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# Deciphering Cyberspace Jurisdiction: Evaluating Legal Jurisdictional Tests

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## ABSTRACT

*“If you don’t know history, then you don’t know anything. You are a leaf that doesn’t know it is part of a tree”- Michael Crichton.*

*Cyberspace makes possible cross border transactions giving rise to a number of problems between parties miles apart. The national laws only sometimes have extra-territorial operation which expands its jurisdiction beyond territorial and sovereign boundaries of the nation which becomes a problem in the case of the Internet which does not recognize territorial or sovereign limitations. There is an absence of any universally applicable uniform international law on jurisdiction and the courts to solve this problem have devised a number of tests. Though the previous research papers on the subject have highlighted the tests formulated by the courts in various commonwealth countries, they have been unable to highlight the underlying significance and rationale for the shifts in the approach, primarily driven by the evolution of the internet and the advancement of the technology. The courts in India have largely traced the outlines left by the US courts. The courts have time and again struggled to balance the rights of the plaintiff and defendant in terms of prescribing a suitable forum. This paper attempts to make an analysis of the approach taken by the courts worldwide. This paper at last suggests some pragmatic methods with a new test or approach in line with the latest technological methods to solve the dilemma of the courts worldwide.*

**Keywords:** *jurisdiction, cyber law, internet, jurisdictional tests, precedents, cyberspace, cybercrime.*

## I. INTRODUCTION

As the digital world stretches its hands, you may at any moment find yourself caught in a web spun by individual miles away, a man has published an article tarnishing your hard earned repute and you stand helpless against the tide of malicious intent as you struggle to determine the place of jurisdiction<sup>2</sup>. The main trait associated with the internet is its borderless nature, where the territorial boundaries dividing the nations lose their meaning. The internet

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<sup>2</sup> Justice S. Muralidhar, *Jurisdictional Issues in Cyberspace*, 6 IJLT 1,1-42 (2010).

jurisdiction is rooted in this borderless nature of the internet that comes straight against the national laws of different nations<sup>3</sup>. Legal scholars get troubled by the problem of internet jurisdiction in a fashion similar to what mathematicians face in deciphering the notes left by renowned Indian mathematician Ramanujan. In a general sense, jurisdiction refers to the power of a court to hear and decide a case, which may be related to legislative, administrative and judicial competence, a part of state sovereignty. Due to the absence of any universally applicable international law on internet jurisdiction, the disputes that arise in this regard are treated under private international law.

The paper has been written with the objective of tracing the evolution of the tests on the subject of cyberspace jurisdiction and providing solutions based on the analysis that are amicable to most nations and the subjects thereof. The first part of the paper deals with the journey of the internet jurisdiction tests and the rationale. The second part deals with the approach of the courts in India and Canada. Lastly, it provides some pragmatic solutions along with the conclusion as an effort to provide a road for the development of jurisdictional laws.

## II. EVOLUTION OF TESTS WITH THEIR CRITICAL ANALYSIS

The main motive here is to encompass the journey of the different tests evolved by the courts to deal with the issue of internet jurisdiction. The history of internet jurisdiction is such that USA has emerged as the main generator of these tests.<sup>4</sup> The tests have already been discussed ad nauseam in other sources but here we will discuss the tests with the reason for their abandonment and what made them evolve. The analysis of the tests is presented with the point of view taken by the courts. Thus, the job here is to not outline the tests but rather to mark their significance, where at last some pragmatic suggestions are listed.

### (A) Problems with minimum contacts test

In *International Shoe Co. v. state of Washington*<sup>5</sup>, a two part test for determining jurisdiction of the forum court for a defendant, he should not be a resident of the place or conduct business within its jurisdiction. The court held that in such circumstances the plaintiff must show to the court that defendant has sufficient ‘minimum contacts’ in the forum state. The court here emphasized on the need for traditional notions of fair play and justice. Here the reasoning was that the defendant when availing the services of the forum state for the purpose of economic

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<sup>3</sup>BERTRAND DE LA CHAPELLE AND PAUL FEHLINGER, THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 727-748 (Oxford University Press 2020).

<sup>4</sup> Julia Hörnle, *The Conundrum of Internet Jurisdiction and How US Law has Influences the Jurisdiction Analysis in India*, 14 IJLT 180, 183 (2018).

<sup>5</sup> *International Shoe Co. v. State of Washington*, (1945) 326 U.S. 310.

benefits must bear the consequences when there is a defect in the services or harm of similar nature. The other party that is the defendant must be protected from the burden of litigating in a distant or inconvenient forum. Moreover, the states must not go beyond the limits imposed on them in terms of exercising their jurisdiction. The main defect in this test is that it fails to look into the issue whether the contacts were sufficient or insufficient to establish “purposeful availment” which led to the next test in the series that is purposeful availment test. This test tends to become irrelevant in situations involving distant wrongdoings or goods that were relocated subsequent to purchase, as well as cases concerning internet defamation and other non-commercial transactions.

### III. RECOGNISING THE DEFECTS IN PURPOSEFUL AVAILMENT TEST

The concept of the defendant's purposeful conduct gained prominence in the case of *Hanson v. Denckla*<sup>6</sup>, as observed by the US Supreme Court. In this case, a Florida court claimed jurisdiction over a Delaware trust company in a dispute involving property appointed by a Florida resident, of which the Delaware company served as trustee. The settlor had relocated from Pennsylvania to Florida after establishing the trust. However, the trust company had not actively sought business or engaged in transactions in Florida, except for routine correspondence with the settlor. The Supreme Court concluded that the Florida court lacked jurisdiction, ruling that the trust company had not consciously chosen to conduct business in Florida. Its connection with the state was solely due to the settlor's independent decision to move there after the contractual relationship had been established.<sup>7</sup>

The next case law on similar lines is *Ballard v. Savage*, this case clarified the meaning of "purposefully availed" as the deliberate actions taken by the defendant within the jurisdiction or the establishment of ongoing obligations to residents of the forum state. The court explained that physical presence or direct physical contacts with the forum were not necessary requirements as long as the defendant's efforts were intentionally directed towards the residents of the forum state. As evident by the discussion of the two tests, the tests are not separate and the scholars repeatedly make the mistake, thinking them as two separate tests.<sup>8</sup> The minimum contacts is a rule where purposeful availment is a branch or a subset of that rule. When the court makes an analysis for the application of minimum contacts principle to see if the minimum contacts are sufficient for the purpose of forum state to assert personal jurisdiction,

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<sup>6</sup>Hanson v. Denckla, (1958) 357 U.S. 235.

<sup>7</sup> World-Wide Volkswagen v. Woodson, (1980) 444 U.S. 286.

<sup>8</sup> R.M. Pollack, *Not of Any Particular State': J. McIntyre Machinery Ltd. v. Nicastro and Non-specific Purposeful Availment*, 89 NYULR 1115, 1088-1116 (2014).

it makes a scrutiny whether the contact was purposeful. Thus, purposeful availment means that the defendant made the contact on purpose, this makes it likely that the requirement of purposeful availment is satisfied. In the present scenario, only satisfying the purposeful availment is not enough and the state on this basis cannot assume jurisdiction over the defendant. Thus, the minimum contacts test is continuously evolving to deal with the changing nature of internet.

#### **IV. THE RISE AND FALL OF ZIPPO TEST**

The need for Zippo test almost completely arose as a result of the rising activity on internet particularly related to the commerce being conducted on websites. In the *Zippo Mfg. Co. v. Zippo Dot Com*<sup>9</sup>, Inc. case, the plaintiff, Zippo Manufacturing, was a Pennsylvania-based company that manufactured cigarette lighters. The defendant, Zippo Dot Com, Inc., was a California corporation operating an internet website and news service. The defendant's offices were located solely in California. To subscribe to the defendant's news service, residents from different states had to visit the website and complete an online application. The plaintiff filed a lawsuit in a Pennsylvania court, alleging trademark dilution, infringement, and false designation.

After reviewing the legal development leading up to the case, the District Court in Zippo established a three-part test for determining the appropriateness of exercising specific personal jurisdiction over a non-resident defendant:

1. The defendant or the wrongdoer must have a "minimum contacts" with the forum state.
2. The claim against the defendant must arise from those contacts.
3. The jurisdiction must be exercised in a reasonable manner.

The court in Zippo categorized websites into three types: passive, interactive, and integral to the defendant's business. Based on the facts presented, the court determined that the defendant's website was interactive. As a result, the court concluded that it had jurisdiction to proceed with the lawsuit.

The court to assert jurisdiction classified the type of websites on the basis of their activity. The test was named 'sliding scale' because personal jurisdiction exercised in this case is directly proportionate to the nature and quality of commercial activity that any business entity conducts over the internet. The court held that the mere posting of any information on the website which may become accessible to users in foreign jurisdictions cannot become a ground for the

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<sup>9</sup> *Zippo Manufacturing Co. v. Zippo Dot Com. Inc.*, (1997) 952 F. Supp. 1119.

exercising of personal jurisdiction. The zippo test has been widely followed in Canada as well. But the zippo test is highly uncertain especially given the nature of internet which is ever changing.

## V. IS THE EFFECTS TEST SUFFICIENT IN TODAY'S SCENARIO?

The difficulty that was faced with the application of the sliding scale test made the way for the application of the 'effects test'. The courts moved from the application of 'subjective territoriality' test to an 'objective territoriality' or 'effects test' in which the forum will forum court will exercise jurisdiction but it must be shown that effects of the defendant's website are felt in the forum state. Thus, it is mandatory in this test to show that the defendant's activities must have resulted in some harm or injury to the plaintiff with the territory of the forum state. Given the effect of a website is felt in several jurisdictions taking into account the nature of the internet, courts have adopted a tighter version of the same test which is 'intentional targeting'. The 'effects' test was first evolved in *Calder v. Jones*<sup>10</sup>. The facts are not stated for the sake of brevity. The Supreme Court upheld the California court's decision to exercise personal jurisdiction over the defendants, stating that based on the facts, it was established that the author and editor intentionally directed their wrongful actions towards California. They were aware that the article would have a severe impact on the respondent, and it could be reasonably anticipated that the majority of the harm would be experienced by the defendant in the state where she resided and worked. This test thus must be seen as an extension of the same type of test. The "effect test" is an extension of the 'forum state targeting' because it takes into consideration the effect of the "out-of-state" conduct in the forum state.

## VI. JUDICIAL APPROACH IN CANADA

The Canadian courts have largely traced the outlines of the courts in USA but tried to differ in one case. The Canadian Supreme Court to solve the dilemma of internet related jurisdictional issues yielded "real and substantial connection" test in the case of *Morguard Investments Ltd. v. De Savoye*<sup>11</sup>. According to this test, the jurisdiction can be exercised when there exists a connection real and substantial in nature, between the forum State, plaintiff, and the defendant, in a manner that the rights of the parties involved in the dispute are balanced appropriately.<sup>12</sup> While in other cases several factors like the connection between defendant and forum, the connection between plaintiff's claim and the forum and interests of other parties involved in

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<sup>10</sup> *Calder v. Jones*, (1984) 465 U.S. 783.

<sup>11</sup> *Morguard Investments Ltd. v. De Savoye*, (1990) 3SCR 1077.

<sup>12</sup> *Muscutt v. Courcelles*, (2002) 213 DLR 577.

the suit were taken into account. The courts in Canada have largely applied the tests evolved in United States only as described above.

## VII. JUDICIAL APPROACH IN INDIA

*“The lack of territorial precision in an online environment necessarily leads to geographically complex facts. Accordingly, domestic courts addressing these disputes will first have to localize the transaction prior to assuming jurisdiction.”* These lines show the need for the courts to first localize the transaction prior to assuming jurisdiction.<sup>13</sup>

The first case in which the issue of internet related jurisdiction arose in India was *Casio India Co. v. Ashita Tele Systems Pvt. Ltd*<sup>14</sup>. The court prohibited the Defendant from accessing the website as the court assumed the jurisdiction over the matter on the ground that the website of the Defendant is accessible in Delhi, which was identified as a sufficient condition for the court to assert jurisdiction over the matter. It is enough for the court that the website could be accessed and thus gave the court territorial jurisdiction to try the suit brought before it.<sup>15</sup> However, following opposite approach in another case, the mere accessibility of a website from one jurisdiction is not enough for a court to show that it can reasonably exercise its jurisdiction. The courts in the matters following this, made judicial pronouncements on the lines of decisions by US courts. The Indian judiciary made its position clear in the case *Banyan Tree Holding Pvt. Limited v. A. Murali Krishan Reddy*<sup>16</sup>. The litigating parties did not reside in Delhi, however, websites belonging to both the parties was accessible there. The court held that mere accessibility of a website there could not confer jurisdiction on the court. The court similar to the approach of US courts rationalized that the plaintiff must be able to establish the defendant’s ‘purposeful ailment directed towards the forum state, implying that the website was used for entering into a commercial transaction with the site user which led to an injury or damage to the plaintiff. The Indian court therefore applied the effects test and sliding scale test. The test established in Banyan Tree is quite detailed but still cannot be regarded as a one size fit all approach although applicable in the domain of commercial transaction and intellectual property but cannot be fairly applied to the commission of torts such as defamation. The cross-border defamation in India is adjudged as per Section 19<sup>17</sup> of CPC where considerations, defendant’s location and place of commission of wrong are made. India has constructed its own

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<sup>13</sup> Wendy A. Adams, *Intellectual Property Infringement in Global Networks : The Implications of Protection Ahead of the Curve*, 10 IJLT 68, 71 (2002).

<sup>14</sup> Morguard Investments Ltd. v. De Savoye, (1990) 3 SCR 1077.

<sup>15</sup> Independent News Service Pvt. Limited v. India Broadcast Live Llc, (2007) 35 PTC 177.

<sup>16</sup> Banyan Tree Holdings v. A. Murali Krishna Reddy, (2010) 42 PTC 361.

<sup>17</sup> The Code of Civil Procedure, 1908, § 19, No. 5, Acts of Parliament, 1908 (India).

rule in this regard, the double actionability rule, the mere fact that the website can be accessed from one jurisdiction is not enough for the court to show that it can reasonably exercise its jurisdiction. Although, if the tort is committed outside the territory of India then Section 20<sup>18</sup> of CPC is applicable.

Further, in the case of *World Wrestling Entertainment, Inc. v. M/s. Reshma Collection*<sup>19</sup>, the court made an observation that given the spontaneous nature of transactions over the internet, the cause of action is taken to have occurred at the place where the customer carried out his part of transaction. Thus, the courts by and large have followed the development of common law in the USA, the UK and other countries which follow Common law system specially in property rights infringement cases.<sup>20</sup> Therefore, indigenous law has not been developed by or for India. The courts in India have always observed a minimum standard even when a quite broad or narrow approach was taken. The balance has to be observed and has been observed to a large extent that is, between the defendant's right to not get dragged before a foreign court where foreseeability is not possible to be seen and the plaintiff right to not get their rights breached from a foreign land.

## VIII. CONCLUSION AND SUGGESTIONS

The clear disparity in the laws regarding the internet jurisdiction has been traced. This section attempts to summarize the paper and provide feasible legal solutions. The United Nations should frame a model law on cyberspace jurisdiction and persuade members to formulate national laws in line with the model law. This solution would help to bring uniformity in national laws. The solution proposed has already proved its efficacy since United Nations has adopted laws of similar nature that is UNCITRAL for the international commerce. Further, an international body to resolve disputes arising on the subject of internet jurisdiction is important to resolve dispute between people from different countries with an obvious need for minimum pecuniary value for the purpose of exercising jurisdiction over the dispute. The body would be able to curb cases of unwanted behavior online and commercial disputes. The success of the model law would depend on the consensus among the stakeholders.

Thus, the innovative tests and approaches of the major courts worldwide have been traced. The internet jurisdiction is still in its earlier stages. The ideal framework is still missing to settle the

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<sup>18</sup> The Code of Civil Procedure, 1908, § 20, No. 5, Acts of Parliament, 1908 (India).

<sup>19</sup> *World Wrestling Entertainment, Inc. v. M/s. Reshma Collection*, (2017) 237 DLT 197.

<sup>20</sup> Wendy A. Adams, *Intellectual Property Infringement in Global Networks : The Implications of Protection Ahead of the Curve* 10 IJLT 68,71 (2002).



complexities on the subject.<sup>21</sup> The courts must keep in mind that both the exercise of jurisdiction and enforcement are essential where the enforcement aspect is often overlooked. To address internet related governance successfully, international cooperation is essential from inter-governmental treaties to inter-governmental institutions to issue-based governance networks.

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<sup>21</sup> Jonathan Spencer Barnard, *A Brave New Borderless World : Standardization Would End Decades of Inconsistency in Determining Proper Personal Jurisdiction in Cyberspace Cases*, 40 *SULR* 245, 249 (2016).

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