

Jurisdiction on the Internet

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I. Introduction

In commercial transactions, personal jurisdiction is determined by the merchant conducting his business in the said jurisdiction. When it comes to the Internet, however, the issue of personal jurisdiction is not so straightforward as the transaction can occur even though the merchant is not “physically” in the said jurisdiction. For example, a Chinese merchant¹ living in Canada would be able to sell his goods to a Malaysian, through his website that is hosted in Chicago whilst his goods are stored in the Philippines. In this scenario, it would be difficult to establish which country has the jurisdiction to try the case should a dispute occur.

It should be noted that the issue of “jurisdiction” raises several questions:

- (a) Is there a cause of action which a court of law has jurisdiction to hear?
- (b) What is the applicable law?
- (c) Is the judgment of the court binding (especially when it deals with a non-citizen or resident)?

For the purposes of this paper, only the first aspect will be discussed, specifically in the context of e-commerce.

[†] This paper, which was presented at the Inaugural University of Malaya Law Conference, is a revised version of a Chapter by the writer titled “Personal Jurisdiction of Websites”, in Khaw, Lake Tee and Syarifah Suhana Syed Ahmad (eds), *ICT Its Impact on Selected Areas of the Law*, Chapter II (Kuala Lumpur: University of Malaya Press, 2006).

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¹ In this situation, it would be referring to a citizen of China.

II. Jurisdiction on the Internet

Having a website on the Internet is almost tantamount to having an international presence. However, just because the website is accessible to the whole world does not mean that the person is submitting himself to the jurisdiction of the entire world. With this in mind, courts have been finding ways to clarify the issue of jurisdiction with respect to online transactions. In this regard, commercial websites and information websites are given different considerations. For the former, the court has to determine whether one has "conducted his business" in the said jurisdiction,² while the latter requires thought as to whether the information had been 'published' in the said jurisdiction.³

As there are limited Malaysian cases on the issue of internet jurisdiction, reference is made primarily to American and European decisions. Although these decisions are not binding on the Malaysian courts, they may be useful as guides.

A. Commercial Websites

1. United States of America

In determining whether an e-merchant has "conducted his business" in a particular jurisdiction, the courts in the United States of America have translated this to mean when an e-merchant:⁴

- (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other transactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

² The cause of action discussed in this aspect is generally e-commerce (contract and tort).

³ The cause of action discussed in this aspect is defamation.

⁴ As stated in the case of *ALS Scan Inc v Digital Services Consultants*. Judgment was made on 14 June 2002 and was accessed from <http://pacer.ca4.uscourts.gov/opinion.pdf/011812.P.pdf> on 20 November 2005.

The nature of the website is a relevant factor in the determination of whether an e-merchant is conducting business in a particular jurisdiction. There are basically three types of websites:⁵

- (a) Interactive: high level of interaction between user and website owner.
- (b) Integral: user may purchase goods or services online.
- (c) Passive: only advertising products and services.

The more interactive the website is with the user, the more likely the courts are to claim jurisdiction. The rationale is based on the fact that the level of interactivity between the website and the user is equivalent to the level of communication (and intention) that passes between a merchant and his client. The more active it is, the more it can be said that the merchant *intends* to deal with the said client.

This is more commonly referred to as the “sliding-scale test”, based on the decision in *Zippo Manufacturing Co v Zippo Dot Com*⁶ in which it was stated:

This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdiction. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. 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

⁵ *Weber v Jolly Hotels* (1997) 2 ECLR 1036.

⁶ 952 F Supp 1119 (W D Pa 1997).

is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Therefore, it can be seen that the interactivity of the website is a crucial factor in determining whether a merchant has conducted his business in the said jurisdiction or not. Furthermore, as mentioned earlier, different considerations have been given to commercial websites and information websites.⁷ For a commercial website, as the court has to determine whether one has “conducted his business” in the said jurisdiction, the level of interactivity is an essential element to consider. An information website is, however, essentially a passive website and would generally not confer any jurisdiction to any State. However, this is not to say that no jurisdiction can be conferred at all; it depends on the type of action being brought which would entail different considerations.

In the case of *Zippo Manufacturing Company v Zippo Dot Com, Inc.*,⁸ Zippo Manufacturing was a Pennsylvanian company which manufactured, amongst others, the “Zippo” tobacco lighters. Zippo Dot Com was a Californian company which had a website with the exclusive right to use the domain names “zippo.com”, “zippo.net” and “zipponews.com”. The website has information regarding the company, advertisements and an application for its News services.⁹

After examining the facts, the courts held that there was jurisdiction as Zippo Dot Com did more than simply advertise on the

⁷ Partly due to the nature of the claim being made, as different considerations are required before a certain action is applicable. In addition, the test for “contacts” would differ according to the type of personal jurisdiction that is being claimed ie whether it is general or specific jurisdiction; with the latter requiring a more stringent test to be applied as a greater nexus is needed between the defendant and the forum State.

⁸ *Supra* n 6 at p 1123. (Full text can be accessed on the website of The Berkman Center for Internet and Society Harvard Law School at <http://cyber.law.harvard.edu/metaschool/fisher/domain/dncases/zippo.htm>, as accessed on 17 September 2007.

⁹ The news service has three levels of membership: (1) Public/Free (2) Original

Internet in Pennsylvania. About 3,000 of its 140,000 subscribers were from Pennsylvania¹⁰ and there were seven contracts with Internet access providers to permit their Pennsylvanian subscribers access to Zippo Dot Com's news. Such actions denote that the website owner was targeting Pennsylvania of its services.¹¹

Compare this with the case of *Cybersell, Inc (An Arizona Corporation) v Cybersell Inc (A Florida Corporation)*.¹² Cybersell AZ, the registered trademark owner of the name "cybersell", brought an action against Cybersell FLA for putting the greeting "Welcome to Cybersell" on their website.¹³ The Ninth Circuit affirmed the district court's decision that there was no jurisdiction. Upon scrutinising the facts, the court felt that Cybersell FLA was not targeting the Arizona market. Although the website did allow users (including those in Arizona) to submit their name and address, and to send emails, the only emails or "hits" from Arizona was from Cybersell AZ. In addition, the only interactivity that the court could find was limited to receiving

and (3) Super. For (2) and (3), customers are required to fill in an online application form and payment is made via credit card (over the Internet or telephone).

¹⁰ To subscribe, the users had to pay for the password.

¹¹ On the facts of this case, the actions of Zippo by obtaining more ISPs indicate their seriousness in obtaining more subscribers from Pennsylvania. However, a question arises as to whether jurisdiction would have been found purely based on the number of subscribers. If so, what is the "acceptable" number that is required before "intention" is derived, or whether just having even one subscriber would have been enough. In this scenario, even though they had 3,000 subscribers, it only represents 2.143% of its total subscribers. How is the determination done?

¹² 130 F.3d 414 (9th Cir 1997). Accessed at [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/5978605BF5E489A588256D95005CB8DB/\\$file/0215035.pdf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/5978605BF5E489A588256D95005CB8DB/$file/0215035.pdf) on 14 September 2007.

¹³ Cybersell FLA's website originally contained a webpage with the logo "Cybersell" above an image of a globe (including the "Welcome to Cybersell" greeting on another web page). Upon being informed by Cybersell AZ that "cybersell" was a registered trademark, they changed their name to Webhorizon's Inc (and later to Websolvers). However, their renamed website still contained the infringing greeting.

the browser's name and address.¹⁴ Thus, it was of the opinion that the lack of additional commercial contacts made it a "passive" website.

It would be erroneous to stipulate that the number of contacts is the only aspect to be considered as the *quality* of contacts is also important. In the case of *Carefirst of Maryland v Carefirst Pregnancy Centers*,¹⁵ Carefirst Pregnancy Centers (CPC) was a non-profit Illinois corporation based in Chicago which provided care for pregnancy-related crisis to expectant women.¹⁶ It operated a website¹⁷ which, amongst others, sought donations online. Carefirst of Maryland filed a complaint against CPC alleging trademark infringement, trademark dilution and unfair competition for using its registered trademark "Carefirst".

In determining whether or not there was personal jurisdiction, the US Court of Appeals (4th circuit) considered three aspects:¹⁸

- (a) whether CPC had "purposefully availed itself" to conducting activities in the state;
- (b) whether Carefirst's claims arise out of those activities; and
- (c) whether the exercise of personal jurisdiction would be constitutionally "reasonable".

In this regard, the court was not interested only in the number of contacts that were made with Marylanders, but rather to the "quality and nature" of the said contacts. CPC's website was "semi-interactive",

¹⁴ Cybersell had not made any contacts with Arizona residents, had not sold nor derived any income from Arizona and did not send any emails to Arizona. Based on this, one cannot say that Cybersell FLA had "targetted" Arizona at all. Its website was only accessible by Arizona residents. In fact, by anyone else in the world.

¹⁵ 334 F.3d 390 (4th Cir 2003). Accessed at <http://pacer.ca4.uscourts.gov/opinion.pdf/021137.P.pdf> on 17 September 2007.

¹⁶ It has its headquarters in Chicago, Illinois and has no physical presence in Maryland at all (no offices, telephone listing, employees or agents).

¹⁷ Its web hosting company is based in Maryland.

¹⁸ *Supra* n 12.

as it allowed a user to exchange information with the host computer.¹⁹ The court then examined the level of interactivity and the commercial nature of the information exchanged.²⁰ By focusing on the quality and nature of the contacts, it was held that Maryland did not have jurisdiction because there was insufficient contact with Maryland.²¹ The case, it is submitted, steers the law on internet jurisdiction towards a clearer path.

However, the position in the United States of America seems to be shifting slightly. In the appeal case of *Howard v Missouri Bone and Joint Center, Inc.*,²² the *Zippo*'s sliding scale test for personal jurisdiction was rejected. In this case, an Illinois plaintiff was bringing an action in Illinois against a Missouri defendant. It was argued that the defendant's website was interactive as it allowed users to make appointments, fill out surveys and ask questions. Hence, when applying the *Zippo* test, jurisdiction can be found. The court, however, was of a different opinion. It regarded the interactivity of the website to be irrelevant and equated its interactivity to advertisement or solicitation of business; which is insufficient to sustain personal jurisdiction in Illinois:

¹⁹ The CPC's website gives users two ways in order to donate: (1) by calling an advertised toll-free number and make a credit card transaction over the phone, or (2) *via* credit card donation through the website. Once a donation is made, their names and addresses are recorded in CPC's database and the donor receives advertisements through the mail. Furthermore, a donor who makes an online donation receives a thank-you email.

²⁰ The courts allowed the reasoning as given in the *Zippo* case, *supra* n 6 at p 1126.

²¹ It was found that the only concrete contact with Maryland residents was the single donation made by Carefirst's counsel, a move made to bolster the position of her client in the case. The website made a plea for donations to the entire world and not Maryland alone, and its website had a completely local content, that is, it constantly emphasized its mission was to assist *Chicago-area* women. It is interesting to note that the court arrived at that decision even though the website host was a Maryland company.

²² No 05-476, N E 2d, 2007 WL 1217855 (Ill App 5th Dist April 24 2007). Judgment accessed from <http://www.state.il.us/court/Opinions/AppellateCourt/2007/5thDistrict/April/5050476.pdf> on 17 September 2007.

An interactive website is similar to telephone or mail communications. A passive website is much the same as advertising on the radio or in a magazine. An ad on the Internet is no different than an ad in any other medium that provides a telephone number or other means to contact a potential defendant. It is mere advertisement or solicitation of business. Illinois courts have long held that a mere advertisement or solicitation is not enough to sustain personal jurisdiction in Illinois.

However, it is to be noted that the *Zippo* case was based on a claim arising from specific jurisdiction,²³ whereas the *Howard's* case is with regards to general jurisdiction.²⁴ Therefore, the *Zippo* sliding-scale was not to be applied in the first place.

2. *United Kingdom*

Internet transactions²⁵ in the United Kingdom are governed by the Electronic Commerce (EC) Regulations 2002,²⁶ which transposes the

²³ Specific jurisdiction covers claims that arise out of the actions relating to the State. Therefore, there needs to be a sufficient connection between the issue and the defendant in the forum State. In order to determine whether specific jurisdiction exists, three aspects need to be fulfilled: the defendant must have "minimum contacts" with the said State; the claim which is being made arises from those said contacts; and the exercise of jurisdiction is reasonable.

²⁴ Where a claim is unrelated to the activities of the State, the plaintiff would be seeking for general jurisdiction. For the court to have jurisdiction over the non-resident defendant, it must be shown that the defendant had "systematic and continuous" activities in the State. Such contacts are "thought [to 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" (as per *International Shoe Co v Washington*, 326 U S 310, 66 S Ct 154, 90 LEd 95 (1945) at p 318).

²⁵ Only commercial transactions conducted online are covered. Any offline elements, even though in relation to an online transaction, are not within its scope.

²⁶ It came into force on 21 August 2002, except for Regulation 16 (on the amendment of "Stop Now Orders") which came into force on 23 October 2002.

Electronic Commerce Directive 2000/31/EC, and applies to all countries in the European Economic Area²⁷ as well as the European Community.²⁸ It is to be noted that for the purposes of this paper, only the internal laws are looked at briefly. The United Kingdom is also part of the European Union, and is also governed by the Brussels Regulations, which replaced the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968 as at 1 March 2002. The Brussels Regulations took into account e-commerce transactions and is applicable to all member states.

The EC Regulations apply to those who provide and receive “information society services”.²⁹ In brief, anyone who sells online or advertises online will be subject to the United Kingdom laws if the trader is established in the United Kingdom. Thus, in essence, the requirement as per the traditional rules of jurisdiction which requires an individual to be “domiciled” within its territory³⁰ is translated to an individual or a company being “established” for the Internet.

The two more notable cases at this point are *1-800 Flowers Inc v Phonenames Ltd*³¹ and *Euromarket Designs Inc v Perters*

²⁷ Iceland, Liechtenstein and Norway.

²⁸ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom (Gibraltar is part of the Community in this case only due to their own implementation – the Isle of Man and the Channel Islands are not).

²⁹ This is defined as services “normally provided for remuneration at a distance, by means of electronic equipment at the individual request of a recipient of a service”. This wide definition not only covers the Internet, but also email and mobile phones, although there are certain exceptions for email. It covers a wide range of economic and commercial activities including online selling of goods, newspapers, magazines, entertainment services, direct marketing, advertising services and professional services.

³⁰ Generally, traditional jurisdiction in civil proceedings is governed by the Civil Jurisdiction and Judgments Act 1982. In essence, the courts have jurisdiction if a writ can be served on the defendant, that is, when he is domiciled in the said jurisdiction. For the purposes of this paper, the issue of domicile is not discussed.

³¹ [2001] EWCA Civ 721. As accessed on 17 September 2007 at: <http://>

and *Crate and Barrel Ltd.*³² Both cases dealt with the issue of trademark.

In *1-800 FLOWERS*, 1-800 Flowers Inc (the Applicant) is an appeal case³³ that arose due to the issue of using the UK phone number for 0800 FLOWERS³⁴ which was owned by Phonenames Ltd (the Opponent) but was the trademark (in the United Kingdom) of 1-800 Flowers. In order to understand this appeal case better, the history of the facts of the previous actions must be discussed first.

In brief, the case began when 1-800 Flowers was awarded the trademark of "1-800 Flowers" by the Registrar of Trade Marks on 17 December 1998.³⁵ The Opponent did not agree³⁶ and brought an

www.hmccourts-service.gov.uk/judgmentsfiles/j462/1-800_Flowers_Inc_v_Phonenames%20Ltd.htm.

³² [2001] FSR 288. Decision can be accessed from the British and Irish Legal Information Institute database: <http://www.bailii.org/ew/cases/EWHC/Ch/2000/179.html>, as accessed on 17 September 2007.

³³ To summarise, 1-800 Flowers (the Applicant) had been awarded the trademark of "1-800 Flowers" by the Registrar of Trade Marks on 17 December 1998. Phonenames Ltds (the Opponent) appeal to the High Court in 1999 was allowed by Jacob J (reported at [2000] FSR 697). The case being discussed is the appeal made by the Applicant against that High Court decision.

³⁴ That is, 800 356-9377. This was a relatively new alpha-numeric concept of allocating letters to keypads on telephones, thus making it easier for consumers to phone the respective company as it was easier to remember.

³⁵ Decision can be found at <http://www.ipo.gov.uk/tm/t-decisionmaking/t-challenge/t-challenge-decision-results/o26798.pdf>, as accessed on 17 September 2007. It is important to note at this point that, at the time of the trademark application by 1-800 Flowers on 13 February 1993, neither party had ownership to the phone number. By the time the trademark was awarded to 1-800 Flowers, Phonenames had already obtained the number.

³⁶ Before a trade mark can be registered, s 17 of the Trade Mark Act 1938 (the old Trade Mark Act) required that there was "use" of the trade mark in the United Kingdom. One of the grounds upon which Phonenames Ltd opposed 1-800 application was the fact that 1-800 Flowers had never used, nor proposed to use, the mark in the United Kingdom. 1-800 Flowers, on the other hand, argued that there was "use" since its website, www.1800flowers.com, and its US toll-free 1-800 FLOWERS number could be accessed by anyone, anywhere in the world. Based on these arguments, the Registrar had awarded the trademark to 1-800 Flowers.

appeal to the High Court in 1999. The High Court stated that there was no evidence of "use" in the United Kingdom as:

- (a) The use of the mark by reference to the number 1-800 FLOWERS was not evidence of use in the UK; and
- (b) With regard to the website, it was held that (in the circumstances), it was not evidence of use of the mark in the United Kingdom, as the primary target audience of the website and its services, is the United States.

The learned judge stated at p 705:

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

But even if ... [a] website use amounted, for trade mark purposes, to use in omnipresent cyberspace, I cannot see how that would help here. If you access the applicant's site in the UK, you can order flowers. But the service of receiving and [transferring] (*ie* the service of the specification) is carried out wholly in New York ...

In the result, I do not think that the applicants have the requisite intention to use or in fact use the mark 800 FLOWERS.

The lower court's decision was upheld by the Court of Appeal, and the case was subsequently followed in the case of *Euromarket Designs*. In that case, the plaintiff was a US company and owner of the Crate & Barrel stores in the United States. An action was brought against an Irish company operating an (unrelated) Crate & Barrel store in Ireland and for using the CRATE & BARREL mark on its website.

In arriving at its decision, the court held that the defendant had done nothing to promote its services to the country. Its website was simply a "window" to the shop that it had and he equated the website to a "shop window" where a user may only look through but not purchase anything. Thus, as the defendant had done nothing to "actively target" any said area, there can be no jurisdiction.

3. *Malaysia*

Unfortunately, there are no Malaysian decisions on the jurisdiction of a commercial website. One can only assume that should a case arise, the basic law regarding courts' jurisdiction would apply. By virtue of s 23(1) of the Courts of Judicature Act 1964 (CJA), Malaysian courts have jurisdiction to try all civil proceedings where in Malaysia:

- (a) the cause of action arose;
- (b) the defendant resides or has his place or business, or
- (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
- (d) —

In addition, the courts will have jurisdiction over a non-resident as per Order 11 rule 1(1)(c) Rules of the High Court 1980 ("RHC"):

1. (1) Where the writ does not contain any claim for damage, loss of life or personal injury arising out of —
 - (i) a collision between ships; or
 - (ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or
 - (iii) non-compliance on the part of one or more of two or more ships, with the collision regulations made under section 251 of the Merchant Shipping Ordinance 1952,

service of a notice of a writ out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say -

(c) if in the action begun by the writ relief is sought against a person domiciled or ordinarily resident or carrying on business within the jurisdiction;

Thus, to summarise, Malaysian courts would have jurisdiction when:

1. The cause of action arose in Malaysia; or
2. The defendant resides or is domiciled in Malaysia; or
3. The defendant has a business or is carrying on a business in Malaysia.

In applying the general rule to the Internet, the main question which would arise would be: has the defendant carried on a business in Malaysia?³⁷ Thus, what are the considerations that must be looked at in determining this fact? It is submitted that the approach taken by the United States of America would be the best way forward, that is, by looking at (i) the interactivity of the websites, and (ii) the nature and quality of the contacts between the user and website before one can determine whether or not the defendant had "carried on his business" in Malaysia.

B. *Information Websites*

An information website refers to a website that offers data and/or information regarding a particular product or service, or is merely providing general information. A prime example would be an online edition of a newspaper. At first glance, it would appear that an

³⁷ The question whether the defendant has a business in Malaysia would be determined by the location of the server which the website is hosted on. Thus, it is more pertinent to determine whether or not the defendant had "carried on" his business in Malaysia.

information website can only be a passive website as it merely provides information and nothing else. However, unlike a commercial website, the considerations in an information website when dealing with "contacts" appear to be different. This is most likely due to the fact that a different type of action is normally brought against an information website, namely, defamation.

1. *United States of America*

In the case of *ALS Scan, Inc v Digital Services Consultant Inc*,³⁸ the US Court of Appeals (4th Circuit) had to determine whether Maryland had jurisdiction over a Georgia based Internet service provider (the defendant, Digital Service Consultant Inc) for allowing a website owner to publish photographs in violation of Maryland copyright laws. In reaching its decision, the court adopted and adapted the sliding-scale test in *Zippo*:³⁹

A State may, consistent with due process, exercise judicial power over a person outside the State when that person (1) directs electronic activity into the State, (2) with the manifest intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifest intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State.

³⁸ 293 F3d 707 (4th Cir 2002). As accessed on 11 November 2005 at <http://pacer.ca4.uscourts.gov/opinion.pdf/011812.P.pdf>

³⁹ *Supra* n 6 at p 10.

Applying the standard to the above case, the court was of the opinion that the activity was passive even though electronic signals from Digital's facility were received in Maryland. It did not select or knowingly transmit the infringing photographs specifically to Maryland with the intention to engage in business (or any sort of activity) there. Its role as an ISP was merely passive.

In the case of *Young v New Haven Advocate*,⁴⁰ an action for defamation was brought against two small Connecticut newspapers, their editors⁴¹ and reporters⁴² who allegedly wrote and published on the Internet, defamatory stories concerning a Virginia prison warden. The US Court of Appeals (4th Circuit) held that the web publication did not establish minimum contacts since the newspapers were not directed at a Virginia audience. The courts found as a fact that the primary focus of the articles complained of was the Connecticut prison transfer policy and its impact on the transferred prisoners and their families. Therefore, it could be seen that Connecticut, and not Virginia, was the focal point of the articles and that the target audience was Connecticut.

Thus, it can be seen that the position in the United States is quite clear: even for information websites, the issue of whether the area seeking jurisdiction had been "targeted" would be focused on. In determining this, the courts have looked at various factors, such as "knowingly transmitting" (as per the *ALS Scan* case), and what the focal point of an article would be (as per *Young's* case).

2. United Kingdom

The situation in the United Kingdom is different, as can be seen in the case of *Lewis v King*.⁴³ In this case, an action for libel⁴⁴ was brought

⁴⁰ 315 F 3d 256 (4th Cir 2002). As accessed on 11 November 2005 at <http://pacer.ca4.uscourts.gov/opinion.pdf/012340.P.pdf>.

⁴¹ That is, the *New Haven Advocate* and the *Hartford Courant*.

⁴² Gail Thompson and Brian Toolan (editors); Camille Jackson (reporter for the *Advocate*) and Amy Pagnozzi (reporter for the *Courant*).

⁴³ [2004] EWCA Civ1329.

against a Californian website for having two texts which could be downloaded in England. In that case, the claimant, Don King, was a well-known American boxing promoter living in Florida while the defendant, Lennox Lewis (British), was a world champion heavyweight boxer who resided principally in New York. There was a court case between the two which subsequently resulted in two publications being made on the Internet.⁴⁵ The courts had to decide which was the better forum; the United States or England.

One of the issues argued was in relation to “targeted state”. It had been contended that if the publications were not targeted in that particular jurisdiction, then there can be no issue of jurisdiction in that area.⁴⁶ This argument was rejected by the courts as it was of the opinion that:⁴⁷

[I]t makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has “targeted”, when in truth he has “targeted” every jurisdiction where his text may be downloaded. Further, if the exercise required the ascertainment of what it was the defendant subjectively intended to “target”, it would in our judgment be liable to manipulation and uncertainty, and much more likely to diminish than enhance the interests of justice.

⁴⁴ The relevant legislations are the Defamation Act 1996 and the Information Society Directive (Directive 2001/29/EC).

⁴⁵ The first article was posted on fightnews.com from 5 July 2003 while the second article was posted three days later on boxingtalk.com. These articles contained serious claims about King, among them accusing him of corruption.

⁴⁶ It was argued that “for the purposes of *forum non conveniens* enquiries involving material published via the Internet, the intention of the defendant should be taken into account”. As accessed from <http://www.hmcourts-service.gov.uk/judgmentsfiles/j2844/lewis-v-king.htm> at para 33 on 18 September 2007.

⁴⁷ *Id* at para 34.

In short, the court was essentially saying that if you posted something on the Internet, you are submitting yourself to the jurisdiction of the entire world. Yet, despite this extremely liberal approach, the court was of the opinion that this would *not* create unfairness nor open a floodgate for litigation on the Internet. It stressed that the parties' connection with the jurisdiction still had to be considered. Yet, if one examines the facts of the *Lewis* case, it is very alarming to note that notwithstanding the fact that the statements were posted on a US website by the agent of a world champion heavyweight boxer living in New York regarding an American boxing promoter living in Florida, the English courts still had jurisdiction. It would appear that the fact that the boxing promoter had a world-wide reputation was sufficient to create a connection.

3. Malaysia

Malaysia, on the other hand, still has a long way to go in establishing whether having a news website tantamounts to "publication" to the entire world. In the case of *Lee Tech Chee & Anor v Merril Lynch International Bank Ltd*,⁴⁸ the court had to consider whether there was publication within its jurisdiction. It dealt with, primarily, alleged libels being published in two newspapers, the *Straits Times* and the *Business Times*, which are published and distributed in Singapore. As there was no evidence of the newspapers being permitted to be distributed in Malaysia, it was held that Malaysia did not have jurisdiction.⁴⁹

The two said newspapers also had corresponding online editions, that is, the "Straits Times Interactive" (or STI) at <http://straitstimes.asia1.com.sg> and *Business Times* at [---

⁴⁸ \[1998\] 4 CLJ 188.](http://business-</p></div><div data-bbox=)

⁴⁹ According to s 6(1) of the Printing Press and Publications Act 1984, the Minister may grant to a proprietor of a newspaper in Singapore a permit allowing such newspaper to be "imported, sold, circulated or distributed in Malaysia". Since there was no evidence to show that such a permit existed for the said two newspapers, there could not have been any publication in Malaysia and thus Malaysia would not have jurisdiction.

times.asial.com.sg. When considering the issue of “publication” over the Internet, the court was of the opinion that there can be no jurisdiction since there was no evidence of anyone in Malaysia accessing or reading “any of the said publications or the alleged defamatory words on the Internet”.⁵⁰

Thus, the judge seems to be suggesting that the only reason for the absence of no jurisdiction in Malaysia is the fact that no one in Malaysia had accessed the website.⁵¹ In other words, because there was no access from Malaysia there was no publication in Malaysia, and therefore, the Malaysian courts could not claim jurisdiction. It follows then, that if there had been a Malaysian who had accessed it, the test of “publication” in Malaysia would have been met and an action can be brought in Malaysia for defamation.

This approach seems to have been supported in the case of *Petroliam Nasional Bhd (Petronas) & Ors v Khoo Nee Kiong*⁵² which dealt with, amongst others, the issue of defamation. The issue discussed in this paper is in relation to the defamatory postings in a newsgroup.⁵³ The court was of the opinion that:⁵⁴

The transmission of a defamatory posting from the storage of a news server is in effect a publication of that posting to any subscriber who accesses that newsgroup containing that posting.

⁵⁰ *Supra* n 8 at p 194.

⁵¹ The issue of publication is a vital matter as s 23(1)(a) Courts of Judicature Act requires that the cause of action to have occurred in Malaysia. Thus, only when the defamatory statement had been published in Malaysia can the courts have jurisdiction.

⁵² [2003] 4 CLJ 303.

⁵³ Two postings were made on soc.culture.malaysia, a Usenet facility which enables people to publish materials to readers worldwide. The postings received to its news server (based at its local service provider) would be disseminated via the newsgroup.

⁵⁴ *Supra* n 52 at p 330.

This case is not as complicated as the earlier case of *Lee Tech Chee*, for it is contained within Malaysia: a Malaysian had made a posting of a defamatory nature in a Malaysian newsgroup about a Malaysian company. Thus, when the posting was made, the writer was aware of his audience (Malaysians) and that his writings could have an impact on the one that he wrote about (*ie* Petronas, a Malaysian based company).

By examining the abovementioned two cases, it can be seen that for Malaysia to have jurisdiction over something posted on the Internet, someone from Malaysia must have accessed the said information or news.

It is submitted that this approach is inadequate and unclear. To base jurisdiction mainly on someone actually accessing the website is open to abuse. For example, prior to the action being brought, a person could be “hired” to access the website just to secure the case. It would be more appropriate to look at the *intention* of the poster and in this regard the United States’ position is more favourable.

It is further submitted that there should be, at the very least, two requirements. It should not be dependent solely on whether a Malaysian is able to access the website (as anyone with an Internet access will be able to), but should also be dependent on whether the website owner wanted a Malaysian to access it.⁵⁵

It is to be pointed out that this situation does not apply to a weblog, which was defined by Datuk Cecil Abraham as:⁵⁶

⁵⁵ In other words, whether he or she had actively done anything to encourage or persuade traffic to his site or alternatively, whether he or she had blocked such traffic from a particular country.

⁵⁶ According to Datuk Cecil Abraham, in the Star newspaper article in the Technology section: “Defamation on the Internet” dated 27 August 2007; accessible on its online edition at <http://star-techcentral.com/tech/story.asp?file=/2007/8/27/technology/20070827114401&sec=technology>, accessed on 17 September 2007.

[A] web-based publication consisting primarily of periodic articles of which tools to automate the maintenance of such sites make them accessible to a much larger population. Therefore, a weblog is a publication for the purpose of the law on defamation.

In essence, if one has a weblog, it is considered a publication in itself. The question which goes to follow is, if it is a foreign weblog, would Malaysia have jurisdiction? In two scenarios, the position in *Lee Tech Chai* is more appropriate.

III. Conclusion

The law seems to be hard pressed to catch up with the rapid growth of the Internet and the advancement of technology. In essence, regardless of the country, the law appears to be sound; but the proper application of the law would greatly depend upon the understanding of the Internet and its uniqueness.

