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E-COMMERCE – SUBJECT TO "THE LAW" OR TO "SOME OF THE LAWS"?

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1. Introduction

The inherent transnational character of the Internet has challenged the international legal system for over 25 years[1] and interestingly, since commerce gravitated to the Internet, the legal risks of selling online, giving inaccurate information and providing customer service have begun to be addressed increasingly in the everyday of offline world[2] by bringing forth extraterritorial Internet disputes[3]. The controversial question here is which law is applicable to this cross-border realm of cyberspace[4]. Normally, the power of a sovereign state to control a conduct under international rules is narrowed in its domain and defined as jurisdiction[5]. However, the multinational character of the e-commerce and the Internet in general disregards these territorial limits of jurisdiction and thus, the concept of extraterritoriality has been emerged in the cyberspace[6]. This essay examines how a foreign state can enforce its public law to a foreign e-commerce business. It starts by explaining the two main United States (US) models that have been initially used for testing jurisdiction, namely the Zippo test which due to its weaknesses gave way to the Effects doctrine which in turn caused the problem of extraterritoriality. It then analyses the phenomenon of extraterritoriality by discussing its meaning and its disadvantages. Finally, it argues that states need to reduce the extraterritorial reach of their laws in cyberspace and in order to support this argument, it provides possible ways by which this problematic aspect of the e-commerce could be mitigated.

2. Extra-territorial public law jurisdiction: The Zippo Test and the Effects Test

The transnational character of the Internet has indeed introduced several conflicts between the

[1] William Guillermo Jiménez and Arno R. Lodder, 'Analyzing approaches to Internet jurisdiction based on a model of harbors and the high seas' (2015) 29 IRLC&T 266
[2] Adam D. Thierer and Clyde Wayne Crews, *Who Rules the Net?: Internet Governance and Jurisdiction* (2003) 91
[3] 'Jurisdiction in the Cyberspace' (*Lawteacher.net*, March 2018) <https://www.lawteacher.net/free-law-essays/commercial-law/jurisdiction-in-the-cyberspace-commercial-law-essay.php#citethis> accessed 17 March 2018
[4] Ibid
[5] C Kuner, 'Data protection Law and Internet Jurisdiction on the Internet (Part 1)' (2010) 18 IJL&IT 176
[6] Ibid (n 3)

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states' jurisdictions and important challenges to the International Public Law[7]. However, it was not until the end of 1996 that the most of Internet-related decisions demonstrated slight genuine understanding of the Internet activity and started introducing territoriality principles in order to determine jurisdiction under public international law[8]. Since then, the majority of courts were inconsiderate with the jurisdictional consequences of their decisions and alternatively supported 'an analogy-based approach in which the Internet was categorized en masse'[9]. In early 1997, a new approach occurred from the decision of *Zippo Manufacturing Co v Zippo Dot Corn, Inc.*[10]. This decision was the very first evidence that courts commenced to appreciate the variety of the Internet activities and that all-inclusive analogies are not suitably applied to the online world[11].

Plaintiff Zippo Manufacturing, a Pennsylvania corporation, submitted suit in Pennsylvania against defendant Zippo Dot Com, a California corporation, by claiming trademark infringement and dilution and false designation under the Lanham Act[12]. Manufacturing supported its claim by arguing that Dot Com used the word 'Zippo' as the domain name in many places in its website[13]. Defendant moved to reject for absence of personal jurisdiction[14]. The court formed a three prong test for identifying when a court has authority over a website[15]. This test divided websites into three categories: active website 'where a defendant clearly does business over the Internet' and so if he 'enters into contracts with residents of a foreign jurisdiction […], then personal jurisdiction is proper'; passive website 'that does little more than make information available to those who are interested in it' and 'is not grounds for the exercise of personal jurisdiction'; and finally, interactive website 'where a user can exchange information with the host computer' and 'the exercise of jurisdiction is determined by examining the level of interactivity'[16]. Namely, this test determines jurisdiction based on the level of interactivity among the website and the nature of e-commerce activity[17]. Following the above test, the court

[7] Michael A Geist, 'Is There a There There-Toward Greater Certainty for Internet Jurisdiction' (2001) 16 BTLJ 1345, 1365
[8] Ibid
[9] Michael Geist, 'The Reality of Bytes: Regulating Economic Activity in the Age of the Internet' (1998) 73 Wash.L.Rev. 521, 538
[10] *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1121 (W.D. Pa. 1997)
[11] Ibid (n 7)
[12] Ibid (n 10)
[13] Ibid 1124
[14] Ibid
[15] Ibid
[16] Ibid (n 10) 1124
[17] Ibid (n 1) 275

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declined the defendant's motion because his contacts (freely decided to sell its services in Pennsylvania) were enough to justify the 'purposeful availment' prong of the test[18].

The Zippo passive versus active test exported to foreign countries. Its widespread acceptance was not surprising as at the time, it appeared the best available alternative. However, the case law illustrates that by 1999, numerous courts started using other criteria rather the Zippo standard for determining where allegation of jurisdiction was suitable (*Search Force v Data Force Intern*; *Bochan v. La Fontaine*)[19]. The shift away from Zippo doctrine occurred due to the lack of clarity regarding the amount of actual interaction that was required[20] as the courts did not give a definition of 'interactivity'[21]. The test's very fact-specific nature and its dependence on an estimation of sufficient factual differences made the decisions reliant upon the judge hearing[22]. In e-commerce disputes, the doctrine was also unhelpful as most of the todays commercial websites are highly interactive[23]. The aforementioned illustrate that the Zippo test was insufficient and inefficient in giving decisive results and so the US courts moved on a wider, effects-based approach by which they focused on the actual consequences that the website caused in the jurisdiction rather than examining the impact of the characteristics of each website[24].

The 'effects test' established in *Calder v Jones* and requires that 'a) the defendant's intentional tortious actions b) expressly aimed at the forum state c) cause harm to the plaintiff in the forum state, which the defendant knows is likely to be suffered'[25]. In this case, the plaintiff, California actress Jones, sued a Florida publisher of a national magazine who alleged that Jones was alcoholic[26]. The US Supreme Court held that personal jurisdiction was appropriately asserted because of the intentional, targeted effects of the defendant's actions (i.e. to injure her professional reputation)[27]. The broader Effects

[18] Ibid (n 10) 1126
[19] *Se*112 F. Supp. 2d 771, 777 (S.D. Ind. 2000); 68 F. Supp. 2d 692, 701-02 (E.D. Va. 1999)
[20] *GTENew Media Services Inc v Bellsouth Corp*, 199 F3d 1343, 1350
[21] F Wang, 'Obstacles and Solutions to Internet Jurisdiction. A Comparative Analysis of the EU and US Laws' (2008) 3 JICLT 233
[22] Uta Kohl, 'Eggs, Jurisdiction, and the Internet' (2002) 51 ICLQ 555, 565
[23] E Hawkins, 'General Jurisdiction and Internet Contacts; What Role, if any, Should the Zippo Sliding Scale Test Play in the Analysis?' (2006) 74 FLR 2371
[24] Ibid (n 7) 1371
[25] *Calder v Jones* 465 U.S. 783 (1984)
[26] Ibid
[27] Ibid

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doctrine went beyond the defamatory action to a range of e-commerce disputes[28]. In *Euromarket Designs Inc. v Crate & Barrel* Ltd, an Illinois-based corporation filed a suit against an Irish trader for trademark violation with an interactive website which permitted Illinois citizens to order things for shipment[29]. The court ruled by following the effects test that the defendant's conduct established jurisdiction because it has deliberately availed itself of the advantage of running activities with Illinois[30]. By following the effects doctrine, courts have also denied to establish jurisdiction in cases where inadequate commercial effects were presented[31]. For instance, the court denied to establish jurisdiction in *People Solutions, Inc. v People Solutions Inc,* where the claimant, a Texas-based business sued a California-based business for its website that could be accessed by Texans, because no Texans had actually bought from that site[32].

In early 2000, the prevailing view between scholars and cyberlawers was that the effects doctrine marked 'the wave of the future in cyberspace jurisdiction issues, because it can produce "greater certainty" in jurisdictional matters'[33]. By implementing the effects test, it has been illustrated that the states are willing to establish jurisdiction from its roots without taking into account any restraining factors[34]. Although the effects was gaining larger approval than the Zippo test[35], the last was still frequently used to determine jurisdiction as case law showed that the effects doctrine has also problematic aspects[36]. Particularly, it tends to be more relevant to particular types of non-commercial disputes, it is even more subjective than the Zippo test and it is less applicable than the Zippo test in directing business transactions in the forum[37]. Consequently, oftentimes, the courts appropriately begin the case examination with the Zippo test but reach the jurisdictional establishment using the effects doctrine[38]. Thus, the courts correctly and fairly do not consider the effects doctrine as 'a panacea to the dilemma of determining jurisdiction, but rather a combination of both the Zippo and

[28] Ibid (n 7) 1374
[29] 96 F. Supp. 2d 824 (N.D. Il. 2000)
[30] Ibid
[31] Ibid (n 7) 1374
[32] No. Civ. A. 399-CV-2339-L, 2000 WL 1030619 (N.D.Tex. Jul. 25, 2000)
[33] Julia Alpert, 'Determining Jurisdiction in Cyberspace: The "Zippo" Test or the "Effects" Test?' (Gladstone Bryant College, USA, 2003) 144
[34] *Hartford Fire Ins Co v California* 509 US 764 (1993)
[35] Ibid (n 22) 575
[36] Ibid (n 33)
[37] Ibid
[38] Ibid

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the effects test is being employed'[39].

3. The problem of extraterritoriality

3.1. Meaning of extraterritoriality

Apart from the above shortcomings of the effects test which appear when it is compared with the Zippo test, it has been extensively discussed that its biggest drawback is the growth of extraterritoriality. Before globalization, the effects test raised matters for transnational corporations but at that time, actions whose effects impacted beyond their territory were rare[40]. In noonday's globalized world, the Internet and particularly the e-commerce activities have some effects everywhere and so the effects doctrine creates the problem of extraterritoriality. Some journalists define 'extraterritoriality as the internationalization of domestic law'[41] whereas others simply explain it is as 'the application of domestic law to foreign conduct'[42]. Particularly interesting is the Hovekamp's view who did not define the term extraterritoriality but recognised the influential power of US law to regulate foreign affairs[43]. Gerber provided a more explicit meaning by stating that extraterritoriality is a 'unilateral jurisdictionalism [that] authorizes states to apply their own laws to conduct outside their territory under certain conditions—without the obligation to take the interests of other states into account'[44]. According to the aforementioned definitions, it is worth noting that 'the line between territorial and extraterritorial is abstruse or at least elusive in public international law' and that 'public international law rules tend to analytically and doctrinally inform judicial analysis of U.S. prescriptive jurisdiction'[45].

3.2. Disadvantages of extraterritoriality

The general application of the effects doctrine allows foreign laws to be enforced to any cyberspace user[46] and so this has given permission to near worldwide jurisdiction[47]. This creates inconsistency and

[39] Ibid
[40] Chris Reed, *Making laws for cyberspace* (1st edn, OUP 2012) 30
[41] Thanh Phan, 'The Legality of Extraterritorial Application of Competition Law and the Need to Adopt a Unified Approach' (2016) 77 LLR 425, 428
[42] Allan E. Gotlieb, 'Extraterritoriality: A Canadian Perspective'(1983) 5 NW.J.I.L.&BUS 449, 449
[43] Herbert Hovenkamp, 'Antitrust as Extraterritorial Regulatory Policy' (2003) 48 AntitrustBull 629
[44] David J. Gerber, 'Global Competition: Law, Markets, And Globalization' (2010) 5
[45] Anthony J. Colangelo, 'What Is Extraterritorial Jurisdiction' (2014) 99 Cornell.L.Rev. 1303, 1313
[46] Ibid (n 40) 31
[47] R.Y. Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 YBIL 146, 159

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confusion as it has 'dramatically expanded the potential for concurrent jurisdiction and its accompanying conflict potential'[48]. Namely, the use of the effects doctrine caused conflicts between the states and international tension[49] by destroying 'territorial restraints, while simultaneously reaffirming the necessity of territoriality as a means of determining jurisdiction'[50]. The series of court procedures in both US and France and the conflicting orders in *Yahoo! v LICRA* is the ultimate example of the real clashes between the public policies of different countries[51]. LICRA accused Yahoo!'s online auction for selling Nazi memorabilia because being visible to the users in France was contrary to the French law[52]. Moreover, extraterritorial domestic regulations 'create piece meal and patchwork solutions' to international affairs in lieu of producing a 'comprehensive regulatory scheme through compromise and state-to-state negotiation'[53]. Therefore, extraterritoriality gives rise to inconsequent settlements[54]. More significantly, the effects doctrine creates unintentional and unsuitable application of domestic laws to cyberspace which in turn reduces the respect of Internet users for the state's laws and so laws lose their normative force[55]. Foreigners seldom apprehend extraterritorial regulations to be rightful. Courts that attempt to regulate overseas issues usually face the allegation of parochial biases with the claim that those courts show favouritism towards local interests[56].

Another drawback of extraterritorial laws is their inherently undemocratic nature[57]. They force non-natives to accept the costs of national laws although non-natives have no power to enact or change those laws[58]. As Gibney has cogently claimed, extraterritoriality 'represent such a vastly different conception of law than what exists under the norms and principles of democratic rule' as it permits 'rulemakers in one country […] to pick and choose which of their laws they will apply in other countries'[59]. Foreigners means outsiders without voting rights and possibly with little capability to

[48] David J. Gerber, 'Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems' (2004) 26 HOUS.J.IL 287, 294
[49] Austen L. Parrish, 'The Effects Test: Extraterritoriality's Fifth Business' (2008) 1, 23
[50] Ibid 26
[51] *Yahoo!Inc. v LICRA* 433 F.3d 1199 (9th Cir. 2006)
[52] Ibid (n 51)
[53] Ibid (n 49) 32
[54] Ibid 23
[55] Ibid (n 40)
[56] Ibid (n 49) 33
[57] Ibid 27
[58] Ibid
[59] Mark P. Gibney, 'The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles' (1996) 19 BCI&CLR 297, 305

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influence national political procedures[60]. The decisions are taken by the national courts which are politically unaccountable and are binding to the foreign defendants. These decisions apply laws for which the defendants have not assented[61]. Therefore, 'extraterritorial laws are an affront to democratic sovereignty'[62]. Undoubtedly, extraterritorial regulations can also lead to foreign revenge[63]. Some states are 'extraordinarily sensitive to other countries' assertions of jurisdiction that seem to impinge on the sacred domain of national sovereignty' and so they may consider extraterritorial regulations as 'a symbol of humiliation'[64].

Besides, the increasing application of extraterritorial domestic laws leads to significant expenditures for corporations and public organisations[65]. International businesses should be cognizant of an extensive variety of regulations from states usually far away from where their corporation is functioning[66]. This overregulation along with the necessity for a pure compliance cost a lot to the international business[67]. Briefly, it is obvious that extraterritorial laws are mainly against the fundamental operations of jurisdictional regulations, namely to augment predictability and diminish transaction expenses[68]. Another point is the peculiarities of each judicial system and particularly that of US litigation which is the most relevant here (juries, class actions, discoveries, potential fees etc.)[69]. The problem here is the fear of foreign defendants who believe that extraterritoriality allows claimants to unlawfully mislead the outcome for sympathetic law which favours them[70]. This view that extraterritorial laws are applied unfairly and unlawfully frustrates judgment implementation[71].

3.3. Mitigating extraterritoriality

States can of course attempt to avert the efficient extraterritorial enforcement of US laws through

[60] Ibid (n 49) 28
[61] Ibid
[62] T. Alexander Aleinikoff, 'Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution' (2004) 82 TEX.L.REV. 1989, 1993
[63] Ibid
[64] Kenneth W. Dam, 'Extraterritoriality and Conflicts of Jurisdiction' (1983) 77 Am.Soc.I.L.Proc. 370, 371
[65] Ibid (n 49) 32
[66] Ibid 33
[67] Ibid
[68] Ibid
[69] Ibid
[70] Ibid
[71] Ibid 34

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diplomatic remonstrations, disapproval of judgments and endorsement of blocking statutes[72]. However, such behaviour would have a concrete impact as it 'can readily arouse foreign resentment', 'provoke diplomatic protests', 'trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields'[73]. Accordingly, states should try to limit the excessive use of extraterritorial laws. This section will examine the possible techniques that can be implemented by states in order to mitigate extraterritoriality.

A possible way to be benefited by the advantages of Internet and e-commerce is by aiming at convergence of laws[74]. This can be achieved if the lawmakers try to eliminate the dissimilarities between their own regulations and those of other countries[75]. When new measures are likely to increase cyberspace matters and significantly differ from other states' laws, both home government and from abroad can exert pressure for non-implementation[76]. Formal procedures like international treaties and regional schemes of harmonization can also achieve convergence of laws[77]. The European Union (EU) is the classic example of harmonization as the European Treaty demands Member States to apply harmonizing EU rules relatively fast[78]. Nonetheless, convergence of national law is a lengthy process and there is little prospect for a predominant international treaty on cyberspace law[79]. Extensive negotiations, political compromises and conceptual difficulties make the whole process extremely difficult[80]. It is not pointless though 'to adopt a policy that new laws should, so far as possible, converge on any international cyberspace norms which are identifiable'[81]. This can decrease the extraterritorial clashes and raise the burden on other countries to follow the norm[82].

Another way to avoid unintended extraterritoriality is by limiting a law's implementation to cyberspace[83]. Limiting the online application of a law requires to determine the people to whom the

[72] Ibid
[73] Gary B. Born, 'A Reappraisal of the Extraterritorial Reach of U.S. Law' (1992) 24 Law&Pol'yInt'lBus (1992) 1, 28-29
[74] Ibid (n 40) 37
[75] Ibid
[76] Ibid
[77] Ibid
[78] Ibid
[79] Ibid 38
[80] Ibid
[81] Ibid
[82] Ibid
[83] Ibid 39

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law apply and those who intend to be excluded from its scope[84]. This can be achieved by framing the law according to the persons' presence or property in the state[85]. This has ratified in the New Zealand Model Code for Consumer Protection in Electronic Commerce 2000 which states that a business out of New Zealand is not liable under that code[86]. The same approach has taken by the EU E-Commerce Directive[87] but without solving the problem internationally as it only applies to intra-EU cyber activities[88]. Another way of defining the law's range is regarding the use of property that is physically placed in the country[89]. Such approach indorsed by the Commentary to Article 5 of the Organisation for Economic Co-operation and Development[90]. A last localization method is to not apply the law to citizens of particular countries. This is one of the elements found in the E-Commerce Directive[91].

Recently, many journalists supported that a targeting-based approach is possibly the most appropriate way to eliminate extraterritoriality. Targeting analysis seeks to recognise the parties' intentions by assessing the stages followed for entering/ avoiding a jurisdiction[92]. Three standards are considered in identifying the criteria used to evaluate whether a website has certainly targeted a specific jurisdiction: neutral technology (for the doctrine to remain related even the emergence of new technologies);[93] neutral content (so that no bias over any interest group will appear; and foreseeability (not based on passive versus active approach but on whether targeting was foreseeable)[94]. Targeting is not a novel approach. Many US courts have already implemented targeting aspects in their decisions for Internet-based activities[95]. Specifically, in the field of e-commerce, targeting approach has become dominant among global organizations which try to develop international minimum legal standards[96]. The OECD Consumer Protection Guidelines stated for the targeting doctrine that 'business should take into account the global nature of electronic commerce and, wherever possible, should consider

[84] Ibid
[85] Ibid
[86] New Zealand Model Code for Consumer Protection in Electronic Commerce 2000
[87] Directive 2000/31/EC on electronic commerce OJ L 178/1, 17 July 2000
[88] Ibid (n 40) 40
[89] Ibid
[90] Ibid
[91] Ibid
[92] Ibid (n 7) 1380
[93] Ibid 1384
[94] Ibid 1385
[95] Ibid 1381
[96] Ibid 1382

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various regulatory characteristics of the markets they target'[97]. Notwithstanding the benefits of a bordered Internet that occurred from the targeting approach, there are also some drawbacks. States may use the targeting test to 'keep foreign influences out and suppress free speech locally'[98]. Furthermore, targeting may 'result in less consumer choice since many sellers may stop selling to consumers in certain jurisdictions where risk analysis suggests that the benefits are not worth the potential legal risks'[99]. Overall, targeting test has started replacing the effects test which increased extraterritoriality and although it 'will not alter every jurisdictional outcome, it will provide all parties with greater legal certainty and a more effective means of conducting legal risk assessments'[100].

4. Conclusion

Undoubtedly, the world has recently experienced a tremendous increase of extraterritorial laws[101]. This growth is largely attributed to the use of the effects test as the central doctrine that has initially determined the courts' scope[102]. Such a growth though, is absolutely problematic because it creates conflicts between the states, confusion in the courts and most importantly, the law loses its normative force when the online users do not respect a foreign law[103]. Thus, it is extremely essential for states to realise the need for avoiding or at least mitigating the negative effects. This can be achieved 'if national lawmakers attempt to make laws whose reach into cyberspace is understood and properly limited'[104]. However, this is not feasible to occur soon as long negotiations are needed and many political and conceptual obstacles are appeared. At the time, the most effective framework that seems capable to deal with the problems of extraterritoriality is the targeting test because 'if a cyberspace activity is targeted at particular community or at users established in particular countries, the cyberspace user can expect to be governed by that community's norms, including any national laws directly applying to the community'[105]. Therefore, it will be more possible that the Internet user will respect it and thus, attempt to obey it[106].

[97] Ibid (n 7) 1382
[98] Ibid 1405
[99] Ibid
[100] Ibid 1406
[101] Ibid (n 49) 46
[102] Ibid
[103] J Hornle, 'Making Laws for Cyberspace, by Chris Reed' (2012) 20 IJL&InfoTech 370, 372
[104] Ibid (n 103)
[105] Ibid (n 103) 373
[106] Ibid

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