

TALES, TECHS, AND TERRITORIES: PRIVATE INTERNATIONAL LAW, GLOBALIZATION, AND THE LEGAL CONSTRUCTION OF BORDERLESSNESS ON THE INTERNET

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I

INTRODUCTION

The Internet has often been described as “borderless,” owing to the technical features of Internet communications that make content accessible to anyone with a network connection, regardless of his or her location. This borderlessness has been widely thought both to confound legal regimes relying on territoriality and to fundamentally create a crisis for jurisdictional determination of both public- and private-law matters. The borderless Internet has thus entered into the loose pantheon of phenomena that herald the arrival of globalization—that vague collection of trends that purportedly erase, or at least significantly compromise, the authority of intermediary levels of social, political, economic, and legal orders such as the nation, state, or province.¹

The coincidence of the popularization of Internet use and globalization rhetoric in the 1990s undoubtedly colored the interpretation of the legal significance of Internet technology. The legal handling of the Internet’s capacity for uncontrolled crossing of territorial borders informs and shapes our understanding of the Internet in two ways: first, by framing the substantive issues arising from the application of local law as a conflict between a cosmopolitanism that embraces global community and a parochialism that thwarts global community; second, by framing procedural issues as a contest between simple and complex approaches to determining the significance of new legal circumstances arising from the technology or the relationships it enables, or both. Without such a critical examination into the legal framing of Internet borderlessness, we fail to truly appreciate that the substantive and procedural

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1. See David Westbrook, *Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort To Think Gracefully Nonetheless*, 47 HARV. INT’L L.J. 489, 490–92 (2006).

aspects of Internet-related cases work together to determine the legal meaning of Internet technologies.

One of the most striking features of cases that touch more than one jurisdiction through the Internet is how narrowly the interjurisdictional issues are often construed. As conflicts-of-laws scholars have complained in other contexts, courts in Internet cases almost always confine conflicts issues to the exercise of prescriptive or personal jurisdiction over a foreign defendant, which is collapsed with the determination that local law applies. In other words, courts in these cases virtually never engage in a full conflicts analysis to determine whether foreign law ought to be applied.²

The interjurisdictional issues raised in Internet tort cases, for instance, are quite often determined via the localization of the tort, wherein new circumstances introduced by Internet technology are converted into facts calling for a more straightforward exercise of territorial authority over people who have caused events to occur *within* a jurisdiction and so are naturally subject to local law. I do not attempt to explain here why this is so, leaving that for conflicts-of-laws scholars, but rather seek to set out how courts and scholars cast Internet technology's significance in resolving disputes that arise from online communications.

Cyberlaw scholarship can serve the role for legal scholarship that science-and-technology-studies scholarship plays for science³—that is, rejecting the assumption that technologies have fixed forms and neutral meaning, an assumption that conceals the ways technologies are socially influenced and their meaning constructed.⁴ Some have advocated applying such critical methods to look at the law itself,⁵—that is, at the ways legal techniques are not natural or inevitable, and the ways that legal form has agency in the production of legal conclusions.⁶

This article takes up both of these theoretical orientations by critically examining the two levels of private international law's engagement with Internet technology, primarily in Canadian Internet-related tort cases with American defendants: (1) through tracing the various narrative figures that give legal meaning to Internet borderlessness by invoking the cosmopolitan—

2. Many authors of cyber-law textbooks contribute to this trend by limiting their sections on jurisdiction primarily to whether content providers will be subjected to local law in foreign jurisdictions. See, e.g., MICHEAL A. GEIST, *INTERNET LAW IN CANADA*, 1–125 (Captus Press Inc., 3d ed. 2002) (2000); DAVID W. QUINTO, *LAW OF INTERNET DISPUTES*, 12-1–12-72 (2001). These texts, intended for students and professionals, do not focus primarily on private international law.

3. Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210, 250 (2007).

4. *Id.*; see also Richard Ford, *Against Cyberspace*, in *THE PLACE OF LAW* 147–77 (Austin Sarat et al. eds., 2003). Both Cohen and Ford argue that space (and consequently jurisdiction) is socially constructed. This article is concerned less about the social constructedness of borders per se than about the ways territorial borders, though accepted by most legal scholars and certainly courts as “real,” are nonetheless subject to assignment of legal significance and consequently are “constructed” in law.

5. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 984–85 (2005).

6. *Id.* at 988.

parochial rubric, and (2) through tracing the ways these cases promote simple or complex private-international-law methods as most appropriate to disputes arising from cross-border communications.

II

THE PRODUCTION OF THE LEGAL MEANING OF INTERNET BORDERLESSNESS

Globalization rhetoric has been described as debased: “It too often involves exaggerated, misleading, meaningless, superficial, ethnocentric, or just plain false statements about processes and phenomena that are better discussed in less hyperbolic terms.”⁷ The exaggerations can go in utopian or dystopian directions, leading either to a new, harmonious, global human community, or to an oppressive homogenization of differences, usually at the expense of less-powerful populations. The utopian vision tends to strive for freedom from the law of individual nations in favor of respect for the choices of Internet participants (to either govern themselves or to choose by whom to be governed), while the dystopian vision tends to reject the dissolution of sovereign authority insofar as doing so recapitulates global power imbalances. Either vision may be favorably aligned with cosmopolitanism (as providing a more open and flexible framework for Internet users as individuals, or as providing a means for otherwise silenced populations to be heard). But so, too, can either vision be negatively aligned with parochialism (as providing another means for more powerful parties to ensure the most favorable legal regime will govern, or as thwarting the march of progress by subjecting Internet users to multiple local regulations). Although the terms “cosmopolitan” and “parochial” shape these arguments, either explicitly or implicitly, clearly neither term is fixed and neither can be deployed to varying rhetorical ends.

For the most part, the production of the legal meaning of Internet borderlessness has followed two narrative lines, both of which operate within the cosmopolitan–parochial rubric.⁸ The first began with the early consideration of Internet activity as occurring in a virtual place without borders, and therefore not subject to conventional territorial law (where Internet activities take place “everywhere and nowhere”).⁹ This early form of the narrative soon shifted to

7. William Twining, *Diffusion and Globalization Discourse*, 47 HARV. INT’L L.J. 507, 508 (2006).

8. As Robert Cover has famously stated, “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each [D]ecalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.” Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983).

9. The phrase “everywhere and nowhere” appears in John Perry Barlow’s famous “A Declaration of the Independence of Cyberspace.” John Perry Barlow, *A Declaration of Independence of Cyberspace* (Feb. 8, 1996), <http://homes.eff.org/~barlow/Declaration-Final.html> (last visited Apr. 22, 2008). The phrase also appears in the lyrics to the 1967 song *Hi Ho Silver Lining* by Jeff Beck. Barlow is a former lyricist for the Grateful Dead, and is a co-founder of the Electronic Frontier Foundation. The Electronic Frontier Foundation is a civil-liberties group whose mission is to defend individual rights in the digital world. Electronic Frontier Foundation, Home, <http://www.eff.org/> (last visited Jan. 18, 2008).

one more fundamentally connected with the territorial world, where universal accessibility is feared to lead to parochial assertion of state authority in every jurisdiction—that is, “everywhere and nowhere” became *everywhere and anywhere*. This fear led to a call for defendant-centered rules, as defendants feared they might be exposed to liability everywhere that Internet content could be accessed. The second narrative line developed in reaction to the first; in it, the relevance of borders is reasserted in contexts where “something more” than mere accessibility is at issue.¹⁰ In this narrative line, setting out the contours of that “something more” becomes an exercise in determining when foreign audiences should be considered part of the community that is addressed by Internet communications—where Internet disputes take place *here, there (and everywhere)*—since the fact that content is accessible elsewhere (or indeed everywhere) is deemed not relevant to the dispute.¹¹

These narrative figures ascribe very different legal meanings to Internet “borderlessness,” even as they all acknowledge the capacity of Internet communications to facilitate global interactions—that is, to potentially allow a person to be heard everywhere. Specific instances of these narratives express different degrees of openness to the position that a new technology requires rethinking whether substantive local law applies to an event that can be construed to occur within the territory.

Cases wherein a central determination concerns the relevance of the recipients of Internet communications as public audiences are particularly illuminating. Although the legal scholarship on Internet law invokes the cosmopolitan–parochial rubric more generally, courts or parties to proceedings invoke it most forcefully in cases dealing with the receipt of information across borders by public audiences.¹² Canadian Internet-defamation cases will therefore serve as the primary examples through which to explore the instances in which the above narrative figures play a prominent role. The reasons why these cases should be the primary locus for working out these tensions are surely related to the prominent role that information exchange plays in visions of global community. That these cases involve U.S. defendants and Canadian

10. The phrase “something more” comes from the line of U.S. defamation cases that descended from *Calder v. Jones*, 465 U.S. 783 (1984). *E.g.*, *Yahoo! Inc. v. La Ligue Contre Le Racisme et l’Antisemitisme*, 379 F.3d 1120, 1124 (9th Cir. 2004); *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002). In those cases, courts interpreted *Calder* as having required something more than the mere foreseeability that damage would be caused in a plaintiff’s jurisdiction to allow a suit to be heard there.

11. U.S. courts have deemed an explicit intent to target a plaintiff’s forum through online communications to satisfy the “something more” requirement. *See, e.g.*, *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *People ex rel. Vacco v. World Interactive Gaming*, 714 N.Y.S.2d 844, 848–850 (N.Y. Sup. Ct. 1999). Canadian courts have not limited the “something more” requirement to audience targeting by a defendant, as will be discussed further with regard to the “here, there (and everywhere)” narrative. *See infra* II.B.

12. Defamation cases are the most prominent Internet-based disputes involving receipt of information by public audiences. The cosmopolitan–parochial rubric is invoked by both the courts and the parties in the much-discussed Australian defamation case *Gutnick v. Dow Jones and Co., Inc.* (2001) V.S.C. 305 (Austl.), *aff’d*, *Dow Jones & Co., Inc. v. Gutnick* (2002) 194 A.L.R. 433 (Austl.).

audiences further speaks to the relatively marginal status of Canadian audiences in the publics directly addressed by U.S. information providers. In this way, these cases are fundamentally about globalization, in that information dissemination is a key paradigm of the global.

A. From Everywhere and Nowhere to Everywhere and Anywhere

It is by now nearly legend that the earliest champions of the Internet's borderlessness tended to embrace the libertarian possibilities of a communications environment unmoored from physical restrictions and not subject to the governments that rule over the physical world.¹³ The most famous and storied advocate of this position is John Perry Barlow, one of the founders of the Electronic Frontier Foundation, whose 1996 manifesto, "A Declaration of the Independence of Cyberspace,"¹⁴ is easily the most oft-quoted document of the early era.¹⁵ Barlow stated that existing territorial governments have no sovereignty in cyberspace, because "[c]yberspace does not lie within your borders."¹⁶ Indeed, as he puts it, cyberspace "is a world that is both everywhere and nowhere, but it is not where bodies live."¹⁷ Cyberspace is thereby understood as a curiously de-territorialized space, an exciting possibility for a new frontier fundamentally outside the reach of existing laws and regulations.

The popular variant of the cosmopolitan vision of the Internet that embraces this new frontier and what it can achieve for global human society is amply illustrated in advertising campaigns for Internet-related services from the 1990s. These ads invested global access to the Internet with a capacity to unite all peoples of the world in the common purpose of information exchange. A Microsoft advertising campaign from 1995, for instance, featured an Internet accessed by ethnically diverse people typing or reading aloud in myriad languages. The advertisement culminated in Microsoft's 1994–2002 company slogan: "Where do you want to go today?"¹⁸ The direct address and clarity of this slogan implies that anyone is free to travel, via the Internet, anywhere he or she pleases. This mode of address deliberately elides any differences (political,

13. Philip Agre notes that reactions to Internet technology ran the whole political spectrum: by his typology, the libertarian left and right, alike, projected images of decentralization and destruction of existing institutions, from the left as an opportunity for radical democracy, from the right as an opportunity to allow the market to determine the shape of the future. The nonlibertarian left approached the Internet as yet another instrument of capitalist domination and expansion, while the nonlibertarian right saw it as yet another instrument of moral decay. Philip E. Agre, *Cyberspace as American Culture*, 11 *SCI. AS CULTURE* 171, 185 (2002).

14. Barlow, *supra* note 9.

15. See, e.g., Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 *BERKELEY TECH. L.J.* 1207, 1212 (2002); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 *CAL. L. REV.* 439, 447 (2003).

16. Barlow, *supra* note 9.

17. *Id.*

18. A valuable database of advertisements of multi- and transnational corporations is available online: Robert Goldman et al., *Landscapes of Capital: Representing Time, Space and Globalization in Corporate Advertising*, <http://it.stlawu.edu/~global/pagesintro/mapfive.html> (last visited Jan. 15, 2008). This database accompanies the analytical project of sociologists Robert Goldman and Stephen Papson.

economic, or cultural) that would surely make free travel, even via the Internet, more difficult for some world populations than for others. A similar campaign was run by Canadian telecommunications company Nortel Networks, prominently featuring their likewise difference-leveling slogan: "What do you want the Internet to be?"¹⁹ U.S. and Canadian companies shared a similar vision of limitless possibility and a message of universal empowerment.

Legal scholars David Johnson and David Post most famously took on the challenge of considering what law in this sort of cyberspace would look like. In their seminal 1996 article, *Law and Borders—The Rise of Law in Cyberspace*, Johnson and Post took seriously the idea of cyberspace as a separate place by positing that Internet users crossed a border more significant than any territorial border when they went online (that is, the border between online and offline) and so should evolve their own norms and rules of behavior rather than be governed by offline laws.²⁰ Support for private ordering by Internet users has been widespread,²¹ often characterizing online forums as cosmopolitan and as threatened by the incursion of parochial norms by national legal systems.²² Casting the assertion of national interest as parochial rests on an assumption that crossing multiple borders negates the legitimacy of claims by any one territory. Johnson and Post, for instance, write:

Governments cannot stop electronic communications from coming across their borders, even if they want to do so. Nor can they credibly claim a right to regulate the Net based on supposed local harms caused by activities that originate outside their borders and that travel electronically to many different nations. One nation's legal institutions should not monopolize rule-making for the entire Net.²³

For Johnson and Post, the claim that territorially bound authorities cannot make a legitimate claim to regulate cross-border communications that cause local harm follows from the fact that these same communications "travel electronically to many different nations."²⁴ In other words, the local jurisdiction's claim is vacated by the mere fact of the global nature of the communication. Such visions of Internet borderlessness privilege the global over the local, invoking a public-policy rationale for preferring international

19. Robert Goldman et al., Making it Social, Making it Emotional, <http://it.stlawu.edu/~global/pageslandscapes/nortelsign33.html> (last visited Jan. 15, 2008).

20. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1378–79 (1996).

21. See, e.g., Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Space*, 29 VAND. J. TRANSNAT'L L. 75, 96 (1996); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 555 (1998).

22. See, e.g., John T. Delacourt, *The International Impact of Internet Regulation*, 38 HARV. INT'L L.J. 207, 234 (1997) ("The national regimes imposed by the United States, Germany, and China apply parochial norms to a cosmopolitan space in an attempt to constrain a medium whose principal value is its flexibility."); Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 UNIV. OF TORONTO L.J. 265, 281 ("Like the medieval Law Merchant, a twenty-first-century Law Merchant is evolving that is cosmopolitan in nature and transcends the parochial interests of nation states.").

23. Johnson & Post, *supra* note 20, at 1390.

24. *Id.*

over national interests, in which “international” is often collapsed with *individual* content provider interests.

Embedded within this privileging of the global over the local (via the cosmopolitan–parochial rubric) is another more-subtle move that translates Barlow’s de-territorialized cyberspace into a phenomenon territorialized in ways that law more readily understands. Specifically, although Barlow’s cyberspace is “everywhere and nowhere,”²⁵ Johnson and Post’s is “everywhere but nowhere in particular.”²⁶ Under this modified conception of Barlow’s cyberspace, cyberspace no longer “does not lie within your borders,”²⁷ but instead “cut[s] across territorial border.”²⁸ Despite their advocacy for self-governance,²⁹ Johnson and Post’s cyberspace shifts the conceptual frame from one structured by an opposition between physical and virtual to one structured by an opposition between global and local, which makes Internet technology more readily manageable by private-international-law approaches.

The “everywhere but nowhere in particular”³⁰ variation on Barlow’s legendary vision appears in cases in which courts have stated that a defendant’s address to the world at large neutralizes the claims of any one specific locale.³¹ Although not truly “nowhere”—since at least the defendant’s home forum is presumed to have authority over the dispute—the cosmopolitan–parochial rubric interprets the nonspecific address as negating the legal significance of information flowing into a specific territory.³² In other words, when the world at large is the audience, parochial norms do not apply.

With the shift from physical–virtual to global–local, exercising jurisdiction and potentially applying local law became a hotbed of controversy in Internet-based disputes.³³ The utopian vision of an alternate universe self-governed by participants gave way to the earth-bound desire to be everywhere but not be subject to legal liability anywhere except in one’s home jurisdiction. This is the legal narrative underpinning the utopian possibilities expressed in the Microsoft and Nortel advertisements described above,³⁴ or in the advocacy of such public-interest projects as the OpenNet Initiative³⁵ and the Global Internet Liberty

25. Barlow, *supra* note 9.

26. Johnson & Post, *supra* note 20, at 1378.

27. Barlow, *supra* note 16.

28. Johnson & Post, *supra* note 20, at 1367.

29. *Id.* at 1383.

30. *Id.* at 1376.

31. *See, e.g.*, *Am. Info. Corp. v. Am. Infometrics, Inc.*, 139 F. Supp. 2d 696, 700 (D. Md. 2001) (federal court action in the United States); *Desjean v. Intermix Media Inc.*, [2006] F.C. 1395 at para. 42 (Can.) (federal court action in Canada).

32. *Am. Info. Corp.*, 139 F. Supp. 2d at 700; *Desjean*, F.C. 1395 para. 35.

33. *Am. Info. Corp.*, 139 F. Supp. 2d at 700; *Desjean*, F.C. 1395 para. 35. *See also* *Panavision Int’l v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998); *GTE New Media Servs., Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1347–50 (D.C. Cir. 2000); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336–37 (5th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997).

34. *See supra* II.A.

35. OpenNet Initiative, Home, <http://opennet.net/> (last visited Jan. 15, 2008).

Campaign.³⁶ Along with the desire to be everywhere came the anxiety that the freedom (and power) to be global would be squelched by overzealous courts asserting parochial interests and imposing local laws on content providers merely because that content could be accessed within those courts' jurisdictions. This double-edged "everywhere and anywhere" narrative became common in court cases,³⁷ commentary,³⁸ and scholarship,³⁹ thereby elevating the frequency and prominence of public-policy arguments against the assumption of jurisdiction in Internet cases.

36. Global Internet Liberty Campaign, Home, <http://www.gilc.org/> (last visited Jan. 15, 2008); see also Electronic Frontier Foundation, Home, <http://www.eff.org/> (last visited Jan. 15, 2008); Center for Democracy and Technology, Mission and Principles, <http://www.cdt.org/mission/> (last visited Jan. 15, 2008).

37. See, e.g., *Am. Info. Corp.*, 139 F. Supp. 2d at 701 ("In the case at bar, the burden on the defendant at least balances the plaintiff's interest in convenience, and the availability of jurisdiction anywhere in the country, over anyone with a Web site that accepts a rudimentary form inquiry, hardly promotes the most efficient resolution of controversies."); *GTE New Media Servs., Inc.*, 199 F.3d at 1350 ("When stripped to its core, GTE's theory of jurisdiction rests on the claim that, because the defendants have acted to maximize usage of their websites in the District, mere accessibility of the defendants' websites establishes the necessary 'minimum contacts' with this forum. [internal citation omitted] This theory simply cannot hold water. Indeed, under this view, personal jurisdiction in Internet-related cases would almost always be found in any forum in the country."); *Cybersell, Inc.*, 130 F.3d at 419 ("While there is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents."). In Canada, see, e.g., *Braintech, Inc. v. Kostiuik (Braintech II)*, [1999] 171 D.L.R. (4th) 46 para. 63 (Can.) ("It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained."); *Desjean v. Intermix Media Inc.*, [2006] F.C. 1395 para. 35 (Can.) ("It would be manifestly unfair to subject Intermix to this Court's jurisdiction since it would, in effect, mean a U.S.-based operator of a website, with no business assets in Canada and no physical presence in the jurisdiction, could be sued in this country as well as in any other country from which a plaintiff might choose to download its products.").

38. See, e.g., Robert W. Hamilton & Gregory A. Castanias, *Tangled Web: Personal Jurisdiction and the Internet*, 24 NO. 2 LITIGATION 27, 27 (1998) ("Since the World Wide Web typically is viewable from any computer on the Internet, anywhere in the world, does the owner of a Website therefore have 'minimum contacts' sufficient to be haled into court anywhere his Website might cause injury?"); Rieko Mashima, *Problem of the Supreme Court's Obscenity Test Concerning Cyberporn: Community Standards Remaining after ACLU v. Reno*, 16 THE COMPUTER LAWYER 23, 23 (1999) ("Information on the Internet can be received virtually by anybody anywhere without the sender's notice, thus reinforcing the pressure to comply with the standard of the strictest community should a sender hope to avoid potential trouble.").

39. See, e.g., Michael S. Rothman, *It's a Small World After All: Personal Jurisdiction, the Internet and the Global Marketplace*, 23 MD. J. INT'L L. & TRADE 127, 186 (1999) ("With increasing frequency, courts are being faced with factual situations where a defendant's contacts with the forum state meet the requirements of 'minimum contacts,' yet do not comport with traditional notions of 'fair play and substantial justice' inherent in the due process analysis (or the international standard of reasonableness). Consequently, cases involving the Internet will increase pressure on this second prong of the due process analysis and courts should use this prong to successfully protect defendants."); Kendrick D. Nguyen, *Redefining the Threshold for Personal Jurisdiction: Contact and the Presumption of Fairness*, 83 B.U. L. REV. 253, 279 (2003) ("With the presumption-of-reasonableness approach in practice, we can hope to reinstate the equilibrium between personal jurisdiction and twenty-first century American society. It is inevitable that personal jurisdiction will evolve to adapt to the environment sooner or later, but we undoubtedly prefer it to be sooner. As we have the ability to make that happen now, courts should act before the defunct legal concept of minimum contacts wreaks havoc in society by perpetuating unfairness and public distrust.").

The initial impetus for the “everywhere and anywhere” narrative came from cases in which courts did find liability for mere accessibility on a foreseeability basis: to choose to post information on the Internet is to know that you may be liable anywhere in the world.⁴⁰ This pure-foreseeability approach had a rare and short-lived legal life, replaced by variously phrased requirements of “something more” than mere accessibility, which is the central project of the “here, there (and everywhere)” narrative figure discussed below.⁴¹ Yet the threat of expansive exercising of personal jurisdiction based on mere accessibility and the resulting application of unfavorable local law has had much greater prominence as a rhetorical strategy. This strategy has been routinely deployed by defendants seeking to avoid liability in foreign jurisdictions for online content, regardless of their degree of activity in relation to the forum. Indeed, insofar as the “something more” requirement is vague and leaves open the possibility that not much more than mere accessibility is sufficient for a court to exercise jurisdiction, it invites this kind of counterargument.

The first Canadian case to consider Internet-based jurisdictional issues was *Braintech, Inc. v. Kostiuk (Braintech I)*.⁴² To date, it is the only Canadian case to consider liability for mere accessibility, and it has consequently been the only case to employ the “everywhere and anywhere” narrative.⁴³ *Braintech I* was an action brought in British Columbia to enforce a Texas defamation judgment obtained by a company with some presence in Texas against a British Columbia resident who posted comments on an online bulletin board.⁴⁴ The trial court ruled the Texas judgment enforceable,⁴⁵ reasoning that the suit had sufficient connection with Texas because of the plaintiff’s presence in Texas and the presence of some of the plaintiff’s investors in Texas, and accepted the Texas court’s holding that the defamation was published in Texas via the Internet. In other words, the harm had been suffered in Texas.⁴⁶ On appeal, the British Columbia Court of Appeal reversed.⁴⁷ It held that the other factors connecting the dispute to Texas became relevant only if the last conclusion, that the tort occurred partly in Texas, was valid.⁴⁸ The court’s reduction of the connecting-factors method to a variant of a single-situs test is a prominent example of the

40. See, e.g., *Playboy Ent., Inc. v. Chuckleberry Publ’g, Inc.*, 939 F. Supp. 1032, 1044 (S.D.N.Y. 1996) (ordering foreign defendant, based in Italy, to be held in contempt of court for violating court’s prior injunction enjoining defendant from selling or distributing goods, which infringed on a U.S. trademark, in the United States); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (court asserted territorial jurisdiction in a trademark-infringement action noting that by posting advertising on the Internet, defendant directed its advertising toward “not only the state of Connecticut, but to all states”).

41. See *infra* II.B.

42. *Braintech I*, [1998] 88 A.C.W.S. 565 (Can.), *rev’d*, *Braintech II*, 171 D.L.R. (4th) 46 (Can.).

43. See *Braintech II*, 171 D.L.R. (4th) 46 para. 62 (Can.), *rev’d* [1998] 88 A.C.W.S. 565 (Can.).

44. *Braintech I*, 88 A.C.W.S. 565 para. 20 (Can.).

45. *Id.* para. 22.

46. *Id.* para 20.

47. *Braintech II*, 171 D.L.R. (4th) 46 paras. 69–70 (Can.).

48. *Id.* para. 58.

draw toward simplicity as an appropriate procedural solution to disruptions caused by Internet technology.⁴⁹ The “everywhere and anywhere” narrative figure justifies the court’s procedural move via a purely negative public-policy rationale—namely, that mere accessibility is not enough to warrant the exercise of jurisdiction, since such a parochial intrusion would hinder the cosmopolitan future of the Internet.

For the British Columbia Court of Appeal, the significance of where the tort occurred was twofold: it highlighted the evidentiary deficiencies that demonstrated neither actual readership in Texas nor intent on the part of the defendant to address a Texas audience.⁵⁰ The court noted that the defendant did not manifest an intention “to enter any particular jurisdiction” and so “[i]t would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who post[ed] fair comment on a bulletin board could be ha[u]led before the courts of each of those countries where access to this bulletin could be obtained.”⁵¹ The “everywhere and anywhere” narrative allowed the British Columbia Court of Appeal to discount the other connecting factors considered by the trial judge regarding the plaintiff’s ties to Texas while justifying the privileging of global address over local effects.

Subsequent to *Braintech II*, Canadian private-international-law cases involving online defamation appear to have diverged from the dominant U.S. approach shared by the Canadian court in *Braintech II*—an approach that makes “targeting” of territorial audiences by defendant publishers a primary consideration.⁵² This trend has generated commentary claiming that the substantive differences in the defamation laws of the United States and of Commonwealth countries have pushed the former and latter in different directions.⁵³ A 2007 review of media law appearing in the *Harvard Law Review*, for instance, suggests that “[a]lthough these inconsistent jurisdictional tests are a matter of procedure, they stem from different substantive laws and from Commonwealth courts’ underlying unfriendliness to U.S. free speech protections.”⁵⁴ There are at least two problems with this assessment. The first problem is that these comments cast the reasoning of Commonwealth countries in negative terms—that is, as anti-American, where “American” stands in for expansive free-speech protections that are deemed to be most appropriate to the promotion of a cosmopolitan and progressive Information Society. The second problem is that such comments inadequately analyze the so-called “procedural variances” as a key arena for parsing the legal technologies that are

49. See *infra* II.B.

50. See *Braintech II*, 171 D.L.R. (4th) 46 para. 65 (Can.).

51. *Id.* paras. 62–63.

52. See, e.g., *Bangoura v. Washington Post*, [2004] 235 D.L.R. (4th) 564 (Can.), *rev’d*, [2005] 258 D.L.R. (4th) 341 (Can.); *Burke v. NYP Holdings, Inc.*, [2005] 48 B.C.L.R. 363 (Can.).

53. *Developments in the Law, The Law Of Media*, 120 HARV. L. REV. 1031, 1032 (2007).

54. *Id.*

used to reach positive (rather than purely negative) ends. An alternative way to understand the divergence of Commonwealth countries from the United States would be to note the decline in the “everywhere and anywhere” narrative’s potency as a deterrent. This decline is accompanied in Commonwealth countries by a turn toward using legal technologies to work out a positive rationale for reclaiming the legal relevance of the receipt of information to the information exchange that is so central to cosmopolitan visions of global online communications.

In the much-publicized- and discussed Australian defamation case, *Gutnick v. Dow Jones and Co., Inc.*, for instance, the defendant, a U.S. publisher, attempted to persuade the court to decline to hear the case even though the plaintiff had established that the defendant had Australian subscribers to its online publication, thereby manifesting at least some intention to reach an Australian audience even by the U.S.-favored “targeting” standard.⁵⁵ The defendant also argued that for any court other than one sitting in defendant’s home jurisdiction to hear the case would result in unlimited liability worldwide for online publishers.⁵⁶ The Victoria court rejected this argument, noting that, although the defendant argued “such a narrow rule was appropriate for the age of globalization[,] [i]t was, of course, also appropriate for his client.”⁵⁷ With this statement, the trial court deflated the public-policy argument that invoked a particular vision of cosmopolitanism as merely a guise for its rhetorical opposite—namely, the promotion of two parochial interests. One was national: that “every hit on a U.S. Web site that unearthed a defamatory statement simultaneously created the U.S. forum to decide the issue.”⁵⁸ Another, the most parochial interest of all, was an individual self-interest.⁵⁹ Although there is undoubtedly resistance in the trial court’s judgment to adopting a principle that would result in U.S. courts’ dominating online content disputes,⁶⁰ the court’s reasoning is less hostile to U.S. law per se than it is to the defendant’s efforts to negate the significance of the Australian audiences for U.S. online publications.

It is this aspect of *Dow Jones* that has been picked up by Canadian courts. Courts in four Internet-jurisdiction cases have cited *Dow Jones*, including the Supreme Court of Canada.⁶¹ *Dow Jones* stands mainly for the proposition that a

55. (2001) V.S.C. 305 para. 1–2 (Austl.) [hereinafter *Gutnick*], *aff’d sub nom. Dow Jones & Co. Inc. v. Gutnick*, (2002) 194 A.L.R. 433 (Austl.) [hereinafter *Dow Jones*]. Some critics have mischaracterized the decision as holding that accessibility alone is enough. See, e.g., Yulia A. Timofeeva, *Worldwide Prescriptive Jurisdiction in Internet Content Controversies: A Comparative Analysis*, 20 CONN. J. INT’L L. 199, 201 (2005) (“Australia exercised even more expansive authority and delivered a defamation judgment against a foreign respondent whose contact with the country was limited to defamatory Internet material accessible within Australia.”).

56. *Gutnick*, VSC 305 para. 16.

57. *Id.* para. 17.

58. *Id.* para. 76.

59. *Id.* para. 74.

60. *Id.* para. 73.

61. Soc’y of Composers, Authors & Music Publishers of Canada v. Canadian Ass’n of Internet Providers (*SOCAN III*), [2004] 240 D.L.R. (4th) 193 (Can.); *Bangoura v. Washington Post*, [2004] 235

territory in which Internet content is received may, in appropriate circumstances, assume jurisdiction over a dispute arising from that content.⁶² The possibility of exercising jurisdiction over disputes arising from content received in Canada demarcates the limits around the “everywhere and anywhere” narrative, such that Internet borderlessness translates into unlimited liability only when courts truly base their authority on mere accessibility alone, as opposed to proof of actual receipt by a more-than-incidental audience.

The second narrative line that gives meaning to Internet borderlessness—“here, there (and everywhere)” —clarifies that information crossing a particular border has legal consequences. It does this by starting from the premise that the capability of crossing all borders does not *necessarily* negate the significance of a specific, local-border crossing.

B. Here, There (and Everywhere)

In response to legal scholars who argued for treating Internet communications as exempt from more local controls,⁶³ other legal scholars reasserted the significance of territorial authority in a variety of ways. Jack Goldsmith, for instance, argued against Johnson and Post’s argument for self-governance by considering claims arising from the Internet’s disruptiveness to be overblown.⁶⁴ For Goldsmith, the Internet posed no truly new problems that private international law could not handle by established means.⁶⁵ In his recent book with Tim Wu, Goldsmith’s assessment is historically borne out, as national governments are chronicled to have succeeded in asserting authority over Internet communications that enter their territory, through various coercive means.⁶⁶ Goldsmith and Wu cast themselves as realists, deflating the exaggerated rhetoric surrounding the threat posed by the assertion of national authority while casting as naïve the thought that nation-states were ever really going away.⁶⁷

Other scholars, such as Neil Netanel and Joel Reidenberg, are less focused on the will of existing territorial nations than they are on the implications of embracing means of deciding legal disputes that thwart the assertion of

D.L.R. (4th) 564, *rev'd*, [2005] 258 D.L.R. (4th) 341 (Can.); *Barrick Gold Corp. v. Blanchard & Co.*, [2003] 9 B.L.R. 316 (Can.); *Burke v. NYP Holdings, Inc.*, [2005] 48 B.C.L.R. 363 (Can.).

62. *Dow Jones*, (2002) 194 A.L.R. 433 para. 54 (Austl.).

63. *See, e.g.*, Delacourt, *supra* note 22, at 34; Trakman, *supra* note 22, at 281.

64. Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1221 (1998). Goldsmith identified the slippery slope of the “everywhere and anywhere” narrative, noting that “this potential threat of liability is relatively insignificant and does not come close to the skeptics’ broad descriptive claims about massive multiple regulation of individual users.” *Id.*

65. *Id.* at 1206.

66. JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD* 184 (2006).

67. *Id.* at 10.

democratically established legal principles.⁶⁸ There are traces of these viewpoints in the *Gutnick* and *Dow Jones* decisions, in which the assertion of Australian jurisdiction is consciously deployed as a counterweight to exaggerated “everywhere and anywhere”-style rhetoric.⁶⁹

Paul Schiff Berman takes a different approach to reasserting the local. On the one hand, he criticizes the inappropriate assertion of territorial authority (his main examples come from U.S. courts that engage private-international-law methods inadequately, if at all); on the other, he proposes that private international law could take account of multiple community affiliations that are not strictly territorial or citizenship-based by taking a “cosmopolitan pluralist” approach.⁷⁰ In doing so, Berman reclaims the term “cosmopolitan” from the global in the service of the local, by which he means something other than mere national interest.

Although Berman’s cosmopolitan-pluralist approach is cast as an alternative to existing approaches to Internet disputes, the assumption of jurisdiction over Internet disputes in Canada is arguably already showing indications of being something other than merely the assertion of territorial sovereignty.⁷¹ The “here, there (and everywhere)” narrative line builds on private international law’s capacity to legally manage events occurring in more than one place (“both here and there”⁷²) and refines this observation for the Internet context by considering the circumstances in which “something more” than mere accessibility of Internet content warrants a court’s hearing a dispute. The exercise of setting out the “something more” is an effort toward determining when a foreign audience is deemed to become legally relevant—based not on territoriality per se, but rather on something closer to Berman’s notion of community affiliation.

Burke v. NYP Holdings, in which a British Columbia court faced a defamation action against a U.S. publisher, is a particularly interesting Canadian example of the “here, there (and everywhere)” narrative.⁷³ Although a British Columbia readership could be established, the manifest intention by the defendant publisher to cultivate that readership was absent.⁷⁴ The court held that it could properly exercise jurisdiction and apply local law because it was foreseeable that plaintiff would bring suit in the forum. The court’s foreseeability determination rested on two findings. First, plaintiff had an

68. See Neil W. Netanel, *Cyberspace Self-Governance: A Skeptical View From Liberal Democratic Theory*, 88 CAL. L. REV. 395, 405 (2000); Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261, 263 (2002).

69. See *Dow Jones*, (2002) 194 A.L.R. 433 para. 54 (Austl.); *Gutnick* (2001) VSC 305 para. 76 (Austl.); see also *supra* II.A.

70. Paul S. Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 478 (2002); Paul S. Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1821 (2005).

71. See, e.g., *Burke v. NYP Holdings*, 48 B.C.L.R. 363 (Can.).

72. *Libman v. R.*, [1985] 2 S.C.R. 178 para. 63 (Can.) (case concerning multi-jurisdictional fraud).

73. 48 B.C.L.R. 363 at paras. 32–33 (Can.).

74. *Id.* at paras. 3–4, 8.

established reputation in British Columbia. Second, it was foreseeable that a British Columbian audience would be interested in plaintiff's online newspaper column, regardless of whether the foreign defendant intended to address that audience.⁷⁵ The determination of a foreseeable British Columbia audience centers on the fact that the original event that inspired the column had occurred in Vancouver at a Canucks hockey game and had enjoyed ongoing interest in British Columbia, and that the allegedly defamatory statements were about a person of interest to British Columbians—namely plaintiff Brian Burke, then-General Manager of the Canucks.⁷⁶ When combined with the strong cross-border reputation of the defendant's newspaper (the *New York Post*) and its sports columnist (Larry Brooks), these facts, the court held, made it foreseeable that the online posting of the story would be read in British Columbia by both ordinary readers and the by British Columbia media—even if no paper editions were sold in British Columbia.⁷⁷

Although a prominent line of U.S. defamation cases descending from *Calder v. Jones*⁷⁸ similarly raised what one court called the “geographic focus” of a story as a relevant consideration,⁷⁹ the *Burke* decision differs from U.S. cases in that it further considers the scope of the content provider's influence to be relevant. The court in *Burke* wrote,

While the Defendants have little or no business connection in British Columbia, it is clear that the Post is a major newspaper in what many describe as the financial capital of the United States which, in turn, is described by many as the most powerful country in the world. By establishing a website which is available on the Internet worldwide, it is reasonably foreseeable that the story set out in the Column would follow Mr. Burke to where he resided. The concept of a “worldwide web” is aptly named.⁸⁰

75. The *Burke* decision can be usefully paired with *Young v. New Haven Advocate*, in which the U.S. Court of Appeals for the Fourth Circuit reversed a lower court's exercise of jurisdiction over a suit arising from allegedly defamatory statements about a Virginia prison warden that were published in an article in the online version of a Connecticut newspaper. 315 F.3d 256, 258 (4th Cir. 2002). The *Young* decision concerned a local newspaper, however, whereas *Burke* dealt with a newspaper with international reputation. A tendency to overlook such important distinctions affecting the determination of the foreseeability of particular audiences is evident in the note, A ‘Category-Specific’ Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law, 117 HARV. L. REV. 1617, 1629 (2004), where the editors compare *Dow Jones* and *Young*, stating that the court in *Young* “could not exercise jurisdiction over two Connecticut newspapers in a defamation action brought by a Virginia resident simply because the allegedly defamatory articles were available on websites.” As discussed above in part II.A, *Dow Jones* did not assume jurisdiction merely because the defamatory article was available on websites, but rather because it was actually accessed in Australia by Australian subscribers.

76. *Burke v. NYP Holdings*, 48 B.C.L.R. 363 para. 32 (Can.). The event was the “sucker-punch” hit by Canucks-player Todd Bertuzzi on Colorado Avalanche player Steve Moore that resulted in Bertuzzi's being charged with assault causing bodily harm. ESPN.com, *Canucks Star Charged With Assault* (Jun. 25, 2004), <http://sports.espn.go.com/nhl/news/story?id=1827388> (last visited Apr. 19, 2008).

77. *Id.* para. 29.

78. *Calder v. Jones*, 465 U.S. 783 (1984).

79. *Revell v. Lidov*, 317 F.3d 467, 476 (2002). In *Calder*, the Court considered the most relevant fact to be, instead, that the defendant-publisher had a significant print circulation in California, where the plaintiff lived and worked. *Calder v. Jones*, 465 U.S. 783, 785 (1984).

80. *Burke v. NYP Holdings*, 48 B.C.L.R. 363 para. 33.

What the court articulates here is the position that not all publications are equal on the Internet, in that a newspaper with an international reputation must own up to its international influence and cannot relegate to legal irrelevance online audiences from jurisdictions with a substantial connection to a story.⁸¹

The *Burke* decision has been called into question by some commentators⁸² who note that the case relies in part on the Ontario Superior Court of Justice decision in *Bangoura v. Washington Post (Bangoura I)*, which was overturned on appeal.⁸³ However, the facts in *Burke* differ substantially from those in *Bangoura I* in that the geographic focus of the impugned article in *Bangoura I* was not Ontario, let alone anywhere in Canada, and the *Bangoura I* plaintiff did not even live in Canada at the time of the initial publication.⁸⁴ The Ontario Court of Appeal thus rightly considered the connection between Ontario and the publication to be minimal and so not sufficient to establish jurisdiction.⁸⁵ In other words, the issue of the relevance of the Canadian audience was overlooked by the trial judge in *Bangoura I*, so jurisdiction was improperly exercised on the mere basis of plaintiff's current residence.⁸⁶

Although substantive differences between U.S. and Canadian defamation law are undeniable, they do not account entirely for the move to consider the relevance of Canadian audiences within the scope of a defendant's sphere of influence as part of the private-international-law process. Indeed, Canadian courts have considered the significance of receiving online communications in their jurisdiction analyses, and have not limited this approach exclusively to defamation actions.⁸⁷ This has shaped the meaning of Internet "borderlessness" in Canada to include the possibility that receipt in some cases may be enough to warrant the exercise of local jurisdiction. In *Burke*, the court appeared to accept that, regardless of intention, if a major newspaper chooses to write about a British Columbia-based person concerning a British Columbia-based event, a British Columbia audience for that content exists.⁸⁸ In other words, another way to frame the "here, there (and everywhere)" narrative is to consider it engaged in legally inscribing wider borders around the relevant online community *regardless* of geographic territory—that is, to be defining the relevant public as

81. Similar reasoning appeared in *Wiebe v. Bouchard*, in which the British Columbia Supreme Court held that a British Columbia resident could bring an action for defamation against a Quebec author of a report issued by the federal government since the audience for the report was nationwide. [2005] B.C.L.R. 47 (Can.).

82. See Brian MacLeod Rogers, *Commentary: Appeal Case Helps Close the Door to "Libel Tourists,"* 25 LAWYERS WEEKLY, Oct. 28, 2005.

83. [2004] 235 D.L.R. (4th) 564 (Can.), *rev'd*, *Bangoura v. Washington Post (Bangoura II)*, [2005] 258 D.L.R. (4th) 341 (Can.).

84. *Bangoura II*, [2005] 258 D.L.R. (4th) 341 para. 22 (Can.).

85. See *id.* para. 46.

86. *Id.* para. 29.

87. See, e.g., *Soc'y of Composers, Authors & Music Publishers of Can. v. Can. Ass'n of Internet Providers (SOCAN I)*, [1999] 1 C.P.R. (4th) 417 (Can.), *rev'd in part*, *SOCAN III*, [2004] 240 D.L.R. (4th) 193 (Can.).

88. *Burke v. NYP Holdings, Inc.*, [2005] 48 B.C.L.R. 363 at para. 29 (Can.).

that with which a defendant's Internet activity is engaged and so to set the scale of that activity in a globalized online world.⁸⁹ Through the "here, there (and everywhere)" narrative, courts can claim that if the public addressed by the defendant's activity *meaningfully includes* the population of the forum jurisdiction, then the forum court may be entitled to exercise jurisdiction and to apply local law.

Although much of the rhetorical work is done by these narratives, the legal meaning of the Internet's borderlessness is also shaped by courts' procedural rules and is rationalized as most appropriate to address the novel issues raised by Internet technology.

III

TECHNIQUES MEET TECHNOLOGIES

Private international law has been characterized as being particularly enamored of the technical or, more properly, both enamored and repelled by its own preoccupation with the technical—that is, the rules, lists of factors, and other doctrines and methods for resolving disputes.⁹⁰ It is no wonder, then, that a technological phenomenon culturally invested with the potential to achieve either internationalism or non-nationalism would not only use private international law's tools, but would both inspire complaints about their inadequacy and demands for new tools. Another layer of drama playing out in the interjurisdictional cases involving the Internet, then, is far more fundamental: namely, it is a debate about the function of law as an instrument, and, further, what sort of legal instrument is most compatible with the narratives of the greater public good derived from global communications.

This drama plays out in two primary contexts: (1) in cases in which private international law's encounter with the Internet inspires a search for simple and uniform rules for determining interjurisdictional legal issues, often basing those rules in the mechanics of Internet technology itself;⁹¹ and (2) in cases preferring multiple-factor analysis as a way to accommodate the complexities of cross-border relationships created via Internet communications.⁹² Although the cosmopolitan–parochial rubric centrally shapes the consideration of the substantive-law issues and the public-policy rationales put forward in cases

89. See Berman, *The Globalization of Jurisdiction*, *supra* note 70, at 436–37. Berman states that "the exercise of jurisdiction may encourage corporate officials to rethink their sense of responsibility to communities far beyond the boundaries of their corporate headquarters." *Id.* Berman goes on to say that "the assertion of community membership is relevant to discussions of Internet jurisdiction as well" and that "the growth of electronic communications is closely linked to our increasing global economic and psychological interdependence." *Id.* at 437. "Given this change in economic and psychological interdependence," Berman writes, "it would not be surprising to see the definition of community membership change as well. And if jurisdiction is one of the ways we express our intuitions about community membership, then jurisdictional rules, in turn, must evolve." *Id.*

90. Riles, *supra* note 5, at 977.

91. See *infra* III.A.

92. See *infra* III.B.

dealing with the cross-border flow of information, preference for simplicity or complexity is the primary rubric through which the appropriateness of procedural approaches have been debated. The simplicity–complexity rubric is of course not unique to Internet disputes. Rather, it has a long history in conflicts case law and scholarship. Some conflicts scholars have championed complexity as the more sophisticated and better way to deal with the public-policy needs of modern life.⁹³ Others have championed simplicity as a return to a more-principled concern for basic, fundamental rights that have been lost.⁹⁴ Although promoting complexity or simplicity can be (and has been) at times connected with particular ideological orientations toward the role of law, in the Internet context, the orientation toward simplicity or complexity is not clearly aligned with any particular worldview, and both orientations claim that the chosen approach will be more fair and more likely to achieve just results. The following analysis of the procedural approaches in Internet cases highlights simplicity and complexity as legal vocabulary employed by courts, vocabulary that is particularly potent whenever the law encounters a new or perceived-to-be-new phenomenon.⁹⁵

A. Single-Situs Tests and Technological Determinism

In the Internet's initial encounter with private international law, a common response of courts to the bewildering circumstance of Internet communication has been to simplify the legal analysis.⁹⁶ Courts often reached for classic formalist rules to determine the jurisdictional and choice-of-law issues, such as *lex loci delicti*: the place where the tort was committed determines the forum and choice of law.⁹⁷ Embracing formalist rules such as this transforms the private-international-law exercise into a matter of determining where torts committed via Internet technology occur, rather than requiring the balancing and weighing of multiple factors that shape the relationships between the parties and the various locations implicated in the dispute. The British Columbia Court of Appeal's decision in *Braintech II*⁹⁸ boils down all the

93. See, e.g., Walter Wheeler Cook, *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 ILL. L. REV. 418, 423 (1943). As Riles writes, discussing and quoting Cook, "Cook himself at times resorted to a version of this external explanation of legal change where he suggested that the failure of the First Restatement was attributable to its inability to adapt to the new scale of complexity of the modern world: 'Just as in physics, chemistry and biology today's theories are much more complex than those current in the Victorian period, so in the field of legal science theories if they are to be adequate must take account of the complexities of modern social economic life.'" Riles, *supra* note 5, at 1017.

94. See, e.g., Lawrence Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 343 (1990).

95. Anthropologist Marilyn Strathern notes that questions of scale always plague analytical projects, such that the relative simplicity or complexity of the framing of a problem (or by extension its solution) is part of the process of setting out the parameters of the study. See MARILYN STRATHERN, *PARTIAL CONNECTIONS*, (AltaMira Press updated ed., 2004) (1991).

96. See, e.g., *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *Bangoura I*, 235 D.L.R. (4th) 564 para. 30 (Can.); *SOCAN I*, [1999] 1 C.P.R. (4th) 417 para. 84 (Can.).

97. BLACK'S LAW DICTIONARY 930 (8th ed. 2004).

98. *Supra* II.A.

connecting factors in that case to the issue whether the defamation could properly be said to have occurred in Texas.⁹⁹ Similarly in *Gutnick* and *Dow Jones*, the courts determined that the place where the defamation occurred was the Australian state of Victoria, which eliminated the need to consider other jurisdictional and choice-of-law issues.¹⁰⁰ Many American cases have likewise turned on the interpretation of states' long-arm statutes,¹⁰¹ which tend to feature *lex loci delicti* rules.¹⁰²

A prominent subset of cases embracing a formalist approach reaches for further simplicity by positing that Internet technology itself should determine the place where the tort, contract, or other legal relationship occurred.¹⁰³ An example of such an embrace of simplicity is the Copyright Board of Canada's conclusion in what became *SOCAN III* on its appeal to the Supreme Court of Canada:¹⁰⁴ "Communications occur at the site of the server from which the work is transmitted, without regard to the origin of the request or the location of the original Web site."¹⁰⁵ The Board elaborated that the "place of origin of the request, the location of the person posting the content and the location of the original Web site are irrelevant."¹⁰⁶ Such a "place of the server" rule has been endorsed by some legal scholars as ensuring a desirable predictability in online disputes, as well as by dissenting Supreme Court of Canada Justice LeBel in *SOCAN III*; he stated that such a rule "provides a straightforward and logical rule for locating communications occurring within Canada that will be readily applicable by the Board in setting tariffs, by the courts in infringement proceedings, and by solicitors in providing advice to their clients."¹⁰⁷

By reducing the determination of jurisdiction and choice-of-law to a question of the location of the tort or the location of a physical machine, these

99. *Braintech, Inc. v. Kostiuk*, [1999] 171 D.L.R. (4th) 46 (Can.).

100. *Dow Jones* (2002) 194 A.L.R. 433 paras. 48, 51, 52 (Austl.); *Gutnick* (2001) VSC 305 para. 124, 130 (Austl.). The court in *Dow Jones* noted that the plaintiff has limited his suit to damages sustained in Victoria, Australia, for publications in Victoria, and that if the plaintiff had sought to sue for damages resulting from publications elsewhere, that the court would have had to undergo a different analysis, taking into account the reasonableness of the publisher's actions in those locations. *Dow Jones*, 194 A.L.R. 433 para 49 (Austl.).

101. *See, e.g.*, *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242–44 (2d Cir. 2007); *People Solutions, Inc., v. People Solutions, Inc.*, No. 399-CV-2339, 2000 WL 1030619, at *1–2 (U.S. Dist. Tex. July 25, 2000).

102. BLACK'S LAW DICTIONARY 930 (8th ed. 2004).

103. Many early judgments involving the Internet devoted a significant portion of the decision to explaining how Internet technology works. These lengthy descriptions are also a symptom of the disruption caused by the Internet, in that the relevance of the technical features of the Internet to the facts of the case is often unclear and tenuous, resulting in an excess of technical description. *See, e.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 849–54 (1997).

104. *SOCAN III*, [2004] 240 D.L.R. (4th) 193 (Can.).

105. *SOCAN I*, [1999] 1 C.P.R. (4th) 417 para. 84 (Can.), *rev'd in part*, *SOCAN III*, [2004] 240 D.L.R. (4th) 193 (Can.).

106. *Id.* para 151. The Board concedes one proviso to this rule—that content specifically intended to be communicated to Canadians may also be considered to occur "in Canada"—though the Board merely considers this issue to remain open. *Id.* para 155.

107. *SOCAN III*, 240 D.L.R. (4th) 193 at para. 146 (Can.) (LeBel, J., dissenting).

approaches claim that a straightforward rule makes both the conduct of business and the administration of law easier and more predictable, and hence fairer. Some legal scholars have endorsed a view that the Internet calls for such straightforward, predictable rules.¹⁰⁸ Those espousing the complexity approach, however, also claim a greater likelihood of achieving fairness by considering simple rules to be arbitrary and more likely to produce unjust results in individual cases than a complex multiple-factor analysis.¹⁰⁹

B. Applying Connecting Factors Methods: Protecting Home Interests or a New Conception of Jurisdiction?

In Canada, Supreme Court Justice La Forest set out a complex approach weighing factors that assess whether a “real and substantial connection” exists between the dispute and the jurisdiction as more appropriate to global human society:

It seems to me that the approach of permitting suit where there is a *real and substantial connection* with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a “power theory” or a single situs for torts or contracts for the proper exercise of jurisdiction.¹¹⁰

A second line of Internet cases similarly eschews the simplified, formalist approach in favor of multi-factor methods for determining whether a sufficient connection exists between the suit and the forum.¹¹¹ In Canada, the analysis involves considering a range of factors regarding the relationships between the parties, the cause of action and the various implicated locations so as to determine whether the suit has a “real and substantial connection” to the forum.¹¹² In the United States, this type of analysis tends to be more defendant-focused, namely by looking at whether the defendant has passed the threshold of “minimum contacts” with the forum¹¹³ and whether exercising jurisdiction would not offend “traditional notions of fair play and substantial choice” guaranteed by the due process clause of the U.S. Constitution.¹¹⁴

108. See, e.g., Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1347 (2001) (Geist includes implied intent to target as sufficient in some circumstances, such as defamation, though the contours of this implied intent are not elaborated and remain defendant-focused); see also Julie L. Henn, *Targeting Transnational Internet Content Regulation*, 21 B.U. INT'L L.J. 157, 158 (2003); Andrew F. Halaby, *You Won't Be Back: Making Sense of “Express Aiming” After Schwarzenegger v. Fred Martin Motor Co.*, 37 ARIZ. ST. L.J. 625, 661 (2005).

109. See, e.g., Dan Jerker B. Svantesson, *Borders on, or Border Around—The Future of the Internet*, 16 ALB. L.J. SCI. & TECH. 343, 373–80 (2006).

110. *Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 para. 51 (Can.) (emphasis added).

111. *SOCAN III*, 240 D.L.R. (4th) 193 para. 59–61 (Can.); *Bangoura II*, 258 D.L.R. (4th) 341 para. 46; *Burke v. NYP Holdings, Inc.*, [2005] 48 B.C.L.R. 363 para. 29 (Can.).

112. *Morguard Invs. Ltd.*, 3 S.C.R. 1077 para. 51 (Can.).

113. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

114. *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

The most prominent Canadian case touching on online jurisdiction and employing the “real and substantial connection” approach is the Supreme Court of Canada’s decision in *SOCAN III*. Interestingly enough, *SOCAN III* was not a typical private-international-law dispute; rather, it concerned the authority of the Copyright Board of Canada to impose a tariff on parties involved in the communication of copyright-protected works to the public via telecommunications and the Internet.¹¹⁵ In other words, this case cast the issue whether Canadian territorial law applies to Internet transmissions originating outside Canada as a private-international-law problem.¹¹⁶ Eschewing the “place of the server” rule espoused by the Copyright Board,¹¹⁷ the court in *SOCAN III* endorsed the “real and substantial connection” approach preferred by the Federal Court of Appeal¹¹⁸ and highlighted the significance of the end user’s location in terms of broader public-policy considerations:

At the end of the transmission, the end user has a musical work in his or her possession that was not there before. The work has, necessarily, been communicated, irrespective of its point of origin. If the communication is by virtue of the Internet, there has been a “telecommunication.” To hold otherwise would not only fly in the face of the ordinary use of language but would have serious consequences in other areas of law relevant to the Internet, including Canada’s ability to deal with criminal and civil liability for objectionable communications entering the country from abroad.¹¹⁹

The court’s statement brings home the persistent concern expressed in the other Canadian interjurisdictional cases, as well as in the Australian *Gutnick* case: that the crossing of communications into Canada is always at least *potentially* significant.¹²⁰ Making such an observation allows a country of reception to exercise jurisdiction and apply local law in appropriate circumstances, depending on the quality of the factors connecting the dispute to the jurisdiction where the communication was received.

Broad policy reasons protecting home interests are at play in the court’s categorical refusal to accept the argument that Canada should never assume jurisdiction merely on the basis of Canadian reception. In order to refine the analysis for determining which conditions of Canadian reception rise to the level of real and substantial connection, *SOCAN III*, like the online defamation cases, significantly concerns the legal determination of who the relevant

115. *SOCAN III*, 240 D.L.R. (4th) 193 para. 1 (Can.).

116. *Id.*

117. *SOCAN I*, [1999] 1 C.P.R. (4th) 417 para. 84 (Can.), *rev’d in part*, *SOCAN III*, 240 D.L.R. (4th) 193 (Can.).

118. Soc’y of Composers, Authors & Music Publishers of Can. v. Can. Ass’n of Internet Providers (*SOCAN II*), [2002] 4 F.C. 3 para. 186 (Can.), *aff’d*, *SOCAN III*, 240 D.L.R. (4th) 193 para. 44 (Can.).

119. *SOCAN III*, 240 D.L.R. (4th) 193 para. 45 (Can.).

120. This concern is also expressed in the Australian case, *Dow Jones v. NYP Holdings*, (2002) 194 A.L.R. 433 (Austl.). The *SOCAN III* court’s statement draws on the pre-Internet 1985 Supreme Court of Canada judgment in *Libman v. R.*, which held the any tort touching on multiple jurisdictions occurs at least “both here and there.” *SOCAN III*, 240 D.L.R. (4th) 193 para 58–59 (Can.) (quoting *Libman v. R.*, [1985] 2 S.C.R. 178 para. 74 (Can.)).

“public” is.¹²¹ The court wrote that the “applicability of our *Copyright Act* to communications that have international participants will depend on whether there is a sufficient connection between this country and the communication in question.”¹²² In other words, the relevant connection is with the character of the communication itself, not just the content provider per se. By focusing on whether Canadians properly constitute a relevant public, recent Canadian cases employing private-international-law methods seem to be fundamentally engaged in positioning audiences in relation to the rest of the Internet-participating world.¹²³ They do so in ways that U.S. online-jurisdiction cases generally have not, even when U.S. courts do sometimes exercise jurisdiction on the basis of receipt alone, due to their defendant-oriented analysis.¹²⁴ In other words, due to the tendency of U.S. case law to see online audiences as determined by the intentional actions of the content provider in defamation actions,¹²⁵ U.S. courts do not consider the wider array of factors that influence audience formation that Canadian courts have started to consider.

Canadian courts have therefore turned to a multi-factor approach in order to justify assuming jurisdiction on the basis of Canadian audiences in some but not all circumstances, since the multi-factored approach is capable of these sorts of case-by-case determinations in ways that single-situs rules are not. Embracing complexity then allows courts to claim that they are not merely giving weight to concern about undermining sovereign authority over home territory, but also working at understanding the constitution of online audiences as global-community members relevant to the disposition of private-international-law issues.¹²⁶ Some legal scholars endorse this type of approach as most suitable to the globalized world. Paul Schiff Berman, for instance, argues that “just as a rigidly territorial conception of jurisdiction eventually gave way in the first part of the twentieth-century to the idea of jurisdiction based on

121. *SOCAN III*, 240 D.L.R. (4th) 193 para. 42. Here, copyright protects the exclusive right to communicate the work to the public by telecommunications. Copyright Act, R.S.C., ch. 42, § 3(1)(f) (1985).

122. *SOCAN III*, 240 D.L.R. (4th) 193 para. 57.

123. *Id.* para. 64.

124. This occurs most often in intellectual-property-infringement cases. See, e.g., *Bunn-O-Matic Corp. v. Bunn Coffee Servs. Inc.*, No. 97-3259, 1998 WL207860 (C.D. Ill. Apr. 1, 1998); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). One very interesting U.S. case dealing with the delineation of the legally relevant “public,” *Voyeur Dorm, L.C. v. Tampa, Florida*, is not a conflict-of-laws case but one concerning the applicability of a municipal ordinance to a business offering adult entertainment to online audiences. 265 F.3d 1232, 1235 (11th Cir. 2001). The court ruled that the “public” was scattered in cyberspace, not located in the municipality. Thus, the business was not subject to the zoning restrictions regarding adult-entertainment establishments. *Id.* at 1236–37.

125. *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

126. Not all Canadian cases are concerned with online community formation. Some have been exclusively concerned with sovereign authority (either finding that it obtains—as in *Lawson v. Accusearch Inc.*, [2007] 280 D.L.R. (4th) 358 para. 51 (Can.)—or finding that it does not—as in *Desjean v. Intermix Media*, [2006] F.C. 1395 para. 36 (Can.)). Likewise, there have been U.S. cases that appear to be more concerned with preserving sovereign authority rather than reinforcing a defendant-focused test for determining minimum contacts. See, e.g., *Playboy Ent., Inc. v. Chuckleberry Publ’g, Inc.*, 939 F. Supp. 1032, 1037 (S.D.N.Y. 1996).

contacts with a sovereign entity, so too a contacts-based approach must now yield to a conception of jurisdiction based on community definition.”¹²⁷ There is an underlying progress narrative at work in Berman’s argument, in which complexity is preferable to simplicity in that it is better able to accommodate change. Whether associating complexity with progress bears out remains to be seen, but it is enough to say here that complexity is being mobilized in the service of progress as the best means for ensuring the ongoing relevance of Canadian audiences in an increasingly internationalized communications context.

IV

CONCLUSION: THE EVOLVING SIGNIFICANCE OF BORDERS AND “BORDERLESSNESS”

Dutch artist Lonnie van Brummelen’s 2005 film *Grossraum* centrally features silent footage of three border-crossing points at the edges of Europe: at Hrebenne (between Poland and Ukraine), Ceuta (between Spain and Morocco) and the disputed “Green Line” in Cyprus (between Greece and Turkey, via Cyprus).¹²⁸ Van Brummelen describes her project as revealing the tension between the European processes of removing internal borders while reinforcing external borders.¹²⁹ The footage mainly documents the activity and landscapes at or near the crossing points without much editing or other intervention by the artist.

The screening portion of the installation is supplemented with an off-screen booklet that includes the correspondence between van Brummelen and the bureaucrats responsible for granting van Brummelen permission to film in each location. The correspondents voice concern as to how van Brummelen’s project will cast the significance of being “outside” of an internally borderless Europe; one contact advises van Brummelen, “[T]he Ukraine does not want to be seen as an Asian wilderness outside the borders of Europe. They will on the other hand certainly appreciate the growing interest in the Ukraine as a neighbor of the European Union.”¹³⁰ Indeed, the correspondence reveals that van Brummelen repeatedly ran into sensitivities regarding her filming the “borders of Europe.”¹³¹ These sensitivities blocked the project altogether from filming in Turkey, despite the artist’s admitting to trying to “make use of the ‘prestige’ and ‘apolitical’ status of art” to get the necessary permissions.¹³²

127. Berman, *The Globalization of Jurisdiction*, *supra* note 70, at 321.

128. *GROSSRAUM* (Lonnie van Brummelen 2005).

129. *Id.*

130. Letter from Darek Szendel to Lonnie van Brummelen, *in* Lonnie van Brummelen & Siebren de Haan, *THE FORMAL TRAJECTORY*, 7 (text accompanying film triptych *Grossraum*) (on file with author).

131. *Id.* at page 26–27.

132. Lonnie van Brummelen, Artist, Master Class given at the Cinematheque Ontario (Apr. 6, 2007) (manuscript on file with author).

In other words, no matter how innocuously presented, both the dissolution and the fortification of borders are inherently laden with political and cultural significance. The project highlights the unevenness of meaning ascribed to national borders and is consequently an antidote to globalization rhetoric.

The project undertaken in this article is parallel to *Grossraum*, in that it tackles the task of charting primarily Canadian private international law's evolving orientation to jurisdictional borders and their significance in the online context. The underlying insight is that, whereas the advent of Internet communications led to calls for simple, consistent, globally harmonized approaches to determining jurisdiction and the applicability of local law, this consistency has ultimately not inspired confidence in Canada, mostly due to the unequal significance of borders to different populations—especially Canada vis-à-vis the United States.

The account of Canadian private international law's encounter with the Internet as charted in this article reveals that the procedural aspects of the case law are as engaged in determining the significance of borders as substantive-law analyses, both of which rely quite heavily on public-policy rationales. On the procedural plane, competing theories of the appropriateness of simple versus complex methods each claim greater likelihood of achieving just ends in a globalized communications environment, but the theories share a common view that Internet communications are creating multi-jurisdictional relationships that cannot be so easily territorialized. On the substantive issues, positioning local law in relation to online disputes has commonly been rhetorically framed either favorably in terms of cosmopolitanism, or negatively in terms of parochialism. From the various deployments of cosmopolitanism emerge two parallel moves: on the one hand, reinforcing or diminishing territorial borders as the globalization rhetoric predicts, but on the other, determining whether Internet-communication recipients are members of online communities that are *not* strictly territorially constituted. Taken together, the procedural and substantive aspects of Internet tort cases involving more than one jurisdiction are clearly grappling with the reconfiguration of audiences in a global communications environment, a process that requires courts to think both territorially and supra-territorially at the same time.