

### Introduction

Criminal law includes defamation among the range of proscribed conducts. The *nomen juris* attributed to related crimes in Latin America covers from libel and slander to contumely and other definitions which usually seek to protect "honor" as a legal interest, both in its objective (reputation) and subjective (self-esteem) dimensions. Irrespective of criminal law theories, we could say that including honor among the interests protected by the State's criminal law apparatus serves either to deter risk or harm to a legal interest or to reinforce –through the threat of criminal action– the value attached at a given time by a society to the relevant legal interest, by punishing conducts that result in risk or damage to it.<sup>1</sup>

Meanwhile, civil law also provides a response to violations of the right to honor. In filing a civil action for defamation, the allegedly aggrieved party seeks a monetary compensation for injury to his or her likeness, honor, moral integrity or reputation. Notwithstanding the fact that jurisdictions differ in the causes of action for defamation and the limitations that they admit, it has been recognized in Latin America that moral damage arising from defamation can lead to an award of damages. However, the quantification of this concept poses several difficulties.

The basis for both criminal and civil actions is always a form of speech. The form of this expression – written, oral or artistic– does not determine the legal consequences, although the scope of its dissemination may be one of the factors that should be considered, for instance, to establish the extent of the damage. Nevertheless, the right to express one's thoughts is one of the fundamental rights in a democracy<sup>2</sup> and therefore, depending on the content of the expression (for instance, an expression about an issue of public interest), it may be successfully argued that any subsequent imposition of (civil or criminal) liability is unnecessary in a democratic society<sup>3</sup> and that no consequences should be attached to the allegedly harmful expression.

Accordingly, judges are expected to address several aspects concerning the expressions of those who are brought before the civil or criminal courts. But which are the judges entrusted with this analysis? Albeit not new, this question takes on added significance when the expression regarded as defamatory has been disseminated on the Internet. In brief, should actions be brought before the judge with jurisdiction over the victim or the offender, or should other criteria be taken into account? This paper will seek to describe how these questions have been answered in Latin America and beyond.<sup>4</sup> The answers to the above questions will be crucial, as the legal standards leading to a judicial determination of the existence of a crime or a valid cause for bringing a civil action will vary by jurisdiction.

In general, in the United States bringing a civil action for defamation has become the most common practice, and the courts require claimants who are public figures to prove the existence of "actual malice", a standard which is hard to meet for all claimants.<sup>5</sup> The English system is more sympathetic to claimants than its American counterpart. In Latin America, apart from making provision for civil claims for damages, most countries establish prison sentences for defamation crimes.

Clearly, the competent judge and the applicable law will be crucial when establishing the legal consequences of certain expressions: reparation through a civil action will be more difficult in some

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<sup>1</sup> In this respect, see Bertoni, Eduardo, "El bien jurídico tutelado en los delitos contra el honor: ¿sigue siendo el mismo aun después de la sanción de la ley de 'habeas data'?" in *Suplemento de Jurisprudencia Penal de la Revista La Ley*, Buenos Aires, March 2001.

<sup>2</sup> The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have upheld the relationship between freedom of expression and democracy in all cases dealing with violations of article 13 of the American Convention on Human Rights. In this respect, see Bertoni, Eduardo, *Libertad de Expresión en el Estado de derecho*, 2nd updated edition, Buenos Aires, Del Puerto, 2007, p. 111.

<sup>3</sup> I have claimed that the consequences of the imposition of subsequent liability for speech may be equated with the effects of prior censorship mechanisms, and that the chilling effect of civil "sanctions" may be as strong or greater than that of criminal sanctions. *Id.*, pp. 95 et. seq.

<sup>4</sup> This article will not focus on when a content may or may not be defamatory, or whether or not an expression may be a part of the right to speak freely. We will assume these circumstances and try to concentrate our efforts on studying the arguments that have been advanced to grant jurisdiction to certain judges above others.

<sup>5</sup> See a study on the legal standard of "actual malice" in Bertoni, *supra* note 2, pp. 141 et. seq.

jurisdictions, whereas other jurisdictions may even provide for criminal sanctions, including the threat of imprisonment.

As we will see below, in Latin America the competent courts have been traditionally those of the place where the allegedly defamatory material was published or in which such material was exposed. In the case of print media, it has been relatively easy to establish the place of publication or dissemination of the defamatory expressions. Internet content, including electronic editions of print publications and blogs and involving new actors such as Internet service providers, search engines, etc., makes the determination of the place of publication and the origin of the expressions a lot more difficult. On the other hand, considering that defamation crimes and actions seek to protect a person's honor and reputation, and that these values may in theory be affected by the scope of Internet distribution, publications made via Internet will possibly influence the determination of the existence of injury to a protected legal interest. Taking into account that concepts such as 'publication', 'editing' and 'damage' have been relevant factors in establishing jurisdiction, it is worth examining how these have been treated by the courts in cases dealing with Internet content.

Under the Inter-American system for the protection of human rights, criminal defamation offenses have been found incompatible with the American Convention on Human Rights, and several countries have adopted legislation to decriminalize such offenses.<sup>6</sup> For many years, the bodies responsible for the protection of freedom of expression have underscored that the mere possibility of being prosecuted for defamation could have a chilling effect for freedom of expression. This chilling effect has recently extended to civil actions as well.<sup>7</sup> But particularly in the criminal sphere, if the content of the publications found on the Internet influences the determination of jurisdiction and extends the exercise of judicial power to defamation suits involving journalists, bloggers and communicators, then there may be a trend towards higher probability of being prosecuted for criminal defamation. In other words, those seeking to discourage criticism on matters of public interest will shop around for jurisdictions which are more "aggressive" to this type of expression.

Internet publications have encouraged a practice known as "*libel tourism*." It is a process by which a plaintiff makes a deliberate choice as to the jurisdiction where an action will be brought (*forum shopping*). In making this decision, the plaintiff seeks to gain an advantage over the other party or parties. One of the inherent dangers of this practice is the possibility that authors will begin imposing self-censorship in order to avoid any reports which could give rise to a criminal action or complaint for defamation.

There are two alternatives to understand the dilemmas of jurisdiction. The first is to attempt a general solution for countries through a treaty that applies to Internet cases. The other possibility is to work towards harmonizing as much as possible the defamation laws of countries, so that irrespective of the place or the law in question, the rules will be equal for all. Technology offers a third alternative: those sharing their ideas on the Internet could make their expressions unavailable in jurisdictions where this could be problematic.

In our region, all such potential solutions are not on the horizon. It is worth highlighting that the idea of harmonization could, in fact, respond to a reinterpretation of the criteria underlying State sovereignty: when it comes to Internet, the domestic actions of a State affect other States, and vice versa. Therefore,

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<sup>6</sup> The chilling effect of criminal sanctions for those who wish to express critical opinions on issues of public interest was addressed by the Inter-American Commission on Human Rights in its report on the compatibility of "desacato" laws with the American Convention on Human Rights (IACHR, *Annual Report of the Inter-American Commission on Human Rights*, 1994, and *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights.*, OEA/Ser.L/V/II.88, doc. 9 rev., February 17, 1995, respectively). This idea was reflected in the recommendations of the Inter-American Commission on Human Rights and the decisions of the Inter-American Court of Human Rights, see in this regard Bertoni, *supra* note 2, pp. 109 y 110.

<sup>7</sup> In the arguments and reflections submitted to the Inter-American Court of Human Rights on August 24-25, 2011, in Bogota, Colombia, in the case brought by the magazine *Noticias* against the former Argentine President Carlos Menem, the expert Roberto Saba noted that a system of civil liability may affect or inhibit the exercise of freedom of expression. Expert Julio Cesar Rivera (J), pointed similarly that

Article 1071 bis is a vaguely worded and broad law, both in terms of the conducts prohibited and the quantification of moral damage. This is particularly troubling for freedom of expression, as such laws have a chilling or intimidating effect and could lead to a selective and discriminatory enforcement.

Source: *Perfil* - Corte Interamericana de Derechos Humanos, "Suplemento Especial: El Juicio Revista 'Noticias' vs. Menem", August 28, 2009, available [online] at:

<[http://www.perfil.com/export/sites/diarioperfil/docs/0829\\_suplemento\\_CIDDHH.pdf](http://www.perfil.com/export/sites/diarioperfil/docs/0829_suplemento_CIDDHH.pdf)>. [Editor's note: accessed on 11/12/11.]

there may be a shared State interest in harmonizing their legislation and, at the same time, retaining their sovereignty.<sup>8</sup>

We would also like to draw attention to the last solution, namely, technology. Although this alternative may protect speakers, one of its indirect effects is that many people who could be interested in their ideas would be prevented from hearing them and their right to information would be impaired. As far as we are able to ascertain, the opportunity has not yet presented itself to discuss a treaty in our region, although the harmonization of the defamation laws will most likely come from the Inter-American System of Human Rights.

As we noted earlier, this article will look at the decisions rendered by the courts of different countries in defamation suits concerning content that originated on the Internet and which posed jurisdiction issues, so as to examine how jurisdiction has been established in such cases.<sup>9</sup> Section I will present several cases and solutions adopted in Australia, Canada, England and the United States, where this issue has received special treatment. Section II will address the criteria adopted in cases which were taken to court in Latin America. Finally, section III will give some insights on Latin America, based on the cases under analysis.

The case summaries were prepared using Internet sources and compilations of cases dealing with jurisdiction issues in defamation actions for Internet speech contained in academic works.<sup>10</sup>

## I. Criteria under comparative law

### I.A. Australia

#### I.A.I. Dow Jones vs. Gutnick (2002)

*Dow Jones vs. Gutnick*<sup>11</sup> is a landmark decision on the issue of jurisdiction in cases of defamation involving Internet content in Australia. Dow Jones & Company Inc. prints and publishes the *Wall Street Journal* and the magazine *Barron's*. Dow Jones also operates the website *WSJ.com*, which displays content from the above outlets.

The October 28, 2000 edition of *Barron's* online contained an article entitled "Unholy Gains", in which references were made to Joseph Gutnick. Mr. Gutnick contended that the article defamed him and brought a civil action for damages against Dow Jones before the Supreme Court of Victoria, where he had his residence.<sup>12</sup>

The Supreme Court of Victoria dismissed Dow Jones's request that further proceedings in the matter be permanently stayed. The company had argued that Victoria was not the proper forum to bring the action. In its appeal to the High Court of Australia, Dow Jones claimed that the article had been uploaded in New Jersey, United States, where the company had its server, and that it was preferable that the publisher of material on the Internet be able to govern its conduct according to the law of the place where it maintained its web servers, unless that place was merely adventitious. Otherwise, so the argument went, there would be no boundaries which a publisher could draw to prevent anyone downloading the information it put on its web server. Gutnick sought damages for the injury to his reputation suffered in Victoria.

The High Court of Australia held that the content was published in Victoria when the article was downloaded by the subscribers of *WSJ.com*. The Court applied a *clearly inappropriate forum* test, whereby the Court would decline, on the ground of *forum non conveniens*, to exercise jurisdiction only

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<sup>8</sup> Bertrand de la Chapelle speaks about conflicts of jurisdiction in the following terms:

National laws remain a key instrument of policy-making. Nonetheless, uncoordinated proliferation of potentially incompatible national norms, for instance those governing privacy or freedom of expression, generates conflicts of jurisdiction. It is difficult for global platforms to respect this diversity of rules. Furthermore, activities of individuals conducted over the Internet often exhibit a cross border nature, which brings particular difficulties in terms of enforcement. Finally, national decisions by a particular government can have direct or indirect effects on the territory of another. If sovereignty is the capacity to exercise supreme authority over a territory, the Internet is a direct challenge to the territoriality of law, one of the key components of the Westphalian model.

See in Multistake Holder Governance, "Principles and Challenges of an Innovative Political Paradigm", in *MIND, CO:LLABORATORY DISCUSSION PAPER SERIES* No1, #2 Internet Policy Making, a publication by the Internet & Society Co:laboraty, Editor Wolfgang Kleinwächter, 2011 IGF Nairobi Special Issue, 1<sup>a</sup> edic., *sine data*.

<sup>9</sup> The purpose of this article is not to provide a comprehensive collection of judicial decision but rather to provide a sort of "sampling" of rulings that we consider of relevance and which offer arguments to reflect on this topic.

<sup>10</sup> Other cases have been drawn from Packard, Ashley, "Wired but Mired: Legal System Inconsistencies Puzzle International Internet Publishers", in *J. INTL MEDIA & ENTERTAINMENT LAW*, 1, 1 (2001), and the *Media Law Resource Center New Developments Bulletin*, December 2010.

<sup>11</sup> *Dow Jones & Company Inc. vs. Gutnick* [2002] HCA 56 (December 10, 2002).

<sup>12</sup> *Dow Jones vs. Gutnick* [2002], *supra* note 10, para. 2.

when it is shown that the forum whose jurisdiction is invoked by the plaintiff is clearly inappropriate. Another relevant principle applied by the Court, and which was not challenged by either of the parties, is the principle that in trying an action for tort in which the parties or the events have some connection with a jurisdiction outside Australia, the choice of law rule to be applied is that matters of substance are governed by the law of the place of commission of the tort.<sup>13</sup>

The Court concluded that Victoria was not a clearly inappropriate forum for the trial as the alleged tort of defamation had occurred there. The Court noted that the tort of defamation in Australia is a tort of strict liability which is focused on compensating individuals for harm to reputation, which occurs when a publication is comprehended by the reader or the observer. Therefore, the Court considered that the publication should be treated as a bilateral rather than a unilateral act, and that the defamation ordinarily occurs in the place where the material is made available (usually, where the person downloads the material), provided that the plaintiff has in that place a reputation which could be thereby damaged. The Court further noted that this bilateral nature of a publication underpins the rule that every defamatory communication gives rise to a separate cause of action.<sup>14</sup> The Court held that Australian law does not require locating the place of publication of defamatory material as being necessarily, and only, the place of the publisher's conduct. Given that damage to reputation is alleged to have occurred in Victoria and that Gutnick had confined his claim to that state, the Court concluded that substantive issues should be determined according to the law of Victoria.<sup>15</sup>

#### I.B. Canada

##### *I.B.I. Black vs. Breeden (2010)*

In *Black vs. Breeden*,<sup>16</sup> Conrad Black filed six libel suits in the Ontario Superior Court between 2004 and 2005, against employees of the company Hollinger International. Conrad Black was a businessman who established a reputation first in Canada and then internationally as a newspaper owner and publisher. Until 2004, he was Chairman of Hollinger International, a Delaware company with offices in New York and Chicago. Black and his associates controlled Hollinger International through two Ontario companies, Hollinger Inc. and The Ravelston Corporation Limited.<sup>17</sup>

In 2003, a minority shareholder of Hollinger International complained about the unlawfulness of certain payments that had been made to Black, his associates and to entities he controlled. This led to an investigation. The Special Committee established to investigate the allegations concluded that certain payments had not been properly authorized.<sup>18</sup>

Black brought several libel actions, claiming that the contents of the Hollinger International website – accessible in Canada – concerning the findings of the Committee and the legal disputes that followed, were libelous. Black alleged that the content was read and republished in Ontario by *The Globe and Mail*, the *Toronto Star* and the *National Post*, and damaged his reputation in Ontario.<sup>19</sup>

The defendants brought a motion to stay the action on the ground that the Ontario court did not have jurisdiction, or alternatively that Ontario was not the convenient forum. They alleged that there was no real and substantial connection between Ontario and the actions, and that the most appropriate jurisdictions were the state of New York or Illinois, in the United States.<sup>20</sup> The motion was dismissed.

The Court of Appeals for Ontario confirmed this decision, and applied the assumed jurisdiction test as reformulated in the case of *Van Breda v. Village Resorts Limited (2010)*.<sup>21</sup> The Court noted that although the motion judge had not performed the analysis described in *Van Breda*, he found that the tort had been committed in Ontario. The Court quoted the motion judge's statement that law is clear that the heart of a libel action is publication. The motion judge held that

The tort of defamation is committed where the publication takes place. Publication occurs when the words are heard, read or downloaded. The statements in question may well have been made in the U.S. by the directors

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<sup>13</sup> *Dow Jones vs. Gutnick* [2002], *supra* note 10, para. 9.

<sup>14</sup> *Dow Jones vs. Gutnick* [2002], *supra* note 10, paras. 25, 26, 27.

<sup>15</sup> *Dow Jones vs. Gutnick* [2002], *supra* note 10, paras. 42, 48.

<sup>16</sup> *Black vs. Breeden*, 2010 ONCA 547, August 13, 2010, Docket c50380.

<sup>17</sup> *Black vs. Breeden* [2010], *supra* note 16, paras. 8, 9.

<sup>18</sup> *Black vs. Breeden* [2010], *supra* note 16, paras. 10, 11.

<sup>19</sup> *Black vs. Breeden* [2010], *supra* note 16, para. 3.

<sup>20</sup> *Black vs. Breeden* [2010], *supra* note 16, para. 29.

<sup>21</sup> 98 O.R. (3d) 721 (C.A.). In *Van Breda*, Sharpe J.A. identified the core of the "real and substantial connection test" as the connection that the claim has to the forum and the connection of the defendant to the forum. The judge considered that the other principles of the test in *Muscutt v. Courcelles* (2002 CanLII 44957 (ON C.A.)) should not be treated as independent factors but as analytical tools to establish these two main factors.

or advisors of a U.S. company, but they were published or republished in Ontario and they are alleged to have caused injury in Ontario. The connection between the subject matter of the actions and Ontario is thus significant.<sup>22</sup>

As for the connection between the claim and the jurisdiction, the Court of Appeal for Ontario noted that although the claim had a connection with the United States and that there may be another jurisdiction with an even more substantial connection than Ontario, Van Breda established clearly that the test for assuming jurisdiction did not depend on a comparison with the strength of the connection with another potentially available jurisdiction. The Court considered that there were damages that clearly arose in Ontario. The Court of Appeal for Ontario concluded that the facts relevant to Black's claim relating to publication in Ontario and the damage to his reputation in Ontario indicated a substantial connection between Black's claims and Ontario.

With regard to the connection between the defendant and the forum, the Court of Appeal of Ontario upheld the motion judge's conclusion that there was a connection between the defendants and the jurisdiction. The motion judge considered that the defendants should have been aware of some of Black's many ties to Ontario or that he had established a significant reputation in Ontario, and applied an analogy with a manufacturer's strict liability for defective goods.

#### *I.B.II. Burke vs. NYP Holdings, Inc. (2005)*

Larry Brooks was a columnist with the *New York Post*. Brooks wrote an article that appeared in the February 27, 2005 edition of the *Post*. The article described the activities of Mr. Burke relating to an incident that occurred in Vancouver at a hockey game and the anticipated testimony of Mr. Burke at a trial. Burke brought an action in Ontario claiming damages for defamation against NYP Holdings, Inc, the company behind *New York Post*. The article on Brooks was available on a website maintained by the *Post*.<sup>23</sup> The newspaper applied for a stay of the proceedings in Ontario and claimed that the courts of Ontario did not have jurisdiction over the case. The Supreme Court of British Columbia concluded that *jurisdiction simpliciter* had been established, and that there was a real and substantial connection with either the defendant or the subject matter of the litigation. To reach this conclusion, G.D. Burnyeat, J. held that

Defamation is a tort. The tortious act took place in British Columbia when Mr. Russell accessed the Column on the website while he was within British Columbia. Publication within British Columbia took place at that time as the tort of defamation occurs where the words are heard or read. *Berezovsky v. Michaels* et al. [2000] 2 All E.R. 986 (H.L.); *Dow Jones & Co. v. Gutnick*, [2002] H.C.A. 56 y *Wiebe v. Bouchard* [2005] B.C.J. (Q.L.) No. 73 (B.C.S.C.).

By publishing on its website a matter which was of interest to people in British Columbia whether or not they were hockey fans, I am satisfied that it was foreseeable that the Column would be picked up by the media in British Columbia given the publicity surrounding the incident at the March 8, 2004 game and the prominence of Mr. Burke within British Columbia. The incident took place in British Columbia. The witnesses to what might have been said by Mr. Burke prior to and during the game all reside in British Columbia. I am satisfied that Mr. Burke has met the onus of establishing jurisdictional facts sufficient to establish a real and substantial connection within British Columbia to the cause of action. Accordingly, I find that *jurisdiction simpliciter* has been established.<sup>24</sup>

As for the determination of *forum conveniens*, that is, whether Ontario or New York was the most convenient forum for the action, the Court applied the test in *Muscutt vs. Courcelles*, and considered that Burke resided in British Columbia; that he suffered damage to his reputation mainly in this location; that the incident referred to took place in British Columbia and that the witnesses to what was or was not said by Burke were found in British Columbia to establish that this was the most appropriate jurisdiction. The Court noted as well that to require Burke to try this case in the state of New York State would deprive him of a significant juridical advantage, given the differences that exist between defamation laws in British Columbia and in New York.<sup>25</sup>

#### *I.B.III. Bangoura vs. Washington Post (2005)*

In *Bangoura vs. Washington Post*,<sup>26</sup> Cheick Bangoura sued in 2003 the *Washington Post* and three of its reporters for two newspaper articles which he alleged were defamatory. The first article, "Cloud of

<sup>22</sup> *Black vs. Breeden* [2010], *supra* note 16, para. 33.

<sup>23</sup> *Burke vs. NYP Holdings, Inc.*, 2005 BCSC 1287, paras. 2, 4.

<sup>24</sup> *Burke vs. NYP Holdings, Inc.*, 2005 BCSC 1287, *supra* note 23, para. 29.

<sup>25</sup> *Burke vs. NYP Holdings, Inc.*, 2005 BCSC 1287, *supra* note 23, paras. 30, 32, 37.

<sup>26</sup> Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO), 16 September 2005.

Scandal Follows UN Drug Control Official: Boutros-Ghali Ties Allegedly Gave Protection," was published on January 5, 1997. The article said that Bangoura's UN colleagues had accused him of sexual harassment, financial improprieties and nepotism during his tenure as assistant regional director of a UN drug control program for Eastern and Southern Africa. Cheickh Bangoura was suspended from his position on January 9, 1997, although his contract was due to expire at the end of January 1997. On January 10, 1997, the *Washington Post* published a second article which described Bangoura's suspension and repeated the allegations that were contained in the earlier article. In 1997, Cheickh Bangoura moved to Montreal, where he lived until June 2000, when he moved to Ontario.<sup>27</sup>

The *Washington Post* brought a motion to stay the action, on the ground that there was no real and substantial connection between this action and Ontario or between the *Washington Post* and Ontario. On January 5, only 7 copies of the newspaper had been delivered to subscribers in Ontario, whereas roughly 1,106,968 copies had been distributed in the District of Columbia. Both articles were published on the *Washington Post* website, where they were available free of charge for 14 days following publication. Thereafter, the articles were accessible through a paid service. Only one person accessed the articles through the paid service: Bangoura's attorney.<sup>28</sup>

The Ontario Superior Court of Justice found that it was appropriate for the courts of Ontario to assume jurisdiction, as Bangoura was a public servant, who had found a home and work in Ontario, where the damages to his reputation would be the greatest. This decision was appealed by the *Washington Post* and the journalists.<sup>29</sup>

The Court of Appeal for Ontario reversed the decision of the Ontario Superior Court of Justice, finding that the connection between Ontario and Bangoura was minimal and that there was no such connection until more than three years after the publication of the articles. Therefore, the Court concluded that there was no evidence that Bangoura had suffered significant damages within Ontario. The Court of Appeal rejected the argument of the Superior Court that the newspaper and the journalists should have foreseen that the story would "follow" Bangoura wherever he resided, and noted that it was not reasonably foreseeable in 1997 that Bangoura would become a resident of Ontario. The Court of Appeal further noted that to hold otherwise would mean that a defendant could be sued almost anywhere in the world where a plaintiff may decide to reside long after the publication of the defamatory material.<sup>30</sup>

#### I.C. England

##### *I.C.I. Bin Mahfouz vs. Ehrenfeld (2005)*

In *Bin Mahfouz vs. Ehrenfeld*,<sup>31</sup> the plaintiffs, several businessmen from Saudi Arabia, filed an application for relief under the summary disposal procedure under the Defamation Act 1996 arising out of allegedly defamatory statements in Rachel Ehrenfeld's books. The action was brought against Rachel Ehrenfeld, a consultant on narcoterrorism, and the U.S. publisher Bonus Books Incorporated.<sup>32</sup> The book, *Funding Evil, How Terrorism is Financed - And How to Stop it*, was being sold in England through online retailers such as *Amazon.co.uk*, *Blackwells.co.uk* and *Amazon.com*. The first chapter of the book was also available on the *ABC News* website.<sup>33</sup> It appears that since 1 July 2003 some 23 hard copies of the book had been sold in England, and in March 2004 some 211,000 people had visited *ABC News* website.<sup>34</sup> The book alleged that the Bin Mahfouz family financed Al Qaeda and other terrorist organizations.<sup>35</sup> Service was effected on the defendants in the United States in October 2004<sup>36</sup>. After the defendants failed to raise a defense, the claimants obtained a default judgment and an injunction against the defendants in December 2004.<sup>37</sup>

The Court that heard the case in England (the High Court of Justice Queen's Bench Division) made a declaration of falsity as requested by the claimants, confirmed the injunction and granted the maximum

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<sup>27</sup> *Bangoura vs. Washington Post* [2005], *supra*, paras. 1, 5, 6, 7, 8.

<sup>28</sup> *Bangoura vs. Washington Post* [2005], *supra*, paras. 2, 10, 11, 12.

<sup>29</sup> *Bangoura vs. Washington Post* [2005], *supra*, paras. 3, 21.

<sup>30</sup> *Bangoura vs. Washington Post* [2005], *supra*, para. 25.

<sup>31</sup> *Bin Mahfouz vs. Ehrenfeld*, [2005] EWHC 1156 (QB).

<sup>32</sup> *Bin Mahfouz vs. Ehrenfeld*, [2005], *supra*, paras. 1, 6, 7, 12, 13.

<sup>33</sup> *Bin Mahfouz vs. Ehrenfeld*, [2005], *supra*, paras. 14, 16.

<sup>34</sup> *Bin Mahfouz vs. Ehrenfeld*, [2005], *supra*, paras. 22, 23.

<sup>35</sup> *Bin Mahfouz vs. Ehrenfeld*, [2005], *supra*, para. 18.

<sup>36</sup> *Bin Mahfouz vs. Ehrenfeld*, [2005], *supra*, para. 19.

<sup>37</sup> *Bin Mahfouz vs. Ehrenfeld*, [2005], *supra*, para. 21.

level of damages in favor of each claimant, which was permitted under the summary procedure of the Defamation Act 1996.<sup>38</sup>

*I.C.II. Dow Jones & Co., Inc. vs. Jameel (2005)*

Dow Jones publishes the *The Wall Street Journal* and *The Wall Street Journal On-line*. The latter is published on a web site, and access is available to subscribers. Yousef Abdul Latif Jameel, a Saudi businessman, considered that an online article which implied that the claimants were suspected of funding al Qaeda was defamatory. The article did not mention Jameel directly, but contained a hyperlink to another document which identified Jameel as one of the donors who had financed Osama Bin Laden.<sup>39</sup>

In the appeal against four decisions rendered against Dow Jones, the Supreme Court of Judicature, Court of Appeal (Civil Appeals Division) decided not to exercise its jurisdiction, as only five subscribers in the jurisdiction had accessed the hyperlink, and three of them were members of Jameel's legal team. The Court found that it would be an abuse of process to continue to commit the resources of the court to this action.<sup>40</sup>

*I.C.III. Don King vs. Lennox Lewis (2004)*

Don King, a well known boxing promoter, filed an action in England against Lennox Lewis, a British citizen.<sup>41</sup> Lewis requested the Court to set aside an order for permission to serve a claim form on the defendant in the United States, where both resided. Lewis had brought an action in New York, United States, against Don King and Mike Tyson for interfering with a commercial agreement between Lewis and Mike Tyson. Don King –in two online articles– claimed that Lewis's attorney had suggested that Don King was an anti-Semite.

In assessing whether the English courts were the appropriate forum for this matter, the Queen's Bench Division of the High Court of Justice held that evidence suggested that King had a substantial reputation in England and made frequent appearances on television, radio and other media. King also had a considerable financial and business connection there, as the result of having promoted a number of fights in England involving British boxers. The Court also took into account that King had friends and acquaintances within the Jewish community in England, and that various witnesses had provided evidence that the two websites were popular and frequently accessed by boxing fans in England. The Court noted that the English law regarded the publications in question as having occurred in England, and that the words had been downloaded to computers in that country. Consequently, the Court affirmed the decision giving permission for service of the claim in the United States.

*I.C.IV. Berezovsky vs. Michaels (2000)*

Two Russian businessmen sued the magazine *Forbes*. *Forbes* was dedicated to investigating and reporting the situation in the post-Soviet phase in Russia, and in 1996 its reporting centered on the role of two important figures in the new Russia. One of them was the businessman and politician Boris Berezovsky. In its issue of December 30, 1996 *Forbes* described Boris Berezovsky and Nicolai Glouchkov, another businessman, as "criminals on an outrageous scale". While in the United States the *Forbes* issue of December 30, 1996 had 748,123 subscriptions, in England there were 566.

Both businessmen decided to sue *Forbes* for libel separately in England. Berezovsky claimed to have extensive business connections with England. They confined their claims for damages to the publication of *Forbes* within the jurisdiction through distribution of copies of the magazine and through publication on the Internet. They applied for leave to serve the writs out of the jurisdiction. *Forbes* applied to have the actions stayed, on the grounds that England was not the most appropriate jurisdiction for trial of the plaintiffs' claims, and that Russia or the United States were more appropriately jurisdictions.

At first instance, and in the Court of Appeal, the principal dispute was the extent of the connections of these businessmen with England and their reputations there. On October 22, 1997, the court of first instance heard the applications by *Forbes* and gave two judgments, concluding that the connections of the businessmen with England were tenuous. The judge argued that Russia was the most appropriate forum.

This decision was appealed by the businessmen. The Court of Appeal concluded that there was a substantial complaint about English torts in the case of both plaintiffs. Accordingly, there was jurisdiction

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<sup>38</sup> *Bin Mahfouz vs. Ehrenfeld*, [2005], *supra*, paras. 74, 75.

<sup>39</sup> *Dow Jones & Co., Inc. vs. Jameel* [2005] EWCA Civ 75.

<sup>40</sup> *Dow Jones & Co., Inc. vs. Jameel* [2005] EWCA Civ 75, paras. 70, 71.

<sup>41</sup> *Don King vs. Lennox Lewis* [2004] EWHC 168 (QB)

to try the action in England and in all the circumstances England was the appropriate jurisdiction for the trial of the action.

*Forbes* appealed to the House of Lords, which noted that the court had been right to conclude that the businessmen had a substantial connection with England and a business reputation to protect there. The House of Lords found that Nicolai Glouchkov's connections with England were of a lesser order. The House of Lords considered that the distribution in England of the defamatory material had been significant and that the plaintiffs had a reputation in England to protect. The House of Lords opined that in such cases it is not unfair that the foreign publisher should be sued in England, and pointed out as well that the substance of the damage arose within the jurisdiction. It found that Russia could not be treated as the most appropriate forum because only 19 copies had been distributed there, that a judgment in favor of the plaintiffs in Russia would not redress the damage to the reputations of the plaintiffs in England, and that the connections of both businessmen with the United States were minimal and, therefore, it was not an appropriate forum.

#### I.D. United States

##### *I.D.I. Calder vs. Jones (1984)*

Although this case does not deal with online defamation, it appears to be the most frequently cited in American jurisprudence on this particular point of jurisdiction.

In *Calder vs. Jones*<sup>42</sup>, Jones had brought suit in the California Superior Court claiming that she had been libeled in an article written and edited in Florida and published in the *National Enquirer*, a national magazine having its largest circulation in California. Jones lived and had centered her career in California. The respondents were the president and editor of the *Enquirer*, the *Enquirer* and the reporter who wrote the article.

Calder was the president and editor of the *Enquirer* and resided in Florida. He had been to California only twice prior to the publication of the article for unrelated business purposes. The *Enquirer* had its principal place of business in Florida. The reporter who wrote the article was employed by the *Enquirer*, he was a resident of Florida and he travelled frequently to California on business. He had done most of his research in Florida.

The defendants had moved to quash the service of process for lack of personal jurisdiction. The California Superior Court granted the motion. The California Court of Appeal reversed the decision, rejecting the suggestion that First Amendment considerations enter into the jurisdictional analysis.

The U.S. Supreme Court affirmed the decision of the California Court of Appeal and held that jurisdiction over petitioners in California was proper. The Court considered that the allegedly libelous article concerned the California activities of a California resident, that Jones career was centered in California, that the article had been drawn from California sources and that the harm, in terms of emotional distress and injury to her professional reputation, had been suffered in California. The Supreme Court determined that the petitioners had written and edited an article that they knew could have a negative impact upon Jones' reputation in California, and so they should have reasonably expected to be subject to the jurisdiction of the California courts.

##### *I.D.II. Edias Software International, L.L.C vs. Basis International LTD (1996)*

In *Edias Software International, L.L.C vs. Basis International LTD*,<sup>43</sup> Basis International LTD (Basis) had entered into an agreement with Edias Software International (Edias) pursuant to which the latter was to distribute the software products of the former. Basis terminated the contract and sent e-mail messages to various European clients and its employees (located in New Mexico) and posted information on its website which explained that Edias was being terminated as a distributor due to its refusal to commit to sell the product at a fair price and provide appropriate technical support.<sup>44</sup>

Edias filed a claim for defamation in Arizona, where it had its offices. Basis filed a motion to dismiss the complaint for lack of personal jurisdiction over Edias in Arizona, arguing that it did not have sufficient contacts with Arizona, and that it would be a great burden to defend in that state. Basis was a New Mexico company and had no offices, employees or bank accounts in Arizona. The Court noted that Basis International's decision to publish the reasons for termination *online* meant that they would be

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<sup>42</sup> *Calder vs. Jones*, 465 U.S. 783 (1984)

<sup>43</sup> 946 F. Supp. 413 (D. Arz., Nov. 19, 1996)

<sup>44</sup> Samson, Martin, "Edias Software International, LLC et al v. Basis International Ltd.", in *Internet Library of Law and Court Decisions*, available [online] at: <[http://www.internetlibrary.com/cases/lib\\_case168.cfm](http://www.internetlibrary.com/cases/lib_case168.cfm)>. [Editor's note: accessed on 11/12/11.]



accessible for Arizona residents, and that such was sufficient reason to try the case in Arizona. The result of such activities would have negative consequences for the plaintiff in Arizona, where its offices were located.

The Court found that:

[...] Compuserve Web Site which reaches Arizona customers ... confers jurisdiction in Arizona under the "effects test". When intentional actions are expressly aimed at the forum state and cause foreseeable harm to the defendant, jurisdiction in the forum state exists. The e-mail, Web page and forum message were both directed at Arizona and allegedly caused foreseeable harm to Edias... Basis should not be permitted to take advantage of modern technology through an Web page and forum and simultaneously escape traditional notions of jurisdiction.<sup>45</sup>

#### *I.D.III. Telco Communications vs. An Apple a Day (1997)*

In *Telco Communications vs. An Apple a Day*<sup>46</sup>, Telco Communications (Telco), a Virginia corporation, with a subsidiary in Missouri, Dial & Save, sued an An Apple a Day (Apple) for trademark infringement.

In the complaint brought in Virginia, Telco alleged that the defendants issued two press releases and made calls to a securities analyst in Maryland that defamed Telco, and that TELCO's stock price was depressed as a result. An Apple a Day (Apple) is a telemarketer corporation that claimed to be the owner of the service mark Dial & Save. Other defendants were Christina Anne Steffen, the owner of Apple, and her husband, Myles Lipton.

Defendants filed a motion to dismiss, which was denied by the *United States District Court for the Eastern District of Virginia*. This Court considered whether there was basis for jurisdiction over the defendants, taking into account that the alleged misconduct had occurred over the Internet. The Court agreed with the interpretation in *Inset Systems Inc. v. Instruction Set*, 937 F. Supp. 161, 165 (D. Conn. 1996), and noted that the posting of an Internet advertisement satisfied the standard for the applicability of the Connecticut long-arm statute. The Court stated that Section 8.01-328.1(A) (4) of the Virginia Code contained similar language, and that defendants engaged in advertising under the Code.

The Court held that although defendants asserted that they did not conduct business in Virginia, they admitted that they were advertising their firm and soliciting investment banking assistance in posting the press releases. The Court concluded that they were conducting business over the Internet. Because they conducted their advertising and soliciting over the Internet, which could be accessed by a Virginia resident 24 hours a day, the Defendants did so regularly for purposes of the long-arm statute. Accordingly, the Court found that posting a Web site advertisement constitutes a persistent course of conduct, and that the two or three press releases rise to the level of regularly doing or soliciting business, thus satisfying Section 8.01-328.1(A)(4) of the Virginia Code.

The Court also understood that jurisdiction existed under subsection (a)(3) of the Virginia long-arm statute. This subsection permits personal jurisdiction over a person who causes tortious injury by an act or omission. The Court noted that although generally this subsection required that the defendant be personally physically present in Virginia when causing the injury, courts had moved away from that requirement, and cited in this regard *Krantz vs. Air Line Pilots Assoc., Int'l*, 25 Va. 202, 427 S.E.2d 326 (1993), where the Supreme Court of Virginia concluded that Subsection (A) (3) was satisfied by a defendant who, acting entirely in New York, accessed a computer "bulletin board" in Virginia. The Court held that, because some further act was required in Virginia to complete the defendant's act of tortiously interfering with the Plaintiffs' contract, subsection (3) was satisfied.

The Corte assessed if the facts of the case could be assimilated to those in *Krantz*, and pointed that defendants should reasonably have known that the press releases would be received in Virginia. The Court found that but for the Internet service providers and users present in Virginia, the alleged tort of defamation would not have occurred in Virginia. It held as well that numerous investors and brokers were located in Virginia, and that the presence of facilities in Virginia was necessary for them to access the press releases. In addition, the Court concluded that because Telco was located in Virginia, the firm sustained the harm there.

The Court further noted that foreseeability was not sufficient, and that Defendants' contacts with that forum should be substantial enough that they would reasonably expect to be "haled into court" in Virginia, and that such had been the case. The Court concluded that defendants should have reasonably

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<sup>45</sup> Source: "Basis".

<sup>46</sup> 977 F. Supp. 404 (1997).

known that their press releases would be disseminated in Virginia and that TELCO was based in Virginia, therefore their activities were sufficient to amount to physical presence in that State.<sup>47</sup>

*I.D.IV. Stanley Young vs. New Haven Advocate (2002)*

In *Stanley Young vs. New Haven Advocate*<sup>48</sup>, the warden of a Virginia prison sued two Connecticut newspapers, the *New Haven Advocate* (Advocate) and the *Hartford Courant* (Courant), available in Virginia through the Internet, for posting articles that allegedly defamed him.

A Court of Appeals in Virginia assessed whether the defendants, the Connecticut newspapers and some of their staff, were subject to the jurisdiction of Virginia.

The newspapers had posted articles referring to the fact that Connecticut had transferred some prisoners to a state facility in Virginia. Young, the director of the Virginia prison, alleged that those articles had libeled him by implying that he was a racist who encouraged abuse of inmates by the guards.

Following the standard in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), the Court of Appeals held that a court in Virginia cannot constitutionally exercise jurisdiction over a person outside of the state when that person posts material on the Internet. The Court found that a court in Virginia cannot exercise jurisdiction over the Connecticut-based newspaper defendants because they did not manifest an intent to aim their websites or the posted articles at a Virginia audience. Therefore, the Court reversed the order denying the motions to dismiss for lack of personal jurisdiction made by the defendants.

*I.D.V. Northwest Healthcare Alliance, Inc. vs. Healthgrades.com, Inc (2002)*

In this case,<sup>49</sup> Northwest Healthcare Alliance (Northwest), a health care provider in the state of Washington, brought an action in Washington against Healthgrades.com Inc. (Healthgrades). Healthgrades was a Delaware corporation with its principal place of business in Colorado. Healthgrades operated a web site that rated health care providers. Northwest brought this action alleging defamation and violation of Washington's Consumer Protection Act, after plaintiff learned it had received what is considered an unfavorable rating on Healthgrades' web site.

The Court of Appeals discussed whether to exercise jurisdiction over Healthgrades. The Court applied the "effects test" and found that Healthgrades had purposefully interjected itself into the Washington state home health care market by offering ratings of Washington medical service providers. This act was expressly aimed at Washington, as Healthgrades was well aware that its ratings of Washington home health providers would be of value primarily to Washington consumers. The Court noted that although Healthgrades obtained its information from various public sources, including the federal government, the information had been received originally from Washington sources, and the allegedly defamatory rating received by Northwest concerned the Washington activities of a Washington resident. The Court further concluded that the brunt of the harm allegedly suffered by Northwest occurred in Washington, where the company was incorporated, had its principal place of business and where its reputation was likely to suffer. The effects of Healthgrades' conduct were felt in Washington, and Healthgrades could reasonably expect to be called to account for its conduct in the forum where it understood the effects of its actions would be felt.

For these reasons, the Court found that the exercise of personal jurisdiction over the defendant in the state of Washington was constitutionally permissible.

*I.D.VI. Clemens vs. McNamee (2010)*

In *Clemens vs. McNamee*<sup>50</sup>, an appeals court examined whether it could properly exercise jurisdiction over the defendant.

Clemens was a professional baseball player. Although he temporarily resided in other cities during his professional career, Clemens had his permanent residence in Houston, Texas. McNamee was being investigated in New York for delivering illegal performance-enhancing drugs to athletes. McNamee told police investigators that he had injected Clemens with performance-enhancing drugs in 1998, 2000 and 2001 in New York and Toronto. Such statements were later incorporated into a report drafted by the

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<sup>47</sup> See *Telco Communications vs. An Apple a Day* 977 F. Supp. 404, 407 (E.D. Va. 1997), available [online] at: <<http://lw.bna.com/lw/19971014/97542.htm>>. [Editor's note: accessed on 11/12/11.]

<sup>48</sup> See No. 01-2340 (4th Cir., December 13, 2002).

<sup>49</sup> See No. 01-35648, D.C. No. cv-01-00488-BJR, Memorandum (9th Circuit, October 7, 2002), available [online] at: <<http://www.techlawjournal.com/courts2001/healthgrades/20021007.asp>>. [Editor's note: accessed on 11/12/11.]

<sup>50</sup> See No. 09-20525 (5th Circuit, August 12, 2010).

federal authorities as part of an investigation conducted by former U.S. Senator George Mitchell into the use of performance-enhancing drugs, known as the *Mitchell Report*.

National news services, as well as every major newspaper in Texas, republished McNamee's statements. Following the release of the *Mitchell Report*, McNamee spoke with John Heyman, a senior writer for the internet site *SI.com*. During this interview at McNamee's house in Queens, New York, McNamee repeated the statements that had been published in the *Mitchell Report*. Heyman posted an article containing these statements to the website *SI.com* on January 7, 2008.

Clemens filed suit for defamation against McNamee in Texas state court in January 2008. McNamee moved to dismiss Clemens' complaint for lack of personal jurisdiction. The district court dismissed the defamation action for lack of personal jurisdiction because the focal point of McNamee's statements about Clemens was not Texas. The decision was appealed.

The appeals court examined if McNamee's alleged defamatory statements were directed to Texas. The appeals court concluded that the statements in question concerned non-Texas activities: the delivery of drugs to Clemens in New York and Canada. The court found that the statements had not been made in Texas or directed to residents of Texas. Based on the above, the Court held that Clemens failed to establish jurisdiction over McNamee.

#### *I.D.VI. Silver vs. Brown (2010)*

In *Silver vs. Brown*<sup>51</sup>, David Silver appealed the decision of the District Court, which dismissed his defamation claim against Mathew Brown and Jack McMullen.

Silver, a citizen of New Mexico, filed a defamation action on May 26, 2009. He asserted that Brown and McMullen, citizens of Florida, had slandered him by posting a comment on the internet that portrayed him in a negative light. Silver was the president of the company Santa Fe Capital Group, and the comment was allegedly posted with the intent of negatively affecting Silver's and Santa Fe's reputation. Santa Fe had entered into an agreement with Growth Technologies International, Inc (GTI). Matthew Brown was the chief executive officer of GTI, and McMullen was a member of GTI's board of directors. In that agreement, Santa Fe agreed to assist GTI in raising money from private investors in exchange for a fee. Silver then sought the remainder of the fee he alleged was due Santa Fe and Brown sought a refund of the portion previously paid by GTI. The purpose of the comment, published by Brown on, or about, May 5, 2009 in the blog *DavidSilverSantaFe.com*, was to discredit Silver for his performance in the contract between Santa Fe and GTI.

The district court dismissed Mr. Silver's claims for lack of personal jurisdiction, holding that, under New Mexico's long-arm statute, neither Brown nor McMullen had sufficient contacts with New Mexico to provide the court with jurisdiction over them.

The appeals court affirmed the district court's dismissal of Silver's claim against McMullen, as he knew, or should have known, that they might have to defend a law suit in New Mexico when they put up the blog.

However, the appeals court reversed the judgment of the district court dismissing Silver's claims against Brown.

With regard to Brown, the appeals court examined if the court had specific jurisdiction over Brown according to the "minimum contacts" standard, which requires that the out-of-state defendant must have purposefully directed its activities at residents of the forum state. The court found that it was clear from *Calder vs. Jones* that Brown purposefully directed his blog at New Mexico, and that Silver's alleged injuries arose out of Brown's New Mexico-related activities.

The appeals considered that the posting of the blog had been clearly an intentional act. The court considered that Brown created the blog in question in direct response to the failed business deal and, in fact, used the threat of posting to attempt to recover money he thought GTI was owed. The court also took into account that Brown served as moderator of the blog and wrote at least the introductory page claiming his company had been wronged by Mr. Silver and Santa Fe. In the opinion of the appeals court, this showed that his clear intention was to damage Mr. Silver's and Santa Fe's reputation.

The appeals court also understood that Brown expressly aimed his blog at New Mexico and that the blog was about a New Mexico resident and a New Mexico company and complained about a business relation that took place largely in New Mexico. In addition, the blog was widely available in New Mexico over the Internet.

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<sup>51</sup> See No. 10-2005 (10th Circuit, June 14, 2010).

Finally, the court established that Brown had knowledge that the brunt of the injury to Silver would be felt in New Mexico. Brown knew Santa Fe was located in New Mexico and that Silver lived in New Mexico and conducted his business from there.

The appeals court rejected the district court's analysis which suggested that the blog was not directed solely at the residents of New Mexico and that the blog was accessible from any part of the world. The Court noted that Internet and the use of search engines make it possible to identify the person to whom the blog is directed, and understood that actions that are performed for the very purpose of having their consequences felt in the forum state are more than sufficient to support a finding of purposeful direction under *Calder*.

## II. Criteria adopted in Latin America

Searching for jurisprudence in Latin America is, with a few exceptions, a complicated task for any researcher. We will now present a series of cases that have a direct relationship with situations where the defamatory content of a statement is conveyed via Internet. Others are cases that, even bearing no direct link with the Internet, expose the reasoning applied by judges and other operators, which they then seek to reproduce in cases involving the Internet.

### II.A. Brazil

In 2006, there was a plane crash near Brasilia in which a passenger aircraft from GOL Airlines collided with an Embraer Legacy jet that belonged to Excel Air. As a result, 154 people died in GOL's plane.

The American journalist Joseph Sharkey, who was traveling in the Legacy jet and survived, wrote an article on his experience that was featured in the cover of the *New York Times*.<sup>52</sup> After this article was published, the journalist was interviewed by U.S. and international newspapers, including the *NBC Today Show* and *NPR*. In addition to that, following Sharkey's comments in a series of interviews pointing out that he knew from international pilots that there were breakdowns in the Brazilian air traffic control system, the then Minister of Defense of Brazil Walter Pires criticized him in the media. The journalist later set up a blog in which he referred to several aspects of the accident.<sup>53</sup> The last article of his blog was posted on January 6, 2008, and is still available online.<sup>54</sup> Sharkey also tells his experience and shares his views on the events in another blog.<sup>55</sup>

Following these events, Joseph Sharkey had to face two suits in Brazil, a civil action and a criminal action, brought by Rosane Gutjhar, a Brazilian citizen who had been married to one of the victims of the plane crash. Rosane Gutjhar considered that Sharkey's statements were an offense against Brazil.

The civil action for damages was brought in 2008 before a Court of First Instance for Civil Matters in Curitiba (Court 18° v Civel).<sup>56</sup> In the civil suit, plaintiff Rosane Gutjhar sought compensation from Joseph Sharkey for expressions that the journalist had allegedly used to refer to the Brazilian people. She claimed that the journalist compared them to "the three stooges", and called them "the most idiot of idiots", "an archaic country", "land of Tupiniquins and bananas", among other names.<sup>57</sup> According to an analysis of the allegations by someone from the journalist's circle, some of these phrases were not taken from the written content posted by the journalist in his blog, but from comments made by blog users to an article published in another electronic magazine, *Brazzil.com*, which the journalist had reproduced in his blog.<sup>58</sup>

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<sup>52</sup> See "Colliding With Death at 37,000 Feet, and Living", in *The New York Times*, October 3, 2006, available [online] at: <<http://www.nytimes.com/2006/10/03/business/03road.html?pagewanted=1>> . [Editor's note: accessed on 11/12/11].

<sup>53</sup> Information provided by the journalist when he was interviewed before drafting this paper.

<sup>54</sup> See "Colliding With Death at 37,000 Feet, and Living", in *The New York Times*, October 3, 2006, available [online] at: <<http://sharkeyonbrazil.blogspot.com>>. [Editor's note: accessed on 11/12/11].

<sup>55</sup> See "Aviation Know-It-All Crashes Plane Into a Pole", en *Joe Sharkey: Brazil*, January 6, 2008, available [online] at: <<http://www.joesharkey.com>>. [Editor's note: accessed on 11/12/11].

<sup>56</sup> See Case File No. 13998/2008.

<sup>57</sup> Page 3 of the English version of the civil complaint can be found at: <http://www.calunia.com.br/p/blog-page.html>. [Editor's note: accessed on 11/12/11].

<sup>58</sup> See "Unsafe Skies? Why, I Oughta.... How DARE They Say These Skies Are Unsafe!", in *Joe Sharkey: Brazil*, on October 7, 2007, available [online] at: <[http://sharkeyonbrazil.blogspot.com/2007/10/how-dare-they-say-these-skies-are\\_07.html](http://sharkeyonbrazil.blogspot.com/2007/10/how-dare-they-say-these-skies-are_07.html)>. [Editor's note: accessed on 11/12/11]. Information provided by Joseph Sharkey.

In terms of jurisdiction to hear a case, the complaint alleged that there was jurisdiction in the court of the plaintiff's domicile and considered that Articles 93 (3), and the single paragraph [*parágrafo único*] in Article 100 of the Brazilian Code of Civil Procedure (Código de Processo Civil, CPC) were applicable.

Pursuant to article 94 of the CPC, lawsuits involving personal rights must be, as a rule, filed before the court of the defendant's domicile. One exception to this rule would be Section 3 of said article, which states that the court of the plaintiff's residence has jurisdiction when the defendant has neither domicile nor residence in the country. On the other hand, according to the single paragraph in Article 100 of the same Code, in cases seeking compensation for damages derived from a crime, there would be jurisdiction in the court of the plaintiff's domicile.

The complaint argued that Joseph Sharkey did not reside in Brazil and was not domiciled in this country, and that the request for damages had been made following the commission of a crime. Therefore, there was jurisdiction in the court of the plaintiff's domicile.<sup>59</sup>

Notice of this action was served at the place where the journalist resided at the time, in New Jersey. He decided not to appear before the court and offered no defense. The judge dismissed the case based on the understanding that the plaintiff did not have standing to sue, as there was no connection between the remarks made by Joseph Sharkey and Rosane Gutjhar. The judge held that there was no such connection because the journalist's remarks did not specifically refer to the plaintiff, but generically to all the Brazilian people.<sup>60</sup> On the other hand, he held that the abuses by the mass media may only be proven when there is a truly deliberate, straightforward offense with obvious aggressive intent. He also considered that the reasonableness standard had to prevail when assessing the journalist's statements, and concluded that these should be tolerated.<sup>61</sup> Rosane Gutjhar filed an appeal against this decision, which was admitted.

The case file was then sent to the Court of Justice of the State of Paraná on February 14, 2011, and the decision on this appeal in the civil case is still pending.<sup>62</sup>

Rosane Gutjhar also brought a criminal action against the journalist in 2009. In 2010, Sharkey received a summons by a court in Curitiba, state of Paraná, at his address in Arizona, with the intervention of a law firm from New York. This summons was sent after Rosane Gutjhar's request that the journalist provide explanations, under the terms of Article 144 of the Criminal Code<sup>63</sup>, for his statements on the accident which were posted in his blogs.<sup>64</sup>

The judge dismissed the case with Joseph Sharkey in absentia, and held that Rosane Gutjhar did not have standing to defend the interests of the Government or its authorities, and that there was no direct offense against her. After said resolution, Rosane Gutjhar filed a legal recourse (Recurso em Sentido Estricto, RESE). In June 2010, the Court of Justice in Paraná affirmed the dismissal and notified the Ministry of Justice so that, if said Ministry was interested in prosecuting Joseph Sharkey, they could take the necessary steps therefor. There is no record of such legal proceedings having been initiated by the Ministry to date.<sup>65</sup>

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<sup>59</sup> Page 6 of the Portuguese version of the civil complaint can be found at:

<http://www.calunia.com.br/p/blog-page.html>. [Editor's note: accessed on 11/12/11]. Below is a transcription of the relevant sections in the articles of the Code of Civil Procedure referred to in the complaint.

Art. 94 - A ação fundada em direito pessoal e a ação fundada em direito real sobre bens móveis serão propostas, em regra, no foro do domicílio do réu. (...) § 3º - Quando o réu não tiver domicílio nem residência no Brasil, a ação será proposta no foro do domicílio do autor. Se este também residir fora do Brasil, a ação será proposta em qualquer foro." Art. 100 - (...) Parágrafo único - Nas ações de reparação do dano sofrido em razão de delito ou acidente de veículos, será competente o foro do domicílio do autor ou do local do fato."

Source: <http://www.iberred.org/sites/default/files/cdigo-procesal-civil-brasil.pdf>. [Editor's note: accessed on 11/12/11].

<sup>60</sup> See p. 191 of the court decision.

<sup>61</sup> See pp. 192 and 193 of the court decision.

<sup>62</sup> Available [online] at: [http://www.assejepar.com.br/cgi-bin/det\\_processo\\_direto.asp?processo=70967&cbo\\_comarca=001&cbo\\_cartorio=18&txt\\_pesquisa=1398/2008&cbo\\_pesquisa=1&rdo\\_tipo\\_pesquisa=1&direto=S](http://www.assejepar.com.br/cgi-bin/det_processo_direto.asp?processo=70967&cbo_comarca=001&cbo_cartorio=18&txt_pesquisa=1398/2008&cbo_pesquisa=1&rdo_tipo_pesquisa=1&direto=S).

[Editor's note: accessed on 11/12/11].

<sup>63</sup> Article 144 of the Criminal Code sets forth (in the source language) that: "Se, de referências, alusões ou frases, se infere calúnia, difamação ou injúria, quem se julga ofendido pode pedir explicações em juízo. Aquele que se recusa a dá-las ou, a critério do juiz, não as dá satisfatórias, responde pela ofensa".

<sup>64</sup> Information provided by Joseph Sharkey.

<sup>65</sup> Information provided by the organization Article 19, Brazil.

Even though the judges did not address the jurisdiction issue, they did render a decision in the civil and criminal cases. The suits were dismissed for reasons associated with the lack of standing to sue rather than the absence of territorial jurisdiction.

## II.B. Argentina

### II.B.I. Cases decided by local courts

We will present a series of decisions issued by local courts of various instances. Some of these cases, as will be seen below, were judged by courts of appeal.

II.B.I.a. *J., G. R. vs. GOOGLE INC*, FEDERAL COURT OF APPEAL OF SALTA [CÁMARA FEDERAL DE APELACIONES DE SALTA], JULY 4, 2011, LA LEY 7/19/11. In this case, plaintiff Guillermo Jenefes, a legislator representing the province of Jujuy, claimed that Google Inc. had hosted and promoted a defamatory space in its *Blogger* systems, despite a court order for removal.

Federal Court No. 2 of Jujuy had rejected, in its resolution dated December 9, 2010, the jurisdictional plea submitted by Google Inc. The resolution of December 9 was based on the opinion of the federal prosecutor, who understood that

jurisdiction is not determined based on paragraph 3 of article 5 CPCCN, but rather on paragraph 4, which establishes that: “In personal actions for crimes or unintentional torts, there will be jurisdiction to sue in the place where such offense was committed or in the place where the defendant is domiciled, at the choice of the plaintiff.” It also specifies that “the information transmitted over the Internet has the peculiarity of reaching every part of the world, including the province of Jujuy, which is where the plaintiff is domiciled and therefore the place where the harmful event had its effects.”<sup>66</sup>

Google Inc. appealed the decision. The company denied that the event at issue had taken place in the province of Jujuy, and argued that none of the alleged actions had occurred there, but in the place where Google systems were based, namely California, US.<sup>67</sup> Google Inc. claimed that the prosecutor’s opinion confuses the place of the events with the place where the action has its effects and held that the latter does not determine jurisdiction under the applicable law. Google Inc. further claimed that

even if there was jurisdiction in the place where the event allegedly had its effects, the opinion is mistaken and contradictory, because the very “universal nature” of the Internet, which is publicly known and has not been challenged herein, suggests that the alleged harmful effects —i.e. the “bad impression” of the plaintiff that third parties would get after reading the blog— can be read all over the world.<sup>68</sup>

The plaintiff, on the other hand, argued that the place of the events is the province of Jujuy, as “that is the place where he lives and where the existence of the blog has affected his family and has reached his peers, friends, clients and potential voters.”<sup>69</sup>

The Federal Court of Appeal of Salta [*Cámara Federal de Apelaciones de Salta*] that heard the appeal rejected the appeal filed by Google Inc and concluded that the court of the place “where the harm occurs; i.e. where the damage affects the aggrieved party” shall have jurisdiction over the case.<sup>70</sup> The Court reaches this conclusion after considering that

Article 5, paragraph 4 of the National Code of Civil and Commercial Procedure authorizes plaintiffs to bring actions in the jurisdiction where the event took place or the defendant is domiciled, which means that plaintiffs may choose among a number of courts with territorial jurisdiction[...]. In this regard, it has been posed that a correct interpretation of this provision—which takes into account the geographical area where the procedural law is applicable and underpins the consistency of the legal system as a whole—, indicates that such choice should be made among competent judges within the provincial territory. It may not be concluded that there is also a right to choose among the different jurisdictions throughout the country; these questions should be governed by the *locus regis actus* rule (cf. Buenos Aires Court of Justice [Corte de Justicia de Buenos Aires], Ac. 80285, 9/1/04, R., D. O. c/ *Flores, Gabriel y otro s/daños y perjuicios*, from the opinion of justice de Lázari). And this Latin aphorism (“the place governs the act”) is linked to a legal principle (territoriality principle) which is not of Roman origin, establishing that the governing rules must be those of territorial law, that is to say, the laws in force in the place where an action is carried out, which is contrary to the principle of personality of the law (cf. Ossorio, Manuel, *Diccionario de Ciencias Jurídicas, Políticas y Sociales*,

<sup>66</sup> Item IV of the opinion on file in folios 207/208, cited in *J., G. R. c/ Google Inc*, Federal Court of Appeal of Salta [Cámara Federal de Apelaciones de Salta], July 4, 2011, LA LEY 7/19/01, Recital 1.

<sup>67</sup> *J., G. R. c/ Google Inc*, *supra* note 66.

<sup>68</sup> *J., G. R. c/ Google Inc*, *supra* note 66.

<sup>69</sup> *J., G. R. c/ Google Inc*, *supra* note 66.

<sup>70</sup> *J., G. R. c/ Google Inc*, *supra* note 66, Recital 2.

Buenos Aires, Argentina, Heliasta, 24<sup>a</sup>, p. 587/ Cabanellas, Guillermo, *Diccionario Poder Judicial de la Nación Enciclopédico de Derecho Usual*, 24<sup>a</sup>, Buenos Aires, Argentina, Heliasta, 1996, volume v, p. 228) [...] Therefore, either due to the free choice that the plaintiff may exercise or as a consequence of applying the most restrictive doctrine when there are judges from different jurisdictions, when it comes to wrongful acts (i.e. in civil law terms, acts causing an unjustified damage) the place where the event occurred shall be the governing factor [...] Now, it is clear that this premise tends to fade when applied to the sphere of legal acts and transactions performed by means of a relatively new media, such as the Internet. In these cases, the place is, strictly speaking, the cyberspace (an artificial sphere created by information technology means, cf. *Diccionario de la Real Academia Española* - 22<sup>nd</sup> edition; [www.rae.es](http://www.rae.es)), which does not pertain to any specific territory, but to all territories at the same time [...]. Therefore, a coherent interpretation of the principles at issue, in light of the new circumstances, indicates that in the case of damages inflicted within this context, there will be jurisdiction in the court of the place where the damage occurs, that is to say, where the damage affects the aggrieved party.<sup>71</sup>

The Court further stated that:

the act by means of which the damage is actually inflicted on the plaintiff (the alleged defamation, damage to reputation and public image, and pain and suffering) has clearly occurred in the province of Jujuy —this being the place of residence of the plaintiff and his family, and the place where he pursues his professional and political activities—, and not in other parts of the globe, let alone at Google’s domicile (California, United States of America) where the plaintiff hardly has a reputation and therefore there cannot be a *prima facie* interest in accessing the blogspot. Besides, if the defendant’s stance was admitted, at a certain point all the individuals potentially aggrieved by an act or omission attributable to the defendant would be forced to travel to the United States to file their lawsuits and litigate pursuant to the U.S. rules of procedure. This would be clearly inconvenient, considering the imbalance that will always exist between individuals and the international company in question.

II.B.I.b. *NUÑEZ, SILVIA ADRIANA C/ COMUNICACIONES Y MEDIOS S.A. Y OTRO S/D. Y P.X RESP. EXTRACONT. DE PART.*, COURT OF APPEAL FOR CIVIL, COMMERCIAL, LABOR AND MINING MATTERS OF THE JUDICIAL DISTRICT OF NEUQUÉN [CÁMARA DE APELACIONES EN LO CIVIL, COMERCIAL, LABORAL Y DE MINERÍA DE LA CIRCUNSCRIPCIÓN JUDICIAL DE NEUQUÉN], CHAMBER I, CASE FILE NO. 367756/8, MARCH 5, 2009.<sup>72</sup>

Silvia Adriana Núñez filed a civil complaint in the province of Neuquén, Argentina, against the Chamber of Agriculture, Industry and Commerce of General Roca and against the company Comunicaciones y Medios S.A., after the Chamber wrote an email calling her “defrauder.” The company Comunicaciones y Medios SA subsequently published the content of the email in the Crime section of the newspaper *La Mañana de Neuquén*.

In the first instance, the case was heard by Civil Court No. 5 of Neuquén [Juzgado en lo Civil N° 5 de Neuquén]. Then the Chamber of Agriculture, Industry and Commerce of General Roca claimed that the court of Neuquén did not have jurisdiction over the matter, as the organization was domiciled in the city of General Roca, province of Río Negro.

The judge of first instance held that the plaintiff had a valid right to file a lawsuit in Neuquén, since the co-defendant, the company Comunicaciones y Medios S.A., was domiciled in the City of Neuquén. This decision was grounded on article 5 (4) of the Code of Civil and Commercial Procedure of Neuquén, which provides that

except when an express or tacit extension is granted, where applicable, and notwithstanding the provisions contained in such Code or in other laws, there will be jurisdiction: (...) 5 In personal actions for crimes or unintentional torts, in the place where such offense was committed or in the place where the defendant is domiciled, at the choice of the plaintiff.

The Chamber of Agriculture, Industry and Commerce of General Roca appealed the decision of the trial court rejecting the motion to dismiss for lack of jurisdiction. It moved for reversal under article 5 (5) of the Code of Civil and Commercial Procedure of Neuquén, which provides that

except when an express or tacit extension is granted, where applicable, and notwithstanding the provisions contained in such Code or in other laws, there will be jurisdiction: (...) 5 In personal actions, where there are several defendants and the claim is for joint obligations which may not be severed, in the court of any of such defendants’ domicile, at the plaintiff’s choice.

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<sup>71</sup> *Idem*.

<sup>72</sup> Source: *elDial.com* - AA55F1, published on 9/9/09.

The Chamber of Agriculture claimed that, in their view, the conditions set forth in article 5 (5), which would allow Núñez to choose a forum for filing her case, had not been met. The Chamber alleged that the obligation claimed was not “indivisible” and that there was no “necessary joinder of actions.”<sup>73</sup>

The Court of Appeal for Civil, Commercial, Labor and Mining Matters of the Judicial District of Neuquén affirmed the dismissal of the motion for lack of jurisdiction.

The Court of Appeal held that, in this case, there was jurisdiction in the court of the place where the news had been spread, and that the courts of the Province of Neuquén were to hear this case. Said court held that the grounds posed by the court of first instance to dismiss the motion for lack of jurisdiction showed that said rejection was in fact based on article 5 (5) of the Code of Civil and Commercial Procedure of Neuquén, which provides that

when [the motion for lack of jurisdiction] is rejected by the trial court, even though she states that the decision is based on [...] art. 5, paragraph 4, the arguments used —when pointing out that there being two defendants, the plaintiff has exercised the right to bring an action in this forum— evidence that said decision is actually based on paragraph 5.<sup>74</sup>

The Court of Appeal held:

Therefore, we understand that the arguments in PI 2005 N°307 T°III F°529/531 and PI 2004 N° 63 T°I F° 107/111 are applicable to the present case. In the cases of reference, the arguments posed by Justice Luis SILVA ZAMBRANO as interim judge of the TSJ in the *Ullman* case were admitted: “Thus, in the case at issue, what is evident in connection with the offenses perpetrated by the press from the point of view of criminal law—in terms of attribution of jurisdiction to the court of the place where the graphic material was printed (or the place of radio or television broadcasting), which favors the investigation of the alleged offense as well as the right of defense of the accused—is not necessarily equivalent to civil law and, more precisely, to the so called “tort law” in which the legal system mainly focuses on the aggrieved party in order to provide compensation for the damage inflicted.” From this perspective, we might hold, as done by the lower Court, that the “place where the event occurs” referred to in article 5, paragraph 4 of the Code of Civil and Commercial Procedure of this province, is the one where the plaintiff is domiciled, resides or has his/her business, i.e. the place where the publication “impacts” on the people who are normally in contact—more or less directly—with the plaintiff or know him/her personally or as a result of professional or business activities. Hence, in my opinion, the perspective offered by tort law requires this distinction. While in the repressive sphere efforts are made to guarantee the investigation of the offense and the right of defense of the accused, here, in contrast, “Justice” means, above all, “compensation for damages”, which basically means focusing on the aggrieved party.

Now, such focus does not only entail the “immediacy principle”, which calls for a direct relationship between the court and the party concerned, but also, and most importantly, the concrete possibility of access to justice. In other words, if I have been aggrieved by content published in the press or broadcast in an alien jurisdiction (even if it is a distant jurisdiction, although this is not the case), as a general rule, I will not be “aggrieved” in such “alien jurisdiction”, but rather in the place where I live and usually interact with other people.

Hence, just as the media outlet used economic and technical resources to “extend” its influence (and more specifically, to “cause damage”) in a different jurisdiction, it should be prepared to face liability for those actions in that territory. In fact, it is usually prepared to do so, or at least to oppose less resistance than the majority of aggrieved parties if they were to litigate in an alien jurisdiction.

In short, the “place where the event occurs” is such where the damage “actually” took place, which is the same as the place where the individual “interacts with other people”, because that interaction is precisely affected by the action considered illegal. If we claim that in order to properly “restore” his or her indemnity we will focus on the aggrieved party, then we must also give priority to the “venue” where he/she will bring the action, since this determines, to a certain extent, his/her actual possibility of accessing a court of justice. This means that the criterion adopted in this respect will compromise the guarantee that he/she will be able to defend his/her rights before a court of law (the constitutional guarantee of due process). In such connection, we cannot claim that the “mass media” —which normally have greater economic power than most individuals— would see the defense of their rights seriously affected by having to litigate in an alien venue. However, if one of the parties should face less favorable circumstances, it is fair that it be the media.

I understand that this reasoning may be challenged by pointing out that the concept of “interaction with other people” is too vague, for an individual may establish relationships in more than one place. It could also be claimed that the concepts of jurisdiction and guarantee of defense before a court of law are being “confused.” Regarding the first objection, I believe that it is preferable to accept such

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<sup>73</sup> Núñez, *Silvia Adriana c/ Comunicaciones y Medios S.A. y otro s/D. y P.X Resp. Extracont. de Part.*, Court of Appeal for Civil, Commercial, Labor and Mining Matters of the Judicial District of Neuquén [Cámara de Apelaciones en lo Civil, Comercial, Laboral y de Minería de la Circunscripción Judicial de Neuquén], Chamber I, Case File No. 367756/8, March 5, 2009. Source: *elDial.com* - AA55F1, published on 9/9/09.

<sup>74</sup> *Idem*.



ambiguity, which might grant the plaintiff the “right to choose.” As to the second objection, I understand that in every genuine conflict involving jurisdiction, the parties struggle to have the case heard by a court that, according to their expectations, will rule in their favor, by reason of specialization, proximity to domicile or place of residence, etc. We believe that these factors will lead to a better understanding of the case and the arguments presented. In other words, such conflict is always related to the possibility of achieving a better defense of our rights. (STJ NEU, Agreement No. 02 dated June 24, 2002, from the minority opinion).<sup>75</sup>

Based on the above grounds, the Court found that there was jurisdiction in the court of the province of Neuquén pursuant to the provisions of article 5, paragraph 4 of the Code of Civil and Commercial Procedure of Neuquén.<sup>76</sup>

II.B.I.c. *ALIFANO, ROBERTO FRANCISCO S/RECURSO DE QUEJA*, NATIONAL COURT OF CRIMINAL APPEALS [CÁMARA NACIONAL DE CASACIÓN PENAL], CASE FILE NO. 9375, MARCH 3, 2009. Roberto Francisco Alifano brought a criminal action for libel in the City of Buenos Aires based on allegedly defamatory statements that had been published in the newspaper *La Gaceta* of Tucumán, in the Argentine Republic, on November 5, 2006.

By means of an order entered in folios 29/30, the Court of Criminal Correction [Juzgado Correccional] No. 14 of the City of Buenos Aires declared its lack of territorial jurisdiction and recognized the jurisdiction of the Court of Criminal Correction of the City of San Miguel de Tucumán, province of Tucumán.

Roberto Alifano appealed this decision. Chamber IV of the National Court of Appeal for Criminal and Correctional Matters [Cámara Nacional de Apelaciones en lo Criminal y Correccional] of the City of Buenos Aires held, in its resolution dated April 29, 2008,<sup>77</sup> that

according to the criterion of the court, libel offenses must be considered perpetrated in the place where the allegedly derogatory statements were made. When such remarks are reproduced by the press, there is jurisdiction in the court of the place where the materials containing the disputed statements were printed (*in re causa* NO. 29 187 *Rodríguez Saa*, reply dated 8/24/06, among others) [...]. Such interpretation is consistent with the one adopted by the Supreme Court of Justice of Argentina (Judgments 311:2537; 312:987; 323:2210; 310:2263; 303:1231; 323:549; 323:2210; 323:4095) and must prevail in this case, even when the plaintiff has learned about the allegedly derogatory statements via Internet in this city. Cyberspace enables an *erga omnes* disclosure of information—as pointed out by the appellant—which is therefore diffuse and unspecified. Hence, the place where the materials were printed shall be the governing criterion.

On these grounds and according to the provisions of articles 37 and 39 of the Argentine Code of Criminal Procedure,<sup>78</sup> the Court of Appeal for Criminal and Correctional Matters of the City of Buenos Aires affirmed the decision rendered by the Court of Criminal Correction No. 14 of the City of Buenos Aires, which had declared its lack of territorial jurisdiction in favor of the Court of Criminal Correction of the City of San Miguel de Tucumán, province of Tucumán.

II.B.I.d. *RODRÍGUEZ, DIEGO S/DESESTIMACIÓN*, NATIONAL COURT OF APPEAL FOR CRIMINAL AND CORRECTIONAL MATTERS OF THE CITY OF BUENOS AIRES (CÁMARA NACIONAL CRIMINAL Y CORRECCIONAL DE LA CAPITAL FEDERAL), CHAMBER IV, CASE FILE NO. 24574, OCTOBER 6, 2004. The trial court dismissed the libel charges filed against Diego Luis Rodríguez. The plaintiffs appealed such decision. Chamber IV of the National Court of Appeal for Criminal and Correctional Matters of the City of Buenos Aires reversed the decision of the trial court, holding that the plaintiffs' claim “fulfills the

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<sup>75</sup> *Idem*.

<sup>76</sup> *Idem*.

<sup>77</sup> See National Court of Appeal for Criminal and Correctional Matters of the City of Buenos Aires (Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital Federal), *Alifano, Roberto Francisco s/ incompetencia*, Case No. 34.227, April 29, 2008.

<sup>78</sup> Below are the English translations of the relevant articles in the Argentine Code of Criminal Procedure.

Art. 37. - In all cases, there will be jurisdiction in the court of the judicial district where the offense was committed.

In the case of continuing or permanent crimes, there will be jurisdiction in the judicial district where the continuing or permanent offense stopped.

In cases of attempted crime, there will be jurisdiction in the court of the judicial district where the last act was performed.

[...]

Art. 39. - At any stage of the proceedings, when a court finds that it lacks territorial jurisdiction, it must transfer the case to a court with jurisdiction, hand over any detainees to such court, and comply with any urgent pretrial proceedings as may be necessary.

requirements of art. 418 of the Code of Criminal Procedure.”<sup>79</sup> Chamber IV of the National Court of Appeal for Criminal and Correctional Matters of the City of Buenos Aires also held:

In this regard, the petitioner is right about territorial jurisdiction, as “...in the case of crimes committed from a location physically distant from the victim, the unlawful act shall be deemed committed in all the jurisdictions in which the action took place, as well as in the place where the results emerged. Under such provision, any of these jurisdictions may be selected taking into account judicial economy, the interests of justice and defense of the accused” (C.S.J.N, *Servira* of 11/23/83, Judgments 305:1993).

This judicial precedent is of key importance to the case under analysis, as the alleged defamatory statements have been made through an Internet site, and the effects thereof have manifested in numerous places; the accused party shall have a right to choose the jurisdiction that they consider most appropriate to exercise their right of defense.

Based on the above grounds, Chamber IV of the National Court of Appeal for Criminal and Correctional Matters of the City of Buenos Aires reversed the decision and dismissed the claim brought by the plaintiffs against Diego Luis Rodríguez for libel and slander.

I.I.B.I.e. *N.N. S/INJURIAS*. NATIONAL COURT OF APPEAL FOR CRIMINAL AND CORRECTIONAL MATTERS OF THE CITY OF BUENOS AIRES (CÁMARA NACIONAL DE APELACIONES EN LO CRIMINAL Y CORRECCIONAL DE LA CAPITAL FEDERAL), CHAMBER IV, CASE FILE NO. 1589/09, OCTOBER 21, 2009. The trial court held that the National Court for Correctional Matters No. 1 of the City of Buenos Aires lacked jurisdiction over this case. The plaintiffs appealed the decision.

Chamber IV of the National Court of Appeal for Criminal and Correctional Matters of the City of Buenos Aires reversed the decision of the court of first instance on the following grounds:

The plaintiffs’ arguments are sufficient to rebut the reasons that underpin the lower court’s decision.

Therefore, the appealed order must be reversed.

In cases such as the present case (libel committed from a location physically distant from the victim), the criterion that must prevail to determine if the offense has been perpetrated [and if the judge has jurisdiction over the matter] is whether the person at which the derogatory statements were directed is aware of such statements (*Código Penal comentado y anotado*, Andrés José D’Alessio-Mauro-Divito, Special Section, articles 79 to 306, La Ley, Buenos Aires, 1.st edition, 2004, p. 119). If the email containing the defamatory statements had not been delivered, the defamation would not have taken place and therefore the victim would never have been aware of such attack.

In addition, prominent legal authors have argued that “...in the case of written, open communications, of which today’s most common examples are telegrams, postcards, emails, mobile phone text messages and Internet pages, the defamation occurs when the intended recipient becomes aware of the remarks at issue, provided they are only meant to defame them...” (Fontán Balestra, Carlos, *Tratado de Derecho Penal*, volume IV, Ed. Abeledo Perrot, Buenos Aires, 2007, p. 339).

The plaintiff claims to have learned about the content of the email by using her personal computer, at her domicile in Avenida Directorio 151, 3<sup>rd</sup> floor. For the time being, the allegations of the aggrieved party shall be regarded as true.

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<sup>79</sup> See *Rodríguez, Diego s/desestimación*, National Court of Appeal for Criminal and Correctional Matters of the City of Buenos Aires, (Cámara Nacional Criminal y Correccional de la Capital Federal), Chamber IV, Case file No. 24574, October 6, 2004. Note: Article 418 of the Code of Criminal Procedure sets forth that:

The criminal complaint shall be filed in writing, in as many copies as defendants in the case. Said criminal complaint shall be filed personally or by a special agent. When filed by a special agent, a power of attorney must be included in the case file. To be admitted, the criminal complaint must include the following information:

- 1) Name, last name and address of the plaintiff.
- 2) Name, last name and address of the criminal defendant. If such information is unknown, any descriptions that may help identify them.
- 3) A clear, precise and detailed description of the facts, indicating the place, date and time when they were perpetrated, if known.
- 4) Any evidence provided, including, where available, the relevant list of witnesses, experts and interpreters, with their addresses and professions.
- 5) If a civil action has been brought, the submission of the relevant complaint pursuant to article 93.
- 6) The plaintiff’s signature, when the complaint is filed in person, or the signature of any other person on their behalf, if the plaintiff were unable to sign. Should the complaint be signed by a nominee, such signature shall be affixed before a judicial officer.

The relevant documents as well as those considered admissible shall be incorporated in the case file; otherwise the complaint shall not be admitted. When such evidence is not available for submission, the complaint shall specify where it may be found.

## II.B.II. Cases decided by the Supreme Court of Argentina

The jurisprudence of the Supreme Court of Justice has been consistent when it comes to determining jurisdiction in criminal cases. To avoid repetition, we will discuss only one case that reflects the opinion of the country's highest court.

II.B.II.a. *VERAZAY, SANTOS JUSTO S/ QUERRELLA POR CALUMNIAS E INJURIAS*, SUPREME COURT OF ARGENTINA (CORTE SUPREMA DE JUSTICIA DE LA NACIÓN), COMPETENCIA NO. 1085. XLIII. In this case there was a conflict of jurisdiction between the members of Chamber I of the Court of Appeal for Criminal Matters [Cámara en lo Penal] of San Salvador de Jujuy, province of Jujuy, and the Court for Criminal Correctional Matters and Guarantees No. 4 of Salta, province of Salta. The Supreme Court rendered a decision<sup>80</sup> based on the provisions of article 16 of the Argentine Constitution.<sup>81</sup>

The opinion of the Attorney General rendered on March 28, 2008 points out that the manager of A.D.A.I.C.O.P. SALTA S.R.L. brought a criminal action for libel and slander against the Argentine Association of Music Writers and Composers (Sociedad Argentina de Autores y Compositores de Música, S.A.D.A.I.C.). In a conference organized by S.A.D.A.I.C. in Salta, the representatives of this association had reportedly suggested that the purpose of A.D.A.I.C.O.P. SALTA was to defraud the writers and composers it represents, as the organization did not send their contributions to S.A.D.A.I.C.<sup>82</sup> The opinion explained that the plaintiff had learned about these statements through the website of the newspaper *El Tribuno* of Salta, while he was in his home in the city of Jujuy.<sup>83</sup> The opinion also points out that, based on the fact that the press conference had been held in Salta and the remarks in question had been printed and reproduced by the press in that city, the members of Chamber I of the Criminal Court of Appeal of Jujuy declared their lack of jurisdiction to hear the case. As noted by the Attorney General, “they adopted this stance despite the fact that the aggrieved party had learned about these statements through a computer located in his home in Jujuy (folios 110).”<sup>84</sup>

On the other hand, the Salta judge understood that the case should continue to be heard by the courts of Jujuy because the plaintiff was domiciled there, and also because that was the place where “the offense had taken place, when the aggrieved party learned about those statements via a website that posts the publications of a newspaper from Salta” (folios 112/115).<sup>85</sup> The court of appeal of Salta ratified its opinion.<sup>86</sup>

Citing the jurisprudence of the Supreme Court, the Attorney General noted that

The Court has held that offenses such as the ones at issue herein should be considered committed in the place where the allegedly defamatory statements were made. When such statements are reproduced by the press, there will be jurisdiction in the court of the place where the defamatory material was printed (Judgments: 312:987 and 318:857) [...]. After applying these principles, and taking into account that the allegedly defamatory statements published by *El Tribuno* newspaper from Salta, which were later reproduced by other newspapers in the same province, were edited there—a circumstance that has not been challenged by the judge from Salta— (see folios 48/51 and 112/115), I understand that the court of the province of Salta is to hear the present case.<sup>87</sup>

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<sup>80</sup> Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación). Competencia N° 1085. XLIII. Available [online] at: <http://www.csjn.gov.ar> [Editor's note: accessed on 11/12/11].

<sup>81</sup> Art. 16:

The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, with the exception made in Section 75, subsection 12, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more provinces, between one province and the inhabitants of another province, between the inhabitants of different provinces, and between one province or the inhabitants thereof against a foreign state or citizen.

<sup>82</sup> Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación). Competencia N° 1085. XLIII, *supra* note 80.

<sup>83</sup> Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación). Competencia N° 1085. XLIII, *supra* note 80.

<sup>84</sup> Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación). Competencia N° 1085. XLIII, *supra* note 80.

<sup>85</sup> Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación). Competencia N° 1085. XLIII, *supra* note 80.

<sup>86</sup> Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación). Competencia N° 1085. XLIII, *supra* note 80.

<sup>87</sup> Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación). Competencia N° 1085. XLIII, *supra* note 80.

For the above reasons, the Supreme Court held on April 28, 2008 that the Court of Criminal Correction and Guarantees [Juzgado Correccional y de Garantías] No. 4 of the 4<sup>th</sup> Judicial District of the province of Salta was to hear the case.<sup>88</sup>

#### II.C. State of affairs in other countries in the region

As explained at the beginning of this chapter, it has been extremely difficult to gather jurisprudence from different countries in our region for reasons beyond the scope of this paper. Several consultations with experts and organizations were arranged in various countries. We received reports of situations in which, while there were no specific rulings, we can identify the lines of thought applied by the judicial actors and other government representatives from the region.

In **Uruguay**, a judicial decision issued by the Court of Appeal for Family Matters [Tribunal de Apelaciones de Familia] held that Internet postings may not be considered means of communication as per the provisions of the Press Act [Ley de Prensa] No. 16099. This action was brought following a complaint by the parents of a schoolgirl whose picture had been posted in a blog. The prosecutor requested for the case to be decided pursuant to the provisions of the Press Act. The juvenile court rejected this request. After a motion by the prosecutor, the Court of Appeal for Family Matters dismissed the prosecutor's claim, arguing that Law No. 16099 referred to the media cited by article 6. This article of the law establishes the qualifications that should be met by the editor of a media outlet, either from the press, radio or television. The judgment states that "clearly, under such factual and doctrinal framework the Internet posting of the picture of an individual, with derogatory comments, does not adjust to the legal model established for publications in media outlets by the laws of Uruguay." It further states that the authors of those postings may, nevertheless, be subject to an investigation pursuant to the law on defamation and libel. This shows that judges do not assimilate an Internet posting to a publication in the press. However, in the Argentine cases they appear to do so.<sup>89</sup>

It is worth mentioning a case from **Mexico** which received great international interest, although it is not related to the Internet.

After publishing her book *Los Demonios del Edén*, the Mexican journalist Lydia Cacho faced a defamation lawsuit in Puebla brought by the businessman Kamel Nacif Borge. In the book, the journalist had reportedly stated that the businessman was cooperating with a pederast.<sup>90</sup> The defamation lawsuit against the journalist was brought in Puebla. The journalist was detained in Cancún, the city where she resided, and taken to a prison in Puebla, where she remained at the Public Ministry premises for thirty hours.<sup>91</sup> Cacho claimed that she had been threatened and humiliated on the journey there.<sup>92</sup> At the journalist's request, the Superior Court of Puebla [Tribunal Superior de Justicia] sent the case to Cancún. The journalist based her arguments on the fact that the alleged offense had been committed in Mexico City, where the book had been distributed, while she lived in Cancún. She alleged that her trial had been moved to Puebla because Kamel Nacif was a friend of the governor of such state. While this is not a case of statements made over the Internet, it is nonetheless relevant. We may assume that the criminal action was brought in Puebla because in this jurisdiction defamation is established under a less demanding standard than in other jurisdictions in Mexico. Should this be confirmed, this would be an example of "libel tourism", an issue we will address in the following sections.

In **Costa Rica**, according to article 20 of the Criminal Code, an offense is deemed committed at the place where the criminal activity is carried out, in whole or in part, as well as at the place where the result of such activity manifests or could have manifested itself. Now, there are cases in which it is difficult or impossible to determine where the offense has had its effect, i.e. offenses taking place through media of massive circulation or with too many copies. Therefore, the place that may be identified is that where the offense has been committed, not the one where its results have been observed. In those cases, the applicable regulation is paragraph *a* of article 47 of the Code of Criminal Procedure, which establishes that the court of the place where the events took place shall be competent to hear the case. This refers to

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<sup>88</sup> Supreme Court of Justice of Argentina (Corte Suprema de Justicia de la Nación). Competencia N° 1085. XLIII, *supra* note 80.

<sup>89</sup> We would like to thank Edison Lanza, Uruguayan academic and journalist, and head of the NGO CAInfo, for the information provided on this case.

<sup>90</sup> See "Traslado juicio contra Lydia Cacho a Cancún", in *es mas*, January 20, 2005, available [online] at: <<http://www.esmas.com/noticierostelevisa/mexico/505582.html>> . [Editor's note: accessed on 11/12/11].

<sup>91</sup> See "Pierde Kamel Nacif juicio contra Lydia Cacho", in *cimac noticias*, January 3, 2007, available [online] at: <<http://www.cimacnoticias.com/site/07010312-Pierde-Kamel-Nacif.16091.0.html>>. [Editor's note: accessed on 11/12/11].

<sup>92</sup> *Idem*.

the place where the server or the press is located; except when these are located in a foreign country and cause their effects (for instance, violating the rights of a Costa Rican individual) in Costa Rica. Should this be the case, the courts of the capital city shall have jurisdiction (paragraph *b* of article 47).<sup>93</sup>

In **Costa Rica** we identified another noteworthy example. On May 19, 2010, a group of lawyers representing the government of Panama released an official communication by the Secretary of Communications which informed that “legal actions shall be soon brought in Costa Rica against the Costa Rican digital newspaper *El País* and against those responsible for defaming Panama.”<sup>94</sup> The government of Panama understood that several postings by the Costa Rican digital newspaper *El País* constituted an assault against national security and the security of the Panama Canal<sup>95</sup>. Moreover, this news release pointed out that the author of the interviews posted by the digital newspaper was liable for defamation for having stated, at a local radio broadcast, that the Panama Canal was managed by Israelite people. In the view of the government, this could put national security at risk.<sup>96</sup> The digital newspaper postings reportedly claimed that the government of Panama had given little help to the United States in the struggle against drug trafficking, and that individuals maintaining close links with a cousin of the president of Panama were apparently involved in drug trafficking.<sup>97</sup>

On May 10, 2011, the Attorney General’s Office of the Republic of **Costa Rica** issued resolution PGR-057-2011 concerning the Interim Attorney General of the Republic of Panama. In said resolution, the Attorney General’s Office responds to a letter from the Attorney General of Panama, dated June 7, 2010, requesting the Attorney General’s Office of Costa Rica to order an investigation into a series of postings made by the digital newspaper *Nuestro País* ([www.elpais.cr](http://www.elpais.cr)) of Costa Rica. The Attorney General of Panama considered that the allegations made in such postings were untrue and that they could hurt the friendly relations between the governments of Costa Rica and Panama. As per the resolution,

The above-mentioned postings, according to the document under analysis, have been extracted from texts published on May 7, 10 and 13 of this year, as well as from a telephone interview with Carlos Salazar Fernandez (broadcast in *Radio Emisora KW Continente* as part of a radio program called *Hora 9*). Those postings criticize a series of government decisions made by the President of the Republic of Panama, Mr. Ricardo Alberto Martinelli.<sup>98</sup>

Also according to the resolution, the Attorney General of Panama cites, in support of his claim, article 282 of the Criminal Code of Costa Rica, which refers to “Hostile Acts” (Title XI Crimes against National Security, Section II Crimes affecting National Peace and Dignity) in connection with article 16 of the Code of Criminal Procedure of Costa Rica (Chapter I Criminal Proceedings, Initiation of criminal proceedings), which authorizes the Attorney General’s Office to initiate criminal proceedings without subordinating to the actions of the Public Ministry, in cases of offenses against national security, among others.

The Attorney General of Costa Rica concludes that the petition submitted by the Attorney General of Panama must be rejected. On the one hand, the facts in question

cannot be considered a “hostile act” (as the actions of Mr. Salazar Fernández may not be regarded as hostile). On the other hand, the aggrieved party is in this case our country and there are no direct consequences for Costa Rica.<sup>99</sup>

Regarding the question of the “active personality principle”, the resolution states that from the information included in the communication—which is one of the reasons why our intervention was requested—, it can be deduced that the publications and statements at issue were made public via a media outlet that is allegedly Costa Rican (the domain is “cr”). However, the broadcasts in question may have been made outside the national territory—given the possibilities offered by the information technology—, and this would pose a conflict of territorial jurisdiction. The same could be argued in connection with the national origin of Mr. Salazar Fernández: his nationality cannot be inferred from his libelous act, but we might assume that he is Costa Rican. Despite the above, under the Law for the Enhancement of Regulations against Terrorism [Ley de Fortalecimiento de la Legislación contra el Terrorismo] No. 8719, dated March 4, 2009, paragraph 4 was recently

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<sup>93</sup> This criterion was shared by Judge Ricardo Salas Porras, from Chamber Three of the Supreme Court. We would like to thank Justice Paul Rueda, of the Supreme Court, for providing us with this information.

<sup>94</sup> See “El Gobierno de Panamá demandará por difamación a elpais.cr”, in *el país.cr.*, May 19, 2010, available [online] at: <<http://www.elpais.cr/articulos.php?id=24504>> . [Editor’s note: accessed on 11/12/11].

<sup>95</sup> *Idem.*

<sup>96</sup> *Idem.*

<sup>97</sup> *Idem.*

<sup>98</sup> Resolution of the Attorney General’s Office of the Republic of Costa Rica PGR-057-2011, May 10, 2011.

<sup>99</sup> *Idem.*

added to article 6 of the Criminal Code. This paragraph introduced the active personality principle and reads: “ARTICLE 6.- Prosecution may be instituted for unlawful acts committed in foreign countries, applying the laws of Costa Rica, when:… 4) the acts in question have been perpetrated by a national of Costa Rica.” This is irrespective of the place where the alleged criminal acts were committed, and the principle that establishes that “domestic law shall follow nationals wherever they are located”<sup>100</sup> would apply to Mr. Salazar Fernández.

In **Panama** we were unable to find a significant number of court rulings dealing with defamation over the Internet, and which would not have a direct connection with Panama or its territory. The information we gathered for this paper showed that actions for damages were adjudicated on the basis of the prevailing doctrine, which gives priority to the jurisdiction where the effects of such damage take place.<sup>101</sup>

We learned about the case of Patrick Visser, a Dutch citizen who runs a reforestation project for Silva Tree company. He brought a criminal action for libel against several journalists who published articles in the newspaper *The Christian Science Monitor* and in the blog *Bananama Republic*, questioning the legitimacy of the company’s activities.<sup>102</sup> There were also other plaintiffs in this case. Silva Tree is based in England and has a subsidiary in Panama. The criminal action was brought in Panama against Okke Ornstein, a journalist in charge of the blog *Bananama Republic* and journalist Sara Miller Llanas, who works for the U.S. newspaper *The Christian Science Monitor* (CSM).

Okke Ornstein is a foreign citizen who writes his blog mainly from Panama, but also from other locations. The blog page is registered in the United States, and its server is located in Florida, United States. Sara Miller Llanas is a correspondent of *The Christian Science Monitor* for Latin America and resides in Mexico.

Counseled by U.S. lawyers, Visser wrote a letter to GoDaddy, the company that provides hosting services for *Bananama Republic*, requesting cancellation of the blog. In this letter, Visser threatened them with bringing an action for defamation in Florida and claimed damages for USD 200,000. To date, we are not aware of the existence of any civil actions against the journalists in any jurisdiction.

The Seventh Prosecutor of the First Judicial Circuit of Panama initially requested the acquittal of the defendants, based on the understanding that the Prosecutor’s Office could not intervene in a case involving the Internet.<sup>103</sup> As the plaintiffs appealed this decision, a judge ordered resumption of the trial, on the ground that the Internet is a means of communication. Ornstein was notified of this decision in February 2011. The next legal step would be to summon the defendants to declare before the court, and the Prosecutor’s Office would then determine whether to indict the defendants. The Prosecutor’s Office gathered information on *Bananama Republic* and *The Christian Science Monitor* from Google Inc, GoDaddy and from the *posting* (sic) service provider of the *Christian Science Monitor*. No response has been provided to this information requests so far. Okke Ornstein points out that he has faced other criminal actions in Panama for articles posted in his blog, but none of these resulted in a conviction.

### III. Insights and suggestions on Latin America

We have so far discussed several court decisions and expert opinions from Latin America and other regions, which provide criteria for establishing jurisdiction based on a specific geographical location, in cases where the intended recipient of a defamatory statement learns about such remark over the Internet. The purpose of this article is not to provide a comprehensive collection of judicial decisions but rather a “sampling” of rulings that we consider of relevance and that offer arguments to reflect on this topic.

We have also noted that the decision as to which judge or court has jurisdiction to hear criminal or civil cases concerning defamatory statements has an important consequence in practice: if such judge or court does not guarantee independence from external pressures –such as the Government– and the rules for establishing jurisdiction are not clear, the plaintiffs may bring their civil or criminal actions before the court that is most convenient to them, for instance, or more vulnerable to pressures. Clearly, the judge may also be selected taking into account the applicable law: the plaintiff in a civil or criminal action may decide to bring an action in the jurisdiction where the decision would be more favorable to them. As pointed out in previous sections, this is what has been known as “libel tourism.”

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<sup>100</sup> *Idem* (no formatting).

<sup>101</sup> We would like to thank the Panamanian academic and attorney Ricardo Lombana for providing this information.

<sup>102</sup> See [available online] articles: <http://www.csmonitor.com/Environment/2010/0420/Carbon-offsets-Using-the-green-cloak-of-certification-to-sell>, <http://www.bananamarepublic.com/2010/04/20/panama-is-open-for-business-3-silva-tree-reforestation-scam> .

<sup>103</sup> The case file number for this criminal action is 206-10.

Both of these happen in Latin America. This is not the right time to discuss the lack of judicial independence in many countries.<sup>104</sup> We will not engage either in a detailed discussion of the different laws applicable in each jurisdiction. But by way of example only, we would like to note that while in some countries defamation has been partially decriminalized in cases of expressions referring to matters of public interest (for instance, in Argentina), in other countries this is still an offense penalized as “contempt”, under which criminal actions may be brought against those who criticize another person’s behavior (Ecuador).

Therefore, it is important to study and present a few ideas on how the question of territorial jurisdiction we have posed in this article should be dealt with, in order to prevent manipulation and the subsequent chilling effect on the exercise of freedom of expression.

The arguments that we have identified in the above court decisions and opinions may be summarized as follows:

- a) Jurisdiction is proper in the court which is domiciled in the same place as the individual that made the defamatory statement.<sup>105</sup>
- b) Jurisdiction is proper in the court which is domiciled in the same place as the victim of the defamatory statement.<sup>106</sup>
- c) Jurisdiction is proper in the court which is domiciled in the same place as the author or the victim of the statement at issue, depending on whether the action is of a civil or criminal nature.<sup>107</sup>
- d) Jurisdiction is proper in the court which is domiciled in the same place where the defamatory content was “printed”.<sup>108</sup>
- e) Jurisdiction is proper in the court which is domiciled in the same place as the server hosting the defamatory statement.<sup>109</sup>

The question to be answered is whether we find any of these general rules sufficiently satisfactory so as to translate it into a general law for various nations which does not undermine freedom of expression. Let us focus now on some of the concerns resulting from the analysis of these general rules.

The rule that grants jurisdiction to the court of the place where the “printing” was made could be useful in a very limited number of cases. If the content of a defamatory statement is in a “printed” publication, such as a newspaper, that is also available in a digital version, such as a digital newspaper, the rule about the place of “printing” could work even when the recipient had learned about such defamatory content only through the Internet. However, there is an ever-increasing dissemination of content that is not “printed” in the traditional sense, and as a result this rule proves to be useless.

Those who struggle to preserve the application of traditional criteria (place of printing rule) because they believe, metaphorically speaking, that the Internet may be assimilated to other scenarios, are wrong. Their error lies in something that has been extensively explained by several authors: the risks of describing situations related to the Internet by means of inappropriate “metaphors.” For instance, the idea that a blog may be “printed” in the same way as a newspaper, and in this way to assimilate a blog to a newspaper, leads us to a solution which relies on a metaphor that is clearly inaccurate.<sup>110</sup>

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<sup>104</sup> On the question of lack of judicial independence in the countries of the region, see the reports issued by the non governmental organization Due Process of Law Foundation - DPLF, available at [www.dplf.org](http://www.dplf.org). On the same issue, specifically in Argentina, see the reports issued by the non governmental organization ANDHES, at [www.andhes.org.ar](http://www.andhes.org.ar)

<sup>105</sup> This is the implicit argument in a decision rendered by a Court of Appeal in the province of Neuquén, in the case *Nuñez*, cited *supra*.

<sup>106</sup> This is basically the argument in *Calder v. Jones*, cited *supra*, which is still applied to other cases related to the Internet. The above-mentioned case from Argentina should not be overlooked: based on the understanding that in cases of defamation via Internet the acts at issue take place in “cyberspace”, it was concluded that the conflict should be solved by fixing jurisdiction in the court of the victim’s domicile. See the case decided in the jurisdiction of the province of Salta, cited *supra*. Similar arguments were raised in the *Sharkey* case in Brazil.

<sup>107</sup> A court of appeal in the province of Neuquén, in Argentina, in the *Nuñez* case cited *supra*, put forward this argument.

<sup>108</sup> This has been the view, among others, of the Supreme Court of Justice of Argentina, in the decisions cited *supra*.

<sup>109</sup> This was one of the arguments posed in the Australian case *Dow Jones v. Gutnick*, cited *supra*. Google presented a similar argument in one of the Argentine cases discussed in this paper.

<sup>110</sup> On the problem of how metaphors or analogies, as argumentation mechanisms, may illuminate or obscure the cases related to Internet, see Bellia Patricia, Paul Berman, Brett Frischmann and David Post, *Cyberlaw: Problems of Policy and Jurisprudence in the Information Age*, 4.<sup>th</sup> edition, *sine loco*, Thomson Reuters, 2011.

We could also erroneously consider that “printing” may be assimilated to the hosting of the elements that make up the content of a statement when it is seen or heard via Internet. But as pointed out above, and even if we do not fall into the trap of choosing a wrong metaphor, it has been suggested that jurisdiction should be determined by the location of the server hosting the statement. This rule is also problematic, as often servers are not located near the domicile of the individual who made the statement or the place of residence of its intended recipient. As a consequence, a potential judicial action—either civil or criminal—would not be satisfactory to any of them, as it would be difficult to bring such an action in the first place.<sup>111</sup>

The remaining rules lead us to establish jurisdiction taking into account the place where the author of the statement, or its victim, are domiciled.

We have seen a judicial decision which suggested a sort of combination depending on whether the action is of a civil or criminal nature. At first sight, this rule seems appealing. It could be reasonable to establish this distinction bearing in mind, as pointed out in the judgment, the different purposes of these proceedings (civil or criminal). Nevertheless, an excessively stringent application of the rule would run counter to the stance adopted by many modern systems of criminal procedure in Latin America, in favor of bringing criminal actions *jointly with* civil actions.

Leaving aside the practical reasons for which a massive application of this rule would not be advisable, the grounds underlying it would be questionable. It is true that a criminal action has a punitive purpose which requires adequate guarantees of defense for the accused, and this is best achieved in the jurisdiction closest to their place of residence, where they will be better positioned to exercise their right to a defense, both material and technical. It is also true that limiting such right to an appropriate defense may also have a chilling effect on free speech. If an individual wishes to make a statement which may be considered defamatory in a jurisdiction that is unknown to them and where they will be unable to defend themselves, this will create incentives for self-censorship and will have a negative effect on the exercise of freedom of expression.

However, a civil action, even if aimed at seeking compensation for the victim, could also have similar deterring effects on individuals who wish to express their views.<sup>112</sup> Therefore, the rule that we might call “the rule of the effects” of an allegedly defamatory statement—which would fix jurisdiction in the court where the intended recipient of the statement is domiciled—may also be inappropriate. And if our arguments are valid, then whether the action is civil or criminal might be irrelevant.

The rule that has survived to date provides that where a statement may have effects in an unlimited number of places, jurisdiction will be established based on the domicile of the person making the statement. There, individuals will be able to defend themselves—at the civil or criminal level—and anticipate the result of any civil or criminal actions, because the proceedings and the laws are more familiar to them. In this scenario, the chilling effect on freedom of expression is lessened.

We are also aware that this rule is aimed at protecting freedom of speech above all other rights which are also of fundamental importance, such as, for instance, the right to honor. In other words, it will be harder for those who have allegedly been “defamed” to assert their rights, as they might be forced to do so in a foreign jurisdiction.

This is not a new problem, and the rule may have to be adjusted in accordance with the type of statement at issue. This rule might be applied generally to expressions related to matters of public interest.

However, should this rule be challenged too, we might have to give up our quest for a general rule on jurisdiction for these cases that is based on location, and focus our efforts on promoting regulations that will prevent decisions which are manifestly arbitrary under the standards, for instance, of the Inter-American System for the Protection of Human Rights.<sup>113</sup>

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<sup>111</sup> The paradigmatic example that is often given to prove that server location is unacceptable as a rule is the case of the *Principality of Sealand*. Sealand is an abandoned military platform located near the coast of Great Britain. Such territory was claimed by Roy Bates, who fought for it against the British government (the emblem of Sealand reads “From the sea, freedom”). The company Havenco considered that this was an independent country and decided to set up a business there, which claimed to be “the safest managed server provider in the world, based in the only place that is truly free”. Jonathan Zittrain points out the academic interest of this case, and explains that the question is not where the “bits” are hosted, but rather where the people who created them and caused damage are located. See Zittrain, Jonathan, “Be Careful What You Ask For: Reconciling a Global Internet and Local Law”, in *Harvard Law School Public Law, Research Paper N°60 (sine data)*, p. 5.

<sup>112</sup> In this respect, see the opinions of Roberto Saba and Julio Rivera, cited *supra*.

<sup>113</sup> Roberto Pereira is a Peruvian lawyer and academic who commented on some of these ideas during a workshop that was held in Buenos Aires on September 12 and 13, 2011. He was very interested in this concept and volunteered to draft a rule that could be effective only if adopted by all the countries in the region. The proposal is as follows:



This could reduce the chilling effect<sup>114</sup> described above, since, in fact, it will not matter who rendered the decision or for what reasons. All that matters is whether such decision will be enforceable or not.<sup>115</sup>

To conclude, Jonathan Zittrain presents us with an interesting reflection:

The advantages of implementing specific rules to facilitate the solution of conflicts of jurisdiction may well be offset by the revolutionary capacity of the Internet. The real question before us is whether we prefer an international harmony and diversity that includes censorship as a form of repression, or an insurmountable protection for freedom of speech that will cover harmful as well as constructive expressions.<sup>116</sup>

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In cases of alleged damage to honor over the Internet, jurisdiction will be proper in the court of the place where the author of the content is domiciled, or else in the court of the place where the aggrieved party is domiciled, provided that the right in question could be affected in those locations. In both cases, jurisdiction will depend on the existence of applicable laws and prior judicial decisions which are consistent with the international standards for the protection of freedom of expression.

<sup>114</sup> This is also the spirit of the solution adopted by the state of New York, in the United States of America, and which was later replicated in many other states. In April 2008, the *Libel Terrorism Protection Act* was enacted to protect U.S. authors and editors from legal actions abroad. Basically, the law provides that foreign judgments shall not be enforceable if they fail to recognize the protection granted by the First Amendment of the United States Constitution.

<sup>115</sup> In this regard, country regulations on the enforcement of foreign judgments should be revised, in order to establish if they are sufficient to prevent enforcement. I would like to thank Julio Rivera (H) for making this suggestion.

<sup>116</sup> Zittrain, Jonathan, *supra* note 111, p. 14.