Chapter 4 Many Destinations But No Map

1. Notice of Foreign Legal Obligations

Online publications are often about people, and as it is perhaps human nature to find greater pleasure in writing and reading scandalous stories reflecting upon the wickedness of one's fellowmen than about the Mother Teresas of this world, defamatory material abounds in cyberspace. Furthermore given that the publishers of such stories, their victim as well as readership are more often than not located in different States, a relatively substantial body of transnational defamation cases has built up. Perhaps by now not surprisingly, in these cases courts have struggled with the issue of how to accommodate transnational defamatory publications within the parameters of national defamation law – parallel to those discussions which have taken place in trademark law, consumer contract law and in the various areas of public or criminal law. Bar minor variations, the common themes running through these areas are undeniable. Again in online defamation cases there is a strong judicial endorsement of the country-of-destination approach despite the protest of the online publishing community and many persuasive arguments to the contrary. Again, there is a tension between the moderate country-of-destination approach (concerned with the protection of online publishers from overregulation) and the outright country-of-destination approach (concerned with the protection of online 'consumers' from injurious foreign content). In this chapter the country-of-destination approach moves centre-stage. It discusses what is identified as the main challenge to the country-of-destination approach, namely notice: the ability of online publishers to foresee and know their foreign legal obligations. The question addressed is: to what extent is the imperative of notice reconcilable with the country-of-destination approach? Again, the discussion is still primarily concerned with the regulatory claims States make in principle (adjudicative and legislative jurisdiction) and not with the question of whether those claims can in fact be enforced (enforcement jurisdiction), explored in Chapter 6.

Defamation provides an ideal illustration of the pitfalls of the country-of-destination approach in the online context and of possible solutions - partly simply by virtue of the fact that judges have had to confront it head on[1] (and for once not mainly from

[1] There is a substantial body of secondary literature on the topic. A few select examples: Matthew Collins, *The Law of Defamation and the Internet* (2nd ed, Oxford: Oxford University Press, 2006); UK Law Commission, *Defamation and the Internet - A Preliminary Investigation*, Scoping Study No 2

the US[2]). This is based on the fact that in transnational defamation cases adjudicative and legislative jurisdiction (or, in the language of private international lawyers, jurisdiction and choice of law) are often tightly intertwined. Under English and Australian common law, for example, whether a transnational defamation dispute should be heard in the forum is decided mainly by reference to the location of the defamation,[3] which also provides the test for the substantive law governing the tort.[4] This close interrelationship has had a significant impact on the type and tenor of arguments advanced by the parties and courts in online defamation cases. The reason is that if the issue is 'only' one of adjudicative jurisdiction and clearly separate from the applicable law, the main concerns underlying the arguments are those of procedural fairness to both parties, relative practicalities, cost and convenience.[5] Adjudicative jurisdiction has at least in principle no bearing on which substantive law governs the case and thus its outcome and substantive justice; whether the dispute is heard here or there, in theory the choice of law rules should yield the same

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(December 2002), esp Part IV http://www.lawcom.gov.uk/docs/defamation2.pdf; Oren Bigos, 'Jurisdiction over Cross-Border Wrongs on the Internet' (2005) 54 *International and Comparative Law Quarterly* 585; Richard Garnett, 'Dow Jones & Company Inc v Gutnick – An Adequate Response to Transnational Internet Defamation?' (2003) 4 *Melbourne Journal of International Law* 197; David Rolph. 'The Message, Not the Medium: Defamation, Publication and the Internet in Dow Jones & Co v Gutnick' (2002) 24 *Sydney Law Review* 263; Damjan Mozina, 'Persönlichkeitsverletzungen im Internet – Die Internationale Zuständigkeit' (2004) 1 *Slovenian Law Review* 77; Holger P Hestermeyer, 'Personal Jurisdiction for Internet Torts: Towards an International Solution' (2006) 26 *Northwestern Journal of International Law and Business* 267. My papers on various aspect of online defamation: 'Ignorance is no Defence but is Inaccessibility? On the Accessibility of Law in the Transnational Online Context' (2005) 14 *Information & Communications Technology Law* 27; 'Who has the Right to Govern Online Activity? - A Criminal and Civil Point of View' (2004) 18 *International Review of Law, Computers and Technology* 387; 'Defamation on the Internet - Nice Decision, Shame about the Reasoning. Dow Jones & Co v Gutnick' (2003) 52 *International and Comparative Law Quarterly* 1049; 'Defamation on the Internet – A Duty Free Zone After All? Macquarie Bank Ltd & Anor v Berg' (2000) 22 *Sydney Law Review* 119.

[2] The First Amendment to the US Constitution makes it difficult to succeed with defamation actions in the US, and thus quite a few Internet cases which might otherwise have arisen in the US shifted elsewhere: *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; *Harrods Ltd v Dow Jones & Co* Inc [2003] EWHC 1162 (QB); *Lewis & Ors v King* [2004] EWCA Civ 1329 (CA).

[3] Note the location of the tort in the forum tends to be only one of a number of heads upon which a court can rely to found personal jurisdiction over the foreign defendant. But at the next *forum non conveniens* inquiry, there is a general presumption that the natural forum in which to try the dispute is where the tort was committed: *Berezovsky v Michaels* [2000] 1 WLR 1004. 1013f; following *The Albaforth (Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey)* [1984] 2 Lloyds's Reports 91, 96; see also *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 47f. In the US the inquiry on personal jurisdiction is not as obviously linked to the choice of law inquiry. But as personal jurisdiction over the foreign defendants is generally established on the basis of special jurisdiction, it is necessary to show that the 'minimum' contacts with the forum are those which gave rise to the particular cause of action. This invariably means that the cause of action arose in the forum, which in turn means that the substantive law applied to the case is also forum law.

[4] In Australia only recently adopted: *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551. See also Bigos, above 2, 604, where the author argues that the *lex loci delicti* should be interpreted differently for the jurisdiction and for the choice of law inquiry. This seems to unnecessarily complicate an already highly technical area of law and judicial practice does not support that differentiation.

[5] This is not to say that in reality 'jurisdiction' is often decisive and, once decided, cases are often settled out of court. Bigos, above n 2, 587. 'No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet' (2003) 116 *Harvard Law Review* 1821, 1824f (note).

substantive law and thus the final result should be the same.[6] This general theoretical assumption has meant that adjudicative jurisdiction has always tended to be more expansive than legislative jurisdiction, justifiable by weaker links with the State.[7] Most private international law regimes operate on the assumption that in respect of most civil disputes a number of courts could conceivably be appropriate fora to hear the matter. In contrast, only one set of substantive laws can govern each dispute.[8] So in the online context, in legal areas where adjudicative and legislative jurisdiction are more clearly separate inquiries, even a weak nexus adopted for adjudicative jurisdiction can be, and has been, defended on the basis that it does not necessarily expose online publishers to innumerable substantive laws; that is a different issue. Typically, the consumer provisions in the EC Jurisdiction Regulation[9] (which in the opinion of the author provide a strong connection) have been defended along those lines:

'the Jurisdiction Regulation only regulates international *jurisdiction* in civil and commercial matters involving cross-border activities and elements, not issues of choice of law. The choice of law in consumer contracts is regulated by the Rome Convention, so it is incorrect to maintain that the consumer provisions in the Jurisdiction Regulation will make e-commerce retailers subject to fifteen different consumer *laws*.'[10]

While this argument is not entirely persuasive,[11] it certainly carries no weight in those transnational defamation cases where adjudicative and legislative jurisdiction go hand in hand.[12] In these cases courts could not avoid facing squarely the issue as to what can reasonably be expected of online providers in terms of compliance with foreign law. Can they be expected to know and comply with the laws of all the States where their sites are accessible or only of those States which were specifically targeted by them or, perhaps going even further - as online publishers have argued - only with the laws of the one State from which their sites originates? Online defamation puts into sharp focus one of the most central issues in the Internet governance debate which ultimately underlies most, if not all, legal areas affected by

[6] The reality is very different: Andrew Beech, 'Discretion in the Exercise of Jurisdiction: Recent Developments' (1989) 19 *Western Australian Law Review* 8, 21, where the author notes that beyond the practical burden on one of the parties of having to litigate abroad, the place of litigation often affects significantly the substantive outcome given (1) the application of forum law to procedural matters e.g. quantification of damages, (2) the application of forum choice of law rules, (3) the potential exposure to forum mandatory laws irrespective of the applicable law according to ordinary choice of law principles. Michael C Pryles, 'Internationalism in Australian Private International law (1989) 12 *Sydney Law Review* 96, 106, where the author refers to the homeward trend of judges, i.e. 'a natural tendency on the part of judges and lawyers to prefer their own laws and legal institutions to those of foreign countries.'

[7] For example, in many Commonwealth countries adjudicative jurisdiction may be based on the damage suffered in the forum, even if the wrong was committed elsewhere.

[8] There are exceptions as, for example, when a contractual choice of the applicable law is partly upheld and partly supplementary by mandatory rules of the forum.

[9] Art 15(1)(c) of the EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, No 44/2001.

[10] Joakim ST Oren, 'International Jurisdiction over Consumer Contract in e-Europe' (2003) 52 *International and Comparative Law Quarterly* 665, 667 [internal footnotes omitted, emphasis in the original].

[11] See above n 6, and also Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations COM(2005) 650 final, which in respect of consumer contracts follows the approach taken in the EC Jurisdiction Regulation.

[12] See above n 3.

the transnationality of the Internet: the laws of which States should online actors comply with? What can reasonably be expected of them?[13]

This question exposes the main substantive competing interests operating in this field: on the one hand, States have an interest in protecting their residents (through the provision of private actions and criminal prosecutions) from 'harmful' foreign Internet activity (as defined differently in different States). On the other hand online publishers have an interest in being able to order their affairs in accordance with law[14] – a matter in which States themselves should have a significant interest as it is vital both for the legitimacy and effectiveness of their laws. But online publishers can order their affairs in accordance with law if, and only if, first, the law's application is foreseeable and, second, they actually foresee and know it. In the Internet context, either may be difficult - depending on the type of country-of-destination approach adopted by States. If an outright country-of-destination approach is adopted, a law's application is easily foreseeable:[15] the laws of every State where the site can be accessed, which is often every State. But actually foreseeing, knowing and ultimately complying with those laws is practically impossible.[16] That problem is avoided, or ameliorated, if a more moderate country-of-destination approach is adopted. Then fewer legal regimes apply, but can they be foreseen? Also are States happy to forego competence when a site has an effect, albeit minor, within their territory? But let us start at the beginning.

2. Foreseeability of Foreign Defamation Law

A. Foreseeability and the Rule of Law

In most legal systems there is the maxim that ignorance of law is no defence. Regardless of whether or not you actually knew the legal consequences of your actions you may be held legally accountable for them. It is a fair maxim. It prevents individuals from relying on their ignorance to avoid responsibility which would reward the ignorant while punishing the knowledgeable. It also creates an incentive for individuals to familiarise themselves with their legal obligations.

While this is fairly uncontroversial, this maxim cannot be seen in isolation from another feature of any legal system which seeks to uphold the rule of law. There

[13] Defamation cases have arguably raised this question with even more urgency than the transnational online criminal cases where the discussion remains more theoretical than real, given that there is no prospect at all of enforcing State assertions of adjudicative/legislative jurisdiction over foreign actors. But even in defamation cases, there is often no willingness to enforce foreign judgments, esp in the US: see Jeremy Maltby, 'Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts' (1994) 94 *Columbia Law Review* 1978; Jeff Sanders, 'Extraterritorial Application of the First Amendment to Defamation Claims against American Media' (1994) 19 *North Carolina Journal of International Law and Commercial Regulation* 515.

[14] The general assumption made in this chapter is that online actors on the whole would prefer to act legally irrespective of whether they could be forced to do so.

[15] On the difficulty of actually foreseeing foreign legal rules, see below Part 4.

[16] Such compliance would only in rare instances be logically impossible: when the law of one State requires what the law of another State forbids. Generally, the most common 'conflicts' are where one State imposes a more stringent duty than another State, which means that the publisher can comply with both laws by complying with the more stringent one.

must not be secret laws: legal consequences must be foreseeable - not necessarily foreseen in the particular case but foreseeable in principle. Individuals should only be accountable for their actions if they could know - if they wanted to - the legal consequences attaching to alternative courses of conduct. They must have had the chance to choose whether to comply or take the risk of sanctions for non-compliance. Or, more formally, the rule of law entails that 'people should obey the law and be ruled by it.'[17] For people to obey the law, 'the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it.'[18]

What does this entail for legal rules and a legal system? It broadly entails three matters. First, there are must be sign-posts, i.e. warning mechanisms, which put people on notice about the legally significant nature of their activities and alert them to the possible legal consequences of their actions. Second, individuals must be able to actually access the relevant legal resources: '[e]lementary justice… demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.'[19] As will be seen below, all legal systems rely on much more informal methods to both warn and inform legal subjects of their rights and obligations. Third, the rules themselves must be such that they are capable of guiding behaviour. Raz argues that this requires that all laws must be prospective, unambiguous, clear as well as relatively stable, both for short and long-term decision-making.[20] These are basic requirements designed to protect human dignity and autonomy which 'entails treating humans as persons capable of planning and plotting their future.'[21] They are not mere niceties or pretty decorative touches attaching to legal systems, but reflect fundamental values which most States, and in particular Western democratic society, claim to treasure. The critical question is to what extent individuals acting on the global Internet can order their affairs with relative legal certainty, given their exposure to numerous foreign laws.[22]

B. Absence of Noticeable Borders in Cyberspace

If online publishers do not know who actually accesses their site or who might access their site, but if that access or accessibility is in law treated as the critical nexus or

[17] Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, 196.
[18] Ibid 198.
[19] *Fothergill v Monarch Airlines* [1981] AC 251, 279 (HL). See also McMahon, 'Improving Access to the Law in Canada' [1999] *Computerisation of Law Resources* 3.
[20] Raz, above n 17, 198f. Where law is applied retrospectively, this is often justified by recourse to arguments based on natural law. H L A Hart, *The Concept of Law* (2nd ed, Oxford: Clarendon Press, 1994) 208: 'It is in this form that Natural Law arguments were revived in Germany after the last war in response to the acute social problems left by the iniquities of Nazi rule and its defeat'; Deryck Beyleveld, Richard Kirkham, David Townend, 'Which Presumption? A Critique of the House of Lords' Reasoning on Retrospectivity and the Human Rights Act' (2002) 22 *Legal Studies* 185, 190f.
[21] Raz, above n 17, 204.
[22] For a discussion of the rule of law in the context of competence, see Brian R Opeskin, 'The Price of Forum Shopping: A Reply to Professor Juenger' (1994) 16 *Sydney Law Review* 14.

link which exposes the publisher to the law of the surfer's State, then that foreign law is unforeseeable. The issue of foreseeability was foreshadowed by Johnson and Post, who argued that cyberspace removes the sign-post function of physical borders,[23] which traditionally alerted individuals to the new legal space they had just entered. They argued that such borders simply do not exist on the Internet. Thus '[i]f someone acting in any given space has no warning that the rules have changed, the legitimacy of any attempt to enforce a distinctive system of law is fatally weakened. No geographically-based sovereign could plausibly claim to have jurisdiction over a territory with secret boundaries.'[24] But is this really the case? It is argued below that the judiciary is not insensitive to the need for foreseeability which is often incorporated into legal doctrines through the requirement of a mental element.

However, those mental elements which indirectly import the requirement of foreseeability of legal exposure can be, and have been, interpreted in two different ways. On the one hand, the critical intentional act is taken to be entering cyberspace and that entry ought to alert online publishers to the applicability of the laws of all the States where the site can be accessed. Therefore there is no further need for sign-posts within cyberspace itself, which would alert publishers of entry into particular States. The laws of all States ought to be foreseen. On the other hand, the mere entry into cyberspace is not taken to be sufficient to expose online publishers to any or all laws. Publishers ought to foresee only the laws of the States which they target. Their own online activities directed at one State rather than another provide the necessary 'sign-posts' which ought to alert them about the particular law-space they enter.

The problem of notice is particularly acute in the online defamation context. First of all defamatory sites are often not interactive, or only marginally so. Most major newspapers have an online version which caters for a passive readership; they are not primarily designed as platforms for online transactions, but simply to be read. Actual transactions are useful for notice purposes, because they often alert publishers about the whereabouts of their customers and also give them a chance to avoid contact with certain States. For this reason these *knowing* online transactions figure so highly in the *Zippo* test (personal jurisdiction in the US[25]) and the 'directing' test (personal jurisdiction in EU consumer contracts[26]). But what is to be done in respect of transnational online defamation when there are no knowing contacts with forum residents? Does the absence of indicia alerting website operators as to the

[23] David R Johnson and David Post, 'Law and Borders - The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1357, 1375. *See also ACLU v Reno* 929 F Supp 824, 859ff (ED Pa 1996); Hague Conference on Private International Law (Avril D Haines), *The Impact of the Internet on the Judgments Projects: Thoughts for the Future,* Prel Doc No 17 (2002) 18: 'In addition to the problems faced with regard to identifying where the "act or omission" causing the injury occurred and where the injury "arose", a defendant would have difficulty, given the nature of the Internet, in proving that it was not "foreseeable"… that someone would be able to pull up the content of his or her web page in any country. Either every jurisdiction is foreseeable or no jurisdiction is foreseeable.'

[24] Johnson and Post, above n 23, 1379 (n 33).

[25] *Zippo Manufacturing Co v Zippo Dot Com Inc* 952 F Supp 1119 (WD Pa 1997).

[26] Article 15(1)(c) of the EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, No 44/2001 Chapter 3, Part 2.a.

whereabouts of their clientele undermine the legitimacy of any country-of-destination approach in the defamation context? Also as a side note, transnational defamation may also arise out of online publications which are not commercial such as, for example, blogs, personal homepages or chat-rooms,[27] which makes the no-pain-no-gain maxim – also underlying the US *Zippo* test and the EU 'directing' test - not as obviously helpful in understanding how the law should develop to accommodate online transnational defamation. Neither can defamation law benefit from contractual choice; in contract law foreign law or courts can be easily foreseen when the contractual parties chose it and that choice is upheld. So defamation law provides an ideal testing ground for exploring the issue of notice.

At the most basic level, the cases below highlight that the lack of harmonisation in private international law exacerbates the problem of foreseeability of legal exposure.[28] Online content providers not only have to absorb the differences in the substantive laws on defamation, but also cope with different rules as to when these substantive laws apply. However, despite differences in the specific rules, there are certainly common themes in the approach. The following examines how States, particularly common law jurisdictions, have dealt with transnational online defamation.

C. Actual Access Even If Miniscule

English and Australian common law require for a civil defamation claim to succeed that there was a 'publication' of the defamatory statement to a third party which takes place where the statement is heard or comprehended.[29] Second, that 'publication' need not be substantial; it is sufficient if it is made to a single third party. In the case of mass media, each separate publication of the same statement founds a separate cause of action.[30] These two rather simple propositions have translated in the transnational online context into another simple proposition: a website must have been actually accessed in the forum to found a local defamation claim, but a single hit on a foreign website satisfies the 'publication' requirement.

[27] Adam Sherwin, 'Chat room insults lead to internet libel victory' (22 March 1996) *The Times* (UK) 17.

[28] For harmonisation efforts in the EU see: Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations (Rome II) COM(2006) 83 final. Differences of the rules are described in the initial Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM(2003) 427 final, 5f, 17f.

[29] In common law countries: *Bata v. Bata* (1948) WN 366; *Lee v. Wilson and Mackinnon* (1934) 51 CLR 276. Note despite some minor variations all EU States apply the law of the State where the defamatory statement has been distributed and where the victim enjoys a reputation (in some State as an alternative to the law where the publisher is established at the victims' choice and in the UK only if that publication occurred in the UK otherwise the 'double actionability rule' applies'). See Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM(2003) 427 final, 17f.

[30] *Duke of Brunswick and Luneberg v Harmer* [1849] 14 QB 184. In as much as holding on to the traditional concept of publication in the online environment entails legal exposure of content providers across State, it also entails their repeat-liability over time: *Loutchansky v The Times Newspapers Ltd & Ors* [2001] EWCA Civ 1805. Contrast to US position under the 'single publication rule': *Firth v The State of New York* 775 NE 463 (Ct App 2002).

The cases below illustrate this proposition as well as its rather drastic consequences for competence.

In *Dow Jones & Co Inc v Gutnick*[31] decided by the High Court of Australia, an Australian business man alleged that Dow Jones, a US publisher, had defamed him in Australia in its magazine and its fee-paying subscription website. Both publications were largely aimed at the US market, but a few of the relevant magazines had been sold in Victoria and similarly the relevant website of *Barrons Online* had hits 'probably in excess of 300'[32] from Victoria. Despite the fact that this represented only a miniscule percentage of the overall number of readers, the High Court refused a stay of proceedings, holding in favour of the local court and local defamation law.[33] Both issues hinged on the location of the defamatory publication. The point of contention was whether a website is 'published' for defamation purposes in the place where it was uploaded onto the web (here New Jersey (US)) or in the place where the subscribers accessed it (here Victoria (Australia)). In practical terms, the issue was whether online publishers have to comply with the laws of the *single* place from where the activity originates (i.e. the country of origin) or with the laws of *all* the places of their customers (i.e. the countries of destination).[34] The High Court unanimously rejected the country-of-origin approach to online defamation and upheld the traditional position that a defamatory publication occurs where the publication is comprehended and not where it is composed.[35] The link which creates competence is actual access, even if minimal, as in this case [36]

Similarly, in *Harrods Ltd v Down Jones & Co Inc*[37] again Dow Jones was sued by Harrods Ltd in respect of an article (following a Harrods' April Fool joke) which appeared in the US, but not European, edition of its Wall Street Journal and its

[31] [2002] HCA 56, affirmed *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (Hedigan J). For the transcript of the arguments brought before the court see *Dow Jones & Co Inc v Gutnick* M3/2002 (28 May 2002) http://www.austlii.edu.au. Australian Standing Committee of Attorney-Generals (SCAG) Working Group of State and Territory (NSW) Officers, *Proposal for Uniform Defamation Laws* (July 2004) 34f, noting that no legislative change is required following *Gutnick.*
The earlier English case of *Berezovsky v Michaels* [2000] 1 WLR 100 also involved an Internet publication in addition to a magazine, but the House of Lords reached its decision without considering the online publication.

[32] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 32.

[33] The three interrelated inquiries were set out most clearly by Kirby J, *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 93-110: (1) had the Victorian court jurisdiction to hear the dispute (2) was it a *forum non conveniens* and (3) was Victorian defamation law the applicable law.

[34] On appeal to the High Court several high-profile publishers, including Amazon.com, Yahoo! Inc, The New York Times Company and Guardian Newspapers Ltd, were granted leave to intervene. Many of those were from the US, whose relatively the publisher-friendly laws, mean that they have most to gain from a country-of-origin approach. *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 188-190 (Callinan J) on the fundamental differences of US and Australian/English defamation law.

[35] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 44, 151, 197ff.

[36] And Kirby J specifically rejected any middle-ground whereby only target destinations should count.: *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 131.

[37] [2003] EWHC 1162 (QB). For Dow Jones' unsuccessful attempt in the US to stall the UK proceedings, see *Dow Jones & Co Inc v Harrods Ltd and Mohamed Al Fayed* 237 F Supp 2d 394 (2002).

website, for defaming the company in the UK.[38] The evidence showed that its US edition had been sent to ten subscribers in the UK (compared to the 1.8 million copies sold in the US) and similarly the website had a few hits from the UK. Despite the miniscule distribution on English soil, the court still found in favour of the English court and law, as the victim was an English company with a well established reputation in England.[39] The defendant did argue that the distribution was simply too miniscule and too technical to count, but unsuccessfully.[40] One may very well wonder when, if ever, the second proposition noted in *Lewis & Ors v King*[41] kicks into play:

'the starting-point for the ascertainment of what is clearly the most appropriate *forum* is to identify the place where the tort has been committed…. But – and here is our second proposition from the cases – the more tenuous the claimant's connection with the jurisdiction (and the more substantial any publication abroad), the weaker this consideration becomes.'[42]

Clearly, even a miniscule distribution out of the overall distribution may not preclude the forum court from asserting adjudicative competence.

In Canada, a minuscule publication (two hits from Canadian surfers) did not deter the court in *Kitkufe v Olaya Ltd,*[43] from refusing to grant a stay of proceedings[44] concerning an alleged defamatory article in a newspaper published in Uganda but re-published online, and alleged to have injured the plaintiff's reputation in Canada. Although there was a number of factors which connected the dispute to Canada,[45] the fundamental basis upon which the *forum non conveniens* even became an issue was the two hits from Canadian territory. The same approach of focusing on actual access has also been adopted in Malaysia[46] and in a criminal defamation case in Italy.[47]

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[38] Although it seems that the action in England was in reality designed to vindicate Harrods' reputation worldwide: *Harrods Ltd v Down Jones & Co Inc* [2003] EWHC 1162 (QB), para 5, 9.

[39] *Harrods Ltd v Down Jones & Co Inc* [2003] EWHC 1162 (QB), para 44.

[40] Relying on *Kroch v Rossell* [1937] 1 All ER 725, requiring a real and substantial connection to found jurisdiction.

[41] [2004] EWCA Civ 1329 (CA).

[42] *Lewis & Ors v King* [2004] EWCA Civ 1329 (CA), para 27.

[43] ACWSJ LEXIS 84447 (Ontario Court of Justice, 1998) 11f: 'I am mindful of the defendant's position that the alleged defamatory article was only published in Uganda and that access on the Internet was limited to two people in Ontario and only to parts of the newspaper other than the page where the article occurred.' So strictly speaking there may not have been a 'publication'.

[44] The court applied the *forum non conveniens* test laid down by the House of Lords in *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625, according to which the defendant must show that there is not a substantially more convenient court where the claim can be adjudicated.

[45] *Kitkufe v Olaya Ltd* ACWSJ LEXIS 84447 (Ontario Court of Justice, 1998) 10, e.g. the defendant and many witnesses were not resident in Canada.

[46] *Lee Teck Chee v Merrill Lynch International Bank Ltd* [1998] Current Law Journal 188, 194f although in this case the issue is somewhat complicated by the fact that the High Court of Malaysia decided that there was no evidence of publication because they did not have the requisite permission to be imported, sold, distributed or circulated in Malaysia. This does of course not necessarily mean that they were not in fact published in Malaysia.

[47] *Re Moshe D* (Italian Court of Cassation, 17 December 2000) http://www.cdt.org/speech/international/20001227italiandecision.pdf

Of course, the problem of multiple simultaneous publications is not peculiar to the Internet and has caused problems for all mass media, whether books, magazines, television or radio.[48] The traditional stance is that it does not matter that the bulk of the distribution occurred elsewhere. In the English case of *Berezovsky v Michaels,*[49] a Russian business man sued a US magazine in England on the basis of a few copies (0.2% of the total circulation) which had been distributed in England. The House of Lords decided that England was the appropriate forum, principally because the tort had been committed in England through the distribution of the magazine where the plaintiff had a reputation to protect.[50] It did not matter that the UK was not targeted. Lord Steyn rejected the targeting approach (focusing on the location of the bulk of the publication) as inconsistent with established principles of libel law.[51] All that mattered was that some magazines had been distributed in the UK.

The parallels between this scenario and the online scenario are unmistakable. And yet, one may question whether the online scenario is not after all distinguishable from the offline scenario? Is the circulation of newspapers in certain States not *quantitatively* different from allowing hits on one's website? Online it is much easier to 'circulate' *fewer* copies to *many more* States.[52] This prima facie does not affect matters of principle, but it does make it questionable whether a position that entitles any country of destination to assume competence, no matter how few hits, is still fair and strikes the correct balance between publishers and defamed plaintiffs.

Even in the US courts have consistently focused on the destination of publications and equally prima facie treated even small publications as giving rise to a defamation - despite the US 'single publication rule'.[53] The 'single publication rule' is at best marginally relevant to competence questions.[54] It was[55] designed to be no more than a procedural device, applicable where the plaintiff has suffered damage in a number of States. The rule allowed them to recover damages for all those injuries in one action, barring claims in other jurisdictions.[56] So it deals with a very specific scenario:

[48] *Jenner v Sun Oil Co* [1952] 2 DLR 526 (radio); *Pinding v National Broadcasting Corp* (1985) 14 DLR (4th) 391 (television).
[49] [2000] 1 WLR 1004.
[50] *Berezovsky v Michaels* [2000] 1 WLR 1004, 1013.
[51] *Berezovsky v Michaels* [2000] 1 WLR 1004, 1012f.
[52] See Chapter 2.
[53] § 577A of the US Restatement (Second) of Torts (1977).
[54] Rejected as irrelevant in *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 35, 65; also rejected in *Berezovsky v Michaels* [2000] 1 WLR 1004, 1011: 'The Uniform Single Publication Act does not assist in selecting the most suitable court for the trial: it merely prevents a multiplicity of suits.' and *Loutchansky v The Times & Ors* [2001] EWCA Civ 1805. Note also that the US 'single publication rule' is an exception to the main rule, according to which each communication by the same defamer, whether to a new person or to the same person, is generally a separate publication giving rise to separate causes of actions: s.577A of *Restatement (Second) of Torts (1977*).
[55] For a brief description of the development of the rule and its frequent judicial convolution with choice of law and jurisdiction issues, see *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 29-35; or Law Commission, above n 2, para 3.1ff.
[56] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 35. Other States use other mechanisms to stop multiple litigation in respect of the same publication. See, e.g. s.9(3) of Defamation Act 1974 (NSW) which prohibits more than one action in respect of multiple publications without leave of the court. Furthermore plaintiffs may be prevented from bringing multiple actions in respect of the same

not just with multiple publications of the same statement per se, but with multiple injuries arising out of these multiple publications. Its rationale is to prevent multiplicity of suits in respect of the same defamatory statement. But it does not say where the single action should be brought and which law should be applied to it. In *Keeton v Hustler Magazine Inc,*[57] the Supreme Court held that the New Hampshire Court had jurisdiction over a Californian defendant on the basis that the defendant had circulated some magazines in New Hampshire each month, although most of the damage had been suffered elsewhere. The court asserted that libel is generally held to occur wherever the offending material is circulated,[58] just as it was decided in England and Australia. For the single publication rule *any* of the countries of destination where 'a substantial number of copies are regularly sold and distributed'[59] may be a suitable forum and not just the main target. By implication if the damage is restricted only to one State, even a small circulation is sufficient to make the forum suitable, just like in Australia and England.[60]

Last but not least, Art 5(3) of the EC Jurisdiction Regulation[61] also accommodates this focus on actual hits on foreign website from the forum. It provides that a defendant may be sued in the place where the 'harmful event occurred' which 'cover[s] both the place where the damage occurred and the place of the event giving rise to it.'[62] In the context of defamation that first limb has been held to be the place where the plaintiff's reputation was harmed by virtue of third persons reading and comprehending the publication.[63] For online defamation, those are the places where the site has been actually accessed.[64]

So although there is an insistence that the site in question has actually been accessed from the State, that access can be minimal. This means that competence is often asserted over foreign sites which have only a minimal effect on the State and that effect is very likely replicated in many States. The critical question in this context

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publication on the basis of vexation. In the EU multiplicity of suits was addressed in *Shevill and Others v Presse Alliance SA* Case C-68/93 [1995] ECR I-415, para 32: the victim must sue in the court of the State where the publisher is established if he wants to recover for the damage suffered in a number of States.

[57] 465 US 770 (1984).

[58] *Keeton v Hustler Magazine Inc* 465 US 770, 777 (1984).

[59] *Keeton v Hustler Magazine Inc* 465 US 770, 771 (1984).

[60] Which is precisely the reason why Gutnick restricted the damages through an undertaking to the court to sue in no place other than Victoria.

[61] EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, No 44/2001.

[62] *Shevill and Others v Presse Alliance SA* Case C-68/93 [1995] ECR I-415, para 20, following *Bier v Mines de Potasse d'Alsace* Case 21/76 [1976] ECR 1735, para 11.

[63] *Shevill and Others v Presse Alliance SA* Case C-68/93 [1995] ECR I-415, para 2.

[64] There are arguably some indications that the European Court of Justice may not take an expansive view on competence. In *Bodil Lindqvist* Case C-101/01 [2004] 1 CMLR 20 the court held that the publication of personal data on a private website dedicated to the activities of a Swedish church did not amount to a 'transfer of data to a third country' pursuant to the EC Data Protection Directive, 1995/46/EC even if such data is thereby made accessible to persons in third countries. Although the main reasons for this holding appears to have been that the Directive was drawn up when the Internet was in infancy, it is significant that the court did not simply transplant traditional legal concepts to the online world in respect of its transnationality.

is: is there a legal requirement that the online publishers must have known or could have known the location of those who accessed his site? If the actual hits which trigger legal exposure are not known or preventable, then legal exposure itself cannot be known or prevented.

D. Foreseeability of Foreign Law in respect of Freely Accessible Sites

Have courts been sensitive to the concern that an online publisher may not have known about the actual hits on his site? This matter was specifically raised in *Gutnick:* 'if the rule of law… is to have any social meaning, then… it will include the capacity to know it in advance so as to be able to shape your conduct in light particularly of the deterrent example held out by people who have been ordered to pay damages… in the past.'[65]

As the site in question was a subscription website,[66] foreseeability should have been straightforward. The credit card details would generally and automatically have revealed the location of the subscribers. But the High Court did not attribute any legal significance to fee-paying subscription nature of the site. Kirby J suggested that both in respect of subscription and freely accessible sites it is impossible for the website operator to know with 100 percent certainty the location of the readers[67] because of anonymising technologies or credit cards issued by a country not corresponding to the subscriber's country of residence. His implicit suggestions were, one, that there is no legally significant difference between the two different types of sites and, two, that 100 percent accuracy is vital for legal purposes. Neither is entirely persuasive.

In the context of a subscription website, generally the correct location of the subscriber reveals itself through the credit card details, and applications from unwanted States can easily be excluded. Operators of freely accessible sites would have to take additional steps and adopt geo-location technology to know the location of surfers and exclude unwanted ones.[68] Of course, such sites would then by definition no longer be freely accessible sites. The difference between subscription and freely accessible sites is that with subscription sites selectivity is already part of the operation of the site and territorial selectivity falls neatly within it and does not substantially alter the structure of the site. Finally, as with subscription sites access is

[65] *Dow Jones & Company v Gutnick* M3/2002 (28 May 2002) 21, also 25f.

[66] The commercial nature of the site (relevant for the no-pain-no-gain maxim) was noted as significant by Callinan J in *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 182.

[67] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 84.

[68] Dan Jerket B Svantesson, 'Geo-Location Technologies and Other means of Placing Borders on the 'Borderless' Internet' (2004) 23 *John Marshall Journal of Computer and Informational Law* 101, 109ff: geo-location technology, based on matching IP addresses with location, is reasonably accurate and e.g. used by http://www.sho.com to exclude all but US users from accessing its site.
In respect of subscription sites: *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 73: 'Dow Jones controls access to its material by reason of the imposition of charges, passwords and the like, and the conditions of supply of material on the Internet. It can, if it chooses to do so, restrict the dissemination of its publication of Barrons on the Internet in a number of respects.' (see also para 115(11)).

financially rewarded, there is less danger that legal exposure to foreign law discourage access and by implication valuable speech.

As to the matter of 100 percent accuracy, should the online publisher accept a subscription in the reasonable, but mistaken, belief that the subscriber comes from a certain State, then the publisher should not be exposed to the laws of the subscriber's true location. This position is entirely consistent with traditional principles of defamation law according to which the publication (although not the defamation) must be intentional or negligent.[69] In the above scenario, there would be no intentional publication in the true location of the subscriber (and thus the tort would not have been committed there and thus no legal exposure ensues). By the same token, in the standard case accepting online subscriptions, knowing the location of the subscribers entails that there is an intentional publication in those locations. Hedigan J at first instance[70] was sensitive to the requirement of intention. He addressed foreseeability as follows: '[i]t is also absolutely clear that Dow Jones intended that only those subscribers in various States of Australia who met their requirements would be able to access them, and they intended that they should',[71] approving implicitly the plaintiff's argument that 'the publication of the article to persons in Victoria who read it was the intended natural and probable consequence of all the acts of the defendant.'[72] *Gutnick* could have been an easy case; instead it became an interesting one. As the High Court did not restrict its ruling to subscription websites, how did it accommodate foreseeability of legal exposure?

Foreseeability of All Destinations[73]

The High Court went along a well-trodden path (although more well-trodden in public than private law); if you go online, world-wide legal exposure is foreseeable:

> 'no more or less ubiquitous than some televisions services. In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact. However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so *knowing* of the reach that their information may have. In particular, those who post information on the World Wide Web *do so knowing* that the information they make available is available to all and sundry without any geographic restrictions.'[74]

The High Court took a robust approach, according to which online publishers are prima facie taken to have targeted all States. It means that once actual access to the site is established, no further evidence is needed as to the intention of the publisher's conduct in the particular territory. The consequence is: the legal requirement of actual access does not prima facie limit the regulatory burden of online publishers at all. If a publisher does not, and perhaps cannot, know the location of the actual hits, it would have to – just in case - comply with all laws. Given the availability of location sensitive site-meters,[75] even publishers of freely accessible

[69] John G Fleming, *The Law of Torts* (9th ed, Sydney: LBC Information Services, 1998) 599f.
[70] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 38f, 68, 73.
[71] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 60.
[72] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 43.
[73] Same as the 'crude' effects test, discussed in Chapter 3, Part 4.b.
[74] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 39 [emphasis added].
[75] For example, http://sitemeter.com.

sites could track the whereabouts of visitors, and thus know at least which foreign legal system might come into play. But without implementing access restrictions they could not prevent or reduce that legal exposure. The legal burden on these publishers would still be unlimited.

This 'robust' approach was recently endorsed by the English Court of Appeal in *Lewis & Ors v King,* [76] where it held that any online 'global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant.'[77] Addressing the defendant's argument that 'for the purposes of *forum non conveniens* enquiries involving material published via the Internet, the intention of the defendant should be taken into account,'[78] the court simply said:

'it makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has "targeted", when in truth he has "targeted" every jurisdiction where his text may be downloaded. Further, if the exercise required the ascertainment of what it was the defendant subjectively intended to "target", it would in our judgment be liable to manipulation and uncertainty, and much more likely to diminish than enhance the interests of justice.'[79]

The court did not reject as irrelevant the publisher's intention per se, but just 'subjective intention.' And in terms of an 'objective intention', the court argued that online publishers must be taken, in light of the nature of the Internet, to target all States. As will be argued below, this is not the only way to interpret the concept of 'objective intention' in the context of online activity; it can be, and has been, interpreted to require an overall assessment of the site in surrounding circumstances to see which *particular* States the publisher objectively targeted.

The Australian High Court sought to explain why its ruling was not quite as dramatic as it seemed; why the exposure to multiple sets of foreign law was more theoretical than real. First, the court pointed to the unlikelihood of having to defend defamation actions if the enforceability of any judgment was questionable.[80] Of course, this argument did not deter Berezovsky, Gutnick, Harrods Ltd or King. Especially in defamation, the verdict itself may often be more important than any monetary compensation to vindicate the plaintiff's reputation. In any event, it seems unfortunate to justify the breadth of liability by reference to its frequent ineffectiveness. Should online publishers really be encouraged to flaunt the laws of States that cannot catch them? Again, Hedigan J adopted a more desirable stance when noting (albeit in relation to the risk of unenforceability of the judgment in the particular case) that the law should prima facie assume that the defendant will honour its legal obligations. The issue of enforceability becomes 'only relevant if the defendant declines to honour any judgment obtained which would be an improper course and damaging to the defendant's reputation world-wide.'[81] Secondly, the

[76] *Lewis & Ors v King* [2004] EWCA Civ 1329 (CA), para 31.
[77] *Lewis & Ors v King* [2004] EWCA Civ 1329 (CA), para 31.
[78] *Lewis & Ors v King* [2004] EWCA Civ 1329 (CA), para 33.
[79] *Lewis & Ors v King* [2004] EWCA Civ 1329 (CA), para 34
[80] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 53. The US has been very reluctant to enforce foreign defamation judgments against local publishers, applying the First Amendment to the US Constitution to those foreign publications, see above n 13.
[81] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 115(7).

High Court suggested that online publishers can foresee the particular foreign laws by foreseeing the likely harm in the particular situation. To this argument we turn now.

Foreseeability of Foreign Harm

The High Court argued that in defamation cases it is easy to identify the particular laws which may come into play. All online publishers have to do is look at the person who is the subject of the article and his residence and voila:

'the spectre which Dow Jones sought to conjure up in the present appeal, of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe is seen to be unreal when it is recalled that in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort.'[82]

Even more explicitly, Kirby J stressed that '[u]nlike product liability or some other negligence claims, damage to reputation cannot occur "fortuitously" in a place outside of the defendant's contemplation.'[83] In short they held that defamation is different from other causes of action: in defamation the location of the potential harm is foreseeable and thus the corresponding foreign law is also foreseeable.[84]

In *Harrods Ltd v Down Jones & Co Inc*[85] foreseeability was not specifically addressed, presumably because the real journal had also been distributed in the UK; thus Dow Jones could hardly argue that it did not know about its destination. However given how miniscule the distribution was, Dow Jones had not foreseen English legal exposure.[86] Yet despite that, competence was asserted, first and foremost because the victim was an English company with a well established reputation in England.[87] So just like in *Gutnick*, the nationality or residence of the person defamed, in addition to the publication however miniscule, ought to have put Dow Jones on notice of English defamation law. In terms of foreseeability this is noteworthy because it shows that foreseeability does not reflect what the particular defendant actually foresaw or even what an ordinary diligent defendant in the circumstances might have foreseen; it is a legal decision as to what the defendant ought to have foreseen or is expected to foresee.

The location of the harm (i.e. of the plaintiff and his reputation) is a relatively stable factor where the plaintiff is an ordinary person, who lives in one State and enjoys a reputation only there. But what about internationally well-known figures? In *Lewis & Ors v King*[88] King, a US national with a world-wide reputation, sued Lennox Lewis (a

[82] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 54, 134.
[83] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 151.
[84] 'Damage in the forum' is a head of jurisdiction, rather expansive, in many Commonwealth countries, which has been criticised for being too insubstantial a link (e.g. *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 100f). If the *forum non conveniens* test is meant to act as a limiting device on expansive heads of jurisdiction, reference to the damage makes little sense in this inquiry. See also discussion in Garnett, above n 2, 202ff.
[85] [2003] EWHC 1162 (QB).
[86] Relying on the case of *Kroch v Rossell* [1937] 1 All ER 725.
[87] *Harrods Ltd v Dow Jones & Co* Inc [2003] EWHC 1162 (QB), para 44.
[88] [2004] EWCA Civ 1329 (CA), affirmed *King v Lewis & Ors* [2004] EWHC 168 (QB).

British national, but resident mainly in the US) and two others alleging that two online publications had damaged his reputation in the UK. The sites had been very popular in the UK,[89] but the main injury had no doubt occurred in the US. He chose England, and not New York, to bring the action, because the 'public figure' doctrine would have doomed any US action.[90] So King's worldwide reputation, coupled with the world-wide availability of the site, allowed him to choose the most favourable forum. Where does that leave the online publisher? It certainly weakens the *Gutnick* argument that the location of potential litigation can easily be anticipated by reference to the subject of the article. In King's case that was anywhere.

Last but not least, the EU also seems to be moving towards a damage-focused approach in its proposal to harmonise the law applicable to non-contractual obligations (commonly known as Rome II). There the general default rule provides that 'the law of the country in which the damage arises' furnishes the applicable law in tortious disputes.[91] Yet, it is reasonably clear that this wording was chosen as a means of avoiding the interpretation of 'harmful event' in Art 5(3) of the EC Jurisdiction Regulation.[92] As noted above, 'harmful event' is there taken to refer both to the place of the initial act and to the place where that act took effect. Rome II is opting for the second limb only (stating expressly that the location of the initial act is irrelevant) and thus uses the perhaps slightly misleading reference to the location of the 'damage'. In fact 'damage' does not refer exclusively to the harm suffered but also to the effect of the defendant's action. As stated in *Shevill and Others v Presse Alliance SA*, it is the law of the 'State in which the publication was distributed and where the victim claims to have suffered injury to his reputation.'[93] So the focus is not just on the harm, but also on the effect of the defendant's intentional activities on a State, for example, on where the defendant intentionally distributed his goods online. So far it is unclear whether in the EC an online seller will be taken to have 'distributed' his site wherever it can be accessed or only in those States to which it is specifically targeted.

Were the judges in *Gutnick* correct in arguing that things are not as bad as they seem, that at least in respect of defamation, online publishers can easily anticipate the location of any potential harm - by reference to the person written about - and then take measures to comply with that particular legal regime? As attractive and simple as it sounds, this argument is flawed in principle for a number of reasons. First, to somehow suggest that only those online publishers who cause harm in a State will be exposed to its laws, is misleading and does not at all reduce their regulatory burden. As long as one complies (knowingly or unknowingly) with a law, one may very well get the impression that that law does not exist or that it does not

[89] *King v Lewis & Ors* [2004] EWHC 168 (QB), para 26.
[90] *King v Lewis & Ors* [2004] EWHC 168 (QB), para 37; *Lewis & Ors v King* [2004] EWCA Civ 1329 (CA), para 40f.
[91] Art 5 of Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations (Rome II) COM(2006) 83 final. (Note currently defamation has been excluded for lack of agreement, see Amendment 57 and Art 1(2)(h)).
[92] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM(2003) 427 final, 11f (explaining the background of Art 5).
[93] *Shevill and Others v Presse Alliance SA* Case C-68/93 [1995] ECR I-415, para 30.

apply to one's actions.[94] But if a law applies, it is there during compliance and during non-compliance (although hopefully more overtly in the latter case). Causing 'harm' in a State never triggers the application of a State's law, but the occurrence of the 'harm' presupposes its prior application. To say that 'harm' has been caused is simply another way of saying that the law (which applied) has been breached. The question, is what attracted the application of the law in the first place? By definition it cannot be the 'harm' itself. Generally, it would be the defendant's activities on the State's territory. In the defamation context, that activity would be publishing on the territory. And when this activity on the particular territory is carried on knowingly, then it seems reasonable to hold that the application of the local laws was foreseeable.

Second, relying on the foreseeability of harm is also intrinsically flawed for another reason. It is based on the idea that there is such a thing as objective, universal harm which should be obvious to anyone anywhere. Yet this is not the case. 'Harm' is a legal construction, defined by, and depending on, the particular legal system and legal culture. What is 'harm' in one legal system may not be recognised as 'harm' in another (except for some universally recognised 'harm', such as bodily harm). In terms of foreseeability, this means that what appears to be blatantly obvious 'harm' in one legal culture is not at all obvious from the perspective of an outsider. So while 'damage to one's reputation' seems rather obvious, it is less so when one considers the position under Chinese law, where it is possibly to damage the reputation of the dead.[95] Would an English journalist writing a historical account of Mao Zedong even pause to consider if any 'harm' could be caused by it to anyone? Would a US publisher, particularly a small one, expect that not all States share the 'obvious' distinction between 'public figures' and 'private figures' made under US defamation law? And this is still only within the boundaries of defamatory harm. Saying that local defamatory 'harm' can easily be foreseen by a foreigner has a distinct whiff of parochialism about it.[96]

Third, focusing on the foreseeability of harm also suggests that the publisher foresees the possibility that damage to reputation may be caused by its article in the first place. This may very well be the case.[97] However, under traditional common law defamation law the defamation itself need not be intentional or even negligent. A publisher may be liable for defamation even though it had no idea that the article was false or defamatory in any way. Consequently, it makes no sense to argue that

[94] Generally, both from a regulator's' and publisher's perspective, knowing compliance is desirable and that entails taking proactive steps towards ascertaining all relevant law before any potential harm is caused.

[95] See e.g. Joy Jacobson, 'Of Love and Defamation in China' (2003) *Poets & Writers Magazine*, http://www.pw.org.

[96] Note the argument that the publisher ought to foresee the foreign law by reference to the potential harm caused abroad is also circular. As the 'harm' is the 'harm under foreign law' the publisher can only foresee that harm if he foresees the application of the foreign law in the first place.

[97] Particularly where the 'publisher' is the author or editor, but less likely so where the publisher is further removed from the initial source, as for example. a distributor of any kind.

such publisher could have anticipated foreign defamation law on the basis of the potential harm - if it foresaw none whatsoever.[98]

For these reasons, it is suggested, the High Court was wrong when it stated that defamation was different from 'cases, like trespass or negligence, where some quality of the defendant's conduct is critical.'[99] And that conduct cannot but also be critical in defamation to satisfy the foreseeability requirement. In defamation that critical conduct is publishing. What must be intentional under traditional defamation law in England or Australia is the publication itself.[100] Significantly 'publication' at common law has never exclusively been concerned with the final *fact* of publication but also with the initial *act* of publication, that is whether or not the defendant intended the publication, or where the publication was at least reasonable foreseeable. For example, it has been held that there is no publication in law, even though there is a publication in fact, where a writer locks a disparaging letter in a drawer and a thief comes, finds the letter and publishes it.[101] There is no publication by the writer because he did not intend the publication. By the same token, a newspaper published in the UK is not published in Japan, merely because a Japanese person buys the paper in the UK and takes it back to Japan and reads it there.[102] The original distributor never intended publication in Japan; that publication is entirely fortuitous. It is precisely this intention to publish here but not there, which means that to a publisher the laws of one State are foreseeable and the laws of another are not. In short, if a person intentionally publishes in a certain State, then it seems entirely reasonable to expect the person to foresee and comply with the laws of that State.

It is of course a matter of considerable debate *where* an online publisher ought to be taken to have intended to publish its site. The above courts have all expressly or implicitly endorsed the 'worldwide intention' proposition: a publisher of a freely

[98] In the US, personal jurisdiction may be based on intentionally causing harm in the forum: *Calder v Jones* 465 US 783 (1984). This applicable intentional torts, including, under US law, defamation which requires that the publisher knew the statement was false or was at least reckless or negligent as to its falsity and thus knew of its defamatory potential. In other words, foreseeing harm or injury is an ingredient of the US defamation action. Depending on the 'public' or 'private' status of the figure defamed. *New York Times Co v Sullivan* 376 US 254 (1964); *Gertz v Robert Welch Inc* 418 US 323 (1974).

[99] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 43, distinguishing defamation from cases of misrepresentations e.g. *Voth v Manildra Flour Mills* (1990) 171 CLR 538 where it held that the focus should be on the substance of the defendant's act and not its consequences. See also *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC).

[100] See above n 70.

[101] *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, 527; see also *Huth v Huth* [1915] 3 KB 32; *Powell v Gelston* [1916] 2KB 615.

[102] *Kroch v Rossell* [1937] 1 All ER 725, where very few copies of a French and a Belgian newspaper, mainly distributed in France and Belgium, had been distributed in England through a distribution company, which bought and resold the magazine. The English court refused to exercise adjudicative jurisdiction, as the tort committed in the jurisdiction was not a real and substantial one. Noteworthy here, although not relied upon by the court, the foreign distribution would have been entirely fortuitous from theo perspective of the initial publishers; it was only within the control and knowledge of the distribution company. For the requirement of a purposeful publication, as opposed to an fortuitous one, under German law, see Hestermeyer, above n 2, 282.

accessible site must be taken to have intended to publish that site everywhere. That is one possible stance. But if one adopts that position, it is theoretically highly unsatisfactory to argue that the foreseeability of the local harm softens its ramifications. First, 'harm' is a legal construction depending on the particular legal culture and not reasonably easily foreseeable from the outside. Second, when the 'harm' has not been intended but is still actionable, it is also difficult to base the foreseeability of foreign law on that unforeseen harm. Another possible stance on 'objective intention' is to focus on specifically targeted destinations.

Foreseeability of Specifically Targeted Destinations[103]

An alternative to the 'worldwide intention' proposition is the notion that most websites specifically target only one State or a limited number of States, and that intention is ascertainable objectively from the general context of the site. Following this approach actual access is not sufficient to establish competence, but must be accompanied by a clear intention to direct the site at the particular State. An essentially local publication, such as a local newspaper, does not turn into a worldwide publication simply and automatically because it is made available on the Internet, even if sporadically accessed from foreign locations. This approach has been adopted in the US, in the context of adjudicative jurisdiction in online defamation disputes.[104]

An early defamation case which recognises the specific territorial focus of sites is *Blumenthal v Drudge*[105] in which the District of Columbia Court held that it had jurisdiction over the Californian defendant Drudge in respect of a claim involving the Drudge Report, published on the Internet from the defendant's computer located in California and allegedly defamatory of the plaintiffs in Columbia. While the defendant sent emails with the report to subscribers of the site, of which a fraction came from California, he in fact had no way of identifying their location. Thus he could prima facie not be said to have intentionally published the report in Columbia.[106] Had he known, like Dow Jones in *Gutnick*,[107] the targeting issue would been more straightforward. Nevertheless the court found that the Californian site targeted Columbia, as 'Drudge specifically targets readers in the District of Columbia by virtue of the subjects he covers....'[108] The subject-matter of the site defined and territorially delimited the readership of the site.

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[103] Same as the 'reasonable' effects test, discussed in Chapter 3, Part 4.b.

[104] In the US not adjudicative and subject-matter jurisdiction not as obviously linked, but if jurisdiction is based on specific personal jurisdiction, the tort is invariably generally committee in the forum. See also above n 3.

[105] 992 F Supp 44 (1998).

[106] *Blumenthal v Drudge* 992 F Supp 44, 54 (1998).

[107] Dow Jones, by accepting subscriptions from Australian residents, knowing they were Australian, targeted Australians with its site. While Australia may not have been the primary target, which was the US market, it was certainly a secondary target. Kirby J acknowledges this when he questions whether a 'targeting' approach would, if applied, also lead to a finding of a publication in Victoria. *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 131.

[108] *Blumenthal v Drudge* 992 F Supp 44, 57 (1998).

More recently, in *Young v New Haven Advocate*[109] two Connecticut newspapers were alleged to have defamed the plaintiff in Virginia by virtue solely of their online versions. In a thoughtful and persuasive judgment, the Fourth Circuit court held that the newspapers need not defend proceedings in Virginia 'because they did not manifest an intent to aim their websites or the posted articles at a Virginian audience.'[110] The electronic activity was not directed at the State with 'the manifested intent of engaging in business *or other interactions* within the State.'[111] The papers had not conceptually 'entered' the State with their sites. They were local sites aimed at a local audience only:

'[t]he overall content of both websites is decidedly local, and neither newspaper's website contains advertisements aimed at a Virginian audience. For example, the website that distributes the Courant… provides access to local… weather and traffic information and links to websites for the University of Connecticut and Connecticut state government… Connecticut, not Virginia, was the focal point of the articles.'[112]

Most interestingly, the court rejected (exactly what the Australian High Court endorsed) the notion that the online publishers could be expected to defend litigation in Virginia because they posted potentially injurious matters on the Internet knowing full well that the plaintiff resided and worked in Virginia.[113] The court held that the foreseeability of foreign harm is not enough to expose the defendant to the foreign court processes. They reiterated what seems an entirely appropriate proposition: '[a]lthough the place that the plaintiff feels the alleged injury is plainly relevant to the… inquiry, it must ultimately be accompanied by the defendant's own… contacts with the state if jurisdiction is to be upheld.'[114] In the final result, the defendant's activities of course outweighed the location of the harm. This is consistent with the above argument, that the competence inquiry (in any legal context, including defamation) should not hinge on where the harm was ~~knowingly~~ inflicted but rather where the site was knowingly published, i.e. at whom it was directed.

If a site is not - as in *Gutnick* or the other English cases - taken to be knowingly published everywhere, the inquiry as to where in particular the site was targeted will often (but not always) yield the same location where the defamatory harm was suffered. This is simply because generally articles about anyone are directed at those readers who know, or live in the same community as, the defamed person. However, as a matter of principle, and occasionally as a matter of substantive justice, it is vital to frame the inquiry correctly and examine the publication itself rather than the 'harm'. The harm, but not the publication, may be unintentional and thus its location fortuitous to the publisher.

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[109] 315 F3d 256 (2002); reversed 187 F Supp 2d 498 (WD Vir 2001) where the lower court had taken the *Gutnick* approach: '[T]he defendants argue that it would be unfair to subject them to worldwide jurisdiction simply because they placed information on the Internet… Again, this court disagrees.'

[110] *Young v New Haven Advocate* 315 F3d 256, 258f (4th Cir 2002)

[111] *Young v New Haven Advocate* 315 F3d 256, 263 (4th Cir 2002) [emphasis added].

[112] *Young v New Haven Advocate* 315 F3d 256, 263 (4th Cir 2002).

[113] *Young v New Haven Advocate* 315 F3d 256, 262 (4th Cir 2002).

[114] *Young v New Haven Advocate* 315 F3d 256, 262 (4th Cir 2002), citing *ESAB Group Inc v Centricut Inc* 126 F3d 617, 626 (4th Cir 1997); following *ALS Scan Inc v Digital Serv Consultants Inc* 293 F3d 707, 714 (4th Cir 2002).

The court also showed how a site's territorial focus can be ascertained in the case of non-interactive, non-commercial websites: simply examine the general thrust and content of the site. Just because a site is passive and non-commercial does not mean that it is not subject to the laws of any State; it is subject to the laws of those States which it objectively targets in light of all the circumstances. This is exactly the same broad notion that underlies the *Zippo* test or the EU 'directing' test for consumer contracts: no pain no gain. Here the gain is simply attracting readers from a certain State.[115] It is the moderate country-of-destination approach, applied to the particular context of online defamation.

This targeting approach has been applied to torts outside the US. Most interestingly, the Australian High Court itself endorsed it in *Voth v Manildra Flour Mills* in respect of negligent misrepresentations:

'If a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff, there is no difficulty in saying that the statement was, in substance, made at the place to which it was directed... And the same would seem to be true if the statement is directed to a place from where it ought reasonably to be expected that it will be brought to the attention of the plaintiff.'[116]

Similarly, in the Scottish trademark case of *Bonnier Media Ltd v Greg Lloyd Smith* Lord Young adopted a targeting approach, noting that he saw no reason 'why similar principles should not be applied to delicts such as defamation, or indeed negligence.'[117] He summarised it perfectly:

'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 other words in any country in the world. It does not follow that he actually commits a delict in every country in the world, however. It is obvious that the overwhelming majority of websites will be of no interest whatsoever in more than a single country or small group of countries. In my opinion a website should not be regarded as having delictual consequences in any country where it is unlikely to be of significant interest… In determining whether the impact of a website is insignificant, it is appropriate in my opinion to look both at the content of the website itself and at the commercial or other context in which the website operates.'[118]

E. Two Destination Principles – Their Flaws and Merits

This targeting approach is not flawless. It lacks certainty, as discussed in Chapter 3. Even in *Young* it could have been argued that the newspaper which had accepted eight subscriptions from Virginia[119] also targeted Virginia provided the locations of subscribers were known. Virginia might not have been the primary target, but it might have been one of many secondary targets. The difficult question is how great

[115] The no-gain-no-pain maxim could be and has also been applied to the outright destination approach: the gain would simply be the world-wide audience acquired by virtue of going online, which is fictional in respect of most localised websites.

[116] *Voth v Manildra Flour Mills* (1990) 171 CLR 538, para 63.

[117] *Bonnier Media Ltd v Greg Lloyd Smith and Kestrel Trading Corporation* (Court of Session, Scotland, 1 July 2002) para 18, http://www.scotcourts.gov.uk/opinionsv/dru2606.html.

[118] *Bonnier Media Ltd v Greg Lloyd Smith and Kestrel Trading Corporation* (Court of Session, Scotland, 1 July 2002) para 19 [emphasis added]; same approach as in *Euromarket Designs Inc v Peters* [2000] ETMR 1025.

[119] *Young v New Haven Advocate* 315 F3d 256, 260 (4th Cir 2002).

the proportion out of the overall readership must be before a State ought to be considered a target of the site. ? And this question is not amenable to an easy and certain answer. However, the main disadvantage which probably explains why many courts have not gone for the targeting approach (and even less so for the country-of-origin approach), is that it requires States to forego competence even though the site had some effect, albeit minor, on the territory. Non-targeted States may often be marginally affected by the site, but the whole point of the targeting approach is to let only those significantly affected regulate it. Sporadic and isolated hits on a site from any country should simply be ignored for competence purposes. That seems unacceptable from the perspective of most States as it would mean that more lenient foreign legal standards can compromise, however marginally, home-grown legal policies. This shines through Hedigan J's comments in *Gutnick*:

'The…argument that it would be unfair for the publisher to have to litigate in the multitude of jurisdictions in which its statements are downloaded and read, must be balanced against the world-wide inconvenience caused to litigants… who would at enormous expense and inconvenience have to embark upon the formidable task of suing in the USA… where the libel laws are… tilted in favour of defendants, or… in favour of the constitutional free speech concepts and rights developed in the USA which originated in the liberal construction by the courts of the First Amendment.'[120]

In the High Court Callinan J defended the adopted approach on the basis that anything else would create 'an American legal hegemony in relation to Internet publications.'[121] And, of course, he had a point because the more lenient speech standards would to some limited extent infiltrate countries with stricter standards on any approach other than the outright country of destination approach. But by insisting on competence over all online activity States shoot themselves in the foot. And this brings us to the substantial advantages of the moderate country-of-destination approach.

First, it reduces the regulatory burden of online content providers to a more realistic level; they need only comply with the laws of the States which they specifically and substantially target and not the laws of all States. The importance of this cannot be understated. To create any order in cyberspace, the first step must be realistic legal expectations. Currently, many people still believe that the Internet is not or only marginally regulated by States. In truth, States have made broad regulatory claims over sites (often without any means of enforcing these claims) across the legal spectrum, so much so that most sites attract a vast expanse of legal regimes - far too great for most online publishers. This means that legal non-compliance[122] cannot but be the default position in cyberspace – a position hardly conducive to law and order. A wider endorsement of the targeting approach would be a step in the right direction of aligning legal expectations by States with the legal capacity of most online actors.

[120] *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, para 73.
[121] *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 200.
[122] This may often take the form of accidental 'compliance'. In other words, a site may not breach a law not because the operator consciously complied with it, but rather because his conduct happened to be in conformity with the law. Despite not breaching the law, the online actor cannot be said to comply with it as compliance entails knowing the law and consciously acting in accordance with it.

Second, despite its lack of certainty, the targeting approach still accommodates foreseeability and control. Online actors, just like the courts, can foresee possible legal exposure by examining the general thrust and content of their sites, and limit legal exposure by changing that general thrust and content, by making the site interesting for visitors from one State but not another. And as isolated, sporadic hits are ignored for legal purposes, freely accessible sites are legally accommodated: they do not need to be transformed into sites with access restrictions to gain control over their visitors and thus legal exposure. This would seem to be highly desirable to protect the openness and accessibility of the Internet as a whole.

Third, the targeting approach allows States to make regulatory claims (i.e. apply their laws and court procedures) in respect of those foreign activities which have a real effect on their territory. Last but not least, on a theoretical level the moderate country-of-destination approach protects the integrity of any transnational regime allocating regulatory competence. These regimes are premised on the assumption that not all States should regulate all activities, they should *share* competence amongst themselves, based on the *relative* strength of the nexus between the activity and the State.

The table summarises the flaws and merits of the two destination principles.

Outright Country-of-Destination Approach Legal exposure based on online accessibility of the site in a State	**Moderate Country-of-Destination Approach** Legal exposure based on directing online activities towards a State
EXAMPLES	
Gutnick, Harrods, King *Yahoo, Töben , Perrin* (Ch 3 & below)	Art 15(1)(c) of the EC Jurisdiction Regulation US jurisprudence on personal jurisdiction: *Zippo* targeting test, the *Young* effects doctrine
ADVANTAGES	
In principle States retain absolute control over their territory (regulate sites with an effect, even if minor, on their territory i.e. all accessible websites) - local policies, businesses, consumers protected Simple (easy foreseeability of foreign legal regimes, namely all)	In principle States retain control over their territory (regulate sites with a significant effect on their territory i.e. websites which are frequently accessed) - local policies and consumers largely protected Fewer concurrent assertions of competence; more realistic regulatory burden for online publishers
DISADVANTAGES	
Innumerable concurrent assertions of competence; significant overregulation of online publishers (non-compliance is the default option)	States lose some control over their territory (activity which has a minor effect is not regulated)

Inconsistent with the idea of sharing competence between States, which underlies all competence regimes Often not enforceable	Lack of certainty and predictability; targeting may lead to varying conclusions Often not enforceable

3. Foreseeability of Foreign Criminal Law

A. Common Rules but Multiple Interpretations

The criminal jurisdiction of States is delimited by public international law. Thus in principle there is only one set of rules, in contrast to the many sets of private international law - making exposure to foreign criminal law in principle more easily foreseeable. The reality is not as clear cut. First, while the territoriality principle itself, the primary basis of criminal jurisdiction, is unchallenged, its boundary areas e.g. the effects doctrine, are controversial;[123] and many online cases fall into grey areas. Second, the precise limits of criminal jurisdiction are invariably determined by national courts which make decisions as to the width of their competence, often preoccupied by local policy, without reference or regard to international law[124] or the need for internationally harmonised rules.[125] Unless those decisions seriously affect the national interests of other States, protests by them against too wide an assumption of regulatory control are rare.[126] It means the existence of an international jurisdictional regime does not pre-empt inconsistencies of jurisdictional assertions or the national fragmentation of principles. Assertions of criminal jurisdiction are unlikely to be more easily foreseeable than legal exposure in the private context simply by virtue of 'harmonisation' at international level.

[123] See Chapter 3, Part 4. See also Rosalyn Higgins, 'The Legal Bases of Jurisdiction' in Cecil J Olmstead (ed), *Extraterritorial Application of Laws and Responses Thereto* (Oxford: ECS Publishing Limited, 1984) 3, 5ff.

[124] A typical example is the recent Australian decision of *Lipohar v R* (1999) 168 ALR 8, 48 where the judges, when *in obiter* referring to the issue of international jurisdiction, at most acknowledged international comity, as opposed to legal limits set by international law.

[125] Sir Robert Jennings and Sir Athur Watts (eds), *Oppenheim's International Law* (9th ed, London: Longham, 1992) Vol 1, 45, noting that 'in many states the courts have to apply their national laws irrespective of their compatibility with international law.' Karl M Meessen, 'International law Limitations on State Jurisdiction' in Cecil HJ Olmstead (ed), *Extraterritorial Application of Laws and Responses Thereto* (Oxford: ECS Publishing Limited, 1984) 38, 39. Note also much criticised dictum in *The Case of the SS "Lotus" (France v Turkey)* (1927) PCIJ Reports, Series A, No 10, 19: 'far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable.'

[126] Michael Akehurst, 'Jurisdiction in International Law' (1972-73) 46 *British Yearbook of International Law* 145, 169 and 187. Note also Comment 'd.' to §402 of the US Restatement (Third) of Foreign Relations Law (1986), stating that the controversy over the effects doctrine has been generally limited to jurisdictional assertion based on economic effects, particularly through competition laws.

Furthermore public international law is designed to maintain an orderly system between States, allowing them to promote their national interest and welfare without interference from other States.[127] The interests of individuals are of secondary importance and subordinate to those of States. This is, for example, reflected in the rule that individuals cannot contract in or out of the public ordering of a State, comparable to private law. In respect of US anti-trust law, a commentator said '[v]oluntary submission clauses would not make US jurisdiction more palatable. Foreign recipients of US goods or technologies admittedly often 'agree to comply' with US export control regulations. But private companies cannot, as a rule, restrict the jurisdiction of their sovereign state by a private contractual obligation.'[128] All public law is of a mandatory character and can never, in terms of foreseeability, benefit from party autonomy. So the criminal jurisdiction regime can hardly be said to have a head start when it comes to foreseeability of legal exposure.

B. Foreseeability and the Territoriality Principle

Does the territoriality principle incorporate foreseeability of legal exposure as a pre-requisite for its application? A critic of Johnson and Post's assertion ~~argument~~ about the absence of noticeable borders in cyberspace argued that the 'argument wrongly imports a notice requirement for prescriptive jurisdiction… But, international law does not in fact require a state to satisfy a reasonableness standard in exercising prescriptive jurisdiction.'[129] But does international law indeed condone States acting in disregard of the rule of law by subjecting individuals to their laws in situations when they could not have known about them? Such sentiments would seem to be entirely irreconcilable with the notion of human dignity reflected in universally recognised human rights.

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[127] Bernard H Oxman, 'Jurisdiction of States' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) Vol 10, 277, 278.

[128] Luzius Wildhaber, 'The Continental Experience' in Cecil HJ Olmstead (ed), *Extraterritorial Application of Laws and Responses Thereto* (Oxford: ECS Publishing Limited, 1984) 63, 66. Note companies not infrequently enter into agreements with States themselves under which they may enjoy immunity from certain laws in return for inward investment. In such situations the State is a party to the contracting out of legal obligations. Generally, Philip J McConnaughay, 'Reviving the "Public Law Taboo" in the International Conflicts of Law' (1999) 35 *Stanford Journal of International Law* 255, 280, where the author refers to recent US cases where private parties to international transactions appear to have been allowed to opt out contractually of otherwise applicable US public law. See also, Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992), para 8.27. http://www.austlii.edu.au/au/other/alrc/publications/reports/58/, In *R v Harden* [1963] 1 QB 8 the court refused to exercise jurisdiction in a criminal case because the accused had agreed with his victims that certain documents were deemed to be received by the accused in New Jersey when they were received by the Jersey post office; discussed in Matthew Goode 'The Tortured Tale of Criminal Jurisdiction' (1997) *Melbourne University Law Review* 411, 418f. This decision, which has frequently been criticised, appears contrary to established practice.

[129] Sanjay S Mody, 'National Cyberspace Regulation: Unbundling The Concept of Jurisdiction' (2001) *Stanford Journal of International Law* 365, para II.B.. But is reasonableness is the same as notice? Similar views are expressed in Karl M Meessen, 'International Law Limitations on State Jurisdiction' in Cecil J Olmstead (ed), *Extraterritorial Application of Laws and Responses Thereto* (Oxford: ECS Publishing Limited, 1984) 38, 39: 'as regards state jurisdiction, those factors listed in *Timberlane* and *Mannington Mills* that are exclusively related to the protection of the individual… are rather unlikely to form part of international law proper.'

One reason why the territoriality principle developed as the main organising principle for allocating regulatory control is that territory or physical distance was, and is, albeit to a lesser extent, determinative of our behaviour, with whom we interact and upon whom our actions have an effect.[130] When physicality or location is determinative of, and delimits, human interactivity, making it a basis for regulatory competence makes sense because of its simplicity and transparency for all concerned: 'In practice,… the [territorial] rule was adopted because it was thought that it would be easy to apply and would produce certainty of result.'[131] The emergence of the territoriality principle as the main organising principle of allocating regulatory competence cannot but have been linked to the high degree of foreseeability of legal consequences which it could produce in a human environment constrained by physical distance. Yet, this does not mean that the foreseeability of legal consequences is also incorporated within the territoriality doctrine as a pre-requisite for legal exposure.

When the foreseeability of legal exposure is clearly present (as when the relevant action or actors are located within one territory only), then it need not be decided if it is in fact a pre-requisite for legal exposure. Such a decision is only required when foreseeability is doubted, as was, for example, the case in respect of US anti-trust law being applied to anti-competitive practices occurring outside its territory.[132] The law was applied to foreign actors who never entered US law space, never crossed its borders, never passed those sign-posts alerting them to the start of new legal space. The only things to transit those borders were the economic effects of their actions. In terms of foreseeability this was problematic, especially because corporate activities frequently have economic effects of varying intensity in a number of States,[133] making it difficult to predict which States have a right to regulate and which do not. Yet, whatever criticism one may mount against the effects doctrine, foreseeability was tackled from the onset. In the seminal *Alcoa* case the judges held that jurisdiction could only be asserted over foreign activities which were subjectively intended to affect the US and did actually affect the US.[134] Given the difficulty of proving anyone's subjective intention, '[t]he requirement of subjective intention to affect American trade or commerce was soon replaced by the objective tests of foreseeability of that effect.'[135] More precisely, US law would apply when

[130] Santiago Torres Bernardez, 'Territorial Sovereignty' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (1987) Vol 10, 487, 487f: 'it enables the integration of the State's human constituents to take place through its attachment to the soil… and provides a solid basis for the powers of control and coercion… [but] it must be admitted that in recent decades the material function of territory has… been affected by the impact of such new phenomena as fast communications, sophisticated weaponry and integrated economic regions.'

[131] Goode, above n 128, 415.

[132] The seminal case in this area: *U S v Aluminium Company of America* (The Alcoa Case) 148 F 2d 416, 443(1945) this expansion of competence was justified by the following, later much disputed statement: '[I]t is settled law… that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends…'

[133] Akehurst, above n 126, 195. A typical recent example is the collapse of Enron plc.

[134] *The Alcoa Case (US v Aluminium Company of America)* 148 F 2d 416, 444 (1945).

[135] A V Lowe (ed), *Extraterritorial Jurisdiction - An Annotated Collection of Legal Materials* (Cambridge: Grotius Publications Limited, 1983) 3.

'foreign transactions have a substantial and foreseeable effect on U.S. commerce.'[136] When the effect of someone's activity on a State is both substantial and foreseeable, it is foreseeable (and must be foreseeable to the actor in question) that that State has a legitimate interest in regulating that activity. Thus its laws are foreseeable. The 'substantial and foreseeable effect' requirement appears to have survived all later US developments (including the rise and fall of the 'balancing test'[137]), with the current position permitting jurisdiction over foreign activity only if it was intended to, and did, produce substantial effects on US territory.[138] The following examines how foreseeability has been dealt with in regulating online conduct through public law.

C. Foreseeability of All Destinations

The crux of the problem in respect of criminal jurisdiction over online activity is the same as with jurisdiction in private cases: online publishers, especially of freely accessible sites - the bread and butter of the Internet - often do not know the location of those who access or might access their sites or, even if they do, it may not be practicable to exclude certain users without transforming the site significantly. A classic example would be the freely available preview site (to a subscription pornography site) in respect of which Perrin was convicted in the UK for an obscenity offence.[139] Online publishers have argued that they do not necessarily know which State they 'enter' and thus cannot foresee the law to which they may be exposed.[140] Have States been sensitive to this argument? The answer is both yes and no. Yes, courts, despite endorsing the country-of-destination approach, have, often expressly, taken foreseeability into account. Yet, this express concern has not translated into a serious engagement with the overall legal burden of online publishers, and invariably led to the implicit conclusion that going online makes world-wide regulation foreseeable.

For example, in the *Yahoo* case the French court was not oblivious to the notion of foreseeability, despite the fact that in the initial judgment in May 2000, Justice

[136] Ibid.

[137] Introduced by *Timberlane Lumber Co v Bank of America* 549 F 2d 597, 614-15 (1976) and required the court to also take into account in deciding jurisdiction a number of factors, including'… the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect'; followed in *Mannington Mills v Congoleum Corp* 595 F 2d 1287, 1294ff (1979); see §402)(1)(c) and 403(2)(a) and (d) of US Restatement (Third) of Foreign Relations Law (1986). The balancing test was rejected in *Hartford Fire Ins Co v California* 509 US 764 (1993).

[138] American Bar Association (ABA), 'Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet' (2000) 55 *The Business Lawyer* 1801, http://www.kentlaw.edu/cyberlaw/docs/drafts/draft.rtf, 82.

[139] *R v Perrin* [2002] EWCA Crim 747.

[140] Perrin relied on interpretation of the 'rule of law' by the European Court of Human Rights in *Sunday Times v UK (No 1)* [1979] 2 EHRR 245, para 49*:* '[T]he following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable.'

Gomez justified France's competence on the basis that Yahoo! Inc, by permitting the online visualisation in France of the objects in question, 'has committed a wrong on the Territory of France, a wrong, the *unintentional nature* of which is apparent'.[141] This argument was somewhat retracted in the November judgment:

'while it may be accurate that the site "Yahoo Auctions" in general is intended principally to internauts based in the United States given the nature of the objects put on sale, the methods of payment provided, the terms of delivery, the language and the currency used, *the same is not true of the sites auctioning objects representing symbols of the nazi ideology which might interest and are accessible to any person who wishes to go to them, including French people…*'[142]

The court imputed to Yahoo! Inc an intention to offer the Nazi objects to the world at large, including France, based on the nature of the objects, which may be of interest anywhere. This intention, in the court's mind, was further evidenced by the fact that Yahoo! Inc provided online advertising which was sensitive to the location of surfers, with surfers accessing the auction site from France being sent advertising banners in French.[143] So, far from saying that Yahoo! Inc's intentions were irrelevant, Justice Gomez held that anyone offering Nazi-memorabilia can be presumed to realise that it is of interest worldwide and thus must be taken to have intended worldwide distribution.[144] Worldwide legal exposure was foreseeable. Similarly, in the *Töben* judgment the German court justified the assumption of jurisdiction by arguing not only that a constituent element of the crime had occurred in Germany[145] but also that Töben had intended this: by putting the Holocaust denials on the Internet, he intended to publish his assertion worldwide and thus also in Germany. The court did note that given the content of the site, it was objectively intended in particular for a German audience.[146]

Interestingly, in both cases the court focused on the content of the particular site to determine the site's objective territorial target. However, the difference to the *Young* approach is that, at least in *Yahoo,* the focus was very narrowly on the particular matter which actually caused the harm, rather than on the general territorial focus of Yahoo! Inc's auction site or the entire yahoo.com. So really Justice Gomez argued very much along the lines of the *Gutnick* court*:* look at the particular

[141] *LICRA & UEJF v Yahoo! Inc & Yahoo France* (Tribunal de Grande Instance de Paris, 22 May 2000) [emphasis added]; affirmed in *LICRA & UEJF v Yahoo! Inc & Yahoo France* (Tribunal de Grande Instance de Paris, 20 November 2000) http://www.foruminternet.org/actualites/lire.phtml?id=273

[142] *LICRA & UEJF v Yahoo! Inc & Yahoo France* (Tribunal de Grande Instance de Paris, 20 November 2000) [emphasis added].

[143] *LICRA & UEJF v Yahoo! Inc & Yahoo France* (Tribunal de Grande Instance de Paris, 20 November 2000)

[144] *R v Timothy K and Yahoo Inc* (Tribunal de Grande Instance de Paris, 26 February 2002, No 0104305259) http://www.foruminternet.org/actualites/lire.phtml?id=273, where the court reinforced the importance of intention. Although the advertising was a constituent element, and indeed essential characteristic, of the relevant crime, 'the factual circumstances of the advertising must reveal the intention of the publication… there is no reprehensible advertising if it results from independent and posterior circumstances foreign to the intention of its author.'

[145] In this case, this was the real capability of the online material to disturb the public peace in Germany: *Töben* (BGH, 12 December 2000, 1 StR 184/00, LG Mannheim) (2001) 8 *Neue Juristische Wochenschrift* 624, 626f.

[146] *Töben* (BGH, 12 December 2000, 1 StR 184/00, LG Mannheim) (2001) 8 *Neue Juristische Wochenschrift* 624, 627.

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person written about, or here the particular thing offered on your site, which caused the 'harm' in our State and you, the online publisher, could have known that that 'harm' would occur here. So 'harm' is treated, just like 'harm' in defamation, as if it was something objectively existent, disconnected from any particular legal system, which should by itself alert the publisher to the application of the law. But, as argued above, harm is what each legal system defines as 'harm' and often very differently. So again the courts took a parochial view on foreign online activity to support the foreseeability of home rules.

A seemingly more moderate country-of-destination approach appears to be adopted by US courts. They seem to follow their anti-trust precedents, requiring as a foundation for criminal jurisdiction that the foreign conduct was intended to, and did, produce actual effects in the territory. For example, in the early consumer protection case of *State v Granite Gate Resorts Inc* dealing with deceptive trade practices, the Minnesota court assumed adjudicative jurisdiction over the foreign defendant on the basis of 'the computer hits on Defendants' Web sites… along with the fact that the Court has determined that WagerNet's mailing list includes Minnesota residents.'[147] Furthermore its advertisement on an American commercial site suggested that the defendant intended to reach an American market.[148] All in all the defendants had 'made a direct marketing campaign to the State of Minnesota. Therefore, it is not unforeseen nor unreasonable to Defendants to be required to come to Minnesota to defend themselves.'[149] A similar approach was taken in *People v World Interactive Gaming Corp,*[150] where the court held that the site operators had targeted the US and thus also New Yorkers:

'WIGC… [is] doing business in New York… [It] engaged in an advertising campaign *all over the country* to induce people to visit their website and gamble. *Knowing* that these ads were reaching thousands of New Yorkers, respondents made no attempt to exclude *identifiable* New Yorkers from the propaganda. Phone logs from respondents' toll-free number (available to casino visitors on the GCC website) indicate that respondents had received phone calls from New Yorkers.'[151]

Of course, this reasoning is not conclusive as to the position the court would have adopted if the defendant had not directed its activities so clearly primarily at the US. What would the court have decided if the US had merely been a secondary target with European States being the primary target? Given the economic power of the US and its technological sophistication it is an attractive market for online businesses around the globe. So being a secondary target is not a question US courts have to

[147] *State of Minnesota v Granite Gate Resorts Inc* 558 NW 2d 715, 720 (1997), affirmed *State of Minnesota v Granite Gate Resorts Inc* WL 767431 (Minn 2d Dist Court, 1996). Although US courts largely apply the same principles to public prosecutions as those governing personal jurisdiction in private cases, the court in *State of Minnesota v Granite Gate Resorts Inc* WL 767431 (Minn 2d Dist 1996) 10 said: 'Minnesota through the Attorney General seeks to regulate solicitation that comes to its state via phone lines hooked up for Internet users. The Courts do not view the contacts the same as what is necessary for a private litigant to pursue a case as compared to the situation in which the state seeks to regulate solicitations within its borders.' Most States would require as a precondition for a prosecution the actual presence of the offender in the territory, not merely 'minimum contacts'

[148] *State of Minnesota v Granite Gate Resorts Inc* 558 NW 2d 715, 720 (1997).

[149] *State of Minnesota v Granite Gate Resorts Inc* WL 767431 (Minn 2d Dist Court 1996) 7.

[150] 714 NYS 2d 844 (1999).

[151] *People v World Interactive Gaming Corp* 714 NYS 2d 844, 849 (1999) [emphasis added].

consider often; generally they can comfortably adopt a seemingly more moderate legal stance on competence, as more often than not adopting that stance justifies their competence. Isolated examples suggest that if the need arises, even the US will not be quite as generous on the competence issues.[152]

Certainly in criminal law, even more so than in private law, all States are deeply concerned about foregoing regulatory competence when that would undermine local policies or, as will be shown in the next chapter, local economic interests. For now, the sentiments expressed by the court in *People v World Interactive Gaming Corp*[153] accurately reflect the concern all States share about foreign online activity which is illegal at home:

'Wide range implications would arise if this Court adopted respondents' argument that activities or transactions which may be targeted at New York residents are beyond the state's jurisdiction. Not only would such an approach severely undermine this state's deep-rooted policy against unauthorized gambling, it also would immunize from liability anyone who engages in any activity over the Internet which is otherwise illegal in this state.'[154]

D. 'Reasonable Foreseeability' – Some Conclusions

What is 'reasonably foreseeable' is not something objectively ascertainable by reference to human or corporate capacity to absorb legal regimes. If this were the case, it would yield the same conclusion quite regardless of the particular legal context or the legal regime. But clearly a foreign legal order not reasonably foreseeable in one context may nevertheless be considered foreseeable in another. 'Reasonable foreseeability' is a legal decision - a legal decision as to what online providers ought to foresee, depending on the State's relative interest in the law's enforcement, balanced against its relative interests in protecting the online publishers from overregulation, and in protecting online activity generally.[155] In short, what is 'reasonably foreseeable' is the conclusion, not the starting point, of the inquiry. Consequently it comes as no surprise that in respect of public law there is a marginally greater readiness to find that the law of a particular State was foreseeable. Courts in criminal matters make less of an attempt to soften the blow handed out by their rulings in favour of worldwide exposure. But ultimately the difference between the approach taken to foreseeability in civil actions and criminal actions is one of degree.

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[152] One example taken from the private context is the trademark case of *Cable News Network LP v CNNews.com* 177 F Supp 2d 506 (ED Va 2001), affirmed in part *Cable News Network LP v CNNews.com* 56 Fed Appx 599 (4th Cir 2003), where a website by a Chinese resident was subjected to the US Laham Act even though the site was in Chinese and accessed almost exclusively from China, no business was transacted in the US and there was no evidence that anyone in the US had actually accessed it. Discussed in Richard L Garnett, 'Trademarks and the Internet: Resolution of International IP Disputes by Unilateral Application of U.S. Law' (2005) 30 *Brooklyn Journal of International Law* 925, 934f.

[153] 714 NYS 2d 844 (1999).

[154] *People v World Interactive Gaming Corp* 714 NYS 2d 844, 850 (1999).

[155] Larry Kramer, 'Rethinking Choice of Law' (1990) 90 *Columbia Law Review* 277, 336: 'the existence of "reasonable expectations" is not an objective question… [but] masks normative judgments reflecting what a court believes the parties ought to expect.'

Furthermore, considering the acceptability of the targeting approach in other private law contexts, as shown in Chapter 3, it is somewhat astonishing that it is generally rejected in private defamation actions.[156] But given that defamation actions touch upon the fundamental value of freedom of expression and how that value should be balanced with competing rights, it is perhaps after all not surprising that States have been very concerned with protecting the particular way they have previously struck that balance. This by implication means that no foreign online inroads, however marginal, that would upset that traditional balance are acceptable.

The policy nature of 'foreseeability' also explains why the 'excuse' advanced by online publishers that they do not know the location of those who access their site has simply not been accepted by the courts. The legal insistence that the site was actually accessed in the forum in defamation actions has not gone hand in hand with a requirement that the publisher knew the location of the surfers. Thus it makes no difference in terms of the regulatory burden on online publishers if the whereabouts of the surfers are neither known nor can be controlled: worldwide legal compliance is still necessary. And for criminal purposes actual access is largely irrelevant for competence. There the accessibility of the site, the mere potential of an effect of the site on the State, is 'harm' enough.[157] No actual effect, no hit on the site from the forum, is needed. This is in many ways not surprising, as the activity in question would have been criminalised precisely because it was considered so harmful as to require the systematic regulation by the State rather than the sporadic enforcement through private litigation. Mere accessibility as a connecting factor is also consistent with the general concern of criminal law to punish the defendant for his blameworthy behaviour,[158] as opposed to civil law which seeks to compensate the victim for actual harm suffered. Thus accessibility of a site is sufficient in criminal law but actual access tends to be necessary for civil law. Accessibility as a criterion for legal exposure makes foreseeability of foreign law extremely straightforward: every law is applicable (although it may lie dormant ready to strike should the need arise).

This goes to the heart of another pressing question: how can courts possibly pretend that actual compliance with the laws of all States is in fact feasible?[159] Is this a case of the emperor in his new suit? The answer is that courts on the whole do not anticipate such compliance, but rather that online publishers forego open access and territorially delimit their sites. Location-sensitive screening with the help of geo-

[156] The more expansive approach is even more surprising given that these cases, as noted above, often concern not just jurisdiction but also applicable law, and thus one might legitimately have expected a more restrictive approach.

[157] This explains why manufactured contacts (i.e. contacts by the defendant with the forum State which were provoked by the plaintiff for the sole purpose of establishing a nexus with the State) are generally not sufficient in private cases but are sufficient in public cases.

[158] Consistent, for example, with *R v Burdett* (1820) 4 B & Ald 115, which concerned a prosecution for seditious libel, which was held to be established without proof of 'publication' in the jurisdiction (here the County of Leiceister). See also *R v Treacy* [1971] AC 537, where a letter sent from England to blackmail a person in Germany was held to be within the criminal jurisdiction of England.

[159] Quite apart from the fact that compliance would also require compliance with the lowest common denominator, as agued e.g. in *R v Perrin* [2002] EWCA 747, para 35.

location technology,[160] discussed in Chapter 7, is the only way to make the regulatory burden realistic. The French court very explicitly required Yahoo! Inc to prevent access to users from French territory, and investigated the feasibility of that order. The Australian policy statement on online offers of securities provides:

'[i]n order not to target persons in Australia… the offeror must… take a variety of precautions designed to exclude subscriptions being accepted from persons in Australia and to check that the precautions are effective… Examples of precautions are not sending notices to, or not accepting applications from, persons whose telephone numbers, postal or electronic addresses or other particulars indicate that they are applying from Australia… It is not acceptable to only use precautions that place the responsibility on the applicant. For example, it is not enough to simply ask an applicant whether they are applying from Australia.'[161]

Although the defendants in *People v World Interactive Gaming Corp* had implemented some screening mechanism, it was so easily circumvented that the court simply rejected the defendants' 'argument that it unknowingly accepted bets from New York residents. New York users can easily circumvent the casino software in order to play by the simple expedient of entering an out-of-state address.'[162] With these words, the court acknowledged both the importance of making the requisite connection knowingly and the need for reliable screening mechanisms and this same approach with only the slightest variations applies also to civil cases.[163] Even if the courts do not specifically mention this as a solution, the implication of *Gutnick* or *Harrods* is simple: forego secondary targets of their sites such as Australia and the UK and simply not accept subscriptions from residents of 'marginally targeted' States. Implementing location-sensitive measures is vital both for the foreseeability

[160] Svantesson, above n 68. See discussion in Chapter 3 on how zoning of online content allows for the operation of concurrent law and prevents conflicting regulatory claims. Already in 1996 *Playboy Enterprises Inc v Chuckleberry Publishing Inc* 939 F Supp 1032, para III.B (SDNY 1996) put the onus on content providers to find means to resurrect borders in cyberspace: 'While this Court has neither the jurisdiction nor the desire to prohibit the creation of Internet sites around the globe, it may prohibit access to those sites in this country. Therefore, while Tattilo may continue to operate its Internet site, it must refrain from accepting subscriptions from customers living in the United States.'

[161] ASIC, above n 163, PS 141.14. This statement also confirms that in the absence of location-sensitive mechanisms a site may be presumed to target Australia. Cf ABA, above n 57, 114: 'securities solicitation rules in the U.S., U.K., and a number of other countries, attempt to distinguish between inadvertent contacts with a resident of the country from abroad (not regulated) and systematic efforts to target consumers in that country (which may be regulated).' But see also ABA, above n 57, 113f where it is noted that existing data protection laws are triggered regardless of whether the collector of data targeted the territory or not.

[162] (1999) NYS 2d 884, 851.

[163] Particularly in criminal law, legal responsibility for a site cannot be removed by the inclusion of a disclaimer or a request on the user to exit the site in certain circumstances. See e.g. Australian Securities and Investments Commission, *Offers of Securities on the Internet*, Policy Statement 141 (10 February 1999, reissued 2 March 2000), PS 141.14 and 141.15. Generally: *Ticketmaster Corp v Tickets.com* Lexis 4553 (CD Cal 2000): 'It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with any one using the web site.' In the private context, the disclaimer may be relevant but must not be inconsistent with other evidence: *Tech Head Inc v Desktop Service Center Inc* 105 F Supp 2d 1142 (D Ore 2000); *Euromarket Designs Inc v Crate & Barrel Ltd* 96 F Supp 2d 824 (ND Ill 2000); see also *Macquarie Bank v Berg* [1999] NSWSC 526. Similarly, the screening of surfers must not merely not be window-dressing: *Twentieth Century Fox Film Corp v iCraveTV* US Dist LEXIS 1013 (WD Pa, 28 January 2000), discussed in Svantesson, above n 68, 129f; *Citron v Zundel (No 4)* (2002) 41 CHRR D/274 http://www.chrt-tcdp.gc.ca. See also ABA, above n 138, 114f (in the data protection context).

of legal exposure as well as for making the regulatory burden manageable. The more reliable those measures, the greater the respect the law will accord to them.

Certainly there is considerable pressure on freely accessible sites, especially those with 'legally significant' content, to drop the 'freely' and implement screening. But this simply begs the question: what is 'legally relevant' and how does one find out? This in turn brings us to the final part of this discussion: how do people normally foresee and know their legal obligations and how do these 'notice' mechanisms operate in the transnational world of the Internet?

4. Actually Foreseeing and Knowing Foreign Law

A. Actual Notice and the Effectiveness of Law

While, as a matter of fairness, individuals should not be exposed to secret laws, that is laws which are not foreseeable, the effectiveness of regulation demands more. It requires that the majority of those affected by it *actually* foresee and know the relevant rules. FAlthough for a legal rule to be effective, that is, achieve its purpose,[164] there need not be 100 percent compliance. Still there is a need for it to be 'obeyed more often than not.'[165] On the reverse, large-scale non-compliance with any legal rule is problematic not just in terms of the failure of achieving the law's purpose, but also in terms of undermining the law's and regulator's credibility more generally. For laws to be obeyed, they certainly need to be known. The exception is indirect regulation; it neither needs to be foreseeable nor actually known to be effective.

Indirect regulation has been described by Lessig, who argued that regulators are frequently more successful in achieving a desired outcome, not by having recourse exclusively to prohibitive rules backed by sanctions, but by using indirect laws which affect other possible constraints such as social norms, the market and the architecture.[166] An advantage of such indirect regulation is that the prohibitive rules are either unnecessary or merely supplementary, facing an environment within which conformity is already largely established. If the government wants people to wear seatbelts, it can make it an offence not to wear one (direct regulation) or – more indirectly - by educating the public on its benefits (ie. influencing social norms), oblige insurance companies to give better rates to seat belt wearers (ie. influencing the market) or mandate cars with automatic seat belts (ie. influencing architecture).[167] One problem or advantage, as the case may be, of any indirect regulation is transparency, or rather the lack of it.[168] The effectiveness of indirect

[164] Raz, above n 17, 207.

[165] H L A Hart, *The Concept of Law* (2nd ed, Oxford: Clarendon Press, 1994) 103. Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1946) 39: 'Efficacy of law means that men actually behave as, according to the legal norms, they ought to behave, that the norms are actually applied and obeyed.' In this chapter the terms 'conformity' and 'obedience' are used interchangeably denoting behaviour which is in accordance with the law, or, in psychological terms, with the 'abdication of initiative to an external source.' Stanley Milgram, *Obedience to Authority* (London: Tavistock, 1974) 114.

[166] Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Book, 1999) 90ff.

[167] Ibid 93f.

[168] Ibid 98. See also Chapter 1.

regulation of relevant market, social norms and architecture does not depend at all on the visibility of the law and at times even positively benefits from its invisibility, however controversial.[169] The object may be achieved without individuals having actual notice of the content or even existence of those indirect laws, with their choices between possible alternative courses of action being directed one way or another by market forces, social norms and architecture.

As much as visibility of the law is not a prerequisite for the effectiveness of indirect regulation (which provides another reason why governments may find it attractive), it is essential for direct regulation. Here the law is not channelled through an external order such as the market or social norms, but is sought to impact on conduct directly. For those norms it is indispensable that they are at least actually known; even more so if the legal subject is not subject to other influences or constraints on his behaviour such as the market or moral norms – as is frequently the case in the transnational online context. And depending on what theory one adopts on why people obey laws, such visibility of, and familiarity with, the law may go quite a way towards obedience.

Very briefly, the traditional and still commonly held Austinian school of thought, is that the fear of sanctions provides the necessary inducement for obedience: it is not the actual sanction being applied, but the threat of it.[170] Clearly, this can only work if individuals have notice about the nature of the sanction and in what circumstances it may arise: '[t]his punishment then… in order to produce its effect must in some manner or other be announced: Notice of it must in some way or other be given, in order to produce an expectation of it, on the part of the people whose conduct it is meant to influence.'[171] The effectiveness of the law in question depends on publicising the content of the rule in question, as well as the sanctions for its breach, so that individuals are not only conscious of the legal consequences that may attach to certain conduct, but also know how they can avoid being subjected to it. If this theory holds true, an immediately obvious problem in the online context is the territorially limited reach of the State's enforcement power, which would mean that foreign online actors have often no motive to comply with laws that cannot be enforced against them. But is obedience indeed based on the fear of a likely sanction being imposed in the case of non-compliance?

[169] Ibid 96, citing as an example the Reagan administration's indirect strategies to reduce the number of abortions.

[170] Bentham's language the fear of pain, and for that fear to be induced, the punishment must be announced to those expected to comply with the relevant law. H L A Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982) 109, 127ff, where he also refers to the prospect of a reward for compliance as a possible motive for obedience. Johnson and Post, above n 23, 1369: 'Law-making requires some mechanism for law-enforcement, which in turn depends on the ability to exercise physical control over, and impose coercive sanctions on, law-violators.' In the context of businesses, the widely held law-as-price theory suggests that businesses obey the law only if conformity would be more profitable than violation. For a criticism of this view see Cynthia A Williams, 'Corporate Compliance with the Law in the Era of Efficiency' (1998) 76 *North Carolina Law Review* 1265.

[171] J Bentham, *Of Laws in General* (ed by H L A Hart, London: Athlone Press, 1970) 134.

Many eminent legal philosophers and legal sociologists[172] have disputed that people obey law out of a fear of sanctions. Hart argues that sanctions are 'required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall.'[173] He asserts that obedience to the law is generally voluntary, based upon, for example, a cost-benefit analysis, a disinterested interest in the welfare of others or a respect for the rules themselves.[174] This last motive, namely that the idea of law itself furnishing the motive for lawful conduct,[175] seems to be captured by what Austin calls habitual obedience.[176] Kelsen seems to agree, although doubting that it provides the only motive for obedience:[177] '[i]n all probability… the motives of lawful behavior are by no means only the fear of legal sanctions or even the belief in the binding force of the legal rules.'[178]

What does the belief in the binding force of legal rules actually entail? Milgram showed with experiments that individuals may voluntarily obey a command in the absence of sanctions or concurrent moral beliefs when the command comes from, what they perceive to be, a legitimate authority.[179] And such perception triggers voluntary obedience which, unlike coerced obedience, does not require constant direct surveillance: 'When the gunman leaves, or when his capacity for sanction is eliminated, obedience stops. In the case of voluntary obedience to a legitimate authority, the principal sanction for disobedience comes from within the person. They are not dependent upon coercion, but stem from the individual's sense of commitment to his role.'[180] He shows that '[i]t is the appearance of authority and not actual authority to which subjects respond.'[181] In the transnational Internet context, this appearance of authority may be absent: individuals may often not accept that a foreign State has or should have any legitimate authority over them, quite regardless

[172] For example, Eugen Ehrlich in Kelsen, above n 165, 24ff.
[173] Hart, above n 20, 198 [emphasis in the original].
[174] Hart, above n 20, 197.
[175] Kelsen, above n 165, 40, notes though at 15: '[t]here are hardly any norms whose purport appeals directly to the individual whose conduct they regulate so that the mere idea of them suffices for motivation.'
[176] J Austin, edited by H L Hart, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1954) 198: 'The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior…' [emphasis in the original]. But note DA Freeman '*Milgram's Obedience to Authority - Some Lessons for Legal Theory'* [1979] 1 *Liverpool Law Review* 45, 54: 'Austin does not deny this essential element of legitimacy: his habit of obedience is recognition that coercive commands will fail if the commander does not also command broad social acceptance. Yet few would deny that the concept of authority is insufficiently delineated in Austin's theory.'
[177] Kelsen, above n 165, 24. He also averts to what Lessig would call market forces, saying that a person may pay his or her debts based on the fear of a commercial sanction in the form of a loss of credit rather than because of a fear of legal sanction for non-payment; or what Lessig would call social norms, saying that lawful behaviour might be induced by moral or religious beliefs which may require the same conduct as that required by the legal rule.
[178] Ibid.
[179] Milgram, above n 165, 138f, also at 8: 'it is a fundamental mode of thinking for a great many people [that] once they are locked into a subordinate position in a structure of authority' that they comply with the demands made by that authority.'
[180] Ibid 140f.
[181] Ibid 140.

of the actual legal position. The frequent lack of an effective sanction against the foreign violator may consolidate that mistaken belief,[182] which again suggests that sanctions play a role, albeit more indirectly, even in respect of voluntary obedience.

So, at the risk of stating the obvious: actual notice of legal rules is absolutely critical for the effectiveness of direct regulation. It is a minimum prerequisite for achieving obedience and possibly even a sufficient prerequisite. Certainly, discussions about the enforceability of foreign laws or the lack of enforcement mechanisms should start from the premise that most legal subjects want to obey the law and then ask the question if such obedience is realistically facilitated in the transnational online context. This is the final issue in this chapter: how accessible are foreign legal norms in fact? Can online actors actually foresee and know them?

B. Traditional Methods of Publication of Law

States expect that foreigners who target or 'enter' territory with a website must comply with local norms - just like traditional transnational entrepreneurs. If that is the case, the State must also make these norms accessible to them. And here it is important to repeat that many of the online actors are not like all their traditional giant counterparts, but are small-to-medium actors for whom one set of local rules often proves burdensome and requires significant efforts by the State to ensure compliance.[183] Even the online giants like Amazon, Ebay or Google are heavily burdened by that insistence[184] – yet at least they tend to have the local legal machinery to ensure compliance. In any event the fact that more actors have to comply with more sets of rules creates the imperative to make these rules more easily accessible.

How do legal subject normally find out about their legal obligations? In the local context much law does not require active publicity after perhaps an initial period following its introduction, but is known simply through common knowledge:

'The law must be made available for anyone, at least anyone with a good lawyer, to peruse and discover. But passive publicity of this sort seems an inadequate substitute for active publicity unless something alerts us that we ought to look at the law. In the case of many laws, this is no problem, either because their existence is common knowledge – we all knew

[182] This concern is implicit in Raz' critique of Austin's definition of law in Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1970) 14f: 'Of course Austin knows that 'in many cases the positive law of a given independent community imposes a duty on a stranger'. He explains the difficulty by introducing the concept of partial or limited membership in a society. A stranger is a partial member in so far as he is susceptible to the sovereign's power. Instead of saying that only commands addressed to subjects are law, it would be more precise to say that *a command is law only if it is addressed to people who are likely to suffer the prescribed sanction, in case this should become necessary*.'[emphasis added, footnotes omitted].

[183] For example, a survey by the Australian Competition and Consumer Commission found that more than 50 per cent of the Australian sites surveyed which sold goods or services illegitimately attempted to disclaim consumers' warranty rights or limit liability. See ACCC, *ACCC issues warning to on-line traders: 'shape-up' sites* (25 June 2004) http://www.accc.gov.au/content/index.phtml/itemId/519730/fromItemId/2332.

[184] This is reflected, for example, in the number of high-profile publishers who intervened in *Dow Jones & Co Inc v Gutnick* [2002] HCA 56.

that there are laws against smuggling… or because the law codifies a universally recognised moral obligation.'[185]

Generally notice of legal rules occurs in more subtle ways than through people reading up about them through official sources: common knowledge. Even when common knowledge does not provide individuals with the intricacies of rules, it nevertheless serves as an alerting device. It alerts us to the possibility of regulation in respect of certain activities, things and matters. For example, in Britain there would not be an expectation of regulation in respect of meetings in a public place or political commentary; but in respect of owning or selling fire arms there clearly is, so much so that anyone wanting to acquire one could reasonably be expected to inform himself of his legal duties.[186] But would they indeed need to go to that effort?

In respect of much regulation, there are hotspots of knowledge that effectively absolve others from the burden of having to know. Often these intermediaries also ensure legal compliance by others through legal restrictions on their own activities.[187] For example, the shop owner selling fire arms will inform prospective buyers of their rights or duties in relation to fire arms, and not sell them any (and being prohibited to do so) unless they meet the prerequisites. The chemist knows what drugs can be sold to whom, when and in which quantities. The news agency, bookshop and TV companies know which publications or programmes are legal or restricted and the publican knows to whom alcohol may or may not be served or what games may or may not be played on the premises.[188] And often these hotspots are mere links in a much longer chain along which regulation occurs and notice expectations are spread. So the chemist can rely on the licensed drug manufacturer or distributor to offer and sell only approved drugs and the news agency can rely on newspaper publishers to know the rules on defamation or obscenity. In short, law-makers often rely on structure and hierarchies along which the need-to-know is spread and often shifted away from the ultimate end-user.

Common knowledge either provides subjects with the content of legal norms (e.g. the rule against stealing or selling heroin) or alerts them to the possibility of regulation (e.g. possession of fire arms). Also the onus to find out about the legal norms is often shifted away from the individual to higher links in the transactional chain. The question is how these notice devices function in the global online village.

C. The Failure of Traditional Methods in the Online World

[185] David Luban, 'The Publicity of Law and the Regulatory State' (2002) 10 *Journal of Political Philosophy* 296, 297.

[186] Note *Staples v US* 511 US 600 (1994), discussed below.

[187] 'It is rather easy to observe that the largest part of behaviour regulation is not generated in today's capitalist societies by the relational networks of sociality but as a result of operating within institutional frames of activity.' Michalis Lianos, 'Social Control after Foucault' (2003) 1(3) Surveillance & Society 412, 414, http://www.surveillance-and-society.org. See also L Hancher and M Moran, 'Organizing Regulatory Space' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford: Oxford University Press, 1998) 148.

[188] At times this may also involve public agency, e.g. social security agency, which means that the law does not require the self-application by citizens.

The answer is: not very well. Beyond a core of universally accepted norms e.g. against theft, murder or breaching contractual promises,[189] there is very little in the way of a global common knowledge serving as an alert system; and this also applies to commercial activity where, in particular, consumer protection regulation varies significantly from State to State. So in respect of those very areas where States do not share harmonised rules and where online actors would need to know about the divergent standards, there is no global common knowledge to trigger legal alertness. This is particularly troublesome for smaller online actors who do not have the benefit of in-house legal advice.

It may be argued that there is certainly a global consciousness that rules vary from place to place and that this should be enough to put individuals and businesses on enquiry as to the foreign legal norms when going online. There are two problems with that argument. Firstly, although online actors may know in principle that rules are different elsewhere, in the particular circumstances our legal imagination is often too tied up with our local common knowledge even to predict the possibility of a divergent foreign legal standard. As argued above, it is unlikely to occur to publishers in the UK to check Chinese defamation standards when writing about a dead Chinese person simply because under the common law you cannot defame the dead.[190] In the US, where public figures are subjected to very robust free speech, smaller publishers might never stop to think that other States might not recognise the 'obvious' distinction between private and public figures. In a State where the laws do not distinguish between consumers and businesses in commercial transactions, it is unlikely that locals would foresee that other States might make that distinction. Secondly, and more worryingly, it is doubtful whether many of the smaller online businesses and publishers even realise that foreign law may apply to their online activities, which makes the substantive foreign law even less accessible.[191]

Perhaps the main purpose underlying cases like *Yahoo* and *Töben*, which stood next to no chance of being enforced, was nothing other than to put online publishers around the world on notice about French or German law on extremist right wing speech as well as potential legal exposure by virtue simply of web presence. Interestingly, the French court in May 2000 ordered the publication of an abstract of the order to be pronounced in five daily or weekly newspapers chosen by the plaintiff.[192] Similarly, the civil plaintiffs asked the French court in the Timothy Koogle prosecution to publish any future judgments in four French newspapers, one newspaper of a Member State of the European Union, in the European and

[189] For an excellent evaluation of the extent of harmonised legal standards see Marc D Goodman and Susan W Brenner, 'The Emerging Consensus on Criminal Conduct in Cybercrime?' (2002) 10 *International Journal of Law and Information Technology* 139.

[190] See above n 95-96 and accompanying text. Sallie Spilsbury, *Media Law* (London: Cavendish, 2000) 77: the 'reputation of a dead person is deemed to die with him.' For the very different interpretations of obscenity see e.g. Karsten Bremer, *Strafbare Internet-Inhalte in International Hinsicht – Ist der Nationalstaat wirklich überholt?* (Frankfurt a M: Peter Lang Verlag, 2001) 138ff, http://ub-dok.uni-trier.de/diss/diss60/20000927/20000927.pdf .

[191] To make foreign substantive law accessible it is necessary that online publishers realise that foreign substantive law may be applicable to them.

[192] *LICRA & UEJF v Yahoo! Inc & Yahoo France* (Tribunal de Grande Instance de Paris, 22 May 2000).

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American editions of the New York Times and Wall Street Journal as well as on the yahoo.com and yahoo.fr websites.[193]

The absence of the global common knowledge is not the only problem creating new 'notice' imperatives for the online world. Traditional legal hierarchies, where intermediaries carry the 'notice' burden on behalf of other businesses or end-users, have also broken down in the online global village. This is illustrated, for example, by the fairly common clause in Marks & Spencer's Terms and Conditions:

'Marks & Spencer make no representation that any products or services referred to in the materials on this website are appropriate for use, or available, in other locations. *Those who choose to access this site from other locations are responsible for compliance with local laws if and to the extent local laws are applicable*.'[194]

Similarly, Amazon.co.uk's Conditions of Use & Sale include the following: 'Additionally, please note that when ordering from Amazon.co.uk, you are considered the importer of record and must comply with all laws and regulations of the country in which you are receiving the goods.'[195]

These clauses show that even substantial businesses are overwhelmed by the global regulatory requirements and that they attempt to handle it by shifting the notice and compliance burden to the foreign end-user. Whether these clauses are in fact effective in absolving them from possible breaches of 'excluded' foreign law is questionable[196] as generally it is not possible to contract out of public law or some private law, such as defamation law. In particular, though, for small online businesses and publishers, such clauses might be the only realistic answer to the legal 'expectation' overload. In any event their use may indeed be legally defensible in so far as it applies to foreign laws that are insufficiently accessible to the online business. For States this abdication of responsibility (whether legally valid or not) by the traditional intermediaries, particularly to the rather unreliable end-users is worrying as the latter may neither be able nor willing to inform themselves and comply. It is like letting the owner of the firearms shop sell firearms to everyone with the proviso that it is up to them to comply with the law – no doubt the number of illicit firearms owners would drastically increase. But equally, from the perspective of the law-abiding citizen, these clauses expect rather too much and frequent accidental non-compliance is also likely to ensue.

The reality is that the global village lacks key 'notice' mechanisms – such as the common knowledge and knowledge hotspots - which in the domestic context play a critical role either in bringing rules to the attention of their subjects or in relieving them of knowing them. States have a responsibility and a self-interest in bringing their rules home to online actors if they expect compliance with them. Any realistic debate on Internet governance, and in particular the legal obligations of online

[193] *R v Timothy K and Yahoo Inc* (Tribunal de Grande Instance de Paris, 26 February 2002, No 0104305259) http://www.foruminternet.org/actualites/lire.phtml?id=273.

[194] Marks and Spencer, Terms and Conditions, http://www.marksandspencer.com/ [emphasis added].

[195] Amazon, Conditions of Sale & Use, http://www.amazon.co.uk, clause 16.

[196] It made no difference in the case of *State of Minnesota v Granite Gate Resorts Inc* 568 NW 2d 715, 717 (1997), where a note on the offending website 'advised users to consult with local authorities regarding restrictions on offshore sports betting by telephone before registering with WagnerNet.'

actors under foreign law, must be sensitive to these more subtle concerns. It is simply wrong to assert that there are no 'decisive factors as to why e-commerce should be treated any differently from transactions that are not carried out by electronic means.'[197] There are.

Perhaps a final illustrative case speaks louder than any theoretical argument. In *Staples v US*[198] the US Supreme Court had to deliberate on the issue of whether owning an assault rifle is conduct that should have put the accused on notice about the possibility of State regulation. It concluded that 'buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car.'[199] Interestingly the common knowledge, or the lack thereof, provided in the eyes of the judges an excuse for non-compliance. But even more stunning, at least from a European perspective, is that US common knowledge would not have rung alert bells as to the possibility of regulation in respect of guns. In Europe alert sirens would have been howling. It is not difficult to see how in the transnational online context online publishers tied up in their local mindset frequently fail to predict that their online conduct is 'legally relevant' elsewhere.

5. An Afterthought

Do all these arguments about principle really matter? Is the vast majority of websites - personal, educative, commercial or local community websites - not rather 'harmless' from any State's perspective? Most States would not only lack the actual power (i.e. enforcement jurisdiction) to in fact regulate them but also have no interest at all in doing so. So does it really matter that in those relatively few instances when a website is 'harmful' and when there is some possibility of enforcing regulatory claims against the foreign controller (or when that enforcement is of secondary importance as is often so in defamation disputes) – that States make these sweeping regulatory assertions?

The answer is yes, it does matter. First of all, there is a legitimate expectation that law is on the whole rationally defensible, that it has integrity. You cannot reasonably defend an irrational legal position on the basis that on the whole it is ineffectual, that most activity is not affected by it. Second, the legal position that every website is subject to the laws of every State is irrational because theoretically it is inconsistent with the system of sharing regulatory competence between States depending on the relative strength of their connection with the controversial facts. It is also irrational because practically for the vast majority of online publishers compliance is simply impossible. Third, one could reverse the argument: if States have in reality no real interest and no real power to regulate the vast majority of foreign sites, would it not be more appropriate to frame assertions of regulatory competence in those relatively isolated instances in a way so as to reflect that general reality? Should the law not simply acknowledge that a French village website for local mushroom enthusiasts is only subject to French law, quite irrespective of the fact that in principle in may be accessed by someone in Brazil, Vietnam or

[197] Oren, above n 10 , 670
[198] *Staples v US* 511 US 600 (1994), discussed in Luban, above n 185, 303ff.
[199] *Staples v US* 511 US 600, 614 (1994).

Finland. Currently that obvious legal conclusion is not supported by case law or legislative practices and that is unfortunate.