PERILS OF PUBLISHING ON THE INTERNET
Broader Implications of *Dow Jones v Gutnick*

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This article takes as its starting point the brief but illuminating discussion of the transnational phenomenon of the internet in Michael Whincop and Mary Keyes' 2001 book *Policy and Pragmatism in the Conflict of Laws*, and observes that the prospect of internet publication will inevitably influence the framing of choice of law and jurisdictional rules from now on. This has already been shown by the High Court's decision in the recent case of *Dow Jones & Company Inc v Gutnick* where, in attempting to adapt the previously certain *lex loci delicti* defamation choice of law rule to the exigencies of the internet, the court effectively transformed the rule into a more fluid — and more reasonable — standard that only allows for presumptive conclusions about the place of the tort as *ordinarily* (but by implication not inevitably) the place of downloading. Further, the fact that the court stressed that the *lex loci delicti* for other kinds of torts will depend on the 'essence' of the tort suggests that policy is now central to choice of law to an extent not previously contemplated. We suggest that is possible to elucidate some relatively certain choice of law rules for internet publications — being as much as can be hoped for at this stage.

Introduction

Before his tragic and untimely death in 2003, Michael Whincop had among his many notable achievements written several articles on private international law, culminating in a book co-authored with Mary Keyes on *Policy and Pragmatism in the Conflict of Laws*.[1] We were each asked to review the book, and we did so in separate publications.[2] This article is our joint response to one of the book's most interesting but undeveloped features: its brief treatment of the phenomenon of the internet in some four pages at the end of the book. That one of us is a private international law scholar and the other a lawyer economist has, we hope, enabled us to give proper homage to Michael's abilities as an expert specialist legal analyst and a brilliant economist of law.

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1 Whincop and Keyes (2001).

2 See Richardson (2002); Garnett (2002a).

Three years have now passed since the book was published, allowing time for some significant developments in the Australian High Court's jurisprudence on private international law to emerge. The most recent is its judgment in the internet defamation case of *Dow Jones & Company Inc v Gutnick*[3] — a case which virtually insists on a robust economic appraisal of its implications and likely effects.

While they had little to say about the internet in *Policy and Pragmatism*, Whincop and Keyes aptly observed something of 'a scientific crisis for the established paradigms for research in [private] international law'.[4] For one thing, they suggested, the internet may make territorial boundaries of nation states — traditionally the linchpin of private international law rules — irrelevant.[5] For another thing, they noted, the opportunity to communicate freely on the internet is a powerful yet fragile instrument of individual and collective self-determination — possibly even more significant than the opportunity to vote in national democratic processes.[6] The comments were made before the High Court gave its decision in *Gutnick*. However, they have turned out to be highly prescient in forecasting the two central problems that emerged in that case: first, the potential arbitrariness of territoriality, especially as far as those who publish on the internet are concerned; and second, the constraining effects that national laws might have for free communication on the internet (particularly in a technological climate where exiting one state may practically require exiting the internet).[7]

The insights offered by Whincop and Keyes thus provide a useful starting point for considering the judgments in the *Gutnick* case and their implications for national law regulation of internet discourse. While our recommendations have implications beyond the internet as well, a central theme of this article is that the special character of the internet calls for internet-adjusted solutions to choice of law and jurisdictional problems. At the very least, general rules need to be framed with the internet clearly in mind.

The Search for the Elusive Place of the Tort

On its face, *Gutnick* reinforces the idea that the law of the place where the tort occurs will govern the substantive issues in the case. It also supports the liberal jurisdictional principle that if the *lex loci delicti* is the *lex fori*, there is a 'powerful argument' for holding the forum not 'clearly inappropriate' to take jurisdiction[8] — an argument which lies with the notion of comparative regulatory advantage (a court of a state is better placed to know and apply the

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3 *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 (*Gutnick*).

4 Whincop and Keyes (2001), p 191.

5 Whincop and Keyes (2001), p 192, pointing (with apparent approval) to the fact that the argument had been made.

6 Whincop and Keyes (2001), p 195, citing Nelson Mandela.

7 Whincop and Keyes (2001), p 195.

8 See further Garnett (2003), p 198.

law of that state than a court of any other state).[9] Indeed, it was not questioned that the law of the place of the tort should have this dual role, established by the earlier High Court decision in *Voth v Manildra Flour Mills Pty Ltd,*[10] (though qualified, to some extent, by the later decision in *Regie Nationale des Usines Renault SA v Zhang*).[11] Nor did the *Gutnick* Court question the sensibleness of a rigid place of the tort approach, chosen over a more fluid flexible exception[12] or full proper law approach[13] for reasons of maintaining certainty and predictability.[14] Rather, what was in issue was locating the place of the tort in a defamation case involving material placed on the internet in New Jersey and viewed, *inter alia*, in Victoria where the plaintiff was resident and claimed his reputation had been damaged. Whereas Dow Jones argued New Jersey law should govern the dispute, as the place of uploading (citing *inter alia* New York authority in support),[15] Gutnick argued — up until that point successfully in the Victorian courts — that Victorian law should govern as the place of downloading and reputation and, accordingly, a Victorian court could properly exercise jurisdiction.

The High Court per Gleeson CJ, McHugh, Gummow and Hayne JJ identified the *locus* of an internet defamation as the place where publication is complete and the material is available for comprehension, being 'ordinarily' the place where damage to reputation (the essence of the tort) occurs.[16] 'Ordinarily', the Court added, that place will be the place of downloading —in this case, Victoria.[17] The place of publication standard adopted in *Gutnick* was

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9 As Whincop and Keyes (2001), p 150, note — although adding the overall efficiency of the jurisdictional presumption depends upon the efficiency of the forum's choice of law rules.

10 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (*Voth*).

11 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 (*Zhang*). In that case, an application by a French manufacturer for a stay of Australian proceedings was refused despite the court finding that French law was the governing substantive law due to the fact that either France or New Caledonia was the place of the tort.

12 See, for example, in England, *Private International Law (Miscellaneous Provisions) Act 1995* (UK), ss 11, 12.

13 See, for example, in the United States, *Restatement of the Law, Second, Conflict of Laws* § 145.

14 See *Zhang* (2002) 210 CLR 491 at 517 (Gleeson CJ et al): 'The selection of *lex loci delicti* as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of *lex causae* engenders doubt as to liability and impedes settlement.'

15 See *Firth v New York* (2002) 775 NE 2d 463 at 464, the New York Court of Appeals holding that an allegedly defamatory publication occurs at the point when it is placed on the web.

16 *Gutnick* (2002) 210 CLR 575 at 600–601 (Gleeson CJ et al). Gaudron, Kirby and Callinan JJ concurred in separate judgments, with minor variations as to reasoning (Kirby J most openly sceptical about the effectiveness of national solutions to problems raised by the internet).

17 *Gutnick* (2002) 210 CLR 575 at 606 (Gleeson CJ et al).

presented as a logical extension of the place of publication standard used for physical world publications. But the language reveals a subtle shift in judicial thinking, forced by consideration of the way in which material spreads through the internet. Previously, the place of publication referred to the place material was put into the public domain and publication necessarily entailed some local conduct for which the defendant could be held responsible. Now the place of publication is the place where the last action occurs and the only local conduct may be that of a recipient who downloads the material off the internet.

Thus the place of publication has effectively been separated from any previously assumed requirement of physical connection between the alleged tortfeasor and the place where the wrong is said to have occurred. Indeed, given the possibilities for secondary dissemination offered by the internet, putative tortfeasors may have absolutely no control over, or foresight of, the act or acts of publication for which they are euphemistically responsible — except in the most attenuated sense that 'those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any territorial restriction'.[18] Further, while identifying the place of publication as ordinarily the place where damage to reputation is experienced may suggest a physical connection at least with the person allegedly defamed is envisaged, even this cannot be assumed. In the internet environment, especially, a reputation may legitimately be claimed in places of no business activity or other physical presence, or even material assets. The House of Lords decision in *Berezovsky* v *Michaels*[19] lends further support to this conclusion in its generous recognition of claims to reputation in transnational defamation cases. For, in that case, two Russian businessmen were allowed to sue a United States-based publisher in England although their only connection with the forum was business visits and only 0.2 per cent of the total distribution of the article occurred there by contrast with 99 per cent in the United States. As one of us observed in commenting on the decision, the impact of the internet is likely to increase claims to an 'international reputation' actionable everywhere.[20]

After *Gutnick*, then, only the actions of anonymous and unpredictable recipients of information serve to localise the tort of defamation — and even this cannot be posited in an unqualified way if, in the end, it is truly the place where the material is *available* for comprehension (even if not actually comprehended) that matters. What is not clear is how such potential connections will be weighted in determining the place of the tort or whether there might indeed be as many places of the tort as of downloading.[21] The

18 *Gutnick* (2002) 210 CLR 575 at 605 (Gleeson CJ et al).

19 [2000] 2 All ER 986.

20 Garnett (2003), pp 208–9.

21 Might there also be multiple suits with different courts taking jurisdiction and applying their law as the *lex loci delicti*? The prospect of this should be minimal according to the *Gutnick* court, observing — (2002) 210 CLR 575 at 604 (Gleeson CJ et al) — that doctrines, such as *res judicata*, issue estoppel, Anshun estoppel and anti-suit injunction, would operate to prevent abuse of process. Such doctrines (which operate in most common law jurisdictions) effectively bar a plaintiff from

court's constant use of the word 'ordinarily' and other qualifiers throughout its judgment suggests no clear conclusion. As the court says in a seminal passage:

> *ordinarily*, defamation is to be located at the place where the damage to reputation occurs. *Ordinarily* that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the *principal* focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation *may* be done. *Ordinarily*, then, that will be the place where the tort of defamation is committed.[22]

Consequences for Internet Defamation

It may be, therefore, that post-*Gutnick* territoriality is a more flexible notion than the older physical *locus* concept that in the past determined the place of defamation. A particular peril for internet publishers has always been predicting where plaintiffs might sue and what law or laws will apply. In Australia it seems the peril has now been confirmed with the High Court's suggestion of a more open-ended approach to its choice of law rule in defamation claims. Even the seemingly certain language of the place of the tort no longer guarantees certainty. In the internet context, the *lex loci delicti* rule gives the impression of evolving into a more fluid — albeit perhaps more reasonable — standard that only allows for presumptive conclusions to be reached. In elucidating the place of the tort for internet defamation cases, the court in *Gutnick* appears to be creating a presumption in favour of the place of downloading but allowing the possibility of exceptions if another law is more closely and essentially connected to the dispute. If so, the Australian approach may not be so different from that of other jurisdictions (such as the United Kingdom)[23] that espouse the place of the tort plus flexible exceptions as the

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bringing subsequent proceedings in another forum if the jurisdictional rules of an existing forum permit the claims to be dealt with together: see Garnett (2003), pp 212–15. The net result once proceedings are launched in Australia, given its generous jurisdictional standards, may well be that a single (Australian) forum exercises entire jurisdiction — although the court did not rule out the possibility that the plaintiff's preferred forum might be found 'clearly inappropriate' for particular claims which concern publications outside Australia: *Gutnick* (2002) 210 CLR 575 at 608. Thus multiple suits are not inconceivable.

22 *Gutnick* (2002) 210 CLR 575 at 606–7 (Gleeson CJ et al), emphasis added.

23 See *Private International Law (Miscellaneous Provisions) Act 1995* (UK), ss 11, 12.

guiding choice of law rule — an approach that many commentators, including us, have favoured for defamation (and other tortious) disputes.[24]

These commentators did not include Whincop and Keyes, who preferred the certainty of an 'off the rack' place of the tort rule for defamation claims over any more flexible approach which permits tailoring to the circumstances of a particular case. They argued that choice of law rules should maximise predictability and invariance of outcomes across jurisdictions with the object of facilitating markets, where markets are feasible, and settlements, where (as in the case of defamation) markets for the conduct in question are not feasible.[25]

Further, it seems that they were aware of the difficulty of developing clear and predictable choice of law rules for the internet context and regarded this as problematic. As they observed with respect to contracting, in the internet environment 'place' is not obvious: it seems to require 'a rule which can function as a focal point' — but the problem with attempting to design such a rule with any precision is 'that the information a court might use for optimal tailoring may not be observable at the time of contracting, given the anonymity of aspects of the internet'.[26] The same may be observed about the place of a tort. Perhaps, had they considered the question, these authors would have preferred the place of uploading for defamation cases as the most predictable standard. Others might question whether a tort, which in economic terms may be viewed as a hypothetical contract between tortfeasor and victim (a deemed contract that effectively forces prospective tortfeasors to take into account costs to prospective victims in determining whether their conduct is worthwhile), should be judged by a law which the parties would not have chosen had contracting been possible.[27] Indeed, why would a prospective defamation plaintiff in a *Gutnick*-type scenario elect the law of New Jersey, the selected place of internet publication by the New York based Dow Jones, except for the fact that this can be known in advance? Predictable it may be but so would be an even simpler rule that, say, California law should govern internet defamation actions. The ultimate question is whether hypothetical contracting parties would always prefer clear simple rules to tailored rules, and although the answer may be that a level of predictability is ideal[28] there is enough evidence of a general preference for fair decision-making (especially in judicial decisions)[29] to reject predictability as the only goal.

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24 See, for example, Garnett (2002b), pp 148–51, and Richardson (2002), p 198.

25 Whincop and Keyes (2001), p 104. Cf the rationale given in *Zhang* for the *lex loci delicti* as a predictable rule, noted in n 14.

26 Whincop and Keyes (2001), p 196.

27 See generally Richardson (2002), pp 197–99.

28 In fact, an ability to predict rules in advance may be considered 'fair' in a procedural sense, in allowing guidance for ethical agents, as pointed out by Whincop and Keyes (2001), p 102.

29 As even economists are now concluding, ideas about fairness need to be factored into imagined preference sets of rational agents: see Zerbe (2001). Further, economic studies indicate that notions of fairness encompass ideas about desert and equal treatment — the sorts of principles that John Rawls himself imagined as

We maintain that the fairest rule for a prospective defamatory publication on the internet — the one hypothetical contracting parties would disinterestedly choose behind a Rawlsian veil of ignorance (not knowing whether they will be tortfeasor or victim) — would look to the law of the place where the injury to reputation is experienced as most appropriate to judge the true costs of the allegedly defamatory conduct. If it is true that a community's social values are revealed in its law, this law is more likely to accurately reflect true harm experienced than any foreign law tailored to the particular history, needs and beliefs of a different social group. It is not just that 'a rather different balance' between freedom of speech and reputation has been struck in the United States, as the *Gutnick* court noted;[30] attitudes to free speech versus reputation vary as well. And they vary not only on the free speech side of the equation: conceptions about the fragility of reputation also differ as between the United States, with its long history of robust public debate, and the rest of the world.[31]

From a fairness perspective, the locus of a person's reputation, the respect accorded to the person's elected community, may thus be more important than where uploading or even downloading occurs. From an efficiency perspective, however, predictability is also desirable, and since ordinarily information is evaluated at the place of downloading, we accept that the place of downloading is ordinarily a reliable indicator of where harm to reputation will occur, as the *Gutnick* court posited. However, we would frame the post-*Gutnick* choice of law rule for an internet defamation claim more elaborately as follows: *ordinarily it should be reasonably foreseeable that downloading and consequential damage to reputation will occur within a deemed 'place' of publication* — as in *Gutnick*.[32]

To the extent that predictability further requires the social values and assumptions of a prospective publisher to be considered in framing reliable legal standards of conduct, the task is for defamation law. The *Gutnick* court suggested Victorian defamation law might acknowledge as 'reasonable' — and thus defensible — the free speech expectations of a publisher who 'has acted in one or more of the United States'.[33] More broadly, anyone who participates

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emerging from decision-making behind the veil of ignorance in his classic study of *A Theory of Justice* (1972): see for instance, Axelrod (1984, 1990); Sunstein (1997) and generally Richardson (2004a).

30 *Gutnick* (2002) 210 CLR 575 at 609 (Gleeson CJ et al); see also at 599 (balancing of interests in free speech and reputation 'differs from society to society').

31 For an interesting account, see Blasi (2002), pp 84–87 (character traits promoted under a free speech ethos include ability on the part of those criticised to adapt to and even accept criticism, treating their reputation as a developing and socially constructed commodity — Blasi, of course, sees this as a good thing).

32 Cf Garnett (2003), p 210 (although preferring an even more stringent standard of intended, not just reasonably foreseeable, harm) — adding that the argument for applying that law would be even stronger if the plaintiff had his or her place of residence there: at 216.

33 *Gutnick* (2002) 210 CLR 575 at 608–9 (Gleeson CJ et al). There is another efficiency consideration here as well: without due deference to US free speech

in the life of the internet is bound to be confronted, and eventually quite possibly affected, by the common values of this new community — including its very high regard for freedom of speech and debate. What may be considered reasonable speech in the internet age may thus well be radically different from what was acceptable before.

The Central Role of Policy

The previous discussion suggests policy must play a central role in elucidating the place of a defamatory publication if any real sense is to be made of the High Court's majority judgment in *Gutnick*. Indeed, one of the most valuable features of *Gutnick* is the open acknowledgment of policy as important, at least at the general level. There are references throughout the principal and separate judgments to the guiding hand of policy in devising appropriate jurisdictional and choice of law rules[34] — and the comments are not restricted to defamation, either. As a broad proposition, the majority observed, citing *Voth*, the question in determining the place of the tort is where 'in substance' did the cause of action arise.[35] In answering this, the court signalled, the starting point must be consideration of the 'essence' of the tort: it is there that it is 'necessary to begin'.[36] For those accustomed to conflict of laws as a body of law which functions largely as a black box, a set of rules to be applied semi-automatically to a neatly classified fact scenario, *Gutnick*'s suggestion of the need for policy analysis may be novel (in this context). But, as became apparent in the course of the case, new situations and circumstances not only call for new rules — in this case, a more refined notion of the 'place' of the tort to meet the exigencies of internet publications — but also a renewed interest in the reasons for the rules.[37] Lawyer economists who use policy to understand and explain as much as to evaluate and critique the law should approve the court's references to policy, and the way in which it is used. They may think the US tendency to equate policy in conflicts cases with government interests[38] under-inclusive of the considerations relevant to a full cost-benefit analysis. If policy can be articulated in more objective party-centred terms, as the *Gutnick* court

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values, the judgment will likely not be enforced in the United States: see *Matusevitch v Telnikoff* 887 F Supp 1 (DDC 1995). But this did not appear to be the *Gutnick* court's primary concern.

34 See, for instance, *Gutnick* (2002) 210 CLR 575 at 600 (Gleeson CJ et al) ('in considering where the tort of defamation occurs it is important to recognise the purposes served by the law regarding the conduct as tortious'); and further see nn 30 and 33.

35 *Gutnick* (2002) 210 CLR 575 at 606.

36 *Gutnick* (2002) 210 CLR 575 at 599.

37 See Richardson (2002), observing that policy considerations were somewhat more apparent at the inception of choice of law rules — in particular, nineteenth century British utilitarianism played a formative role. It was only later, under the influence of the positivist movement, that the rules became detached from their reasons in Anglo-Australian jurisprudence.

38 See, for example, Currie (1963).

arguably attempts for internet defamation, it fits well with the emphasis in economics on the efficient operation of markets.[39] And for economists who believe the law should be fair (even if only because fairness is important to parties), an expansion of the analysis to encompass Rawlsian bargains represents a logical development. The challenge in examining *Gutnick* through the lens of efficiency and (or including) Rawlsian fairness,[40] however, is the very sketchy assistance provided when it comes to the detail — especially, although not surprisingly given the limited claim pleaded, as we move beyond defamation to consider other kinds of torts or equitable wrongs.

Beyond *Gutnick*

Gleeson CJ et al said the *lex loci delicti* might be different for, say, trespass or negligence where 'some quality of the defendant's conduct is critical' (unlike defamation, where it is the damage 'and not the insult' which establishes the action); in these cases, 'it will usually be very important to look to where the defendant acted, not where the consequences of the conduct were felt'.[41] Regarding trespass, the passing comment is illuminating. The court in *Zhang* had already indicated that, if a suitable opportunity arose, it would revisit the *Moçambique* rule precluding courts taking jurisdiction over actions in respect of title to or trespass to foreign land,[42] and there is nothing that derogates from this in *Gutnick*. Perhaps the *Zhang* court was influenced by the fact that the rule has now been statutorily abolished in New South Wales[43] and partly abolished in the Australian Capital Territory[44] and England[45] (where trespass actions may now be brought). But the origins of the *Moçambique* rule date back to a period where property rights were seen to be vested in the place

39 As Richard Posner noted in commending Whincop and Keyes on their 'thoroughly economic' treatment: of conflict of laws: Whincop and Keyes (2001), foreword. Whincop and Keyes also maintained that a policy-based approach should ideally be pragmatic, rejecting the need to create a 'secure philosophical or metaphysical foundation for discourse': p 2. But it is not necessary to take the position that an economic approach which attempts to provide useful guidance on practical issues cannot at the same time have a philosophical foundation (and, indeed, the solid utilitarian roots of economics suggest otherwise).

40 We use the words 'and (or including)' deliberately, because of course economists may wish to take into account fairness for reasons of their own, not simply because this is assumed to be part of the preference set of market agents — that is, economists need not be solely concerned with efficiency: see Hadfield (1999), p 50.

41 *Gutnick* (2002) 210 CLR 575 at 606.

42 *Zhang* (2002) 210 CLR 491 at 520 (Gleeson CJ et al). The *Moçambique* rule is derived from *British South Africa Co v Companhia de Moçambique* [1893] AC 602.

43 *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW). Under section 4 of the Act, courts now have a discretion as to whether to adjudicate matters involving title or trespass to foreign land.

44 *Law Reform (Miscellaneous Provisions) Act 1955* (ACT), s 34.

45 *Civil Jurisdiction and Judgments Act 1982* (UK), s 30.

where they were granted, being in essence a delegation of authority by the state.[46] Thus, with respect to intellectual property rights, the High Court deciding *Potter v Broken Hill Pty Ltd*[47] had in 1906 no trouble extending the *Moçambique* rule to an alleged infringement of a foreign patent on the basis that 'as the right is the creation of the State, the title to it must devolve, as in the case of land, according to the laws imposed by the State' and the 'franchise or monopoly has no effective operation beyond the territory of the State under whose laws it is granted and exercised'.[48] This was another case whose standing was questioned in *Zhang*[49] and again, the court may have had an eye on recent English developments where the *Moçambique* rule has been held no longer to apply to the enforcement of foreign intellectual property rights, at least where the *validity* of such rights is not put in question.[50] If so, this would be a welcome development.

Modern economic thinking about property rights is that, far from representing a full delegation of state authority, they are essentially limited rights to deal with 'property' as an asset granted to foster markets and promote investment; any power of exclusion they may carry exists primarily for the reason of ensuring markets can function, and generally a separate decision as to whether conduct tortiously violates exclusivity is still needed.[51] Thus, as Whincop and Keyes point out, there is no reason other states cannot recognise and enforce foreign 'property' entitlements, especially if they can be guaranteed reciprocal treatment of local property rights.[52] Certainly, a party-centred approach suggests that, when it comes to assessing the *locus* of a tort whose essence is invasion of a property right, it is the coercive and unjustifiable misuse of the property — a failure to deal in the market without good reason — that matters, and this applies equally whether the conduct

46 For an insightful analysis, see early legal realist Cohen (1927), p 8.

47 *Potter v Broken Hill Pty Ltd* (1906) 3 CLR 479.

48 *Potter v Broken Hill Pty Ltd* (1906) 3 CLR 479 at 494 (Griffith CJ). See also at 511 (O'Connor J).

49 *Zhang* (2002) 210 CLR 491 at 520 (Gleeson CJ et al).

50 *Pearce v Ove Arup Partnership Ltd* [2000] Ch 43. For an interesting observation that such developments, in revealing a 'loosening of copyright from its territoriality premise', are not necessarily to be regarded as positive, see Austin (2002), p 108.

51 See generally Merrill and Smith (2001). These authors prefer the older notion of 'property' entailing a high degree of exclusivity as a proper reward for private investment of resources. But modern economists have largely accepted that it cannot be assumed that every unauthorised use of another's property is harmful in any utilitarian sense (or indeed unfair, if fairness is a consideration as well): case-by-case decisions evaluating the character of the conduct may be needed, making the 'exclusivity' of a property right merely presumptive. This was the tenor of Ronald Coase's influential article (1960), and see generally (noting this as especially the case for intellectual property, with patents a partial exception in requiring greater security in exchange for the high investment required) Richardson (2004b).

52 Whincop and Keyes (2001), p 115.

occurs at the *situs* of the property or (as frequently happens where intangible intellectual property rights are concerned) elsewhere.[53]

Thus we would frame the choice of law rule for trespass or other invasion of a property right as follows — *ordinarily the law of the place where conduct occurs (in case of internet uses uploading or downloading depending on whose conduct is in question) governs the tort, subject to the terms of a relevant statute of the forum.* The last qualification is added because, of course, a forum statute establishing an intellectual property right might have something to say regarding the territorial scope of such a right and statutory terms prevail over common law choice of law rules.[54] Consequently, in some cases, the statutory language may suggest a particular choice of law rule in derogation from the general principle regarding property rights.[55] Further, most intellectual property statutes specify that the infringing conduct must occur in the place the property right is established — thus the *lex situs* continues to exercise residual control.[56] Until this position changes (or at least as long as there is not near-complete international harmonisation on national law standards), there cannot be a truly international intellectual property system.[57]

The *Gutnick* court's implication that the *lex loci delicti* for negligence, as for trespass, would centre on the place of conduct is more questionable. Unlike trespass and allied torts, the wrong of negligence is not legally established unless and until there is damage. From the economist's perspective, the purpose of the tort is to ensure a proper cost benefit analysis is made if conduct may lead to injury to others.[58] The requirement that fault be established in the

53 See generally Garnett (2000).

54 Garnett (2000). Different principles may apply to govern the operation of foreign statutes in the forum: see Dutson (1996).

55 *Euromarket Designs v Peters* [2001] FSR 288 — commercial use requirement for trade mark infringement taken to require anticipated/intended downloading of content within the forum by users and targeting of such persons by the infringer there. Contrast the *Copyright Act 1968* (Cth), ss 36 and 31(1)(iv) (as amended by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth)), making communication of a work to the public an infringement, with 'communicate' defined in s 10 as 'make available online' — that is, upload.

56 See, for instance, *Patents Act 1990* (Cth), s 13(3), which specifies that 'a patent has effect throughout the patent area' (this seems to require both patent grant and infringing conduct occur in Australia) and *Copyright Act 1968* (Cth) s 36, which specifies that copyright is infringed by 'a person who, not being the owner of the copyright and without the licence of the owner of the copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright'. As to trademarks, see Garnett (2000), p 115 (suggesting territoriality would be implied, although it is not expressed in the Australian 1995 Act).

57 The limiting territorial effect of such statutory constraints is ameliorated to some extent by international conventions that facilitate establishment of intellectual property rights (either by registration or, in the case of copyright, by the making of a work in any *Berne Convention* country) in multiple jurisdictions — and most countries are parties to these conventions.

58 For a comprehensive (although rather Chicago School) treatment of the economics of tort law, see Posner (1998), Ch 6.

case of negligence, enlarging the focus on conduct, allows for the variety of circumstances where the tort may be invoked. Nevertheless, the economic policy is one of avoiding (unnecessary) damage, and the courts to some extent have accepted this.[59] Therefore it is difficult to conclude outright that conduct *rather than* damage is of the essence to negligence.

Indeed, it may be argued that negligence is more like defamation in making damage its essence and this is particularly noticeable in the context of the action for negligent misrepresentation, where it is well established that it is the law of the place where the material was directed and received by the plaintiff rather than the place where the statement was made by the defendant that constitutes the place of the tort.[60] A similar approach, focusing on the place of receipt of the representation, has been taken when locating the place of infringement in actions for breach of section 52 of the *Trade Practices Act 1974* (Cth), which proscribes misleading or deceptive conduct in trade or commerce.[61] If the legal issue is negligent disclosure (or non-disclosure) of information — for instance, involving the publication on the internet of the identities of individuals in circumstances which place their security at risk — we would also contend the law of the place where damage will be experienced is most relevant to the setting of legal standards and should, therefore, be the law of the tort. And the principle can be applied more broadly to other kinds of dealings (commercial or otherwise) in information.

Its potential breadth of application is illustrated in the case of *Hyde v Agar*.[62] This case involved an action by Rugby Union players who had suffered personal injury during games. The plaintiffs sued the International Rugby Football Board, an association responsible for making and monitoring the rules of the game, alleging that it had negligently failed to amend the rules to prohibit the practices that caused their injuries. A majority of the New South Wales Court of Appeal took the view that the place of the tort was in New South Wales, where the plaintiffs suffered their injuries, rather than England, where the Board conducted its meetings. While the location of the meetings at which the omission occurred was purely fortuitous, what was crucial to the action was the place where the omission had its natural and even intended effects, namely where the rules were received by the local administrators and required to be acted upon by them.[63] Such an approach emphasises the place of damage where the negligence claim concerns dealings in information.

In other areas of negligence, as well, courts have focused on damage as the gist of the action when inquiring as to the place of the tort for jurisdictional or choice of law purposes. Such an approach seems to belie the comment by the court in *Gutnick* that the place of acting rather than the place of

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59 See Richardson (1999), pp 135–38 especially, and further Kirby (1999), p 114.

60 *Voth* (1990) 171 CLR 538; *Cordoba Shipping Co Ltd v National State Bank (The Albaforth)* [1984] 2 Lloyd's Rep 91.

61 *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539.

62 (1998) 45 NSWLR 487 (reversed on other grounds (2000) 201 CLR 552).

63 The court per Spigelman CJ and Stein JA especially: (1998) 45 NSWLR 487 at 515.

consequences will be the defining location in negligence cases. For example, in the area of product liability, courts have generally allowed a plaintiff consumer injured by a product manufactured outside the forum to plead its case against the foreign manufacturer as one of failure to warn of harm to be suffered by defects in the forum rather than negligent manufacture, with the result that the tort is deemed to have occurred in the forum.[64] However, by contrast, in business to business cases with parties of more equal bargaining power (for example, foreign manufacturer and local distributor), courts have been much less willing to find a local tort based on failure to warn of defects. Courts have described such attempts as artificial, and insisted that the gravamen of the negligence action is the manufacture, which occurred abroad.[65]

And there is a good economic argument for the law of the place of manufacture governing such claims brought by business entities (but not by consumers who, being less informed generally and perhaps less able also to look after their interests, require more protective treatment).[66] Manufacturers who already comply with their own stringent product liability standards, effectively assuming the role of insurers for those who may suffer damage, cannot reasonably be expected to take into account also the potentially different legal standards of foreign states where their products might end up — at least in the case of suits brought by businesses. In fact, business users who require greater protection than provided by the law of the place of manufacture are free to contract for (and pay for) a higher level of protection either *via* the importer or, if they deal directly, with the manufacturer. It therefore seems, in product liability cases, that a distinction can be drawn between persons of commercial sophistication and consumers (and also employees),[67] with the latter group being given greater flexibility to plead their cases and consequently more opportunity to secure local law and jurisdiction. In such cases, therefore, the place of harm will and should continue to exercise great control for jurisdictional and choice of law purposes.

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64 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458; *Jacobs v Australian Abrasives Pty Ltd* [1971] Tas SR 92; *Castree v ER Squibb Ltd* [1980] 1 WLR 1248; *D'Ath v TNT Australia* [1992] 1 Qd R 369; *Drummond v ANSTO* [1999] NSWSC 20. Compare: *Macgregor v Application des Gaz* [1976] Qd R 175.

65 *George Monro Ltd v American Cyanamid and Chemical Corporation* [1944] 1 KB 432; *Lewis Construction Co Pty Ltd v Tichauer SA* [1966] VR 341; *ICI Australia Operations Pty Ltd v Kidde-Graviner Ltd* [1999] WASCA 65; *Granite Springs Pty Ltd v Intercooler Water Dispensers Pty Ltd* [2000] VSC 224.

66 See generally Richardson (1996).

67 In *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554, the New South Wales Court of Appeal found that, in an employee suit arising out of exposure to asbestos dust, the place of the tort was the country where the employee was exposed rather than the country where the product was manufactured. See also *Porter v Bonojero Pty Ltd* [2000] VSC 265. Compare *Buttigeig v Universal Terminal & Stevedoring Corp* [1972] VR 626 where the court refused to find a local tort where a wharf labourer was injured in Victoria by negligent stowing of goods on a ship in New York.

It remains to be seen how the High Court will address future cases involving product liability, in particular whether it will distinguish between business-to-consumer and business-to-business actions. Unfortunately it did not take the opportunity to elaborate on this in *Zhang* or in *Gutnick*. One member of the court, at least, appears unlikely to take such a step.[68] Interestingly, the *Zhang* case itself concerned a product liability claim brought against a French car manufacturer by a consumer arising out of an accident suffered in New Caledonia. But, as it happened, the High Court did not have to identify the place of the tort because French law applied in both possible locations: the place of manufacture — France — and the place of failure to warn of defects — New Caledonia.[69] However, in another respect, the court made an important observation about the place of the tort inquiry. In terms of applicable law, the traditional approach has been to apply the law of the forum to determine both the questions of whether a 'tort' was committed and where the relevant act took place. Yet this course may be inappropriate where the foreign country, in which at least part of the events occurred, would characterise the plaintiff's claim for choice of law purposes differently to the law of the forum.[70] For example, in a case between contracting parties, the law of the foreign country may require the plaintiff to bring suit in contract rather than tort, and so no 'tort' as such has been committed. If this approach were adopted, a court may refuse to find that any tort has been committed in the forum. This was the result reached in *Granite Springs Pty Ltd v Intercooler Water Dispensers Pty Ltd*.[71] Hence, questions of characterisation may intrude in the inquiry as to the place of the tort. Query the efficiency of such a complex approach.

In summary, then, while the *Gutnick* court appears to suggest the focus in negligence cases will be the law of the place of acting rather than the place of effects or harm, it remains unclear whether such a view can be applied to all facets of the tort given the diverse range of actions and parties involved. We have suggested that it cannot be. We would frame the rule for negligence post-*Gutnick* as follows: *ordinarily the place of conduct is the place of the tort, especially if this is also the place of damage; but if the tort involves disclosure (or non-disclosure) of or other dealings in information, or entails a product liability claim other than one as between business parties, then the locus delicti is ordinarily a reasonably foreseeable place of damage.* We add the same proviso for internet publications as for defamation: *and ordinarily it should be reasonably foreseeable that this is also a place of downloading.*

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68 Callinan J recently stated that, in product liability cases, 'the best place for trial will usually be the place where the defendant misconducted himself or omitted to do something'. He also said: 'true it is in a case of tort that damage is said to be the gist of the action but equally there will be no damage but for the defective design, manufacture, assembly or supply as the case may be': *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 76-77, [180].

69 *Zhang* (2002) 210 CLR 491 at 539 (Kirby J).

70 *Zhang* (2002) 210 CLR 491 at 519-20 (Gleeson CJ et al).

71 [2000] VSC 224.

The above discussion does not take into account the myriad of other possible torts, or equitable wrongs, which might result from a publication on the internet. Some of these have been discussed in other venues.[72] For our purposes, it suffices at this point to consider the interesting case of torts or equitable wrongs which are hybrid in the sense that their starting point is a property right but their focus is a harmful disclosure of information. Unlike the proprietary torts discussed earlier, these torts/wrongs are formulated in such a way as to suggest that damage, not conduct, is of the essence, although their ostensible premise is protection of a property right.

One might think coercive taking should be sufficient if a proprietary interest is at stake — yet in the way the law is framed, it is not. Examples are the tort of passing off and the equitable wrong of breach of confidence. The first protects a trader's property in their reputation from the damage that may be caused by another trader's misrepresentation — 'passing off' — of a trade connection between them, usually effected through copying the first trader's common law trade marks.[73] The second protects *inter alia* confidential commercial information, acknowledged as 'proprietary' for trading purposes, from unauthorised uses that may destroy the confidentiality of the information or otherwise reduce its value.[74] Although 'damage' is generously construed in both cases, so generously as to virtually follow from establishment of the requisite misrepresentation or unauthorised use (at least in Australia), it is still the focus of the legal or equitable wrong. Why might this be — why is misappropriation *per se* not sufficient? Again the reason is a policy one. Our law has not accepted that the consequences of a property right in information should necessarily be the same as for physical assets, for the simple economic reason that information is different: it is not used up in the process of being used (although its value may be diminished); entitlements may be difficult to establish and maintain; excluding free-riders is often costly given costs of copying are generally low; competition often depends on a degree of imitation; and derivative use is an important feature of the innovation process.[75] Thus, if exclusivity cannot be assumed for physical property, it certainly cannot be assumed for intangible elements of value — and this is particularly so for those categories of information which do not fall within the established (statute-based) intellectual property systems. In terms of their level of exclusivity,

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72 See especially Garnett (2000).

73 See *Erven Warnink BV v J Townend & Sons (Hull Ltd)* [1979] AC 531 at 540–44 (Lord Diplock); and *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45. See also Gummow J in *Conagra v McCain Foods* (1992) 23 IPR 193 at 246–48, adopting Lord Oliver's statement in the House of Lords in *Reckitt & Colman Products Ltd v Borden* [1990] RPC 341 at 406 as usefully articulating the passing-off action's 'classic trinity' of reputation (and associated insignia), misrepresentation and damage.

74 See Richardson (2004b).

75 See generally *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 54–55 (although not elaborating on all these aspects; rather stressing mainly the value of competitive conduct); and further Ordover and Baumol (1988), as well as Richardson (2004b).

trading goodwill and confidential information is only one step up from intangible elements of value which enjoy no proprietary status at all[76] — and indeed it may be questioned what the 'proprietary' label adds to the level of protection conferred on these kinds of information. (Protection under the equitable breach of confidence doctrine, for instance, extends equally, if not more rigorously, to private personal information, which is not recognised as 'proprietary'.)[77] Acknowledging that there is property in these cases may do little more than signify that information can be traded in the market, with any presumption established in favour of exclusivity as a result of the proprietary status conferred a slight one (which could equally be established in other ways — for instance, by identifying information as private and personal).

Thus we conclude that, for these hybrid torts/wrongs, the proper choice of law rule is determined by the character of the tort or equitable wrong with its focus on damage rather than the proprietary label attached to the information — *the law of the place of damage should ordinarily govern (with the same qualifications going to reasonable foreseeability as apply to defamation), subject to any geographical constraints in the framing of the tort or wrong.*

Query the importance of the last constraint. On current formulation, passing off or breach of confidence can only be established if a requisite reputation or confidentiality exists within the jurisdiction, and this may be taken as implying that the *lex situs* exercises residual control (as with statutory intellectual property torts). But it could equally be said that the geographical constraint goes to the establishing of damage — to a valuable reputation, on the one hand, to the value associated with confidentiality on the other — and it is for *this* reason that reputation or confidentiality must be localised in the jurisdiction whose law applies as the law of the place of damage. We find support for this in the fact that, first, section 52 of the *Trade Practices Act 1974* (Cth) has through the cases developed an equivalent operation to common law passing off under the simple rubric of a more generally framed misrepresentation provision;[78] and, second, the Anglo-Australian breach of confidence doctrine is framed in broadly the same way for information that is private and personal as for commercial (proprietary) information. And for privacy, at least, it is clear that it is the place of damage that matters.[79]

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76 Those that fall outside the established heads of action: see *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 509 (Dixon CJ), and further *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414 at 444–45 (although suggesting a need for a flexible approach to the traditional actions such as passing off and presumably breach of confidence). See also *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 54–55.

77 As noted by Richardson (2004b).

78 Like *Voth* (1990) 171 CLR 538 (albeit statutory strict liability standard).

79 See, for instance, *Douglas v Hello! Ltd* [2003] EMLR 585I at [41] (Rix LJ for the Court of Appeal) ('publication in England is the essence of [the plaintiff's] complaint' for breach of confidence — thus English law applied, notwithstanding that the information was obtained and passed on by paparazzi operating in New York and California).

Not that place of damage-focused choice of law rules will help privacy plaintiffs much where internet publications are concerned. For one thing, the internet's non-territoriality virtually ensures all privacy will be lost once a sufficiently well-publicised publication occurs (as former US President Clinton found out to his cost). For another, the limited prospects that currently exist to enforce injunction remedies in foreign jurisdictions mean a judgment obtained in one jurisdiction may be virtually ineffective elsewhere.[80] If the exigencies of the internet mean that exiting one state requires exiting the internet, the converse applies to privacy (it takes one state — the state in which the server is located; in which uploading occurs — to permit entry, for entry across the internet to be effectively possible).[81] Thus both freedom of speech and privacy have to be treated as especially fragile in the internet context, and — short of international solutions — harmonisation of national law standards is the best hope for avoiding the worst peril of internet publishing, the race to the bottom. In the wake of *Gutnick*, we hope that the High Court will be as sensitive to the special privacy concern the internet raises, if and when a suitable case arises, as it was with respect to free speech in that case.

Conclusion

Gutnick reveals two conflicting concerns facing all courts in developing choice of law rules: promoting certainty on the one hand and achieving desirable outcomes for a particular case on the other. Whincop and Keyes pointed to the need for certainty in framing choice of law rules for tort claims, although they acknowledged the special problems the internet raises in maintaining any real certainty when territoriality is an arbitrary concept. In *Gutnick*, the artificial certainty of the *locus delicti* in framing any choice of law rule for the internet environment became fully apparent. The High Court might have been more explicit about its subtle shift towards a more flexible approach. Operating 'chiefly by stealth' may have been the great guiding principle of English common law development where considerations of policy were kept brief and the treatment was simple.[82] But, as the American legal realists appreciated in

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80 Note that under common law principles, a foreign judgment may only be enforced where it is for a monetary sum: see Nygh and Davies (2002), p 181. However, under the *Foreign Judgments Act 1991* (Cth), s 5(4), there is scope for registration of non-money judgments from courts for which regulations have been proclaimed. No such regulation is currently in force. The problem of enforcing foreign judgments has been made worse by the internet where the viewing of certain material may be permissible in the place of upload but illegal in other countries where the material might be downloaded. A judgment given in the place of download imposing liability on a site operator located in the country of upload is highly unlikely to be enforced in that country. See *Yahoo Inc v La Ligue Contre Le Racisme et L'Antisemitisme* 169 F Supp 2d 1181 (2001).

81 For the technical possibility of a state taking the step to block access within the territorial jurisdiction, see Lindsay (1999), pp 123ff. But it should be noted this has rarely been taken up (China and Singapore being notable examples).

82 As classical utilitarian John Stuart Mill aptly observed in his 'Essay on Bentham' (1962), pp 108–9.

the 1930s, the natural authority of courts can no longer be assumed in a more sophisticated age and a fuller discussion of policy allows for better understanding and evaluation of common law (and equitable) developments.[83] That said, the High Court's intentions may to some extent be discerned from the language and tenor of its judgment in *Gutnick* and other recent conflicts cases, and hopefully they will be made even clearer in other cases to come.

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