Chapter-5

Jurisdictional Issues in Electronic Contracts

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One question that inevitably arises, after the conclusion of any contract (including e-contracts), is regarding the time ‘when’ and the place ‘where’ the contract was actually concluded. In the last chapter (Chapter-4), the questions of when and where a contract is said to have formed have been answered. In this chapter, the question regarding where it is governed and enforced will be answered.

As the internet is a unique market place in terms of market penetration, any computer, anywhere in the world, connected to the internet can access a web site and may conclude, though that site, an e-contract. E-commerce, like off-line commerce, leads to obligations. These contractual obligations exist between the offeror and the offeree in an electronic market. It is also not necessary that obligations arising out of e-commerce will have electronic attributes only; there may be physical attributes also, in terms of physical execution of the contract, although it was formalized by electronic means.

The nature of the internet as a world wide web of linked networks and computers also, from time to time, could give rise to issues pertaining to jurisdictions. When, for instance, an Indian company accepts an offer from a American company over the internet to render certain service in Singapore and the ISP of the Indian Company (and its server) is in London and that of the American Company is in Colombo, the determination of the choice of law would indeed be a challenging task, leading to consequences not intended by the contracting parties!

Imposing the traditional common law principles of jurisdiction to the borderless world of internet transactions has proved to be very challenging for the courts and has resulted in the application of a myriad of different tests and principles.

Is the internet necessitating an evolution or a revolution in legal thinking? The legal community disagrees about whether the internet is yet another breakthrough that can be incorporated into the classical legal principals or whether the medium is so inherently different from reality that an entirely new paradigm is necessary.¹ The

preceding notions of jurisdiction are based on a physical reality which does not exist in cyberspace. Actions in the virtual world of the internet, however, have legal ramifications in the tangible world.\(^2\) For that reason, and due to the undefined dangers involved in the wholesale creation of new legal principals, established norms should be used to regulate this new technology. Personal jurisdiction arising from internet contacts poses the most difficult application of traditional law. Lot of attention has been paid recently to jurisdictional issues arising from the maintenance of websites. There are, nevertheless, other methods by which persons can cross jurisdictional lines via the internet.

5.1 THE US LAW OF JURISDICTION

5.1.1 Traditional Exercise of Jurisdiction

Personal jurisdiction is the right of a court to call a person before it to reply to allegations made by another party. The plaintiff, by virtue of filing suit, prefers the jurisdiction in which he elects to have the dispute heard. The defendant after that has the option of accepting the forum or filing a motion to dismiss in order to escape the judgment of that jurisdiction on the substantive issue of the case. Traditionally, a court could only exercise personal jurisdiction over persons present in the State in which the action was brought.\(^3\) This rule, however, became less effective as interactions increased between persons who are geographically distant.

5.1.2 Expansion of Jurisdiction by the US Supreme Court

The law has had to adapt to the development of faster modes of transportation and methods of communication that lessen or negate a party’s physical contact with the forum State.\(^4\) The US Supreme Court determined that relaxation of the due process\(^5\) limits on personal jurisdiction is appropriate because ‘modern transportation


\(^4\) See, e.g., *Hess v Pavloski*, 274 US 352 (1927) (applying personal jurisdiction to the invention of the automobile) *See also, Hanson v Denckla*, 357 US 235, 250-51 (1958) (‘As technological progress has increased the flow of commerce between the states, the need for jurisdiction over nonresidents has undergone a similar increase.’)

\(^5\) See, US CONST. Amend. XIV.
and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.\(^6\)

The Court took a substantial step in this direction in *International Shoe Co. v Washington*\(^7\) and created the ‘minimum contacts’ test that allows for jurisdiction over a non-resident when such contacts exist between the defendant and the forum State such that “maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’.”\(^8\) The Court’s ‘minimum contacts’ test for specific jurisdiction\(^9\) abandons more formalistic tests that focus on a defendant’s ‘presence’ within a State in favour of a more flexible inquiry into whether a defendant’s contacts with the forum made it reasonable, in the context of the US federal system of government, to require it to defend the suit in that State.\(^10\)

Through cases like *International Shoe*, the court set out fundamental guidelines under which the States must operate. The language in the court’s opinions allowed for flexibility and a measure of fairness under the law, but it has removed the certainty and uniformity that can only exist under a bright line rule.\(^11\)

#### 5.1.3 Application of ‘Minimum Contacts’

Constitutional due process gives the upper limit for state jurisdiction; it does not define it. State law determines state court jurisdiction within the constitutional boundaries; and in response to the relaxed requirements for jurisdiction, many States rewrote their laws.\(^12\) Some state long-arm statutes have defined jurisdiction as that

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\(^{7}\) 326 US 310 (1945).

\(^{8}\) Ibid, at 316 (quoting *Milliken v Meyer*, 311 US 457, 463 (1940)).

\(^{9}\) Specific jurisdiction is the exercise of personal jurisdiction over a non-resident when the case stems directly from the contacts the party has with the forum state. See, *Helicopteros Nacionales de Columbia, S A v Hall*, 466 US 408, 414 (1984). The Court also created a test for general jurisdiction in instances where there is no connection between the case and the contacts used to establish jurisdiction. The Court requires that the party have ‘systematic and continuous’ contacts with the forum state and that the party would expect to have to defend himself in that state for any type of claim brought against him. Cited in Cheryl L. Conner, *Compuserve v Patterson: Creating Jurisdiction Through Internet Contacts*, 4 RICH. JL & TECH 9, (Spring 1998) [http://www.richmond.edu/~jolt/v4h3/conner.html] accessed: 04 June 2012.


\(^{11}\) Cheryl L. Conner, *supra*, n 1.

\(^{12}\) Ibid.
which is allowed under the (US) Constitution,\footnote{See, e.g., CAL. CIV. PROC. 410.10 (West 1973) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").} while others are more specific.\footnote{See, e.g., NY CPLR 302 (Consol. 1978):}

Courts located in States that describe personal jurisdiction with more specificity may not exercise jurisdiction over a person, even though jurisdiction would not violate due process, unless the acts giving rise to the claim fall within one of the statutory categories. Typically, federal courts may exercise personal jurisdiction\footnote{See, FED. R. CIV. P. 4(k)(l)(A). See also, Volk Corp \textit{v} Art-Pak Clip Art Service, 432 F. Supp. 1179, 1180 n.2 (SDNY 1977) (Federal courts must use state court processes in the absence of a contrary statute ).} only to the extent a State court, in the State in which the federal court sits, may exercise jurisdiction under its long-arm statute.\footnote{Those exceptions include: the Securities Exchange Act, 15 USC 78 aa, the Clayton Act, 15 USC 22; RICO, 18 USC 1965; ERISA, 29 USC’ 1451(d), and statutory interpleader, 28 USC 2361. Cited in Cheryl L Conner, \textit{supra}, n 1.} There are few statutory exceptions.\footnote{Cheryl L Conner, \textit{supra}, n 1.} Accordingly, federal courts also rely on the ‘minimum contacts’ analysis to establish personal jurisdiction.

The circuit courts have not been consistent in their application of the ‘minimum contacts’ test.\footnote{See, \textit{Ibid}.} There has, however, been movement toward uniformity with the development of a three-prong test:\footnote{See, \textit{Ibid}.} (1) the claim underlying the litigation ‘arise(s)
out of or relate(s) to the defendant’s contacts with the forum'; 20 (2) the defendant ‘purposefully avail itself of the privilege of conducting activities within the forum State’; 21 and (3) ‘maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’. 22

One of the overarching principles courts in both Canada and the US have looked to on questions of jurisdiction is that of reasonableness with regard to the circumstances. 23 In Canada, the courts have framed this as a ‘substantial connection’ test 24, whereby connecting factors such as the location of the content provider, the host server, the intermediaries and the end user, are considered in the overall analysis. 25 In the US, the reasonableness requirement is captured in the ‘minimum contact’ or ‘purposeful availment’ test. 26 The principle being that a defendant cannot be brought before a court of a particular State unless that person has: minimum contacts... such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’. 27 In Sayeedi v Walser 28 a US trial court refused to exercise jurisdiction over an e-Bay transaction between two individuals on the basis that one sale, ‘without more, does not constitute sufficient purposeful availment to satisfy the minimum contacts necessary to justify summoning across State lines, to a New York court, the seller of an allegedly non-conforming good’.

Another approach to determining jurisdiction was outlined in the US case of Zippo Manufacturing v Zippo Dot Com. 29 The Court, in this case, applied a passive versus active test to the question of jurisdiction which involved a ‘sliding scale analysis’

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22 International Shoe Co. v Washington, 326 US 310, 316 (1945) (citing Milliken v Meyer, 311 US 457, 463 (1940)).
24 Morguard Investments Ltd. v De Savoye, [1990] 3 SCR 1077 (A judgment delivered by the Supreme Court of Canada)
28 2007 NY Slip Op 27081. (a US Trial Court judgment)
computing the nature and quality of the commercial activity of the defendant on the internet. To invoke jurisdiction, the *Zippo* test requires an interactive website and commercial activity. The passive versus active approach has been criticized for discouraging interactivity in a time when websites are in fact becoming more interactive.\(^{30}\)

More recently, courts have looked towards effects or targeting tests\(^{31}\), determining jurisdiction on the basis of the actual impact of the action in the locality.\(^{32}\) The principle was set out in the pre-internet case of *Calder v Jones*\(^{33}\): the fact that the *action had an effect* in the other jurisdiction was factored into the equation in order to determine whether jurisdiction existed in that forum. Under this 'effects test', jurisdiction is determined by analyzing the effects intentionally caused within the forum by a party's online conduct outside the forum.\(^{34}\)

The internet age and the scores of transactions between parties across the globe, while having an impact on several areas of law, have also led to the (need of) evolution of a new variety of jurisdictional jurisprudence. The two major factors that need to be considered vis-à-vis a court extending its jurisdiction over e-business, that have in fact acted as the twin reasons for the various case laws on this point, and the evolution of the law, are first, the chief reason behind corporate houses choosing business over the internet is precisely because of its cost effectiveness, and to now factor in the potential costs of defending against litigation in every place where they could be accessed would be a major dent in their cost planning, making the web-based business more expensive.\(^{35}\) Second, on the other hand, to allow the business and service providers to insulate themselves against the jurisdiction in every state, except the place where they are physically located, would be troublesome and

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\(^{30}\) Michael Geist, supra, n 23.

\(^{31}\) See Information Corporation *v* American Infometrex (D. Md. April 2001); Panavision International *v* Toeppen (1998), 141 F 3d 1316 (9th Cir); Easthaven Ltd *v* Nutrisystem com Inc. (2001) 55 OR 3d 334 (Ontario Superior Court of Justice)

\(^{32}\) Mary Paterson, 'Following the Right Lead: Gutnick and the Dance of Internet Jurisdiction' (March 2004) 3(1) Can J. Law &. Tech. 49


\(^{34}\) Julia Alpert Gladstone "Determining Jurisdiction in Cyberspace The 'Zippo' Test or the 'Effects' Test?" Bryant College, Smithfield, Rhode Island, USA. Available at <http://www.informingscience.org/proceedings/IS2003Proceedings/docs/029Glad.pdf>

unreasonable to the consumers situated across the globe, who have a much lesser bargaining power and resources to litigate in a foreign country.\(^{36}\)

To achieve a balance between these two diverse considerations, the US courts have applied the principles of minimum contact, effective functions, and the theory of long arm statutes, generally used in traditional contracts, with necessary adaptations to e-contracts. The courts, in most cases, assume jurisdiction where it is proved that the corporate on its own volition marketed and contracted with the other party belonging to the forum State, with the cause of action arising out of its actions.\(^{37}\)

**5.1.4 CompuServe, Inc. v Patterson\(^{38}\)—A Case Study**

In *CompuServe, Inc. v Patterson*, a click-wrap agreement was held enforceable. In this case, Patterson, a Texas resident, got into a contract to distribute shareware through CompuServe’s internet server located in Ohio. From Texas, between 1991 and 1994, Patterson electronically uploaded thirty-two master software files to CompuServe’s server in Ohio through the internet. One of Patterson’s software products was designed to facilitate people navigate the internet. Subscribers, who downloaded the software, paid the ‘shareware’ fee and sent their money to CompuServe, which then deducted a percentage and sent the rest to Patterson. The standard electronic distribution agreement ‘was first manifested at Patterson’s own computer in Texas, and then transmitted to the CompuServe computer system in Ohio.’ Both, the contract and the terms of service to which the agreement referred, stated that they were entered into in Ohio, and the terms of service said that it was to be governed by Ohio law. When CompuServe later started marketing a product that Patterson believed to be similar to his own, he threatened to sue. Hence, a dispute arose between Patterson and CompuServe as regards possible trademark infringement by CompuServe when it marketed a product similar to that provided by Patterson. CompuServe instituted an action in the Southern District of Ohio, seeking a declaratory judgment. The trial court held that the electronic ‘link’ between the defendant in Texas and CompuServe in Ohio were ‘too tenuous to

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\(^{38}\) 89 F. 3d 1257 Court of Appeals, 6th Circuit 1996
support the exercise of personal jurisdiction' in a lawsuit by CompuServe against a Texas subscriber.

This case presents a novel question of first impression:39 Did CompuServe make a *prima facie* showing that Patterson’s contacts with Ohio, which have been almost entirely electronic in nature, are sufficient, under the Due Process Clause, to support the district court’s exercise of personal jurisdiction over him?

The US Supreme Court has noted, on more than one occasion40, the confluence of the ‘increasing nationalization of commerce’ and ‘modern transportation and communication’, and the resulting relaxation of the limits that the Due Process Clause imposes on courts’ jurisdiction. The Court stated that there is less perceived need today for the federal constitution to protect defendants from ‘inconvenient litigation’, because all but the most remote forums are easily accessible for the pursuit of both business and litigation. The US Supreme Court41 has also stated that the due process rights of a defendant should be the courts’ primary concern where personal jurisdiction is at issue.

The internet represents possibly the latest and greatest manifestation of these historical, globe-shrinking trends. It allows anyone with the right equipment and knowledge—that is, people like Patterson—to operate an international business cheaply, and from a desktop. That business operator, nevertheless, remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able ‘to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit’. To determine whether personal jurisdiction exists over a defendant, federal courts apply the law of the forum State, conditional on the limits of the Due Process Clause of the Fourteenth

39 Ibid, at 1262
Amendment. ‘[T]he defendant must be amenable to suit under the forum State’s long-arm statute and the due process requirements of the Constitution must be met.’

According to the Court of Appeal, the Ohio long-arm statute allows an Ohio court to exercise personal jurisdiction over non-residents of Ohio on claims arising from, inter alia, the non-resident’s transacting any business in Ohio. It is settled Ohio law, furthermore, that the ‘transacting business’ clause of that statute was meant to extend to the federal constitutional limits of due process, and that as a result Ohio personal jurisdiction cases require an examination of those limits. Also, personal jurisdiction may be either general or specific in nature, depending on the nature of the contacts in a given case.

In the instant case, for the reason that CompuServe bases its action on Patterson’s act of sending his computer software to Ohio for sale on its service, CompuServe seeks to establish such specific personal jurisdiction over Patterson. Therefore, as always in this context, the crucial federal constitutional inquiry was whether, given the facts of the case, the non-resident defendant had sufficient contacts with the forum State that the district court’s exercise of jurisdiction would comport with ‘traditional notions of fair play and substantial justice’. The Court of Appeal has repeatedly employed three criteria to make this determination:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant’s activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

The Court finally concluded that Patterson had knowingly made an effort — and, in fact, purposefully contracted — to market a product in other states, with Ohio-based CompuServe operating, in effect, as his distribution centre. Therefore, it is reasonable to subject Patterson to suit in Ohio, the State which is home to the

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42 89 F 3d 1257 Court of Appeals, 6th Circuit 1996, at p. 1252
43 Ibid, at 1263.
computer network service he chose to employ. The Court also observed the following:44

Admittedly, merely entering into a contract with CompuServe would not, without more, establish that Patterson had minimum contacts with Ohio... By the same token, Patterson’s injection of his software product into the stream of commerce, without more, would be at best a dubious ground for jurisdiction... Because Patterson deliberately did both of those things, however, and because of the other factors that we discuss herein, we believe that ample contacts exist to support the assertion of jurisdiction in this case, and certainly an assertion of jurisdiction by the state where the computer network service in question is headquartered.

Thus, in CompuServe, to the question—whether an internet service provider’s home State can exercise jurisdiction over an out-of-state author of software who subscribes to the internet service provider and receives commissions for software sold via the internet service provider—the Court answered in affirmative stating that a forum state can exercise jurisdiction over an author of software who sells his software via internet service provider based in the forum State because (a) the author purposefully avails himself of the forum’s laws by acting in the forum, (b) the cause of action arises from that availment, and (c) the burden on the defendant author is less than that on the forum State’s interests in determining its laws concerning trademarks and trade names. The US Court of Appeal, therefore, extended the doctrine of minimum contact to the contracts of an electronic nature, and although, the contract between the parties had itself originally stated that it would be governed by the Ohio law, the Court took this clause on the choice of law as only one of the considerations of jurisdiction and looked at other facets such as targeted customers of Patterson in Ohio, the mode of payment, etc.

5.1.5 McDonough v Fallin McElligott

A similar case on jurisdiction, that reiterated the fact on minimum contact and restricted the courts from assuming jurisdiction in all cases where a website could be merely accessed, was the case of McDonough v Fallin McElligott45, where the Court held that a commercial website’s accessibility to forum residents, standing alone, is

44 Ibid, at 1265
insufficient to sustain personal jurisdiction over the creator of the site in a suit that does not arise out of operation of the site itself. In this case, the plaintiff, a sports photographer residing in California, sued the defendant (Fallon McElligott), a Minnesota based advertising agency which had neither offices nor employees in California. The defendant also operated a website that could be accessed by California residents (although that apparently did not feature the allegedly infringing advertisement). The plaintiff alleged that the defendant's conduct constituted copyright infringement, unfair competition, and violations of plaintiff's privacy and publicity rights. The plaintiff sued on copyright claims for reproducing a photo of basketball player (Charles Barkley) for use in a magazine and submission to a national advertising awards contest. The plaintiff argued that the web site's accessibility by Californians allowed him to sue the defendant for issues wholly unrelated to the content of the website. In granting defendant's motion to dismiss for want of personal jurisdiction, the Court explicitly held that the availability of defendant's website to California residents was insufficient to create personal jurisdiction over the defendant for all of its actions, whether or not related to the web site. The court observed: '...plaintiff has alleged that Fallon maintains a World Wide Web site. Because the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists; the court is not willing to take this step. Thus, the fact that Fallon has a Web site used by Californians cannot establish jurisdiction by itself.' The Court in the above case, thus, made a distinction between the mere existence of a website that could be accessed from within the jurisdiction of the forum State and certain express actions on the part of a contracting party to invoke the jurisdiction of a court.

5.1.6 Zippo Manufacturing Co. v Zippo Dot Com, Inc.46—A Case Study

_Zippo Manufacturing Co. v Zippo Dot Com, Inc_ is basically an internet domain name dispute decided by the United States District Court for the Western District of Pennsylvania wherein the Court found personal jurisdiction over a defendant providing internet services.

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The plaintiff, Zippo Manufacturing Corporation (‘Manufacturing’), is a Pennsylvania corporation with its principal place of business in Bradford, Pennsylvania. Manufacturing makes, among other things, well known ‘Zippo’ tobacco lighters. Zippo Dot Com, Inc. (‘Dot Com’) is a California corporation with its principal place of business in Sunnyvale, California. Dot Com operates an internet website and an internet news service and has obtained the exclusive right to use the domain names ‘zippo.com’, ‘zippo.net’ and ‘zipponews.com’ on the internet.

Dot Com’s Web site contains information about the company, advertisements and an application for its internet news service. Any customer, who wants to subscribe to the service, fills out an on-line application that asks for a variety of information including the person’s name and address. Payment is made by credit card over the internet or the telephone. The application is then processed and the subscriber is assigned a password which permits the subscriber to view and/ or download internet newsgroup messages that are stored on the Defendant’s server in California.

Dot Com’s contacts with Pennsylvania have occurred almost exclusively over the internet. Dot Com maintains no offices, employees or agents in Pennsylvania. Dot Com’s advertising for its service to Pennsylvania residents involves posting information about its service on its webpage, which is accessible to Pennsylvania residents via the internet.

Defendant has approximately 140,000 paying subscribers worldwide. Approximately two percent (3,000) of those subscribers are Pennsylvania residents. These subscribers have contracted to receive Dot Com’s service by visiting its website and filling out the application. Additionally, Dot Com has entered into agreements with seven internet access providers in Pennsylvania to permit their subscribers to access Dot Com’s news service. Two of these providers are located in the Western District of Pennsylvania.

The basis of the trademark claims is Dot Com’s use of the word ‘Zippo’ in the domain names it holds, in numerous locations in its website and in the heading of
internet newsgroup messages that have been posted by Dot Com subscribers. When an internet user views or downloads a newsgroup message posted by a Dot Com subscriber, the word 'Zippo' appears in the 'Message-Id' and 'Organization' sections of the heading. The news message itself, containing text and/or pictures, follows. Manufacturing points out that some of the messages contain adult oriented, sexually explicit subject matter.

The plaintiff, therefore, files a complaint against Dot Com alleging trademark dilution, infringement, and false designation under the Federal Trademark Act, 15 USC §§ 1051-1127. In addition, the complaint alleges causes of action based on state law trademark dilution under 54 Pa.CSA § 1124, and seeks equitable accounting and imposition of a constructive trust. Dot Com moves to dismiss for lack of personal jurisdiction and improper venue pursuant to Fed R Civ P 12(b)(2) and (3) or, in the alternative, to transfer the case pursuant to 28 USC § 1406 (a).

The Court held that it may appropriately exercise personal jurisdiction over the Defendant and that venue is proper in this judicial district. It was observed that when a defendant raises the court's lack of personal jurisdiction as a defence, the burden is upon the plaintiff to come forward with sufficient facts to establish that the jurisdiction is proper. The plaintiff satisfies this burden by making a prima facie showing of sufficient contacts between the defendant and the forum State. The Court's authority to exercise personal jurisdiction is conferred by State law and the extent to which a court may exercise that authority is governed by the Due Process Clause of the Fourteenth Amendment.47

Pennsylvania's long arm statute empowered the Court to exercise jurisdiction over non-resident defendants upon contracting to supply services or things within the state. The Constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or specific jurisdiction over a non-resident defendant. General jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in 'systematic and continuous' activities in the

In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the 'minimum contacts' framework" of *International Shoe Co. v Washington* and its progeny. Manufacturing does not contend that the Court should exercise general personal jurisdiction over Dot Com. Manufacturing concedes that if personal jurisdiction exists in this case, it must be specific.

A three-pronged test has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant is appropriate: (1) the defendant must have sufficient 'minimum contacts' with the forum State, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable. The 'Constitutional touchstone' of the minimum contacts analysis is embodied in the first prong, 'whether the defendant purposefully established' contacts with the forum State. Defendants who "...'reach out beyond one State' and create continuing relationships and obligations with the citizens of another State are subject to regulation and sanctions in the other State for consequences of their actions." "[T]he foreseeability that is critical to the due process analysis is ... that the defendant's conduct and connection with the forum State are such that he should reasonably expect to be haled into court there." This protects defendants from being forced to answer for their actions in a foreign jurisdiction based on 'random, fortuitous or attenuated' contacts. "Jurisdiction is proper, however, where contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."

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49 326 US 310, 66 S.Ct 154, 90 L.Ed. 95 (1945).
50 *Mellon*, 960 F.2d at 1221.
51 952 F.Supp 1119, at 1122-23 (1997)
53 *Id.* (citing *Travelers Health Assn v Virginia*, 339 US 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950))
The 'reasonableness' prong exists to protect defendants against unfairly inconvenient litigation.\(^{57}\) Under this prong, the exercise of jurisdiction will be reasonable if it does not offend 'traditional notions of fair play and substantial justice.'\(^{58}\) While determining the reasonableness of a particular forum, the court must consider the burden on the defendant in light of other factors including: 'the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's right to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.'\(^{59}\)

The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet.

A passive website that does little more than making information available to those who are interested in it is no ground for the exercise of personal jurisdiction. The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.

When an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper. The defendant, in this case, has not merely posted information on a website that is accessible to Pennsylvania residents who are connected to the internet; but, it has done more than creating an interactive website through which it exchanges information with Pennsylvania residents in the hope of using that information for commercial gain later.

\(^{57}\) *World-Wide Volkswagen*, 444 US at 292, 100 S Ct. at 564-65.

\(^{58}\) *International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158.

\(^{59}\) *World-Wide Volkswagen*, 444 US at 292, 100 S Ct. at 56.
The defendant's business constitutes purposeful availment of doing business in Pennsylvania. The company has done more than advertising on the internet in Pennsylvania. It has sold passwords to approximately 3,000 subscribers in Pennsylvania and entered into seven contracts with internet access providers to furnish its services to their customers in the State.

The defendant argues that its contacts with Pennsylvania residents are merely fortuitous because Pennsylvanians happened to find its website or heard about its news service elsewhere and decided to subscribe. This argument misconstrues the concept of fortuitous contacts. The defendant chose to process Pennsylvania residents' applications and to assign them passwords. It knew the result of these contracts would be the transmission of electronic messages into Pennsylvania. The transmission of these files was entirely within its control. When a defendant makes a conscious decision to conduct business with the residents of a forum state, it has clear notice that it is subject to suit there.

A cause of action for trademark infringement occurs where the passing off occurs. Trademark infringement is a tort-like injury and a substantial amount of the injury from the alleged infringement was likely to occur within the home State of the plaintiff. Both a significant amount of the alleged infringement and dilution, and the resulting injury have occurred in Pennsylvania.

The Court, therefore, disagreed with the defendant's contention that the exercise of jurisdiction would be unreasonable in this case. Pennsylvania has a strong interest in adjudicating disputes involving the alleged infringement of trademarks owned by resident corporations. The defendant consciously chose to conduct business in Pennsylvania, pursuing profits from the actions that are now in question. Due process is not a territorial shield to interstate obligations that have been voluntarily assumed. Therefore, the Court decided the case in favour of the plaintiff, and personal jurisdiction over the defendant was valid.

The law laid down in the above-discussed cases seems to be a rational approach to the concept of jurisdiction over the internet. In its quintessence, the internet is a
storehouse of information created by the individual contributions of innumerable people from various corners of the world and from various legal systems that can be accessed anywhere in the world. To ensure that the internet retains its nature of universal access, it is necessary that the courts hold restraint before invoking jurisdiction over activities that may be reasonably construed to have occurred outside the territorial confines of its borders.60

5.2 POSITION IN EUROPE

The question as to which country’s courts have jurisdiction to resolve a dispute is answered in the majority of commercial contracts in Europe by one of the two regimes61—one is under the provisions of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968 (Brussels Convention), incorporated in the UK by the Civil Jurisdictions and Judgments Act 1982 (CJJA 1982) (as amended); and, the other is under Council Resolution (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation) which was adopted on 8 December 2000 and replaced the Brussels Convention in all EU Member States. The Brussels Regulation was extended to Denmark by separate agreement on 1 July 2007.62

For the application of Brussels/Lugano Convention or Brussels Regulation, a defendant must be ‘domiciled’ in a contracting State (i.e. a State party to the Convention or Regulation) (Article 2 of the Brussels Convention and Brussels Regulation).

Article 17 of the Brussels Convention provides that where the parties have agreed the jurisdiction, that court will have exclusive jurisdiction; however, this will not affect the consumer’s right to choose to sue in his own jurisdiction in a consumer contract. The Brussels Regulation, in addition, provides for the enforcement of non-exclusive jurisdiction clauses [Art 23 (1)]. The Brussels Convention requires any agreement as

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60 Abhishek Krishnan and Rakshithaa, supra, n 35, at 211.
62 Ibid, at A/64.
to jurisdiction to be in writing, while the Brussels Regulation, on the other hand, provides that any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing [Art 23 (2)].

Where the Brussels Convention or the Brussels Regulation do not apply, the English common law governs the issue of jurisdiction.\(^63\) This will be the case where contracts are concluded with persons domiciled outside States not subject to the Brussels Convention or Brussels Regulation. Common law rules on jurisdiction will be most relevant to two situations:\(^64\)

a. Where a claimant seeks leave to serve a claim out of the jurisdiction (under the Civil Procedure Rules Part 6). Where a party is present in the jurisdiction, no permission will be required; and

b. The defendant seeks a stay of a claim on the basis that another jurisdiction would be more appropriate, i.e. on the basis of forum non conveniens.

In considering the issue of appropriate forum, an English court will take into account the fact whether this jurisdiction has the most real and substantial connection to the matter being tried. Factors that a court takes into account when determining this issue include: convenience and expense, the law governing the relevant transaction, and the places where the parties reside and carry on business.\(^65\)

5.3 INDIAN POSITION

Indian law, on the assumption of jurisdiction in internet disputes is theoretically close to the position in the United States. Section 20 of the Civil Procedure Code 1908 (CPC) deals with jurisdictional aspects, and states that a court may assume jurisdiction in a case, when the cause of action arises within its sphere.\(^66\)

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\(^63\) Ibid, at A/68.

\(^64\) Ibid, at A/68-A/69.

\(^65\) See, Spihada Maritime Corp v Cansulex Ltd (The Spihada) [1987] AC 460

\(^66\) Section 20, CPC 1908 reads as:

Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who
section, although more relevant to domestic courts and is essentially the domestic law of a country, yet it can be interpreted so as to apply to transnational issues as well as private international law. This provision for jurisdiction based on the cause of action is quite wide in its ambit, enabling the court to assume jurisdiction over a dispute regardless of where the principles are resident or the *situs* of the business, so long as a portion of the cause of action takes place within the local jurisdiction, while still having an implied standard set, in a way similar to the US long-arm jurisdiction provisions.\(^67\)

Moreover, the Indian procedural law also provides for the recognition and enforcement of such decisions—its own as well as the enforcement of foreign decisions—since a mere assumption of jurisdiction, and passing a judgment without it being recognized and enforceable in another country would have no effect. S. 13 of the CPC provides for the effect of foreign judgments on Indian courts; it also provides for their enforcement in all cases except under a few circumstances\(^68\), in which case the courts would delve into the issues of jurisdiction of the court, the public policy, and morality of the decision to be enforced, keeping the merits of the case as off-limits.\(^69\) By virtue of S. 44A of the CPC, the decrees of the Indian courts are enforceable in countries which the central government has declared by notification under the section, and those which have entered into reciprocal agreements with the Government of India, in respect of the enforcement of their decrees in the Indian courts.\(^70\) Such agreements and reciprocal relationships are of

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\(^{67}\) Abhishek Krishnan and Rakshithaa, *supra*, n 35, at 211-12.

\(^{68}\) S. 13, CPC reads as:

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction,
(b) where it has not been given on the merits of the case,
(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
(d) where the proceedings in which the judgment was obtained are opposed to natural justice;
(e) where it has been obtained by fraud,
(f) where it sustains a claim founded on a breach of any law in force in India


\(^{70}\) S. 44 A, CPC reads as:
quintessence particularly in internet contracts, where the parties have an international existence, needing a mutual cooperation between countries in effecting the valid judgments of each other.

However, in case, a country that does not have a reciprocal agreement with India, then enforcement of any judgment can be done only by commencing a new action for enforcement in that court, which might often be complicated, since the foreign court may wish to re-assess the merits of the case or re-assess the Indian court’s assumption of jurisdiction before giving effect to the decisions.\textsuperscript{71} This difficulty in the recognition and enforcement of judgments in other countries exists not only for the Indian courts, but for other jurisdictions too, and mainly occurs because of the possibility of multiple jurisdictions hearing a particular matter arising over the internet, and the wide range of laws that may govern the dispute. A Uniform Code, as it exists in the United States, dealing with interstate jurisdictions providing for the jurisdictional questions and choice of law if enacted for international jurisdiction in e-contracts,\textsuperscript{72} along the lines of the CISG (Convention on International Sales of Goods) for the sale of goods would bring in a legal certainty, solving most of the controversies and confusion regarding jurisdictional matters.

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(1) Where a certified copy of decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation 1— "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2— "Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect to a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

\textsuperscript{71} Abhishek Krishnan and Rakshithaa, \textit{supra}, n 35, at 212.

\textsuperscript{72} T Ramappa, \textit{Legal Issues in Electronic Commerce} (New Delhi: Macmillan India Ltd., 2003) at 65
S. 13 of the IT Act\textsuperscript{73} addresses the issues of the time and place of dispatch and receipt of an electronic record, thus, addresses the issue of jurisdiction in electronic contracts. Clause (1) provides that the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. With regard to receipt of the record, the law distinguishes between whether the originator has sent the message to a computer resource designated by the recipient to receive communications or a non-designated computer resource. Receipt takes effect at the time the electronic record enters the designated computer resource unless the record was sent to a non-designated computer resource, in which case it occurs at the time when the electronic record is retrieved by the addressee. Hence, it would seem that when the acceptance of an offer is emailed to a computer system designated by the offeror, the mailbox rule would not apply. Ultimately, the location of the computer resource is irrelevant. S. 13(3) states that an electronic record is deemed to be dispatched from the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

In \textit{PR Transport Agency v Union of India}\textsuperscript{74}, the Allahabad High Court held that since the acceptance (through e-mail) was received by the petitioner at Chandauli/Varanasi, therefore, the contract became complete by receipt of such acceptance. And, as both these places were within the territorial jurisdiction of the High Court of Allahabad, therefore, a part of the cause of action had arisen in UP and the High Court had territorial jurisdiction. Further, the High Court considered following points for its decision:

i. With regards to contracts made through telephone, telex or fax, the contract is complete ‘when the acceptance is received’ and at the place ‘where the acceptance is received’. However, this principle can apply only where the transmitting terminal and the receiving terminal are at fixed points.

ii. In case of an e-mail, the data (in this case, ‘acceptance’) can be transmitted from anywhere by the e-mail account holder. It goes to the memory of a ‘server’ which can be located anywhere and can be retrieved by the addressee account holder from anyplace in the world.

\textsuperscript{73} See, \textit{supra} Chapter-4.

\textsuperscript{74} AIR 2006 All 23; 2006 (1) AWC 504.
Accordingly, there is no fixed point either of transmission or of receipt.

iii. Section 13(3) of the IT Act has addressed this intricacy of ‘no fixed point either of transmission or of receipt’. In accordance with this section, ‘...an electronic record is deemed to be received at the place where the addressee has his place of business.’

iv. The acceptance of the tender shall be deemed to be received by the PRTA at the place where it has place of business. In the instant case, it is Varanasi/ Chandauli (both in UP)

5.4 GOVERNING LAW

Under traditional contracts, the governing law is the law of the State where the transaction occurred, unless agreed otherwise by the parties to the contract, for which the rules of private international law were used in case of transnational contracts. Nonetheless, moving over to e-contracts, where the parties belong to different countries, and where there is no specific factor to determine the place of consummation of the contract, and there is no mention of what the proper law is, in the rules of most of the domestic legislations—this sets the courts in motion to apply the law of the country that has the closest and most substantial connection to the contract, with the courts again differing in the factors that they take into consideration in arriving at the decision.

Nevertheless, most contracts concluded online, be it B2B or B2C, specify both the jurisdiction and the governing law of any subsequent dispute. In such cases, the court usually upholds the contract between the parties, giving way to contractual autonomy, although with certain limitations especially for B2C contracts that are contracts of adhesion, thus, requiring the intervention of the courts to induce reasonability of the terms and fairness. This is basically for the reason that the issue of consumer protection is closely intertwined with public policy, and legislatures the world over have realized the unequal bargaining power of the consumers in determining the jurisdiction and governing law of the contract, similar to the
determination of the other relevant terms of the contract, giving a significant scope for forum shopping by the corporate.\textsuperscript{75}

Furthermore, the legislations of various countries and international conventions themselves provide for the consumer protection in such contracts of adhesion and prohibit the exclusion of their jurisdiction by the contractual terms. For instance, S. 28 of the Indian Contract Act\textsuperscript{76} and S. 11(2) of the Consumer Protection Act 1986 (India)\textsuperscript{77} spell out for the protection of the rights and remedies that the Indian law provides to its consumers, and allows the court to disregard the agreement between the consumer and the seller in so far as the choice of forum and the governing law are concerned.

At the International level, on 30 October 1999, a Special Commission of the Hague Conference on Private International Law adopted a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters ('Preliminary

\textsuperscript{75} J N Adams, \textit{supra}, n 36, at 279.
\textsuperscript{76} S. 28 reads as:
Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

Exception 1.-This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2. Nor shall this section render, illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

\textsuperscript{77} S. 11 (2) of the Consumer Protection Act 1986 reads:

(2) A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction,-

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or
(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or carry on business, or have a branch office or personally work for gain, as the case may be, acquiesce in such institution; or
(c) the cause of action, wholly or in part, arises.
Draft Convention, or ‘PDC’). The Preliminary Draft Convention text, besides covering the questions of jurisdiction, provides a focus on provisions of particular concern in the areas of intellectual property rights and electronic commerce. Art. 7 of the Preliminary Draft Convention raises some important questions in the burgeoning area of electronic commerce, and provides that a consumer may bring suit in the courts of the State in which he is habitually resident, if the consumer’s claim relates to trade or professional activities that the defendant has engaged in or has directed to that State irrespective of the terms of the contract.

78 Art. 7 of the PDC reads as under:

Contraets concluded by consumers

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if
   a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
   b) the consumer has taken the steps necessary for the conclusion of the contract in that State.

2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.

3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court—
   a) if such agreement is entered into after the dispute has arisen,
   or
   b) to the extent only that it allows the consumer to bring proceedings in another court.


‘For electronic commerce, this provision creates some obvious problems. Paragraph 3, which prevents choice of court clauses entered into prior to a dispute, can frustrate efforts at predictability in electronic consumer contracts. By preventing a consumer from ever entering into a valid choice of court clause prior to a dispute, this article takes a paternalistic approach to consumer contracts, preventing the possibility that consumers may rather opt for other trade-offs, including a lower price. By subjecting an electronic commerce participant to the potential of suit in any state in which a consumer may purchase its goods, Article 7 raises the cost of entry in a manner that may well frustrate the growth of electronic commerce.

With the arbitration exclusion from the scope of the convention in Article 1(2), it is possible to include an arbitration clause in a consumer contract, and thus avoid the impact of Article 7 by removing the transaction from the scope of the convention altogether. It is a bit incongruous, however, for a convention designed in part to place litigation on a par with arbitration by providing litigation with benefits long available in arbitration under the New York Convention, to incorporate its own incentives to opt for arbitration over litigation as a preferred method of dispute settlement.’
There has been an ongoing effort to form new rules that would apply to the online environment reflecting a growing consensus to accord appropriate respect to the freedom of contract of the parties, while providing some protection to the consumers in terms of reasonability for facilitating the development of electronic commerce.\textsuperscript{79} However, there are no strong and pervasive laws as such for e-contracts at present at the international level, both for determining the governing law of the contract, and also for the establishment of the \textit{forum conveniens}, and the recognition and compulsory enforcement of such decisions in other jurisdictions.\textsuperscript{80} Nevertheless, one viable suggestion would be to frame an international convention for the recognition, enforcement, and determination of the substantive laws of a contract that would solve various problems relating to e-contracts at a practical level.

\textbf{5.5 CONCLUSION}

The decisions subsequent to \textit{CompuServe} suggest a number of truths. Firstly, approach of giving huge significance to physical presence is gone. Even though the Court determined, in \textit{International Shoe}\textsuperscript{81}, that physical presence was not necessary in order to exercise jurisdiction, yet the Court did not hold that physical presence was irrelevant. Only in recent years has physical contact with the forum State been viewed at par with the other factors that the court considers. In view of the nature of the modern world, this change is reasonable and necessary. Physical presence was indeed vital at a point in time when people had very little ability to affect anyone from a distance. Modern technology has allowed the average person to travel farther and faster more frequently. Greater mobility has increased the possibility that a person’s legal rights can be affected by someone who resides a great distance away. Modern technology allows a person to diminish another’s legal interests without ever stepping foot in the same jurisdiction. For the reason that there are so many ways to harm a person without physical presence, it has very little value when deciding jurisdiction. Secondly, the application of the expansion of the traditional principles of jurisdiction should be done only to the extent necessary to cover the facts of the individual case, and not to cases where this expansion is not needed.

\textsuperscript{80} Abhishek Krishnan and Rakshithaa, \textit{supra}, n 35, at 214.
\textsuperscript{81} 326 US 310 (1945).
Finally, contacts made through internet contacts, different from those made through websites, are conceptually easier to deal with than trying to find jurisdiction based solely on website activity. For that reason, the courts have separated the two kinds of cases and applied differing analysis. When the court looks at internet contacts arising from more than the maintenance of a website, the facts can easily fit within the traditional jurisdiction analysis.

Thus, the US courts have been successful in interpreting the personal jurisdiction principles in online setting. In fact, their case-law is growing and courts have introduced novel measures to resolve disputes, like nature of website, sliding-scale method, geographical location of users, website owner and web server. Even the traditional measures, such as, the terms of service-agreements, disclaimers, choice of law or forum clauses are playing an important role. Across Atlantic, in Europe the approach is more convention and directive based and the Brussels Regulation is one stride to harmonize e-commerce rules and regulations at least in EU countries.

The Indian legal system is in harmony with other legal systems, and the Indian legal system definitely gives due credence to the conflict of law approaches. If in the US, the emphasis is on ‘minimum contacts’ and ‘purpose availment’ to establish personal jurisdiction, then in India, the emphasis is on ‘cause of action’. In India, as the case law on e-commerce dispute resolution is still almost non-existent, it would be prudent on the part of the judges to take cognizance of the US and EU case laws; however, not at the cost of already established ‘Indian’ principles. Indeed, it is necessary to understand the technology issues involved while deciding the question of personal jurisdiction, but law should not be made subservient to technology.

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83 Cheryl L. Conner, supra, n 1.