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The assertion of judicial jurisdiction over cyber-torts. A comparative analysis[1]

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Abstract

The aim of this paper is to analyze the legal reasoning used by judges in common law and civil law legal traditions when they have to solve problems about assertion of jurisdiction over Cyber-Torts cases. Here I discussed around the theory of jurisdiction, competence, Tort, non contractual liability and Cyber-Torts. These concepts are compared with cases decided in Colombia, Canada and the U.S. To conclude that the traditional rules of civil procedure are sufficient to resolve conflicts of jurisdiction over Interne-based cases.

Keywords: civil law, competence, common law, domicile, jurisdiction. judicial jurisdiction, *forum non convenient*, tort, non contractual liability, cyber-tort.

Resumen

El objetivo de este trabajo es analizar los argumentos jurídicos utilizados por los jueces en el common law y en el derecho civil como tradiciones jurídicas cuando tienen que resolver problemas sobre la determinación de competencia judicial sobre Cyber-Torts. Aquí se analiza la teoría alrededor de jurisdicción, competencia, Tort, responsabilidad civil extracontractual y Cyber-Torts. Tales conceptos se confrontan con casos resueltos en Colombia, Canadá y EE.UU. Para concluir que las reglas tradicionales de procedimiento civil son suficientes para resolver conflictos de jurisdicción y competencia sobre casos con componentes del Internet.

Palabras clave: competencia, common law, derecho civil, domicilio, jurisdicción, *forum non conveniens*, responsabilidad civil extracontractual, cyber-tort, tort.

1 Todas las traducciones contenidas en este documento fueron realizadas por el autor, por tanto, no son ni deben considerarse como traducciones oficiales de los textos legales y doctrinales citados.

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Sumario

Introduction

Is the internet a phenomenon so revolutionary to command changes in the procedural rules within the common and civil law as legal traditions? Furthermore, are the internet activities complexes enough to challenge the traditional and long established rules for the assertion of Judicial Jurisdiction within the legal traditions? What about the question, which court has the jurisdiction to hear a tort action committed on the "cyberspace"?

The aim of this document is to analyze how the common law and civil law judiciary had resolve the problem of assertion of Judicial Jurisdiction over what scholars call "Cyber-Torts". Arguing that a first glance, the members of the judiciary of these legal traditions had incepted new approaches to solve these questions, in my opinion, those constructions are not accurate, therefore, unnecessary. Instead, the regular doctrines in use from some decades ago to nowadays, had proven to be sufficient to give guidance in the matter of whether or not a court have judicial jurisdiction over a internet-based case.

The first part deals with the theoretical axis to understand the problem: Jurisdiction, Judicial Jurisdiction and "Cyber-Tort". These issues are analyzed from the inside of the aforementioned legal traditions, hence, for the common law are Canada and USA, on the other hand, Colombia, Quebec, France and Germany. I also make some references to the EU system. The second part is dedicated to Colombia, where I applied the theoretical axis to the only know internet-based case and compare it with the reasoning of the judge and with the related jurisprudence. On the third part, I will cover the case law analysis form Canada, USA and UK, outlining the pros and cons of their judiciary approach to the problem. And finally, on the fourth part will be my Conclusion.

I. JURISDICTION AND JUDICIAL JURISDICTION

Thousands of library reference exists around the concept of jurisdiction, the focus of this part is on the concept of jurisdiction and Judicial Jurisdiction from an international law perspective.[2] Jurisdiction is the state faculty to rule over judicial, legislative and administrative matters related with the elements of the state (OEA, 1933).

For Browlie (2008) jurisdiction and sovereignty are almost the same. He states that "jurisdiction is an aspect of sovereignty" over general areas such: "judicial, legislative and administrative competence" (p. 299). He also distinguishes between jurisdiction and civil jurisdiction. For Dorsett and McVeigh (2007) the matter of jurisdiction focuses in the existence of the law, the power of the law, and the "determinations of authority within a legal regime". In their intent to create a concept of jurisdiction, they cite Emile Benveniste (1973, p. 392, in MacVeigh, 2007)[3] who has drowned

2 Thorough a search with the browser available on the website of York's University Law Library of the word Jurisdiction, among the given search options of title, subject, keyword and periodical title; shows the following numbers of hits for each search options in the mentioned order: 1295 records, 614 records, 1910 records, 614 records.

3 "The Latin juris-dictio links the Latin noun ius with the verb dicitio. Ius is usually translated as "law" and refers to the adjectival situation of conforming to law (iustus). Linked to the verb dicere- the saying or speech of law- ius becomes performative (and adverbial). Within the institutional domain of the roman courts, ius and dicere are linked to the office of the iu-dex, he who states the law, and juris-dictio, the saying or speaking of the law (Digest 2.1.1)" (McVeigh, 2007)

an etymology of jurisdiction in conjunction with the Roman law; being the etymological meaning of jurisdiction the saying or speaking of the law. These ideas have in common the exercise of authority on behalf of a legal prerogative. Thus, in a real life situation Canada enacted a statute to define, regulate and punish criminal behaviours; issued by-laws to give a frame work to commerce activities or resolve a divorce case with family judge adjudication.[4] All these activities represent the jurisdiction of Canada.

In conclusion, Jurisdiction is the quality of the states that enables them to rule over their components. Furthermore, internationalists recognize the existence of a sub category of jurisdiction like the Judicial Jurisdiction or civil jurisdiction (eg. Browlie, 2008; Walker & Castel, 2005; Born & Rutledge, 2007).

Judicial Jurisdiction is the faculty that a court or judges have to hear and decide over a case brought before them, and the source of this authority (exercise of the jurisdiction) is the local law of the state.[5] These ideas in comparison with the international private law requires that states keep a system of courts prepared to apply and enforce local or international law rules when a party is a non-national of the country (Browlie, 2008; Walker, 2005) For more understanding of the Judicial Jurisdiction I am going to analyze its rules, within the common and civil law tradition as the predominant legal traditions in the countries under study.

A. Judicial Jurisdiction Rules within Common Law

To understand the rules for assertion of Judicial Jurisdiction within the common law is necessary to analyze them as Janet Walker (2005, Ch. 10, §10.1.) did, this is: (*I*) whether the court can decide the case or (*II*) whether the court should exercise judicial jurisdiction over the case The analysis and application by the judiciary of these components can take various ways in two opposing sides between civil law and common law legal traditions, and even among jurisdictions' inside the same legal tradition.[6] At the end, when the litigants are arguing about the legal grounds for assertion or not of Judicial Jurisdiction, it becomes a mini-trial even when it is of a pure procedural nature (Svantesson, 2007, pp. 20-21)[7].

Whether or not a court can decide the case within the common law had been addressed under two major rules: one is the defendant residency in the forum and the other is the real and substantial connection between the matter and the forum (Walker & Castel, 2005, Ch. 11, §11.1; Geist, 2001, p. 1.345; Svantesson, 2007). Additionally, USA judiciary have distinguished two forms of Judicial Jurisdiction, named as general and specific Judicial Jurisdiction (Svantesson, 2007)

4 See e.g. *Criminal Code*, R.S.C. 1985, c. C-46, *Canadian Aviation Security Regulations*, S.O.R./91-49 s.4., *Civil Marriage Act*, S.C. 2005, c.41.

5 The part in braces must be understood under the definition of jurisdiction given above.

6 See e.g. *Civil Code of Quebec*, R.S.Q. 1991, c. 64, Art.3134 [*Civil Code of Quebec*]; but in contrast *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

7 Here the author discusses if it is accurate to call "conflict of laws" a case where the applicable law is obvious but is in dispute the forum, "There is no conflict of laws, but rather a conflict of forums."

The defendant residency in the forum is a well established Rule in common law, it had been said that derivates from the power of the state to detain the defendant until the dispute is resolved (MacDonald Vs Mabee, 1917). Although, the arrest of a corporation or legal entity is not possible, therefore this concept falls short, due to this situation, the residence of legal entities have been solved in matters of Judicial Jurisdiction regarding the state where it was incorporated (Casad & Richmann, 1998, Ch. 11, §11.1, cited in Born & Rutledge, 2007), if is registered or qualified to engage in business within the forum (Sternberg Vs. O´Neil, 1988),[8]or if have its center of operations or principal office within the forum (28 U.S.C. § 1332 (c) (1), EE.UU). Furthermore, The Hague Judgements Convention conferred general Judicial Jurisdiction on the courts of the place where a corporate defendant was incorporated (Hague Conference on Private International Law, 2005, article 4,1).

Whether the court should exercise Judicial Jurisdiction over the case is also affected by the *forum non conveniens* doctrine, that according to Walker (2005) "refers to the doctrine by which the court may exercise its discretion to decline to decide a mater because there is a clearly more appropriate forum elsewhere for the pursuit if the action and for securing the ends of justice". (Ch 1, §1.11.g).This doctrine defends the idea that a court should restrain of conduct an action if there is a better forum to hear the case in relation with the parties, with the evidence and with the justice administration. If the translation is done from Latin to English the phrase means that the forum (jurisdiction) is inappropriate (Spiliada Maritime Corp. Vs Canulex Ltd., [1987] UKHL A.C. 460-474 H.L.). But the mentioned wording is plain and ambiguous, as Barret (1947) says: "But inconvenient to whom? The court?, The Plaintiff?, The defendant?" (Barret, 1947).

A construction from different statutes, cases and secondary materials about this doctrine, clearly lead me to conclude that the doctrine application is very discretionary and subjective, which means that even it inception into statutory law the wording used is open to judicial interpretation (28 U.S.C. § 1404; Canadian Encyclopedic Digest Conflict of Laws II-Jurisdiction of the Courts,7-Forum Non Conveniens §63; Sim Vs Robinow,1892, 19 R. 665, Scotland Ct. of Sess. p. 668). For instance, as Barret (1947) states, the *forum non convieniens* enforcement can lead to subjective reasoning from the judiciary based on matters like politics, international relations and similar. Therefore, no matter which legal or political reasoning leads courts to do not assert Judicial Jurisdiction over a case, them always be supported on the *forum non convieniens* doctrine.

Conversely, the Judicial Jurisdiction rule named in the USA as the general jurisdiction rule can be defined as follows: "For a USA court to exercise general jurisdiction, the defendant must be domiciled in the forum state or his or her activities there must have substantial or continuous and systematic" (Walker, 2005). Hence general jurisdiction allows to USA courts to hear

8 In this case the Supreme Court of Delaware held that: (1) Delaware courts had personal jurisdiction over Ohio parent corporation of Delaware subsidiary, and (2) Delaware courts had jurisdiction over individual non-resident defendants who were directors of Delaware subsidiary but did not have jurisdiction over those who were not directors.

any claim against defendant with a "close" relation with the forum (e.g. nationality, domicile, incorporation) (Born & Rutledge, 2007) Equally important is to clarify what the specific jurisdiction rule mentioned above means. This "kind" of jurisdiction is asserted when these three components are satisfied:

In Panavision v. Toeppen, A California Company named *Panavision* attempted to register a web site on the Internet with the domain name Panavision.com. It could not do that, because an Illinois resident (Toeppen) had already established a web site using Panavision's trademark as his domain name. Panavision's counsel sent a letter from California to Toeppen in Illinois informing him that Panavision held a trademark in the name Panavision and telling him to stop using that trademark and the domain name Panavision.com. Toeppen then offered to "settle the matter" if Panavision would pay him $13,000 in exchange for the domain name. For the federal court of the 9th Circuit this facts past the specific jurisdiction test (Panavision Vs Toeppen, 1998).

At the end, can be stated that the general jurisdiction rule is *Vis a Vis* with the domicile of the defendant rule, and the specific jurisdiction rule is *Vis a Vis* the real and substantial connection between the matter and forum as well. Thus, within common law system the rules for assertion of judicial jurisdiction are the domicile of the defendant and the substantial connection between the matter and the forum.

B Judicial Jurisdiction within Civil Law

The general rule for assertion of Judicial Jurisdiction within Civil Law legal tradition is the domicile, identified by the parts and the judge from and objective schedule.[9] This schedule by general rule can be found in statutory law, this is, the Civil Code (CC) and the Code of Civil Procedure (CCP); and in the case of the European Union in Conventions and Council Regulations (EU, 1968 y 2000). In relation with Non-Contractual liability cases the place where the facts took place may also serve to assert Judicial Jurisdiction.

To have a clear idea of how the rules of Judicial Jurisdiction are enforced by civil law judges, first is necessary to define the domicile and what constitutes it; second identify which party domicile leads to Judicial Jurisdiction assertion and third, how the CC and the CCP identifies the place where the facts took place.

The domicile is an attribution of the person.[10] Generally the definition of domicile within the civil law legal tradition is the will of settle in a geographical place (Civil Code of Quebec art. 75; Code Civil France art. 102). The main idea is to consider when in the CC is used the word person; refer to natural (human) and legal (enti-

9 Compare the definition of domicile given by *Black's* Dictionary: "1.The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere. • A person has a settled connection with his or her domicile for legal purposes, either because that place is home or because the law has so designated that place." with the concept of domicile within the civil law tradition.

10 The attributions of the person or of the personality are those unique characteristics which can serve to identify a person as an individual like his name, nationality, status, capacity, patrimony and domicile.

ty) persons without distinction. Hence, a person has a domicile when the person has some kind of physical presence within the forum.

However, how a judge determines if a person has his main establishment in the forum? Once again the CC has sub rules to address the different variants that can occur when emerge doubt around domicile. Basically these rules divide the problem in three groups: (1) Domicile of natural persons, (2) Domicile of legal persons and (3) Domicile based on contractual relations; here, I just will refer and cover the first two groups considering the aim of this paper.

When the domicile of a natural person is not clear, is necessary to apply the rules of residency (Colombian Civil Code art. 84). Residency can be defined as the place where a natural person regularly inhabits and has intention to remain (Code Civil France art. 103). For example, if a person works in Toronto, owns or rents a place to live in Toronto and his mail arrives to Toronto and specially to these places, hence, his residence and domicile is Toronto; but if this person own or rents a place to live in Oakville, ON, works in Toronto and regularly make transactions in Toronto, and all his activities take place in Toronto, the domicile will be Toronto and the residence will be Oakville. Consequently, the attachment to a territory with the intention to remaining there (work, family, business, trade etc.) constitutes residence.

On the other hand, the legal persons or juridical persons domicile follows the same pattern as the natural persons, but with two fundamental differences, one is that a legal person does not have residence, therefore, the sub rules of residence cannot be used with this type of person; and the other is that by public or private instrument the legal entities can choose which the domicile for services of notices is (Code Civil France art. 113, Colombian Civil Code, art. 86). Furthermore, this strong domicile rule was included in the aforesaid Hague Judgements Convention (2005) in the exact traditional schedule within civil law jurisdictions. In conclusion, the domicile of a person within civil law tradition is the territory where has settled.

Provided that, now is necessary to take a look to the rules of procedure, which as I mentioned before, are codified in the CCP and by the especial treaties regarding international private law. Quebec is the exception, because they have set the rules of Judicial Jurisdiction in matters of international private law into the Civil Code.

To assert Judicial Jurisdiction civil law judges must fulfil two mandatory rules: (i) whether the judge have jurisdiction over the case, and (ii) whether the judge have competence over the case. Is when this test is applied to cases with an international law component what put in different sides the common law Judicial Jurisdiction rules with the civil law rules, because as a general rule the civil law countries do not apply the *forum non conveniens* doctrine (Walker, 2008), therefore a civil law judge always will hear the case if he has competence over it.

For instance, the entire judiciary have jurisdiction but not all the judges have competence. As I explained at the beginning of this document in relation to what is Jurisdiction and Judicial Juris-

diction, is clear that a judge always have jurisdiction in the matters that the law dictates to him and is limited in the same way.

Subsequently, all the attention should be on the idea of competence.[11] The competence of a judge is the capacity that the procedural law entitles him to hear an action based on the subject matter, amount of the claim and territory (Couture, 2004). These sub rules (matter, amount and territory) are clearly developed by the CCP and its application is as follows based on a Canadian example.

Competence upon the matter is constructed from the substantive law[12] applicable to the facts of the case. Hence, a case pleading to convict a citizen for being responsible of manslaughter the competent judge will be a criminal judge. The main reason is that manslaughter was created, defined and it is regulated by the Criminal Code(Criminal Code, R.S.C. 1985, c. C-46, s. 222,4). Furthermore, in a divorce case a family court is entitled of competence over it. The family court hears the case based on the enacted substantive laws, these are the *Divorce Act* (Divorce Act, R.S.C. 1985 R.S.C. 1985, c. 3, 2nd Supp.) and the *Court of Justice Act* (Court of Justice Act, R.S.O. 1990, c. C.43, s. 21.8 (1) Sched.) In relation with the amounts it is straight forward, depending on the amount claimed, the judge will be chosen accordingly; the court hierarchy of the judge will be based on the amount (the bigger the amount claimed the highest the judge competent).

In relation with the competence based on the territory the CCP's are very broad and have multiple choices that must be applied in the order that are scheduled, but the bottom-line is what was stated before, civil law judges always have jurisdiction no matter if all the options given by the CPP to choose the domicile of the defendant can not be fulfill, it has as last resort the domicile of the plaintiff. See e.g. the French CPP Art. 42 and 43:

> The territorially competent court is, unless otherwise provided, that of the place where the defendant lives.
>
> If there are several defendants, the plaintiff may, at his choosing, bring his case before the court of the place where one of them lives.
>
> If the defendant has neither a known domicile nor residence, the plaintiff may bring his case before the court of the place where he lives or before the court of his choice if he lives abroad.
>
> The place where the defendant lives means:
>
> - in relation to a natural person, the place where he has his domicile or, in default thereof, his residence,
>
> - in relation to a corporate entity, the place where it is established.

In civil law tradition the assertion of Judicial Jurisdiction is addressed in an objective perspective represented by the CCP's, based only in the

11 Black's Dictionary: "1. A basic or minimal ability to do something; qualification, esp. to testify <competence of a witness>. 2. The capacity of an official body to do something <the court's competence to enter a valid judgment>. 3. Authenticity <the documents were supported by a business-records affidavit, leaving their competence as evidence beyond doubt>

12 *Black's* Dictionary: "The part of the law that creates, defines, and regulates the rights, duties, and powers of parties."

territorial attachment of the litigants (domicile) to the forum. Even more, in Tort cases the CCP gives competence to a plural number of judges at will of the plaintiff. See e.g. the Colombian CCP Art. 23 (8):

> In Non-Contractual Liability matters, the judge of the place were the fact took place will have competence as well.[13]

Here relies the importance of understanding the concept of domicile within the civil law tradition and how its conception and enforcement is almost opposed to the idea of domicile and it application in the common law. As discussed before, common law judges and parties engage in a pre-trial that is almost a complete trial when is on discussion the assertion of Judicial Jurisdiction, because whether or not a court hear a case is always under the scrutiny that the court do over the facts; opposite to the civil law, legal tradition where the assertion of Judicial Jurisdiction is constructed based on the rules of domicile (of the defendant or of the plaintiff), and regarding tort cases could be also the place where the action/omission took place, from an objective test inserted in the CCP interpreted harmoniously with the CC.

II. TORT, NON-CONTRACTUAL LIABILITY AND CYBER-TORTS

Common and Civil law, has a body of regulations for each one, in regards to the inflection of civil damages that arose from a relationship other than a contractual one between the parties involved. Tort law is called by the Common law, and Non-Contractual Liability Law in the Civil Law.[14] Nowadays with the use of the internet scholars (Geist, 2001; Svantensson, 2007; Mosier & Fitzgerald, 2007), coined the Cyber-Tort concept when they want to make mention to the tortious activities happened or committed on or regarding the Internet.

The civil law tradition works upon the rules of Non-Contractual Liability, were the key feature is the concept of fault, which is a general idea not attached to a specific fact or situation. The commission of a fault will lead to injure the rights of a person (plaintiff). Such fault could be intentionally or negligently inflicted, or derivated from strict liability; the conjunction of these three elements fault (cause), intention, negligence or strict liability (nexus) and effect (injure or harm) impose liability to the person (defendant) (Gardley, 2006)

In contrast common law tradition tort law do not have such type of "general clause" that is

13 *Ibid;* In the same aspect the French CCP is broader, given competence also to the judge of the place were the damage was suffered *Code de Procedure Civil, Decree n°81-500 of 12 May 1981, Article 7, Official Journal of 14 May 1981, amendment JORF of 21 May 198. Art. 46:*

"The plaintiff may bring his case, at his choosing, besides the court of the place where the defendant lives, before:

- in contractual matters, the court of the place of the actual delivery of the chattel or the place of performance of the agreed service;

- in tort matters, the court of the place of the event causing liability *or the one in whose district the damage was suffered;*

- in mixed matters, the court of the place where real property is situated;

- in matters of support or contribution to the expenses of marriage, the court of the place where the creditor lives."[emphasis added]

14 The English version of the *Quebec Civil Code* talks of Non-Contractual Obligations. I do not agree with the use of the term "obligation", because the Obligations is a body of law with intricate and multiple rules established to the regulate behaviours; instead the liability is a consequence of law against the person founded liable of the alleged facts.

the concept of fault; instead, it is historically constructed upon particular situations and precise classifications of torts. Nowadays, the law of torts had been reconstructed identifying the rights that each type of tort protects and also by the causal nexus, this is intention, negligence or strict liability (Gardley, 2006).

Tort law, Non-Contractual Liability and Cyber-Tort will be explained as follows: (i) definition and (ii) sources.

A. Tort

Among all the definitions around the concept of tort, I find the most complete and accurate the one given by Linden and Feldthusen which states: "A tort is a civil wrong, other than a breach of contract, which the law will redress by an award of damages". In addition for a better understanding of it, should be take considered what Cory J wrote in Hall Vs. Hebert, 1993 (cited in Klar, 2008): "A primary object of the law of torts is to provide compensation to persons who are injured as a result of the actions of others".

Thus, an amalgamation of these two sentences will create the most complete definition: Tort is a civil wrong, other than a breach of contract, which the Tort law will provide compensation to whom are injured as a result of the actions of others.

The sources of the tort law are predominantly Acts and case law (Klar, 2008). The case law began in the 12th century in England and has been active since then (Wigmore, 1894). At the beginning of 20th century Anglo-American scholars imitated and used ideas from the civil law writers to organize the tort law (Gardley, 2006). The ideas borrowed by theses writhers were the concepts of intention, negligence or strict liability, towards the alignment and to put some order to the case law on torts; because of this amalgamation of ideas, the law of torts within common law is a mixture of the historical system of writs with a continental law classification (Wigmore, 1894).

B. Non-Contractual Liability

A construction of the concept of Non-Contractual Liability is deducted from the French Civil Code articles 1382 to 1386.[15] Indeed, Germany and

15 *Code Civil*, *Supra* note 32. Art.1382:

"Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it."

Art.1383:

"Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence."

Art.1384:

"A person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.

However, a person who possesses, regardless of the basis thereof, all or part of a building or of movable property in which a fire has originated is not liable towards third parties for damages caused by that fire unless it is proved that the fire must be attributed to his fault of to the fault of persons for whom he is responsible.

This provision may not apply to the landlord and tenant relationship, which remains governed by Articles 1733 and 1734 of the Civil Code."

The father and mother, in so far as they exercise "parental authority" are jointly and severally liable for the damage caused by their minor children who live with them.

Masters and employers, for the damage caused by their servants and employees in the functions for which they have been employed;

Teachers and craftsmen, for the damage caused by their pupils and apprentices during the time when they are under their supervision.

The above liability exists, unless the father and mother or the craftsmen prove that they could not prevent the act which gives rise to that liability.

the countries influenced by its Civil Code (best know as BGB), rejected the before mentioned "general clause" system of liability, instead they adopted a schedule of rights protected which can be identified in articles 823 (1) (2) and 826.[16] With these provisions, the BGB intended to "objectively narrow" the scope of the possible harm inflected. In brief, Non-Contractual Liability is "triggered by 'fault' or by actions of persons or things, which the law makes the defendant responsible as a matter of law". (Bermann & Picard, 2008). It follows that there is not such thing as classification of Non-Contractual Liability as it is for Torts.[17]

As to teachers, the faults, imprudence or negligent conducts invoked against them as having caused the damaging act must be proved by the plaintiff at the trial, in accordance with the general law."

Art.1385:

"The owner of an animal, or the person using it, during the period of usage, is liable for the damage the animal has caused, whether the animal was under his custody, or whether it had strayed or escaped."

Art.1386:

"The owner of a building is liable for the damage caused by its collapse, where it happens as a result of lack of maintenance or of a defect in its construction."

16 *BGB*, Art.823:

" (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault."

Art.826:

"A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage."

17 Above; Also as was mentioned the common law clearly have a writ system for torts, and each one have sub rules created through case law See e.g. *Canadian Encyclopaedic Digest*, Torts I, Introduction §7: "Historically, separate, distinct causes of action developed within the law of torts because suits had to be pleaded within an existing and recognized form of action in order to succeed."

C. Cyber-Torts

Technology enhance interaction between persons, and the internet has become the perfect tool for development of new transactions in all traditional aspects of the society such as commerce, trade, communications, education etc. Since the inception of the brand new immaterial human dimension, sometimes not all the activities performed using the internet lead to a happy ending, therefore, inflection of damages are a real possibility triggering claims towards compensations and award of damages for injuries caused through the internet. As result tort and non-contractual liability as areas of law are confronted to cases in a way not previously contemplated.

The notion of "Cyber-Tort" was coined to identify these new civil wrongs which involve the use of internet (Mosier & Fitzgerald, 2007). Indeed, in compliance with its common law nature, a classification of them had been made as follows (Hague Conference on Private International Law, 2002):

1) Cyber squatting: is a situation in which a "cyber squatter" registers a famous trademark as a domain name and later attempts to sell or license the domain name to a company that has invested a significant amount of money in developing good will in the mark (Panavision Vs. Toeppen, 1998).

2) Meta-tagging: is when computer codes are used by a search engine (like Google or Yahoo!) to identify which websites should be listed as part of an Internet search result. Meta-tags can be illegal if companies use meta-tags which

contain the trademark or trade name of a competitor as a way of indexing their site.[18]

3) Linking: is a process whereby a user connects from one site to another by clicking on a designated space on the initial site. Linking can be problematic if the link remits the user to a false site which does not keep correspondence with the site offered (Haines report).

4) Web Crawlers: are programs that query other computers over the Internet to obtain information (eBay Inc. Vs. Bidder's Edge, 2000)[19]

5) Framing: to build a frame or border of text or graphics and pull another web page from another site into that frame or border. The creation of the "new" page may constitute a derivative work of the original page which would create a copyright infringement, trademark infringement, false designation of origin, or unfair competition (Haines report).

6) Post-Domain URL Paths: which are not parts of a domain name but nevertheless appear as users enter further into a website, illustrating how the website is organised. Occasionally protected trademarks may be used in the post-domain path, and although in most cases it appears that such uses fall under nominative fair-use or under statutory limitations or exceptions, there has been the suggestion that if the trademark were to be used gratuitously, it could be seen as an infringement (Haines report).

7) Political Cyber squatting: is when someone advocating a certain opinion registers a domain name that will induce individuals with the opposite opinion to visit his or her website.[20]

8) Spam: Also know as junk mail. This consists in the delivery of undesired publicity or solicitation via electronic mail.[21]

All this "new" torts had been address by the courts through the traditional categories; especially with those related with personal property like Conversion, Misappropriation of Trade Secrets and Trespass Chattels, as a result the term "Cyber-Tort" remains on the academic grounds without been included within the case law for now (Mosier & Fitzgerald).

III. JUDICIAL JURURISDICTION AND CYBER-TORTS WITHIN COLOMBIA

Colombia as a civil law jurisdiction do not have a formal application of the doctrine of precedent, thus, cases are only reported on the Courts gazettes.[22] However, with some effort is pos-

18 See e.g., Hanseatic, 6 U 4123/99 (April 6, 2000) (The Munich Court of Appeal held that use of a trademark in the meta-tag of an internet page can infringe the mark); *Eli Lilly & Co. v. Natural Answers, Inc*., 233 F.3d 456 (7th Cir. 2000) Plaintiff, a drug manufacturer, brought suit against Natural Answers, alleging that the defendant's HERBROZAC product infringed and diluted its Prozac trademark. The U.S. Court of Appeals of the Seventh Circuit affirmed the lower court's decision to grant a preliminary injunction for the plaintiff. The fact that Natural Answer's website contained a source code which included the term "Prozac" as a meta-tag was considered to be evidence of the defendant's intent to confuse and mislead consumers; Cited in *Haines report*, *Supra* note 73.

19 A United States district court issued a preliminary injunction, enjoining Bidder's Edge from using software robots or other automated programs to access eBay's computer systems without permission in order to obtain information on ongoing auctions. The court issued the injunction on the grounds that such activity is likely to constitute a prohibited trespass to chattels. The court further held that the defendant's conduct interfered with eBay's possessory interest in its computer system. Cited in *Haines report*, *Supra* note 73.

20 *Ibid*.

21 See generally *Am. Online, Inc., v. IMS*, 24 F. Supp. 2d 548, 549 (E.D. Va. 1998); Pub.L. 108-187, § 2, Dec. 16, 2003, 117 Stat. 2699. Know as CAN-SPAM Act.

22 It is important to clarify that since the inception of the Constitutional Court by the Constitution of 1991, there is a national debate about the implementation of the precedent doctrine. A full explanation of this debate was made by Diego Eduardo López Medina, *El Derecho de los Jueces*, 2nd ed.(Bogota: Legis, Universidad de los Andes, 2006)

sible to have access to them; especially to the Constitutional Court decisions, which keeps an online report service.[23] Taking into consideration these initial remarks, the analysis of the Colombian estate of the art in reference to Judicial Jurisdiction on Cyber-Torts, will be done based on the only case decided on this area known as *Rovira's* Injunction (Juzgado Segundo Municipal de Rovira, 2003).

In *Rovira's*, the complainant, a Colombian citizen with domicile in Bogota D.C. receives at least 8 SPAMS within a period of 10 months from the defendant a Colombian citizen with domicile in Bogota D.C. sole proprietorship of "VIRTUAL CARD"[24] and from some of his clients. Within a time period of 10 months, complainant and defendant exchanged e-mails back and forth; the first requiring the exclusion of his e-mail from the "VIRTUALCARD" database, and the second replying affirmatively to his demand; Nonetheless, this promise never happened and the complainant kept receiving undesired publicity e-mails.

The complainants filed an injunction seeking a restrain order against the defendant, with the intentions of stop receiving SPAM and exclude his email from the defendant's business data base. The complainant supports his case on article 15 of the Constitution which protects the personal intimacy and *Habeas Data* rights[25]; and under the action and procedure established in article 86 of the Constitution[26] and Decree 2591 of 1991. The case was brought up by the complainant via e-mail to the municipal court of Rovira, Tolima, and from beginning to end the process was processed and solved via e-mail.

In Rovira's the judge divided the case in three issues: (i) whether or not he has competence over the case, (ii) The legal regime of the SPAM within Colombia and (iii) The fundamental right trespassed. For the purpose of this document, I will only analyze the first issue.

The thesis in *Rovira's* regarding the internet activities and the nature of an e-mail account, is that the internet is a "cyberspace" where all the actions performed in it take place in a "virtual reality", furthermore, the judge estates that the e-mail address is the "virtual domicile" of the

23 Available at <http://www.corteconstitucional.gov.co>

24 Offers the services of mailing, multimedia, databases, electronic bulletins and e-commerce.

25 *Colombian Constitution*, Art.15: "All persons are entitled to their privacy and their personal and family good name, and the State must be respected and enforced. Similarly, they have right to know, update and rectify information that is collected on them in databases and files of public and private entities.

In the collection, processing and data flow will be respected freedom and other guarantees enshrined in the Constitution." [translated by the author]; Nelson Remolina Angarita defines Habeas data in these terms: "the essence of the right to habeas data means that the person controls what happens to your data staff, regardless of whether they are public or cuasi private." [translated by author] Cited in COLOMBIA, Corte Constitucional. Sala plena. Magistrado Ponente: Jaime Córdoba Triviño. Sentencia del 16 de Octubre de 2008 (Sentencia numero C-1011/08)

26 *Colombian Constitution,* Art. 86: "Everyone will have to seek remedy before the courts in anywhere, anytime, through a preferential and summary procedure, by itself or by anyone acting on its behalf towards immediate protection of their constitutional rights, whenever they are violated or threatened by action or omission of any public authority.

The protection will consist of an order in respect of those who sought guardianship, act or refrain from doing so. The ruling, which will be of immediate compliance, may be challenged before the competent court and in any case, it will refer it to the Constitutional Court for possible review.

This action will only be affected when no other means of defence court, except that it is used as a mechanism to avoid injury irremediable.

In any case may not pass more than ten days between application for guardianship and resolution.

The law shall establish the cases where the appropriate remedy against private responsible for providing a public service or whose conduct affects serious and direct interest or in respect of whom the applicant is in a state subordination or helplessness."

complainant within the "cyberspace", and because of these unique situations based on the Decree 1382 of 2000 art. 1, and in a Council of State decision (2002) regarding the constitutionality of the mentioned provision, he held:

> [A]bout the place where the effects of violation of a fundamental right are inflicted, the Council of State held (internal citation omitted) [...] that the place where the violation occurs or threatens the fundamental right not only is the one where the action unfolds or incurred in the omission, but likewise where the effects of these behaviours are perceived [...] [T]he consequences of inadequate management of new technologies deployed in cyberspace where the virtual domicile of the complainant is located, the fact that no rule had been enacted will not prevent us from considering this Court as any other anywhere in the Republic of Colombia, is competent to hear a case of this nature until an statute say otherwise.

Here in *Rovira's* the *obiter dicta* and *ratio decidendi* regarding the assertion of Judicial Jurisdiction in my opinion are wrong and do not correspond with the Colombian jurisprudence and statutory law applicable to the case. These errors are reflected in the miscomprehension and not application of the jurisprudence about Judicial Jurisdiction competence in this type of cases, and not application of the jurisprudence in matters of activities on the internet.

First, the citation made in *Rovira's* of the Council of State (2000) rule about competence based on Decree 1382 of 2000 art. 1, which follows the rules set on a Constitutional Court review decision that I named *Silvio* (*T-574, 1994).* In *Silvio*, a citizen domicile in Tunja[27] brought an injunction against the Ministry of Communications before the Appellate District Court of Tunja. The court do not asserted Judicial Jurisdiction arguing that the possible trespass of the complainant rights took place where the Ministry have domicile, this is Bogota D.C. The *ratio decidendi* in *Silvio* regarding the assertion of Judicial Jurisdiction by the judge of the place where the harm is inflected is as follows:

> It is true that under Article 37 of Decree 2591 of 1991, have jurisdiction over the remedy in the first instance, to prevention, judges or courts with jurisdiction in the place where the violation occurs or the threat that encourage the injunction. However, not always the competence is asserted in compliance with the place where the events happened physically, because [...] the performance of an official or agency that, despite being based in a particular location- for example, the Capital of the Republic- and to carry out their acts there, exercises authority throughout the national territory. Such is the case of Ministries, whose actions nevertheless have usually originated in Santa Fe de Bogota, applied in various parts of the country, regardless of the place in which are applied. Thus, in the case for reviewing the judgments by which revoked the act of awarding the public tender is signed in Santa Fe de Bogota, but it affected the petitioner in another city [...] Hence it is not correct to say that the place of alleged violation of their fundamental rights necessarily coincide with the place of issue of the resolutions, nor argued that, to protect them, necessarily had to move to Santa Fe de Bogota and act before its judges.

27 Capital city of the department of Boyacá, 100 km north of Bogota D.C.

In *Rovira's* the domicile of both parties were Bogota D.C., nor the complainant nor the defendant have any kind of territorial attachment with the town of Rovira, not even a "real and substantial connection" with it; Thus if is strictly enforced the Decree 1382 of 2000 art.1, and followed the rule in *Silvio* which was followed by the Council of State, the trial court of Rovira should have declined to hear the case on the grounds of lack of competence.

Even if the assertion of Judicial Jurisdiction is under the argument that all the facts took place within the "cyber space" where the parties have "virtual domicile", the *Rovira's* judge do not have competence as well, for two fundamental reasons, one is because the ideas of "cyber space" and "virtual domicile" are not legal fictions created, defined or even accepted in any statutory law or jurisprudence within the Colombian civil law system; and the second because the statutory law and jurisprudence regarding the use of electronic data in Colombia had set rules to define "where the things happen" in relation with the Internet. The Colombian law anchorages the internet activities to the "material reality" by an objective test that I named *origin of communication rule* suggested by the Constitutional Court (*C-1146,* 2001).

The *origin of communication rule* is incepted from the construction of a statue known as the *Electronic Commerce Act* (Ley 527 de 1999). The test, sets out how is possible to identify if an action performed in the internet took place within the Colombian jurisdiction or if it can be called as a Colombian electronic data for taxation matters.

The *Electronic Commerce Act* states what is meant by "data message" (Article 2), who is given a data message sent over the Internet (article 16), and what is the real place of sending and receiving data (Article 25). This last point is especially relevant for the test, to the extent that the data message, in principle, is sent from the place where the originator has its domicile. Consequently the Court in *ratio decidendi* held:

> In this way, the legislature establishes a relationship between the virtual space of real action that is created in Internet and its correlation expressed in the work of its designers and operators, in order to clarify certain legal effects as it has been recognized by international statutory law related to the subject. Thus, there is a legal claim to the origin of the web pages and websites [...]

Furthermore, at first glance a web page can be identified as Colombian if uses the Internet's Domain Name System .CO, but as the Court dictates: "For the allocation of a domain in Colombia .co and for business .com [...] are technically useful, however, does not defines all the legal aspects relevant [...] "(*C-1146,* 2001).

In *Rovira's*, all the data messages where sent from Bogota D.C. and all of them where received in Bogota D.C., not any one of them were sent from Rovira nor any one of them were received in Rovira, except for the court "e-files". Hence, *Rovira's* judge do not have Judicial Jurisdiction over the case because the data was sent and received in Bogota D.C., in compliance with the *origin of communication* test in conjunction with the fact that the ideas of "cyber space" and "virtual domicile" are not legal fictions recognized within Colombian jurisdiction.

IV. JUDICIAL JURISDICTION AND CYBERTORT WITHIN COMMON LAW (USA AND CANADA)

Under this title I will refer to the most relevant cases in relation with the assertion of Judicial Jurisdiction in the United States and Canada. Here, the aim is to extract the rules, tests or doctrines created by the case law to address the issue Internet v. Judicial Jurisdiction.

A. USA: Sliding Scale and Effects Tests for Judicial Jurisdiction on Internet cases

The assertion of Judicial Jurisdiction by the USA judiciary was initially dominated by the *Sliding Scale test* incepted in *Zippo* (Zippo Mfg. Co. Vs Zippo Dot Com., Inc., 952). The substance of Zippo and the way that the *Sliding Scale test* works is clearly identified by Elizabeth F. Judge (2005)

> A passive site merely posting information on the website which is accessible to users in a foreign jurisdiction would not support jurisdiction; whereas on the active part of the spectrum, an "interactive site," which is enabled to complete e-commerce transactions or which repeatedly transmits files over the internet to the forum, would support jurisdiction.

The plaintiff, who manufactured Zippo lighters, sued the California defendant, an internet news service, in the western district of Pennsylvania for violations of trademark laws. In Zippo the highlight of the *ratio decidendi* was that "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site (Zippo Mfg. Co. Vs Zippo Dot Com., Inc.)

Specifically, the *Sliding Scale* test incepted in Zippo is just the reaffirming of the precedent case Bensusan *Restaurant Corp. v. King.*[28] In Bensusan the rule set out regarding solicitation through the internet and the forum with Judicial Jurisdiction over disputes related with is that "the poster" (person who publish the information on the internet) itself does not determine who sees the site; "pull" technology requires an active rather than passive viewer". [29]

In Bensusan and *Zippo* the courts reasoning regarding Judicial Jurisdiction over internet disputes are supported on traditional USA constitutional principals. The approach of the *Sliding Scale* test is that this new technology (internet) enables anyone can have access to the information posted on it from anywhere, does not mean that the assertion of Judicial Jurisdiction can be asserted anywhere the information can be accessed (Judge, 2005).

Conversely, the *Sliding Scale* test from a public policy perspective, offers a narrow and framed

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28 937 F.Supp. 295 (S.D.N.Y. 1996), aff'd 126 F.3d 25 (2d Cir. 1997)[*Bensusan*]; Jayatan Kumari, "Determining Jurisdiction in Cyberspace": The plaintiff corporation owned the internationally famous "Blue Note" nightclub in New York City. The defendant was the owner of a nightclub in Missouri also called "The Blue Note", which catered to college students at the nearby university. The plaintiff sued in New York for trademark infringement and unfair competition on the basis of the defendant's website. It also asked the court to order the defendant to change the name of the club and to shut down the website, which contained a calendar of upcoming attractions, and a telephone number to call for further information. The Missouri Blue Note website originally contained a hyperlink to the New York "Blue Note" site, but it was removed when the plaintiff complained.

29 "An Overview of the Law of Personal (Adjudicatory) Jurisdiction: The United States Perspective", available at < http://www.kentlaw.edu/cyberlaw/docs/rfc/usview.html> (last visited 6 April 2009)

guidance, which do not help to foresee and measure the risk and exposure to possible litigation within the forum (Geist, 2001). If the idea is to promote the use and engage people on internet activities, especially the commercial, the rule set in *Zippo* discourages these intentions, because people and business' need interactive web pages, with features that makes possible the place of orders and exchange of information in real time, and these activities since the *Sliding Scale* test inception equals be hauled into the US forum.

Although US judiciary have not dropped the *Sliding Scale test*, the truth is that a new trend has been in use for the *Effects Tests* in the last 10 years, where "Rather than examining the specific characteristics of a website and its potential impact, courts are focusing on the actual effects that the website has had in the jurisdiction" (Haines report). This approach is based on the U.S. Supreme Court *case Calder v. Jones*, 1984 (cited by Geist, 2002)30 The *Calder doctrine was* implemented on the internet context in *Nissan Motor Co. Ltd. v. Nissan Computer Corporation* (2000). Here a complaint was filed by the automobile corporation in California against a computer corporation, arguing that the domain names owned by the defendant "nissan.net" and "nissan.com" trespass the property rights that the defendants have on "Nissan" trademark.

Here in Nissan the court ruled that Nissan Computer had intentionally modified the information posted on its web page creating confusion on the consumer to exploit and to profit from the "Nissan" trademark owned by the plaintiff. Furthermore, because Nissan Computer is a California based entity, the harm was suffered in the forum state.

Clearly this new trend towards assertion of Judicial Jurisdiction for internet cases related and based on the *Calder doctrine* takes the risk of being hauled into a US court room to an incontrollable level and do not have co-relation with the frantic pace of the internet development. Considering the universal access of the internet, even if a person takes all the possible measures (technological and legal) to avoid the US forum, the exchange of information and interactivity from the forum can cause harm to someone on it; even if, the owner/responsible of the electronic data do not have as a "target" this particular forum.

B. Canada

The assertion of Judicial Jurisdiction over internet-based cases in Canada has followed the USA case law pattern mixed with the well known Judicial Jurisdiction rules. Hence, Canadian judiciary as USA judiciary initially adopted the *Sliding Scale test*, and nowadays the *Effect test*. This last one clearly resembles the Canadian doctrine of *real and substantial connection*. I am going to show two cases where the Canadian

30 This case know as the *Calder doctrine* is explained by *Geist* as follows: "This doctrine holds that personal jurisdiction over a defendant is proper when a) the defendant's intentional tortious actions b) expressly aimed at the forum state c) causes harm to the plaintiff in the forum state, of which the defendant knows is likely to be suffered. In Calder, a California entertainer sued a Florida publisher for libel in a California district court. In ruling that personal jurisdiction was properly asserted, the Court focused on the effects of the defendant's actions. Reasoning that the plaintiff lived and worked in California, spent most of her career in California, suffered injury to her professional reputation in California, and suffered emotional distress in California, the Court concluded that defendant had intentionally targeted a California resident and thus it was proper to sue the publisher in that state."

courts analyzed the assertion of Judicial Jurisdiction that not only involves internet issues but also these cases have a conflict of laws (international private law) component.

In *Alteen v. Informix Corp* (1998), Shareholders in Newfoundland brought action in tort against U.S. Corporation for allegedly issuing false and misleading statements regarding its current and future operations which artificially inflated the price of its common shares, these statements were posted and were available on the internet.

The Newfoundland Supreme court ruled that the Defendant could have reasonably foreseen that foreign investors would have access to this information and could have consulted reports and affect the decision process, whether or not to purchase these shares; therefore if the Defendant communicated its financial performance through internationally accessible mediums, could have reasonably foreseen that its shares would be purchased in Newfoundland.

The substance of *Alteen* can be divided in two parts, in relation with the assertion of Judicial Jurisdiction; the first one is the pure availability of access to information posted on the internet (misleading or not) for people within the forum in conjunction with the fact that these people rely on the posted information with the intention to do something, which at the end can cause harm to them; This entitles the judge of the forum to assert Judicial Jurisdiction; and second, is the intention of the defendant whether or not was directed to the forum, is not relevant to assert Judicial Jurisdiction since it finally caused harm and its effects are suffered within the forum.

On the other hand is *Braintech Inc. v. Kostiuk* (1999) Here the respondent a British Columbia based corporation obtained a default judgment in the District Court of Harris County in the State of Texas against the appellant, Kostiuk, a businessman who posted a commentary on a group or bulletin board-internet based called "Silicon Investor", which was used to transmit and publish defamatory information about the respondent.

The rule set on *Braintech* by the British Columbia Court of Appeals is that the mere possibility that someone in Texas might have accessed material insufficient to constitute real and substantial connection required, gives jurisdiction to the Texas court. Hence, to enforce recovery on judgment obtained in Texas, on the basis of use of a web-based bulletin board would encourage multiplicity of actions wherever internet access to the posted information is available. Furthermore the Court in obiter dicta clearly cited and used *Zippo* in this sense:

> 61. It is equally clear the bulletin board is "passive" as posting information volunteered by people like Kostiuk, accessible only to users who have the means of gaining access and who exercise that means.
>
> 65 In the circumstance of no purposeful commercial activity alleged on the part of Kostiuk and the equally material absence of any person in that jurisdiction having "read" the alleged libel all that has been deemed to have been demonstrated was Kostiuk's passive use of an out of state electronic bulletin. The allegation of publication fails as it rests on the mere transitory, passive presence in cyberspace of the alleged

> defamatory material. Such a contact does not constitute a real and substantial presence. On the American authorities this is an insufficient basis for the exercise of an in personam jurisdiction over a non-resident (Emphasis added)

When *Braintech* took into consideration the *Sliding Scale test,* set the reasoning that depending on the interactivity of a web page can be derived on inferred the possible inflection of damages within the forum, in contrast with *Alteen* where the "mere possibility that someone in "Newfoundland "have accessed" information posted on the internet "constitute real and substantial connection required to give jurisdiction.

V. CONCLUSION

The state of the art of the Colombian legal approaching to the internet based cases is not far from the jurisdiction analyzed here, if is measure from a stability, predictability and certainty standards. Clearly Canada and USA with their subjective assertion of Judicial Jurisdiction (*forum non convieniens* and substantial connection with the forum doctrines) creates a very volatile risk in matters of access of justice. Colombia judiciary must go back to the basics (domicile, residence and place where the action/ omission took place) when a problem of assertion Judicial Jurisdiction over an internet-related case is brought before them.

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