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Abstract

This comment explores a judgment in Texas against a Canadian defendant and corresponding suit in Canada seeking to enforce the judgment. The ultimate determination was significant, representing the first time that a Canadian appellate court addressed the impact of the Internet on a Court's adjudicatory decision. The comment explores the difficulty that the internet poses to the doctrine of recognition and enforcement of foreign judgments.

COMMENT

CANADA'S APPROACH TO JURISDICTION OVER CYBERTORTS: *BRAINTECH* v. *KOSTIUK*

*Daniel P. Schafer**

It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained.¹

INTRODUCTION

On May 7, 1997, the District Court of Harris County, Texas, entered a US\$300,000 judgment in favor of BrainTech, Inc.² The award compensated BrainTech for general and aggravated damages,³ which resulted from allegedly defamatory remarks posted on an Internet bulletin board.⁴ The judgment, however, was rendered against a Canadian defendant with no assets in the United States.⁵ Therefore, BrainTech brought suit in Canada, and petitioned the court to recognize and enforce the judgment.⁶ The ultimate determination was significant, representing the first time that a Canadian appellate court addressed the impact of the Internet on a court's adjudicatory jurisdiction.⁷ Also,

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1. *BrainTech v. Kostiuk*, 1999 B.C.D. Civ. J. LEXIS 2020, *32.

2. *See id.* at *3 (noting that district court entered default judgment against appellant).

3. *See id.* at *18 (granting BrainTech US\$250,000 in general damages and US\$50,000 in aggravated damages).

4. *See id.* at *10 (stating that there is no record of content of defamatory postings). The court, however, assumed that a valid cause of action sounding in tort existed. *Id.*

5. *See id.* at *3 (indicating in statement of defense that John Kostiuk, defendant, had no connection to forum state).

6. *See id.* at *2 (noting that BrainTech commenced proceedings in Supreme Court of British Columbia to enforce judgment).

7. *See* Robert Wisener, *Web Activities Not Immune from Liability*, COMPUTING CANADA, June 4, 1999 (noting that ruling by British Columbia Court of Appeals was first decision to address issues created by Internet).

the decision addressed the impact of the Internet on the Canadian doctrine of recognition and enforcement of foreign judgments, a doctrine recently altered due to increased interaction among nations.⁸

In the last twenty years, interaction among distant economies and cultures has increased.⁹ Modern communication technology has facilitated this interaction¹⁰ by instantly disseminating published materials across the globe via satellite, television, and most importantly, the Internet.¹¹ Scholars note, however, that, as individuals of different nations interact on a common ground, international conflicts and litigation are bound to increase.¹²

The international community has addressed problems¹³ cre-

8. See *Morguard v. De Savoye* [1990] 3 S.C.R. 1077, 1097 (Can.) (stating that doctrine of recognition of foreign judgments was changed "in light of a new world order.").

9. See Antonio de Souza Menezes, *Globalization and the World Economy*, INDEPENDENT, Nov. 28, 1999, available in 1999 WL 21953301 (defining increased interaction as globalization, which is process by which goods, services, people, and capital flow across national boundaries, increasing interaction among nations).

10. See Emma Rothschild, *Globalization and the Return of History*, FOREIGN POLICY, July 1, 1999, available in 1999 WL 16580411 (noting that globalization is often associated with new technologies, such as Internet, cable news, international capital markets, and high-speed travel).

11. See Rachel B. Korsower, *Matusевич v. Telnikoff: The First Amendment Travels Abroad, Preventing Recognition and Enforcement of a British Libel Judgment*, 19 MD. J. INT'L L. & TRADE 225, 229 (1995) (noting how world is increasingly becoming single market for media transmission while remaining fragmented market for legal services); see also *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996) (defining Internet as network of computers). The court specifically stated:

The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network or networks. This is best understood if one considers what a linked group of computers—referred to here as a "network"—is, and what it does. . . . Some networks are "closed" networks, not linked to other computers or networks. Many networks, however, are connected to other networks, which are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network in the system. This global Web of linked networks and computers is referred to as the Internet.

Reno, 929 F. Supp. at 830-31.

12. See Symposium, *The Long Arm of Cyber-Reach*, 112 HARV. L. REV. 1610, 1634 (1999) (stating that courts are going to encounter flood of litigation concerning Internet contacts); Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U.L. REV. 416, 417 (1999) (arguing that increased interaction among individuals from different nations increases likelihood of states becoming involved in adjudicatory and enforcement actions).

13. See, e.g., Alexander Gigante, *Ice Patch on the Information Superhighway: Foreign Liability for Domestically Created Content*, 14 CARDOZO ARTS & ENT. L.J. 523, 550 (1996) (stating that problem created by satellite broadcasts is liability of transmitting entity to

ated by traditional technological media¹⁴ through treaties and international cooperation.¹⁵ The problems created by the Internet,¹⁶ however, have not received a unified response.¹⁷ Instead, individual nations have attempted to regulate the Internet, applying domestic rules and principles.¹⁸ In the short-term, individual governments have exercised some control over the Internet by regulating conduct that directly affects its citizens or occurs within its borders.¹⁹ In the long-term, however, it is unlikely that individual governments will be able to regulate

regulatory jurisdiction in all countries receiving broadcast signals). Also, satellite transmissions may violate copyright laws in every country in which the images are received. *Id.*

14. See Ryan Yagura, *Does Cyberspace Expand the Boundaries of Personal Jurisdiction*, 38 IDEA: J.L. & TECH. 301, 310 (1998) (defining traditional technological media, in context of defamation cases, as newspapers, magazines, telephone, fax, television, or radio broadcast).

15. See, e.g., Gigante, *supra* note 13, at 550 (describing Council of Europe adopting European Convention on Transfrontier Television). The European Convention on Transfrontier Television grants jurisdiction over satellite transmissions to the country in which the broadcasts originated. *Id.* This convention, however, did not address the ability of a single transmission to violate copyright laws in various countries. *Id.* Therefore, the European Union issued a directive applicable to transborder television broadcasts that specifically addressed copyright issues and transborder satellite transmissions. *Id.*

16. See, e.g., Michael Hatcher et. al., *Computer Crime*, 36 AM. CRIM. L. REV. 397, 398-401 (1999) (noting that computer crime is major problem created by Internet). Scholars have been unable to formulate a concise definition of computer crime, due to the variety of actionable offenses that are committed with a computer. *Id.* at 398-99.

17. See Steve Gold, *Storm Brews Between the US and EC over Internet Regulation*, NEWSBYTES, Apr. 1, 1998 (stating that European Union and United States differ over type of regulation, if any, that is needed for development of Internet). The Commission for the European Communities (or "Commission") wants to establish regulatory mechanisms to ensure fair competition. *Id.* The United States, however, is hesitant, fearing that any regulatory mechanisms would create a nanny state over the Internet. *Id.* But see Steve Gold, *World Cybercrime Treaty May Be Under Way*, NEWSBYTES, Jan. 14, 2000 (citing unconfirmed reports that numerous countries, including, Canada, European Union, Japan, United States, and others, are working on Cybercrime treaty). The draft is rumored to cover topics such as Internet hacking and eavesdropping. Gold, *supra*. If true, then this draft would be the first time legislators have addressed the issue of Internet security since the inception of the Internet. *Id.*

18. See Ogilvy Renault, *Jurisdiction and the Internet, Are Traditional Rules Enough?*, Uniform Law Conference of Canada, July 1998 (visited Apr. 11, 2000) <<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>> (on file with the *Fordham International Law Journal*) (commenting that practical effect of Internet disputes is important because courts traditionally apply domestic rules of forum).

19. See Symposium, *Cyberspace Regulation and the Discourse of State Sovereignty*, 112 HARV. L. REV. 1680, 1691-93 (1999) (noting that governments are determined to regulate cyberspace); Robert J. Anello, *New Technology Spawns New Crimes and Privacy Issues*, N.Y.L.J., Sept. 16, 1999, at S13 (noting that Federal Trade Commission has brought 97

computer-mediated communications completely based on territorial notions effectively.²⁰

Scholars note that the decentralized nature of the Internet confounds national legislation²¹ by rendering laws based on territorial control inconvenient and irrelevant.²² The very notion of territoriality may even be outdated in a world demarcated not by nations and states, but by computer networks.²³ Individual nations, however, continue to decide cases, applying laws defined by notions of territorial sovereignty to extraterritorial and international transmissions.²⁴

These judgments are often unenforceable because individual nations are not obligated to recognize foreign judgments.²⁵

Internet fraud enforcement actions in last five years). These cases involve pyramid schemes, false advertising, and investment fraud. Anello, *supra*.

20. See Renault, *supra* note 18 (stating that characteristics of Internet make it resistant to traditional rules and principles).

21. See *id.* (stating that ability of Internet to circumvent national legislation is most apparent in disputes over forum). Internet communications are not confined within geographical boundaries, but instead broadcast throughout the world through digital networks. *Id.*; see also Jo-Ann M. Adams, *Controlling Cyberspace: Applying the Computer Fraud and Abuse Act to the Internet*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 403, 405 (1996) (arguing that structure of Internet prohibits government regulation, allowing crimes on Internet to occur).

22. See Gigante, *supra* note 13, at 548 (stating that Internet is beyond all government regulation because individual nations can impose only partial regulatory framework on Internet); David R. Johnson & David G. Post, *New Civic Virtue on the Internet*, (visited Apr. 11, 2000) <www.cli.org/paper4.html> (on file with the *Fordham International Law Journal*) (questioning whether laws organized by territorial boundaries can be effective in environment that separates effects of action from location in which action occurs); Joel Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, in BORDERS IN CYBERSPACE 84, 85-87 (Brian Kahin & Charles Nesson eds., MIT Press 1996) (describing destruction of territorial borders by Internet); Juliet M. Oberding & Terje Norderhaug, *A Separate Jurisdiction for Cyberspace* (visited Apr. 11, 2000) <<http://www.ascusc.org/jcmc/vol2/issue1/juris.html>> (on file with the *Fordham International Law Journal*) (discussing whether traditional notion of jurisdiction should be altered in light of global nature of Internet).

23. See Matthew R. Burnstein, *Conflict on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 81 (1996) (stating that Internet communications can circumvent laws based upon national borders and territorial jurisdiction).

24. See Peter H. Lewis, *Limiting a Medium Without Boundaries*, N.Y. TIMES, Jan. 15, 1996, at D1 (noting that China regulates Internet by controlling access through centrally regulated servers); see also David L. Marcus, *Nations Strive To Limit Freedom of the Internet*, BOSTON GLOBE, Dec. 28, 1998, at A1 (reporting that at least 20 states limit Internet access); Gigante, *supra* note 13, at 548 (commenting that national legislation of Internet communications will create Tower of Babel with each nation applying law based on territorial boundaries to extraterritorial transmissions).

25. See Whincop, *supra* note 12, at 419 (stating that nations must submit to commitments on their own accord); Russell J. Weintraub, *How Substantial Is Our Need for a*

Absent international obligation, some countries do recognize and enforce foreign judgments based on their own national standards.²⁶ Often these doctrines require that the original court properly exercised jurisdiction.²⁷ Scholars note, however, that this requirement presents a problem for courts debating whether to recognize and enforce international Cybertorts²⁸ and Cybercrimes.²⁹

Since Cybertorts transcend traditional jurisdictional analysis, courts may have difficulty determining when to enforce a foreign Cybertort judgment.³⁰ Commentators have stated that this

Judgments-Recognition Convention and What Should We Bargain Away To Get It?, 24 BROOK. J. INT'L L. 167 (1998) (noting that no international accord requires United States to recognize and enforce foreign judgments).

26. See, e.g., Symposium, *A Canadian Perspective*, 24 BROOK. J. INT'L L. 31, 42-51 (1998) (noting that Canadian doctrine of recognition and enforcement of foreign judgments is not based upon existence of treaty). Until the 1990s, Canada had become a signatory to only one treaty on enforcement of foreign judgments. *Id.* at 42. Some Canadian provinces, however, have designated individual countries as reciprocating jurisdictions, essentially facilitating enforcement of judgments through a registration mechanism. *Id.*; see also Felix D. Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 LOY. L.A. INT'L COM. L.J. 55, 64 (1999) (noting that Switzerland will enforce foreign judgment that meet certain procedural requirements).

27. See Strebel, *supra* note 26, at 63 (stating that most important requirement is proper exercise of jurisdiction by court that originally passed judgment).

28. See Rosalind Resnick, *Cybertort: The New Era*, NAT'L L.J., July 18, 1994, at A1 (defining Cybertort as cause of action that exists due to harmful Internet contact). Rosalind Resnick notes that some Cybertorts are so revolutionary that legislative and judicial guidance is non-existent. *Id.* Other disputes, however, are simply high-tech versions of existing causes of action. *Id.*

29. See Gabriole Zeviar-Geese, *The State of the Law on Cyberjurisdiction and Cybercrime on the Internet*, (visited Apr. 11, 2000) <<http://www.law.gonzaga.edu/borders/documents/cyberlaw.htm>> (on file with *Fordham International Law Journal*) (stating that Cybercrimes include credit card fraud, unauthorized access to computer systems, child pornography, software piracy, and cyberstalking). The definition for Cybercrimes, however, is constantly evolving under U.S. federal and state law. *Id.* The definitional classification of new crimes and torts is not the only difficulty commentators posed by Cybertorts and Cybercrimes. *Id.* They also create a problem for courts when analyzing jurisdiction, because the Internet is a-jurisdictional. *Id.*; Tomas A. Lipinski, *The Developing Legal Infrastructure and the Globalization of Information: Constructing a Framework for Critical Choices in the New Millennium Internet—Character, Content and Confusion*, 6 RICH. J.L. & TECH. 19, (1999) (last visited Apr. 27, 2000) <<http://www.richmond.edu/jolt/v6i4/article2.html>> (on file with the *Fordham International Law Journal* (commenting that legal problems arise due to conflicting viewpoints over characterization of Internet); Renault, *supra* note 18 (stating that traditional rules relating to jurisdiction are based on territorial boundaries, allowing countries to govern solely within geographical borders)).

30. See Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 342 (1996) (noting that courts struggle with Cybertorts due to failure to comprehend Internet and jurisdiction).

determination is important, because the Internet has offline effects.³¹ Allowing individuals to hide behind the anonymity of the Internet³² may lead to inequitable results.³³ One commentator has urged that the international community avoid this result, advocating that different nations establish cooperative mechanisms to recognize and enforce judgments based on accepted notions of jurisdiction.³⁴

This Comment explores the difficulty that the Internet poses to the doctrine of recognition and enforcement of foreign judgments. Part I provides an overview of U.S. jurisdiction analysis and the Canadian doctrine of recognition and enforcement of foreign judgments. Part I also provides a brief overview of the

31. See Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1200 (1999) (stating that Internet causes harm to individuals, thereby creating normative case for jurisdiction); *Cyberspace Regulation*, *supra* note 19, at 1687 (commenting that Internet overrides community values and standards, subjecting communities to whatever information may be online).

32. See Johnson & Post, *supra* note 22 (noting that law enforcement on-line is problematic because finding anonymous or pseudo-anonymous user within any specific jurisdiction is very difficult).

33. See Pierre Trudel, *Jurisdiction over the Internet: A Canadian Perspective*, 32 INT'L LAW. 1027, 1028 (1998) (noting that increased interaction has made it difficult for courts to establish jurisdiction); Tamir Maltz, *Customary Law & Power in Internet Communities*, (visited Apr. 11, 2000) <www.ascusc.org/jcmc/vol2/issue1/custom.html> (on file with the *Fordham International Law Journal*) (commenting that Internet is exit strategy from government regulation, because offender can shift geographic location when certain activities violate laws of territorial government); Whincop, *supra* note 12, at 417 (stating issue of enforcement is important due to increased interaction among nation states). As interaction increases, the likelihood of conflict of laws will increase exponentially. Whincop, *supra*. This increase will, in turn, necessitate cooperation among individual nations. *Id.*

34. See Trudel, *supra* note 33, at 1028 (advocating that individual countries must rework their legislative policies while, internationally, countries must establish cooperative mechanisms). This approach is novel because the international community has already developed cooperative mechanisms to ensure that crimes are punished, regardless of the territorial location of the offenders. *Id.* at 1033; see also Dagesse v. Plant Hotel N.V., No. 98-713-B, 2000 U.S. Dist. LEXIS 1073, at *25 (D.C.N.H. Jan. 5, 2000) (stating that "[t]he [U.S.] Supreme Court has long recognized that personal jurisdiction must adjust to changing technological and commercial innovation."); Hanson v. Deckla, 357 U.S. 235, 250-51 (1958) (acknowledging that "as technological progress has increased the flow of commerce between the States, the need for jurisdiction has undergone a similar increase"); Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985) (acknowledging that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."); Renault, *supra* note 18 (stating that expansion of court's jurisdiction, which was originally spurred by internal trade and communication, has been necessitated by Internet).

Internet, including its creation, structure, and features. Finally, Part I discusses how the United States has dealt with jurisdiction requirements in cases involving the Internet, specifically addressing defamatory postings on the Internet. Part II discusses the *BrainTech v. Kostiuk* case, which is the first Canadian appellate court decision to discuss the enforcement of a foreign, Cybertort judgment. Part III argues that the British Columbia (or "B.C.") Court of Appeals mechanical application of the Canadian doctrine of recognition and enforcement of foreign judgments exemplifies a protectionist ruling, which the Supreme Court of Canada recently indicated was impermissible. Also, the British Columbia Court of Appeals improperly applied existing U.S. case law to determine whether a real and substantial connection exists between the cause of action and the forum state.

I. JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS: PROBLEMS CREATED BY CYBERTORTS

Ultimately, the jurisdiction of a court to adjudicate an action depends on whether it can bind the parties to its judgment.³⁵ Generally, geographical boundaries define a court's jurisdiction.³⁶ Either an individual must reside or the injury underlying a cause of action must occur in the adjudicating country.³⁷ Territorial boundaries are pivotal in judicial enforcement,³⁸ allowing a country jurisdiction over its citizens and inter-

35. See Trudel, *supra* note 33, at 1035-39 (discussing principle of territoriality of laws). The principle of territoriality of laws provides that countries can adjudicate and regulate actions that take place within the country's geographic boundaries. *Id.* at 1035. As a derivative of sovereignty, the principle of territoriality is recognized universally. *Id.* at 1035-36. This principle has two branches: subjective and objective territoriality. *Id.* at 1036. Objective territoriality recognizes jurisdiction over actions that cause harm within the territories of a state, but do not actually occur there. *Id.* at 1036-37. On the other hand, subjective territoriality recognizes jurisdiction over actions that occurred completely within the territories of a state. *Id.* at 1036.

36. See Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMMUNICATION L. REV. 69 (1998) (noting that principle of subjective territoriality allows country to regulate actions within territorial boundaries).

37. See Business Law Committee on Law of Commerce in Cyberspace, American Bar Association, *Prospectus, Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction*, (visited on Apr. 11, 2000) <<http://www.abanet.org/buslaw/cyber/initiatives/prospect.html>> (on file with the *Fordham International Law Journal*) [hereinafter ABA Prospectus] (outlining jurisdiction of court to adjudicate action and noting that link must exist between adjudicating forum and defendant).

38. See *Cyberspace Regulation*, *supra* note 19, at 1682 (stating that discussions on Internet regulations yield three interpretations of state sovereignty: realist, representa-

nal affairs.³⁹ Many states, however, also assume jurisdiction over nonresident defendants.⁴⁰

In such an action, a successful litigant may have to enforce the judgment in a foreign court.⁴¹ The foreign court may recognize the judgment, but only after scrutinizing the original court's jurisdiction analysis.⁴² Such an analysis, however, is difficult when examining a foreign Cybertort judgment, since Cybertorts can transcend territorial boundaries.⁴³

A. U.S. Jurisdiction and Canadian Enforcement of U.S. Judgments

In the United States, the Due Process Clause of the Fourteenth Amendment⁴⁴ limits the ability of a state court to render

tional, and postmodern). According to the representational conception, the ability of a nation to regulate activity depends on whether such regulation would prevent a state from representing the populace. *Id.* at 1686-87. The postmodern conception states that in an era of increased globalization, overlapping and segmented authority is developing. *Id.* at 1688-90. Most discourse on Internet regulation, however, relies on the realist conception. *Id.* at 1684. This conception asserts that an individual country possesses sole power to regulate its citizens and internal affairs. *Id.* at 1683.

39. *See id.* at 1683 (discussing examples of states relying on realist conception to regulate online activities).

40. *See, e.g.,* CODE CIVIL [C. Civ.], art. 3148 (Can.) (defining situations in which court can hear personal actions of patrimonial nature). A Quebec court has jurisdiction when:

- (1) the defendant has his domicile or his residence in Quebec;
- (2) the defendant is a legal person, is not domiciled in Quebec but has an establishment in Quebec, and the dispute relates to its activities in Quebec;
- (3) a fault was committed in Quebec, damage was suffered in Quebec, an injurious act occurred in Quebec or one of the obligations rising from a contract was to be performed in Quebec;
- (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
- (5) the defendant submits to its jurisdiction.

Id.

41. *See* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 255 (1991) (declaring that U.S. litigants must not only consider ability to obtain favorable judgment, but also ability to enforce judgment in foreign court).

42. *See* A.V. DICEY & J.H.C. MORRIS, *THE CONFLICT OF LAWS*, Rule 41 (L. Collins et al. eds., 1993) (discussing process by which courts recognize foreign judgments).

43. *See* Zembek, *supra* note 30, at 342 (commenting that courts fail to understand problems created by Internet and jurisdictional requirements).

44. *See* U.S. CONST. amend. XIV (stating, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

a valid judgment against a non-resident defendant.⁴⁵ If a judgment against a non-resident defendant is obtained, however, then the award is enforceable only if a foreign court recognizes the judgment.⁴⁶ In Canada, a court will enforce a judgment from a foreign country, provided a real and substantial connection exists between the original court and the cause of action.⁴⁷

1. *In Personam* Jurisdiction

Historically, in personam jurisdiction grants a court power over a defendant.⁴⁸ Therefore, the defendant's physical presence within the forum state is a prerequisite to a court exercising jurisdiction.⁴⁹ The Due Process Clause of the Fourteenth Amendment, however, allows courts to adjudicate claims over nonresident defendants if certain procedural and substantive requirements are met.⁵⁰

a. Due Process

The Due Process Clause places two limitations on the extension of jurisdiction: courts may exercise jurisdiction only if the defendant has sufficient contacts⁵¹ with the forum state and in-

45. See *Kulko v. California Superior Court*, 436 U.S. 84, 91 (1978) (stating that "the Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants.").

46. See Jerome A. Hoffman, *Recognition by Courts in the Eleventh Circuit of Judgments Rendered by Courts of Other Countries*, 29 CUMB. L. REV. 65, 69 (1999) (commenting that original court's judgment is recognized and enforced according to recognizing sovereign's standards).

47. See *Amchem Products, Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897 (Can.) (extending application of real and substantial test from recognition of judgments rendered in sister-provinces to judgments rendered in foreign jurisdictions).

48. See *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945) (commenting that jurisdiction of court to render judgment in personam is power over defendant's person).

49. See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (stating that in order to determine liability of defendant, "he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.").

50. See *id.* at 714 (holding that Due Process clause limits states' ability to exercise jurisdiction over non-resident defendant).

51. See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (holding that minimum contacts analysis should focus on "relationship among the defendant, the forum, and the litigation."); *Hanson v. Deckla*, 357 U.S. 235, 253 (1958) (commenting that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting business within the forum State, thus invoking the bene-

justice will not result.⁵² The first limitation of the Due Process analysis may be satisfied if the court exercises general⁵³ or specific jurisdiction⁵⁴ over an individual.

In order to determine whether injustice will result, courts often weigh numerous factors.⁵⁵ The factors are not applied uni-

fits and protections of its laws."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (analyzing relationship between defendant and forum to determine whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

52. See *International Shoe*, 326 U.S. at 316 (stating that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." (internal citations omitted)).

53. See *Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1121 (3d Cir. 1992) (stating that "[i]f a party is subject to the general jurisdiction of a state, that party can be called to answer any claim against her, regardless of whether the subject matter of the cause of action has any connection to the forum."). Therefore, general jurisdiction allows a court to adjudicate a claim, even if the cause of action does not have a connection to the forum. *Id.*; see also *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984) (holding that defendant must establish systematic and continuous contacts with forum state for general jurisdiction to exist). In *Helicopteros*, the Court held that a business trip to the forum state, purchase of equipment from a resident within the forum state, and acceptance of a check drawn from a state bank within the forum did not constitute systematic and continuous activities. *Helicopteros*, *supra*; see *International Shoe*, 326 U.S. at 318 (holding that activities must be "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.").

54. See *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring in judgment) (stating that individuals must have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign."). Therefore, specific jurisdiction arises when a defendant knows that a particular activity may compel a court to exercise jurisdiction. *Id.*; see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) (noting that court will impute knowledge when defendant's actions were intentionally directed at resident of forum state); *Helicopteros*, 466 U.S. at 414 (holding that litigation arises out of or relates to the defendant's actions).

55. See *Burger King v. Rudzewicz*, 471 U.S. 462, 4776 (1985) (listing factors that court applies to determine whether injustice results from court's exercise of jurisdiction). The factors include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.*; see also *Core-Vent Corp. v. Nobel Industries AB.*, 11 F.3d 1482, 1487-88 (9th Cir. 1993) (discussing application of factors to case) The factors are:

- (1) the extent of the defendant's purposeful interjection into the forum state's affairs;
- (2) the burden on the defendant of defending in the forum;
- (3) the extent of conflict with the sovereignty of the defendant's state;
- (4) the forum state's interest in adjudicating the dispute;
- (5) the most efficient judicial resolution of the controversy;

formly, creating tension in their application.⁵⁶ Courts have indicated, however, that a plaintiff must meet a higher jurisdictional threshold when a non-resident defendant is a foreign citizen, as opposed to a U.S. citizen.⁵⁷

b. Long-Arm Statutes

If the constitutional requirements of the due process clause are satisfied, then a court must determine whether a state's long-arm statute permits the exercise of jurisdiction.⁵⁸ Most state legislatures have broad statutes, allowing the jurisdiction of state courts to extend as far as due process allows.⁵⁹ Therefore, personal jurisdiction analysis often will be decided by the due process analysis.⁶⁰

2. U.S.-Canadian Cooperative Mechanisms for Enforcement and Recognition of Foreign Judgments

In lieu of extending territorial jurisdiction, countries have developed mechanisms to deal with the limited reach of their

(6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and

(7) the existence of an alternative forum.

Core-Vent Corp., F.3d at 1487-88.

56. *Id.* at 1488.

57. See *FDIC v. British-American Ins. Co. Ltd.*, 828 F.2d 1439, 1444 (9th Cir. 1987) (noting that burden of defending suit in foreign jurisdiction weighs against exercising jurisdiction); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984) (commenting that court's finding of jurisdiction over non-resident defendant presents potential affront to sovereignty of defendant's state).

58. See *Hanson v. Deckla*, 357 U.S. 235 (1958) (placing restriction on long-arm statutes by requiring that defendant purposefully avail himself of benefits and protections of laws of forum state); *Hess v. Pawloski*, 274 U.S. 352 (1927) (affirming constitutionality of Massachusetts statute that granted jurisdiction over non-resident defendant motorists involved in altercation in Massachusetts); see, e.g., *N803RA, Inc. v. Hammer*, 11 S.W.3d 363, 367 (Tex. Ct. App. 2000) (explaining that Texas courts may exercise jurisdiction over non-resident defendants if state long-arm statute authorizes jurisdiction and exercise of jurisdiction complies with federal constitutional guarantees).

59. See, e.g., *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996) (stating that broad language of Texas long-arm statute extends jurisdiction to limits of due process clause). But see John A. Lowther IV, *Personal Jurisdiction and the Internet Quagmire: Amputating Judicially Created Long-Arms*, 35 SAN DIEGO L. REV. 619, 621 (1998) (commenting that long-arm statutes differ, which is simply nature of jurisdictional law).

60. See E. Gabriel Perle, et al., *Electronic Publishing And Software, Part II*, 17 COMPUTER LAW. Jan. 15, 2000 (noting that jurisdictional analysis of most courts only examines due process requirements since most state statutes exercise jurisdiction to extent of constitution).

laws.⁶¹ Mutual legal assistance,⁶² cooperation,⁶³ supranational adjudication,⁶⁴ and harmonization⁶⁵ are mechanisms that extend the reach of a country's jurisdiction while promoting respect for the sovereignty of another nation.⁶⁶ Also, countries can cooperate by recognizing and enforcing judgments rendered in a foreign jurisdiction.⁶⁷

61. See Trudel, *supra* note 33, at 1030 (commenting that jurisdiction of court to adjudicate depends on ability legally to bind parties). Since a court cannot bind parties beyond the geographical borders of the forum state, cooperative mechanisms were developed to effectuate the decisions of tribunals. *Id.*

62. See *id.* at 1050 (defining mutual legal assistance in criminal matters as process by which domestic nation permits foreign nation to engage in criminal procedures that are within jurisdiction of domestic nation). Mutual legal assistance developed because international law prohibits nations to exercise executive jurisdiction in another nation. *Id.* at 1047. Therefore, mutual legal assistance developed to prevent repression of a crime with international elements. *Id.* In a criminal context, mutual legal assistance allows a foreign state to execute search warrants, gather evidence, and transfer individuals in custody. *Id.* at 1050-51.

63. See Delvin J. Losing, *Comity in the Free Trade Zone*, 74 N.D. L. REV. 737, 762 (1998) (discussing use of foreign judgment agreements). Foreign judgment agreements are the most effective method to achieve fairness and consistency in the international legal system. *Id.* First, signatories could determine the scope of any agreement, thereby establishing consistency between two countries. *Id.* Next, enforcement of the standards would be consistent, ensuring that judgments could be enforced fairly. *Id.* Finally, an agreement would provide transparency to the legal system, allowing individuals and corporation to modify their behavior accordingly. *Id.*

64. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 276 (1997) (stating that European Court of Justice and European Court of Human Rights played major role in convincing national governments to participate in high-stakes, supranational adjudication); see also Gigante, *supra* note 13, at 548 (discussing proposal by French government to adopt international law of Internet). The proposal was made in response to the ability of the Internet to circumvent existing legal regimes. Gigante, *supra*.

65. See Lipinski, *supra* note 29 (defining harmonization as process by which nations conform their laws to international standards).

66. See Trudel, *supra* note 33, at 1030 (stating that cooperative mechanisms facilitate respect for foreign standards).

67. See Hoffman, *supra* note 46, at 65 (describing process by which court recognizes and enforces foreign judgments); *A Canadian Perspective*, *supra* note 26, at 34 (discussing interest of Canada joining multilateral convention on enforcement of foreign judgments). In the 1990s, the recognition of foreign judgments in Canada began to be perceived as too liberal. *A Canadian Perspective*, *supra*, at 34-35. Canadians feared this liberalization would diminish the likelihood of reciprocal treatment. *Id.* at 35. Also, commentators feared that North American Free Trade Agreement would increase international conflicts, subjecting Canadian nationals to foreign litigation. *Id.* But see Henry H. Perritt, Jr., Symposium, *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 4 (1996) (stating that international legal framework does not facilitate enforcement of foreign judgments). Although judgments may be enforced, the lack of coherence in the international legal framework does not promote confidence in a party that a judgment will actually be enforced. *Id.*

a. Recognition and Enforcement of Foreign Judgments

A country recognizes a foreign judgment by certifying, through a judicial hearing that a judgment rendered in another country shall be treated as its own.⁶⁸ This action, if successful, forecloses the possibility of re-adjudicating claims, defenses, or other issues already resolved by the tribunals originally exercising jurisdiction.⁶⁹ Thereafter, the recognizing court can authorize the appropriate agencies or agents to enforce the judgment,⁷⁰ empowering agents to seize the debtor's assets or take other actions.⁷¹

b. U.S.-Canadian Recognition and Enforcement of Foreign Judgments

At least until the early 1990s, Canadian courts based the recognition of foreign judgments upon British common law⁷² and pre-Revolutionary French civil law rules.⁷³ Recently, however, the Supreme Court of Canada stated that the doctrine of recog-

68. See Hoffman, *supra* note 46, at 66-75 (discussing difference between recognition of foreign judgments and enforcement of foreign judgments). The doctrine of reognition and enforcement of foreign judgments resembles a judicial function and consists of two parts. *Id.* at 67. First, the judgment must be recognized, a process by which the appropriate tribunal certifies that the judgment is a valid, enforceable decision. *Id.* at 69. Next, the tribunal enforces the judgment, a process by which procedures for enforcing the judgment are prescribed and implemented. *Id.* at 70. This distinction, which is fine, is not always made when legal scholars discuss the doctrine of enforcement. *Id.*

69. See Celia Wasserstein Fassberg, *Rule and Reason in the Common Law of Foreign Judgments*, 12 CAN. J.L. & JURIS. 193, 194 (1999) (noting that court does not function as appellate court). Therefore, a court will not review the substance of a decision, even if the foreign court made a mistake as to fact or law. *Id.*

70. See *Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1321 n.8 (2d Cir. 1973) (stating that determination of enforcement of foreign judgment and recognition of foreign judgment are separate); *Victrix S.S. Co. v. Salen Dry Cargo*, 65 B.R. 466, 470 (S.D.N.Y. 1986) (stating that recognition of foreign judgment does not necessitate enforcement).

71. See Strebel, *supra* note 26, at 61-63 (describing terms commonly used in enforcement of foreign judgments). Enforcement is the actual seizure, sale, and distribution of funds. *Id.* at 61; see also John Spears, *Lloyd's Names Ordered To Pay Losses*, *TORONTO STAR*, Mar. 9, 2000, at BU 01 (describing collection of assets in Canada on judgment originally entered in England).

72. See *A Canadian Perspective*, *supra* note 26, at 38 (noting that British common law rules were traditional and conservative); Ivan F. Ivankovich, *Enforcing U.S. Judgments in Canada: "Things Are Looking Up!"*, 15 NW. J. INT'L L. & BUS. 491, 491-93 (1995) (stating that under U.K. common law rules, Canada maintains strict recognition policy).

73. See *A Canadian Perspective*, *supra* note 26, at 38 (noting that French civil law rules were solely followed in Quebec); Weintraub, *supra* note 25, at 178 (stating that

dition and enforcement of foreign judgments must adjust to technological and societal advancements.⁷⁴ Therefore, Canadian courts will defer to comity and recognize a foreign judgment if a real and substantial connection exists between the forum state and the cause of action.⁷⁵

i. Real and Substantial Connection

In *Morguard Investments Ltd. v. De. Savoye*,⁷⁶ the Supreme Court of Canada took the first step towards reformulating the basis for recognizing foreign judgments.⁷⁷ Although the decision did not explicitly involve foreign judgments, the court held that courts should give full faith and credit to decisions rendered in other provinces.⁷⁸ Recognition, however, was limited to cases where the original court properly exercised jurisdiction.⁷⁹ The *Morguard* court further refined this point, stating that a judgment should only be recognized if a real and substantial connection existed between the original court and the cause of action.⁸⁰

judgments from other provinces were only recognized if original exercise of jurisdiction was consistent with enforcing provinces jurisdictional requirements).

74. See *Morguard v. De Savoye* [1990] 3 S.C.R. 1077, 1097 (Can.) (stating that Canadian doctrine "must be adjusted in light of a changing world order.").

75. See *Amchem Products, Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897 (Can.) (stating that real and substantial test formulated in *Morguard* applies to issuance of anti-suit injunction).

76. *Morguard*, [1990] 3 S.C.R. 1077.

77. See, e.g., *Moses v. Shore Boat Builders Ltd.*, [1993] 83 B.C.L.R.2d 177 (Can.) (extending application of *Morguard* to international cases). Judge George S. Cummings, of the British Columbia Court of Appeals, stated: "The case at bar arises out of international commerce—the sale of a boat to Moses in Alaska. So the informing principle of private international law (comity) supports the extension of the real and substantial test to the circumstances here." *Id.* at 187.

78. See *Morguard*, 3 S.C.R. at 1102 (analyzing constitutional rules of various countries before extending principle in U.S. Constitution of full faith and credit to judgments rendered in sister-provinces). Justice Gerard V. La Forest stated: "[T]he courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or territory, so long as the court has properly, or appropriately, exercised jurisdiction in the action." *Id.*

79. See *id.* at 1103 (noting that "the taking of jurisdiction by a court in one province and its recognition in other provinces must be viewed as correlatives, and . . . recognition . . . should be dependent on the fact that the court giving judgment 'properly' or 'appropriately' exercised jurisdiction.").

80. See *A Canadian Perspective*, *supra* note 26, at 39 (discussing formulation of *Morguard* test). The *Morguard* test provides that a court should only recognize a judgment rendered in another province if a real and substantial connection existed between the original court and the cause of action. *Id.*; see also *Hunt v. T & N plc* [1993] 4

ii. Comity

Three years later, in *Amchem Products, Inc. v. British Columbia (Workers' Compensation Board)*,⁸¹ the Supreme Court of Canada expounded on the principles discussed in *Morguard*, while addressing the basis for an anti-suit injunction.⁸² The court recognized that comity⁸³ was an issue, since the issuance of an anti-suit injunction infringes on the sovereignty of a foreign court.⁸⁴ Generally, comity is the respect due to the acts taken by another country.⁸⁵ The notion of comity, however, is not only based on the principle of respect, but also on convenience and necessity.⁸⁶

The definition of comity adopted by the *Amchem* court implied two competing interests, international duty and territorial sovereignty.⁸⁷ Neither interest is paramount.⁸⁸ Instead, the doc-

S.C.R. 289 (Can.) (upholding real and substantial test and holding that test was grounded in constitutional values).

81. *Amchem Products, Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897 (Can.).

82. See *id.* at 912-13 (noting that anti-suit injunction is aggressive remedy whereby individual petitions domestic court to restrain foreign litigant from "launching or continuing a proceeding in the courts of another jurisdiction.").

83. See *id.* at 913-14 (adopting definition of comity set forth by U.S. Supreme Court in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)). The Court stated that:

'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens of other persons who are under the protection of its laws.

Id. (emphasis added)

84. See *Amchem*, 1 S.C.R. at 913 (discussing anti-suit injunctions and comity). Anti-suit injunctions infringe on the sovereignty of a foreign court, because the injunction enjoins litigation in another country, in effect, resolving the litigation for the foreign court. *Id.*

85. See *Morguard v. De Savoye* [1990] 3 S.C.R. 1077, 1095 (Can.) (stating that comity is "deference and respect due by other states to the action of a state legitimately taken within its territory.").

86. See *id.* at 1096 (stating that in modern times, common ground is needed to facilitate flow of goods and services between nations). The court then quotes at length from Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1603 (1968), which states, in part, that "[t]he ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted." *Id.*

87. See *Amchem*, 1 S.C.R. at 913-14 (recognizing country's international duty and duty to citizens in definition of comity).

88. See *id.* (noting that lack of universal acceptance of comity necessitates issuance

trine of *forum non conveniens*⁸⁹ acts as a counterweight, balancing the interests.⁹⁰ Therefore, a Canadian court will infringe on the sovereignty of a foreign court or contradict a foreign court order only when the foreign court has departed from the Canadian doctrine of *forum non conveniens*.⁹¹

iii. Forum Non Conveniens

Although all Canadian jurisdictions recognize the doctrine of *forum non conveniens*, governing legislation⁹² and common law statutes⁹³ in this area are succinct.⁹⁴ One commentator notes

of anti-suit injunctions in certain cases, but only when original court departed from Canadian doctrine of *forum non conveniens*).

89. See Ellen B. Hayes, *Forum Non Conveniens in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation*, 26 U.B.C. LAW REV. 41 (1992) (discussing application of doctrine of *forum non conveniens*). In accordance with doctrine of *forum non conveniens*, a court should decline to exercise jurisdiction over a defendant if the forum is not the appropriate venue for the action. *Id.* Also, a court should decline to exercise jurisdiction if considerations of justice require the plaintiff to litigate in another jurisdiction. *Id.*

90. See *Amchem Products, Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897, 915 (Can.) (noting that doctrine of *forum non conveniens* provides specific criteria to determine whether to defer to comity).

91. See *id.* at 934 (discussing situations when Canadian court will grant anti-suit injunction). The court stated:

[W]hen a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to the [doctrine of] *forum non conveniens*, that decision will be respected and a Canadian court will not purport to make the decision for the foreign court. The policy of our courts with respect to comity demands no less. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with our rules of private international law and an injustice results to a litigant or "would-be" litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking foreign jurisdiction can be restrained. The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.

Id.

92. See CODE CIVIL [C. CIV.], art. 3135 (Can.) (stating that court may decline jurisdiction "if it considered that the authorities of another country are in a better position to decide.").

93. See CODE CIVIL PROC. [C. CIV. PROC.], rule 17.06(2) (Can.) (stating that court may stay proceeding or set aside service of non-resident defendant if it is satisfied that Ontario is not convenient forum for hearing).

94. See *Renault*, *supra* note 18 (discussing doctrine of *forum non conveniens* in Canada). A Canadian court may stay or dismiss a suit if it finds that another jurisdiction has a closer connection to the events giving rise to the litigation or that another jurisdiction is better situated to adjudicate the issues. *Id.* Therefore, the court considers evidence indicating that a more appropriate forum exists. *Id.* Such evidence includes the location of parties, witnesses, and evidence. *Id.*

that such legislative restraint has produced a fluid doctrine that can easily adapt to specific disputes.⁹⁵ Even though the Supreme Court of Canada clarified the doctrine of *forum non conveniens* in *Amchem*,⁹⁶ provincial courts still reject well-founded *forum non conveniens* applications.⁹⁷

In *Amchem*, the Supreme Court of Canada stated that, in conformity with the doctrine of *forum non conveniens*, a court must determine whether there is another forum that is clearly more appropriate than the domestic forum.⁹⁸ The court must consider factors such as applicable law, the location of key parties, and activities giving rise to the litigation.⁹⁹ Also, the court must recognize as a matter of comity that a foreign court has already assumed jurisdiction.¹⁰⁰

95. See *id.* (stating that Canadian courts have declined *forum non conveniens* applications notwithstanding occurrence of negligent acts and damages within alternate forum).

96. See *Amchem Products, Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 921 (Can.) (holding that "the existence of a more appropriate forum must be clearly established to displace the forum selected."); *Antares Shipping Corp. v. The Ship "Capricorn"* [1976] 65 D.L.R. (3d) 105, 123 (Can.) (discussing application of *forum non conveniens* in admiralty action). The court stated that the primary consideration in determining whether to exercise its discretion to issue an order out was "the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice." *Antares Shipping*, [1976] 65 D.L.R. at 123.

97. See *Renault*, *supra* note 18 (noting that Canadian courts have declined *forum non conveniens* applications despite occurrence of alleged negligence in different jurisdiction).

98. See *Amchem*, [1993] 1 S.C.R. at 58 (discussing issuance of anti-suit injunctions). The court stated that "the domestic court must proceed to entertain the application for an injunction but only if it is alleged to be the most appropriate forum and is potentially an appropriate forum" *Id.*

99. See *Renault*, *supra* note 18 (stating that court must consider connection between forums competing for jurisdiction and cause of action).

100. See *Amchem*, [1993] 1 S.C.R. at 59 (stating that recognition of foreign proceeding is element of *forum non conveniens*). The court further noted:

In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

B. *Internet, Its Applications, and Cybercrimes*

The Internet is an expansive computer network that operates by connecting computers from around the world to each other.¹⁰¹ Such an organizational structure provides a powerful means to interact with other individuals in remote corners of the world.¹⁰² Increased human interaction, however, has led to litigation.¹⁰³

1. Background

The Internet began in the 1960s as a U.S. Department of Defense (or "DOD") project in response to the Cold War.¹⁰⁴ The DOD commissioned engineers to connect the agency's computers, creating the Advanced Research Project Agency Network ("ARPANET").¹⁰⁵ Recognizing the utility of computer networks in civilian applications, the U.S. government encouraged scientific and academic communities to develop their own computer networks to further their research.¹⁰⁶ Thereafter, commercial entities realized the potential of the Internet and quickly attempted to make the Internet accessible to the general public.¹⁰⁷

Id.

101. See *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (defining Internet as "international network of interconnected computers.").

102. See Lowther, *supra* note 59, at 622 (commenting how company can be accessible worldwide through use of Internet with minimal investment of time and money).

103. See Losing, *supra* note 63, at 737 (noting that international litigation is commonplace due to increased interaction among distant countries).

104. See Jay Krasovec, *Cyberspace: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101, 104 (1997) (stating that technology was perceived to be key to winning Cold War); *Reno*, 521 U.S. at 849 (stating that specific configuration of Internet was designed to allow defense community to communicate, even if portions of network were destroyed in war).

105. See Adams, *supra* note 21, at 406-07 (stating that technicians did not realize potential magnitude of their work); Gary Anthes, *The History of the Future*, COMPUTERWORLD, Oct. 3, 1994, at 101 (quoting Severo Ornstein, one of original architects of Internet, responding to governments requests). Ornstein stated "[s]ure we could build such a thing, but I don't see why anybody would want it." Anthes, *supra*; see also *ex rel. American Reporter v. Renno*, 930 F. Supp. 916, 925-27 (S.D.N.Y. 1996) (discussing development of Internet and its beginnings as experimental project of U.S. Department of Defense's Advanced Research Projects Administration).

106. See Adams, *supra* note 21, at 405-06 (noting that universities, at insistence of government, contributed software to National Science Foundation Net ("NSF Net")). NSF Net was created by the National Science Foundation to link remote supercomputer research centers with researchers at remote academic and government institutions. *Id.* at 405.

107. See Andrew J. Slitt, *The Anonymous Publisher: Defamation of the Internet After*

The Internet does not resemble a typical consumer product, because it is not owned, controlled, manufactured, or produced by a single entity.¹⁰⁸ Instead, the Internet is a collaborative effort to cull together a network of computers.¹⁰⁹ This network operates by connecting computer networks and host computers to each other,¹¹⁰ relying on the continuous communication between these computers to function.¹¹¹

2. Applications and Functionality

By connecting computers around the globe into a seamless web, the Internet provides a means to disseminate and receive information from worldwide sources.¹¹² Commentators note

Reno v. American Civil Liberties Union and Zerani v. American Online, 31 CONN. L. REV. 389, 392 (1998) (noting that growth of personal computer market coincided with availability of Internet to mainstream public, especially with introduction of World Wide Web).

108. See Henry M. Cooper, *Jurisdictional Trends in Cyberspace*, (visited Apr. 11, 2000) <<http://www.law.stetson.edu/courses/hcooper.htm>> (on file with the *Fordham International Law Journal*) (noting that Internet, or National Information Infrastructure ("NII"), does not resemble tangible device).

109. See Reno v. ACLU, 521 U.S. 844, 850 (1997) (noting that Advanced Research Project Agency Network "provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world.").

110. See Cooper, *supra* note 108 (providing concise and simple explanation of how computer networks communicate). Henry Cooper stated:

How these connections work is rather complicated, but can be analogized to how trains travel on train tracks. The information being communicated would be the train. This information is translated by the computer into a universal protocol, called TCP/IP, which uses a common name and address space so that other computers connected to the network can locate and understand the information being sent. The information travels through switches which are computers that establish the path that the information must take to reach its destination. These switches can be likened to the train's dispatch giving directions to the train's conductor on which tracks to travel on so that the train will reach its destination. The path itself is called a router. Just as a train will switch tracks when it can no longer use that track to reach its destination, the information will switch routers when the router can no longer deliver the information to its destination. The Internet is unique in that there are millions of routers to ensure that the information will reach its destination.

Id.

111. See ACLU v. Reno, 929 F. Supp. 824, 830-32 (E.D. Pa. 1996) (stating that there is no centralized control point of such computer network). Due to the lack of centrally controlled servers, one single entity cannot control the flow of information that occurs on the computer networks. *Id.*

112. See Yagura, *supra* note 14, at 303 (stating that Internet users can interact in ways that were not possible previously).

that the most powerful feature of the Internet is the ability to interact almost instantaneously with users in remote areas of the world.¹¹³ Anyone with Internet access can interact with a truly global audience,¹¹⁴ discussing a wide range of topics.¹¹⁵

Generally, individuals can communicate on-line through a variety of mechanisms, including e-mail,¹¹⁶ mail exploders,¹¹⁷ newsgroups or bulletin boards,¹¹⁸ chat rooms,¹¹⁹ real-time remote computer utilization,¹²⁰ and remote information retrieval.¹²¹ One commentator notes that most scholarly literature does not distinguish between these communication mecha-

113. See Zembek, *supra* note 30, at 343-44 (noting that people many miles apart can freely communicate). This communication allows millions of people to interact and form relationships on a daily basis. *Id.* at 343. Although communicating with others across the globe may seem novel today, such interaction did not exist 10 years ago. *Id.* at 344; Marcelo Halpern & Ajay K. Mehrota, *The Tangled Web of E-Commerce: Identifying the Legal Risks of Online Marketing*, 17 *COMPUTER LAW* 8 (2000) (stating that companies can transact business around world with advanced Internet marketing techniques).

114. See *Cyber-Reach*, *supra* note 12, at 1610 (noting that Internet provides source of mass communication without considerable start-up and operating costs). This differs from traditional mass communication systems, which require considerable expenditures to construct and maintain. *Id.*

115. See *ACLU*, 929 F. Supp. at 842 (stating that "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought.").

116. See *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (describing e-mail, which allows individual to send electronic messages to individuals or groups of individuals).

117. See *id.* (stating that mail exploders resemble e-mail to large group of people). Mail exploders function in a simple two-step process: subscribers send messages to an e-mail address and then these messages are automatically forwarded to every subscriber. *Id.*

118. See *id.* (describing newsgroups as online discussion areas in which thousands of conversations take place). Often, newsgroup discussions focus on a specific topic, such as "comp" (computers), "soc" (social issues), or "sci" (science). *Id.* These topics are often further subdivided to allow highly focused discussions to take place. *Id.* *Reno* describes newsgroups as follows:

There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted everyday. In most newsgroups, postings are automatically purged at regular intervals.

Id.

119. See *id.* (describing chatrooms as devices enabling individuals to engage in immediate dialogue).

120. See *ACLU v. Reno*, 929 F. Supp. 824, 834-36 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (giving example of real-time remote computer utilization, which, for example, would allow user to access library's on-line card catalog).

121. See *id.* (stating that remote information retrieval system is tool primarily used for searching Internet).

nisms.¹²² This generalization, however, fails to yield nuanced approaches,¹²³ and instead provides stereotyped results that often mischaracterize the nature of the debate.¹²⁴ Therefore, this Comment specifically focuses on computer bulletin boards.

Computer bulletin boards¹²⁵ are electronic "cork and pin" bulletin boards, where Internet users can read, post, and respond to messages.¹²⁶ These messages are not private, because the posting is not routed exclusively from one computer to another.¹²⁷ Instead, everyone who accesses the bulletin board can read the postings.¹²⁸

The bulletin board systems¹²⁹ maintain these messages, sav-

122. See Wu, *supra* note 31, at 1164 (stating that legal analysis of Internet should be aware of architecture of Internet).

123. See *id.* at 1163 (stating that single model of analysis was effective when Internet was in its infancy). This single model of analysis, however, fails today because the dynamic nature of the Internet does not generalize well. *Id.*

124. See *id.* at 1165 (providing analogous example to stereotyped analysis of Internet). Wu states that:

To understand this point, just think of the "network" of appliances in your home: They all use the same standard of electricity (the basic protocol), but then widely differ in what they offer the user. A television offers something quite different than the power saw, even though they both use 110 volts of electricity. This is the result of a deliberate choice. The design of the electricity 'network' puts most of the power to decide functionality in the hands of the appliance designer. The Internet, conceptually, is not all that different. Contrast this with the telephone network, where nearly everything that matters about the telephone comes from the basic standards to which all telephones adhere. The difference between these networks is the result of a deliberate and important decision, and one that cannot but have a decisive impact on the legal analysis of any network.

Id.

125. See Michael Freitag, *As Computer Bulletin Boards Grow, If It's Out There, It's Posted Here*, N.Y. TIMES, Apr. 2, 1989, at 38 (stating that bulletin boards are also called electronic speakers' corners, because users discuss topics in same manner that people discuss ideas at Speakers' Corner in London's Hyde Park).

126. See Jeremy Stone Weber, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235, 238 (1995) (defining computer bulletin board as computer version of traditional corkboard). Once a user gains access to computer bulletin board, the individual can post original messages, respond to existing messages, or read existing messages. *Id.* at 239; see also Eric C. Jensen, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COM. L.J. 217 (1987) (commenting that computer bulletin boards provide powerful means of communication).

127. See Jensen, *supra* note 126, at 218 (noting that system operator places information on bulletin board for any individual to access).

128. *Id.*

129. See, e.g., Kevin M. Savetz, *Your Internet Consultant—The FAQs of Life Online*, (visited Apr. 11, 2000) <<http://www.savetz.com>> (on file with the Fordham International Law

ing postings and relaying them to subsequent users.¹³⁰ An individual with the proper equipment can access these messages by subscribing to an Internet service provider,¹³¹ logging on to the Internet service provider's computer network, and then contacting the desired bulletin board.¹³² Once logged on to a network, the Internet user can choose from a wide range of bulletin boards, with discussions ranging from politics and finance to movies and trivia.¹³³

There are numerous advantages to communicating by computer bulletin boards as opposed to traditional forms of communication.¹³⁴ First, communicating by computer bulletin boards allows users to receive an unlimited amount of information.¹³⁵ Second, bulletin boards reveal very few social clues, encouraging

Journal) (describing Usenet as system through which large collection of Internet bulletin boards is maintained).

The Usenet is simply the largest, most active and most varied discussion forum in the world. Imagine a bulletin board on the wall. Imagine that as people pass it, they glance at what's there, and if they have something to add, they stick their note up, too. Now (here's the big leap), imagine that there are thousands of bulletin boards in this building, and that there are actually tens of thousands of buildings throughout the world, each with its own identical copy of the bulletin board. Got it? That's Usenet.

Id.

130. See Judith Berck, *It's No Longer Just Techno-Hobbyists Who Meet by Modem*, N.Y. TIMES, July 19, 1992, at 12F (noting that sysops, or system operators, create and maintain computer bulletin boards).

131. See Carl Thorsen, et. al., *Rules of the Road, AMERICA'S NETWORK*, Apr. 15, 1999 (defining Internet service provider ("ISP") as company that provides voice and data services to Internet users). Often, a consumer must pay a monthly service fee in order to access an ISP's server or Internet portal, which provides consumers access to the Internet. *Id.*

132. See Sheldon J. Burnett, *Actual Malice on Computer Bulletin Boards?*, (visited Apr. 11, 2000) <<http://www.lawinfo.com/forum/bbmalice.html>> (on file with the *Fordham International Law Journal*) (indicating that anyone can access bulletin board with proper software and subscription to Internet service provider); see also Rex S. Heinke & Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, COMPUTER LAW., July 1994, at 1 (stating that many people gain access to bulletin boards by paying fee to ISP).

133. See Burnett, *supra* note 132 (indicating that more than 100,000 computer bulletin boards exist, with topics ranging from cars to sports).

134. See John D. Faucher, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1045-47 (1993) (describing advantages that bulletin boards have over existing methods of communication); see Jensen, *supra* note 126, at 223 (arguing that bulletin boards possesses distinct advantages over existing forms of communication).

135. See Faucher, *supra* note 134, at 1078 n.6 (describing enormous databases that are available to individuals online).

individuals to interact freely.¹³⁶ Finally, users can converse instantly on a wide range of topics with people from across the globe.¹³⁷

3. Cybertorts and Cybercrimes

Scholars note that the global reach of the Internet has both positive and negative implications.¹³⁸ While the Internet facilitates the worldwide exchange of information, it also increases international conflicts and litigation.¹³⁹ The new wave of offenses occurring on the Internet has received the monikers of Cybertorts and Cybercrimes.¹⁴⁰ Although online offenses resemble actionable offenses in the physical world, they have aspects

136. See *id.* at 1047 (stating that individuals communicate openly online); see also Jensen, *supra* note 126, at 223 (noting that bulletin board conversations are anonymous, encouraging individuals to communicate freely). Under such circumstances, identity, appearance, and personality may become unimportant. Jensen, *supra*, at 224.

137. See Jensen, *supra* note 126, at 224 (commenting that instant interaction possible through Internet bulletin boards avoid slow process of communication by mail).

138. See 143 CONG. REC. E1633 (daily ed. Sept. 3, 1997) (statement of Representative Robert W. Goodlatte introducing Internet Gambling Prohibition Act of 1997) (noting that Internet facilitates community discussion, while potentially overriding local standards). Representative Robert W. Goodlatte further stated:

The ability of the World Wide Web to penetrate every home and community across the globe has both positive and negative implications—while it can be an invaluable source of information and means of communication, it can also override community values and standards, subjecting them to whatever more may or may not be found online. In short, the Internet is a challenge to the sovereignty of civilized communities, States, and nations to describe what is appropriate and decent behavior . . . The legislation I am introducing today will protect the rights of citizens in each State to decide through their State legislatures if they want to allow gambling within their borders and not have that right taken away by offshore, fly-by-night operators.

Id.; see also Menezes, *supra* note 9 (stating that long-term effects of globalization are uncertain). There are some effects, however, that are readily apparent. Menezes, *supra*. Globalization has destroyed cultural differences and economic barriers. *Id.* Also, globalization has created a race towards the bottom, encouraging countries to adopt lax regulations in order to attract business. *Id.*; see also Thomas R. Lee, In Rem Jurisdiction In Cyberspace, 74 WASH. L. REV. 97, 98 (2000) (stating that Internet has created new problems that existing legal mechanisms have been unable to solve).

139. See Losing, *supra* note 63, at 737 (discussing increase in international litigation due to movement of goods and services across borders). Often, a litigant who wins a money judgment in an international case will have to enforce the judgment in the defendant's country. *Id.*

140. See Anello, *supra* note 19, at 1 (discussing increase in, and types of, computer crime). Robert Anello states:

News stories of the use of computers to commit crimes and to disrupt government and business have become common, including such acts as: e-mail threats of school violence, release of computer viruses, copyright infringe-

that are wholly unique to the Internet.¹⁴¹ Internet offenses occur quickly and transcend traditional concepts of borders, making law enforcement difficult.¹⁴² Also, Internet offenses afford individuals anonymity, shielding their identity from law enforcement agents and victims.¹⁴³

Computer bulletin boards serve as the medium for a host of Cybertorts, including conversion,¹⁴⁴ fraud,¹⁴⁵ and electronic trespass.¹⁴⁶ Defamation, however, is an increasing problem.¹⁴⁷ Since the bulletin boards provide an easy and inexpensive way

ment, child pornography, securities fraud, computer espionage and the transmission of nuclear secrets to foreign governments.

Id.

141. See Todd Wallack, *Top Cops To Tackle Web Crime*, SAN FRAN. CHRON., Jan. 10, 2000, at B1 (stating that Internet enables individuals to commit crimes across globe, raising jurisdictional questions).

142. See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *THE IMPACT OF THE INTERNET ON THE MISSION OF THE ATTORNEY GENERALS* 6 (Mar. 12, 2000) (on file with the *Fordham International Law Journal*) (noting that Internet poses challenges to law enforcement agencies because Internet is "borderless, instantaneous, anonymous, dynamic, and changing.").

143. See Sherri Hunter, *Defamation and Privacy Laws Face the Internet*, COMM. LAW., Fall 1999 (stating that anonymous Internet communications may render computer-law debates moot due to inability to find and prosecute offenders).

144. See, e.g., Felicity Barringer, *Electronic Bulletin Boards Need Editing. No They Don't*, N.Y. TIMES, Mar. 11, 1990, at D4 (stating that online conversion occurs with credit card numbers). Some bulletin boards post valid credit card numbers, allowing individuals to use the numbers to charge purchases. *Id.*

145. See Stacey Hartmann, *Free Speech or Cheap Shots? Electronic Bulletin Boards Provide Platform for Corporate Criticism*, TENNESSEAN, Apr. 25, 1999, at E1 (noting that investors use bulletin boards to share information that may or may not be true). Recently, the U.S. Securities and Exchange Commission ("SEC") has become more involved with regulating such fraudulent activities, specifically through the monitoring and prosecution of Internet frauds. *Id.* Internet frauds include sham offerings and illegal touting of stocks. *Id.* In July 1998, the SEC announced the first nationwide Internet fraud sting, filing 23 actions against 44 defendants. *Id.*

146. See Zeviar-Geese, *supra* note 29 (defining Internet trespass as unauthorized access to individual's computer system, notably through use of computer viruses); see also Chuck Sudetic, *Bulgarians Linked to Computer Virus*, N.Y. TIMES, Dec. 21, 1990, at A9 (stating that Bulgaria was source of numerous computer viruses during 1980s). A virus spreads either through floppy disks, computer modems, or computer networks. *Id.* Once on a computer, a virus can destroy the computer's memory and any information stored on it. *Id.*

147. See Kathleen Ostrander, *Internet Remarks Bring Suit*, WIS. ST. J., Sept. 12, 1998 (paraphrasing Barry Orton, telecommunications professor at University of Wisconsin-Madison, stating that there is likely to be increase in anti-corporate communications online); see also Robert C. Cumbow & Gregory J. Wrenn, *Reputation On (the) Line: Defamation and the Internet*, CORP. LEGAL TIMES, Feb. 1996 (stating that Pacific Northwest computer retailer attributes its bankruptcy to defamatory comments posted on computer bulletin board).

for a speaker to reach a large audience,¹⁴⁸ disgruntled customers and employees have used them to voice their concerns over a company, regardless if the complaints are justified.¹⁴⁹ Also, due to the sheer size of the Internet, bulletin board comments are almost guaranteed to gather attention, unlike a scathing letter to a newspaper editor, which may not be printed.¹⁵⁰

C. Jurisdiction Problems Created by the Internet

One commentator notes that bringing suit over a Cybertorts is a novel cause of action that has not received extensive judicial consideration.¹⁵¹ When such cases are brought, courts have struggled with questions about the role of lawmakers on the Internet¹⁵² and the community standards that should govern.¹⁵³ Cybertort litigation,¹⁵⁴ however, frequently has concerned a single issue: the jurisdiction of a court to adjudicate.¹⁵⁵

148. See Jensen, *supra* note 125, at 220 (noting that individual can start bulletin board for initial investment of US\$2500).

149. See Cumbow & Wrenn, *supra* note 147 (stating that Internet communications provide forum for disgruntled consumers and employees to discuss company). Often, this discussion disparages the offending company, its products, or its personnel, whether the individual actually has a legitimate complaint. *Id.*

150. See Ostrander, *supra* note 147 (quoting Barry Orton discussing act of posting comments on computer bulletin-board). Orton stated: "It is easy to do and you get publicity you are not likely to get with say, a letter to the editor, which may or may not get printed." *Id.* But Orton downplayed the importance of bulletin board posting, stating:

Anybody that reads these bulletin boards doesn't take this information as gospel. It can be anybody writing about anything using anyone's name. You don't know what kind of ax the person has to grind and it's not credible, like something you would read in a newspaper, because it has no attribution.

Id.

151. See Yagura, *supra* note 14, at 301 (stating that courts have not established any definitive rules in Internet personal jurisdiction cases).

152. See Johnson & Post, *supra* note 22 (stating that determination of who should be lawmakers for Internet is more important than more popular issue: law enforcement on Internet). The authors argue that the Internet community should develop its own rules and norms. *Id.*

153. See ABA Prospectus, *supra* note 37 (stating that as long as laws differ among jurisdictions, procedural questions will be important question for E-commerce).

154. See Mike France, *Free Speech on the Net? Not Quite*, *Bus. Wk.*, Feb. 28, 2000 (noting that majority of Internet cases were filed in second half of 1999; thus very few have reached their final disposition).

155. See *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997) (stating that "[t]he Internet, which is a worldwide interconnected computer network, undoubtedly challenges the 'territorial-based concepts' that court have traditionally applied to problem of personal jurisdiction."); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) (stating that "[t]he Internet, a new and

1. Bringing Suit over Cybertorts

Internet communications are not geographically dependent, but disseminated globally.¹⁵⁶ Moreover, the configuration of the Internet has the potential to bypass quickly¹⁵⁷ traditional jurisdictional limitations.¹⁵⁸ An analysis based on geographic boundaries, however, is insufficient when computer-mediated activities, especially bulletin boards, are involved.¹⁵⁹

rapidly developing means of mass communication and information exchange, raises difficult questions regarding the scope of [a] court's personal jurisdiction in the context of due process jurisprudence."); *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997) (stating that "[w]ith the global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages."); *Vitulo v. Velocity Powerboats, Inc.*, 1998 WL 246152, at *2 (N.D. Ill. Apr. 27, 1998) (stating that "Defendants' motion requires this court to consider one of the newest areas of law of personal jurisdiction: effect of the Internet."); Aristotle G. Mirzaian, *Y2K Who Cares? We Have Bigger Problems: Choice of Law in Electronic Contracts*, 6 RICH. J.L. & TECH. 18, (1999) (last visited Apr. 27, 2000) <<http://www.richmond.edu/jolt/v6i4/article3.html>> (on file with the *Fordham International Law Journal*) (stating that personal jurisdiction arises in every Internet-related suit when defendant is not physically present in forum).

156. See Gigante, *supra* note 13, at 524-25 (discussing inability of technology to limit geographical area within which certain Internet sites can be viewed). The Internet transcends geographical borders, limiting states to a minimal role in the regulation of the Internet. *Id.* at 548. But see *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (discussing ability of Internet content providers to control information on Internet). The court held that the operator of an adult billboard could determine the destination of material through the use of passwords. *Thomas, supra*.

157. See George P. Long III, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, 1180 (1994) (describing speed with which information can travel on Internet). An Internet user can travel across the globe in a matter of seconds. *Id.* For example, an Internet user can travel at speeds of up to two billion bits per second; such speeds enable a user to move the entire Encyclopedia Britannica from New York to California in less than two seconds. *Id.*

158. See Maltz, *supra* note 33 (stating that, in long-term, individual governments will not be able to regulate Internet). First, the configuration of the Internet ensures that information does not travel through a central location. *Id.* Next, users can avoid government prohibitions by quickly switching to a less repressive regime. *Id.* Finally, technological advancements always lead to a legislative lag in regulation. *Id.* But see Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 515 (1999) (arguing that ability to regulate Internet depends upon architecture of Internet, which government can alter).

159. See *ACLU v. Reno*, 929 F. Supp. 824, 830 n.9 (E.D. Pa. 1996) (holding that Internet has ability to circumvent geographical boundaries). Specifically, the court states in Finding 86:

Once a provider posts its content on the Internet, it cannot prevent that content from entering any community. Unlike the newspaper, broadcast station, or cable system, Internet technology gives a speaker a potential worldwide audience. Because the Internet is a network of networks . . . any network connected to the Internet has the capacity to send and receive information to any

In response to the Internet's ability to confound the traditional bases for jurisdiction, scholars have offered a variety of solutions, which fall into three general categories.¹⁶⁰ The proponents of the first category state that the jurisdictional problems created by the Internet cannot be solved and that Cyberspace cannot be regulated.¹⁶¹ These commentators state that the ability to avoid government regulation by shifting geographic locations destroys regulations based on territorial notions and, therefore, the government should not regulate the Internet.¹⁶²

Commentators in the second category argue that governments must establish new rules for determining jurisdiction.¹⁶³ One commentator within this category, John Perry Barlow, believes that online communications have altered human interaction and, therefore, an alteration of the existing laws is necessary.¹⁶⁴ Within this category, the approaches have varied consid-

other network. Hotwired Ventures, for example, cannot prevent its materials on mixology from entering communities that have no interest on the topic.

Id. at 844.

160. See Christopher P. Beall, *The Scientological Defenstration of Choice-of-Law Doctrines for Publication Torts on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 361 (1997) (stating that commentators have suggested numerous evolutions in law to deal with problems created by Internet, specifically choice-of-law).

161. See *Cyberspace Regulation*, *supra* note 19, at 1681 (summarizing various claims that Internet cannot be regulated). This article notes that commentators within this category often base their claims on appeals to state sovereignty. *Id.* at 1680. These claims can be divided into three groups. *Id.* at 1681. Some commentators claim that regulating cyberspace would infringe upon the sovereignty of other states. *Id.* Other scholars espouse that the Internet constitutes its own state and, therefore, any regulation of the Internet is illegitimate. *Id.* While other scholars claim that the Internet has eroded the power of the state to regulate, thereby making attempts to regulate ineffective. *Id.*

162. See Joel R. Reidenburg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 912 (1996) (arguing that new legal paradigms must be developed that recognize complexity of Internet). But see Sivia Ascarelli, *Two On-Line Service Companies Investigated in Racial Hatred Case*, WALL ST. J., Jan. 26, 1996, at B2 (describing ability of German prosecutor to shut down website that contained neo-Nazi information).

163. See Beall, *supra* note 160, at 361-63 (describing earliest arguments advocating creation of new legal doctrine for Internet). But see Timothy Wu, *When Law & the Internet First Met*, 3 GREEN BAG 2d 171, 173 (2000) (stating that no demand exists for separate law of Cyberspace).

164. See John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age*, WIRED ONLINE, Mar. 1994 (visited Apr. 11, 2000) <http://www.ram.org/ramblings/philosophy/fmp/economy_of_ideas.html> (on file with the *Fordham International Law Journal*) (noting that Internet allows individuals not only to convey ideas solely through impersonal, computer network, but also to create powerful tools that never exist in tangible form). Since ideas and expressions conveyed over the Internet often lack a physical manifestation, the nature of property rights is uncertain.

erably, from establishing rules based on federal common law,¹⁶⁵ maritime law,¹⁶⁶ or satellite transmission regulations.¹⁶⁷

A commentator who falls within the third category proposes that governments simply apply existing rules to Internet communications.¹⁶⁸ Commentators in this category acknowledge that the Internet, like traditional communications networks,¹⁶⁹ enables individuals to harm others across state lines.¹⁷⁰ These commentators also acknowledge that courts will exercise jurisdiction over Cybertorts before new jurisdictional rules are implemented.¹⁷¹

Id. John Perry Barlow advocates that governments declare a moratorium on litigation, legislation, and treaties until a new social contract emerges, solidifying consensus on Internet property issues. *Id.* Once a collective expression emerges among Internet users, the government can implement legislation that reflects the new order of human interaction. *Id.*

165. See Beall, *supra* note 160, at 368-73 (summarizing arguments for creation of federal common law). The U.S. Constitution authorizes federal courts to create a federal common law for activities that implicate federal interests, which include the regulation and conservation of the national telephone Internet. *Id.* Therefore, federal courts can create a federal common law to govern the Internet. *Id.*

166. See Gigante, *supra* note 13, at 549 (describing analogy between Internet and high seas). Maritime law is based on the notion that international commerce would not exist if a ocean vessels had to comply with the laws of every country claiming jurisdiction over the high seas. *Id.* Therefore, maritime law states that the laws of a ship's registry determine jurisdiction, regardless of where the ship is located. *Id.* This analogy is not effective for Internet communications because data, unlike ships, actually penetrate the literal borders of a country. *Id.* Also, ocean vessels must stop at a port for inspection before unloading, which would be a highly unacceptable prospect for Internet communications. *Id.*

167. See *id.* (describing Council of Europe regulations that confer jurisdiction over satellite transmission on country from which broadcast occurred).

168. See Michael L. Russell, *Back to the Basics: Resisting Novel and Extreme Approaches to the Law of Personal Jurisdiction and the Internet*, 30 U. MEM. L. REV. 157, 178 (1999) (arguing that courts do not need to formulate new test for personal jurisdiction, Cybertort analysis). Instead, proper application of existing rules should produce consistent results. *Id.*

169. See Yagura, *supra* note 14, at 302 (stating that framework for jurisdictional analysis already exists for communications devices, and since Internet is simply a communications device, jurisdictional rules already exist).

170. See *id.* at 309 (stating that ability to quickly and easily cause harm across state borders with Internet does not change jurisdictional analysis).

171. See Dale M. Cendali & Rebecca Weinstein, *Personal Jurisdiction in Cyberspace*, N.Y.L.J., July 20, 1998 (noting that courts apply traditional personal jurisdiction analysis to Internet cases). See, e.g., Ontario Inc. v. Nexx Online, Inc. [1999] No. C 20546/99, 1999 Ont. C.J. LEXIS 16867 (Ontario Super. Ct. June 14, 1999) (exercising jurisdiction in Canadian lawsuit against bulk e-mailer); Queneau v. Leroy [1998] E.C.C. 47 (T.G.I. 1997) (exercising jurisdiction in European lawsuit involving Internet copyrights); British Telecomm. v. One In A Million Ltd. [1999] 1 W.L.R. 903 (C.A. 1998) (exercising jurisdiction in British lawsuit against fraudulent domain name seller).

2. Specific and General Internet Jurisdiction

U.S. courts have addressed Internet-related jurisdiction problems on numerous occasions¹⁷² and they have applied and adapted existing jurisdictional rules to the Internet.¹⁷³ One scholar has noted that these decisions will likely influence foreign tribunals when they face similar issues.¹⁷⁴ Therefore, an analysis of relevant U.S. case law is warranted.¹⁷⁵

The majority of U.S. cases involving the Internet focus on whether an individual's Internet activities give rise to specific, rather than general, jurisdiction.¹⁷⁶ As many courts have noted, a non-resident defendant's website cannot give rise to general jurisdiction.¹⁷⁷ If such a rule were established, then the personal jurisdiction requirement would be a mere formality, subjecting

172. See *Dagesse v. Plant*, No. 98-713-B, 2000 U.S. Dist. LEXIS 1073, at *23 (D.N.H. Jan. 5, 2000) (stating that "a large number of federal courts have already considered the effects of a defendant's Internet activities on personal jurisdiction").

173. See *Molnlycke Health Care AB v. Dumex Surgical Products Ltd.*, 64 F. Supp. 2d 448, 451 (E.D. Pa 1999) (stating that "[w]hile the court acknowledges that new technology will necessarily have an effect on many aspects of the law, it is untenable to suggest that all prior jurisprudence is irrelevant to the Internet."); see also *Weber v. Jolly Hotels*, 977 F. Supp. 327, 333 (D.N.J. 1997) (stating that "[a]lthough the Internet is a new medium that raises new issues for the courts, district courts have successfully applied the principles established by *International Shoe* and its progeny to cases involving the Internet.").

174. See *Renault*, *supra* note 18 (stating that precedents established by U.S. courts will most likely influence Canadian courts).

175. Numerous cases specifically involving allegedly defamatory postings on computer bulletin boards have been settled out of court. See, e.g., *Suarez Corp. Industries v. Meeks*, No. 267513 (Ohio Cuyahoga County 1994) (involving journalist, Brook Meeks, who posted allegedly defamatory messages on computer bulletin board about plaintiff); *Medaphone Corp. v. DeNigris*, No. 92-3785 (D.N.J. 1993) (involving corporation who sued individual for posting on bulletin board that "corporation was having hard time.").

176. See *Molnlycke*, 64 F. Supp. 2d at 452 n.3 (recognizing that "most of the cases premising jurisdiction on Internet activity have ruled on the basis of specific jurisdiction"); *Coastal Video Communications Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562, 570 n.6 (E.D. Va. 1999) (recognizing that "vast majority of Internet-based personal jurisdiction cases involve specific jurisdiction.").

177. See *Molnlycke*, 64 F. Supp. 2d at 451 (discussing general jurisdiction and mere accessibility). The court stated that it:

[D]isagrees with plaintiff's more fundamental premise and holds that the establishment of a website through which customers can order products, does not, on its own, suffice to establish general jurisdiction. To hold that the possibility of ordering products from a website establishes general jurisdiction would effectively hold that any corporation with such a website is subject to general jurisdiction in every state. The court is not willing to take such a step.

Id.; see also *ESAB Group, Inc. v. Centricut, LLC*, 34 F. Supp. 2d 323, 330 n.4 (D.S.C. 1999) (stating that "[a] finding of jurisdiction based on the fact that the web page is

individuals from across the globe to lawsuits in the United States.¹⁷⁸ Courts, however, have based specific jurisdiction on a variety of theories.¹⁷⁹

a. Sliding Commercial Scale

Many courts have applied an analytical framework based on a sliding scale, finding the ability of a court to exercise jurisdiction to be directly proportional to the type of activity conducted online.¹⁸⁰ At one end of the scale is interactive, commercial websites.¹⁸¹ These sites permit corporations to contract with residents of a foreign jurisdiction over the Internet.¹⁸² At the opposite end of the scale are passive websites that merely post information on the Internet.¹⁸³ In the middle of the scale are

accessible in the forum means that there would be nationwide jurisdiction over any who posts a web page.”).

178. See *McDonough v. Fallon McElligott*, 1996 U.S. Dist. LEXIS 15139, 1996 WL 753991 at *3 (S.D. Cal. 1996) (stating that “allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists”); *Millennium Enterprises, Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 910 (D.Or. 1999) (refusing to find general jurisdiction based on reasoning in *McDonough*); *Hearst Corp. v. Goldberg*, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 27, 1997) (stating that jurisdiction based on Internet website would create worldwide service of process, which is clearly inconsistent with traditional case law).

179. See Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. Rev. 925, 939 (1998) (stating that current case law is inconsistent, irrational, and irreconcilable); Beth I. Boland & Diane Gwin, *The Internet and Personal Jurisdiction Under the Constitution: In What State, Exactly, Is the Internet Located?*, BOSTON L.J., Jan. 2000, at 16 (noting that determination of potential liability is unpredictable due to inconsistency in case law).

180. See *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (stating that “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.”). Some courts, however, have used the *Zippo* analysis to determine whether general jurisdiction was appropriate. *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999); *Harbuck v. Aramco, Inc.*, No. 99-1971, 1999 U.S. Dist. LEXIS 16892, 1999 WL 999431, at *5 (E.D. Pa. Oct. 21 1999); *Resnick v. Manfredy*, 52 F. Supp. 2d 462, 467-68 (E.D. Pa. 1999).

181. See *Zippo*, 952 F. Supp. at 1124 (stating that individual falls within this category “when a defendant clearly does business over the Internet.”).

182. See, e.g., *id.* (describing company that contracted with approximately 3000 individuals and seven Internet access providers in Pennsylvania); *CompuServe, Inc., v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (finding jurisdiction when non-resident defendant had entered into contract with plaintiff and repeatedly transmitted files to forum state). The court noted that CompuServe “acted as Patterson’s distributor, albeit electronically and not physically.” *Id.* at 1265; see also *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 744 (W.D. Tex. 1998) (finding jurisdiction over non-resident defendant because plaintiff signed contract with defendant over Internet).

183. See *Zippo*, 952 F. Supp. at 1124 (describing passive website as advertisement

websites that allow an individual to exchange some information with the host computer.¹⁸⁴

Many courts have recognized the utility of the *Zippo* test,¹⁸⁵ which considers the actual nature of the contacts between the defendant and the forum.¹⁸⁶ Other courts, however, have only found the test useful when the case fits neatly into one of the extremes of either fully interactive or passive websites.¹⁸⁷ Some scholars have condemned the test, stating that even passive web-

"that does little more than make information available to those who are interested in it.").

184. *See id.* (describing analysis that should be applied to websites in middle category). The court stated that "the middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Id.* (internal citations omitted); *see also* *Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F. Supp. 636, 639 (E.D. Pa. 1998) (reformulating *Zippo* test according to categories). The court stated:

The first type of contact is when the defendant clearly does business over the Internet. If the defendant enters into contract with residents of a foreign jurisdiction that involve the knowing and repeated transmissions of computer files over the Internet, personal jurisdiction is proper. The second type of contact occurs when a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Website. The third type of contact involves the posting of information or advertisements on an Internet Web Site which is accessible to users in foreign jurisdictions. Personal jurisdiction is not exercised for this type of contact.

Blackburn, 999 F. Supp. at 639 (citations and quotations omitted).

185. *Zippo*, 952 F. Supp. at 1119.

186. *See, e.g.*, *Vitullo v. Velocity Powerboats, Inc.*, No. 97-C-8745 1998 WL 246152 at *5 (N.D. Ill. Apr. 27, 1998) (stating that consideration of nature of contacts prevents jurisdictional requirements from being destroyed); *Patriot Systems, Inc. v. C-Cubed Corporation*, 21 F. Supp. 2d 1318, 1324 (D. Utah 1998) (stating that "the court finds this analysis helpful in this relatively new and changing area of law and is of the opinion that the evidence plaintiff presents in the instant case most closely aligns with the second category described above."); *Atlantech Distribution, Inc. v. Credit General Ins. Co.*, 30 F. Supp. 2d 534, 537 (D. Md. 1998) (stating that *Zippo* test was widely accepted and holding that court did not have personal jurisdiction over defendant due to existence of passive website); *SF Hotel Co. v. Energy Investments, Inc.*, 985 F. Supp. 1032, 1034-35 (D. Kan. 1997) (applying *Zippo* test in general personal jurisdiction case).

187. *See, e.g.*, *Dagesse v. Plant Hotel*, No. 98-713-B, 2000 U.S. Dist. LEXIS 1073, at *31 (D.C. N.H. Jan. 5, 2000) (stating that *Zippo* test is useful when website fits into either extreme); J. Christopher Gooch, *The Internet, Personal Jurisdiction, and the Federal Long-Arm Statute: Rethinking the Concept of Jurisdiction*, 15 ARIZ. J. INT'L & COMP. L. 635, 654 (noting that determination of interactivity is difficult with proliferation of websites and diversity of Internet users).

sites have the potential to cause harm.¹⁸⁸

b. Passive Websites

In numerous cases, courts have refused to exercise jurisdiction over non-resident defendants when the defendant's sole contact with the forum state was advertising over the Internet.¹⁸⁹ Courts have stated that Internet advertisements do not satisfy the constitutional requirements of purposeful availment and substantial contact.¹⁹⁰ Instead, these courts have found that Internet advertisements are similar to solicitations in national magazines,¹⁹¹ which do not constitute continuous and substantial contact with the forum state.¹⁹²

188. See Michael Traynor, *Personal Jurisdiction and the Internet: 1999 and Looking Ahead*, 564 PLI/PAT 109, 117 (1999) (stating that *Zippo* analysis has some shortcomings because posting defamatory comments or competitors' trade secrets causes harm regardless of type of website on which information is displayed); Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, 566 (1999) (arguing that forced application of existing jurisdictional rules to Internet contacts has created confusing and contradictory results). Todd Leitstein also notes that the *Zippo* court's definition of interactive website would encompass all websites. Leitstein, *supra*, at 566; see also Boland & Gwin, *supra* note 179, at 17 (stating that it is difficult to determine outcome of case when Internet site falls in middle of *Zippo* scale).

189. See, e.g., *Smith v. Hobby Lobby Stores*, 968 F. Supp. 1356 (W.D. Ark. 1997) (refusing to find jurisdiction over nonresident defendant who advertised over Internet, but did not sell goods or services in forum state); *Hearst Corp. v. Goldberger*, No. 96-3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997) (finding court lacked jurisdiction over nonresident defendant whose website is merely viewable by residents of forum state); *Bensusan v. King*, 126 F.3d 25 (2d Cir. 1997) (holding court's exercise of jurisdiction improper when only contact with forum state was Internet website).

190. See, e.g., *Weber v. Jolly Hotels*, 977 F. Supp. 327, 334 (D.N.J. 1997) (finding that jurisdiction based on Internet advertising would violate Due Process Clause of 14th Amendment).

191. See *Hearst*, No. 96-3620 1997 WL 97097 at *12 (finding that "Internet website is analogous to an advertisement in a national publication and this does not constitute sufficient contacts with New York to provide the Court with personal jurisdiction over [defendant]."); *Weber*, 977 F. Supp. at 334 (agreeing with "finding in *Hearst* that advertising on the Internet falls under the same rubric as advertising in a national magazine.").

192. See, e.g., *Gehling v. St. George's School of Medicine*, 773 F.2d 539, 542 (3d Cir. 1985) (holding that advertising in national magazine does not constitute continuous and substantial contact with forum state); *Giangola v. Walt Disney Co.*, 753 F. Supp. 148, 156 (D.N.J. 1990) (stating that "[i]n an age of modern advertising and national media publications and markets, plaintiffs' argument that such conduct would make a defendant amenable to suit wherever the advertisements were aired would substantially undermine the law of personal jurisdiction.").

c. Internet Advertisements and Off-Line Contacts

In cases involving advertising over the Internet, courts have exercised jurisdiction over a non-resident defendant when the defendant purposefully directed his Internet activities towards the forum state.¹⁹³ The federal District Court for the Eastern District of Missouri held that a website that encourages individuals in the forum state to add their names to a mailing list was sufficient to establish jurisdiction.¹⁹⁴ Another court held that the existence of a website coupled with a toll-free telephone number is sufficient.¹⁹⁵ The District Court of Arizona held that a website coupled with paper contracts and sales with the forum state is sufficient.¹⁹⁶

193. See, e.g., *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (finding jurisdiction where "there has been 'something more' to 'indicate that the defendant purposefully (albeit electronically) directed his activities in a substantial way to the forum state.'" (citations omitted)).

194. See *Maritz, Inc., v. CyberGold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (stating that nature of defendant's contacts with forum state favors exercise of jurisdiction). The court specifically stated:

With CyberGold's website, CyberGold automatically and indiscriminately responds to each and every internet user who accesses its website. Through its website, CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally. Thus, CyberGold's contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over defendant.

Id. But see *Desktop Technologies, Inc. v. Colorworks Reproduction & Design, Inc.*, No. Civ. A. 98-5029, 1999 WL 98572 at *3 (E.D. Pa. Feb. 25 1999) (holding that inviting users to print out order form and to fax completed order form to company was not sufficient basis to exercise jurisdiction); *Grutkowski v. Steamboat Lake Guides & Outfitters, Inc.*, No. Civ. A. 98-1453, 1998 WL 962042 at *5 (E.D. Pa. 1998) (stating that website's use of e-mail link that only permits readers to send questions is insufficient basis on which to exercise jurisdiction); *Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F. Supp. 636, 639 (E.D. Pa. 1998) (rejecting notion that e-mail requests for information could provide basis for personal jurisdiction).

195. See *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (finding jurisdiction over website that contained company's toll-free telephone number). But see *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996) (holding website consisting of general information would not give rise to jurisdiction).

196. See *EDIAS Software International, L.L.C. v. BASIS International Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996) (finding jurisdiction due to contracts with parties in forum state). The court stated:

The pleadings and oral arguments of the parties indicate that [the defendant] has purposefully availed itself of the protections and privileges of Arizona law based on the contractual relationship between [the plaintiff] and [the defendant]

Id. at 421; see also *CompuServe v. Patterson*, 89 F.3d 1257, 1261-68 (1996) (holding that

3. Specific Jurisdiction and Defamation Cases

Although the *Zippo* court's approach has been widely applied, another line of cases developed around traditional defamation claims.¹⁹⁷ These cases apply the reasoning in traditional media cases to Internet defamation claims,¹⁹⁸ finding personal jurisdiction over non-resident defendants when the effect of the tortious act was felt in the forum state.¹⁹⁹ While defendants have argued that traditional publications differ from Internet publications,²⁰⁰ courts have been unwilling to accept this analysis.²⁰¹

individual who purposefully contracted and communicated via Internet was subject to jurisdiction in state where contracted party resided).

197. See, e.g., *Panavision*, 141 F.3d at 1322 (applying effects test to extortion case); *EDIAS*, 947 F. Supp. at 420 (applying *Calder* effects test to transmission of defamatory e-mail messages); *Transcraft Corp. v. Doonan Trailer Corp.*, No. 97-C-4943, 1997 WL 733905 at *3 (N.D. Ill. Nov. 17, 1997) (applying effects test to trademark claim); *California Software Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356 (C.D. Cal. 1986) (finding jurisdiction over allegedly libelous statements circulated on computer network due to foreseeability of injury in forum state); *Blakey v. Continental Airlines, Inc.*, 322 N.J. Super. 187, 730 A.2d 854 (N.J. Super. Ct. App. Div. 1999) (applying effects test to computer bulletin board defamation claim).

198. See Yagura, *supra* note 14, at 310 (stating that traditional cases involve newspapers, magazines, mail, telephone calls, fax, or television and radio broadcasts that carry defamatory meanings across state lines); Perritt, *supra* note 67, at 17-18 (stating that traditional media cases are helpful in personal jurisdiction determinations involving Cybertorts). Print publications have similar characteristics to electronic publications. Perritt, *supra*. Both are disseminated from central locations and both can come into contact with multiple jurisdictions. *Id.*; see also *Inset Systems*, 937 F. Supp. at 165 (stating that Internet advertisements differ from traditional publication because Internet is always accessible).

199. See *Calder v. Jones*, 465 U.S. 783, 789 (1984) (stating that defendant knew brunt of injury would be felt in forum state, and therefore, could anticipate being subject to suit there); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999) (applying effects test to Internet bulletin board defamation case); Perritt, *supra* note 67, at 17-18 (stating that "publication usually satisfies minimum contacts analysis if it has substantial circulation in jurisdiction or if defendant publisher intended to cause injury in the jurisdiction.").

200. See *California Software Inc. v. Reliability Research*, 631 F. Supp. 1356, 1363 (C.D. Cal. 1986) (arguing that comment on bulletin board differs from medium of communication in *Calder*).

201. See *id.* (stating that "the conversational format . . . does not affect the jurisdictional analysis"). The court further stated "It would be both unfair, in light of the forum-related activity, and inefficient to require plaintiffs who have suffered an economic injury as a result of defendant's intentional conduct to sue in the defendant's home states . . . in which the known recipients of the [bulletin board messages] reside." *Id.* at 1364; see also *EDIAS*, 947 F. Supp. at 420 (stating that defendant "should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction").

a. Bulletin Board Postings

Some courts have found that posting information on a bulletin board cannot be construed as an act purposefully directed at a forum state.²⁰² These courts have analyzed a variety of factors including the origin, destination, subject matter, and effect of the postings.²⁰³ Courts have also examined the parties themselves, where they live, where they are headquartered, and where they are incorporated.²⁰⁴ One commentator noted that these cases only allow jurisdiction in the state in which the sender or recipient resides.²⁰⁵

b. Jurisdiction by Location of Server

At least one state court has based the ability to exercise jurisdiction solely on the location of the server.²⁰⁶ Some commenta-

202. See *Mallinckrodt Medical Inc. v. Sonus*, 989 F. Supp. 265 (D.C. Cir. 1998) (holding that mere posting of message on computer bulletin boards is not sufficient basis for court to exercise jurisdiction). The court stated that the posting cannot be perceived as transacting business in the District of Columbia. *Id.* at 271. *Blakey*, 322 N.J. Super. at 187 (holding that posting of messages was not sufficient contact with forum state for court to exercise jurisdiction); *Barrett*, 44 F. Supp. 2d at 728 (stating that "posting of messages to . . . USENET discussion groups technically differs from the maintenance of a 'passive' Web page because messages are actively disseminated to those who participate in such groups.").

203. See *Mallinckrodt*, 989 F. Supp. at 273 (stating that "[w]hile the transmission of the message occurred from outside the District of Columbia, there is no indication that plaintiffs themselves suffered any injury in the District of Columbia . . .").

204. See *id.* at 271-72 (analyzing nexus between allegedly defamatory bulletin board posting and forum state). The court stated:

The AOL transmission from Seattle to Virginia which was subsequently posted on an AOL electronic bulletin board and may have been accessed by AOL subscribers in the District of Columbia, cannot be construed as "transacting business" in the District of Columbia. The message was not sent to or from the District of Columbia, the subject matter had nothing to do with the District of Columbia, and neither the plaintiffs nor [defendants] reside in, have their headquarters in, or are incorporated in the District. Other than the fact that some people may have visited the electronic bulletin board and read the message from here, the AOL posting has no connection to this jurisdiction.

Id. at 272.

205. See *Jurisdiction Declined Where Posting Read*, M2 PRESSWIRE, Feb. 26, 1998 (quoting David Flint, partner in Intellectual Property & Technology Law Group of MacRoberts, stating that "it would appear that . . . legal jurisdiction will only lie where the sender, and possibly the recipient (if the sender knows this), resides.").

206. See *Krantz v. Airline Pilots Association, Int'l.*, 245 Va. 202, 427 S.E. 2d 326 (1993) (holding that use of bulletin board, physically located within Virginia facility, satisfied jurisdictional requirements); *Mitchell v. McGowan*, Civ. No. 98-1026-A, 1998 U.S. Dist. LEXIS 18587 at *1 (E.D. Va. Sept. 18 1998) (unpublished disposition) (stating

tors dismiss this position due to the ability of Internet users to circumvent legal regimes.²⁰⁷ Also, such an analysis would allow individuals to forum-shop, anticipating where the best legal environment exists and connecting to a server within that jurisdiction.²⁰⁸

II. BRAINTECH v. KOSTIUK: A CANADIAN RESPONSE

On March 18, 1999, the Court of Appeals for British Columbia released the first Canadian appellate court decision to address the enforcement of a foreign Cybertort judgment.²⁰⁹ In refusing to enforce the judgment of a U.S. District Court, the B.C. Court of Appeals said that the simple act of posting content on the Internet does not put Canadians in jeopardy of violating the defamation laws of foreign jurisdictions.²¹⁰ The ruling establishes that the mere posting of information on a website, although defamatory, does not constitute a real and substantial connection to a jurisdiction in which the website can be accessed.²¹¹ Therefore, the B.C. Court of Appeals stated that Canadian courts will not defer to comity and recognize the judgments of foreign courts unless a more substantial link to the forum can be established than merely posting comments on a computer bulletin board.²¹²

that *Krantz* did not apply to defendant because bulletin board was physically located outside court's geographical jurisdiction).

207. See Oberding & Norderhaug, *supra* note 22 (stating that this theory allows individuals to remove themselves from state's regulatory jurisdiction, decreasing effectiveness of state's governing power).

208. See *id.* (noting that individuals could technologically forum shop to obtain most favorable legal environment).

209. See Wisener, *supra* note 7 (stating that "[e]xperts say the decision by British Columbia's top court is the most important of its kind for Internet law in Canada and may have wide implications for issues as diverse as free speech rights and electronic commerce.").

210. See *BrainTech v. Kostiuk*, 1999 B.C.D. Civ. J. LEXIS 2020 at *33 (refusing to enforce judgment of District Court of Harris County, Texas). The court stated that "[i]n these circumstances the complainant must offer better proof that the defendant has entered Texas than the mere possibility that someone in that jurisdiction might have reached out to cyberspace to bring defamatory material to a screen in Texas." *Id.* at *32.

211. See *id.* (stating that defamatory posting of information does not constitute real and substantial connection to forum). The court stated "[t]he allegation of publication fails as it rests on the mere transitory, passive presence in cyberspace of the alleged defamatory material. Such a contact does not constitute a real and substantial presence." *Id.* at *33.

212. See *id.* at *36 (refusing to defer to comity and recognize judgment of Texas

A. *Texas District Court's Proceedings*

On November 1, 1996, BrainTech, Inc.²¹³ filed the original petition²¹⁴ against John C. Kostiuk²¹⁵ in a Texas District Court, alleging that Mr. Kostiuk posted defamatory information²¹⁶ on a computer bulletin board.²¹⁷ BrainTech did not serve Kostiuk, but instead, they served the Secretary of State, who was under a

District Court). The court stated "[i]n the circumstances revealed by record before this Court, British Columbia is the only natural forum and Texas is not an appropriate forum." *Id.* Therefore, comity does not require the B.C. Court of Appeals to recognize the judgment of the Texas Court. *Id.*

213. See BrainTech's Corporate Website (visited on Apr. 11, 2000) <<http://www.bnti.com/main/index.html>> (on file with the *Fordham International Law Journal*) (describing BrainTech as "[a] technology company founded in 1994, [that] specializes in the design and development of adaptive pattern matching recognition technologies and products."); *BrainTech*, 1999 B.C.D. Civ. J. LEXIS 2020 at *9 (describing company as stated in original petition). The original petition stated:

BrainTech, Inc. is a developmental stage company with corporate offices located in Vancouver, British Columbia and research and development facilities located in Austin, Texas. BrainTech is involved in design and development of advanced recognition systems based in its patented and highly adaptable set of computer-based pattern matching algorithms.

Id.

214. See *BrainTech*, 1999 B.C.D. Civ. J. LEXIS 2020 at *13 (stating that on February 11, 1997, BrainTech filed amended petition in U.S. District Court of Harris County, Texas).

215. See *id.* at *11 (describing Kostiuk as Canadian national with neither place of business nor agent appointed for service in Texas).

216. See *id.* at *10 (stating that record was silent on allegedly defamatory statements). The court stated "[t]here are no particulars in the record of either information transmitted by Kostiuk or of his defences to the allegations of defamation and business disparagement. It was assumed at trial and here that both are valid causes of action sounding in tort." *Id.*

217. See *id.* at *9-10 (describing means of dissemination). Specifically, the means of dissemination was alleged in BrainTech's amended pleading ("Amended Petition") as follows:

A discussion group or bulletin board has been established on the Internet to facilitate discussion and exchange of information regarding technology stocks and investments. This discussion group, which is operated under the name Silicon Investor, allows those interested in technology companies like BrainTech to exchange information relevant to possible investments in such companies.

Id.; Tracking High-Tech Stocks—Web Reviews, Yahoo! Internet Life, Aug. 1997 (visited Feb. 27, 2000) <<http://charts.techstocks.com/yahoo.html>> (on file with the *Fordham International Law Journal*) (stating that *Silicon Investor* had "more than 60,000 active subscribers—including many engineers, software developers, and even CEOs—posting more than 1.3 million notes to their message boards to date, you will find no shortage of expert analysis on hundreds of tech stocks, ranging from mighty Microsoft to tiny Tekelec.")

statutory duty to serve Kostiuk.²¹⁸ Both the Secretary of State and subsequently a local process server, however, were unable to effectuate service.²¹⁹ Notwithstanding the lack of actual service of the complaint on Kostiuk, the District Court of Texas accepted that Kostiuk had notice of the litigation²²⁰ and entered a

218. See TEXAS CIVIL PRACTICE AND REMEDIES CODE §§17.044, 17.045 (prescribing requirements for service on non-resident defendant). Section 17.044(b) states in relevant part:

the Secretary of State is an agent for service of process on a nonresident who engages in business in this state, but does not maintain a regular place of business in this state or a designated agent for service of process, in any proceeding that arises out of the business done in this state and to which the nonresident is a party.

Id. § 17.044(b). Section 17.045 (Notice to Nonresident) states in relevant part:

(a) If the Secretary of state is served with duplicate copies of process for a nonresident, he shall require a statement of the name and address of the nonresident's home or home office and shall immediately mail a copy of the process to the nonresident.

(b) . . .

(c) . . .

(d) The process or notice must be sent by registered mail or by certified mail, return receipt requested.

Id. § 17.045.

219. See *BrainTech v. Kostiuk*, 1999 B.C.D. Civ. J. LEXIS 2020 at *11-14 (describing district court's inability to serve Mr. Kostiuk). The original complaint was sent to 2408 Westhill Court, West Vancouver, British Columbia, V7S 3A5. *Id.* at *12. Kostiuk, however, had not lived at this address for a period of nine months. *Id.* Instead, Kostiuk's father, who accepted the letter, lived there. *Id.* The court summarized three affidavits of Mr. Livingston, the local process server:

(a) In his original affidavit of service (Livingston No. 1) asserts service of the Amended Petition was effected by presenting and leaving the same with John Kostiuk;

(b) says in Livingston No. 2 that service was effected upon 'a man who identified himself to me as the defendant'

(c) in Livingston No. 3, and with Kostiuk's denial of service before him, says he recognized Kostiuk to whom he said "John"; the person who answered the door did not deny this form of address; and, upon the person closing the door as he attempted to effect service he thrust the Amended Petition forward which jammed the door as it was closed.

Id. at *14.

220. See *id.* at *18 (stating that trial judge in Texas relied on affidavits of Mr. John McDonald, Vice President at BrainTech). Mr. McDonald's affidavits stated:

a) by reason of prior contact with Kostiuk and his father in British Columbia, that Kostiuk was known to evade service of process there;

b) his personal belief that Kostiuk acted in bad faith in defaming BrainTech because of the part the latter's officials played in establishing that Kostiuk's father had committed securities offenses;

c) BrainTech's general damages were \$250,000 and \$50,000 aggravated damages;

d) the correct address for Kostiuk remained at the Westhill Court address.

default judgment.²²¹ Two days later, BrainTech brought suit in the Supreme Court of British Columbia.²²²

B. *Supreme Court of British Columbia*

On August 8, 1997, Kostiuk filed his statement of defense in the Supreme Court of British Columbia, denying service of process, connection to the forum, and attornment to Texas.²²³ Also, Kostiuk alleged that the plaintiff defrauded the Texas District Court.²²⁴ As relief, Kostiuk sought a declaration that the Texas Court erred and a dismissal of BrainTech's claim.²²⁵

BrainTech responded, claiming that jurisdiction was proper under either Section 17.042(2) of the Texas Civil Practice and Remedies Code²²⁶ or by reason of a real and substantial connection between the cause of action and Texas.²²⁷ Next, BrainTech

Id. at *17-18.

221. *See id.* at *3 (stating that Texas District Court awarded US\$300,000, which is equivalent to Can\$409,680).

222. *Id.* at *2.

223. *Id.* at *3-4.

224. *Id.* at *3.

225. *See id.* at *4 (seeking "declaration that the Texas court acted without jurisdiction and for an order dismissing BrainTech's claim.").

226. *See* TEXAS CIVIL PRACTICE AND REMEDIES CODE §17.042 (proscribing requirements for jurisdiction in cases involving non-resident defendant). The Code provides:

In addition to other acts that may constitute doing business, a nonresident defendant does business in this state if the nonresident:

- (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;
- (2) commits a tort in whole or in part in this state; or
- (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

Id. § 17.042.

227. *See BrainTech v. Kostiuk*, 1999 B.C.D. Civ. J. LEXIS 2020 at *4-5 (listing particular basis upon which BrainTech claimed real and substantial connection between cause of action and forum). The list includes:

- (a) the Defendant defamed the Plaintiff and disparaged the business of the Plaintiff by the transmission and publication in the State of Texas of untruths and false and disparaging words, as alleged in the Plaintiff's Original Petition and First Amended Petition filed in the District Court of Harris County.
- (b) at the time of the aforesaid publication, shareholders of the Plaintiff resided in . . . Texas
- (c) at the time of the aforesaid publication, the Plaintiff maintained an office in Texas, its director of research and development resided in Texas and its research and development activities were carried on in Texas. Furthermore, the Plaintiff's head office had been located in Texas until 1995;
- (d) . . .

filed a notice of motion for judgment under Rule 18A of the Rules of the Supreme Court of British Columbia.²²⁸ In response, Kostiuk moved for an order adjourning the summary trial application, seeking more time to conduct discovery.²²⁹ The court denied Kostiuk's motion,²³⁰ but allowed the hearing for the Rule 18A application to proceed.²³¹ On April 2, 1998, the Supreme Court of British Columbia ruled in favor of BrainTech, enforcing the judgment of the Texas District Court.²³²

C. British Columbia Court of Appeals

On appeal, the B.C. Court of Appeals addressed three issues.²³³ The B.C. Court of Appeals, however, stated that any

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- (e) it was reasonably foreseeable to the Defendants that the Plaintiff's reputation stood to be injured in Texas by the publication of untruths by the Defendant in Texas;

Id.

228. *See id.* at *6 (citing Rule 18A of Supreme Court of British Columbia, which state options of court upon hearing Rule 18A motion). Sub-rule 11(a) states that upon hearing the motion, a court may:

- (a) grant judgment in favor of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

Id.

229. *See id.* at *5 (stating that Kostiuk wanted to continue discovery in order to cross-examine key individuals).

230. *See id.* at *6 (presenting B.C. Court of Appeals' opinion that further discovery was clearly warranted). The B.C. Court of Appeals stated, however, that the decision to proceed to summary trial does not amount to a failure of judicial discretion. *Id.* at *7.

231. *Id.* at *7.

232. *See BrainTech, Inc. v. Kostiuk*, [1990] 88 A.C.W.S. 3d 565, *7-8 (Can.) (finding real and substantial connection since BrainTech maintained research and development, marketing, and investor relations office in Texas). Also, 10% of BrainTech's shareholders, and BrainTech's chief technology officer, lived in Texas. *Id.* Due to the location of BrainTech's shareholders, offices, and management in the forum state, the Supreme Court of British Columbia stated that damages incurred in Texas by means of Internet publication in the forum state. *Id.* at 8; *see also BrainTech v. Kostiuk*, 1999 B.C.D. Civ. J. LEXIS 2020 at *22 (noting that enforcement required Supreme Court of British Columbia to apply *Morguard* test and find real and substantial connection existed between cause of action and forum state). Also, the trial judge dismissed Kostiuk's claim on insufficient service of process, finding that the Texas court relied on service through the Secretary of State. *Id.* at *16.

233. *See BrainTech v. Kostiuk*, 1999 B.C.D. Civ. J. LEXIS 2020 at *3 (listing three issues that Court of Appeals recognized on Kostiuk's appeal). The court stated that the issues were:

fraud practiced on the Texas court,²³⁴ or any error on the Rule 18A proceeding did not effect the final determination.²³⁵ Ultimately, the B.C. Court of Appeals stated that the crux of the appeal was whether the Texas Court had a real and substantial connection with the cause of action.²³⁶

The B.C. Court of Appeals recognized that comity was an element in the case at bar, necessitating an *Amchem* analysis.²³⁷ The court stated, however, that the Texas District Court was bound by principles similar to the Canadian doctrine of *forum non conveniens*.²³⁸ This analysis left one issue, whether a real and substantial connection existed between Texas and the cause of action.²³⁹

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1. Whether, in the circumstances, the trial judge erred in proceeding to summary trial under the provisions of Rule 18A of the Rules of the Supreme Court of British Columbia[?] [sic]
 2. Whether a fraud was practiced on the Texas court of which cognizance should be taken in the courts of British Columbia[?] [sic]
 3. Whether there was a real and substantial connection between Texas and the wrongdoing alleged to have taken place in that state[?] [sic]

Id.

234. *Id.* at *18 (listing court's reasons for such decision). The Court of Appeals stated "[w]hether a fraud was or was not committed on the Texas Court has, at this stage and in these proceedings, little relevance if there is not established a real and substantial connection between the Texas court and the parties to this litigation." *Id.*

235. *See id.* at *6-7 (stating that court did not need to decide this issue). The Court of Appeals stated:

[T]he decision whether to proceed to trial on the affidavit material is a matter within the discretion of the trial judge. The motion to adjourn was not made in a timely way. In my view it has not been demonstrated that his decision to proceed with the summary trial amounts to a failure to exercise a discretionary power judicially. I would not give effect to the appellant's contention in this Court that the cause should be remitted to the Supreme Court to be placed on the regular trial list.

Id.

236. *See id.* at *18 (stating that appeal must "succeed on the issue of whether the Texas court had a real and substantial connection with the subject matter of the action.").

237. *See id.* at *22-23 (stating that decision in *Amchem* was not considered by trial judge).

238. *See id.* at *24 (noting that *Amchem* specifically dealt with enforcement of judgment rendered in Texas).

239. *See id.* at *26-27 (commenting that court could not apply *Morguard* real and substantial test without defining real and substantial connection in context of Internet communications). The court specifically stated:

If the obligation to defer to the comity which is to be accorded the default judgment of the District Court of Harris County pronounced 7 May 1997 is to be tested by the principle of *forum non conveniens* some flesh must be put on the bare bones of "real and substantial connection."

In order to determine whether a real and substantial connection existed, the B.C. Court of Appeals applied the *Zippo* test that bases jurisdiction on a sliding commercial scale.²⁴⁰ Finding that the bulletin board on which Kostiuk posted information was passive, the B.C. Court of Appeals held that the Texas Court could not constitutionally exercise jurisdiction.²⁴¹ Therefore, the B.C. Court of Appeals did not enforce the judgment.²⁴²

The B.C. Court of Appeals further stated that the mere posting of information was insufficient to find jurisdiction, noting that better proof was necessary than evidence of a website's accessibility in a foreign jurisdiction.²⁴³ Although the B.C. Court of Appeals did not explicitly state what constituted better proof, the court listed eight reasons why the Texas court was an inappropriate forum.²⁴⁴ The list, however, is inclusive, according to

Id.

240. *See id.* at *28-31 (quoting at length from *Zippo* decision). Specifically, the B.C. Court of Appeals quoted the *Zippo* court's description of Internet and also the *Zippo* court's jurisdiction analysis. *Id.*

241. *Id.* at *32 (stating that no evidence existed to indicate that Kostiuk's speech had commercial purpose).

242. *See id.* at *36 (allowing appeal, setting aside judgment, and dismissing action).

243. *See id.* at *32 (refusing to adopt specific standard that would subject defendant to suit in any jurisdiction). The court continued to state:

It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin board could be obtained.

Id.

244. *See id.* at *33-35 (providing court's factual basis for declining to enforce Texas District Court judgment). The court specifically stated:

1. Kostiuk is a non-resident of Texas who has neither done business nor maintained a place of business nor appointed an agent for service there. His only connection is "deemed" by virtue of the allegation of having committed a tort in Texas.
2. BrainTech is a Nevada corporation domiciled in British Columbia. According to the Standard & Poor's [sic] service excerpt to Kostiuk's affidavit of 18 February 1998, it was incorporated in Nevada on 4 March 1987 and has undergone a number of name changes before assuming its present name in 1987. As of December 1996 its transfer agent was located in Salt Lake City; its office in North Vancouver, British Columbia its stock was traded on the OTC Bulletin Board (the location of which is not identified); and its principal officers (Chairman, President and Vice President and Chief Financial Officers) were located in North or West Vancouver.
3. BrainTech has had no presence in Texas since 31 December 1996. Between 1 September and 31 December 1996 its technical development activities are said to have been centered in Austin, Texas. Between January

the B.C. Court of Appeals.²⁴⁵

III. THE B.C. COURT OF APPEALS MISAPPLIED THE ZIPPO TEST AND FAILED TO FOLLOW THE SPIRIT OF MORGUARD AND ITS PROGENY

The B.C. Court of Appeals' decision in *BrainTech v. Kostiuik*²⁴⁶ demonstrates the ability of individuals to use the network-structure of the Internet²⁴⁷ and the technical-capabilities of bulletin boards²⁴⁸ as a shield from the application of a sovereign's laws.²⁴⁹ By refusing to recognize and enforce the ruling of the Texas District Court, the B.C. Court of Appeals established a precedent that allows residents to post defamatory comments on a computer bulletin board intentionally.²⁵⁰ The defamatory post-

1994 and the fall of 1995 its head office was located in Arizona. In the fall of 1995 it was moved to Vancouver.

4. No person in Texas is alleged to have seen the alleged defamatory material and the witnesses required to prove its damages are acknowledged to be citizens of Canada. The only proof of damages in the record is the McDonald affidavit of 17 April 1997, sworn in Vancouver.
5. No juridical advantage is alleged to accrue in Texas which is not available if a defamation action was brought in British Columbia. The authorities cited in BrainTech's brief in support of default judgment relate to the use within Texas of electronic communication for actual business purposes. None support the passive posting on an electronic bulletin board as constituting in itself the commission of a tort within Texas. To enforce recovery of the default judgment obtained in Texas on the deemed proof of use of an electronic bulletin board would encourage a multiplicity of actions the world over where the Internet was available.
6. The mode of service in the case at bar falls below the minimum constitutional standards for an American court.

Id.

245. See *id.* at *33 (stating that list of reasons considered by B.C. Court of Appeals was not exhaustive).

246. See *supra* notes 233-45 and accompanying text (discussing *BrainTech v. Kostiuik*).

247. See *supra* notes 108-11 and accompanying text (noting that Internet is computer network that functions by continuously communicating).

248. See *supra* notes 125-37 and accompanying text (discussing use of Internet bulletin boards and advantages to bulletin board over traditional forms of communication).

249. See *supra* notes 138-43 and accompanying text (noting ability of individual to commit Cybertort and effectively evade application of territorial laws); see also *supra* notes 156-59 and accompanying text (stating that Internet communication quickly transcends territorial laws).

250. See *supra* notes 243-45 and accompanying text (holding that posting defamatory comment, without more, does not constitute real and substantial connection to forum state).

ings are still actionable in British Columbia, but the capabilities of the Internet allow individuals to inflict injury throughout the world.²⁵¹ If such an injury occurs, then economic considerations may prohibit the injured party from bringing suit, preventing the administration of justice and the compensation of the aggrieved party.

Although the B.C. Court of Appeals applied the proper framework to recognize and enforce a foreign judgment,²⁵² the *BrainTech* court did not comply with the spirit of the doctrine, as espoused in *Amchem*.²⁵³ Also, the B.C. Court of Appeals improperly applied existing U.S. precedents to determine whether a real and substantial connection existed. Instead of applying the *Zippo* test,²⁵⁴ the B.C. Court of Appeals should have applied the *Calder* effects test,²⁵⁵ finding that a real and substantial connection existed between the cause of action and the forum state.

A. *The B.C. Court of Appeals Failed To Follow the Spirit of the Canadian Doctrine of Recognition and Enforcement of Foreign Judgments*

With the decision in *Amchem*, the Supreme Court of Canada stated that the Canadian doctrine of recognition and enforcement of foreign judgments would no longer protect Canada's sovereignty.²⁵⁶ Instead, the Canadian doctrine would reflect the changes wrought by globalization²⁵⁷ and recognize a foreign judgment if a real and substantial connection exists between the

251. See *supra* notes 112-15 and accompanying text (noting that Internet allows individuals to communicate with global audience).

252. See *supra* notes 236-42 and accompanying text (applying Canadian doctrine of recognition and enforcement of foreign judgment to Cybertort).

253. See *supra* notes 72-100 and accompanying text (noting that Canadian doctrine of recognition and enforcement of foreign judgments evolved from protectionist norms to doctrine that balances international duty with territorial sovereignty).

254. See *supra* notes 180-92 and accompanying text (stating that courts apply *Zippo* test to determine constitutionality of court's exercise of jurisdiction).

255. See *supra* notes 197-205 and accompanying text (discussing application of traditional media cases to Cybertorts).

256. See *supra* notes 81-100 and accompanying text (noting that Canadian courts will defer to comity and recognize and enforce judgment if foreign court has not departed from Canadian doctrine of *forum non conveniens*).

257. See *Morguard Investments, Ltd. v. De. Savoye* [1990] 3 S.C.R. 1077, 1097 (Can.) (discussing prevalence of international business and decentralization of legal and political power and noting that facilitation of "flow of wealth, skills and people across state lines has now become imperative.").

forum state and the cause of action.²⁵⁸ This indicated a sharp departure from the doctrinal formulation that existed, but a departure that reflected the reality of progress.²⁵⁹

The *Amchem* court did not specifically address the Internet. *Amchem*, however, should be applied to foreign Cybertort judgments,²⁶⁰ since the case arose in response to globalization, a process clearly facilitated by the Internet.²⁶¹ Therefore, Canadian courts should implement the *Amchem* court's ideal of increased recognition of foreign judgments and refrain from adopting an isolationist stance when litigation involves a Cybertort.

The *BrainTech* court applied the analytical framework espoused in *Morguard* and *Amchem*, but failed to comply with this ideal of increased recognition.²⁶² The B.C. Court of Appeals did not encourage recognition of foreign judgments, but instead, adopted a protectionist attitude, fearing that enforcement would lead to lawsuits against Canadian nationals across the globe.²⁶³ Also, the holding in *BrainTech* allows an individual to hide behind territorial boundaries,²⁶⁴ a result that not only violates the spirit of *Amchem* Court, but also that language of the *Amchem* Court.²⁶⁵

258. See *supra* notes 72-75 and accompanying text (discussing Canadian doctrine of recognition and enforcement of foreign judgments).

259. See *supra* notes 71-74 and accompanying text (following evolution of Canadian doctrine of recognition and enforcement of foreign judgments from protectionist pre-revolutionary French civil law and British common law rules to doctrine based on human interaction in modern society).

260. See *supra* notes 9-12 and accompanying text (noting that Internet facilitates globalization); see also *supra* notes 112-15 and accompanying text (discussing ability of Internet discussions to occur with individuals from different countries across globe).

261. See *supra* notes 9-12 and accompanying text (commenting that Internet is form of modern communication technology that facilitates globalization by disseminating material throughout world).

262. See *supra* notes 233-45 and accompanying text (refusing to recognize judgment of Texas District Court because bulletin board posting did not constitute real and substantial connection between cause of action and forum state).

263. See *supra* note 243 and accompanying text (stating that exercise of jurisdiction would have detrimental effect on freedom of expression).

264. See *supra* notes 141-43 and accompanying text (discussing ability of individuals to use territorial boundaries and network capabilities of Internet as shield to commit Cybertorts with anonymity).

265. See *Amchem Products, Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897, 932 (Can.) (stating that "since the court is concerned with the ends of justice . . . account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so.") (internal citations omitted).

B. *The B.C. Court of Appeals Improperly Applied the Zippo Test To Determine Whether a Real and Substantial Connection Existed Between the Cause of Action and the Forum State*

The Canadian doctrine of recognition and enforcement of foreign judgments compels Canadian courts to recognize a foreign judgment if a real and substantial connection exists between the cause of action and the forum state.²⁶⁶ The ability of the Internet to transcend territorial borders, however, complicates this determination.²⁶⁷ Therefore, courts and scholars have presented numerous solutions to facilitate the jurisdictional analysis when a Cybertort occurs.²⁶⁸

In *BrainTech v. Kostiuk*, the B.C. Court of Appeals applied one solution, the *Zippo* test,²⁶⁹ to determine whether the exercise of jurisdiction by the District Court of Texas was proper.²⁷⁰ Finding that John Kostiuk's postings did not have a commercial purpose,²⁷¹ the B.C. Court of Appeals stated that a real and substantial connection did not exist between the cause of action and the forum state.²⁷² By applying the *Zippo* test to a defamatory bulletin board posting, however, the B.C. Court of Appeals misapplied U.S. case law²⁷³ and failed to heed the advice of scholars.²⁷⁴

Although U.S. courts apply multiple theories to determine whether jurisdiction over a Cybertorts is proper, recent decisions

266. See *supra* notes 72-100 and accompanying text (formulating Canadian doctrine of recognition and enforcement of foreign judgments).

267. See *supra* notes 156-71 and accompanying text (discussing jurisdictional problems created by Cybertorts and scholars' responses).

268. See *supra* notes 160-71 and accompanying text (discussing three general approaches to base jurisdiction in cases involving Internet).

269. See *supra* notes 180-88 and accompanying text (describing *Zippo* test that bases constitutionality of court to exercise jurisdiction on level of commercial interactivity of website).

270. See *supra* notes 240-42 and accompanying text (refusing to find real and substantial connection between forum and cause of action because statements of John Kostiuk did not have commercial content and, therefore, exercise of jurisdiction is unconstitutional).

271. See *supra* note 241 and accompanying text (discussing commercial nature of John Kostiuk's speech).

272. See *supra* notes 240-43 and accompanying text (applying *Zippo* test and concluding that Texas District Court could not have exercised jurisdiction constitutionally).

273. See *supra* notes 180-208 and accompanying text (discussing U.S. Cybertort case law and noting that existing case law specifically addresses defamatory claims on Internet).

274. See *supra* notes 185-88 and accompanying text (noting shortcomings of *Zippo*).

indicate that a consensus is emerging.²⁷⁵ U.S. courts follow primarily two approaches: the *Zippo* test and the *Calder* test.²⁷⁶ *Zippo* applies when the Cybertort clearly involves commercial activity,²⁷⁷ while *Calder* applies when the Cybertort involves defamatory postings.²⁷⁸

The cursory analysis of *Zippo* by the B.C. Court of Appeals indicates that the court did not fully comprehend *Zippo* and its progeny. *Zippo* applies when a nonresident defendant enters contracts²⁷⁹ or commercial transactions on-line.²⁸⁰ Also, U.S. courts apply the *Zippo* test when the non-resident defendant owns or operates a website.²⁸¹ In *BrainTech*, however, John Kostiuk did not own or operate a website, or enter into contracts on-line. Instead, John Kostiuk posted allegedly defamatory information on a bulletin board, an act devoid of any commercial intent.

The B.C. Court of Appeals should have applied the *Calder* effects test to determine whether there was a real and substantial connection between the cause of action and the forum state. The *Calder* effects test acknowledges the similarities between traditional and on-line communication methods.²⁸² Also, the *Calder* effects test allows courts to compensate victims of harmful, on-line contacts, even if the contact does not occur in a commercial context.²⁸³ If the B.C. Court of Appeals applied *Calder* in *BrainTech v. Kostiuk*, then the holding would have differed be-

275. See *supra* notes 180-201 and accompanying text (discussing two main cases, *Zippo* and *Calder*, that U.S. courts apply to analyze propriety of exercising jurisdiction).

276. See *supra* notes 197-201 and accompanying text (discussing Cybertorts and application of *Calder*, which analyzes effect of posting to determine whether jurisdiction is proper).

277. See *supra* notes 180-97 and accompanying text (discussing applicability of *Zippo* to variety of commercial Internet contacts).

278. See *supra* notes 197-205 and accompanying text (discussing applicability of *Calder* to Cybertorts and noting variety of factors courts apply in analysis).

279. See *supra* note 182 and accompanying text (discussing application of *Zippo* when parties entered into contractual agreements online).

280. See *supra* notes 180-88 and accompanying text (discussing applicability of *Zippo* to owners and operators of web sites).

281. See *id.* (discussing U.S. case law analyzing on-line commercial activity). In all of the cases, the non-resident defendant owned or operated a website, which the plaintiff claimed was sufficient grounds to establish jurisdiction. *Id.*

282. See *supra* notes 197-201 and accompanying text (noting that traditional forms of publication and Internet communication both allow individuals to cause harm across national borders).

283. See *supra* note 188 and accompanying text (discussing shortcomings of *Zippo* and noting that *Zippo* test does not compensate victims harmed in non-commercial context).

cause BrainTech maintained offices in the forum state,²⁸⁴ the defamatory comments were published in the forum state,²⁸⁵ and the effect of the defamatory comments were felt in the forum state.²⁸⁶

CONCLUSION

Due to the technical capabilities of the Internet, individuals are increasingly interacting on-line with an international audience. This interaction will inevitably lead to litigation, and when it does, courts will be forced to decide novel questions of law. One such question, the circumstances under which a court will recognize and enforce a foreign Cybertort judgment, was addressed for the first time in Canada by the British Columbia Court of Appeals in *BrainTech v. Kostiuk*. The B.C. Court of Appeals refused to enforce the judgment of the Texas district court, holding that a defamatory bulletin-board posting did not constitute a real and substantial connection between the forum state and the cause of action. The decision established a dangerous precedent, allowing Canadian citizens to use territorial boundaries as a shield from the reach of another country's laws. Also, the decision indicates that Canada will not cooperate with foreign countries to monitor and regulate Internet conduct, choosing instead to litigate Internet claims within the Canadian court system. Such a protectionist stance, however, will hinder the worldwide administration of justice by allowing individuals to exploit the limited reach of courts' adjudicatory jurisdictions. Therefore, other courts within Canada, and around the world, should resist establishing isolationist precedents, and instead, should adopt cooperative mechanisms to recognize and enforce foreign, Cybertort judgments when the Internet activity is clearly commercial or directly effects an individual within the forum state.

284. See *supra* note 232 and accompanying text (noting that BrainTech maintained numerous offices in forum state, conducting research and development, marketing, and investor relations activities).

285. See *id.* (holding that real and substantial connection existed between cause of action and forum state because defamatory bulletin board postings were published in forum state).

286. See *id.* and accompanying text (noting that 10% of BrainTech's shareholders reside in forum state and finding that BrainTech suffered damages in forum state).

