

**COPYRIGHT LAW, DIGITAL
CONTENT AND THE
INTERNET IN THE ASIA-PACIFIC**

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CIVIL JURISDICTION, INTELLECTUAL PROPERTY AND THE INTERNET

Brian Fitzgerald and Samsung Xiaoxiang Shi

INTRODUCTION

At the core of the civil litigation system is the notion of jurisdiction. In a narrow sense it refers to whether a court has the authority to hear a case in relation to specific people and activities (subject matter) but in a broader sense it also encompasses what law should be applied (choice of law), whether the court is a suitable court to hear the case (choice of court) and the enforcement of judgements.

The notion of jurisdiction provides a tool for efficiently managing litigation and traditionally has been based upon notions of connection to a particular territory. In the global transnational world of the Internet the concept of jurisdiction has struggled to find a sensible meaning.¹ Does jurisdiction lie everywhere that the Internet runs or is it more narrowly defined?

In this chapter we examine recent cases concerning jurisdiction and the Internet before the courts of the People's Republic of China (PRC) in matters relating to intellectual property. We also consider decisions in Australia and the United States of America (US) and international developments in the area.

¹ For further, see Brian Fitzgerald, Anne Fitzgerald, Gaye Middleton, Yee Fen Lim and Timothy Beale, *Internet and E Commerce Law* (2007) 33-126.

THE FUNDAMENTALS OF JURISDICTION

What is jurisdiction?

At its broadest level the notion of jurisdiction concerns the power of a sovereign state to make, administer and enforce laws. In a narrower sense it refers to the authority of courts in relation to particular people, activities or events, encompassing:

- personal and subject matter jurisdiction
- choice of law
- choice of forum
- enforcements of foreign judgments.²

Under international law jurisdiction can be based on five heads:

- territorial connection
- nationality of the parties
- security or protection
- nationality of the victim (passive personality principle)
- the universal nature of the activity (eg war crimes).³

Personal and Subject Matter Jurisdiction

The general rule in the PRC is that in a civil suit against a Chinese citizen, personal jurisdiction will be established if the action is taken in a place where the defendant is domiciled.⁴ The domicile of a natural person is where their *hukou* (registered permanent residence) is, and in the case of legal person (eg a corporation) it is where they are registered.⁵ If it happens that the place of domicile is not the same as the place of

² Brian Fitzgerald et al, *Internet and E Commerce Law* (2007) 33-34.

³ Brian Fitzgerald et al, *Internet and E Commerce Law* (2007) 33-34.

⁴ See the *Civil Procedure Law of PRC* art. 22. The *Civil Procedure Law of PRC* was adopted on 9 April 1991 at the Fourth Session of the Seventh National People's Congress, and revised by the 30th Session of the Standing Committee of the 10th National People's Congress on 28 October 2007. See

<<http://www.lawinfochina.com/law/display.asp?db=1&id=6459&keyword=civil%20procedure%20law>> at 22 November 2007.

⁵ See article 3 of the *Opinions on the Application of the Civil Procedure Law of PRC*, issued by the Supreme People's Court of PRC on 14 July 1992.

habitual residence (natural person) or primary place of business (legal person), the later shall prevail.⁶

Moreover, a case founded on tort(s) including infringement on intellectual property rights is subject to a 'special territorial jurisdiction rule'.⁷ A lawsuit brought for a tortious act is under the jurisdiction of a court at the place where the tort has occurred (place of tortious acts) or where the defendant is domiciled. Furthermore, it must be pointed out that the place of occurrence includes where the tort is committed and where the results of the infringement occur.⁸

The subject matter jurisdiction of courts is normally set out by the statute or other instrument under which the particular court is constituted. Articles 18-21 *Civil Procedure Law 1991* (amended 2007) outline the subject matter jurisdiction of courts in the PRC. This is further elaborated by interpretations or decrees of the Supreme People's Court of the PRC.⁹ Additionally, cases involving foreign elements (*shewai* cases) are also governed by a set of specific rules.¹⁰

Choice of Law

In litigation in which the activities at issue extend beyond the boundaries of any one state and where potentially conflicting laws could be applied the court will need to determine which law to apply. The rules used by courts to determine which law to apply in such proceedings are known as the choice of law rules.

⁶ See the *Civil Procedure Law of PRC* art 22.

⁷ See the *Civil Procedure Law of PRC* art 29.

⁸ See the *Opinions on the Application of the Civil Procedure Law of PRC* art 28.

⁹ For example, article 2 of the *Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network* provides that only intermediary courts or higher level courts have jurisdiction over domain name cases; moreover, article 2 of the "*Interpretation of the Supreme People's Court on the Relevant Issues concerning the Scope of Jurisdiction and the Scope of Application of Laws for Hearing Trademark Cases*", adopted at the 1203rd meeting of the Judicial Committee of the Supreme People's Court on December 25, 2001, states that trademark cases should be subject to the jurisdiction of intermediary courts or local district courts nominated by local high people's court; and so on.

¹⁰ See further, the *Civil Procedural Law of PRC* (adopted 1991 and revised 2007) part 4 and relevant provisions in the *Opinions on the Application of the Civil Procedure Law of PRC*.

In context of cases involving foreign elements (*shewai* cases), foreign law may be applicable under certain conditions in China.¹¹ Accordingly, while dealing with claims for damages of torts, the law of the place where an infringing act is committed shall apply.¹²

In instances where it is possible (e.g. in a contractual scenario as opposed to a tort situation where no pre-existing relationship exists), the parties may have clarified this issue through an agreement in advance known as a choice of law agreement/clause. These clauses are often given effect by the courts but can be held to be invalid if they contravene the fundamental policy or interests of the forum.¹³

Choice of Forum

Even if a court determines that it has personal and subject matter jurisdiction in proceedings; and can easily determine which laws should apply, the court may still decline to exercise jurisdiction, or the defendant may obtain a stay of the proceedings, on the basis that it is not appropriate for the court to exercise jurisdiction.

In instances where it is possible parties may try and resolve this issue through agreement in advance through a choice of forum or choice of court clause.¹⁴ In the *shewai* cases relating to contract or property disputes, the parties may, in the form of written agreement, choose the

¹¹ The general rules regarding choice of law are provided in the *General Principles of the Civil Law of PRC* (1986) chapter 8 (art. 142-150). It was adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Order No 37 of the President of the People's Republic of China on April 12, 1986, and effective as of January 1, 1987.

Moreover, in June 2007, the Supreme People's Court of PRC issued *The Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters*.

¹² See the *General Principles of the Civil Law of PRC* (1986) art 146. It states: "The law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied. An act committed outside the People's Republic of China shall not be treated as an infringing act if under the law of the People's Republic of China it is not considered an infringing act."

¹³ Brian Fitzgerald et al, *Internet and E Commerce Law* (2007) 63-64; 68-69. See further Dan Jerker B Svantesson, 'Private International Law and the Internet' (2007) 198ff.

¹⁴ Brian Fitzgerald et al, *Internet and E Commerce Law* (2007) 91-95

court located in the place that has “actual connections” with their disputes, subject to any special requirements.¹⁵

A new Hague Convention on Choice of Courts adopted in 2005 seeks to support the enforcement of judgments given pursuant to a choice of courts clause that nominates courts of members to the Convention.¹⁶ On 26 September 2007, Mexico, as the first country, deposited its instrument of accession to the Convention. One more ratification or accession will suffice to bring the Convention, which is open to all States, into force.¹⁷

Enforcement of Judgments

Articles 265 and 266 of the *Civil Procedure Law of PRC* (amended 2007) and articles 318 and 319 of the *Opinions of the Supreme People’s Court on the Application of the Civil Procedure Law of PRC* deal with the recognition and enforcement of judgments in the PRC. An involved party may apply to a Chinese intermediary court for the enforcement of a judgment made by a foreign court provided the Chinese court has jurisdiction. Moreover, under international treaties to which the PRC is a signatory party or the principle of reciprocity, a Chinese court may enforce foreign judgments upon the request of a foreign court.¹⁸

JURISDICTION AND THE INTERNET IN INTELLECTUAL PROPERTY CASES IN THE PRC

In the context of the Internet and IP cases the general rules which have emerged (especially in the copyright area) based on existing laws and cases are that jurisdiction will be found at the place where:

¹⁵ See the *Civil Procedural Law of PRC* art. 242. See further Dan Jerker B Svantesson, ‘Private International Law and the Internet’ (Kluwer Law International, 2007) 188 ff.

¹⁶ See Convention on Choice of Court Agreements (Concluded 30 June 2005) <http://www.hcch.net/index_en.php?act=conventions.text&cid=98&zoek=choice%20of%20court%20agreement> at 18 December 2007.

¹⁷ See ‘Mexico first State to join Choice of Court Convention of 2005’, <http://www.hcch.net/index_en.php?act=events.details&year=2007&varevent=137>, at 7 January 2008.

¹⁸ See the *Civil Procedure Law of PRC* art 265.

- the defendant is domiciled;
- the equipment (such as the server or computer terminal) by which the tortious acts is committed, is located; or
- in domestic cases, if the previous two are unidentifiable or difficult to determine (although this is not a prerequisite in *shewai* cases), the equipment (such as computer terminal) by which the plaintiff finds the infringement, is located.

Copyright

Ruide (Group) Inc v Yibin Cuiping District Oriental Information Service Inc is one of the first cases involving jurisdiction and the Internet to be heard before the courts of the PRC.¹⁹ The plaintiff found out that the defendant's website was in large part a copy of the plaintiff's. Thus, in 1999 the plaintiff instituted proceedings against the defendant in the Beijing Haidian District People's Court for infringement of copyright and trade secret laws. The defendant challenged the Court's jurisdiction on the ground that Beijing Haidian District is neither the place of domicile of the defendant nor the place of occurrence of the infringement. The challenge was dismissed by the Court²⁰ and this rejection was confirmed by the appellant court, the Beijing No. 1 People's Court.²¹ Both the trial and appellate courts found that the plaintiff's webpages were stored in and published through a server which was located at the plaintiff's residence in the Haidian District, Beijing. To access (including viewing and making a copy of) the webpages, the defendant had to utilise the server. Therefore, it was held that where the injured party's server was located was the place of commission of the infringement.²²

¹⁹ See the Civil Ruling (1999) *Hai Zhi Chu No 21* made by the Beijing Haidian District People's Court and the Civil Ruling (1999) *Yi Zhong Zhi Chu No 64* made by the Beijing No. 1 Intermediary People's Court.

²⁰ See Beijing Haidian People's Court the Civil Ruling (1999) *Hai Zhi Chu No 21*.

²¹ See the Beijing No. 1 People's Court the Civil Ruling (1999) *Yi Zhong Zhi Chu No 64*.

²² *Ibid*.

These rulings have been subject to criticism.²³ On 19 December 2000, the Supreme People's Court of PRC issued the *Judicial Interpretation on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes relating to Computer Networks Copyright (Copyright Networks Interpretation)* which was amended in 2003 and 2006.²⁴ The '*Networks Copyright Interpretation*' seeks to clarify 'the place of occurrence of the torts' in the context of online copyright infringement. It states:

- A case involving copyright disputes over a computer network shall be subject to the jurisdiction of the people's court of the place of tortious act or that at the domicile of the defendant.²⁵

Moreover, it gives further explanation on 'the place of tortious act', stating:

- The place of tortious act includes the place where such equipments by which the sued tortious act is committed as internet server, computer terminal, are located. Where it is difficult to determine the place of the tortious act or the domicile of the defendant, the place where the equipments, in which the tortious content is discovered by the plaintiff, such as a computer terminal, is located may be deemed as the place of tortious act.²⁶ (emphasis added)

²³ Some scholars argue that if the sever is the place where the infringement is committed, any access to the plaintiff's webpages would be regarded as infringement. Some other scholars believe that the server of the defendant instead of that of the plaintiff is the place of commission of the infringement because the defendant's act of uploading the infringing webpages to his sever should be regarded as committing the tort.

²⁴ Adopted at the 1144th meeting of the Sentencing Committee of the Supreme People's Court on November 22nd, 2000; amended according to the Decision of the Supreme People's Court on Amending the Interpretations on Several Issues concerning the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Network passed at the 1302nd Session of the Sentencing Committee of the Supreme People's Court for the first time on December 23, 2003; amended according to the Decision of the Supreme People's Court on Amending the Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Network (II) for the second time on November 20th, 2006.

²⁵ See the *Interpretation on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes relating to Computer Networks Copyright* art 1.

²⁶ *Ibid.*

Since the release of the ‘*Copyright Networks Interpretation*’, cases involving online copyright disputes have followed the jurisdictional rules enunciated in them. For example, in the recent case, *Li Xuebin v Beijing Sohu (.com) information service Inc.*,²⁷ the defendant challenged the jurisdiction exercised by the Shanghai No. 2 Intermediary People’s Court on the ground that ‘disputes involving internet copyright infringement should be subject to relevant judicial interpretation; and accordingly, only courts located in the place where the torts happened, or where the defendant resides can exercise jurisdiction. In this case, the residence of the defendant is at Beijing, and the involved Internet server is also located in Beijing. Therefore, this court does not have jurisdiction.’²⁸ The plaintiff argued that the company behind the website at the heart of the dispute (sohu.com) also operated an internet server located in Shanghai which could be proved by the evidences provided by the plaintiff.²⁹

The court affirmed the relevant provision in the ‘*Copyright Networks Interpretation*’, finding that the Internet servers carrying the defendant’s website (sohu.com) are located in both Beijing and Shanghai. Therefore, the court held that this dispute was subject to its jurisdiction and the defendant’s jurisdiction demurral was rejected.³⁰

Domain Names

On 17 July 2001, the Supreme People’s Court issued another judicial interpretation in relation to domain name disputes (hereinafter referred to as ‘*Domain Name Interpretation*’).³¹ It states:

- In light of the tort disputes over domain names, the intermediate courts in the places of tort or the residences of the

²⁷ See the Civil Ruling (2006) *Hu Er Zhong Min 5 (Zhi) Chu* No 226 issued by the Shanghai No.2 Intermediary People’s Court on 25 August 2006.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ The *Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network* was adopted at the 1182nd meeting of the Judicial Committee of the Supreme People's Court on June 26, 2001, and came into force on July 24, 2001.

accused have the jurisdiction. In case the places of tort or the residences of the accused are difficult to affirm, the places, where a terminal or other installations of the computers through which a prosecutor finds the domain names, may be the places of tort.³²

It should be noted that there is a significant difference between ‘*Copyright Networks Interpretation*’ and the ‘*Domain Name Interpretation*’.³³ In contrast to the ‘*Copyright Networks Interpretation*’ the ‘*Domain Name Interpretation*’ does not expressly state that jurisdiction can be found on the basis of the location of the equipment (such as the server or computer terminal) by which the tortious acts is committed. It is arguable that the law would now imply such a basis for jurisdiction but this is still unclear.

Trademarks

Infringement on the exclusive rights of a registered trademark which is defined in *Trademark Law of PRC*³⁴ should be subject to the jurisdiction

³² See art 2 of the *Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network*

³³ Moreover, it provides intermediary courts are the lowest court to deal with cases involving domain name disputes. See *Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network* art 2.

³⁴ See the *Trademark Law of PRC* (Amended 2001) art 13 and 52. Art 13 states: “If a trademark, for which an application for registration is filed, of the same or similar commodity is the copy, imitation or translation of a well-known trademark of others which hasn’t been registered in China, and misleads the public and leads to possible damage to the interests of the registrant of that well-known trademark, it shall not be registered and shall be prohibited from use. If a trademark, for which an application for registration is filed, of a different or dissimilar commodity is the copy, imitation or translation of a well-known trademark of others which has been registered in China, and misleads the public and leads to possible damage to the interests of the registrant of that well-known trademark, it shall not be registered and shall be prohibited from use.” Art. 52 states: “Any of the following acts shall be an infringement upon the right to exclusive use of a registered trademark: 1) using a trademark which is identical with or similar to the registered trademark on the same kind of commodities or similar commodities without a license from the registrant of that trademark; 2) selling the commodities that infringe upon the right to exclusive use of a registered trademark; 3) forging, manufacturing without authorization the marks of a registered trademark of others, or selling the marks of a registered trademark forged or manufactured without authorization; 4) changing a registered trademark and putting the commodities with the changed trademark into the

of the court which is located at the place where the tortious act is committed, where the infringing product is stored or seized, or where the defendant is domiciled.³⁵ In a recent case (in 2007) involving online infringement of trademarks,³⁶ a court, Xi'an (Shanxi Province) Intermediary People's Court, by way of analogy, applied the '*Copyright Networks Interpretation*'.³⁷ The defendant was accused of infringing on the plaintiff's trademarks³⁸ on online game software. It was found that the defendants owned an 'Internet server' within the Xi'an city where the court was located. Under the '*Copyright Networks Interpretation*', 'the place of tortious act includes the place where such equipments by which the sued tortious act is committed as internet server or computer terminal are located'.³⁹ Accordingly, it was held that, in this case, the place where the defendant's server was located was regarded as the place of the commission of the trademark infringement. Moreover, the domicile of one of the defendants, the Shenzhen Tencent Computer System Co., Ltd. (Xi'an Branch), was also found within the Xi'an city. Therefore, the court denied the jurisdictional challenge raised by the defendants.⁴⁰

The defendants strongly disagreed with the Xi'an court and appealed to the Shanxi High People's Court. It was argued that the first trial court incorrectly applied the '*Copyright Networks Interpretation*' which could only be applied to online copyright infringement cases. The High Court also dismissed the defendants' (appellants') jurisdiction challenge, but on

market without the consent of the registrant of that trademark; and 5) causing other damage to the right to exclusive use of a registered trademark of another person."

³⁵ See the *Interpretation Concerning the Application of Laws in the Trial of Cases of Civil Disputes Arising from Trademarks* art. 6. This Interpretation was adopted at the 1246th Session of the Judicial Committee of the Supreme People's Court on October 12, 2002, and was promulgated for implementation as of October 16, 2002.

³⁶ *Shenzhen Yuan Hang Technology Co Ltd v Shenzhen Tencent Computer System Co Ltd, Tencent Technology Co Ltd. (Shenzhen), and Shenzhen Tencent Computer System Co Ltd, (Xi'an Branch)*

³⁷ See the first trial Civil Ruling (2007) Xi Min Si Chu No 23 issued by the Xi'an Intermediary People's Court on 5 March 2007.

³⁸ The defendant's trademarks, 'Wa Keng (挖坑)' and 'Bao Huang (保皇)' have been registered to be used on computer software.

³⁹ See the *Interpretation on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes relating to Computer Networks Copyright* art 1.

⁴⁰ See the first trial Civil Ruling (2007) Xi Min Si Chu No. 23 issued by the Xi'an Intermediary People's Court on 5 March 2007.

different ground.⁴¹ It held, ‘indeed, it is inappropriate that the first trial court applied the “*Copyright Networks Interpretation*” to decide on the jurisdiction issue in this case’.⁴² However, the domicile of one of the defendants is within the Xi’an city, Shanxi Province which gives rise to the jurisdiction of the Xi’an (Shanxi Province) People’s Court.’ Accordingly, the defendants’ jurisdictional challenge was rejected.

Shewai Cases (Cases Involving Foreign Elements)

Under the Chinese civil procedure law, a set of provisions, including jurisdictional rules, are applicable to civil proceedings involving foreign elements (*shewai* cases) within the territory of the PRC.⁴³ *Shewai* cases refer to cases where : (1) one or more parties are a foreign natural or legal person or organization; or (2) the legal relationship between the parties establishes, changes, suspends or occurs outside the territory of China; or (3) the location of the object of litigation is outside the territory of China.⁴⁴

In relation to jurisdictional issues in *shewai* cases, most jurisdictional rules concerning domestic cases are currently applicable except as otherwise provided in the chapter 24 (art 241-244) of the *Civil Procedural Law 1991* (amended 2007). Civil actions against a defendant who does not reside within the territory of China are subject to the rules specified in art. 241 of the *Civil Procedural Law 1991*. If the defendant has a representative organization or detainable property within the territory of China, the case could be under the jurisdiction of a Chinese court of the place where the detainable property is located, where the representative organization is located, or where the tort occurs.⁴⁵

⁴¹ See the final Civil Ruling (2007) *Shan Min San Zhong No. 25* made by the Shanxi High People’s Court on 29 April 2007.

⁴² *Ibid.*

⁴³ See the *Civil Procedure Law of PRC* (Amended 2007) art 235-267.

⁴⁴ See the *Opinions on the Application of the Civil Procedure Law of PRC* art 304.

⁴⁵ See the *Civil Procedure Law of PRC* (Amended 2007) art 241. It states: “A lawsuit brought against a defendant who has no domicile in the People’s Republic of China concerning a contract dispute or other disputes over property rights and interests, if the contract is signed or performed within the territory of the People’s Republic of China, or the object of the action is within the territory of the People’s Republic of China, or the defendant has detainable property within the territory of the People’s Republic of China, or the

The operation of these provisions was at issue recently when Yahoo! Inc was sued by a Chinese citizen, Wang Lu, for copyright infringement. In *Wang Lu v Yahoo! Inc*, through a computer terminal located in Haidian District, Beijing, the plaintiff discovered his copyright work was published on the defendant's website without authorisation. Therefore, in 2005 the plaintiff sued the defendant in the Beijing No. 1 Intermediary People's Court. The defendant challenged the jurisdiction of the court which was denied by the court.⁴⁶ Then, the defendant appealed to the Beijing High People's Court on the ground:⁴⁷

- Firstly, it is incorrect that the first trial court applies article 243 of the *Civil Procedure law of PRC*⁴⁸ because the plaintiff failed to prove that this case met the requirement provided by the applied law. Consequently, article 29 should be applied so that this case should be under the jurisdiction of the court at the place of the tortious act or of the defendant's domicile.
- Secondly, according to the article 1 of the '*Copyright Networks Interpretation*', the court does not have jurisdiction because the defendant is a company registered in US and the internet server and computer terminal relating to the accused infringement are also located within the territory of US.

defendant has its representative agency, branch, or business agent within the territory of the People's Republic of China, may be under the jurisdiction of the people's court located in the place where the contract is signed or performed, the subject of the action is located, the defendant's detainable property is located, the infringing act takes place, or the representative agency, branch or business agent is located.⁴⁷

⁴⁶ See Beijing No 1 Intermediary People's Court Civil Ruling (2005) *Yi Zhong Min Chu No. 5761*.

⁴⁷ *Ibid*.

⁴⁸ This article has been changed to Article 241 when the Civil Procedure Law was amended in 2007. See the *Civil Procedure Law of PRC (Amended 2007)* art 241.

The appellate court confirmed the first trial court's decision and dismissed the jurisdictional challenge raised by the defendant.⁴⁹ The court held, 'It is a *shewai* online copyright infringement case which is subject to special provisions on *shewai* jurisdiction'.⁵⁰ Therefore, article 243 of the Civil Procedure Law of PRC should be applicable.⁵¹ It could be concluded from this judgment that the '*Copyright Networks Interpretation*' is not applicable in *shewai* cases because the court did not support the appellant's argument that was based on the '*Copyright Networks Interpretation*' (as mentioned above).⁵²

Furthermore, the appellate court held that the appellee (plaintiff), through their computer terminal which is located in Haidian District of Beijing, accessed the defendant's website and copyright infringement was found. Therefore, Haidian District is the place of tortious act, and is within the jurisdiction of the first trial court.

In a previous *shewai* case, *Beijing Billich Culture Development Co., Ltd v. Charles Billich*, both the first trial court, Beijing No. 2 Intermediary People's Court,⁵³ and the appellate court, Beijing High People's Court,⁵⁴

⁴⁹ See Beijing High People's Court Final Civil Ruling (2006) *Gao Min Zhong No 1365* issued on 1 December 2006.

⁵⁰ *Ibid.*

⁵¹ This article has been changed to Article 241 while the Civil Procedure Law was amended in 2007. See the *Civil Procedure Law of PRC* (Amended 2007) art. 241. It states: A lawsuit brought against a defendant who has no domicile in the People's Republic of China concerning a contract dispute or other disputes over property rights and interests, if the contract is signed or performed within the territory of the People's Republic of China, or the object of the action is within the territory of the People's Republic of China, or the defendant has detainable property within the territory of the People's Republic of China, or the defendant has its representative agency, branch, or business agent within the territory of the People's Republic of China, may be under the jurisdiction of the people's court located in the place where the contract is signed or performed, the subject of the action is located, the defendant's detainable property is located, the infringing act takes place, or the representative agency, branch or business agent is located.

⁵² When Jiang Zhipei, Chief Justice of the Supreme People's Court of PRC, was answering a question about jurisdiction and *shewai* cases, he excluded the application of 'Copyright Networks Judicial Interpretation' to *shewai* cases, and he said, 'Jurisdictional provisions of the Civil Procedural Law should be applied to online copyright *shewai* cases.' <<http://www.chinaiprlaw.com/wtjd/wtjd63.htm>>, at 19 January 2008.

⁵³ See Beijing No 2 Intermediary People's Court, Civil Ruling (2003) *Er Zhong Min Chu Zi No 03814*.

⁵⁴ See Beijing High People's Court, Civil ruling, (2004) *Gao Min Zhong Zi No. 36*.

held that the location (Chaoyang District, Beijing, PRC) of the computer by which the plaintiff accessed a website and found the infringement gave rise to the jurisdiction of the Chinese Court.⁵⁵

Generally in domestic cases it appears that the location of the equipment (such as computer terminal) by which the plaintiff finds the infringement will only be a basis of jurisdiction in cases where it is difficult to determine the domicile of the defendant or the place where the equipment (such as the server or computer terminal) by which the tortious acts is committed, is located. However in *shenai* cases it appears that the location of the equipment (such as a computer terminal) by which the plaintiff finds the infringement will be a primary basis of jurisdiction in order to allow the Chinese courts to hear the matter. It could be argued that such an approach is too broad because jurisdiction will be found at any point one can access the Internet.⁵⁶

JURISDICTION AND THE INTERNET: US AND AUSTRALIAN APPROACHES

The United States

There have been many cases relating to jurisdiction and the Internet in the United States (US) as each state of the US is regarded as a separate

⁵⁵ When commenting on this case, Chen Jinchuan, Judge, Beijing High People's Court, said that the 'Copyright Network Jurisdiction' should be only applicable to domestic cases instead of *shenai* cases and in *shenai* cases, Chinese courts should exercise jurisdiction once the case, to some extent, has connections to China. And, the place of a computer by which the plaintiff accesses infringing materials and finds the infringement is the place of occurrence of the consequences of the infringement. Therefore, the Chinese court located at the place where the computer terminal by which the plaintiff finds the infringement has jurisdiction. See Chen Jinchuan, 'Abstract of and Comments on Copyright cases of Beijing High People's Court 2004', (2005) 01 *Journal of Chinese Copyright*, <<http://www.chinaiprlaw.cn/file/200612219710.html>> at 19 January 2008.

⁵⁶ As explained below, decisions in the USA (such as the *Pebble Beach* case) have held that access alone is not sufficient to found jurisdiction although in Australia in the *Gutnick* decision (discussed below), arguably, it has been held to be sufficient.

law district. In the US courts have found specific (as opposed to general)⁵⁷ jurisdiction where:

- There is meaningful contact by the defendant with the jurisdiction
- The defendant purposefully availed themselves of the advantage of doing business in the jurisdiction
- The cause of action arose from defendant's activities within the jurisdiction
- The exercise of jurisdiction is fair and reasonable

The key tests adopted in relation to the Internet are the:

- Sliding Scale Test enunciated in *Zippo Manufacturing Co v Zippo Dot Com Inc.*⁵⁸ and
- The *Calder v Jones*⁵⁹ - Effects plus Targeting Test

In *Zippo Manufacturing Co v Zippo Dot Com Inc.*,⁶⁰ the court held that a finding of jurisdiction was contingent upon the nature of the website and sought to employ a sliding scale test. A fully interactive website would found jurisdiction while a passive website used for mere advertising (without more) would not. In principle, to found jurisdiction under the sliding scale test, the website has to reach out and touch the territory in question.

⁵⁷ On this distinction see *MGM Studios, Inc v Grokster, Ltd et al*, 243 F Supp 2d 1073, 1090 (CDCA, 2003).

⁵⁸ 952 F Supp 1119, 1124 (WD Pa 1997).

⁵⁹ *Calder v Jones*, 465 US 783 (1984).

⁶⁰ The plaintiff Zippo Manufacturing Co. was a Pennsylvania corporation which made the well-known "Zippo" tobacco lighters, and was the holder of a trademark on the name ZIPPO. The defendant Zippo Dot Com, Inc. was a California corporation which operated a web site and Internet news service, and the holder of the rights to the domain names ZIPPO.COM, ZIPPO.NET, and ZIPPONEWS.COM. The plaintiff alleged that by using the trademarked name Zippo on its websites and services the defendant had infringed its intellectual property rights. The defendant argued that the Pennsylvania court did not have jurisdiction over the matter. The Court rejected this argument and upheld jurisdiction on the basis that that Zippo Dot Com Inc had undertaken extensive electronic commerce within the jurisdiction: 1125-1127. Defendant moves to dismiss for lack of proper jurisdiction. For further information, see the case abstract <<http://cyber.law.harvard.edu/property00/jurisdiction/zipposum.html>> at 21 January 2008.

United States courts have also utilised the *Calder* ‘effects test’ to found jurisdiction. In essence, this test provides that where an act is done intentionally, has an effect within the forum state and is directed or targeted at the forum state, then jurisdiction will be satisfied.⁶¹ This approach was evidenced in *MGM Studios, Inc v Grokster, Ltd*,⁶² where a Californian court assumed jurisdiction in a case relating to copyright infringement. One of the defendants in that case distributed, through a website, a software product known as Kazaa Media Desktop which was used to share digital entertainment such as music and film. The Court held that jurisdiction was established on the basis that the software had an impact or effect in California as it was the movie capital of the world and that the software had been targeted at California.⁶³

A more recent US case concerning jurisdiction is that of *Bragg v Linden Research Inc*.⁶⁴ The Californian based defendants in this case, Linden Research Inc. (‘Linden’) and its Chief Executive Officer, Philip Rosedale, operated the well known virtual world known as ‘Second Life’.⁶⁵ As the Court explained “in 2003, Linden announced that it would recognize participants’ full intellectual property protection for the digital content they created or otherwise owned in Second Life.”⁶⁶ Further, the defendants, in press releases, interviews, and through the Second Life website, encouraged users to buy, own, and sell virtual goods in Second Life. Plaintiff Marc Bragg was a Second Life user who traded in virtual property. In April 2006, the defendants froze the plaintiff’s account (for

⁶¹ In *Calder v Jones*, 465 US 783 (1984) California based entertainer Shirley Jones brought a libel action in California against the Florida based publication *The National Enquirer*. The US Supreme Court rejected a challenge to the jurisdiction of the Californian court to hear the matter saying “California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California.” 1486-1487. For details, see <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/465/783.html>>.

⁶² *MGM Studios Inc v Grokster, Ltd. et al*, 243 F Supp 2d 1073, 1090 (CDCA, 2003).

⁶³ *Ibid*.

⁶⁴ *Bragg v. Linden Research Inc*, 487 F Supp 2d 593 (ED Pa 2007)

⁶⁵ ‘It is hosted at <http://secondlife.com>. In Second Life, participants create avatars to represent themselves, and it is populated by hundreds of thousands of avatars, whose interactions with one another are limited only by the human imagination’. See further, *Bragg v. Linden Research Inc*, 487 F Supp 2d 593 (ED Pa 2007).

⁶⁶ *Bragg v Linden Research Inc*, 487 F Supp 2d 593 (ED Pa 2007).

allegedly engaging in improper trading), confiscating all of the virtual property and currency that he maintained on his account with Second Life. Bragg commenced action in his home state of Pennsylvania and the defendants challenged jurisdiction. The US District Court E.D. Pennsylvania held that Rosedale's representations - which were made as part of a national campaign to induce persons, including Bragg, to visit Second Life and purchase virtual property constituted sufficient contacts to exercise specific personal jurisdiction over the defendants.⁶⁷

In *Pebble Beach Co. v Michael Caddy*,⁶⁸ the plaintiff a well-known golf course and resort located in California, USA sued for trademark infringement. The plaintiff had used 'Pebble Beach' as its trade name for 50 years (arguing on this basis that it had acquired secondary meaning in the US and UK) and operated a website located at www.pebblebeach.com. The defendant, was a dual citizen of the US and the UK, who occupied and ran a restaurant and bar located in southern England, UK named 'Pebble Beach' which he advertised at his website www.pebblebeach-uk.com. The website was not interactive and simply included general information about accommodation including lodging rates in pounds sterling, a menu, and a wine list. The District Court's decision that it lacked personal jurisdiction over this case was affirmed by the Court of Appeals for the Ninth Circuit. Both courts held that the defendant's actions were not expressly aimed or targeted at California or the US. Moreover, a passive website and domain name alone did not satisfy the *Calder* effects test.

⁶⁷ Ibid.

⁶⁸ *Pebble Beach Co. v. Caddy*, 453 F 3d 1151, 1154 (9th Cir 2006).

Australia⁶⁹

*Dow Jones & Company Inc v Gutnick*⁷⁰

The landmark case in Australia is *Dow Jones & Company Inc. v Gutnick*.⁷¹ Dow Jones operated WSJ.com an Internet fee based subscription news-site. Those who had not paid a subscription could also have access if they registered, giving their user name and a password. The content at WSJ.com includes *Barron's Online* in which the text and pictures published in the current printed edition of *Barron's* magazines are reproduced. *Barron's Online* for 28 October 2000 and the hard copy edition of the magazine which bore the date 30 October 2000 contained an article entitled "Unholy Gains" in which several references were made to Gutnick. At the time 305, 563 hard copies were sold, 14 in Victoria, Australia and there were 550,000 online subscribers, 300 in Victoria Australia. Gutnick argued that part of the article defamed him and brought an action in the Supreme Court of Victoria against Dow Jones claiming damages for defamation. Gutnick lived in Victoria and was a well-known businessman there, although he also conducted business overseas

Rule 7.01(1) of the Supreme Court (General Civil Procedure) Rules 1996 (Vic) provided that:

"(1) Originating process may be served out of Australia without order of the Court where -

...

(i) the proceeding is founded on a tort committed within Victoria;

⁶⁹ See generally Brian Fitzgerald, et al, *Internet and E Commerce Law* (2007) 33-126.

⁷⁰ See generally Brian Fitzgerald 'Dow Jones & Co Inc v Gutnick: Negotiating "American Legal Hegemony" in the Transnational World of Cyberspace.' (2003) 21 *Melbourne University Law Review*, <<http://www.austlii.edu.au/au/journals/MULR/2003/21.html>> at 21 January 2008.

⁷¹ *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575; 194 ALR 433; 77 ALJR 255 (10 December 2002), <<http://www.austlii.edu.au/au/cases/cth/HCA/2002/56.html>> at 21 January 2008.

(j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring”.

The key issues turned on whether the Victorian Supreme Court had personal jurisdiction, and if so what law should apply and whether it was a suitable court to hear the matter. As the material had been written in New York, uploaded to a server in New Jersey USA and downloaded in Victoria Australia the defendants argued that jurisdiction should only be granted in the jurisdiction of uploading not downloading. The High Court of Australia rejected this argument by explaining that:

In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.⁷²

As publication had occurred in Victoria, Rule 7.01 (1) (j) was held to be applicable to found jurisdiction:

The place of the commission of the tort was Victoria as alleged that is where the damage to reputation was alleged to have occurred. It is his reputation in *that State*, and only that State, which he seeks to vindicate. It follows, of course, that substantive issues arising in the

⁷² *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, [44]; (2002) 210 CLR 575, 606-607..

action would fall to be determined according to the law of Victoria. But it also follows that Mr Gutnick's claim was thereafter a claim for damages for a tort committed in Victoria, not a claim for damages for a tort committed outside the jurisdiction. There is no reason to conclude that the primary judge erred in the exercise of his discretion to refuse to stay the proceeding.⁷³

On the difficulty of solving jurisdictional issues in the Internet world Justice Kirby explained:

The urgency of a new rule. To wait for legislatures or multilateral international agreement to provide solutions to the legal problems presented by the Internet would abandon those problems to "agonizingly slow" processes of lawmaking. Accordingly, courts throughout the world are urged to address the immediate need to piece together gradually a coherent transnational law appropriate to the "digital millennium". The alternative, in practice, could be an institutional failure to provide effective laws in harmony, as the Internet itself is, with contemporary civil society - national and international. The new laws would need to respect the entitlement of each legal regime not to enforce foreign legal rules contrary to binding local law or important elements of local public policy. But within such constraints, the common law would adapt itself to the central features of the Internet, namely its global, ubiquitous and reactive characteristics. In the face of such characteristics, simply to apply old rules, created on the assumptions of geographical boundaries, would encourage an inappropriate and usually ineffective grab for extra-territorial jurisdiction.⁷⁴

However, such results are still less than wholly satisfactory. They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself. In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to

⁷³ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, [48]; (2002) 210 CLR 575,608.

⁷⁴ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, [119]; 627-628.

settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair.⁷⁵

The decision in *Gutnick* has been criticised for allowing the view that jurisdiction will be found wherever the Internet can be accessed.⁷⁶ In this regard it is in direct contrast to the US decision of *Young v New Haven Advocate*⁷⁷ which was decided about one week later. The facts in *Young*⁷⁸ were very similar yet the US federal Court of Appeals for the Fourth Circuit in dealing with this “intra-US” dispute resorted to the notion of targeting and effects to deny jurisdiction. The problem with adopting a wide view of jurisdiction is that it may be difficult to enforce the judgment against the assets of the defendant in their home jurisdiction. Judgments given outside the US that conflict with fundamental US law such as the First Amendment right to free speech may be difficult to enforce.⁷⁹

⁷⁵ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, [166]; (2002) 210 CLR 575, 643.

⁷⁶ The Court countered this criticism to some extent by saying: “... In considering what further development of the common law defences to defamation may be thought desirable, due weight must be given to the fact that a claim for damage to reputation will warrant an award of substantial damages only if the plaintiff has a reputation in the place where the publication is made. Further, plaintiffs are unlikely to sue for defamation published outside the forum unless a judgment obtained in the action would be of real value to the plaintiff. The value that a judgment would have may be much affected by whether it can be enforced in a place where the defendant has assets” at [53].

⁷⁷ *Stanley Young v. New Haven Advocate, et al.*, 315 F.3d 256 (4th Cir 2003).

⁷⁸ The jurisdictional question raised in this case concerned whether two Connecticut newspapers and certain of their staff subjected themselves to personal jurisdiction in Virginia by posting on the Internet news articles that, in the context of discussing the State of Connecticut's policy of housing its prisoners in Virginia institutions, allegedly defamed the warden of a Virginia prison. See further *Stanley Young v. New Haven Advocate, et al.*, 315 F 3d 256 (4th Cir 2003), <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=4th&navby=case&no=012340Pv2&exact=1>>, at 21 January 2008.

⁷⁹ *Griffis v Luban* 646 NW 2d 527 (S Ct Minn 2002); *Yahoo! Inc v La Ligue Contre Le Racisme et l'Antisemitisme*, 433 F 3d 1199 (9th Cir 2006).

THE FUTURE

Strategies

At a pragmatic level, online businesses have sought to limit the reach of their websites and the potential for establishing jurisdiction by doing things such as employing jurisdictional disclaimers on their websites, geo-location technologies to limit who can access the website and a particular language and currency and subscription or registration process. As well businesses have used contractual agreements specifying choice of law and choice of courts although as explained above these are not always an option nor are they always upheld by national courts.

The recent *Hague Convention on Choice of Courts Agreements* (2005) and the recent ALI Statement of *Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* (2007)⁸⁰ provide further support for these types of agreements in certain circumstances. However the broader Hague Convention on Jurisdiction⁸¹ which has been on the drawing board for many years and at one time offered the prospect of solving some the key internet jurisdiction issues seems a long way off completion.

CONCLUSION

In summary jurisdiction is likely to be found where there is some level of contact with that jurisdiction. It is difficult to be certain as to how that will be defined and to what role national courts will play in shaping this benchmark for contact at the transnational level. However what we see emerging from the analysis undertaken in this chapter are three distinct yet related approaches to what will constitute ‘sufficient contact’. We see approaches based on the nature of the activities (the USA approach

⁸⁰ It is a set of non-binding rules concerning jurisdiction, choice of law, and the enforcement of judgments abroad in international IP litigation, and members of ALI approved a final text on 15 May 2007. See The American Law Institute (ALI): *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* <http://www.ali.org/doc/2007_intellectualproperty.pdf> at 18 December 2007.

⁸¹ See Hague Conference on Private International Law's *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, <<http://www.cptech.org/ecom/jurisdiction/hague.html>> at 18 December 2007.

of looking for “effects and targeting”), location of the computer equipments (the emerging approach in the PRC) and the point of access to the Internet (the approach adopted in the Australian *Gutnick* decision).

In these Internet related cases we have seen courts trying to reconcile notions such as the free flow of Internet communication and business with a desire to prevent harm to reputation, intangible property and economic interests. Internet businesses (e.g. web services, online publishers) have argued against the reach of jurisdiction over them into foreign countries that they did not set out to engage with. On the other hand IP rights holders have sought to expand the notion of jurisdiction to protect their assets. They have argued that their rights can be damaged wherever people comprehend, view or copy their IP much in the same way as defamation was established in *Gutnick*. This leads to a finding of jurisdiction almost anywhere the Internet runs. Furthermore these IP rights holders are seeking the ability to commence world wide litigation in their jurisdiction of choice, usually an IP friendly jurisdiction.⁸²

For commerce to prosper in the future we need jurisdiction rules that are sensible, efficient and flexible and that are designed to harness the potential that the technology provides. Unclear approaches to jurisdiction have the very real potential to stymie innovation.

There is still too much uncertainty in this area as the key actors battle to protect their respective interests. There is an urgent need - as Justice Kirby points out in the *Gutnick* decision - for countries like China, Australia and the US to work together to find clearer and more robust solutions in this area.

⁸² See further, The American Law Institute, ‘Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes’, <<http://www.ali.org/index.cfm?fuseaction=projects.members&projectid=1>> at 20 January 2008. See also Rochelle Dreyfuss, ‘The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?’ (2005) 30 (3) *Brook Journal of Intellectual Property Law* 819-848.