CHAPTER 7

DISPUTE RESOLUTION IN CYBERSPACE: DETERMINING JURISDICTION AND APPLICABLE LAW
In the world of pre Internet, disputes were largely resolved through the traditional process of court litigation which is principally structured on a territorial basis i.e. each country has its own laws and courts, which decide disputes falling under their jurisdiction, mostly on the basis of the application of local laws. As long as the parties to a dispute arising on the Internet belong to the same jurisdiction, there is no problem, as the dispute in such a case would be solved in the same manner as any other offline dispute. For example, XYZ enterprises have their Web site through which they are selling goods manufactured by them. XYZ enterprises are based in Delhi and their customers are also in Delhi. In case any dispute arises between XYZ enterprises and their customer, it would be resolved according to the laws applicable in Delhi. But the problem would arise when their customers are from different countries and they are transacting with them through their Web site.
This dispute resolution mechanism based primarily on territoriality faces a number of challenges when applied to disputes arising on the Internet. The Internet is by definition International and can be accessed from almost any place on Earth hence multi-jurisdictional. On the Internet digitised data may travel through various countries and different jurisdictions in order to reach its destination. For example, a dispute may arise between two parties who entered into contract on the Internet and who belong to different countries. Now courts of which country should have jurisdiction to determine this dispute? The laws of which country should be relied upon to determine the dispute?

Which court should hear disputes arising out of Internet activities? On what grounds may a court assert or decline the jurisdiction? What laws should be used to decide a particular dispute? These are perplexing questions currently being faced by courts worldwide because of the trans-national nature of the Internet by which people can transcend borders readily and rapidly. One simple and straightforward factor confronting lawmakers is that while most laws have a territorial nexus, the Internet defies the notion of territoriality. The unique nature of the Internet has undermined the very foundation of the traditional notion of jurisdiction and applicable law and the territorially based concepts of law and their application. Traditionally, judicial jurisdiction has been exercised on a number of bases, such as where the defendant resides, whether the defendant is present within the forum and whether the defendant has property in the forum or not. The Internet has made these elements largely irrelevant.

This chapter analyses the traditional notion of dispute resolution based on various national and international laws in the light of Internet based activities which are inherently decentralised and ubiquitous. It highlights the problems that arise in the process of dispute resolution vis-à-vis activities conducted in cyberspace by examining various statutes. Lastly, it demonstrates how the courts have responded to this challenge in the absence of any definite and universally accepted international law on Internet jurisdiction by examining recent
INTERNATIONAL DISPUTE RESOLUTION IN THE CYBERSPACE: THE ROLE OF PRIVATE INTERNATIONAL LAW

Internet is by definition international and it is natural that the disputes in most of the cases will also be international. In this regard, it becomes important to examine what rules apply for adjudication of disputers that have an international element.

Private international law or conflict of laws is the body of law that seeks to resolve certain issues that result from the presence of a foreign component in legal relationships. Internationally, questions of jurisdiction, applicable law and enforcement of foreign judgments have been resolved by reference to private international law. Private international law is a part of the municipal law and essentially aims to regulate conduct between private parties. It is called international because of the fact that it comes into application because of the presence of a foreign element in legal relationships. Private international law has a long tradition in legal systems. In principle, each country determines its own rules of private international law. In certain regions of the world some of these rules have been harmonized by bilateral or multilateral treaties.

Cross-border movements of persons and goods, for commercial and other purposes have been there for hundreds of years and are the primary catalysts of private disputes involving foreign elements. Such disputes require some form of private international law rules to be resolved. With the huge increase in international trade across the globe during the last century, private international law has developed into an indispensable component of the legal apparatus of each nation. Private international law issues could arise in areas such as
contracts, crimes, torts, consumer protection, taxation, marriage, intellectual property, etc. For example, private international law could be sought to resolve, contractual disputes between parties located in different jurisdictions or the marital status of partners belonging to different countries.

The following issues arise in the context of private international law:

- Jurisdiction to adjudicate a dispute at a particular location (i.e., the forum or situs);
- Applicable law to the dispute; and
- Enforcement of judgments in courts in foreign jurisdictions.

Most of the transactions on the Internet that we know of today, are international in nature and possibly many jurisdictions might have some kind of connection with a particular dispute. In this situation, if every court in possibly every county will have jurisdiction over that dispute, it would amount to hampering trade. So private international law tries to come out with broad general principles that determine who will exercise jurisdiction and what law will be applicable.

A very broad principle on which private international law is based is that the place which has the closest connection with that transaction should have the jurisdiction. When there is a conflict of laws, when two or more laws apply to a particular pact situation simply because two or more countries are involved, the seller in one country, the buyer in another country, then law will look to that country which has the closest nexus or connection to the transaction at hand. For example, in case of a contract, it may be looked at where the contract was formed. If the contract was formed in country B, then there is a better chance of claiming jurisdiction in country B. Similarly, if it can be proved that the goods were defective when they left the seller, and therefore, the performance was affected in the seller's country itself, and then there might be a good reason for claiming that jurisdiction is in that country. Similarly, according to most private
international law rules, questions concerning the legal status of real property, i.e. land, building, etc. are to be determined by reference to the substantive law of the country where the real property at issue is located. The private international law rules do not try to resolve the substance of dispute, but merely function as a rule of attribution that determines the appropriate forum and laws which will govern the dispute.

Nations across the world have realized that there are problems with private international law and they have come together and entered into certain international conventions and agreements for the purpose of unification and harmonisation. The principal source of private international law rules at the multilateral level is the Hague Conference on Private International Law. The Hague Conference is an intergovernmental organization the purpose of which is “to work for the progressive unification of the rules of private international law.”

The Hague Conference entered into force in 1955 and currently has 62 Member States.

Many multilateral treaties on private international law have been concluded under the auspices of the Hague Conference. Most of these conventions concern questions of jurisdiction, recognition of judgments and of other official acts, or applicable law. Typically, the scope of the Hague conventions are highly focused and restricted to certain specific topics, such as questions of marital status, adoption, certain aspects of civil procedure and the international sale of goods. In 1992, discussions began at the Hague Conference, at the request of the United States of America, to explore the possibility of establishing a new multilateral instrument on the recognition and enforcement of judgments. Several drafts of such new proposed treaty, entitled Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the “draft Hague Convention”) have been tabled and it has been envisaged that a number of its provisions would be

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2 A list of such treaties is available at http://www.hcch.net/e/conventions/index.html.
devoted specifically to intellectual property. Negotiations have been difficult and slow, and it is unclear at this stage whether the Convention ultimately will see the light of day. The provisions of the draft Convention are nevertheless indicative of the future trends and suggestive of global thinking and, therefore, are discussed in more detail in the remaining part of the chapter.

There also exist many private international law instruments at the regional level. In Europe, the most notable include the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968 (Brussels Convention), the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 16, 1988 (Lugano Convention), and the EC Convention on the Law Applicable to Contractual Obligations of June 19, 1980 (Rome Convention). The European Commission has also recently addressed the need to update and harmonize the private international law rules concerning jurisdiction and recognition and enforcement of judgments. In July 1999 it issued a “Proposal for a Council Regulation on jurisdiction and enforcement of judgements in civil and commercial matters.” The Regulation was intended to replace the Brussels Convention of 1968 (and its Protocol), with the objective of improving and expediting the free movement of judgments in civil and commercial matters within the European market. It closely corresponds to the Brussels Convention and subsumes to a substantial extent the results of the negotiations of an ad hoc working party for the revision of the Brussels and Lugano Conventions. The Brussels Convention recently has been replaced by Council Regulation (EC) No. 44/2001 of December 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which entered into effect on March 1, 2002 (Brussels II).  

4 Id. at 117, para. 275.
DETERMINING JURISDICTION AND APPLICABLE LAW FOR ONLINE DISPUTES

Resolving disputes in cyberspace requires determining appropriate jurisdiction and applicable laws. Jurisdiction is the authority by which courts take cognisance of and decide cases. The word jurisdiction is of large and comprehensive import, and embraces every kind of judicial action. Jurisdiction is broadly of two types: (1) Subject matter jurisdiction and (2) Personal jurisdiction.

Courts are creatures of statute -- the legislature vests them with power, and may condition that grant of power on their ability to hear only certain kinds of disputes. Courts are not only restricted in terms of the persons over whom they can exercise power, they may be restricted in terms of the kinds of disputes that they can adjudicate. By subject matter jurisdiction we mean the power of a particular court to hear the type of case that is then before it. Invariably in any country there would be several courts and tribunals. Like in India, apart from the regular hierarchy, i.e. the Supreme Court, high courts, district courts, we also have specialized courts like consumer courts, family courts, income tax tribunals, customs tribunals, etc. The Information Technology Act, 2000 has introduced the Cyber Appellate Tribunal5. So all these specialized courts, tribunals and authorities have been constituted to determine certain categories of disputes, because the law presumes, that for certain kinds of disputes specialisation has to be introduced as such specialised courts and tribunals would be best suited to adjudicate upon a particular kind of complex issue because they have some kind of background in that field. Broadly, a court would only hear a matter that arises within its defined and demarcated area.

The most complex part is in the form of what is know as personal jurisdiction by which is meant the legal power of the court to render a personal judgement

against a party to an action or a proceeding. In what circumstances would an Indian court or would a local court have jurisdiction over someone who is not within its local limits, who does not reside in those areas? It gets even more complex when there are cross border transactions and you have a dispute arising and the facts of the dispute involve more than three different countries. For example, a person in country A dispatches goods to a buyer in country B and the buyer finds that the goods are faulty and therefore wants to sue. Now, where does he sue? Does he sue in country A or country B or if the goods have passed to country C and got destroyed there does he sue in country C? Where is the \textit{locus} going to be? Where is the \textit{situs}, in which court is he going to sue? Can he sue in all three jurisdictions just because each jurisdiction has some kind of link to the transaction? Can an Indian intellectual property appellate tribunal in a trademark dispute haul up somebody in France for infringing the trademark? In other words, would the tribunal have personal jurisdiction over someone in France is what personal jurisdiction deals with.

In the common law systems, the general requirement is that courts must have both personal and the subject matter jurisdiction. Whether a court has personal jurisdiction over a defendant is a function of the degree of contact between the defendant and the forum (for instance, is the defendant a resident in the forum, or does he only have infrequent or minor contacts there?).

Once a court determines that it possesses jurisdiction to hear a case, it must then decide which substantive law should be applied to decide the dispute. As long as the parties are from the same jurisdiction it is usually a simple matter but this becomes a complex question when a foreign element is involved in a case. Determining the applicable law involves many of the same questions that arise in relation to determining the proper jurisdictional forum. For example, in a matter where consumer rights are concerned, the laws of which country are to be applied. The vendor would always plead for the application of laws of a country where the laws are not very consumer friendly and the consumer would always
look for the laws that go to his advantage. In the copyright context, when protected material is made available or transmitted to consumers in many countries, uncertainty may arise as to which country’s law governs the determination of authorship or ownership, the scope of rights, and the validity of contractual agreements? The application of the laws of one system, rather than the other, in most cases will lead to different results. These questions are always challenging, but become more intricate in the online environment.

The principles of law for determining jurisdiction and applicable law could vary depending on the nature of the dispute and under which branch of law it falls. Disputes concerning digital products could arise primarily in the area of copyright law. But as far as the exploitation of digital products on the Internet is concerned, copyright law is intertwined with other branches of law such as trademark law, contracts, torts and criminal law. All these principles are discussed below together with an analysis of how these principles would apply in the online environment.

Each country determines, for its own jurisdiction what is to be protected as intellectual property, who should benefit from such protection and for how long and how protection should be enforced. Therefore, intellectual property laws are "territorial," in nature because the geographical scope of their application is defined by and restricted to the boundaries of the country. Consequently, the fact that a person may have a valid and enforceable intellectual property right in one country, as such, has no bearing on whether that right will be recognized in another country.

Intellectual property infringements, such as an infringement of a patent, trademark or copyright, generally belong to the category legally known as ‘torts’ or ‘delicts’, that is, activity in violation of a legal duty which results in an injury or
other civil wrong. It may also result in a crime being committed, for example, in certain cases of copyright violations.\(^6\)

As far as rules regarding jurisdiction are concerned the general principles are stated in the Code of Civil procedure, 1908 but there are certain specific legislations that to a certain extent modify the principles contained in the Code of Civil Procedure and Copyright Act, 1957 is one of these. The Copyright Act provides for the widest jurisdiction. Section 62 talks about the jurisdiction of court over matters arising under the Copyright Act:\(^7\)

1. Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the District Court having jurisdiction.

2. For the purpose of sub-section (1), a “District Court having jurisdiction” shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.

It authorizes a plaintiff to file a suit in a court under whose jurisdiction he is based. So, a copyright holder gets a very wide playing field. Considering an Internet situation, an owner of copyright is a resident of Delhi and his work has been put illegally on the Internet by a resident of Brazil. So, the owner of

\(^6\) S. 63 of the Copyright Act, 1957.
\(^7\) S. 62(1) and (2), Copyright Act, 1957.
copyright will be within his rights to file a suit in the courts of Delhi. This can indeed put the defendant to a lot of difficulties.

The draft Hague Convention provides for a non-exclusive special jurisdiction for this category, specifying that a plaintiff may bring an action "in tort or delict" in the courts of the State where (a) the act or omission that caused injury occurred or (b) the injury arose, unless the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.\(^8\)

Similarly, Brussels II provides for jurisdiction in "the courts for the place where the harmful event occurred or there is the risk of it occurring."\(^9\)

The consequences of applying these terms to disputes involving infringements on the Internet are less than clear. The difficulty stems from a reliance, as has generally been the case in private international law, on physical "points of attachment" – such as "the State...in which the act or omission...occurred" or "in which the injury arose" – for determining jurisdictional competence. This approach may not sit well with the essentially "de-localized" character of the Internet and the activity conducted on it.\(^10\) The problem is clearly illustrated in the case of an Internet-based copyright infringement. When a user in one country or users in multiple countries download an allegedly infringing copy of a copyrighted work from a foreign Web site, has a tort "occurred" in the user's forum (i.e., the copying of the work into the memory of the user's computer or other digital device), thus triggering jurisdiction? Or does the tort (unauthorized copying or

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\(^8\) Art. 10 of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.


distribution) occur in the foreign State where the computer server hosting the Web site is located, with only an impact in the forum of the user? In the latter case, the foreseeability test (in the draft Hague Convention) may be implicated to determine whether the foreign party would have reasonably foreseen that the publication of the work would have an impact (i.e., cause an injury to the copyright owner) in the user’s forum State.  

Apart from private international law there exists other means of dealing with problems resulting from cross-border legal relationships. For example, the principle of ‘national treatment’. The requirement for national treatment in case of copyright is contained in Article 5 of the Berne Convention:

[a]uthors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

Persons desirous to protect their copyright in a foreign jurisdiction can resort to the principle of national treatment which is aimed at resolving certain questions arising from the presence of foreign elements in a legal relationship. The principle of national treatment only requires countries to allow foreigners to benefit from their legal regimes to the same extent and in the same manner as their nationals, without any discrimination with respect to the acquisition, maintenance and enforcement of the rights concerned.

The Berne Convention is on the whole quite silent on the question of the acquisition of rights and leaves the same to national law. As per the territoriality principle of the copyright system it would imply that each country determines,

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11 Id. at 13, para. 53.
separately and on its own, who is to be regarded as an author of a work. For example, the author of copyright in a cinematograph work may be the producer according to one national law while it may be the director as per the laws of another country. Such point of view could result in changes in the identity of an author of a work, as it crosses national boundaries. In the context of the Internet such consequence is bound to create legal uncertainties.

Article 5.2 of the Berne Convention concerning the law applicable to copyright infringement states:

> [t]he extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

Now what does the expression "country where protection is claimed" mean; does it mean the country where the court proceedings are brought or the country where the infringing acts have occurred. The latter interpretation is more widely accepted by copyright scholars.

In the context of the Internet, the difficulty arises in determining where the infringing act has occurred. For example, if an infringing file is posted on the Internet and thus made available to one and all by a person residing in country X, on a server located in country Y, for downloading and viewing around the world, where has the infringement occurred? Whether it has occurred in the country X or in the country Y or in each country where the file was viewed or downloaded? This option would imply that the mere accessibility of a Web site is sufficient grounds for finding copyright infringement. That means a case involving the posting of an infringing copy of a copyright work on the Internet, accessible instantly around the world, raises the possibility that the laws of numerous countries are implicated.
Recognizing the daunting task that would arise in adjudicating infringements by applying a strictly territorial approach, commentators in the copyright field have suggested that a useful precedent may be found in the context of satellite transmissions, which, by virtue of the technology involved, are also capable of being disseminated instantaneously to multiple countries. The European Commission, in its Satellite Directive, determined that the country from which “the copyright-triggering act of ‘communication to the public’ occurs is the country from which the satellite signal is up-linked.” This approach may support a view, with regard to Article 5.2 of the Berne Convention, that the country from which the alleged multi-country infringement originated can be considered as the “country where protection is sought.” While this analysis might offer the promise, in certain cases, of simplifying choice of law questions arising from the digital dissemination of copyrighted works, issues would nonetheless remain, such as what to do if certain countries become havens for copyright infringement.13

Exploitation of digital products on the Internet takes place with tagging trademarks to them. Trademark rights, like copyright, are legal creations that are fundamentally territorial in nature. If a trademark is not entitled to protection in a country, practically, it will be viewed as legally non-existent in that country. Acts committed in one or more territories would constitute an infringement of a trademark would be judged separately for each jurisdiction in which such rights were acquired, based upon the laws of that jurisdiction. The consequence of the territoriality of trademark rights is the independence of trademarks illustrated by article 6(3) of the Paris Convention which states:14

A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin.

13 Supra note 10 at 20-21, para 78.
14 Art. 6(3), Paris Convention for the Protection of Industrial Property, 1883.
The Trademarks Act, 1999, which is the new trademark legislation in India provides in section 134:\(^{15}\):

(1) No suit-
  (a) for the infringement of a registered trade mark; or
  (b) relating to any right in a registered trade mark; or
  (c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered, shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.

This means it is going to be a very, very wide scene for trademark owners as well. Trademark owners can file suits in the places where they are located and not necessarily in the place where the defendant is located. This law is in the form of exception of the general rule contained in the Code of Civil Procedure, 1908.

If a business enterprise in one country operates a Web site using a sign that has not been registered there by any third party, but nonetheless offers commercial services in connection with the use of the sign in an allegedly infringing manner

\(^{15}\) S. 134, Trademarks Act, 1999.
in other countries where a corresponding trademark is registered, where has the infringement occurred, and where does jurisdiction lie? Without an appropriate regulatory framework, someone using a trademark on the Internet may potentially be sued in court in any country of the world, and courts will have to determine whether a sufficient nexus exists to justify the exercise of jurisdiction.\textsuperscript{16}

Internationally, under Article 10 of the draft Hague Convention, one view is that the act which caused the infringement and any resulting injury could only have occurred in the States where the mark is protected, and jurisdiction would thus lie in those places.

1. A plaintiff may bring an action in tort [or delict] in the courts of the State –
   a) in which the act or omission that caused injury occurred, or
   b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State.\textsuperscript{17}

Alternately, the trademark holder, under the draft Convention’s general jurisdiction provision\textsuperscript{18}, could bring suit against the alleged infringing company for all harms at the company’s “habitual residence”, but the court there may have difficulty in determining the applicable law.

\textsuperscript{16} Supra note 10 at 14-15, para 53.
\textsuperscript{17} Art. 10 of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. This is the text of the preliminary draft Convention of October 1999. No specific proposals were made to modify this text. However, it was noted that the paragraph would have to remain under consideration in light of e-commerce and intellectual property issues, its relation to activity jurisdiction proposals, and constitutional issues in one State.
\textsuperscript{18} Art. 3 of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.
Under Article 10 of the draft Hague Convention, the trademark owner, like a copyright owner, would be permitted to sue for all harms at the place “in which the injury arose,” provided that the foreseeability test is met and the trademark owner has its “habitual residence in that State.” Article 10 states:

2. A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.19

3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State.20

4. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.

Apart from private international law rules the principle of national treatment is enshrined in Article 2 of the Paris Convention, which states as follows:

Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy

19 This proposal seeks to insert an activity based jurisdiction similar to that proposed in relation to Article 6.

20 This proposal seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State.
against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

Use of a sign or mark on the World Wide Web is visible from anywhere and to anybody in the world and thus may potentially result in infringements in any number of jurisdictions. Even though a business enterprise may aim solely at the local market, the moment they have an Internet presence they potentially come in conflict with similar marks protected elsewhere.

WIPO has recently published a study concerning the use of trademarks on the Internet.21 On the question of ‘Use’ WIPO has suggested that:

There seems to be a general understanding that the mere appearance of a sign or a mark on the Internet is not sufficient to establish a connection between that sign or mark and a given territory. Many comments suggest that a relationship between a sign used on the Internet and a given territory is only established through commercial use of that sign in respect of that territory or, as it was expressed in one comment, whether the sign used on the Internet has ‘commercial effect’ in a territory.

‘WIPO Joint Recommendation’22 establishes the principle in Articles 2 and 3 that the mere visibility of a sign used on the Internet in a particular jurisdiction can

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22 Based on preparatory work by the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of WIPO adopted, on the occasion of the thirty-sixth session of the Assemblies of the Member States of WIPO, in September 2001, the WIPO Joint Recommendation Concerning the Protection of Marks, and Other Industrial Property Rights in Signs on the Internet (the “Joint Recommendation”).
only form the basis for the finding of an infringement if the use “has a commercial effect” in the territory concerned. In addition, the Joint Recommendation introduces a procedure for notice and avoidance of conflict in Articles 9 through 12. Under this procedure, a rightsholder, who is of the view that the use of a sign on the Internet by a third party infringes its rights in a particular territory, can send a notification of infringement to such third party. The Joint Recommendation shields the third party from liability, if it indicates that it has a right in the sign in another territory and “expeditiously takes reasonable measures that are effective to avoid commercial effect in the Member State referred to in the notification.” The important advantage of the procedure contemplated by the Joint Recommendation is that a person intending to use a sign on the Internet no longer would be under the same pressure to clear in advance his rights in multiple jurisdictions, but can limit doing so in those where effectively business will be conducted, leaving any problems that may arise in other jurisdictions to be resolved ex post on the basis of the notification procedure, and this without running the risk of incurring liability.23

The WIPO Joint Recommendation also contains a number of provisions that are intended to avoid that remedies are granted with too broad effect on the Internet. Article 13 establishes the general principle that “[t]he remedies provided for the infringements of rights or for acts of unfair competition in a Member State, through use of a sign on the Internet in that Member State, shall be proportionate to the commercial effect of the use in that Member State.” Furthermore, Article 15 stipulates that “[w]here the use of a sign on the Internet in a Member State infringes a right, or amounts to an act of unfair competition, under the laws of that Member State, the competent authority of the Member State should avoid, wherever possible, imposing a remedy that would have the effect of prohibiting any future use of the sign on the Internet.”

23 Supra note 3 at 130, para. 306.
Copyright and contract go hand in hand. More and more exploitation of digital products on the Internet is taking place through individual contracts between the vendor and the consumer. In many situations, the rights and liabilities of the parties are governed by the contractual terms. The contractual disputes could be of two types. One, in which a provisions as to jurisdiction of a particular court and application of particular laws should a dispute arise, have been incorporated. The other is the one where no such clause forms the part of the contract. Courts generally try to look into what was the choice of the parties, what have the parties put into the contract, and which courts did they intend should cover their transactions. If the contract says that the courts at New Delhi should have exclusive jurisdiction in this regard, then only New Delhi will ordinarily have jurisdiction.

The general regulatory principle, as codified in relevant national and international instruments, is to respect the choice of law made by the parties. In Europe, the Rome Convention on the Law Applicable to Contractual Obligations governs this area, providing generally that a “contract shall be governed by the law chosen by the parties.”

The draft Hague Convention respects the principle of party autonomy by permitting the parties to choose for themselves the court or courts that will have jurisdiction to settle any dispute arising in connection with their legal relationship. Article 4 states:

If the parties have agreed that a court or the courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen

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24 Art. 3, Rome Convention on the Law Applicable to Contractual Obligations, OJ L266/1 (1980). Art. 16 of the Rome Convention provides generally that the parties' designation of law may be excluded only where its application “is manifestly incompatible with the public policy of the forum.”
or may arise in connection with a particular legal relationship, that
court or those the courts of that Contracting State shall have
jurisdiction, provided the court has subject matter jurisdiction and
that jurisdiction shall be exclusive unless the parties have agreed
otherwise.

Further article 4(5) restricts such a choice of the parties:

The parties cannot be deprived of the right to enter into agreements
conferring jurisdiction.26

This proposal seeks to make it clear that national law may not prohibit the entry
into choice of forum clauses by express prohibition or the use of public policy,
except in the cases which may be provided for in the Convention, such as
consumer transactions or employment contracts.

Section 2827 of the Indian Contract Act tells that through a contract one cannot
divest any party of his rights or remedies that he can get in a normal court or
tribunal. If a contract contains such a clause, the Act seems to suggest that
under section 28 any such clause would violate the Contracts Act and therefore
that clause would not be recognized. Then what exactly is the extent and scope
of conferring jurisdiction by contract on a particular court to the exclusion of all
others by a clause of the contract?

26 Art. 4(5) of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and
Commercial Matters.
27 S. 28, Indian Contract Act, 1872 states:
Every agreement, 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, is void to
the extent.
Section 28 makes void only those agreements which ‘absolutely’ restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. It has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried.28

The validity of an agreement by which the parties to a contract prefer one of the two courts depends upon the fact that both the courts must have jurisdiction in deciding the matter.29 Where the parties agreed that the court at a particular place shall have jurisdiction but the court of that place is not the place for instituting the suit either as the place in which the cause of action has arisen or as the place where defendant lived, the agreement is illegal and court at that place cannot be invested with jurisdiction by such agreement.30 Where the courts at M and B have ordinary jurisdiction to try a suit but the parties contract to sue only at B the court at M cannot entertain the suit filed by one of the parties to the contract.31

Where in the case of a global tender the work under contract was to be performed by a foreign company at Baroda in India and there was therefore a specific term that the contract would be governed by Indian laws and that Indian courts shall have jurisdiction to hear and determine all actions and proceedings arising out of the contract. It was held that in absence of any special circumstance like fraud, coercion etc. which go to vitiate a contract, the term was binding on parties. Section 28 would not militate against such term nor would it make the term void.32

28 Musa Ji Lukman Ji v. Durga Dass, AIR 1946 Lah 57 at 59 (Full Bench).
31 AIR 1950 Kutch 32 (33).
32 ILR (1973) 2 Cal 485.
When in a dispute the plaintiff has an alternative cause of action in tort he is not obliged to sue on the basis of the contract and if he brings a suit in tort, a term embodied in the contract relating to institution of suits arising out of the contract in particular court does not apply.33

In India, for contracts the jurisdiction and applicable law designation provides both parties with a measure of certainty in case of a dispute. Absent that clause, the rules regarding jurisdiction will be determined with regard to the Code of Civil Procedure, 1908. Section 20 lays down the rule 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 do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
(c) the cause of action, wholly or in part, arises.

So, the court before assuming jurisdiction would have to examine where the defendant resides or carries on business or where the cause of action arose, for example, where was the contract formed. At its broad level a contract basically consists of an offer and an acceptance. Where is it formed - at the place where

33 1971 MP LJ 1052.
the offer was made, or where it was accepted? By and large it is the view that a contract comes into force at the place where the offer was accepted. Another factor is the place of performance of the contract, where did the parties intend or which place was the contract intended to be performed at.

When you have something as complex as the Internet, where is it accepted – when an offer is sent by e-mail? When is it accepted – when it enters the mailbox or when a recipient actually reads it? The questions are very many still to be decided upon. Since e-mail is so complex and since we cannot presume that everyone reads his or her e-mail every day, should it be considered that an acceptance takes place only when e-mail is actually read?

Since businesses engaging in e-commerce will have to contend with potential litigation in every country, there is a tendency to specifically disclaim that their products or services are intended for consumers in certain countries. This is in order to avoid any kind of relationship with certain jurisdictions. For example, a Web site dealing with astrology may say that their services are not intended for X, Y and Z countries. This could be because it is anticipating that problems could arise in case they deal within the jurisdiction of particular countries. Normally, it should be the prerogative of the supplier or vendor to do business within a particular jurisdiction or not but on the Internet the notion of “directing activities” toward a particular country or region may still be difficult to comprehend.

Businesses, particularly small or medium sized enterprises, offering goods or services on a widespread geographical basis over the Internet, must be aware of and understand the implication of embracing e-commerce. With an adequate understanding, they can begin to organize the conduct of their affairs in order to achieve some assurance that they will not be subject to potential lawsuit at multiple and remote locations, or at locations where their rights are not given adequate recognition and protection. On the other hand, should they fail to do
so, the resulting confusion may discourage enterprises from using this efficient and internationally accessible avenue of commerce.

For transactions in which an order is placed online, but the goods or services are physically delivered offline to the customer, the existing rules of private international law remain relevant. However, for transactions that are performed completely online, the place of performance may be difficult to ascertain. Would it coincide with the location of the purchaser’s computer (e.g., software that is downloaded to the customer’s computer), or the seller’s system (e.g., the on-line purchase of securities, which takes place through computing processes on the seller’s server)? To avoid these potential issues, online agreements should, whenever possible, designate the place where performance under the contract may be deemed to have taken place, or, better yet, specify the court or courts which the parties agree will have jurisdiction if a dispute arises.\(^3^4\)

In the United States of America, the Uniform Computer Information Transactions Act (UCITA), adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in July 1999, contains a provision on forum selection providing that:\(^3^5\)

\[
\text{The parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust.}
\]

Section 109(b) of the UCITA provides that in the absence of an enforceable choice-of-law term, the following rules apply:

\(^3^4\) Supra note 10 at 15, para 57.

\(^3^5\) S. 110(a) of the Uniform Computer Information Transactions Act, 1999. This approach is consistent with the recommendations of a significant international business alliance, the Global Business Dialogue on Electronic Commerce (GBDe), that governments and international organizations generally respect the freedom of contract.
(1) An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor is located when the agreement is made.

(2) A consumer transaction that requires delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer.

(3) In all other cases, the contract is governed by the law of the jurisdiction with the most significant relationship to the transaction.

The UCITA introduces a rule that attempts to be more finely tuned to the realities of electronic commerce. Sub-section (1) selects the applicable law based on the location of the licensor. The Official Comment explains that this is intended to enhance certainty for online vendors, large or small, in the context of digital networks that make access available to the entire world via the Internet, and that any other rule would require the vendor to comply with the law of all States across the world, since it may not be clear or even knowable where the contract is formed or information sent. Sub-section (2), on the other hand, chooses the law of the consumer’s forum, so as not to upset the expectations of the consumer. Here, the licensor would know where the physical delivery will occur, and must be aware of the consequences for potential exposure to local mandatory consumer protection laws. Sub-section (3) codifies traditional choice of law principles, setting forth “the most significant relationship” test, which allows courts some flexibility in weighing various factors that might be relevant in the online environment.36

E-commerce as a business model has important legal impact on the issue of consumer protection. Prior to the development of the Internet as a medium for commercial exchanges, consumers rarely entered into a direct relationship with foreign vendors. Foreign products and services were, almost always, distributed through local agents of the foreign vendors from whom consumers residing in

36 Supra note 10 at 19, para 73.
their territory made purchases. But with the emergence of the Internet, consumers can enter into contracts, place orders, or receive goods and services from the sites of foreign vendors, thus entering into a direct contractual relationship with them without any necessity of local presence on the part of the vendor.

When both parties to the transaction i.e. consumer and the vendor are located in the same jurisdiction, there are no particular difficulties with respect to the questions of which courts have jurisdiction and which laws should apply to consumer disputes. The disputed will be decided according to the local laws applicable. However, if those parties are located in different countries and hence different jurisdictions, the question arises whether the courts of the country of the consumer or those of the vendor should have jurisdiction and the laws of which jurisdiction would apply.

Considering that the vendor would be liable in all the jurisdictions where his Web site could be accessed, it would be very difficult and unreasonably burdensome for him to comply with the consumer protection laws of all the countries. If, on the other hand, only the courts of the country where the vendor is located will have jurisdiction the consumers, will have neither the resources nor the incentives to pursue vendors in foreign courts.

As consumer protection is regarded a matter of public policy in many countries, such questions of jurisdiction and applicable laws are particularly vexing to solve, even at the regional or national level. The situation becomes more accentuated in case of e-commerce when it comes to the international level.

Basically the relationship of any consumer with the vendor is contractual in nature. But there are certain exceptions to the contractual principles when we go by the contract and respect the contracting parties’ agreement to confer jurisdiction on a particular court and apply particular laws. This is simply
because the issue of consumer protection is closely twined with public policy and legislatures the world over have realised that it’s not an equal bargaining power situation when a dispute is between ordinary consumers and big suppliers or producers. Normally, big suppliers or producers tend to exclude jurisdiction of those countries where laws are consumer friendly. If a particular country has a Consumer Protection Act like there is one in India, which grants special rights to consumers, there is a great chance that the foreign vendor would actually say that Indian courts will have no jurisdiction, and only a particular court will have jurisdiction simply because he wants a more favourable jurisdiction which does not have a consumer friendly legislation. So, he knows for a fact that he is never going to be liable in that jurisdiction. It is broadly a concept called the forum shopping, where you choose the ‘best’ forum with a greater likelihood of a favourable decision or you choose the laws of the best forum to suit your convenience. But legislatures realise that there is an unequal bargain, the consumer really has no choice. So, courts may not recognize that particular clause in a consumer contract under certain circumstances, particularly when they find that the consumer is disadvantaged because of his very position.

Section 11(2) of the Consumer Protection Act, 1986 states:\textsuperscript{37}

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 of 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

\textsuperscript{37} S. 11(2) of the Consumer Protection Act, 1986.
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 case of action, wholly or in part, arises.

This means a consumer forum (court) in India may disregard the agreement between the consumer and the vendor as far as the choice of forum is concerned and instead decide to go by the above stated principle of jurisdiction. In *Byford Leasing Ltd. v. Sewa Singh Dara*\(^38\) it was held:

The Consumer Protection Act is a social piece of legislation. It provides a specific provision regarding territorial jurisdiction of the fora to entertain the complaint, which is different from the provisions contained in section 20, CPC.... A special provision has been made as above to bestow jurisdiction on the fora of a District where head office or Branch office of the Opposite Party exists, apart from the part of cause of action having arisen therein to entertain the complaints. No doubt under general law, parties could opt for one of the Courts having jurisdiction to entertain the suit but the aforesaid principle is not attracted to the proceedings under the Consumer Protection Act.

At the international level, the draft Hague convention realises and provides for the prerogatives of the consumer as a party deserving special treatment. It provides that a consumer may bring suit “in the courts of the State in which it is habitually resident,” if the consumer’s claim relates 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.”39 In the case of an e-business Web site it will be a matter of fact dependant on various facts whether the activities of that particular business are directed towards the consumer’s state. The consumer would also be free to initiate court proceedings at the place where the business is “habitually resident.”40 A claim against a consumer can only be brought in the courts of the State of the habitual residence of the consumer.41

In Brussels II42, the freedom of contract is restricted, in particular, in contracts involving consumers. Article 5 provides in relevant part that, notwithstanding Article 3, “a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law in the country in which he has his habitual residence.”

Infringement of copyright is a crime as well, the general principles of the same are provided in the Indian Penal Code, 1860. The Indian Penal code deals with criminal offences, propounds the basic jurisdictional principle that Indian courts will have jurisdiction only over offences committed in India.43 For offences committed outside India by Indian citizens, Indian courts will have jurisdiction in the same manner as if the offence were committed in India.44 If an Indian goes to France and commits murder, Indian courts will have jurisdiction. Similarly if any

40 This would include the locations where it has its statutory seat, is incorporated, has its central administration, has its principal place of business, or has branches (provided the dispute relates directly to the activity of that branch). See, Articles 3.2 and 9 of the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.
43 S. 2, Indian Penal Code, 1860.
44 S. 3, Indian Penal Code, 1860.
person, whether foreigner or Indian, on board an Indian ship or an Indian aircraft commits a crime, he is susceptible to jurisdiction in India because an Indian aircraft or ship which is either in air or on the high seas, is actually considered to be an expansion of Indian territory.45

Procedurally, the jurisdictional principles for crimes are contained in the Code of Criminal Procedure, 1973. As per section 177 and 178 of Cr PC:46

Ordinary place of inquiry and trial.- Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

Place of inquiry or trial.- (a) When it is uncertain in which of several local areas an offence was committed, or (b) where an offence is committed partly in one local area and partly in another, or (c) where an offence is a continuing one, and continues to be committed in more local areas than one, or (d) where it consists of several acts done in different local areas it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

The jurisdictional principle of IPC based on territoriality and nationality has been widened by the Information Technology Act, 2000. Section 1(2) states that the Act:47

shall extend to the whole of India and, save as otherwise provided in this Act, it applies also to any offence or contravention thereunder committed outside India by any person.

45 S. 4, Indian Penal Code, 1860.

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Further section 75 says:48

(1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.

(2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

For the offences and contraventions contained within the IT Act, 2000 any person whether or not he is a citizen of India can be made liable for his act whether committed within or outside India provided the effect of the same is felt on any computer49, computer system50 or computer network51 located in India.

49 S. 2(i), IT Act, 2000 says:
“computer” means any electronic, magnetic, optical or other high-speed data processing device or system which performs, logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network.
50 As per s. 2((j), IT Act, 2000:
“computer network” means the interconnection of one or more computers through – (i) the use of satellite, microwave, terrestrial line or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained.
51 As per s. 2((l), IT Act, 2000:
“computer system” means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files which contain computer programmes, electronic instructions, input data and output data that performs logic, arithmetic, data storage and retrieval, communication control and other functions.
Therefore, even if a foreigner outside the territorial limits of India commits an offence or contravention under the IT Act, the courts in India would have the jurisdiction over him. The extra territorial operation of the IT Act has been put in place considering the ease with which anybody actually present anywhere in the world can commit a cyber crime having an impact in India. In this way the legislature in India has been influenced by the effect theory whereby the jurisdiction is determined by examining where the effect of a particular offence is felt. This principle is an extension of the principle propounded in section 182 of Cr PC where an offence which is committed by means of telecommunication messages can be inquired into or tried by any court within whose local jurisdiction such messages were received.

JUDICIAL TRENDS IN DECIDING ONLINE DISPUTES

After having discussed the various approaches and national and international laws it becomes important to glimpse how courts have acted in resolving disputes arising in cyberspace; which legal principles and doctrines have they applied to resolve such disputes.

As per s. 182, Cr PC, 1973:

Offences committed by letters, etc.- (1) Any offence which includes cheating may, if the deception is practiced by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received; and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by a Court within whose local jurisdiction the property was delivered by the person deceived or was received by the accused person.
The US approach

The digital technologies originated in the USA and not surprisingly, the earliest disputes arose in the USA as well. Of late the disputes in the cyberspace have also been arising in various jurisdictions around the world.

Long arm statutes

The US consists of a variety of states, each of which have specific and independent legislations. And most of them have what are known as long arm statutes to catch defendants who actually do not belong there but have some kind of transaction with that state in order to exercise jurisdiction over them. Various state legislative Acts have a long arm clause which provides for personal jurisdiction, via substituted service of process, over persons or corporations which are non-residents of the state and which voluntarily go into the state, directly or by agent, or communicate with persons in the state, for limited purposes, in actions which concern claims relating to the performance or execution of those purposes, for example, transacting business in the state, contracting to supply services or goods in the state, or selling goods outside the state when the seller knows that the goods will be used or consumed in the state.

Minimum contact

The broad principle of these long arm statutes is that you have to show a minimum contact. For a non-resident to be subject to a state’s personal jurisdiction, he must have certain minimum contacts with state such that maintenance of suit does not offend traditional notions of fair play and substantial justice, and this is the “minimum contacts principle.” That means it has to be

shown that there is some minimal contact between the defendant and a particular jurisdiction.

In the Internet context, we have to show something more than mere access of a Web site. Because if that were not so, every Web site owner would be liable in every jurisdiction simply because the Web site can be accessed everywhere as long as you have an Internet access. It would lead to very unreasonable results where the defendant would have to defend himself in each potential jurisdiction.

One of the most path breaking judgement, that came out in this regard was *CompuServe, Inc. v. Patterson*\(^54\). In this case, the plaintiff CompuServe, an Internet service provider had its own Web site and it acted as a conduit. Its subscribers could upload their software on to CompuServe system and CompuServe then displayed it, and if there were interested buyers they could buy the displayed software and then through CompuServe the subscriber could get payment.

CompuServe was based in Ohio and the defendant, Patterson, was a subscriber of CompuServe. Every customer had to subscribe to CompuServe services, which meant that he had to go on to the Web site, enter all the details and particulars required, and in some cases make slight payment and then he became a subscriber and could avail of all its services and facilities on the Web site. Patterson was a resident of Texas who availed of these services and loaded some of his software. He placed his shareware\(^55\) on the network and it was also sold. There were buyers for his shareware and the payment came to

\(^54\) 89 F.3d 1257 (6th Cir. 1996).

\(^55\) Shareware is software that is distributed free on a trial basis with the understanding that the user may need or want to pay for it later. Some software developers offer a shareware version of their program with a built-in expiration date (after 30 days, the user can no longer get access to the program). Other shareware (sometimes called litemare) is offered with certain capabilities disabled as an enticement to buy the complete version of the program. (http://searchvb.techtarget.com/sDefinition/0,,sid8_gci212977,00.html).
him through CompuServe, that's from Ohio to Texas. Later, Patterson found that the shareware that he placed on CompuServe's system was copied by CompuServe and it was trying to sell its own version of the same. So, Patterson had a definite problem with CompuServe, he wanted to sue them.

As soon as CompuServe came to know that they were going to be sued, they filed a sort of counter claim, they filed another suit in the Ohio court – Patterson was going to file it in the Texas court – they filed in Ohio saying that let the court declare that we haven't infringed – for a declaratory judgement.

Patterson took up the argument that he didn't belong to Ohio, how could he, then, be amenable to jurisdiction of courts in Ohio? But the court held that since Patterson purposefully availed himself of the privilege of doing business in Ohio, he was amenable to jurisdiction there. The factors that the court considered were, first, the shareware agreement that Patterson entered into with CompuServe indicated that Ohio law will govern; second, CompuServe's system was located in Ohio; third, while transacting with CompuServe, or with its buyers, Patterson was addressing all his electronic communications through the server system in Ohio. Software was also sold in Ohio, there were buyers from Ohio, and there was payment also made from Ohio.

These factors were sufficient to create what we call a minimal contact. In fact, this was more than minimal contact with that particular jurisdiction. This was more than enough to confer jurisdiction. Court concluded that the user "reached out" from Texas to Ohio and "originated and maintained" contacts with Ohio.

In, *Cybersell, Inc. v. Cybersell, Inc. et al.*

56, Cybersell was the registered service mark of Cybersell, Inc., which was based in Arizona. There was another corporation identically named Cybersell, Inc. that came up in Florida. And Cybersell, Florida registered a Web site where they used the trademark

56 *Cybersell, Inc. v. Cybersell, Inc. et al.*, 130 F.3d 414 (9th Cir. 1997).
Cybersell. This Web site was basically intended to render Web design services and said in the Web page ‘if you want your Web pages designed, just contact us by e-mail’. It was accessible, however, in Arizona as well, because it’s a Web site that has to be accessible all over the world.

Plaintiff, an Arizona corporation sued the Florida corporation for trademark infringement, arising out of the defendant’s use of the (federally registered) “Cybersell” mark on its Web page saying that ‘Cybersell’ belonged to them and the Florida corporation had no right to use it on their Web site. The contention was that since the Web site could be accessed from Arizona, they had every ground to sue in Arizona.

The court dismissed the suit for lack of personal jurisdiction over the defendant, holding that the defendant’s contacts with the forum state were insufficient to qualify as “purposeful activity invoking the protections of Arizona.” It was held that the minimum contact clause is not satisfied because it was a passive Web site and was merely ‘accessible’ in the state. The court noted that the “likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” The court stated that in this case the defendant:[h]as conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the web, using the name "Cybersell". While there is no question that anyone, anywhere, could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that the defendant deliberately directed its merchandising efforts toward Arizona residents. The defendant did nothing to encourage people in Arizona to access its site, and there is no evidence that any part of its business (let alone a continuous

57 Ibid.
part of its business) was sought or achieved in Arizona. …No Arizonan except for [plaintiff] 'hit' defendant's web site. There is no evidence that any Arizona resident signed up for defendant's… services. [Defendant] entered into no contracts in Arizona, made no sales in Arizona, and sent no messages over the Internet to Arizona.

In *Maritz, Inc. v. CyberGold, Inc.*, the plaintiff, CyberGold, Inc., a corporation based in California, had launched a Web site which invited correspondence from public regarding their services. This was basically a Web site that was going to come out; it wasn't fully functional as yet. They used to email a copy of all their services to anyone who sent them a mail so that customers could then come and transact on the Web.

It was shown in the court that there were people from the plaintiff's jurisdiction, Missouri, who had access to that site and the Web site was an active solicitation, it had stuff like ‘please enter your e-mail address so that we could send out our services to you’ and people from the plaintiff's jurisdiction had actually written and queried about them. Therefore, it was held that there was a minimal contact in this case and that since the plaintiffs actively solicited business from users in that particular state by asking for their e-mails, they were susceptible to jurisdiction in this particular state. Court noted that defendant's Web site was accessible to any Internet user, including those in Missouri, and in fact had been accessed by people in Missouri. This was held sufficient by the court to exercise jurisdiction over the plaintiff.

In this case, this a sort of *via media* between both the extremes that we just discussed. We had an extreme where there was hard-on contact, we had another extreme where there was no minimal contact, no contact as such, just Web site access. This is an in-between case.

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In, Zippo Manufacturing Company v. Zippo Dot Com, Inc.,\textsuperscript{59} plaintiff, manufacturer of tobacco lighters with its principal place of business in Pennsylvania, sued defendant, an Internet subscription news service with its principal place of business in California, for trademark infringement and dilution arising out of Defendant's use of the domain names "zippo.com", "zippo.net" and "zipponews.com" on the Internet.

The court noted that the defendant's contacts with Pennsylvania "have occurred almost exclusively over the Internet. Dot Com's offices, employees and Internet servers are located in California. 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 Web page, 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 Web site 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 court found that the exercise of jurisdiction is proper in this case because the defendant:

\begin{quote}
[h]as done more than create an interactive Web site through which it exchanges information with Pennsylvania residents in hopes of using that information for commercial gain later. We are not being asked to determine whether Dot Com's Web site alone constitutes
\end{quote}

the purposeful availment of doing business in Pennsylvania. This is a "doing business over the Internet" case in the line of CompuServe, supra. We are being asked to determine whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania. We conclude that it does. Dot Com has contracted with approximately 3,000 individuals and seven Internet access providers in Pennsylvania. The intended object of these transactions has been the downloading of the electronic messages that form the basis of this suit in Pennsylvania.60

And there it was felt that it is not a Web site that is 'merely accessible'. They were providing very, very interactive services. They were asking you to enter your name, your address, to fill out a long line application form, you were then given a password, you were made to make a credit card payment, etc., etc., and you were part of a news group that used Zippo on the top as its title. Therefore, it was not merely Web site access, it was an interactive Web site. It was targeting people in the jurisdiction of Zippo Manufacturing Company. So, it was held that the Pennsylvania court was perfectly entitled to exercise jurisdiction.

'Sliding scale' theory

Zippo was again one of the path breaking judgements, and the court in this case evolved what is known as the 'sliding scale' theory when it comes to personal jurisdiction. The court discussed the 'sliding scale' for exercise of personal jurisdiction based upon Internet contacts. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. For example, in the CompuServe case. At the

60 http://www.cli.org/jurisdictioncases.htm#Maritz%20v%20Cybergold.
opposite end of the spectrum are situations where a defendant has simply posted
information on an Internet Web site which is accessible to users in foreign
jurisdictions. A passive Web site that does little more than make information
available to those who are interested in it is not grounds for the exercise personal
jurisdiction. For example, *Cybersell, Inc. v. Cybersell, Inc. et al.*\(^{61}\), and *Bensusan
Restaurant Corp. v. King*\(^{62}\). The middle ground is occupied by interactive Web
sites where a user can exchange information with the host computer, like *Maritz,
Inc. v. CyberGold, Inc.*\(^{63}\). 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 Web site.

Effects theory – where is the effect of the transaction felt?

In *Panavision Int'l, L.P. v. Toeppen*\(^{64}\), the defendant, Toeppen, an Illinois
resident, had registered, as his Internet domain name, Panavision’s trademark,
as well as the trademarks of numerous other well-known companies. He
registered the name and then offered to sell it back to the plaintiffs. When
Panavision later attempted to establish a Web site using its own trademarked
name, it was prevented from doing so by Toeppen’s prior registration. Rather
than acquiesce to Toeppen’s extortionate demand for $13,000 to release the
domain name, Panavision sued in California for trademark infringement.

The California court held that jurisdiction was “proper because Toeppen’s out-of-
state conduct was intended to, and did, result in harmful effects in California.” It
reasoned that “Toeppen allegedly registered Panavision’s trademarks as domain
names with the knowledge that the name belonged to Panavision and with the

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\(^{61}\) *Cybersell, Inc. v. Cybersell, Inc. et al.*, 130 F.3d 414 (9th Cir. 1997).


intent to interfere with Panavision's business. Toeppen expressly aimed his conduct at California," which is Panavision's principal place of business.

The court stated that the defendant Toeppen was an individual who:

\[ \text{[a]tempts to profit from the Internet by reserving and later reselling or licensing domain names back to the companies that spent millions of dollars developing the goodwill of the trademark.} \]

More importantly, the fact that the defendant had registered the domain name with intent to sell it, with intent to target the plaintiff by misappropriating the plaintiff's trademark was considered a good ground for the courts in the plaintiff's jurisdiction to exercise jurisdiction. The defendant knew that it was someone else's trademark and that he was misappropriating it, hoping to make a neat profit out of it. The court relying on the effects theory, noted that the effect of the defendant's action was felt in Plaintiff's jurisdiction because it's plaintiff's trademark that is involved.

**Crystallisation of US approach**

The US approach became very clear in a series of Internet related cases. By a number of decided cases a three-pronged test has emerged for determining whether the exercise of personal jurisdiction over a non-resident defendant is appropriate:

- the defendant must have sufficient (minimum contacts) with the forum state,
- the claim asserted against the defendant must arise out of those contacts, and
- the exercise of jurisdiction must be reasonable.\(^65\)

'Jurisdiction is proper [...] where contacts from actions by the defendant himself create a substantial connection with the forum state.' In an Internet context the real issue is whether making available a web site in the forum (and in the rest of the world) suffices to establish specific jurisdiction over a defendant and the cases arise where the web site contains a trade mark that is allegedly reproduced there without the permission of the trade mark owner in the jurisdiction-place where the site is accessed. The Zippo court applied this rule to the Internet context and found that its review of the available cases ‘reveal[ed] that the likelihood that personal jurisdiction can be constitutionally exercised is directed proportionate to the nature and quality of commercial activity that an entity conducts over the Internet’. A passive web site that does little more than make information available to those who are interested in it is not a ground for the exercise of personal jurisdiction. This was, for example, the case when a Jazz club operated a web site that contained information about the venue and forthcoming events, but that did not offer visitor the opportunity to send e-mails or to make bookings. Things change when the site invites visitors to add their addresses to a mailing list. This was held to amount to a substantial connection because the conduct amounted to active solicitations and because every visitor received a reply. It suffices that the visitors of the site can contact the site-owner from the forum to establish a substantial connection. That

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shows that the defendant has taken deliberate action\textsuperscript{72} towards the forum. Similarly the combination of a web site and a newspaper add in a local paper to solicit funds established the necessary connection.\textsuperscript{73} A defendant that reaches intentionally beyond its boundaries to conduct business with foreign residents is subject to the exercise of specific jurisdiction. This was for example the case when Mr Patterson, a Texas resident, deliberately dealt with CompuServe in Ohio to upload his shareware software.\textsuperscript{74} In the Zippo case Zippo Dot Com had contacted 3000 individuals and seven Internet access providers in the Pennsylvania forum. This was sufficient in terms of contact to warrant the exercise of specific jurisdiction. The court pointed out\textsuperscript{75} though that ‘the test has always focused on the nature and quality of the contacts with the forum and not the quantity of those contacts’.\textsuperscript{76}

The cases discussed above, despite slight differences between them, show a clear and coherent approach adopted by the US courts in jurisdictional issues, even if the defendant deliberately avoids any personal contact with the jurisdiction.

The EU approach

In, a French decision of 1996 concerning the conflicting use of the mark ‘Payline’ in Germany and France, the plaintiff’s mark ‘Payline’ was registered in France, the German defendant had a similar mark for identical services registered in Germany. As the defendant’s web site was also accessible in France, the plaintiff sued for infringement of its French trademark, arguing that access in France was sufficient to assume jurisdiction. The French court\textsuperscript{77} indeed found the

\textsuperscript{72} Ballard v. Savage, 65F. 3d 1495, 1498 (9th Cir. 1995).
\textsuperscript{74} CompuServe, Inc. v. Patterson, 89 F. 3d 1257 (6th Cir. 1996).
\textsuperscript{77} Tribunal de Grand d’Instance de Nanterre, interim injunction of 13 October 1996, reported by Bettinger and Thum, “Territorial Trade Mark Rights in the Global Village – International
accessibility of the defendant's web site in France sufficient for affirming jurisdiction (and infringement). The French courts ordered worldwide cessation of use. A similar view was expressed by the High Court in Stuttgart when it ruled that an on-line offer that was accessible in Germany was sufficient for there to be an infringement of the trade mark.

1-800 Flowers Inc v. Phonenames Ltd concerned an appeal against a decision to register the trade mark 800 FLOWERS in class 35 for flowers and floral products. The applicant had argued that the trademark had been used in the UK by its use on a web site. The court considered that merely because an Internet web site could be accessed from anywhere in the world, that of itself did not mean that it should be regarded as having been used everywhere in the world. ‘Use’, for trade mark purposes, depended on all the circumstances of a particular case, particularly the intention of the owner of the web site and the understanding that a person using the Internet would gain from reading the web site. On the facts of this case, the applicant's use of the mark on its website did not sufficiently constitute evidence of the requisite intention to use the mark in the United Kingdom. In the words of Jacob, J.:

I think that the mere fact that websites can be accessed anywhere in the world does not mean, for trademark purposes, that the law should regard them as being used everywhere in the world. It all depends upon the circumstances, particularly the intention of the website owner and what the reader will understand if he accesses

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the site. In other fields of law publication on a website may well amount to a universal publication, but I am not concerned with that.

In *Euromarket Designs Inc. v. Peters*\(^8^1\) concerned alleged acts of infringement of a mark registered in the UK by the use of a sign by the defendant on a web site emanating from Ireland. An American company had a UK trademark for ‘Crate & Barrel’ in class 21. The defendant, Peters, ran a store in Dublin called ‘Crate & Barrel’. The defendants advertised their shop in Dublin on a web site. It was alleged that two kinds of goods sold in the Irish store, a hurricane lamp and a beaded coaster, fell within the specification of the plaintiff’s trademark. The question turned on whether the sign ‘Crate & Barrel’ on the defendant’s web site had been *used* in the UK. The court considered that an apt analogy was to consider peering down a telescope towards Dublin, and being invited to visit the shop in Dublin. This would not amount to use in the UK. This was different to other Internet selling activities, where the web site owner goes out actively seeking world-wide customers. In those circumstances, a sign would be ‘used’ on a web site. The judge relied on the fact that the advertisement was intended for a local clientele by the trader, seen in combination with the fact that visitors of the site from outside that local area would understand that the web site was not directed at them. This leads inevitably to the conclusion that any active use of the trademark in the course of trade is limited to the local area.\(^8^2\)

*The League Against Racism And Antisemitism (LICRA) and The French Union Of Jewish Students v. Yahoo! Inc., California and Yahoo! France Inc.* is a recent controversy relating to activities on the Internet. Yahoo! is one of the most famous Web portals by the domain name, www.yahoo.com. It had a section on auctions where one can participate in auctions involving the sale of a variety of items and among these items was Nazi memorabilia. The *yahoo* case arose in


the year 2000 when the plaintiffs, International League Against Racism and Anti-Semitism and the Union of French Jewish Students, took the defendants, Yahoo and its former chief executive Tim Koogle to court in France. The plaintiffs asked the court to force Yahoo! Inc. to block French Internet users from bidding on Nazi memorabilia that was being auctioned from a Web site that Yahoo hosted. The Plaintiff's sought to charge Yahoo! under a French law that makes it illegal to exhibit or sell items with racist undertones.

The Web site also contained a disclaimer, which said that they are not liable in any way for any loss that you suffer as a result of accessing the Web site i.e., you access at your own risk. It further said:83

Choice of Law and Forum. The TOS and the relationship between you and Yahoo! shall be governed by the laws of the State of California without regard to its conflict of law provisions. You and Yahoo! agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California.

In November 2000, the French court directed Yahoo! to block Internet users in France from auctions selling the memorabilia. Judge Jean-Jacques Gomez of the Paris Tribunal de Grande Instance ruled that Yahoo!’s display of Nazi artefacts in France violated the law and was “an offence against the collective memory of a country profoundly wounded by the atrocities committed by and in the name of the Nazi criminal enterprise.”84

Yahoo! corporation has about 25 subsidiaries based in different countries targeting different linguistic and geographical groups, like Yahoo! has a subsidiary for India, i.e. in.yahoo.com. Yahoo! likewise had a French subsidiary,

83 http://docs.yahoo.com/info/terms/.
fr.yahoo.com, which immediately blocked access to the auctions pages in question recognising that it has to abide by the laws of the country in which it is based. But while Yahoo! France quickly complied, its U.S. parent company fought on. The company contended that the sale of such memorabilia is perfectly legal in the United States, where Yahoo! and its Web servers are based. In turn, Yahoo even approached a California federal court for a summary judgment against the order. The judgment was granted.

But for the French court trying the Yahoo case, the answer was clear-cut: If a reader of a Web page is on French soil has access to the site then French law applies. The courts also seemed to have relied on an additional factor to exercise jurisdiction; it was noticed that whenever www.yahoo.com is accessed from France some French advertisements appear; which means that Yahoo! knows very well who is accessing it. If Yahoo! can know from where the Web site is being accessed, they can also, logically, block those persons from the banned Nazi memorabilia. The court, ordered Yahoo! to make it impossible for Internet users in France to view online auctions of banned Nazi memorabilia on its U.S. Web site. The court told the company to return in two months to explain how it would implement the block. The court had said it would fine Yahoo! about $14,000 for each day it exceeds the order's deadline.

*The Times* of London described the decision “the first attempt by any country to impose international censorship on the world wide web.” *The Times* also referred to the decision as “a conflict between France’s culture of state regulation and the American tradition of free-for-all.” London’s Guardian said the ruling would have “repercussions for Internet users around the world.” Lawrence Lessig, a Stanford University Internet law scholar, called the decision the clearest example to date of a free and sovereign nation setting rules for what material can be accessed from its soil- “To the extent that governments insist on more of these types of control, freedom on the Internet will be restricted”. The decision looks to augur
the beginning of the end of what Harvard law professor Jonathan Zittrain called 
"the pleasant anarchy of the Internet."85

Yahoo! argued that it would be technically impossible to block just French 
citizens from access to its online auctions if should the auctions contain 
objectionable items. Web security consultant Jean-Denis Gorin of Edelweb SA, 
who acted as an expert witness for Yahoo! said, “It's difficult to say for sure 
where Web site visitors are from. The current techniques for relating users' IP 
addresses to their Internet service provider--and hence to the country in which 
they are likely to be found-- had a margin of error of 20 percent."86.

A software product was also considered that allows a company to geographically 
locate in real time a customer and redirect him to an alternative page. This 
means, that anyone who tries to access www.yahoo.com (the US site) from 
France will be automatically diverted to fr.yahoo (the French site). But such 
software didn't meet the strict criteria set by the court. For example, the users of 
America Online's Internet access service were impossible to be located by 
means of their IP address because requests for Web pages from AOL 
subscribers are first routed through servers at the company's U.S. headquarters 
before being sent out onto the Internet. This meant that wherever AOL 
subscribers are in the world, they always appear to be in Virginia, where AOL is 
located. This problem alone made it impossible to definitively locate some 13 
percent of French Internet users.

But a recent judgement of the Paris court's on February 11, 2003 has thrown out 
accusations that Yahoo! and its former chief executive Tim Koogle should be 
legally responsible for the auction of Nazi paraphernalia that took place on its 
Web sites. The court ruled that Yahoo! and its former chief executive, Tim

86 Peter Sayer and Sarah Deveaux, “Jurisdiction in Cyberspace”, IDG News Service, (July 28, 
Koogle, never sought to “justify war crimes and crimes against humanity” -- the accusation levelled by human rights activists, including Holocaust survivors and their families. “Justifying war crimes means glorifying, praising, or at least presenting the crimes in question favourably.” Yahoo! and its auction pages did not fit that description, the court said.87

Yahoo! had been arguing that a global company cannot be held to regional laws, and that it is protected by the U.S.’s First Amendment right to free speech. It had argued that Yahoo! is not amenable to the jurisdiction of French courts. But the very fact that the court went into merits of the dispute shows that it assumed jurisdiction over Yahoo Inc.

German authorities have also investigated Yahoo for the alleged auction sale of Adolf Hitler's *Mein Kampf*, which is banned in that country. In a controversial move, Germany’s highest civil court ruled that any Web site accessible by people in Germany is subject to German law, regardless of the site’s physical origin.88

The approach in the EU countries is not as crystallised as we see in case of the USA. Though courts gradually are looking at the impact of the web presence of a business entity on the local jurisdiction along with their intention of entering into some sort of relationship.

**Indian approach**

As far as the criminal law is concerned, the position has been straighten by the IT Act, 2000 which says that if the impact of a particular act is felt in India, Indian courts will have jurisdiction, thereby endorsing the ‘effect’ theory.

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Looking from a contractual perspective, the law is contained in the Code of Civil Procedure, which says that the jurisdiction lies where the cause of action, whether wholly or partly, arises. This principle would mean even if a part of cause of action has arisen within the precincts or the jurisdiction of an Indian court, the Indian court could exercise jurisdiction. Section 20 of CPC doesn't talk about due process or minimum contact principles. So, under this theory mere Web site access could suffice for a court to assume jurisdiction. The moment a plaintiff shows that the Web site is accessible from India, he can show that a part of the cause of action has arisen here because Indian viewers are likely to view the Web site. Both the Copyright Act and the Trademarks Act say that the plaintiff can file a suit where he is located; he doesn't need to bother about where the defendant is located. This means Indian courts have a very wide jurisdiction as far as the Internet is concerned.

But we find that courts in India are, to a large extent, looking at something beyond mere access of a Web site. In *Tata Sons v. Ghassan Yacoub and others*[^89], where the defendant, Ghassan Yacoub, was based in the USA and had registered the domain name Tatagroup.com. The defendant had registered the domain name with Network Solutions Incorporated, which is a registrar based in the USA. The Delhi High Court did not go extensively into the question of jurisdiction but made a statement to the effect that the Internet has transactional ramifications, which means it potentially impacts almost every jurisdiction where it is accessible and we have to look at where is the impact felt. Based on this reasoning, the High Court of Delhi granted an *ex parte* interim injunction against the defendants restraining them from using and transferring the infringing domain name Tatagroup.com. The court accepted the contention put forth by the plaintiff.

[^89]: Unreported *ex parte* interim injunction order; Suit No. 1672/99 (Delhi High Court); see, presentation of P. Anand, Partner, Anand & Anand, WIPO International Conference on Electronic Commerce and Intellectual Property (September 1999), available at: http://ecommerce.wipo.int/meetings/1999/index.html.
that in matters concerning Internet communications, which have trans-national ramifications, the effect of the impugned transactions in India is an important factor for determining jurisdiction.

In, *Himalayan Drug Company v. Sumit*\(^\text{90}\), the plaintiff, the Himalaya Drug Company, had on their Web site a huge database on Ayurvedic concepts and the whole range of products and herbs listing out the herbs’ Sanskrit and Latin names, their properties, the medicines it was used in, etc., etc. with graphical and pictorial presentation. The whole database was exactly copied by the defendant who was based in Italy and pasted on a Web site called ‘ayurveda.sumit.net’. The only contact with the plaintiff’s was the one stated on the Web site in the form of an e-mail address ‘sumit@democrat.com’. So, the plaintiff sued the defendant along with the Internet service provider, also an Italian entity, virtualace.net, who had actually sub leased the domain name and Web space to the infringer. The court exercised jurisdiction in this case because it was a case of copyright violation and under section 62 of the Copyright Act, 1957, a suit can be filed at a place where the plaintiff in based. Moreover the Web site could be opened in Delhi and the damage could also be said to have occurred there. The fact that the defendants belonged to Italy did not desist the court from exercising jurisdiction.

**CONCLUSION**

With respect to commercial disputes and intellectual property infringements on the Internet, the application of the above general principles often crystallizes in the question of whether the mere accessibility of a Web site in the territory is a sufficient basis for finding jurisdiction, or whether something more than mere accessibility is required. Generally, the mere accessibility of a Web site in a forum will not be deemed sufficient for a court to exercise jurisdiction over the

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\(^{90}\) *Himalayan Drug Company v. Sumit*, Suit No. 1719 of 2000 (High Court of Delhi).
defendant, but this position is not uniformly shared in all countries. Mere creation of a Web page anywhere in the world could potentially strike millions of individuals and businesses everywhere in the world. It would be unreasonable to suggest that this one act puts the owner of the Web site amenable to the jurisdiction of every court on the planet earth. This is a proposition which is correct neither theoretically nor practically or functionally.

The Internet operates in an environment, which allows infringements to take place with no clear and convenient jurisdiction in which the rightsholder can file suit. The challenge to the legal community posed by such an environment, is currently being dealt with at the national and international level. There has been an ongoing effort to form new rules that would apply to the online environment. They reflect a growing consensus that the principle of 'freedom of contract' should be accorded appropriate respect under the law as a means for facilitating electronic commerce. For the time being, in a complex international legal environment, a major role is played by private international law. Its role is to determine where one can litigate and which national law will apply to the various transactions. This means that existing tools are used to fill the vacuum. Where the infringer is neither domiciled nor has his place of business or property within national territory, the rights holder has no choice but to enforce a judgment obtained within national territory in a foreign country. At regional level, there are proceedings for recognition of foreign judgments91, but they are sometimes rather tedious and time-consuming. Consequently, steps should be taken towards creating an international convention for the recognition of foreign judgments, applicable throughout the world.

At the national level, the disputes are being settled through case-by-case determinations of the courts. The courts, however, face myriad, difficult factual

91 The European Convention on Jurisdiction and Enforcement of Judgements and the Lugano Convention, which were concluded specifically in order to facilitate the enforcement of national judgments, at least within the EU and the EFTA.
circumstances, and must determine whether the exercise of jurisdiction is proper in situations where the relevant "contacts" with the forum have been through the network while the defending party is located in another state or country.

Originally cyberlaw was not equipped at all to regulate transnational commercial transactions over the Internet and national laws were ill at ease in the digital borderless environment of the Internet. The courts around the world, not surprisingly, are struggling to come up with a coherent doctrine of personal jurisdiction for Internet transactions. It is probably far too early to suggest that concrete rules have yet emerged. Though, a few general themes appear to be emerging. Courts, by and large are looking at the contact, impact and effect of a particular Web site on local jurisdiction meaning thereby something more than a mere Web site access. It may take some time before a common understanding is achieved in the context of resolving disputes arising in cyberspace.