INTERNATIONAL LAW AND TECHNOLOGY

U.S. Jurisdictional Rules of Adjudication over Business Conducted via the Internet—Guidelines and a Checklist for the E-commerce Merchant

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If you can buy something in person,
chances are you can buy it online.[1]

I. INTRODUCTION

The Internet is one of those topics which cuts across many legal disciplines.[2] Some scholars are of the view that it is not a topic in itself at

1. Tracy LeBlanc, *Online Shopping Brings the Mall to You*, PC NOVICE GUIDE TO GOING ONLINE 128 (1997).
2. For a good overview of the Internet, see GRAHAM J. H. SMITH, INTERNET LAW AND REGULATION, ch. 1 (Sweet & Maxwell, 2d ed. 1999). For a succinct judicial account of the history and evolution of the Internet, see *A.C.L.U. v. Reno*, 929 F. Supp. 824, 830-38 (E.D. Pa.

all, but merely a new aspect of every legal subject area. I tend to subscribe to that view. Internet and the law may be examined in general, but to go into the depth of its effects and the law, one must necessarily focus on a specific area of the law. By general categorization, the top three types of jurisdictional disputes over Internet activities have been over: first, advertising and intellectual property infringements (especially domain name, trademark dilution, and the like); second, tortious conduct and harm over the Internet (including defamation and civil rights violations); and third, business activities and contractual relationships (the "transaction of business" prong of any long arm statute). Of the three topics, arguably the one of greatest interest and significance presently is the third category, which involves what is now popularly known as "e-commerce."

At its simplest definition, and one that will serve the purpose of this Article, "e-commerce" involves buying and selling on the Internet by the use of its fast and efficient communications support. The rise of online shopping has grown exponentially. Its rapid rise is due to its cost efficient, speedy nature, its effective reach, and its popularity over conventional trade methodologies and business models.

An example of a typical scenario involving e-commerce is as follows. A buyer identifies a need for a good or service and proceeds to find a source via the Internet, frequently by conducting a search through a search engine. He comes across the seller's Web site which contains a catalogue of goods or services that suits his needs and proceeds to make selections, placing them into his virtual "shopping cart." The buyer fills out a secured online order form (including submission of his credit card number) and clicks on a "submit" icon. He is then shown an electronic contract form containing the terms and agreement of the purchase, including the price, quantity, description, shipping cost, and other pertinent information about the purchase and is then given the option of confirming his order by clicking the "buy" icon. This can be considered the seller's final *offer*. Once the buyer clicks on the "buy" icon and the Web site registers the click (i.e., the Internet service provider (ISP) registers the information), there is a valid *acceptance* and the contract is for all intents and purposes concluded.[3] Two questions arise at this point:

1996), entitled *The Nature of Cyberspace: The Creation of the Internet and the Development of Cyberspace*.

3. *See Electronic Commerce 101: The Minimalist Introduction*, *at* http://www.clarkson.edu/~dubrovvj/400/ecom101/ecom101.htm. This site provides a rudimentary account of what e-commerce entails and also provides helpful links to other sites providing more information on e-commerce.

(1) whether a legally enforceable business transaction occurred (a substantive law issue),[4] and (2) who has jurisdiction over any dispute that may arise out of the transaction (a procedural law issue). This Article is concerned with the latter question.

When I first embarked upon the challenge of writing a paper on this topic, I held some preconceived notions on the issue that I had tasked myself to consider. My original intent in writing on this subject was mainly to present the line of cases dealing with judicial jurisdiction (specifically over business transactions conducted over the Internet) and, by critically viewing the traditional doctrines and tests for establishing personal jurisdiction against the backdrop of the romanticized brave new dimension of cyberspace, expect to find it lacking. I was then going to expound on the new and exciting tests for jurisdiction which some recent cases seemed to offer. However, after much research and careful comparison of the cases, I found that what seemed to be new tests were in fact mirror images of the old ones. My grandiose plans of introducing a new and exciting set of jurisdictional rules for Internet transactions were dashed. I found that my outlook on the matter had done a total *volte-face*, and that the old way is still the best way from a bifurcated viewpoint (both policy and legal perspectives). As the adage goes: "If it ain't broke, don't fix it."

Hence, Parts IV through VI of this Article will be devoted to considering whether the traditional methods of establishing jurisdiction are suitable to what is considered by some to be a whole new realm of commerce, with my analysis leading to the conclusion that there is in fact no abandonment from, nor any need for a departure from, the traditional due process model found in *International Shoe*[5] and *World-Wide Volkswagen*.[6] My evaluation will crystallize into the conclusion that, albeit with some new terminology, the U.S. courts have basically been adapting, redressing, and reusing the old principles for establishing jurisdiction to adjudicate in e-commerce cases.

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4. *See* Mark E. Budnitz, *Symposium, Consumer Surfing for Sale in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?*, 16 GA. ST. U. L. REV. 741, 786-87 (2000). The author concludes that Internet contract transactions are confusing to purchasers and causes them uncertainty. He proposes new legislation, possibly as part of the Uniform Commercial Code (UCC), as a model uniform state law or as federal law, which he posits to be beneficial to purchasers and merchants alike. *See also* Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263, 1263-1400 (1997).

5. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

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

As I was writing and focusing on the law in the United States at present, I was also interested in finding out how the regional jurisdictional treaties currently in existence (like the Brussels and Lugano Conventions) would treat business transactions conducted over the Internet. I also wanted to consider briefly what the negotiators for an international jurisdictional convention (especially in the context of the draft Hague Convention) should consider about this issue. Part VII of this Article will be devoted to these observations, developments and considerations.

Also, during the course of my research, it occurred to me that the needs of the people most concerned with the subject of jurisdiction, that is, the e-commerce merchants, entrepreneurs, and businessmen, would not be served by a purely legal analysis. There appears to be a dearth of writings from their perspective, and they face the daunting challenge of having to wade through a morass of legal jargon to decipher their legal obligations when setting up their businesses on the Internet. Consequently, I saw a compelling need to present guidelines and checklists for the average e-commerce merchant interested or involved in Internet commerce in order for him to know and predict, to some extent, the scope and chances of jurisdiction over his transactions, and to enable him to tailor his way of doing business to "control" the limits of his potential liability —to avoid, be prepared for, or manage and better confine it. Hence, I devote a substantial portion of the Article to useful guidelines and checklists for limiting and defining jurisdiction, including providing some advice on the methods that could be used to exercise some "control" over choice of forum. Although it is not meant to supplant independent legal counsel, this exercise will hopefully be of practical assistance to both e-commerce merchants and lawyers. This will form Part VIII of this Article.

Finally, a caveat: Although the focus of this Article will be on Internet-transacted business—as my audience is the commercial player—jurisdictional issues clearly cut across disciplines. Hence, some significant authorities to be examined will be culled from cases where other subject matters are at issue (e.g., cases such as *Zippo*[7] and *Maritz*,[8] which involved trademark infringement). It should be noted that different variations and emphases of the basic *International Shoe*[9]/*World-Wide Volkswagen*[10] jurisdictional model might be required to tackle

7. Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119 (W.D. Pa. 1997).
8. Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996).
9. *Int'l Shoe*, 326 U.S. 310.
10. *World-Wide Volkswagen*, 444 U.S. 286.

different forms of conduct over the Internet, depending on the cause of action taken and the issues considered. For example, the ease of defamation and trademark dilution through the Internet may justify a more expansive "effects" test,[11] while business activities should, for policy reasons, be confined to a stricter test requiring "something more."[12] In some instances, such as domain name disputes, a whole new area of law is evolving which may require more special treatment.[13] In any event, this Article does not cover nonbusiness areas of concern such as privacy and defamation, tort, trademark and domain name, etc. Neither will it deal with other matters which may also be of concern to the international trading or business community such as data security, electronic signature systems, copyright and trademark matters, electronic registration, taxation, etc.[14]

II. U.S. JUDICIAL JURISDICTIONAL DETERMINATIVE RULES FOR PERSONAL JURISDICTION[15]

There are two types of jurisdiction that may be established: general jurisdiction and specific jurisdiction.

General jurisdiction is the power of a court to hear a cause of action even if the cause of action does not arise out of the defendant's contacts

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11. *See* Calder v. Jones, 465 U.S. 783 (1984).

12. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 111-12 (1987) (addressing the "something more" requirement); *see also* text and discussion accompanying note 31, *infra*; *contra* Justice Brennan's opinion in *Asahi* as discussed at note 116 *infra*.

13. For example, the World Intellectual Property Organization (WIPO) and the Internet Corporation for Assigned Names and Numbers (ICANN) are private international law initiatives, on top of domestic efforts, to regulate such problems (the former evolving and the latter created for a regulatory role). WIPO offers arbitration as an alternative forum of choice for disputants to resolve domain name disputes. As for ICANN, the United States has since signed a Memorandum of Understanding with the corporation assigning to it the U.S. government's management of the domain name system of registration. The document is *available at* http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm. ICANN also maintains a list of dispute resolution providers.

14. Many international forums such as the International Telecommunications Union (ITU), WIPO, the United Nations Commission of International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the International Chamber of Commerce (ICC) are considering these issues as part of their current agenda. The European Union as a regional grouping has already issued many directives on several of these topics as well as others as part of its "eEurope Initiative." *See, e.g.*, *infra* note 146.

15. U.S. courts apply the same jurisdictional test to foreign parties as to U.S. parties. If minimum contacts exist, parties from other countries may be haled into a U.S. court just as parties from one U.S. state may be haled into another. Similarly, U.S. litigants may be tried by the courts in another country if the said country finds that it has jurisdiction based on its rules of jurisdiction. Although every country's laws are different, many rely on some sort of "effects" test similar to the U.S. courts' approach (whereby a party is subject to jurisdiction in a place where his conduct has an effect).

with the forum.[16] However, general jurisdiction has a high threshold requirement usually consisting of a physical presence or "continuous and systematic contacts" with the forum state.[17] Other methods of conferring general jurisdiction (by a strong connecting factor) which are also easily determinative include nationality, domicile, residence, registration, etc.[18]

Specific jurisdiction is the power of a court to hear a cause of action that must relate to, or arise out of, the defendant's contacts with the forum. Hence, a lower threshold standard is used.[19] The basic model for assessing conditions suitable for asserting specific jurisdiction is distilled from a series of cases beginning with *International Shoe*,[20] and currently consists of three main elements: minimum contacts, purposeful availment[21] or purposeful direction,[22] and reasonableness.[23] U.S. courts generally exercise jurisdiction over a person for causes of action arising out of his contacts with the state, or arising out of activities taking place outside the state expressly intended to cause an effect within the state.[24]

There is a two-step, or two-question, approach to establishing either general or specific jurisdiction:

(1) Ask yourself whether there is a legislative grant of authority authorizing the court to exercise jurisdiction over the defendant; and

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16. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 (1984).

17. *Id.* at 416; *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945); Fields v. Sedwick Associated Risks, Ltd., 796 F.2d 299, 301 (9th Cir. 1986) ("This is a fairly high standard in practice."). Hence, minimum contacts must consist of some type of systematic and continuous contact with the forum.

18. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987). For some examples of European regional equivalent connecting factors, see articles 2 and 5 of the Brussels Convention, *infra* note 131.

19. Minimum contacts may be established even by isolated or occasional contacts purposefully directed toward the forum.

20. *Int'l Shoe*, 326 U.S. 310.

21. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980)); *see also* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

22. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984) (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98); *see also Int'l Shoe*, 326 U.S. at 317; Calder v. Jones, 465 U.S. 783 (1984).

23. *See infra* note 24; *see also* Lake v. Lake, 817 F.2d 1416, 1421-22 (9th Cir. 1987) (stating that "the assertion of jurisdiction must be reasonable," and evaluating seven factors to determine reasonableness).

24. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS OF THE UNITED STATES § 37 (1971) ("A state has [the] power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."). Similarly, "[i]nternational law permits nations to regulate extraterritorial activity with local effects." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

(2) Ask yourself whether the exercise of personal jurisdiction over the defendant contravenes the Constitution.

With regard to the first inquiry, the court must look to the forum state's "long-arm" statute that sets the parameters for the state's exercise of its constitutional power to govern the conduct of nonresidents. The language of long-arm statutes varies widely from state to state. For example, Arizona grants the broadest possible freedom to its courts,[25] whereas New York, on the other hand, gives a more restricted and specific charge to its courts with its long-arm statute, which permits the exercise of jurisdiction over out-of-state residents only under limited circumstances.[26] The federal courts have the equivalent of a long-arm statute of their own, in Rule 4(k) of the Federal Rules of Civil Procedure, which provides three basic grants of jurisdiction.[27]

With regard to the second inquiry—whether the exercise of personal jurisdiction over the defendant contravenes the Constitution—the court must look beyond the forum state's law. In other words, to be subject to personal jurisdiction in a state that is not his domicile, a person must not only fall under the ambit of the forum state's long-arm statute, but the exercise of that state's jurisdiction must also be valid under the Due Process Clause of the Fourteenth Amendment. The standard for constitutional exercise of jurisdiction was articulated in *International Shoe*.[28] Pursuant to the Due Process Clause, a nonresident defendant

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25. Arizona will "exercise personal jurisdiction over parties, whether found within or outside the state, to the maximum extent permitted by the Constitution of this state and the Constitution of the United States." ARIZ. R. CIV. PRO. 4.2(a) (West 1998).

26. N.Y.C.P.L.R. § 302 (McKinney 1990 & 2001). For example, section 302(a)(1) creates personal jurisdiction over a nondomiciliary who "transacts business" within the state and there is "[an] articulable nexus between the business transacted and the cause of action sued upon." *See also* Cutco Indus. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986) (citing McGowan v. Smith, 52 N.Y.2d 268, 272 (1981)).

27. First, Federal Rule of Civil Procedure 4(k) authorizes federal courts to "borrow" the long-arm statute of the state in which the federal court is located. FED. R. CIV. P. 4(k). Second, it authorizes federal courts to exercise grants of personal jurisdiction contained in federal statutes (e.g., the federal securities and antitrust laws, which have their own jurisdiction provisions). *Id.* Third, it grants long-arm jurisdiction in an international context—within the boundaries of the Constitution—over parties to cases arising under federal law who are not subject to the jurisdiction of any one particular state. *Id.* The concept of being able to have minimum contacts with the United States as a whole will have profound implications for the Internet and international jurisdiction.

28. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). It is interesting to note at this juncture that *International Shoe* itself was a response to the advances in communications and transportation technologies in the 1940s and is the best example of evolution in the jurisdictional rules by judicial reinterpretation of a constitutional phrase. The Court reconfigured the due process constraints so as to no longer base them on territorial presence (which was established in *Pennoyer v. Neff*, 95 U.S. 714 (1877)), but rather on a kind of virtual presence as measured by the "minimum contacts" test (whereunder a court must consider both the amount of the party's

may not be sued in a forum unless the forum state has first established sufficient minimum contacts with the defendant,[29] and the defendant's conduct and connection with the forum must be such that he should reasonably anticipate being haled into court there. This test relies on courts to decide what contacts are sufficient according to a "traditional conception of fair play and substantial justice."[30]

Courts will generally hold that contacts are sufficient to satisfy due process only if the nonresident "purposefully availed" himself of the benefits of being present in, or doing business in, the forum. A connection sufficient for minimum contacts may arise through an action of the defendant purposefully directed toward the forum state. "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[31] However, advertising or marketing in the forum state may nonetheless fulfill the deliberate availment requirement,[32] provided there is clear evidence that the defendant sought to serve the particular market. Thus, even if the minimum contacts test is met, a court may only exercise jurisdiction if it is "reasonable" to do so.[33]

After distilling and summarizing the body of law that has arisen to explicate the meaning of the "minimum contacts" standard, in order to exercise jurisdiction over a defendant and comport with due process you must ask yourself the following questions:

(1) Does the defendant have the requisite minimum contacts with the forum state from which the plaintiff's claim arises? The plaintiff must show that the defendant's contacts with the forum are "continuous and systematic," or that the lawsuit arises out of or is related to the defendant's contacts;[34] *or*

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contacts with the state and the relationship between the contacts and the claims to determine whether it can exercise personal jurisdiction over that party).

29. Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (holding that the Constitution permits a state to apply its law if it has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair").

30. *Int'l Shoe*, 326 U.S. at 324 (Black, J.). "There is a strong emotional appeal in the words 'fair play,' 'justice,' and 'reasonableness.'" *Id.* at 325 (Black, J.).

31. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 112 (1987).

32. *Id.*

33. *Id.* at 113 (citing *Int'l Shoe*, 326 U.S. at 316; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)). In cases in which the litigants are from foreign countries, a court must also consider the policies of the foreign countries, as well as U.S. foreign policy, in determining whether exercise of jurisdiction would be fair. *Id.* at 115.

34. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 415-16 (1984) (general jurisdiction).

> (2) Has the defendant purposefully availed himself of the benefits and protections of the forum state or directed his actions toward that state? There must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State,"[35] and the defendant's conduct and connection with the forum state must be such that "he should reasonably anticipate being haled into court there";[36] *and*
> (3) Will imposing jurisdiction comport with traditional notions of fairness and substantial justice? The exercise of personal jurisdiction must be "reasonable" under the circumstances.[37]

Virtually no cases have held that Internet contacts can create *general* jurisdiction.[38] On the other hand, a court in one state can and will exercise *specific* jurisdiction over a party in another state or country whose conduct (1) has substantial effects in the state, and (2) constitutes sufficient contacts with the state to satisfy due process, provided it is reasonable to do so. Because this jurisdictional test is ambiguous, courts in every state of the United States may be able to exercise jurisdiction over parties anywhere in the world, based solely on Internet contacts with the state alone. Thus, most, if not all, Internet jurisdictional cases are specific jurisdiction cases.

III. THE CURRENT TREND IN U.S. CASE-LAW OF PERSONAL JURISDICTIONAL OVER INTERNET BUSINESS ACTIVITIES

At present, I am not aware of any existing or pending U.S. legislation dealing with jurisdiction over Internet activities.[39] It is to be

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35. Hanson v. Denckla, 357 U.S. 235, 253 (1958) (specific jurisdiction).

36. *World-Wide Volkswagen Corp.*, 444 U.S. at 297 (specific jurisdiction).

37. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). In determining reasonableness, a court must weigh and consider the burden on the defendant to litigate in the forum, the forum state's interests in the matter, the interest of the plaintiff in obtaining relief, efficiency in resolving the conflict in the forum, and the interests of several states in furthering certain fundamental social policies. *Id.* at 476-77.

38. *See* Weber Hotels v. Jolly, 977 F. Supp. 327 (D.N.J. 1997) (holding that presence on the World Wide Web is not sufficient, in and of itself, to support the exercise of general jurisdiction over nonresident defendants); *see also* Sean M. Flower, Note, *When Does Internet Activity Establish the Minimum Contact Necessary to Confer Personal Jurisdiction?*, 62 MO. L. REV. 848-49 (1997) ("The application of general jurisdiction doctrines to cases involving the Internet and on-line services is unlikely to effectuate major legal changes. Several courts have held that Internet contact is insufficient to confer general jurisdiction, as any other result would allow virtually any user of the Internet to be sued anywhere." (citations omitted)).

39. Because concepts of jurisdiction are principally based on notions of physical presence within a jurisdiction, it is important to ensure that the nature of the World Wide Web is not forgotten when dealing with personal jurisdiction issues related to Internet activities. In *A.C.L.U. v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), the parties agreed on a pretrial statement of facts describing the nature of the Internet. *Id.* at 830. The court also took pains to describe the nature

noted that the United States is also not a party to any international or regional jurisdictional treaties (although the U.S. government is currently involved in negotiations over the draft Hague Convention). Hence, this area, which was traditionally in the domain of case law, remains in the hands of the courts.[40]

Academic studies of the "visual" perception courts have taken in jurisdictional jurisprudence involving Internet operations are varied but analogous. For example, one writer observes that there are principally three approaches: the "spiderweb approach," the "highway approach," and the "cyberspace model."[41] Similarly, another writer postulates the use of three views: the "single point presence view," the "virtual presence view," and the "non-territorial view."[42] The third view is the theoretical construct of scholars and will be considered more below, whereas current case law can be compartmentalized into the first and second categories.

The courts have yet to come up with a single coherent doctrine of personal jurisdiction for Internet transactions, and it is still too early to suggest that concrete rules have already emerged from the current body of case law. However, the following group of leading cases address diverse legal subject matters that all relate to electronically transacted Internet activities, as generally categorized, and will show that a general

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of the Internet and the difficulties in using traditional concepts of geographically based jurisdiction. *Id.* at 830-32.

40. See *Enacted Legislation Affecting the Internet*, *Pending Legislation Affecting the Internet*, *at* http://www.sidley.com/cyberlaw/features/pending_b.asp (last visited July 17, 2002), for updated lists on legislative efforts in the development of Internet law. The United States is behind the European Union in developing legal norms and regulations for Internet activities. However, this "hands free" approach is more deliberate than incidental.

41. Richard Philip Rollo, Note, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 679, 684, 693 (1999). These approaches are similar to those of Kevin R. Lyn's three views (*see infra* note 42), and can be compared in the following manner: the "spiderweb approach" is to the "virtual presence view," as the "highway approach" is to the "single point presence view," as the "cyberspace approach" is to the "non-territorial view." *See also* Matthew Oetker, Note, *Personal Jurisdiction and the Internet*, 47 DRAKE L. REV. 613, 630-33 (1999) (describing in a similar manner three approaches to looking at the issue of Internet jurisdiction, namely, a "virtual presence," a "single-point presence," and a "stream of commerce" view).

42. Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts?*, 22 CAMPBELL L. REV. 341, 349-52 (2000). The writer observes that courts and scholars alike perceive the operation of the Internet under these three basic paradigms. The "single point presence view" turns on the intention to purposefully direct activity for commerce, and is more predictable—and consistent with—Justice O'Connor's "something more" analysis in *Asahi*. *Id.* at 350. The "virtual presence view," on the other hand, is similar to Justice Brennan's "stream of commerce" approach in *Asahi*. *Id.* at 349. As for the "non-territorial view," this idea of a cyberspace dimension requiring a whole new construct of jurisdictional rules is radical and still rather novel. *Id.* at 351.

framework of rules has emerged to give us an understanding of jurisdictional determinants. These rules are summarized into tabular form in the paper supplement for a comparative overview with the "traditional" principles.[43]

A. *Passive Web Sites Which Merely Provide Information or Advertisements to Users*

Generally, cases have held that there should be no jurisdiction, whether general or specific, to cover acts of advertisement or the provision of information over the Internet *without more*. This excludes interactive acts, or the potential therefore, such as providing toll-free phone numbers, e-mail contacts, subscriptions, etc. These sites may be accessible by Internet users surfing through other Web sites via hyperlinks. In this situation, no specifically defined geographic or group of persons is identified or focused upon (i.e., there is no discretion as to who may receive the information).

In *Santana Products, Inc. v. Bobrick Washroom Equipment*,[44] for example, the court held that where the contact was merely passive inclusion on a noninteractive Web page, the court had no general jurisdiction. The plaintiff in this case accused the defendants of disparagement and sought to have the case, which involved the allegation of antitrust conspiracy, heard in Pennsylvania. This despite the fact that the allegation was unrelated to any acts of the defendant in that state. The defendant was an architectural representative of a national company for New York and New Jersey. The court required more active use of the Internet Web page in order to establish jurisdiction, and a passive Web page was held to be an insufficient basis upon which to exercise jurisdiction. The court analogized the passive Web page to national magazine advertisements.[45]

Similarly, in *Weber v Jolly Hotels*[46] the court held that mere presence on the World Wide Web is not sufficient, in and of itself, to support the exercise of general jurisdiction over nonresident defendants. In this case, the defendant corporation (an Italian hotel) merely advertised its services on the Internet. The plaintiff booked a room through a travel agent that was licensed by the defendant in New Jersey, and was injured while staying as a guest in the defendant's hotel in Italy.

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43. *Infra* App. A.
44. 14 F. Supp. 2d 710 (M.D. Pa. 1998).
45. *Id.* at 714.
46. 977 F. Supp. 327 (1997).

The court did not consider the advertisement as a means by the defendant to conduct or transact in its business.[47]

Likewise, in the earlier case of *Osteotech, Inc. v. GenSci Regeneration Sciences, Inc.*,[48] general *as well as* specific jurisdictions were denied on similar grounds. In this case, the defendants were incorporated in Canada and had their principal place of business in Washington. The plaintiff brought a patent infringement action against the defendants in New Jersey, arguing for the New Jersey court's jurisdiction on the ground that the defendant's Internet advertisement was easily accessible from anywhere, and everywhere, in the world. The court declined to exercise general jurisdiction on the basis that the defendant had no continuous and systematic contacts with the forum. There was nothing "significantly more" than bare minimum contacts here and the plaintiff failed the "rigorous test" required to establish continuous and systematic contacts with the forum to establish general jurisdiction.[49] The court also examined the relationship among the defendant, the forum, and the cause of action, and determined that the defendant did not have the "fair warning" that it could be brought to suit in the forum state. Hence, specific jurisdiction was also denied.[50]

The same result occurred in the earlier case of *McDonough v. Fallon McElligott, Inc.*[51] In *McDonough*, a California photographer's copyright infringement claim was dismissed for lack of personal jurisdiction. The nonresident defendants had allegedly made contact

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47. *Id.* at 333-34. Most other cases involving mere advertisement through the Internet also denied jurisdiction over the defendant concerned. *Compare* IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258 (N.D. Ill. 1997); Hearst Corp. v. Goldberger, 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997) (analogizing the Web site to an advertisement in a national periodical not specifically directed to New Yorkers, then relied on New York law, which held that advertisements in national publications are not sufficient to provide personal jurisdiction and are not within the terms of the New York long-arm statute); *contra* Inset Sys. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (involving a dispute over "INSET" as a trademark/domain name in which the court determined that under the totality of the circumstances it was fair and just to require the defendant who was in the nearby state of Massachusetts to travel to Connecticut to face jurisdiction for its *permanent, continuous and regular* advertisement which was directed to all states). *Inset Systems* was an *anomalous case* and is the exception rather than the rule. It should be strictly confined to the facts. Cases in which personal jurisdiction were found only on the maintenance of a Web site have usually relied on *additional factors* showing an additional link between the defendant and the forum state, even if it may be intangible, such as intentional interference with the business of another company that he knew was located in the forum state. In this case, the court seemed to focus on both the Web site and the toll-free number as a sufficient basis for finding jurisdiction.

48. 6 F. Supp. 2d 349 (D.N.J. 1998).

49. *Id.* at 353-54.

50. *Id.* at 355-56.

51. Civ. No. 95-4037, 1996 U.S. Dist. LEXIS 15139 (S.D. Cal. Aug. 5, 1996).

with California through a Web site located in Minnesota. The plaintiff made no allegation that the defendants' specific Internet activities were material to the claim, other than his claim that the accessibility of defendants' Web site within the forum established general jurisdiction. The court held that, "[b]ecause the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists."[52] As a policy matter, the court was not willing to take that step. Thus, the fact that the defendants had a Web site used by Californians cannot establish jurisdiction by itself.[53]

One of the most popular case example for this category of cases is the celebrated *Bensusan Restaurant Corp. v. King*.[54] King, a Missouri resident, set up a Web site called "the Blue Note" to advertise his Missouri jazz club. His Web site included, for example, a schedule of events, information on ticket prices and outlets, and telephone numbers for the ticket outlets. Bensusan, the New York corporation that owned "The Blue Note" jazz club in New York City, brought suit against King for trademark infringement. The court held that the defendant neither met the New York long-arm statute requirements nor the minimum contacts test.[55] The trial court applied the following test for specific jurisdiction:

> (1) whether the defendant purposefully availed himself of the benefits of the forum state;
> (2) whether the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there; and
> (3) whether the defendant carries on a continuous and systematic part of its general business within the forum state.[56]

In summary, from the line of cases on the matter, it would appear that passive Web sites (such as those offering general business advertisements in the Internet) are merely viewed, in common law terms,

52. *Id.* at *7.

53. *Id.* at *18. At this stage, it can be noted that, to date, the courts have never found general jurisdiction over a nonresident defendant solely on the basis of the defendant's Web site. *See also* Graphic Controls Corp. v. Utah Med. Prods., Inc., 149 F.3d 1382 (W.D.N.Y. 1998); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356 (W.D. Ark. 1997).

54. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

55. *Id.* at 299-301. The case was affirmed by the United States Court of Appeals for the Second Circuit. Bensusan Rest. Corp. v. King, 126 F.3d 25 (2d Cir. 1997). The Second Circuit affirmed the lower court decision solely on the basis that the New York long-arm statute did not intend to reach this type of defendant activity. *Id.* at 27-29.

56. *Bensusan*, 937 F. Supp. at 300-01 (quoting Indep. Nat'l Distrib., Inc. v. Black Rain Communication, Inc., No. 94 Civ. 8465, 1995 WL 571449, at *5-*6 (S.D.N.Y. Sept. 28, 1995)).

as invitations to treat (and not offers) which should not satisfy due process for jurisdiction. This should also apply to the conveyance of other business messages and information. Accessibility is thus to be distinguished from targeting for specific business transactions.

B. Cases Involving a Certain Level of Information Exchange Between Merchants and Users

You must ask yourself some important questions when facing a scenario involving contact and the exchange of information. What is the level of exchange?[57] Is there the presumption of targeting of the forum for business?

What is the level of exchange? In most cases involving the mere exchange, or possibility for the exchange, of information the courts have denied jurisdiction on the basis of the objective contacts.[58] This is especially so for cases involving advertisements offering toll-free numbers.[59] However, there have been cases where courts have found jurisdiction based on secondary criteria, but they are not common and mostly *sui generis*.[60]

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57. Cases in which the U.S. courts have factored into jurisdictional analyses some "purposeful contacts" involving information exchange include: *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996) (directing advertising solicitations to a wide audience of potential customers, including those in the forum state); *Inset Systems v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D. Conn. 1996) (providing a toll-free number where the seller can be reached); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1329-34 (E.D. Mo. 1996) (transmitting information by e-mail to residents of the forum state); and, last, but certainly not least, *Zippo Manufacturing Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1126 (W.D. Pa. 1997) (selling or providing registration passwords to residents of the forum state via the Web site). *Zippo* was cited in GRAHAM J.H. SMITH, INTERNET LAW AND REGULATION 155 (Sweet & Maxwell, 2d ed. 1999). See also GRAHAM J.H. SMITH, INTERNET LAW AND REGULATION ch. 6 on "Enforcement and Jurisdiction" for a useful but limited country-by-country analysis of jurisdiction and enforcement.

58. The mere existence of an Internet business with electronic connection to the United States is not likely to be sufficient, by or in itself, to establish personal jurisdiction. *See, e.g.*, Hearst Corp. v. Goldberger, 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997).

59. *See, e.g.*, Shapiro v. Santa Fe Gaming Corp., No. 97 C 6117, 1998 U.S. Dist. LEXIS 2488 (N.D. Ill., Feb. 26, 1998) (claiming jurisdiction because of defendant's toll-free number and internet site in an action for the recovery of attorney's fees); Ragonese v. Rosenfeld, 722 A.2d 991 (N.J. Super Ct. Law Div. 1998) (holding that Internet site and 800 number are insufficient contacts in an action for breach of contract for nonissuance of airline ticket).

60. *See, e.g.*, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997). In *Cybersell*, the defendant employed an essentially passive Web page which nevertheless invited users to send e-mail messages to it. *Id.* at 419. However, unlike *Maritz* (see *infra* note 61), where the defendant's Web page received over a hundred visitors in the forum state (thus subjecting the defendant to jurisdiction), the defendant in *Cybersell* received only one "hit" on his Web page from the plaintiff's state (Arizona). Furthermore, there was no evidence that the defendant (Cybersell) utilized a toll-free telephone number in connection with its Internet advertising (although it is a rather fine distinction to make between e-mail and telephone contact). In any

In *Maritz, Inc. v. Cybergold, Inc.*,[61] the court considered the use of a subscription mailing list system to disseminate advertisements to be interactive enough for jurisdiction. The defendant in this case operated an Internet site in California which provided a service to the subscribers of its mailing list, who received advertisements. The plaintiff, a Missouri corporation, filed a suit in Missouri citing trademark infringement and unfair competition by the defendant. The only contacts the defendant had with Missouri was that out of three hundred "hits" (or visitors), one hundred eighty were from Missouri. But those visits were made by the plaintiff. Notwithstanding that, the Missouri court still held that it had jurisdiction over the defendant. The court utilized a five-part test by examining: (1) the nature and quality of the defendant's contacts with the forum state (i.e., Missouri), (2) the quantity of those contacts, (3) the relation of the cause of action to the contacts, (4) the forum state's interest in providing a forum for its residents, and (5) the balance of convenience to the parties.[62]

The result was similar in *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*[63] In this case, contempt proceedings were brought against the defendant for an alleged violation of an earlier judgment enjoining it from publishing or distributing its "Playmen" magazines in the United States. The court found that defendant had violated the injunction because it had actively solicited the business of U.S. customers. One of defendants' Web sites was a "pay site" and a customer had to actively subscribe for the service and pay the defendant before gaining access to it (via a password). The court thus found that the defendant knew that people in the United States were accessing its site because of this arrangement, and it thereby constituted a U.S. distribution in violation of the injunction.[64]

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event, the defendant Web publisher in *Cybersell* was not subject to jurisdiction in the plaintiff's forum.

61. 947 F. Supp. 1328 (E.D. Mo. 1996). Incidentally, it is to be noted that *Maritz* is the first case in the Eighth Circuit to apply traditional personal jurisdiction doctrines to Internet contacts.

62. *Id.* at 1332. The court's rationale for upholding jurisdiction seems to run counter to that which justifies refusal of jurisdiction in the majority line of cases involving Web site advertisements. The court justified jurisdiction on the basis of the defendant's intent to reach a global audience. This case may, however, be distinguished on its facts, especially on the highly commercial nature of the Web page from which the court inferred an intention to solicit business in Missouri.

63. 939 F. Supp. 1032 (1996).

64. *Id.* at 1039. Hence, some courts do read the due process constraints liberally, sustaining exercises of jurisdiction on the basis of little more than the accessibility of a defendant's Web page to residents of the forum state. But they usually have special reason to do so; for example, in this case, to give effect to court orders and injunctions. Cases generally

Is there the presumption of targeting of the forum for business? In cases where there is evidence from which to infer some subjective intent to target the forum, courts have generally allowed the presumption of "fair warning" to the defendant.[65] It is left to the defendant to disprove the targeting or to argue that on a balance of fairness, justness, and reasonableness he should not be haled before the forum courts.

In the highly popular case *Zippo Manufacturing Co. v. Zippo Dot Com*,[66] the plaintiff was Zippo, a cigarette lighter manufacturer in Pennsylvania that brought a trademark infringement and dilution action against the defendant, a California Internet news service company that was using the domain name of "zippo.com," "zippo.net," and "zipponews.com." The defendant's Web site had advertisements and applications could be filled out by users wishing to subscribe to its news service. Upon processing, and after credit approval, a password was assigned to the subscriber for access to the service. The defendant was haled into court on the basis of purposeful availment and targeting through its contracts with seven Internet providers in Pennsylvania (including two in the plaintiff's district), and the fact that it had electronically entered into subscription agreements with three thousand residents of the forum state.[67] The defendant was held to have purposefully availed itself of the benefits of Pennsylvania law and its economy by entering into contracts over the Internet and engaging in knowing and continuous transmission of computer files over the Internet to Pennsylvania residents. Hence, it should also have to bear the foreseeable burden of defending itself in Pennsylvania courts.[68]

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applying the broadest possible view of Internet contacts, and sustaining exercises of personal jurisdiction on the basis of the accessibility of defendant's Web sites to residents of the forum state, include the following: *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (1996); *Bunn-O-Matic Corp. v. Bunn Coffee Service Inc.*, No. 97-3259, 1998 U.S. Dist. LEXIS 7819 (C.D. Ill. Mar. 31, 1998); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (1996); and *Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997).

65. *Playboy Enters.*, 939 F. Supp. at 1039. This indeed seemed to be the case in *Maritz*. *See Maritz*, 947 F. Supp. 1328. In *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996), another case involving trademark infringement in advertisements, the additional fact that the defendant placed similar print advertisements concurrent in the WASHINGTON POST (a local newspaper specifically available in the forum state) and not in a paper with nationwide circulation, convinced the court that there was purposeful targeting of the residents of the forum state. *Id.* at 3. This substantially elevated the plaintiff's argument for specific jurisdiction. The fact that the defendants did receive benefits in the form of actual donations by the deceptively similar name in response to their advertisements convinced the court that the exercise of its jurisdiction was well within due process. *Id.* at 3-4.

66. 952 F. Supp. 1119 (W.D. Pa. 1997).

67. *Id.* at 1126.

68. *Id.* at 1125-27. See also *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), a prominent case cited by the court in *Zippo*, which also involved a similar nature of activity

C. *High-Level Interaction and Actual Conduct of Business by Use of the Internet*

Is an Internet communication (such as an online contract) followed up by an act of delivery of goods or services sufficient? If so, what form or type of delivery will suffice, such as physical or digitally online? Usually, where interaction is followed up by an act of delivery of the good or service, especially the traditional physical act of delivery for payment, it is compelling evidence, or proof, of an intention to conduct business in the forum state.[69] The higher the volume and value of such exchange or transaction, the harder it is for the defendant to argue against jurisdiction based on the minimum contacts, purposeful availment and targeting, and the reasonable of jurisdiction. The courts have generally been consistent in their decisions rendering business agreements related to, or arising out of, Internet contacts to be susceptible to personal jurisdiction.

Popular shopping sites such as Amazon.com (for books), BMG.com (for music), eBay.com (for auctions), etc. have a scroll down feature that allows nearly everyone from any country in the world to buy or auction products from or through them. This is worldwide targeting. In some other cases, the company or business lists only U.S. states for service or delivery (in which case it is at least proof of an intention to conduct business by transacting in goods or services with potential customers from all the listed places). In these cases, it is clearly easy to argue for jurisdiction over the said company or business, especially if the volume and value are high. Even general jurisdiction may be established in such cases. In fact, the Internet activity is merely a factor, and may not even be the primary or determinative factor, in a jurisdictional due process analysis. Hence, the more interactive the case, the less of an issue of the Internet aspect of the business.

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where jurisdiction was found. In this case, the defendant was a software provider using the plaintiff to knowingly advertise and distribute its services and "shareware" to the forum residents.

69. See, for example, *American Network, Inc. v. Access America, Inc.*, 975 F. Supp. 494 (S.D.N.Y. 1997), which was a trademark infringement case where hyperlinks in the defendant's Web site led to a sales and contract page, and service contracts were in fact executed online between the defendant and its customers residing in the forum state. *See also* Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34 (D. Mass. 1997) (finding that defendant did consulting work for a corporation that did much of its business in the forum, as well as advertised on its Web site that it had done business for that forum customer); Gary Scott Int'l, Inc. v. Baroudi, 981 F. Supp. 714 (D. Mass. 1997) (finding that where the defendant had physically sold goods to residents in the forum state and touted at a trade show that he intended to sell large numbers of the goods to a pharmacy that does business in forum state).

IV. TRADITIONAL TEST

The traditional test is whether the Web site is an active or passive one. The plaintiff must prove this by showing the following factors in support of jurisdiction:

(a) the nature and quality of the contacts is such that it seeks to reach all Internet users; *and*

(b) that the quantity of contacts –

(i) evinced purposeful availment in that it shows that the information transmitted was clearly intended to promote the defendant in the forum state (or even nationwide or worldwide), which in turn evinces a purposeful availment to itself of the privilege of conducting activities in the forum state (or even in all U.S. states or globally), and

(ii) it was fair, just and reasonable to impose jurisdiction (for specific jurisdiction); *or*

(iii) that there was substantial and continuous activities by the defendant in the forum, or the contacts and the cause of action are related (for general jurisdiction).

This test has been applied in Internet cases, and most recently in the case of *GTE New Media Services, Inc. v. BellSouth Corp.*[70] In this case, the district court held that the defendant companies' service of providing national "Yellow Pages" directories over the Internet subjected it to the forum court's jurisdiction because the Web sites were "highly interactive" and "significantly commercial in both quality and nature."[71] The defendants derived substantial advertising revenues from the sites because of the residents of the forum who accessed and utilized the site. However, on appeal the United States Court of Appeals for the District of Columbia disagreed with the lower court's decision that there was sufficient evidence to support personal jurisdiction. Nonetheless, the D.C. Circuit determined that plaintiff was entitled to pursue discovery aimed at addressing matters relating to personal jurisdiction. Thus, the court remanded the case for jurisdictional discovery.[72] The D.C. Circuit preferred a strict purposeful availment test over the interactivity test used by the district court because purposeful availment focuses on whether the defendants have chosen to target their activities toward a specific forum. Therefore, because defendants can control whether they engage in activities targeting a specific forum, it is easy for them to predict whether a court will find that they have done so, as opposed to predicting whether

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70. 199 F.3d 1343 (D.C. Cir. 2000).
71. *Id.* at 1349.
72. *Id.* at 1351-52.

a court will label their Web sites as sufficiently interactive to warrant jurisdiction.[73]

Another example is *Cybersell, Inc. v. Cybersell, Inc.*[74] The plaintiff in *Cybersell* was an Arizona corporation providing Internet and Web advertising, marketing, and consulting services. It obtained approval to register the name "Cybersell" as a federal service mark. The defendant, a Florida corporation providing business consulting services for management and marketing on the Internet, maintained a Web page at the time that the defendant obtained its federal service mark approval. After the defendant failed to satisfactorily change its Web page following such a demand from the plaintiff, it commenced an infringement lawsuit in Arizona. The district court, however, granted the defendant's motion to dismiss the action for lack of personal jurisdiction. The defendant appealed the decision. In affirming, the United States Court of Appeals for the Ninth Circuit focused on the traditional due process analysis.[75] In the course of its decision, the court rejected the plaintiff's reliance on an "effects" test, stating that it did not apply with the same force to a corporation as it does to an individual "'because a corporation does not suffer harm in a particular geographic location in the same sense that an individual does.'"[76] Second, the court distinguished the defendant's conduct from that of the defendant in *Panavision International, L.P. v.*

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73. *See Civil Procedure—D.C. Circuit Rejects Sliding Scale Approach to Finding Personal Jurisdiction Based on Internet Contacts.*—GTE New Media Services Inc. v. BellSouth Corp., *199 F.3d 1343 (D.C. Cir. 2000)*, 113 HARV. L. REV. 2128, 2131-33 (2000).

> The circuit court's strict purposeful availment standard is more determinate than the district court's interactivity standard because purposeful availment focuses on whether the defendants have chosen to target their activities toward a specific forum. Because defendants can control whether they engage in activities targeted toward a specific forum, it is easier for them to predict whether a court will find that they have done so than to predict whether a court will label their Websites as sufficiently interactive to warrant jurisdiction.

Id. at 2133. This was not the first time, nor would it be the last time, that a Circuit Court would prefer the traditional test. *See, e.g.*, Flower, *supra* note 38, at 846-47 (discussing the *Maritz* case where the court applied the usual five-part test to determine "minimum contacts" sufficient to confer jurisdiction).

74. 130 F.3d 414 (9th Cir. 1997).

75. *Id.* at 416-17 ("'[I]t is essential in each case that there be some 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.'" (quoting Hanson v. Denckla, 357 U.S. 235 (1958))).

76. *Id.* at 420 (quoting Core-Vent Corp. v. Nobel Indus., 11 F.3d 1482, 1486 (9th Cir. 1993)).

Toeppen, because here the defendant unknowingly used a plaintiff's trademark.[77]

Similarly, the United States Court of Appeals for the Sixth Circuit in *CompuServe, Inc. v. Patterson*[78] utilized the traditional test. The court examined an infringement declaratory action brought in Ohio by an Ohio corporation against a Texas resident who used its online service as a distribution center for the defendant's shareware software products. The Sixth Circuit held that personal jurisdiction lay in Ohio because the Texas resident had entered into a "Shareware Registration Agreement" which provided, among other things, that it was "to be governed by and construed in accordance with" Ohio law.[79] The defendant had electronically transmitted thirty-two master software files to CompuServe and sales were made in Ohio to the defendant in Texas. Because the defendant had chosen to transmit his product from Texas to CompuServe's system in Ohio, the court concluded that the defendant had purposefully availed himself of the privilege of doing business in Ohio.[80]

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77. *Id.* at 420 n.6; *see also* Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996) (involving a defendant who registered the domain names of many California companies with the express purpose of extorting fees from them).

78. 89 F.3d 1257 (6th Cir. 1996).

79. *Id.* at 1262-63.

80. *Id.* at 1263-68; *see also* Cheryl L. Conner, CompuServe v. Patterson*: Creating Jurisdiction Through Internet Contacts*, 4 RICH. J.L. & TECH. 9 (1998), *available at* http://www.richmond.edu/~jolt/v4i3/conner.html#t5 (last visited July 17, 2002); Joanna B. Bossin, Note, *What Constitutes Minimum Contacts in Cyberspace After* CompuServe, Inc. v. Patterson*: Are New Rules Necessary for a New Regime?*, 13 GA. ST. U. L. REV. 521 (1997).

> [L]etting the common law run its course in order to better understand where cyberspace is heading . . . . need not be complicated further by new laws . . . .
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> The point of discussing the correctness of the circuit court's ruling in *CompuServe* is to show that traditional rules of minimum contacts jurisprudence are not strained when applied to Internet cases; in fact, they are easily applied to such cases, and more than one feasible solution is possible. . . .
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> . . . [T]he Internet can fit into the shoes of its personal jurisdiction predecessors to achieve consistent results.

Id. at 544-45. Hence, what matters is the end result (purposeful direction of activity) rather than the means or medium of doing so. *See, e.g.*, Edias Software Int'l, L.L.C. v. Basis Int'l, Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (finding that the contractual relationship between an Arizona limited liability company and a New Mexico corporation combined with the defendant's use of the Internet justified jurisdiction in Arizona notwithstanding that the contract provided that it would be governed by the law of the State of New Mexico).

V. INTERNET-ADAPTED TESTS

A. *Zippo's Sliding Scale Test*[81]

In cases involving the conduct of commercial activity through the Internet, a "sliding scale" test for jurisdiction—which involves measuring the degree of interactivity of a Web site—is frequently applied.[82] The "sliding scale" test originated in the heavily cited Internet case *Zippo Manufacturing Co. v. Zippo Dot Com.*[83]

In *Zippo*,[84] the court categorized Internet business and commerce transactions as a spectrum which could be divided into three bands. The exercise of jurisdiction is measured directly and proportionately to the

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81. Many writers and judges consider this the best model so far. *See* Brian E. Daughdrill, Comment, *Personal Jurisdiction and the Internet: Waiting for the Other* Shoe *to Drop on First Amendment Concerns*, 51 MERCER L. REV. 919, 933 (2000) (pointing out that while it is the best model proposed thus far, it still lacks clarity in defining what constitutes an interactive and a passive Web site); *see also* Mark C. Dearing, *Personal Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System into the 21st Century?*, 4 J. TECH. L. & POL'Y 4 (1999), *available at* http://journal.law.ufl.edu/~techlaw/4/Dearing.html (last visited July 17, 2002). "[T]his test appears to be the most natural progression for the theory of personal jurisdiction as developed from the days of *International Shoe* up through Justice O'Connor's opinion in *Asahi*." *Id.* ¶ 38. It certainly is the most widely used one. It is alternatively called the "nature of the web site analysis" (*id.* ¶ 17), the "Web site continuum approach," or the "degree of interactivity analysis," but they all mean the same thing. Finally, see also Christopher McWhinney et al., *The "Sliding Scale" of Personal Jurisdiction via the Internet*, STAN. TECH. L. REV. 1 (2000), for a simple analysis of *Zippo* and a short post-*Zippo* account of the application of the sliding scale test in subsequent cases.

82. Since the *Zippo* decision, there has been a plethora of subsequent cases in different states and courts (lower and higher) applying the sliding scale test. The *Zippo* court's approach has been adopted or cited with approval in several circuit courts. *See, e.g.*, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999). The approach has also been endorsed by numerous federal district courts, for example, *Roche v. Worldwide Media, Inc.*, 90 F. Supp. 2d 714 (E. D. Va. 2000). Furthermore, the test has been applied and has resulted in jurisdiction in a whole range of actions. *See, e.g.*, Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356 (W.D. Ark. 1997) (wrongful death case); Transcraft Corp. v. Doonan Trailer Corp., No. 97 C 4943, 1997 U.S. Dist. LEXIS 18687 (N.D. Ill. Nov. 12, 1997) (trademark infringement case); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738 (W.D. Tex. 1998) (contract case); Park Inns Int'l, Inc. v. Pac. Plaza Hotels, Inc., 5 F. Supp. 2d 762 (D. Ariz. 1998) (trademark infringement case); Blumenthal v. Drudge & AOL, 992 F. Supp. 44 (D.D.C. 1998) (tort/defamation case); GTE New Media Servs., Inc. v. Ameritech Corp., 21 F. Supp. 2d 27 (1998) (antitrust case); Mieczkowski v. Masco Corp., 997 F. Supp. 782 (E.D. Tex. 1998) (tort/wrongful death case); ESAB Group, Inc. v. Centricut, LLC, 34 F. Supp. 2d 323 (D.S.C. 1999) (patent infringement case); Origin Instruments Corp. v. Adaptive Computer Sys., Inc., No. 3:97-CV-2595-L, 1999 U.S. Dist. LEXIS 1451 (N.D. Tex. Feb. 3, 1999) (trademark infringement case); Int'l Star Registry of Ill. v. Bowman Haight Ventures, Inc., No. 98 C 6823, 1999, U.S. Dist. LEXIS 7009 (N.D. Ill. May 4, 1999) (trademark infringement case); Millennium Enters., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907 (D. Or. 1999) (trademark infringement case).

83. 952 F. Supp. 1119 (W.D. Pa. 1997).

84. *Id.*

nature, quantity, and quality of the commercial activity that is conducted over the World Wide Web. A "sliding scale" for the evaluation of Internet contacts is one under which "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[85] The court then described and explained the scale as follows:[86]

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. *E.g. CompuServe, Inc. v. Patterson*, 89 F.2d 1257 (6th Cir. 1996).[87] At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. *E.g. Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).[88] The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *E.g., Maritz, Inc. v. Cybergold, Inc.* 947 F. Supp. 1328 (E.D. Mo. 1996).[89]

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85. *Id.* at 1124; *see supra* text accompanying note 66 (discussing the facts in *Zippo*).

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

87. "Doing business over the Internet" Web sites. At this end of the spectrum, personal jurisdiction is proper as the defendant runs an "active" Web site, which undertakes business transactions involving the knowing and repeated transmission of computer files to remote users, a which is clearly conduct of electronic commerce. Jurisdiction over this level of interactive activity satisfies due process and the reasonableness of the forum state claiming jurisdiction because the defendant will be purposefully availing himself of the law and economic benefits of the forum state. As a reasonable person, the defendant must anticipate being haled into court in the forum because of the manner in which he targeted or directed his sale of goods or services at the forum state. The nature and quality of forum contacts and consciousness, as well as the deliberateness of the contacts, are important factors that the courts will consider.

88. Passive Web sites. At this end of the spectrum, personal jurisdiction is not proper because the Web site is merely "passive," for example, by doing no more than advertising or merely distributing information.

89. Interactive Web sites. In the intermediate level or middle of the spectrum are Web sites that mostly involve the defendant and users exchanging information via an Internet service provider. In this gray area it is less clear whether personal jurisdiction is warranted or not and the assertion of such jurisdiction will depend on the facts of each case. The courts must make an individual factual inquiry—an ad hoc evaluation—of the facts and circumstances and arrive at a conclusion through a totality of circumstances test. The courts must consider several factors, including the level of interactivity and the nature—whether commercial or not—of the Web site in question. The level of activity must still be reasonable; that is, the forum state should have a strong interest in the adjudication of a dispute involving a resident corporation and the forum's interest should be weighed against the burden on the defendant to defend himself there.

As noted earlier, *Zippo* has been followed by many courts and is in the process of becoming a generally accepted standard for evaluating the exercise of personal jurisdiction based on contacts over the Internet.[90]

In the later case *Weber v. Jolly Hotels*,[91] the court identified three types of Internet jurisdiction cases that, not surprisingly, fall neatly into *Zippo*'s three sectors. The first are cases involving passive Web page usage (e.g., for advertisements and information dissemination); second, Web pages with some interactivity (e.g., "where a user can exchange information with the host computer"); and third, where the parties engage in business on the Internet, either entirely through the computer (especially involving information services) or coupled with traditional acts of commerce (mostly involving goods transactions).[92] Thus, this categorization strongly resembles the popular "sliding scale" model presented by *Zippo*.

B. Other Tests[93]

Various other types of tests have been used by U.S. courts. For example, a sort of *"totality of contacts" test* or *"multi-factor" test* was preferred to the *Zippo* test and applied to jurisdictional analysis in *Telco Communications v. An Apple A Day*.[94] While the court in this case acknowledged the *Zippo* spectrum analysis, it determined that *Inset* established a more convincing precedent.[95] *An Apple A Day* involved defamatory press releases placed on the defendant's Web page which, but for *Inset*, would be characterized as a passive site under *Zippo* and would not permit personal jurisdiction in Virginia, the forum state. According to the court, some further act in the plaintiff's forum state was required, and "[b]ut for the Internet service providers and users present in Virginia, the alleged tort of defamation would not have occurred in Virginia."[96] In addition, the defendants knew that the plaintiff was based in Virginia when the defendants issued the press releases. As a result, the defendants

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90. *See supra* note 82.
91. 977 F. Supp. 327 (D.N.J. 1997).
92. *Id.* at 333; *see* Russell D. Shurtz, Comment, *www.international_shoe.com: Analyzing* Weber v. Jolly Hotels*' Paradigm for Personal Jurisdiction in Cyberspace*, 1998 BYU L. REV. 1663 (1998) (arguing that although it would be a useful analysis, *Weber* was "incomplete" and required "fixing" by augmentation with both a "relatedness" and a "reasonableness" criteria to complete the analysis). Note that the writer is conforming the *Weber* analysis to the traditional model (by including the second and third prongs of the minimum contacts test). *Id.* at 1690-91. Note also how similar the complaint of vagueness applies to *Weber* as it did to *Zippo*.
93. *See* Dearing, *supra* note 81, ¶¶ 32-37.
94. 977 F. Supp. 404 (E.D. Va. 1997).
95. *Id.* at 406.
96. *Id.* at 408.

could reasonably have anticipated being haled into court there.[97] The court preferred analyzing the connecting factors and summing them up as sufficient contact, rather than focusing on the Internet dimension per se.[98]

In *Panavision International, L.P. v. Toeppen*,[99] the court applied an "effects" test to find that personal jurisdiction existed.[100] In *Panavision*, the California-based plaintiff held registered trademarks to the names "Panavision" and "Panaflex" in connection with movie equipment; in attempting to register "Panavision.com" as its Internet domain name, the plaintiff found that the Illinois-based defendant had already registered that domain name. The defendant, however, offered to sell the domain name rights to the plaintiff for $13,000.[101] The plaintiff sued in California for an action in, inter alia, trademark dilution. The district court determined that it had personal jurisdiction over the defendant in California. The defendant appealed, but the Ninth Circuit affirmed jurisdiction. In considering the jurisdictional issue, the court reviewed its earlier decisions in *Cybersell* and *CompuServe*, noting that in *Cybersell* its reference to "the effects felt in California" was an application of the "effects doctrine" to determine purposeful availment.[102] The defendant's

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97. Dearing, *supra* note 81, ¶¶ 30-31.

98. Hence, in such an analysis, the interactivity of the defendant's Web presence will be a factor as well as the defendant's other actions in and around the forum state. The courts may consider such additional factors as the existence of wire communications with or within the forum state, external news group, published advertisements, or customers located within the forum state. This means of analysis still satisfies the "something more" necessary for a conclusion of purposeful availment (at least more than mere "stream of commerce"). In the context of e-commerce, for example, many Internet business transactions are followed up by physical delivery in the real world. In such cases, the Internet usage is only one consideration (usually an ancillary or secondary factor) among the many factors the court considers when determining sufficient contacts—and fairness—in extending jurisdiction over a defendant.

99. 938 F. Supp. 616 (C.D. Cal. 1996).

100. Under the "effects" test in a tort law context, a defendant has purposefully availed itself of forum benefits when his allegedly tortious actions are expressly calculated to cause injury in the forum. *See, e.g.*, Cal. Software, Inc. v. Reliability Research, Inc., 631 F. Supp. 1356 (C.D. Cal. 1986); Calder v. Jones, 465 U.S. 783 (1984) (holding that the publisher of defamatory statements was subjected to suit where the plaintiff suffered damage); Indianapolis Colts, Inc. v. Metro. Balt. Football Club L.P., 34 F.3d 410 (7th Cir. 1994) (holding in an infringement of trademark action that jurisdiction was proper in the forum (Indiana) where the plaintiff was harmed). It should be noted that this test is more commonly applied in tort cases and intellectual property disputes.

101. It was determined that the defendant was the quintessential "cybersquatter," that is, someone who pre-empts the registration of companies' or other famous entities' usually trademarked names as Internet domain names, and then offers to sell the domain name rights back to them for monetary gains.

102. Examining the "effects doctrine" more closely, the Ninth Circuit noted that in tort cases, personal jurisdiction may be attached if the defendant directs his conduct toward the forum state or the conduct has an effect in the forum state. The court went on to say that the instant case

acts of extortion was the "something more" needed to satisfy the purposeful availment requirement.[103]

Some writers and commentators, despite their misgivings about the usefulness of the traditional tests for Internet transactions, have proposed even more elaborate and novel alternative jurisdictional tests,[104] such as a cyber-contacts/earnings analysis,[105] and a cyber-court with online jurisdiction, "complete with its own rules and procedures"![106]

As I have noted in the introduction to this Article, different tests yield different results if and when applied to similar facts, but state courts largely have the sovereignty to apply whichever test they prefer. Also, different subject matters may deserve different treatment. Hence, we see

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was analogous to a tort case. *Panavision Int'l*, 938 F. Supp. at 621. The defendant purposefully registered the plaintiff's trademarks as domain names with the intent of extorting money from the plaintiff. The plaintiff suffered the brunt of the harm in California, and the defendant knew that that was likely because plaintiff's principle place of business and working industry was located there. *Id.*

103. Some commentators support a *Calder*-type "effects" test. *See, e.g.*, Sam Puathasnanon, Note, *Cyberspace and Personal Jurisdiction: The Problem of Using Internet Contacts to Establish Minimum Contacts*, 31 LOY. L.A. L. REV. 691, 716-21 (1998) (proposing a modified yet still expansive effects test which includes non-intentional acts having foreseeable effects). Most others, however, strongly caution against such a test as potentially giving way to a lax treatment of the jurisdictional question and allowing too low a threshold. *See, e.g.*, Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2269-74 (1997) (noting that purposeful availment and expectation should be emphasized instead of mere knowledge). The danger is one of slipping down the slippery slope to the sort of "stream of commerce" analysis envisioned by Justice Brennan in *Asahi* (*see infra* note 116), rather than the "something more" requirement of Justice O'Connor in *Asahi* (*see supra* note 31) that is more consistent with the *International Shoe/World-Wide Volkswagen* test and their progeny. Yet others worry that this would "chill" e-commerce. *See, e.g.*, Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, ¶¶ 60-61 (1997) (voicing his worry that a lowering of the jurisdictional threshold would be "anathema to the very free-information flow nature and democratizing influence" of the Internet).

104. Richard A. Rochlin, Note, *Cyberspace,* International Shoe*, and the Changing Context for Personal Jurisdiction*, 32 CONN. L. REV. 653 (2000). "Courts must begin to look at *Shoe* as more than an evolving framework; they must question its underlying assumptions and paradigms." *Id.* at 674.

105. *Id.* at 671-72. According to a proposed "cyber-earnings/contacts" analysis,

> a court would assess the amount of earnings reaped from business in the state where the defendant is challenging jurisdiction. If the defendant reaped minimum profits/earnings in that state such that the costs of maintaining the suit would be proportional to the profits, jurisdiction over the out-of-state defendant would be proper.

Id. at 671. The problem with this test is that it can also be arbitrary and give rise to inconsistent results. It could, however, be a helpful *factor* in due process fairness analysis and a refinement to the "sliding scale."

106. *Id.* at 672-73. Under this proposal, the modern tenets of personal jurisdiction would be replaced by a system that would ostensibly provide an affordable and technological solution, which would uniquely and substantively addresses the economic realities of the Internet. Even though this may not (yet) be feasible in the domestic context, it may not be too farfetched an idea in the international context in the long run.

that non-commercial cases such as defamation, tort law and domain name disputes may justify, for example, an "effects" type test that may not be suitable or popularly applied in the commercial and business context.

It is possible to summarize, at this stage of analysis, the above tests under an umbrella consisting of a general and common rationale. The trend of cases and tests for determining jurisdiction are both practical and logical. Passive usage of Web pages such as information-providing and general advertising Web sites, without more, are not the type of purposeful activity related to the forum that would make the exercise of jurisdiction reasonable. If the rule were otherwise, defendants would be amenable to suit everywhere—even in the absence of evidence of purposeful availment—by mere fortuitous contact or "stream of commerce," and we know how information on the Internet is more a flood than a stream. Lowering the threshold too much would lay too onerous a burden on e-commerce merchants and entrepreneurs and would impede free trade. Hence, even cases such as *An Apple A Day* and *Panavision* (which utilized the "effects" test) still required that "something more." This is still the order of the day in jurisdictional analyses in most, even if not all, U.S. courts. Predictability and certainty underlies smooth economic activities in jurisdiction as in every other area of the law, be it in the context of the "real world" or cyberspace.

VI. CAN THE OLD RULES RECONCILE WITH THE NEW OR ARE THEY IN FACT ANALOGOUS? EVOLUTION VS. QUANTUM LEAP[107]

> *"A complex system that works is invariably found to have evolved from a simple system that worked."*
>
> —John Gall

It has been said that "'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."[108] On the other hand, "[u]nderstanding technology is key to resolving the

107. Some commentators go as far as to suggest an entirely new legal and judicial system to deal with transactions occurring in the dimension of cyberspace, one that is mutually exclusive from the "real world" legal system. For example, laws created and enforced by cyber-communities, the development of a cyber-lex mercatoria, etc. Even if such a suggestion can be instituted in the near future for some categories of Internet disputes, such a system simply cannot replace the framework of court adjudication and the existing legal rules simply because Internet transactions and "real world" transactions are interlinked and overlap in many respects.

108. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

conflicts between law and technology. Efforts to develop norms can bridge the gap between old laws and new technology."[109] With the development of supposedly "new" tests and the new jurisdiction-determining models proposed by some writers, the question facing us is: Is the so-called traditional test ill-suited to the Internet realm and e-commerce context, or are the "new" tests merely progressive developments and the product of the natural evolution of the *International Shoe/World-Wide Volkswagen* test (which itself was an evolution from the *Pennoyer* model)? If so, are the avant garde and innovative for due process jurisdictional analysis in Internet transactions unnecessary? As one writer asks: "Does the Internet necessitate an evolution or a revolution in legal thinking?"[110] There is a clear split in opinion between academic proponents and opponents of an Internet revolution overhauling jurisdictional principles for Internet transactions.

So, is the Internet really such a different form of communication and means of commercial transaction from other electronic means (such as the telephones and fax machines) so as to merit or justify a paradigm shift? After examining the cases, the so-called "new" tests, and after considering the thought-provoking proposals for determining U.S. courts' jurisdiction over Internet transactions, I believe that all the hullabaloo is just a tempest in a teapot. As one commentator stated: "[t]he Internet is not, as many suggest, a separate place removed from our world. Like the telephone, the telegraph, and the smoke signal, the Internet is a medium through which people in real space in one jurisdiction communicate with people in real space in another jurisdiction."[111] The idea of cyberspace as

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109. Juliet M. Oberding & Terje Norderhaug, *A Separate Jurisdiction for Cyberspace?*, Journal of Computer-Mediated Communication: Vol. 2, No. 1: Pt. 1 of a Special Issue (June 1996), *available at* http://www.ascusc.org/jcmc/vol2/issue1/juris.html (last visited July 17, 2002).

110. Cheryl L. Conner, CompuServe v. Patterson*: Creating Jurisdiction Through Internet Contacts*, 4 RICH. J.L. & TECH. 9 (1998), *available at* http://www.richmond.edu/~jolt/v4i3/conner.html#t5 (last visited July 17, 2002. The writer expresses the view that there are dangers involved in the wholesale creation of new legal principals which, even though it is difficult to adapt and apply current jurisdictional principles to Internet transactions, do not justify displacing established norms that may still be used to regulate this new technology. Although an analysis of the line of cases subsequent to *CompuServe* showed the diminished importance of physical presence, a contacts analysis (i.e., contacts made through Internet contacts), different from those made through Web sites, will nonetheless be conceptually easier to deal with than basing a finding of jurisdiction solely on Web site activity. It will also restrain the possible floodgates of litigation in U.S. courts if a more generous model for jurisdictional analysis was developed.

111. Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475, 476 (1998). The theme of Goldsmith's article is that, despite contrary views, the Internet is no more likely to undermine national sovereignty (as some were concerned with) than other forms or mediums of electronic transaction such as the telephone, satellite or television. Thus, legal regulation of the Internet is still best served by the "traditional" territorial methodologies that regulated other transnational transactions; the Internet

a new and separate dimension with its own laws and legal system is romantic but illusory, and to give in to this notion is to accept a fallacy.[112]

It is tempting to articulate and argue for paradigm shifts in legal doctrines, especially when caught up in a new and exciting technological development. Many legal commentators will give in to this temptation to join the ranks who articulate new lawmaking principles and systems. However, for the people and businesses practically impacted by the rules, predictability and constancy is essential, and to cloak the old rules with potentially confusing new ones without analogyzing the old ones and clarifying their interrelation, will only perpetuate confusion.[113] The stability of progressive development is always preferable to tectonic paradigm shifts.[114] Certainly, the courts have taken this practical view and approached the matter accordingly.[115] The three prongs of current

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deserves no more special treatment. The writer also defends the idea of decentralized control in a world without international uniformity of regulatory mechanism (which is currently still a dream more than it is a reality, *see infra* Part VII).

112. For commentaries agreeing with this point view, Conner, *supra* note 80. Conner likewise expresses concern over the viability of the "science fiction" of a "virtual community sufficiently organized to create its own 'customs, norms, and rules.'" *Id.* ¶¶ 63-65; *see also* Shane A. Orians, *Exercising Personal Jurisdiction on the Internet: The Misapplication of the* Asahi Metal *Decision to "Cyberspace"*, 24 OHIO N.U. L. REV. 843, 861 (1998) ("When we begin to draw lines between the 'real world' and a 'virtual world,' we lose sight of the fact that one has created the other.") "'Cyberspace' does not exist: courts and commentators have been misled by the idea of 'Cyberspace.'" *Id.* at 863. "The popular thought of a 'society without borders' does not, and will never exist . . . . When a transaction occurs over the Internet, there are definite, traceable actions which courts can attribute to either a plaintiff or defendant." *Id.* at 864; *cf.* Bossin, *supra* note 80, at 544-45. Hence, what matters is the end result—purposeful direction of activity—rather than the means or medium of doing so. However, contrast this view with Richard Philip Rollo, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667 (1999). Rollo suggests that the United States "federally regulate the Internet and adopt the Cyberspace model to the Internet." *Id.* at 694.

113. The reality and practicality of business transcends the idea of a digital/"real world" dichotomy or divide. *See, e.g.*, Felix C. Pelzer, Note, *Unchartered Territory: Personal Jurisdiction in the Internet Age*, 51 S.C. L. REV. 745, 756-57 (2000). The author gave two examples of divergent scholastic approaches to the perceived Internet jurisdictional problem. On the one hand, Professor Howard B. Stravitz suggests an evolution of the traditional test by a greater focus on the fairness/reasonableness limb of the *Burger King* test and a concomitant relaxation of the minimum contacts threshold. *Id.* at 756. Professor Martin H. Redish, on the other hand, suggests the reformulation of "a more modern basis for the exercise of personal jurisdiction based on the internet" and rejects the purposeful availment test as being outdated. *Id.* at 757. The former view is more in line with my view that evolutionary rules should evolve but not be deconstructed, destroyed or replaced. According to Pelzer, this also seems to be the view of the United States Supreme Court. *Id.*

114. Such shifts are often propounded by what I term as "quantum leap theorists."

115. "Considering their specialized nature, courts [tend to] focus on the defendant's activities rather than the global nature of the Internet Itself. Just as they focus on where a defendant ships goods, not on where the interstate highway system runs." Michael Lampert, *The Internet and Personal Jurisdiction*, 198 N.J. LAW. 47, 48 (Aug. 1999). It is important to remember

jurisdictional analysis have proven themselves flexible enough to bring even Internet-related business transactions into its fold.[116]

Thus, the "minimum contacts," "purposeful availment," and "reasonableness" test is, as before, merely progressing to another level of development, and the test is perfectly adaptable to activities conducted over the Internet. The basic principles, paradigms and assumptions for the due process analysis remains unchanged.

Through a cursory examination of a line of Internet cases, it might seem that the U.S. courts have started to apply whole new sets of tests to determine the parameters of the jurisdiction that may be exercised over commercial Internet activities. However, there is actually not much difference among the general principles of all the so-called "new" tests, such as the *Zippo*, *An Apple A Day*, and *Panavision* tests.[117] They are variations and permutations of a contacts and connector analysis which closely resembles the traditional geographically-based test, seemingly so unsuitable to electronic cyberspace transactions. They seem to be "natural progression[s]" of which the *Zippo* spectrum has become the forerunner in terms of being followed, utilized and applied.[118]

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the distinction between means and end when talking about jurisdiction, in the Internet business context, we should focus on the means as well as the ends.

116. *See* Michael L. Russell, Note, *Back to the Basics: Resisting Novel and Extreme Approaches to the Law of Personal Jurisdiction and the Internet*, 30 U. MEM. L. REV. 157 (1999). Russell criticizes proponents of a "cyberspace jurisdiction unto itself, subject to its own substantive laws" stating that the abolition of the traditional jurisdictional analysis "underestimate the flexible nature of the due process analysis which is capable of addressing questions of personal jurisdiction that are raised by internet web sites." *Id.* at 182; *see also* Lampert, *supra* note 115. Lampert perceptively notes that all the courts have to do is analyze "the primary purpose of [a] website and any electronic interactions should be analyzed in addition to any non-electronic contacts and purposeful availment . . . [and] fundamental fairness and reasonableness." *Id.* at 50-51. In that way the online merchant can alter online commercial behavior according to a relatively stable cost/benefit analysis. *Id.* at 51. Among the factors to be considered are: the Web site's level of interaction with a user, the intent of the site creator, benefits gained by its posting, and any other non-electronic contacts (if any). *Id.* at 47.

117. For example, the "effects" test's key factor is whether the defendant's actions were aimed directly at or have a direct effect in the forum state, which is not that different from the *Zippo* test, and is clearly consistent with the traditional *International Shoe* test. *Contra* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 119 (1987) (discussing Justice Brennan's "stream of commerce" idea); *cf. id.* at 112 (Justice O'Connor's opinion in the same case).

118. *See* Dearing, *supra* note 81, ¶ 38. The author states:

> While some courts have applied variations to these analyses, the general and commonly accepted trend is to apply a *Zippo* analysis. Some cases have looked at a defendant's other actions to determine whether or not personal jurisdiction is proper. Factors to consider are additional contacts, location, effects on the plaintiff and the plaintiff's location, and the knowledge and intent of the defendant.

Id. ¶ 5.

Hence, on a closer comparative analysis, the *Zippo* sliding scale analysis (and other permutations) and the *Weber*-type three classification model[119] has morphed into a "Web site continuum of activity."[120] This "continuum" is essentially synonymous with the existing three-prong minimum contact, purposeful availment or targeting, and reasonableness model for the proper exercise of jurisdiction.[121]

In fact, this is precisely why courts such as *GTE* chose to apply the language of the equally functional, traditional test in its jurisdictional analysis without creating more problems in the analysis.[122] To further illustrate this point, the court in the copyright infringement case *Millennium Enterprises, Inc. v. Millennium Music, LP*[123] followed the *Zippo* and *Bensusan* precedents, but determined that they correctly applied the International Shoe/World-Wide Volkswagen principles to Internet contacts.

Therefore, the main factors courts will consider to determine the scope of jurisdiction include the following: (1) the level of interaction between the merchant and the consumer user (electronic interactivity); (2) the intention of the merchant in creating the Web site (intentional "targeting" or "reaching"); (3) the benefits the merchant gained by using the Web site (question of availment); and (4) any non-electronic or digital contacts or follow-up in the form of a transfer of goods or services relating to, or arising out of, the initial Internet contacts.

Whatever the courts use, the underlying concepts and goals are the same. Mere passive activity does not suffice *unless* something additional happens that would allow the defendant to reasonably expect being haled into court in another jurisdiction.[124] In the Internet context, where e-

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119. Shurtz, *supra* note 92, at 1683. The three classifications are as follows: (1) "Defendants who actively conduct business over the Internet," (2) "Cases in which a defendant maintains an interactive web site allowing users to exchange information with the host computer," (3) "Cases in which defendants have simply posted information on an Internet web site which is accessible to users in foreign jurisdictions." *Id.* at 1683-90. These classifications are similar to the active/interactive/passive distinction in *Zippo*, and to my earlier analysis of the three broad case categories.

120. With complete passivity on the one end and high activity on the other, the "scale" consists of different degrees of contacts.

121. *Infra* App. A.

122. *See generally D.C. Circuit Rejects Sliding Scale Approach*, *supra* note 73. Some writers have also noted that many courts still utilize the traditional jurisdictional analysis for companies conducting business over the Internet. *See, e.g.*, Richard A. Rochlin, Note, *Cyberspace,* International Shoe*, and the Changing Context for Personal Jurisdiction*, 32 CONN. L. REV. 653 (2000). The writer analyzed the *Inset* case where the court indicated that jurisdiction was properly established anywhere that a Web site was accessible to a forum resident. *Id.* at 664.

123. 33 F. Supp. 2d 907 (D. Or. 1999).

124. *See* Dearing, *supra* note 81, ¶ 42.

commerce is growing at an incredible rate and the United States is a front-runner in this market, it makes sense not to "rock the boat" by causing uncertainty among entrepreneurs contemplating entry into the market by electronic means.

From the U.S. policy perspective, it seems wise to adhere to the traditional application of jurisdictional principles. Balancing on a spinning top (which is the "reasonableness" prong) are several policy interests.[125] The consumer interests,[126] business interests,[127] the interests of the judiciary (involving a "judicial-efficacy analysis"),[128] and the interests of the Executive Branch (involving an "economic policy analysis").[129]

VII. AN INTERNATIONAL SOLUTION FOR A GLOBAL PHENOMENON

Is the current international treaty regime as a whole adequate to deal with jurisdictional issues involving electronic transactions?[130] The most prominent international (or more appropriately, regional) instruments are the European conventions on jurisdiction in relation to, inter alia, commercial matters. For example, such instruments include the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 27, 1969

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125. Here, I use the term "policy considerations" as an umbrella term to encompass the courts' balancing act of considering many policies, some of which conflict, when determining minimum contacts or purposeful availment (within a more confined discretion), and when determining reasonableness, fair play, and substantial justice (with a little more discretion for adjustment).

126. This analysis includes questions of consumer protection, fundamental justice, and the right to access judicial recourse (which is the plaintiff's interest in obtaining convenient and effective relief). *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

127. This analysis includes the defendants' concern over on their burden to defend in any given forum state. The merchant will want to maintain economic viability, certainty, and predictability in legal matters, especially any potential liability and the likely forums for dispute resolution.

128. The practical consideration of court dockets should not be forgotten. Internet-based disputes are a potential volcano of litigation lava which, if not controlled, will engulf the courts.

129. The U.S. economic policy reflects a desire to maintain business viability within the United States, and to attract business to set up bases for economic activities, especially including e-commerce. There is certainly cause for concern when unpredictable jurisdictional tests have a "chilling effect" on business enterprises and entrepreneurship. Hence, the issue of accession to an international jurisdictional convention will be considered in greater detail later in Part VII. The potential for the United States to grow as a hotbed of e-commerce activities will be enhanced only with a predictable legal environment for the Internet-based business. In order to achieve such predictability, a fundamental legal issue that must be resolved is, of course, personal jurisdiction.

130. Should there be a universal, uniform forum jurisdictional rule for Internet activities? *See* Heather McGregor, Note, *Law on a Boundless Frontier: The Internet and International Law*, 88 KY. L.J. 967 (1999/2000).

(Brussels Convention),[131] which deals with the issue of jurisdiction to adjudicate and also covers enforcement of foreign court judgments,[132] and the Rome Convention on the Law Applicable to Contractual Obligations of June 19, 1980 (Rome Convention),[133] which determines which state's substantive law should be applied in a certain case. These shall be examined before I consider the prospects of a wider and stronger uniform initiative.

A. E-Commerce and Private International Law—A Regional Experience[134]

Under the Brussels Convention, which provides for jurisdiction to adjudicate, "persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that State."[135] In order to determine whether a party is domiciled in a contracting state a court is to apply its internal law.[136] The seat of a company shall be treated as its domicile; however, in order to determine the location of the seat the court shall

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131. The text of the Brussels Convention is *available at* http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_brux-textes.htm (last visited July 17, 2002). For a list of useful resources, see also Gerald Moloney & Nicholas K. Robinson, *The Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments: Papers and Precedents from the Joint Conference with the Union des Avocats Européens held in Cork* (Sept. 1989), *available at* http://www.maths.tcd.ie/pub/IrishLaw/table.htm (last visited July 17, 2002).

132. There is an equivalent convention known as the Lugano Convention on Jurisdiction and the Enforcement in Civil and Commercial Matters of September 16, 1988 (Lugano Convention), which is identical to the Brussels Convention as to substance, differing only as to the signatories, which in this case included Member States of the European Union as well as the European Free-Trade Association. Since the jurisdictional provisions of the Lugano Convention are synonymous with those in the Brussels Convention (rendering them in effect "mirror" or "parallel" conventions), further reference to provisions of the Brussels Convention will apply to the concomitant provisions under the Lugano Convention. The text of the Lugano Convention is *available at* http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_lug-textes.htm (last visited July 17, 2002).

133. The Rome Convention was drafted by the European Union. Convention on the law applicable to contractual obligations, 1980 O.J. (L 266) 1 [hereinafter Rome Convention). The parties to the convention are the members of the European Union.

134. Unlike the European Union, the United States, with its traditional deference to state sovereignty, does not have a uniform domestic federal legislation governing e-commerce. Some writers have suggested that Congress enact federal legislation to eliminate the need for a choice of forum (or choice of law) analysis in relation to e-commerce. Congress has the authority to pass such legislation (from the commerce clause under U.S. Constitution, Article I, Section 8, Clause 3). *See* Aristotle G. Mirzaian, *Y2K . . . Who Cares? We Have Bigger Problems: Choice of Law in Electronic Contracts*, 6 RICH. J.L. & TECH. 20 (Winter 1999/2000). Traditionally, Congress has broad power to regulate interstate commerce and it has not diminished despite the perceived retreat in *United States v. Lopez*, 514 U.S. 549 (1995).

135. Brussels Convention, *supra* note 131, art. 2.

136. *Id.* art. 4.

apply its rules of private international law.[137] There are some exemptions from the Brussels Convention jurisdiction rule that may give a plaintiff a choice as to where he would like to sue a defendant. For example, in matters relating to a breach of contract, a person domiciled in a contracting state may also be sued in another contracting state (other than the domicile state), such as the state where the contract was (or was to be) performed.[138] There are also rules in the Convention specifically for consumer protection, which lay down that a consumer may chose between filing an action either in the country in which he is domiciled or in the seller's country of domicile. However, the seller can only sue the consumer in the consumer's country of domicile.[139]

Under the Rome Convention, the law chosen by the parties shall govern a contract. The choice does not have to be in writing, but it must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.[140] Thus, this requirement can be interpreted in different Internet environments, whether concerning the formation of an electronic contract itself or contract for goods and services involving the Internet (e.g., delivery). In the absence of a choice of an applicable law, the Rome Convention expresses the principle that the law of the state with which the contract is most closely connected shall govern the contract.[141] Even in a merchant-consumer relationship, the parties are in principle free to chose the applicable law. However, the consumer is protected insofar as he cannot by such an agreement be deprived of the protections that are accorded to him by any mandatory rules of the law of his state of habitual residence.[142]

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137. In addition to the usual registration and set-up of a corporation under the laws of a country, for example, other aspects of Internet commerce such as the place where Internet server equipment operates can also affect the question of establishing domicile. These issues are still open for examination and interpretation by drafters and the European courts alike.

138. Brussels Convention, *supra* note 131, art. 5(1). Hence, the place of performance may determine jurisdiction, and courts in the state where the obligation has been (or should have been) fulfilled may have jurisdiction. Consequently, issues that would affect the determination of the place of performance in e-commerce can include, for example, such fact-based analyses as where and when an electronic contract is concluded, and whether the product is provided (digitally) over the Internet.

139. *Id.* art. 14. "The consumer" is defined under article 13. The parties can derogate from this consumer protection exception under restricted circumstances as per Article 15.

140. Rome Convention, *supra* note 133, art. 3(1).

141. *Id.* art. 4(1). Furthermore, there is a presumption that the contract is most closely connected with the country where the party who is to effect the performance that is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence or, in the case of a corporate body, its central administration. *Id.* art. 4(2).

142. *Id.* art. 5.

B. Proposed and Adopted Changes to the European/EFTA Jurisdictional Conventions

Within the European Union, the Brussels and Rome Conventions currently govern the issue of cross-border jurisdiction and choice of law. However, in response to the rise of Internet business and other transactions, which are inevitably followed by disputes, the European Union's Council of Ministers recently adopted a controversial regulation proposed by the European Commission on November 30, 2000 (Brussels I),[143] which would allow consumers to bring civil and commercial disputes against a European Web site in the courts of their home country, no matter where the site was based.[144] This recent provision is still hotly debated as to its scope of coverage (i.e., exactly which Web sites will be affected).[145] In theory, the regulation affects only companies with Web

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143. This amendment (as well as the concomitant proposed amendment to the Rome Convention [hereinafter Rome II]) was proposed with the intention of modernizing the Brussels Convention and allowing the European Union to apply the principles of jurisdiction, recognition, and enforcement of judgments to e-commerce. It has since evolved into a battle between consumers' interest groups on the one side (*see, e.g.*, *Consumers' Rights in Electronic Commerce: Jurisdiction and Applicable Law on Cross-border Consumer Contracts*, Bureau Européen des Unions de Consommateurs (BEUC), BEUC/183/99 (Dec. 13, 1999), *available at* http://www.beuc.org (last visited July 17, 2002), and trade groups and business organizations on the other (*see, e.g.*, *European Publishers' Council Position Paper*, *available at* http://www.epceurope.org/statements/ecomciv.htm (last visited July 17, 2002); *Advertising Association's Position Paper*, *available at* http://www.adassoc.org.uk/position/convent.html) (last visited July 17, 2002). The consumers appear to have emerged the victor, at least in the EU legal context. See also *Links Dossier: EU E-commerce Directive*, *available at* http://www.euractiv.com (last visited July 17, 2002), for a set of useful links to both perspectives. While consumers would prefer the convenience of bringing Internet-based disputes before the courts of their country of residence (i.e., the principle of "country of destination"), industry groups generally prefer jurisdiction in the country where the supplier is based (i.e., the "country of origin" principle).

144. The long-term implications of the regulations are unclear. Despite the force of EU regulations (as contrasted with directives), there is no guarantee that this regulation will last. Because of political sensitivities and industry objections, the European Union agreed to revisit the regulation in five years and to amend the law if necessary. It remains to be seen how European e-commerce businesses will deal with the secondary legislation which, under EC law, trumps domestic legislation that might be contrary to it. *See* Stéphanie Francq, *The Impact of EC Legislation for a Service Provider Established in the United States*, 60 LA. L. REV. 1071 (2000). Businesses have until March 2002, when the law actually comes into force, to effect compliance. In the meantime, neither the cost implications of effecting compliance (in order to be represented in every member state), nor the changes in e-commerce business patterns (predicted to slow down e-commerce development, especially small operations) have been determined.

145. At the least, the law of the place of destination (the "home jurisdiction") applies with regard to insurance, employment and consumer contracts. *See* Karol K. Denniston & Robert A. Boresta, *Thinking Twice About Your Web Site—You May Be Liable in Countries You Didn't Intend to Visit*, ANDREWS BANK & LENDER LIAB. LITIG. REP., Jan. 11, 2001, at 13. The authors also state that "[i]n addition to setting the rules for contractual disputes, the commission is expected to expand the regulation's scope to cover pre-contractual liability of online traders and, as a result, regulate marketing and site content." *Id.* at 13. The focus of the European Union's

sites that have targeted and solicited clients in countries other than their own.[146] However, the definition is unclear on its face and has not yet been interpreted or clarified by the courts.

The E-commerce Directive is only one of several legislative initiatives within the EU,[147] as it followed the group of nations' conscious efforts to incorporate the fast-growing e-business sector into the internal market trade dynamics, as well as the European Commission's "eEurope" initiative.[148] The E-commerce Directive seeks to encourage e-business by settling several Internet business-related matters.[149] Among

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legislation, regulations, and administrative rules is clearly on consumer protection. But what will be the effect of further expansion of home jurisdiction to other areas of dispute (e.g., tortious, etc.)? It could have a chilling effect on the development of e-commerce and e-business in the European Union.

146. Brussels I currently provides that where a Web site's activities are "directed at" one or more member states, any person in those member states could initiate proceedings in its own country against the Web site operator. Thus, Web site operators run the risk that their business may be scrutinized by other member states.

147. Other significant (proposed or adopted) directives include the "E-commerce Framework Directive," which deals with free movement issues, electronic contracts, and liability of intermediaries; the "Distance Selling Directive" (June 2001) [Directive 97/7/EC] which seeks to provide additional consumer protection in long distance transactions (including a seven-day right to refund period); the "Data Protection Directive" (in force) [Directive 95/46/EC]; the "E-signatures Directive" (July 2001) [Directive 1999/93/ECJ]; and the "Consumer Interest Directive" (Jan. 2001) [Directive 98/27/EC]. See also JOHN DICKIE, INTERNET AND ELECTRONIC COMMERCE LAW IN THE EUROPEAN UNION (1999), which dedicates one chapter to the analysis of each directive.

148. For more on the "eEurope" initiative, see Stephen O. Spinks, *EU Initiatives on E-commerce* (Feb. 24, 2000), *available at* http://www.coudert.com/practice/dotcomspinks.htm (last visited July 17, 2002). The E-commerce Directive is rather controversial and, like Brussels I and Rome II, illustrates the conflict between the European Union's business and consumer lobbyists. The E-commerce Directive's primary aim was to ensure the free movement of electronic goods and services by authorizing operators to provide information services throughout Europe subject to compliance by the operator with the laws of its home state. EU Member States were given eighteen months from the date of its adoption (May 4, 2000) to transpose it into domestic law in accordance with the EC treaty. Through the E-commerce Directive, Europe has taken the initiative by adopting rules and regulations that will have a significant impact, not only on European businesses, but also businesses in the United States and other foreign companies looking to establish a presence in Europe. Aileen A. Pisciotta, Heather M. Wilson & John A. Wenzel, *European E-Commerce Directive Will Have Controversial and Far-Reaching Impact*, GLOBAL ECOMMERCE L. & BUS. REP., July 2000, at 20.

149. Briefly, the E-commerce Directive provides that

a) service providers make certain information about themselves and their activities readily available to recipients;

b) service providers be subject only to the regulations of their home state (i.e., the state in which they have their center of operations), but host states can still intervene on public policy grounds;

c) consumers are entitled to the full protection of consumer laws of the host state;

d) intermediaries will not be liable for material transmitted, provided that they do not initiate or modify it (and, in the case of caching and hosting, are not on notice as to

other matters, the E-commerce Directive covers the issue of which country's laws should be applicable to a given online provision of goods or services. Understandably, this issue is of great interest to the businesses conducting or contemplating entry into Internet commerce.[150]

The jurisdiction issue has revealed a rift within the Commission and exposed outright contradictions in European legislation that have caused confusion to national governments. The E-commerce Directive defends the notion that the country of origin should assume jurisdiction in civil and commercial disputes, rather than the country of destination.[151] However, in anticipation of the potential conflicts between Brussels I and the Directive, many EU member countries have put off measures to transpose the Directive into national law.[152] The deadline for the transposition of the E-commerce Directive into national law was June 2000. Thus, as the jurisdiction regulation was adopted before the E-commerce Directive is to "become law" in the EU nations, the Commission might have to rewrite the Directive or otherwise solve the dilemma. Although the European Commissioners deny that there is a clash between the two regulations, European organizations nonetheless

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its contents and act expeditiously to remove or bar access to the information upon becoming aware of the circumstances requiring removal or barring);

e) the laws of EU member states must be adapted to permit the formation of electronic contracts;

f) unsolicited commercial communications (i.e., "spamming") will need to be readily identifiable as such on receipt and will be subject to opt out registers; and

g) if a contract is to be entered into through clicking an icon, the contract is concluded only when the recipient of the service *receives* an electronic acknowledgment of his acceptance.

See generally Spinks, *supra* note 148.

150. *See* Mark Owen, *International Ramifications of Doing Business Online: Europe*, 564 PLI/PAT. 263 (1999). Owen noted the global initiatives already in place, including the UNCITRAL Model Law on Electronic Commerce (1996) and other proposals from the ICC, WTO and OECD. *Id.* at 267.

151. As noted before, Brussels I and Rome II would make the law of a consumer's jurisdiction the applicable law for e-commerce transactions, and would make the consumer's home state the appropriate forum as well. Thus, the proposed Brussels I would effectively nullify the E-commerce Directive's jurisdictional principle. The Directive would permit EU merchants engaged in electronic contracting within the European Union to comply only with the applicable law of their home country, eliminating the need to comply with the law of each Member State individually. Brussels I and Rome II also seem to disregard the effort underway to harmonize Member State consumer protection law through legislation based on the requirements of the Distance Selling Directive, as well as the effort to reduce the expense of resolving disputes for both merchants and consumers through the alternative dispute resolution provisions of the E-commerce Directive.

152. Under the Treaty of Amsterdam, regulations trump directives in their force of application.

will face a lack of consistency and legal certainty in jurisdictional rules with regard to their commercial Internet activities.

The problem with Brussels II is that it not only is at odds with the approach taken in the E-commerce Directive, but, as a proposal to Internet business activities, it does not appreciate the difference between establishing a passive Internet Web site that is accessible all over the globe, and the active solicitation and targeting of consumers (e.g., by advertisements and e-mailing). Efforts such as Brussels II that attempt to preserve the rights of consumers effectively shift the cost of litigating in a remote jurisdiction from the consumer to the merchant, and thereby exert a chilling influence on European enterprises considering the use of the Internet for marketing and contracting throughout the European Union.

If the modernized Brussels Convention causes problems for Europe's e-commerce industry, a similar initiative to update the Rome Convention (Rome II) is certain to make matters more confusing by sending mixed signals to merchants. The proposed Rome II revised text is expected to follow the footsteps of Brussels I. As in the case of the Brussels reform, Rome II states that the law of the consumer's country of domicile should apply, whereas under the E-commerce Directive the applicable law is that of the country where the company selling the goods or services is based.

Given the multi-national frameworks in which the abovementioned Conventions are negotiated, governments and industries have been calling for "harmonization projects" to remove obstacles to e-commerce. For example, the UNCITRAL promulgated a Model Law on Electronic Commerce in 1996 to encourage state and national governments to look to uniform principles in enacting e-commerce regulations.[153] These principles have influenced to varying extents the efforts of countries to bring their laws closer to true consistency. Also, there have been calls for even more co-ordination efforts on an international level toward a unified e-commerce law, with the aim of encouraging the development of online industries.[154]

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153. *See* Christopher Poggi, *Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation*, 41 VA. J. INT'L L. 224, 227 (2000).

154. *Id.* at 228. The author also discussed U.S. and EU efforts at e-commerce legislation to address problems relating to applicable law, forum selection and choice of law in online business disputes. *Id.* at 243-72. He then examined the efforts made toward an International Convention on Electronic Transactions "with a greater substantive breadth and scope than the UNCITRAL Model Law." *Id.* at 274; *see also id.* at 272-76.

C. E-Commerce and Private International Law—Prospects for International Uniformity[155]

I have already set out how the jurisdictional due process analysis in U.S. courts generally follows a three-part test to find (1) purposeful availment (by the defendant seeking the privilege of conducting activities within the forum and the protections of the laws of the forum), (2) a claim that arises out of those purposeful business activities, and (3) allowing the action to proceed constitutes a reasonable exercise of jurisdiction.

With a harmonized jurisdictional recognition and enforcement structure (an ideal worth realizing), jurisdiction skirmishes such as anti-suit injunctions, refusal to enforce or recognize judgments, and negative declarations need not occur. It will also prevent overlapping and render secondary rules, such as venue transfer provisions and prioritization or allocation of jurisdiction provisions, complementary.[156] The countries currently not parties to the Brussels or Lugano Conventions, particularly the United States, have an incentive to enter into similar agreements because of the benefits of avoiding the peculiarities of alien jurisdictional rules of the national laws of each country (and in the context of the European nations, see article 3 of both the Brussels and Lugano Conventions, respectively). Parties to a common set of jurisdictional rules not only benefit from clarity of the law, but also from such exorbitant jurisdictional provisions (see article 4 of the Brussels Convention).[157]

Hence, in the wider analysis, it benefits the United States, the European Union, and their negotiating partners to come to a joint agreement on reciprocally enforceable jurisdictional rules. The on-going negotiations for a Hague Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters is an example of just such an effort.[158] The proposed Hague Convention would apply where there is

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155. International Uniformity is premised on the value of the single institutional framework (e.g., in a plurilateral context, the EU, and the U.S. federal court structure).

156. That is, after finding that such contacts exist, the inquiry shifts to whether assertion of jurisdiction over the out-of-state defendant would comport with notions of "fair play and substantial justice." *See* Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 692-93 (1999).

157. For examples of the exercise of such expansive jurisdictional bases to the detriment of nonparties, see *id.* at 696-701.

158. The Hague Conference on Private International Law is a multilateral effort in which the United States participates, and which is considering jurisdictional issues ranging from contracts, torts, choice of law clauses, service of process, applicable law to data protection, evidence, and standards of procedure for online dispute resolution, among others, with the ultimate goal of drafting a global convention on these matters. *See Electronic Data Interchange,*

national diversity of residency between the parties and where a foreign enforcement of a judgment is desired (i.e., when one or more of the defendants to a lawsuit is foreign, and where recognition and enforcement is desired in another signatory country).[159] The convention would, like its (albeit regional) predecessors, apply to most civil and commercial matters, with the exception of family law, wills and succession, insolvency, and admiralty/maritime matters.[160]

Despite the problems encountered during negotiations over the disparate jurisdictional rules (especially those relating to the U.S. due process model), it makes sense for the negotiating parties to also consider the e-commerce dimension and incorporate it into the convention (as the European Union had attempted to do—via Brussels I and the E-commerce Directive—despite the mixed and confusing results).[161] Significantly, this new convention will not be affected by the previous regional agreements.[162] The benefits of a fixed, consistent and uniform criterion (such as domicile or place of performance) for jurisdictional analysis (like in the Brussels and Lugano Conventions) over the flexible (and sometimes unpredictable) U.S. due process analysis have been convincingly argued by non-U.S. delegates during earlier Hague rounds of negotiations.[163] The problem facing the United States in the Hague negotiations derives from its constitutionally entrenched due process analysis, which creates a serious obstruction to forming an agreement

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Internet and Electronic Commerce, Preliminary Document (Apr. 7, 2000) by Deputy Secretary-General Catherine Kessedjian, which can be found (together with the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters) at the Hague Conference Web site, *available at* http://www.hcch.net/e/workprog/e-comm.html (last visited July 17, 2002), under "work in progress."

159. The Convention would not displace domestic laws of jurisdiction, recognition, and enforcement when all the defendants are local, as domestic recognition and enforcement is desired.

160. Edward C.Y. Lau, *Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments*, 6 ANN. SURV. INT'L & COMP. L. 13, 14 (2000); *see also* Michael Traynor, *An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: U.S. and European Perspectives*, 6 ANN. SURV. INT'L & COMP. L. 1 (2000) (providing an introductory framework to Lau's article).

161. This effort at coordination will be consistent with efforts elsewhere with other aspects of e-commerce.

162. See articles 57 of both the Brussels and Lugano Conventions, respectively. Note also that the piecemeal approach under article 59 of the Brussels Convention is not a satisfactory solution.

163. See for contrast the Brussels and Lugano Conventions that contain rules channeling all cases to the single most relevant jurisdiction, something which is more difficult to define under the jurisdictional "everywhere or nowhere" system in the United States. As mentioned, the European nations (and EFTA) were able to agree to a "black list" (article 3 of both conventions) and common connectivity test (article 5 of both conventions).

with clear jurisdictional "yes" and "no" (or "white" and "black") bases. In light of the above-described issues, a compromise was necessary.

Accordingly, the draft Hague Convention has been established in the form of a "mixed Convention."[164] By way of contrast, under a "double Convention" it is a violation of the treaty to exercise jurisdiction based on a prohibited ground of jurisdiction. However, a "mixed Convention" sets out a "gray list" between a "black list" and "white list." With regard to the "white list," any jurisdictional ground enumerated on this list will be allowed, and recognition and enforcement follows such usage. In addition, jurisdictional grounds found on the "black list" are forbidden, and recognition and enforcement will not follow such usage. Lastly, the jurisdictional grounds off the "gray list" *may* be used, but the forum country requested has discretion whether to enforce a judgment based on such usage.[165] While the Convention offers benefits to the

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164. *See* Brand, *supra* note 156, at 705-06 (discussing the Convention as the "only mutually acceptable approach" and the "only alternative proposed to date"). Brand also discussed the limitations of due process and its constitutional nature with regard to U.S. negotiating authority, maneuverability, and the scope of concessions in the Hague rounds. For example, the delegation could only agree to limitations on jurisdiction within, but not outside of, the due process limits. *Id.* at 702, 705-06. The latest draft of the Hague Convention is *available at* http://www.launet.com/Hague/index.htm (last visited July 17, 2002). In establishing the Special Commission, the Hague Conference considered three options for the type of Convention that might be developed:

> 1) a single Convention, confined to provisions on recognition and enforcement of judgments (which does not include direct rules on jurisdiction);
> 2) a double Convention which, in addition to provisions on recognition and enforcement of judgments, includes a list of permitted grounds of jurisdiction and a list of prohibited grounds of jurisdiction; and
> 3) a mixed Convention which, in addition to provisions on recognition and enforcement of judgments, has a list of permitted grounds of jurisdiction (a "gray list"), *as well as* a list of prohibited grounds of jurisdiction that the court in a member state may rely on (depending on the national laws of that state), although the resulting judgment from such an exercise of jurisdiction (from the list) would not be entitled to recognition in another Contracting State.

See also the Australian Attorney-General's Department, *International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil Matters, Draft Hague Convention Issues Papers 1 and 2* (1999), *available at* http://law.gov.au/publications/haguepaper (Paper 1) and http://law.gov.au/publications/hagueissue2/issuespaper2.html (Paper 2) (last visited July 17, 2002).

165. *See* Lau, *supra* note 160. Lau discusses the relevant articles in the following passage:

> Where jurisdiction is not premised on General Jurisdiction (Article 3) or Special Jurisdiction (articles 4-16), AND where jurisdiction is not prohibited under Article 18, then the national law of the place of suit will apply. This is the "permitted basis" of jurisdiction. Judgments on this ground of jurisdiction do not have the benefit of mandatory recognition and enforcement under this convention. However, if jurisdiction against a defendant is premised solely on an Article 18 "prohibited basis" of jurisdiction, not only is enforcement not allowed in another signatory country, but such foreign defendant may not even be sued or joined as a co-defendant in the suit.

Contracting States by prohibiting the exercise of exorbitant jurisdiction, it maintains flexibility by permitting, but and at the same time discouraging, the use of "gray list" grounds of jurisdiction.[166]

This Article will not address the sources of and solution to resolving the stalled negotiations, as that subject matter is outside the scope of this discussion.[167] Suffice it to say, at the least this Article gives notice of the

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> Thus, jurisdiction based solely on a prohibited basis is disallowed even where the defendant otherwise has assets in the local jurisdiction and enforcement under the Convention (i.e. in another signatory country) is not needed. This is one area where there is a reduction of benefits over existing laws.

Id. at 19-20.

166. Law discusses the three grounds for jurisdiction in the following passage:

> The delegations have adopted an approach consisting of three categories of jurisdiction: "Required Bases" (Articles 3-16), "Permitted Bases" (Article 17), and "Prohibited Bases" (Article 18). The Required bases are those jurisdictional bases under which a judgment is required to be recognized and enforced by another signatory country. Suits based on Prohibited bases of jurisdiction are not allowed and shall be dismissed for lack of jurisdiction if jurisdiction is based solely on the prohibited bases.

Id. at 15. Whether a gray list outcome can be considered a success is debatable. *See, e.g.*, Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1307 (1998). Zekoll noted that, although it may be the only option for agreement to a convention, an expansive gray zone (i.e., where the "white list" is small, and the "gray list" large) will be "largely meaningless" because the ability to enforce judgments abroad is severely limited. *Id.* The Permitted bases may be enforced in the original forum court, but this is not guaranteed elsewhere. The problem during the negotiations in following this scheme is, of course, deciding on what goes into each list. *See* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89 (1999) (describing the desirability of seriously negotiating and acceding to such a convention (in order to achieve the net gain of a predictable, uniform legal system and greater recognition and enforcement of foreign judgments), even if some reforms must be made to the existing jurisdictional structure).

167. Clermont offers some insight into the benefits and detriments of the United States becoming a signatory, as well as the progress of negotiations:

> Such a treaty would help untangle the mess that is the U.S. law of territorial jurisdiction in civil cases, even if it means compromising some traditional jurisdictional rules by abandoning the notion of "tag" or transient jurisdiction, attachment jurisdiction, doing business as a basis for general jurisdiction, and *forum non conveniens* (at least in cases involving foreign parties). At the very least, the United States can apply the lessons learned in the preparatory and negotiating process to improve its jurisdictional model.

Id. at 129-30; *see also* Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000) (discussing a potential draft federal statute concerning the recognition and enforcement of foreign judgments consistent with the draft Hague international treaty); Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 88 (1993) (urging the United States to take immediate action to create such an agreement "in order to protect its interests abroad and its position in the world"). Finally, see also the line of articles in 61 ALB. L. REV. (1998) resulting from a symposium on the topic Could a Treaty Trump Supreme Court Jurisdictional Doctrine? by such distinguished authors as John Fitzpatrick (id. from 695), Russell Weintraub (id. from 1269), Patrick J. Borchers (id. from 1161), Stanley E. Cox (id. from 1177), and Joachim Zekoll (id. from 1283). On the whole, the outlook was pessimistic as to the success and utility of a convention.

Hague Convention's potential for providing a solution to the issue of jurisdiction and e-commerce in an international forum, perhaps even harmonizing transnational e-commerce jurisdictional issues.[168]

D. Some Suggestions That Will Help in the Formulation of a Global Solution

Although the Brussels and Lugano Conventions may not provide ideal solutions to the jurisdiction and e-commerce issues, especially in cases when the products are delivered over the Internet, an international solution is probably the only feasible approach. Thus, if we decide to amend existing conventions (and some effort, albeit deficient, has already been made in the EU conventions), or created a new one (e.g., the draft Hague Convention or drafts under the auspices of inter-governmental initiatives such as UNCITRAL and UNIDROIT or by non-governmental private organizations such the ICC), a thorough overhaul and careful insertion of various aspects of e-commerce is required. Also, some other measures and initiatives will help clarify the entire area of Internet-related law, as well as provide some clarity when defining jurisdictional issues.

First, there needs to be a uniformly accepted manner of interpreting concepts. A common "net-terminology" is a necessary first step to avoid preliminary disputes over the definitions and meaning of words and concepts with regard to Internet transactions.[169] Initial efforts have already been made to establish standard terms for e-commerce. For example, work is underway on some aspects of e-commerce terminology at organizations such as the ICC, along the lines of the INCOTERMS (e.g., ICC's proposed "E-Terms"), at the ITU, and (hopefully) through private sector bodies such as the Internet Law and Policy Forum (ILPF).

Second, jurisdictional rules and regulations can only be clearly formulated if other activities related to e-commerce, such as electronic contracts and electronic signatures, are first clarified and made uniform. Are they legally acceptable and recognized? If so, what are the legal details (e.g., when and where are digital offers and acceptances made)? Hence, either before or concomitant with finalizing a jurisdictional

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168. For more on the negotiation efforts at the Hague Convention, see Traynor, *supra* note 160, and Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOKLYN J. INT'L L. 7 (1998).

169. Differing terms and usage of the same Internet activities in various countries, some of which are still in the early development stages of advanced technology presents problems when creating new rules or practice standards, and hinders efforts to reach a consensus on an applicable law in this area.

convention, the nations of the world must formulate uniform rules on these relatively new features of the e-commerce model and the attendant ways of doing business.

A number of countries or political jurisdictions (states within the United States, for example) are exploring general infrastructure rules, often based to some extent on the UNCITRAL Model Law on Electronic Commerce, a broadly negotiated document. Some of its provisions indirectly serve as applicable law pointers. Some countries have supported the U.S. proposal for a convention that would embody many of the UN's model provisions, along with basic principles such as party autonomy, which would thus achieve an enabling but otherwise minimalist approach to international rules, at least for the short term until global and domestic commercial patterns become more clear. Other avenues for inclusion of general ground rules on applicable law are the proposed E-commerce provisions for the UNIDROIT Principles of International Commercial Contracts, the draft European Principles, etc.

Third, a limited but helpful online dispute system and the concept of a virtual magistrate could be considered.[170] This option is especially attractive for small and low volume transaction contracts because it would reduce cost of either party having to go to a geographically distant jurisdiction for a court appearance. A number of proposals for online dispute resolution have been advanced, but none have so far gained wide usage, and few have reached the pilot stage.[171] Uncertainty as to both jurisdiction for enforcement and applicable law within the dispute process has been one of the main obstacles. Application by analogy of

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170. In fact, innovations in dispute resolution in cyberspace have already arisen in the realm of civil disputes, even if principles related to a "cyber-community" and a community-wide standard have not exactly been embraced by many courts. See *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), where the defendants and their *amicus*, in a criminal trial for distributing obscene materials over the Internet, argued (albeit unsuccessfully) that the relevant local community standards by which the allegedly obscene material should be judged was the community of cyberspace. A good example of a virtual magistrate is the Virtual Magistrate arbitration program (VMAG), *available at* http://www.vmag.org/docs/index.html (last visited July 17, 2002). This is a free service that began operations in March 1996 and offers arbitration for rapid, interim resolution of disputes involving users of online systems, those who claim to be harmed by wrongful messages, postings, and files, and system operators. Arbitration services will be available for computer networks *anywhere in the world* as long as the relevant parties agree to participate. Although it has not been popular, this can be seen as the first wave in this initiative for the future.

171. In a real example, the European Union's "E-commerce Directive" (discussed *supra* at notes 148-149), contains provisions for some "progressive" mechanisms that could become useful alternatives to court litigation. The proposed directive encourages, inter alia, "the drawing-up of codes of conduct at Community level by trade, professional and consumer associations or organizations" (article 16(1)(a)) and requires Member States to provide in their legislation, for example, for the possibility of (electronic) "out-of-court dispute settlement" (article 17).

existing jurisdictional laws, conventions, regulations or court decisions regarding dispute resolution, consumer rights, enforceability and related areas of the law are largely uncertain.

Commonly suggested models for dispute resolution systems online, created outside existing juridical systems, include the following: Internet consumer contract systems; third-party data services systems (with rules binding senders and receivers); industry and sector specific dispute systems; and online spin-offs of, or linkages to, existing alternative dispute resolution facilities and systems, such as administered arbitration centers.[172] Regarding the last suggestion, arbitral systems already in place, especially in relation to international commercial disputes (for which a widespread treaty system for enforcement exists) are quite feasible. However, because existing arbitration conventions, such as the New York and Panama Conventions, were not designed with Internet transactions in mind, new interpretations and amendments must (again) be explored.[173]

VIII. A SELF-HELP CHECKLIST FOR E-COMMERCE MERCHANTS—PLANNING AND RISK AVOIDANCE[174]

The U.S. courts have shown a willingness to exercise jurisdiction over Web sites and their operators regardless of where they are based. To reiterate briefly, the trend of U.S. cases on this matter establishes the following broad guidelines:

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172. Many suggestions have been made for projects to resolve jurisdictional issues such as online dispute settlement systems and virtual magistrates, electronic transactional laws, electronic transfer of rights to tangible and intangible property, system of rights to electronic data, creation of standard terms for electronic commerce, cross-border recognition, and an omnibus protocol to amend multilateral treaty regimes. *See* Hal Burman, *New Directions for International Projects in the Coming 2000's*, Presentation at the International Law & Policy Forum entitled "Jurisdiction: Building Confidence in a Borderless Medium," Montreal, Canada (July 26-27, 1999), *available at* http://www.ilpf.org/events/jurisdiction/presentations/burmanpr.htm (last visited July 17, 2002).

173. Discussion of the various online models raises, once again, issues such as whose law and whose procedures will apply. The relation to existing terrestrial courts is of course a major factor to be addressed.

174. The challenge for e-business is to take appropriate steps to minimize risks of accidental infringement of established laws of jurisdictions in which it may be deemed to trade or conduct business, and to take account of new patterns of trading (such as that in Internet commerce) that may run headlong into well-established, yet unfamiliar, legal issues. *See* Julian Randall & Bridget Treacy, *Legal Risks in the New E-conomy*, ANDREWS CORP. OFF. & DIRECTORS LIAB. LITIG. REP., Sept. 11, 2000, at 14 (discussing the risks of going online and identified the key "e-risks" to be considered in the contractual, jurisdictional, intellectual property, and internal/content contexts).

> (1) a passive Web site that does little more than make information available to those who are interested in it is not ground for the exercise of specific or general jurisdiction; but
> (2) where the Web site operates as an interactive Web site, a court will review the level or degree of interactivity, as well as the commercial nature of the exchange of information, to determine whether jurisdiction should be exercised.

It is important that businesses looking to establish a Web presence consider not only the financial risks involved but also the legal risks by doing a liability assessment. Insurance should also be considered to protect against the risks, especially against inevitable or unforeseeable risks. So, what can online merchants do to maintain certainty in their business transactions conducted over the Internet, and how may lawyers assist their clients in defining clear parameters of potential jurisdiction? Given the nature of the buyer-seller transaction, matters of jurisdiction are of greater concern to the seller, hence the methods of establishing certainty under the analysis in this Part of the Article will be addressed to the seller. However, buyers can take note of these tactics and either refuse such terms (when they can do so) or bargain for terms and conditions which they can accept, either through lobbyists or consumer organizations, for example.[175]

Every potential litigant wants the home court advantage and nobody wants to litigate in a foreign and distant jurisdiction. It would be expensive, inconvenient, time-consuming, require more work (such as understanding foreign laws or hiring foreign lawyers), increase chances of being sued, and may induce one who feels cornered into settling on less favorable terms.

Concerns regarding certainty and predictability involve the preemption of foreseeable liability; the following is a *checklist for prevention*:

(1) Define the market and minimize potential grounds for dispute.
(2) Forum selection clauses as the contractual term of trading and jurisdiction.
(3) Choice of law clauses or substantive law application.
(4) Disclaimer and liability notices.
(5) Alternative dispute resolution.

175. For the average consumer, a very helpful informational Web site about buying products through the World Wide Web and contracting online is *The U.S. Federal Trade Commission's Consumer Protection: E-commerce and the Internet Web Site*, *available at* http://www.ftc.gov/bcp/menu-internet.htm (last visited July 17, 2002). Consumers may even file complaints against merchants online with the Commission.

A. Checklist for Prevention

1. Define the Market and Minimize Potential Grounds for Dispute—Geographical Flow Control Devices and Access Conditioning

Sellers should make a conscious decision as to their market and not take on more than they can handle.[176] Potential defendants should "'structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.'"[177] Sellers wishing to avoid extensive liability in U.S. courts should limit their business activities on the Internet (i.e., limit the site's interactivity) in a variety of ways.[178] Traditional and commonsense ways to limit such liability include declining sale opportunities in a forum where it does not want to be subject to jurisdiction. For example, this can be done by restricting access by instituting an "invitation or membership only" requirement, subjecting membership to approval, requiring password access, or defining shipment or offer limits in a mandatory main page and refusing purchases from a party in a country or state which it does not intend to trade (hence not availing itself of the benefits of the laws of that locale).[179]

The creation and operation of a Web site, and trading or doing business through it, involves an act of publishing.[180] Many of the legal issues a Web site owner faces are really not that different from those that affect traditional publishers. The Web site operator should check that the

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176. For example, assume a U.S. merchant decides to extend his base of operation into the European Union. Obviously, matters relating to the Brussels and Rome Conventions, as well as the way the E-commerce Directive (and other directives) relate to the Internet (all of which are relevant to the subject matters of jurisdiction and applicable law), will have to be carefully examined by the U.S. merchant. *See* Francq, *supra* note 144, at 1079-82. The bigger a market, the more a merchant must be aware of in terms of his obligations and rights.

177. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). Note that most concerns of Internet business transactions involve civil liability (including tort and products liability), but potential criminal liability must also be kept in mind, especially when one is dealing with such products or services as pornography, gambling, and drugs that may be illegal in some countries.

178. *See* Flower, *supra* note 38, at 867 ("[W]ays to control liability, include declining sales opportunities in, or restrict access by users in, a forum that a seller wishes to avoid.").

179. Thus, merchants can take such steps as conditioning access to content by requiring the presentation of geographical identification by the user for approval in order to control content flows geographically. As digital signatures and filtering technologies continue to develop to facilitate such geographical identification, the "cyberspace" entrepreneur can act like any other "real world" merchant who must take care not to send his content into a jurisdiction where he does not want to be subject to that law.

180. Electronic publishing in its widest sense may include any material accessible on the Internet. In fact, any Web site containing words or pictures can be said to be "published" over the Internet.

site (such as advertisements) does not contain anything defamatory, obscene, blasphemous or discriminatory, and that it does not infringe any intellectual property rights. The operator should also ensure that at least regional and international standards are met, as well as the legal standards of the targeted market.[181] If a Web site contains hyperlinks to other Web sites, the Web site owner will have to consider whether he is willing to accept liability for the information on these linked sites.[182] The owner should also be sure to obtain the permission of the original Web site owner or at least give sufficient notice of due credit.

If the electronic seller advertises his goods or services on a Web site and the visitor can order goods by electronic means, there may be a risk of liability. For example, if the goods are defective, not of satisfactory quality, or do not conform to the description given on the Web site liability may flow. With respect to services, the risk of liability increases if the service was not carried out with reasonable skill and care. The Internet business must be careful that his trademark, domain name, or other "net identity" is legally his own to use by searching registers domestically, regionally and internationally,[183] and especially within market parameters. Other important considerations include, for example, confidentiality in data and transaction details.[184]

Clearly, the scope of liability can be great because we can neither predict all eventualities, nor can we prepare and fully guard against

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181. *See, e.g.*, Effross, *supra* note 4, at 1263. This article attempts to reconcile e-commerce with the ICC framework and offers both practical and theoretical considerations for the optimal legal configuration of commercial Web sites as they can, and should, be rebuilt in order to anticipate and resolve legal problems. The author draws from many sources in making recommendations for owners of commercial Web sites to take special care to indicate conspicuously, and in clear language, the terms and conditions of their electronic contracts.

182. Otherwise, the Web site owner should make it clear to the visitor that the visitor's usage of the merchant's hyperlink to another Web site in no way constitutes an acceptance of liability for the content therein. This may be done by a disclaimer clause such as the sample in Appendix C.

183. For example, examine the registers at ICANN (international) and those in countries like Australia (domestic) in relation to domain names, as well as the registers at WIPO (international) and almost every country in relation to trademarks.

184. Note the potential legal requirements that may arise if one operates in a U.S. state which is a signatory to the proposed U.S. Safe Harbor principles, for example, in relation to trading with EU countries and the Data Privacy Directive. Note also that these requirements are merely basic and general considerations and are nonexhaustive. Every merchant on the Internet has their own method of conducting business and different legal considerations may apply to each depending on their circumstances, the way they conduct business, as well as the subject matter of their business.

them.[185] Yet, there are several other ways to further minimize, limit or exclude a Web site owner's liability for its content or for his transactions?

2. Forum Selection Clauses as the Contractual Term of Trading and Jurisdiction[186]

If a seller wishes to widen the market for his products or services while, at the same time, confining jurisdiction to one location, he may do so by inserting a forum selection clause. Forum selection clauses are also known as "prorogation of jurisdiction agreements."[187] To ensure that the clause will be upheld by U.S. courts, the seller must ensure that it is fair and reasonable, and that adequate notice is given to buyers. The U.S. courts, and indeed the courts of most other countries,[188] have generally sought to carry out the will of the parties as expressed in such clauses, and some courts has gone even further to the extent of favoring this economically practical, business-oriented approach. There is no reason why that approach will not extend to Internet business transactions.

Freedom to choose a forum for potential disputes is consistent with recent U.S. cases governing contractual choice of forum clauses, including those in consumer contracts. In *Carnival Cruise Lines, Inc. v. Shute*,[189] the Supreme Court went so far as not to require a negotiated contract between a merchant and a consumer with equivalent bargaining

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185. For one, the domestic laws of many countries restrict the extent to which liability can be excluded or restricted in contracts with consumers (for their protection). In the United Kingdom, for example, the Unfair Contract Terms Act of 1977 (UCTA) provides, among other things, that the operator can only exclude liability in contracts with consumers (or even standard form contracts between two businesses) for breach of contract to the extent that it is "reasonable" to do so. What is "reasonable" really depends on the circumstances of each case, and depends on factors including the relative bargaining powers of the parties, the availability of alternative suppliers, language used, etc.

186. See the Sample Forum Selection Clause at Appendix B.

187. Prorogation agreements or permissive forum clauses are nonexclusive agreements to submit to the jurisdiction of a specifically agreed upon court or jurisdiction without excluding other possibilities (*contra* exclusive agreements which mandates litigation *only* in the specified forum). *See* GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 371-72 (3d ed. 1996).

188. For comparative law perspectives on transnational jurisdiction in cyberspace issues, see a Web site project conducted by "The American Bar Association Global Cyberspace Jurisdiction Project," *available at* http://www.kentlaw.edu/cyberlaw/documents.html (last visited July 17, 2002). In particular, see the "foreign comments" link, *available at* http://www.kentlaw.edu/cyberlaw/docs/foreign (last visited July 17, 2002), which contains useful information from representatives of many different countries as to their jurisdictional bases.

189. 499 U.S. 585 (1991). The two important aspects of reasonableness relating to contractual choices of law in cyberspace are the requirement of sufficient "connecting factors" to the chosen forum, and the lack of a gross inequality of bargaining power (such that the choice is oppressive to one party) or fairness. *Id.* at 593-94.

power, so long as there was notice.[190] Hence, forum selection clauses in standard form contracts are acceptable and will be upheld unless to do so would be fundamentally unfair to the consumer.[191] In another case, this time involving an arbitration clause in a computer form contract, the United States Court of Appeals for the Seventh Circuit also upheld the provision.[192]

3. Choice of Law Clauses or Substantive Law Application[193]

Related to the above-described exercise in determining adjudicatory jurisdiction is the exercise of establishing prescriptive (or substantive) jurisdiction. A business Web site should also include a clause in its terms and conditions for agreement that governs either a conflicts of law mechanism or an applicable substantive law (preferably the latter). This would enable the business to retain control of any disputes that may arise out of transactions conducted through, or involving the content of, the Web site, and also prepare the business for the type of law that it may face in relation to future disputes.

Although this may, like a forum selection provision, not fully guarantee that the forum court, whether U.S. or foreign, will accept such a provision, it is better to include such clauses than to leave the matter

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190. In actuality, granting such broad discretion to the contract drafter without limiting its application to consumer contracts may effectively deprive many consumers in online transactions from any effective remedy in the event of a dispute. The best business practice, and for more certain legal and policy sanction, it behooves online businesses to be as fair to consumers as possible. Although the United States is generally not as consumer protective as the European Union, the courts will still look out for the weaker party and strike down unconscionable agreements, where there was a lack of assent by one party, duress, etc.

191. In the European context, according to the Brussels Convention, parties to a contract have the right to make an agreement as to which court has jurisdiction to adjudicate a dispute. This agreement will hinder a trial in another court, but only if a party makes an objection to the court's jurisdiction. There are, however, certain formal requirements that must be fulfilled for such prorogation to be accepted under the Brussels Convention. These may be found under Article 17 of the Convention, which requires that the agreement be (a) in writing or evidenced in writing, (b) in a form which accords with practices established between the parties, or (c) in the case of international trade or commerce, in a form which accords with a usage of certain dignity. Note that in the Internet context, as the requirement for writing does not stipulate that it must be written on paper, the provision can technically be interpreted in such a way as to satisfy its functional requirements in an electronic commerce environment.

192. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997). *Compare id. with* Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 575 (1998) (finding an arbitration clause unconscionable); *see also* David R. Johnson, Susan P. Crawford & Samir Jain, *Deferring to Contractual Choices of Law and Forum to Protect Consumers (and Vendors) in Ecommerce* (Aug. 16, 1999), *available at* http://www.kentlaw.edu/cyberlaw/docs/drafts/crawford.html (last visited July 17, 2002) (discussing "the American Bar Association Global Cyberspace Jurisdiction Project" Web site under "Internet Jurisdiction").

193. See the Sample Choice of Law Clause at Appendix B.

purely to chance. As with forum selection clauses, there are ways to increase the odds that such clauses will be enforced by (as noted above) ensuring clarity, adequate notice, reasonableness, and so on.[194]

An Internet case example is *CompuServe, Inc. v. Patterson*,[195] where a choice of law provision in the agreement between the parties designating Ohio law as the choice was determinative in influencing the court's decision to apply Ohio law. Despite the overall favorable attitude towards such provisions, merchants must still be careful to designate a forum (1) that allows parties to include choice of law provisions to govern their transactions without any limitation, and (2) where the parties' freedom to contract on an applicable law is not subject to, for example, nonderogable mandatory consumer protection laws.[196]

4. Disclaimer and Limited Liability Notices[197]

A Web merchant should always ensure that Web site visitors have read the disclaimers and relevant terms and conditions (including choice of forum and choice of law clauses, and other such information)[198] in order to render the disclaimers and terms effective before doing anything (such as concluding a contract) which may give rise to liability. Disclaimer clauses can come in many forms and be made conspicuous in many ways. A well-designed Web site can ensure that the other party (the buyer) to the transaction is given adequate notice of important information by, for example, forcing a visitor (the potential client) to look at its disclaimers, terms, and conditions, and to require them to perform an act of acceptance such as clicking a button or actually typing the

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194. Choice of law and venue selection laws are generally honored in the United States so long as the choice is reasonable and fair. *See* RESTATEMENT (SECOND) CONFLICTS OF LAWS OF THE UNITED STATES § 80 (1971).

195. 89 F.3d 1257, 1260 (6th Cir. 1996); *see also* Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 935 (1998), *available at* http://www.law.sc.edu/sclr/stravitz.htm (last visited July 17, 2002).

196. That is, merchants should avoid choosing a law that renders that very choice unenforceable in a consumer contract because the chosen law violates the substantive laws of the forum jurisdiction. For more in-depth discussion of choice of law issues involving contract matters, see Raymond T. Nimmer, *Selling Product Online: Issues in Electronic Contracting*, 467 PRAC. L. INST. 823 (1997). For a discussion of choice of law issues in the tort context, see Christopher J. Beall, Comment, *The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 361 (1997). *See also* Matthew R. Bernstein, Note, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75 (1996).

197. For an excerpt of a draft sample, see Appendix C.

198. Other notices of significance to be considered are privacy and confidentiality notices.

words "I agree" or "I accept" so that they are bound by the terms before exploring the Web site or before a contract is concluded.[199]

5. Alternative Dispute Resolution

Parties can agree through their forum and law selection clauses that any future dispute arising from that relationship will be submitted to an alternative dispute resolution service. With respect to both adjudicative and substantive jurisdiction, private dispute resolution such as arbitration can be inherently transnational. International commercial arbitration under the New York Convention is a prominent example. Moreover, private dispute resolution is not limited to litigation or even arbitration.[200] This is important for companies or businesses that depend on and exploit the global reach of the online marketplace. It is undisputed that the trend in the United States and many other countries is to uphold and enforce alternative dispute resolution clauses (both as to forum and applicable law).[201] Oftentimes alternative dispute venues, as well as the laws and such special terms of those venues, are crucial to the viability of a start-up company and greatly reduce the risks and uncertainties attendant to conducting online business.

Taking it another step, it may not be too farfetched an idea for the Internet business community (sectoral or general) to set up alternative dispute resolution organizations to oversee Internet-related business disputes, for parties to subscribe into such organizations, and also for

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199. *See* Effross, *supra* note 4, at 1263. Web site store owners can also attempt to block visitors from certain states or countries by, for instance, requiring users to identify their state, zip code or country of domicile, and restricting access accordingly. Additionally or alternatively, a disclaimer can be prominently featured on the homepage (if it is a mandatory portal for further access) with language to the effect that by proceeding further into the site the visitor represents that he or she is not a resident of, or ordering the products from, the locations not serviced by the merchant.

200. Other such options include mediation and consultations. *See* Henry H. Perritt, Jr., *The Internet Is Changing the Public International Legal System*, 88 KY. L.J. 885 (1999-2000). Perritt notes:

> [S]ome new models for private dispute resolution being employed include credit card charge-back mechanisms, dispute prevention and resolution systems unilaterally adopted by private Internet intermediaries. For example, eBay offers an escrow system, an insurance system, a dispute resolution system in the form of mediation, and a mechanism for a kind of consumer blacklisting of merchants who misbehave.

Id. at 923. See also the eBay Web page itself entitled "Why eBay is Safe?" at the official eBay.com Web site, *available at* http://pages.ebay.com/help/basics/n-is-ebay-safe.html (last visited July 17, 2002).

201. *See generally* Thomas E. Carbonneau, *Cases and Materials on the Law and Practice of Arbitration* (2d ed. 2000) (paying particular attention to chapter 10, "The U.S. Supreme Court Decisional Law on International Commercial Arbitration").

core community principles and community norms to emerge from usage and custom in due course (much like the *lex mercatoria* has emerged for international sale of goods law). This could, for example, be done under existing commercial organizations such as the ICC.[202] The private international level can be supplementary while the party-to-party level is supreme when it comes to contractual will or intentions.

Finally, on a nonlegal note, the e-commerce businessperson or merchant should use logical business sense. If you as a businessperson adhere to fair business practices over the Internet (just as you must when conducting business in the "real world" of commerce), then the chance of offending the laws of a country you are trading in via the Internet will be decreased. For example, use fair business, advertising and marketing practices (be truthful and accurate); disclose full information about the terms, conditions and costs of the transaction (and relay other relevant information effectively to consumers);[203] provide an easy-to-use and secure method for online payments (by adopting security measures such as encryption software appropriate to the transaction); ensure consumer privacy, etc. Basically, you should adopt the type of fair, effective and easily understood self-regulatory policies and procedures (a basic level of protections) to e-commerce as are currently extended to other forms of commerce.

In the event that you did not anticipate or take preventive measures against jurisdiction being established over your business activity on the Internet and jurisdiction is found to exist by the courts, and you do not want to be subject to that jurisdiction, all is not lost. Even where juridical jurisdiction is established, there are other (usual and well-established) recourses to seek a dismissal or to avoid that jurisdiction. These recourses are outlined in the following *checklist for avoidance*:

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202. It is to be noted that under the EU E-commerce Directive article 17(1) the Member States are exhorted to ensure that "their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means." *Id.* art. 17(1). Hence, while the Directive does not deal with enforcement mechanisms in detail, it does require EU members to establish dispute resolution recourses that offer adequate procedural guarantees. *Id.* art. 17(2); *see also* Owen, *supra* note 150, at 271. Owen stated with regards to this proposal that "it may [now] be necessary for a new pan-European or global law of contract to be introduced." *Id.*

203. For example, one could provide consumers with a full, itemized list of costs involved in the transaction, designate the currency involved, the terms of delivery or performance, and terms, conditions and methods of payment. If applicable and appropriate to a transaction, these businesses also include information about restrictions, limitations or conditions on the purchase; instructions for proper use of the product and any safety and health care warnings; warranties and guarantees; cancellation or refund policies; and whether after-sale service is available. Language must be clear, nontechnical and be one that all potential targeted customers can understand.

(1) *Forum non conveniens.*
(2) *Lis alibi pendens.*
(3) Anti-suit injunctions, negative declarations, etc.

B. Checklist for Avoidance

1. Forum Non Conveniens

A defendant who is properly brought before a court but who does not want to defend himself in that particular forum can raise the defense of *forum non conveniens*. *Forum non conveniens* may be defined as a power within the discretion of the court to decline jurisdiction "when convenience of parties and ends of justice would be better served if action were brought and tried in another forum."[204] Thus, by definition *forum non conveniens* requires both that venue be proper in the first instance, and that an alternative venue be open as well.[205]

Once a plaintiff has established that venue is indeed proper in the first instance, a foreign defendant may try to avoid jurisdiction by requesting the court to look beyond the technical requirements of the venue, and dismiss the action in the inconvenient forum for lack of connections between the forum and the case (in the form of the facts, evidence, circumstances, etc.). It seems ironic, however, to entertain both the argument that enough contacts to a Web site have permitted the court to assert jurisdiction, as well as the argument that the absence of contacts between the forum state and the matter make it more sensible for the dispute to be brought elsewhere.[206] Nonetheless, the contacts discussed in a jurisdictional analysis are of a different nature than the contacts discussed in a *forum non conveniens* analysis.

In evaluating a *forum non conveniens* argument, the court will generally look at such things as travel costs, where the injury occurred, the location of the witnesses and evidence, etc.[207] Generally, the courts

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204. BLACK'S LAW DICTIONARY 665 (6th ed. 1990).

205. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). Here, a Virginia resident sued a Pennsylvania corporation licensed to do business in Virginia and New York. After an accident in Virginia, Gilbert brought suit in New York, and while the Supreme Court recognized that New York was a proper venue under a particular statute, it would have been inconvenient to try this case in New York given that, inter alia, the facts of the case arise out of an occurrence in Virginia. *Id.* at 511-12.

206. While *forum non conveniens* and venue transfers do not afford a potential defendant with complete immunity from suit, these doctrines offers some relief for Internet commerce participants from any harshness of the jurisdictional tests in U.S. and foreign courts.

207. *See* Oberding & Norderhaug, *supra* note 109. In *Creative Technology, Ltd. v. Aztech System Pte., Ltd.*, No. 93-16997, 1995 U.S. App. LEXIS 19179 (9th Cir. July 24, 1995), both Creative and Aztech were Singapore corporations with U.S. subsidiaries, and all design and manufacturing was performed in Singapore. Creative sued Aztech for copyright infringement in

looks at a bunch of public and private policy matters.[208] Thus, in the context of e-commerce, a business running a Web site, for example, can argue that jurisdiction in a distant court (1) would be judicially undesirable, (2) would lead to unjust costs and vexation, given the resources of the business relative to the borderlessness of its market, and (3) the fact that the defendant's operations are predominantly in an alternate venue.

However, *forum non conveniens* does not come without its price. It can only be successfully argued if the policy factor and convenience arguments are convincing. Additionally, the U.S. courts generally favor a plaintiff's right to choose their preferred forum. And even when a defendant business argues *forum non conveniens* successfully, it may be subject to conditions (such as submitting to the jurisdiction of his preferred jurisdiction). Moreover, *forum non conveniens* is never successfully argued if there is no "adequate alternative forum" for the plaintiff to bring an effective action.[209]

2. *Lis Alibi Pendens*

So long as litigation is imminent, it also behooves a defendant to move fast in the jurisdiction of his choice.[210] Wherever the doctrine of *lis alibi pendens* applies,[211] it is a shield that a defendant can use to request the forum court to stay (but not dismiss, as in the case of *forum non conveniens*) the action while a parallel proceeding is pending, or has been started, elsewhere. The fact that there is already litigation pending between the same parties regarding the same subject matter in another jurisdiction may thus give the defendant grounds on which to obtain a stay of proceedings.

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a U.S. court. Aztech countered with a lawsuit in Singapore and filed a motion to dismiss the U.S. lawsuit. The trial court granted Aztech's motion to dismiss based on the legal doctrine of *forum non conveniens*. *Id.* at *22.

208. *See* Born, *supra* note 187, at 319-40.

209. *See id.* at 341-57. However, the court will not consider the favorableness or unfavorableness of the laws of the alternative forum in deciding on whether or not to exercise jurisdiction. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 244 (1981) (noting in a majority opinion that "a change in the substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry"); *see also Requirement of a Second Forum for Application of Forum Non Conveniens*, 43 MINN. L. REV. 1199, 1199 (1959).

210. The advantages of this, for example, under article 21 of the Brussels Convention is the basic rule that, where an action can be brought in more than one country, the court first approached establishes mandatory jurisdiction. Brussels Convention, *supra* note 131, art. 21.

211. For example, it applies in most common law jurisdictions such as the United Kingdom, United States, and Australia, as well as many Commonwealth countries.

Lis alibi pendens has been applied in varying degrees in different U.S. state courts and in the federal courts. Some jurisdictions narrowly limit the circumstances under which they may grant a stay of proceedings, whereas others are more generous with the grant of such relief.[212]

3. Anti-Suit Injunctions, Negative Declarations, etc.

A method defendants can use to preempt jurisdiction is by the initiation of a parallel proceeding, followed by a request to the preferred court jurisdiction for an anti-suit injunction.[213] An anti-suit injunction does not work at the plaintiff court's end (unlike *forum non conveniens* and *lis alibi pendens*, which are requests for the removal of jurisdiction or to force such a removal *after* the defendant had already started it) but rather from the preferred court's end by the latter issuing an order forbidding a party (in this case the plaintiff) from initiating or participating in judicial proceedings in any other forum than that court.

If you anticipate being sued in a foreign jurisdiction and wish to preempt those proceedings, you may request the court to grant a declaration that you are not liable. A negative declaration is an action for preemptive relief. Alternatively, if an action has already started at the plaintiff's court, the defendant can start an action on the same subject matter and with the same parties in *his* preferred forum, "race" to a judgment first in the preferred jurisdiction (by obtaining a judgment earlier than the plaintiff), and then bring the decision before the plaintiff's court and plead *res judicata* in the plaintiff's forum.

Armed with such a declaration or judgment, a defendant can ask that it be recognized and enforced in the plaintiff's preferred forum. The chances of success in this regard depend on whether the court will respond to legal, policy or comity considerations in favor of the defendant, and that in turn depends on the legal-political relationship between both jurisdictions.

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212. The stricter school of thought subscribes to *Colorado River*'s belief in the courts' "unflagging obligation" to exercise jurisdiction and to grant a stay only under "exceptional circumstances." *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). The court looks to a list of factors or "guiding principles" to determine whether such an "exceptional circumstance" exists. *Id.* at 817. The more liberal school of thought subscribes to the *Landis* court's deference to the "sound discretion" of courts to grant a stay with its concomitant lower burden of persuasion. Landis v. North American Co., 299 U.S. 248 (1936). Subsequent courts list a variety of factors not unlike those enunciated by the court in *Colorado River*. *See also* Born, *supra* note 187, at 461-74.

213. *See* Born, *supra* note 187, at 475-90.

IX. CONCLUSION

The Internet is a transnational communication medium. Once connectivity is allowed, there is little one country, state or jurisdiction can do to block communications. In fact, this "free market" feature is often touted as its greatest virtue. There are some technologies to block information flow, but these are of limited effect. However, no country can afford to ignore the economic and intellectual potential for advancement the medium has to offer. Business-wise, e-commerce is expanding at an amazing speed and the forerunners will reap the benefits and rewards from the market-reach and the low tariff and tax barriers that this manner of doing business allows.

You have seen that all the cases that dealt with the issue of jurisdiction over e-commerce (i.e., business transactions conducted over the Internet) have applied a variety of tests to determine eligibility. For example, *Zippo*'s "sliding scale" test, *An Apple A Day*'s "totality of contacts" test or "multi-factor" test, *Panavision*'s "effects" test, as well as *other courts*' (e.g., *GTE*'s) application of the traditional three stage analysis, namely, minimum contacts, purposeful availment or directedness, and reasonableness.

In all its manifestations, the application of jurisdictional rules differ to some extent because the Internet is a special medium of communication that differs greatly from face-to-face transactions, and from its predecessors in electronic transactions such as the telephone or mail.[214] Logically, when applying jurisdictional rules, these rules ought to be modified in order to take into consideration the impact of this medium on commerce, paying particular attention to public and private interest factors such as the balance of fairness to buyers and sellers, court control of dockets, and even international comity, and so on. Comparisons to other methods of communication are "less than satisfactory in determining whether defendant has 'purposefully availed' itself to this forum."[215] Hence, the permissible scope of adjudicatory jurisdiction must be modified for this medium as it has been for its predecessors.

While becoming more comfortable with Internet-related legal disputes, courts are still grappling with the application of the so-called traditional concepts of personal jurisdiction to this new technology. Although no "bright line" test exists, there may not be a need for one.[216]

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214. Application also differs across subject matters irrespective of the transactional medium.

215. Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996).

216. However, the line will become clearer as case law develops with the growth of commercial electronic transactions. *See* Christopher Wolf, *Personal Jurisdiction* (2000), *available*

We cannot expect an answer to every jurisdictional question. The Internet is constantly evolving, and an overly rigid judicial approach could create a stagnant body of case law incapable of adjusting to future developments, especially in this medium that has proven to be dynamic and to evolve at incredible speed. As Oliver Wendell Holmes once said, "It cannot be helped, it is as it should be, that the law is behind the times."[217] So until the explosive growth tapers off (which is not in the foreseeable future), the active-passive paradigm (as in *Zippo*'s "sliding scale" test) is probably as good as it gets. Yet, as we have seen, it is not so much different from the traditional test after all. It can be considered a progeny of the latter, rather than a radical departure.

Moving from a micro-analysis of the subject to a macro-analysis, I have shown the potential and necessity of an international uniform approach to the jurisdictional question. Regional conventions such as the Brussels and Lugano Conventions have shown the possibility of formulating a transnational agreement on mutual jurisdictional recognition and enforcement. Even the signatories to those conventions are attempting to amend them to accommodate technological changes and the advent of the Internet, albeit not in a very consistent manner. On-going work on the Hague Convention and in other venues give hope that some international solution is near at hand that would contribute to consistency, certainty and predictability for the online trader and businessperson. This is especially important for e-commerce, the biggest virtue of which is the global "reach" of information, products and services.

Connection to the Internet enables regulatory arbitrage by which businesses can carefully arrange their manner of doing business and thereby evade domestic regulations (by taking advantage of foreign regulatory regimes). Similarly, the smart and wary businessperson can arrange their business affairs and contracts to preempt and avoid unfavorable or expansive jurisdiction.[218] Finally, I hope that the succinct guidelines and checklists will assist the e-commerce merchant in setting

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at http://www.legalwks.com/conferences/Handouts/cyberlawschool/personal_jurisdiction.htm (last visited July 17, 2002).

217. Oliver Wendell Holmes, Speech at a Dinner of the Harvard Law School Association of New York on February 15, 1913, *reprinted in* COLLECTED LEGAL PAPERS 294 (1921).

218. *See* A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, *in* BORDERS IN CYBERSPACE 129 (Brian Kahin & Charles Nesson eds., 1997). Regulatory arbitrage reduces a nation's policy flexibility by rendering the enforcement of domestic laws and policies difficult to enforce. For example, the effectiveness of EU data protection laws is reduced when personal information can be stored in offshore data havens. However, the European Union did manage to cause the United States to enact "safe-harbor provisions" in reaction to its privacy laws.

up a business or in diversifying into cyberspace marketing and business transactions.

APPENDIX A: COMPARATIVE TABLE

Due Process and Specific Jurisdiction: Main Traditional Test and the Internet Trends—A Simplified Comparison

STEPS	TRADITIONAL TEST	WEBER CATEGORIES	ZIPPO SLIDING SCALE	CASE CATEGORIES	REMARKS
0.	Asahi's Stream of Commerce	Passive Websites which merely provides information or advertisements to users	Passive Websites (passive posting)	No interactivity Merely product or services informative and/or even invitations to treat	No jurisdiction generally. Bensusan v. King—solely informational Web site
1.	International Shoe's Minimum Contacts	Cases involving minimum level of exchange of information between user and host computer—What is the level of exchange?	Non-Passive Web sites only, level of interactivity to objectively determine systematic contacts (Web site plus non-traditional acts)	Low level interactivity (without traditional acts) Plaintiff bears burden of proof to show more than bare minimum contacts with forum	No jurisdiction generally.
2. step 1	World-Wide Volkswagen's Purposeful Availment (of privileges and benefits of forum)	Cases involving higher level of exchange of information between user and host computer—Do the exchange evince targeting of forum?	Active Web sites with traditional acts, level of inter-activity to indicate subjective intentional aim of conduct (Web site plus traditional acts)	Mid-level interactivity (with/without traditional acts) Presumption of "fair warning" since defendant directed activities at forum	Jurisdiction generally. Balancing test subject to (3) *Maritz v. Cybergold*—information and mailing list provided via Web page
		Cases where the defendant	High inter-activity	High level interactivity	*Compu-serve v.*

STEPS	TRADITIONAL TEST	WEBER CATEGORIES	ZIPPO SLIDING SCALE	CASE CATEGORIES	REMARKS
		actually shown to be doing business on the internet with forum state	and commer-cial nature, especially active soliciting within jurisdiction "active sending"	(with traditional acts) Plaintiff actually proves or defendant fails to disprove intention to do business in the forum	*Patterson* — conducting business over the Internet Web site
3. step 2	General Principles of Fair Play and Substantive Justice/ Reasonableness				Policy considera-tions to validate (2)

APPENDIX B: SAMPLE CLAUSES

Sample Forum Selection Clause

It is hereby agreed by and between [party 1] and [party 2] that all disputes and matters whatsoever arising under, in connection with or incidental to this contract shall be [litigated][arbitrated] in and before a Court located in [selected forum] to the exclusion of the [courts][tribunals] of any other state or country.

Sample Choice of Law Clause

It is hereby agreed by and between [party 1] and [party 2] that [selected law] will govern remedies for breach or any other claims related to this agreement excluding the application of its conflicts of law rules as well as [the United Nations Convention on Contracts for the International Sale of Goods][other international Conventions].

Sample Combined Forum and Choice of Law Selection Clause in Standard Form Contract

This agreement is governed by the laws of the [selected law] excluding its conflicts of law rules and [other Conventions] to which it may be a party. You hereby consent to the exclusive jurisdiction and venue of [courts][tribunal] in [selected forum] in all disputes arising out of or relating to this contract. If any part of this agreement is determined to be invalid or unenforceable pursuant to the applicable [law][decision] then the invalid or unenforceable provision will be deemed superseded by a valid, enforceable provision that most closely matches the intent of the original provision and the remainder of the agreement shall continue in effect.

APPENDIX C: SAMPLE NOTICE

Sample Disclaimer Notices

The [seller] makes no representations, warranties or guarantees about the suitability, reliability, timeliness and accuracy of the [information][products][services] which are [advertised on this website][contracted for between the [seller] and [buyer]] for any purpose for which it was not intended, whether foreseeable or otherwise and the purpose of the [information][products][services] are listed exhaustively as follows: [list]

Or

The [seller] hereby disclaims all warranties, conditions of merchantability, fitness for purpose and title with respect to the [information][products][services] advertised on this website and which is the subject matter of the contract between the parties. In no event is the [seller] liable for any and all damages arising out of or in any way connected to the use and performance of the [information][products][services] otherwise than is exhaustively listed as follows: [list]