2020

Targeting Factors and Conflict of Laws on the Internet

Marketa Trimble
University of Nevada, Las Vegas -- William S. Boyd School of Law

TARGETING FACTORS AND CONFLICT OF LAWS ON THE INTERNET

Marketa Trimble†

ABSTRACT

Courts have employed the concept of "targeting" to limit the reach of personal jurisdiction and applicable law on the Internet. To determine whether a defendant has targeted a particular country or state—and whether the defendant should be subject to the jurisdiction of and law in that country or state—courts consider various factors, such as the language, the top-level domain, and the currency used by the defendant on the Internet. However, developments in Internet technology and increasing Internet actor and user sophistication put the significance of the factors into question. In the absence of a defendant's express limitation on the territorial reach of its actions, such as through geoblocking or disclaimers accompanied by defendant conduct that is consistent with any disclaimers, courts should assume that the defendant has targeted all countries connected to the Internet. This approach may result in courts finding personal jurisdiction over a defendant more frequently, thus raising legitimate concerns about possible "overexposure" of Internet actors to personal jurisdiction and applicable law. However, any overexposure that might result from this approach will be mitigated by a number of procedural and practical constraints and, to the extent that overexposure might exist, additional solutions should be created from the already existing solutions that address complexities in the national legal systems.

† Samuel S. Lionel Professor of Intellectual Property Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author thanks for their comments Professor Thomas Main, Professor Ralf Michaels, and Professor Jean Sternlight. The author thanks for their research support Professor Jeanne Price, Associate Professor Youngwoo Ban, and Christal Folashade (J.D. '22). The author is grateful for the research support that was provided by the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany. The author is indebted to Gary A. Trimble for his invaluable editing suggestions.

INTRODUCTION

Specific jurisdiction[1] presents some of the most unsettled questions of conflict of laws;[2] the questions were sufficiently complex before the advent of the Internet,[3] but the Internet, with its borderlessness[4] and ubiquitousness, has contributed an additional

1. Specific jurisdiction is a court's personal jurisdiction over a non-resident defendant that is based on the defendant's acts and/or the effects of the defendant's acts in the forum. The dispute must "arise out of or [be] connected with the activities within the [forum] state." Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). *See also* Daimler AG v. Bauman, 571 U.S. 117, 117–19 (2014) (explaining the difference between general jurisdiction and specific jurisdiction).

2. *See, e.g.*, Ronald A. Brand, *Comparative Method and International Litigation*, 2020 J. DISP. RESOL. 273, 286 (Spring 2020) ("When it is specific jurisdiction, not general jurisdiction, that is involved, recent Supreme Court jurisprudence is not so clear.").

3. This article uses the term "Internet" in a general sense and does not use the term in a narrow technical sense as a reference to any particular protocol.

4. As this article later discusses, the borderlessness of the Internet might be an antiquated concept, given the technological advancements that now permit a territorial partitioning of the Internet. *See infra* Part II, Section C.

layer of complexity to the questions.[5] Even twenty-five years after the Internet became a multi-use and mass medium, law in the United States is unclear as to the rules of specific jurisdiction on the Internet. The U.S. Supreme Court has not yet ruled on the difficult personal jurisdiction questions generated by the Internet environment.[6] In May 2020, the Court denied certiorari in another case that arguably would have given the Court an opportunity to clarify the application of the rules of personal jurisdiction on the Internet.[7]

The development of the application of conflict-of-laws rules in Internet-related cases has been affected by concerns about acts on the borderless and ubiquitous Internet that have caused courts to assert personal jurisdiction expansively—solely on the basis of the accessibility of online content from the territory of the court. To limit such an expansive reach of personal jurisdiction on the Internet and prevent the "overexposure" that this approach to personal jurisdiction and choice of law would create for parties acting on the Internet ("Internet actors"), courts in the United States and some other countries have employed the concept of "targeting" in order to territorially limit the exposure of Internet actors to personal jurisdiction and/or applicable law.[8]

Two justifications seem to motivate courts in their utilization of targeting. First, in some cases, Internet actors actually intend to target users in only one or a small number of countries, but, (as the justification goes), the Internet does not provide the necessary technological means to enable actors to limit effectively the territorial

---

5. Although the effects of the Internet have been likened to the effects of the earlier media and their means of communication, the Internet is clearly a separate category of media. *See also, e.g.*, Frederike Zufall, *Shifting Role of the "Place": From* Locus Delicti *to Online Ubiquity in EU, Japanese and U.S. Conflict of Tort Laws*, 83 RABELSZ 760, 781 (2019).

6. *Cf.* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2084 (2018) (serving as an example of a decision in which the U.S. Supreme Court ruled on regulatory jurisdiction on the Internet in the context of a state's imposition of sales tax).

7. Facebook, Inc. v. K.G.S., 294 So. 3d 122, 126 (Ala. 2019), *cert. denied*, 140 S. Ct. 2739 (2020). The oral argument in *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, which the Court heard on October 7, 2020, mentioned internet sales, but it remains to be seen whether and to what extent the Court will clarify the rules of personal jurisdiction on the Internet in its decision in the *Ford Motor* case. Ford Motor Co. v. Montana Eighth Judicial Dist. Court, 395 Mont. 478 (2019), *cert. granted* 140 S. Ct. 917 (Mem).

8. In some countries, courts and agencies have also used targeting in the choice-of-law context to limit the scope and number of applicable laws.

reach of their acts.[9] Under these circumstances, it would be unreasonable and unfair to subject Internet actors to the jurisdiction of the courts of all countries that are connected to the Internet simply because Internet technology offers no effective tool to effectuate a territorial restriction of the actors' acts.[10]

The second justification for limiting the exposure of Internet actors to jurisdiction is that, even if actors do not intend to limit the territorial reach of their acts, it seems unreasonable and unfair to demand that actors be subject to jurisdiction in the courts of all countries connected to the Internet. The vast majority of Internet actors are unable to institute and/or maintain global legal compliance[11] because of the high costs of doing so and a myriad of obstacles, including difficult access to information about laws, different languages, and difficult-to-access local legal expertise. Being forced to litigate in unexpected venues and having to comply with a multitude of national laws are costly propositions that would make the Internet an unworkable environment for most Internet actors. Additionally, global compliance is objectively impossible in cases where contradictions in countries' laws prevent actors from complying with all national laws simultaneously.

The justifications continue to resonate with judges and commentators.[12] In the United States, judicial limitations on the scope of personal jurisdiction based on activities on the Internet have aligned with the U.S. Supreme Court's recent territorially-restrictive approach to interpreting the rules of personal jurisdiction.[13] Nevertheless, in the

---

9. *See infra* Part II, Section C for a discussion of the existing technological means that enable actors to territorially limit the effects of their acts on the Internet.

10. *See infra* Part I, Section A for a discussion of the outdated nature of this assumption.

11. In this sense, scope is "global" to the extent that the reach of the Internet may be considered global—even if pockets still exist in the world where segments of a population have no access to the Internet or have extremely limited access to the Internet.

12. For courts' comments on the borderlessness of the Internet *see, e.g.*, Fox Television Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1011 (9th Cir. 2017) ("[A]n Internet-based service has no geographic boundary . . . ."); Google, Inc. v. Equustek Sols., Inc., [2017] 1 SCR 824, 827 (Can.) ("The Internet has no borders—its natural habitat is global."); Judgment of 17 October 2017, Bolagsupplysningen OÜ v. Svensk Handel AB, C-194/16, EU:C:2017:766, paragraph 48 ("[I]n the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal. . . .").

13. *E.g.*, J. McIntyre Mach. v. Nicastro, 564 U.S. 873, 886 (2011); Daimler AG v. Bauman, 571 U.S. 117, 138–39 (2014); Walden v. Fiore, 571 U.S. 277, 279

context of the Internet, the validity of the justifications that relate to limitations regarding potential overexposure is becoming questionable after a quarter-century of Internet evolution.

The means for a territorial delineation of the Internet were initially imperfect and costly. However, the Internet has matured and is now, for better or for worse, far from borderless. The availability of constantly improving geolocation and geoblocking technologies undermines arguments regarding inabilities to restrict territorially one's acts on the Internet.[14] Also, the sophistication of Internet actors with respect to the medium has increased, as has actor awareness and expectations of the territorial reach of their Internet activities. Although the number and complexity of legal orders regulating conduct on the Internet has not decreased in the past twenty-five years, the argument that Internet technology is inadequate to territorially limit acts on the Internet has weakened considerably over time.

Advancements in Internet technology and increasing Internet actor and user sophistication put into question a number of the factors that courts consider when they analyze the targeting of a defendant's activity on the Internet. This article critically assesses the factors and argues that the state of the technology, combined with Internet actor and user sophistication, requires a re-evaluation of the approach to the factors, and the article suggests a new approach to the assessment of the factors. The article admits that in some cases the new approach could result in more courts finding specific jurisdiction in a particular case[15]; therefore, the new approach could raise legitimate concerns about Internet actors' overexposure to jurisdiction and applicable law. In response, this article argues that (1) existing legal and practical constraints would minimize any actual instances of overexposure, and (2) protection against any overexposure should rely on tools other than the limitations of the territorial reach of personal jurisdiction.

(2014). For a comparison of the approaches to personal jurisdiction in the United States and other countries prior to 2002 *see* Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 322–24 (2002) (observing that "in many respects U.S. assertions of judicial jurisdiction are actually narrower than those in many civil law countries and even other common law countries.").

14. For a discussion of geolocation and geoblocking *see infra* Part II, Section C. *Cf.* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2103 (2018) (pointing to the burden of "calculating and remitting sales taxes on all e-commerce sales," though it is unclear how much of the burden the four dissenting justices attributed to the difficulty of localizing the sales and/or the purchasers).

15. For examples of the types of cases in which multiple courts of specific jurisdiction might exist *see* Zufall, *supra* note 5, 773, 781, 786, and 790.

Part I of this article reviews the evolution of courts' approaches that have attempted to limit the overexposure of Internet actors, including the *Zippo* sliding scale test and targeting analyses. Part II analyzes the effects that technological and other developments on the Internet have had on some of the main factors that courts have used in targeting analyses. After concluding that a re-evaluated approach to the factors may lead to findings of specific jurisdiction in a greater number of cases, Part III discusses the legal and practical constraints on litigation that would mitigate the resulting overexposure of Internet actors and proposes means other than limitations on the territorial scope of personal jurisdiction to address the overexposure.

Problems of specific jurisdiction on the Internet have attracted the attention of certain authors who have critically evaluated U.S. law on specific jurisdiction and have proposed changes to the law and/or to the targeting analysis.[16] As opposed to the works of these authors, which have focused on U.S. law, this article approaches targeting from a comparative perspective. A comparative lens is useful because targeting has been used to achieve identical goals in different legal systems. This article therefore gives examples from various jurisdictions to illustrate the uses of targeting, though it does not attempt to provide a detailed or comprehensive list of all instances of the uses of targeting in all jurisdictions.[17]

---

16. *See, e.g.*, Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs,"* 100 CORNELL L. REV. 1129, 1167–74 (2015) (proposing a narrowing of the scope of personal jurisdiction on the Internet); Adam R. Kleven, *Minimum Virtual Contacts: A Framework for Specific Jurisdiction in Cyberspace*, 116 MICH. L. REV. 785, 800 (2018) (proposing a broadening of the scope of personal jurisdiction). For critical discussions of Walden v. Fiore, 571 U.S. 277 (2014), *see, e.g.*, Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385 (2015); Julie Cromer Young, *The Online-Contacts Gamble after* Walden v. Fiore, 19 LEWIS & CLARK L. REV. 753 (2015).

17. The article draws lessons from the commonalities and differences that are pertinent to the present discussion, and it proceeds with a certain degree of abstraction and remoteness from the laws of any single country. As a result, the article provides no detailed analysis of a number of issues in national laws that would deserve their own treatments. For example, for comprehensive works on conflict-of-laws issues in intellectual property law and conflict-of-laws issues in the Internet environment *see, e.g.*, JAMES J. FAWCETT & PAUL TORREMANS, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW (2d ed. 2011); INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW: COMPARATIVE PERSPECTIVES (Toshiyuki Kono ed. 2012); UTA KOHL, JURISDICTION AND THE INTERNET: A STUDY OF REGULATORY COMPETENCE OVER ONLINE ACTIVITY (2007); DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET (3d ed. 2016).

This article uses examples of cases involving infringements of intellectual property rights ("IP rights"), such as copyright, patent, and trademark rights. IP rights are among the rights that are particularly adversely affected by courts' limitations of the reach of personal jurisdiction on the Internet. Depriving courts of jurisdiction (and therefore sometimes also depriving countries of the applicability of their laws in cases of IP rights infringements) diminishes, and may even defeat, the enforceability of the rights.[18] Because of the significant impact on IP rights, cases involving these rights offer useful examples to illustrate the problems of analyses of targeting on the Internet.

I. LIMITATIONS ON THE TERRITORIAL SCOPE OF PERSONAL JURISDICTION AND APPLICABLE LAW ON THE INTERNET

The principles that underlie the rules of conflict of laws pre-date the Internet era, and the Internet, unsurprisingly, has created scenarios that have made the application of the rules challenging.[19] Instead of pursuing legislation that could have provided conflict-of-laws rules tailored to the specificities of the Internet,[20] Internet-specific versions of the rules have been left to judicial interpretation[21] and courts have applied the existing media-neutral rules to specific conditions in Internet-related cases.[22] Even the *Zippo* sliding scale

---

18. *E.g.*, Brief for Association of American Publishers as Amicus Curiae Supporting Plaintiff-Appellant, Lang Van, Inc. v. VNG Corp., No. 19-56452 (9th Cir. Dec. 13, 2019).

19. *See, e.g.*, Lucasfilm Ltd. v. Andrew Ainsworth [2009] EWCA (Civ) 1328 [193] (Jacob, L.J.) (appeal taken from Ch D) ("It is true that the internet and its uses take us into a new world, and that its existence as it were in the ether (but based on servers physically located in the real world) has in general presented novel difficulties to the law and to regulators.").

20. *See, e.g.*, Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 368 (2013) (proposing that specific rules be created for jurisdiction in the "cloud").

21. *See, e.g.*, Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace,* 6 ALB. L.J. SCI. & TECH. 339, 346 (1996) ("Some commentators . . . believe a new body of jurisprudence is required to address" the question of personal jurisdiction and the Internet).

22. *E.g.*, Petition for a Writ of Certiorari at 3–4, Facebook, Inc. v. K.G.S., 294 So. 3d 122, 126 (Ala. 2019), *cert. denied*, 140 S. Ct. 2739 (2020) (No. 19-910) (suggesting that the U.S. Supreme Court's "pre-internet precedents involving specific jurisdiction over the intentional dissemination of harmful material should . . . have controlled").

test,[23] which is discussed later, might have appeared to be an attempt to change existing rules through judicial interpretation, but became merely an aid in the application of the existing rules.[24]

To eliminate, or at least minimize, the overexposure of Internet actors to the multiplicity of possible fora,[25] courts have employed the concept of targeting: only the jurisdictions that a defendant targeted with his acts would have personal jurisdiction over the defendant. In some countries, courts have employed targeting to limit the scope of applicable law, ensuring that only the laws of the countries that the defendant targeted would apply to the defendant's acts and their effects.[26]

Courts have, depending on the circumstances, considered various factors to determine whether an Internet actor targeted a particular jurisdiction. These factors have included the language of the website, the country-code top-level domain, the payment currency, delivery options, country-specific and language-specific versions of the website, lists of local distributors,[27] and the forum selected for dispute resolution with Internet users.[28] The results of targeting

---

23. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Penn. 1997).

24. *See, e.g.*, Best Van Lines, Inc. v. Walker, 490 F.3d 239, 252 (2d Cir. 2007) (noting that while the *Zippo* test might help the inquiry, traditional principles still apply).

25. *See, e.g.*, ALS Scan, Inc. v. Dig. Serv. Consultants, Inc., 293 F.3d 707, 713 (4th Cir. 2002) ("In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet."); *See also* Opinion of Advocate General Szpunar on 28 March 2019, AMS Neve Ltd. v. Heritage Audio SL, C-172/18, EU:C:2019:276, paragraph 70 ("If the fact that a website is accessible from the territory of a Member State is regarded as sufficient to confer jurisdiction on the courts of that Member State, this would lead to a considerable increase in the number of fora with jurisdiction as regards infringement of EU trade marks.").

26. *See infra* notes 79–81 and accompanying text.

27. *E.g.*, Sohlen für Sportshuhe, Landgericht Düsseldorf [LG] [Regional Court of Düsseldorf], 4a O 33/01, Feb. 5, 2002, para. 54.

28. *See, e.g.*, Judgment of 7 December 2010, Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG, joined cases C-585/08 and C-144/09, EU:C:2010:740, paragraph 93 (a non-IP case); Judgment of 18 October 2012, Football Dataco Ltd. v. Sportradar GmbH, C-173/11, EU:C:2012:642, paragraph 42; Omnibill (Pty) Ltd. v. Egpsxxx Ltd. (in liquidation) [2014] EWHC 3762 (IPEC) para. 34, 36; Warner Music UK Ltd. v. TuneIn Inc. [2019] EWHC 2923 (Ch) para. 17–18; *see also* CJEU Advocate General Szpunar's proposed factors for a targeting analysis in Opinion of

analyses have had the greatest effect on limiting the scope of jurisdiction and applicable law in cases where Internet actors acted solely on the Internet, but courts have also considered targeting on the Internet in cases where a defendant's conduct had both online and offline elements.

A. Targeting in U.S. Courts

Targeting is a key concept that U.S. courts have used to limit the territorial scope of personal jurisdiction. The U.S. Supreme Court referred to "targeting" in the context of specific jurisdiction in *Nicastro*,[29] and lower courts have employed targeting even if they have not always used the term "targeting" in their opinions. Even the well-known *Zippo* sliding scale test, formulated in the seminal 1997 *Zippo* decision,[30] was a de facto targeting test, though the decision did not use the term.

The *Zippo* sliding scale test was created in response to attempts to limit the territorial scope of personal jurisdiction on the Internet. The complaint in *Zippo* was filed in 1996—in the early days of the Internet—and concerned the use of a trademark in internet domain names.[31] In its decision, the U.S. District Court for the Western District of Pennsylvania addressed questions of personal jurisdiction of the court over a California defendant. The court reviewed the limited sources that existed on the topic at the time and concluded that, in general, "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[32] The court devised a sliding scale for categorizing Internet activities that began at activities actually resulting in contacts with the

---

Advocate General Szpunar on 28 March 2019, AMS Neve Ltd. v. Heritage Audio SL, C-172/18, EU:C:2019:276, paragraph 89–92). For the proposed targeting factors see *Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet*, WORLD INTELL. PROP. ORG. 8 (WIPO, 2001), Article 3, available at https://www.wipo.int/edocs/pubdocs/en/marks/845/pub845.pdf (last visited Feb. 19, 2020).

29. J. McIntyre Mach. v. Nicastro, 564 U.S. 873, 905 (2011).

30. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Penn. 1997).

31. *Id.* at 1119; *Zippo* predated the Anti-Cybersquatting Consumer Protection Act, which was enacted in 1999. *See* 15 U.S.C. § 1125(d) (2018).

32. *Zippo*, 952 F. Supp. at 1124.

particular jurisdiction, continued through a highly interactive Internet presence, and ended at a purely passive Internet presence.[33]

Actual contacts, at the one end of the *Zippo* sliding scale test, resulted in personal jurisdiction over the actor, but interactive websites, which fell in the middle of the scale, required an examination of "the level of interactivity and commercial nature of the exchange of information that occurr[ed] on the Web site."[34] Under the test, websites that were purely passive did not establish personal jurisdiction; the fact that they were merely accessible in the forum was insufficient to support a finding of personal jurisdiction in the forum's courts.

Although the *Zippo* sliding scale test gained significant popularity, not all U.S. courts adopted the test without reservations.[35] Some U.S. courts rejected both the test itself and the relevance of interactivity to the jurisdictional inquiry, while other courts rejected the test but considered interactivity relevant to the inquiry.[36] In the end, the test did not displace existing rules and, as noted in a decision by the U.S. Court of Appeals for the Tenth Circuit, even courts that have adopted *Zippo* "tend to employ [the sliding scale test] more as a heuristic adjunct to, rather than a substitute for, traditional jurisdictional analysis."[37]

Regardless of how different courts eventually viewed *Zippo*, in the end they consistently rejected the notion that mere accessibility—the existence of a purely passive website—could, by itself, be grounds for jurisdiction in the place where users could access

---

33. *Id.*

34. *Id.*

35. For an overview of the manner in which courts have treated *Zippo see* Trammell & Bambauer, *supra* note 16, at 1150. For a critique of *Zippo see id.* at 1147–49. On *Zippo*'s unsuitability in cases involving activities other than postings on websites *see* Andrews & Newman, *supra* note 20, 360–62.

36. *E.g.*, Hy Cite Corp. v. Badbusinessbureau.com, LLC, 297 F. Supp. 2d 1154, 1159–61 (W.D. Wis. 2004); Best Van Lines, Inc. v. Walker, 490 F.3d 239, 252 (2d Cir. 2007).

37. Shrader v. Biddinger, 633 F.3d 1235, 1242 n.5 (10th Cir. 2011). In 2017 the U.S. Supreme Court discussed the use of a different "sliding scale approach," but the Court's comment in the decision concerning the different "sliding scale" applies equally to the *Zippo* sliding scale: "[A] defendant's general connections with the forum are not enough" because specific jurisdiction cannot arise from activity unrelated to the underlying claim. Bristol–Myers Squibb Co. v. Sup. Ct. of Cal., 137 S. Ct. 1773, 1781 (2017); *see also* Bandemer v. Ford Motor Co., 931 N.W.2d 744, 754 (Minn. 2019), *cert. granted*, 140 S. Ct. 916 (2020) (discussing the sliding scale test).

a website.[38] Courts would find jurisdiction if the maintenance of a passive website was accompanied by further acts of the defendant that were directed at the forum. This was the result, for example, in the pre-*Zippo* decision *Heroes, Inc. v. Heroes Found.*,[39] a trademark infringement case in which the court found jurisdiction based on the combination of a passive website (with a toll-free number available in the forum) and the defendant's solicitation in the local newspaper.[40] In *Gary Scott Int'l, Inc. v. Baroudi*,[41] the website alone was insufficient for personal jurisdiction, but the website combined with sales of infringing products in the forum did suffice for a finding of personal jurisdiction.[42]

In early pre-*Zippo* cases, some courts did hold that the accessibility of passive websites would support a finding of personal jurisdiction. For example, in *Maritz, Inc. v. Cybergold, Inc.*[43] the court based its jurisdiction on the accessibility of a passive website and noted that "[a]lthough [the defendant] characterize[d] its activity as merely maintaining a 'passive website,' its intent [was] to reach all internet users, regardless of geographic location."[44] The court added that "[t]hrough its website, [the defendant] has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally."[45] The court in *Inset Sys., Inc. v. Instruction Set, Inc.*[46] also accepted a passive website presence as a ground of personal jurisdiction; in this case, however, the court considered it significant that the defendant also listed a toll-free number on the website that was available to users from all U.S. states, including to users from the forum.[47]

---

38. *E.g.*, Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 297 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997); GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1349–50 (D.C. Cir. 2000); Roblor Mktg. Grp, v. GPS Indus., Inc., 645 F. Supp. 2d 1130, 1142 (S.D. Fla. 2009); Pablo Star Ltd. v. Welsh Gov't, 170 F. Supp. 3d 597, 607 (S.D.N.Y. 2016); A Corp. v. All Am. Plumbing, Inc., 812 F.3d 54, 61 (1st Cir. 2016).

39. 958 F. Supp. 11, 51 (D.D.C. 1996).

40. *Id.*

41. 981 F. Supp. 714, 718 (D. Mass. 1997).

42. *Id. See, e.g.*, EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413, 413 (D. Ariz. 1996).

43. 947 F. Supp. 1328, 1333 (E.D. Mo. 1996).

44. *Id.* In *Maritz*, the court was aware that the website was accessed 131 times by the residents of the forum.

45. *Id.*

46. 937 F. Supp. 161, 165 (D. Conn. 1996).

47. *Id. See also infra* Part II, Section E (describing phone numbers as factors in the targeting analyses).

Other courts in the early days of Internet-related cases disagreed with these views regarding passive websites. For example, the court in *Hearst Corp. v. Goldberger*[48] refused to follow *Maritz* and *Inset Sys.*, noting that the *Maritz* and *Inset Sys.* approach "would, in effect, create national (or even worldwide) jurisdiction, so that every plaintiff could sue in plaintiff's home court every out-of-state defendant who established an Internet web site."[49] Similarly, the court in *Barrett v. Catacombs Press*[50] warned (in the context of an intra-U.S. jurisdictional contest) that "following the rationale of *Inset Sys.* would subject anyone who posted information on the Web to nationwide jurisdiction."[51]

Because courts have refused to consider passive websites as *acts* of the defendants in places where the websites are accessible, plaintiffs have sought to have courts extend specific jurisdiction to these places based on the *effects* that the websites have where the websites can be accessed. In these cases, in which plaintiffs have argued jurisdiction under the *Calder* effects test,[52] targeting has also been crucial. For example, in *Cybersell, Inc. v. Cybersell, Inc.*,[53] the U.S. Court of Appeals for the Ninth Circuit rejected the application of the effects test in a trademark infringement case because the court found that the website at issue was not only "essentially passive," but also "simply [. . .] not aimed intentionally at Arizona knowing that harm was likely to be caused there to [the plaintiff]."[54] In *Carefirst of Md. Inc. v. Carefirst Pregnancy Ctrs., Inc.*,[55] the U.S. Court of Appeals for the Fourth Circuit recognized the forum state's "strong interest in adjudicating disputes involving the alleged infringement of trademarks owned by resident corporations" but maintained that the defendant lacked a "manifest intent"[56] to direct its acts at the forum and "could not, [on the basis of its website,] have 'reasonably anticipate[d] being haled into [the forum] court.'"[57] In copyright infringement cases, the Ninth Circuit Court held that the "individualized targeting" required by *Calder* was established if the

48. 96 CIV. 3620 PKL AJP, 1997 WL 97097, at *20 (S.D.N.Y. Feb. 26, 1997).
49. *Id.*
50. 44 F. Supp. 2d 717, 727 (E.D. Pa. 1999).
51. *Id.*
52. Calder v. Jones, 465 U.S. 783, 783 (1984).
53. 130 F.3d 414 (9th Cir. 1997).
54. *Id.* at 420.
55. 334 F.3d 390 (4th Cir. 2003).
56. *Id.* at 401.
57. *Id.* (internal citation omitted).

defendant infringed copyright willfully while knowing of "both the existence of the copyright and the forum of the copyright holder."[58]

The U.S. Supreme Court's 2014 decision in *Walden v. Fiore*[59] significantly affected the use of the *Calder* effects test. The Court warned in the decision against courts "impermissibly allow[ing] a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis,"[60] and although the Court's comment did not concern Internet-related cases specifically, some courts have revised their approach in Internet-related cases based on *Walden*. For example, the U.S. Court of Appeals for the Ninth Circuit in a 2017 clarification of its application of the effects test stated that when applying the test courts should "look to the defendant's 'own contacts' with the forum, not to the defendant's knowledge of a plaintiff's connections to a forum."[61] The court explained that "individualized targeting" may still be "relevant to the minimum contacts inquiry" but it will "not, on its own, support the exercise of specific jurisdiction."[62]

Post-*Walden* decisions from district courts in the Ninth Circuit and elsewhere suggest that the *Calder* effects test might no longer be useful for establishing jurisdiction in the place of the IP rights owner if the test is based solely on a passive website or even on a semi-interactive website.[63] This post-*Walden* development is a significant limitation on the scope of personal jurisdiction of courts in the United States in cases involving acts on the Internet. Although there are signs of a post-*Walden* correction in Internet-related cases,[64] the U.S. Supreme Court might need to clarify the effects of *Walden* on Internet cases.

---

58. Washington Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 678–79 (9th Cir. 2012); *see also* Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1124 (9th Cir. 2010); Mavrix Photo, Inc. v. Brand Technologies, Inc., 647 F.3d 1218, 1229, 1231 (9th Cir. 2011).

59. *See* Walden v. Fiore, 571 U.S. 277, 288 (2014).

60. *Id.* at 289.

61. Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1070 (9th Cir. 2017).

62. *Id.* at 1069–70.

63. *E.g.*, Erickson v. Neb. Mach. Co., No. 15-CV-01147-JD, 2015 WL 4089849, at *4 (N.D. Cal. July 6, 2015); UMG Recordings, Inc. v. Kurbanov, 362 F. Supp. 3d 333, 335 (E.D. Va. 2019), *rev'd and remanded*, 963 F.3d 344 (4th Cir. 2020), petition for certiorari filed, No. 20-503, Oct. 12, 2020. *Cf.* Walden, 571 U.S. at 290, n.9 (noting that "whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State" is a "very different question").

64. *See* UMG Recordings, Inc. v. Kurbanov, 963 F.3d 344, 352–53 (4th Cir. 2020).

In addition to jurisdictional analyses, targeting also features in the context of the choice of applicable law. For instance, in *McBee v. Delica Co., Ltd.*,[65] the U.S. Court of Appeals for the First Circuit characterized the territorial scope of the U.S. trademark statute—the Lanham Act—as a matter of subject matter jurisdiction,[66] and in its decision the court warned against applying the Act in any case in which a website is accessible in the United States. The court cautioned that "allowing subject matter jurisdiction under the Lanham Act to automatically attach whenever a website is visible in the United States would eviscerate the territorial curbs on judicial authority that Congress is, quite sensibly, presumed to have imposed in [the] area [of trademark law]."[67] When deciding whether the Act reached the activity on the website, the court considered the language of the website, the manner in which the website was listed in search engine results, and the fact that there was no actual confusion by users when visiting the website.[68]

It remains to be seen whether targeting will continue to play a role in the determination of the reach of U.S. law even under the recently reformulated rule for the determination of the territorial scope of U.S. laws. Under *RJR Nabisco*,[69] the place of the "conduct relevant to [a] statute's focus" will determine whether cases involve a permissible extraterritorial application of the statute in situations where the reach of the statute is not considered to be extraterritorial.[70] If the conduct occurs in the United States, the statute applies.[71]

---

65. Ltd. 417 F.3d 107, 116 (1st Cir. 2005).

66. 28 U.S.C. § 1338(a) (2011) (referring to "any civil action arising under any *Act of Congress* relating to patents, plant variety protection, copyrights and trademarks") (emphasis added). However, such framing is misplaced because, as the U.S. Court of Appeals for the Federal Circuit pointed out, "the extraterritorial scope of a statute [is] an element of the claim, not a requirement of subject matter jurisdiction." Litecubes, LLC v. N. Light Prods., Inc., 523 F.3d 1353, 1364, 1367 (Fed. Cir. 2008) (for both patent and copyright infringements; referring to Lauritzen v. Larsem, 345 U.S. 571, 571 (1953)).

67. McBee v. Delica Co. Ltd., Ltd. 417 F.3d 107, 124 (1st Cir. 2005).

68. *Id.*

69. RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090 (2016).

70. *Id.* at 2101.

71. For an example of an application of the *RJR Nabisco* rule in a copyright infringement case *see* Spanski Enterprises, Inc. v. Telewizja Polska, S.A., 883 F.3d 904, 914 (D.C. Cir. 2018).

B. *Targeting in Courts Outside the United States*

Within the European Union, the mere accessibility of a website will support a finding of specific jurisdiction in tort cases brought under EU jurisdictional rules.[72] The targeting analysis may not be employed in tort cases, such as IP rights infringement cases, because the EU jurisdictional rule on torts does not include any requirement that acts be directed at the forum.[73] The situation is different in cases concerning consumer contracts,[74] in which the mere fact that a website is accessible does not suffice for a finding of specific jurisdiction, and targeting is required.[75]

---

72. National rules in individual EU member states that apply in cases involving non-EU-domiciled defendants may require that national courts employ targeting analyses. *See, e.g.*, Oberlandesgericht Düsseldorf, [OLG] [Higher Regional Court of Düsseldorf], 15 U 48/19, Sept. 12, 2019 (Ger.), para. 8 (noting that "[m]ere accessibility in Germany does not suffice") (translation by the author).

73. Brussels I Regulation (recast), Article 17(1)(c) v. Article 7(2); Judgment of 22 January 2015, Pez Hejduk v. EnergieAgentur.NRW GmbH, C-441/13, EU:C:2015:28, paragraph 33. For a criticism of this rule *see* Opinion of Advocate General Szpunar on 28 March 2019, AMS Neve Ltd. v. Heritage Audio SL, C-172/18, EU:C:2019:276, paragraph 70 (discussing how there would be a significant increase in courts with jurisdiction over EU trademark infringement cases if website accessibility within a State sufficed for jurisdiction). Perhaps this rule makes sense given the mutual trust among the judiciaries of the EU member states regarding their own judicial systems and given the limitations imposed by the rule for the choice of applicable law. In the choice-of-law context, the CJEU has upheld targeting as the proper analysis in cases involving infringements of IP rights under EU member-states' laws, including in cases in which courts assess the territorial scope of the application of EU member-states' laws. Judgment of 18 October 2012, Football Dataco Ltd. v. Sportradar GmbH, C-173/11, EU:C:2012:642, paragraph 39. For choice of applicable law in cases involving national IP rights, the mere accessibility of a website will not suffice. Judgment of 12 July 2011, L'Oréal SA v. eBay Int'l AG, C-324/09, EU:C:2011:474, paragraph 64; Judgment of 18 October 2012, Football Dataco Ltd. v. Sportradar GmbH, C-173/11, EU:C:2012:642, paragraph 36. *See also* Merck KGaA v. Merck Sharp & Dohme Corp. [2017] EWCA (Civ) [Court of Appeals (Civil)] 1834, para. 168 (Eng.); Argos Ltd. v. Argos Systems, Inc. [2018] EWCA (Civ) [Court of Appeals (Civil)] 2211, para. 48 .(Eng.). As a result, even when a court in the EU has specific jurisdiction based solely on the accessibility of a passive website, the court might not be able to decide on an infringement if the targeting analysis does not support the application of the law of the EU member state of the court.

74. Judgment of 7 December 2010, Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG, joined cases C-585/08 and C-144/09, EU:C:2010:740, paragraph 94 and the ruling (interpreting Article 15(1)(c) of the Brussels I Regulation).

75. *Id. See also* Judgment of 6 September 2012, Mühlleitner v. Yusufi and Yusufi, C-190/11, EU:C:2012:542.

The rule that website accessibility alone will suffice for a finding of personal jurisdiction in IP rights infringement cases applies only in cases where IP rights under the laws of individual EU member states are at issue. The Court of Justice of the European Union ("CJEU") has taken a different approach to the interpretation of the special jurisdictional rule for unitary EU trademarks.[76] CJEU Advocate General Szpunar warned in his opinion in AMS Neve, Ltd. v. Heritage Audio SL that if jurisdiction were to depend solely on accessibility, then disputes concerning infringements of unitary EU trademarks could be brought in the courts of all of the EU member states because the courts of all of the EU countries would have jurisdiction (though, in any given member state's court outside the court of general jurisdiction, only as to acts committed within the territory of the forum member state).[77] The CJEU eventually held in AMS Neve that the courts in an EU member state to which "advertising and . . . offers for sale are directed" (on a website) have jurisdiction with respect to infringements of the EU trademark in that member state's territory.[78]

In the choice-of-law context, the CJEU upheld targeting as the proper analysis in cases involving infringements of IP rights under EU member states' laws, including in cases in which courts assess the territorial scope of the application of EU member states' laws.[79] For an EU member-state's law to apply in cases involving national IP

76. Judgment of 5 September 2019, AMS Neve Ltd. v. Heritage Audio SL, C-172/18, EU:C:2019:674.

77. Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, Articles 125(5) and 126(2). The CJEU case concerned the earlier version of the regulation: Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, Articles 97(5) and 98(2). The court of the defendant's domicile has general jurisdiction. Council Regulation (EC) No 207/2009, Article 97(1).

78. Judgment of 5 September 2019, AMS Neve Ltd. v. Heritage Audio SL, C-172/18, EU:C:2019:674, paragraph 65. *See also* Opinion of Advocate General Szpunar on 28 March 2019, AMS Neve Ltd. v. Heritage Audio SL, C-172/18, EU:C:2019:276, paragraph 96. Cases involving infringements of EU trademarks by non-EU defendants may also be brought in the court of the claimant; that court has jurisdiction to grant remedies EU-wide. Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, Article 125(2).

79. Judgment of 18 October 2012, Football Dataco Ltd. v. Sportradar GmbH, C-173/11, EU:C:2012:642, paragraph 39.

rights, the mere accessibility of a website will not suffice. [80]As a result, even when a court in the EU has specific jurisdiction based solely on the accessibility of a passive website, the court might not have the power to decide on an infringement if the targeting analysis does not support the application of the law of the EU member state of the court.[81]

Examples of uses of targeting analyses exist in other countries as well. The Federal Court of Australia applied targeting in Ward Group Pty Ltd v. Brodie & Stone Plc.[82] and in International Hair Cosmetics Group Pty Ltd v. International Hair Cosmetics Limited;[83] the German Federal Supreme Court affirmed the use of targeting in Hotel Maritime,[84] Arzneimittelwerbung im Internet,[85] and Englischsprachige Pressemitteilung;[86] English courts applied targeting in 1967 in Limited v. British Sky Broadcasting Ltd.,[87] Omnibill (PTY) Ltd. v. Egpsxxx Ltd.,[88] and Warner Music UK Ltd. v.

---

80. Judgment of 12 July 2011, L'Oréal SA v. eBay Int'l AG, C-324/09, EU:C:2011:474, paragraph 64; Judgment of 18 October 2012, Football Dataco Ltd. v. Sportradar GmbH, C-173/11, EU:C:2012:642, paragraph 36. *See also* Merck KGaA v. Merck Sharp & Dohme Corp. [2017] EWCA (Civ) [Cout of Appeals (Civil)] 1834, para. 168 (Eng.); Argos Ltd. v. Argos Systems, Inc. [2018] EWCA (Civ) [Court of Appeals (Civil)] 2211, para. 48 (Eng.).

81. The choice-of-law rule is different for unitary EU IP rights, such as EU designs: While the choice-of-law rule for infringement of a national IP right is "the law of the country for which protection is claimed," for infringement of an EU unitary right it is "the law of the country in which the act of infringement was committed." Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 8(1) and (2). *See* Judgment of 27 September 2017, Nintendo Co. Ltd. v. BigBen Interactive GmbH, joined cases C-24/16 and C-25/16, EU:C:2017:724, paragraph 103, 108.

82. Ward Group Pty Ltd. v. Brodie & Stone Plc. [2005] FCA 471/47 (22 April 2005) (Austl.).

83. International Hair Cosmetics Group Pty Ltd. v. International Hair Cosmetics, Ltd [2011] FCA 339 (8 April 2011) (Austl.).

84. Hotel Maritime, Bundesgerichtshof [BGH] [Federal Court of Justice], I ZR 163/02, Oct. 13, 2004 (Ger.).

85. Arzneimittelwerbung im Internet, Bundesgerichtshof [BGH] [Federal Court of Justice], I ZR 24/03, Mar. 30, 2006 (Ger.).

86. Englischsprachige Pressemitteilung, Bundesgerichtshof [BGH] [Federal Court of Justice], I ZR 131/12, Dec. 12, 2013 (Ger.). See also an overview of court decisions in Oberlandesgericht Frankfurt am Main, 6 U 3/18, Feb. 14, 2019, par. A., 2., c), (1).

87. 1967 Limited v. British Sky Broadcasting Ltd. [2014] EWHC (Ch) [High Court (Chancery)] 3444, para. 21 (Eng.).

88. Omnibill (PTY) Ltd. v. Egpsxxx Ltd. (In Liquidation) [2014] EWHC (IPEC) [High Court (Intellectual Property Enterprise Court)] 3762 (Eng.).

TuneIn Inc.,[89] and referred to targeting in Argos Limited v. Argos Systems Inc.;[90] the French Cour de Cassation analyzed targeting in eBay Europe v. SARL Maceo.[91] The Supreme Court of Canada has yet to decide whether Canadian courts should employ targeting analyses when determining personal jurisdiction under Canadian law,[92] but it has already endorsed the use of targeting in the context of determining the reach of substantive law.[93]

C. *Conclusions on Targeting*

Targeting analyses are fact specific; the factors that are relevant and the weight the factors receive depend not only on the facts of a case but also on the claims that are raised.[94] If an Internet actor offers on its website a downloadable pirated copy of a motion picture that the actor has promoted by displaying on the website an image of a poster for the motion picture, the targeting analysis could differ, depending on whether the analysis concerns a claim of a copyright-infringing public display of the poster or a claim of a copyright-infringing public distribution of the pirated copy of the motion picture.[95]

---

89. Warner Music UK Ltd. v. TuneIn Inc. [2019] EWHC (Ch) [High Court (Chancery)] 2923, para. 16–34 (Eng.).

90. Argos Limited v. Argos Systems Inc [2018] EWCA (Civ) [Court of Appeal (Civil)] 2211, para. 52–55 (Eng.).

91. eBay Europe v. SARL Maceo, Cour de Cassation [Cass.] W 10-12.272, Mar. 29, 2011 (Fr.).

92. Breeden v. Black, [2012] 1 S.C.R. 666, para. 36 (Can.). A commentator suggested that "it seems likely that Canadian courts will consider the concepts of interactivity and targeting in assessing whether they have jurisdiction . . . ." John McKeown, *Canada: Targeting, Jurisdiction and the Internet*, MONDAQ (Apr. 17, 2019), *available at* http://www.mondaq.com/canada/x/798842/Trademark/Targeting+Jurisdiction+And+The+Internet (last visited Jan. 28, 2020). For a case in which a Canadian court applied a targeting analysis (in the context of a decision on the recognition of a U.S. judgment) to determine whether a court in Texas had personal jurisdiction *see* Braintech, Inc. v. Kostiuk (1999), 171 D.L.R. 4th 46 (Can.) (denying leave to appeal to the Supreme Court of Canada [1999] S.C.C.A. No. 236), *available at* https://www.bccourts.ca/jdb-txt/ca/99/01/c99-0169.txt (last visited Feb. 13, 2020).

93. Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, [2004] 2 S.C.R. 427, para. 139 (Can.).

94. The nature of the claims is important because both specific jurisdiction and applicable law are linked to the underlying claims.

95. Although both acts may be classified as "making available to the public" under the laws of some countries, the acts are different. *See also* Sari Depreeuw and

Significant differences in the outcomes of targeting analyses may result from the choice of perspective that courts adopt in assessing targeting—whether courts choose the perspective of the defendant (whether the Internet actor acted in order to target a particular forum) or the perspective of Internet users (whether the users perceived the defendant's Internet presence as being directed at them).[96] U.K. courts adopt the latter perspective. Lord Justice Kitchen stated unequivocally that "the issue of targeting is to be considered objectively from the perspective of average consumers in the [forum]."[97] Dicta in the U.S. Supreme Court's decision in Walden suggest that the defendant's intentions should be the focus of the analysis.[98] A future decision by the Court might clarify whether the U.S. position will be as extreme as two commentators have suggested—they have argued that "[u]sers, not authors, initiate distribution in the virtual world."[99]

Perhaps the nature of the claim raised in a particular case should guide a court's choice of perspective; courts could determine the appropriate perspective according to whether a case involves a strict liability tort (which requires no tortfeasor intent) or an intentional tort. While adopting the perspective of an Internet actor is logical for targeting analyses in cases of intentional torts,[100] adopting an Internet user's perspective seems more appropriate in cases involving strict liability torts. If courts require that an actor intend to target a country in order for the actor to be subject to the country's law, but that country's law imposes strict liability based on an actor's conduct, courts might in some cases defeat the law's intended protections if they require intentional targeting by an actor in a case that involves a strict liability tort.[101]

Jean-Benoît Hubin, *Of Availability, Targeting and Accessibility: Online Copyright Infringements and Jurisdiction in the EU*, 9 J. INTELL. PROP. L. & PRACTICE 750, 756–59 (Sept. 2014) (juxtaposing the differences in targeting analyses in cases of streaming and downloading).

96. For a discussion of whether there is a difference between targeting Internet actors and targeting a jurisdiction *see* Trammell & Bambauer, *supra* note 16.

97. Merck KGaA v. Merck Sharp & Dohme Corp. [2017] EWCA (Civ) [Court of Appeals (Civil)] 1834, para. 169 (Eng.). *See also infra* notes 214–219 and accompanying text.

98. *See* Walden v. Fiore, 571 U.S. 277, 289 (2014) (warning against "impermissibly allow[ing] a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis").

99. Trammell & Bambauer, *supra* note 16, at 1163.

100. But *cf.* Kleven, *supra* note 16, at 798–800 (pointing out the problem of requiring express aiming under *Walden* in cases of intentional torts).

101. Intent to infringe and intent to target a jurisdiction might not always coexist.

II. THE CHANGING SIGNIFICANCE OF THE FACTORS IN TARGETING ANALYSES

Developments in technology, and increasing Internet actor and user familiarity with the Internet, have affected a number of factors that courts use in targeting analyses; the weight that some factors should receive has changed, and some factors have become less important or even completely irrelevant for the purposes of targeting analyses. The changing utility of some factors might have little impact on the results of targeting analyses when other factors are also considered, but when other factors are absent, the results of targeting analyses could change when courts consider only the factors discussed in this part, or only some of the factors discussed in this part.

A. Top-Level Internet Domains

One of the factors that courts have considered in targeting analyses is the top-level domain ("TLD") that an Internet actor has selected and used for a website. While courts have been wary of giving much weight in targeting analyses to an Internet actor's selection of a .com domain name,[102] they have given weight to domain name selection when an actor has chosen a particular country-code TLD (a "ccTLD"), such as .de or .fr.[103] In cases of a ccTLD, it seems more likely that an actor has targeted Internet users in the country of the ccTLD—meaning Germany or France in the case of .de or .fr, respectively.[104]

Internet actors do have choices when selecting TLDs; the choices are many but are not unlimited. There are some subject matter-specific TLDs on which registration eligibility is limited to particular subject matters; for example, the .law and .abogado domains were created to host websites of the legal community, such as law firms and

---

102. *See, e.g.*, Oberlandesgericht Frankfurt am Main [OLG] [Higher Regional Court of Frankfurt am Main], 6 U 3/18, Feb. 14, 2019 (Ger.), para. 24 (noting that .com domains are unlikely to be targeting only English-speaking countries, because English is used widely in other countries as well).

103. *Id.* at para. 24 (concerning the .de domain).

104. *E.g.*, Oberlandesgericht Frankfurt am Main, [OLG] [Higher Regional Court of Frankfurt am Main], 6 U 3/18, Feb. 14, 2019 (Ger.), para. 24 (discussing the relevance of the defendant's choice of the .de domain).

law schools.[105] But more importantly for this article, TLDs may have territorial restrictions on eligibility for registration.

A ccTLD consists of the internationally-standardized two-letter country code,[106] and therefore a ccTLD "correspond[s] to a country, territory, or other geographic location."[107] However, whether a ccTLD actually corresponds to its territory with respect to the geographical origin of the registrants of its websites depends on the registration eligibility requirements for the ccTLD. The requirements are set by the ccTLD registries and vary for each ccTLD[108] because the Internet Corporation for Assigned Names and Numbers ("ICANN"), which administers the Internet domain name system,[109] has delegated the ccTLDs without imposing any territorial conditions concerning domain name registration eligibility requirements.

The .ca domain—the ccTLD of Canada—is an example of a TLD with strict territorial restrictions on registration eligibility, and therefore this ccTLD has strong ties to its country. According to the Canadian Presence Requirements for Registrants,[110] persons and entities may register a domain name on the .ca ccTLD only if they are Canadian citizens or permanent residents; corporations, trusts, and partnerships established or registered under the laws of Canada; Canadian political parties and trade unions; Canadian educational

---

105. To register a domain name on .law or .abogado, the registrant must be "a qualified lawyer," a law firm, a court, a law school, or "a legal regulator." *Eligibility Criteria*, .LAW, http://home.law/#new_tab (last visited Feb. 1, 2020).

106. *ISO 3166 Country Codes*, ISO, https://www.iso.org/iso-3166-country-codes.html (last visited March 22, 2020).

107. *FAQs*, ICANN, *available at* https://www.icann.org/resources/pages/faqs-2014-01-21-en (last visited Feb. 1, 2020). *See also* Peter K. Yu, *The Never-Ending ccTLD Story*, *in* ADDRESSING THE WORLD: NATIONAL IDENTITY AND INTERNET COUNTRY CODE DOMAINS 3 (Erica Schlesinger Wass ed., 2003) (discussing the exception in the case of .uk).

108. Registries (domain registry operators) are responsible for operating top-level domains. *Welcome Registry Operators*, ICANN, https://www.icann.org/resources/pages/registries/registries-en (last visited Feb. 1, 2020); *see also* Torsten Bettinger & Volker Greimann, *ICANN's Agreements with Registries and Registrars*, *in* DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 26–28 (2d ed. 2015).

109. On ICANN *see, e.g.*, *Welcome to ICANN!*, ICANN, https://www.icann.org/resources/pages/welcome-2012-02-25-en (last visited Feb. 1, 2020).

110. *Canadian Presence Requirement for Registrants, Version 1.3*, CIRA, https://cira.ca/sites/default/files/policy/canadian-presence-requirements-for-registrants.pdf (last visited Feb. 1, 2020).

institutions; and other Canadian institutions.[111] One exception exists for trademarks that are registered in Canada: even a non-Canadian person or entity may register a .ca domain name "consisting of or including the exact word component of that registered trade-mark."[112]

The .ie domain—the ccTLD of the Republic of Ireland—is an example of a ccTLD with less restrictive registration eligibility requirements, yet it still enforces strong ties to its country. According to the .ie Registration and Naming Policy Statement, ".ie is . . . Ireland's online address and as such, all .ie domain holders must be either based in the island of Ireland or have a real connection to the island of Ireland."[113] To show that a person or entity is based in Ireland, an applicant-natural person may use his or her Irish driver's license or passport; an entity may use documents such as an Irish registered business number or VAT number. As .ca domain names are available to holders of a Canadian trademark, .ie domain names are available to holders of an Irish trademark.[114] To register a domain name based solely on "a real connection" to Ireland, an applicant must "show that the [prospective] domain holder trades with, or clearly intends to trade with, consumers or businesses in the island of Ireland."[115]

Some other ccTLDs have been more open[116] and far less territorially restrictive; for instance, Tuvalu's .tv ccTLD is completely open and benefits from the Tuvalu two-letter code coinciding with the abbreviation for "television," which has allowed the small island country's virtual "territory" to expand far beyond its physical borders.[117] Some countries that did have restrictive registration

111. *Id.* at § 2. Additional conditions are set for trusts, partnerships, and associations with respect to the origin of their members. *Id.*

112. *Id.* at § 2(q). A similar provision exists for "official marks" protected by section 9(1) of the Canadian Trade-Marks Act. *Id.* at § 2(r).

113. *Registration and Naming in the .IE Namespace*, IE DOMAIN REGISTRY, § 2, p. 4, (2018), https://www.iedr.ie/wp-content/uploads/2019/04/IEDR-RegistrationNaming-.IE-Namespace.pdf (last visited Feb. 1, 2020).

114. *Id.* at 4.

115. *Id.* at 5.

116. Open ccTLDs are "ccTLDs in which there are no restrictions on the persons or entities registering in them." *ccTLD Best Practices for the Prevention and Resolution of Intellectual Property Disputes*, WIPO, Version 1 (June 20, 2001, p. 2), *available at* https://www.wipo.int/amc/en/domains/bestpractices/bestpractices.html (last visited Feb. 1, 2020).

117. In 2019, the second largest ccTLD, based on the number of domain names registered on the domain, was the Tokelau ccTLD., .tk,. *The Domain Name Industry*

eligibility requirements eventually liberalized their requirements in attempts to attract more registrants (and greater revenues) to their ccTLDs;[118] countries that opened their ccTLDs to foreign registrants include Belgium (in 2000),[119] Sweden (in 2003),[120] Slovenia (in 2005),[121] Portugal (in 2012),[122] and Finland (in 2016).[123]

ICANN gradually became more sensitive to issues related to physical geography, as some countries and other jurisdictions expressed concerns about misuses of territorial names in the domain name ecosystem.[124] Therefore, when ICANN began to delegate new

---

Brief, VERISIGN, Vol. 16.4, 2 (Dec. 2019), https://www.verisign.com/assets/domain-name-report-Q32019.pdf (last visited Feb. 1, 2020). The popularity of the domain likely stems from the fact that registrations of domain names on the domain are free of charge. *See* Freenom, *Terms and Conditions*, FREENOM, http://www.freenom.com/en/termsandconditions.html (last visited Feb. 19, 2020).

118. *DSTI/ICCP/TISP(2006)6/FINAL*, Org. for Econ. Co-operation & Dev. (OECD) 5 (Nov. 17, 2006), *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/TISP(2006)6/FINAL&docLanguage=En (last visited Feb. 1, 2020).

119. Youn Jung Park, The Political Economy of Country Code Top Level Domains 148 (2008) (Ph.D. dissertation, Syracuse Univ.).

120. Petter Rindforth, *Sweden ('.se')*, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 878 (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015).

121. *Domain Name Law and Practice*, OXFORD UNIVERSITY PRESS, *available at* https://global.oup.com/booksites/content/0199278253/updates/country_overviews/slovenia (last visited Feb. 1, 2020); *General Terms and Conditions for Registration of Domain Names under the .si Top-Level Domain*, REGISTER.SI (Sept. 2, 2019), *available at* https://www.register.si/wp-content/uploads/general-terms.pdf (last visited Feb. 1, 2020).

122. *FCCN announces the liberalization of .pt domain registration*, CENTR (Feb. 27, 2012), *available at* https://www.centr.org/news/news/fccn-announces-the-liberalization-of-pt-domain-registration.html (last visited Feb. 1, 2020).

123. Finland liberalized its registration eligibility requirements in 2016. *See How to Get an .fi-Domain Name*, TRAFICOM, https://www.traficom.fi/en/communications/fi-domains/how-get-fi-domain-name (last visited Feb. 1, 2020).

124. *E.g.*, *Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries*, EUROPEAN COMMISSION SWD 452 final/2, 12 (Dec. 20, 2019), https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158561.pdf (last visited Feb. 1, 2020) (expressing concern that the "[f]ailure to recognise geographical indications as conferring rights in domain name disputes on the internet (the UDRP – Uniform Domain-Name Dispute-Resolution Policy) facilitates channels for marketing counterfeits." *Id. See also* A. Michael Froomkin, *When We Say US™, We Mean It!*, 41 HOUS. L. REV. 862–65 (2004); Marketa Trimble, *Territorialization of the Internet Domain Name System*, 45.4 PEPPERDINE L. REV. 623 (2018).

geographical TLDs (geoTLDs), it excluded from these geoTLDs "country or territory names"[125] and mandated that applications for delegations of other "geographic names . . . be accompanied by documentation of support or non-objection from the relevant governments or public authorities."[126]

Notwithstanding ICANN's greater attention to territorial issues in the domain name ecosystem, territorial limitations on registrations on geoTLDs also vary significantly because geoTLDs registries are free to set their own registration eligibility requirements (subject possibly to the registries' agreements with the governments or authorities that have supported the registries' applications for the geoTLDs). For example, a .corsica domain name may be registered by a "[l]egal entity in Corsica[,] . . . [i]ndividuals living in Corsica[,] . . . [and] [a]ny individual who has and will prove a direct or indirect link attachment (economic, social, cultural, familial, historical or otherwise) with Corsica."[127] The domain .hamburg requires that a registrant have "an economic, cultural, historical, social or any other connection to the [city]. . . ."[128] But other geoTLDs set no territorial limits on registration; examples of such open geoTLDs include .tokyo[129] and .vegas.[130]

As is apparent from the foregoing review of the range of territorial restrictions on TLD registrations, it is impossible to attach a consistent weight to an Internet actor's selection of a particular TLD when conducting a targeting analysis. In cases of TLDs with strict territorial limitations on registration eligibility, registrant contacts that are required for a domain name registration are likely to be the same contacts that will establish jurisdiction of the courts in the particular

---

125. gTLD Applicant Guidebook, Version 2012-06-04, 2012, 2–13, para. 2.2.1.4.1.

126. *Id.* at 2–14, para. 2.2.1.4.2.

127. *.corsica Registration Policy*, Dot Corsica Version 1, § 1.2 (June 8, 2015), *available at* https://portal.ascio.com/productdb/q.aspx?downloadFile=.CORSICA_Registration_Policy.pdf (last visited Feb. 1, 2020).

128. *Policy for the Registration of .HAMBURG Domain Names*, .HAMBURG § 5.1 (Sept. 12, 2019), https://nic.hamburg/sites/nic.hamburg/files/2019-09/190912%20HAMBURG%20Registration%20Policies.pdf (last visited Feb. 1, 2020).

129. *.tokyo Domain Name Registration Policies*, GMO REGISTRY Version 1.01, § 3.1 (June 10, 2014), https://www.gmoregistry.com/en/geotlds/PDF/Tokyo_Domain_Name_Registration_Policies.pdf (last visited Feb. 1, 2020).

130. *.vegas Policies*, .VEGAS, *available at* http://www.nic.vegas/policies/ (last visited Feb. 1, 2020).

country of the ccTLD or in the place of the particular geoTLD.[131] In cases of TLDs with no limitations or very relaxed territorial limitations on registration eligibility, the territorial significance of a TLD may be so diluted that it becomes questionable whether a registrant actually intended to target the country or territory when choosing the particular TLD, given that the TLD is probably populated by websites of many different geographical origins with a broad range of targeting intentions.

Certainly the diverse territorial restrictions that TLDs maintain for registration eligibility have contributed to a dilution of the territorial significance of TLDs. This diversity makes it difficult for Internet users to identify the TLDs that are purely territorial and those that have few or no territorial ties. Of course when a TLD becomes notorious for being used by websites with no connection whatsoever to the TLD's territory, such as the .tv domain,[132] it is unlikely that users will expect websites on the TLD to have any connection to the country of the TLD.

Whether users in a particular territory assume that a website with a domain name on that particular ccTLD or geoTLD is directed at them is, of course, an empirical question. Anecdotal evidence suggests that users tend to be skeptical of any connection between the territory of a ccTLD or geoTLD and the origin or intended targeting of a website on the ccTLD or geoTLD. While users might not expect content on a website on a .fr domain to originate in France, they might expect to find some content on the website to be in the French language even if the website is the website of a multinational corporation or another corporation operating in multiple countries, including in France. In cases where TLDs imply a connection with a particular language, concerns apply that are discussed below about attaching too much weight to an Internet actor's choice of a particular language.

The picture is even more complicated in the example of the .cc domain (the domain of the Cocos Islands); a domain name on this ccTLD may actually suggest that a registrant is targeting a country *other than* the country of the ccTLD. The ccTLD has apparently been popular with Chinese registrants, some of whom have embraced the

131. *E.g.*, *see supra* notes 110–115 and accompanying text for the .ca and .ie registration requirements.

132. *See supra* notes 116–117 and accompanying text. Other similar examples are the TLDs .it (for Italy) and .io (the British Indian Ocean Territory), which are popular with high-technology registrants because the TLDs are the same as the abbreviations for "information technology" and "input-output."

fact that the domain's .cc abbreviation coincides with the abbreviation for "Chinese company."[133] In this case the combination of the ccTLD and the language of the website might be important—a website written in Chinese on a .cc domain suggests the targeting of Chinese users.

Most importantly, TLDs are losing their significance because Internet users are increasingly less reliant on domain names to locate or recall a website—they use search engines to locate content on the Internet instead, whether through a website interface or in the address line of an Internet browser. Internet users may not even know what the TLD of a website is, which means that the relevance of a ccTLD or geoTLD in a targeting analysis can be questionable.[134]

Even in the age of user reliance on search engines, an Internet user's selection of a particular TLD could be considered significant if the choice of that TLD affects the results returned by a search engine. However, it is unclear how much weight search engine algorithms give to TLDs, and since search engine algorithms are trade secrets or—at a minimum—proprietary information, it is difficult to determine whether the use of TLDs in Internet searches has some effect—or any effect—on the accessibility of websites on TLDs in a particular territory.[135]

B. Languages

The language used on a website is another factor in targeting analyses that may merit reconsideration. Courts have taken into account the language or languages in which a website is available in order to evaluate whether the Internet actor—the website operator—has targeted a country where the language is spoken. A website in

---

133. *See, e.g.*, Oaktree Capital Management, L.P. v. Jason Zou, WIPO, Case No. DCC2016-0012, Feb. 19, 2017.

134. The continuing interest in the business of domain name registration and the rising numbers of domain name disputes may indicate the continuing relevance of domain names. *See, e.g.*, Klint Finley, *Who Should Control the Internet's .Org Addresses?* WIRED (Feb. 4, 2020), https://www.wired.com/story/who-control-internets-org-addresses/ (last visited Feb. 12, 2020); ICANN, *Program Statistics*, New Generic Top-Level Domains, ICANN.ORG, https://newgtlds.icann.org/en/program-status/statistics (last visited Feb. 12, 2020); *Total Number of Cases per Year*, WIPO, https://www.wipo.int/amc/en/domains/statistics/cases.jsp (last visited Feb. 12, 2020).

135. For Google's advice to Internet actors on how to select a TLD *see* Google, *Managing multi-regional and multilingual sites*, GOOGLE HELP CENTER, https://support.google.com/webmasters/answer/182192 (last visited Feb. 12, 2020).

German is likely to target Germany; a website in French is likely to target France. Of course, a website in French could also target countries such as Belgium, Canada, and the Republic of the Congo, where French is also an official language; therefore, if a court were assessing targeting by a French-language website, it would presumably consider additional factors in order to conclude that France was indeed the country targeted.

Several issues exist with respect to the language factor. One issue relates to common languages—languages that are spoken and understood in multiple countries. CJEU Advocate General Szpunar commented on this issue in *AMS Neve* when he pointed out that some languages are widely understood across multiple EU member states.[136] Indeed, knowledge of foreign languages is common in EU countries: in 2016, 35.2% of working-age adults in the EU knew one foreign language, 21% knew two foreign languages, and 8.4% knew three or more foreign languages.[137] English is the obvious example of a common language; according to a 2016 Eurostat report, English is "by far the most widely-spoken foreign language in the EU,"[138] and in 2013, the British Council reported that one in every four people in the world spoke English "at a useful level."[139] English is a common language worldwide, and Spanish, for example, plays a similar role in many countries, including in the United States. If a website is in a common language, the language factor will likely warrant much less weight—or no weight—in a targeting analysis; an English-language website could be directed at any country (or at least at many countries) in the world.

Even if a language is not widely spoken in a country, the basics of the language might still be familiar in that country. As the Düsseldorf Regional Court observed, "in the case of an average German consumer, one may assume basic knowledge of the English

---

136. Opinion of Advocate General Szpunar on 28 March 2019, AMS Neve Ltd. v. Heritage Audio SL, C-172/18, EU:C:2019:276, paragraph 92.

137. *Foreign Language Skills Statistics*, EUROSTAT, https://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_language_skills_statistics (last visited Feb. 2, 2020). More than 90% of working-age adults reported knowing at least one foreign language in Sweden, Latvia, Denmark, Lithuania, Luxembourg, Finland, Malta, and Estonia. *Id.*

138. *Id.*

139. *The English Effect*, BRITISH COUNCIL 2 (2013), https://www.britishcouncil.org/sites/default/files/english-effect-report-v2.pdf (last visited Feb. 3, 2020).

language."[140] The Trade Marks Manual of the U.K. Intellectual Property Office states (in the context of the doctrine of foreign equivalents) that "[w]hilst the majority of UK consumers cannot be assumed to be fluent in all or any of [the most widely understood European] languages, most of them will have an appreciation of some of their more common words."[141] Therefore, depending on the language used by a website, its content and terminology, and other circumstances, a website in a foreign language might be considered to target a country even if the language is not commonly spoken in the country.

Other issues concerning language concern pockets of a population that speak a language that is different from the language of the majority of the population; if a website uses a minority's language, it could be targeting the minority in the country even if the majority population does not understand the language.[142] For instance, a website of a Polish television station written in Polish might be targeting Polish-speaking minorities in Canada and the United States, even if the majority populations in the two countries do not understand Polish.[143] And particular circumstances may make some foreign language websites more likely to target certain segments of a population or particular groups. In *Easygroup, Ltd.*, on the issue of whether a Spanish-language website targeted the United Kingdom, Justice Nugee noted that European backpackers traveling to Colombia "would not necessarily be deterred by the website being in Spanish."[144]

But most important today is that the relevance of a given website's language has been diminished by the automatic translation tools that enable Internet users to view a website's text in virtually any language. Translation tools are continuously improving and Internet

---

140. Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court of Düsseldorf], 15 U 48/19, Sept. 12, 2019 (Ger.), para. 9 (translation by the author).

141. Intellectual Property Office, *Trade marks manual*, GOV.UK (Aug. 23, 2018), https://www.gov.uk/guidance/trade-marks-manual/the-examination-guide (last visited Feb. 2, 2020).

142. Opinion of Advocate General Szpunar on 28 March 2019, AMS Neve Ltd. v. Heritage Audio SL, C-172/18, EU:C:2019:276, paragraph 92.

143. This situation would be similar to the situation in *Spanski v. TV Polska*. *See* Spanski Enterprises, Inc. v. Telewizja Polska, S.A., 883 F.3d 904 (D.C. Cir. 2018) (ignoring personal jurisdiction).

144. Easygroup Ltd. v. Empresa Aérea de Servicios y Facilitatión Logística Integral S.A. – Easyfly S.A. [2020] EWHC (Ch) [High Court (Chancery)] 40, para. 56 (Eng.). Nor did Judge Nugee consider the website's listing of prices in Colombian pesos to be a deterrent. *Id.*

users can now enjoy the convenience of websites translated with tools built directly into their Internet browsers.[145]

Some experts argue that the approach to the language factor should depend on whether the website itself employs an automatic translation tool (thereby offering different language versions to users) or whether a user utilizes a third-party automatic translation tool, such as one that is built into the user's Internet browser. The American Law Institute's Principles on conflict of laws in IP take the position that "if a user employs the user's own translator program (or one acquired elsewhere), only the languages of the website should be taken into account."[146]

As translation tools improve and become commonplace, the translation source or method could become irrelevant if Internet actors begin to rely on automatic translation tools to provide acceptable quality alternative language versions of their websites.[147] An Internet actor targeting Spanish speakers might no longer need to offer a Spanish-language version of a website if the actor knows that Spanish speakers can view high-quality translations of the website through the automatic translation tools that are built into users' web browsers.[148]

---

145. Google, *Change Chrome languages & translate webpages*, Google Chrome Help, GOOGLE.COM, https://support.google.com/chrome/answer/173424?co=GENIE.Platform%3DDesktop&hl=en (last visited Feb. 3, 2020); Microsoft, *Translate websites*, BING.COM, https://www.bing.com/translator (last visited Oct. 28, 2020); Dave Johnson, *How to Translate a Web Page in Google Chrome on Desktop or Mobile*, BUSINESS INSIDER (Dec. 10, 2019), available at https://www.businessinsider.com/how-to-translate-a-page-in-google-chrome (last visited Feb. 3, 2020). *See also* Easygroup Ltd. v. Empresa Aérea de Servicios y Facilitatión Logística Integral S.A. – Easyfly S.A. [2020] EWHC (Ch) [High Court (Chancery)] 40, para. 56 (Eng.) ("A substantial number of EU citizens speak Spanish and it is not difficult for others to translate websites through a browser. . . .").

146. INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES, § 204 (Am. Law Inst. 2008) [hereinafter ALI PRINCIPLES].

147. *Cf.* Google Help Center, GOOGLE, https://support.google.com/webmasters/answer/182192 (last visited Feb. 12, 2020) (recommending Internet actors not rely on automatic translation tools to provide different language versions of their websites).

148. *E.g.*, Easygroup Ltd. v. Empresa Aérea de Servicios y Facilitatión Logística Integral S.A. – Easyfly S.A. [2020] EWHC (Ch) [High Court (Chancery)] 40, para. 56 (Eng.) (acknowledging that "[a] substantial number of EU citizens speak Spanish and it is not difficult for others to translate websites through a browser" *Id.*).

C. *Geolocation and Geoblocking*

While the previous two sections concerned factors that are losing some or most of their weight in targeting analyses, this section concerns factors that are becoming more significant in the analyses. The factors are Internet actors' use of geolocation, geoblocking, or both technologies to territorially delineate their activities on the Internet. Geolocation tools enable Internet actors to localize Internet-connected devices and identify users' real-time physical location;[149] geoblocking tools[150] enable Internet actors to deny access to content to users who are connected to the Internet from a particular territory or territories.[151]

Initially courts were skeptical of the accuracy and reliability of geolocation and geoblocking, which the courts considered inadequate for purposes of legal compliance. In 2002, for example, the High Court of Australia opined in *Dow Jones v. Gutnick* that "there [was at the time] no adequate technology that would enable non-subscription content providers to isolate and exclude all access to all users in specified jurisdictions."[152] The 2006 *Yahoo!* decision (and particularly Judge Fisher's concurrence) revealed the U.S. Court of Appeals for the Ninth Circuit's ambivalence about geolocation at that time.[153] Courts were also concerned about the accuracy of geolocation and geoblocking because users could (and can) utilize circumvention tools that make users appear as if they are in a location different from their actual physical location.[154]

Substantial improvements in geolocation and geoblocking technologies should now alleviate courts' concerns about the accuracy

---

149. Of course the location of a device does not always correspond to the location of its user.

150. Sometimes geoblocking is referred to as "geofencing" or "access-blocking." *See, e.g.*, Plixer Int'l. v. Scrutinizer GmbH, 905 F.3d 1, 9–10 (1st Cir. 2018).

151. *See also* Spanski Enterprises, Inc. v. Telewizja Polska, S.A., 883 F.3d 904, 907 (D.C. Cir. 2018) ("[G]eoblocking . . . allows a website owner to digitally embed territorial access restrictions into uploaded content.").

152. *Dow Jones & Co, Inc v Gutnick* [2002] 210 CLR 575, para. 86 (Austl.).

153. Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1247 (9th Cir. 2006).

154. *E.g.*, *Id.*; Declaration of Bennet Laurie in Lieu of Direct Testimony at 12, Nitke v. Ashcroft, 253 F. Supp. 2d 587, 594 (S.D.N.Y. 2005). On circumvention in general *see, e.g.*, James A. Muir & Paul C. Van Oorschot, *Internet Geolocation: Evasion and Counterevasion*, 42 ACM COMPUTING SURVEYS 1 (Dec. 2009); Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567 (2012).

and cost of geolocation and geoblocking tools.[155] Simple methods of geolocation that rely on unreliable self-reporting or the more reliable detection of Internet protocol addresses[156] are being replaced with advanced methods that combine data from multiple sources, such as GPS and Wi-Fi signals, to provide a significantly higher accuracy with increased granularity.[157] Because of improved geolocation, geoblocking can function with greater accuracy and operate in more narrowly defined territories and specific locations. The cost of sufficiently reliable tools has decreased to the point where the cost is arguably an acceptable price of doing business on the Internet, similar to the price of obtaining and maintaining an Internet domain name.[158]

Many motivations prompt Internet actors to geolocate users; location information can be used to collect statistics for marketing and other purposes, provide localized content, support cybersecurity measures, divide markets in order to price discriminate, and accomplish other purposes.[159] Gradually, geolocation is ceasing to be a matter of choice and is becoming a necessity for legal compliance

---

155. *See, e.g.*, Plixer Int'l., Inc. v. Scrutinizer GmbH, 905 F.3d 1, 559 (1st Cir. 2018) (rejecting the defendant's argument that geoblocking, referred to as "access-blocking technology," should be irrelevant because it is an "imperfect, developing technology;" the court considered the defendant's allegations about the state of geoblocking technology "misplaced based on the record before [the court]").

156. *See, e.g.*, Joshua J. McIntyre, *Balancing Expectations of Online Privacy: Why Internet Protocol (IP) Addresses Should Be Protected As Personally Identifiable Information*, 60 DEPAUL L. REV. 895, 900–05 (2011); Trimble, *supra* note 154, at 594–97 (on IP addresses).

157. *E.g.*, Ethan Katz-Bassett et al., *Towards IP Geolocation Using Delay and Topology Measurements*, IMC '06: Proceedings of the 6th ACM SIGCOMM conference on Internet measurement, Oct. 25–27, 2006, *available at* http://dl.acm.org/citation.cfm?id=1177090 (last visited Feb. 3, 2020); Bamba Gueye et al., *Constraint-Based Geolocation of Internet Hosts*, 14 IEEE/ACM TRANSACTIONS ON NETWORKING 1219, 1220 (Dec. 2006). The improving technology has allowed not only increased precision in geolocation but also the proliferation of different methods and uses, including the development of 3D geolocation.

158. Means of circumvention of geoblocking continue to be available, but improved geolocation and geoblocking tools make it increasingly difficult to circumvent geolocation and geoblocking. Also, the possibility of circumvention might not be relevant in a targeting analysis if the Internet actor employs geolocation and geob-locking tools of sufficient reliability.

159. *See, e.g.*, Nicolas Seidler & Andrei Rabachevsky, *Internet Society Perspectives on Internet Content Blocking: An Overview*, INTERNET SOCIETY, (Mar. 2017), https://www.internetsociety.org/wp-content/uploads/2017/03/ContentBlockingOverview.pdf (last visited Feb. 3, 2020) (discussing the types of methods of content blocking on the internet, including a discussion of how certain parties collect location information for various purposes).

on the Internet. As geolocation tools improved, countries became less hesitant to regulate conduct on the Internet based on the effects of the conduct; they are now replacing regulation based on the source of the conduct with regulation based on the place of consumption.[160] And so for purposes such as sales taxes,[161] copyright royalties,[162] gaming licenses,[163] and personal data protection,[164] countries now regulate Internet actors' conduct based on where the actors' customers are—which means that the countries' laws are requiring that Internet actors geolocate users.[165] The use of geoblocking might become necessary to achieve compliance with national laws, or even indispensable if an Internet actor wants to remain out of the reach of a country's laws.[166] As more and more obligations arise that require Internet actors to

---

160. *See* Marketa Trimble, *Extraterritorial Enforcement of National Laws in Connection with Online Commercial Activity*, RESEARCH HANDBOOK ON ELECTRONIC COMMERCE 261, 266–70 (John A. Rothchild ed., 2016) (discussing the differences between regulation that is based on point of consumption and regulation that is based on point of source).

161. *E.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2095, 2097–98 (2018) (concerning an internet seller's duty to collect and remit sales tax).

162. Cases concerning common law copyright in the United States; Warner Music UK Ltd. v. TuneIn, Inc. [2019] EWHC (Ch) 2923 [137].

163. Gibraltar Betting & Gaming Association Ltd. v. Secretary of State for Culture, Media & Sport, [2014] EWHC (Admin) 3236 (Eng.).

164. Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the EU General Data Protection Regulation, or "GDPR") implicates the use of geolocation, as the GDPR applies whenever an Internet actor collects and processes the personal data of EU users. *See also* Google's statement on the use of geoblocking to comply with the "right to be forgotten" in the European Union. Press Release, *Adapting Our Approach to the European Right to Be Forgotten*, GOOGLE (Mar. 4, 2016), https://blog.google/topics/google-europe/adapting-our-approach-to-european-rig/ (last visited Feb. 3, 2020). *See also* S.A.N., May 13, 2014 (No. C-131/12) (Spain), http://curia.europa.eu/juris/document/document.jsf?text=&docid=138782&doclang=EN.

165. Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, 2017 O.J. (L 168) 1, 98.

166. *E.g.*, Spanski Enterprises, Inc. v. Telewizja Polska, S.A., 883 F.3d 904, 916 (D.C. Cir. 2018) ("[A] foreign broadcaster that, as here, directs infringing performances into the United States from abroad commits a domestic violation of the Copyright Act."). *See also* Marketa Trimble, *Copyright and Geoblocking: The Consequences of Eliminating Geoblocking*, 25(2) B.U. J. SCI. & TECH. L. 476, 486 (2019) ("In the *Spanski* case, geoblocking played a role in the determination of intent; it was because of the failure to geoblock properly that the judge found intent on the part of TV Polska to make the content available in the U.S.").

geolocate users, fewer and fewer Internet actors will *not* know their users' location.[167]

Given the increasingly common deployment of geolocation and geoblocking tools on the Internet,[168] the argument that Internet actors or users are oblivious to borders on the Internet seems less and less plausible. Though many Internet actors might have been unaware of geolocation and geoblocking technologies twenty-five years ago, few Internet actors could now plead ignorance of geolocation and geoblocking. Most Internet users have encountered the effects of the technologies; the prominence of geographically tailored content, including geographically targeted advertising, debates regarding the tracking of users and the protection of users' geographical location data,[169] and users' experiences with geoblocked content,[170] all contribute to Internet actor and user recognition of the fact that the Internet is location aware and therefore Internet actors are capable of imposing territorial limitations on users' access to the actors' content.

Given that geolocation is essentially a standard feature of today's Internet, should an Internet actor's failure to geoblock warrant a finding that the actor targeted a country that the actor did not geoblock? Courts in the United States appear to be receptive to the argument that an Internet actor's use of geoblocking might evidence the actor's intent not to target a geoblocked jurisdiction[171]; this

---

167. *See also infra* Part II, Section D.4 on localized advertising.

168. *See, e.g.*, Allison McDonald et al., *403 Forbidden: A Global View of CDN Geoblocking*, 2018 ACM INTERNET MEASUREMENT CONFERENCE, (Nov. 2018), https://ensa.fi/papers/403forbidden_imc18.pdf (last visited Feb. 3, 2020) ("Our results show that geoblocking is a widespread phenomenon, present in most countries globally.").

169. *See, e.g.*, *In re* iPhone Application Litig., 844 F. Supp. 2d 1040 (N.D. Cal. 2012); *In re* Google Location History Litigation, 428 F. Supp. 3d 185 (N.D. Cal. 2019); An Act to Protect the Privacy of Online Customer Information, Maine, ME. REV. STAT. ANN. tit. 35-A, § 9301 (2019).

170. For example, Liana B. Baker and Yinka Adegoke, *Olympics Fans Find Ways to Circumvent NBC's Online Control*, REUTERS, (July 30, 2012, 8:06 PM), https://www.reuters.com/article/us-olympics-tech-workaround/olympics-fans-find-ways-to-circumvent-nbcs-online-control-idUSBRE86U02R20120731; Aaron Gell, *Reinventing the Web: A New App Lets You Watch Whatever TV Program You Want, Including the Olympics, Anywhere in the World*, BUSINESS INSIDER, (Jan. 25, 2014, 7:04 AM), http://www.businessinsider.com/hola-tv-watch-olympics-vpn-blocker-netflix-world-2014-1.

171. *See* Triple Up Ltd. v. Youku Tudou, Inc., 235 F. Supp. 3d 15, 24–25 (D.D.C. 2017) (rejecting as a "most novel argument" that a lack of geoblocking should lead to a finding of personal jurisdiction but finding it "unobjectionable" that "a website's *affirmative geoblocking* efforts should weigh *against* the exercise of

conclusion might be the case even if users from the geoblocked territory circumvent the geoblocking and gain access to the blocked content.[172] But courts in the United States have not yet ruled that Internet actors *must* geoblock in order to avoid exposure to specific jurisdiction in the courts of a country in which their online content would otherwise be accessible.[173]

In *Plixer International, Inc. v. Scrutinizer GmbH*,[174] the U.S. Court of Appeals for the First Circuit concluded that the use of geoblocking is not required for limiting the territorial scope of activity on the Internet for jurisdictional purposes.[175] Nevertheless, the court took the lack of geoblocking into account, observing that the use of geoblocking "is surely relevant to [a defendant's] intent not to serve the United States."[176] In *Plixer*, the defendant's "failure to implement such restrictions, coupled with its substantial U.S. business, provide[d] an objective measure of its intent to serve customers in the U.S. market and thereby profit."[177] An additional factor that supported the court's view of the lack of geoblocking in *Plixer* was that the defendant was aware of the location of its users; in its privacy policy the defendant listed user location data among the information that the defendant stored.[178]

In the future it may be even more problematic for Internet actors to avoid a finding of jurisdiction if they ignore available information about user location. With the widespread deployment of geolocation and the extensive use of geolocation data it is not inconceivable that courts could eventually view a lack of geoblocking

---

personal jurisdiction . . ."); *see also* Carsey-Werner Co., LLC v. BBC, No. CV 17-8041 PA (ASx), 2018 U.S. Dist. LEXIS 33862, at *11–21 (C.D. Cal. Feb. 23, 2018).

172. *Carsey-Werner Co., LLC*, 2018 U.S. Dist. LEXIS 33862, at *11–21.

173. *E.g.*, *Triple Up Ltd.*, 235 F. Supp. 3d at 24–25; *Carsey-Werner Co., LLC*, 2018 U.S. Dist. LEXIS 33862, at *11–21. In other contexts, courts may require geoblocking. *See, e.g.*, Jazette Enter. Ltd. v. Commonwealth *ex rel.* Brown, No. 2012–CA–001366–MR, 2014 WL 689044, at *2 (Ky. Ct. App. Feb. 21, 2014) (requiring that an online gambling website employ geoblocking to prevent access to its content by users connecting from the State of Kentucky).

174. 905 F.3d 1 (1st Cir. 2018).

175. The same conclusion was reached in *Triple Up Ltd.*, 235 F. Supp. 3d at 24–25.

176. *Plixer Int'l., Inc.*, 905 F.3d at 9.

177. *Id.*

178. Exhibit 4 to the *Declaration of James G. Goggin in Support of Opposition to Motion to Dismiss* at 3, Plixer Int'l. v. Scrutinizer GmbH, 293 F. Supp. 3d 232 (D. Me. 2017), *aff'd*, 905 F.3d 1 (1st Cir. 2018).

as evidence of intent to target a non-geoblocked territory.[179] Some courts are already unlikely to be sympathetic to Internet actors who have been using geoblocking for other purposes while not employing geoblocking to limit their jurisdictional exposure.[180]

D. Third-Party Activities

One question that arises in targeting analyses is how third-party activities should factor into the analyses. Third parties might be, for example, Internet service providers ("ISPs")[181] who provide services to Internet actors, such as hosting for Internet actors' (user-generated) content (e.g., Twitter or Facebook) or placing the advertising of still other third parties (in this case third-party advertisers) on Internet actors' websites (e.g., Google's placing of advertisements of third-party advertisers on Internet actors' websites through Google's AdSense service).[182]

---

179. The use of geoblocking is not without its opponents. For example, the Australian Productivity Commission proposed that the Government of Australia amend the Australian copyright statute to provide that the circumvention of geoblocking not violate Australian copyright law. PRODUCTIVITY COMMISSION Inquiry Report No. 78, AUSTRALIAN GOVERNMENT, INTELLECTUAL PROPERTY ARRANGEMENTS, INQUIRY REPORT NO. 78 (2016), at 11, https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf; *see also* Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geoblocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, 2018 O.J. (L 60) 1, 13.

180. *See* Warner Music UK Ltd. v. TuneIn, Inc. [2019] EWHC (Ch) 2923 [25] (where the defendant used geoblocking to limit access to some radio stations).

181. The term "internet service providers" is used in its broadest sense in this article and includes service providers under 17 U.S.C. § 512(k) (2012).

182. "**AdSense** . . . allows [Internet actors] to host or 'publish' Google ads on their web sites. These [Internet actors] receive a share of the revenue Google receives for each click on an AdWords advertisement that appears on their web sites." Woods v. Google, Inc., 889 F. Supp. 2d 1182, 1187 (N.D. Cal. 2012) (citation omitted); *see also How AdSense Works*, GOOGLE, https://support.google.com/adsense/answer/6242051?hl=en (last visited Feb. 4, 2020).

For an analysis of the effects of activities by another type of third parties—social media influencers—see Denise Wiedemann, *Stilikonen, Travel Addicts and Food Junkies*, in IPR ZWISCHEN TRADITION UND INNOVATION 163 (Caroline Sophie Rupp ed., 2019).

ISPs might use geolocation information for the benefit of Internet actors, and through their activities ISPs can influence how Internet users perceive the presence of Internet actors and the actors' targeting of users.[183] For example, a social media ISP can use a user's location to prioritize certain content in the user's feed of posts;[184] an ISP that places ads can display the advertisements on a website according to the location of the user viewing the website. While ISPs placing ads might offer advertisers the opportunity to limit geographically the locations where the advertisers' ads will be displayed (as Google does for Google Ads),[185] the ISPs placing the ads might not offer the same territorial limitation option to Internet actors on whose websites the ISPs display the advertisers' ads.[186]

One difficulty in evaluating the effects that third-party activities have on targeting is that an Internet actor's knowledge of the functioning of the activities will vary—and therefore the weight that courts give to an actor's use of the services will vary as well.[187] Large

---

183. An ISP's use of geolocation does not always inure to the benefit of its Internet actors. For example, in 2019 an actor using AdSense shared his problem with the service: As a candidate for mayor he needed to avoid having businesses from within the city appear on his website. However, most of his website visitors were connecting from the city (or the county where the city was located), so AdSense was showing them ads from within the city. The mayoral candidate was therefore looking to exclude local advertisers from AdSense-displayed ads shown to local visitors (i.e. local voters) on his website. Frankie Abbruzzino, Posting to ADSENSE COMMUNITY (Apr. 24, 2019), https://support.google.com/adsense/thread/4753910?hl=en (last visited Feb. 4, 2020).

184. On limitations relating to geolocation in some countries *see, e.g.*, IAB EUROPE TRANSPARENCY & CONSENT FRAMEWORK POLICIES, 7, 15 (2019), https://iabeurope.eu/wp-content/uploads/2019/08/TransparencyConsentFramework_PoliciesVersion_TCFv2-0_2019-08-21.3_FINAL-1-1.pdf (last visited Feb. 4, 2020) (limiting by Section 16(2) on p. 15 the use of "precise geolocation data" defined in Section 1(18) on p. 7).

185. *Location Targeting*, GOOGLE ADS, https://support.google.com/google-ads/answer/6317?hl=en (last visited Feb. 4, 2020).

186. The "country restrictions" on Google's AdSense are imposed pursuant to the location of the publisher (the Internet actor), not the location of users. *Understanding AdSense Country Restrictions*, GOOGLE ADSENSE HELP, https://support.google.com/adsense/answer/6167308?hl=en (last visited Feb. 4, 2020).

187. On the requirement of a link between a defendant's acts of targeting (as opposed to a third-party's acts of targeting) and the cause of action see Bandemer v. Ford Motor Co., 931 N.W.2d 744, 755–62 (Minn. 2019), *cert. granted*, 140 S. Ct. 916 (2020) (Anderson, J., dissenting). The dissenting judges in *Bandemer* objected

corporate Internet actors are likely to be familiar with how ISP services operate and they will know that ISPs utilize geolocation; they will also understand how an ISP's use of geolocation impacts the localization of content.[188] Other Internet actors might not be familiar with ISP industry practices or have only a general idea of how ISP services actually work.

To the extent that courts consider Internet users' perceptions as relevant to or determinative in the courts' targeting analyses, courts face an additional difficulty: they must evaluate Internet users' perceptions of the effects that third-party activities have on the content that the users see. Sophisticated users will know that Internet geolocation is used, how it is used, and how the uses affect the content that they see. Even if these users do not know the intricacies of ISPs' use of geolocation (such as their particular search and display algorithms), they might understand that the content they see is being delivered by an ISP rather than by the Internet actor. Less sophisticated Internet users might not even know that geolocation exists or they may understand in only basic terms how geolocation and content localization work; as a result, they may assume that the content they see is either localized randomly or localized by the Internet actor itself (and not by the ISP).

How Internet users perceive the localization of content on the Internet is an empirical question; increased user sophistication regarding Internet use in general and Internet territorialization in particular suggests that more and more Internet users assume that localized Internet content is targeted at them. However, users' perceptions may vary according to whether users are aware that the tailoring of the content, which is based on their location, is being conducted by an ISP or whether they assume that it is the Internet actor who is localizing the content.[189]

---

to the "court's reliance on the activities of persons other than [the defendant]," which the judges called "fundamentally flawed." *Id.* at 762.

188. *Cf.* a dispute over the extent of Google's use of an Internet actor's user location data in Digital Envoy, Inc. v. Google, Inc., 370 F. Supp. 2d 1025, 1031 (N.D. Cal. 2005) ("[The plaintiff] . . . argue[d] that while the parties fully contemplated and discussed Google's use of [the plaintiff's] geolocation technology on Google's own website through the AdWords program, the parties never contemplated that [the plaintiff's] technology would be used in conjunction with third party sites, as in AdSense.").

189. It is worth noting that "today's college students have difficulty remembering the internet when it was not geographically aware—when it did not recognize the physical location of devices connected to the internet." Marketa

In the United States, some courts have considered the role that third-party geographically-targeted advertising should play in a targeting analysis. In *Mavrix Photo Inc. v. Brand Technologies, Inc.*,[190] the U.S. Court of Appeals for the Ninth Circuit considered it relevant for a finding of specific jurisdiction over the Internet actor in California that the third-party services at issue, including Google AdSense and ValueClick,[191] placed advertisements that targeted California on the actor's website. The court concluded that "it [was] immaterial whether [it was] the third-party advertisers or [the Internet actor] [who] targeted California residents"[192] and that the Internet actor "kn[ew]—either actually or constructively—about its California user base, and . . . exploit[ed] that base for commercial gain by selling space on its website for advertisements."[193] These facts combined with other facts led the court to find that the Internet actor was subject to specific jurisdiction in a court in California.[194]

Similarly, third-party advertising contributed to a finding of personal jurisdiction in *UMG Recordings, Inc. v. Kurbanov*.[195] Initially, the lower court rejected the plaintiff's reliance on the defendant's tracking of user location and geotargeting advertisements, dismissing the plaintiff's "attenuated argument" because "tracking the location of a user does not show targeting of the user or their location; instead, it is merely a recording of where the user's unilateral act took place."[196] The U.S. Court of Appeals for the Fourth Circuit disagreed,

---

Trimble, *Geoblocking and "Legitimate Trade*," in INTELLECTUAL PROPERTY AND OBSTACLES TO LEGITIMATE TRADE 53 (Christopher Heath, Anselm Kamperman Sanders & Anke Moerland eds., 2018). Google released its Google Maps API in 2005, and the iOS and Android location-aware smartphone applications were launched in 2009. Rob Kitchin, Tracey P. Lauriault & Matthew W. Wilson, *Understanding Spatial Media*, UNDERSTANDING SPATIAL MEDIA, (Rob Kitchin et al. eds., 2017).

190. 647 F.3d 1218, 1230 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1101 (2012). The decision was issued six weeks after the U.S. Supreme Court ruled in J. McIntyre Mach. v. Nicastro, 564 U.S. 873 (2011).

191. Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss at 6, Mavrix Photo, Inc. v. Brand Tech., Inc., No. 2:09-CV-02729-PSG-JC (C.D. Cal. July 6, 2009).

192. *Mavrix Photo, Inc.*, 647 F.3d at 1230.

193. *Id.*

194. *Id.* at 1232.

195. 963 F.3d 344, 354–55 (4th Cir. 2020), petition for certiorari filed, No. 20-503, Oct. 12, 2020.

196. UMG Recordings, Inc. v. Kurbanov, 362 F. Supp. 3d 333, 340 (E.D. Va. 2019), *rev'd*, 963 F.3d 344 (4th Cir. 2020), petition for certiorari filed, No. 20-503, Oct. 12, 2020.

finding it relevant that the defendant "ultimately profits from visitors by selling directed advertising space and data collected to third-party brokers, thus purposefully availing himself of the privilege of conducting business within [the forum]."[197]

On the other hand, geotargeted third-party advertisements did not help establish personal jurisdiction in *AMA Multimedia, LLC v. Wanat.*[198] In this case, additional contacts with the United States existed—the defendants had used a U.S. domain name registrar and a U.S. domain name server, and the United States was the largest market for the defendant's business. However, the court found that, as opposed to the situation in the *Mavrix* case, the defendants' content did not have a "specific focus" on the United States but was of interest globally; the content was largely uploaded by users, and in the court's view, "the popularity or volume of U.S.-generated adult content does not show that [the defendants] expressly aimed the site at the U.S. market."[199] As for the geotargeted third-party advertising, the court warned that "[i]f such geo-located advertisements constituted express aiming, [the defendants] could be said to expressly aim at *any* forum in which a user views the website."[200]

In some cases, the role of third-party geographically-targeted advertising in a specific jurisdiction analysis might be irrelevant if a court does not consider the claims at issue as arising out of or relating to the advertisements at issue. In *Triple Up v. Youku Tudou, Inc.*,[201] the Internet actor argued that "the presence of third-party advertisements on a website is no more indicative of purposeful availment than the general accessibility of that website";[202] the U.S. District Court for the District of Columbia held that it had no specific jurisdiction over the defendant in the case because the plaintiff's claims did not "aris[e] out of or relate[ ] to those third-party advertisements, as specific jurisdiction requires."[203]

If claims actually arise from third-party advertising, the question might become to what extent the advertising demonstrates a

---

197. *UMG Recordings, Inc.*, 963 F.3d at 353.

198. AMA Multimedia, LLC v. Wanat, 970 F.3d 1201 (9th Cir. 2020).

199. *Id.* at 1210.

200. *Id.* at 1211. On the potentially insufficient evidence with respect to the advertising see ibid. at 1217 (Judge Nelson, concurring).

201. 235 F. Supp. 3d 15 (D.D.C. 2017), *aff'd* 2018 WL 4440459 (D.C. Cir. 2018).

202. Brief for Defendant-Appellee at 18, Triple Up Ltd. v. Youku Tudou, Inc., 2018 WL 4440459 (D.C. Cir. 2018) (No. 17-7033), 2017 WL 2876027 at 9.

203. *Triple Up Ltd.*, 235 F. Supp. 3d at 26 (internal quotation omitted).

defendant's acts of targeting—as opposed to contacts created solely by a plaintiff's activity, a third party's activity, or yet another party's (an Internet user's) activity. In *Beijing Daddy's Choice Science and Technology Co. v. Pinduoduo Inc.*,[204] the U.S. District Court for the Southern District of New York rejected the plaintiff's assertion that specific jurisdiction existed over the Internet actor, observing that "these advertisements . . . were not sent to consumers in New York in any meaningful sense, but rather were automatically generated with regurgitated geolocation data."[205] Ultimately, the court saw no nexus between the advertisements and the claims. In *UMG Recordings, Inc. v. Kurbanov*, the U.S. District Court for the Eastern District of Virginia viewed localized advertising as resulting in contacts created by users, but the appellate court disagreed, finding purposeful availment by the defendant.[206]

A U.K. court addressed the question of who—an ISP (Google in the case) or an Internet actor—targeted Internet users through geographically-tailored advertisements delivered via the ISP's ad-placement service (Google's AdSense). In *Argos Limited v. Argos Systems Inc.*[207] the U.S. Internet actor used geolocation to identify users connecting from the U.K. and—for these users only—the actor opened its website to AdSense-delivered advertisements which were then localized, based on the users' location, to the U.K.[208] Because the Internet actor did business under a name that was identical to the plaintiff's EU-registered trademark, the plaintiff sued the Internet actor for infringement of the trademark,[209] arguing that the actor targeted its website to users from the U.K.[210] The court remarked that "[t]he display of the Google ads was the critical element relied on by [the plaintiff] to establish targeting."[211]

Lord Justice Floyd rejected an argument in *Argos* that contended that only Google was targeting the U.K. through its AdSense advertisements; he concluded that "both Google and [the Internet actor] were targeting the ads at the UK,"[212] noting that

204. No. 18 CIV. 6504 (NRB), 2019 WL 3564574 (S.D.N.Y. Aug. 6, 2019).

205. *Id.* at *6.

206. UMG Recordings, Inc. v. Kurbanov, 362 F. Supp. 3d 333, 340 (E.D. Va. 2019), *rev'd*, 963 F.3d 344 (4th Cir. 2020), petition for certiorari filed, No. 20-503, Oct. 12, 2020.

207. [2018] EWCA (Civ) 2211, [2018] WLR 734.

208. *Id.* at para. 6.

209. *Id.* at para. 2–3, 12.

210. *Id.* at para. 17.

211. *Id.* at para. 21(ii).

212. *Id.* at para. 64.

"Google had a role in causing the ads to be targeted at the UK. Nevertheless, the consequence of the selection of those ads was that they appeared on [the Internet actor's website], which thus became targeted at UK customers."[213]

When courts assess the effects of third-party activities, the courts' choice of perspective (whether they assess targeting from the point of view of Internet actors or Internet users) plays an important—and in some cases a determinative—role. As noted earlier, courts in the United Kingdom evaluate "the issue of targeting . . . objectively from the perspective of average consumers in the [forum]."[214] Justice Birss considered targeting from this perspective in a case involving ISP-placed advertisements in *Warner Music UK Ltd v. TuneIn Inc.*[215] He emphasized that "[t]he objective presence of UK-targeted advertisements is what matters for targeting,"[216] and dismissed as irrelevant the argument that "the targeting of the visual advertising was the result of the effect of automated advertising platforms and that [the Internet actor] did not select the individual advertisements."[217] The Justice noted that "from the point of view of the user—the public in the UK—it would still appear that they were being targeted."[218] But even in the United Kingdom, where courts focus on the perspective of Internet users, an internet actor's intent might still be relevant; as Lord Justice Floyd conceded in *Argos*, while U.K. courts assess targeting "objectively from the perspective of the average consumer," evidence of an Internet actor's intent is "a relevant, and possibly (where the objective position is unclear or finely balanced) a determinative consideration."[219]

Regardless of the perspective that courts adopt, they seem to be increasingly unreceptive to arguments contending that an Internet actor did not understand the role played by an ISP's use of geolocation or that Internet users assume that localized advertisements appear randomly. The advanced territorialization of the Internet is defeating

---

213. *Id.*

214. Merck KGaA v. Merck Sharp & Dohme Corp. [2017] EWCA (Civ) 1834 [169].

215. [2019] EWHC (Ch) 2923.

216. *Id.* at para. 24.

217. *Id.*

218. *Id.*

219. Argos Ltd. v. Argos Sys. Inc [2018] EWCA (Civ) 2211 [51], [2018] WLR 734. Lord Justice Floyd added that "[s]ubjective intention cannot, however, make a website or page (or part of a page) which is plainly, when objectively considered, not intended for the UK, into a page which is so intended."

any remaining illusions that the Internet is a borderless and location-agnostic medium.

E. Other Factors

Other factors that courts employ in targeting analyses have evolved as well, and both the weight given to these factors and the manner in which courts weigh the factors could be changing.

One of the other factors is the contact phone number that an Internet actor has listed; if an actor uses a phone number from a specific country, the theory goes that the actor would more likely be targeting that country. For example, a website listing a contact phone number with country calling code +44 would be directed at the United Kingdom, and a website with country calling code +49 would be directed at Germany. However, giving weight to the provenance of a contact phone number is questionable; to begin with, it is doubtful that a website listing a phone number with a country calling code is targeting that country because users connecting from within the country should not need the country calling code to connect. Only users from outside the United Kingdom would need the U.K. country calling code to dial a U.K. phone number. Additionally, some services allow Internet actors to obtain a phone number in a foreign country without requiring that the actors have any links to the country.[220] The detachment of phone numbers from territories, like the detachment of ccTLDs and geoTLDs from their territories, dilutes the territorial significance of country calling codes.

The fact that an Internet actor has listed a phone number from a specific country might also be losing weight in targeting analyses because modern communication technologies are removing barriers—such as high costs—to international calling; for example, the WhatsApp application (though it still requires a country calling code) enables its users to call internationally free of charge.[221] In *Easygroup*, a case that was litigated in England, the defendant actually directed users to the app; the defendant's "website contain[ed] an invitation to contact [the defendant's] call centre through a WhatsApp messaging

---

220. *See Get Your Online Phone Number*, SKYPE, https://www.skype.com/en/features/online-number/ (last visited Feb. 23, 2020) (describing the ability to obtain a phone number in a foreign country "wherever you are, on any device").

221. *Making Voice Calls*, WHATSAPP, https://faq.whatsapp.com/en/android/28000016/?category=5245237 (last visited Feb. 5, 2020).

service with an international dialling code."[222] As of February 2020, WhatsApp had registered 2 billion users worldwide.[223]

Internet actors may list additional means for users to contact them, such as email addresses or instant messaging handles, or offer chat widgets for users to chat with actors' customer service representatives. In the case of an email address, a particular TLD may still indicate a country connection, but as discussed earlier for TLDs,[224] it is questionable whether an actor's choice of a particular TLD should be given much weight in targeting analyses. Instant messaging handles and chat widgets can be designed to signal the targeting of a country through the language used or the name chosen for a customer service representative; however, the sophistication of users who use instant messaging and chat widgets can affect the weight given to this factor—or even eliminate the relevance of the factor—in targeting analyses.

Courts have also looked at an Internet actor's choice of currency; for example, a website in the German language that listed prices in German marks (which were used in Germany before the Euro was introduced) was likely to target customers in Germany rather than in Austria—another German-speaking country that used a different currency at the time.[225] However, listing prices in a particular currency does not necessarily evidence the targeting of the country using the currency without the presence of other concurrent acts by the Internet actor aimed at limiting payment options. International payment cards enable users to pay prices in various currencies,[226] as do payment services such as PayPal.[227] And an Internet actor's acceptance of

---

222. Easygroup Ltd. v Empresa Aérea de Servicios y Facilitatión Logística Integral S.A.—Easyfly S.A. [2020] EWHC (Ch) 40 [56].

223. *Two Billion Users—Connecting the World Privately*, WHATSAPP (Feb. 12, 2020), https://blog.whatsapp.com/10000666/Two-Billion-Users%E2%80%94Connecting-the-World-Privately.

224. *See supra* Part II, Section A.

225. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 30, 2006, I ZR 24/03, para. II.1.

226. *E.g., Easygroup,* [2020] EWHC (Ch) 40, at [56] ("[S]ome backpackers (or other visitors) from Europe planning to travel to Colombia are likely to try and arrange internal Colombian flights before leaving Europe, and if they were to do so would not necessarily be deterred by the website being in Spanish and the price in Colombian currency . . . and so long as international credit cards are accepted, the fact that prices are quoted in local currency is not likely to be a deterrent either.").

227. *How Do I Send a Payment in Another Currency?*, PAYPAL, https://www.paypal.com/us/smarthelp/article/how-do-i-send-a-payment-in-another-currency-faq1555 (last visited Feb. 5, 2020); *Currency Codes*, PAYPAL,

cryptocurrencies can obviate the relevance of this targeting factor altogether.

III. TARGETING AND OVEREXPOSURE

Developments in Internet technology and increasing Internet actor and user sophistication warrant a revised approach to targeting factors. It no longer seems reasonable to assume that a website in German targets only users in Germany, that a website with a Spanish contact phone number targets only users in Spain, or that a website with an .it domain name targets only users in Italy. Considering the progress in the territorialization of the Internet, it seems unreasonable to attach no targeting significance whatsoever to localized third-party advertising or to assume an actor's ignorance of available user location information. It is time to adopt a more realistic approach to the various targeting factors.

A revised approach to targeting factors, in light of the developments discussed in the previous Part, will not play a determinative role in cases where other factors of targeting are present. But in other cases where other evidence of targeting is missing, the approach could lead to either of two extreme outcomes: a court could find either that an Internet actor targeted no country at all, or that the actor targeted all countries connected to the Internet.

Concluding that an Internet actor targeted no country would lead to inequitable results;[228] the logical alternative conclusion, that the actor targeted all countries connected to the Internet, is consistent with courts' approaches to targeting in larger jurisdictions, where courts have found that when an actor targeted a larger jurisdiction the logical inference is that the actor targeted smaller jurisdictions within the larger jurisdiction. For example, targeting the entire United States means that Connecticut was targeted.[229]

---

https://developer.paypal.com/docs/api/reference/currency-codes/ (last visited Feb. 5, 2020).

228. *See* PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 117 (4th ed. 2019) ("[A]n overly rigid conception of territoriality in this class of cases may result in the conclusion that no infringement has occurred anywhere.").

229. *E.g.*, in *Inset Systems, Inc. v. Instruction Set, Inc.*, the court considered it significant that the defendant listed a toll-free number on the website, notwithstanding the fact that the toll-free number was available to users from all U.S. states and not only to users from Connecticut. Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996).

On a global scale, targeting the world should be interpreted as targeting each and every country in the world, unless an actor expressly excluded a particular country or countries. An Internet actor's exclusion of a territory, if accompanied by the actor's enforcement of the exclusion, will support a court's finding that the actor has not targeted the territory. Courts may accept as evidence of non-targeting an Internet actor's geoblocking of users connecting from a country,[230] or an Internet actor's disclaimer on its website that it does not serve a particular country (if the disclaimer is accompanied by conduct of the actor that is consistent with its disclaimer).[231]

A revised approach to targeting does not presage the end of targeting analyses; the analyses will continue to limit the territorial reach of personal jurisdiction when the facts show that Internet actors have taken actions to avoid targeting a particular country or countries. Eliminating targeting analyses altogether and holding Internet actors accountable globally—even if an actor took active steps such as the employment of geoblocking to territorially delineate the scope of its conduct on the Internet—would be an extreme position, but it would be in line with some courts' skepticism regarding the effectiveness of any technical means of territorial delineation, such as geoblocking, the effectiveness of which continues to be undermined by geolocation (and geoblocking) circumvention tools.

The more realistic approach to targeting factors that this article advocates is subject to at least two criticisms: critics will argue that the approach promotes a deeper territorial partitioning of the Internet, including through the use of geoblocking, which many disfavor as an unfortunate and undesirable trend.[232] Although the idea of a borderless

---

230. *See also* ALI PRINCIPLES, *supra* note 146, at 49–50 ("[J]urisdiction may be lacking when the defendant . . . blocks access to websites by users in the State or employs other technological means, such as geolocator software, to screen out users from the State . . . .").

231. *E.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 30, 2006, I ZR 24/03, para. II.1. ("[A]n effective disclaimer requires that it be phrased clearly and unambiguously and presented in such a manner that the disclaimer is understood to be taken seriously. The disclaimer is of significance only if the [Internet actor] actually follows the disclaimer and does not, contrary to [the disclaimer], deliver to the disclaimed territory.") (translation by the author).

232. Alexander Peukert, *The Coexistence of Trade Mark Laws and Rights on the Internet, and the Impact of Geolocation Technologies*, 47(1) INT. REV. INTELL. PROP. & COMPETITION L., 60, 73 (2016) ("Incentivizing market segmentation by coupling international jurisdiction to the (non-)application of geolocation technologies may exacerbate the emergence of a global and diversified online market with all its potential economic and cultural benefits.").

Internet continues to have strong support from many, and particularly from those who have suffered because of the barriers erected and maintained among countries in the physical world, reality requires that Internet actors be able to operate in an environment of predictability and legal certainty and limit territorially their exposure to personal jurisdiction and applicable law.[233] Internet actors must know what actions they should take for purposes of legal compliance, and the proposed approach would allow actors to structure their conduct in anticipation of their potential exposure to personal jurisdiction and the applicable laws of various countries.[234]

Another criticism is that the revised approach will lead to an expanded reach of personal jurisdiction and applicable law on the Internet, because courts would find personal jurisdiction and extend a country's law in a greater number of cases.[235] Critics have correctly pointed out the negative consequences of such overexposure.[236] The following Part explains that practical and legal barriers can likely mitigate many instances of overexposure and suggests that means other than limitations on the territorial reach of personal jurisdiction and applicable law can and should provide appropriate avenues for addressing any negative consequences of overexposure.

A. Mitigation of Overexposure

Expansion critics fear that approaching targeting analyses in the manner suggested above will result in many Internet actors being subject to personal jurisdiction and national laws worldwide. In practice, however, overexposure of this magnitude is unlikely because a number of procedural and practical constraints limit the overexposure; the constraints concern both choice of court and choice of applicable law.

An increase in the number of countries that are deemed to have been targeted by an Internet actor will increase the number of courts

---

233. Actors' uncertainty about how they can territorially limit their exposure could have negative effects, as actors might cease to act on the Internet because of concerns about overexposure.

234. If actors' decisions to limit their exposure on the Internet stem from their concerns about the law and jurisdiction in undemocratic countries, the problem that the rest of the world should address is not the trend toward territorialization on the Internet but the legitimacy of regimes in undemocratic countries.

235. *See supra* note 15 for the examples of the types of cases in which multiple courts of specific jurisdiction might exist.

236. *See supra* Introduction.

having specific jurisdiction over the actor, but the increase should not change the number of courts having general jurisdiction over the actor. Regardless of the number of countries that an Internet actor has targeted or is deemed to have targeted, general jurisdiction should remain with one court—the court of the Internet actor's domicile—or, exceptionally, with a few courts if conflict-of-laws rules provide for alternative domiciles, an additional court of general jurisdiction, or both.[237]

The increase in the number of targeted countries will therefore affect only the number of courts that may decide claims that are related to or that arise solely from acts that form the basis for specific jurisdiction over a defendant. Because of the constraints on the scope of the court's jurisdiction and also on the scope of any remedy that a court of specific jurisdiction may award, the utility and effectiveness of suing the Internet actor in one of these courts is limited.

The utility of pursuing a claim in a court of specific jurisdiction is further constrained in cases where an Internet actor has no assets in the forum country. If the Internet actor has no assets in the forum country and does not comply voluntarily with a judgment from that country, the plaintiff must seek recognition and enforcement of the judgment in the country where the actor is domiciled. This additional step in enforcement might dissuade some plaintiffs from pursuing their claims in courts of specific jurisdiction.

In addition to the costs associated with having a judgment recognized and enforced in a third country, plaintiffs may also be discouraged by the fact that a foreign court might not recognize a judgment issued by a court of specific jurisdiction. Typically, a court (the "enforcing court") may refuse to recognize or enforce a foreign judgment if, according to the enforcing court's law, the court that rendered the judgment had insufficient grounds to exercise jurisdiction over the actor.[238] This was the case for example in Lucasfilm v. Ainsworth,[239] where the English court refused to recognize a U.S. court's judgment against a U.K.-domiciled Internet actor because the ground of jurisdiction in the U.S. case (which was based on

---

237. *E.g.*, RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016). General jurisdiction in the place of the plaintiff might exist in defamation or personality rights cases. *See, e.g.*, Joined Cases C-509/09 and C-161/10, eDate Advert. Gmbh , Oliver Martinez, and Robert Martinez v. MGN Ltd., 2011 E.C.R. I-10269.

238. *E.g.*, Brussels I Regulation (recast); 28 U.S.C. § 4102(b)(1) (2012) (the "SPEECH Act").

239. [2009] EWCA (Civ) 1328.

California's long-arm statute) was insufficient under U.K. law for the recognition of the judgment in the United Kingdom.[240] As Lucasfilm illustrates, an enforcing court's law filters out the recognition and enforcement of any foreign judgments when the foreign court's jurisdictional ground is unacceptable to the forum country.[241]

Another aspect of overexposure is exposure to multiple countries' laws, but this aspect may also be mitigated because in practice the choices of applicable law are limited because it might be difficult, or even impossible, to pursue claims under the laws of multiple countries. First, the power of a court of general jurisdiction may be constrained by the justiciability of the foreign claims; for example, in IP cases courts will not adjudicate the validity of IP rights that are granted by or registered in foreign countries. Sometimes this rule can extend to cases where the issue of validity is raised as a defense or counterclaim.[242]

Second, practical considerations, such as the cost and availability of other resources, including witnesses, will limit the number of countries' under whose laws a plaintiff may realistically be able to pursue claims. In some countries courts require parties to prove foreign law, or courts expect the parties to assist the court in determining foreign law.[243] And even if plaintiffs have sufficient resources to prove or help determine the laws of multiple countries, plaintiffs might not have the evidence necessary to prove infringement or damages in all of the countries.[244]

A court's exercise of the forum non conveniens doctrine can also mitigate the overexposure; a court may conclude that another court is a more convenient forum to decide a dispute.[245] If a court of

240. *Id.* at 209.

241. Not all countries have particular jurisdictional requirements that foreign judgments must meet; for example, some countries apply the "mirror image" principle, under which their courts apply their own (forum) law to assess whether a foreign court had jurisdiction over a defendant.

242. *E.g.*, Voda v. Cordis Corp., 476 F.3d 887, 904 (Fed. Cir. 2007); Brussels I Regulation (recast); *see also* PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 106–08 (4th ed. 2019).

243. The obligation to assist the court may be as significant in some countries as proving foreign law.

244. Proof of actual damages might not be necessary if some other computation of damages is available, such as statutory damages or reasonable royalties. *E.g.*, 17 U.S.C. § 504(c) (2012).

245. On the exclusion of *forum non conveniens* in the European Union *see* Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1462 (for courts of general jurisdiction).

specific jurisdiction uses forum non conveniens, it applies the doctrine to a claim brought under the forum law, in which case only a court of general jurisdiction may be an alternative forum, and only if the claim is justiciable under the law of the court of general jurisdiction.

In IP cases brought in courts of specific jurisdiction, forum non conveniens might not be an option; this scenario occurs when disputes concern IP rights granted by or registered in the country of the court of specific jurisdiction, in which case the IP rights disputes might not be justiciable in courts of general jurisdiction. Additionally, in cases that concern other IP rights such as copyright, a court of specific jurisdiction might be reluctant, when no case law exists on point in the country of the court of general jurisdiction, to assume that the court of general jurisdiction would consider the claims concerning rights under foreign law to be justiciable and would adjudicate the claims.[246]

Legitimate reasons exist for skepticism with respect to the effectiveness of the mitigating factors. Internet actors may have assets in multiple countries, and judgments rendered by courts in countries with the assets, even if these courts only have specific jurisdiction over the actors, might be enforceable in these countries, obviating the necessity for recognizing and enforcing the judgments in the country where the actors are domiciled. In such cases the recognition and enforcement process of the country where the actors are domiciled will not provide the filter that is mentioned above. Additionally, enforcement in one country, even if it is not the country of general jurisdiction, may have global effects.

On the other hand, Internet actors who have assets in multiple countries are more likely to be actors who can afford the costs of global, or at least regional, compliance, and they should reasonably expect to be haled into all courts and held to the laws of all, or multiple, countries. Major ISPs[247] are likely the kind of actors who should reasonably be expected to meet the demands of global compliance, unless they clearly limit their activities to only selected countries.

On the applicability of the doctrine in courts of specific jurisdiction *see* Barry J. Rodger, *Forum Non Conveniens* Post-*Owusu*, 2 J. PRIV. INT'L L. 71, 92 (2006). On *forum non conveniens* in copyright cases see generally PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 109–11 (4th ed. 2019).

246. *See, e.g.*, Mecklermedia Corp. v. D.C. Congress GmbH [1998] 1 All ER 148; Halo Creative & Design Ltd. v. Comptoir des Indes, Inc., 816 F.3d 1366, 1371 (Fed. Cir. 2016).

247. For the broad definition of ISPs that is used in this article see *supra* note 181.

ISPs are the de facto gatekeepers of legal compliance for their users; as such, they might lessen the overexposure of their users. As ISPs endeavor to avoid direct liability and secondary liability for content generated by their users, ISPs set rules and implement policies and procedures to shield themselves from liability; notice-and-takedown, notice-and-notice, and similar systems that ISPs operate in order to comply with national copyright laws guide users' conduct and channel users, and the ISPs themselves, into legal compliance.[248]

Not everyone agrees that the current limitations on transnational litigation can sufficiently mitigate overexposure.[249] For example, several expert groups exploring the intersection of IP law and conflict of laws have considered the overexposure problem and suggested adjustments to the rules of personal jurisdiction and choice of applicable law that they say will better reflect the potential dangers of overexposure.

The American Law Institute's Principles on conflict of laws in IP cases (the "ALI Principles")[250] suggest that only courts in countries that an Internet actor has targeted should have specific jurisdiction over the actor.[251] At the same time, however, the ALI Principles expand the number of courts of general jurisdiction; in addition to the court of a defendant's residence,[252] further courts of general jurisdiction would exist "in any State in which [an Internet actor] has substantially acted, or taken substantial preparatory acts, to initiate or further an alleged infringement."[253] In Internet-related cases such general jurisdiction would exist, for example, in the place from which the Internet actor had operated its website.[254]

---

248. *E.g.*, 17 U.S.C. § 512; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Articles 12–15, 2000 O.J. (L 178) 1, 12–13; Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, art., Article 17(4), 2019 O.J. (L 130) 92, 120.).

249. For a proposal to narrow personal jurisdiction on the Internet *see* Trammell & Bambauer, *supra* note 16.

250. ALI PRINCIPLES, *supra* note 146.

251. *Id.* at 49 ("In lieu of the term 'targets,' the ALI Principles substitute the concept that the defendant 'directs' the alleged infringement into the forum.").

252. *Id.* at 34.

253. *Id.* at 47–48. The ALI Principles also include a special provision that would be applicable when "a person . . . cannot be sued in a World Trade Organization-member State with respect to the full territorial scope of the claim." *Id.*

254. *Id.* at 48.

For choice of law, the ALI Principles mandate the application of "the law or laws of the State or States with close connections to the dispute"[255]; close connections may be evidenced, for example, by "the principal markets towards which the parties directed their activities."[256] The selected law or laws would apply for multi-country claims as well, but the ALI Principles envision a carve-out for some countries if "a party . . . prove[s] that, with respect to particular [countries] covered by the action, the solution provided by any of those [countries'] laws differs from that obtained under the law(s) chosen to apply to the case as a whole."[257]

The ALI Principles thus limit a plaintiff's choice of courts but make it easier for the plaintiff to seek multi-country relief; they then shift onto the defendant the burden of disproving the applicability of the selected law for some country or countries. A similar solution was proposed by the European Max Planck Group in its Principles ("CLIP Principles"), according to which "the law of the State having the closest connection with the infringement"[258] should apply unless a party "prove[s] that the rules applying in a State or States covered by the dispute differ from the law applicable to the dispute in aspects which are essential for the decision."[259]

The solutions pursued by the two sets of Principles contain features that are similar to approaches in current use in various contexts: fewer courts of specific jurisdiction but an additional court or additional courts of general jurisdiction is a solution that has been used in defamation and personality rights cases, where some countries' systems have recognized an additional court of general jurisdiction in the place of the plaintiff's domicile.[260] The so-called emission principle, where a single country's law governs multi-

255. *Id.* at 153 ("Law or Laws to Be Applied in Cases of Ubiquitous Infringement.").

256. *Id.*

257. *Id.*

258. CONFLICT OF LAWS IN INTELLECTUAL PROPERTY: THE CLIP PRINCIPLES AND COMMENTARY, EUROPEAN MAX PLANCK GROUP ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, 2013, 314 (Article 3:603).

259. *Id.* The provision adds that "[t]he court shall apply the different national laws unless this leads to inconsistent results, in which case the differences shall be taken into account in fashioning the remedy."

260. Joined Cases C-509/09 and C-161/10, eDate Advert. Gmbh , Oliver Martinez, and Robert Martinez v. MGN Ltd., 2011 E.C.R. I-10269; *see also* the proposal in Andrews & Newman, *supra* note 20, at 366.

country effects, is recognized in the EU Satellite and Cable Directive[261] and the EU DSM Directive.[262]

B. Ignorantia Legis on the Internet

The key concern that fuels the use of targeting analyses is that overexposure unreasonably and unfairly subjects Internet actors to the courts and laws of countries whose jurisdiction and laws the actors could not have anticipated. The U.S. Supreme Court said that "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there."[263] Foreign residents must have an opportunity to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[264] Predictability regarding applicable law mirrors the predictability concerning the litigation forum; the choice-of-law rules are the rules of the forum court, and knowing where one might be brought into court means, at least in theory, knowing also what law might apply.[265] These concerns are paramount; they invoke society's interest in maintaining due process, legal certainty, and the rule of law.

If we accept the premise that technological changes, combined with an increasing degree of Internet actor and user sophistication, no longer warrant an expectation of a location-agnostic and borderless Internet, then it seems reasonable to conclude that Internet actors who do not actively limit the territorial scope of their activities on the Internet are targeting the entirety of cyberspace—all countries connected to the Internet—or they are targeting any portion of

---

261. *See* Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L 248) 15.

262. *See* Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, 2019 O.J. (L 130) 82.

263. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

264. *Id.* 297; *see also* Opinion of Advocate General Szpunar on 28 March 2019, AMS Neve Ltd. v. Heritage Audio SL, C-172/18, EU:C:2019:276, paragraph 85 ("[A] potential defendant [must be] able to foresee the fora in which he may possibly be sued on account of the fact that he has control over his marketing and the sales made via his website.").

265. *E.g.*, Brussels I Regulation (recast), Recital 15 ("The rules of jurisdiction should be highly predictable . . . ").

cyberspace that they do not actively exclude from their activities. Under these circumstances, actors should expect that they could be haled into court in any and all countries and be subject to the laws of any and all countries that they do not exclude from their activities.

Courts' hesitation to reach the foregoing conclusion is based on the understanding that global compliance (or compliance with the laws of a significant number of countries) imposes costly and difficult, if not impossible, demands on Internet actors. Countries' laws, even in areas that are highly harmonized by international treaties, such as copyright, can impose, either directly or by interpretation, inconsistent and contradictory requirements.

Should the hurdle of determining and complying with many different laws be addressed by limiting the territorial scope of personal jurisdiction and applicable law? This hurdle is comparable to the hurdle that exists within individual countries: modern legal systems comprise vast numbers of complex and overlapping laws, and some of the laws are even contradictory. The principle of ignorantia legis neminen excusat ("ignorance of the law excuses no one")[266] has eroded as legal systems have suffered from "law inflation";[267] one scholar remarked that "[n]ot only is the number of legislative acts multiplied but their texts are also increasingly muddy and far too long, more and more loaded with technological expressions and cross references to other normative texts."[268] The principle that ignorance of the law is no excuse has always been a fiction subject to exceptions,[269]

---

266. Other versions of the maxim are "*ignorantia juris neminem excusat*," "*ignorantia legis non excusat*," and "*nemo censetur ignorare legem.*"

267. DANILO ZOLO, *The Rule of Law: A Critical Reappraisal*, in THE RULE OF LAW: HISTORY, THEORY AND CRITICISM 44 (Pietro Costa and Danilo Zolo eds., 2007); MARC HERTOGH, NOBODY'S LAW: LEGAL CONSCIOUSNESS AND LEGAL ALIENATION IN EVERYDAY LIFE 179–180 (2018).

268. *Id.* at 44.

269. In the United States see, *e.g.*, Case Comment, *Mistake of Law in Equity and at Law*, 32 HARV. L. REV. 283, 283–85 (1919) ("The rule is declared to exist in full force, yet so many arbitrary exceptions have been grafted on it that, in fact, nothing remains thereof."); Frederick G. McKean Jr., *The Presumption of Legal Knowledge*, 12 ST. LOUIS L. REV. 96, 100–02 (1927) (listing examples of exceptions to the maxim); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 687–68 (1975); Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 343 (1998) (commenting on the serious erosion of the principle over the last century). On the abandonment of the principle in some cases concerning an error in law *see* Morgan Guaranty Trust Co. of New York v. Lothian Regional Council, 1995 S.L.T. 299 (Scotland). On the origin and history of the principle *see* Vera Bolgar, *The*

but the principle is now even more detached from reality because the complexity of legal systems has only increased.[270]

National legal systems have always had means to account for the fact that it is impossible to know all national laws.[271] In some cases systems provide for notices to alert actors of the need to comply with laws or regulations, and the systems afford lenient treatment to actors when actors have received no notice.[272] IP laws provide some instructive examples: under U.S. copyright law, if no copyright notice has been attached to a copy of a copyright-protected work, an infringer may defend its actions by asserting that he is an innocent infringer; if the defense is successful, a court takes into account the fact that the infringement was innocent when it awards actual or statutory damages.[273] Under U.S. patent law a patentee will be granted no damages for an infringement unless the patentee has marked the product as patented or the patentee shows that the infringer was notified of the infringement.[274] The notice-and-takedown regime in the U.S. Copyright Act provides for notice to an ISP that copyright

---

Present Function of the Maxim Ignorantia Iuris Neminem Excusat—A Comparative Study, 52 IOWA L. REV. 626, 630 (1967); *see also* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 46 (Anders Wedberg trans., The Lawbook Exchange Ltd., 1945) ("[I]t is a *presumption juris et de jure*, i.e. an 'irrebuttable presumption,' a legal presumption against which no evidence is permitted, a legal hypothesis the incorrectness of which must not be proved, that all the norms of a positive legal order can be known by the individuals subject to this order. This is obviously not true; the presumption in question is a typical legal fiction.").

270. According to Bolgar, it was Austin who mentioned "the pointed contrast between 'is' and 'ought': law *might* or *ought* be knowable by all who are bound to obey it, but that any actual system *is* knowable, is ridiculously and notoriously false." Bolgar, *supra* note 269, at 638 (citing JOHN AUSTIN, LECTURES ON JURISPRUDENCE 497 (4th ed. 1873)). For some of the issues in which the principle has been questioned in modern complex legal systems because of "law inflation" *see id.* at 642–644. *Cf.* Michael Cottone, *Rethinking Presumed Knowledge of the Law in the Regulatory Age*, 82 TENN. L. REV. 137, 148 (2015) ("[W]e do not live in a world of few criminal laws. Instead of changing to meet new circumstances, however, the principle of *ignorantia legis* has remained largely static.").

271. For exceptions that legal systems have created from the principle of *ignorantia legis neminen excusat* see Bolgar, *supra* note 269, 636, 639–40, 653–54. Courts have treated a mistake about foreign law as a mistake of fact instead of a mistake of law. 73 A.L.R. 1260 ("Mistake as to law of another state or country as one of law or of fact.").

272. On the requirement that sufficient notice of a law be given see Bolgar, *supra* note 269, at 644.

273. 17 U.S.C. § 401(d). (2012); *see also* 17 U.S.C. § 402(d) (2012) for phonorecords.

274. 35 U.S.C. § 287(a) (2012).

infringement is alleged and gives the ISP an opportunity to avoid damages by complying with the regime.[275]

Notice systems and their application on the Internet are not without problems.[276] The informational value of copyright and patent notices are diminished when notices appear on physical copies or products but infringing acts concern digital copies and products; U.S. courts have refused to treat defendants as innocent infringers under U.S. copyright law when copyright notices were on phonorecords (compact disks) but infringers handled only digital files.[277] The notice-and-takedown system under the U.S. Copyright Act has been criticized by many commentators; an important criticism has been that the Act entrusts to ISPs de facto the power to adjudicate copyright infringements at the initial level.[278]

Notwithstanding the current limitations of notice systems, which are illustrated by the examples above, the basic principles that the systems embody can guide legal systems in mitigating the overexposure created by the revised approach to targeting factors. When applying foreign law and granting remedies, courts could take into account an actor's partial or total lack of knowledge of the legal requirements of foreign countries, while considering factors such as an actor's sophistication or resources,[279] compatibility among countries' legal requirements, and alignment of the requirements with what a reasonable expectation of the foreign law might be.

Legislation or court discretion, or a combination of both, could provide a framework that would accommodate a global compliance requirement. The measures could be implemented across all areas of law, although it is likely that an expansive approach to jurisdiction and applicable law would justify tailored solutions in some areas of law.

---

275. 17 U.S.C. § 512 (2012).

276. *E.g.*, U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS (2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

277. BMG Music v. Gonzalez, 430 F.3d 888, 892 (7th Cir. 2005); Maverick Recording Co. v. Harper, 598 F.3d 193, 199 (5th Cir. 2010).

278. *See* Jennifer M. Urban, Joe Karaganis, & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, Version 2 (UC Berkeley Public Law Research Paper No. 2755628, March 2017), https://ssrn.com/abstract=2755628.

279. *See*, similarly, ALI PRINCIPLES, *supra* note 146, at 50 ("Reasonableness should also be judged by the sophistication of the parties, particularly with respect to intangible goods and the technologies available for screening.").

The proposed approach would not create transnational substantive rules as an alternative to countries' laws.[280] Other authors have suggested such approaches, which would accommodate multiple countries' laws in IP cases. Professor Dinwoodie has suggested that in transnational copyright cases courts combine principles from different national laws to create a hybrid rule to accommodate the rights and interests involved in these cases.[281] Professor Peukert has proposed that contradictory or overlapping interests in trademarks be resolved through an accommodation addressing different interests in a manner that would result in "the implementation of a fair coexistence of conflicting trade mark laws and rights"[282] on the Internet. The approach proposed in this article would be based on each country's law; a country's law would include mechanisms to account for, when appropriate, the territorial expansiveness of a country's law.[283]

At least initially, the expansion of personal jurisdiction and applicable law on the Internet would not improve legal certainty, particularly if the expansion occurred on a country-by-country basis, because Internet actors would not know what countries had effectuated an expansion, when a country had made an expansion, the extent of the expansion, and how and to what extent a country's courts would reflect the expansion in their treatment of substantive law. The likelihood that countries would agree to a concerted effort concerning personal jurisdiction seems slim; a failed attempt to conclude an international treaty on jurisdiction showed the difficulty of reaching an agreement on a topic so contentious.[284]

Preventing or mitigating abuses of the new approach would also be a challenge. Some plaintiffs would file lawsuits in countries of specific jurisdiction with the goal of obtaining default judgments

---

280. *Cf.* Paul Schiff Berman, *Choice of Law and Jurisdiction on the Internet*, 153 U. PA. L. REV. 1819, 1852–53 (2005) (discussing proposals for judicially-created special rules for multistate cases).

281. Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 542 (2000).

282. Peukert, *supra* note 232, at 81.

283. On "cosmopolitanism" as another possible approach to addressing problems in Internet-related cases see Berman, *supra* note 280, at 1856–57.

284. *E.g.*, Yoav Oestreicher, *"We're on a Road to Nowhere"—Reasons for the Continuing Failure to Regulate Recognition and Enforcement of Foreign Judgments*, 42 INT'L LAW. 59, 70–79, 84–86 (2008); PERMANENT BUREAU, HAGUE CONF. ON PRIV. INT'L L., ANNOTATED CHECKLIST OF ISSUES TO BE DISCUSSED BY THE WORKING GROUP ON RECOGNITION AND ENFORCEMENT OF JUDGMENTS 13–14 (Jan. 2013), http://www.hcch.net/upload/hidden/2013/jdgm2013note01en.pdf.

against defendants who were incapable of defending themselves in remote (for the defendants) venues chosen by the plaintiff. Even if a plaintiff never sought recognition and enforcement of the judgment in the country or countries where the defendant was domiciled, the judgment could have significant adverse effects on the defendant; for example, in addition to damaging the defendant's reputation, a judgment could result an ISP treating a defendant as a "repeat infringer"[285] and possibly denying a defendant access to the ISP's service. A default judgment might foreclose a defendant from future investments and other asset allocations in the country where the default judgment was rendered.[286] Presumably, the potential negative effects on future foreign investment should incentivize countries to find ways to prevent these types of litigation abuses.

ISPs could suffer under the new approach as well; in addition to facing the same negative effects as other Internet actors with respect to direct liability, ISPs would also risk expansion of their exposure to indirect liability.[287] Because their users could be sued under the revised approach in a greater number of countries and under the laws of those countries, ISPs could also be attacked in those countries under the laws of those countries for the role that the ISPs' play in contributing to or otherwise facilitating the users' acts. The chilling effects that the new approach could generate might then extend to ISPs and cause them to stop providing services in some countries to avoid liability and litigation in those countries.

Perhaps the strongest counterargument to these doomsday prophecies is that the status quo is not radically different from the grim picture painted above. Internet actors and ISPs do not now have legal certainty with respect to countries' laws regarding personal jurisdiction on the Internet; even in the birthplace of the Internet—the United States—the law is not clear. And countries' courts do render default judgments against absent defendants in Internet-related cases,

285. *E.g.*, 17 U.S.C. § 512(i)(1)(A) (2012).

286. The effects of default judgments can be lessened through statutes of limitations governing the enforcement of the judgments.

287. In some instances, the direct and indirect liability of ISPs might both be at issue. *E.g.*, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, art., 17(1), 2019 O.J. (L 130) 92, 119–20 (on direct liability of ISPs).

and these judgments do affect defendants' future conduct in those countries.[288]

CONCLUSIONS

Targeting has become a staple feature of analyses of personal jurisdiction and choice of applicable law in Internet-related cases. For the Internet environment especially, targeting seems to be an indispensable concept; without targeting, personal jurisdiction would exist and countries' laws would extend de facto globally, with no territorial constraints. Any departures from the targeting framework have attracted criticism from commentators, and any suggestion that targeting should limit jurisdiction and applicable law in fewer cases seems to be tantamount to suggesting a plunge off a cliff.

Nevertheless, some erosion of the targeting principle has already occurred. The CJEU refused to implement targeting as a test for personal jurisdiction in tort cases and in IP cases confirmed that jurisdiction is available in the courts of any EU member state where tortious content is accessible online. Some courts in the United States and the United Kingdom have adopted nuanced approaches to some factors in targeting analyses; the new approaches reflect the courts' recognition of the Internet's technological advancements and the increase in Internet actor and user sophistication regarding the functioning of the Internet. In one case the U.S. Court of Appeals for the District of Columbia interpreted the rule on the territorial scope of a U.S. statute in a manner consistent with the minimalistic approach to targeting suggested above in Part III.[289]

This article proposes that courts scrutinize targeting factors critically and take into account developments in Internet technology and Internet actor and user sophistication. A consideration of Internet developments suggests that an Internet actor's targeting be found to be global more often; only limited sets of facts should prove a lack of global targeting, such as when an Internet actor geoblocks users connecting from a country, or when an Internet actor disclaims targeting of a country and acts in a manner that is consistent with the disclaimer.

---

288. *E.g.*, Lucasfilm Ltd. v. Ainsworth, [2009] EWCA (Civ) 1328; Teller v. Dogge, 8 F. Supp. 3d 1228, 1231 (D. Nev. 2014).

289. Spanski Enter., Inc. v. Telewizja Polska, S.A., 883 F.3d 904 (D.C. Cir. 2018). The court did not use the term "targeting."

Other authors have proposed that the reach of personal jurisdiction and applicable law on the Internet be restricted. A restrictive approach does not offend national sovereignty when a country's own courts adopt such an approach to limit the specific jurisdiction of their courts over Internet activities. But a restrictive approach can deprive countries of their regulatory power when the approach causes courts of general jurisdiction to deny the applicability of foreign countries' laws and deny the recognition and enforcement of judgments rendered by the courts of foreign countries based on the laws of the foreign courts. These denials are particularly troubling in cases involving strict liability torts, such as IP rights infringements.

A revised approach to targeting should please rights owners and open greater opportunities for them to enforce their rights; the danger is, of course, that the approach could be open to abuse, could chill free speech, and could discourage other activities on the Internet. Are these dangers overstated? The current potential for abuse and the current level of legal uncertainty may be just as high, and the revised approach, rather than the status quo, would at least provide future clarity regarding the minimum technological steps needed to comply with legal standards. The existing constraints on transnational litigation, combined with an accommodation that permits the application of the laws of multiple countries when applicable, could achieve the appropriate balance of interests in Internet-related cases.