



RULES FOR OFFLINE AND ONLINE IN
DETERMINING INTERNET JURISDICTION.
GLOBAL OVERVIEW AND COLOMBIAN CASES*

*REGLAS OFFLINE Y ONLINE PARA
ESTABLECER LA JURISDICCIÓN EN INTERNET.
MIRADA GLOBAL Y CASOS COLOMBIANOS*

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ABSTRACT

The development of cyberspace law poses a challenge to the traditional borders of law. The increase of activities and business deals on the internet has awakened the interest of lawyers, civil servants, businessmen, and scholars regarding the manner on how to determine internet jurisdiction. The goal of this paper is to establish the criteria for determining jurisdiction that are being used by courts when they have to resolve cases on the internet. The paper analyses academic literature and selected cases in the US, Europe, Colombia, and the world with qualitative and inductive method, using primary and secondary sources, documentary review, and direct observation techniques. The conclusions are that: 1) Differences between common or civil law systems seem to be disappearing when new rules emerge to establish jurisdiction on the internet; 2) An alternative use of both new online and traditional offline rules is observed in resolving cases by the courts, especially in the US; 3) International cases suggest that courts have applied traditional rules rather than online rules like the Zippo test, Calder tests, or the mere accessibility among others; 4) European (Germany, Netherlands) and the Colombian cases show that they prefer use offline criteria, although we can find some online rules.

Keywords: Cyberlaw; internet; jurisdiction; online rules; offline rules

RESUMEN

El desarrollo del derecho del ciberespacio es un desafío para los tradicionales límites del derecho. El incremento de actividades y negocios en internet ha llamado la atención de abogados, funcionarios públicos, empresarios y académicos acerca de la manera como se determina la jurisdicción. El objetivo del trabajo es establecer los criterios que están siendo usados por las cortes cuando han resuelto casos de internet. El estudio analiza la literatura, y casos seleccionados en Estados Unidos, Europa, Colombia y el mundo mediante un método cualitativo e inductivo, usando fuentes primarias y secundarias, y técnicas de revisión documental y observación directa. Se concluye que: 1) las diferencias entre el sistema del common law y el derecho continental parecen desaparecer cuando emergen nuevas reglas para establecer la jurisdicción en internet; 2) se observa un uso alternativo tanto de nuevas reglas online y las tradicionales reglas offline por las cortes, cuando resuelven casos especialmente en Estados Unidos; 3) los casos internacionales sugieren que las cortes han aplicado reglas tradicionales más que reglas online como el Zippo test, Calder tests o la simple accesibilidad, entre otros; 4) Los casos europeos (Alemania, Países Bajos) y colombianos señalan que ellos prefieren el uso de criterios offline, aunque se pueden encontrar algunas reglas online.

Palabras clave: *derecho del ciberespacio; internet; jurisdicción; reglas online; reglas offline*

SUMMARY

INTRODUCTION.- I. JURISDICTION IN THE OFFLINE JURIDICAL FRAMEWORK.- A. Jurisdiction in International Law.- B. United States of America.- C. Jurisdiction in Europe.- D. Jurisdiction in Colombia.- II. BACKGROUND IN DETERMINING INTERNET JURISDICTION.- A. US Internet Jurisdiction: the Zippo and Calder tests.-B. International Internet Jurisdiction.- C. European Internet Jurisdiction. 1. The German case.-2. Dutch cases. -D. Colombian Internet Jurisdiction.- III. COLOMBIAN CASES.- CONCLUSIONS.- BIBLIOGRAPHY.

INTRODUCTION

Since online activities and business deals are growing on the Internet, lawyers, businessmen, and scholars began to be concerned about determining jurisdiction.¹ In early academic works authors tried to identify a number of legal controversies on the internet: 1) intellectual property; 2) privacy; 3) the first amendment and free speech; 4) public and private spaces, and rights; 5) foreign regulation of the internet; 6) jurisdiction and the global community; 7) service provider applications.² Others held that cross-border law and jurisdiction are some of the most important issues in law and cyberspace,³ and identified its problems and some of the more acceptable solutions.⁴

Recent studies continue focusing on the matter of internet jurisdiction. Accordingly, the main reason for internet regulation problems is that laws and regulations have been created on the assumption that activities are geographically bound and, in consequence, location is the criterion for determining jurisdiction. In Uta Kohl's metaphor case of the colored eggs and jurisdiction, she finishes with the following conclusion: "Finally, States are today struggling with accommodating these difficult events within their allocation rules based on location, so much so that there have been some calls to abandon the territorially based system of regulation."⁵ Other authors assert the importance of holding an international summit in order to seek solutions to problems in both legislation and jurisdiction in e-commerce,

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- 1 In 2000 there were 361 million Internet users worldwide, in 2013 there were approximately two billion users, a 480% increase. In 2015 was 3.174 million: <http://www.statista.com/statistics/273018/number-of-internet-users-worldwide/>. Forrester Research expects online sales of over \$248.7 billion by 2014 in U.S. and \$155.7 billion in Western Europe, with growth of 10-11% annually. See <http://www.wwwmetrics.com/shopping.htm>
 - 2 David Quinto, *Law of Internet Disputes* (Aspen and Law Business, New York, 2003).
 - 3 Chris Reed, *Internet Law. Text and Materials* (2nd edition, Cambridge University Press, Cambridge, 2004).
 - 4 Julia Gladstone, *Determining Jurisdiction in Cyberspace: The "Zippo" Test or the "Effects" test?*, *Informing Science*, 143-156 (June 2003). Available at: <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/GladstoneDeterminingJurisdiction.pdf>
 - 5 Uta Kohl, *Jurisdiction and the Internet. Regulatory Competence over online Activity*, 3 (2nd edition, Cambridge Book Online, Cambridge, 2010).

because of the risk of being subjected to local liability that could have potentially harmful effects on global business.⁶ In fact, the academic community, governments, and Information and Communications Technology —ICT— companies have created organizations forums and held workshops in order to establish policy networks and guidelines to improve internet governance.⁷ Finally, the crucial importance of jurisdiction in order to apply laws on the internet is noted as follows: “In the end, however, law can only be applied if you decide on jurisdiction. Since jurisdiction deals with territory you have to link what happens on the internet to a particular country, or to be more precise: to an actor (person, government) and/or computer”.⁸ The conclusion is that cyberlaw tends to override the territory of a specific jurisdiction.⁹

At the beginning, two different approaches regarding jurisdiction on the internet were applied: a) A strong belief that the traditional rules about personal jurisdiction could be applied to the virtual transactions in a straightforward way; “It was assumed, at first, that straightforward transportation of the rules of ‘real’ to ‘virtual’ world would be enough to avoid legal anomie;”¹⁰ b) By contrast, many legal academics claim that upon the establishment of new juridical rules that will emerge with cyberspace activity: “Their central assertion was that the traditional jurisdictional rules based on geographic location are not transferable to the transnational Internet.”¹¹ So, academic

6 Newton de Lucca, *Contratación informática y telemática* (Temis, Bogotá, 2012). Faye Fangfei Wang, *Obstacles and Solutions to Internet Jurisdiction. A Comparative Analysis of the EU and US Laws*, 3 *Journal of International Commercial Law and Technology*, 4, 233-241 (2008). Available at: <http://www.jictl.com/index.php/jictl/article/view/65/64>

7 See, for example www.internetjurisdiction.net, <http://www.intgovforum.org> (Internet Governance Forum) or giga-net.org (Global Internet Governance Academic Network).

8 Arno R. Lodder, *Ten Commandments of Internet Law Revisited: Basic Principles for Internet Lawyers*, 22 *Information & Communications Technology Law*, 3, 264-276, 266 (2013). Available at: SSRN: <http://ssrn.com/abstract=2343486>

9 Internet jurisdiction could be extended over everybody, everywhere. The illusion of an International law term “no-man’s land”, should be changed by a realistic term “every-man’s land”. Dan Svantesson, *Private International Law and the Internet* (Kluwer Law International, Alphen aan den Rijn, 2007).

10 Newton de Lucca, *Contratación informática y telemática*, 11 (Temis, Bogotá, 2012).

11 Uta Kohl, *Jurisdiction and the Internet Regulatory Competence over online Activity*, 11 (2nd edition, Cambridge Book Online, Cambridge, 2010). Obdulio César Velásquez, *Ju-*

literature reflects the controversy surrounding internet jurisdiction: do we need specific rules online, or traditional rules offline that are sufficient and well defined?

The principal *goal* of this paper is to establish the different criteria that are used to establish jurisdiction in internet lawsuits in both common law and civil law regimes. *Specific goals*: a) To determine if new principles and juridical rules are needed to establish the personal jurisdiction in internet cases. b) To define the criteria for determining jurisdiction that are being used in Colombian high courts when they have tried cases regarding internet jurisdiction.; c) To analyze relevant cases on the internet.

The paper is divided into four parts. Firstly it presents the juridical framework of jurisdiction in International law, the US, Europe, and Colombia; secondly, it checks and analyzes the background of internet jurisdiction; thirdly, it analyzes Colombian cases, and finally, it states the conclusions.

I. JURISDICTION IN THE OFFLINE JURIDICAL FRAMEWORK

A. Jurisdiction in International Law

Jurisdiction in international law seems to be a broad concept that refers to the power of a state to regulate conduct under international law in matters not exclusively of domestic concern.¹² To do this, a state can use its legislative, judicial, and executive power. According to this concept, jurisdiction can be related to three aspects: a) Regulatory power of a state (to prescribe and enforce laws); b) Physical territory of the state, and c) The right to assume and to resolve transnational disputes (to adjudicate).¹³

isdictional Problems in Cyberspace Defamation, 6 *International Law, Revista Colombiana de Derecho Internacional*, 247-300 (2005). Available at: <http://www.redalyc.org/articulo.oa?id=82400608>

- 12 Christopher Kuner, *Data Protection Law and Internet Jurisdiction on Internet (Part 1)*, 18 *International Journal of Law and Information Technology*, 2, 176-193 (2010). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1496847. Nevertheless, nowadays international courts and organizations have the power of jurisdiction beyond the state.
- 13 Uta Kohl, *Jurisdiction and the Internet Regulatory Competence over online Activity* (2nd edition, Cambridge Book Online, Cambridge, 2010). Some authors refer to three types of

The common denominator of transnational jurisdiction is the location (conduct, parties, properties, contracts, torts...). However, there are some differences between public international law and private international law. While the *territoriality principle* determines jurisdiction in public international law, in private international law jurisdiction is established by the location of the defendant, location of the tort, location of contractual agreement or performance, location of registration of the patent or trademark, and location of the server.¹⁴

Jurisdiction in public international law is determined by treaties, conventions, or international agreements concluded between the states parties and it is focused on criminal law more than on civil matters. Public international law is strongly supported by the *non-intervention principle* that emerges from the widespread and accepted idea of sovereign equality of states.¹⁵ Hence the importance of territory of limiting the jurisdiction of the state to apply law and to execute judgments over persons or things is not surprising. This is called the *territoriality principle of law*. Nonetheless, there are some exceptions to the *territoriality principle* in public international law:

- *The effect principle*. When an action performed abroad has generated effects within the territory of the state, it acquires jurisdiction.¹⁶

jurisdiction in international law: jurisdiction to regulate, to adjudicate and enforcement. Julia Gladstone, *Determining Jurisdiction in Cyberspace: The “Zippo” Test or the “Effects” test?*, *Informing Science*, 143-156 (June 2003). Available at: <http://euro.ecom.emu.edu/program/law/08-732/Jurisdiction/GladstoneDeterminingJurisdiction.pdf>

14 Uta Kohl, *Jurisdiction and the Internet Regulatory Competence over online Activity*, 20 (2nd edition, Cambridge Book Online, Cambridge, 2010). Dan Svantesson, *Private International Law and the Internet*, 6 (Kluwer Law International, Alphen aan den Rijn, 2007).

15 Kai Ambos, *Los fundamentos del ius puniendi nacional, en particular su aplicación extraterritorial*, 51 *Persona y Derecho*, 225-254 (2004). Available at: <http://dadun.unav.edu/handle/10171/14488>, http://dadun.unav.edu/bitstream/10171/14488/1/PD_51_10.pdf

16 It appeared the first time to justify the Turkish jurisdiction in Permanent Court of International Justice; the *Lotus* case of 1927. Permanent Court of International Justice, *Lotus (France v. Turkey)* case of 1927, September 7, 1927. Available at: http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf. Kai Ambos, *Los fundamentos del “ius puniendi” nacional, en particular su aplicación extraterritorial*, 51 *Persona y Derecho*, 225-254 (2004). Available at: <http://dadun.unav.edu/handle/10171/14488>, http://dadun.unav.edu/bitstream/10171/14488/1/PD_51_10.pdf

- *The flag principle*. Confers jurisdiction over ships, vessels, or spacecraft to the state whose flag they fly and where they are registered.
- *The active personality principle (nationality)*. The state pursues the conduct of its nationals, regardless of location.
- *The protection principle*. Includes the jurisdiction of a state over events that injure or threaten internal legal rights, regardless of who produces them.
- *The universal jurisdiction principle*. When the completed act violates universally protected rights or fundamental human rights; actions that threaten the safety or cause injury not only to the state, but that of other states.
- *The extra criminal justice principle*. State jurisdiction applies to a person who is within its territory for acts committed in another state. Contrary to the above principle, it is the state that captures the offender and applies the law on behalf of the state that cannot do so.¹⁷

On the other hand, private international law regulates international disputes among persons in contradistinction to disputes between states (e.g. commerce, contracts, or defamation). Thus determining jurisdiction becomes crucial.¹⁸ It is important to know that private international law consists of three issues of strongly interconnected topics: a) Jurisdiction, to have judicial power to hear and to give judgment in a case; b) Choice of law, that is, to establish which law should be applied; c) Recognition and enforcement, which means that the foreign judgment has both a direct effect and can compel compliance.¹⁹

As has already been mentioned above, jurisdiction rules are focused on location and courts often are concerned with

17 William Guillermo Jiménez, *Globalización jurídica. Estado-Nación y territorio* (Universidad Libre, Bogotá, 2015).

18 “Private International Law” is used in continental Europe and part of England, instead in the US, Canada and parts of England it is referred “conflict of laws”.

19 Dan Svantesson, *Private International Law and the Internet*, 3-10 (Kluwer Law International, Alphen aan den Rijn, 2007). Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China*, 7 (Cambridge University Press, New York, 2010).

“where” (where is the defendant domiciled, where the contract was performed, where the tort occurred...); however, in private international law there are exceptions to the rule: the parties can agree in contracts to jurisdiction with some legal restrictions (choice of forum clauses).²⁰ The following are the most important regulations in private international law:

- The Hague Conference on Private International Law and its international conventions, e.g., Convention on Choice of Court Agreements (2005).
- United Nations Convention on Contracts for the International Sale of Goods (1980), by United Nations Commission on International Trade Law — UNCITRAL.
- United Nations Convention on the Use of Electronic Communications in International Contracts (2005), by UNCITRAL.
- United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008), by UNCITRAL.

B. United States of America

US jurisdiction is classified into two categories: a) *General jurisdiction*, when contacts are continuous, systematic, and ongoing and the defendant has a domicile in a certain forum; b) *Specific jurisdiction*, when the contacts are “related” to the dispute and the defendant is a non-resident in the forum.²¹ Nevertheless, US academic literature and law disputes refer to “*personal jurisdiction*” rather than general or specific jurisdiction. Personal jurisdiction is one of the two categories of jurisdiction derived

²⁰ Uta Kohl, *Jurisdiction and the Internet Regulatory Competence over online Activity* (2nd edition, Cambridge Book Online, Cambridge, 2010). Dan Svantesson, *Private International Law and the Internet*, 6 (Kluwer Law International, Alphen aan den Rijn, 2007).

²¹ Obdulio César Velásquez, *Jurisdictional Problems in Cyberspace Defamation*, 6 *International Law, Revista Colombiana de Derecho Internacional*, 247-300, 260 (2005). Available at: <http://www.redalyc.org/articulo.oa?id=82400608>. Faye Fangfei Wang, *Obstacles and Solutions to Internet Jurisdiction. A Comparative Analysis of the EU and US Laws*, 3 *Journal of International Commercial Law and Technology*, 4, 233-241 (2008). Available at: <http://www.jiict.com/index.php/jiict/article/view/65/64>

from Roman law *in personam* (based on the person) or *in rem* (based on the thing).²²

In the US jurisdiction *in personam* refers to the courts' power to adjudicate against person who: 1) Resides, 2) Has contact, 3) Has been informed of the process (served notice) in the location where the court is established (forum), and 4) A person who consents to be subject to it. By contrast, jurisdiction *in rem* is power to adjudicate over a particular property and as such jurisdiction is determined by location. In short, while jurisdiction *in personam* can be possible regardless the person where she/he is located, jurisdiction *in rem*, is possible only in regard to a particular location where the thing is.²³

Personal jurisdiction is determined by the due process Clause of the US Constitution²⁴ and rule 4 of The Federal Rules of Civil Procedure (FRCP).²⁵ Following the “check and balances” system, the United States Supreme Court enacted the FRCP and that the United States Congress could exercise a veto during the following 7 months. These rules were established in 1938 and the FRCP has undergone substantial amendments since. According to the United States Constitution and the FRCP, procedural rules require that the defendant must be served with a summons or complaint with a copy to be given to the court

22 There are other types of jurisdiction according to the matter, the parties, functional factor, etc., however, personal jurisdiction is crucial because it: “... can give rise to more complex issues and is the focus for the discussion of jurisdiction.” Dan Svantesson, *Private International Law and the Internet*, 6 (Kluwer Law International, Alphen aan den Rijn, 2007).

23 See “in personam”, in <https://www.law.cornell.edu/search/site/in%20personam>

24 “Amendment XIV. Section 1. All persons born or naturalized in the United States ...; nor shall any state deprive any person of life, liberty, or property, *without due process of law*; nor deny to *any person within its jurisdiction* the equal protection of the laws” (italics outside the original). Taken from: <http://www.law.cornell.edu/constitution>

25 “Rule 4. Summons. (k) Territorial Limits of Effective Service.(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located... (2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.” United States of America, Federal Rules of Civil Procedure, FRCP. Available at: <https://www.law.cornell.edu/rules/frcp>. Taken from: http://www.law.cornell.edu/rules/frcp/rule_4

with personal jurisdiction to try the case unless that defendant had filed a waiver of service.

The “*minimum contacts*” test is applied extensively to solve the problems relating to personal jurisdiction in US and it made its first appearance in 1945 in the Supreme Court case of *International Shoe Co. v. State of Washington*. The case dealt with a dispute for the recovery of taxes, in which the Court asserted personal jurisdiction in Washington over a corporation located in Missouri that had been selling shoes in Washington. Once the notice to the defendant had been served, the Court held that: “... due process requires only that in order to subject a defendant to a judgment in personam, if he be not present into the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”.²⁶ Additionally, the Court argued that the defendant would be able to exercise his right of defense in another state because modern communication and transportation would be available to him. According to this view, personal jurisdiction can arise from a single contact with the forum by telephone, mail, or facsimile transmission.²⁷ Thereby, the “*minimum contacts*” tests became very broad, flexible, and generous.²⁸

Later, the “*purposely avails*” approach arose from a jurisdiction dispute between two states (Florida and Delaware) in the case of *Hanson v. Denckla* in 1958, where the Supreme Court prescribed certain limits to determine personal jurisdiction: a court cannot exercise jurisdiction over a non-resident defendant if he only has sporadic and inadvertent contacts with the state, then, it is necessary that “... some act by which the defendant purposely avails itself of the privilege of conducting activities

26 United States Supreme Court, 326 U.S.310.311 (1945), *International Shoe Co. v. State of Washington* case. Available at: <https://supreme.justia.com/cases/federal/us/326/310/case.html>

27 See “Personal jurisdiction”, in <http://legal-dictionary.thefreedictionary.com/Personal+Jurisdiction>

28 For the *International Shoe* case, its origins and critical review, see Douglas McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 *Missouri Law Review*, 4, 753-811 (2003). Available at: <http://ssrn.com/abstract=1955287>

with the forum state and invokes the benefits and protection of state law.”²⁹

Finally, some courts enacting “*long-arm statutes*” to obtain jurisdiction over anyone who is not present in the state and: a) Transacts business within the state, b) Commits a tort within the state, and c) Commits a tort outside the state that causes injury within the state, or owns, uses, or possesses real property within the state.³⁰ However, courts can refuse its jurisdiction according with the *forum non conveniens* doctrine, when they consider that it is inconvenient, unjust, or ineffective,³¹ proving that this criterion is somewhat subjective in a common law system.

Thereby, personal jurisdiction depends of the link between the defendant’s activity, the forum, and the litigation. The following are the most important factors relating to personal jurisdiction when the defendant is non-resident in the forum:

- Defendant: his physical presence within the forum is not necessary, according to the “*long arm statute*” and “*minimal contacts*” test.³²
- Plaintiff: must show that the defendant has “*minimum contacts*” or purposefully directed its activities toward the state, and invokes the benefits and protection of state law.

29 United States Supreme Court, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), *Elizabeth Donner Hanson v. Katherine N. R. Denckla* case. Available at: <https://law.resource.org/pub/us/case/reporter/US/357/357.US.235.107.117.html>

30 Allyson Haynes Stuart, *The Short Arm of the Law: Simplifying Personal Jurisdiction Over Virtually Present Defendants*, 64 *University of Miami Law Review*, 133-174 (2009). Available at: <http://ssrn.com/abstract=2316353>

31 Obdulio César Velásquez, *Jurisdictional Problems in Cyberspace Defamation*, 6 *International Law, Revista Colombiana de Derecho Internacional*, 247-300, 262 (2005). Available at: <http://www.redalyc.org/articulo.oa?id=82400608>. The *Forum non conveniens* principle seems to have origins in Scotland, although the doctrine was developed in US by a Pennsylvania Court in 1801.

32 Interesting paper regarding personal jurisdiction over foreigners is Linda S. Mullenix, *Outsourcing Liability: General and Specific Jurisdiction over Foreign National Corporations in American State Courts*, 326 *University of Texas, School of Law, Public Law and Legal Theory Research, Paper Series*, 174-180 (2011). It presents some reviews of Supreme Court Cases (*Goodyear Luxembourg Tires, S.A. v. Brown and J. McIntyre Machinery Ltd. v. Nicastro*). Available at: <http://ssrn.com/abstract=2212308>

- Court: Must verify if notice was served on the defendant and must determine if its discretion is in accordance with notions of fair play and substantial justice.³³

C. Jurisdiction in Europe

One State member of the EU is faced with at least a set of two types of regulations: a) National laws, and b) European laws. National law jurisdiction can be found in each country and it is often contained in various civil, criminal, labor, and administrative procedure codes (civil law countries).³⁴ EU laws give specific rules regulating jurisdiction.

Some civil codes grant jurisdiction in disputes regarding privacy and personality rights. In Germany, for example, jurisdiction means power of a court to: i) To hear and determine a case; ii) To apply choice of law; iii) To decide if the court is willing to execute a judgment. In addition, the German Code of Civil Procedure —Zivilprozessordnung, ZPO— sets out three types of jurisdiction: general jurisdiction (defendant’s domicile), special, and exclusive jurisdiction (specific cases, parties’ agreement).³⁵ In the Netherlands, jurisdiction is established in the Code of Civil Procedure (Rv) articles 1 to 14.³⁶

33 Uta Kohl, *Jurisdiction and the Internet Regulatory Competence over online Activity* (2nd edition, Cambridge Book Online, Cambridge, 2010). Julia Gladstone, *Determining Jurisdiction in Cyberspace: The “Zippo” Test or the “Effects” test?*, *Informing Science*, 143-156 (June 2003). Available at: <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/GladstoneDeterminingJurisdiction.pdf>

34 Jurisdiction is not based neither on due process nor *minimal contact* rules, unlike the US and Australia “... the court should not decline to exercise its jurisdiction on the grounds of *forum non conveniens* upon the defendant domiciled in the European Union”, see Obdulio César Velásquez, *Jurisdictional Problems in Cyberspace Defamation*, 6 *International Law, Revista Colombiana de Derecho Internacional*, 247-300, 270 (2005). Available at: <http://www.redalyc.org/articulo.oa?id=82400608>. In countries with Roman civil law system, the most important jurisdiction principles are “*Actor sequitur forum rei*” (the plaintiff should follow the forum of the property in suit, or the forum of the defendant’s residence) and “*Lex loci delicti commissi*” (the law of the place where the tort, offense or injury was committed).

35 Desiree Jaeger-Fine, Joel R. Reidenberg, Jamela Debelak & Jordan Kovnot, *Internet Jurisdiction: A Survey of German Scholarship and Cases*, 1-28 (Fordham Center on Law and Information Policy —CLIP—, Working Paper 2309575, 2013). Available at: <http://ssrn.com/abstract=2309575>

36 Netherlands, Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering), enacted in 1986. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=7420>, <http://>

EU law context has specific rules regulating jurisdiction. These rules originate from the International law contained in EU treaties and they are enacted by The European Council (EC) or European Parliament (EP), while The European Court of Justice (ECJ) makes legislative control and interprets the laws.³⁷ Since the creation of the EU was based on economic grounds, most of its provisions deal with civil and commercial matters. Some of the most important European rules are:

- Council Regulation (EC) N° 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation). General jurisdiction is established being based on the defendant's domicile; special jurisdiction is applied to contracts where the place of performance of the obligation is located; exclusive jurisdiction is the court named by the parties in the contract. Also, Article 5 (3) establishes jurisdiction where "A person domiciled in a Member State may, in another Member State, be sued: ... in matters relating to tort, delict, or quasi-delict, in the courts of the place where the harmful event occurred or may occur."³⁸ Finally, Article 23 (2) provides the only specific rule in e-commerce issues: a durable recorded agreement shall be equivalent to writing.³⁹
- Regulation (EC) 864/2007 of the European Parliament and Council on Non-contractual Obligations in Civil and Commercial Matters, is relevant in choice of law cases.
- Regulation (EC) 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations.

www.dutchcivillaw.com/civilprocedureleg.htm

37 In European Community law, "Regulations" have same the level of law in all countries; "directives", give some flexibility to states in adopting processes; "decisions", are addressed relating to specific persons. These norms are all hard law, while "recommendations" and "opinions" are soft law (not binding rules).

38 In 2011, the European Court of Justice has interpreted the scope of Article 5(3) in *eDate Advertising GmbH v X (C-509/09)* and *Olivier Martinez and Robert Martinez v MGN Limited (C-161/10)* case. Available at: <http://curia.europa.eu/juris/liste.jsf?&num=C-509/09>

39 Faye Fangfei Wang, *Obstacles and Solutions to Internet Jurisdiction. A Comparative Analysis of the EU and US Laws*, 3 *Journal of International Commercial Law and Technology*, 4, 233-241, 234 (2008). Available at: <http://www.jiclt.com/index.php/jiclt/article/view/65/64>

- Directive 2000/31/EC of the European Parliament and Council in 2000, on society information services and e-commerce, seeking harmonization and integration of law.⁴⁰

Finally, the Brussels Convention provides jurisdiction in civil and commercial matters in a general way.⁴¹ The main characteristics are:

- Persons domiciled in a member country may be sued in that jurisdiction.
- In contracts, a person may be sued in the place of performance of the obligation; in other types of contracts other than consumer type contracts, the parties can agree on the forum or jurisdiction.
- In injury cases, a person may be sued in the place where the harm took place.
- The consumer, may elect to be sued in his domicile or in another jurisdiction.

D. Jurisdiction in Colombia

Latin American countries follow the Roman civil law heritage and thus they have a specific statutes or regulations similar to Continental European countries. In Colombia, jurisdiction rules are prescribed in the Constitution and in specific laws.

40 Recently there has been increased activity by the EU authorities regarding the regulation of the Internet, e.g. in February 2014 the European Commission published the policy document on internet and governance that reflects the tensions between cross-border internet and national internet jurisdictions; in March 2014 the European Parliament adopted a Data Protection Regulation reform which can be applied extraterritorially regardless of jurisdiction in which European personal data is processed. European Commission, Communication on Internet Policy and Governance. Available at: <http://ec.europa.eu/digital-agenda/en/news/communication-internet-policy-and-governance>. European Parliament, European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)) adopted a Data Protection Regulation. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN>

41 Brussels Convention of 27 September 1968, on jurisdiction and the enforcement of judgments in civil and commercial matters. Available at: <http://curia.europa.eu/common/reccdoc/convention/en/c-textes/brux-idx.htm>

The Constitution establishes the *due process* principle as a fundamental right: the defendant has the right to defense, to have a tribunal, to appeal the judgment, and to the protection of *non bis in idem*.⁴² General procedure rules are contained in the Code of Civil Procedure (before) and General Code of the Process (new), which determine courts' jurisdictional powers in civil, family, commercial, and land matters. The most important aspects for territorial jurisdiction criteria are:

- In contentious proceedings, the court asserts jurisdiction in the defendant's domicile; if the defendant has several domiciles, the plaintiff may choose the forum.
- If the defendant does not have a domicile, the court asserts jurisdiction in the defendant's residence; if the defendant does not have a domicile or residence in the country, in the court of the plaintiff's domicile.
- In contracts, the plaintiff may choose between the place of performance or the defendant's domicile.
- In tort, where the incident occurred.
- In cases relating to goods and property, where they are situated.⁴³

In addition to the above, there are different procedural codes in criminal, labor, and administrative matters. In criminal law jurisdiction is linked to the place where the crime was committed, if it is not possible to determine where the crime was committed or is committed abroad, the court has jurisdiction where the charge is laid; in labor law, in the last place where the service was provided/performed or in the defendant's domicile; in administrative law, in the place of the location of the headquarters of government or in the domicile of the particular defendant; in

42 Political Constitution of Colombia, Art. 29. Available at: http://www.secretariassenado.gov.co/senado/basedoc/constitucion_politica_1991.html, http://confinder.richmond.edu/admin/docs/colombia_const2.pdf

43 Decree 1400 of 1970, Art. 23. Available at: http://www.secretariassenado.gov.co/senado/basedoc/codigo/codigo_procedimiento_civil.html. In 2012 a new regulation was issued (Act 1564/12), this came into effect after the first of January 2014. Act 1564 of 2012, July 12, 2012. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_1564_2012.html

the case of contracts, in the place of performance; in damages, where the events occurred.⁴⁴ Finally, in constitutional law (*amparo*) a court asserts jurisdiction where the violation or threat took place or where its effects occurred.⁴⁵

In accordance with international treaties and national laws, Colombian courts may have jurisdiction over foreign persons in specific cases, when they apply the “extraterritoriality of the law” principle in civil, labor, and criminal law.

II. BACKGROUND IN DETERMINING INTERNET JURISDICTION

A. US internet jurisdiction: The *Zippo* and *Calder* tests

Two principal tests came to be used in the US: the *Zippo test* and the *Calder test*. They are both derived from the *minimum contacts* and *long arm* personal jurisdiction doctrines.

The *Zippo test*, also called the “sliding scale test”, is the first model to be used to define jurisdiction in internet disputes. It made its first appearance after the case *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* in 1996 in a Pennsylvania District Court decision and it bases jurisdiction on the level of interactivity between the website and the forum: personal jurisdiction is directly proportional to the nature and quality of commercial activity on internet. Thus, it is necessary to identify a *sliding scale* based on the spectrum of commercial activity: a) Personal jurisdiction is proper when the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet;

44 See Act 906 of 2004, August 31, 2004, Art. 43. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_0906_2004.html. Decree-law 2158 of 1948, June 24, 1948, Art. 5. Available at: http://www.secretariassenado.gov.co/senado/basedoc/codigo_procedimental_laboral.html. Decree 01 of 1984, January 2, 1984, Art. 134-D. Available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal.jsp?i=6543>, respectively. The last had effect until 01 July of 2012 (the new regulation is contained in Act 1437/11). Act 1437 of 2011, January 18, 2011. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_1437_2011.html

45 See Decree 2591 of 1991, November 19, 1991. Available at: <http://www.corteconstitucional.gov.co/lacorte/DECRETO%202591.php>, Decree 1382 of 2000, July 12, 2000. Available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal.jsp?i=5230>

b) Personal jurisdiction is not proper when the defendant has simply posted information on an internet passive web site, which is accessible to users in foreign jurisdictions; c) Personal jurisdiction is not clear for interactive web sites where a user can exchange information with the host computer: “In these cases, the exercise of personal jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site”.⁴⁶ In consequence, the *Zippo* test does not appear to be useful in order to establish specific jurisdiction when the interactivity on the web is low;⁴⁷ also the Court did not provide a definition of ‘Interactivity’ and in e-commerce disputes the test is unhelpful because today a majority of commercial sites are highly interactive.⁴⁸ Others have criticized the *Zippo* test because it is under-protective of due process rights in the context of general jurisdiction.⁴⁹

On the other hand, the *Calder* model, also called the “*Effects test*”, is based on the effects intentionally caused within the forum by a defendant’s behavior outside the forum. It is not interested in the level of interactivity or website features such as defined in the *Zippo* case. This test derives from the non-internet controversy case of *Calder v. Jones* in the USA Supreme Court decision in 1983.⁵⁰ It promotes more certainty than the *Zippo* especially in e-commerce disputes as it can be used to determinate jurisdic-

46 Pennsylvania District Court, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1124 (W.D. Pa. 1997). Available at: <http://cyber.law.harvard.edu/metaschool/fisher/domain/dncases/zippo.htm>

47 Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 *Berkeley Technology Law Journal*, 3, 1345-1406 (2001). Available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1331&context=btlj>. Julia Gladstone, *Determining Jurisdiction in Cyberspace: The “Zippo” Test or the “Effects” test?*, *Informing Science*, 143-156 (June 2003). Available at: <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/GladstoneDeterminingJurisdiction.pdf>

48 Faye Fangfei Wang, *Obstacles and Solutions to Internet Jurisdiction. A Comparative Analysis of the EU and US Laws*, 3 *Journal of International Commercial Law and Technology*, 4, 233-241, 239 (2008). Available at: <http://www.jiclt.com/index.php/jiclt/article/view/65/64>

49 Eric C. Hawkins, *General Jurisdiction and Internet Contacts; What Role, if any, Should the Zippo Sliding Scale Test Play in the Analysis?*, 74 *Fordham Law Review*, 4, 2371-2423 (2006). Available at: <http://ir.lawnet.fordham.edu/flr/vol74/iss4/29>

50 Although its remote origins are discussed in the *Lotus* case, international law in 1927. Permanent Court of International Justice, *Lotus (France v. Turkey)* case of 1927, September 7, 1927. Available at: http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf

tion in some types of non-commercial cases, especially in torts or injuries to individuals rather than corporations (because it is difficult to establish where a corporation was harmed). In order to establish effects in cyberspace, courts can consider whether there is a specific targeting of someone (targeting-based analysis in Geist's terms),⁵¹ such as the use of specific language, currency, or nationality. However, the *Calder* test has its own problems: a) It can be more subjective than others; and b) In conducting online business transactions in the forum, the *Zippo* test is better than the *effects* test.⁵²

In an attempt to establish trends in internet jurisdiction, recent research analyzed 318 academic articles published in English and a set of 41 US key law cases.⁵³ According to the survey, the academic literature shows a frequent use of the *Zippo* test by a majority of federal courts in the US to determine personal jurisdiction. Here the nature and quality of activity in the forum is the key to solving the problem. Some authors argue that courts have sufficient legal tools and that they can use traditional *due process* (minimum contacts and reasonableness standard). Other studies suggest that current tools are inadequate and that new tests are required to be developed by the courts. Finally, the 41 cases of law analyzed exposed the following trends:

- Internet disputes are concentrated in certain federal circuits more than in others, e.g. The Ninth Circuit Court has 25% of the cases.
- All cases were linked to personal jurisdiction, not choice of law or enforcement matters.

51 Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 *Berkeley Technology Law Journal*, 3, 1345-1406 (2001). Available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1331&context=btlj>

52 Julia Gladstone, *Determining Jurisdiction in Cyberspace: The "Zippo" Test or the "Effects" test?*, *Informing Science*, 143-156, 144 (June 2003). Available at: <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/GladstoneDeterminingJurisdiction.pdf>

53 Joel R. Reidenberg, Jamela Debelak, Jordan Kovnot, Megan Bright, N. Cameron Russell, Daniela Alvarado, Emily Seiderman & Andrew Rosen, *Internet Jurisdiction: A Survey of Legal Scholarship published in English and United States cases Law*, 1-83 (Fordham Center on Law and Information Policy—CLIP—, Working Paper 2309526, 2013). Available at: <http://ssrn.com/abstract=2309526>

- Intellectual property is the most important matter in internet jurisdiction (62%) followed by defamation disputes.
- Regarding the test applied, the *Zippo Test* is the most prominent cited by the courts and is more apt for determining specific personal jurisdiction. However, the *Calder test* remains very important in intentional torts and online defamation cases, but courts are applying those as not being mutually exclusive. In cases that applied neither the *Zippo* nor *Calder* test “...the majority applied traditional offline principles of jurisdiction to the Internet setting such as the Sixth Circuit in *CompuServe*.”⁵⁴ Being another work showing the importance of traditional principles as the long arms statutes to determine jurisdiction disputes on the internet.⁵⁵

B. International Internet Jurisdiction

According to English academic literature (over 318 articles)⁵⁶ the two principal cases that are of prime relevance in international internet jurisdiction are: *Dow Jones & Co. Inc. v. Gutnick* case in Australia and *Yahoo!, Inc. v. La Ligue Contre le Racisme et L’Antisemitisme —LICRA—* in France and the US. Nevertheless, as the analyses by scholars did not identify the jurisdiction rules used in these cases, it has now become necessary to do so.

In the *Dow Jones* case of 2002, *Gutnick*, the defendant who lived in Australia, instituted a libel action against *Dow Jones & Co. Inc.*, for an article uploaded in New Jersey (US) that appeared in the Barron’s online section of its website. The article

54 Joel R. Reidenberg, Jamela Debelak, Jordan Kovnot, Megan Bright, N. Cameron Russell, Daniela Alvarado, Emily Seiderman & Andrew Rosen, *Internet Jurisdiction: A Survey of Legal Scholarship published in English and United States cases Law*, 1-83, 58 (Fordham Center on Law and Information Policy —CLIP—, Working Paper 2309526, 2013). Available at: <http://ssrn.com/abstract=2309526>

55 Michelle Boldon, *Long-Arm Statutes and Internet Jurisdiction*, 67 *The Business Lawyer*, 1, 313-320 (2011). Available at: http://www.americanbar.org/publications/the_business_lawyer/volume_67/number_1.html

56 Joel R. Reidenberg, Jamela Debelak, Jordan Kovnot, Megan Bright, N. Cameron Russell, Daniela Alvarado, Emily Seiderman & Andrew Rosen, *Internet Jurisdiction: A Survey of Legal Scholarship published in English and United States cases Law*, 1-83 (Fordham Center on Law and Information Policy —CLIP—, Working Paper 2309526, 2013). Available at: <http://ssrn.com/abstract=2309526>

was accessible only to Dow Jones' subscribers some of whom (about 300) were located in Australia. The Supreme Court of Victoria, found that the article was published in Victoria so Victorian law applied to the case. Dow Jones then appealed the judgment to the High Court of Australia claiming that the article was published where it was uploaded, this being in New Jersey and not where it was downloaded in Victoria. The Court rejected Dow Jones' argument and held that: "The objections that the appellant is not present in this country, has no office or assets here...; has only minimal commercial interest in the sale of Barron's magazine or online services in Victoria or to Australians... are considerations irrelevant to the issue of jurisdiction once the propounded long-arm rule is found valid and applicable."⁵⁷ In short, the case applied traditional US offline rules: while the High Court applied the *long arm* rule, the defendant requested the "purposely avails" test from the *Hanson v. Denckla* case to demonstrate sporadic and inadvertent contacts of non-residents.

In the *Yahoo! Inc.* case of 2006, the plaintiffs filed a suit against *Yahoo! Inc.* in France for promoting the sale of Nazi items on the company's auction website claiming that such activity was considered a crime in France. The French Court ordered *Yahoo! Inc.* to block users' access in France and established a fine for each day after three-months of implementation, if the content was still accessible. *Yahoo!* then moved to the Northern District of California and filed suit against French organizations seeking a declaratory judgment that the orders of the French court could not be enforced in the United States. The District Court found personal jurisdiction over the defendants and held that the French Court enforcement was precluded in the US in accordance with the First Amendment. This decision was taken on appeal to the Ninth Circuit Court of Appeals which confirmed the prior judgment and asserted personal jurisdiction over the French defendants: "Because California's long-arm jurisdictional

57 High Court of Australia, *Dow Jones & Co. Inc. v. Joseph Gutnick*, December 10, 2002, point 103. Available at: <http://www.austlii.edu.au/au/cases/cth/HCA/2002/56.html>

statute is coextensive with federal due process requirements... LICRA [La Ligue Contre le Racisme et L'Antisemitisme] and UEJF [Union des Étudiants Juifs de France] contend that we must base our analysis on the so-called "effects" test of *Calder v. Jones*... There are three such contacts... However, the third contact, considered in conjunction with the first two, does provide such a basis."⁵⁸ In summary, the Court applied the traditional offline *long arm* statute, although the defendant argued for the application of the *effects* test online; the French court appears to have applied, in turn, jurisdiction offline rules based on the French Code of Civil Procedure.⁵⁹

According to the Internet & Jurisdiction Project's observatory,⁶⁰ disputes related to the terms of service of web pages are frequent, as they do not provide clarity or assurance to the users. In April 2013, a Canadian Court rejected an eBay clause that only gave jurisdiction (for every lawsuit) to the courts in California and it assumed jurisdiction; in November 2013 the Dutch Data Protection Authority (DPA) concluded that Google's privacy policy was in breach of privacy law; in February 2014, the High Court in Berlin ordered Facebook to change its terms of service and comply with German Data Protection law. Finally in March 2014, Google and Facebook were sued by a group of French consumers for lack of clarity in the terms of service.⁶¹ Information about jurisdiction rules that were applied is unfortunately not available at the moment.

Two cross-border cases in Canada and the US show the trend to expand extraterritorial jurisdiction in internet cases, based on

58 United States Court of Appeals, Ninth Circuit, *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, LICRA*, point II. Available at: <http://caselaw.findlaw.com/us-9th-circuit/1144098.html>

59 France, Code of Civil Procedure, enacted in 1804. Available at: www.legifrance.gouv.fr/content/download/1962/13735/.../Code_39.pdf

60 The Internet & Jurisdiction Projects observatory has created a collection of cases since 2012 from around the world regarding topics such as adoption of new regulations, drafts of law, block offensive content, fines for violating local law, choice of law and jurisdiction, among others. Some of them are useful in this research and for future reference. See www.internetjurisdiction.net/observatory/

61 The Internet & Jurisdiction Project, November 2013, February and March 2014, in www.internetjurisdiction.net/observatory/retrospect/archive2013/, www.internetjurisdiction.net/observatory/retrospect/archive2014/

the principles of the place of access and server location criteria.⁶² In the *HomeAway.com, Inc. v. Martin Hrdlicka* case in December 2012, the Applicant, a US established company, *HomeAway.com Inc.*, requested the Canadian Federal Court to expunge a Canadian trade mark registration VRBO [Vacation Rentals by Owner] because its little, M. Hrdlicka: a) was not the person entitled to register the trade-mark when he filed the application; b) the trade-mark had been and is distinctive of HomeAway.com; c) and, the registration was obtained on the basis of false material or fraudulent statements. The Court verified the use of the HomeAway.com trade mark in Canada and found that prior to M. Hrdlicka, HomeAway was advertising and contracting with Canadians to display their premises on the VRBO website, and that website displayed the trade-mark VRBO to Canadians, and finally held: “[22] I find, therefore, that a trade-mark which appears on a computer screen website in Canada, regardless where the information may have originated from or be stored, constitutes for Trade-Marks Act purposes, use, and advertising in Canada.”⁶³ Then, the Court assumed jurisdiction and ordered the striking out the Canadian trade-mark registration. It should be noticed that the Court not only confirmed that advertising appeared on the screens of computers (mere accessibility), but also that the trade-mark VRBO was identified and that Canadians had the possibility of contracting. Hence, this case applies online rules to determine jurisdiction similar to the Zippo tests although, the Court did not mention it.

In a second case of *MacDermid, Inc. v. Deiter* in December 2012, the plaintiff a US chemical company located in Connecticut, sued Jackie Dieter who lived in Canada and who was employed in Canada by MacDermid’s Canadian subsidiary; just before she lost her employment she sent confidential and unauthorized MacDermid’s data files from her MacDermid’s

62 The Internet & Jurisdiction Project, in www.internetjurisdiction.net/observatory/retrospect/archive2013/ (January-2013)

63 Canadian Federal Court, citation 2012 FC 1467 (December 12, 2012), *HomeAway.com, Inc. v. Martin Hrdlicka* case. Available at: in <http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/61674/index.do>

email account to her personal email account. All the facts took place in Canada (“from one computer in Canada to another computer in Canada”). The Court for the District of Connecticut dismissed the complaint arguing that Dieter had not used a computer in Connecticut and that she was not amenable to long-arm jurisdiction, but the US Court of Appeals overruled the lower decision and held that: “While it is true that Dieter physically interacted only with computers in Canada, we do not believe that this fact defeats long-arm jurisdiction... Dieter used the Connecticut servers and because the servers are computers under the long-arm statute, we conclude that Dieter used a computer in Connecticut and that the Connecticut district court had long-arm jurisdiction.”⁶⁴ Although this is a controversial decision, the courts have applied offline rules from long-arm statutes twice.

In a recent UK trial (January-2014), the England and Wales High Court assumed jurisdiction in Google’s Safari case (*Judith Vidal-Hall, Robert Hann, and Marc Bradshaw v. Google Inc.*). Google was accused of having bypassed security settings in the browser to install advertisement cookies and Google had argued that the forum for the lawsuit should be California, where the company is incorporated.⁶⁵ The Court applied offline rules from the *Spiliada Maritime Corp v. Cansulex Ltd* (1987)⁶⁶ case, and argued that the criteria that govern the application of the principle of *forum non conveniens* are: “i) The burden is upon the Claimant to persuade the Court...; ii) The appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice; iii) One must consider first what is the ‘natural forum’; namely that with which the action has the most real and substantial connection”, and the Court

64 United States Court of Appeals for the Second Circuit, No. 11-5388-cv, pp. 5-6 (26-12-2012) *MacDermid, Inc. v. Jackie Deiter*. Available at: http://www.internetcases.com/library/cases/2012-12-26_macdermid_v_deiter.pdf

65 The Internet & Jurisdiction Project, in <http://www.internetjurisdiction.net/observatory/retrospect/> (August-2013, November-2013; January-2014 as well)

66 House of Lords, United Kingdom, *Spiliada Maritime Corp v. Cansulex Ltd* (1987) case. Available at: <http://www.bailii.org/uk/cases/UKHL/1986/10.html>

concluded that: “133. By contrast, the focus of attention is likely to be on the damage that each Claimant claims to have suffered. They are individuals resident here, for whom bringing proceedings in the USA would be likely to be very burdensome”.⁶⁷ In this case, the *Forum non conveniens* principle is strongly connected with the place of the injury, not where the unlawful acts were committed. These arguments on internet jurisdiction disputes seem to be very similar to the principle of *Actor sequitur forum rei* governing the continental civil law system (see the German and Colombian cases).

In conclusion, in order to determine internet jurisdiction in international cases, courts have applied traditional rules offline rather than special rules online, like the *Zippo* and *Calder* tests, except the Canadian case. This trend is parallel or is applied similarly in both common law regimes such as the USA, Australia, or UK and also in civil law regimes such as France.

C. European Internet Jurisdiction

1. The German case

A recent survey of German cases can throw light upon what happens in Europe. This survey analyzes 215 sources (articles, court cases, and treatises) of German literature linking these with internet jurisdiction.⁶⁸ The research reveals the following trends:

1) Treatises are an important component of the German law system because they provide an interpretation and commentary on original legal provisions (laws, rules, etc.). In internet disputes, authors try to apply the rule 23 of German Code of

⁶⁷ England and Wales High Court, Queen’s Bench Division, case No: HQ13X03128 (16/01/2014) *Judith Vidal-Hall, Robert Hann and Marc Bradshaw v. Google Inc.* Available at: <http://www.bailii.org/ew/cases/EWHC/QB/2014/13.html>

⁶⁸ Desiree Jaeger-Fine, Joel R. Reidenberg, Jamela Debelak & Jordan Kovnot, *Internet Jurisdiction: A Survey of German Scholarship and Cases*, 1-28 (Fordham Center on Law and Information Policy —CLIP—, Working Paper 2309575, 2013). Available at: <http://ssrn.com/abstract=2309575>

Civil Procedure —the ZPO— which establishes jurisdiction in the district (place) where the unlawful act occurred. In treatises the conclusion on internet jurisdiction is that jurisdiction is based on two principles: i) Place of commission, and ii) Place of injury. If any of these occur within Germany, the court has jurisdiction and the plaintiff can choose the court. A majority opinion holds that the place of commission is the place where the website is intended to be accessed; a minority opinion holds that mere accessibility of the website is sufficient.⁶⁹

2) International Private Law (conflict of laws) has some of its own features regulated in terms of the German Civil Code, Art. 40 and Regulation 864 (EC) of 2007. Jurisdiction over defendants for unlawful acts is subject to the laws of the state where the defendant acted and the plaintiff can chose in which court to institute the action with reference to the place of injury. In internet disputes treatises' have proposed polemic theses as: i) The place where the act took place is where the information is uploaded (the server location is irrelevant); ii) The place of injury is where injury occurs rather than where the website is accessed.

3) German courts have established certain online rules, arising especially from the *New York Times* case in 2010, when a German resident filed a suit against the newspaper because it had published an allegedly defamatory article online. District and regional German courts dismissed the claim and held that article was addressed to a US audience, not to a German audience and, thus, mere accessibility of a website in Germany is not sufficient to determine jurisdiction as it needs “*Intentional accessibility*” (it seems to be a *Calder* effects-targeting test). However, the Federal Supreme Court overruled the prior judgments and established new rules: a) Rejection of the “*mere accessibility*” argument, because the availability of evidence may not exist in every place where the webpage can be accessed; b) Rejected the “*intentional*”

69 Desiree Jaeger-Fine, Joel R. Reidenberg, Jamela Debelak & Jordan Kovnot, *Internet Jurisdiction: A Survey of German Scholarship and Cases*, 1-28, 7 (Fordham Center on Law and Information Policy —CLIP—, Working Paper 2309575, 2013). Available at: <http://ssrn.com/abstract=2309575>

accessibility” argument, because the harm would occur when the publication was actually read whether or not that reading was intended; c) Asserted the “*objective domestic connection*” argument, when publication has the possibility to attract audience to the forum “...significantly more likely than it would be with mere accessibility.”⁷⁰ The Court held that the content of the *New York Times* article had a high probability of attracting a German audience (the German resident was mentioned by full name, his alleged conduct being a crime in Germany, and the *New York Times* having a worldwide audience) and therefore, the Court had jurisdiction.

In short, internet jurisdiction in Germany concerns itself with determining two things: a) Where did the harmful event occur? (The place where the website was accessed, where was the website intended to be accessed, or where was the information uploaded); b) Where did the injury occur? (Where did the user get access or where did the injury to reputation take place). Meanwhile, the courts have developed some rules to resolve the problems as well as “*mere accessibility*”, “*intentional accessibility*”, or “*objective domestic connection*”. There is information from the *Tribunal de Grande Instance de Paris* which has pronounced “*The page view counts*” argument. It seems that European courts do not apply the US *Zippo* and *Calder* online tests.

2. Dutch cases

1) The Supreme Court of Netherlands in *H&M v. G-Star* case (Cassation),⁷¹ H&M AB a foreign company who had a large number of clothing stores in the Netherlands (including a store

70 Desiree Jaeger-Fine, Joel R. Reidenberg, Jamela Debelak & Jordan Kovnot, *Internet Jurisdiction: A Survey of German Scholarship and Cases*, 1-28, 9 (Fordham Center on Law and Information Policy — CLIP—, Working Paper 2309575, 2013). Available at: <http://ssrn.com/abstract=2309575>

71 Supreme Court of Netherlands in *H&M v. G-Star* case (Hoge Raad, December 7, 2012 (H&M v. G-Star), LJN BX9018). Available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2012:BX9018&keyword=LJN+BX9018>. All dutch cases were found at www.rechtspraak.nl, the site of Netherlands judiciary. Free translations were used (no official).

in Dordrecht) and its own website (www.hm.com) for selling and advertising its merchandise, was found guilty of infringing the trademark and copyright of G-STAR, a Dutch Company, because a G-Star jeans called “Elwood” was found for sale in an H&M store in Amsterdam. The first judgment was handed down by the judge in the Court of Dordrecht of August 13, 2009 and the second one was by the Court of Appeal in The Hague on April 19, 2011. In September 2009 a factual report found that these jeans was in H&M stores also for sale in 23 Dutch cities, but not in Dordrecht. H&M AB challenged the international jurisdiction of the Dordrecht Court over the claims against her.

Supreme Court held that: “The case-law of the ECJ follows that as ‘the place where the harmful event occurred’ within the meaning of Art. 5 paragraph 3 Brussels Regulation is meant to include the place where the damage occurred (the *erfolgsort*)”. Also, the Supreme Court reminded that in the European Court of Justice —ECJ— jurisprudence about disputes concerning an infringement via website of a trade mark registered in a Member State, lawsuits may be brought before the courts of the Member State in which: a) The mark is registered or, b) The advertiser is established (CJEU April 19, 2012, C-523/10, NJ 2012/403 (Wintersteiger). Finally, the Supreme Court connected the offline rules with specific internet characteristics of the case:

Now with regard to the claim against H&M AB it is allegedly an infringement of the Dutch copyright of G-Star by selling or at least offering clothing through the website www.hm.com, which is owned by H & M AB, (see in 3.1 above iii) all H & M clothes would also be available through this website (as in argument on behalf of H & M has been communicated to the court), and that the website was also aimed at the Dutch market (para. 9, the Supreme Court jurisdiction was not contested), all of which implies that the Elwood trousers offered for sale in Dordrecht, the court in the district Dordrecht had international jurisdiction under art. 5 paragraph 3 of the Brussels Regulation to take cognizance of the present claims against H & M AB.

The Supreme Court then dismissed the application. Not new rules online were established.

2) The Court of Amsterdam in the case of *Klokkenluideronline.nl v. Lawyers*,⁷² a law firm filed a suit against a journalist and a Foundation because they had published unlawful statements about the law firm in *Klokkenluideronline.nl* site. The Court asserted jurisdiction applying the cross-border and wide range internet characteristics and offline rules regarding the place of the injury:

2.2. The Dutch courts have jurisdiction in the dispute. The allegedly unlawful statements are distributed through the internet, in the Dutch language and on the Dutch public-oriented websites, making the harmful event that has occurred or may occur in the Netherlands (article 6 of the Code of Civil Procedure). Since the alleged unlawful statements are also made within the district of Amsterdam to consult, the judge of this court has jurisdiction over the dispute.

The Court ordered the defendant to remove the information from its website and gave judgment awarding damages to the plaintiff with costs and ordering a fine for each day after judgment if defendant did not comply with the judgment.

3) The Court of Breda in *Dahabshiil v. [defendant]* case⁷³ the plaintiff, a foreign company Dahabshiil Transfer Services Limited, a financial organization established in London, sued a resident Somali, a journalist who was admitted as a refugee in the Netherlands since 2007, because he published in different websites (including one of his own) some articles accusing Dahabshiil that they were committing a criminal offenses such as the financing of terrorism, at least provoking offenses, including that of inciting the murder of a Somali singer. The defendant replied that: a) The Dutch court did not have jurisdiction because Dutch law did not apply, and b) Denied that he was acting

72 Court of Amsterdam in *Klokkenluideronline.nl v. Lawyers* case (Voorzieningenrechter Amsterdam 6 maart 2012 (klokkenluideronline), LJV BV7967). Available at: <http://uitspraken.rechtspraak.nl/#jn/BV7967>

73 Court of Breda in *Dahabshiil v. [defendant]* case (Voorzieningenrechter Breda 8 februari 2011 (Dahabshiil), LJV BP3480). Available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBBRE:2011:BP3480&keyword=LJV+BP3480>

unlawfully. The Court asserted jurisdiction regarding offline rules as follow:

3.4. Article 2 Rv provides that in cases that have to be initiated by summons, the Dutch courts have jurisdiction if the defendant is domiciled in the Netherlands or has habitual residence. This is also the main rule in the system of the Brussels I Regulation (Article 2 EEX), upon which Regulation [defendant] relies, among other things. [Defendant] lives in [residence], so that the Dutch court has jurisdiction.

The judge found that there were no wrongful acts done by the defendant by publishing on his own website and that publications on other websites did not provide sufficient basis for the assignment of liability to the defendant. The judge rejected the claims and gave a judgment with costs against Dahabshiiil.

4) In the case *OPTA v. Dollar Revenue* in the Rotterdam Court (appeal).⁷⁴ The College of the Independent Post and Telecommunications Authority (OPTA) was sued by five plaintiffs who were fined for violation of Article 4.1, first paragraph, of the Decree on universal service and end-user interests (Besluit universele dienstverlening en eindgebruikersbelangen, hereinafter *Bude*).⁷⁵ The activity of the plaintiffs (called *Dollar Revenue* in the trial) was to gain revenue by placing as much advertising software possible on end user computers. The plaintiffs put objections against that decision, but it was dismissed by OPTA. On appeal, they claimed: a) That the defendant lacks jurisdiction, b) That the defendant has failed to fulfill its burden of proving their liability, c) That the fines are disproportionate. For the Court, was clear that Article 4.1 of the *Bude* is an implementation of Article 5, third paragraph, of Directive 2002/58 EC on Privacy and Electronic Communications which states that: "... the use of electronic communications networks to store information or

⁷⁴ Court of Rotterdam in *OPTA v. Dollar Revenue* case (Rechtbank Rotterdam 3 februari 2010 (OPTA v. DollarRevenue), LJN BL2092). Available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2010:BL2092&keyword=LJN+BL2092>

⁷⁵ Netherlands, Decree on universal service and end-user interests (Besluit universele dienstverlening en eindgebruikersbelangen, *Bude*, 7 mei 2004). Available at: http://wetten.overheid.nl/BWBR0016698/geldigheidsdatum_12-09-2015

to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the user concerned is provided clear and comprehensive information in the purposes of the processing.”

According to the plaintiffs, the Article 4.1 of the Bude is not intended to protect electronic communications users who are not active in the Netherlands (i.e. US or Australia)... “Now the vast majority of installations outside the Netherlands and the EU has taken place, these plants cannot be considered a violation of the Bude.” For the Court, this is a narrow interpretation of Bude regulation, and it held that:

The text of the law nor the notes offering any clue to the view of the plaintiffs that the defendant should be limited to the plants in the Netherlands or the EU ... Article 4.1 of the standard Bude itself states in any case that all acts carried out in or from the Netherlands, such as the Privacy Directive email communication behaviors What incidentally, they also further the geographic location of the end-user computers, installing and accessing data occurred from Dutch territory. This gives to the defendant authority to act...

The Court decision was to allow the appeal by two plaintiffs (X and C) and confirmed before decision regarding to the rest. No online rules have been used.

5) The *Travelport v. IATA* case in Court of Amsterdam,⁷⁶ the International Air Transport Association (IATA) established in Montreal-Canada, was sued by Travelport Global and Travelport International (the first established in Amstelveen-Netherlands), because IATA infringed the Travelport’s database rights and caused damage to their income. In the complaint Travelport argued that IATA reused and acquired substantial parts of the Travelport database for the benefit of its PaxIS [Passenger Intelligence Services] database, and that “The infringement committed by IATA took place in the EEA [European Economic Area]. Database right is identical in all EEA countries. For that

⁷⁶ Court of Amsterdam in *Travelport v. IATA* case (Voorzieningenrechter Amsterdam 1 oktober 2009 (Travelport), LJN BJ9179). Available at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2009:BJ9179&keyword=LJN+BJ9179>

reason, an injunction is available to all those countries and the judge is empowered to issue such a cross-border injunction... and also in the Netherlands, so the Dutch court has jurisdiction.” Conversely, IATA asked the Court to refuse the relief sought. Regarding jurisdiction, the Court of Amsterdam held:

4.1. Under Article 6, e) Rv the Dutch courts have jurisdiction in cases involving tort where the harmful event occurred or may occur in the Netherlands in the Netherlands (sic). On the basis of this article, the Dutch judge has jurisdiction in this case to hear the dispute to the extent that this is on the (possible) infringements in the Netherlands. IATA, based in Canada, will follow its defense due that the Dutch court has competence (jurisdiction) to impose a cross-border injunction...

In its decision, the Court refused the claims because it could not be established that there was an infringement and granted judgment against Travelport to pay the litigation costs. The rules to establish jurisdiction came from the Rv Dutch (Code of Civil Procedure).⁷⁷

6) The Court of Amsterdam in the case *Dimensione v. Cassina*,⁷⁸ Cassina S.P.A., being a company incorporated in Meda-Italy, and La Fondation Le Corbusier a company incorporated in Paris-France, filed a suit against Dimensione Direct Sales SRL, established in Bologna-Italy, for unlawful acts of violating copyright and trademark rights of Cassina, by offering furniture models for sale through its website, catalog, and mailing focused on the Netherlands. For Cassina, the fact that Dimensione is located in Italy and sells through its website does not affect the fact that it is acting illegally in the Netherlands: “That the general conditions of the Web site to determine that the sale takes place in Italy does not alter this... So there is no question of a transfer of ownership in Italy.” Dimensione refuted all Cassina’s charges

⁷⁷ Netherlands, Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering), enacted in 1986. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=7420>, <http://www.dutchcivillaw.com/civilprocedureleg.htm>

⁷⁸ Court of Amsterdam in *Dimensione v. Cassina* case (Rechtbank Amsterdam 12 februari 2009 (Dimensione), LJN BH6546). Available at: http://uitspraken.rechtspraak.nl/inzien_document?id=ECLI:NL:RBAMS:2009:BH6546&keyword=LJN+BH6546

related to infringing the copyright or trademark rights and argued that according to copyright protection under Directive 2001/29, it includes the exclusive right to control the distribution of the work when it is in a tangible form and that it gives the holder no more rights than that: “Dimensione is not guilty of ‘distribution’ for the purposes of this Directive, now there is no transfer of property (other than property transfer takes place lawfully in Italy).” The Court asserted jurisdiction on the basis of precedent in Supreme Court jurisprudence:

4.6. The Internet is accessible worldwide, however, by its nature and a website can in principle by any user, anywhere in the world, be visited... The Lexington judgment of the Supreme Court (HR January 3, 1964, NJ 1964, 445) in combination with Ladbroke’s judgment of the Supreme Court (HR February 18, 2005, NJ 2005, 404) that the acts of Dimensione may be considered unlawful and an infringement if the disclosures of the pictures of her (infringing) furniture and offering for sale through its website, catalog, and mailing (also) was focused on the Netherlands... The existence of a website focused on the Netherlands, according to the Ladbroke’s judgment depends on the circumstances of the case, such as the top-level’ domain of Internet addresses, the language in which the websites are presented or the language options offered by the websites or other references on the website to a specific country.

The Court found that Dimensione was guilty and it was ordered to cease its acts and to pay money. This is the only Dutch case found where the judge did not use offline rules, instead the Court applied online rules in terms of targeting information to Dutch people according to the “effects test” general model (see 3.2).

D. Colombian Internet Jurisdiction

Most literature refers to issues or topics that do not relate to internet jurisdiction. However, some relevant studies can be found. The first study refers to the position which asserts that no own judicial developments have taken place in Colombia to establish jurisdiction on internet. Thus, this subject is based

on jurisprudence and international doctrine.⁷⁹ After reviewing the fundamental principles and rules relating to jurisdiction in Colombia (objective/subjective criteria, territorial/functional criteria, and connection criteria), the study analyzes three cases in the USA, elements from both the *Zippo* and *Calder* tests are applied, although the author does not identify those models.⁸⁰ Finally, this paper recommends in the case of contracts, that the parties agree between themselves as to the jurisdiction that would apply in a possible lawsuit.

A second work analyzes the problem to establish judicial jurisdiction over cyber-torts in both common law and civil law systems.⁸¹ The author argues that new approaches are inaccurate and unnecessary, instead traditional rules have proven to be sufficient and accurate to solve internet jurisdictional issues. After giving an overview of jurisdiction rules, tort, non-contractual liability, and cyber-torts, the paper focuses on *Rovira's* Colombian case of cyber-tort (according to the author, the only case decided in the country). During 10 months a person sent e-mails to the plaintiff, who considered these as spam, despite the plaintiff's request to delete his email from the database. The plaintiff instituted a constitutional action before Rovira's Judge (a court outside of Bogota, however the parties were domiciled in Bogota and the messages were sent within Bogota) requesting the protection of his fundamental right to privacy. The judge asserted jurisdiction and held that in cyberspace, the e-mail address is the "virtual domicile" and "...the place where the violation occurs... not only is the one where the action unfolds

79 Juan Pablo Restrepo-Echavarría, *Derecho.com.co. El internet en el derecho colombiano* (mimeo, Pontificia Universidad Javeriana, 2000). Available at: www.javeriana.edu.co/biblos/tesis/derecho/dere2/Tesis12.pdf

80 The cases were: *Fuset Systems Inc. v. Instruction Set Inc.*, the Connecticut Court accepted jurisdiction over non-resident persons; *Cybersell v. Cybersell*, same name case from different states, court applied passive/active criteria (*Zippo tests*); *State of Minnesota v. Granite Gate Resorts*, Minnesota Court declares itself competent applying effects and connection criteria.

81 Johann Manrique, *The Assertion of Judicial Jurisdiction over Cyber-Torts. A Comparative Analysis*, 5 *Revista de Derecho, Comunicaciones y Nuevas Tecnologías*, 2-24 (2011). Available at: https://derechoyotics.uniandes.edu.co/components/com_revista/archivos/derechoyotics/ytics52.pdf

or incurred in the omission, but likewise where the effects of these behaviors are perceived... 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 a statute says otherwise”;⁸² thus the plaintiff has a virtual domicile because he has an e-mail and he then can perceive the effects everywhere. According to the author’s point of view, this decision was wrong because: a) ‘Cyberspace’ or ‘virtual domicile’ are not legal fictions accepted or defined in Colombian law; b) Does not apply specific rules such as those contained in the *Electronic Commerce Act* (Act 527/1999)⁸³ and the jurisprudence regarding internet in Colombia. Finally, the author concludes that the *common law systems* such as in the US and in Canada, create a very volatile risk because there is a subjective assertion of jurisdiction based on *forum non conveniens* and substantial connection with the forum principles; on the other hand, in *civil law systems* such as in Colombia, it is not necessary to invent new principles or rules: “...judiciary must go back to the basics (domicile, residence and place where the action/omission took place).”⁸⁴

A third work is a book that addresses the issue of jurisdiction in criminal law related to computer systems and internet. The study concludes that although there is research and statistics on cybercrime carried out by the Police: “Like most Latin American countries, Colombians courts have not established jurisprudence on the application of criminal law to behavior committed to through computer systems and internet.”⁸⁵

82 Johann Manrique, *The Assertion of Judicial Jurisdiction over Cyber-Torts. A Comparative Analysis*, 5 *Revista de Derecho, Comunicaciones y Nuevas Tecnologías*, 2-24, 15 (2011). Available at: https://derechoytics.uniandes.edu.co/components/com_revista/archivos/derechoytics/ytics52.pdf

83 Act 527 of 1999, August 18, 1999. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_0527_1999.html

84 Johann Manrique, *The Assertion of Judicial Jurisdiction over Cyber-Torts. A Comparative Analysis*, 5 *Revista de Derecho, Comunicaciones y Nuevas Tecnologías*, 2-24, 20 (2011). Available at: https://derechoytics.uniandes.edu.co/components/com_revista/archivos/derechoytics/ytics52.pdf

85 Cristos Velasco, *La jurisdicción y competencia sobre delitos cometidos a través de sistemas de cómputo e internet*, 349 (Tirant lo Blanch, Valencia, 2012).

A fourth paper is directly related with jurisdiction and it analyzes the position of the Colombian Authority of Industry and Commerce (SIC).⁸⁶ The SIC decided in November 2014 that it did not have jurisdiction over the handling of personal information recorded on Facebook because that company had not domicile in Colombia; this argument is criticized by the author according to the General System of Protection of Personal Data (enacted in Act 1581/12)⁸⁷ and the internet cross-border nature.

The last study deals with “*cloud computing*” contracts and some jurisdictional problems.⁸⁸ It held that cloud computing are not a new kind of contracts, they can be a lease contract (data center space platform) or a supply contract (software services). Legal problems arise when the supplier and data centers (severs) are in different jurisdictions or when the server is abroad. This is a challenge for the law. Some conclusions are: i) Parties jurisdiction is only a part of the juridical analysis; ii) Harmonization of the law is needed because there are more or less protectionist states; iii) In Colombia specific norms covering cloud computing do not seem to be essential.

III. COLOMBIAN CASES

Five courts have been searched: a) Three High Courts: (*Corte Constitucional*; *Corte Suprema de Justicia*, and *Consejo de Estado*); b) Two District courts: (*Tribunal Administrativo de Cundinamarca* and *Tribunal Superior de Bogotá*). Key words were searched (internet, online, websites, Facebook, computer crime, cyberlaw, and social networks) on the official databases with

86 Nelson Remolina, *Zuckerberg, redes sociales digitales y el concepto de la Superintendencia de Industria y Comercio sobre el ámbito de aplicación de la ley colombiana de protección de datos*, Observatorio Ciro Angarita Varón sobre Protección de Datos (2015). Available at: <http://habeasdatacolombia.uniandes.edu.co/?p=1718>

87 Act 1581 of 2012, October 17, 2012. Available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal1.jsp?i=49981>

88 Gonzalo Andrés Moreno, *Jurisdicción aplicable en materia de datos personales en los contratos de Cloud Computing: análisis bajo la legislación colombiana*, 9 *Revista de Derecho, Comunicaciones y Nuevas Tecnologías*, 2-28 (2013). Available at: <http://habeasdatacolombia.uniandes.edu.co/wp-content/uploads/Jurisdiccion-y-cloud-Gonzalo-Moreno-2013.pdf>

historical records until 2013. In this process 65 related judgments were found, but some of them were repeated or irrelevant (a majority were linked to the legal probative value of electronic files or e-mails), so it applied false positive filters (reading the abstracts and key words inside). At the end, only 17 sentences or judgments were selected during the period analyzed (2003-2013).

1. *Corte Constitucional*: 10 related cases, 3 about constitutional control and 7 about fundamental rights protection, mostly concerning cases related to defamation, freedom of speech, violation of privacy, equality, and due process. No cases on internet jurisdiction disputes were found.⁸⁹

2. *Corte Suprema de Justicia* —CSJ—: no related cases were found in its database; an office reporter of the civil service said that he did not know of or had heard of internet cases and recommended that a search be conducted in the District Attorney's office. However CSJ has two decisions (orders called “autos”) resolving conflicts of jurisdiction among districts. These were found in the Tribunal Superior de Bogotá database.⁹⁰

89 Corte Constitucional, Sentence C-1147-01, 31 de octubre de 2001, magistrado ponente Manuel José Cepeda-Espinosa. Available at: <http://www.corteconstitucional.gov.co/relatoria/2001/C-1147-01.htm>. Sentence C-981-05, 26 de septiembre de 2005, magistrada ponente Clara Inés Vargas-Hernández. Available at: <http://www.corteconstitucional.gov.co/relatoria/2005/c-981-05.htm>. Sentence C-1153-05, 11 de noviembre de 2005, magistrado ponente Marco Gerardo Monroy-Cabra. Available at: <http://www.corteconstitucional.gov.co/relatoria/2005/c-1153-05.htm>. Sentence T-013-08, 17 de enero de 2008, magistrado ponente Marco Gerardo Monroy-Cabra. Available at: <http://www.corteconstitucional.gov.co/relatoria/2008/t-013-08.htm>. Sentence T-208-08, 28 de febrero de 2008, magistrada ponente Clara Inés Vargas-Hernández. Available at: <http://www.corteconstitucional.gov.co/relatoria/2008/t-208-08.htm>. Sentence T-713-10, 8 de septiembre de 2010, magistrada ponente María Victoria Calle-Correa. Available at: <http://www.corteconstitucional.gov.co/relatoria/2010/t-713-10.htm>. Sentence T-058-12, 9 de febrero de 2012, magistrado ponente Humberto Antonio Sierra-Porto. Available at: <http://www.corteconstitucional.gov.co/relatoria/2012/t-058-12.htm>. Sentence T-260-12, 29 de marzo de 2012, magistrado ponente Humberto Antonio Sierra-Porto. Available at: <http://www.corteconstitucional.gov.co/relatoria/2012/t-260-12.htm>. Sentence T-550-12, 13 de julio de 2012, magistrado ponente Nilson Pinilla-Pinilla. Available at: <http://www.corteconstitucional.gov.co/relatoria/2012/t-550-12.htm>. Sentence T-643-13, 16 de septiembre de 2013, magistrado ponente Nilson Pinilla-Pinilla. Available at: <http://www.corteconstitucional.gov.co/relatoria/2013/t-643-13.htm>

90 Corte Suprema de Justicia, Sala de Casación Penal, *Jerónimo A. Uribe* case, Auto rad. 33.474/2010, 10 de febrero de 2010, magistrada ponente María del Rosario González de Lemos. Available at: [http://www.usergioarboleda.edu.co/derecho_penal/jurisprudencia_2010/jurisprudencia_primer_trimestre_2010/33474\(10-02-10\).doc](http://www.usergioarboleda.edu.co/derecho_penal/jurisprudencia_2010/jurisprudencia_primer_trimestre_2010/33474(10-02-10).doc). Corte Suprema de Justicia, Sala de Casación Penal, *Centro Comercial Campanario* case, Auto rad. 34.564/2010, 25 de agosto de 2010, magistrado ponente José Leonidas Bustos-Martínez.

3. *Consejo de Estado*: 4 related cases, no cases or disputes on internet jurisdiction were found in its databases.⁹¹

4. *Tribunal Administrativo de Cundinamarca*: No related cases were found. In opinion of a civil servant, the majority of internet lawsuits are between individuals and not between the administration and individuals, so there are not cases in administrative law.

5. *Tribunal Superior de Bogotá*: 3 items relating to 2 disputes on internet jurisdiction cases.⁹² Both cases concern criminal law; the *Corte Suprema de Justicia* resolved a jurisdictional conflict between circuit courts from different districts.

In the *Jerónimo A. Uribe* case in 2010, a son of the then president of the Republic, Álvaro Uribe-Vélez, filed a complaint because on Facebook a group appeared called *Me comprometo a matar a Jerónimo Alberto Uribe, hijo de Álvaro Uribe* (*I promise to kill Jerónimo Alberto Uribe, son of Álvaro Uribe*), this is considered instigation to commit a crime in Colombia. Police located and caught a person who allegedly created the group. This was in Chía (a town just outside of Bogotá). The complaint was laid by the prosecutor in a court in Bogota. The defense questioned the jurisdiction of the court in Bogota and argued that "... such conduct was committed in cyberspace, but originated in the town of Chía, the court who should assert jurisdiction is a court of the judicial district of Cundinamarca" (where Chía is located). But CSJ stated that Facebook has "...global and transnational coverage, that does not allow it to specify that it occurred in the town of Chía."⁹³ Therefore, the Court held that territorial criteria

Available at: [http://www.usergioarboleda.edu.co/derecho_penal/jurisprudencia_2010/jurisprudencia_tercer_trimestre_2010/34564\(25-08-10\).doc](http://www.usergioarboleda.edu.co/derecho_penal/jurisprudencia_2010/jurisprudencia_tercer_trimestre_2010/34564(25-08-10).doc)

91 Consejo de Estado, Sección Quinta, Judgment 9 de octubre (2003), 25000-23-25-000-2003-1144-01 (ACU), consejero ponente Darío Quiñonez Pinilla. Consejo de Estado, Sección Primera, Auto 6427 (2006), 26 de noviembre de 2006, consejero ponente Camilo Arciniegas-Andrade. Available at: <http://190.24.134.114:8080/WebRelatoria/ce/index.xhtml>. Consejo de Estado, Sección Primera, 2005-01666 AP (2010), 5 de agosto de 2010. Available at: <http://190.24.134.114:8080/WebRelatoria/ce/index.xhtml>. Consejo de Estado, Sección Segunda, Auto 48-10 (2012), 26 de enero de 2012, consejero ponente Víctor Hernando Alvarado-Ardila. Available at: <http://190.24.134.114:8080/WebRelatoria/ce/index.xhtml>

92 Tribunal Superior de Bogotá, Sala Penal, Rad. 11001-6000097-2009-00090-02 of 2010. Tribunal Superior de Bogotá, Sala Penal, Rad. 11001-6000-097-2009-00090-04 of 2012.

93 Corte Suprema de Justicia, Sala de Casación Penal, *Jerónimo A. Uribe* case, Auto rad. 33.474/2010, 10 de febrero de 2010, magistrada ponente María del Rosario González de

is not useful for the case and in these cases it followed the Code of Criminal Procedure⁹⁴ and that the jurisdiction is established by the court where the charge is laid by the prosecutor and this was in Bogota, thus the court in Bogota has jurisdiction. The final decision was to declare the defendant innocent for lack of evidence showing that he had created the group on Facebook.

This case focuses on determining jurisdiction according to the place where the illegal acts occur and, as such, cyberlaw disputes can create doubts about the place where a crime is committed. The Court applied the specific offline rule from the procedural code as an exception to the territorial principle of *actor sequitur forum rei*. No new online rules were applied.

In *Centro Comercial Campanario* case in 2010, five persons entered into an illegal banking transaction in the city of Barranquilla to steal money from Campanario's bank account in the city of Popayán. The crime was "Theft by computer and similar media." The charge was laid in a Court of Barranquilla where the unlawful acts took place, but this court sent the process to the District Court of Popayán where the victim had his domicile. This court in turn, transferred the case to CSJ to determine jurisdiction. The CSJ held that "...the *prejudice to the juridical good* of the individual's economic assets, certainly occurred in the city of Popayan, since it was here that the object of plundering, money hijacking, took place, no matter where the maneuver originated by which the money was transferred and what its final destination was" (italics outside the original).⁹⁵ Then, in order to establish jurisdiction in cybercrime, the place

Lemos. Available at: [http://www.usergioarboleda.edu.co/derecho_penal/jurisprudencia_2010/jurisprudencia_primer_trimestre_2010/33474\(10-02-10\).doc](http://www.usergioarboleda.edu.co/derecho_penal/jurisprudencia_2010/jurisprudencia_primer_trimestre_2010/33474(10-02-10).doc)

94 "Jurisdiction: It is competent to take cognizance of the judgment of the local judge where the crime was committed. When it is not possible to determine the place of occurrence of the fact, or one that has been carried out in several places, or uncertain where or abroad, the jurisdiction of the court is fixed by the place where the charges are brought by the attorney General's office of the District of the Nation, where the fundamental elements of the charge are located." Act 906 of 2004, August 31, 2004, Art. 43. Available at: http://www.secretariassenado.gov.co/senado/basedoc/ley_0906_2004.html

95 Corte Suprema de Justicia, Sala de Casación Penal, *Centro Comercial Campanario* case, Auto rad. 34.564/2010, 25 de agosto de 2010, magistrado ponente José Leonidas Bustos-Martínez. Available at: [http://www.usergioarboleda.edu.co/derecho_penal/jurisprudencia_2010/jurisprudencia_tercer_trimestre_2010/34564\(25-08-10\).doc](http://www.usergioarboleda.edu.co/derecho_penal/jurisprudencia_2010/jurisprudencia_tercer_trimestre_2010/34564(25-08-10).doc)

of injury seems to be most relevant rather than place where the criminal facts took place.

The focus of this case was where the damage or injury took place, not where the unlawful behaviors were put into operation (see the German discussion).⁹⁶ It can be a useful rule that applies the *effect principle* to determine jurisdiction in tort or injury that originates on the internet, because here it is easier to establish the place of injury than where the facts took place. No new online rules were applied.

96 *Locus delicti* has a broad meaning that includes the place where the behavior, tort, offense, or injury has been committed.

CONCLUSIONS

Differences between common and civil law systems seem to be disappearing when new rules are established to determine jurisdiction on the internet because new online rules are necessarily controversial, casuistry, and developed by the courts. On the other hand, it seems that the common or civil law systems are relevant to determine whether they apply new or traditional rules: i) the alternative use of both new and old rules is observed in resolving cases by the courts, especially in the US (common law); ii) international cases suggest that courts have applied traditional rules rather than special rules; iii) the German, Dutch, and Colombian cases reflect that the civil law system has a strong link with the offline rules, although we can find some online rules. The following points summarize the conclusions:

- US studies and cases show that the courts apply both new online rules (*Zippo*, *Calder* test) and traditional offline rules (long-arm, minimum contacts, purposely avails).
- International cases suggest that courts have applied traditional rules (due process, long-arm statutes, procedural codes) rather than special rules like the *Zippo* test, *Calder* tests, *mere accessibility* among others. This is parallel for both the common law traditions (US, Australia, UK) and civil law traditions (France).
- In Germany, despite its strong tradition of applying traditional rules offline the courts have been developing new rules to determine jurisdiction online, as well as “*intentional accessibility*” or “*objective domestic connection*”.
- Dutch cases show an important use of offline rules to determine internet jurisdiction, these rules come from European regulations and/or national regulations. The only case that uses online rules was guided by the “Effects test” with targeting arguments.
- It is true that in *Rovira* case, the judge applied an online rule with its “*virtual domicile*” test, but the two Colombian cases from the *Corte Suprema de Justicia* show that it is applying

a set of offline criteria according to the Code of Criminal Procedure. The importance here is the way that the code can be interpreted in internet disputes. Where was the crime committed? It has two possibilities: 1) The place where the illegal acts took place, 2) and the place of injury. Since the place of unlawful acts is extremely difficult to determine by virtue of the cross-border nature of cyberspace, the jurisdiction may be established by the place where the charge is laid by the prosecutor considering that the necessary evidence is found there (it seems go back to the *actor sequitur forum rei* principle). On the other hand, the place of injury is related to the place where violation of legal rights or interests took place or were affected, although this is sometimes not easy to establish, especially in defamation or tort cases via internet. This approach can be very useful for determining jurisdiction in controversies arising from the internet when the first criterion is not clear or is irrelevant.

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