Canada’s Approach to Jurisdiction Over Cybertorts: Braintech v. Kostiuk

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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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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).
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).


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 is 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.


ated by traditional technological media\textsuperscript{14} through treaties and international cooperation.\textsuperscript{15} The problems created by the Internet,\textsuperscript{16} however, have not received a unified response.\textsuperscript{17} Instead, individual nations have attempted to regulate the Internet, applying domestic rules and principles.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{14} See Ryan Yagura, \textit{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).

\textsuperscript{15} See, e.g., Gigante, \textit{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.

\textsuperscript{16} See, e.g., Michael Hatcher et. al., \textit{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.

\textsuperscript{17} See Steve Gold, \textit{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, \textit{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, \textit{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.

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

computer-mediated communications completely based on territorial notions effectively.\textsuperscript{20}

Scholars note that the decentralized nature of the Internet confounds national legislation\textsuperscript{21} by rendering laws based on territorial control inconvenient and irrelevant.\textsuperscript{22} The very notion of territoriality may even be outdated in a world demarcated not by nations and states, but by computer networks.\textsuperscript{23} Individual nations, however, continue to decide cases, applying laws defined by notions of territorial sovereignty to extraterritorial and international transmissions.\textsuperscript{24}

These judgments are often unenforceable because individual nations are not obligated to recognize foreign judgments.\textsuperscript{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) &lt;www.cli.org/paper4.html&gt; (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) &lt;http://www.ascusc.org/jcmc/vol2/issue1/juris.html&gt; (on file with the Fordham International Law Journal) (discussing whether traditional notion of jurisdiction should be altered in light of global nature of Internet).


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. Often these doctrines require that the original court properly exercised jurisdiction. Scholars note, however, that this requirement presents a problem for courts debating whether to recognize and enforce international Cybertorts and Cybercrimes.

Since Cybertorts transcend traditional jurisdictional analysis, courts may have difficulty determining when to enforce a foreign Cybertort judgment. Commentators have stated that this
determination is important, because the Internet has offline effects.\textsuperscript{31} Allowing individuals to hide behind the anonymity of the Internet\textsuperscript{32} may lead to inequitable results.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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. Generally, geographical boundaries define a court's jurisdiction. Either an individual must reside or the injury underlying a cause of action must occur in the adjudicating country. Territorial boundaries are pivotal in judicial enforcement, 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.


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. Many states, however, also assume jurisdiction over nonresident defendants.

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

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

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

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.

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).


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. If a judgment against a non-resident defendant is obtained, however, then the award is enforceable only if a foreign court recognizes the judgment. 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.

1. *In Personam* Jurisdiction

Historically, in *in personam* jurisdiction grants a court power over a defendant. Therefore, the defendant’s physical presence within the forum state is a prerequisite to a court exercising jurisdiction. 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.

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 contacts with the forum state and in-

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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.").


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).


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. The first limitation of the Due Process analysis may be satisfied if the court exercises general or specific jurisdiction over an individual.

In order to determine whether injustice will result, courts often weigh numerous factors. The factors are not applied unilaterally and protections of its laws.

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 Shafer, 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. 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.

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. Most state legislatures have broad statutes, allowing the jurisdiction of state courts to extend as far as due process allows. Therefore, personal jurisdiction analysis often will be decided by the due process analysis.

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
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 corporations 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. This action, if successful, forecloses the possibility of re-adjudicating claims, defenses, or other issues already resolved by the tribunals originally exercising jurisdiction. Thereafter, the recognizing court can authorize the appropriate agencies or agents to enforce the judgment, empowering agents to seize the debtor's assets or take other actions.

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 law and pre-Revolutionary French civil law rules. Recently, however, the Supreme Court of Canada stated that the doctrine of recognition and enforcement of foreign judgments resembles a judicial function and consists of two parts. First, the judgment must be recognized, a process by which the appropriate tribunal certifies that the judgment is a valid, enforceable decision. Next, the tribunal enforces the judgment, a process by which procedures for enforcing the judgment are prescribed and implemented. This distinction, which is fine, is not always made when legal scholars discuss the doctrine of enforcement.

68. See Hoffman, supra note 46, at 66-75 (discussing difference between recognition of foreign judgments and enforcement of foreign judgments). The doctrine of recognition 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).


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
nition and enforcement of foreign judgments must adjust to technological and societal advancements. 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.

i. Real and Substantial Connection

In Morguard Investments Ltd. v. De Savoye, the Supreme Court of Canada took the first step towards reformulating the basis for recognizing foreign judgments. 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. Recognition, however, was limited to cases where the original court properly exercised jurisdiction. 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.

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).


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 1108 (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)*, the Supreme Court of Canada expounded on the principles discussed in *Morguard*, while addressing the basis for an anti-suit injunction. The court recognized that comity was an issue, since the issuance of an anti-suit injunction infringes on the sovereignty of a foreign court. Generally, comity is the respect due to the acts taken by another country. The notion of comity, however, is not only based on the principle of respect, but also on convenience and necessity.

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

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


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 Mehener & 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 patters 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* acts as a counterweight, balancing the interests. 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*.

iii. Forum Non Conveniens

Although all Canadian jurisdictions recognize the doctrine of *forum non conveniens*, governing legislation and common law statutes in this area are succinct. 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 *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).

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.\textsuperscript{95} Even though the Supreme Court of Canada clarified the doctrine of \textit{forum non conveniens} in \textit{Amchem},\textsuperscript{96} provincial courts still reject well-founded \textit{forum non conveniens} applications.\textsuperscript{97}

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

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

\textsuperscript{96} \textit{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, 128 (Can.) (discussing application of \textit{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." \textit{Antares Shipping}, [1976] 65 D.L.R. at 123.

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

\textsuperscript{98} \textit{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 . . . ." \textit{Id}.

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

\textsuperscript{100} \textit{See} Amchem, [1993] 1 S.C.R. at 59 (stating that recognition of foreign proceeding is element of \textit{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 \textit{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. Such an organizational structure provides a powerful means to interact with other individuals in remote corners of the world. Increased human interaction, however, has led to litigation.

1. Background

The Internet began in the 1960s as a U.S. Department of Defense (or “DOD”) project in response to the Cold War. The DOD commissioned engineers to connect the agency’s computers, creating the Advanced Research Project Agency Network (“ARPANET”). 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. Thereafter, commercial entities realized the potential of the Internet and quickly attempted to make the Internet accessible to the general public.

Id.


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, 990 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.\textsuperscript{108} Instead, the Internet is a collaborative effort to cull together a network of computers.\textsuperscript{109} This network operates by connecting computer networks and host computers to each other,\textsuperscript{110} relying on the continuous communication between these computers to function.\textsuperscript{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.\textsuperscript{112} Commentators note

\begin{quotation}
\textbf{Reno v. American Civil Liberties Union and Zeran 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).

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

\textbf{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.").

\textbf{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.

\textit{Id.}

\textbf{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. \textit{Id.}

\textbf{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 on 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 Halpem & 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), affd, 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).
This generalization, however, fails to yield nuanced approaches, and instead provides stereotyped results that often mischaracterize the nature of the debate. Therefore, this Comment specifically focuses on computer bulletin boards.

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

The bulletin board systems 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.

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. An individual with the proper equipment can access these messages by subscribing to an Internet service provider, logging on to the Internet service provider’s computer network, and then contacting the desired bulletin board. 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.

There are numerous advantages to communicating by computer bulletin boards as opposed to traditional forms of communication. First, communicating by computer bulletin boards allows users to receive an unlimited amount of information. 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.

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.


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 possess 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. Finally, users can converse instantly on a wide range of topics with people from across the globe.

3. Cybertorts and Cybercrimes

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

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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 Annello 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. Internet offenses occur quickly and transcend traditional concepts of borders, making law enforcement difficult. Also, Internet offenses afford individuals anonymity, shielding their identity from law enforcement agents and victims.

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

Id.


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, disgruntled customers and employees have used them to voice their concerns over a company, regardless if the complaints are justified. 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.

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. When such cases are brought, courts have struggled with questions about the role of lawmakers on the Internet and the community standards that should govern. Cybertort litigation, however, frequently has concerned a single issue: the jurisdiction of a court to adjudicate.

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).

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 quickly\(^ {157}\) traditional jurisdictional limitations.\(^ {158}\) An analysis based on geographic boundaries, however, is insufficient when computer-mediated activities, especially bulletin boards, are involved.\(^ {159}\)

\(^{156}\) 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. \textit{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. \textit{Thomas, supra.}

\(^{157}\) See George P. Long III, \textit{Who Are You?: Identity and Anonymity in Cyberspace}, 55 U. PRRT. 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. \textit{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. \textit{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. \textit{Id.} Next, users can avoid government prohibitions by quickly switching to a less repressive regime. \textit{Id.} Finally, technological advancements always lead to a legislative lag in regulation. \textit{Id.} But see Lawrence Lessig, \textit{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. The proponents of the first category state that the jurisdictional problems created by the Internet cannot be solved and that Cyberspace cannot be regulated. 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.

Commentators in the second category argue that governments must establish new rules for determining jurisdiction. 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. 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.


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.


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 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).


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).

2. Specific and General Internet Jurisdiction

U.S. courts have addressed Internet-related jurisdiction problems on numerous occasions\textsuperscript{172} and they have applied and adapted existing jurisdictional rules to the Internet.\textsuperscript{173} One scholar has noted that these decisions will likely influence foreign tribunals when they face similar issues.\textsuperscript{174} Therefore, an analysis of relevant U.S. case law is warranted.\textsuperscript{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.\textsuperscript{176} As many courts have noted, a non-resident defendant's website cannot give rise to general jurisdiction.\textsuperscript{177} If such a rule were established, then the personal jurisdiction requirement would be a mere formality, subjecting

\begin{itemize}
\item \textsuperscript{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").
\item \textsuperscript{173} See Molnycke Health Care AB v. Dumex Surgical Products Ltd., 64 F. Supp. 2d 448, 451 (E.D. Pa 1999) (stating that "while 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.").
\item \textsuperscript{174} See Renault, \textit{supra} note 18 (stating that precedents established by U.S. courts will most likely influence Canadian courts).
\item \textsuperscript{175} Numerous cases specifically involving allegedly defamatory postings on computer bulletin boards have been settled out of court. \textit{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.").
\item \textsuperscript{176} See Molnycke, 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.").
\item \textsuperscript{177} See Molnycke, 64 F. Supp. 2d at 451 (discussing general jurisdiction and mere accessibility). The court stated that it:
\begin{quote}
[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. \textit{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
\end{quote}
individuals from across the globe to lawsuits in the United States.\textsuperscript{178} Courts, however, have based specific jurisdiction on a variety of theories.\textsuperscript{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.\textsuperscript{180} At one end of the scale is interactive, commercial websites.\textsuperscript{181} These sites permit corporations to contract with residents of a foreign jurisdiction over the Internet.\textsuperscript{182} At the opposite end of the scale are passive websites that merely post information on the Internet.\textsuperscript{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.”).


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

\textsuperscript{182} See, e.g., \textit{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.” \textit{Id.} at 1265; \textit{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).

\textsuperscript{183} See \textit{Zippo}, 952 F. Supp. at 1124 (describing passive website as advertisement
websites that allow an individual to exchange some information with the host computer.\textsuperscript{184}

Many courts have recognized the utility of the \textit{Zippo} test,\textsuperscript{185} which considers the actual nature of the contacts between the defendant and the forum.\textsuperscript{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.\textsuperscript{187} Some scholars have condemned the test, stating that even passive web-

\textsuperscript{184} \textit{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." \textit{Id.} (internal citations omitted); \textit{see also} Blackburn v. Walker Oriental Rug Galleries, Inc., 999 F. Supp. 636, 639 (E.D. Pa. 1998) (reformulating \textit{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.

\textit{Blackburn}, 999 F. Supp. at 639 (citations and quotations omitted).

\textsuperscript{185} \textit{Zippo}, 952 F. Supp. at 1119.

\textsuperscript{186} \textit{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 \textit{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 \textit{Zippo} test in general personal jurisdiction case).

\textsuperscript{187} \textit{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 \textit{Zippo} test is useful when website fits into either extreme); J. Christopher Gooch, \textit{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).


\(^{191}\) 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. 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. Another court held that the existence of a website coupled with a toll-free telephone number is sufficient. The District Court of Arizona held that a website coupled with paper contracts and sales with the forum state is sufficient.

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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)).


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.


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. These cases apply the reasoning in traditional media cases to Internet defamation claims, finding personal jurisdiction over non-resident defendants when the effect of the tortious act was felt in the forum state. While defendants have argued that traditional publications differ from Internet publications, courts have been unwilling to accept this analysis.

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


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.”).


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. These courts have analyzed a variety of factors including the origin, destination, subject matter, and effect of the postings. Courts have also examined the parties themselves, where they live, where they are headquartered, and where they are incorporated. One commentator noted that these cases only allow jurisdiction in the state in which the sender or recipient resides.

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. 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.").

tors dismiss this position due to the ability of Internet users to circumvent legal regimes.\textsuperscript{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.\textsuperscript{208}


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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{212}

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\textsuperscript{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).

\textsuperscript{208} See id. (noting that individuals could technologically forum shop to obtain most favorable legal environment).

\textsuperscript{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.”).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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. filed the original petition against John C. Kostiuk in a Texas District Court, alleging that Mr. Kostiuk posted defamatory information on a computer bulletin board. 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.


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.


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.\textsuperscript{218} Both the Secretary of State and subsequently a local process server, however, were unable to effectuate service.\textsuperscript{219} Notwithstanding the lack of actual service of the complaint on Kostiuk, the District Court of Texas accepted that Kostiuk had notice of the litigation\textsuperscript{220} and entered a

\begin{itemize}
  \item[218.] See \textit{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:
    \begin{quote}
    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.
    \end{quote}
  \end{itemize}

\begin{itemize}
  \item[219.] See \textit{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. \textit{Id.} at *12. Kostiuk, however, had not lived at this address for a period of nine months. \textit{Id.} Instead, Kostiuk's father, who accepted the letter, lived there. \textit{Id.} The court summarized three affidavits of Mr. Livingston, the local process server:
    \begin{itemize}
      \item[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;
      \item[b)] says in Livingston No. 2 that service was effected upon 'a man who identified himself to me as the defendant'
      \item[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.
    \end{itemize}
  \end{itemize}

\begin{itemize}
  \item[220.] See \textit{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:
    \begin{itemize}
      \item[a)] by reason of prior contact with Kostiuk and his father in British Columbia, that Kostiuk was known to evade service of process there;
      \item[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;
      \item[c)] BrainTech's general damages were $250,000 and $50,000 aggravated damages;
      \item[d)] the correct address for Kostiuk remained at the Westhill Court address.
    \end{itemize}
default judgment.\textsuperscript{221} Two days later, BrainTech brought suit in the Supreme Court of British Columbia.\textsuperscript{222}

\textbf{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.\textsuperscript{223} Also, Kostiuk alleged that the plaintiff defrauded the Texas District Court.\textsuperscript{224} As relief, Kostiuk sought a declaration that the Texas Court erred and a dismissal of BrainTech’s claim.\textsuperscript{225}

BrainTech responded, claiming that jurisdiction was proper under either Section 17.042(2) of the Texas Civil Practice and Remedies Code\textsuperscript{226} or by reason of a real and substantial connection between the cause of action and Texas.\textsuperscript{227} Next, BrainTech

\textit{Id.} at *17-18.
\textsuperscript{221} See \textit{id.} at *3 (stating that Texas District Court awarded US$300,000, which is equivalent to Can$409,680).
\textsuperscript{222} \textit{Id.} at *2.
\textsuperscript{223} \textit{Id.} at *3-4.
\textsuperscript{224} \textit{Id.} at *3.
\textsuperscript{225} See \textit{id.} at *4 (seeking “declaration that the Texas court acted without jurisdiction and for an order dismissing BrainTech’s claim.”).
\textsuperscript{226} See Tex\textsc{as} 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.

\textit{Id.} § 17.042.
\textsuperscript{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

(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.\(^{230}\) Id. at *7.

231. 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.

232. 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,\textsuperscript{234} or any error on the Rule 18A proceeding did not effect the final determination.\textsuperscript{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.\textsuperscript{236}

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

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?\textsuperscript{[sic]}\textsuperscript{234}
2. Whether a fraud was practiced on the Texas court of which cognizance should be taken in the courts of British Columbia?\textsuperscript{[sic]}\textsuperscript{234}
3. Whether there was a real and substantial connection between Texas and the wrongdoing alleged to have taken place in that state?\textsuperscript{[sic]}\textsuperscript{234}

\textit{Id.} \textsuperscript{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." \textit{Id.} \textsuperscript{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.

\textit{Id.} \textsuperscript{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.").

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

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

\textsuperscript{239} See id. at *26-27 (commenting that court could not apply \textit{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 \textit{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. 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. Therefore, the B.C. Court of Appeals did not enforce the judgment.

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. 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. The list, however, is inclusive, according to

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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. Kos-tiuk246 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 prece-dent 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 as constituting in itself the commission of a tort within Texas.
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. Kos-tiuk).
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. 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, the BrainTech court did not comply with the spirit of the doctrine, as espoused in Amchem. 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, the B.C. Court of Appeals should have applied the Calder effects test, 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. Instead, the Canadian doctrine would reflect the changes wrought by globalization 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. This indicated a sharp departure from the doctrinal formulation that existed, but a departure that reflected the reality of progress.

The Amchem court did not specifically address the Internet. Amchem, however, should be applied to foreign Cybertort judgments, since the case arose in response to globalization, a process clearly facilitated by the Internet. 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. 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. Also, the holding in BrainTech allows an individual to hide behind territorial boundaries, a result that not only violates the spirit of Amchem Court, but also that language of the Amchem Court.

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 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, 952 (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 for-
eign judgment if a real and substantial connection exists be-
tween the cause of action and the forum state. The ability of
the Internet to transcend territorial borders, however, complicates this determination. Therefore, courts and scholars have
presented numerous solutions to facilitate the jurisdictional
analysis when a Cybertort occurs.

In BrainTech v. Kostiuk, the B.C. Court of Appeals applied
one solution, the Zippo test, to determine whether the exercise
of jurisdiction by the District Court of Texas was proper. Finding that John Kostiuk's postings did not have a commercial pur-
pose, the B.C. Court of Appeals stated that a real and substan-
tial connection did not exist between the cause of action and the
forum state. By applying the Zippo test to a defamatory bulle-
tin board posting, however, the B.C. Court of Appeals misap-
plied U.S. case law and failed to heed the advice of scholars.

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

266. See supra notes 72-100 and accompanying text (formulating Canadian doc-
trine 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 ap-
proaches to base jurisdiction in cases involving Internet).
269. See supra notes 180-88 and accompanying text (describing Zippo test that bases
constituency 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 sub-
stantial connection between forum and cause of action because statements of John Kos-
tiuk did not have commercial content and, therefore, exercise of jurisdiction is unconsti-
tutional).
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 con-
cluding that Texas District Court could not have exercised jurisdiction constitution-
ally).
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.\textsuperscript{275} U.S. courts follow primarily two approaches: the \textit{Zippo} test and the \textit{Calder} test.\textsuperscript{276} \textit{Zippo} applies when the Cybertort clearly involves commercial activity,\textsuperscript{277} while \textit{Calder} applies when the Cybertort involves defamatory postings.\textsuperscript{278}

The cursory analysis of \textit{Zippo} by the B.C. Court of Appeals indicates that the court did not fully comprehend \textit{Zippo} and its progeny. \textit{Zippo} applies when a nonresident defendant enters contracts\textsuperscript{279} or commercial transactions on-line.\textsuperscript{280} Also, U.S. courts apply the \textit{Zippo} test when the non-resident defendant owns or operates a website.\textsuperscript{281} In \textit{BrainTech}, however, John Kostiuk did not own or operate a website, or enter into contracts online. 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 \textit{Calder} effects test to determine whether there was a real and substantial connection between the cause of action and the forum state. The \textit{Calder} effects test acknowledges the similarities between traditional and on-line communication methods.\textsuperscript{282} Also, the \textit{Calder} effects test allows courts to compensate victims of harmful, on-line contacts, even if the contact does not occur in a commercial context.\textsuperscript{283} If the B.C. Court of Appeals applied \textit{Calder} in \textit{BrainTech v. Kostiuk}, then the holding would have differed be-

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

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

\textsuperscript{277} See supra notes 180-97 and accompanying text (discussing applicability of \textit{Zippo} to variety of commercial Internet contacts).

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

\textsuperscript{279} See supra note 182 and accompanying text (discussing application of \textit{Zippo} when parties entered into contractual agreements online).

\textsuperscript{280} See supra notes 180-88 and accompanying text (discussing applicability of \textit{Zippo} to owners and operators of web sites).

\textsuperscript{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. \textit{Id}.

\textsuperscript{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).

\textsuperscript{283} See supra note 188 and accompanying text (discussing shortcomings of \textit{Zippo} and noting that \textit{Zippo} test does not compensate victims harmed in non-commercial context).
cause BrainTech maintained offices in the forum state,\textsuperscript{284} the defamatory comments were published in the forum state,\textsuperscript{285} and the effect of the defamatory comments were felt in the forum state.\textsuperscript{286}

\textit{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 \textit{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.

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

\textsuperscript{285} See \textit{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).

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