

*The Scotsman, the Greek, the Mauritian company and the Internet: Where On Earth Do Things Happen in Cyberspace?*

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*“It follows in my opinion, that the person who sets up the website can be regarded as potentially committing a delict in any country where the website can be seen, in any other words in any country in the world.”*

Lord Drummond Young in *Bonnier Media Ltd v Greg Lloyd Smith and Kestrel Trading Corporation*, at para 19.

Internet jurisdiction is currently one of the most vexed issues in the generally disputatious domain of cyberspace law. Where should disputes about Internet events be heard, when they happen simultaneously both everywhere and nowhere? It is one of the greatest strengths of Internet architecture that it is designed to be both universally accessible and geographically opaque: so a web page can be published by anyone anywhere, will usually give little overt indication of its true geographical place of uploading, may be read anywhere, and yet is often perceived as inhabiting a mythical virtual domain called “cyberspace”. As it was famously (and slightly surreally) put in one US jurisdiction case, “The Internet has no territorial boundaries. Not only is there perhaps “no there there”, the “there” is everywhere there is Internet access.<sup>2</sup>” Disputes about Internet jurisdiction arise regularly in the fields of libel, commercial contract, consumer contract, trademarks and copyright and tort/delict, and indeed have the potential to occur in almost any Internet transaction, communication or event.

Despite the ubiquity of the problem, no jurisdiction has, to this writer’s knowledge, yet expressly developed rules of jurisdiction tailored *ab initio* for the Internet. Instead valiant attempts have been made to adapt existing case law, constitutional principles, legislation and international treaty law to meet the challenge of the Internet. In the United States, where the greatest part of Internet-related cases have been heard, a sophisticated but not entirely internally consistent jurisprudence has developed which takes into account issues such as minimum contacts with the forum selected by the plaintiff, the targeted nature or otherwise of Internet communications, the interactivity of the website in question (where applicable) and the general fairness in due process terms of bringing the defendant within the courts of the forum<sup>3</sup>.

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<sup>2</sup> *Digital Equipment Corporation v Altavista Technology Inc*, 960 F.Supp. 457, D.Mass 1997

<sup>3</sup> See for a good general summary of the current state of US Internet jurisdiction case law in relation to contracts primarily, Debussere F. “International Jurisdiction Over E-Consumer Contracts in the European Union: *Quid Novi Sub Sole?*” (2002) 10 IJLIT 344.

In the European Union, the main jurisdictional instrument which has faced interpretative death by Internet has been the Brussels Regulation (“Brussels 2”<sup>4</sup>), which from 1 March 2002 replaced and updated the Brussels Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters of 1968 (“Brussels 1”). Brussels in both its incarnations has been implemented in the UK by the Civil Jurisdiction and Judgments Act 1982 (“CJJA”) to which amendments were recently made<sup>5</sup> to reflect the Brussels 2 alterations, which mainly pertain to consumer contracts. Although CJJA is a UK-wide statute, it implements Brussels differentially for Scotland and England. The basic mandatory requirement imposed by EC law is that the Brussels rules must be applied to the exclusion of all others in disputes between two EU domiciliaries, but not necessarily in disputes between two domestic domiciliaries of one EU state – that being a wholly domestic issue – nor in disputes between domestic domiciliaries and non-EU domiciliaries – that not being a Single Market matter. The situation is also complicated when Brussels is implemented for an EU member state such as the UK which contains multiple domestic legal systems. The end result is that Schedule 1 of CJJA implements the Brussels rules in any disputes involving a domiciliary of a UK legal system and a non-UK EU national; while Schedule 4 applies very slightly adapted Brussels rules to any intra-UK disputes eg between a Scottish and an English domiciliary. However in terms of wholly domestic and non-EU disputes (eg, between a Scot and another Scot, or a Scot and a Nigerian), the English and Scottish positions diverge. Scotland chose to apply the Brussels rules uniformly as its domestic rules of jurisdiction (with, again, very slight tweaks) in Schedule 8 of CJJA. England however chose to retain its longstanding common law rules of jurisdiction for such disputes. Hence the Brussels rules are perhaps not as well-known in the English courts as in Scottish ones, and have not been relevant in a number of prominent recent trans-national cases heard in English courts, including most notably the US-defended House of Lords libel case of *Berezovsky v Forbes*<sup>6</sup>. This relative downplaying of Brussels rules in England may have had some interesting effect on authority cited to decide the Scottish case under analysis, *Bonnier Media Ltd v Greg Lloyd Smith and Kestrel Trading Corporation*<sup>7</sup>, as will be discussed below. *Bonnier* was plead in terms of Brussels 1 throughout, a point we will also return to.

*Bonnier Media* arose out of a trademark and domain name dispute between the Scottish newspaper, *business a.m.* (now defunct) owned by Bonnier Media, and a company, Kestrel Trading, run by Smith. Smith, who had a chequered history of cybersquatting-like activities (such as registering Amazon.gr in Greece) and who also had an antagonistic past acquaintance with Bonnier (libel proceedings were in fact outstanding between the pursuer and defender at the time of the action) acquired the domain “businessam.com”, with the averred intention of using it to set up a website for an “on line business advisory service” which would aim at a worldwide market. Bonnier already owned seven domain names all involving the name “business-am” or

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<sup>4</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It entered into force on 1 March 2002. The Regulation is applicable throughout the EU except for in Denmark.

<sup>5</sup> See for Scotland the Civil Jurisdiction and Judgments Order 2001 SI 2001/3929, Sched 2, Part III.

<sup>6</sup> [2000] 2 All ER 986.

<sup>7</sup> 2002 SCLR 977. The case is also available at the Scottish Courts Web site at <http://www.scotcourts.gov.uk/opinions/DRU2606.html>. For ease of reference, I will use paragraph numbers to identify quotes from the case report.

variations thereon, but not the vital .com domain name. The newspaper proprietors claimed the defenders had acquired the domain name in order to pass themselves off as Bonnier and had breached s 10 of the Trade Marks Act 1994. Accordingly they sought interdict against Smith and Kestrel continuing to use, register, maintain or set up websites using domain names featuring the “business a.m” name or variations thereon. At this point however this relatively simple case of apparent cyber-squatting became complicated by the issue of jurisdiction, which is the only point this note will consider. *Bonnier* is noteworthy as the first case on Internet jurisdiction to be heard in Scotland and, as such, is an important precedent. In the globalised world of Internet commerce, the decision also however has an unusual degree of international significance.

Two main issues arose:

- (i) Could the Scottish courts exercise jurisdiction in respect of a *threatened* as well as an *actual* wrong which was likely to produce a harmful result in Scotland?
- and
- (ii) Could jurisdiction be exercised in Scotland, even where the wrong was the result of a website which was physically housed on a server located outside Scotland, and which could be accessed anywhere in the world?

The first of these points is an interesting matter of technical interpretation and reconciliation of different Schedules of CJA as drafted to implement Brussels 1 – a matter of some, though now mainly historical, UK domestic concern – but the second point is an issue of vital significance to e-businesses and publishers all over the world, and thus has attracted considerable comment - and concern - worldwide.

(i) *the “threatened wrong” question*

Smith, it was agreed, although previously resident in Scotland, was now domiciled in Greece, which made the case between him and Bonnier, a Scottish domiciliary, a matter for Schedule 1 of CJA. Kestrel, by contrast, was incorporated in Mauritius, a non-contracting state, but the pursuers argued it was domiciled in either England or Greece, which would have invoked the rules of respectively, Schedules 8, 4 and 1. However as we will see, the court did not in the end find the need to determine Kestrel’s domicile.

The basic rule of Brussels 1 is that jurisdiction is founded in the domicile of the defender (Art 2). However, Art 5(3) of Brussels 2 also provides a “special jurisdiction” whereby “in matters relating to tort, delict or quasi-delict” jurisdiction may also be founded “in the courts for the place where the harmful event occurred”. Since the action here related to trademark infringement and passing off, Art 5(3) was relevant. Schedule 1, which applied in relation to the Bonnier/Smith part of the dispute, as a matter of treaty obligation, transposes the Brussels Regulation wording of Art 5(3) essentially word for word. However when it came to Schedules 4 and 8, Parliament was free to make what rules it pleased and thus, for whatever historical reason, the wording is slightly different than in Schedule 1. Both Schedules<sup>8</sup> refer not only to jurisdiction in the courts of the place where the harmful event occurred, but

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<sup>8</sup> See Schedule 4, Art 5(3) of CJA; and Schedule 8, rule 2(3) and (10) CHECK.

also refer to jurisdiction over a *threatened* wrong, in which case jurisdiction is founded in the courts of the place where the harm was *likely* to occur. Smith argued therefore that, taking into account the contrasts in wording, Sched 1 was deliberately not intended to grant jurisdiction in Scotland, the place where the threatened harm was likely to occur. Since his on-line business venture had yet to start trading and cause any actual harm in Scotland, if this reasoning was accepted, proceedings would conceivably have had to be instituted solely in his domicile state of Greece.

Lord Drummond Young however gave this line of attack short shrift. The fact that express provision was made for threatened wrongs in Schedules 4 and 8 but not in Schedule 1 was irrelevant as the provisions of an Act of Parliament could not be used to interpret provisions dictated by the text of an international treaty (unless they expressly were intended to modify those treaty obligations). From the point of view of principle, it would be impossible for a state to maintain the rule of law if the courts did not have jurisdiction to deal with threatened delicts likely to cause harm in its territory as well as actual delicts. Furthermore it would not always be easy to separate out cases involving threatened from actual harmful events, as in the case of a pollution discharge, where future discharges might be likely to occur at any time. Accordingly the correct view was that Schedule 1 implicitly referred to threatened as well as actual wrongs and so in fact contained identical grounds for jurisdiction on an Art 5(3) basis as Schedules 4 and 8. This also led to the convenient outcome (though the court did not quite express it as such) that it was not necessary to fix the domicile of Kestrel, since whether the dispute between that company and Bonnier fell under Schedule 1, 4 or Schedule 8, all three schedules would cover threatened wrongs.

This part of the judgment, though interesting, is of essentially historical significance as Brussels 2 expressly alters Art 5(3) as transposed into Schedule 1 of CJJA to include harmful events which have occurred “or may occur”<sup>9</sup>. And although Brussels 2 is a Regulation and thus of direct effect, for clarity this change is implemented in Scotland and England by the Civil Jurisdiction and Judgments Order 2001<sup>10</sup>. The most peculiar aspect of the decision in *Bonnier* is, as Barry Rodger points out<sup>11</sup>, that given on internal evidence the action could not have been raised any earlier than 21 May 2002 (the date when Bonnier were informed that Kestrel had acquired the businessam.com domain name) it would seem that the action should have been raised in terms of Brussels 2 – in which the whole of this part of the argument would have become otiose. Were all parties concerned really reading from the same wrong page? (And, perhaps most practically, how did this affect the costs?)

(ii) the “*offshore website publisher*” question

The crucial argument made on this point by Smith and Kestrel was that the mere putting up (or “uploading”) of material on to a website which was accessible in Scotland, but not physically located *in* Scotland, was not enough to constitute a wrong which would occur in Scotland; and that accordingly jurisdiction should not be founded. Instead they argued that there should be jurisdiction only in the place of uploading. The underlying hypothesis here is that since any website can in principle be accessed anywhere in the world, it is unfair and puts too great a business risk on

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<sup>9</sup> SI 2001/3929, Sched 2, Part III, rule 2(c).

<sup>10</sup> SI 2001/3929.

<sup>11</sup> Rogers “International Private Law Developments in 2002” (2003) 8 SLPQ 130.

traders who utilise the Internet, to expose them to possible suit anywhere in the world merely on the grounds of that universal accessibility. Such traders might also be open to multiple suits in multiple different legal systems, and to forum shopping by pursuers/plaintiffs. These problems in their turn might then prove (or at least be seen to be) a burden that would inhibit the development of e-commerce, especially among the SME community, or might lead to the express selection by such traders of one or several markets rather than the entire worldwide market opened up by the Internet. This in its turn would suppress competition, limit consumer choice, restrict wealth creation and retail expansion, and generally not be in the public interest. These problems have been taken seriously all over the world, but have caused particular sensitivity in Europe, which has always lagged behind the United States in the (now slightly passé) e-commerce gold rush. Accordingly, the argument usually goes, something more should be required to found jurisdiction than mere accessibility, such as some degree of intentional targeting of the forum, interactivity with the forum, or the actual delivery of goods or services to persons located within the forum. But even among those who accept this argument, there is less than consensus on the exact details of what degree of targeting, interactivity etc should be required, and whether these requirements should differ according to the type of action in question (eg Internet libel, cybersquatting and consumer contracts, to name but three common sources of angst). Thus this question has become one of the fundamental current controversies in Internet jurisprudence, which has arisen time and again, in *inter alia* the courts of the USA<sup>12</sup>, Canada<sup>13</sup>, Australia<sup>14</sup>, and most significantly for the case at hand, England, as well as in Scotland for the first time in *Bonnier*.

Considerable emphasis was laid in the discussion in *Bonnier* on dicta drawn from two English trademark infringement cases, *800-Flowers Trade Mark*<sup>15</sup> and *Euromarket Designs Inc v Peters and Trade and Barrel Ltd* (the “*Crate & Barrel*” case)<sup>16</sup>, both decided by Jacob J at first instance, with the former progressing to the Court of Appeal. The odd and mostly un-remarked point<sup>17</sup> is that neither of these cases in fact deal with jurisdiction *per se* (even though the *Crate & Barrel* case is expressly referred to as a “jurisdiction” case at para 17, third para of *Bonnier*). They are in fact cases about the substantive law of trademarks, the matter of jurisdiction (presumably)

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<sup>12</sup> The current leading US cyber-jurisdiction case is possibly still *Zippo Manufacturing Co v Zippo Dot Com* 952 F. Supp. 1119, 1126 (W.D. Pa. 1997) which introduced the active/passive/interactive test, though commentators have noted a shift away from the *Zippo* test towards a wider approach taking more account of effects on the forum since the early 2000s. Recent important cases have included *Pavlovich v Superior Court of Santa Clara County* 109 Cal.Rptr. 2d 909, 911 (Ct.App. 2001) (the “DeCSS” case) and *MGM v Grokster, Leiber and Consumer Empowerment*, US District Court, Central District of California, January 9 2003 (the “KaZaa” case). The US Supreme Court has so far declined to impose a national standard on the hundreds of state decisions. Good summaries of the state of US cyber-jurisdiction law can be found in Geist M. “Is There a There There? Towards Greater Certainty for Internet Jurisdiction” (2001) 3 Berkeley Technology Law Journal 1345, Mehta S.N. “Cyberlaw: *Pavlovich v Superior Court of Santa Clara County*” (2002) 17 Berkeley Tech LJ 337, and Debussere, supra n. 2.

<sup>13</sup> *Braintech Inc v Kostiuik* [1999] 171 DLR (4<sup>th</sup>) 46, 61 (BCCA).

<sup>14</sup> *Dow Jones v Gutnick* [2002] HCA 56, December 10 2002 and *Macquarie Bank v Berg* 1999 NSWSC 526. See discussion in Edwards L. “Caveat Uploader? Recent Developments in Cyberspace Jurisdiction” (2003) E-L@w Rev 9-1.

<sup>15</sup> [2002] FSR 191.

<sup>16</sup> [2001] FSR 288.

<sup>17</sup> See *inter alia* commentaries on *Bonnier* by Warner J. (2002) 7 SL&PQ 295; Edgar L.(2002) 4 EBL 15; Gordon L. (2002) 13-3 C&L 24

having been non-contentious. In both cases the principle issue was whether a trademark had been “used” in the United Kingdom in such a way as to satisfy the requirements of the relevant sections of the Trade Marks Act 1994. In *800-Flowers*, an American company selling flowers from its website, sought to register its name as a trade mark in the UK. This critically required that the trade mark be shown to be in use in the UK. Would the mere presence of a website in New York which could be accessed in the UK suffice? Jacob J held at first instance that it would not, stating:

“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 on the circumstances, particularly the intention of the website owner and what the reader will understand if he accesses the site. In other fields of law, publication on a website may well amount to a universal publication, but I am not concerned with that.”<sup>18</sup>

This approach was subsequently upheld in the Court of Appeal who also laid emphasis on the fact there was no evidence of what they termed, rather reflexively, “actual” use of the mark in England: how much, for example, the website had *in fact* as opposed to potentiality, been accessed by UK customers.

In *Crate & Barrel*, an American company who ran a chain of kitchenware stores in the USA called “Crate & Barrel” (complete with US based website) raised an action for trade mark infringement against an Irish company, also with website, who ran a shop in Dublin also called “Crate & Barrel”. Bizarrely, the action was brought in England, where neither company had significant trading profits, on the ground that the US company had some years before registered a UK trade mark (apparently with a view to expanding their operations in Europe) which they now argued the Irish company were infringing. Again, the crucial question was whether the Irish company were “using” the trade mark *Crate & Barrel* in the UK to sell their goods and services. The evidence here was that aside from the web site presence, the Irish company had no shops in the UK, did not intend to trade in the UK, and had placed a single advertisement, once, in an English newspaper. Jacob J was again scathing about whether this would suffice to found trade mark infringement. “[I]s it rational to say that the defendants are using the words “Crate & Barrel” in the UK..? If it is, it must follow that the defendants are using the words in every other country of the world.” He went on to opine that a website should not be regarded as reaching out a “tentacle onto the user’s screen” as plaintiff counsel had suggested. Instead it was more appropriate to see a user in the UK accessing a foreign website as “focusing a super-telescope into the site concerned.” In other words, the mere accessibility of a site in the UK is not sufficient for that site to be regarded as making “use” of a trade mark in the UK; instead the trade mark is in reality being used abroad, and thus not infringing the UK mark. The website is only visible to the UK web-surfer because they have taken the initiative of reaching out to access that site. In this view of the Net, websites are seen as essentially passive, and web-surfers (or consumers) as the active agents.

In *Bonnier*, however, Lord Drummond Young took a different approach. He rejected Jacob J’s analysis of competing analogies as inappropriate. “Legal analysis of delicts

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<sup>18</sup> [2000] FSR 697 at 705. Also quoted by Jonathan Parker LJ at para 41 of the Court of Appeal judgment.

committed by way of the Internet must be based on principle.<sup>19</sup>” He then went on however to have his own stab at capturing the essence of the Internet. It was not “a mere static physical entity: nothing more than a group of computers containing information which are linked physically together.” Instead it was a “process of communication... What is peculiar about the Internet is that the message will not be conveyed unless the initiative is taken by the operator of the second, recipient, computer.<sup>20</sup>” In this world view, website servers are not seen as entirely passive entities, but as interactive agents; although consumers at the recipient end are still seen as the key active agent. He then went on to pronounce the words which have bounced provocatively round the world’s news wires and sent shivers down the spines of potential dot.com entrepreneurs: “It follows in my opinion, that the person who sets up the website can be regarded as potentially committing a delict in any country where the website can be seen, in any other words in any country in the world.”

These words were however, to the partial relief of the e-industry, immediately qualified. “It does not follow that he actually commits a delict in every country in the world”. The *de minimis* principle would apply to inhibit a court from accepting jurisdiction where the impact of a website on the forum was properly to be regarded as insignificant. In *Crate & Barrel* for example, the Irish company’s trade with the UK was minimal to non-existent, so it was correct for the English courts not to find an infringement of the US company’s trade mark. In the instant case, the situation was very different. Smith had worked in Scotland, knew about the newspaper *business a.m.*, and had announced the intention to launch an “on line business advisory service” which was clearly designed to trade on the goodwill in Scotland of the *business a.m.* name. His acts were intentionally aimed at the pursuer’s business, which was centred in Scotland. Accordingly, the case passed the “significance” test and the Scottish courts had jurisdiction.

#### *Assessment of Bonnier*

With respect, *Bonnier* appears to be a classic case of a decision which reaches the correct conclusion but via the wrong route. Much of this may be ascribed to the citing of recent Internet-related English authority based on the Trade Marks Act 1994, rather than less recent non-Internet related authority actually dealing with the Brussels Convention (or Regulation) and the issue of jurisdiction - for, crucially, *Bonnier* is a decision on a fundamentally different piece of law than *Crate & Barrel* and *800-Flowers*. Hence the dicta they contain, thoughtful and well-expressed though they are, are fundamentally not “on all fours” with the instant case and may indeed have been actively misleading.

*Bonnier* as a jurisdiction case turns on the interpretation of Art 5(3) of Sched 1 of CJA, which transposes the Brussels Convention rules. This much is abundantly plain from the earlier discussion on “threatened wrongs”. Yet when it came to the discussion of the *second* question, how to deal properly with an off-shore website publishing material accessible in Scotland, and therefore likely to cause harm in Scotland, this framework was apparently abandoned. Authority does however exist to determine what is meant in Brussels jurisprudence by the “place where the harmful

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<sup>19</sup> At para 18.

<sup>20</sup> *Ibid.*

event occurred, or may occur”. It happens to be primarily authority relating to causes of action such as libel and negligence, rather than trade mark infringement, but this is of no matter, since these are all cases that fall sub the Art 5(3) rubric of “tort, delict or quasi-delict”. The key issue here is of how to deal with torts/delicts that begin in one country and end up causing harm in another; not how to deal specifically with websites, or trade marks.

The leading case on trans-national torts under Art 5(3) is usually regarded as being *Shevill v Presse Alliance SA*<sup>21</sup>, a case which went as far as the English House of Lords and then was referred to the European Court of Justice – this last step being especially significant as the courts have emphasised repeatedly that interpretation of Brussels should be harmonised on a European basis rather than allowed to develop in different national directions<sup>22</sup>. *Shevill* was a libel case brought by an English plaintiff involving statements published in a French domiciled (hard copy) newspaper with a small circulation in England. In it, the ECJ firmly held that even though the vast bulk of the circulation of the offending statement was in France, there was still jurisdiction under Art 5(3) in the English courts (which are of course, notoriously kind to libel plaintiffs) since that was where the “harmful event”, namely, the damage to the plaintiff’s reputation in England, had occurred. *Shevill* drew on the even earlier and certainly pre-Internet case of *Mines de Potasse*<sup>23</sup>, a case of negligence in one country, France, leading to pollution washing downstream in the Rhine basin and causing harm to a market garden business in another country, namely the Netherlands. In both cases, the jurisdictional issue was determined by what was meant by “where the harmful event occurred”. Did it occur where the harmful event was originated (or potentially would originate, as in *Bonnier*), namely (respectively) France, where the newspaper was published; the polluting mines in France; or the Kestrel web site? Or did it occur where the harm impacted on the plaintiff (or would be likely to impact, as in *Bonnier*), namely England, where the plaintiff in *Shevill* had her reputation; the market garden in the Netherlands; or Scotland, where *business a.m* traded? In both *Mines de Potasse* and *Shevill*, the ECJ found that *either* interpretation – the “source” or the “target”, as I have called it elsewhere<sup>24</sup> - was competent. Hence in *Shevill*, Art 5(3) allowed for jurisdiction to be taken in both France and England<sup>25</sup>. By similar application, in *Bonnier*, the “target” of the potential harm – the anticipated trade mark infringement and passing off – would obviously have been Scotland.

Thus it was in many ways perfectly simple to solve the problem in *Bonnier* without reference to the Jacob J cases. There is no difference – in *principle*, as Lord Drummond Young emphasised – between the website intended to be operated by Kestrel and the newspaper in *Shevill*. Or is there?

One key point is that the operators of a website have little or no idea of who is accessing their site (though software can be obtained to analyse the IP addresses of visitors and what domain they come from at little cost) but more importantly, also

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<sup>21</sup> [1995] 2 WLR 499.

<sup>22</sup> See for example, *Kalfelis v Bankhaus Schroder Munchmeyer Hengst & Co* [1988] ECR 5565.

<sup>23</sup> *Handelswekerij G.J. Bier B.V v Mines de Potasse d’Alsace* [1978] QB 708 (the “*Reinwater*” Case).

<sup>24</sup> See Edwards L. “Defamation and the Internet” in Edwards L. and Waelde C. eds *Law and the Internet: A Framework for Electronic Commerce* (Hart, 2000).

<sup>25</sup> At 62. For completeness, of course, there would also have been jurisdiction under Art 2 in France as the place where the defendant was domiciled.

have little way of knowing *from what national jurisdiction* their visitors are coming. Even if a web-visitor apparently comes from a country-coded domain such as (say) demon.co.uk, they might conceivably be a French national (say) dialling into Demon's server. And what if the visitor comes from aol.com, or random-site.com? There is no cheap and easy way of reliably telling the geographic origin of a visitor from a non-geographic top level domain (TLD) (except of course by asking them – which poses the question of whether personal bar would arise to bar suit in their domicile in cases of deception)<sup>26</sup>. Furthermore as a result of that same geographical non-transparency, it is extremely difficult to block all visitors to a site coming from, say, France. Contrast the situation with the newspaper in *Shevill*. Those defendants had the option not to sell any copies of their newspaper to England. That would have heavily minimised the chances of their being sued for libel in England. Of course that would also have reduced their trading opportunities but that would then be a business risk/benefit trade-off decision that could be rationally assessed. The risk would be avoidable.

Contrast again the situation in *Crate & Barrel*. If that had indeed been a jurisdiction case heard under Brussels rules<sup>27</sup>, rather than a substantive trade mark case, I would have argued that the English court had no choice but to hear the action under Art 5(3). The “target” of the potential harm complained of was clearly in England – namely, the infringement of the UK trade mark held by the US Crate & Barrel chain. This much is obvious, but what is less so is that under Brussels there is no discretion to refuse to accept jurisdiction on the grounds that the defendant's connections with the forum are tenuous, (or “insignificant” in Lord Drummond Young's terminology) or that the matter might more practically or more fairly be heard elsewhere. The discretion that Jacob J had to play with in determining if the trade mark in question was “used” in the UK in terms of the Trade Marks Act 1994 does not exist under the far more certainty-oriented Brussels regime. This concept, which we may identify with the common law idea of *forum non conveniens*, is foreign to the Brussels legislation<sup>28</sup>, whose aim is to create a level playing field across the Single Market for judgments, and to minimise forum-shopping<sup>29</sup>. What Lord Drummond Young appears almost instinctively to be doing in *Bonnier* is seeking, by considering (though not following) Jacob J's dicta and instead inventing the concept of “significance”, to re-install the concept of *forum non conveniens* for Internet jurisdiction under Brussels. But fortunately or otherwise, the rules of Sched 1 do not allow this. (*Forum non conveniens* has however been preserved for Schedules 4 and 8<sup>30</sup> however, so that is another story for another court.) Lord Drummond Young's approach is reasoned and understandable, but it is not necessarily in line with either the letter or the spirit of

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<sup>26</sup> In one case, albeit concerning criminal rather than civil law, a French court has taken into account in accepting jurisdiction over a US defendant, that defendant's potential ability to identify the true geographical origin of up to 90% of visitors to their site, and the fact that they did so in order to make profits from targeting advertisements to the appropriate country in the appropriate language: see *UEJF et LICRA v Yahoo! Inc et Yahoo! France*, T.G.I Paris May 22, 2000. However it would be an understatement to say that this decision has been controversial and it has also (for other reasons) not been recognised and enforced in the US courts (*Yahoo! Inc v LICRA*, US Dist LEXIS 18378.)

<sup>27</sup> In fact, since the dispute was between a US company and an Irish company, jurisdiction would not have been determined by Brussels rules.

<sup>28</sup> Brussels 2, Art 3(1) and 21. CHECK

<sup>29</sup> Anton and Beaumont *Civil Jurisdiction in Scotland* (2<sup>nd</sup> edn, W.Green & Co., 1995) Chap 1 and 5.

<sup>30</sup> See *Cumming v Scottish Daily Record and Sunday Mail and ors* [1995] EMLR 538.

Brussels. The fact that it is also not in line with the English approach taken by Jacob J in *800-Flowers* and *Crate & Barrel*, is in fact where it may be at its most correct.

### *Jurisdictional reform for trans-national torts and delicts?*

*Bonnier* is a good though relatively ambivalent example of the problems that arise when the ubiquitous accessibility of the Internet runs up against the brick wall of the rigid Brussels rules. Few people will have much sympathy for the defenders in *Bonnier*, who were fairly plainly quasi-cyber-squatters, intentionally causing trouble for a Scottish based business. It seems fair and reasonable to bring them into court in Scotland. But the facts of other cases provide much more problematic scenarios. In the English libel case of *Berezovsky v Forbes*<sup>31</sup>, for example, an American news magazine, *Forbes*, which was available both in hard copy and on the web, published an article allegedly libelling Russian businessmen, who had residences and business reputations in England. Although the case did not actually concern the Internet presence of *Forbes*, let us imagine that the magazine was available in England only via the Internet (something that was in essence true, as the hard copy circulation in England was minimal compared to that in the USA.) Would it be fair to bring the defendants into court in England simply because England was indubitably “the place where the harmful event occurred” as per Art 5(3), in that a reputation existed in England to be damaged? Should the proprietors of an investigative journal such as *Forbes* have to guard against the risk of suit in every jurisdiction in the world or only in the ones they actively market themselves towards and make profits out of? Should the opportunity of forum-shopping to a “libel magnet”<sup>32</sup> jurisdiction like England be so readily available, especially as one of the aims of the Brussels Regulation is to minimise forum shopping within the EU? Would it be better to contemplate the limitation of actions to one jurisdiction which in some way represented the “centre of gravity” of the dispute? But what would this say for the rights of real victims of unintentional torts/delicts to sue in the place where they suffered the damage?

Are there any ways in which reform of Art 5(3) could be contemplated, to better meet these challenges posed not just by the Internet but the general growth of trans-national torts in a globalised, instant communications world? Several alternatives exist to the current forum-shopping-friendly approach to Art 5(3). First, as we have seen above, there is the notion of adding into the mix the plea of *forum non conveniens*. However there are two major problems attached with importing this into the structure of Art 5(3). The whole notion of *forum non conveniens* is inimical to the stated intention of Brussels to minimise the number of possible jurisdictional venues, and to provide certainty to defenders, and it was deliberately excluded from that scheme in the reports that preceded the drafting of the 1968 Convention. Secondly, and perhaps even more importantly, *forum non conveniens* is an extremely discretionary concept which courts in the Commonwealth world have proved very reluctant to make use of in recent trans-national libel cases. *Forum non conveniens* was plead in both *Berezovsky v Forbes* and the recent leading Australian Internet libel case, *Gutnick*<sup>33</sup>, and in both cases the courts firmly dismissed it essentially on the grounds that victims of libel deserved to have a right to sue in the place where their reputation had suffered

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<sup>31</sup> *Supra*, n. 5.

<sup>32</sup> Phrase from David Hooper of Biddles, Solicitors, interviewed by the BBC in reference to the *Berezovsky* decision.

<sup>33</sup> *Supra*, n.13.

harm, even if that place was not an obvious or intentional target of the publication. It is unlikely that civilian judges trained in Brussels rules would be any more likely to use *forum non conveniens* in a tactical or expansive way. It is of course also true that *forum non conveniens* brings in a degree of uncertainty which has to be balanced against the advantages in terms of predictability of the existing more rigid Brussels rules.

Another approach which has been partially examined in the US jurisprudence is adding some notion of “targeting”. In the US, as noted above, the requirements for a state to take jurisdiction in inter-state disputes have been mediated through constitutional requirements of due process. As a result, with a few early or aberrant exceptions<sup>34</sup>, the US courts have generally refused to extend jurisdiction over a defendant simply because they operate a website which is theoretically accessible in the forum. Instead they have elaborated a notion of “minimum contacts” and “purposeful availment” of the forum, which can take into account in a very sophisticated way the actual use of the website made by residents in the forum, the degree of interactivity of the website<sup>35</sup>, and the extent to which there are real-world contacts with the forum, e.g. actual orders from residents of the forum state<sup>36</sup>, delivery of goods and services, investigative visits or interviews with residents<sup>37</sup>, advertising in the forum, etc. In one of the most recent leading decisions, the “*Ka-Zaa*” file sharing case<sup>38</sup>, jurisdiction was accepted in California even though Ka-Zaa had no servers in California, was incorporated in Vanuatu, and claimed not to be especially targeting Californian business. However it was plain that millions of Californians had downloaded software to use KaZaa, and that as a result Ka-Zaa were making money out of delivering advertisements paid for by Californian and US businesses. Ka-Zaa, in fact, were clearly targeting California residents, and affecting California businesses’ profits. The degree of analysis and balancing of certainty and fairness that is available to the court in these decisions, far exceeds that available to European courts under Brussels rules<sup>39</sup>.

Targeting has in fact already been adopted in the one part of Brussels which did undergo extensive (and controversial) reform in Brussels 2, namely the rules on consumer contracts. Brussels 1 had left it unclear if a business with an off-shore website could be sued in the forum of the consumer simply because that consumer could access that website by virtue of the universal access nature of the Net<sup>40</sup>. Brussels 2 in Art 15 attempts to address this issue by redefining a “consumer contract” as one where the seller “directs such activities” towards the forum state

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<sup>34</sup> For example *Inset Systems Inc v Instruction Set Inc* 937 F.Supp. 161 (D. Conn. 1996).

<sup>35</sup> See *Zippo Dot Com*, supra n.11.

<sup>36</sup> See *Cybersell Inc v Cybersell Inc*. 130 F.3d.414 (9<sup>th</sup> Cir. 1997).

<sup>37</sup> See *Blumenthal v Drudge*, 992 F.Supp. 44 (D.D.C. 1998).

<sup>38</sup> *MGM v Grokster*, supra, n.11.

<sup>39</sup> It should be noted however that at least one Canadian commentator – Geist, supra n. 11 – is dissatisfied with the US law on the grounds that it, too, does not have enough of a “targeting” approach.

<sup>40</sup> See for some flavour of the controversy, the European Commission *Hearing on electronic commerce, jurisdiction and applicable law*, 4-5 November 1999. For a very clear analysis of the issue, Stone P. “Internet Consumer Contracts and European Private International Law” (2000) 6 *Inf Comm Tech Law* 8.

where the consumer is domiciled<sup>41</sup>. This formulation too has created difficulties (or at least anticipated ones) for businesses. Reed<sup>42</sup> points out that most businesses will effectively still target all jurisdictions since it is costly and unwieldy to attempt to partition a website into countries which the site is willing to trade with and those it is not. A simple disclaimer may not be sufficient to bar the “directed towards” test. The problem of analysing the geographical origin of web-visiting consumers arises again as well.

In the context of trans-national *torts*, a targeting test both does, and does not, make a great deal of sense. Of course the whole essence of a tort is usually that it is not pre-meditated, unlike a contractual relationship, and therefore a targeting test can be seen as at odds with the whole nature of jurisdiction over such “harmful events”. Yet it is illustrative to look at some of the cases we have been discussing. In *Crate & Barrel*, Jacob J’s finding was essentially that the Irish company had no intention of targeting the UK market and that therefore it was not “rational” to find the Irish company guilty of trade mark infringement in the UK. In *Bonnier* on the other hand it was plain that the defenders *did* know about business a.m. in Scotland and were intentionally targeting their business and goodwill.

Libel cases, however, commonly present more difficult scenarios<sup>43</sup>. In *Forbes*, it could be said that it was fairly plain that the magazine was not targeting the UK market since there were extremely few sales there and no advertising. On the other hand the Russian plaintiffs would (and did) argue that they could hardly have been more specifically targeted as the offending story was about them, and they had reputations and residences in the forum. Would the issue change fundamentally if the *Forbes* story on the Net had been written in (say) Turkish, a language not spoken by many in the forum of England? In terms of Art 15, the European Commission has informally indicated that whether a website “directs” its activities towards a forum will not necessarily rest or fall on the language used on the website (many websites for example, even those exclusively or primarily aimed at the Continent, use English as an international and “cool” lingua franca”). As can be seen, a targeting test is no easy way out of the woods. But it does offer a degree of flexibility – perhaps too much flexibility – to a forum court deciding whether or not to accept jurisdiction which is not currently available under Art 5(3).

A final solution, which may be seen as a variation on a “targeting” test is a “centre of gravity” or “real and substantial connection” approach. This idea is perhaps best known in the form of the “single publication” rule in American libel law<sup>44</sup>. In the USA, as a result of its history of frequent multi-state litigation, and commitment to non-suppression of freedom of speech by lawsuit, a rule exists that a libel is seen as

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<sup>41</sup> This replaced the Brussels 1 formulation which required the conclusion of a contract with a consumer to be “preceded by a specific invitation addressed to him or by advertising”. It was uncertain if a website met either prong of this test.

<sup>42</sup> See discussion in Reed C. *Internet Law* (Butterworths, 2000) p 196.

<sup>43</sup> Interestingly, Lord Drummond Young in *Bonnier*, while restricting his judgment to trade mark infringement cases only, commented that he did not see why the reasoning should not extend to defamation and negligence cases as well – para 18.

<sup>44</sup> See discussion in Edwards L. “*Times for a Change: Loutchansky v Times Newspapers*” (2002) E-L@w Rev 3-2.

published in one place only (and at one time only<sup>45</sup>), rather than, as in most common law jurisdictions and under Brussels, being seen as published in a multiplicity of places – e.g., everywhere the “harmful event” occurs. The advantage of the “single publication” rule in the libel domain is that the defendants are protected from multiple suits and to some extent from the uncertainty and risks of forum-shopping and being sued in unknown legal systems.

Attempts to introduce the single publication rule via recent trans-national and Internet libel cases into England and Australia have been resoundingly repelled<sup>46</sup>. This does not mean however that the EU could not conceivably introduce such an approach into the Brussels rules, either for libel alone or for all trans-national/Internet related torts/delicts. In the choice of law rather than jurisdiction domain (which is of course, a very different kettle of fish) such an approach is already established in respect of trans-national torts in the UK in the Private International Law (Miscellaneous Provisions) Act 1995 – which in general refers trans-national torts to the single law with which the action has its most “real and substantial connection”. This legislative formula was taken, interestingly, from two leading House of Lords cases<sup>47</sup> which attempted to grapple with the inequities and unwieldiness of the former common law “double actionability” rule<sup>48</sup>. Arguably, therefore, there is some judicial support for a “centre of gravity” approach in relation to trans-national torts although so far not expressed at the level of jurisdiction rather than choice of law, where it has always been seen as desirable to have a single *lex causae* operating. The current draft proposals on Rome II (on choice of law in non-contractual obligations) also float the idea of a single law being applicable to defamation actions, namely the law of the habitual residence of the victim, and a different single law being applicable to most other torts, namely the law of the place where the loss to the victim is sustained<sup>49</sup>. Although this proposal has received a decidedly mixed response, it does at least provide a degree of certainty. Another exactly opposite but equally controversial option, would be to abolish Art 5(3) for Internet torts/delicts altogether and require such actions *only* to be brought in the domicile (or habitual residence) of the *defender*<sup>50</sup>. These ideas may seem wild; but they should at least be canvassed to see if they might in some circumstances provide both more fairness *and* more certainty than the existing rules.

To be frank, this writer is sceptical as to the chances in the near future of change to the Brussels rules to reflect the difficulties highlighted in this article. It was a hard-fought enough struggle to reach consensus between commercial, consumer and state interests when the rules about consumer contracts were under review. Similar problems seem recently to have effectively ended any chances of agreement on a

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<sup>45</sup> The question of temporal “single publication” was in fact the main reason for the rule being put forward by the defence in *Loutchansky*, *infra*.

<sup>46</sup> *Berezovsky v Forbes*, *supra*, n. 5; *Dow Jones v Gutnick*, *supra*, n. 13; *Loutchansky v Times Newspapers* [2001] 4 All ER 115.

<sup>47</sup> *Boys v Chaplin* [1971] AC 356, *Red Sea Insurance Co Ltd v Bouyges SA & Ors* [1994] 3 All ER 749.

<sup>48</sup> Which, to add to the general confusion, has still been retained by the 1995 Act for defamation and libel actions.

<sup>49</sup> See Lord Chancellor’s Consultation Response on Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations, October 2002, available at [www.lcd.gov.uk](http://www.lcd.gov.uk).

<sup>50</sup> Some support for founding jurisdiction only in either the habitual residence of the plaintiff *or* defender, as an expedient “bright line”, can be found from Reed; *supra*, n.40, p 199.

global Hague Convention on Jurisdiction and Judgments, with US industry in particular opposed to any potential growth in exposure to global risk of suit. Yet it is, in my opinion, inevitable that cases will arise in the Scottish and English courts in future in which, unlike in *Bonnier*, the equities of the situation and the requirements of Art 5(3) will diverge. This has already arguably occurred in the context of English common law jurisdiction in the libel field, but the specialities of that area, and the apparent determination of the English courts to retain as wide a libel jurisdiction as possible have restricted the ambit of debate. Lord Drummond Young's "significance" approach is neither the whole answer, nor, possibly, the right answer. A wider discussion on how to determine jurisdiction in cyberspace is essential, and *Bonnier* should at least kick-start that debate in Scotland.