's architecture would have made the matter equally transnational in principle because the site could have been accessed by anyone

[57] See discussion on voluntary zoning in Chapter 4 (4.2. Voluntary Zoning by Content Providers).
[58] This does not necessarily mean they will be sued but that there is the risk of litigation.
[59] Of course, in such a scenario the likely unenforceability of the injunction would not have been a concern. Yet, Justice Simpson stressed that the likely unenforceability of an injunction was merely a factor adverse to the exercise of the discretion in the plaintiff's favour and not critical to her final decision.

from anywhere; thus an injunction would have been equally incompatible with the defendant's enjoyment of his possibly unfettered rights to publish the relevant material in, say, the Bahamas or Mongolia.[60] In such a hypothetical scenario Justice Simpson might have been tempted to justify an injunction on the ground that the offending conduct occurred 'at home' (because it was put on a NSW server); yet it has long been established that in defamation the place of the publication is the place of the destination of the publication rather than the place of its source or origin. In the context of radio broadcasts it has been held:

> '[i]t is the publication of the defamatory material that is the actionable tort, that is the making of persons of persons to hear and understand it, and if the hearing and understanding is within the jurisdiction the place of origin of the sound-waves or ether-waves is immaterial.'[61]

This means that the offending conduct in the hypothetical case would not have occurred anymore 'at home' than in the present case. Neither the location of the server from where the material is hosted nor the whereabouts of the defendant affect one way or another the strength of the argument in favour of an injunction based on NSW law because neither factor shifts or circumscribes the location of the offending conduct - ie. the publication - to NSW.[62] This reasoning was expressly confirmed in *Gutnick*, where the defendant unsuccessfully argued (relying on policy arguments as well as technical grounds) that the place of uploading, ie. the place of origin, rather than the place of downloading, ie. the place of destination, is the place of publication.[63]

It appears that in the above hypothetical case an injunction should not have been refused merely on the basis of the transnational character of the Internet. But how could such an injunction be justified? Perhaps one should not pay any special

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[60] Garnett, above n 39, 124f.

[61] *Jenner* v Sun *Oil Co* Ltd [1952] 2 *DLR* 526, 526; *M Isaacs & Sons Ltd* v *Cook* [1925] 2 KB 391; *Gorton* v *Australian Broadcasting Commission* (1973) 22 FLR 181; *Allsopp* v *Incorporated Newsagencies Co Pty* Ltd (1975) 26 FLR 238.

[62] The situation would appear to be different in the EC because the place of origin of the publication is considered one place where the offending conduct can be held to have occurred. In *Shevill* v *Presse Alliance SA* Case C-68/93, para 20, the European Court of Justice noted that 'the expression "place where the harmful event occurred" in Art 5(3) of the Convention [now Regulation] must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.' For a discussion see Lilian Edwards 'Defamation and the Internet' in Lilian Edwards and Charlotte Waelde (eds), Law and *the Internet – A Framework for Electronic Commerce* (2nd ed, Oxford: Hart Publishing, 2000) 256ff.

[63] *Gutnick* v *Dow Jones & Co Inc* [2001] VSC 305, para 67. Supported Lawrence Collins (ed), *Dicey and Morris on the Conflicts of* Laws (13th ed, London: Sweet & Maxwell, 2000) para 36-137. 'Uploading' refers to the process of putting material on a server and thereby making it available on the Internet. For a discussion of the place-of-origin rule versus the place-of-destination rule in the European defamation context see: Law Commission (UK), *Defamation and the Internet - A Preliminary Investigation*, Scoping Study No 2 (2002) 27ff, at http://www.lawcom.gov.uk/files/defamation2.pdf

attention to the transnational nature of the Internet if in the particular instance the Internet is merely used as yet another medium for communication within a limited territory - with its international character being entirely incidental to the particular matter. The subject-matter and harm in the hypothetical case, like in the actual case, would have been centred in Australia as it would have concerned an Australian institution (or the Australian branch of an international institution)[64] and an Australian employment relationship. The Internet was treated as nothing special in *Rindos* v *Hardwick*,[65] in which Justice Ipp of the Supreme Court of Western Australia acknowledged its world-wide reach, but proceeded - without giving it a second thought - to impose Western Australian defamation standards on the publication anyway because this quite clearly was a Western Australian defamation case. The centre of gravity of the action was in Western Australia - a publication concerning a former employee of the University of Western Australia and his dispute with the University, with the publication being transmitted by an Australian primarily for a Western Australian audience. Arguably that case might have justified focus on the international aspect of the communication medium because the plaintiff, a US national, enjoyed a reputation amongst scientists worldwide.

The general question though is whether any defamation case, no matter how parochial it is in substance, will always prompt jurisdictional questions merely by reason of the fact that the imputation was published on the Internet. Do the legal burdens and benefits of transnationality attach to any publisher, even of the most local material, just because it is put on the Internet? Does the Internet automatically transform a local matter into an international matter?[66]

As the tort of defamation occurs where the defamatory imputation is published,[67] the question is what amounts to 'publication' generally, and how this applies to the medium of the Internet. Does world-wide accessibility equate with world-wide publication and, if not, where is web material published? In defamation, the

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[64] The company website at http://www.macquarie.com.au/au/about_macquarie/international_activities.htm states that it offers services in 16 countries which, of course, means that Macquarie Bank's reputation is by no means restricted to Australia. Nevertheless in the particular case it seems that most of the harm would have been suffered in Australia.

[65] Supreme Court of Western Australia, No 1994 of 1993 (Unreported, Ipp J, 31 March 1994). Note that this case concerned the forerunner of the Internet, computer bulletin boards.

[66] In *Buddhist Society of Western Australia* v *Bristile Ltd &* Anor P73/2000, at http://www.austlii.edu.au , Gleeson CJ and Callinan J, in an application for grant of special leave to appeal to the High Court, were unreceptive to the appellant's argument that the website, unrestricted by a password, was not a publication to the whole world but a publication to a far smaller group of people, that is the members and supporters of the Buddhist Society of Western Australia.

[67] Above n 61.

defamatory imputation is published if it is communicated to some person or person(s) other than the plaintiff himself.[68] With the emphasis being on communication or the making known of the defamatory imputation,[69] it is not enough to write defamatory words[70] and it is not even enough to deliver a defamatory statement to another if the other person does not become aware of the defamatory words.[71] Similarly publication is generally not equivalent to the mere posting of a message, but becomes only complete when the communication reaches the addressee.[72] While the plaintiff need not necessarily prove that the defamatory matter was brought to the actual knowledge of anyone, which may often be difficult to prove, publication is only established if the plaintiff makes it a matter of reasonable inference that such was the case:[73]

> 'Publication will be presumed, and the burden of disproving it lies upon the defendant, in all cases in which the document is so put in the way of being read and understood by someone that it is probable that he actually read and understood it.'[74]

Thus, in the absence of proof of actual communication, it must be probable, or a matter of reasonable inference, that someone read the defamatory imputation after it was sent. In *Gutnick*, for example, there was evidence that more than 300 subscribers from Victoria had accessed the relevant site, which does not prove, but makes it probable, that they also read the site.[75]

Having said that, at times the fact that a third party obtained knowledge of the statement does not necessarily result in a 'publication' for the purposes of defamation law. The reason for that, it is submitted, is that the law of defamation focuses on the meaning of publication as the *process* of making something

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[68] *Pullman v Hill & Co Ltd* (1891) 1 QB 524, 527. 'Publication' is not defined in the *Defamation Act* 1974 *(NSW).*

[69] *Webb v Bloch* (1928) 41 CLR 331, 363: 'To publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle.'

[70] *Pullman v Hill & Co Ltd* (1891) 1 QB 524, 527..

[71] *Clutterbuck v Chaffers* (1816) 1 Stark 471. See also *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 23-36, 60.

[72] This reasoning also underlies the recent English judgment in *Loutchansky v The Times Newspaper Ltd & Ors* [2001] Civ 1805, para 74f, where the Court of Appeal held that a publication does not just occur at the time of the original publication but every time it is communicated to a person thereafter.

[73] *Gaskin v Retail Credit Co* 43 DLR (2d) 120, 49 DLR (2d) 542; See also *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 27 where the plaintiff argued that this is a matter of evidence rather than what constitutes doctrinally 'publication'. While this is no doubt largely correct, the fact that the publication must be 'the intended natural and probable consequences of all of the acts of the defendants' (para 43) is also doctrinal requirement as to the defendant's state of mind and not merely an evidentiary matter.

[74] *Jenner v Sun Oil Co Ltd* [1952] 2 DLR 526, 536, citing Salmond on Torts, 10th ed, 389.

[75] See above n 72.

publicly known in addition to the *result* of that process.[76] This means that at times even if a defamatory statement is publicly known, the maker of the statement may not be held to be liable if he has not published it, that is if he has not intentionally or negligently made the statement publicly known.[77] Of course, in most cases the fact that a statement is publicly known creates a strong inference that the defendant intentionally or negligently caused that result.

The following will examine the concept of publication, how it has been applied to traditional communication media and to what extent online communications, especially through the web, are comparable to communicating through traditional media for the purposes of defamation law.

2.3.2. The TV or Radio Analogy

The question in the Internet context is, how probable is it that a particular website is being accessed by someone other than the plaintiff, in the absence of positive evidence of such access? And for those who assume that putting a website on the Internet equates with worldwide publication,[78] it must not merely be probable that someone accessed the site but that someone in every jurisdiction accessed it. While this may at first not appear to be difficult to prove, it must be appreciated that there are more than 31 million domain names registered world-wide[79] and that it can be assumed that the number of individual webpages must be in the 100 millions. Given the sheer number of websites the Internet must be distinguished from traditional broadcast television and radio. Mere accessibility of these media has been held to equate with publication of their programs, i.e. publication is presumed to occur in all areas to which their waves are transmitted.[80] This is

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[76] Note in Dow Jones & Company v Gutnick M3/2002 (28 May 2002) High Court of Australia Transcripts at http://www.austlii.edu.au, 25f, 39 counsel for various intervening parties argued that the law should change and the concept of publication should only focus on the act of publishing rather than the facts of publication. Justice Kirby disputed, quite rightly, that this would constitute no more than a slight move in the law. The argument in this Chapter is that the traditional concept of publication has always to some extent looked at the defendant's state of mind attending the process of publishing in addition to the actual fact of the publication.

[77] See text accompanying n 101. Also *Gutnick* v Dow Jones & Co Inc [2001] VSC 305, para 59, where Hedigan J stated that the question of where something is published 'is not a question of where a scientist believes it was published..., or an executive of the defendant, nor for that matter the plaintiff himself.' Note that negligence incorporates an objective element into the notion of the defendant's intention.

[78] Matthew Collins, The Law of Defamation and the Internet (Oxford: OUP, 2001) 288, 292. Edwards, above n 61, 257.

[79] NetNames International Ltd, Latest Domain Stats, at http://www.domainstats.com/main.html (visited December 2002).

[80] Jenner v Sun Oil Co Ltd [1952] 2 DLR 526; Gorton v Australian Broadcasting Commission (1973) 22 FLR 181. TV and radio appear to be distinguishable from the Internet in that the broadcast is sent to a particular area (push technology), while on the World Wide Web surfers have to request a site before it reaches the area where the surfer is present (pull technology). Therefore, a site which has never been requested by

because (given the relatively limited number of radio and TV channels and the great number of viewers and listeners) it is highly probable that someone in each area will actually switch their radio and TV on and view or listen to the particular program. Yet, in relation to the Internet, it is not at all probable that every website is accessed in every jurisdiction where it can theoretically be accessed. Some States have clearly a much greater Internet presence than others.[81] This may make it probable that even an obscure site is accessed in a State such as the US but not necessarily in one which is hardly connected to the Internet. So, if as a matter of reasonable inference, it cannot be assumed that any site put on the Net, and theoretically accessible from anywhere, is in fact accessed everywhere, where then can publication be assumed? This is a question of fact which will depend on the circumstances of each particular case.[82]

2.3.3. The Addressees of a Website

The issue of where the publication took place was answered, as long as fifty years ago, in *Bata* v *Bata* by deciding to whom the circular letters, written in Zurich, were addressed because it was there that it was probable that the letters were published (meaning 'being read'): 'It was the publication of the contents of a defamatory document *to* a third party which constituted the tort of libel... In this case the circular letter had been published *to* persons living in London.'[83] Thus publication took place in England. While it may seem that in the Internet context every website is necessarily addressed to the world at large, is this indeed the case? Maybe not. Some websites clearly indicate the location of their targeted addressees by choosing a domain name reflecting the geographic origin of the content provider. Others indirectly demarcate their markets by using a particular language or currency. Moreover, sometimes the subject-matter of the online content is clearly parochial, as is often the case with defamatory statements. They are about particular individuals or entities, such as Macquarie *B*ank Ltd, which enjoys a reputation and resultant interest within certain more or less limited territories -

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anyone is not in any physical sense anywhere apart from the place where it was put on the server. But *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 15, 36 this distinction was rejected in terms of being relevant to determining the location of the publication as a publication only occurs when a site is sent to a surfer and thus occurs in the surfer's location. The argument was also rejected in *Zundel v Canada* 175 *DLR* (4th) 512, para 67f (1999).

[81] See above n 9.

[82] *Byrne v Dean* [1937] 1 KB 818, 837.

[83] *Bafa v Bata* (1948) WN 366, 367.

outside those territories they are of no interest.[84] Thus although most websites do not expressly spell out to whom they are addressed, many are clearly tailored for one or possibly a few jurisdictions and thus bear de-facto addresses. This, no doubt, makes it generally probable that the site is in fact accessed in that jurisdiction - which means in the defamation context that a publication occurred in that jurisdiction. In respect of jurisdiction to which the site is not tailored or addressed, actual evidence that the site was accessed in that jurisdiction seems necessary.

The concept of de-facto addresses on websites is accepted in US jurisdictions. In *Blumenthal* v *Drudge*, a defamation case, the Columbian District Court rejected Drudge's argument that he should not be subject to the jurisdiction of the court on the ground that he had 'not specifically targeted persons in the District of Columbia for readership, largely because of the non-geographic nature of communicating via the Internet.'[85] The court's decision was partly based on the reasoning in *Telco Communications* v *An Apple A Day*[86] and put as follows:

> '[T]he subject matter of the Drudge Report [containing the alleged defamatory imputations] primarily concerns political gossip and rumor in Washington, D.C... [It] is directly related to the political world of the Nation's capital and is quintessentially "inside the Beltway" gossip and rumor... By targeting the Blumenthals who work in the White House and live in the District of Columbia, Drudge knew that "the primary and most devastating effects ... would be felt" in the District of Columbia.'[87]

Thus although the Report could be read theoretically by anyone anywhere via the Internet, in reality it was 'addressed' to persons living in the District of Columbia as it was of greatest, and possibly exclusive, interest to them. This makes it probable that they read it. The same reasoning was recently employed in the Scottish trademark and passing off case of *Bonnier Media Ltd v Greg Lloyd Smith* where

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[84] This is not to say that the defamation is always intended (see text accompanying n 52) but rather that most articles are written for and with a particular audience in mind.
[85] *Blumenthal v* Drudge 992 F Supp 44, para III.A (DDC 1998).
[86] 977 F Supp 404 (ED Va 1997), followed more recently in *Young v New Haven Advocate* 187 F Supp 2d 498, 508 (WD Va 2001), although in the latter case some of the court's reasoning, such as the following, is highly dubious and inconsistent with other recent authority: 'Thus, this court concludes that the defendants by positing allegedly defamatory articles on Internet websites accessible twenty-four hours a day in Virginia, conduct an act or omission within Virginian sufficient for this court to confer jurisdiction over them in this case.'
[87] *Blumenthal v* Drudge 992 F Supp 44, para III.A (DDC 1998).

Lord Young, noting that he saw no reason 'why similar principles should not be applied to delicts such as defamation, or indeed negligence',[88] stated:

> 'It does not follow that he actually commits a delict in every country in the world, however. It is obvious that the overwhelming majority of websites will be of no interest whatsoever in more than a single country or small group of countries. In my opinion a website should not be regarded as having delictual consequences in any country where it is unlikely to be of significant interest... In determining whether the impact of a website is insignificant, it is appropriate in my opinion to look both at the content of the website itself and at the commercial or other context in which the website operates.'[89]

Applying this analysis to the *Gutnick* case, the locations of the addressees of the site is clear. Indeed, given the nature of the site as a subscription website, it is not even necessary to inquire into the de-facto or probable addressees of the site:

> 'in relation to paying subscribers within Victoria.. the defendant deliberately entered into contract with them for consideration to provide them with access to the defendant's Website ... [and] the defendant therefore knew its Website would reach Victoria just as much as a telex or fax would...'[90]

As the locations of addressees of the site were known to the defendant, it is submitted that, for deciding whether the site was published in Victoria, it was irrelevant that the content of the site was indelibly American, as the defendant argued,[91] or that parts of the article were indelibly linked to Victoria, as the plaintiff asserted and with which Justice Hedigan agreed.[92] Who Dow Jones targeted could simply be ascertained from the subscribers of the site, which included residents of Victoria as well as the US. On the other hand, in *Lee Tech Chee & Anor v Merrill Lynch International Bank Ltd*, the defamatory articles in two online Singapore newspapers could not be said, and were not held to be, 'published' in Malaysia, given that there was a statutory prohibition on accessing them from the Internet in Malaysia.[93] Finally, in *Macquarie Bank*, given the content of the site and its close

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[88] *Bonnier Media Ltd v Greg Lloyd Smith and Kestrel Trading Corporation* (1 July 2002) Court of Session (Scotland), at http://www.scotcourts.gov.uk/opinionsv/dru2606.html, para 18.
[89] *Bonnier Media Ltd v Greg Lloyd Smith and Kestrel Trading Corporation* (1 July 2002) Court of Session (Scotland), at http://www.scotcourts.gov.uk/opinionsv/dru2606.html, para 19.
[90] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 39.
[91] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 20.
[92] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 129. That though is not to say that it is not of relevance in deciding whether the site was defamatory in Victoria.
[93] *Lee Tech Chee & Anor v Merrill Lynch International Bank Ltd* (1998) MLJU LEXIS 733

link with NSW, the site was certainly targeted and thus 'published' in NSW even in the absence of proof of access.[94]

2.3.4. The Postcard-versus-Letter Analogy

An argument for geographically limited 'publication' on the seemingly limitless Internet (or a graded concept of publication) can also be made by asking how easy the writer of the defamatory statement made it for others to read his or her statement.[95] If the writer of a defamatory statement provides for easy access by a third person to the defamatory statement, and thus makes it a natural and probable consequence that a third person in fact reads it, a publication can be presumed even in the absence of actual evidence to that effect. Publication was thus presumed in the case of postcards[96] and telegrams[97] (even if not addressed to a third party) because some third party such as a post office worker could easily read their content during transmission. If, on the other hand, the defamatory letter is put in an unsealed envelope (which makes it that little bit harder to read it), it has been held, that there is no presumption of publication of the letter, but publication could be proven by actual evidence that someone in the post office had in fact read the letter.[98]

Finally, if a third person can only with difficulty, or other than in the ordinary course of events, obtain knowledge of the defamatory statement then there is not only no presumption in favour of publication but there is no publication at all,[99] the reason being that the defendant neither intentionally nor negligently published the statement and the dissemination of the statement was, as far as the maker is concerned, entirely innocent.[100] Thus it was said that if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, there would not be a publication by the writer.[101] Clearly, there is a correlation between the efforts made by the writer to make his or her statement known or keep it secret and the existence or absence of

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[94] This, of course, does not mean that it was not also published in other territories.
[95] While every publication presumes some active participation by the reader, the precise degree of input required varies greatly depending on the efforts by the writer to facilitate reading.
[96] *Chattell v Turner* [1896] 12 TLR 360; *Robinson v Jones* (1879) 4 LR Ir 391.
[97] *Chattell v Turner* [1896] 12 TLR 360.
[98] *Huth v Huth* [1915] 3 KB 32.
[99] *Huth v Huth* [1915] 3 KB 32; *Powell v Gelston* [1916] 2 KB 615; *Sharp v Skues* (1909) 25 TLR 336.
[100] See defence of innocent dissemination in s.1 of the Defamation Act (UK) and also *Godfrey v Demon Internet Ltd* [1999] 4 All ER 343
[101] *Pullman v Hill & Co* [1891] 1 QB 524. Similarly, if a defamatory letter addressed to the defamed person is wrongfully opened by a third person, there is no publication: *Huth v Huth* [1915] 3 KB 32; *Powell v Gelston* [1916] 2 KB 615.

publication for defamation purposes. This correlation is consistent with the fact that the publication of the statement (but importantly not its defamatory character) must have been intended or at least negligent.[102] Making the existence of publication dependant upon the publisher's intention, negligence or innocence in respect of the statement's dissemination shows that the imposition of liability goes hand in hand with the relative control and fault by the publisher. [103]

Applying this analysis to websites, it is submitted, that depending on various factors, a particular site may be like a postcard in one jurisdiction, like a letter in an unsealed envelope in another and in yet another like a letter locked in a drawer. It is like a post card in those jurisdictions where its subscribers are based or, more generally, to which it is targeted and in which surfers obtain easy access to it because, for example, they know or are likely to get to know its URL.[104] To assess that likelihood, several factors would appear to be relevant, including the online and offline advertising efforts made by the content provider, whether the content of the site was prima facie comprehensible and of interest to certain readers and whether the URL could easily be guessed in view of the offline activity of the entity in that jurisdiction. In respect of such jurisdictions, even in the absence of evidence that a site was published in a State, it can be held to be published. On the other hand, if the site is a subscription website and the content provider, for example, rejects subscriptions from residents of certain jurisdictions on the basis of credit card details, the site is like a letter locked in a drawer in respect of that jurisdiction.[105] Finally, where access to residents of certain States is restricted on the basis of self-declarations by users, the content provider is clearly negligent in terms of the publication of the site to those users and thus if access by those users can be proven, a publication has occurred. The same, it was argued above, is applicable in respect of jurisdictions not specifically targeted by an unrestricted site, as it appeared Canada was in relation to a Ugandan newspaper put online in *Kitakufe* v *Olaya*.[106]

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[102] For a discussion of the distinction between unintentional defamation published intentionally and unintentional publication of intentionally defamatory matter see Fleming, above 49, 599f.

[103] In *Gutnick* v *Dow Jones & Co Inc* [2001] VSC 305, para 71 Hedigan J rejects the argument that the defendant had no control over publication or over the location of the publication. The existence of control means that person could have avoided conduct which gives rise to liability.

[104] For example, through the print media, TV or radio and online through links, link collections, banners or meta-tags.

[105] Like the site in Lee *Tech Chee & Anor* v *Merrill Lynch International Bank Ltd* (1998) MLJU LEXIS 733 in relation to Malaysia where the court said that even if there had been evidence that the site had been accessed in Malaysia contrary to the statutory prohibition it would still not have amounted to a publication in Malaysia. Note commentary in *Gutnick* v *Dow Jones & Co Inc* [2001] VSC 305, para 44, 45.

[106] (1998) ACWSJ LEXIS 84447. Given that case there was no evidence that anyone from Canada had actually accessed the site in question, the assumption that the site was published in Canada seems dubious.

The above discussion, summarised in the table below, shows that generally speaking, applying the traditional concept of publication to the Internet, it is easy (indeed too easy) to establish that a site was published in a jurisdiction: a content provider of a freely accessible site is always negligent as far as the publication in the not-targeted jurisdictions is concerned, as illustrated by *Kitakufe v Olaya*.[107] Proof that the site was accessed by only a single person in the jurisdiction would then establish the publication of the site there. Here, it may be asked whether it would not be desirable to depart from the traditional interpretation of publication and require proof that more than a negligible number of persons accessed the site in jurisdiction not targeted by the site, which would both lend more reality to the concept of publication and retain its usefulness as a jurisdictional concept in relation to the many unrestricted relatively passive sites.

Table 2 Was there a 'publication' to a 3rd party (eg. the postman)?
In which jurisdiction is a website 'published'?

	Postcard	Letter in an unsealed envelope	Letter in a sealed envelope (or locked drawer)
Defendant's state of mind in relation to communication to 3rd party	intentional	negligent	innocent
Ease of Access by 3rd party	easy	manageable	difficult
The WWW equivalent	interactive sites accepting access/subscriptions/ contractual offers from residents in the jurisdiction based on reliable IDs eg. credit card details passive site which in all the circumstances is targeted at the jurisdiction	interactive sites refusing access/subscriptions/ contractual offers from residents in the jurisdiction based on unreliable IDs eg. self-declaration by users passive site which in all the circumstances is not targeted at the jurisdiction **Reform?**	interactive sites refusing access/subscriptions/ contractual offers from residents in the jurisdiction based on reliable IDs eg. credit card details
Evidence necessary to prove publication	publication can be presumed	publication cannot be presumed - evidence needed that actual communication occurred	no publication even if there is evidence that someone from that jurisdiction accessed the site

[107] (1998) ACWSJ LEXIS 84447, para 11, 12, where the court stated: 'I am mindful of the defendant's position that the alleged defamatory article was only published in Uganda and that access on the Internet was limited to two people in Ontario and only to parts of the newspaper other than the page where the article occurred.'

2.3.5. The Newspaper or Library Analogy

This argument for reform may find some support in the traditional treatment of newspapers for the purposes of publication. It may be argued a site should be treated as 'distributed' in the jurisdictions to which it is targeted only, even if isolated access from other jurisdictions can be proven. In those latter jurisdictions that site is more like a newspaper which the isolated interested customer obtains by travelling to the jurisdiction in which it is distributed. In such a case the newspaper would still be treated as published in the place of its distribution only and not in the country of its final destination.[108] The same analogy was incidentally also employed in *Playboy Enterprises Inc v Chuckleberry Publishing Inc*, albeit in the context of intellectual property, when the judge rejected the defendant's argument, namely that:

> 'the use of the Internet is akin to boarding a plane, landing in Italy, and purchasing a copy of PLAYMEN magazine....Once more, I disagree. Defendant has actively solicited United States customers to its Internet site, and in doing so has distributed its product within the United States.'[109]

It appears that, in other circumstances, if the defendant had not actively solicited US customers to its site, the judge might have been persuaded that the product was not distributed in the US, but only in Italy, despite the fact that it could have been accessed in the US via the Internet. Yet another version of the same argument was unsuccessfully presented by the defendant in *Gutnick* arguing that accessing a website is comparable

> 'to taking a book out of a library in New Jersey and taking it home to Victoria to read, [in respect of which]...no action would lie in Victoria against the New Jersey library because it would not have caused any publication in Victoria.'[110]

While the defendant was correct in stating no action would lie in Victoria in that scenario, the facts of the actual case were clearly not comparable, given that Dow

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[108] But note this does not include the scenario where the newspaper is actually distributed in the country of destination, even if only a small number of copies. In *Kroch v Rossell et Compagnie Societe des* personnes a *Responsibilite* Ltee [1937] 1 All ER 725 the court held that there was a 'publication' of a French and a Belgian newspaper in England because a small number of each was actually brought to and distributed in England.
[109] *Playboy Enterprises Inc v Chuckleberry Publishing Inc* 939 F Supp 1032, para III.B (SD NY 1996).
[110] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 15, also para 21.

Jones intentionally disseminated its site in Victoria, that is opened a library in Victoria. In *Macquarie Bank* the site www.macquariebankontrial.com, given its content and context, was 'distributed' or 'published' in NSW but importantly was very unlikely accessed in the 'Bahamas, Tazhakistan, or Mongolia' which in turn means that it was not published there and an injunction based on NSW law would not have superimposed NSW defamation standard on these other jurisdictions. By the same token no one would argue that an injunction enjoining a newspaper distributed in Australia from publishing a particular article takes effect in the rest of the world just because people from those other jurisdictions could no longer exercise their right to 'access' it.

The above analysis was primarily concerned with freely accessible sites and how they fit within the existing private international law framework. While this question was not expressly addressed in *Gutnick*, the above argument was intended to show that the *Gutnick* case is at the very least consistent with the proposition that something more than the mere accessibility of a site is required for there to be a 'publication' within the territory. It was argued that the traditional understanding of 'publication' would not easily sit with mere accessibility of material online, no matter how unlikely it is that it is indeed accessed and read. This means that not every site should automatically be held to be 'published' in every jurisdiction. The only instance when accessibility itself, in the absence of actual access, should amount to a 'publication' is when a site is targeted to a jurisdiction as evidenced by, for example, its content or by the acceptance of subscriptions from residents of that jurisdiction. At the other end of the spectrum are the situations when, even if access in a jurisdiction has been proven, no publication occurred because in all the circumstances the defendant neither intentionally nor negligently allowed for that publication there, such as when a site operator precludes residents from certain States (based upon reliable screening mechanisms). The middle ground, which is the most problematic ground, is occupied by all those instances when residents from a jurisdiction are not positively targeted nor clearly precluded from accessing the site. In such circumstances the traditional concept of 'publication' would dictate that actual access must be proven.

2.4. The Formative Factors

2.4.1. Incremental Development

What emerges from the above discussion is that Justice Simpson's rejection in *Macquarie Bank* of the suitability of the traditional remedy of an injunction to the Internet not only has potentially catastrophic effects on the viability of defamation law in the online context but offline too.[111] However it was based upon the mistaken Johnson and Post assumption that online content is 'published' everywhere to the same degree. It was argued above that the traditional concept of publication can, and has to, accommodate the fact that not all websites, even unrestricted ones, are as much here as there, if it is to remain a useful jurisdictional concept beyond avoiding the drastic conclusions reached by Johnson and Post and Justice Simpson.

Apart from this backward looking argument based upon coherence and consistency, a graded understanding of publication is also desirable in terms of future oriented consequentialist argument,[112] as otherwise content providers even of the most local material could not exclude the possibility of litigation abroad in the absence of reliable access restrictions. So a graded conception of publication allows one to discriminate between uses of the Internet as a truly transnational communication medium, which should expose the content provider to foreign laws on the one hand, and as a medium which is used for local communication because it is cheap, fast and efficient and only incidentally transnational. In the latter case it would be entirely fictitious to take into account legally the global nature of the Internet as well as inappropriate and undesirable to burden local content providers with the legal framework traditionally faced by large transnational actors.

While the judge in the later case of *Gutnick* did not have to confront the difficult scenario of unrestricted sites, his prima facie attitude to his ability of transplanting traditional defamation concepts to the online world was clearly very different to that of Justice Simpson. In fact he strongly emphasised the necessity of accommodating online communication within traditional legal parameters and emphatically rejected the defendant's argument for treating the Internet legally radically different:

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[111] The inability to regulate cyberspace cannot but undermine the effectiveness as well as the legitimacy of regulating the same conduct offline.
[112] See Chapter 2 on the two types of arguments in legal reasoning.

> 'the World Wide Web was an information repository and delivery system unlike any other and which defies traditional analysis. That may be so, but the law must nevertheless cope with it... Bold assertions that the Internet is unlike other systems do not lead to the abandonment of the analysis that the law has traditionally and reasonably followed to reach just conclusions'[113]

And indeed the defendant itself could not but seek to accommodate its arguments within existing legal parameters:

> 'The irony can hardly have escaped the mind of senior counsel for the applicant/defendant in that, with respect to the unique and revolutionary Internet, he sought support for his submission in the legal sense on two cases decided in the first half of the 19th century.'[114]

Having said that existing norms relating to the concept of publication can accommodate the online phenomenon is not to say that there are not legitimate concerns about squeezing the new scenario into the old jacket. These concerns are not first and foremost of a doctrinal or qualitative nature, but rather relate to the efficiency of administering the old law in the new environment.[115]

2.4.2. The Problem of Efficiency

In the recent English defamation case of *Loutchansky v The Times Newspapers Ltd & Ors* counsel for the newspaper unsuccessfully argued that the common law as to what amounts to a republication had developed to suit hard copy publication and is inimical to modern conditions because the easy accessibility of online archives means that the maintainer of a website is essentially indefinitely exposed to repeated claims in defamation.[116] In as much as holding on to the traditional concept of publication in the online environment entails potential exposure to suits over time, it also entails the greater exposure of content providers to suits across jurisdictions.

There is no doubt that, even employing a fine-tuned understanding of publication (which is critical if it is to remain a useful jurisdictional concept), many websites will

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[113] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 68, for commentary see Rolph, above n 29, 269f. See also comments by Gaudran J in *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au, 14.
[114] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 22.
[115] See Chapter 2 on the difference between the qualitative and quantitative legal problems.
[116] *Loutchansky v The Times Newspapers Ltd & Ors* [2002] EWCA Civ 1805, para 55, 62.

still be 'published' in more than one jurisdiction. While the subscription website in *Gutnick (*applying a straightforward traditional analysis) is published in all jurisdictions from which the defendant knowingly accepted subscriptions, the unrestricted site in *Macquarie Bank* should possibly be held to be 'published' (even applying a more refined concept of 'publication') in all jurisdictions in which Macquarie Bank carried on operations. This shows that the fine-tuning process of the legal concept of publication is itself not unproblematic as it makes the answer to the question of what amounts to a publication no longer straightforward and easily predictable. So while traditional defamation has had to cope with simultaneous publications across multiple jurisdictions in respect of traditional mass media, such as newspaper, TV or radio and can ostensibly cope with the online phenomenon, the Internet certainly exacerbates existing legal inefficiencies by both increasing the number of transnational publishers and requiring a more subtle or fine-tuned concept of publication.[117] As was discussed in Chapter 3, these two factors are directly oppositional to each other: the increasing number of transnational publishers who have far fewer resources than the traditional global publisher requires simpler, more easily applied legal rules rather than the more refined versions of traditional tests emerging as a result of incremental legal adjustment to the Internet.[118] The answer to this seemingly inescapable paradox lies in more radical reforms.

In the defamation context, one possibility which has been put forward in Australia and the UK, albeit unsuccessfully,[119] is the adoption of a US style 'single publication rule'[120] which, as its advocates argue, treats re-repeat publications and the same publications across State borders as a single publication.[121] But is this

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[117] Phillip Adam Davis, 'The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflict of Laws in Inadequate to Navigate the Borderless Reaches of the Intangible Frontier' (2002) 54 Federal Communications Law Journal 339, 355, arguing that the concern that the case-by-case search for fairness sacrifices certainty and simplicity is no more than a traditional real-space criticism. While this is no doubt correct, it is equally indisputable that the concern has been exacerbated by the Internet.

[118] Chapter 3.

[119] UK: Berezovsky v Michaels [2000] 1 WLR 1004, 1011f; Loutchansky v The Times [2001] EWCA Civ 1805. Australia: Gutnick v Dow Jones & Co Inc [2001] VSC 305, para 75 (also para 19, 76-79, 108-110): 'if you do publish a libel justiciable in another country with its own laws (not mere copies of the U.S. law as the defendant's submissions appear to favour...) then you may be liable to pay damages for indulging that freedom.'

[120] Davis, above n 117, 357, where the author notes that in the US the 'single publication rule' has been criticised on the basis of being inadequate in the online context. See also Odelia Braun, 'Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply' (2002) 32 Golden Gate University Law Review 325, and Marc A Franklin, David Anderson and Fred H Cate, Mass Media Law (6th ed, New York: Foundation Press, 2000) 413ff.

[121] Note that the 'single publication rule' in the US certainly does not prevent a defamed plaintiff to bringing an action in a State where the publication occured; see for example: Young v New Haven Advocate 187 F Supp 2d 498 (WD Va 2001). For an attempt to extend the single publication rule as providing choice of law rule see

indeed the case? According to its original statement the single publication rule has singly the effect of treating simultaneous mass communications as a single communication. S. 577A of *Restatement (Second) of Torts (1977)* states:

> '(2) A single communication heard at the same time by two or more third persons is a single publication. (3) Any edition of a book or newspaper, or any radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.' (emphasis added)[122]

The stated rationale of the rule is to is to protect 'defendants and the courts from the numerous suits that might be brought for the same worlds if each person reached by such a large-scale communication could serve as the foundation for a new action.'[123] So not only does this original statement of the single publication rule seem much narrower than the versions advanced in the Internet defamation cases in Australia and England, but it seems regularly overlooked that the single publication rule is in fact an exception to the main rule, according to which each communication by the same defamer, whether to a new person or to the same person, is generally a separate publication giving rise to separate causes of actions.[124]

In the jurisdictional context the single publication rule is no more than a procedural device: should a simultaneous mass communication (ie. a single publication) cross State borders, the plaintiff can recover all damages suffered in all jurisdictions in one action and a judgment upon the merits of any action for damages will bar any other action for damages between the same parties in all jurisdictions.[125] This does not make the single publication rule a choice of law rule, according to which the publications in the various jurisdiction are to be determined by reference to the forum law only.[126] But most critically, in *Keeton* v *Hustler Magazine Inc*, the US

Dow Jones & Company v *Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au, 54.

[122] This section has its equivalent in Australia; for example s.9(3) of *Defamation Act 1974 (NSW)* prohibits more than one action in respect of multiple publications without leave of the court. Fleming, above n 49, 595.

[123] 'Comment on Subsection (3)' of s.577A of Restatement (Second) of Torts (1977). *Loutchansky* v *The Times* [2001] EWCA Civ 1805, para 65 (relying partly on *Chase Securities Corp* v *Donaldson* 325 US 304, 314 ( ): 'to combat the problem of multiplicity of suits in different States arising out of a single dissemination of a libel [as well as] ... to spare the courts from litigation of stale claims and the citizen from being put to his defence after memories have faded, witnesses have died or disappeared and evidence has been lost.'

[124] S.577A(1) of Restatement *(Second) of Torts (1977)*: 'Except as stated in Subsection (2) and (3), each of several communications to a third person by the same defamer is a separate publication.'

[125] S.577A(4) of Restatement *(Second) of Torts (1977)*. The common law equivalent is that multiple actions in different jurisdictions in respect of essentially one publication would generally be regarded as an abuse of process and vexatious: *Maple* v *David Syme* [1975] NSWLR 97. Fleming, above n 49, 595, and Rolph, above 29, 275.

[126] See *Dow Jones & Company* v *Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au, 54f.

Supreme Court held that the State where the plaintiff can recover damages in respect of the injury suffered in all States, need not be the State where most of the damage arose.[127] In other words, the defamation action need not be brought in the State with the closest connection with the dispute and the single publication rule does not point to one forum in which the action must be brought.[128] So even if the single publication rule was applied to online defamation disputes, this would not at all have the desired effect of reducing the number of possible venues and applicable laws which a defendant could easily foresee.

So the adoption of a single publication rule would only partially address the concern relating to the foreseeability of legal exposure in the online world. What would significantly address this concern would be the adoption of a rule which reduced the number of possible venues and applicable laws to one. In *Gutnick* it was argued that this one venue (and one governing law[129]) should be supplied by the place of uploading,[130] it being the place where the tort of defamation occurred. In *Berezovsky* it was argued that this one venue should be in the location of the bulk of the publication.[131] In effect both arguments endorse a country of origin approach, because the location of the server and the location of the bulk of the

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[127] *Keeton v Hustler Magazine Inc* 465 US 770 (1984) where, although the plaintiff only suffered some injury in New Hampshire and most damage arose elsewhere, New Hampshire was nevertheless held to be an appropriate forum to adjudicate the dispute, based on the defendant's regular circulation of magazines in New Hampshire. New Hampshire was deemed to have an interest in redressing an injury that occurred within its borders and in co-operating with other states in the application of the single publication rule. In contrast in the EC it was held in *Shevill v Presse Alliance SA* Case C-68/93, para 32: 'The plaintiff... has the option of bringing his entire claim before the courts either of the defendant' s domicile or of the place where the publisher of the defamatory publication is established.' (emphasis added) See also *Berezovsky v Michaels* [2000] 1 WLR 1004, 1012f, reaffirming the common law rule that a plaintiff who seeks leave to serve out of jurisdiction in respect of publication within the jurisdiction is guilty of an abuse if he seeks to include in the same action matters occurring elsewhere. *Diamond v Sutton* (1866) LR 1 Ex 130, 132 and *Eyre v Nationwide News Pty Ltd* [1967] NZLR 851.

[128] *Berezovsky v Michaels* [2000] 1 WLR 1004, 1011: 'The Uniform Single Publication Act does not assist in selecting the most suitable court for the trial: it merely present a multiplicity of suits.'

[129] An argument strongly advocated by counsel for the intervening parties *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au, 19ff. *Defamation* is one of the few torts which has traditionally had to accommodate multiple lex loci delicti in respect of multinational publications.

[130] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 16ff (the location 'where the Website was physically located'). In the appeal to the High Court, *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au, 12f, 18f, 24, the argument seems to have changed in that counsel for the defendant argued for a substance test according to which the publication occurs only where the editorial decisions are made, so replacing the 'multiple publication' rule by the 'global publication' rule - similar to the argument by the counsel for the intervening parties, that it should the location of those humans who are responsible for the publication.

[131] *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts at http://www.austlii.edu.au, 19ff.

publication[132] is invariably (although not necessarily) the location of the publisher of the statement, which is more often than not the US. However, given the differences in defamation standards across the globe[133] and the costs and burden associated with litigating abroad, the country of origin approach has been firmly rejected::

> 'The...argument that it would be unfair for the publisher to have to litigate in the multitude of jurisdictions in which its statements are downloaded and read, must be balanced against the world-wide inconvenience caused to litigants, from Outer Mongolia to the Outer Barcoo, frequently not of notable means, who would at enormous expense and inconvenience have to embark upon the formidable task of suing in the USA, with its different fee and costs structures and where the libel laws are, in many respects, tilted in favour of defendants, or,... in favour of the constitutional free speech concepts and rights developed in the USA which originated in the liberal construction by the courts of the First Amendment.'[134]

So although the country of origin approach offers indisputable advantages in terms of clarity, simplicity, certainty and predictability, it will remain an unacceptable legal solution as long as it yields to no more than a theoretical legal remedy to the aggrieved party. In other words both substantive legal harmonisation and the reduction of the cost and inconvenience of litigating abroad seem necessary pre-requisites for its acceptability.

2.4.3. The Problem of Constructive Notice

The basic premise of Justice Simpson's argument in *Macquarie Bank* against the grant of the injunction was that the injunction could not be limited to publication or dissemination within NSW as there are no means by which material, once published on the Internet, could be excluded from transmission to or receipt in any geographical area. And indeed the creator of the very website under attack validated this sentiment by displaying the following disclaimer on his homepage:

> 'Important Notice
> This site and its content are constitutionally protected by the laws of the United States of America. Should you be in a jurisdiction where these fundamental rights and freedoms do not apply, please disconnect from this

[132] While 'the bulk of the publication' approach ostensibly embraces a place of destination approach, like the 'country of origin' approach it would allow publishers to carry on significant activity in other States and violate their laws with impunity.
[133] The US law on libel is widely regarded as one of the most lenient defamation laws in the world. See generally on free speech in the US: Laura R Palmer, 'A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo' (2001) 26 *Yale Journal of International Law* 179.
[134] *Gutnick* v Dow Jones & Co Inc [2001] VSC 305, para 73.

> website NOW and refrain from disseminating the details of this website address to anyone else.'[135]

The messages this notice in fact conveys are: (1) I have no way of knowing who accesses my site. (2) Even if I knew who accessed my site I cannot exclude them.[136] (3) Therefore the onus of complying with national law must be on the end user rather than on me and I cannot be liable for any infringement. Justice Simpson's judgment more or less expressly accepts (1) and (2), from which (3) seems to follow, as it would be contrary to the rule of law and fundamental justice to expose someone to laws which he or she could not reasonably have foreseen and complied with.

But, of course, both the premises in (1) and (2) are flawed. The idea of foreseeability, underlying premise (1), is the very foundation of the above argument as to the appropriate interpretation of the concept of 'publication' in the online context. A site is only 'published' in a State for which it is objectively intended in view of all the circumstances, which in turn makes the location of the publication, namely the location of those who access the site, reasonably foreseeable. While in *Gutnick* the foreseeability of the publication in Victoria was beyond doubt and thus not in issue given that subscriptions from Victorian residents had been accepted, it is all the more noteworthy that Justice Hedigan was highly conscious of its significance. First, he approved the statement made in the US case of *Digital Equipment Corporation* v *Alta Vista Technology Inc* where the court stressed that:

> 'ATI [the defendant] 'knows' that its Website reaches residents of Massachusetts who choose to access it, just as surely as it 'knows' any lateral telephone call is likely to reach its destination. And it presumably 'knows' the context of its Website. ATI is a corporation whose primary business is providing Internet software; it is charged with the knowledge that its Website is accessible through the Internet in Massachusetts. It not only took no steps to prevent the alleged infringement for reaching this State's residents... it plainly intended to market its wares here.'[137]

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[135] At http://www.macquarieontrial.com.

[136] Also argued by counsel for the defendant in the Gutnick High court appeal *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au, 10f (for persuasive counter-arguments see 35f).

[137] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 38f.

He then went on to state that the defendant in this case equally deliberately entered into contracts with Victorian residents, approving implicitly the plaintiff's argument that 'the publication of the article to persons in Victoria who read it was the intended natural and probable consequence of all the acts of the defendant...'[138] which he finally emphatically underlined by saying: 'it is also absolutely clear that Dow Jones intended that only those subscribers in various States of Australia who met their requirements would be able to access them, and they intended that they should.'[139] Counsel for the intervening parties in the *Gutnick* appeal to the High Court of Australia went even further and addressed the theoretical underpinnings of legal foreseeability:

> 'if the rule of law, particularly in the zone of civil law, is to have any social meaning, then... it will include the capacity to know it in advance so as to be able to share your conduct in light particularly of the deterrent example held out by people who have been ordered to pay damages... in the past.'[140]

Whether that entails the consequences he envisaged, namely

> 'that it is the law of the place in which the human being is located... who does the act which causes the consequences giving rise to the plaintiff's claim, which ought, for reasons of rule of law, deterrence, predictability and prospective effect of law, not merely retrospective vindication through litigation, be that system of law which ought to supply, prima facie, always the choice of law for tort,'[141]

is another question.

In as much as the subscription nature of the site made Victorian users foreseeable in *Gutnick*, It may be argued that the content of the site of www.macquarieontrial.com (being on trial in NSW) made NSW users equally easily foreseeable in *Macquarie Bank.* So while in *G*utnick the subscription mechanism recreated 'noticeable' boundaries in the online world, the same was achieved by the subject-matter of the site in all the circumstances in *Macquarie Bank.*

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[138] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 43.
[139] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 60.
[140] *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts at http://www.austlii.edu.au, 21, also 25f.
[141] *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au, 21.

In respect of premise (2), it has long been accepted, and discussed in some detail in Chapter 4, that there are a variety of ways in which content providers can restrict access to their sites,[142] and that these measures will be effective in preventing legal exposure in so far as they are effective in excluding users from otherwise targeted jurisdictions. So Berg's disclaimer in *Macquarie Bank*, which appears almost an invitation to access the site should not preclude Berg's exposure to the laws of the clearly targeted jurisdiction of NSW.[143] Again the possibility of these measures and their legal significance was averted to by Justice Hedigan in *Gutnick* where of course the subscription mechanism itself allowed for the screening and exclusion of users from certain jurisdictions:

> 'Dow Jones controls access to its material by reason of the imposition of charges, passwords and the like, and the conditions of supply of material on the Internet. It can, if it chooses to do so, restrict the dissemination of its publication of Barrons on the Internet in a number of respects.'[144]

The availability of these measures means that national law can legitimately be imposed on online conduct. as they prima facie allow content providers to adjust their behaviour in conformity with the law. More specifically, an injunction could have legitimately been imposed on Berg without any concern of interfering with his online activities in other States - a concern which in any event, as argued above, was overstated given that his online activities were primarily aimed at NSW.

Nevertheless, as was discussed in Chapter 4, the legal encouragement of online screening of users is not unproblematic as it recreates the very boundaries the Internet promised to overcome.[145] There is no doubt that, for example the *Gutnick*

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[142] Already in 1998, it was stated, for example in Thomas *P*. Vartanian, Robert H Ledig, Lynn Bruneau, *21st Century of Money, Banking & Commerce* (Washington DC: Fried, Frank, Harris Shriver & Jacobson, 1998) 607 that a content provider may install filtering devices programmed to determine the customer's self-reported geographic location, and based on pre-determined criteria, such software could reject attempts to transact business by customers of unfavourable states. Note also McHugh J in Dow Jones & Company v Gutnick M3/2002 (28 May 2002) High Court of Australia Transcripts, at http://www.austlii.edu.au , 10, who suggested: 'Why cannot your client use a software screening program which scans messages for certain key words such as "Victoria" and then directs that the message be reviewed according to some protocol or by some other person?'

[143] Garnett, above n 39, at 125: '[I]n the context of defamation, where the offending material is usually not designed by a defendant to attract custom for itself but to pass comment on the plaintiff, the use of court ordered disclaimers would seem to be less helpful.' This reasoning underlies the US defamation decision in Bochan v La Fontaine 68 F Supp 2d 692, 697 (ED Va 1999) where the defendant's argument that his website's disclaimer that his corporation sells computers only in New Mexico was irrelevant as far as the defamation action in Virginia was concerned, as the defamatory comments were clearly directed to Virginia, quite regardless to where the computer business was directed.

[144] *Gutnick* v Dow Jones & Co Inc [2001] VSC 305, para 73, para 115(11) (also para 14).

[145] *Playboy Enterprise Inc* v *Chuckleberry Publishing Inc* 939 F Supp 1032, para III.B (SDNY 1996): 'The Internet deserves special protection as a place where public discourse may be conducted without regard to

judgment, which exposed the US content provider to NSW law on the basis of the acceptance of NSW subscriptions, will lead content providers to be more cautious and, at the very least, to consider rejecting NSW subscriptions in the future.[146] In this context, it is perhaps all the more important to stress how critical the above fine-tuned interpretation of the concept of publication (and for that matter other traditional jurisdictional concepts) is as it preserves the possibility of unrestricted websites. If, in the absence of restrictions, a site is deemed to be 'published' or 'used' or 'present' in every jurisdiction, it sends out the message that the only appropriate strategy to avoid the risk of being subjected to any or all laws is to restrict access to the site to a limited group of users[147] - a message which is not easily, or at all, reconcilable with preserving the Internet as an open world-wide medium.

2.4.4. A Private Cause of Action

So are there any features in the decisions and reasoning in *Macquarie Bank* and *Gutnick* which could be attributed to, and reflect, the private nature of the cause of action? First of all, both in *Macquarie Bank* and *Gutnick* the defendant was beyond the enforcement reach of the court, that is outside Australia and in neither instance could the court realistically anticipate the co-operation of a foreign court because injunctive relief is very rarely enforced by foreign courts, and because US courts are reticent (to say the least) about enforcing a foreign defamation damages award.[148] While the uncertainty of enforceability was held to be an adverse, albeit not decisive, factor against granting the injunctive relief in *Macquarie Bank*[149], in *Gutnick* Justice Hedigan was less concerned about its relevance. He merely noted that it is 'only relevant if the defendant declines to honour any judgment obtained

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nationality, religion, sex, age, or to monitors of community standards of decency... However, this special protection does not extend to ignoring court orders and injunctions.'

[146] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 16 -18, commented on by Rolph, above n 29, 272f.

[147] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 17 'any solution other than that the place of publication should be the place of uploading, and not downloading, would be contrary to the public interest in all countries, because Internet publishers would have to pay regard to the different defamation laws in numerous countries, with the likely effect of diminishing the amount of information made available on the Internet.'

[148] Uta Kohl, 'Injunctions v Damages (The Age of the Internet) Old Battle of Remedies Revisited (2001) 11 *Journal of Law and Information Science*, 160. Cf Graham J H Smith, *Internet Law and Regulation* (3rd ed, London: Sweet & Maxwell, 2002) 265f. On the very insular US approach to choice of law in defamation and the enforcement of foreign defamation judgments see Jeremy Maltby, 'Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts' (1994) 94 *Columbia Law Review* 1978; Kyo Ho Yum, 'The Interaction Between American and Foreign Libel Law: US Courts Refuse to Enforce English Libel Judgments' (2000) 49 *International and Comparative Law Quarterly* 131; Sanders, above 52; Franklin, Anderson and Cate, above n 120, 417.

[149] *Macquarie Bank Ltd & Anor v Berg* [1999] NSWSC 526, para 9-11.

which would be an improper course and damaging to the defendant's reputation world-wide.'[150] This assumption that the foreign defendant will voluntarily honour any judgment against him is consistent with the weight of authority according to which a court should not contemplate that its orders will be disobeyed.[151] For courts to rely upon this assumption may be acceptable in a private action as the risk of disobedience is essentially a risk for the successful private party who should thus be free to assume it or not to assume.[152] For example, the plaintiff in *Gutnick* was happy to live with the risk because 'the main purpose of damages in a defamation case is vindication and damages are secondary.'[153] To what extent this view is shared, and should be shared, in respect of public or criminal causes of actions will be examined below.

Paradoxically though, despite denying the relevance of enforceability, it seems that the possibility in private law of a judgment, the enforcement of which is uncertain and dependant upon the co-operation of foreign courts, tends to go hand in hand with more moderate views as to the legitimacy of adjudicative and prescriptive jurisdiction than in public or criminal law. Of course, in many ways this is not paradoxical at all, as argued in Chapter 5, given that any judgment based upon an exorbitant assumption of jurisdiction is unlikely to be enforced by a foreign State. It suggests that any co-operation in respect of the enforcement of judgments between States has positive spin-off effects in terms of the breadth of extra-territorial regulatory claims.

So were the answers given to the questions as to the legitimacy of asserting adjudicative and/or subject-matter jurisdiction in fact moderate? Certainly, in neither case was the mere accessibility of a site regarded as a sufficient ground to justify the assumption of jurisdiction. Indeed, in *Macquarie Bank* Justice Simpson comes close to following Johnson and Post's overbroad conclusion that as any website is as much here as there no State has a superior claim than any other to

[150] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 115(7).
[151] Garnett, above n 39, 22. For example *Dunlop Rubber Company Ltd v Dunlop* [1921] 1 AC 367.
[152] The plaintiff always has the option of suing the defendant in his place of residence, which then assures the existence of enforcement jurisdiction. See Chapter 3 (Pre-Internet Refinements in Private Cases).
[153] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 115(7).

apply its law,[154] despite the fact that there was clear evidence pointing to the fact that NSW was not a forum in which the site was m*erely* accessible and thus that it had a more compelling claim than the court of other jurisdictions. Not surprisingly, Justice Simpson's reasoning has been criticised.[155] Yet, although Justice Hedigan in *Gutnick*, as was noted above, was far less impressed by arguments based upon the revolutionary nature of the Internet and not prepared to even contemplate whether the Internet should be a defamation-free zone, he nevertheless expressly restricted his reasoning to sites of a subscription nature[156] in respect of which the assumption of jurisdiction is far more easily justifiable than in respect of unrestricted sites.[157] So the assumption of jurisdiction in *Gutnick* can hardly be argued to be anything but reasonable. That Justice Hedigan in *Gutnick* came to a moderate conclusion and that Justice Simpson in *Macquarie Bank* erred far too much on the side of caution, is highlighted by the jurisdictional assertion made in public or criminal cases, where States have tended not to insist on a more compelling claim than any other State to assert jurisdiction but merely on a claim not any less compelling.

3. Public Law: An Obscene Online "Publication"

3.1. R v Perrin [2002] EWCA 747

In *Perrin* the defendant, Stephane Laurent Perrin, a French national resident in England, was charged with the offence of publishing an obscene article contrary to s 2(1) of *Obscene Publications Act 1959* [hereafter the Act] after an officer attached to the UK Obscene Publications Unit of the Metropolitan Police accessed the defendant's website.[158] The charges related to a freely available preview site

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[154] But for the fact that Simpson J allowed for the possibility of an award of damages which would only have inadequately remedied the plaintiff's injury. The plaintiff's right to an injunction was sacrificed in the name of the potential chilling effect of such an order on online publications or, as Justice Simpson put it, in the name of not interfering with the unfettered right to publish material in other jurisdictions.

[155] Garnett, above n 39.

[156] *Gutnick* v Dow Jones & Co Inc [2001] VSC 305, para 41: 'this case is not concerned with the World Wide Web because Dow Jones only puts it on for subscribers or trial subscribers. It limits access and thereby limits it from the world.'

[157] Because by their very nature they are never merely accessible sites in the jurisdictions from which subscriptions are accepted, and as they themselves restrict the free flow of information, arguments based upon any public interest in the global uninhibited Internet are far less persuasive than in respect of unrestricted sites.

[158] S.2(1) of Obscene Publication Act 1959: '.. any person who whether for gain or not, publishes an obscene article or who has an obscene article for publication for gain... shall be liable on summary conviction [or on conviction on indictment] to a fine... or to imprisonment... [or both].'; discussed in Michael Hirst,

for a pornography subscription website in respect of which he was convicted and sentenced to two and a half years' imprisonment, and to the subscription website itself, in respect of which he was acquitted. The reason for the acquittal in respect of the latter site will be explained shortly. While the defendant admitted that he had set up the website to which the charges related, he sought to avoid liability on the basis that the website was located outside the UK.[159] In relation to that he *inter alia* contended that, given the nature of the Internet, an offence that criminalises actions which have taken place outside the jurisdiction violated Art10 of the *European Convention on Human Rights and Fundamental Freedoms* [hereafter ECHR], protecting freedom of speech. Alternatively, he contended that there was insufficient evidence of an obscene publication. Both arguments were rejected by the Court of Appeal, for reasons which will be discussed below.

While neither of these arguments was couched in jurisdictional terms,[160] both at the very least touch upon jurisdictional matters. The first freedom of expression argument was to the effect that the offence created by the Act, if applied to online conduct originating from outside the jurisdiction, would be inconsistent with the ECHR. The effect of the argument was that in the online world a more restrictive jurisdictional approach than that taken by the Act is necessary so as not to violate the guaranteed freedom of speech. The alternative argument was that even if the Act (and with it the jurisdictional test in the form of the concept of 'publication') was valid, the territorial nexus was in this case not satisfied because the evidence did not disclose a sufficient publication. So the issue of whether the court had jurisdiction to hear the matter, and ultimately whether the defendant had committed an offence under English law, depended on the court's determination of what amounted to a sufficient publication in England in the online environment to satisfy the requirement of the Act, and to what extent actions which take place

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'Cyberobscenity and the Ambit of Criminal Law' (2002) 13(2) *Computers & Law* 25. See also Amanda Kearsly, 'The Internet, Paedophilia and the ISP' (2001) April/May *Computers and Law* 29. An equivalent provision in Australia would be s.578C of *Crimes Act 1900 (NSW)* which deals with publishing child pornography and indecent articles; discussed in Gareth Griffith, *Censorship in Australia: Regulating the Internet and other Recent Developments* (Briefing Paper 4/2002) at http://www.parliament.nsw.gov.au.

[159] It appears, he admitted that he was a director and/or majority shareholder of one or more US companies involved in operating the website from the US. Online Updates to Graham J H Smith, *Internet Law and Regulation* (3rd ed, London: Sweet & Maxwell, 2002) at http://www.smlawpub.co.uk/online/intereg/apr02.cfm , para 12-067.

[160] *R* v Perrin [2002] EWCA 747, para 14.

outside the jurisdiction impact on the legitimacy of asserting jurisdiction. While the problem raised by this case is similar to the problem raised in the private law context, its resolution in the criminal law context diverges in significant respects from that adopted in defamation law.

3.2. The Significance of the Location of the Publication

3.2.1. The Territoriality Principle

Before considering how the legal concept of 'publication' is interpreted in criminal law, its relevance in the context of transnational crimes needs to be understood. The specific starting points for any enquiry into the issue of a court's competence to adjudicate a transnational crime appear contradictory. On the one hand the court in ***Perrin*** would have relied upon s.46(2) of *Supreme Court Act 1981,* which provides that '[t]he jurisdiction of the Crown Court with respect to proceedings on indictment shall include jurisdiction... for offences wherever committed.'[161] On the other hand, there is Viscount Simond's far more restrictive statement in *Cox* v *Army Council:*

> '[A]part from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England.'[162]

It is beyond doubt that the wide statement in s.46(2) must be read subject to this more restrictive notion which is supported by a long line of judicial authority. At the end of the 19th century Lord Halsbury famously noted that all crime is local and that jurisdiction over a crime belongs to the country where the crime was committed.[163] And it has been reaffirmed in many cases that 'there is a strong presumption that when parliament... creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any [foreign] country...'[164] Occasionally, there may be exceptional circumstances when

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[161] Emphasis added. An equivalent very broad sphere of application is provided for by, for example, s. 3A of *Crimes Act 1914 (Cth):* 'This Act applies throughout the whole of the Commonwealth and the Territories [ie. Australia] and also applies beyond the Commonwealth and the Territories. '

[162] *Cox v Army Council* [1963] AC 48, 67.

[163] *Macleod v Attorney General* (NSW) [1891} AC 455, 458, approved recently in Australia in *Lipohar v R* (1999) 168 ALR 8, 12.

[164] For example *R v Treacy* [1971] AC 537, 551; *R v Foster, Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 257.

this presumption is displaced and when acts committed wholly abroad (with no effect at all in the State) constitute indictable offences such as under the *Sex Offenders Act 1997* in the UK and *Crimes (Child Sex Tourism) Amendment Act 1994 (Cth)* in Australia.[165] In these cases, the basis for the assumption of jurisdiction is only the nationality of the offender, ie. the legislation only applies to acts committed abroad by the citizens or residents of the legislating State.[166]

Leaving aside these rather exceptional crimes, the above statement that all crime is local reflects, and is consistent with, the main basis of jurisdiction under public international law, which is the territoriality principle. But as has been discussed in previous Chapters,[167] the territoriality principle (or the principle that all crime is local) is not as clear cut as may appear. More specifically, the question when a crime can be said to have been committed locally (and thus to fall within the territoriality principle) defies easy answers in the context of transnational crimes. There may be problems where it is not clear at all where the elements of the crime should be held to have been committed,[168] or when different aspects or elements of the crime occur in different States,[169] or when only the effects of a crime abroad are felt in the State.[170]

These problems to some extent affected the *Perrin* case particularly as it was alleged that the major steps leading to the online publication were taken outside the UK. Yet, this would not be fatal to the prosecution case if it was not a necessary element of the crime and another element of the crime occurred, or possibly the effects of the foreign crime were felt, on UK territory thus providing a

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[165] Amends the *Crimes Act 1914 (Cth).* Discussed in Ryszard Piotrowicz, 'Child Sex Tourism and Extra-Territorial Jurisdiction' (1997) 71 *Australian Law Journal 108*

[166] Section 7(2) of *Sex Offenders Act 1997* and s.50AD of *Crimes Act 1914 (Cth).*

[167] See discussion in Chapter 3 (Pre-Internet Refinements in Criminal Cases).

[168] For example in *Governor of Brixton Prison, ex parte Levin* [1997] QB 65 the question was whether the defendant could have committed theft in the US by typing instructions from his computer in Russia. The answer given was affirmative.

[169] This is reflected in principles such as the objective territoriality principle/effects doctrine and subjective territoriality principle. For a detailed discussion of various other theories justifying jurisdiction in the context of transnational crimes see Matthew Goode, 'The Tortured Tale of Criminal Jurisdiction' (1997) *Melbourne University Law Review* 411. And for example *Libman v R* [1985] 2 SCR 178 - a decision by the Supreme Court of Canada clearly allows for the possibility that a crime can be committed in more than one territory.

[170] See for example s.10C(2)(b) of *Crimes Act 1900 (NSW)* which provides most expressly for the assumption of jurisdiction on the basis of the effects doctrine by stating that there is a sufficient territorial nexus with the State where 'the offence is committed wholly outside the State, but the offence has an effect in the State.'

sufficient link with the UK to justify its assertion of jurisdiction. Where could and should the 'publication' be held to have occurred? If it had occurred on the territory of the UK and it was sufficiently obscene, the crime would be a local crime in respect of which a UK court could assume regulatory competence.

3.2.2. The Relevant Nexus: 'Publication' or 'Obscene Publication'?

In the above discussion on defamation, one question which was examined was whether the nexus which supplied the basis for adjudicative and/or subject-matter jurisdiction, could be a publication which was not defamatory of, that is did not harm, the plaintiff in that particular State (because he or she enjoyed no reputation in the jurisdiction). The tendency was against allowing such regulatory assertions. In the criminal context there is the requirement that there must not only be a publication in the territory but that that the publication must also be obscene there. The reason that this requirement is mandatory may be explained by the fact that in the criminal context courts would not possibly consider applying the law of a State within which the publication might have been obscene in the absence of it being obscene in the forum State.

This is illustrated and explained by the jurisdictional status of the subscription website in *Perrin* in respect of which he was not convicted. While it may seem that, in contrast to *Gutnick*, the subscription site was found not to have been published in the State in which its subscribers were located, this is certainly not the case. In as much as the preview pages were held to be published in the UK by virtue of the police officer's access, so the subscription site was published in the UK by virtue of the same action too. Yet, unlike the preview pages, the subscription site was not found to be 'obscene' in the UK. This is not on the basis that the material on the subscription site was any different or less offensive from that on the preview page, but rather on the basis that it was likely to be accessed by different persons in relation to which the material was not likely to be obscene. Under the Act an obscene publication is defined by reference to the likely effect it has on the person who is likely to be confronted with it:

> 'an article shall be deemed to be obscene if its effect... is... such as to tend to deprave and corrupt persons who are likely... to read, see or hear the matter contained or embodied in it.'[171]

In ***Perrin*** the effect of the subscription site on those who were likely to pay for, and thus read and see the subscription website, would not be such as to deprave and corrupt them anymore than they were already depraved and corrupt.[172] Perrin had not committed an offence under the Act in respect of the subscription site, despite it being published in the UK, because it was not 'obscene' in the UK.

Accordingly, the following discussion of the concept of 'publication' in respect of freely available sites and their location should not be taken to be inapplicable to subscription sites. As in the private law context, these sites can be much more easily reconciled within the existing jurisdictional framework because the content provider knowingly accepts subscriptions from residents from certain States; thus any arguments about the non-territorial nature of the Internet and/or the potential for overregulation are far less persuasive.[173] The other point against which the following discussion should be seen is the fact that the requirement that the publication must be 'obscene' within the State, like the harm to the reputation in the defamation context, prima facie limits legal exposure. How far it does so is examined in more detail below.

3.3. 'Publication' Online

3.3.1. 'Publication' –The Place of Destination: Downloading

Like in the defamation context, the term 'publication' has a technical legal meaning under the Act. It is defined in s.1(3) of the Act according to which a *person* published an article who

> '(a) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or
> (b) in the case of an article containing or embodying matter to be looked at ... where the matter is data stored electronically, transmits that data.'

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[171] Section 1(1) of *Obscene Publications Act 1959.*
[172] *R v Perrin* [2002] EWCA 747, para 11.
[173] *R v Perrin* [2002] EWCA 747, para 34, where the defendant asserted '...because of the worldwide nature of the internet it is difficult for the publishers to comply with the statutory requirement of individual states, and if they are obliged to do so the most restrictive laws will prevail.'

What is noteworthy about this definition is that it defines publication by reference to the action of the person who publishes the material rather than by reference to the result brought about by his or her actions.[174] This contrasts to its definition in the defamation context where the main focus is on the effect of the action: was the material communicated to a third person? Having said that, the essential difference between the acts specified in s.1(3)(a) and the act specified in s.1(3)(b) appears to be that the former to some extent reflects upon the effect of the action in relation to outsiders, while the latter does not. This is apparent from Justice Ashworth's reading of s.1(3)(a) in *R v Barker*:

> 'The forms of publication included in the definition in section 1(3)(a) fall into three distinct groups: in one group, comprising the words 'sells, lets on hire, gives, or lends' publication is *to* an *individual*; in the second group, comprising the words 'distributes, circulates,' publication is on a *wide scale*, *involving more than* one *person*; in the third group a mere offer for sale or letting on hire constitutes publication.'[175]

Verbs such as 'distributes', 'circulates', 'sells', 'gives', 'lends' or even a 'mere offer for sale' do not merely connote what a person did but also the effect which is brought about by his or her actions on others. So the verb 'sell' implies that someone else 'buys', 'give' implies someone else 'takes', an 'offer for sale' implies bringing the item to the attention of someone else. These verbs are comparable to the understanding of 'publication' in defamation law, which also focuses on the effect of the publisher's act on outsiders. And so, it is submitted, comparable to defamation law, a State can establish jurisdiction in respect of 's.1(3)(a)' publishers provided the person 'distributes, circulates, sells...' the relevant material on the State's territory. In the online context that would mean finding evidence which shows the downloading or the online sale of the material in the jurisdiction. In terms of public international law, focusing on the location of the effect of acts rather than the location of the causative act itself (ie the uploading) falls squarely within the objective territoriality principle.

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[174] Contrast to the treatment of the distinction between process/act and result/fact in defamation law; see above n 75 and accompanying text.
[175] R v *Barker* [1962] 46 Cr App R 227, 230.

In *Perrin* the court held that s.1(3)(a) was not relevant to the case.[176] This result is somewhat surprising, firstly, because the court relied upon the evidence of a police officer accessing the relevant pages to prove that there was a publication.[177] What would this evidence prove, if not that Perrin 'circulated' or 'distributed' the obscene material within the UK and thus 'published' it there? Secondly, relying on the effects of the defendant's conduct on UK territory would have gone to the heart of the defendant's argument that the UK has no jurisdiction to prosecute him on the basis that the major steps involved in publishing the web page took place outside the UK.[178] As in the defamation context, it would have made the location of these steps, that is the location of the causative act, simply irrelevant. While the court came to this conclusion,[179] its basis for doing so is far from clear, given that the court only relied on s.1(3)(b) which, as will be argued below, focuses on the causative act (ie. the major steps leading up to the publication) rather than its effect to establish 'publication'.

Nevertheless, what is clear from *Perrin* is that the Court of Appeal was entirely unimpressed by the defendant's argument in favour of restricting regulatory competence in the case of online behaviour *exclusively* to the country of origin - reminiscent of the defendant's argument in *Gutnick* - based on policy reasons and the human right of freedom of expression.[180] The defendant's argument in favour of a country of origin approach had several strands, including that it presents the only workable solution to online regulation because otherwise it would be difficult for online publishers to comply with the laws of various States and they would be obliged to comply with the most restrictive law.[181] This would be undesirable and too great an interference with the human right of freedom of expression[182] - a conclusion which, it was alleged, has also been endorsed in the US in respect of

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[176] *R v Perrin* [2002] EWCA 747, para 18.
[177] *R v Perrin* [2002] EWCA 747, para 17, see also para 51, where the Crown responds to the defendant's jurisdictional argument that 'there was a publication when anyone accessed the preview page.'
[178] *R v Perrin* [2002] EWCA 747, para 32ff. Note the defendant also argued that they were lawful there, which, of course, the court could not have confirmed given that no evidence as to where the date files were posted was adduced. See above n 159 and 168.
[179] *R v Perrin* [2002] EWCA 747, para 52. In fact it went further than that when it stated: 'We reject the suggestion that it is ever necessary for the Crown to show where the major steps in relation to publication were taken.' (emphasis added).
[180] *R v Perrin* [2002] EWCA 747, para 32-52.
[181] *R v Perrin* [2002] EWCA 747, para 33f.
[182] *R v Perrin* [2002] EWCA 747, para 35.

obscene online publications.[183] Furthermore, the defendant argued that web publishers cannot avoid that problem as they are incapable of restricting access to their sites based on the geographic location of the Internet users visiting their site[184] and that if inhibition is necessary, it can be achieved more effectively by industry self-regulation, blockage by service providers and steps taken at home.[185] The Court was not sympathetic to these arguments and noted, *inter alia*, that given that the restriction on freedom of speech was prescribed by law, for a legitimate purpose of protecting morals consistent with Art 10(2) of EHCR, there is no reason why a responsible government should abandon the protection afforded by the Act to children in favour of other limited remedies available to parents,[186] and that you cannot rely on country of origin to take the appropriate measures.[187]

In summary, although the reasoning in *Perrin* shows that the court endorsed the country of destination approach, it is submitted that it failed to appreciate that s.1(3)(a) captures this very approach and moreover that it could have applied s.1(3)(a) to the *Perrin* scenario relatively easily, given that the material could clearly be accessed from UK territory. This in turn would have closely mirrored the route chosen in respect of the location of 'publication' in defamation. Having said that, there is a critical aspect in respect of which even the country of destination approach to the legal concept of publication varies significantly in the private and public context, which will be examined below in the discussion on the sufficiency of the publication.

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[183] *R v Perrin* [2002] EWCA 747, para 36 (see also para 41f). Note though that one of the latest challenges to the US governments attempts to protect children from unsuitable obscene online material on the ground of First Amendment violation was not successful: *Ashcroft v American Civil Liberties Union* 122 SCt 1700 (2002) where the US Supreme Court held that the *Child Online Protection Act*'s reliance on 'contemporary community standards' to identify material harmful to minors did not by itself render the Act unconstitutional. Most noteworthy the court stated: '[W]e do not believe that the medium's "unique characteristics" justify adopting a different approach than set forth in *Rambling* and *Sable*... If a publisher chooses to send its material into a particular community, this Court's jurisprudence teaches that it is the publisher's responsibility to abide by that community standard. The publisher's burden does not change simply because it decides to distribute its material to every community in the Nation... If a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.' (1712) - a holding most unfavourable to Perrin's argument. Also, the US has not shown as much respect for free speech in, for example, the online gambling scenario, despite the fact that the policy arguments and problems faced by content providers are exactly the same. See for example *US v American Sports Ltd* 286 F 3d 641 (2002).

[184] *R v Perrin* [2002] EWCA 747, para 36f.

[185] *R v Perrin* [2002] EWCA 747, para 43.

[186] *R v Perrin* [2002] EWCA 747, para 45f, 48f. It also noted that the court should be slow to find that the response by parliament to the Internet was inadequate.

[187] *R v Perrin* [2002] EWCA 747, para 51.

3.3.2. 'Publication' - The Place of Origin: Uploading

In contrast to s.1(3)(a), the approach taken in s.1(3)(b) is substantially different from the one favoured in private law. Section 1(3)(b) makes the mere transmission of the data sufficient to make the 'transmitter' a publisher no matter whether any outsider has received and understood it. Indeed, a strict reading of s.1(3)(b) would encompass a situation where a person who merely 'transmits' the data between his or her own computers is a publisher. The verb 'transmit' focuses far less on the qualitative effect of the action of the transmittor on outsiders and does not even presuppose their existence. So the verb 'transmit' is broad enough to encompass merely uploading data onto a website regardless of whether that site is actually downloaded by anyone else. This broad reading of s.1(3)(b) was endorsed in *R* v *Waddon*, upon which the court in *Perrin* relied:

> 'As it seems to us, there can be publication on a Web site aboard, when images are there uploaded; and there can be a further publication when those images are downloaded elsewhere. That approach is, as it seems to us, underlined by the provisions of s 1(3)(b) as to what is capable of giving rise to publication where matter has been electronically transmitted.'[188]

Making uploading (ie. the causative act) by itself, without any evidence of downloading (ie. the effect), a 'publication' falls within the subjective territoriality principle as *long* as it can be shown that the causative act occurred on the State's territory.[189] In both *R* v *Waddon* and *R* v *Perrin* the defendant admitted being responsible for the uploading of the images onto a website located abroad. And as they were both at the relevant times in the UK, it is submitted, that the necessary territorial connection to assert jurisdiction was present. Yet it has been argued that *R* v *Waddon* should be distinguished from *Perrin* because in the former case 'the material ...had been prepared by W in England and uploaded *from England* onto a

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[188] *R* v *Waddon* [2000] All E*R* (D) 502. *R* v *Perrin* [2002] EWCA 747, para 18. This is consistent with the very broad statutory definition given to the term 'publish' in other jurisdictions in respect of similar offences; see for example s. 578C(1) of *Crimes Act 1900 (NSW)* where 'publish' is defined as to include: '(a) distribute, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire or offer to let on hire, or (b) have in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a)...'

[189] See for example *R* v *Treacy* [1971] AC 537 where the accused sent blackmailing letters from England to German and the House of Lords held that the offence of blackmail was committed in England where the letters were posted; discussed in Goode, above n 168, 427.

Web site in the US'[190] In response to that argument it may be said, firstly, that even in *R* v *Waddon* there was evidence that W acted though agents rather than himself and secondly, that in an age of sophisticated means of communication criminal responsibility should not depend on the location of easily manipulated technical processes such as the uploading of electronic data. The court in *Perrin* acknowledged that problem when stating that it would 'lead to publishers taking their major steps in countries with the most relaxed laws.'[191]

The law should look to the location of those who are substantively behind the act giving rise to the offence, even more so in a case such as *Perrin*, where there was 'no evidence as to where the data files were created and posted, and... as to the location of the server.'[192] This substance approach was adopted in Canada, most recently by the Canadian Human Rights Tribunal in *Citron* v *Zundel (No 4)* where the Tribunal ruled that Zundel, a resident of Canada, was in control of the hate speech Zundelsite, a website located on a US server in San Diego and administered by Zundel's employee in the US, and thus a proper respondent before the Tribunal.[193] Curiously enough, although in *Perrin* the court relied on s.1(3)(b) to establish the existence of a publication within the jurisdiction, it did not at all look to Perrin's actions in terms of proving it. Instead the court viewed the downloading by the police officer rather than the uploading by Perrin as proof of publication within the jurisdiction. As was argued above, this interpretation of publication falls much more neatly within s.1(3)(a).

Regardless of this, it is clear that if the uploading by itself can make a person a publisher, one possible scenario is that a UK resident might be a publisher

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[190] Hirst, above n 158, 26 (emphasis in the original).
[191] R v *Perrin* [2002] EWCA 747, para 51.
[192] R v *Perrin* [2002] EWCA 747, para 33, but see above n 159. See also Graham J H Smith, *Internet Law and Regulation* (3rd *ed*, London: Sweet & Maxwell, 2002) 533.
[193] *Citron* v *Zundel (No 4)* (2002) 41 CHRR D/274, at http://www.chrt-tcdp.gc.ca, para 13-48, which also provides an overview of the various of the stages of the dispute which started in 1996 (Appendix "A"). Note s.13(1) of the Canadian Human Rights Act, in issue in this case, states: 'It is a discriminatory practice for a person...to communicate telephonically or to cause to be so communicated...' (emphasis added). As the discussion above show in law the term 'to publish' tends to mean 'to communicate'. Note also that this issue of jurisdiction had previously featured with more prominence *Zundel* v *Canada* 175 DLR (4th) 512, para 62-66 (1999) where the Federal Court rejected Zundel's argument that the website located outside Canada was beyond the Human Rights Commission's and Tribunal's competence and stated that a 'person in Canada causes material to be communicated for the purpose of section 13 if that person effectively controls the content of material posted on a website that is maintained from outside Canada.' (para 65).

because he or she uploads images onto a computer even though these images are not made accessible to anyone in the UK. In *R* v *Waddon* the court refused to rule upon this hypothetical scenario, ie:

> 'to rule upon what the position might be in relation to jurisdiction if a person storing material on a Web site outside England intended that no transmission of that material should take place back to this country.'[194]

It is submitted that in these circumstances, although technically there is a publication under the Act pursuant to s.1(3)(b) (provided the responsible person was at the relevant time on UK territory), this publication does not fulfil the obscenity requirement in relation to which evidence of likely downloading is always a pre-requisite, given that it depends upon the effect of the publication on those likely to be confronted with it. This was acknowledged by the court in *Perrin*, which stated that once a publication is established the court has to consider

> '(1) whether any person or persons were likely to see the article, and if so - (2) whether the effect of the article... was such as to tend to deprave the... persons who were likely... to see the matter...'[195]

So while, for the purposes of publication, the effect of the defendant's actions on persons within the territory is irrelevant, it is critical for establishing the obscenity requirement. To what extent, then, the obscenity requirement requires a more substantial connection with the State seeking to assert jurisdiction, and thus implicitly limiting the number of States which could assert jurisdiction, will be examined next.

In summary, though, it should be noted that s.1(3)(b) clearly allows for jurisdiction to be asserted by the State of the origin of the publication, or more precisely by the UK provided the person who is in substance responsible for the uploading is in the UK at the relevant time[196] - a basis which has its equivalent in private law only in respect of adjudicative jurisdiction when the court of the State in which the defendant is present, assumes jurisdiction on the basis of process being served on

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See also the US case of *People v World Interactive Gambing Corp* 714 NYS 2d 844, 858f (1999).

[194] *R v Waddon* [2000] All ER (D) 502, although it went on to say that the answer to that question would depend 'upon questions of intention and causation in relation to where publication should take place.' Note, that the location of the computer where the material is stored is never of any further relevance.

[195] *R v Perrin* [2002] EWCA 747, para 19.

[196] See above n 129-134 and accompanying text.

the defendant. So does s.1(3)(b) embrace the country of origin approach which the defendant in *Perrin*, and for that matter the defendant in *Gutnick*, envisaged? It is a far cry from it. Both defendants advocated that jurisdiction should be asserted by the country of origin *to the exclusion of* regulatory claims by any other States, and not as s.1(3)(b) does, supplying competence to the country of origin *in addition to* the countries of destination.

3.3.3. A Sufficient Publication in England? - The 'Obscenity' Requirement

The reason why the court in *Perrin* looked at the issue of whether there was a publication, was primarily to refute the defendant's argument that there was an insufficient publication of the material in the UK - insufficient in terms of satisfying the obscenity requirement under s.1(1) of the Act.[197]

As was averted to above, the obscenity requirement may be of critical jurisdictional significance in cases where the 'publication' element is established by virtue only of the local defendant being responsible for the uploading of the material, without any further need to inquire whether the material has at all been downloaded in the jurisdiction. As the obscenity element requires proof that some person in the jurisdiction was likely to access the material, it protects defendants from criminal liability in circumstances where their site was not even accessible in the UK.[198] But even if the 'publication' element is established by reference to the downloading of material within the jurisdiction, the obscenity element may add an additional jurisdictional threshold, given that to prove 'publication' through downloading you merely have to show that the material was accessible in the jurisdiction and no more. In *Perrin* the only evidence that went towards proving the publication in the jurisdiction was the police officer's one visit to the site. This, of course, is no more than a manufactured contact, discussed in the previous Chapter, which is incapable of showing that the site was anything more than merely accessible in the jurisdiction and had in fact an effect on the territory. So the question is, to what

[197] To do this the court had first to decide whether there was a publication at all which, as discussed above, it established by reference to s.1(3)(b).
[198] *R v Perrin* [2002] EWCA 747, para 19.

extent the obscenity requirement requires more than mere accessibility of the site in the jurisdiction?

As 'obscenity' is defined, as noted above, by reference to the likely effect of the publication on those who are likely to see the publication, it appears necessary to establish not only that the material was likely to be accessed, but also that access was likely by those who might be corrupted and depraved by the material in question. The question of how great that likelihood must be has been addressed in previous cases where one authority suggested that the number of person likely to be affected by the material must be a significant proportion of those persons likely to read it, or not be so small as to be negligible.[199] The court in *Perrin* stated that this was a case justifying the more restrictive reading of s.1(1) by Lord Pearson in the House of Lords case of *DPP* v *White:*

> 'there is no requirement as to the number of persons, or as to the proportion of its readers, which the article will tend to corrupt and deprave. The word 'persons' is plural, but it may include the singular.'[200]

While it seems that Lord Person was more concerned about the requirement of a 'significant proportion' while endorsing the 'more than a negligible number' requirement,[201] for the purposes of this discussion it is significant that the obscenity requirement may be satisfied in suitable cases if a single person, of all those likely to access it, is likely to be corrupted by the material. And furthermore the court in *Perrin* seems to assert that 'when what is alleged to be obscene is accessible material on a web page in relation to which a section 4 defence [publication is for the public good] could not realistically be raised...',[202] you have such a suitable case. Unfortunately the court did not expand on why the Internet should justify such a restrictive approach any more so than the printed word.[203] It is submitted that the only factor which should make a difference as to the

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[199] *R v Calder and Boyars Ltd* [1968] 52 Cr App *R* 706, 711.
[200] *DPP v Whyte* [1972] AC 849, 864.
[201] *DPP v Whyte* [1972] AC 849, 865: 'In such a case, if the comparatively small number of copies is not so small as to be negligible, the statutory definition should be applied according to its terms: the book's effect taken as a whole is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read it. 'Persons' means some persons. Cockburn CJ in *R v Hicklin* LR 23 QB 360 did not suggest any requirement as to the number of persons, or as to the proportion of its readers, which a book might tend to deprave and corrupt.' (emphasis added)
[202] *R v Perrin* [2002] EWCA 747, para 25.
[203] *R v Perrin* [2002] EWCA 747, para 25.

restrictiveness of the approach is the content of the material and whether it has any redeeming value, whether it would be regarded as for example artistic by all, but a negligible number of viewers. The nature of the medium is entirely irrelevant: whether a single person is exposed to obscene material, unredeemed by any other feature, in a book or on a web page should not make a difference. In other words, while the court in *Perrin* may have been correct in holding that even likely access by a single person likely to be depraved by the publication was sufficient to establish s.1(1) in that case,[204] it is at least questionable whether this should have based on the nature of the Internet rather than on the kind of material under consideration.

The nature of the medium of communication on other hand would appear to be relevant when it comes to evidentiary matters, that is to proving that access by a single 'corruptible' viewer or a significant proportion of viewers, as the case may be, was likely to have occurred. While it would appear that such proof is more easily obtained in relation to the Internet, the problem in the case of unrestricted sites is the anonymity of users which would make it difficult, if not impossible, both prospectively and retrospectively, to establish that there was in fact access of the material by, for example, a child (which would then easily satisfy the obscenity element). This seems to underlie the court's rejection of Perrin's argument that access only by a police officer, who was unlikely to be depraved and corrupted by it, could never be sufficient to establish the obscenity requirement:

> 'The publication relied on in this case is the making available of preview material to any viewer who may choose to access it (including of course vulnerable young people) and in such a situation the prosecution was entitled to invite the jury to look beyond PC Ysart... [S]ection 1(1)... only requires the jury to be satisfied that there is a likelihood of vulnerable persons seeing the material. The prosecution does not have to show that any such person actually saw it or would have seen it in the future.'[205]

One may speculate whether the same evidence of the one visit by the police officer could also have been sufficient evidence to establish the obscenity element

[204] Which depends on whether its interpretation of *DPP v Whyte* [1972] AC 849 was correct; see above n 201.
[205] *DPP v Whyte* [1972] AC 849, para 22

if, in the case of obscene publication with redeeming values, a 'significant proportion' of the likely viewers must be likely to be corrupted by the material.

Whatever the answer to that question, at least in respect of obscene publication with no redeeming value, it is clear that the mere accessibility of that publication within the jurisdiction is sufficient to satisfy the obscenity requirement. This means that it creates no higher jurisdictional threshold than the interpretation of publication as meaning online material which is 'downloadable' in the jurisdiction. So, in the eyes of the *Perrin* court, neither the 'publication' nor the 'obscenity' requirement, as applied to online activity, imported any need to prove that the material had an actual effect on UK territory and could thus be deemed to have been targeted at, or objectively intended for, the UK anymore than any other State - which, as argued in the previous chapter, would have meant the site was more than a 'merely accessible' site in the UK. But, of course, the court's approach is entirely consistent with the approach taken by courts around the globe in respect of online criminal jurisdiction, possibly with the exception of the US.[206]

3.4. Formative Factors

3.4.1. Incremental Legal Development

What is most striking about *Perrin*, in particular when compared with private cases such as *Gutnick* dealing with substantially similar issues, is how utterly unimpressed the court was by any argument advanced for reinventing the law in light of the online phenomenon. In *Perrin* the most adventurous argument was that in favour of a country of origin approach contrary to the express definition of publication in s.1(3) of the Act, but allegedly consistent with the ECHR. The court merely noted that accepting Perrin's argument, for which there was no support in the form of English or other European authority, would involve writing words into s.1(3).[207] It further held that, if a court in the US has come to a different substantive conclusion this is not due to the inherent nature of the Internet but rather due to

[206] See discussion in Chapter 3 and 4; cf Hirst, above 158, 27, arguing entirely unrealistically that a foreign State may not legitimately assume competence to regulate a 'site content that is lawfully published within the state where the site is hosted ..., unless perhaps it can be established that its target audience was situated in that other state.'

the fact that the US court did not have 'any power to balance the needs of vulnerable children against the constitutional requirement to safeguard freedom of speech',[208] unlike courts in Europe. Finally, even acknowledging that 'the internet is different... the problem which it presents was addressed by Parliament when in 1994 it amended the 1959 Act.'[209]

So the court not only barely acknowledged that the Internet is different, it certainly did not engage into any substantive analysis of that difference and its legal implication, but rather hid behind the statute and the role of parliament to change the law - an attitude which the judges in *Macquarie Bank* and *Gutnick* could have adopted in principle but did not. Even in *Gutnick* Justice Hedigan, despite expressing his view that traditional legal principles cannot be discarded in respect of online conduct, went to considerable lengths to refute substantively the defendant's argument and, indeed, to restricting his comment to subscription sites.

As was shown above, the court in *Perrin* was not only unreceptive to any arguments for the need for radical change, but in applying traditional legal concepts to the online scenario it opted for an extremely wide interpretation of the publication concept and an interpretation of the obscenity requirement which, bar access restrictions, it would be nearly impossible not to satisfy in the online context. So the court made not the slightest concessions (which it could easily have accommodated within the words of the statute) to the difficulty faced by providers of online content, which is not universally condemned (unlike, for example, child pornography), in trying to comply with the varying legal standards in different States.

To say this is not to say that the judgment in *Perrin* was ill-guided, but rather to stress how much powers the perceived need to uphold existing legal standards,

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[207] *R v Perrin* [2002] EWCA 747, para 33.
[208] *R v Perrin* [2002] EWCA 747, para 36
[209] *R v Perrin* [2002] EWCA 747, para 48. Section s.168(1) of *Criminal Justice* and *Public Order Act 1994* inserted the part of s.1(3) upon which the court in Perrin relied: 'or, where the matter is data stored electronically, transmits that data.'

particularly those protected by public law, exerts even in view of radically changed circumstances.

3.4.2. No Problem of Certainty or Efficiency

The 'jurisdiction everywhere' approach, of which *Perrin* is yet one more instance, may be problematic in terms of substantive notions of fairness and in terms of overregulation but, as discussed in Chapter 3, it does not suffer from the problem of efficiency of administering sophisticated legal norms or jurisdictional concepts, comparable to private law. As courts, like in *Perrin*, refuse to look beyond their parochial interest in enforcing the criminal offence in front of them, they adopt the widest definition of the relevant nexus, needing in fact very little to find in favour of jurisdiction. They do not require a 'real and substantial' link, with its related concerns of certainty and efficiency, between the offence and the territory as discussed recently by the High Court of Australia in *R v Lipohar*:

> 'The assumption [that an offence is committed in only one place] would be inconsistent with a rule, of common law or statute, to the effect that, in the case of a crime consisting of multiple elements, an offence was committed wherever one of those elements occurred, or a rule to the effect that the offence would be taken to be committed in any territorial area where there is a real and substantial link between the offence and the territory.'[210]

It can hardly be argued that the 'real and substantial link' consists of the mere accessibility of the site in the territory. Although in *Perrin* the fact that Perrin was actually operating his site from the UK clearly created a more substantial link between the crime and the territory of the UK, the reasoning of the court clearly relies on the more tenuous link in the form of the mere accessibility of the site in the UK. The virtue of this nexus is that it provides a simple test which is easily answered and creates little doubt as to potential applicability of the law in question. Not surprisingly, the courts in *Perrin* and *R* v *Waddon* established the existence of a publication within the territory within a few paragraphs, while the court in *Gutnick*, intent on making out a special case for subscription sites as opposed to

[210] *R v Lipohar* (1999) 168 ALR 8, 13 (para 19). It appears that in that case, with the exception Kirby J (who rejected the 'real and substantial' connection test at least for intra-federation crimes), the judges required at the most a 'real' connection with the jurisdiction (see Gleeson CJ para 38; Gaudran, Gummow, Hayne JJ para 123; Kirby J para 186; Callinan J para 269)

unrestricted sites, dedicated a lengthy judgment to its reasoning in favour of publication, without even touching upon the issue of unrestricted sites.

Again, asserting that courts in respect of transnational crime tend to rely on far more tenuous connections than courts are willing to rely on in private cases, is not to be understood as an objection but rather as a statement of the legal status quo, an explanation of which will be proffered shortly.

3.4.3. The Problem of Actual Notice

It was argued in Chapter 4, that the proposition of 'jurisdiction everywhere' (or in other words the assumption of jurisdiction based on the mere accessibility of the site in the territory) creates certainty as to constructive notice, but problems in respect of actual notice: while content providers can reasonably foresee exposure to the laws of all States, they are likely to encounter problems in trying to determine and comply with them.

In *Perrin* the problem of trying to comply with the laws of all States was raised as an argument in favour of the country of origin approach by Perrin. Perrin relied on the 'rule of law' notion averted to by the European Court of Human Rights in *Sunday Times v UK (No 1):*

> '[T]he following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable.'[211]

Although Perrin's argument was couched in terms of constructive notice, in jurisdictional terms it was concerned with actual notice, or, as counsel for Perrin

[211] *Sunday Times v UK (No 1)* [1979] 2 EHRR 245, para 49, discussed in the context of the rule of law in McMahon, 'Improving Access to the Law in Canada' [1999] Computerisation of Law Resources 3, at http://www.austlii.edu.au/. *Groppera Radio AG v Switzerland* [1990] 12 EHRR 321, para 68: 'the scope of the

argued, the fact that 'it is difficult for the publishers to comply with the statutory requirement of individual states, and if they are obliged to do so the most restrictive laws will prevail.'[212] As '[c]ommunity standards as to what tends to deprave and corrupt are not [even] European-wide'[213] this amounts to an undue interference with Perrin's right of freedom of speech.

The court's response to this argument appears essentially twofold. Firstly, the court notes the case of *Groppera Radio AG* v *Switzerland* where Swiss regulation of cable transmission was held not to be contrary to the applicant's freedom of speech in a case where the applicant had broadcast from an Italian territory radio programmes intended for the Swiss which were redistributed on Swiss territory by Swiss cable companies.[214] It is interesting that the court in *Perrin* does not at all distinguish that case where the applicant could clearly be expected to comply with the laws of the one territory to which he directed his activity, from the online scenario in front of it where there was no evidence at all as to whether Perrin targeted any one territory, whether the UK or any other territory, with his site. If anything, this confirms the court's implicit view that it is not unreasonable to expect Perrin to comply with all the laws in which his site is accessible, ie. the laws of all States.

This argument is indirectly supported by what appears to be the court's second response to Perrin's argument relating to overregulation:

> 'On the other side of the balance sheet, apart from the general right to freedom of expression, there is no public interest to be served by permitting a business for profit to supply material which most people would regard as pornographic... *Yet... the infringement of the appellant's freedom is limited,* as can *be* seen *by reference of the jury* on counts *2* and *3*'[215]

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concept of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.'

[212] *R* v *Perrin* [2002] EWCA 747, para 35.

[213] *R* v *Perrin* [2002] EWCA 747, para 37.

[214] *Groppera Radio AG* v *Switzerland* [1990] 12 EHRR 321, 324ff, where the defendant had argued that the relevant Swiss law was not 'sufficiently accessible or precise for a citizen to be able to adapt his behaviour to them - even after consulting a lawyer, if necessary' (para 65) which the court rejected despite the fact that 'the relevant provisions... were highly technical and complex... [and] primarily intended for specialists' (para 68).

[215] *R* v *Perrin* [2002] EWCA 747, para 49 (emphasis added).

So the court referred to the fact that Perrin was not guilty of the offence of 'publishing obscene material' in respect to his subscription websites. In other words access restrictions either to certain people, who are likely to be corrupt and depraved already, or more wisely to residents of States within which access to the site was not illegal or restricted, allow content providers to avoid having to comply with the most restrictive law. Even in the absence of the court's remark, the necessity of access restrictions for sites likely to come into conflict with the criminal law of States is the clear message sent out by *Perrin*. And, quite unlike in respect of private law, it is irrelevant whether the site was targeted or objectively intended for the State which asserts criminal jurisdiction, as every freely accessible site is presumed to be objectively intended for every territory.

3.4.4. A Public Cause of Action

The decision in *Perrin*, although concerning a very specific context, namely the *Obscene Publications Act 1959*, shows all the trademarks which may be expected from a national court decision concerning criminal jurisdiction, not least in that it barely acknowledges the fact that the appeal was concerned almost entirely with the issue of jurisdiction[216] and treats the case as if involving largely only parochial questions.

So to what extent can the decision be attributed to the public or criminal nature of the cause of action? The first feature of the case, in stark contrast to the above defamation cases, was that the court had enforcement power over the defendant. As noted above, Perrin had already been sentenced to two and a half years' imprisonment. The reason why enforcement power tends to be a prerequisite before the assertion of adjudicative/legislative criminal jurisdiction is considered, is that the court cannot rely on voluntary obedience with the court orders nor, as was discussed in the previous chapter, on the co-operation by other States in the enforcement of its orders. This last problem, though, is subject to one indirect exception. In respect of activity which is universally condemned, such as child

[216] On the face of it the judgment seems to address the issue of jurisdiction only in one paragraph: *R v Perrin* [2002] EWCA 747, para 51.

pornography, that is consensus crimes,[217] States can rely upon other States prosecuting behaviour originating from their territory, which may also have an effect on the territories of the former States. Yet, this only applies to a very limited number of activities, best reflected in the *Cybercrime Convention*,[218] of which the *Perrin*'s 'obscene publications' offence is not one. This state of affairs no doubt provided the background for the rejection by the court in *Perrin* that a prosecution should only be brought in the State in which the major steps leading to the publication were taken.[219]

But to say that courts will not even consider the issue of adjudicative/legislative criminal jurisdiction in the absence of enforcement jurisdiction, does not necessarily entail that this has an impact upon the substance of the nexus required for adjudicative jurisdiction. Yet, as discussed in the previous chapter, this is the case. In contrast to private law, in practical terms it is irrelevant whether the nexus justifying jurisdiction is a real and substantial one, given that there is not even the possibility in criminal law that a foreign court may scrutinise that decision and make its determination whether that decision is enforceable or not, dependant upon the fairness of that nexus. So the absence of a possible external check (possibly apart from State protest against a breach of public international law) in conjunction with the inability to rely on other States (which may be more closely connected to the activity in question) to prosecute the offender (with the possibility of underregulation), cannot but at least partly explain that when States have enforcement power, even the most tenuous connection with the territory will be

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[217] For a discussion of the varying types of crimes and the crimes with regard to which there is exists a consensus see Marc D Goodman, Susan Brenner, 'The Emerging Consensus on Criminal Conduct in Cyberspace' (2002) 10 *International Journal of Law and Information Technology* 139. Note also the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (adopted by the UN General Assembly resolution A/Res/54/263 of 25 May 2000; entered into force on 18 January 2002) which in its preamble refers to the 'growing availability of child pornography on the Internet... and [the need for] the worldwide criminalization of the production, distribution, transmission... of child pornography...', at http://www.unhchr.ch/html/menu2/dopchild.htm.

[218] *Convention on Cybercrime* (Council of Europe), at http://conventions.coe.int . The Convention seeks to accommodate differences of national standards on certain issues by providing for them in Additional Optional Protocols. The *Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems* (which was adopted by the Committee of Ministers on 7 November 2002) covers, as the name suggests, online hate speech which is criminalised in many European State but tolerated in the US: at http://www.coe.int . The Second Additional Protocol is intended to cover 'terrorist activities', at http://www.heise.de/English .

[219] *R* v *Perrin* [2002] EWCA 747, para 51: 'Not only would that lead to publishers taking their major steps in countries with the most relaxed laws, but such countries might also have little interest in prosecuting, especially if the offensive material was targeted elsewhere.'

used to justify adjudicative/legislative jurisdiction. Furthermore, as *Perrin* illustrates, the fact that 'publication' in the criminal context is taken to include mere uploading (which is a highly strained meaning of publication) means that at least one basis for adjudicative/legislative jurisdiction exists when either the responsible defendant is, or the originating act occurs, within the jurisdiction; in other words, adjudicative/legislative and enforcement jurisdiction are made to coincide.[220]

This latter reading of 'publication' may also be explained by reference to the criminal nature of the activity. Criminal liability, as was discussed in the previous chapter. is frequently attached to activity not just because of its effect on others but because it is per se perceived as reprehensible. So not dissimilar to the criminal offence of defamation where no communication of the disparaging comments to a third party is required,[221] and the place of posting is also considered as a place of publication,[222] the *Obscene Publications Act 1959* makes the mere act of uploading without any evidence of further communication to third parties prima facie illegal. Last but not least and as discussed in the previous Chapter, relying upon the mere accessibility of the site in the UK to find in favour of a publication within territory (and ultimately also to prove that it was obscene) also flows from the criminal nature of the action, where even the possibility of harm is perceived as sufficient harm and where, in the specific context of the Internet, the concern has not been overregulation but underregulation.

4. Conclusion

One criticism of the above comparison between the different interpretations of the legal concept of publication within the online context may be that the cases were drawn from two entirely disparate legal contexts which could not possibly fairly be compared. In reply to that criticism it may be argued that the disparity is useful in highlighting the distinctive characteristics of the approaches to one and the same

[220] In private law, this occurs when adjudicative jurisdiction is based upon service within the territory. See discussion in Chapter 3 (Pre-Internet Refinements in Private Cases).
[221] Fleming, above 49, 593: 'For unlike the criminal law, the civil law was concerned not so much with insult as with injury to reputation, the esteem in which one is held by others.' *R* v *Burdett* (1820) 4 *B* & Aid 95, 111f, 126
[222] In *R* v *Burdett* (1820) 4 *B* & Aid 95, it was held that where a defendant writes and composes a libel in one jurisdiction with the intent to publish, and afterwards publishes it, in another jurisdiction he may be indicted for

issue, while at the same time illustrating that neither approach is the natural or only approach to the issue.

In each case, one of the questions which was considered was whether the publication in the form of a website had occurred in the territory, so much so as to supply the relevant jurisdictional nexus; the only essential difference being that in the first case the site was allegedly defamatory and in the latter case it was obscene - a difference an outsider may regard as no more than one of degree.[223] Yet, its implications, whether in terms of strict legal consequences or in terms of the underlying approach, are certainly impressive. While 'something more', ie a clear effect of the site on the territory, is required in private law, mere accessibility is sufficient in criminal law to assert jurisdiction - this difference clearly illustrates the disparate opinions as to which State of destination is, and should be, entitled to regulate online content, whether targeting is necessary and what amounts to targeting. Yet, however at odds the answer given to that question in defamation is with the answers in respect of obscene publication, there is equally one powerful denominator common to all the above decisions. This denominator lies in the unequivocal rejection of an exclusive country of origin approach, that is allowing the State from which the online conduct originated, to exercise jurisdiction to the exclusion of all others. This, it is submitted, amounts to an unacceptable surrender of domestic policies (whether in terms of private rights or public regulation) by the States of destination to the interests and polices of foreign States.[224]

Finally, the discussion sought to refute Johnson and Post's argument that web activity is felt to the same degree everywhere and thus gives no State a stronger claim to regulate the activity than any other State. The above discussion provides two answers to that argument. Firstly, in the private context, even a concept as

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a misdemeanour in either jurisdiction. In other words both the country of origin and the country of destination can assume jurisdiction in respect of the crime.

[223] Interestingly, in *DPP* v *Whyte* [1972] AC 849, which as discussed above concerned an obscene publication under the *Obscene Publications Act 1959*, the keywords categorising the case refer to it as 'obscene libel'.

[224] In *Dow Jones & Company* v *Gutnick* M3/2002 (28 May 2002) High Court of Australia Transcripts at http://www.austlii.edu.au, 15, this sentiment is expressed on a number of occasions, but possibly most emphatically by Kirby *J*: 'That is a very American viewpoint which is not shared by the rest of the world. The whole rest of the world does not share [it]. It has to be very clear. The international covenant on civil and political rights does not share the American, as others see it, obsession with free speech. There are countervailing human rights, including reputation and privacy.'

unlikely as 'publication' can accommodate grades of effects of sites on different territory which allows States to differentiate between different sites. Secondly, in the criminal context, the fact that the effects of publishing, for example, an obscene site is held to be felt everywhere to the same degree, has not proved as problematic as Johnson and Post envisage given, firstly, that concurrent jurisdiction has long been tolerated and indeed is even desirable when it comes to socially very undesirable activities, and, secondly, that legal accountability can be avoided by content providers through the adoption of access restrictions and is in practical terms dependant upon the enforcement jurisdiction of the State.

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Chapter 7: Conclusion

1. The Egg Mystery Unravelled?

So what *did* happen to the egg industry? Has this thesis solved the mystery and, by implication, our own jurisdictional dilemma induced by the Internet? Well, no. There are many possible ways in which the egg story could have unfolded. Due to all the haggling the egg prices might have gone up drastically, putting people off their eggs and throwing the whole egg industry into a deep depression from which it never recovered and which certainly made the issue of which egg belongs to whom far less interesting. Chicken farmers might have abandoned chickens in favour of cows or pigs. On the other hand, the chickens might have suffered from a debilitating virus, possibly even purposefully introduced, which robbed them of their colour, turning all eggs white or brown. Or possibly the blue industry, due to its superior weapons, came to dominate all other industries and decided once and for all to end the issue of colour through genetic engineering. Or maybe, just maybe, all the different egg industries entered into an international egg-convention abolishing the right to eggs on the basis of colour, and instead introduced a new principle that made title to eggs dependant upon possession only, and lived happily ever after.

The essential point is that there is no single inevitable destiny that is predetermined, no blueprint that may be discovered after thorough analysis, after 'discovering the 'rhythms' or the 'patterns', the 'laws' or the 'trends' that underlie the evolution of history'[1] and the evolution of law. Even if we knew what happened to the egg industry, we could not be sure that history would repeat itself. This also means that what will and will not happen in the future, how regulation and State law will change in response to the Internet, is to a large extent in our hands; it is not a prophecy beyond our control.

[1] Karl R Popper, *The Poverty of Historicism* (London: Routledge & Kegan Paul, 1961) 3.

2. Piecemeal Tinkering

Yet, while it is impossible to say how the Internet *will* change law and society in the long term, it is within our means to argue how the law *should* change in response to the Internet. This thesis attempted to do just that with particular focus on the transnational nature of the Internet. It sought to establish the outer parameters within which the rules allocating regulatory competence should evolve or in other words, how they should *not* evolve.

The first and overarching argument of this thesis was that when we look for realistic answers to the question as to how law *should* evolve in response to the Internet, we cannot do so in disregard of legal tradition. Thus we cannot simply look for the most efficient legal system, no matter how this system fits within existing laws. The past restricts our freedom to construct our legal future; tomorrow's rules are embedded in yesterday's and today's legal framework, its underlying legal assumptions and policies. It was argued that existing legal doctrines, including jurisdictional concepts, will not suddenly be abandoned in favour of a start from scratch, even if such a fresh start could promise a far more efficient and rational regulatory framework. That is not how law works. Evolution, or what Karl Popper calls 'piecemeal tinkering', rather than revolution, reflects the law's inherent resistance to drastic change, which in turn allows a legal system to fulfil its main functions, namely to maintain legal, and thus, social stability, certainty and order. If these needs are to be fulfilled, the legal engineer should always be (and invariably, in the form of the judiciary or legislature, is) the piecemeal engineer rather than the utopian engineer:

> 'The characteristic approach of the piecemeal engineer is this. Even though he may perhaps cherish some ideals which concern society 'as a whole' - its general welfare, perhaps - he does not believe in the method of re-designing it as a whole. Whatever his ends, he tries to achieve them by small adjustments and re-adjustments which can be continually improved upon... The piecemeal engineer knows, like Socrates, how little he knows. He knows that we can learn from our mistakes. Accordingly, he will make his way, step by step, carefully comparing the results expected with the results achieved, and always on the look-out for the unavoidable unwanted consequences of any reform.'[2]

[2] Ibid 66.

While such piecemeal tinkering may be frustrating, particularly given the clear view of the promised land, it certainly avoids the pitfalls of utopian or holistic reformers, who may find that due to the uncertainty of the 'human factor':

> 'the holistic method turns out to be impossible; the greater the holistic changes attempted, the greater are their unintended and largely unexpected repercussions, forcing upon the holistic engineer, the expedient of piecemeal *improvization*.'[3]

The only viable method for redesigning legal rules, institutions and frameworks is legal piecemeal tinkering with the status quo. Yet, how do you start? What do you preserve and what do you discard? What can you not discard, if challenged, without at the same time making the legal system infinitely poorer, more unfair and less efficient? And what are those fundamental rules and institutions which, although possibly not intrinsically valuable, are simply so deeply entrenched within the legal system that no piecemeal tinkering with them would be acceptable, at least in the foreseeable future? This thesis attempted to answer these questions by reference to the Internet-induced jurisdictional problems and thus to provide some guidance as to how jurisdictional rules should evolve in response to the Internet.

3. The Outer Parameters of the Jurisdictional Debate

The central argument made in this thesis is that an appreciation of the existing division of jurisdictional problems into private and public ones and its underlying rationale is essential for assessing the severity of the jurisdictional problems caused by the Internet and the acceptability of regulatory responses to them. The discussion in Chapters 3, 4 and 6 illustrated that, although the online phenomenon presents both sets of rules with exactly the same types of problems, the responses to them invariably and consistently vary between the sets of rules. Chapter 5 sought to explain these different legal treatments by exploring the underlying rationale of the public-private dichotomy and its jurisdictional ramifications, concluding that the dichotomy embodies the paradox that in respect of the high-priority laws States have to be entirely self-sufficient and cannot hope for

[3] Ibid 68 (emphasis in the original).

cooperation by other States, beyond a small core of universally condemned activities. This explains why the Internet, which has inherited a plethora of regulatory objectives from existing media across an unprecedentedly wide regulatory range, including many of the 'public' type, presents such a threat to State regulation: the increase of transnational activity regulated traditionally through public law entails a decrease in the possibility of self-sufficiency and thus a loss of regulatory control in respect of those very activities the regulation of which is made a priority by the State.

Yet, possibly the most important point made in Chapter 5, and corroborated by the discussions in the other chapters, is that the public-private dichotomy and its jurisdictional ramifications are deeply entrenched within national laws as well as international law and here to stay for the foreseeable future and thus not likely to be amenable to piecemeal legal tinkering. So regulatory solutions to Internet-induced jurisdictional problems must be found within the confines of the dichotomy, which may leave States with no choice but to shift away from public law regulation to private law regulation and even self-regulatory mechanisms, that is the type of regulation in respect of which State self-sufficiency is not a precondition for its effectiveness. While the regulatory approach to obscene online content in Australia provides an example of such a regulatory shift, the discussions in Chapters 3, 4 and 6 show that there are innumerable instances when States are not prepared to surrender public law regulation in favour of self-regulation. Given the type of activity in question this is hardly surprising.

While the desirability of preserving the public-private law dichotomy in view of the online phenomenon is at least questionable, Chapters 3 and 4 discussed fundamental legal concepts and policies which, although challenged by the Internet, cannot be surrendered without depriving our legal systems of fundamental and treasured legal values as well as undermining their efficacy.

More specifically, the discussion in Chapter 3 showed that the jurisdictional doctrines challenged by the Internet have not only been challenged before by other transnational developments, but also tinkered with. Although the nexuses required

have remained essentially territorial, in response to greater globalisation and sophisticated means of communication, there has been a move away from physical connections to more intangible territorial ones. This broadening of the jurisdictional bases has, in the private law context, been accompanied by limiting factors, and generally given rise to highly sophisticated refined jurisdictional doctrines. The online phenomenon challenges this status quo, not because online activities cannot be accommodated within the doctrinal evolution, but rather because the refinement process which it further encourages threatens the demands of *formal justice* and thus certainty and predictability, particularly given the increased number of transnational low-value disputes. Alternatively, in respect of public or criminal law, the lack of refinement in jurisdictional doctrines combined with the limits of the State's enforcement power means that the Internet challenges the status quo by exacerbating the m*ight-is-right* approach to criminal jurisdiction. Striving for substantive justice at the expense of formal justice, on the one hand, and reducing the claims of substantive justice to power, on the other hand, are two alternative routes taken to accommodating increasing transnationality within national law - both ultimately threaten overall substantive justice.

Chapter 4 examined the concept of notice in the jurisdictional context, arguing that the *foreseeability of legal rules* is an essential requirement for upholding the rule of law as well as a pre-condition for ensuring widespread actual *notice of legal rules*, without which compliance with them, and thus their efficacy, cannot be ensured. While traditionally both kinds of notices could be taken for granted, in the online context this is not the case. Although the Internet appears to challenge particularly the concept of constructive notice, upon closer analysis the real problem lies not in the foreseeability of legal exposure (addressed through the 'objective intention' test) but in the fact that the burden of determining, and complying with, the laws of multiple jurisdictions is too high for most online actors. This is quite apart from the fact that they can frequently flaunt the law with impunity. This affects particularly regulation through public law, in respect of which States are very quick to find a basis for regulatory competence. Making the regulatory burden on online actors both foreseeable as well as manageable must inform the search for improved

jurisdictional rules as they are essential preconditions for ensuring not only substantial justice but also the effectiveness of legal norms.

4. Piecemeal Tinkering with a Vision

While this thesis has not found (nor attempted to find) solutions to specific jurisdictional problems, the clear overall message which emerges from the discussion, is that the allocation of regulatory competence on the basis of location or territory is at worst anachronistic and at best sits decidedly uneasy with the transnational Internet. Ultimately, the solutions to this problem lie in either making the Internet less transnational or making law more transnational. In other words, the regulatory problems caused by the Internet can only be solved efficiently either through the harmonisation of substantive legal rules,[4] which allows the Internet to be retained as an open medium but occurs at the expense of national values, or through the territorial zoning of the Internet (with the help of Code), which allows national policies reflecting peculiar cultural, social and political values to be preserved but occurs at the expense of the uninhibited freedom of transnational online communications. Clearly, neither of these alternatives is without drawbacks and the future of online regulation is likely to be a mixture of both. What is critical at this stage, is that the piecemeal engineers across the globe are aware of the inevitable drawbacks of the alternatives; in short that they are tinkering with a vision and are conscious of the bigger picture.

Although personally, I find it almost impossible to make a choice between these two alternatives, given that the preservation of different legally protected cultural, political and social values seems as desirable as the preservation of an open Internet allowing for uninhibited transnational communications, I cannot, but once again, agree with Neil MacCormick who stated:

> 'A community of mutually respectful and self-respecting citizens would be one within which freedom of communication between and among persons would be both maximized and most of all at a premium... Freedom of communication is the antithesis of manipulation - so here again, the case for the Rule of Law comes down to and rests upon the value of respect for

[4] This may take various forms, including abandoning existing regulatory approaches entirely in favour of self-regulation.

> persons and its particular corollary of the desirability of maximal unimpeded intercommunication among persons.'[5]

Yet ultimately, a preference for either of these alternatives is a value or personal judgment in respect of which the most sophisticated legal arguments cannot be helpful.

[5] Neil MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999) 46f.

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