

I. [Introduction: Consumer Confidence and E-Commerce.](#)

A. [Goals Are Easily Defined.](#)

On December 18, 2000, the European Union and the United States issued a joint statement regarding the necessity for building consumer confidence in order to further global e-commerce. The joint statement went on to point out that generating consumer confidence requires a combination of private sector initiatives and a “clear, consistent and predictable legal framework.”

It went on to “reaffirm these important goals and objectives, including the agreement to provide ‘active support for the development, preferably on a global basis, of self-regulatory codes of conduct and technologies to gain consumer confidence in electronic commerce.’”

B. [Implementation is More Difficult.](#)

Does the consumer in fact enjoy the same kind of protection in e-commerce that he or she have in other kinds of transactions? Does the consumer need the same level of protection or does the e-commerce consumer have greater relative bargaining strength? How much should courts enforce agreements by consumers to give up valuable substantive and procedural rights?

As with all worthy goals, the difficulty is in implementation. This fact is particularly true when dealing with a worldwide medium like the Internet. Obviously, if we had the same standards for e-commerce around the world, the system would be relatively clear and consistent. But global binding standards would require intergovernmental agreement, which historically takes many years to reach.

Governmentally-endorsed guidelines and recommendations could be a fallback position, so long as there were a reasonable amount of harmony among the various positions. The American Bar Association in 2000 embarked on a special project, “Alternative Dispute Resolution in Online Commerce” which hopes to develop a system of guidelines for ADR in e-commerce disputes. The project has focused particularly on consumer disputes, since the amount of money involved in consumer matters seldom warrants elaborate ADR machinery. Until mechanisms are in place that address consumer concerns, the full maturation of e-commerce will be hampered.

C. [Concerns of Consumers.](#)

Studies show that key concerns on the part of consumers involve some or all of the following:

1. Lack of confidence in online financial transactions, e.g., concern over misuse of debit and credit cards.

2. Non-delivery or late delivery of goods and services.
3. Fraud.
4. Hidden costs, such as postal charges and taxes.
5. Unrestricted or hidden collection of personal data and channeling of such data to third parties.
6. Lack of independent certification of website policies and practices.

D. [Failure of E-Commerce Businesses to Follow Best Practices.](#)

In September 2000, ClickSure conducted a best practice analysis of Internet business websites in Europe and the United States. It measured six operational aspects: privacy, security, clarity of website information, transaction management, quality and monitoring. Its resulting report concluded that there was a clear failure to measure up to internationally-recognized best practices.

Consumers International (“CI”) subsequently conducted a privacy study concluded in January 2001. It found that, although the majority of websites collected personal information from the user, “only a tiny minority provided a privacy policy that gave users meaningful information about how that data would be used. It concluded that websites in both the U.S. and E.U. fall woefully short of the standards set by international guidelines on data protection.” According to the CI study, the majority of sites ignore even the most basic principles of fair information use, such as telling consumers how their data will be used, how it can be accessed, what choices the consumer has about its use and how the security of that data is maintained.

Although E.U. legislation in the privacy area is more extensive than in the U.S., the CI study found nothing to show that sites based in the E.U. gave better information or a higher degree of choice to their users than sites based in the U.S. The study concluded that: “In practice, E.U. sites do no better than U.S. ones at keeping their users informed. Indeed, it appears that many E.U. sites are failing to comply with E.U. rules that state that the consumer must be given the right to opt out if their data is to be used for direct marketing purposes.”

In August 2001, the consulting firm of Arthur Andersen completed a study of the U.S.-EU “Safe Harbor” privacy principles. The study covered 75 Fortune 500 and medium size, well-known U.S. companies, representing different industries. The study showed that most U.S. multinationals doing business internationally has made little progress in adopting and implementing minimum worldwide standards for ensuring the privacy of individuals’ personal data. In evaluating the privacy standards evidenced on the companies’ websites, Andersen found that none of the 75 companies met all six “Safe Harbor” principles. In fact, only two of the 75 companies passed as many as five of the

principles. Eight companies passed only one principle. Only 25% of them included proper “notice”; only 34% addressed issues around “access”; and only 46% offered acceptable levels of “security.”

E. [How to Improve Consumer Confidence.](#)

We do not purport in this paper to address consumer privacy, since that is the subject of a separate study. The focus here is on e-commerce disputes involving consumers. The key questions are: Who has jurisdiction? Whose law applies? How enforceable are pre-dispute agreements made online by consumers?

If consumer concerns are to be adequately addressed, e-commerce businesses are going to have to provide better information concerning consumer protection, redress and dispute resolution. There must be enforcement of the rules, but there should also be adequate dispute resolution and complaint handling systems. There should be adequate website policies and practices. The consumers and the providers of goods and services need greater clarity as to whose law and what forum will apply to e-commerce transactions.

The foregoing issues, which are at the heart of B2C commerce, also spill into the P2P (peer to peer) space as well. While there are marked differences between Europe and the United States in the ways the issue has been conceptually approached, we have begun to see some similarities in case-by-case outcomes. To provide a framework, we first compare the different conceptual approaches and then analyze how cases have evolved.

II. [Jurisdiction: A Comparison of U.S. and European Approaches.](#)

As globalization of e-commerce increases, it is more important for California practitioners to be aware of the difference between E.U. and U.S. approach to jurisdictional issues that affect consumers. The following discussion highlights the primary differences.

A. [E.U. Rules on Jurisdiction.](#)

1. [General Principles.](#)

Under the Brussels Convention, the consumer is entitled to sue in his or her jurisdiction if the consumer has been subject to a “specific invitation” or advertising made in the consumer’s state of domicile. To address the advent of e-commerce in the context of the existing Brussels Convention, the E.U. Commission in 2000 recommended that jurisdiction should generally be based on the defendant’s domicile, but that alternative jurisdictional grounds should be available if there were a “close link” between

the court and the action or if the “sound administration of justice” would be facilitated.<sup>1</sup> The jurisdiction of the domiciliary country would continue.<sup>2</sup> The place of performance would have jurisdiction over contract actions.<sup>3</sup> In tort actions, jurisdiction would lie in the place “where the harmful event occurred or there is a risk of it occurring.”<sup>4</sup>

## 2. [The “Brussels Regulation”](#).

The E.U. subsequently issued the so-called “Brussels Regulation,” which takes effect January 1, 2002.<sup>5</sup> In contrast to a convention or directive, a “regulation” of the E.U. becomes binding in its adopted form without further implementation by the 15 member countries.<sup>6</sup> The E.U. felt that the need for certainty and uniformity of jurisdictional rules by an early date made it inappropriate to proceed by a mere directive.<sup>7</sup>

The Brussels Regulation does not alter the broader structure of the Brussels Convention, but makes certain changes intended to take account of new technological developments relating to e-commerce. Specifically, the regulation provides that courts of consumer’s domicile have jurisdiction over a foreign defendant if the latter “pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State . . . and the contract falls within the scope of such activities.”<sup>8</sup> This language expands the range of situations in which the consumer can sue in his or her place of domicile. Importantly, the Brussels Regulation abandons the requirement in the Brussels Convention that there be a specific invitation or advertising in order to create jurisdiction in the consumer’s residence. Instead, the consumer’s jurisdiction applies to any consumer contract “concluded with a person who pursues commercial activities in the Member State of the Consumer’s domicile . . . by any means.”

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<sup>1</sup>E.U. Proposal, Preamble, point (11).

<sup>2</sup>Id. at Ch. II, §1, art. 2.

<sup>3</sup>Id. at Ch. II, §1, art. 5(1).

<sup>4</sup>Id. at Ch. II, §1, art. 2(3).

<sup>5</sup>Council Brussels Regulation (EC) (Dec. 22, 2000), OFFICIAL J. L012, 16/01/2001, p.0001-0023.

<sup>6</sup>Marco Berliri, The E.U. Approach on Jurisdiction in Cyberspace Under Regulation 44/2001, paper presented at program of the American Bar Association, Section of International Law and Practice, “LEGAL ISSUES FOR INTERNAT’L BUSINESS ONLINE” (Washington, D.C., May 24, 2001) [“Berliri”], 2.

<sup>7</sup>Id.

<sup>8</sup>Art. 15(c) of Brussels Regulation; emphasis added.

The phrase “by any means” was not inserted as a catch-all. Rather, it was specifically intended to reach Internet-based transactions.<sup>9</sup> In contrast, the Brussels Convention required that a consumer have performed the acts necessary to conclude the contract in the consumer’s own country in order to bring suit there. As a result, a consumer who has contracted from a different country, or who cannot prove that he or she contracted from his or her domicile, is not entitled to sue in his or her domicile. The language used in the Brussels Regulation effectively removes this limitation and requires simply that the contract fall within the scope of the activities directed to the consumer’s domicile. Thus, the Brussels Regulation “equates the offer of goods and services via the Internet with an invitation or advertising by businesses which ‘by any means . . . direct their activities towards that Member State . . . .’”<sup>10</sup>

### 3. [Pre-Dispute Choice of Forum.](#)

Both the Brussels Regulation and the Brussels Convention provide that any pre-dispute choice of forum other than the consumer’s domicile, if a consumer is dealing with a business, is null and void. The E.U. Commission was expressly unwilling to allow consumer contracts to contain forum selection clauses that referred disputes to courts other than those in the consumer’s domicile.<sup>11</sup> (The European Commissioner for Health and Consumer Protection purportedly justified this position as necessary to consumer confidence in doing business over the Internet.<sup>12</sup>) The effect is that the consumer cannot, even by consent, be deprived of jurisdictional rights provided by the Brussels Regulation.

Because of its non-waiver provisions, the Brussels Regulation is controversial and has been the subject of some fierce lobbying during the legislative process by business and consumer groups.<sup>13</sup> Industry groups claim it would hinder the growth of e-commerce by making small to medium-sized businesses reluctant to set up websites for fear of being subjected to the jurisdiction of the courts of every other country.<sup>14</sup> The Confederation of British Industry (“CBI”) has argued that the Brussels

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<sup>9</sup>See European Commission, Explanatory Memorandum to the Proposal for a Council Regulation on Jurisdiction, COM (1999) 348 of 14 July 1999, online at [www.europa.eu.int/comm/justice\\_home/pdf/com1999-348-en.pdf](http://www.europa.eu.int/comm/justice_home/pdf/com1999-348-en.pdf). The European Commission pointed out that “the concept of activities . . . directed towards a Member State is designed to make clear that [this provision] applies to consumer contracts concluded via a website accessible in the State of the consumer’s domicile.”

<sup>10</sup>Berliri, 4, citing Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, CES 233/2000-99/1054 CNS (March, 2000).

<sup>11</sup>Berliri, 5.

<sup>12</sup>Id.

<sup>13</sup>Id., 5-6.

<sup>14</sup>Id., citing Jean Eaglesham, Web Suits Plan Attacked, FIN. TIMES, (Nov. 6, 2000).

Regulation “fails to honour the pledges made by European leaders at Lisbon to promote e-business and, more importantly, does nothing to promote e-business in the E.U. or help consumers in an ever more complex world.”<sup>15</sup> According to some commentators:

“Whilst previously business had to consciously solicit contracts with consumers in other countries (and therefore the Brussels Convention could be seen as right and fair) the Internet has radically altered the way we do business. The Internet, by definition, allows companies to offer their services on a world market without specifically targeting one particular country. Therefore article 15, which says that if a trader by any means, directs such activities to that Member State or to several countries including that Member State, creates an enormous uncertainty for an online trader.”<sup>16</sup>

In defense of its position, the E.U. Commission argued that the absence of strong consumer protection principles in e-commerce disputes would not only negatively impact consumer confidence but also affect the unified European market.<sup>17</sup> If consumers who shop online only shop with established enterprises they are familiar with in their own country, the Commission believes that the E.U. e-commerce sector will be put at a significant competitive disadvantage to the U.S., on the theory that the U.S. has stronger consumer protection laws.<sup>18</sup>

The Brussels Regulation arguably makes less important the ultimate outcome of the Hague Convention on Jurisdiction. The Hague Convention, which aims to make civil judgments enforceable across borders, has been stalled since 1999 due to a disagreement over how business-consumer disputes should be settled. For example, if adopted in the U.S., this treaty would require U.S. companies to defend consumer suits in the country where the consumer resides, even if the company didn’t intend to market to that forum, so long as the company advertised on the web and the advertisement could be accessed by the consumer choice of law clauses entered into before a dispute had arisen would be unenforceable. Moreover, unlike the present situation where U.S. courts which are asked to enforce a foreign judgment will examine the jurisdiction of the foreign court using U.S. standards of “minimal contacts,” the Hague Convention would require U.S.

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<sup>15</sup>Nigel Hickerson & Pamela Taylor, The Brussels Regulation . . . Bad for Business, 2 E-COMM. LAW & POL. (Issue 2, Dec. 2000), 10.

<sup>16</sup>Id. at 11.

<sup>17</sup>European Commission Explanatory Memorandum to Amended Proposal for Council Brussels Regulation. COM (2000) 689, Final October 26, 2000.

<sup>18</sup>David Byrne, European Commissioner for Health and Consumer Protection, on the occasion of the Annual Conference of the Kangaroo Group of MEP’s 18th September 2000 ([http://europa.eu.int/comm/dgs/health\\_consumer/library/speeches/speech55\\_en.html](http://europa.eu.int/comm/dgs/health_consumer/library/speeches/speech55_en.html), visited on March 27, 2001).

courts to enforce foreign judgments so long as they simply satisfy criteria of the Hague Convention. Thus, under the Hague Convention U.S. courts would be required to enforce a foreign judgment against a U.S. resident even if the only contacts with the foreign country were that its site could be accessed there.<sup>19</sup>

B. [U.S. Rules on Jurisdiction.](#)

1. [General Principles.](#)

In contrast to the E.U., whose basic jurisdictional law is statutory, jurisdictional principles in the U.S. are developed in case law, which apply broad concepts to specific fact patterns. Assertions of jurisdiction over the person of the defendant by U.S. courts must comport with due process in order to be enforceable either by the court rendering the judgment or by other state or federal courts.

The constitutional jurisdictional inquiry focuses on the contacts between the defendant, the forum, and the litigation.<sup>20</sup> The defendant must have such “minimum contacts” with the forum that the assertion of jurisdiction by it does not offend “traditional notions of fair play and substantial justice.”<sup>21</sup> Whether the contacts are sufficient to satisfy the constitutional standard depends upon the “quality and nature” of the defendant’s acts in the forum “in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”<sup>22</sup> This formula focuses on two inquiries: the degree to which the defendant acted in the state and the relationship between those acts and the claim brought against her. There must be an act “by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>23</sup> Such an act may be a single occurrence, such as performing a single service in the state.

Although its jurisdictional approach has remained constant, the U.S. Supreme Court has subtly shifted the precise word formula it uses to describe the requirements of due process. “Minimum contacts” is now equated with the requirement that the defendant act purposefully to connect herself to the forum state, and the “fair and orderly

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<sup>19</sup>Testimony of Barbara Wellbery before House Subcommittee on Commerce, Trade and Consumer Protection, May 22, 2001.

<sup>20</sup>International Shoe Co. v. Washington, 326 U.S. 310 (1945).

<sup>21</sup>326 U.S. at 316.

<sup>22</sup>Id. at 319.

<sup>23</sup>Hanson v. Denckla, 357 U.S. 235, 253 (1958). This focus on the defendant’s purposeful choice contrast with France, which outside the constraints imposed by the Brussels Convention, will assert jurisdiction whenever the plaintiff is a French national. Code Civil [C. Civ.] Article 14 (Fr.). See Kevin M. Clermont, Jurisdictional Salvation and the Hague Treaty, 85 Cornell L. Rev. 89, 91-95 (1999).

administration of the laws” is now said to require that the assertion of jurisdiction be “reasonable.”<sup>24</sup> But the two variables remain the same and are at the core of the analysis.

Under the Brussels Convention, specified acts by a domiciliary of a contracting state subject the actor to jurisdiction. In many instances, these actions parallel those upon which a U.S. court would rely to find purposeful availment. For example, performance in a Member state of a contractual obligation or the occurrence of a tortious event there will create jurisdiction in that state.<sup>25</sup> Japan’s Code of Civil Procedure similarly provides for jurisdiction where a contractual obligation is to be performed or where a tortious act took place.<sup>26</sup>

a. Jurisdiction Over Physically Absent Defendants.

(i) “Stream of Commerce” Doctrine.

In the U.S., jurisdiction can be constitutionally permissible even over a defendant who has never been physically present in the forum state. Thus, a defendant never physically present in the forum has been constitutionally subjected to its jurisdiction under the so-called “stream of commerce” doctrine, which initially arose from a decision of the Illinois Supreme Court.<sup>27</sup> It sustained jurisdiction over a component parts manufacturer when a product containing its part was purchased in Illinois by a consumer who was later injured there by an alleged malfunction of the part. The Illinois court reasoned that without the sale to the Illinois consumer of the completed product, the parts manufacturer would have had no market for its part; therefore, the laws of Illinois that produce and facilitate commerce within the state benefit and protect the defendant, whose true, although indirect, source of economic benefit was Illinois.<sup>28</sup>

The U.S. Supreme Court first used the Illinois type of analysis in World-wide Volkswagen Corp. v. Woodson, although it held that the particular facts did not warrant jurisdiction.<sup>29</sup> In World-wide, the objecting defendants were a New York car retail dealer and its regional distributor. The plaintiffs had purchased a car in New York and, when

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<sup>24</sup>Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987).

<sup>25</sup>Brussels Convention, Ch. II, §2, art. 5.

<sup>26</sup>Code of Civil Procedure, arts. 4-7. See generally ZENTARO KITAGAWA, DOING BUSINESS IN JAPAN, Volume 7 §1.02 (1997) and Hiroshi Oda, Japanese Law (2d ed. 1999). However, in transactional disputes Japanese courts may take into account “exceptional circumstances” that overcome a general presumption of jurisdiction whenever authorized by the Code. Oda, at 447-48.

<sup>27</sup>Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961).

<sup>28</sup>Id.

<sup>29</sup>444 U.S. 286 (1980).

injured in an accident in Oklahoma, attempted to sue the defendants, as well as the car manufacturer and importer, in Oklahoma. The Court held that whatever “stream of commerce” the car had entered, it left that stream at the point of its purchase, *i.e.*, in New York. A subsequent unilateral decision of the purchasers to remove the car from New York could not provide a basis of jurisdiction over the retailer and distributor, who had had no voice in that decision and procured no benefit from it.

A later case demonstrated the difficulties of applying the World-wide doctrine.<sup>30</sup> The Supreme Court unanimously found that the assertion of jurisdiction by a California court over a Japanese company sued as a third party by a Taiwanese component parts manufacturer seeking indemnification was unreasonable, hence, unconstitutional. The defendant manufactured tube valve assemblies sold to the Taiwanese company that manufactured the tube used in a tire sold to Honda.

The Court split, however, on the question of whether the Japanese defendant’s use of the stream of commerce was sufficient to constitute “purposeful availing” and thus provide the requisite “minimum contacts.” Writing for herself and three others, Justice O’Connor argued that it was not. Assuming the defendant was aware that its product might well be used in a motorcycle purchased in California, Justice O’Connor found that “mere awareness” was insufficient, and that it was necessary that the defendant in some fashion purposefully direct its action toward the forum state.<sup>31</sup> Four other justices thought that the “regular and anticipated flow of products from manufacture to distribution to retail sale” in a forum was enough for jurisdiction, and Justice Stevens thought the inquiry depended upon “the volume, the value, and the hazardous character of the components.”<sup>32</sup>

(ii) “Effects” Test.

A second doctrine under which a defendant never physically present in the forum nonetheless may be constitutionally subject to its jurisdiction is called the “effects” test. Under this doctrine, a defendant who reasonably anticipates causing injury in the forum is subject to the forum’s jurisdiction. This doctrine was first articulated in Calder v. Jones.<sup>33</sup> The movie actress Shirley Jones sued in California, alleging that two individual defendants, a newspaper editor and reporter, as well as the newspaper itself, had libeled her. Jurisdiction over the paper was not challenged, because it sold copies of the paper in California, the forum state.

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<sup>30</sup>480 U.S. 102 (1987).

<sup>31</sup>Id. at 121.

<sup>32</sup>Id. at 121, 117.

<sup>33</sup>465 U.S. 783 (1984).

The two individual defendants challenged jurisdiction, since neither of them had ever had any substantial presence in California. Nonetheless, jurisdiction over them in California was upheld as constitutional. Although the actual writing and editing occurred outside the state, the story focused on plaintiff and her motion picture career in California; her alleged improper acts took place there; the story's sources were there; and defendants' activities were done intentionally. The primary place of damage was California. All these led to the conclusion that the individual Defendants could reasonably anticipate causing injury in California.

## 2. [Pre-Dispute Choice of Forum.](#)

The U.S. Supreme Court upheld the pre-dispute contractual choice of forum as against a consumer in the Carnival Cruise Lines case.<sup>34</sup> The choice of forum was contained in printed terms and conditions contained in a passenger ticket. The Supreme Court stated that forum-selection clauses in form agreements with passengers were "subject to judicial scrutiny for fundamental fairness."<sup>35</sup> However, it found there was no fraud or overreaching by the cruise line, and noted that the defendants conceded having prior notice of the provision.<sup>36</sup> However, when the law of an individual states applies, rather than federal law (Carnival Cruise Lines was an admiralty case, so federal law controlled), state courts may as a matter of public policy refuse to enforce a forum selection clause.<sup>37</sup>

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<sup>34</sup>Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

<sup>35</sup>Id. at 595.

<sup>36</sup>Id. at 594.

<sup>37</sup>See, e.g., Jones v. GNC Franchising, Inc., 211 F.3d 495 (9th Cir. 2000) (refusing to enforce Pennsylvania choice of forum clause against a California franchisee). See also the online cases discussed in subpart III.D., *infra*. Cf. State ex rel Meierhenry v. Spiegel, 277 N.W.2d 298 (S.D. 1979), which involved a choice of law. In an action by South Dakota consumer, to recover interest charged by a nonresident seller which violated South Dakota's usury laws, the defendant, an Illinois-based mail-order enterprise, had offered credit sales through catalogues available in South Dakota. Because the credit agreements provided that they were to be governed by Illinois law, the trial court granted summary judgment for the defendant, ruling that the interest rates allowed by Illinois law, rather than those under South Dakota law, applied. The Supreme Court of South Dakota reversed, holding that the general rule, that parties to a contract may effectuate their own choice of law, was trumped by the public policy as expressed in the South Dakota usury statute, which made the provision of the credit agreement void.

C. [How United States Courts Apply Traditional Jurisdictional Principles to E-Commerce.](#)

1. [Jurisdictional Precedents Arising From Print, Telephone and Radio Cases.](#)

From the onset, courts assessing Internet jurisdiction had precedents involving print, telephone and radio media to use in determining whether jurisdiction over specific activities offends constitutional due process. These precedents relate primarily to the intent with which the Internet is used. Thus, if an Internet-based news service were to send a number of messages specifically addressed to residents of a forum, there would be “purposeful direction” into the forum. Purposeful direction can exist on the ‘Net even though, in contrast to shipment of some physical goods into a state as occurred in the National Enquirer Case (from which the shipper was deemed to foresee an effect in that state), nothing is shipped physically over the Internet.<sup>38</sup> E-mail over the Internet can be logically compared to traditional postal mail and to phone calls.

However, bulletin boards and websites are not directed to a place or even to a point in virtual space, in contrast to e-mail. The person who posts a bulletin board message knows that the message can be resent by others elsewhere in the world, but the posting person cannot control such redistribution. A website is even more of a passive medium, because it sends nothing specifically directed to the forum state. The site merely posts general information so viewers can log on to the site. As the cases have increasingly recognized, websites are similar to advertisements beamed to the world over television. Perhaps an analogy to the size of the National Enquirer’s forum state circulation could be drawn from the number of hits on the website that emanate from viewers in a forum state. A site operator can identify the source of “hits” on his site; an operator of a website would therefore know whether a large proportion of the hits came from California. If information about a California resident were posted on the site, it could then be argued under the National Enquirer Case rationale that the operator purposefully directed the information to California residents. However, this would be similar to basing jurisdiction over a telecast on the number of viewers in a given jurisdiction.

2. [The Effects of the Internet On Traditional Principles of Jurisdiction.](#)

Basic principles have been essentially geographically based and have therefore been difficult to apply in the context of the Internet. A website can be viewed from any place in the world where there is access to the Internet. As a result, geographical location has less significance than previously in the context of jurisdiction. Information over the Internet passes through a network of networks, some linked to other computers or networks, some not. Not only can messages between and among computers travel along much different routes, but “packet switching” communication protocols

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<sup>38</sup>See discussion of [Calder v. Jones](#) at note 33, [supra](#) and accompanying text.

allow individual messages to be subdivided into smaller “packets” which are then sent independently to a destination where they are automatically reassembled by the receiving computer.<sup>39</sup>

The actual location of computers among which information is routed along the Internet is of no consequence to either the providers or recipients of information, hence there is no necessary connection between an Internet address and a physical jurisdiction.<sup>40</sup> Moreover, websites can be interconnected, regardless of location, by the use of hyperlinks. Information that arrives on a website within a given jurisdiction may flow from a linked site entirely outside that jurisdiction.<sup>41</sup> For example, one packet of an e-mail message sent from California may travel via telephone line through several different states and countries on its way to New York. Part of the “trip” may even go through a satellite in space. Meanwhile, another packet of the same message may travel by fiber-optic cable, arriving in New York before the first packet, with both transmissions completed in nanoseconds. Finally, notwithstanding the Internet’s complex structure, the Internet is predominately a passive system; Internet communication only occurs when initiated by a user.

3. [Specific Jurisdiction on the Internet.](#)

a. [Early Evolution of Internet Caselaw in the U.S.: The “Inset” Case.](#)

The early cases involving jurisdiction over cyberspace in the U.S. were marked not only by inconsistencies, but also by failure to appreciate the technological realities of the new medium. One example was a decision of the Connecticut federal court in 1996. Inset Systems sued Instruction Set (“ISI”) in Connecticut (Inset’s home) for trademark infringement.<sup>42</sup> Even though ISI had no assets in Connecticut and was not physically transacting business there, the district court determined that it had specific personal jurisdiction over ISI in Connecticut. It based its determination on ISI’s use of a toll-free telephone number and the fact that there were at the time 10,000 Internet users in

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<sup>39</sup>See stipulated facts regarding the Internet in American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830-32 (E.D. Pa. 1996).

<sup>40</sup>D. Johnson and D. Post, Law and Borders—The Rise of Law in Cyberspace, 48 STAN. L. REV. 1367, 1371 (1996).

<sup>41</sup>The Internet also uses “caching,” i.e., the process of copying information to servers in order to shorten the time of future trips to a website. The Internet server may be located in a different jurisdiction from the site that originates the information, and may store partial or complete duplicates of materials from the originating site. The user of the World Wide Web will never see any difference between the cached materials and the original. American Civil Liberties Union v. Reno, *supra*, note 17, 929 F. Supp. at 848-49.

<sup>42</sup>Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (herein “Inset”).

Connecticut, all of whom had the ability to access ISI's website. It found the advertising to be "solicitation of a sufficient[ly] repetitive nature to satisfy" the requirements of Connecticut's long-arm statute, which confers jurisdiction over foreign corporations on a claim arising out of any business in Connecticut.<sup>43</sup> The court also held that the minimum contact test of the due process clause of the Fourteenth Amendment was satisfied, reasoning that defendant had purposefully "availed" himself of the privilege of doing business in Connecticut in "directing" advertising and its phone number to the state, simply because subscribers could access the website.

What the Inset court failed to appreciate adequately (just as the Paris court failed to do four years later), was that any website can be accessed worldwide by anyone at any time. Moreover, it failed to give weight to the lack of evidence that any Connecticut residents actually had accessed the site or made a toll-free call to ISI.<sup>44</sup> Under the court's line of reasoning, any website would be subject to jurisdiction everywhere just by virtue of being on the Internet.

b. [The Zippo and Cybersell Cases: the Sliding Scale of Online Interactivity.](#)

Also in 1996, a Pennsylvania federal court delivered the first decision in the United States that included an overall analytical framework to test specific personal jurisdiction based on Internet activity. The case is Zippo Mfg. Co. v. Zippo Dot Com, Inc. ("Zippo").<sup>45</sup> Zippo created a "continuum," or sliding scale, for measuring websites, which fall into one of three general categories: (1) passive, (2) interactive, or (3) integral to the defendant's business. The "passive" website is analogous to an advertisement in Time magazine; it posts information that is generally available to any viewers, who has no on-site means to respond to the site. Courts ordinarily would not be expected to exercise personal jurisdiction based solely on a passive Internet website, because to do so would not be consistent with traditional personal jurisdiction law.<sup>46</sup> An "integral" website is at the other end of the continuum: it is used actively by the operator to conduct transactions with persons in the forum state, receiving on-line orders and pushing confirmation or other messages directly to specific customers. In such cases, traditional

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<sup>43</sup>Id. at 164.

<sup>44</sup>Id. The court deemed web posting to be "solicitation" within Connecticut.

<sup>45</sup>952 F. Supp. 1119, 1124 (W.D. Pa. 1996).

<sup>46</sup>Only a handful of reported cases to date have based personal jurisdiction essentially on website accessibility alone, including : (1) Inset, discussed supra at notes 42-44 and accompanying text, and (2) Telco Communications Group, Inc. v. An Apple A Day, Inc., 977 F. Supp. 404 (E.D. Va. 1997). (Relying on Inset to hold that personal jurisdiction existed over defendant for defamation claim solely on basis of website which "could be accessed by a Virginia resident 24 hours a day"); Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc., 1998 U.S. Dist. LEXIS 7819 (C.D. Ill. Mar. 31, 1998) (although court in essence used an "effects" test, saying defendant was aware of impact of infringing mark on Illinois).

analysis supports personal jurisdiction. The middle category, or “interactive” website, falls between passive and integral. It allows a forum-state viewer to communicate information back to the site, by toll-free telephone number, regular mail or even e-mail. Under Zippo, exercise of jurisdiction in the “interactive” context is determined by examining the level of interactivity and the commercial nature of the site. Because in Zippo a non-resident California defendant operated an integral website that had commercial contacts with 3,000 Pennsylvania residents and Internet service providers, the court had no difficulty finding jurisdiction.

The first decision by a federal appellate court involving specific jurisdiction in cyberspace was Cybersell, Inc. v. Cybersell, Inc. (“Cybersell”).<sup>47</sup> Here, the Ninth Circuit, in contrast to the Connecticut federal court in the Inset case, rejected the notion that a home page “purposely avails” itself of the privilege of conducting activities within a jurisdiction merely because it can be accessed there.<sup>48</sup> The plaintiff in Cybersell was an Arizona corporation that advertised its commercial services over the Internet. The defendant was a Florida corporation offering web page construction services over the Internet. The Arizona plaintiff alleged that the alleged Florida trademark infringer should be subject to personal jurisdiction of the Federal court in Arizona because a website which advertises a product or service is necessarily intended for use on a worldwide basis.

In finding an absence of jurisdiction, the Ninth Circuit used a Zippo-type analysis without specifically adopting Zippo. First, the court articulated a three-part test for determining whether a district court may exercise specific jurisdiction over a nonresident defendant:

“(1) The nonresident defendant must do some act or consummate some transactions with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections[;] (2) the claim must be one which arises out of or results from the defendant’s forum-related activities[; and] (3) exercise of jurisdiction must be reasonable.”

Applying the foregoing principles, the Ninth Circuit concluded that the Florida defendant had conducted no commercial activity over the Internet in Arizona. The Ninth Circuit found that posting an “essentially” passive home page on the Web using the name “Cybersell” was insufficient for personal jurisdiction. Even though anyone could access defendant’s home page and thereby learn about its services, that this fact alone was not enough to find that the Florida defendant had deliberately directed its merchandising

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<sup>47</sup>130 F.3d 414 (9th Cir. 1997).

<sup>48</sup>Id. at 420.

efforts toward Arizona residents.<sup>49</sup> Accordingly, defendant's activities over the Internet were insufficient to establish "purposeful availment." In so ruling, the Ninth Circuit observed that if all that were needed for jurisdiction was a web page, every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located.<sup>50</sup>

After Zippo and Cybersell, subsequent case law showed courts increasingly reluctant to grant jurisdiction merely on the basis of the number of potential customers in the forum jurisdiction who can access a passive website even where accessibility is accompanied by other means of communicating with the site operator or a small amount of other contacts with the forum.<sup>51</sup> Indeed, the Connecticut Superior Court, without even

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<sup>49</sup>Id. at 419.

<sup>50</sup>Id. at 420.

<sup>51</sup>Among an increasing number of cases declining to find jurisdiction are: Fugazy International Travel Group, Inc. v. Fugazy Executive Travel, Inc., 2001 WL 50936 (S.D.N.Y.) (In trademark infringement action, no jurisdiction where substantial part of acts giving rise to claim did not occur in New York; fact that defendant's Internet site could be accessed from New York "does not alone" support jurisdiction absent "targeting of business" in New York); Purchased Parts Group, Inc. v. Royal Appliance Manufacturing Co., 2000 WL 33125340 (Tenn. Ct. App. October 11, 2000) [hereafter "Purchased Parts"] (no specific jurisdiction in Tennessee although website posted and accepted information and processed orders, its "800" number accepted orders, it marketed and sold product in Tennessee through local retailers; general jurisdiction also rejected); Liberty Aircraft v. Atlanta Jet, Inc., 2000 WL 1682500, 28 Conn. L. Rep. 398 (discussed at note \_\_, supra); Holiday v. 3Com Corp., 2000 WL 1796535 (D. Wyo.) (where no specific jurisdiction over employment dispute because no substantial in-state activity related to plaintiff's claim, general jurisdiction could not be based on operating a website capable of being accessed in Wyoming; no indication that any transactions occurred); First Financial Resources v. First Financial Resources Corp., \_\_\_ F. Supp. 2d \_\_\_ (N.D. Ill. 2000) (website which was slightly more than passive because it allowed clients of financial planner to exchange information via e-mails still insufficient for jurisdiction); American Information Corp. v. American Infometrics, Inc., \_\_\_ F. Supp. 2d \_\_\_, 2001 WL 370109 (D. Md.) ("an entirely passive Web site cannot create jurisdiction in Maryland simply because it is theoretically available to Web users in Maryland and everywhere else," even if site "uses someone else's trademark as an address"; ability to submit inquiry on availability of services in viewer's area not significant); American Online, Inc. v. Chih Hsien Huang, 2000 U.S. Dist. LEXIS 10232 (E.D. Va.) (defendant's only contact with Virginia was through domain name registration made with Virginia registrar); Heathmart E.A. Corp. v. Technodrome.com, 200 U.S. Dist. LEXIS 10591 (E.D. Va.) (same holding); Chiaphua Components Limited v. West Bend Company, 95 F. Supp. 2d 505 (E.D. Va., Norfolk Div. 2000); Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc., 1999 WL 76446 (E.D. La.), \_\_\_ F. Supp. 2d \_\_\_ (1999) (an advertisement on website held essentially "passive"); Pheasant Run, Inc. v. Moyse, 1999 WL 58562 (N.D. Ill.), \_\_\_ F. Supp. 2d \_\_\_ (1999) (advertisement on website containing defendant's telephone number); Mink v. AAAA Devel. L.L.C., 190 F.3d 333 (5th Cir. 1999) ["Mink"] (website with printable mail-in form, toll-free call-in number and e-mail address insufficient for specific personal jurisdiction); People Solutions, Inc. v. People Solutions, Inc., 2000 U.S. Dist. LEXIS 10444 (N.D. Tex.) (no jurisdiction where defendant's website merely had

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potential to interact with and sell to Texas residents); Minge v. Cohen, 2000 WL 45873 (E.D. La.) (maintaining website alone is insufficient to confer personal jurisdiction); Search Force Inc. v. Dataforce International Inc., 2000 U.S. Dist. LEXIS 12790 (S.D. Ind.) (utilizing interactive Internet service to post information under allegedly infringing mark does not confer personal jurisdiction); Millenium Enterprises, Inc. v. Millenium Music, L.P., 1999 WL 27060 (D. Ore.), \_\_\_ F. Supp. 2d \_\_\_ (1999) (interactive website was not targeted at Oregon viewers and had no significant sales in Oregon); Origin Instruments Corp. v. Adaptive Computer Systems, Inc., 1999 WL 76794 (N.D. Tex.) \_\_\_ F. Supp. 2d \_\_\_ (1999) (no jurisdiction where “moderate level” of interactivity); ESAB Group, Inc. v. Cetricut, LLC, 1999 WL 27514 (D.S.C.) \_\_\_ F. Supp. 2d \_\_\_; Blackburn v. Walker Oriental Rug Galleries, 1998 U.S. Dist. LEXIS 4517 (E.D. Pa. 1998) (website illustrating various types of rugs sold by plaintiff was passive advertisement and hence without message by e-mail is not enough to demonstrate the nature and quality of the commercial activity in the jurisdiction more did not form continuous and substantial contacts with the forum sufficient for general jurisdiction hyperlink allowing readers to send); Transcript Corp. v. Doonan Trailer Corp., 1997 U.S. Dist. LEXIS 18687 (N.D. Ill., Nov. 17, 1997) (in trademark infringement action, website was just a general advertisement accessible worldwide, with no particular focus on Illinois); No Mayo-San Francisco v. Memminger, 1998 U.S. Dist. LEXIS 13154 (N.D. Cal. 1998) (merely registering someone else’s trademark as a domain name and posting it on a website not sufficient by themselves to subject a party in Hawaii to jurisdiction in California); CFOS 2 GO, Inc. v. CFO 2 Go, Inc., 1998 WL 320821 (N.D. Cal. June 5, 1998) (defendant’s website and e-mail addresses for communication over the Internet insufficient in trademark suit to establish that the defendant had purposefully availed itself of the privilege of conducting activities within plaintiff’s home state, relying on Cybersell); K.C.P.L., Inc. v. Nash, 49 U.S.P.Q.2d 1584, 1998 WL 823657 (S.D.N.Y. Nov. 24, 1998) (court lacked personal jurisdiction over alleged cyberpirate who allegedly registered domain name for sole purpose of extorting money from plaintiff in exchange for the assignment of all rights in the name, where the defendant resided in California and had no contacts with New York whatsoever, and there were no allegations that defendant sought to encourage New Yorkers to access his site or that he conducted business in New York); Conseco, Inc. v. Hickerson, 698 N.E. 2d 816 (Ct. App. Ind. 1998) (Hickerson’s use of Conseco’s trademarked name in the text of its website not sufficient to support personal jurisdiction in Indiana over resident of Texas where mention of Conseco in website was made without any other contact with Indiana); Patriot Systems, Inc. v. C-Cubed Corporation, 21 F. Supp. 2d 1318 (D. Utah 1998) (although court determined that C-Cubed was transacting business with Utah by virtue of its license relationship with Folio, headquartered in Utah, and payment of royalties to Folio in Utah, there was insufficient nexus between the claims in the lawsuit and C-Cubed’s other contacts with Utah for specific personal jurisdiction over the Virginia company; website was passive advertisement, merely providing information to those interested in it); Edberg v. Neogen Corporation, 17 F. Supp. 2d 104 (D. Conn. 1998) (defendant’s website had hypertext links that permitted users to learn about Neogen products, order product information through an online catalog, e-mail specific comments or questions to or from Neogen representatives, and order products through a toll-free “800” telephone number; but there was no act purposefully directed towards the forum state, any evidence that anyone in Connecticut purchased any product of Neogen through its website or that any website advertisement of Neogen was directed to Connecticut); Osteotech, Inc. v. Gensci Regeneration Sciences, Inc., 6 F. Supp. 2d 249 (D.N.J. 1998) (Internet advertisements and websites easily accessible from computers in New Jersey were insufficient proof by themselves of purpose availment in New

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a reference to the Connecticut federal court's opinion in Inset, ruled in 2000 that specific jurisdiction could not be based on the mere accessibility within Connecticut of a website operated from Georgia.<sup>52</sup> However, both before and after the acceptance of Zippo in most courts, the reported cases reflect inconsistencies, such that one court may find jurisdiction on facts that another court will find insufficient.<sup>53</sup>

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Jersey, even with a phone number and e-mail address on the website); Bancroft & Masters, Inc. v. Augusta National, Inc., 1998 U.S. Dist. LEXIS 22025 (N.D. Cal. 1998) (domain name dispute, website not enough for specific or general jurisdiction California); Black & Decker (U.S.) Inc. v. Pro-Tech Power Incorporated, 26 F. Supp. 2d 834 (E.D. Va. 1998) (patent suit, fact that defendants advertised their products on website accessible to Virginia residents and provided interested customers in Virginia with their e-mail addresses, not enough to show purposeful availment for personal jurisdiction); Advanced Software, Inc. v. Datapharm, Inc., 1998 U.S. Dist. LEXIS 22091 (C.D. Cal. Nov. 3, 1998) (no jurisdiction over Datapharm in California where it had website with the domain name of datapharm.com and links to other pharmaceutical sites such as the FDA, offered visitors to the site the ability to send it e-mail by clicking on a hyperlink, listed Datapharm's address and provided an "800" telephone number); 3D Systems, Inc. v. Aarotech Laboratories, Inc., 160 F.3d 1373, 48 U.S.P.Q.2d 1773 (Fed. Cir. 1998) (no jurisdiction over parent of alleged patent infringer where it only maintained a website accessible by California residents that was merely passive and it did not purposefully direct any of its activities at California residents); Cybersell Inc. v. Cybersell Inc. (9th Cir. 1997) (mere accessibility by Arizona resident to passive, Florida-based website); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) (Missouri defendant based on a website advertising the defendant's nightclub; no evidence that sales were made or solicited in New York or that New Yorkers were actively encouraged to access the site); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (no general jurisdiction where Hong Kong manufacturer of artificial Christmas tree advertised on the Web, but tree was purchased from a retailer in Arkansas); McDonough v. Fallow McElligott, Inc., *supra*, note 1 (mere accessibility of Missouri website by Californians insufficient for general personal jurisdiction); Hearst v. Goldberger, 1997 WL 97097 (S.D.N.Y. 1997) (no specific jurisdiction where New Jersey site was accessible to and visited by New Yorkers, where no sales of goods or services had occurred).

<sup>52</sup>Liberty Aircraft v. Atlanta Jet, Inc., 28 Conn. L. Rep. 398 (2000). The court stated that "[f]undamental notions of fairness lead the court to conclude that the defendant did not intend to subject itself to every jurisdiction in which its general advertisement reached." 28 Conn. L. Rep. at 401.

<sup>53</sup>Thus, in contrast to some of the fact situations in the cases cited at note 52, *supra*, personal jurisdiction was found to exist in: Starmedia Network, Inc. v. Star Media Inc., 2001 WL 417118 (S.D.N.Y.) (site deemed "interactive" because, while customers could not purchase products online, they could register, send comments, and obtain special price information, and defendants "could reasonably expect its actions to have consequences in New York"); Divicino v. Polaris Industries, 129 F. Supp. 2d 425 (D. Conn. 2001) (specific jurisdiction in product liability case where in addition to website with toll free number, advertisements on site indicated reasonable expectation that defendant's goods would be used in Connecticut); Multi-Tech Systems, Inc. v. VocalTec Communications, Inc., 122 F. Supp. 2d 1046 (D. Minn. 2000) (specific personal jurisdiction based on "moderately interactive" website that allowed Minnesota residents

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to register, download and use Internet phone software and emphasizing use of a click box on the website for “States (U.S. only)” that listed all states in the U.S.); Nida Corp v. Nida, 118 F. Supp. 2d 1223 (M.D. Fla. 2000) (accessibility of website in Florida plus placing of one industry-specific advertisement and small percentage of sales in Florida sufficient for jurisdiction); Publications Intern., Ltd. v. Burke/Triolo, Inc., 121 F. Supp. 2d 1178 (N.D. Ill. 2000) (Zippo used to find jurisdiction over interactive website which posted information and allowed users to fill out and submit catalog requests, even though no actual sales made online, plus defendant maintained representative in Illinois); Peridyne Tech. Solutions, LLC v. Matheson Fast Freight, Inc., 117 F. Supp. 2d 1366 (N.D. Ga. 2000) (defendants illegally hacked into plaintiff’s servers and directories in Georgia to download proprietary information and access plaintiff’s source codes); Hsin Ten Enterprises USA, Inc. v. Clark Enterprises, \_\_\_ F. Supp. 2d \_\_\_ (S.D.N.Y. 2000) (applying the Zippo test to find jurisdiction where viewers could purchase infringing exercise machine online, download forms and query online representatives); Archdiocese of St. Louis v. Internet Entertainment Group, Inc., 1999 WL 66022 (E.D. Mo.) \_\_\_ F. Supp. 2d \_\_\_ (1999) (operator of adult site intended to reach Missouri residents in connection with papal visit to St. Louis); GTE New Media Services, Incorporated v. Ameritech Corporation, 21 F. Supp. 2d 27 (D.C., D.C. 1998) (telephone companies increased advertising revenue by channeling District of Columbia viewers to their websites); American Network Inc. v. Access America/Connect Atlanta, Inc., 975 F. Supp. 494 (S.D.N.Y. 1997). (Georgia Internet service provider sued in New York for trademark infringement had 7,500 customers worldwide, including six in New York who paid \$150.00 per month in the aggregate, and defendant sent software and agreements to sign to new customers; court found “purposeful availment” in the New York forum); Telco Communications v. An-Apple-A-Day, 977 F. Supp. 404 (E.D. Va. 1997) (defendant’s Web page along with the other contacts with Virginia held enough for jurisdiction over defendants, who posted allegedly defamatory press releases regarding plaintiffs on a passive Internet site); Cody v. Ward, 1997 U.S. Dist. LEXIS 1496 (D. Conn. Feb. 4, 1997) (California defendant’s telephone and e-mail transmissions to a Connecticut plaintiff for the purpose of inducing the plaintiff to purchase securities was enough to exercise personal jurisdiction under Connecticut statute); Telephone Audio Productions, Inc. v. Smith, 1998 U.S. Dist. LEXIS 4101 (N.D. Tex. March 26, 1998) (although defendants’ acts failed to rise to the level necessary for the court to have general jurisdiction over the defendants, they were sufficient for specific jurisdiction where defendants maintained a website to promote their business with a registered trademark owned by plaintiff; the web-page with the allegedly infringing mark was accessible to Texas residents and defendants used the infringing mark at a trade show in Texas and received orders from distributors in Texas, hence the combination of the website and other contacts with Texas were sufficient for jurisdiction); Mieczkowski v. Masco Corp., 997 F. Supp. 782 (E.D. Tex. 1998) (nature of the manufacturer’s website which had a “Shop Online” page, offering customers an opportunity to check the status of their purchases and providing for direct on-line communications with sales representatives, combined with other factors such as the volume of business conducted in the state, provided a basis for asserting general personal jurisdiction over a bunk bed manufacturer); Clipp Designs, Inc. v. Tag Bags, Inc., 996 F. Supp. 766 (N.D. Ill. 1998) (Personal jurisdiction found in trade dress infringement action where defendant was alleged to have solicited orders for its locket tag protector in Illinois and advertised the device on its website and through a national magazine); Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc., 1998 U.S. Dist. LEXIS 7819 (C.D. Ill. March 31, 1998) (allegedly infringing marks used on defendant’s passive website, which provided only general information, did not allow customers to place orders by accessing the site

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A post-Zippo difficulty in the cyberspace world is that the question as to whether specific jurisdiction will be found and a site put in the “interactive” or “passive” category may often turn more on a court’s perception than on real differences in the manner in which the user employs the Internet. Subjectivity even plays a role where the Zippo method of analysis is employed. For example, a judge in the Southern District of

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had no Illinois resident who accessed site for contest to obtain free coffee or used its toll-free telephone numbers and, other than its website, defendant did not advertise, sell or ship any of its goods or services in Illinois; nonetheless, defendant’s actions in setting up a website accessible to residents of plaintiff’s home state of Illinois held to meet the low threshold for jurisdiction where the defendant was on notice that its use of an infringing mark would cause injury to an Illinois resident); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (personal jurisdiction in District of Columbia over Drudge, a California resident, based on: (1) interactivity of the website between defendant Drudge and D.C. residents; (2) the regular distribution of the “Drudge Report” via AOL, email and the World Wide Web to D.C. residents; (3) Drudge’s solicitation of and receipt of contributions from D.C. residents; (4) the availability of Drudge’s website to D.C. residents 24 hours a day; (5) Drudge’s interview with C-SPAN in D.C.; and (6) Drudge’s contacts with D.C. residents who provided gossip for his Drudge Report, which was distributed to subscribers by email, by Drudge’s own website, and by Hotwired magazine and AOL, all adding up to a “persistent” course of contact with D.C.); Heroes, Inc. v. Heroes Foundation, 958 F. Supp. 1 (D.D.C. 1996) (Defendants’ web-page, soliciting contributions and providing toll-free telephone number, and use of allegedly infringing trademark and logo, along with other contacts, resulted in “persistent” contact with the District of Columbia); Hall v. La Ronde, 1997 Cal. App. LEXIS 633 (August 7, 1997) (Court of Appeals held use of electronic mail and telephone to enter into contract with California resident and continuing relationship contemplated by such contract were sufficient to establish minimum contacts with California to support personal jurisdiction over New York defendant); Hasbro Inc. v. Clue Computing Inc., 1997 U.S. Dist. LEXIS 18857 (D. Mass. Sept. 30, 1997) (Rhode Island website operator listed Massachusetts client on its site and which was accessible to Massachusetts residents); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (repeated transmission of software and messages over the Internet to forum state); Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996); Heroes, Inc. v. Heroes Foundation, 41 U.S.P.Q.2d 1513 (D.D.C. 1996); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (191 hits by Missouri viewers on California website constituted “purposeful availment”); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (3,000 Pennsylvania subscribers to Internet news service constituted “purposeful availment”); Panavision Intern, L.P. v. Toepfen, 938 F. Supp. 616 (C.D. Cal. 1996), aff’d, 144 F.3d 1316 (9th Cir. 1998); EDIAS Software Intern, L.L.C. v. Basis Intern, Ltd., 947 F. Supp 413 (D. Ariz. 1996) (defendant could foresee impact in the forum state of defamatory material on its website and e-mail sent into state); Minnesota v. Granite Gate Resorts, Inc., 1996 W.L. 767432 (E. Minn. 1996) (contract provision that website operator could sue user of operator’s services in user’s home state); Resuscitation Technologies, Inc. v. Continental Health Care Corp., 1997 W.L. 148567 (S.D. Ind. 1997) (although plaintiff initiated contacts with its website posting, subsequent extensive e-mail and phone contacts by Michigan defendants warranted Indiana jurisdiction); California Software Inc. v. Reliability Research, 631 F. Supp. 1356 (C.D. Cal. 1996) (messages placed by Vermont residents on web bulletin board defaming California business foreseeably caused damage in California).

New York in 2000 acknowledged that plaintiffs' allegations that defendants' mobile telephone and two-way e-mail services were used in New York were "factually unsupported." Nevertheless, the court found that the mere availability of the defendant's website in New York made it "intuitively apparent" that defendant's services were used by New York residents, thereby establishing a basis for jurisdiction.<sup>54</sup>

A more strict application is reflected People Solutions, Inc. v. People Solutions, Inc.,<sup>55</sup> where the Texas-based plaintiff registered the trademark "People Solutions." The defendant, a California-based human resources company bearing the same name as the plaintiff's, developed a web site using the name "peoplesolutions." Defendant's site contained various interactive pages allowing customers to take and score performance tests, download product demonstrations, order products online and register for brochures, test demonstration diskettes, and answer test questions. The defendant did not sell any products exclusively through its web site nor did it sell any products or services to anyone in Texas through its website or as a result of any Texan's interaction with this web site, although it had one Texas client.

Plaintiff sued in Texas for trademark infringement, unfair competition and injury to business reputation. Plaintiff argued that specific jurisdiction over the defendant existed because the defendant used the name "peoplesolutions" on its web site. However, applying the Zippo analysis, the court held that the defendant's "interactive" website did not rise to a level of interactivity sufficient for Texas jurisdiction.<sup>56</sup> Although its web site had the "potential to interact with, sell products to, and contract with Texas residents," the level of Texas-based commercial activity actually achieved by the defendant on its web site was inadequate to establish personal jurisdiction.<sup>57</sup> As the court observed that "[p]ersonal jurisdiction should not be premised on the mere possibility, with nothing more, that Defendant may be able to do business with Texans over its web site; rather, Plaintiff must show that Defendant has 'purposely availed itself' of the benefits of the forum state and its laws."<sup>58</sup> Even though defendant had one Texas client whom it invoiced in Texas, this did not alter the result, particularly where defendant communicated with that client through offices outside Texas.<sup>59</sup>

In contrast to People Solutions is another decision by the same court in the same year: American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.<sup>60</sup>

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<sup>54</sup>Cable News Network, L.P. v. GoSMS.com, Inc., 2000 WL 1678039 (S.D.N.Y.)

<sup>55</sup>2000 U.S. Dist. LEXIS 10444 (N.D. Tex.)

<sup>56</sup>Id. at \*13.

<sup>57</sup>Id. at \*12.

<sup>58</sup>Id. at \*11.

<sup>59</sup>Id. at \*12.

<sup>60</sup>106 F. Supp. 2d 895 (N.D. Tex. 2000).

Plaintiff American Eyewear was a Texas corporation based in Dallas that registered the trademark “Peeper’s” in connection with its retail optical business. The defendant, Peeper’s was a Minnesota-based retail optical firm that registered the domain names “peepers.com” and “peepers2000.com” to sell its products online. Peeper’s did not sell its optical products under the “Peeper’s” name; rather, it sold them under the marks of their third-party manufacturers. Nonetheless, American Eyewear sued Peeper’s for unfair competition and trademark infringement as a result of Peeper’s use of the “peepers.com” domain name.

Peeper’s had no officers, sales agents, or other representative in Texas, and neither owned nor leased any real or personal property there. It did not maintain any bank accounts or phone listings in Texas, nor did it market products or advertise directly in Texas. It was neither licensed to do business in, nor paid taxes in Texas, and its retail stores made no sales to Texas-based customers. The defendant’s sole nexus to Texas was through its website, for which the host computers were located in New York. Peeper’s site enabled customers to browse through catalogues and complete order forms for eyewear products they chose to purchase, and upon completing their orders, Peeper’s would send them e-mail messages confirming the transactions. Although Peeper’s regularly sold products to Texas customers through its web site, and a six-week period in late 1999, e-commerce sales to Texans “occurred almost daily and typically involved multiple transaction each day,” although those sales constituted fewer than one-half of one percent of Peeper’s total sales.<sup>61</sup>

Applying Zippo, the court found that Peeper’s website to be interactive since customers could use the site to submit orders and could receive “personal service” from the site because its e-mail capability enabled them to communicate directly with Peeper’s customer service department.<sup>62</sup> Peeper’s shipped products ordered by Texas residents to their Texas homes and furnished them with user names and passwords to facilitate future orders. A Peeper’s executive also acknowledged that his company “attempts to reach every person, including all Texans, who have Internet access and to provide them with the opportunity to purchase [Peeper’s] products from anywhere, at any time.”<sup>63</sup> The court found personal jurisdiction over Peeper’s, deeming irrelevant that Peeper’s did not sell products using the “Peeper’s” name, or that its host computers were not located in Texas, or that its sales to Texas resident constituted fewer than one-half of one percent of its total sales.<sup>64</sup> The court pointed to steps that Peeper’s purportedly could have taken to avoid Texas jurisdiction: designing its website to block order from or deliveries to Texas

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<sup>61</sup>Id. at 898.

<sup>62</sup>Id. at 901.

<sup>63</sup>Id.

<sup>64</sup>Id. at 902-03.

residents, or incorporating a “clickwrap agreement” into its web site that contained a choice of jurisdiction.<sup>65</sup>

c. [The “Effects” Test in Cyberspace.](#)

If the website operator intends to cause an effect in a given forum and actually does, he arguably avails himself of the privilege of doing business there in the same manner as occurred in the National Enquirer case. In the first federal case applying the “effects” test to cyberspace, a resident of Illinois allegedly operated a “cybersquatting” scheme, which consisted of registering exclusive Internet domain names for his own use that contained registered trademarks belonging to others.<sup>66</sup> Defendant allegedly demanded fees from Panavision, a well-known California resident, and other businesses as the price for relinquishing his rights to domain names that corresponded to existing trademark registrations. The Ninth Circuit affirmed the trial court’s finding of specific personal jurisdiction in California, because the cybersquatter was viewed as having committed a tort which “is aimed at or has an effect in the forum state.”<sup>67</sup>

The Ninth Circuit recognized that the mere act of registering another’s trademark as a domain name and posting an infringing site on the Internet does not, without more, subject a non-resident to personal jurisdiction in a forum state.<sup>68</sup> However, the “something more” consisted here of defendant’s efforts to “extort” money from plaintiff, hence defendant’s conduct in Illinois was designed to, and in fact did, cause injury to the plaintiff in California.<sup>69</sup>

When the facts may be insufficient under the Zippo doctrine alone, i.e., where there is little more than accessibility of defendant’s website, some courts will invoke the “effects” test to tilt the scale in favor of jurisdiction. For example, in a trademark suit in which the federal court in Michigan found defendant’s site “highly” interactive, it also found that defendant may have targeted Michigan residents by selling merchandise online that contained logos of Michigan sports teams.<sup>70</sup> Defendant conducted its business primarily through the Internet, not through traditional retail outlets. Its web site enabled users to order merchandise online through its “virtual store,” where they could search for specific products, browse through catalogs, place items in virtual shopping carts, view product descriptions, prices, and pictures, view items previously placed in their shopping carts, purchase products at the “checkout counter” by providing credit card and shipping information, and track the status of order. After

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<sup>65</sup>Id. at 903.

<sup>66</sup>Panavision Int’l, L.P. v. Toeppen, 144 F.3d 1316 (9th Cir. 1998).

<sup>67</sup>141 F.3d 1316 at 1321.

<sup>68</sup>See id. at 1322.

<sup>69</sup>Id.

<sup>70</sup>Sports Authority Michigan, Inc. v. Justballs, Inc., 97 F. Supp. 2d 806 (E.D. Mich. 2000).

placing an order, they would receive e-mail confirmations from Justballs.<sup>71</sup> In actuality, the court could just as easily have based jurisdiction on a finding that the website “integral” to defendant’s commercial operations.

D. [International Trends in Cyberspace Jurisdiction.](#)

1. [Foreign Defendants in U.S. Courts.](#)

a. [Website Alone Insufficient for Jurisdiction.](#)

As Internet use increases globally, so to do the number of jurisdiction-related cases involving international litigants. Ty Inc. v. Clerk is an example of the reluctance of U.S. courts to assume jurisdiction over foreign defendants based essentially on their operation of a website.<sup>72</sup> Ty Inc., the creator of Beanie Babies, sued defendants in the U.K. for trademark infringement, unfair competition, consumer fraud and deceptive trade practices. Defendants sold Beanie Babies and other products through a website registered under the domain name “beaniebabiesuk.com.” The website, hosted by an ISP located in California, was accessible to viewers everywhere, including in Illinois. The defendants’ website contained an e-mail link through which consumers could obtain product information, but they could not order merchandise directly through the site. To order, users had to print an order form from the website and either fax, phone, or mail it to the U.K.

The Illinois district court dismissed for lack of jurisdiction, finding that although defendants’ website was not completely passive, because its e-mail link enabled consumers to direct product-related and order-placement inquires to defendants, the interactivity level was limited by the inability of customers to place orders over the Internet.<sup>73</sup> The court stressed that defendants made “extremely clear” on their website that they did not conduct on-line transactions.<sup>74</sup>

A similar result obtained in a Tenth Circuit decision involving Soma Medical International (“SMI”), a Delaware corporation based in Utah that made medical monitoring devices.<sup>75</sup> It opened a bank account at the Hong Kong branch of Standard Chartered Bank (“SCB”), a multinational bank based in the U.K. SMI had instructed SCB not to release funds from the account without specific written authorization, but a third person allegedly created a fraudulent signature card, directed SCB to close SMI’s account and transfer all the funds to his account in Nevada, and SCB complied, emptying

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<sup>71</sup>97 F. Supp. 2d at 814.

<sup>72</sup>2000 U.S. Dist. LEXIS 383 (N.D. Ill.)

<sup>73</sup>Id. at \*9-\*10.

<sup>74</sup>Id. at \*10. The court found the case “extremely similar” to Mink, supra note 97.

<sup>75</sup>Soma Medical International v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999).

SMI's account. Soma sued SCB in Utah federal court, alleging breach of contract, negligence and other theories. The district court granted SCB's motion to dismiss for lack of personal jurisdiction, and Soma appealed.<sup>76</sup>

The Tenth Circuit affirmed, holding that although SCB's website was accessible in Utah, it was passive under Zippo. SCB "[d]id little more than make information available to those who are interested." Accordingly, SCB, through its website, did not engage in the kind of substantial and continuous local activity to render it subject to general jurisdiction in Utah. Moreover, SCB's wholly passive website did not amount to "the kind of purposeful availment of the benefits of doing business in Utah, such that SCB could expect to be haled into court in that state," hence SCB was not subject to specific jurisdiction in Utah.

Virginia federal court has also rejected personal jurisdiction over a foreign-based corporation where there was no evidence of targeting.<sup>77</sup> America Online ("AOL") and a wholly-owned subsidiary, both based in Virginia, sued eAsia, Inc. in the Eastern District of Virginia, alleging that defendant's use of the "ICQ" mark on its website constituted various torts, such as unfair competition, infringement, false designation of origin and dilution. eAsia was a California corporation based in Taiwan, developed Internet-related software and provided Internet service for Asia-based customers through its subsidiaries. It targeted primarily, if not exclusively, Chinese-speaking Asians; thus, its web pages were in Chinese and its marketing efforts aimed exclusively at Asia. AOL claimed that eAsia's use of ICQ on its websites infringed AOL's service mark, and that eAsia was subject to personal jurisdiction in Virginia because it had registered the domain names on which the allegedly infringing marks appeared ("picq.com" and "picq.net") with Network Solutions Incorporated (NSI), a domain name registrar located in Virginia.

The court granted eAsia's motion to dismiss for want of jurisdiction.<sup>78</sup> It found that NSI's role in the domain name registry system was "limited to (i) assigning unique second level domain names for certain [Top Level Domains], and (ii) directing DNS queries to the appropriate [Second Level Domain] name server, which server will typically be controlled and maintained (as here) by someone other than NSI."<sup>79</sup> Thus, by registering the allegedly infringing domain names with NSI, such acts were "so modest in scope and nature" that the court found it "difficult" to view them as a basis for jurisdiction.<sup>80</sup> Registration with NSI occurred entirely online, by way of NSI's web site, lasted no more than a few minutes, and involved no negotiation of terms nor performance

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<sup>76</sup>196 F.3d at 1295.

<sup>77</sup>America Online, Inc. v. Huang, 106 F. Supp. 848 (E.D. Va. 2000).

<sup>78</sup>Id. at 860.

<sup>79</sup>Id. at 853.

<sup>80</sup>Id. at 855.

of substantial services in Virginia over time.<sup>81</sup> The court also noted that no evidence was presented that eAsia registered its domain names with NSI because of NSI's Virginia residency.<sup>82</sup> Since eAsia did not "purposefully direct" its activities to Virginia, personal jurisdiction did not exist.

Also declining to find jurisdiction based upon website accessibility was the federal district court in New York, in a case involving a German publishing firm.<sup>83</sup> Plaintiff sought trademark and copyright remedies for alleged unauthorized use of her image in defendant's German-language magazine and website. The court found the defendant's maintenance of a website accessible to New York residents was insufficient for specific jurisdiction under the New York long-arm statute, adding that the site does not target New York residents and, in fact, was "written in German."<sup>84</sup> Significantly, even though the German defendant was neither a citizen nor resident of the U.S., the federal court also ruled that finding jurisdiction "would offend the due process clause of the Fourteenth Amendment."<sup>85</sup> Part of the U.S. contrast to France and Italy, discussed below, lies in the fact that neither European country recognizes constitutional limits on its jurisdictional reach.

A Pennsylvania federal court declined to find personal jurisdiction over a Canadian company in a trademark infringement action where the only contacts with Pennsylvania were the accessibility of its website and links on the home page by which Pennsylvania residents could send emails.<sup>86</sup> The Canadian company did business exclusively in western Canada. The court used a Zippo analysis to find the level of interactivity minimal and not sufficient to support jurisdiction.

b. [Website Alone or With Little Additional Activity Sufficient for Jurisdiction.](#)

In contrast to the foregoing cases—and also in contrast to a decision involving the same defendant in the United Kingdom discussed below—an Illinois federal court held that a U.S. furniture retailer doing business as "Crate & Barrel" could maintain a trademark action in Illinois against an Irish furniture seller doing business under the same name.<sup>87</sup> The Irish retailer operated a website at [www.crateandbarrel-](http://www.crateandbarrel-)

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<sup>81</sup>Id. at 850, 855.

<sup>82</sup>Id. at 857.

<sup>83</sup>Stewart v. Vista Point Verlag & Ringier Publishing, \_\_\_ F. Supp. 2d \_\_\_, 56 U.S.P.Q.2d 1842, 2000 WL 1459839 (S.D.N.Y.)

<sup>84</sup>2000 WL 1459839 \*4.

<sup>85</sup>Id., \*5.

<sup>86</sup>Desktop Technologies, Inc. v. Colorworks Reproduction Design, Inc., 1999 WL 98572 (E.D. Pa. 1999).

<sup>87</sup>Euromarket Designs, Inc. v. Crate & Barrel Ltd., 96 F. Supp. 2d 824 (N.D. Ill. 2000).

*ie.com*, where visitors could view and purchase goods. The court denied the Irish defendant's motion to dismiss for lack of personal jurisdiction, finding that the web site "actively solicits all users, including residents of Illinois, to purchase goods." The court noted that although the defendants had added a statement on the site saying "Goods Sold Only in the Republic of Ireland," users of the site were given the opportunity to select the United States as part or both of their shipping and billing addresses, and the evidence demonstrated that the defendants had actually done business in Illinois using the Crate & Barrel trademark. The court characterized the defendant's site as integral to defendant's operation under the Zippo sliding scale.

Out of step with the trend to deny jurisdiction on mere accessibility of a website was the decision by the federal district court in Pittsburgh, Pennsylvania, to take jurisdiction over a small Canadian webcasting service called "iCraveTV." iCraveTV in 1999 introduced a system that provided users with the capability to watch 17 channels directly on their personal computers.<sup>88</sup> Among the channels were all the major Canadian broadcasters and a number of U.S. broadcasters (NBC, ABC, PBS, and WB).<sup>89</sup> The broadcasts were picked up by iCrave's antennae in Toronto, then retransmitted in digital form. The signal was tuned into a retransmission signal, then retransmitted in digital form onto the Internet. Viewers could access iCraveTV's signal by personal computer, using Real Player and a high speed modem.

While iCraveTV's activities were legal in Canada, they involved potential copyright violations in the U.S. Accordingly, iCraveTV took several steps to ensure that only persons located in Canada could access the service. The first required a potential user to enter his or her local area code. If the area code entered was not a Canadian area code, the user was denied access to the service. The second step required a potential user to enter into a "clickwrap" agreement confirming that the user was located in Canada. Thus, a user was confronted with two icons: "I'm in Canada" and "Not in Canada." If the user were to click on the "In Canada" icon, he or she would be presented with another clickwrap agreement, setting forth a complete terms of use agreement, including another confirmation that the user was located in Canada.

Under iCraveTV's system, U.S. residents needed to navigate through three stages to access the iCraveTV website and could not enter it unless they lied about both their local area code and their location. Nonetheless, the federal district court held it had personal jurisdiction. This, of course, is wholly at odds with the policy of Pennsylvania's blue-sky regulators, who were the first to adopt the blue-sky policy that said jurisdiction over a web-based securities offering would not be asserted by the state if the site disclaimed doing business in Pennsylvania and a system of screens and filters were used

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<sup>88</sup>John Borland, Online TV Service May Spark New Net Battle (online at <http://news.caet.com/news/0-1004-200-1477491.html>).

<sup>89</sup>Id.

to block access based on a viewer's representation of residence in Pennsylvania (see subsection IV.B.4.b, supra).

2. Jurisdiction in Foreign Courts Over Non-Residents.

a. The Yahoo Case: An Aberration or Important E.U. Shift?

A French court in 2000 took jurisdiction over Yahoo! Inc., a corporation located in Santa Clara County with no presence in France, to adjudicate a complaint of French residents that they could access the Yahoo! auction site on which Nazi memorabilia were being offered for sale.<sup>90</sup> The complaint, filed in April 2000, was also brought against Yahoo! France, which is Yahoo's French subsidiary, which is located in France, is in the French language and targets the French audience.<sup>91</sup>

A spokesman for one of the two plaintiffs, Ligue Internationale contre le Racisme et l'Antisémitisme ("LICRA"), said there were more than 1,000 Nazi-related items (pictures, coins flags, etc.) available on the auction site.<sup>92</sup> When the Paris court first ruled on May 22, 2000 that Yahoo was required to block access to such sites in France, where sales of such material are illegal, it gave Yahoo two months to develop a plan for such selective blocking. It subsequently extended this date in order to hear testimony from experts on the technical feasibility of such blocking. The French judge rejected the argument of Yahoo that such screening technology does not exist; rather, the judge asserted, it merely does not work very well at present.<sup>93</sup> Although the auction links were then removed from the Yahoo! France site, Yahoo declined to block French access to its U.S. web portal or put warning messages on its U.S. site. In November 2000, the French court ordered Yahoo to create a filtering system within three months that would prevent Internet surfers in France from accessing its online auctions. It imposed a fine of 100,000 francs (\$13,000) per day for each day that Yahoo exceeded the deadline.

Ironically, in a different case triggered by a neo-Nazi website carried by a French Internet service provider, a Nanterre court declined to order the company to tighten its controls on future sites. The court said that service providers had no legal obligation to investigate the identity of their clients. The provider, Multimania, had already closed down the site after a complaint in February. It should also be noted that the U.S. Supreme Court ruled in May, 2000 that an Internet service provider bore no responsibility for the material it carried, and that a court in Munich overturned the

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<sup>90</sup>INTL. HERALD -TRIBUNE (May 29, 2000), 7. See also notes 2-4 supra and accompanying text regarding the Yahoo case.

<sup>91</sup>Scottish Daily Record (Apr. 13, 2000) 41, 2000 WL 17093040.

<sup>92</sup>Id.

<sup>93</sup>Id.

conviction of the former head of CompuServe in Germany for aiding and abetting the spread of child pornography.<sup>94</sup>

The French decision, if followed by other courts, could make material in a foreign language and not specifically aimed at the population of another country actionable under that country's laws, simply because it is available there. For instance, Muslim countries could entertain lawsuits and award damages against French websites, such as "Moulin Rouge," featuring nudity that constitutes a crime in those countries.<sup>95</sup> In the words of Florent Latrive, a writer for Liberation on the Internet, "[t]his lawsuit marks a watershed—the internet—a space with no boundaries, where one could read the writings of anyone in the world,—is under threat."<sup>96</sup> Latrive goes on to predict that the type of reasoning used by the French court will gradually transform the Internet into a rough network of nationalities and jurisdictions, and that a mere click on a mouse may prompt a demand for identity papers before a viewer is allowed to proceed.<sup>97</sup>

In December 2000 Yahoo filed suit in U.S. Federal District Court for the Northern District of California, seeking a declaratory judgment that any final judgment in the French court would not be enforceable in the United States.<sup>98</sup> A prime issue in international jurisdiction may soon shift from the question whether a court will take jurisdiction to whether another court will enforce the first court's judgments. In oral argument before Federal Judge Jeremy Fogel in San Jose on April 9, 2001, LICRA attempted to argue that the question of enforceability was not ripe, because the French court had not yet made any effort to actively enforce its order.<sup>99</sup> In an ironic twist, LICRA also objected to jurisdiction of U.S. courts on the ground that LICRA's mailing of a cease and desist letter to Yahoo in California and its procuring of service of process in California did not constitute "purposeful availment" for specific jurisdiction purposes.<sup>100</sup> (In the Fall of 2001, Judge Fogel granted declaratory relief to Yahoo! Inc., so that the French judgment will be unenforceable in the U.S.)

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<sup>94</sup>David Hearst, Yahoo! Faces French Fines for Nazi Auctions, GUARDIAN (July 24, 2000), 2000 WL 24265519.

<sup>95</sup>John Place, Address to American Bar Association National Institute on International Ventures in the Old and New Economies, San Francisco (November 16, 2000).

<sup>96</sup>Quoted in William Peakin, Cyberspace Threat to Wipe Out French Sovereignty Over Nazi Loot. THE SUNDAY HERALD [London] (Aug. 6, 2000), 4, 2000 WL 23171818.

<sup>97</sup>Id.

<sup>98</sup>See complaint filed in No C-00-21275 JF, Yahoo! Inc. v. LaLique Contre Racisnae et L'Antisemitisme, U.S. Dist. Ct., Northern Dist. of Calif., San Jose Div.

<sup>99</sup>Craig Anderson, Yahoo Seeks Judge's Shield From French Court Ruling, DAILY JOURNAL (S.F., Apr. 10, 2001) ["Anderson"], 1.

<sup>100</sup>Id.; see Yahoo! Inc.'s Supplemental Brief in Opposition to Motion to Dismiss, filed Apr. 12, 2001 in Case No. C-00-21275 JF at 1, 3-4.

The result in the Paris court can be contrasted not only with the U.S. cases rejecting jurisdiction based on website accessibility, but with U.S. federal district court ruling in July 2000 also involving an online auction site. A federal judge in the Eastern District of Michigan held that the sale by a Texas resident to Michigan residents of allegedly infringing items on eBay's Internet auction site did not create personal jurisdiction in Michigan over the Texas resident.<sup>101</sup> The Michigan plaintiff company made and sold craft patterns for decorative figures such as reindeer and Easter bunnies. The defendant, a Texas resident who made and sold her crafts almost exclusively in the Houston area, occasionally made mail-order purchases of the plaintiff's patterns and used them to make crafts. In 1999, she sold to Michigan residents over the eBay auction site, some craft goods based on the plaintiff's designs. The Michigan court refused to broadly hold that the mere act of maintaining a website that includes interactive features ipso facto established personal jurisdiction over the sponsor of that website anywhere in the United States.

After the plaintiff sued in Michigan for copyright infringement, the defendant moved to dismiss for lack of personal jurisdiction, asserting that she never transacted any business in Michigan, never been to the state, and never owned or maintained any property there. In contrast to the Paris court, the court found that plaintiff had failed to show the "minimum contacts" required under International Shoe. The court ruled that, merely by listing her craft goods for sale on eBay, defendant did not target Michigan residents and that Michigan residents simply happened to be the winning bidders in those auctions. Since defendant had no control over who was the highest bidder, she could not have purposefully availed herself of the privilege of doing business in Michigan. The court reasoned that her sales were random and attenuated.

The Michigan court also addressed the Zippo "sliding scale," noting that under Zippo, defendant's site would be a hybrid "middle ground" or "interactive" site. The court expressed concern over the lack of clarity under Zippo as to the proper means of measuring a site's level of interactivity in guiding personal jurisdiction and questioned the need for a special Internet-focused test for minimum contacts. It found that the ultimate question still had to be answered by determining whether the defendant had sufficient "minimum contacts" in the forum state: "The manner of establishing or maintaining those contacts, and the technological mechanisms used in doing so, are mere accessories to the central inquiry." The court also faulted the failure of plaintiff to show that the defendant's site resulted in the development of any customer base in Michigan to warrant personal jurisdiction. It expressed the view that even under Zippo, the nature and quality of the asserted contacts are more important than the quantity of contacts. To the court, the fact that the site may have been "interactive" implied nothing about the extent of defendant's involvement with Michigan as a specific forum for any of her business. Even if all commercial websites could be accessed from anywhere a computer is

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<sup>101</sup>Winfield Collection Ltd. v. McCauley, (E.D. Mich., No. 99-CV-75875-DT, July 24, 2000.

connected to the Internet, the judge found a lack of evidence as to the level of interactivity or how such a level might compare with one who actively does business with Michigan residents: “Without such indications of active (or perhaps ‘interactive’) efforts to secure customers in the forum state through her website, the use of the Internet alone is no more indicative of local jurisdictional contacts than an isolated advertisement in a nationally-distributed magazine.”

b. [The Dulberg Case: Italy Weighs In.](#)

Italy in January 2001, through its appeals court, ruled that foreign sites could be blocked if they failed to comply with Italian anti-defamation laws.<sup>102</sup> The Italian ruling, by a Milan appeals court, followed a complaint from a Genoa resident, Moshe Dulberg, that several U.S.-and Israel-based websites had accused him of “kidnapping” and “brainwashing” his two young daughters. Dulberg claimed defamation in a lower court, which passed the case to the Milan appeals court on grounds that it was beyond the lower court’s jurisdiction. Although the court did not address general Internet issues in its ruling, legal experts say the ruling could set a precedent that would require Italian internet service providers to monitor and control the material accessible through their services. How closely that line is followed will not be known until another case is filed and the Dulberg case is referred to as a precedent.<sup>103</sup> No damages were awarded in the Dulberg case, but the Court ruled that since they are distributed by Italian service providers, local authorities can order access to the sites can be blocked.

The allegedly defaming pages were produced as a result of a bitter battle between Dulberg and his former wife, Tali Pikan-Rosenberg, over custody of their two girls. Dulberg sued for and was awarded custody of the girls in 1997, but they never returned. In 1999, Pikan-Rosenberg was discovered with the two girls in Tel Aviv, and an Israeli judge ordered the children returned to their father. At that point, a war of the websites began. An Italian site said Pikan-Rosenberg suffered from “an unstable psychological condition” and it accused her of kidnapping the girls. An Israeli site countered by publishing nine pages, alleging among other things that Dulberg was attempting to “change the girls into true Italians . . . by depriving them of kosher foods [and] depriving them of their religion.” The Israeli site also published letters purportedly written by the two girls, calling their father “frightening” and accusing him of violence.<sup>104</sup>

Dulberg then filed the anti-defamation suit, alleging that the web campaign violated his rights of privacy under the Italian constitution. The result was contrary to a

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<sup>102</sup>[In re Dulberg](#), reported on World Internet L. Rep. (February 2001), 14; see Ruth Gruber, [Italy Blocks Web Sites](#), JERUS. POST (Feb. 7, 2001) online at [www.jpost.com/Editi...02/07/JewishWorld/JewishWorld.21001.html](http://www.jpost.com/Editi...02/07/JewishWorld/JewishWorld.21001.html).

<sup>103</sup> Anderson.

<sup>104</sup> [Id.](#)

ruling in a previous case—involving print media, not the Internet—which said that Italian judges cannot pursue defamation-related crimes that originate outside the country. The Milan court said that Dulberg’s case was prosecutable because Italian Internet users needed Italy-based service providers in order to view the offending pages.<sup>105</sup>

c. [United Kingdom](#).

Out of step with the Illinois federal court’s decision was the holding of the United Kingdom High Court in [Euromarket Designs Inc. v. Peters](#).<sup>106</sup> The same U.S. plaintiff that prevailed on the jurisdictional issue in its trademark suit in Illinois federal court<sup>107</sup> sued essentially the same defendants in the U.K., where plaintiff had a registered mark for domestic and garden items. However, in practice the court found that plaintiffs did not trade in the United Kingdom.<sup>108</sup> Defendants had since 1994 run a shop in Ireland called “Crate and Barrel.” Plaintiff alleged two acts of infringement in the U.K. One was a magazine advertisement and the other a website upon which the Crate and Barrel mark was used. A hurricane lamp and a beaded coaster were sold through the site, which goods fell within those covered by plaintiff’s registered mark.

Plaintiff applied for summary judgement, alleging that defendant had obtained the idea for its name from one of plaintiff’s shops in the U.S. Defendant claimed there was no use of the mark in the course of trade in the U.K. and that, in any event, it was a fair use of its own name, denying that the name had been “copied.” Defendant said it had no customers in the U.K. and did not expect the website or magazine ad to drum up business there.<sup>109</sup>

The judge court dismissed the application for summary judgment against defendants, ruling that, for purposes of summary judgement, he had to assume there was no copying; at the same time, the court also ruled that it probably lacked jurisdiction over defendants.<sup>110</sup> Although plaintiff argued that the presence of an advertisement in a U.K. magazine was enough to establish a “course of trade” in the United Kingdom, the court thought that it was necessary to inquire as to the purpose and effect of the advertisement.<sup>111</sup> Since the advertisement for the Irish shop was in a magazine with both Irish and U.K. circulation, the court viewed it as analogous to a trader merely carrying on business in State X, when one of his advertisements slips over the border into State Y.

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<sup>105</sup>[Id.](#)

<sup>106</sup>Case reported in E-COMMERCE LAW & POLICY (Aug. 2000), 02.

<sup>107</sup>[See](#) note 198, [supra](#).

<sup>108</sup>E-COMMERCE LAW & POLICY (Aug. 2000), 02.

<sup>109</sup>[Id.](#)

<sup>110</sup>[Id.](#) at 03.

<sup>111</sup>[Id.](#)

In such case, the court did not believe any businessman would regard that slip as meaning that he was “trading” in Y, particularly if the advertisement were for a local business, such as a shop or a local service.

The court viewed the local nature of the website as even clearer. The website was attached to an “ie” domain name (which denotes Ireland), making it fairly obvious in its opinion that the site related to a shop in Ireland. Accordingly, there was no reason why anyone in the U.K. should regard the site as directed to him.<sup>112</sup> The court opined that whether a user arrived at the website by a search or by directly typing the address, it did not follow that defendants were using the words “Crate & Barrel” in the U.K. in the course of trade in goods. Otherwise, “it must follow that the defendants are using it in every other country of the world.”<sup>113</sup> The court cited an earlier ruling where the court rejected the suggestion that the website owner should be “regarded as putting a tentacle onto the user’s screen.” Instead, the court approved of plaintiffs’ analogy: using the Internet was like the user focussing a super telescope from the Welsh hills overlooking the Irish Sea to look into defendant’s shop in Dublin. The court also reasoned that the very language of the Internet conveys the idea of the user going to the site, since “visit” is the common word.<sup>114</sup>

E. [Possible Approaches to Jurisdictional Criteria.](#)

It is important to promote Internet use in e-commerce to gain all the benefits of individual empowerment, broader markets, speed price transparency and other efficiencies that it can offer. In the future, we may find that our jurisdictional models are inadequate for the dramatic changes in how business is and will be done. Traditional tests should therefore be reexamined. A significant trend in jurisdiction cases has been to focus on the place where information is directed, or where the residents are “targeted.” Applying traditional principles of securities jurisdiction, jurisdiction is being extended in online cases to persons who use the Internet to “target” residents of a given jurisdiction. Under current cases, when a person located outside a given jurisdiction uses a website to conduct transactions with residents of that jurisdiction, the website operator has “availed” itself of the jurisdiction and should reasonably expect to be subject to its courts in matters relating to the transactions. However, the intercession of a cyberagent, or “bot,” dealing with other bots in cyberspace is not necessarily “availing” itself of a jurisdiction. Other factors that may be applied include:

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<sup>112</sup>Id.

<sup>113</sup>Id.

<sup>114</sup>Id.

(a) [Push Technology](#).

The conscious “pushing” of information into a given jurisdiction, whether by a bot or any other complex of agents, should probably still be viewed as targeting activity that warrants specific jurisdiction in the location of the “pushee.”

(b) [Language](#).

The selection of language on which information is cast can also be relevant to the “targeting” issue. At present, approximately 80% of Internet communication is conducted in English (even though that may be expected to decrease over time).<sup>115</sup> This, together with the fact that English is the standard commercial language, make its use on a website insufficient ordinarily to establish jurisdiction of an English-speaking country. However, an Internet offering in Portuguese may arguably be considered to be targeted at Brazilian investors, just as securities offerings in Dutch on the Internet are considered by Dutch securities regulators to be offered to residents of the Netherlands.

Again, bots alter the equation. A robot need not communicate in any human language, and indeed could be programmed to communicate in every principal language. Thus, languages other than English become less evidence of targeting.

(c) [Currency](#).

When the offering price of securities is quoted in a currency other than that of the issuer’s place of incorporation, this is arguably some evidence of “targeting.” Currencies such as the E.U. are intended to be generic and should not be evidence, taken alone, of targeting any jurisdiction. Nor should widely-used currencies be seen, taken alone, as evidence of targeting. For example, U.S. dollars are almost akin in their pervasiveness to the use of English on the Internet. Pounds Sterling and Swiss Francs are likewise universal currencies. If an offer is expressed in Spanish Pesetas and available in Spain, Spanish law should arguably apply. On the other hand, an offering expressed in Spanish Pesetas and accessed in Italy would probably not be deemed directed to Italian offerees.

However, as bots and agents can change the significance of this factor as well. They will be able to translate one currency into another in a nanosecond, making currency identification less of a significant factor.

(d) [Tax and Special Laws](#).

If Internet securities information which goes into detail on the tax laws or other laws of a particular nation could be deemed targeted to that particular audience. . . . by pointing out that, regardless of the precautions adopted, if the content appeared to be

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<sup>115</sup>[The Economist](#), London (Oct 24, 1997).

targeted to the U.S. (e.g., by a statement emphasizing the investor's ability to avoid U.S. income tax on the investments) then it would view the website as targeted at the U.S. Arguably, the intervention of bots and agents would not affect this factor.

(e) [Pictorial Suggestions](#).

A French Franc denominated offering made on a background of the Eiffel Tower might be said to be aimed at French investors. But can they be said to be aimed at a French investor's multilingual bot? The answer would depend on how nearly the bot's information system was programmed to include the principal's patriotic sensibilities.

(f) [Disclaimers](#).

Disclaimers are already a regular part of international paper-based securities offerings. While typically lengthy with respect to U.S. securities laws, disclaimers are often much shorter and less specific for other jurisdictions and may amount to no more than a statement that an offer is not made in any jurisdiction in which it would be illegal to make an offer unless registered. An SEC Release comments: "The disclaimer would have to be meaningful. For example, the disclaimer could state, "This offering is intended only to be available to residents of countries within the European Union." Because of the global reach of the Internet, a disclaimer that simply states, "The offer is not being made in any jurisdiction in which the offer would or could be illegal," however, would not be meaningful. In addition, if the disclaimer is not on the same screen as the offering material, or is not on a screen that must be viewed before a person can view the offering materials, it would not be "meaningful."<sup>116</sup>

The proliferation of bots could actually make the use of disclaimers even more meaningful. Common types of software protocols could efficiently screen out properly-programmed bots before they even accessed a screen. Acting sort of like a long-range radar, the disclaimers would deter certain bots from even approaching certain areas of cyberspace. The question is whether the targeting approach will fit the Internet down the line, where highly sophisticated robots will be moving through a wholly non-geographic virtual "space" to both communicate and transact business, frequently with other robots, and without human intervention.

For a purchaser or an investor to engage in the use of robots and other non-geographically grounded intermediaries is somewhat like sending a note in a bottle out to sea: it becomes harder to argue that the note writer's home jurisdiction should control in preference to the residence of whoever picks up the note or the place where it is picked up. By like token, a web participant who unleashes a bot into a digital environment awash with other robots and virtual proxies has voluntarily "left" his or her geographical and elected to travel and transact in a wholly different environment. It is harder to argue

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<sup>116</sup>SEC Release No. 33-7516(March 23,1998), note 21.

that such a person can have a reasonable belief that the laws or the courts of the home jurisdiction will apply.

Perhaps the “Zippo” horizontal continuum will need another dimension in the future.<sup>117</sup> The test might not be based solely on the “passive-interactive” gradations of Zippo, but might also include a vertical component, based on how far the entire process is removed from direct human involvement. For example, processes involving cyber-robots are more likely to be removed from direct human involvement and arguably should be scrutinized differently. Because of the sophistication of the environment in which the bots operate, jurisdiction should be highly consensual, i.e., affected by any and all click-wrap terms or conditions imposed or accepted by the bots. In the absence of click-wrap acceptance, an activity by a bot representing someone in Forum A should not necessarily establish jurisdiction in Forum A when the bot deals with another bot in Forum B. This would, in a way, be the obverse of the stream of commerce theory: a person who sends a bot into the Internet world can be deemed to foresee that, absent understandings to the contrary, it would be engaging in transactions that subject the person to the laws and courts of foreign jurisdictions.

F. [E.U. and U.S. Split on Internet Jurisdiction.](#)

As discussed earlier, the jurisdictional law that has developed in the U.S. has generally held that one state does not have jurisdiction over a website in another state unless the site is “active” within the host state or “directs” activities to that state.<sup>118</sup> Prior to issuing the Brussels Regulation, the E.U. Commission rejected a proposed amendment that would have based jurisdiction on activities deemed to be “directed” toward one or more member States.

The Commission stated that the rejected definition “is based on the essentially American concept of business activity as a general connecting factor determining jurisdiction, whereas the concept is quite foreign to the approach taken by the regulation.”<sup>119</sup> The E.U. Commission intended specifically to reject the U.S. jurisdictional rule that only “active websites” constitute doing business in a given jurisdiction.<sup>120</sup> This is a key difference between the U.S. and E.U. approaches to consumer protection. The other key difference is the non-waivability of the consumer’s own residence by pre-dispute contract choice of forum.

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<sup>117</sup>Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997)

<sup>118</sup>See Section II.C.2.b. above.

<sup>119</sup>Berliri, 4. European Commission, Explanatory Memorandum to Amended Proposal for Council Brussels Regulation, COM (2000) 689, Final October 26, 2000.

<sup>120</sup>Berliri, 4, referencing Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997) and Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), aff’d, 126 F.3d 25 (2d Cir. 1997).

### III. Choice of Law.

#### A. General Rules in U.S. and E.U., Absent Contractual Choice of Law.

The choice as to which law to apply is generally determined by the forum's choice of law doctrine. In the U.S., more flexible approaches that analyze contacts between the forum and the dispute in issue, as well as examine policies that weigh the interests of different fora in having their own law applied to particular issues in controversy, have displaced earlier, more rigid formulas.<sup>121</sup> Thus, Section 6 of the Restatement (Second) of Conflict of Laws, followed by most American states, directs a court's attention, absent a statutory directive, to concerns similar to those found in the Restatement (Third) of Foreign Relations Law.<sup>122</sup>

The American approach to tort actions is summarized in §145 of the Restatement (Second) of Conflict of Laws Under the Restatement, the law of the state with the most significant relationship to the occurrence and the parties is to be applied, taking into account such factors as where the injury occurred, where the conduct causing the injury occurred, the home of parties, and the place where any relationship between the

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<sup>121</sup>The earlier American approach is reflected in the FIRST RESTATEMENT OF CONFLICT OF LAWS. The newer flexible approach is set out in Section 6, RESTATEMENT (SECOND) OF CONFLICT OF LAWS.

<sup>122</sup>Compare Section 6.d. of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS with Section 403, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW. The concerns in Section 403 include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Of the foregoing, needs of the interstate and international systems is perhaps the most significant. Choice-of-law rules should seek to harmonize relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result. Restatement (Second) of Conflict of Laws §6, comment d.

parties is centered.<sup>123</sup> As to contract disputes, the Restatement again provides that the law of the state with the most significant relationship to the issue should apply, taking into account where the contract was negotiated, entered into and to be performed, where the subject matter of the contract is and where the parties live.<sup>124</sup>

Corresponding provisions of the Rome Convention provide that, absent contractual choice, the applicable law shall be that of the country with which the contract is most closely connected, which is presumed to be the habitual residence or principal place of business of the party who is to effect the performance that is deemed “characteristic of the contract.”<sup>125</sup> If the contract involves immovable property, it will be presumed that the country where the property is located has the closest connection to it.<sup>126</sup> With respect to the carriage of goods, the most closely connected country is the carrier’s principal place of business, if it is also where the goods are loaded or discharged or the principal place of business of the consignor.<sup>127</sup>

Similar to Europe, Japan also focuses on the place of the relevant act, without consideration of “various nexuses.” For example, in tort cases the applicable law is that of the place where the facts giving rise to the claim arose, whereas in contract cases, absent party choice, the law of the place where the offer was dispatched governs.<sup>128</sup>

#### B. [U.S. Rules on Pre-Dispute Contractual Choice of Law.](#)

Under the U.S. approach to contracts, summarized in §§186-188 of the Restatement (Second) of Conflict of Laws, contractual choice of law clauses will control unless the selected forum’s law has no substantial relationship to the parties or transaction and is not otherwise reasonable, or use of the chosen law would violate a fundamental policy of a forum with a materially greater interest in the issue than that

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<sup>123</sup>The differences between the U.S. and European approaches are arguably more theoretical than real. The substantive law applied under modern contacts or interests analysis in the U.S. most frequently is the same law that would get applied under the doctrine of *lex loci delicti*. Under the purportedly formal European approach, questions regularly arise as to the where the harm occurred, for application of the tort choice of law rule.

<sup>124</sup>Restatement §188. If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§189-199 and 203.

<sup>125</sup>[EC Convention on the Law Applicable to Contractual Obligations](#) (“Rome Convention”) (June 19, 1980), 80/934/EEC, 1980 O.J. (L266) 1, Article 4(2).

<sup>126</sup>[Id.](#) at Article 4(3).

<sup>127</sup>[Id.](#) at Article 4(4).

<sup>128</sup>Tokushige Yoshimura, [Jurisdiction Research](#), available online at [www.kentlaw.edu/cyberlaw](http://www.kentlaw.edu/cyberlaw).

chosen and whose law would have applied under §188 of the Restatement had there not been a contractual choice.

The rule of Carnival Cruise Lines, which sanctioned enforcement against consumers of reasonable pre-dispute choice of forum clauses even in form contracts,<sup>129</sup> has been extended by U.S. appellate courts to choice of law clauses.<sup>130</sup> Thus, a U.S. consumer can validly choose to have law of a jurisdiction other than his residence apply to a transaction. However, as noted earlier, courts may refuse to enforce choice of law based on public policy grounds.<sup>131</sup>

### C. E.U. Rules on Pre-Dispute Contractual Choice of Law.

Under the Rome Convention, contractual choice of law clauses also are generally enforceable, except where the contract is entered into by a consumer (or where only one country is connected to the issues in dispute). A consumer contract cannot preclude use of law of the consumer's residence.<sup>132</sup> Italy provides that the choice of any forum other than the consumer's domicile is deemed unfair and, therefore, unenforceable unless the seller can demonstrate the existence of dealings over that clause with the consumer. Similarly, the choice of the law of a non-E.U. country is void if the chosen law is less favorable to the consumer and the contract's closest connection is to an E.U. country.<sup>133</sup>

Proponents of the Brussels Regulation argued shortly after its adoption that it only affected choice of forum, not choice of law, and hence would not create a legal swamp in e-commerce. Thus, a representative of the U.K.'s Consumer Association argued:

“The new regulation does not mean that an e-business based in the EC is subject to the public laws of all 15 member states. It is unfortunate that some of the critics of the [Brussels] Regulation have argued that business will be paralyzed by the legal risks

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<sup>129</sup>See notes 34-37 supra and accompanying text.

<sup>130</sup>See, e.g., Haynsworth v. The Corporation, 121 F.3d 956, 965 (5th Cir. 1997).

<sup>131</sup>See subsection II.B.2, supra.

<sup>132</sup>Id. at Article 5. A mandatory rule is one that cannot be derogated from by contract. Id., Article 7.

<sup>133</sup>See Emilio Tosi, Consumer Protection under Italian Law, available at <<http://www.kentlaw.edu/cyberlaw/docs/foreign/>>.

A detailed discussion of these clauses and their treatment in Europe is contained in Gabrielle Kaufmann-Kohler, Choice of Court and Choice of Law Clauses in Electronic Commerce, in Vincent Jeanneret (dir.), *Aspects Juridiques du Commerce Electronique*, Zurich (Schulthess) 2000.

presented by being subject to the trading laws of all of the member states. this is untrue. In fact all advertising, sales promotion etc. 'public law' will fall within Article 3 of the draft e-commerce directive which makes it clear that the country of origin principle should apply."<sup>134</sup>

However, the notion that e-commerce sellers and providers need only familiarize themselves with procedural, as distinguished from substantive, laws of the 15 different E.U. members was dispelled in early February, 2001. A proposed regulation called the "Rome II Green Paper" was introduced at the European Commission to govern noncontractual liability in cross-border disputes.<sup>135</sup> In any dispute involving a citizen of one country and a company marketing its goods or services or communicating over the Internet from another, the proposed regulation would make the law in the consumer's home country apply.<sup>136</sup> Such a rule would, of course, be at odds with the E.U. Proposal, which had provided that the laws of the country of origin should apply.

One commentator said the proposed regulation would push Europe "back to tribalism in communications."<sup>137</sup> By late April 2001 it was reported that officials at the European Commission had shifted tactics on Rome II and were trying to sidestep opposition by enacting it using a fast-track procedure with almost no public debate.<sup>138</sup> An advisor to the E.C.'s Justice and Home Affairs Commissioner is quoted as saying the draft regulation will be presented to the European Commission for a vote after the August recess but before the end of 2001.<sup>139</sup>

A storm of controversy then erupted. Critics pointed out that, while not only the prior E.U. e-commerce directive but many other European regulations state that the laws of the country where the supplier or website is situated should govern in a consumer transaction online, Rome II would enact the opposite, giving jurisdiction to the consumer's domicile. Business argued strenuously that Rome II's approach would impose such a nightmare of overlapping and conflicting laws on them that doing international business over the Internet would be impractical for a company without a

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<sup>134</sup>Ajay Patel, The Brussels Regulation . . . Good for Business, 2 E-COMM. LAW & POL. (Issue 2, Dec. 2000), 10, 11.

<sup>135</sup>European Commission, Communication the Commission to the Council and the European Parliament: E-Commerce and Financial Services, COM (2001) 66 final (Feb. 7, 2001)

<sup>136</sup>Paul Meller, Concern on Europe E-Commerce, N.Y. TIMES online (Feb. 8 2001), at <http://www.nytimes.com/2001/02/08/technology/08EURO.html>.

<sup>137</sup>Id.

<sup>138</sup>Paul Meller, Europe Tries to Fast-Track Proposed E-Commerce Rules, N.Y. TIMES online (April 27, 2001) at <http://www.nytimes.com/2001/04/27/technology/27EURO.html>.

<sup>139</sup>Id.

huge legal staff.<sup>140</sup> In the words of Hans Merkle, Deputy President of the World Federation of Advertisers in Brussels, “[a]dvertisers would be subjected to different and possibly conflicting laws,” such that “Pan-European advertising could become a game of Russian roulette.”<sup>141</sup>

Perhaps as a result of this firestorm, in June 2001 the European Commission backtracked. Making what the New York Times called “a spectacular turnabout,” the European Commission decided to slow down its process and seek consultations with industry and consumer groups.<sup>142</sup>

The E.U. Proposal was similar to the Rome Convention; it provided that:

“The autonomy of the parties to a contract other than an employment, insurance or consumer contract to determine the courts having jurisdiction must be respected. Contractual clauses electing jurisdiction between parties with unequal negotiating strength must, however, be regulated.” [Emphasis added]

D. [Effects of Internet on Contractual Choice of Law and Forum.](#)

1. [General Considerations.](#)

As discussed earlier, the U.S. Supreme Court has upheld the pre-dispute contractual choice of forum as against a consumer.<sup>143</sup> However, it should be remembered that the Supreme Court stated that “fundamental fairness” was required in such situations.<sup>144</sup> Moreover, in the case before the Court there was no question of the passengers having prior notice of the contractual choice of forum.

Many disputes involving electronic commerce arise between parties who are bound by a contract determining the terms and conditions upon which they have agreed to interact. Frequently, an online contract itself may provide choice of forum clause as well as a choice of law.<sup>145</sup>

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<sup>140</sup>Id.

<sup>141</sup>Louella Miles, [Local Liability: Rome II, Internet 0](#), CCFO (April 2001) online at [www.ecfonet.com/articles/al\\_local\\_liability0401.html](http://www.ecfonet.com/articles/al_local_liability0401.html).

<sup>142</sup>[European Commission Changes Tack on E-Commerce Law](#), N.Y. TIMES online at [http://www.nytimes.com/thestandard/standard\\_27469.html?pagewanted=prnt](http://www.nytimes.com/thestandard/standard_27469.html?pagewanted=prnt)

<sup>143</sup>See discussion of [Carnival Cruise Lines, Inc. v. Shute](#), 499 U.S. 585 (1991) at subpart II.B.2, *supra*.

<sup>144</sup>499 U.S. at 595.

<sup>145</sup>Contract terms themselves, of course, also supply a set of substantive rules to govern the transaction, which will be used by a court unless they violate the public policy of the forum.

If parties to the contract are presumed to have equal bargaining power and, therefore, an equal ability to accept or reject such clauses, the clauses are generally uncontroversial and enforced. However, equality between buyer and seller has not always been presumed when one party to the contract is a consumer. Instead, the seller is assumed to define its market and set the terms of the contract for its own benefit. While the buyer is assumed to be confronted with either (a) accepting terms imposed by one of a limited number of sellers serving the buyer's market or (b) foregoing the purchase altogether.

## 2. Pre-Dispute Selection Using "Click-Wrap" Agreements.

A "click-wrap" agreement is one which a provider of goods or services presents online to the purchaser, who can agree to the terms and conditions of the agreement by either clicking a designated icon or button or typing specified words or phrases. Such click-wrap agreements are the cyberspace progeny of "shrink-wrap licenses," which were introduced in connection with the sale of CD\_ROM disks which had a software license agreement encoded on the disk and printed in the user manual. The license terms were not on the outside of the box containing the disk, but the box customarily referred to the license. Such shrink-wrap licenses were upheld as valid by the Seventh Circuit in ProCD, Inc. v. Zeidenberg,<sup>146</sup> even though the license was not viewed until after the CD-ROM was inserted into the user's computer, because the software could not be used unless and until the user was shown the license terms and manifested his assent.<sup>147</sup>

The Seventh Circuit viewed the buyer's use of the software after having had the opportunity to read the license at leisure as a form of acceptance by conduct.<sup>148</sup> The shrink-wrap agreement could thus be enforced unless their terms violate a rule of positive law or are unconscionable.<sup>149</sup> In the on-line environment, a user may view the terms and conditions on the screen, using a control such as a keyboard, or mouse to scroll through or otherwise navigate the terms and then click a button or bar indicating assent. A true click-wrap assent should be distinguished from situations where the terms and conditions are merely posted on the website and agreement to those terms and conditions is implied, rather than the user being required to expressly indicate agreement by clicking a specific button or icon. Such agreements are sometimes called "browse-wrap."<sup>150</sup>

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<sup>146</sup>86 F.3d 1447 (7th Cir. 1996).

<sup>147</sup>86 F.3d at 1451-52.

<sup>148</sup>Id. at 1452.

<sup>149</sup>Id. at 1449. But see Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000).

<sup>150</sup>Pollstar v. Gigmania Ltd., 2000 WL 33266437 (E.D. Cal.).

Perhaps the earliest reported U.S. case supporting an online agreement was the Sixth Circuit's decision in Compuserve, Inc. v. Patterson.<sup>151</sup> This was more than a standard click-wrap, since the user actually typed "agree" to an online agreement whose choice of jurisdiction was used as one of several contacts to warrant holding the user subject to personal jurisdiction in service provider's home state. Subsequently, a state court upheld a click-wrap choice of forum by an AOL subscriber where the subscriber could only enroll on AOL by clicking the "I agree" button placed next to the "read me" button or the "I agree" button next to the "I disagree" button at the conclusion of the subscription agreement, which contained the forum selection clause.<sup>152</sup>

A state court in Rhode Island subsequently sustained a click-wrap forum selection where subscribers to the Microsoft Network had the option of either clicking a box which said "I Agree" or clicking another which said "I Don't Agree" at any time while scrolling the adjacent terms and conditions, which included a forum selection clause, before registering for the service.<sup>153</sup> In the Rhode Island case, the subscriber clicked "I Agree," allowing the court to draw an analogy to the pre-contractual opportunity to read the fine-print terms in Carnival Cruise Lines, and the court refused to treat an electronic presentation differently from one on paper.

An Illinois federal court found a click-wrap arbitration agreement binding on the user as against a defense of procedural unconscionability where the arbitration clause appeared in the final paragraph of the agreement under the caption "Miscellaneous," which included provisions on choice of law and forum.<sup>154</sup> The court noted that the clause was in same font as the rest of the agreement, was freely scrollable and viewable without time restrictions, and a viewer had to agree to the online license agreement before being able to install software from the provider's website. The same federal judge had earlier enforced the same click-wrap agreement in the same action.<sup>155</sup> A number of other cases have upheld a click-wrap choice of forum.<sup>156</sup>

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<sup>151</sup>89 F.3d 1257 (6th Cir. 1996).

<sup>152</sup>Groff v. America Online, Inc., 1998 WL 307001 (R.I. Super. May 27, 1998).

<sup>153</sup>Caspi v. Microsoft Network, L.L.C., 732 A.2d 528 (N.J. App. Div. 1999).

<sup>154</sup>In re RealNetworks, Inc., Privacy Litigation, 2000 WL 631341 (N.D. Ill.). The court also ruled that the click-wrap agreement was a "written" agreement as required by the Federal Arbitration Act, although the federal "E-Sign Act" had not yet been enacted. 2000 WL 631341 \*3.

<sup>155</sup>Lieschke v. RealNetworks, Inc., 2000 WL 198424 (N.D. Ill.) (arbitration clause on Real Networks site contained in a click-wrap license which users were required to traverse before they could download software to play and record music).

<sup>156</sup>America Online, Inc. v. Booker ("Booker"), 781 So. 2d 423 (Fla. 2001 Ct. App.) (forum selection provision in an online ISP subscription, "freely negotiated" and not shown "unreasonable or unjust"; decision unclear on whether agreement to the forum was express via a click-through or simply implied in some way); Celmins v. America Online, Inc., 748 So. 2d 1041

(continued . . .)

More recently, some courts have begun to find grounds on which to decline to enforce consumer click-wraps. Thus, a California Court of Appeal this year invoked a public policy exception to consumer choice of law.<sup>157</sup> The trial court had found the forum selection clause in a click-wrap agreement made during installation process on CD-ROM unfair and unreasonable, because the clause (a) was not negotiated at arm's length, (b) was in a standard "form" contract, (c) was in small text and placed at the end of the agreement, hence not readily identifiable by plaintiff and (d) was contrary to California public policy which affords its citizens specific and meaningful consumer remedies. The prime difference between the Virginia consumer protection law and that of California was that the California statute allows a consumer to bring a class action, Virginia's does not. The trial court therefore found a Virginia forum selection clause invalid.

The appellate court focused on the public policy issue rather than on the issue of assent. It shifted the usual burden of proof in jurisdiction cases from the defendant to the party seeking to uphold a forum selection clause contrary to California's Consumers Legal Remedies Act (CLRA). It emphasized the anti-waiver provision in the CLRA and then compared the consumer protection provisions in Virginia's statutes. It held that the provision in California's statute for class actions, not found in the Virginia statute, made the California protections substantially greater and therefore unwaivable as a matter of public policy.

A California federal district court declined to enforce a click-wrap contained in an online agreement where the terms and conditions were not distinctly shown.<sup>158</sup> The home page of Ticketmaster's website contained instructions, a directory to subsequent event pages (each with separate electronic address and a hypertext link), and, upon scrolling to the bottom, the terms and conditions, including prohibitions against deep linking and against copying for commercial use, as well as a term saying that anyone going beyond the home page thereby agreed to the terms and conditions. There was no "I agree" button or other signification of assent by the website user, who could go directly

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(Fla. Ct. App. 1999) (electronic agreement with Internet service provider enforced forum selection clause; no indication whether there was click-through or implied assent); Rudder v. Microsoft Corp., 1999 Carswell Ont. 3195 (WL) (Ontario Super. Ct. Justice Oct. 8, 1999) (Canadian court expressly upheld the validity of a forum selection clause in click-through contract where subscription procedure required the user to accept the agreement terms each time they appeared on the monitor, and entire agreement could be viewed by scrolling down screen, with terms not analogous to fine print). Hotmail Corp. v. Van\$ Money Pie, Inc., 1998 WL388389 (N.D. Cal.) the court applied online terms of service to an action involving alleged tradename and service mark infringement, etc., without discussing the requirements for a valid contract.

<sup>157</sup>America Online, Inc. v. Superior Court, 90 Cal. App. 4th 1 (2001).

<sup>158</sup>Ticketmaster Corp. v. Tickets.com Inc., 54 U.S.P.Q. 1344, 2000 U.S. Dist. LEXIS 4553, 2000 WL 525390 (C.D. Cal.).

to the linked page without seeing the terms and conditions). Later, the court reaffirmed its ruling.<sup>159</sup> Addressing arguments of copyright and trespass to chattel, the court briefly reiterated that the contract claim lacked “sufficient proof of agreement by defendant.” The judgment was affirmed.<sup>160</sup>

A Massachusetts case declined to enforce a click-wrap in a class action lawsuit concerning installation of software which damaged the user’s system before the user could review and assent to the agreement.<sup>161</sup> America Online (“AOL”) had set the default for reviewing the agreement to “I Agree;” but the alleged damage would already have been caused at the start of the installation. The actual agreement terms were accessible only by twice overriding the default choice of “I Agree” and clicking “Read Now” twice. If the user then rejected the agreement, his computer system would already have been harmed. Since the harm arose from precontract conduct, the forum selection clause would not be enforced. The court here also invoked public policy, citing the impropriety of requiring residents of Massachusetts with small claims to litigate in Virginia).

In July 2001, a New York federal court applied California law to hold unenforceable what was essentially a browse-wrap agreement in Specht v. Netscape Communications Corp.<sup>162</sup> Netscape had offered “SmartDownload” software free on its website to any website visitor that would click onto a button labeled “Download.” The only reference on the page to the license agreement was in text visible only if the visitor scrolls down through the page to the next screen. The visitor would then see an invitation to review the license, but was required neither to view it nor affirmatively to indicate assent before proceeding to download.<sup>163</sup>

Plaintiffs were website visitors who brought a putative class action, claiming their use of the free software caused them to violate privacy and computer fraud statutes. Distinguishing the factual situation from shrink-wraps and click-wraps, the Southern District of New York found “Netscape’s failure to require users . . . to indicate assent to its license as a precondition to downloading and using its software . . . [to be] fatal to its argument that a contract had been formed.”<sup>164</sup> Accordingly, defendants were unable to compel arbitration pursuant to the online browse-wrap license.

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<sup>159</sup>2000 WL 1887522 (C.D. Cal. Aug. 10, 2000).

<sup>160</sup>2001 WL 51509 (9th Cir.) (unpublished).

<sup>161</sup>William v. American Online, Inc., 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001).

<sup>162</sup>150 F. Supp. 2d 585 (S.D.N.Y. 2001).

<sup>163</sup>150 F. Supp. 2d at 588.

<sup>164</sup>Id. at 595.

The result in Specht is difficult to square with a prior decision by another judge of the same federal court. In Register.com v. Verio, Inc.<sup>165</sup>, plaintiff had posted license terms on its website alongside a statement that “[b]y submitting this query [to plaintiff’s database], you agree to abide by these terms.”<sup>166</sup> The court found the foregoing sentence removed any question that by proceeding to submit a query, defendant “manifested its assent to be bound” by the Plaintiff’s terms of use.<sup>167</sup>

a. [Practices by Which Online Providers May Properly Obtain Assent to Online Terms.](#)

In those jurisdictions which will honor click-wrap choice of law and forum when fairness requirements are met, practitioners should advise their online business clients to design the terms and conditions in a way to create the best factual basis to support validity of the click-wrap agreement. There are several important factors to consider. First, there should be a reasonable opportunity for the user to access the terms and conditions and review them before being bound. Second, the terms and conditions should be sufficiently conspicuous and readable. Third, there should be clear and unambiguous manifestation of assent to the terms and conditions. Last, the online provider should ensure that a viewer who has not clearly manifested consent not be able to contract.

To satisfy the first requirement, proposed terms that involve any choice of law or forum should be presented to the user before the user has any opportunity to take an action to be bound by the agreement’s terms. All the terms should either appear automatically or the user should be required to click on a clear icon or hyperlink that accesses the terms. The user should then be afforded user sufficient opportunity to review the agreement terms, with the ability to read the terms at his or her own pace and to navigate back and forth within the terms by scrolling or changing pages. Once the user views the terms, those terms should remain accessible to the user for further reference.

In the U.S., sufficient conspicuousness includes having the format and content of the terms comply with requirements in applicable laws, such as the Uniform Commercial Code, as to notice, disclosure language, conspicuousness, and the like. The terms should be in plain language and legible. Moreover, the terms and conditions should not be lost in a welter of other information as in the RealNetworks case.<sup>168</sup> It is equally important that other information on the website should not contradict the agreement terms or render the agreement ambiguous.

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<sup>165</sup>126 F. Supp. 2d 238 (S.D.N.Y. 2000).

<sup>166</sup>Id. at 248.

<sup>167</sup>The Specht decision noted that the judge in Register.com was applying New York law, whereas “I am applying California law.” 150 F. Supp. 2d at 594, n. 13.

<sup>168</sup>Supra, note \_\_\_\_.

The format of the assent must comply with any applicable laws requiring particular assent to a particular type of term, as well as an overall assent to all of the terms. It is desirable that there be an express statement just before the user is able to click his agreement that stresses the effect of agreement. For example, the website might warn the user that: "By clicking 'I agree' below, you acknowledge that you have read, understand, and agree to be bound by the terms above."

In order to assure that the user has the opportunity to see all of the agreement before assenting, it is advisable to place the means of assent at the end of the agreement terms. It is also important to use clear language of assent, e.g. "I agree," "I consent," or "I assent," rather than more ambiguous language, e.g., "Continue," "Submit," or "Enter." Such clear language of assent should be combined with clear choice for the user not only to assent but to reject the terms and to be informed of the consequence of rejection. Ideally, the option to reject will occur at the same point in the process where final assent is requested, and involve an equally clear and unambiguous button or term, such as "I disagree," "I do not agree," "Not agreed," "No," or "I decline."

Finally, a user who rejects the online agreement should not be able to take the transaction any further, without choosing to go back and specifically agreeing to the terms and conditions.

#### IV. [Toward Low Cost and Trusted Dispute Resolution.](#)

One of the conclusions drawn by the report prepared by the American Bar Association's two year Project on Jurisdiction in Cyberspace was that cyberspace may need new forms of dispute resolution, in order to reduce transaction costs for small value disputes and have structures that will work effectively across national boundaries.<sup>169</sup> Following submission of the report, the ABA constituted a multi-disciplinary special committee to develop criteria and recommendations for such a dispute resolution system. That group has held a number of meetings over the past thirteen months, starting in late November 2000, and is currently working on a set of guidelines which might form a worldwide-acceptable basis of dispute resolution procedures. If industry and consumers can both "buy in" to such guidelines, consumers may become more comfortable in online transactions. To the extent consumers come to rely upon trusted neutral guidelines and the reliability of neutral appraisers of expeditions memo of dispute resolution, the question of whose law and forum should apply will become less critical.

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<sup>169</sup>Report, [Achieving Legal and Business Order in Cyberspace](#), 55 BUS. LAW. 1801, 1824 (2000).

CONSUMER PROTECTION IN  
E-COMMERCE: CURRENT ISSUES  
INVOLVING CHOICE OF LAW AND FORUM

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Founding Chair, 1997-2001, California State Bar  
Committee on Cyberspace Law; Chair, American Bar  
Association Subcommittee on International Venture Capital  
and Subcommittee on Asia-Pacific Law; Chair of Securities  
Working Group, ABA Project on Jurisdiction in  
Cyberspace; Member, ABA Project on Alternative Dispute  
Resolution in Online Commerce

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I.	Introduction: Consumer Confidence and E-Commerce .....	1
A.	Goals Are Easily Defined .....	1
B.	Implementation is More Difficult.....	1
C.	Concerns of Consumers.....	1
D.	Failure of E-Commerce Businesses to Follow Best Practices.....	2
E.	How to Improve Consumer Confidence.....	3
II.	Jurisdiction: A Comparison of U.S. and European Approaches .....	3
A.	E.U. Rules on Jurisdiction .....	3
1.	General Principles .....	3
2.	The “Brussels Regulation” .....	4
3.	Pre-Dispute Choice of Forum .....	5
B.	U.S. Rules on Jurisdiction .....	7
1.	General Principles.....	7
a.	Jurisdiction Over Physically Absent Defendants .....	8
2.	Pre-Dispute Choice of Forum .....	10
C.	How United States Courts Apply Traditional Jurisdictional Principles to E-Commerce.....	11
1.	Jurisdictional Precedents Arising From Print, Telephone and Radio Cases.....	11
2.	The Effects of the Internet On Traditional Principles of Jurisdiction.....	11
3.	Specific Jurisdiction on the Internet.....	12
a.	Early Evolution of Internet Caselaw in the U.S.: The “Inset” Case.....	12
b.	The Zippo and Cybersell Cases: the Sliding Scale of Online Interactivity.....	13
c.	The “Effects” Test in Cyberspace .....	22
D.	International Trends in Cyberspace Jurisdiction .....	23
1.	Foreign Defendants in U.S. Courts .....	23
a.	Website Alone Insufficient for Jurisdiction .....	23
b.	Website Alone or With Little Additional Activity Sufficient for Jurisdiction .....	25
2.	Jurisdiction in Foreign Courts Over Non-Residents .....	27

a.	The Yahoo Case: An Aberration or Important E.U. Shift? .....	27
b.	The Dulberg Case: Italy Weighs In.....	30
c.	United Kingdom.....	31
E.	Possible Approaches to Jurisdictional Criteria.....	32
(a)	Push Technology.....	33
(b)	Language.....	33
(c)	Currency.....	33
(d)	Tax and Special Laws .....	33
(e)	Pictorial Suggestions.....	34
(f)	Disclaimers .....	34
F.	E.U. and U.S. Split on Internet Jurisdiction .....	35
III.	Choice of Law .....	36
A.	General Rules in U.S. and E.U., Absent Contractual Choice of Law .....	36
B.	U.S. Rules on Pre-Dispute Contractual Choice of Law.....	37
C.	E.U. Rules on Pre-Dispute Contractual Choice of Law .....	38
D.	Effects of Internet on Contractual Choice of Law and Forum .....	40
1.	General Considerations .....	40
2.	Pre-Dispute Selection Using “Click-Wrap” Agreements .....	41
a.	Practices by Which Online Providers May Properly Obtain Assent to Online Terms .....	45
IV.	Toward Low Cost and Trusted Dispute Resolution .....	46