

Jurisdiction for Human Rights Violations on the Internet

Gregor Heissl [\[1\]](#)

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Abstract

The lack of regional confinement is the Internet's main characteristic. Due to that the determination of jurisdiction for probable third party Human Rights violations is challenging. Existing regulations are strongly related to certain territories. This essay discusses a new approach from the US-American legal order including the aiming of the information.

1. Introduction

At the beginning of 2010 a criminal case in Italy triggered international attention. Three high ranking Google executives were prosecuted and subsequently convicted. A video-clip was placed on YouTube showing a minor with Down Syndrome being bullied by classmates. The criminal conduct of the convicts was the privacy violation of the minor, not by uploading the clip, which was performed by the classmates themselves, but by letting the clip accessible on the platform and not deleting it in time. [\[2\]](#) This case illustrates (among other things) the challenge to determine jurisdiction for third party Human Rights violations on the Internet. The ECHR requires a Member State guaranteeing protection mainly on its territory. However, concerning the issue at stake this concept offers unsatisfying solutions. Since the majority of well-known homepages and connected corporations are based in the USA, its legal order offers the longest tradition of relevant case law and judicial approaches (especially concerning libel cases). The approach to determine jurisdiction includes the aiming of the information. The essay describes this concept and examines whether it could be applied to the European system to determine jurisdiction for third party Human Rights violations on the Internet.

The lack of regional confinement is the Internet's main characteristic feature. Accordingly it is feasible to access any website, up and download data, send emails and therefore distribute information from any computer with Internet connection. This enables e.g. to post commentaries from different continents at British online-journals and publish pictures or video-clips on international sites while being in Spain. Furthermore books or (almost) any other items can be ordered to France, even though these items might be prohibited

domestically (such as material of NAZI propaganda).

This characteristic feature or better yet, this recipe of success of the Internet affects Human Rights of users and others concerned. At first glance a person's privacy being part of the right to private life is at stake. Respective interferences include e.g. publications of pictures (not aimed for the general public) on friendship-sites or video clips on YouTube having unpleasant effects on the persons concerned, as indicated in the example stated above. It remains uncontested that the minor's privacy was concerned and even violated. As well defamations (hence the mere use of words) can interfere with human rights.

Strongly intertwined with the right to privacy is the issue of data protection being concerned in numerous cases. One example is the photo documentation of entire streets (Google Street View), which e.g. was interrupted in Austria, once it became public that (additionally) personal data transferred through wireless networks was captured. [3] Furthermore the infringement of intellectual property facilitated by various websites interferes with the right to property protection. Hence, the Internet offers a broad spectrum of possible interferences with or even violations of human rights.

The ECHR guarantees in its Article 8 the right to private (and family) life. Based on that, the European Court of Human Rights (ECtHR) developed positive obligations of a State to ensure the protection from third party violations as well. [4] Therefore, the state is obliged to implement an effective and assertive system of legal remedies. [5] Leaving aside the extent of States' obligations regarding the Internet, this essay focuses on the question WHICH state is responsible, leading to the issue of jurisdiction of third party Human Rights violations on the Internet.

In a first step, different approaches of various courts are presented to illustrate on the one hand the importance of the issue at stake as well as on the other the inherent challenge for legal security and stability of law. Due to its long and extensive case law, the solutions offered by US courts are presented. Moving on to the ECHR, initially, its jurisdiction provision (Article 1) is analysed in the light of the issue at stake. Since the inadequacy of the relevant legal framework is submitted, the US-American approach is transferred to the ECHR system and scrutinised according to its applicability.

2. Different Courts' Approaches

The German Federal Court (12.12.2000, 1 StR 184/00) regarded the mere possibility to access a homepage in Germany as being sufficient that the success of the offence occurred in this country. In this case an Australian citizen was accused of denying the Holocaust on his Australia-based website. It was pointed out that the expressions affected an important domestic legal value and were capable of disturbing peace. Due to the particular relation to Germany jurisdiction was affirmed.

A similar approach has been applied by the Australian High Court (*Dow Jones/Gutnick* [2002] HCA 56) concerning an article on an Australian business man published on the online-issue of an US-American Journal. News on this website was only accessible for registered users (approx. 500.000 in total and 1.700 in Australia). The Court expressed unambiguously: If foreign websites are accessible in Australia, domestic jurisdiction is affirmed. By the same token a French Court (Tribunal de Grande Instance de Paris

20.11.2000, *UEJF & Licra/Yahoo!*) ordered to ban the access from France to any items with NAZI content on the website of the well-known Californian based Internet platform. Since the homepage can be accessed from France, French law has to be applied. [6]

In contrast, the Austrian Administrative Court (22.11.2007, 2005/09/0181) took the physical location of the activity instantaneous preceding the publication into account. If the pressing of the Enter-button or the mouse-click happened in a certain territory, its jurisdiction was affirmed. The physical location of the server was considered to be important by Swedish Courts in the famous 'Pirate Bay' decision, where homepage operators were sentenced in connection with substantial violations of intellectual property law. [7]

3. Internet Jurisdiction in the USA

Due to the lack of clear statutory guidelines, the issue of Internet jurisdiction is being developed by courts. In this essay mainly Supreme and Circuit Court rulings are considered; only exceptionally the ones' of lower ranking courts. In the USA 13 Circuit Courts in total are implemented, each including several States. The vast majority of the cases concern libel and intellectual property violations. In the development particularly two different aisles are to be highlighted: on the one hand, the reference to the extent of interactivity of the website and the effects of the information on the other. Although most cases deal with issues of domestic jurisdiction, the same principles apply with abroad connections (*Yahoo!/La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 [9th Cir. 2006]) and *Pebble Peach/Caddy*, 453 F.3d 1151, 1158 [9th Cir. 2006]).

3.1 Constitutional Background

The constitutional base for jurisdiction is the due-process-clause of the 14th amendment of the US constitution, according to which States are prohibited to 'deprive any person of life, liberty, or property, without due process of law'. The famous decision *International Shoe/Washington*, 326 US 310, 316 (1945), substantiated this guideline by requiring 'certain minimum contacts' with the forum if the person concerned

'is not present within (its) territory', in order not to offend 'traditional notions of fair play and substantial justice'. In this context the relationship among the defendant, the forum, and the litigation has to be considered (*Shaffer/Heitner*, 433 US 186, 204 [1977]).

Additionally the notion of foreseeability is at stake, which was especially in the equally important decision *World-Wide-Volkswagen/Woodson*, 444 US 286 (1980) the crucial point. A couple had purchased a car at a New York salesman (only operating there) and was involved in an accident in Oklahoma 2000 km away. The following product liability suit filed in Oklahoma pointed expressively out that not only the mere possibility that an item finds its way to the forum is decisive for the due process analyses. Moreover it is required to 'reasonably anticipate being hauled into court there'.

3.2 Interactivity of the Website

The increase of commercial online activity led to an extension of the Supreme Court's guidelines. [8] One district court decision worth accentuating (*Zippo Manufacturing/Zippo Dot Com*, 952 F. Supp. 1119 [W.D. Pa. 1997]) concerned a website domain dispute. The California based entity *Dot Com* operated a couple of homepages all including the name *Zippo*, where news was available for subscribed and paying users. The corporation *Zippo Manufacturing* produces among other things the famous *Zippo*-lighter. At the forum of its residence (Pennsylvania) *Zippo Manufacturing* filed for trademark violations.

The Supreme Court guidelines would have resulted in the denial of jurisdiction. All offices, employees and servers of *Dot Com* are based in California and only two per cent of the total amount of 140.000 paying users are in Pennsylvania. The court newly proposed a sliding scale to determinate jurisdiction:

The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involves the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

As an example of a 'passive' website the case of a Missouri based jazz-club operator was stated, who's homepage merely informed on events and ticket prices (*Bensusan Restaurant/King*, 126 F.3d 25 [2d Cir. 1997]) concerning the mostly identical domain of a more famous Club in New York City). In contrary, the homepage of *Dot Com* was regarded as (inter)active, because contracts were closed with users to repeatedly transfer news. Hence, doing business over the Internet was the main incentive and criteria. Due to that Pennsylvania's jurisdiction was approved.

Subsequently in a multiplicity of cases the 'Zippo test' was applied (for an exhaustive overview see Hart, *Internet Law*, 612 f) but later increasingly criticised, mainly by Catherine Ross Dunham (*Zippo-ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis*, 43 *University of San Francisco Law Review* 559-584 [2009]) and Michael Geist (*The Shift Toward "Targeting" for Internet Jurisdiction*), in Thierer/Wayne Crews Jr. [eds] *Who Rules The Net?* [2003] 103). The main reasons concern the resulting borderless jurisdiction on cases of interactive homepage operators, leading to the insecurity to be hauled into court wherever the

plaintiff prefers. The courts moved on to take the effects of websites and information rather than the interactivity into account.

3.3 Effects-Test

This development finds its base in the US-Supreme Court *Calder/Jones*-Decision, 465 US 783 (1984). A Florida based magazine with a large circulation in California (approx. 600,000 copies) published an article on a Californian actress who subsequently claimed libel. The Court considered the focus of the article combined with its effects to evaluate jurisdiction:

'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.'

Writing and editing of the article were intentional actions and 'expressly aimed' at California. Due to the knowledge that the brunt would be felt in the State in which the person concerned lived and worked (and in which the magazine had its largest circulation), it was 'reasonable (to) anticipate being hauled into court there' (789 f).

Hence, the *Calder* Test applies three different factors to assess jurisdiction and all of them have to be fulfilled, namely (1) The act has to be intentional. (2) The action has to be expressly aimed at the forum. (3) The brunt of injury has to be felt in the forum which is known to the acting person. The last requirement set out in *Calder* was surprisingly softened in *Keeton/Hustler*, 465 US 770 (1984), decided on the same day and similarly drafted by the then Chief Justice Rehnquist, concerning comparable circumstances. It was stated that a victim of a libel is free to choose any forum 'with which the defendant has certain minimum contacts' as long as the 'traditional notions of fair play and substantial justice' are not offended (780 f). [9] Since the beginning of the new century this test is applied not only to libel, but to any other case of tort related to the Internet as well.

The requirement of the intentional action is hardly controversial. Similar to the writing and editing of an article in *Calder*, the operating of a website (*Pebble Beach/Caddy*, 453 F.3d 1151 [9th Cir. 2006]; *Rio Properties/Rio Int'l Interlink*, 284 F.3d 1007 [9th Cir. 2000]) or only the uploading of special parts are included, as well as the publication of any contribution (among others *Tamburo/Dworkin*, 08-2406 [7th Cir. Apr 8, 2010]) and the mere registration of a domain (*Panavision/Toeppen*, 938 F.Supp. 616 [S.D.Cal. 1996]).

However, of crucial importance is the evaluation of 'expressly aiming' of the action or information. The mere accessibility is not regarded to be sufficient (*Young/New Haven Advocate*, 315 F.3d. 256 [4th Cir. 2002]) since 'something more' is what the Supreme Court described as 'express aiming' at the forum state' (see *Pebble Beach/Caddy*, 453 F.3d 1151, 1156 [9th Cir. 2006]). One respective example is the registration of a domain distinctive with a domestic entity, with the mere intention to alienate it for a substantial fee (*Panavision/Toeppen*, 938 F.Supp. 616 [S.D.Cal. 1996]). This criterion is easily fulfilled, if persons or entities are directly targeted by information on websites (e.g. *Pebble Beach/Caddy*, 453 F.3d 1151 [9th Cir. 2006]). Defaming and libel comments published on an out-of-state website concerning a person or corporation are expressly aimed to the

region of its base (*Tamburo/Dworkin*, 08-2406 [7th Cir. Apr. 8, 2010]; *Amway/Procter & Gamble*, 346 F.3d 180 [6th Cir. 2003]). As well the mere distribution of emails to defaming material of a person on a website was regarded to be sufficient (*Nicosia/De Rooy*, 72 F. Supp. 2d 1093 [N.D. Cal. 1999]).

However, more challenging is the issue in cases of intellectual property violations. In *Brayton Purcell/Recordon*, 07-15383 (9th Cir. Aug. 5, 2009) legal information was plagiarised from a law firm's website and placed on the homepage of a competitor. The court recognised an action to place the two firms in competition and to create confusion among potential clients. Hence, the expressly aiming criterion was affirmed. [10] But the acts do not necessarily have to be wrongful. In the famous decision *Yahoo!/La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1209 (9th Cir. 2006) a French Court order concerning the well-known entity was sufficiently purposefully directed towards the forum, where it has its base.

The lack of the expressly aiming criterion becomes especially obvious in the famous *Schwarzenegger/Fred Martin Motor* decision, 374 F.3d 797 (9th Cir. 2004), even though not relating to the Internet. A newspaper only distributed in certain regions of Ohio, published an image of the California Governor at that time and actor with Austrian roots, who subsequently filed a suit in Los Angeles. Since the newspaper did not show any connection to the forum and was not available there, jurisdiction was denied. The knowledge of where the person concerned lives was not sufficient, since the newspaper was merely orientated to a local market far away.

Hence, getting back to the Internet, the lack of any relation to the forum leads to the lack of jurisdiction. This is especially the case, if nothing on the homepage can be connected which was decisive e.g. in *Pebble Beach*. An English B&B operator provided information on his homepage (www.pebblebeach-uk.com) on the three guestrooms, their prices and a menu including wine list. A tool for online reservations was not available, merely the phone number was provided. The California based Golf Resort filed a suit, due to an alleged intellectual property violation. In the courts' view, the mere use of a domain name without any further relation does not fulfil the expressly aiming requirement. Therefore jurisdiction was denied (*Pebble Beach/Caddy*, 453 F.3d 1151 [9th Cir. 2006]). The mere ending of the domain '.com' does not suffice to assume US-American jurisdiction.

Moreover, the formation of a contract with a non-resident party is not, standing alone, sufficient to create jurisdiction. In *Burger King/Rudzewicz*, 471 US 462, 478 (1985), it was stated unambiguously:

If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. By the same token, due to lack of any expressly aiming of an eBay offer, its acceptance is also not enough (*Boschetto/Hansing*, 539 F.3d 1011 [9th Cir. 2008]).

Again relating to eBay, a motion alleging an offer to violate intellectual property sent to eBay based in California, can be considered to be expressly aimed at the forum of the seller (*Dudnikov/Chalk Vermilion*, 514 F.3d 1063 [10th Cir. 2008]). A Colorado based corporation offered items on eBay, whose servers are based in California. From

Connecticut a complaint concerning intellectual property violations was sent to eBay, resulting in the subsequent suspension of the offer. After brief mail correspondence the seller filed a suit in Colorado. Applying a very lively explanation, the (second instance) court affirmed jurisdiction:

Thus, while, as defendants emphasize, the (complaint) formally traveled only to California, it can be fairly characterized as an intended means to the further intended end of cancelling plaintiffs' auction in Colorado. In this way, it is something like a bank shot in basketball. A player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket. Here, defendants intended to send the (complaint) to eBay in California, but they did so with the ultimate purpose of cancelling plaintiffs' auction in Colorado. Their 'express aim' thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard, but to make a basket. [11]

Due to the lack of highest instance case law regarding jurisdiction on the Internet, the described criteria are handled differently from court to court. [12] Anyhow, to achieve a comprehensive overview, variations in details were skipped.

4. Internet Jurisdiction and ECHR

4.1 Article 1 ECHR

The Member States of the ECHR are obliged to 'secure to everyone within their jurisdiction' the guaranteed Human Rights standards. The first benchmark of this test is the territory. Hence, not only citizens, but residents or any person being on the soil are covered. Additionally the State is responsible for any region abroad where effective control is exercised. [13] In connection with Internet activity again the territory is considered. In *Perrin*, 18.10.2005, 5446/03, concerning a conviction of a French citizen for publishing an obscene article on an US-American homepage, while being in the UK, the ECtHR stated:

In the present case, the Court notes that the applicant was a resident of the United Kingdom. As a result, he cannot argue that the laws of the United Kingdom were not reasonably accessible to him. Moreover, he was carrying on a professional activity with his internet site and could therefore be reasonably expected to have proceeded with a high degree of caution when pursuing his occupation and to take legal advice.

This concept strongly orientated and focused on the territory offers unsatisfying solutions for the issue at stake. A State can hardly exercise effective control over the Internet, all its websites and content. Moreover, to be responsible of any information published on the Internet concerning a person on the territory, would lead to an unreasonable and unfeasible burden. Hence, a required constraint for the jurisdiction regarding third party Human Rights violations can be shown by applying the US-American approach.

4.2 Applicability of the US-American Approach to the ECHR System

Even if adoptions of precise concepts from foreign legal orders bear its challenges not only due to difference in backgrounds, the 'expressly aiming' approach has its advantages. Since merely the application of the core is affirmed, the separate criteria of intentional actions and the knowledge of the location of the brunt are excluded, but are dealt with in connection with the main assessment. Similar to the *Calder* test based on the constitutional due process clause, the point of reference in the European System could be the principle of fair trial (Article 6 ECHR), demanding a clear and foreseeable regulation of jurisdiction to avoid being hauled into court arbitrarily. The proposed concept can be summarised as follows: Jurisdiction is not primarily related to affection, residents or further matters of the State but on the focus of the information. Therefore the principles of protection and territory are diminished by considering the intention being necessary due to the Internet's border exceeding character. Once a resident is in connection with the information, not related at all to the State or the region, jurisdiction will be denied.

The main criteria for the application to human rights violations will be sketched exemplarily. First of all, the nature of website or more precisely its orientation is of primary concern, assessed by a number of aspects to be considered altogether. Even though the world wide accessibility of any homepage is the main criteria of the Internet, the majority of its websites are focused on particular regions. [14] This is especially at stake with online versions of newspapers. The homepage of the *Giornale di Sicilia* (www.gds.it) is as clearly orientated to Sicily/Italy as the *Galway Advertiser* (www.advertiser.ie/galway) to the County Galway in Ireland and www.stuttgarter-zeitung.de to the region around Stuttgart in Germany. [15] Domain endings (e.g. '.com') alone are hardly suitable to lead to a territorial confinement, since they are subject to free disposal. [16] Furthermore regionally assignable groups of people can be taken into account as well. An example would be the publication of a picture (presumable privacy violation of the person visible) on a Facebook profile only accessible to a limited number of users based in a particular region. By the same token, websites of sporting clubs are significant mainly in certain areas.

Additionally the language has to be considered, but with caution. Not every site in English is orientated at English-speaking countries and not every homepage in German is focused on Austria, Germany, Liechtenstein, Switzerland or Southern Tyrol. For example the homepage of the Turkish language Journal *Yeni Hareket* aims at Turks and Austrian citizens with Turkish roots in Austria. [17] As soon as the homepage is not orientated at a certain territory but at the general public, the nature of the information has to be considered as well. [18] This refers primarily to the affection of persons, by e.g. a defaming article on generally orientated websites as well as the recognisability on pictures or movies on YouTube. Information can as well be focused on further matters of a State's concern, such as the proclamation on Facebook of a demonstration in Vienna. [19]

4.3 Consequences of this Approach

The consequences of this approach to third party Human Rights violations will be illustrated in several examples. An allegedly libellous article on the website of the newspaper *Miami Herald* (www.miamiherald.com) concerning a Belgian citizen based in Brussels would not fall into the responsibility of Belgium to protect the person's privacy.

The newspaper and the respective website are merely of regional importance and the article is not expressly aimed to Belgium, since there is no relation at all. An affirmation of Belgian jurisdiction would lead to an unforeseeable and incalculable amount of possible cases in different States and legal orders.

As soon as the article would encourage offending the Belgian resident, the orientation would shift to the location of the person concerned. Even though this is unambiguously applicable for physical actions, it is trickier if the call encourages expressing its dissenting opinion via email, phone or mail. This is e.g. the case in the urgent actions of amnesty international. [20] But as well in the latter cases the message is orientated to a particular region or person, since the aim is to achieve different acts, acquiescence or omissions. Similarly, once the intensity of libel crosses a certain line, it is submitted that the intention is mainly to brunt, therefore the orientation shifts to the residence as well.

The case referred to in the introduction concerning the condemnation of high ranking Google executives after the publication of a video-clip on *YouTube*, showing the bullying of a minor with Down Syndrome, would lead to Italian jurisdiction following this proposed theory as well. Since the website is not aimed at a particular region or State but to the general public, the focus regarding jurisdiction is on the person concerned.

Contracts closed via eBay would lead to jurisdiction at the location of the buyer according to this approach. The offer is not aimed at any particular person or region, but at the general public. In case of assuming jurisdiction that would constitute an unforeseeable risk of the seller, to be hauled into court in different legal orders. Hence the buyers' only possibility is to sue at the forum of the seller. But that risk is already evident at the time of closure of the contract (when the location of the seller is indicated) and can therefore be calculated.

However, since the websites of the *Dow Jones* journals are not expressly aimed at Australia the allegedly libellous article on an Australian citizen would not lead to Australian jurisdiction. Similarly, concerning the condemnation of the Australian citizen in Germany for the publication of an article on his Melbourne based website, its aiming and orientation would need to be taken into account. It would, as far as the latter detail can be assessed, lead to the denial of German jurisdiction.

The last example indicates the boundaries of the approach set out. It would exclude the condemnation of possibly criminal expressions of opinions (e.g. the denial of the Holocaust) in websites orientated at the general public, as well as for publication of child pornographic material in the Internet. Neither focused on a particular region, nor are the respective websites. In similar cases the principle of territoriality has to be applied and the location of the physical action leads to jurisdiction. However, this approach bears its challenges. Due to the inclusion of the publishers' intention, more efforts and difficulties of proof are expected.

5. Summary

Present concepts to determine jurisdiction for third party Human Rights violations focus primarily on the territory of the State. This, however, can hardly be applied on the Internet. An approach of the US-American legal order includes the aiming of the

information. Even if this path might not be the last conclusion of wisdom bearing certain challenges, it leads to an effective and foreseeable determination of jurisdiction for third party Human Rights violations on the Internet.

[1] Dr. Gregor Heissl, E.MA, works at the Institute for Public Law, State and Administrative Theory, University of Innsbruck, Austria. The essay was drafted during a research project at the University of California, Berkeley, generously funded by the Marshall-Plan-Foundation.

[2] Italy Convicts Google Execs for Down Syndrome Video, Reuters 24.2.2010, <http://www.wired.com/epicenter/2010/02/google-executive-convicted-in-italy-for-downs-video/> (15.3.2011)

[3] Karin Tzschentke, *Österreich stoppt Google Street View*, Der Standard 28.5.2010, 20, dazu Stefan Ernst, *Google StreetView: Urheber- und persönlichkeitsrechtliche Fragen zum Straßenpanorama*, Computer und Recht 178-184 (2010)

[4] E.g. ECtHR 16.3.2000, *Özgür Gündem*, 23.144/93; 21.2.2002, *Schüssel*, 42.407/98; 24.6.2004, *von Hannover*, 59.320/00; 15.11.2007, *Pfeifer*, 12.556/03.

[5] E.g. ECtHR 4.12.2003, *MC*, 39.272/98; 26.3.1985, *XY*, 8978/80

[6] An US-Circuit Court, *Yahoo!/La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) later ruled, that the French Court order must not be executed in the USA, since it violates freedom of expression. See e.g. Marc H. Greenberg, *A Return to Lilliput: The Licra v. Yahoo Case and the Regulation of Online Content in the World Market*, 18 Berkeley Technology Law Journal 1191 (2003); Joel Reidenberg, *The Yahoo Case and the International Democratization of the Internet*, Fordham Law and Economics Research Paper No.11 (Apr. 2001)

[7] Stockholms Tingsrätt, 17.4.2009, Court of Appeal 26.11.2010, refer to Göcke, Katja, *Die Zukunft des Urheberrechts - Das Urteil im Pirate Bay-Verfahren*, 69 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 865-882 (2009). At present the case is pending at the Swedish High Court.

[8] Earlier decisions have been *Panavision/Toeppen*, 938 F.Supp. 616 (S.D.Cal. 1996); *Bensusan Restaurant/King*, 126 F.3d 25 (2d Cir. 1997) und *Maritz/Cybergold*, 1996 U.S. Dist. Lexis 14976 (E.D.Mo. Aug. 19, 1996). For an exhaustive overview see Jonathan D. Hart, *Internet Law: A Field Guide* (2007) 612 f. In one of them the location of the server was of chief importance: *CompuServe/Patterson*, 89 F.3d 1257 (6th Cir. 1996), concerned a software producer who had uploaded data to a server in Ohio to be sold on the Internet. In connection with the uploading an application at the website together with the closing of a standardised contract was performed. The court regarded the relationship to be 'intended to be ongoing in nature' and not only 'a one-shot affair' (1265). This was sufficient to develop 'minimum contacts' to Ohio.

[9] Anyhow, the location of brunt is partly taken into account. The harm connected to the purchase of a domain with the mere intention to resell it to a corporation with a like name, occurred at the base of the latter (*Panavision/Toeppen*, 938 F.Supp. 616 [S.D.Cal. 1996],

see Hart, *Internet Law* [2007] 655). The harm related to an intellectual property violation occurred at the residence of the infringed person, as long as the perpetrator is aware of that (*Brayton Purcell/Recordon*, 07-15383 [9th Cir. Aug 5, 2009], but refer to the *dissenting opinion* in that case FN 10). See as well *Dudnikov/Chalk Vermilion*, 514 F.3d 1063 (10th Cir. 2008) und *Yahoo!/La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

[10] The dissenting opinion of Judge Reinhard is worth considering as well: 'The majority opinion would permit a defendant who resides in Ohio, Florida, or Maine, thousands of miles from the Ninth Circuit, to be sued in the Northern District of California based on nothing more than his knowledge that the plaintiff, whose intellectual property rights he allegedly infringed resides in San Francisco. Under the majority's opinion, every website operator faces the potential that he will be hailed into far-away courts based upon allegations of intellectual property infringement, if he happens to know where the alleged owner of the property rights resides. Due process and basic principles of fairness prohibit such an expansive exercise of personal jurisdiction.'

[11] See Cassidy, Teresa J., *Civil Procedure - Effects of the Effects Test: Problems of Personal Jurisdiction and the Internet: Dudnikov v. Chalk Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008) , 9 Wyoming Law Review 575-598 (2009); similarly *Bancroft & Masters/Augusta National*, 223 F.3d 1082 (9th Cir. 2000).

[12] Hence, some courts interpreted the 'express aiming'-requirement fairly broadly, requiring only conduct that is 'targeted at a plaintiff, whom the defendant knows to be a resident of the forum state' (*Bancroft & Masters/Augusta National*, 223 F.3d 1082, 1087 [9th Cir. 2000]). Others have read it more narrowly to require that the forum state is the 'focal point of the tort' (*Dudnikov/Chalk Vermilion*, 514 F.3d 1063, 1074 [10th Cir. 2008]). See as well *Tamburo/Dworkin*, 08-2406 [7th Cir. Apr 8, 2010]. Occasionally it is distinguished between purposeful avilment and purposeful direction e.g. *Brayton Purcell/Recordon*, 07-15383 (9th Cir. Aug 5, 2009); *Dudnikov/Chalk Vermilion*, 514 F.3d 1063, 1071 (10th Cir. 2008); *Boschetto/Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008) and *Yahoo!/La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006). In tort and some further cases it was assessed whether the claim arose out of or related to the forum-related activities and whether the exercise of jurisdiction comports with fair play and substantial justice (*International Shoe/Washington*, 326 US 310, 316 [1945]). E.g. *Schwarzenegger/Fred Martin Motor*, 374 F.3d 797, 802 (9th Cir. 2004); *Tamburo/Dworkin*, 08-2406 (7th Cir. Apr. 8, 2010); *Dudnikov/Chalk Vermilion*, 514 F.3d 1063, 1080 (10th Cir. 2008) and *Yahoo!/La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

[13] See ECtHR 18.12.1996, *Loizidou*, 15.318/89; 12.12.2001, *Bankovic'* (GC), 52.207/99; 8.7.2004, *Ilascu* (GC), 48.787/99; 16.11.2004, *Issa*, 31.821/96; 12.5.2005, *Öcalan* (GC), 46.221/99; 2.5.2007, *Behrami and Saramati* (GC), 71.412/01 and 78.166/01. Refer to Rick Lawson, *Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights*, in Coomans/Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 83; Georg Ress, *State Responsibility for Extraterritorial Human Rights Violations - The Case of Bankovic*, 6 Zeitschrift für Europarechtliche Studien 73 (2003); Gerhard Thallinger, *Grundrechte und extraterritoriale Hoheitsakte* (2008).

[14] This idea was taken from *Pebble Beach/Caddy*, 453 F.3d 1151 (9th Cir. 2006).

[15] Similarly in *Schwarzenegger/Fred Martin Motor*, 374 F.3d 797, 802 (9th Cir. 2004), it was argued that the newspaper was merely orientated to a certain region of Ohio.

[16] Even if the domain www.pebblebeach-uk.com had a '.com'-ending (which would point to the USA), the homepage was merely orientated to a region in the UK (*Pebble Beach/Caddy*, 453 F.3d 1151 [9th Cir. 2006]).

[17] See www.yenihareket.com as well as http://www.ots.at/presseaussendung/OTS_20100901_OTS0162/yeni-hareket-die-erste-tuerkische-zeitung-in-der-oesterreichischen-auflagenkontrolle-oeak (15.3.2011).

[18] Similarly *Tamburo/Dworkin*, 08-2406 (7th Cir. Apr 8, 2010) and *Amway/Procter & Gamble*, 346 F.3d 180 (6th Cir. 2003)

[19] On June 18th, 2009 a candle-lit demonstration merely announced on Facebook around the Austrian Parliament took place. See 'Lichterkette ums Parlament, Wachrütteln für eine anderes Österreich' Der Standard, 12.6.2009, <http://derstandard.at/1244460494440/Lichterkette-ums-Parlament-Wachruetteln-fuer-ein-anderes-Oesterreich?seite=10> (15.3.2011).

[20] Refer to www.amnesty.de/urgent-actions-0 (15.3.2011)

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