

The access-based jurisdictional principle in Internet-related cases

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*This study focuses on the access-based jurisdictional approach and on the effect that this approach can have on the fulfilment of freedom of expression online. The term access-based jurisdictional approach describes the criterion used by some national courts to establish jurisdiction in Internet-related cases. There are two distinctive elements that define the access-based jurisdictional approach. First, this approach is used by national courts to establish jurisdiction over content published online but uploaded and hosted outside the domestic forum. Second, the basis upon which jurisdiction is exercised is that the content published online from within the territory of a foreign State can be accessed within the territory of the country exercising jurisdiction. This study aims to answer the following research questions: how has the access-based jurisdictional approach so far been applied by national courts dealing with Internet-related cases? What are the main characteristics of this approach? Can establishing jurisdiction based on access affect the fulfilment of freedom of expression online? This study argues that the access-based jurisdictional approach allows countries to apply their laws extraterritorially to regulate virtually any content published online. This fact limits the freedom of expression of Internet users located in foreign States and subjected to foreign jurisdictions. In theory, these parties should only comply with the laws of their countries when uploading content on the Internet, rather than being expected to abide by the laws of every country where that content is accessible. This thesis is developed through the analysis of seven leading Internet jurisdiction cases discussed before national courts in Europe, North America and East Asia where the access-based jurisdictional approach was adopted: *Dow Jones v Gutnick*, *Young v New Haven Advocate*, *Coleman v MGN Limited*, *Breeden v Black*, *Yeung v Google Inc.*, *R v Perrin*, *LICRA and UEJF v Yahoo! Inc.* and *Yahoo France* and *eDate Advertising GmbH v X* and *Olivier Martinez Robert Martinez v MGN Limited*. Overall, this study identifies the problems associated with the exercise of jurisdiction based on access to online content and highlights the need for national courts to abandon this approach. The paper also examines the positive and negative aspects of adopting an alternative jurisdictional criterion, such as the targeting test.*

1. The access-based jurisdictional approach

The advent of the Internet has posed numerous challenges to the human rights protection regime. One of these challenges refers to the definition of the concept of State

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jurisdiction in cyberspace. Jurisdiction according to some authors is the most affected area of international law by cyberspace.² Indeed, currently there is a high level of uncertainty as to the meaning of State jurisdiction online, according to both general international law and human rights law.

One of the reasons why it is difficult to ascertain the meaning of State jurisdiction in cyberspace is the apparently borderless nature of the Internet. Indeed, as observed by many commentators, traditionally State jurisdiction has been established by relying primarily on the territorial criterion i.e. a State can exercise jurisdiction over acts committed within its territory and over those established within its borders.³ However, the acts committed online happen in a *prima facie* non-physical environment, where it is not always possible to clearly identify both the perpetrator of an unlawful act and the territory in which the act originated. It is also equally unclear where the unlawful act produced its adverse effects. Indeed, once published online, content becomes immediately accessible to everybody everywhere. For all these reasons, it appears particularly difficult to establish which State would be entitled to apply its own laws to regulate acts committed online.

Currently, multiple and conflicting national laws are simultaneously being applied by States to regulate content published online.⁴ Indeed, as stated in an issue paper published in 2014 by the Council of Europe High Commissioner for Human Rights, several States have simultaneously applied their national laws to regulate “activities of individuals who are not nationals of those States and who live outside their respective territories”.⁵ Due to the uncertainty as to the rules governing the exercise of State jurisdiction online several national courts have established jurisdiction over content published online and hosted abroad on the basis of the fact that that content could be accessed from within the territory of the States where the courts are located.

This phenomenon can be described as the access-based jurisdictional approach. According to this approach, the accessibility from within the territory of a given State of

² Mika Hayashi, ‘Objective Territorial Principle or Effects Doctrine? Jurisdiction and Cyberspace’ (2006) 6 In.L. 284.

³ Hayashi (n 2) 284; Robert Uerpman-Witzack, ‘Principles of International Internet Law’ (2010) 11 German L. J. 1245, 1253.

⁴ Uta Kohl, ‘Ignorance is no Defence, but is Inaccessibility? On the Accessibility of National Laws to Foreign Online Publishers’ (2005) 14 Info. & Comm. Tech. L. 25.

⁵ Council of Europe High Commissioner for Human Rights “The rule of Law of the Internet and in the Wider Digital World”, 2014, section 3.4.2, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2734552&SecMode=1&DocId=2262340&Usage=2>> (Accessed: 21 August 2016).

content published online from abroad is deemed to be a sufficient link for the national courts of that State to establish jurisdiction over it.

The distinctive characteristic of the access-based jurisdictional approach is that when establishing whether they have jurisdiction over the content published online the courts are not concerned with establishing where that content was uploaded from or which country it was targeting. Indeed, according to general international law, a State can exercise jurisdiction over acts committed in full or in part within its territory, or over acts directed against its nationals or carried out by them. A State can also exercise jurisdiction over acts that were committed elsewhere but produced negative effects within its territory. The peculiarity of the access-based jurisdictional approach is that no jurisdictional link exists between the content published online and the country exercising jurisdiction other than the fact that that content can be accessed by Internet users located within the territory of the State exercising jurisdiction. Indeed, as explained in the next paragraphs, the parties responsible for the publication of the material online are usually foreign parties located in foreign States where they claim that the material has been uploaded from and is stored. Besides, the content is perfectly legal in the country where the party responsible for its publication operates.

Another important characteristic of the access-based jurisdictional approach is that, as some authors rightly observe, this principle seems to incorporate both the objective territorial principle and the effects doctrine.⁶ In other words, the rationale behind its application by national courts is not always clear. More specifically, it is unclear whether the act of publishing content online is equated to having committed an act within the territory of the State where that content can be accessed or whether publishing content online, although happened abroad, has produced an adverse effect within the territory of the country establishing jurisdiction. In this regard, the authors arguing that the objective territorial principle and the effects doctrine tend to merge when applied to cyberspace are correct.⁷

The purpose of this paper is to illustrate the key characteristics of the access-based jurisdictional approach and to explore the main critiques that it has attracted. To achieve this objective, section two will provide an outline of some key cases where national courts in Europe, North America and East Asia established jurisdiction based on the accessibility of online content. Section three will critically analyse the main characteristics of this jurisdictional approach, while section four will focus on the implications that this

⁶ Hayashi (n 2) 284; Uerpmann-Witzack (n 3) 1245.

⁷ Hayashi (n 2) 286.

approach has on the fulfilment of freedom of expression in cyberspace. Finally, section five will summarize the main conclusions of the analysis conducted in the previous sections.

2. Case selection: objectives and rationale

The cases examined in the next paragraphs are heterogeneous: they are related to different jurisdictions and different areas of law. These cases have been discussed before the national courts of Australia, US, Ireland, Canada, Hong Kong, UK, France and the European Court of Justice (ECJ). Seven out of eight cases are civil cases while the remaining one, the *R v Perrin*, is a criminal one.⁸ Six cases deal with defamation (*Dow Jones v Gutnick*,⁹ *Young v New Haven Advocate*,¹⁰ *Coleman v MGN Limited*,¹¹ *Breeden v Black*,¹² *Yeung v Google Inc.*¹³, *eDate Advertising GmbH v X and Olivier Martinez Robert Martinez v MGN Limited*¹⁴), and two with the publication of content that violates criminal law (*R v Perrin* and *UEJF et Licra v Yahoo! Inc. et Yahoo France*¹⁵). Moreover, while seven out of eight cases are related to acts committed by defendants located in a foreign State, the case of *Young v New Haven* examines an inter-state dispute between parties situated in two different States within the United States.

Notwithstanding these differences, all these cases outline the difficulties that national courts face when establishing jurisdiction in Internet-related disputes over defendants located outside the domestic forum. Indeed, the national courts in these cases were faced with the same challenge: establishing when an act committed online by defendants located in another State can be said to have happened within the domestic court's jurisdiction. More importantly, the national courts in these cases have all given the same answer to this question: jurisdiction can be exercised in the country where the content published online can be accessed.

The case selection was conducted by relying on a theoretically informed, research question-driven approach. Indeed, the cases that were selected are those in which the

⁸ *R v Perrin* [2002] EWCA Crim 747.

⁹ *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575.

¹⁰ *Young v New Haven Advocate et al*, 184 F. Supp. 2d 498 (W.D. Va. 2001); *Young v New Haven Advocate et al*, 315 F.3d 256 (4th Cir. 2002).

¹¹ *Coleman v MGN Limited* [2012] IESC 20 [4] (Denham CJ).

¹² *Breeden v Black* 2012 SCC 19 666.

¹³ *Yeung, Sau Shing Albert v Google Inc.* HCA 1383/2012.

¹⁴ Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH v X and Olivier Martinez Robert Martinez v MGN Limited* [2011] ECR I-10269.

¹⁵ TGI Paris, référé, 22 mai 2000, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France*, available at <http://juriscom.net/2000/05/tgi-paris-refere-22-mai-2000-uejf-et-licra-c-yahoo-inc-et-yahoo-france/> (Accessed: 19 February 2017).

access-based jurisdictional approach was adopted. The rationale behind this choice lies in the fact that this research aims to shed light on the distinctive characteristics and critiques of the use of the access-based jurisdictional criterion. These aspects emerge from the analysis of the cases where this approach has been adopted, irrespective of the country in which it was used, the area of law affected and the civil or common law nature of the legal system in place.

While there are many studies that explain how States have exercised jurisdiction online, a systematic analysis of the access-based jurisdictional approach is missing. The same is true for the study of the problems that this approach raises regarding the fulfilment of freedom of expression online. This analysis aims to fill this gap in the literature. Such an analysis is needed because many commentators have observed that whilst the access-based approach is used, it is indeed a problematic way of exercising State jurisdiction online.¹⁶

Establishing jurisdiction based on access would appear to be quite common among national courts, at least in Western countries. Indeed, many scholars investigating this subject agree that establishing jurisdiction based on access has become an increasingly popular and acceptable way for States to exercise jurisdiction over content posted online.¹⁷ An example of this point can be found in the ECJ *eDate Advertising* case which shows that according to EU law the accessibility of online content from within the territory of a Member State can be a sufficient basis for that State to exercise jurisdiction over the content.¹⁸ In addition, some authors underline how the access-based jurisdictional approach has been adopted by States transversally across different areas of law, rather than being associated with (or confined to) a specific area. Kohl, for example, refers to a variety of documents and national laws that span from consumer protection to gambling

¹⁶ Kohl (n 4); University of Geneva (2016) *Geneva Internet Disputes Resolution Policies 1.0*. Available at: <https://geneva-internet-disputes.ch/> (Accessed: July 2017); Council of Europe High Commissioner for Human Rights report (n 5) 56; B Maier, 'How has the law attempted to tackle the borderless nature of the internet?' (2010) 18 Int J Law Info Tech 142, 149-157.

¹⁷ Kohl (n 4) 25-26, 37; Council of Europe High Commissioner for Human Rights report (n 5) 56; Uerpmann-Witzack (n 3) 1255. According to the Geneva Internet Disputes Resolution policy, the accessibility criterion has been mostly discredited and abandoned outside the EU community law. To substantiate this claim, the policy at page 4 refers to a series of national cases in England, France and the United States where this approach has been rejected. However, this point is debatable. Indeed, the cases examined in this paper show that as of 2012 this approach was still in use at least in the countries mentioned in the paper. This view is also confirmed by other scholars, such as Michael Geist, who underline how some States are recurring to the access criterion to establish jurisdiction in cross-border cases. See Michael Geist (2013) 'Courts adopt aggressive approach in cross-border Internet jurisdiction cases' *The Star.com*, 5 January. Available at: https://www.thestar.com/business/2013/01/05/courts_adopt_aggressive_approach_in_crossborder_internet_jurisdiction_cases.html#.UOrJtuIHp7w.twitter (Accessed: 15 November 2017).

¹⁸ *eDate Advertising GmbH v X and Olivier Martinez Robert Martinez v MGN Limited* (n 14). See paragraph 2.6 for an analysis of the *eDate* case.

and from defamation to obscenity when outlining some instances where this approach was adopted.¹⁹ However, there are other commentators that highlight how the access-based approach appears to be particularly common in a specific area of law, such as defamation.²⁰ Lastly, the authors investigating the access-based jurisdictional approach have mainly referred to laws and cases from North America, Australia and Europe. It is therefore safe to say that the access-based jurisdictional approach has been used in these countries, as the cases analysed in this paper show. However, this fact in itself doesn't prove that establishing jurisdiction based on access is mainly a Western phenomenon. Rather, it shows that little research has been carried out regarding whether courts in other countries have established jurisdiction based on access to online content.

2.1. The *Dow Jones v Gutnick* case

The case of *Dow Jones and Company Inc v Gutnick* was decided in December 2002 by the High Court of Australia (HCA). The defamation proceedings were initiated in October 2000 by Mr. Gutnick, an Australian businessman and resident, who brought a case before the Supreme Court of Victoria. Mr. Gutnick sought compensation for a damage to his reputation that he alleged had happened in Victoria. The harm to reputation was said to be caused by the publication of a defamatory article by the US-based Dow Jones on the subscription website WSJ.com, where the allegedly defamatory article was published as part of the *Barron's Online* journal.

Dow Jones applied to Hedigan J from the Supreme Court of Victoria asking for the current proceedings to be set aside and any further proceedings on the matter to be stayed.²¹ Dow Jones claimed that the Supreme Court of Victoria did not have jurisdiction to hear the case as the publication of the allegedly defamatory article had happened in the United States, and more specifically in New Jersey, where the article was uploaded on the Dow Jones' servers. Hedigan J dismissed Dow Jones' appeal since he found that the defamation of Mr. Gutnick had happened in Victoria, where the article could be downloaded and was therefore "comprehensible" by readers located there.²² The Court

¹⁹ Kohl (n 4) 37. The documents cited by Kohl are: European Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, No 44/2001 of 22 December 2000, OJL 012, 16/01/2001; US v. Ross [1999] WL 782749 (SDNY); National Sporttotaliser Foundation v. Ladbrokes Ltd District Court, The Hague, 27 January 2003; Australian Securities and Investments Commission, Offers of Securities on the Internet, Policy Statement 141 (10 February 1999, reissued 2 March 2000); Dow Jones & Co Inc v. Gutnick [2002] HCA 56; R v. Perrin [2002] EWCA 747; R v. Tdben BGH, Urt. v. 12.12.2000-1 StR 184/00 (LG Mannheim), reproduced in *Neue Juristische Wochenschrift*, 8.

²⁰ Maier (n 16), 149-157.

²¹ *Dow Jones and Company Inc v Gutnick* (n 9) [5].

²² *ibid* [2].

of Appeal of Victoria, dismissed Dow Jones' appeal and upheld the primary judge's decision. The case was therefore brought to the High Court of Australia (HCA).

In its judgment, the HCA explained that Australia common law choice of law requires the judges to apply the law of the place of the tort, which in the present case is defamation. The judges then explained the main elements of the tort of defamation. They stated that under Australian law defamation is defined as damage to reputation due to the publication of defamatory material. The HCA also added that the tort of defamation is usually located at the place where the damage to reputation occurs. In addition, the judges clarified that since the "actionable wrong" is the damage to reputation, for the tort of defamation to exist not only the material has to be published, it must be made available to the reader in comprehensible form as well.²³ This is because it is only when the material is comprehended by a third party that the damage to reputation occurs.²⁴ Indeed, the Court specified that publication of defamatory material must be interpreted as "a bilateral act - in which the publisher makes it available and a third party has it available for his or her comprehension".²⁵ Therefore, the Court found that the respondent's claim that the damage to his reputation had happened in Victoria was correct. Indeed, Mr. Gutnick had a reputation in Victoria and it was in Victoria that the material published online could be downloaded and was therefore comprehensible to readers. As stated by the Court "[i]n the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed".²⁶

2.2. The *Young v New Haven Advocate* case

Legal proceedings in the case of *Young v New Haven Advocate* were initiated by Mr. Young, an American citizen who lived and worked in Virginia as a warden in the Wallens Ridge State Prison.²⁷ On 12 May 2000 Mr. Young sued two Connecticut-based newspapers, the New Haven Advocate and the Hartford Courant, their editors, and two journalists who worked for the newspapers. The appellant's claim was related to the publication of two allegedly defamatory articles on the newspapers' respective websites.

²³ *ibid* [25].

²⁴ *ibid* [26].

²⁵ *ibid*.

²⁶ *ibid* [44].

²⁷ *Young v New Haven Advocate et al* W.D. (n 10).

²⁸ The articles were focused on the transfer of some inmates from Connecticut to Virginia. Mr. Young claimed that the articles contained allegations that he was a racist and favoured the mistreatment of the Wallens Ridge inmates. ²⁹ The proceedings were brought before Virginia Western District Court.

The defendants asked the Court to dismiss the proceedings due to lack of personal jurisdiction over them. Indeed, the defendants, who were based in Connecticut, claimed that they did not operate in Virginia and neither their articles nor their websites targeted Virginia audience. On the other hand, Mr. Young contended that the fact that the defendants maintained the websites and had published the articles online equated to conducting business activities in Virginia. ³⁰ Therefore, according to the plaintiff's claim, Virginia Western District Court had jurisdiction to hear the case.

In its decision of 10 August 2001, the District Court found that it had jurisdiction over the Connecticut-based defendants pursuant to section 8.01-328(A) (3) of the Code of Virginia. ³¹ Point (3) establishes that Virginian courts have jurisdiction over non-resident defendants who cause tort or injuries by an act or omission committed in Virginia. ³² The District Court found that the defendants had acted within the territory of Virginia because they had published allegedly defamatory articles on their websites, which were accessible in Virginia. ³³ In addition, the judges found that the exercise of personal jurisdiction over the defendants did not violate the requirements of due process because of two main facts. ³⁴ First, the articles published online were related to events that had happened in Virginia and at least one of those articles expressly mentioned Mr. Young, a Virginia resident. Secondly, when posting those articles online, the defendants knew that that material was accessible to Virginia residents and that therefore any potentially defamatory content related to a Virginia resident was going to produce harm in Virginia. ³⁵ In this regard, the Court added that since content published online is accessible to a worldwide audience, it is 'physically "present" in different locations at one time' and can therefore be subjected to multistate jurisdiction. ³⁶ Finally, the Court found that the exercise of personal jurisdiction was legitimate because Virginia had a 'proper

²⁸ *Young v New Haven Advocate et al*, 4th Cir. (n 10) 4-5.

²⁹ *Young v New Haven Advocate et al* W.D. (n 10) 501.

³⁰ *ibid* 502.

³¹ Va.Code Ann. § 8.01-328.1(A) (3).

³² *ibid*.

³³ *Young v New Haven Advocate et al* W.D. (n 10) 508.

³⁴ *ibid* 511.

³⁵ *ibid* 508.

³⁶ *ibid* 510.

interest’ in preventing that its residents were subjected to online defamation.³⁷ Therefore, the District Court denied the defendants’ motion to dismiss for lack of personal jurisdiction.³⁸

The defendants appealed to the Fourth Circuit Court of Appeal, which issued its decision on 13 December 2002. Unlike the District Court, the Court of Appeal accepted the defendants’ claim that Virginia courts lacked personal jurisdiction over them and therefore reversed the District Court’s order.³⁹ Indeed, the judges found that Virginia Courts could not exercise jurisdiction over the out-of-state defendants since neither their websites nor their articles were directed at a Virginia audience. In this regard, the Court stated that the mere publication of content online by people living outside a given State is not sufficient to bring them within the jurisdiction of that State or within the jurisdiction of any State from which that content is accessible. The consequence of adopting this jurisdictional approach would be to violate the due process principle, which regulates the exercise of State jurisdiction over out-of-State residents.⁴⁰ The judges found that ‘[s]omething more than posting and accessibility is needed’ for a State to establish jurisdiction over online content posted by Internet users located in another State.⁴¹ More specifically, ‘an intent to target and focus’ on the audience located in a given State is necessary for that State to establish jurisdiction over the person responsible for the publication of that content online.⁴²

The criteria relied upon by the Court to establish whether the two newspapers had intentionally targeted Virginia were the absence of advertisement aimed at a Virginia audience, Connecticut-based weather and traffic information, and links to Connecticut institutions.⁴³ The judges then turned to the content of the allegedly defamatory articles to determine whether the articles targeted Virginia. In this case as well, the Court found that the articles were focussing on events and policies that affected Connecticut, rather than Virginia.⁴⁴ Therefore, because both the websites and the articles were not manifestly targeting Virginia, the Court of Appeal concluded that the defendants did not have ‘sufficient Internet contacts with Virginia to permit the district court to exercise specific jurisdiction over them’.⁴⁵

³⁷ *ibid.*

³⁸ *ibid* 511.

³⁹ *Young v New Haven Advocate et al* 4th Cir. (n 10) 3.

⁴⁰ *ibid* 10.

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *ibid* 10-11.

⁴⁴ *ibid* 11.

⁴⁵ *ibid.*

2.3. The *Coleman v MGN Limited* case

John Coleman, an Irish citizen living in Ireland, brought legal proceedings against MGN Limited, the England-based editorial group which publishes, sells and supplies the newspaper Daily Mirror. The proceedings were brought before the High Court of Ireland. Mr. Coleman alleged that he had been defamed by MGN due to the publication of two articles and a photograph of him accompanying the articles. The articles and the picture appeared in March and September 2003's printed editions of the Daily Mirror. Although Mr Coleman's name was not mentioned in the articles, he claimed that he had been defamed due to the juxtaposition of the picture and the articles. Since the articles talked about excessive alcohol consumption in the UK, Coleman claimed that it could be inferred that their content was referring to him.

Originally, Mr Coleman's claim was confined to the circulation on the Irish territory of printed copies of the Daily Mirror.⁴⁶ MGN asked the High Court to decline jurisdiction, but Charleton J dismissed the defendant's request. MGN appealed to the Supreme Court against the High Court's decision. The company argued that Irish Courts lacked jurisdiction because the alleged defamation had happened in England, where MGN was established. In addition, the appellant pointed out that there was no evidence of the circulation of the relevant printed editions of the Daily Mirror on the Irish territory.

In the proceedings before the Supreme Court, however, Mr Coleman's claim changed to focus exclusively on the publication of the said articles and picture on the Internet. More specifically, the plaintiff's argument was that the damage to his reputation had happened on the Irish territory because the Daily Mirror was published online at the time of the proceedings before the Supreme Court, in 2012. It could therefore be assumed that in 2003 the defamatory material had been published online as well, and was accessible from within Ireland's territory.⁴⁷ The Supreme Court dismissed Mr. Coleman's argument because it evidenced several "fatal flaws".⁴⁸ Indeed, although the appellant's claim shifted from the publication of printed copies of the newspaper to its online publication, it was never pleaded that the relevant material had been published online.⁴⁹ More importantly, the Court found that for the tort of defamation to be established, it is essential to produce evidence of publication of the defamatory material within the domestic jurisdiction. However, the Court stated that no evidence had been produced showing that

⁴⁶ *Coleman v MGN Limited* (n 11).

⁴⁷ *ibid* [10].

⁴⁸ *ibid* [14].

⁴⁹ *ibid*.

the defamatory content or the Daily Mirror itself had been published online in 2003. In addition, there was no evidence that the defamatory material had been accessed from within the territory of Ireland. For these reasons, the Supreme Court established that it did not have jurisdiction on the subject matter of the case.

The approach followed by the Supreme Court to deny jurisdiction over this case seems to confirm the access-based jurisdictional criterion. Indeed, had Mr. Coleman produced evidence of both the online publication of the defamatory material and actual access to it within the Irish territory, the Supreme Court would have held that the tort of defamation had happened in Ireland. This is irrespective of where the material had been uploaded from, or where it was hosted.

2.4. The *Breedon v Black* case

Lord Black is a businessman with an established reputation both in Canada and internationally. He detained Canadian citizenship until 2001, when he abandoned the citizenship to become part of the House of Lords in the UK.⁵⁰ Between 2004 and 2005, Lord Black brought six libel actions in the Ontario Superior Court of Justice against 10 defendants.⁵¹ The defendants were directors, advisors and vice-president of the company Hollinger International, of which Lord Black was a chairman. Hollinger International was both incorporated and headquartered in the United States.⁵² All the defendants lived in the United States, except for two of them who lived in Ontario and Israel respectively.⁵³

Lord Black claimed that he had been defamed due to the publication on the company's website of some reports and press releases containing allegations that he had received illegitimate payments from Hollinger International. The plaintiff brought the libel actions in Ontario since the defamatory content published on the website was accessed, read and republished in Ontario by three newspapers.⁵⁴

The defendants asked the motion judge to stay the case because there was no real and substantial connection between the actions and Ontario. Alternatively, they maintained that US courts were a more appropriate forum.

The motion judge dismissed these arguments and found that the defamation had happened in Ontario due to three main reasons. First, the content published on the website was accessible in Ontario, where it was republished by the three newspapers. Second,

⁵⁰ *Breedon v Black* (n 12).

⁵¹ *ibid* [5].

⁵² *ibid* [3].

⁵³ *ibid* [8].

⁵⁴ *ibid* [6].

Lord Black had a reputation in Ontario. Finally, it was reasonably foreseeable for the defendants to anticipate that the publication of that content would have caused damage to the plaintiff's reputation in Ontario.⁵⁵

Ontario Court of Appeal upheld the motion judge's decision because it found that the clear and substantial connection requirement was satisfied. In addition, the Court stated that it was not necessary to determine whether a targeting approach should be adopted in Canadian law.⁵⁶ In other words, according to the Court, it was not necessary to determine whether the content published online was targeting a Canadian audience. Notwithstanding this, the judges emphasized that the relevant content did target Ontario because the press releases contained contact information directed at Canadian media.⁵⁷

The defendants appealed against the Court of Appeal's decision and brought the case before the Supreme Court of Canada. They maintained that in transnational libel claims jurisdiction should be exercised only in the forum that has a real and substantial connection with the 'substance of the action'.⁵⁸ This expression was defined by the defendants as the subject matter and conduct giving rise to the case, which was identified in Lord Black's actions. Since these actions had happened in the United States, the defendants claimed that there was no real and substantial connection between Canada and the case.⁵⁹

The Supreme Court found that the appellants were liable for the tort of defamation in Canada because the defamation had happened there.⁶⁰ Indeed, it was in Ontario that the defamatory content displayed on the website was published to a third party: the three newspapers which accessed the material, read and republished it.⁶¹ The Court added that according to Canadian law, each republication of a defamatory statement constitutes a new publication. Besides, the original publisher of the defamatory statement is responsible for its republications if he authorizes them or if the republication "is the natural and probable result of the original publication".⁶² Finally, the Supreme Court concluded that Ontario was a convenient forum because the appellants had failed to unequivocally show that US courts constituted a clearly more appropriate forum.⁶³

⁵⁵ *ibid* [11].

⁵⁶ *ibid* [13].

⁵⁷ *ibid*.

⁵⁸ *ibid* [14].

⁵⁹ *ibid* [15].

⁶⁰ *ibid* [20].

⁶¹ *ibid*.

⁶² *ibid*.

⁶³ *ibid* [29].

2.5. The *Yeung v Google Inc.* case

Albert Yeung, a businessman and managing director of the Hong Kong-based Emperor Group, brought a defamation complaint against Google Inc. before the High Court of the Hong Kong Special Administrative Region.⁶⁴ The complaint was related to the Google Search Autocomplete search function.

Yeung alleged that when searching for his name on Google.com, Google.com.hk and Google.com.tw the autocomplete suggestion “triad” came up. The plaintiff therefore claimed to have been defamed by Google Inc. and asked for compensation, adding that the company had failed to remove the defamatory content notwithstanding the several requests received.

Google Inc. argued that the Hong Kong Court lacked personal jurisdiction over it. Besides, the defendant maintained that there was no good arguable case or serious issue to be treated on the merits of the case brought by the plaintiff.⁶⁵ For this reason, Google Inc. asked the Court to either declare that it had no jurisdiction over the case or alternatively to refuse to exercise any jurisdiction it may have.

Due to the scope of this analysis, the only part of the judgment that will be examined in this paper is that related to establishing where Mr. Yeung’s alleged defamation happened.

Yeung argued that the tort of defamation had happened in Hong Kong, since the damage to reputation had either been sustained there or it had happened following an act committed in Hong Kong.⁶⁶ More specifically, the plaintiff maintained that the defamation had occurred in Hong Kong because it was there that the defamatory content could be accessed (i.e. downloaded) and was therefore published to a third party.⁶⁷

The Court confirmed this view, by stating that in defamation cases the damage to reputation occurs when the defamatory content is published or made available to a third party. When the defamatory content is published online, the content is believed to have been published in the place where the material is “viewed/downloaded”.⁶⁸ The other condition for the exercise of jurisdiction by the domestic forum is that the plaintiff has a reputation there.⁶⁹ Therefore, the Court concluded that “an internet publisher who places

⁶⁴ *Yeung, Sau Shing Albert v Google Inc.* (n 13).

⁶⁵ *ibid* [15].

⁶⁶ *ibid* [18].

⁶⁷ *ibid* [19].

⁶⁸ *ibid* [37].

⁶⁹ *ibid*.

material on the internet will be responsible for the effects of his action whenever the damage occurs”.⁷⁰

Google accepted the principles set out by the Court regarding defamation through online publication.⁷¹ However, it contended that the plaintiff had failed to prove that there had been publication to a third party. In this regard, Yeung argued that the proof of publication to a third party was represented by the fact that the IT department of his company had been able to download and print the defamatory words. Google’s counter argument was that the IT department could not be considered as a genuine third party, since the people in the IT department worked for Yeung and had been expressly tasked to find the defamatory material.⁷²

The Court dismissed Google’s point and found that the IT department did constitute a genuine third party, irrespective of the fact its members were employed by Yeung. Indeed, the people working for Mr. Yeung could still be considered as a party other than Yeung that accessed the defamatory content.⁷³

Overall, the Court dismissed all Google’s claims, awarded the costs to the plaintiff and found that a trier of facts should be carried out in the present case.⁷⁴ In September 2014 Google filed a motion for the Leave to Appeal Against the Order, which was granted by the Court in October 2014.⁷⁵ This case is therefore still ongoing.

2.6. The *eDate Advertising* case

This joined case was discussed by the European Court of Justice on 25 October 2011.⁷⁶ The case concerns the interpretation of article 5(3) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters and article 3(1) and (2) of the Directive 2003/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services.⁷⁷ This case was referred to the ECJ by the German Federal Court of Justice, the Bundesgerichtshof, and the Paris Regional Court, Tribunal de Grande Instance (TGI). The case concerns the liability of the Austria-based

⁷⁰ *ibid* [37].

⁷¹ *ibid* [39].

⁷² *ibid*.

⁷³ *ibid* [41]-[42].

⁷⁴ Columbia University Global Freedom of Expression *Dr. Yeung, Sau Shing Albert v. Google Inc.* Available at: <https://globalfreedomofexpression.columbia.edu/cases/dr-yeung-sau-shing-albert-v-google-inc/> (Accessed: 10 November 2017).

⁷⁵ *ibid*.

⁷⁶ *eDate Advertising GmbH v X and Olivier Martinez Robert Martinez v MGN Limited* (n 14).

⁷⁷ *ibid* para 1.

eDate Advertising and the England-based MGN Limited before the German and French courts respectively for an alleged infringement of personality rights due to the publication of content online. In particular, the Austrian company eDate Advertising was asked by X, a German resident, to refrain from using his full name when reporting on the website administered by the company about a crime that X committed in 1990.⁷⁸ As to MGN, the company was accused by the French actor Olivier Martinez and his father of having violated their right to private life and the actor's right to his image. These violations had resulted from the posting of an article on the Sunday Mirror website giving details about a meeting between Olivier Martinez and Kylie Minogue and alleging that the actor had resumed his relationship with the singer.⁷⁹ Both eDate Advertising and MGN claimed that the German and French courts lacked jurisdiction due to the absence of a sufficient connecting link between the content published online and the damage produced on the German and French territory.⁸⁰

Given the purpose of this analysis, this paragraph will focus on the interpretation of article 5(3) of the EU Council Regulation on jurisdiction. The ECJ was asked by the Bundesgerichtshof and the TGI to clarify how the expression "the place where the harmful event occurred or may occur" contained in article 5(3) can be interpreted when content is published online.⁸¹ According to the Regulation, jurisdiction is generally based on the place of domicile of the defendant. However, article 5(3) establishes that in case of tort a person domiciled in a given Member State can be sued in another Member State if the harmful event occurs there.⁸² The ECJ first clarified that the place where the harmful event occurs can be both the place giving rise to the event, and the place where the damage occurs. Both these criteria constitute "a significant connecting factor" as far as jurisdiction is concerned.⁸³ Besides, the Court found that in the case of an infringement of personality rights due to the publication of online content, the place where the harmful event occurs can be interpreted as the place where the victim has his or her centre of interest. This is usually the place where the person resides, however it can also be the place where they conduct professional activities, irrespective of whether they live there. In other words, when defamatory material is published online, the victim might choose to initiate legal proceedings in the Member State where they have their centre of interest. That State, as underlined by the Court, will have jurisdiction in respect to all the damage

⁷⁸ *ibid* para 17.

⁷⁹ *ibid* para 25.

⁸⁰ *ibid* para 18, 26.

⁸¹ *ibid* para 37.

⁸² *ibid* para 6.

⁸³ *ibid* para 41.

caused by the publication.⁸⁴ According to the ECJ, the criterion of the place where the victim has their centre of interest is respondent to the principles of the “sound administration of justice” and predictability of jurisdiction.⁸⁵ This is because the court of the place where a person has their centre of interest is best placed to assess the impact of the online publication of defamatory content on that person’s reputation. As to predictability, the ECJ stated that the publisher is or should be in a position to know where the person to whom the online content refers has their centre of interest. In other words, this criterion has the benefit of both being predictable for the defendant and easily allowing the applicant to know where they might be able to initiate legal proceedings.⁸⁶

However, the ECJ added that there is another choice available to victims of online defamation. Indeed, they can also initiate legal proceedings in the Member States where the content published online can be accessed. In that case, however, the national courts will have jurisdiction only in respect to the damage to reputation that happened locally.

⁸⁷

In conclusion, according to the EU Regulation on jurisdiction, in case of defamation committed through the publication of content online, jurisdiction can be exercised by the Member State where the publisher is established or the Member State where the victims have their centre of interest in regard to all the damage caused by the publication. Jurisdiction can also be exercised by all the Member States where the online content can be accessed in regard to the damage to reputation that happened within that Member State, provided that the victims have a reputation there.⁸⁸

2.7. The *Perrin* case

Mr. Perrin, a French national who lived in the United Kingdom, was one of the major shareholders of the US-based Metropole News Group, the company administering the website www.sewersex.com.⁸⁹ On 25th October 1999, a police officer of the Obscene Publications Unit in the UK accessed during the course of his duty some pictures of a sexual nature which had been published on the above-mentioned website.⁹⁰ More specifically, the pictures were on a preview page available free of charge on the said

⁸⁴ *ibid* para 48.

⁸⁵ *ibid* paras 48-50.

⁸⁶ *ibid*.

⁸⁷ *ibid* para 51.

⁸⁸ *ibid* para 52.

⁸⁹ *R v Perrin* (n 8).

⁹⁰ The pictures showed “people covered in faeces, coprophilia or coprophagia, and men involved in fellatio”, *ibid* [2].

website. The images available on the preview page were deemed to violate section 2(1) of the Obscene Publications Act 1959 which prohibited the publication of obscene material.⁹¹ As a result, Mr. Perrin was arrested. During an interview with the police, he accepted the responsibility for the publication of the pictures.⁹² On 16 October 2000 he was convicted by Southwark Crown Court for the publication of an obscene article.⁹³ On 6 November 2000 Southwark Crown Court sentenced Mr. Perrin to 30-month imprisonment.⁹⁴ Mr. Perrin appealed against his conviction to the Criminal Division of the England and Wales Court of Appeal (EWCA). The Court of Appeal, however, dismissed both Mr. Perrin's appeal against the conviction and his subsequent appeal against the sentence.⁹⁵ Mr. Perrin therefore filed an application to the European Court of Human Rights (ECtHR) to bring a case against the United Kingdom. His main claim was that the UK had violated article 10 of the European Convention on Human Rights (ECHR) by convicting and sentencing him for the publication of the pictures on the website www.sewersex.com.⁹⁶ The ECtHR, however, dismissed Mr. Perrin's claim and declared the application inadmissible.⁹⁷

Mr. Perrin stated before the ECtHR that due to "the worldwide nature of the internet, it was unreasonable for publishers to foresee the legal requirements in all the individual states where the material could be accessed".⁹⁸ He therefore suggested that it should only be possible for English courts to convict "if major steps towards publication had taken place in a location over which they had jurisdiction".⁹⁹ Besides, Mr. Perrin claimed that the publication of the pictures did not happen within the territory of the United Kingdom.¹⁰⁰ In fact, it happened in the United States, where the pictures were legal as the

⁹¹ "Prohibition of publication of obscene matter. (1) Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article or who has an obscene article for publication for gain (whether gain to himself or gain to another)] shall be liable— (a) on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months; (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding [five years] or both", Obscene Publications Act 1959, pt 2, s(1) (a)(b).

⁹² As to Mr. Perrin's formal admission, 'when the case came on for trial at Southwark Crown Court in October 2000 counsel then appearing for the appellant made a formal admission on his behalf— "It is agreed and accepted by the defendant that he was legally responsible for the publication of the articles referred to in counts 1, 2 and 3 on the indictment"', *R v Perrin* (n 8) [5].

⁹³ *R v Perrin* (n 8) [1].

⁹⁴ *ibid.*

⁹⁵ *R v Perrin* (n 8) [52].

⁹⁶ *Perrin v the United Kingdom* (dec.), no. 5446/03, ECHR 2005-XI.

⁹⁷ *ibid.*

⁹⁸ *ibid.* 5.

⁹⁹ *ibid.*

¹⁰⁰ More specifically, in the case before the Court of Appeal the counsel stated at 32 that the UK courts could not assume that the major steps towards the publications of the pictures had happened within the territory of the UK. Indeed, Mr. Perrin's counsel claimed at 17 that "the sole evidence of publication adduced at the Crown Court was of one visit by PC Ysart to the relevant web page, the preview page" and

Obscene Publications Act 1959 did not apply.¹⁰¹ For this reason, that section 2 of the 1959 Act was neither sufficiently foreseeable nor sufficiently precise to be considered as “prescribed by law” within the meaning of Article 10 § 2 of the Convention.¹⁰²

As to the approach adopted by the EWCA regarding establishing jurisdiction on the case, the judges found that “a mere transmission of data constitutes publication”.¹⁰³ The Court also added that, as established in the *R v Waddon* case, “there is publication for the purposes of section 1(3) both when images are uploaded and when they are downloaded”.¹⁰⁴ In addition, the judges rejected the appellant’s claim that there should be prosecution against a publisher only when the major steps towards the publication had happened within the territory of the State exercising jurisdiction. The EWCA also rejected Mr. Perrin’s claim according to which the Crown should have shown where the major steps towards the publication were taken. In this regard, the Court accepted the respondent’s argument that adopting Mr. Perrin’s approach would have had the effect of encouraging publishers to publish only in countries where there were less chances of being prosecuted.¹⁰⁵ Overall the Court of Appeal concluded that “the publication shown by the evidence was sufficient to give jurisdiction to the Court”.¹⁰⁶

As to the admissibility decision of the ECtHR, the judges of the European Court clarified that section 2 of the Obscene Publications Act 1959 had been already examined by the Court in the cases *Handyside* and *Hoare* and that it had been found in compliance with article 10 of the ECHR.¹⁰⁷ Although those cases did not involve publication on the Internet, the Court stated that section 1(3) of the 1959 Act makes it clear that the law also applies to transmission of data stored electronically.¹⁰⁸ Besides, the Court observed that

that there was no sufficient evidence as to where the data files were created and posted. It was also equally unclear where the server hosting the data was located.

¹⁰¹ “In his first ground of appeal the appellant contends that there was no evidence to rebut his statements in interview that the major steps involved in publishing the web page that resulted in his conviction were in a jurisdiction where the material published was lawful”, *R v Perrin*, (n 7) [32]. “The applicant submitted that section 2 of the 1959 Act was not sufficiently foreseeable to satisfy the requirements of law within the meaning of Article 10 § 2 of the Convention because the major steps towards publication took place in the United States, where the 1959 Act did not apply”, *Perrin v the United Kingdom* (n 95) 5.

¹⁰² *Perrin v the United Kingdom* (n 96) 5.

¹⁰³ *R v Perrin*, (n 8) [18].

¹⁰⁴ *ibid* [51]. In this regard the respondent for the Crown Prosecution Service argued before the EWCA that “there was publication when anyone accessed the preview page”.

¹⁰⁵ *R v Perrin*, (n 8) [51]; “Finally, it [the EWCA] noted, on the jurisdictional point, that the applicant’s suggestion, that conviction should only be possible where major steps had been taken towards publication in a place over which the court had jurisdiction, would undermine the aim that the law was intended to protect by encouraging publishers to take the steps towards publication in countries where they were unlikely to be prosecuted”, *Perrin v the United Kingdom* (n 96) 3.

¹⁰⁶ *R v Perrin*, (n 8) [52].

¹⁰⁷ *Handyside v the United Kingdom* (1976) Series A no 24; *Hoare v UK* App no 31211/96 (Commission Decision, 2 July 1997) in *Perrin v the United Kingdom* (n 96) 6.

¹⁰⁸ *ibid*.

Mr. Perrin was a UK resident and could therefore not claim that the UK laws were not reasonably accessible to him. In addition, since he was carrying out a professional activity through his website he should have acted more cautiously than normally expected and should have sought legal advice.¹⁰⁹ In addition, the Court found that the fact that the images available on Mr. Perrin's website were legal in the US did not mean that the UK had exceeded its margin of appreciation by proscribing the circulation of those images within its territory and by prosecuting and convicting the applicant.¹¹⁰ Finally, in assessing the proportionality of the conviction and sentence by the UK domestic courts, the ECtHR gave particular relevance to the fact that Mr. Perrin was conducting a professional activity whose services were available upon payment. In this regard, the Court concluded that "it would have been possible for the applicant to have avoided the harm and, consequently, the conviction, while still carrying on his business, by ensuring that none of the photographs were available on the free preview page (where there were no age checks). He chose not to do so, no doubt because he hoped to attract more customers by leaving the photographs on the free preview page".¹¹¹

2.8. The *LICRA and UEJF v Yahoo! Inc. and Yahoo France* case

The *LICRA and UEJF v Yahoo! Inc. and Yahoo France* case (hereafter the *Yahoo!* case) was initiated in France in May 2000 by two French associations combating racism and anti-Semitism, the Ligue Contre la Racisme et l'Antisémitisme (LICRA) and the Union des Etudiants Juifs de France (UEJF). LICRA and UEJF brought a case before the Tribunal de Grande Instance (TGI) of Paris accusing Yahoo! Inc. and Yahoo France of having violated article R.645-1 of the French penal code, according to which the display of Nazi-related items for sale is a criminal offence.¹¹² More specifically, the two companies were accused of having violated the French penal code because Internet users located in France could access the *Yahoo! Auction* webpages where several Nazi-

¹⁰⁹ *ibid.*

¹¹⁰ *ibid* 7-8.

¹¹¹ *ibid* 8.

¹¹² '[C]ette exhibition d'objets proposés à la vente constituait non seulement une infraction aux dispositions de l'article R. 645-1 du Code Pénal mais encore la plus grande entreprise de banalisation du nazisme qui soit' TGI Paris, référé, 22 mai 2000, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France* (n 15); Marc H. Greenberg, 'A Return to Lilliput: The LICRA v Yahoo! Case and the Regulation of Online Content in the World Market' (2003) 18 Berk. Tech L J 1191; Yaman Akdeniz, 'Case analysis of League against Racism and Antisemitism (LICRA), French Union of Jewish Students v Yahoo! Inc. (USA), Yahoo France, Tribunal de Grande Instance de Paris (The County Court of Pairs), Interim Court Order, 20 November, 2000' (2001) 1 E.B.L.R. 110.

memorabilia were displayed for sale. The *Yahoo! Auction* website was maintained by Yahoo! Inc. and could be accessed by all Internet users via the Yahoo.com portal or through a link to Yahoo.com available on Yahoo.fr. The fact that the *Yahoo! Auction* webpage containing the Nazi-related items could be accessed by users located in France was equated by the plaintiffs to having committed a crime within the French territory. Therefore, LICRA and UEJF asked the TGI to issue an order requesting the defendants to prevent Internet users located within the French territory to access the Nazi memorabilia displayed for sale on the Auction website.¹¹³

The defendants rejected the plaintiffs' claims. Indeed, Yahoo! Inc. stated that the French court lacked jurisdiction since the display and sale of the Nazi items had happened in the United States, where both the company and its servers were based.¹¹⁴ Moreover, Yahoo! Inc. claimed that any restrictions on the accessibility of the items on sale would have violated the First Amendment of the US constitution in addition to being technically impossible to realize.¹¹⁵ As to Yahoo France, which was accused of promoting anti-Semitism due to the link to Yahoo.com, it denied liability since the auction was not hosted on Yahoo.fr.¹¹⁶

In its order of 22 May 2000, the TGI established that it had jurisdiction over the case pursuant to article 46 of the Code of Civil Procedure. Article 46 establishes that in tort matters a plaintiff may bring a case before 'the court of the place of the event causing liability or the one in whose district the damage was suffered'.¹¹⁷ Judge Gomez found that making it possible for users in France to access a website where Nazi memorabilia were displayed for sale equated to committing a wrong within the French territory that produced harm in France.¹¹⁸ The judge therefore accepted LICRA and UEJF claims and ordered Yahoo! Inc. to "take all necessary measures to dissuade and render impossible" from within the French territory "any access via Yahoo.com to the Nazi artefact auction

¹¹³ [L]a LICRA, dont l'objet social est notamment de combattre par tous moyens le racisme et l'antisémitisme... et de défendre l'honneur et la mémoire des déportés, nous demande d'enjoindre sous astreinte à la société YAHOO! Inc., propriétaire de Yahoo.com, de prendre les mesures nécessaires pour empêcher l'exhibition-vente sur son site Yahoo.com d'objets nazis sur l'ensemble du territoire français' TGI Paris, référé, 22 mai 2000, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France* (n 15).

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ Art. 46 nouv. C. pr. civ, English translation available at https://www.legifrance.gouv.fr/content/download/1962/13735/version/3/.../Code_39.pdf (Accessed: 20 February 2017).

¹¹⁸ 'Whereas while permitting these objects to be viewed in France and allowing surfers located in France to participate in such a display of items for sale, the Company YAHOO! Inc. is therefore committing a wrong in the territory of France [...] Whereas, the damage being suffered in France, our jurisdiction is therefore competent to rule on the present dispute under Section 46 of the New Code of Civil Procedure' Greenberg (n 112) 1208-1209 citing Pl.'s Compl. for Decl. Relief, ex. A, at 5-6.

service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes".¹¹⁹ At the same time, Yahoo France was ordered to issue all the Yahoo.fr Internet users with a warning that if they were to continue their search on Yahoo.com and were provided with search results that included sites that violated French law they should stop their search. Failure to do so would expose them to liability under French law.¹²⁰

Following the 22 May order, Yahoo France modified its terms of use and introduced a banner reproducing the warning issued in the order.¹²¹ On the other hand, Yahoo! Inc. contested the order and stated that applying filtering procedures to block French Internet users from specific websites was technically impossible as well as disproportionately expensive.¹²² However, on 20 November 2000 the TGI ordered Yahoo! Inc. to comply with the May order within 3 months from the November order being issued and to pay 100000 Francs per each day of delay once the 3-month compliance period expired.¹²³

One important aspect of the November order is related to the TGI's considerations as to the audience targeted by Yahoo!. Indeed, the company claimed that its services were predominantly directed at an American audience. In replying to this argument, Judge Gomez mentioned a series of factors related to the Auction website, such as the items on sale, the method of payment, the delivery terms, the language and the currency used. He found that these elements validated the claim that the Auction site was mainly directed at an US audience. However, Gomez found that the same could not be said of the sale of Nazi-memorabilia, which could have interested anyone.¹²⁴ In addition, the judge found

¹¹⁹ *Yahoo! inc v La Ligue Contre le Racisme et l'Antisemitisme et al*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), available at <http://law.justia.com/cases/federal/district-courts/FSupp2/169/1181/2423974/> (Accessed: 20 February 2017).

¹²⁰ 'Or, attendu que connaissant le contenu des services proposés par Yahoo.com, et en l'occurrence le service de ventes aux enchères comportant dans l'une de ses déclinaisons la vente d'objets nazis, il lui appartient de prévenir l'internaute, sur un panneau, ce dès avant même que celui-ci poursuive sa recherche sur Yahoo.com ; que, dès lors que le résultat de sa recherche sur Yahoo.com soit à partir d'une arborescence, soit à partir de mots-clés, l'amène à pointer sur des sites, des pages ou des forums dont le titre et/ou les contenus constituent une infraction à la loi française, ainsi en est-il des sites faisant directement ou indirectement, volontairement ou involontairement l'apologie du nazisme, il doit interrompre la consultation du site concerné sauf à encourir les sanctions prévues par la législation française ou à répondre des actions en justice qui pourraient être initiées à son encontre' TGI Paris, référé, 22 mai 2000, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France* (n 15).

¹²¹ Akdeniz (n 112) 4.

¹²² TGI Paris, référé, 11 août 2000, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France*, available at <https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-ordonnance-de-refere-du-11-aout-2000/> (Accessed: 20 February 2017).

¹²³ 'Ordonnons à Yahoo! Inc de satisfaire dans les 3 mois de la notification de la présente ordonnance aux injonctions contenues dans notre ordonnance du 22 mai 2000 ce sous astreinte de 100.000 Francs par jour de retard à compter du 1er jour qui suivra l'expiration du délai de 3 mois' TGI Paris, référé, 20 novembre 2000, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France* 20, available at <http://juriscom.net/wp-content/documents/tgiparis20001120.pdf> (Accessed: 21 February 2017).

¹²⁴ 'Attendu que s'il est exact que le site "Yahoo Auctions" en général, s'adresse principalement à des internautes basés aux Etats-Unis eu égard notamment à la nature des objets mis en vente, aux modes de

that Yahoo! was aware that it was addressing a French audience because the users that accessed Yahoo.com from France were shown advertising banners in French.¹²⁵ Therefore, Gomez concluded that a sufficient basis for the exercise of jurisdiction had been established.¹²⁶

3. Case analysis

The cases examined in the previous paragraphs outline the difficulties that national courts face when establishing jurisdiction in Internet-related disputes over defendants located outside the domestic forum. As mentioned above, the national courts in these cases were faced with the same challenge: establishing when an act committed online by defendants located in another State can be said to have happened within the domestic court's jurisdiction. Overall, four conclusions can be drawn from the analysis of these cases.

First, the domestic courts have used the accessibility of online content within the national territory as a basis to establish jurisdiction over that content.¹²⁷ More specifically, the accessibility of online content from within the territory of a given State has been used to justify the application of both the objective territorial principle and the effects doctrine: e.g. online content X is accessible within the territory of State A therefore content X was published in State A (objective territorial principle: the act happened in State A); online content Y is accessible in State B therefore it produced negative effects there (effects doctrine: the act was committed elsewhere but produced negative effects in State B).

The *Perrin* case and the Virginia Western District Court's decision in *Young v New Haven* offer an example of how the objective territorial principle has been applied to online content. Indeed, in the *Perrin* case, the EWCA found that online content is published in the UK both when material is uploaded and when it is downloaded (or merely accessed) from within the territory of the UK.¹²⁸ Similarly, Virginia District Court

paiement prévus, aux conditions de livraison, à la langue et à la monnaie utilisées, il n'en est pas de même des enchères d'objets représentant des symboles de l'idéologie nazie qui peuvent intéresser et sont accessibles à toute personne qui souhaite les suivre, y compris aux Français' *ibid* 3.

¹²⁵ 'Attendu enfin que Yahoo sait qu'elle s'adresse à des français puisque à une connexion à son site d'enchères réalisée à partir d'un poste situé en France, elle répond par l'envoi de bandeaux publicitaires rédigés en langue française' *ibid* 4.

¹²⁶ *ibid*.

¹²⁷ The only exception to this point is represented by the Fourth Circuit Court of Appeal in the *Young v New Haven* case. Indeed, the judges openly rejected the accessibility criterion and relied exclusively on a targeting test to establish whether the Court of Appeal had jurisdiction over the article published on the defendants' websites.

¹²⁸ *R v Perrin*, (n 8) [18].

established that the accessibility of an online article from within the territory of Virginia meant that the defendants had acted in Virginia by publishing that article on their website.

¹²⁹ More specifically, as previously mentioned, the Court found that since content published online is accessible to a worldwide audience, it is ‘physically "present" in different locations at one time’ and can therefore be subjected to multistate jurisdiction.

¹³⁰

On the other hand, an example of how the effects doctrine has been applied to online acts can be found in the *Dow Jones v Gutnick* case, where the Victoria Supreme Court found that in defamation cases content published online produces adverse effects in the place where the content is accessed.¹³¹ The *Yeung v Google* case offers another example of this point, since the High Court of the Hong Kong Special Administrative Region established that “an internet publisher who places material on the internet will be responsible for the effects of his action whenever the damage occurs”.¹³² The emphasis placed by the Court on the negative effects produced by content published online on the territory where that content is accessed seems to confirm that the court relied on the effects doctrine when establishing jurisdiction on it.

The second conclusion that stems from the cases analysed is that the distinction between the objective territorial principle and the effects doctrine is not always clear-cut when these two principles are applied to cyberspace.¹³³ Indeed, some of the cases examined can be interpreted as an example of the application of both the principles. All the defamation cases, for instance, can be interpreted as saying that an act of online defamation happens within a State’s territory both because the content published online is found to have been published there (objective territorial principle) and it produces negative effects within that country (effects doctrine). This is because in the legal systems of the countries analysed, defamation happens in the place where the damage to reputation occurs. This place is identified with the place where content is published to a third party which, in the case of online content, is the territory from where it can be accessed. Therefore, it does appear that content published online from foreign States is considered as both having been published and capable of exercising negative effects in the States where it is accessible. For this reason, both the effects doctrine and the objective territorial principle appear as an equally plausible basis for exercising jurisdiction. The *Yahoo!* case

¹²⁹ *Young v New Haven Advocate et al* W. D. (n 10) 508.

¹³⁰ *Yeung, Sau Shing Albert v Google Inc* (n 13) 510.

¹³¹ *Dow Jones and Company Inc v Gutnick* (n 9) [44].

¹³² *ibid* [37].

¹³³ Hayashi (n 2) 298-301.

offers another example of this point. In this case, Judge Gomez seemed to confirm both the objective territorial principle and the effects doctrine: ‘[by] permitting these objects to be viewed in France and allowing surfers located in France to participate in such a display of items for sale, the Company YAHOO! Inc. is therefore committing a wrong in the territory of France [...] Whereas, the damage being suffered in France, our jurisdiction is therefore competent to rule on the present dispute under Section 46 of the New Code of Civil Procedure’.¹³⁴ Besides, confirmation of this point can be found in the different interpretation given by some authors of the jurisdictional basis relied upon by the TGI to establish jurisdiction. Indeed, while some commentators found that the TGI had relied on the effects doctrine, others interpreted Judge Gomez’s decision as an example of the application of the objective territorial principle.¹³⁵ Overall, this point can be concluded by observing that on the Internet the distinction between these two principles seems to lose “significance”, since, as has been pointed out by Hayashi, ‘[t]he extent of extraterritorial jurisdiction justified by the objective territorial principle seems to be as limitless as the one justified by the effects doctrine’.¹³⁶

The third conclusion is that in addition to the objective territorial principle and the effects doctrine, some national courts carried out a targeting test to reinforce the finding that they had jurisdiction over the defendants.¹³⁷ The extent of this targeting test was, however, quite limited. Indeed, the courts established the defendant’s intent to target an audience located within the domestic forum based on a very limited number of factors. In the *Young v New Haven* case, for example, Virginia Western District Court referred to the content of the allegedly defamatory article. The judges found that the fact that the article mentioned a Virginia resident and was related to events that had happened in Virginia proved that the exercise of jurisdiction over the defendants respected the due process requirement.¹³⁸ Another example of this point can be found in the TGI’s reliance in the *Yahoo!* case on the language of the advertising banners shown to the users that accessed Yahoo.com from France. Judge Gomez found that the fact that Internet users located in France were shown advertising banners in French proved that Yahoo! Inc. was targeting a French audience.¹³⁹ Such reliance on the targeting test as an additional basis of jurisdiction could be interpreted as a desire on the Courts’ part to justify the application

¹³⁴ Greenberg (n 112) 1208-1209 citing Pl.’s Compl. for Decl. Relief, ex. A, at 5-6.

¹³⁵ See Greenberg (n 112) 1208 for the effects doctrine; Hayashi (n 1) 295-296 for the objective territorial principle.

¹³⁶ Hayashi (n 2) 299.

¹³⁷ Uerpmann-Witzack (n 3) 1255-1256.

¹³⁸ *Young v New Haven Advocate et al* W. D. (n 10) 508.

¹³⁹ TGI Paris, référé, 20 Novembre 2000, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France* (n 123) 4.

of national laws to foreign defendants by showing a further link, however feeble, between the country exercising jurisdiction and the events happened online.

The last conclusion that can be drawn is related to the limits to the exercise of jurisdiction based on access. The access-based jurisdictional approach seems to give all the States where a certain content published online can be accessed the power to exercise jurisdiction over it. However, the cases examined show that two limits have emerged. The first is related to defamation cases. This limit is the requirement that national courts establish jurisdiction over a defamation claim only if the claimant has a reputation in the domestic forum.¹⁴⁰ The reputation requirement limits the number of States that can exercise jurisdiction over content published online from a foreign State. Indeed, it is unlikely that a person has a reputation in every country where the allegedly defamatory content can be accessed.¹⁴¹

The second limit is related to the proof of actual access to the content published online within the domestic forum. More specifically, in the cases examined, the national courts have established jurisdiction over online content that could be accessed from within their territory when the party making this argument proved that that was the case.¹⁴² In other words, proof of actual access to content published online is required, while the presumption that content published online can and was accessed within the domestic forum is not deemed enough to exercise jurisdiction.¹⁴³ The *Coleman v MGN Limited* illustrates this point particularly well. Indeed, in that case the Supreme Court of Ireland established that it did not have jurisdiction over the content published by MGN because no evidence had been produced showing that that content or the newspaper where it appeared had been published online in 2003. In addition, there was no evidence that the defamatory material had been accessed from within the territory of Ireland.¹⁴⁴ Due to the worldwide nature of the Internet, the actual access requirement does not limit significantly the exercise of State jurisdiction based on access. Indeed, it appears relatively easy to prove that a website can be accessed within a given national territory, especially if the website does not filter users based on their geographical location. Nonetheless, the actual access requirement constitutes a distinctive characteristic of the access-based approach and it contributes to shed light on this jurisdictional criterion.

¹⁴⁰ *Dow Jones and Company Inc v Gutnick* (n 9) [48]; *Young v New Haven Advocate et al*, 4th Cir. (n 10) 8; *Bredeen v Black* (n 12) [11]; *Yeung, Sau Shing Albert v Google Inc* (14) [37].

¹⁴¹ Maier (n 16) 151.

¹⁴² *R v Perrin* (n 8) [2]; *Young v New Haven Advocate et al*, 4th Cir. (n 10) 5; *Yeung, Sau Shing Albert v Google Inc* (n 13) [4], [42]; *Bredeen v Black* (n 12) [20]; *Dow Jones v Gutnick* (n 8) [2].

¹⁴³ Maier (n 14) 154.

¹⁴⁴ *Coleman v MGN Limited* (n 10) [15].

4. The implications of the access-based jurisdictional approach on the fulfilment of freedom of expression online

The access-based jurisdictional approach has attracted many critiques. The first critique that has been moved to this approach is that it impacts negatively on the freedom of expression of Internet users located in foreign States and subjected to foreign jurisdictions.¹⁴⁵ Indeed, if all the countries followed the same approach and claimed that the application of their national laws extended globally, the principle of freedom of expression and the right to access information, as well as the principle of certain and predictable laws could be compromised. Yahoo!'s decision following the TGI's proceedings to amend its terms and conditions and ban the sale of Nazi-related items is particularly useful to illustrate this point. Indeed, as observed by Korff, 'whereas it was always completely out of the question that a US court would impose such a ban, Yahoo! was put in a position by the ruling of a foreign court in a foreign jurisdiction that led it to decide "voluntarily" to impose a ban on US citizens using its US-based services to buy and/or sell Nazi memorabilia, a ban that US courts could most probably not have imposed'.¹⁴⁶

Another example of the implications of the access-based jurisdiction on the rights of foreign citizens is represented by the *Perrin* case. In that case, the EWCA made it clear that the content published on Mr. Perrin's website was illegal in the UK.¹⁴⁷ Therefore, as observed by some commentators, if the person who manages a website hosting similar content from a foreign country were to enter the territory of the UK, he would be liable for prosecution there.¹⁴⁸ As stated above, this would happen regardless of whether the content displayed on the website is legal in the country where the website is hosted.

Freedom of expression concerns have also been raised regarding the use of the access-based approach in defamation cases. On the one hand, as observed by Maier, some commentators have pointed out that this approach encourages forum shopping and exposes publishers to liability in virtually all the countries where the online content can be accessed.¹⁴⁹ On the other hand, other authors and some courts recurring to the access-based approach have underlined that the requirement that the claimant has a reputation in the forum exercising jurisdiction effectively limits the number of countries where the

¹⁴⁵ Council of Europe High Commissioner for Human Rights report (n 5) 60-62.

¹⁴⁶ Council of Europe High Commissioner for Human Rights report (n 5) 59-60.

¹⁴⁷ *ibid* 59.

¹⁴⁸ Alisdair A. Gillespie, 'Jurisdictional issues concerning online child pornography' (2012) 20 *Int J Law Info Tech* 170.

¹⁴⁹ Maier (n 16) 151.

publishers are liable.¹⁵⁰ Another limitation to the risk of forum shopping has been identified in the fact that the claimants might be inclined to pursue a defamation case only in those forums where the damage to their reputation has been substantial, in the hope to receive a consistent reimbursement.¹⁵¹ However, both the above-mentioned points are controversial. Indeed, as observed in the Geneva Internet Disputes Resolution Policy “practical evidence in the field of online defamation has shown that forum shoppers are not actually concerned with the quantum of damages as they rely on the mere threat of a lawsuit made abroad to pressure websites into settlement or into compliance”.¹⁵² Therefore, it can be observed that the mere threat of legal action on multiple jurisdictions can have a negative impact on freedom of expression.

Another critique moved to the access-based approach is related to the lack of a thorough analysis of the link between the perpetrator of the unlawful act, the illegal content published online and the State that exercises jurisdiction, as observed by Korff.¹⁵³ This analysis could have helped the national courts to limit the exercise of their jurisdiction only to cases that have a close nexus with their country. The targeting test applied by the Fourth Circuit Court of Appeal in the *Young v New Haven* case offers an example of this point. Indeed, in that case the Court stated that ‘an intent to target and focus’ on the audience located in a given State is necessary for that State to establish jurisdiction over the person responsible for the publication of that content online.

In relation to the necessity of conducting such an analysis there are, however, contrasting opinions. Indeed, in the *R v Perrin* case, when referring to the theory related to the country where the major steps for publication had been taken, Mr. Perrin’s counsel accepted that this theory was not supported by any European or English authority.¹⁵⁴ However, this statement was related to the position of European or English authorities (as interpreted by Mr. Perrin’s counsel and the EWCA) up to 2002, which is when the *R v Perrin* case was held. As to more recent positions regarding the criteria according to which a State can exercise jurisdiction over content published online, it is worth mentioning the 2011 Joint Declaration on Freedom of Expression and the Internet issued by the Special Representatives for freedom of information and freedom of the media of the United Nations (UN), the Organisation for Security and Cooperation in Europe (OSCE), the Organisation of American States (OAS) and the African Commission on

¹⁵⁰ *ibid*; *Dow Jones v Gutnick* (n 9) [152]-[155].

¹⁵¹ Geneva Internet Disputes Resolution Policies 1.0. (n 16) 4.

¹⁵² *ibid*.

¹⁵³ Council of Europe High Commissioner for Human Rights report (n 5) 61-62.

¹⁵⁴ *R v Perrin*, (n 8) [33].

Human and People's Rights (ACHPR).¹⁵⁵ According to the Joint Declaration, '[j]urisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State'.¹⁵⁶ A similar opinion has been expressed by the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR). Indeed, in the document *Freedom of Expression and the Internet* published in 2013 the Office of the Special Rapporteur stated that 'in order to prevent the existence of indirect barriers that disproportionately discourage or directly limit the right to freedom of expression on the Internet, jurisdiction over cases connected to Internet expression should correspond exclusively to States to which the cases are most closely associated, normally because the perpetrator resides there, the expression was published from there, or the expression is aimed directly at a public located in the State in question'.¹⁵⁷

These two documents define the criteria for establishing jurisdiction in Internet related cases in a slightly different way. More specifically, while the Joint Declaration explicitly refers to the place from where 'the content is uploaded'¹⁵⁸, the document produced by the Office of the Special Rapporteur of the IACHR refers more generically to the State from where 'the expression was published'.¹⁵⁹ The latter is more generic than the former because it does not explain what publication consists of and whether it encompasses downloading content in addition to uploading it.¹⁶⁰ This point is particularly relevant. Indeed, defining the act of publishing content online in a way that encompasses only the uploading of content has the effect of reducing the number of national courts that could legitimately exercise jurisdiction over that content. On the other hand, if the place of publication is the place where the content is uploaded or downloaded, then potentially

¹⁵⁵ Joint Declaration on Freedom of Expression and the Internet issued by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Organisation of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 1 June 2011, available at <http://www.osce.org/fom/78309> (Accessed: 17 August 2016).

¹⁵⁶ *ibid* [4](a).

¹⁵⁷ *Freedom of Expression and the Internet*, Office of the Special Rapporteur for Freedom of Expression Inter-American Commission on Human Rights, 31 December 2013 para. 66, available at http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_Internet_ENG%20WEB.pdf (Accessed: 17 August 2016).

¹⁵⁸ Joint Declaration on Freedom of Expression and the Internet (n 155) [4] (a).

¹⁵⁹ *Freedom of Expression and the Internet* (n 157), para 66.

¹⁶⁰ *R v Perrin* (n 8) [18].

all the countries in the world where that content can be accessed could have jurisdiction, which is the core of the *Perrin*'s reasoning.

Overall, following the 2011 Joint Declaration and the 2013 IACHR document some conclusions can be drawn. First, some consensus at the international level exists - at least among some international authorities in the field of freedom of expression - on limiting State jurisdiction only to cases where a close nexus can be found between the State establishing jurisdiction and the content published online/person publishing it. Second, some criteria for establishing which State has the right to exercise jurisdiction online have been identified. These are: the place where the author/perpetrator is established, the place where the content has been uploaded/published and the place/people targeted by the content published/uploaded on the Internet. The third conclusion stems from observing that the first two of these criteria refer to the territorial principle of jurisdiction, while the last one is related to a targeting test. It can therefore be argued that even in a borderless environment such as the Internet territory is seen as a central element in establishing jurisdiction. On the other hand, however, the territorial principle could be not very useful in all those cases where it cannot be established the place where the content has been uploaded or even who uploaded it. Therefore, the targeting test seems better suited to establish which State has jurisdiction in a non-physical environment such as the cyberspace. Indeed, the targeting test permits to by-pass the obstacles represented by the unknown location of the person who uploaded some content online or the place where the content was uploaded from. This is because for the targeting test to be satisfied it is sufficient to establish that the content published online was targeting an audience located within a given State, regardless of where the content was originally uploaded from or who uploaded it. However, the difficulty associated with the targeting test is that so far there is no consensus as to the criteria upon which this test should be based.¹⁶¹ In other words, it is unclear which factors must be considered when establishing whether content published online from a given State targets an audience located in a foreign country. The debate regarding this issue is currently ongoing within the scholarly community investigating State jurisdiction online and is likely to continue in the forthcoming years.

5. Conclusion

In this paper, the main characteristics of the access-based jurisdictional approach have been examined through the analysis of some key cases discussed in various

¹⁶¹ Geneva Internet Disputes Resolution Policies 1.0. (n 16) 6-7.

jurisdictions. Notwithstanding the heterogeneous nature of the cases examined, several conclusions can be drawn regarding the access-based jurisdictional approach.

First, the accessibility of online content from within the territory of a given State has been used to justify the application of both the objective territorial principle and the effects doctrine.

Moreover, in addition to these two jurisdictional principles, some national courts carried out a targeting test to reinforce the finding that they had jurisdiction over the defendants. The extent of this targeting test was, however, quite limited, since the courts established the defendant's intent to target the domestic forum based on a small number of factors. Such reliance on the targeting test could be interpreted as the courts' desire to justify the application of national laws to foreign defendants by showing a further link, however feeble, between the country exercising jurisdiction and the events happened online.

Furthermore, the cases examined show that the distinction between the objective territorial principle and the effects doctrine is not always clear-cut when these two principles are applied to cyberspace. Indeed, some courts' decisions can be interpreted as an example of the simultaneous application of both principles. Some authors have observed that a consequence of this point is that '[t]he extent of extraterritorial jurisdiction justified by the objective territorial principle seems to be as limitless as the one justified by the effects doctrine'.¹⁶²

Another conclusion that can be drawn from the analysis conducted in this paper is that there seems to be two limits to the exercise of jurisdiction based on access: the reputation requirement, which is related to defamation cases, and the actual access requirement. However, the efficacy of these requirement on limiting the exercise of jurisdiction based on access is debated. This is especially true regarding the reputation requirement, since the threat of lawsuits in multiple legal systems is still a possibility and constitutes a phenomenon that can negatively impact freedom of expression online.

The curtailing effect of the access-based approach on freedom of expression is one of the main critiques that have been moved to this jurisdictional criterion. Indeed, the cases analysed in this paper could be interpreted as having the same overall effect: imposing restrictions on Internet users located in foreign countries and subjected to foreign jurisdictions. This is because if other countries followed the same approach and claimed that the application of their national laws extended globally, the principle of

¹⁶² Hayashi (n 2) 299.

freedom of expression, the right to access information, and the principle of certain and predictable laws could be compromised. Indeed, following the court's decision in the *Yahoo!* case, Yahoo! introduced a ban on the sale of Nazi-related items among its terms and conditions. Therefore, Internet users in the US could not view, buy or sell material that was perfectly legal there according to US law. In addition, following the logic of the *Perrin* case, if a person living outside the UK and managing a website hosted in a foreign country published on that website content illegal in the UK, he could be prosecuted there if he were ever to enter British territory.

Another critique moved to establishing jurisdiction based on access is that no thorough analysis of the link between the perpetrator of the unlawful act, the illegal content published online and the State that exercises jurisdiction has been conducted by the courts adopting this approach. This analysis could have helped the national courts to limit the exercise of their jurisdiction only to cases that have a close nexus with their country. In relation to the necessity of conducting such an analysis there are, however, contrasting opinions. Nevertheless, there seems to be some consensus among international authorities in the field of freedom of expression on limiting State jurisdiction only to cases where a close nexus can be established. Besides, some criteria for determining which State has the right to exercise jurisdiction online have been identified by the above-mentioned authorities. These are: the place where the author/perpetrator is established, the place where the content has been uploaded/published and the place/people targeted by the content published/uploaded on the Internet. There are, however, some difficulties associated with these criteria. Indeed, the territorial principle is not useful in all those cases where it cannot be established the place where the content has been uploaded or even who uploaded it. On the other hand, while the targeting test permits to by-pass these obstacles, there is no consensus as to the criteria upon which this test should be based. The debate regarding this issue is currently ongoing within the scholarly community investigating State jurisdiction online and is likely to continue in the forthcoming years.

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