

UNITED STATES AND EUROPEAN UNION APPROACHES TO INTERNET JURISDICTION AND THEIR IMPACT ON E-COMMERCE

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1. INTRODUCTION

Technological innovation on the internet has brought the globalization trend to businesses and spawned an industry of “e-commerce” that has forever changed the way companies provide goods and services. Company web sites are accessible to virtually any internet user in the world. It is the unique global character of the internet to develop, however, that has prevented a uniform approach to jurisdiction over cases involving consumer transactions via the web. “Jurisdiction is the power and authority of a court to hear and determine a judicial proceeding.”¹ The lack of a uniform legal framework for jurisdiction regarding internet transactions between different countries means companies face the possibility of being subject to any foreign legal judgments in which their web sites can be accessed. The unpredictability of jurisdiction makes it difficult for companies with web sites to limit their legal liability and inhibits the growth of e-commerce.

This Comment will focus on the different approaches taken by the United States and European Union (“EU”) towards determining jurisdiction and how this lack of uniformity limits the growth of the e-commerce industry because of the various strategies businesses must employ to limit their legal liability. Section 2 of this Comment gives an overview of the internet and how its infrastructure simultaneously encourages and hinders the development of e-commerce. Section 3 analyzes the U.S. and EU approaches for determining jurisdiction in internet cases.

* J.D. candidate, 2004, University of Pennsylvania Law School; I would like to thank my family for their love and support, and the Board members of the Journal of International Economic Law at the University of Pennsylvania for their hard work on this Comment. To the Commish and Batman - you made it bearable. I would also like to thank Schnader Harrison for this article's inspiration.

¹ X.M. FRASCOGNA, JR. ET AL., THIS BUSINESS OF INTERNET LAW 143 (2001).

Beginning with the U.S.'s traditional framework of subject matter jurisdiction and personal jurisdiction that centers on a party's domicile, this Section goes on to explain the difficulties of establishing the domicile of an internet user who is party to a lawsuit. The two primary tests U.S. courts have used in deciding jurisdictional issues are the sliding scale commonly known as the "Zippo continuum," named after a case where the court held that a court's jurisdiction is dictated by a sliding scale between highly interactive contact and passive contact between the defendant company's web site and the plaintiff,² and a broader, effects-based approach that analyzes where the actual effects of a web site occurred to determine jurisdiction. Next, this Section analyzes the EU's multi-prong regulatory approach. In March 2002, the European Council ("EC") revised the Brussels Convention³ ("Brussels Convention") in the form of the Brussels Regulation ("Brussels I") which attempted to create a uniform approach to internet jurisdiction within the EU.⁴ The legislation that focused on business-to-consumers ("B2C") transactions adopted a country-of-destination approach that is heavily protective of consumers by giving the consumer the choice of litigating in their local jurisdiction. In addition to Brussels I, the EC is also contemplating a proposed revision to the Rome Convention,⁵ which dictates the substantive law the Court should apply in a case, known as Rome II.⁶ Section 4 discusses the weaknesses of both the U.S. and EU approaches and the problem with developing a hybrid approach as the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters⁷ is attempting to do.

² Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

³ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 O.J. (C 27) 1 [hereinafter Brussels Convention].

⁴ Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I].

⁵ Convention on the Law Applicable to Contractual Obligations, 1998 O.J. (C 27) 34 [hereinafter Rome I].

⁶ See Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation, COM(02)654 final [hereinafter Green Paper] (setting out the general text of the legal questions of Rome II), available at <http://register.consilium.eu.int/pdf/en/03/st05/st05516en03.pdf> (last visited Jan. 21, 2003).

⁷ See Hague Conference on Private International Law, Future Hague

Finally, Section 5 explains the various strategies businesses can employ to avoid jurisdictional disputes and examines the question of whether there is any legitimate protection from, or sufficient limitation to, legal liability.

2. OVERVIEW OF THE INTERNET AND ELECTRONIC COMMERCE

2.1. *Development of the Internet*

In 1969, the U.S. Department of Defense's Advanced Research Project Agency ("ARPA") created an experimental project called ARPANET, the internet's predecessor. ARPANET's purpose was "to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to reroute communications if one or more individual links were damaged or otherwise unavailable."⁸ The design was deliberately decentralized as a defense mechanism during the Cold War era. In 1984, the National Science Foundation ("NSF") established NSFNET for the purpose of encouraging the use of the internet throughout the higher education system and also agreed to provide the backbone for U.S. internet service by supplying supercomputers which made higher volume traffic possible.⁹ Dr. Tim Berners-Lee created the universal language of Hypertext Markup Language ("HTML") in the late 1980s that linked documents to computers connected to the internet and created the world wide web ("WWW").¹⁰ When asked about the difference between the internet and the web, Dr. Berners-Lee answered:

The internet ('Net) is a network of networks. Basically it is

Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters [hereinafter Hague Convention Draft Revision] (presenting various preliminary documents that discuss the progress of a revised Hague Convention), available at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Jan. 26, 2003).

⁸ *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

⁹ See Richard T. Griffiths, *History of the Internet, Internet for Historians*, (describing the development of the internet from ARPANET to the world wide web), at <http://www.let.leidenuniv.nl/history/ivh/chap2.htm> (last modified Oct. 11, 2002).

¹⁰ *Id.*

made from computers and cables. What [the founders of the internet] did was to figure out how this could be used to send around little "packets" of information. . . . That's what the Internet does. It delivers packets—anywhere in the world, normally well under a second. . . . The Web is an abstract (imaginary) space of information. On the Net, you find computers—on the Web, you find documents, sounds, videos information. On the Net, the connections are cables between computers; on the Web, connections are hypertext links.¹¹

In 1993, Marc Andreessen developed the first web browser called Mosaic X that allowed for searches on the internet.¹² The combination of HTML, which made graphically-attractive web sites, and an internet browser, which made it easier to access those web sites, made the world wide web more user-friendly to the public.

2.2. *Technical Basics of the Internet*

There are two types of computers connected to the internet—clients and servers. A client, such as a browser, is a software program in the computer that reads files from a web server. The browser contacts a server and requests information while the server provides that requested information to clients. Based upon Transmission Control Protocol/Internet Protocol ("TCP/IP"), data is broken up into packets, each of which is accompanied by the router information (to help point the way to the destination), header information (IP addresses of origin and destination computers), TCP/IP information (method of breaking down, placing header information, determining size of packets, sending packets, ensuring arrival, resending bad packets, verifying data) and the actual data.¹³ The TCP divides the data into packets while the IP gives each packet the address of the final destination.¹⁴ Each

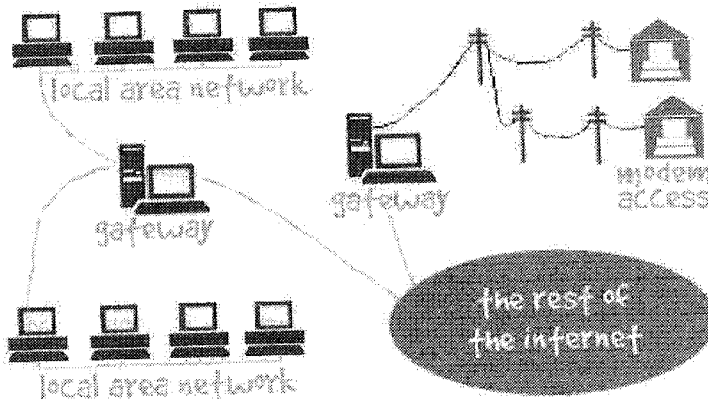
¹¹ *Id.*

¹² *Id.*

¹³ See Internet Basics 101 (explaining what a packet is), at <http://www.usd.edu/trio/tut/start/packet.shtml> (last visited Jan. 26, 2003).

¹⁴ PETER LENDA, INTERNET AND CHOICE-OF-LAW: THE INTERNATIONAL SALE OF DIGITISED PRODUCTS THROUGH THE INTERNET IN A EUROPEAN CONTEXT 21 (2001).

packet is sent along a chain of routers that connect the various networks of the internet together. The routers determine the most efficient path for the packet, which means that if one route is particularly slow or damaged, the packet is simply rerouted and when the receiving computer has all the packets in its proverbial hand, it can reassemble the file and display the document to the recipient user.¹⁵ A Uniform Resource Locator (“URL”) is an address for a specific web site and each portion of the URL contains information.¹⁶ For example, in the URL <http://www.dukebasketballreport.com/summaries/index.cgi?268>, “http://” indicates the protocol (http is a HTML document), “www.dukebasketballreport.com/” indicates the server or domain name, “summaries/” indicates the path name to the directory requested (like a folder), and “index.cgi?268” is the filename requested (actual data wanted).¹⁷ To access the internet, a computer must be connected to a gateway which then connects it to a network of networks which is the internet.¹⁸



¹⁵ See Internet Basics: The Five Things You Need to Know about the Internet (explaining how the internet works), at http://business.cisco.com/prod/tree.taf?asset_id=49617&public_view=true&kbns=1.html (last visited Jan. 26, 2003).

¹⁶ See Internet Basics (explaining what a URL is), at <http://www.usd.edu/trio/tut/start/url.shtml> (last visited Feb. 4, 2004). For a more technical explanation of URL, see World Wide Web at <http://www.nic.funet.fi/index/FUNET/history/internet/en/www.html> (last visited Jan. 26, 2003).

¹⁷ The Duke Basketball Report web site is dedicated to the Duke Men’s Basketball team and maintained by rabid Duke fans.

¹⁸ See Internet Basics 101 (demonstrating how a computer connects to the internet), at <http://www.usd.edu/trio/tut/start/gateway.shtml> (last visited Jan.

2.3. *Electronic Commerce (E-Commerce) Growth*

The internet has become more accessible and user-friendly, with an estimated 700 to 945 million internet users projected in 2004.¹⁹ Not only have more people been accessing the internet, but more people have been utilizing it to set up their own web sites, as well. According to the Organization for Economic Cooperation and Development ("OECD"), in July 2000, the United States hosted 46.5 web sites per 1000 inhabitants while the EU hosted 12.7 web sites per 1000 inhabitants.²⁰ It is not surprising, then, that e-commerce involving sale of goods and services on the internet has exploded, as well. There are primarily two types of transactions in e-commerce—B2C relationships and business-to-business ("B2B") relationships. B2C transactions involve the purchase of products by individuals outside their trade or profession while B2B transactions involve performance against payment or performance against performance. In 1999, the ratio between B2C and B2B transactions reached 40%/60% in the United States and 31%/69% in the EU.²¹ This trend does not seem to be diminishing for "[e]ven after the dot-com shakeout in the year 2000, Forrester [Research, Inc.] predicted that North American e-commerce alone 'would reach \$3.2 trillion in 2004.'"²²

26, 2003).

¹⁹ See *Cyber Atlas, Global Online Populations* (listing the number of active internet global users from various sources), at http://cyberatlas.internet.com/big_picture/geographics/print/5911_151151 (last visited Nov. 20, 2002).

²⁰ See ALESSANDRA COLECCHIA ET AL., *MEASURING THE INFORMATION ECONOMY 2002* 40 (Oct. 18, 2002) (analyzing data of more than 80 indicators of Information and Communication Technologies (ICT) and its use), available at http://www.oecd.org/EN/document/5/0,2340,en_2649_201185_2765701_1_1_1_1,00.html; see also Martin Fern, *Keeping Abreast of Evolving Internet Regulations*, 23 *LOS ANGELES BUS. J.* 52 (2001) ("[T]he annual growth rate [in U.S. internet backbone traffic] has been 100 percent in each of the past four years."); see generally Zoe Baird, *Governing the Internet: Engaging Government, Business and Nonprofits*, 81 *FOREIGN AFF.* 15 (2002) (insisting that the rapid growth of the internet requires government regulation).

²¹ Norel Rosner, *International Jurisdiction in European Union E-Commerce Contracts*, May 1, 2002, at http://www.llrx.com/features/eu_ecom.htm.

²² STUART BIEGEL, *BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE* 29 (2001).

2.4. How the Internet's Design Impacts E-Commerce Businesses

2.4.1. Advantages for Businesses

The internet's global expanse enables businesses to reach millions of potential customers through their web sites. There is a low cost of entry into the marketplace as a business need only to invest in a computer and an internet connection to have a worldwide presence. Record-keeping can become more accurate because web transactions can be recorded with computer software that never requires manual entry. Time spent on customer service becomes more efficient as well, for the web permits a company to communicate with its customers more quickly through e-mail or even instant messaging programs that operate in real-time (instantaneous time).²³

2.4.2. Disadvantages for Businesses

As beneficial as the internet can be to a business, it also exposes the business to some unorthodox risks not seen in traditional commercial transactions. An e-commerce transaction is more difficult to trace, identify, and distinguish. This lack of transparency allows for anonymity, should the consumer desire it.²⁴ Such anonymity could make it potentially difficult to resolve any disputes that arise from the transaction itself. A customer could leave the company unpaid, and it could be difficult to track him down. Due to the anonymity of the consumer party, any resolution would be far-fetched, if not impossible.

Furthermore, there are also security risks that may be more technologically advanced than a business is equipped to handle.²⁵ For example, denial of service ("DOS") attacks launched by

²³ Lenda, *supra* note 14, at 27.

²⁴ *Id.* at 28 ("There are at least five different aspects of the anonymity of Internet transactions: who (which person or persons) are involved in the transaction; what constitutes the object of the transaction (including elements of privacy); where does the transaction take place; when does an activity have legal consequences; and how are transactions performed.").

²⁵ Hackers may be able to enter a company's electronic archive and steal vital information, such as customer credit card numbers. Viruses or denial-of-service (DOS) attacks can render a company web site inaccessible. See, e.g., Financial Times, *Virus Hits A.T.M.s and Computers Across Globe*, N.Y. TIMES, Jan. 26, 2003 (demonstrating how a virus can affect e-commerce), at <http://www.nytimes.com/2003/01/26/business/FT1042491212045.html>.

hackers which prevent communication between the network and its clients and servers are commonplace. In February 2000, there were three straight days of DOS attacks on Yahoo!, Amazon.com, Buy.com, CNN.com and other popular web sites which slowed down web traffic considerably and cost businesses lost revenue.²⁶ Normally, a client computer will send a request to a server for authentication. The server returns authentication approval and the client computer is allowed on to the network.²⁷ In a DOS attack, the client sends numerous requests to the server which ties up the network's other lines.²⁸ Because these requests usually have false addresses, when the server tries to return authentication approval, it cannot.²⁹ In similar fashion to a fax machine, the server then waits a few minutes before trying to return the authentication approval again.³⁰ After a few tries, it then quits, whereupon the client sends another batch of false authentication requests, thereby starting the process all over again.³¹ Aggregated activity from several client computers makes it difficult for the server to distinguish between legitimate and false traffic.³² As a result, a DOS attack clogs up internet traffic and slows down activity on the web sites that are being attacked. Protecting a company's web site from DOS attacks or other computer viruses can be costly and in some cases, prohibitive.

3. U.S. AND EU APPROACHES TO INTERNET JURISDICTION

Traditionally, jurisdiction in legal systems has been anchored in the geographic location of the parties in a lawsuit.

3.1. U.S. Approach to Internet Jurisdiction

3.1.1. Traditional Notions of Jurisdiction in the U.S. Courts

²⁶ See *Internet Quiet after Three Straight Days of Attacks*, CNN.COM, Feb. 10, 2000 (discussing the hacker attacks), at <http://www.cnn.com/2000/TECH/computing/02/10/denial.attack.01/index.html>.

²⁷ See CERT Coordination Center, *Denial of Service Attacks* (1997), at http://www.cert.org/tech_tips/denial_of_service.html (explaining how DOS attacks work) (last visited Mar. 2, 2004).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

In the United States, subject matter jurisdiction (“SMJ”) deals with the court’s authority to hear and decide cases in certain areas of the law. Personal jurisdiction is the court’s authority over a defendant and arises only when a defendant has sufficient ties to a state that makes him answerable to that state’s courts. When a connection is found between the defendant and the state, the defendant is served a summons, or notice, about the lawsuit pending against him.³³ Most states have long-arm statutes that set the state’s guidelines for when its courts can assume jurisdiction over a non-resident defendant.³⁴ To comply with due process concerns, personal jurisdiction cannot offend “traditional notions of fair play and substantial justice.”³⁵ There are two kinds of personal jurisdiction – general and specific. General jurisdiction is asserted over a non-resident defendant only if the defendant’s contacts with the state are “continuous and systematic,” even if the contacts are unrelated to the dispute at hand.³⁶ Specific jurisdiction arises when the lawsuit is related to the defendant’s contacts with the forum state.³⁷ Ultimately, the question is whether the defendant’s “minimum contacts” with the forum state can cause him to reasonably anticipate being sued in the forum state’s Court.³⁸ There are three tests courts have used to find whether the defendant’s minimum contacts with the forum state reached the level to cause specific jurisdiction to arise. A defendant may *purposefully direct* his activity towards a forum state,³⁹ *purposefully avail* himself of the benefits of doing business in the forum state,⁴⁰ or deliver his products into the *stream of commerce* of the forum state⁴¹ to satisfy the requisite level of contact for specific jurisdiction.

³² *Id.*

³³ FRASCOGNA, JR. ET. AL, *supra* note 1, at 143-44.

³⁴ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (explaining how the long-arm statute gives courts authority to assume jurisdiction over non-residents).

³⁵ *Id.* at 316 (citations omitted).

³⁶ *Id.* at 317.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Calder v. Jones*, 465 U.S. 783 (1984).

⁴⁰ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

⁴¹ *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

3.1.2. Difficulties of Determining Jurisdiction in Internet Cases

The traditional notions of jurisdiction focus heavily on the location where the transaction in dispute took place to determine the proper jurisdiction to adjudicate the dispute. However, internet transactions are conducted over a network, and as a result, it does not conform to traditional geographic boundaries. There are several ways that the infrastructure of the internet has made it difficult to establish the geographic location of the internet user.

- (1) The internet is insensitive to geographic location and is designed to ignore rather than document geographic location.⁴²
- (2) Addresses on the internet are digital and not geographic addresses.⁴³
- (3) The internet cannot feasibly be closed to users from another state as it is, by nature, an instrument of interstate commerce.⁴⁴
- (4) The user name and e-mail address are often the only indicators of a user's identity.⁴⁵ As a result, a consumer buying goods through a web site may not be sure where the seller is located geographically.
- (5) Information travels through many different paths through the internet which makes tracing difficult.⁴⁶
- (6) There is no way to avoid an internet user's message from reaching residents of any particular state.⁴⁷

Because of the internet's decentralized and anonymous nature, determining whether a defendant has made minimum contact with a forum state is extremely difficult. Is the click of a button to enter

⁴² See *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 741-45 (E.D. Mich. 1999) (describing the various unique characteristics of the internet and the consequent difficulty in establishing a party's domicile); but see *The Internet's New Borders*, *ECONOMIST*, Aug. 9, 2001, available at http://www.economist.com/agenda/displayStory.cfm?Story_id=730089 (arguing that old geographic borders are proving to be resilient on the internet because of the lack of consumer sophistication to manipulate their electronic location).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 742-43.

⁴⁶ *Id.* at 745.

⁴⁷ *Id.*

a web site or the mere existence of a web site enough for minimum contact? Is the state where the server is maintained to keep the web site running or the state where the recipient views the web site the forum state? Indeed, “[i]t is unique to the internet that these minimum contacts can be established without any physical presence by or on behalf of the company in a given state.”⁴⁸ The courts have only begun a piecemeal approach towards applying specific jurisdiction standards to internet cases.

3.1.3. *Development of U.S. Case Law in Internet Jurisdiction*

U.S. courts have tended to focus on the actions of the seller (or web site owner) rather than the actions of the consumer in determining whether or not specific jurisdiction has arisen. One of the most significant developments has been that of the “Zippo Continuum,” or sliding scale of contact as delineated by the District Court in the Western District of Pennsylvania in *Zippo Mfg. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).⁴⁹ The manufacturers of “Zippo” tobacco lighters, incorporated in Pennsylvania, sued the defendant, Zippo Dot Com, a California-based news service which obtained exclusive use of several domain names such as “zippo.com,” “zippo.net,” and “zipponews.com.”⁵⁰ The Western District of Pennsylvania Court exercised jurisdiction over the defendant, despite the fact that the news service’s offices, employees and internet servers were all in

⁴⁸ Christopher McWhinney et al., *The “Sliding Scale” of Personal Jurisdiction Via the Internet*, STAN. TECH. L. REV. (1999), at http://stlr.stanford.edu/STLR/events/personal_jurisdiction/contents_f.html (last visited Mar. 2, 2004).

Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and: (1) the power of local governments to assert control over online behavior; (2) the effects of online behavior on individuals or things; (3) the legitimacy of a local sovereign’s efforts to regulate global phenomena; and (4) the ability of physical location to give notice of which sets of rules apply.

See also David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STANFORD L. REV. 1367, 1370 (1996).

⁴⁹ Mere interactivity that allows a consumer to make a transaction through a web site does not seem to merit enough minimum contact to justify personal jurisdiction. *Snyder v. Dolphin Encounters Ltd.*, 235 F. Supp. 2d 433 (E.D. Pa. Dec. 10, 2002).

⁵⁰ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1121 (E.D.Pa.1997).

California.⁵¹ Its only contact with Pennsylvania was advertising for the news service on its web site through which it gained 3000 Pennsylvania residents as subscribers.⁵² The defendant also contracted with seven internet access providers to allow their customers to access its web site, and two of those providers were based in Pennsylvania.⁵³ The Court defined the Zippo continuum as a spectrum that ranges from active (where the defendant clearly does business over the internet through repeated transmissions of files over the web) to passive (where the defendant has merely made information available on the web and no interchange between the web site and visitor is allowed) with the middle ground occupied by the interactive (where a web site enables a user to exchange information with the host computer).⁵⁴ Using this guideline, the Court held that the defendant actively intended and did conduct business in Pennsylvania, thus satisfying minimum contacts.⁵⁵ The Zippo test has been adopted by various federal appellate circuits, as in *Gator.com v. L.L. Bean, Inc.*,⁵⁶ where the Ninth Circuit held that L.L. Bean's web site presence in California via its online store operated "as the functional equivalent of a physical store," and that the Zippo test "does not require an actual

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (citations omitted).

⁵⁴ [T]he 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. This sliding scale is consistent with well developed personal jurisdiction principles. 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 involved the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. 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 of personal jurisdiction. 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.

Id. at 1124.

⁵⁵ *Id.* at 1125-27.

⁵⁶ *Gator.com v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079 (9th Cir. 2003).

presence in the state. Rather, the nature of the commercial activity must be of a substantial enough nature [so as to be an equitable substitute for a physical store]."⁵⁷ As a result, L.L. Bean was subjected to personal jurisdiction in California, despite its Maine incorporation and its principal place of business and headquarters being located in Maine.

Another test courts have used is the effects-based test which allows a court to exercise personal jurisdiction if the harm occurs in the forum state and the defendant knew that it would occur there.⁵⁸ For example, in *Calder v. Jones*, the plaintiff was a professional entertainer who worked in California and sued the writers who were based in Florida for libel as a result of an article they wrote that was published in the *National Enquirer*.⁵⁹ The Supreme Court held that California courts could exercise jurisdiction over Florida residents for the article that censured the plaintiff because the story concerned the California activities of the California resident, was drawn from California sources, and the brunt of the harm was felt in California.⁶⁰ In the effects-based test, rather than examining the specific characteristics of a web site to determine its level of contact, the court focuses on the actual effects the web site has had in the forum state. This foreseeability factor of the effects-based test, while rather expansive in theory, has been limited by a targeting requirement.⁶¹ The targeting requirement has a three-prong test. The defendant must: (1) direct electronic activity into the forum state; (2) intend to engage in business or other interactions in the forum state; and (3) engage in activity that created under the forum state's law a potential cause of action with regard to a person in the forum state.⁶² For example, in *Young v. New Haven Advocate*, two Connecticut newspapers posted on the

⁵⁷ *Id.*

⁵⁸ See *Calder v. Jones*, 465 U.S. 783 (1984) (delineating the effects-based test for exercising jurisdiction).

⁵⁹ *Id.* at 783.

⁶⁰ *Id.*

⁶¹ See *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (adapting from the Zippo Continuum and creating a three-prong test for finding express targeting or aiming); see also *Revell v. Lidov*, 317 F. 3d 467 (5th Cir. 2002) (supporting the Court of Appeals for the Fourth Circuit's targeting approach); *Pavlovich v. Superior Court of Santa Clara County*, 58 P.3d 2 (Cal. 2002) (holding that mere foreseeability of the potential harm is not enough to establish jurisdiction under the effects-based test).

⁶² See *ALS Scan Inc.*, 293 F.3d at 714 (adapting from the Zippo Continuum and creating a three-prong test for finding express targeting or aiming).

internet an article about the housing of Connecticut prisoners in Virginia and allegedly defamed a Virginia prison warden. The Fourth Circuit Court ruled that Virginia could not exercise personal jurisdiction because the Connecticut defendants did not target their web site or article at Virginia residents.⁶³ Thus, in order for the effects-based test to apply, the defendant must intend to aim his web site at a particular forum state or its residents.

However, since e-commerce is still in its infancy, it is unlikely that the sliding scale test or effects-based test is the final evolution of determining jurisdiction in internet cases in the United States.⁶⁴

3.2. EU Approach to Internet Jurisdiction

The EU approach to internet jurisdiction is markedly different from the U.S. approach in that it is highly regulatory. The EU already suffers from a lack of skilled information technology ("IT") workers. It is a phenomenon partially attributed to the lack of incentive for Europeans to aggressively upgrade their job skills since they are guaranteed a comfortable minimal standard of living from the social safety net of benefits the EU countries provide.⁶⁵ Rather than letting the private sector lead in developing the commercial aspects of the internet, the EU response has been to pass legislation to regulate the internet's commercial development.⁶⁶ The EU's goal is to create an entrepreneurial business culture similar to the United States' culture, but retain their socially protective benefits, as well.⁶⁷ Because the EU approach has been to establish a series of bright-line rules, this Section will only focus on B2C consumer transactions over the internet, as addressing all commercial transactions would be too vast of a topic.

⁶³ See *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) (demonstrating the effect of the targeting requirement).

⁶⁴ See Jeremy Gilman, *Personal Jurisdiction and the Internet: Traditional Jurisprudence for a New Medium*, 56 BUS. LAW. 395 (2000) (surveying the U.S. approach to internet jurisdiction).

⁶⁵ MARCUS FRANDA, *GOVERNING THE INTERNET: THE EMERGENCE OF AN INTERNATIONAL REGIME* 89 (2001).

⁶⁶ *Id.* at 83.

⁶⁷ *Id.* at 89.

3.2.1. Brussels Convention

The 1968 Brussels Convention⁶⁸ dealt with the issues of jurisdiction and the enforcement of foreign judgments. Instead of the legislation becoming automatic, member states to the Convention were required to enact laws in their own countries that gave effect to the objectives of the Convention.⁶⁹ According to the Brussels Convention, in a typical commercial transaction, the plaintiff would sue in the “place of performance of the obligation in question”⁷⁰ or where the transaction is or should have been completed.⁷¹ Consumer transactions were dealt with differently from regular commercial transactions as it gave consumers a choice of jurisdictions. Article 13 of the Brussels Convention defined a consumer contract as B2C contract for goods and services for the purposes outside a consumer’s normal trade or profession if it met the following requirements:

- (1) the contract was for the sale of goods on installment credit terms; or
- (2) a contract for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods; or
- (3) any other contract for the supply of goods or services.⁷²

In addition, the conclusion of the contract had to be preceded by a specific invitation addressed to the consumer or by advertising in his state of domicile *and* the consumer had to take in his state of domicile the steps necessary for the conclusion of the contract.⁷³ Article 14 gave the consumer a choice of jurisdictions between either his own domicile, or that of the supplier (e.g., web site owner).⁷⁴ This bright-line rule left little room for debate. If the contract met the requirements of a consumer contract, the consumer had the option of choosing the jurisdiction in which to

⁶⁸ Brussels Convention, *supra* note 3.

⁶⁹ *Id.*

⁷⁰ Brussels Convention, *supra* note 3, art. 5(1).

⁷¹ Agne Lindberg, *Jurisdiction on the Internet – the European Perspective*, American Bar Association Section of Business Law, Committee on Law of Commerce in Cyberspace, Subcommittee on International Transactions, July 20, 1997, at <http://www.abanet.org/buslaw/cyber/initiatives/eujuris.html>.

⁷² See Brussels Convention, *supra* note 3, art. 13 (defining consumer contract).

⁷³ *Id.*

⁷⁴ *Id.* art. 14.

litigate.⁷⁵ A consumer could also choose to forgo the choice of jurisdiction by opting to make an agreement with the supplier as to which court would have jurisdiction before agreeing to the contract in a forum selection clause. This opt-out choice was allowed only if it fulfilled several formal requirements. The agreement had to: (1) be in writing; (2) be in a form that conformed to practices established between the parties; and (3) in international trade or commerce, be in a form that accorded with a usage of certain dignity.⁷⁶ However, jurisdiction was an entirely different story for suppliers (e.g., sellers). In a restriction against suppliers, Article 14 only permitted suppliers to bring suit in a consumer's domicile.⁷⁷ The restriction against suppliers also applied to non-EU suppliers who had branch offices in the EU.⁷⁸ The Brussels Convention clearly favored consumers in its jurisdiction provisions.

3.2.2. *Brussels I Regulation*

While the Brussels Convention clearly dealt with jurisdiction, it had not anticipated the internet and the unique difficulties e-commerce would cause courts in determining where a case should be heard. As noted in Section 3.1.2, merely establishing the *domicile* of an internet user could be difficult. Furthermore, e-commerce in the EU clearly lagged behind the United States,⁷⁹ and much of this was attributed to lack of consumer confidence in the security of internet transactions.⁸⁰ As a result, on December 22, 2000, the EU's Council of Ministers adopted Brussels I in an effort to modernize the Brussels Convention.⁸¹ Brussels I came into force in March 2002.⁸² Brussels I differed from the Brussels Convention in

⁷⁵ See Michael Cordera, *E-Consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet*, 27 RUTGERS COMPUTER & TECH. L.J. 231, 237 (2001) (explaining how the EU bright-line rule approach differed from American jurisprudence and its "minimum contacts" analysis).

⁷⁶ Lindberg, *supra* note 71.

⁷⁷ Brussels Convention, *supra* note 3, art. 14.

⁷⁸ *Id.* at art. 13.

⁷⁹ See, e.g., FRANDA, *supra* note 65, at 91 ("In 1999, for example, the EC [European Community] estimated e-commerce revenues for the fifteen EC nations at only \$16.8 billion, compared with \$71.4 billion . . . for the United States alone.").

⁸⁰ See Victorya Hong, "Brussels I" Angers EC Businesses, INDUS. STANDARD, Dec. 1, 2000 (on file with author) (quoting Leonello Gabrici, a commission spokesman, stating "[a] lack of consumer confidence is the main thing holding up the development of e-commerce").

⁸¹ Brussels I, *supra* note 4.

⁸² *Id.*

adoption, for it was directly binding on the members of the EU, rather than having each country adopt its own version in its statutory code.⁸³

There was great debate over whether Brussels I would take a country-of-origin or country-of-destination approach in consumer transactions. The country-of-origin approach dictates that all legal disputes over transactions contracted over the internet would be determined by the law of the supplier, where the good/service originated.⁸⁴ Consumers are thought to be disadvantaged by this approach because the approach subjects them to foreign laws they may not be familiar with when purchasing a product in another member state of the EU. This problem is only compounded if the seller masks his domicile on his web site.⁸⁵ The country-of-destination approach applies the law of the consumer's domicile in legal disputes over internet transactions. This is advantageous for consumers,⁸⁶ but it leaves sellers vulnerable to being subject to any foreign jurisdiction where their web site can be accessed.

The drafters of Brussels I chose to embrace a country-of-destination approach in the name of boosting consumer confidence in e-commerce. Article 15 of Brussels I broadened the definition of consumer transactions in Article 13 of the Brussels Convention. Whereas the Brussels Convention required that the consumer contract had to be preceded by specific advertisement or invitation and be completed in the consumer's domicile,⁸⁷ Brussels I makes

⁸³ *Id.* art. 76.

⁸⁴ See Elisa Alexandridou, *The Country of Origin Principle in E-Commerce Viewed from a Greek Law Perspective*, in CONSUMER LAW IN THE INFORMATION SOCIETY 103, 104 (Thomas Wilhelmsson et al. eds., 2001) (explaining the country-of-origin principle).

⁸⁵ At present it is often unimportant, and sometimes impossible, to discover the geographic origin of a particular electronic communication. . . . It is easy for fraudsters to access a large number of consumers through an Internet presence which is both simple to change and difficult to link back to the fraudster.

John Dickie, *EU Internet and Electronic Commerce Law: Consumers and Non-Consumers*, in CONSUMER L. INFO. SOC., 127, 129 (Thomas Wilhelmsson et al. eds., 2001).

⁸⁶ See Avril D. Haines, *The Impact of the Internet on the Judgments Project: Thoughts for the Future*, Preliminary Document No. 17, at 10, Hague Conference on Private International Law (Feb. 2002) (discussing the impact of the internet on the draft [Hague] Convention), available at <http://www.hcch.net/e/workprog/jdgm.html>.

⁸⁷ See Brussels Convention, *supra* note 3, art. 13 (defining consumer contract).

no mention of the latter requirement that the contract be completed in the consumer's domicile⁸⁸ because for the purposes of internet transactions, a consumer's physical location is difficult to ascertain.⁸⁹ Furthermore, Brussels I makes clear that contracts completed via an interactive web site falls within its confines,⁹⁰ thereby giving every EU consumer who buys a good/service through the internet the privilege of litigating in their own domicile. The consumer's freedom to choose which domicile she will bring a cause of action is significantly strengthened.⁹¹ Brussels I also retained the Brussels Convention limitation that restricted a supplier's choice-of-law to bringing suit in the consumer's domicile.⁹² Lastly, while Article 17 in Brussels I allows for forum selection clauses,⁹³ it does not allow any such contractual agreements to take away the consumer's right to bring suit in his home jurisdiction, unless the agreement is entered into *after* the dispute arises.⁹⁴ Ultimately, if a seller is running a web site that is "directing its activities" towards an EU member state, under Brussels I, the seller would be under that member state's jurisdiction.⁹⁵ Brussels I unabashedly protects the consumer's choice of forum by embracing the country-of-destination approach.

3.2.3. Rome II Draft Proposal

While the Brussels Convention and Brussels I deal with which

⁸⁸ Compare Brussels I, *supra* note 4, art. 15(1)(c) (explaining when and how a contract is concluded) with Brussels Convention, *supra* note 3, art. 13(3) (describing extra requirements for conclusion of a contract).

⁸⁹ Commission Proposal for Council Regulation Concerning the Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, COM(99)348 final at 7 [hereinafter Commission Proposal].

⁹⁰ See Brussels I, *supra* note 4, art. 15(c) (making clear that a supplier who pursues or directs commercial activity into a consumer's member state has taken the necessary step towards linking the transaction to the consumer's domicile).

⁹¹ *Id.* art. 16(1).

⁹² *Id.* art. 16(2).

⁹³ Forum selection clauses are agreements between both parties of a contract to select a predestined jurisdiction to resolve any potential conflicts arising from the contract.

⁹⁴ Brussels I, *supra* note 4, art. 17.

⁹⁵ See Steve Hill, *Trouble in Store? Many E-Commerce Sites are Breaking the Law Without Even Realising It. Make Sure You Don't Get Caught Out by Following Our Guide to Keeping Your Online Store Legal*, INTERNET MAGAZINE, Apr. 2002 (surveying the burden on e-commerce sites to comply with EU regulations), available at http://www.findarticles.com/cf_dls/m0CXD/2002_April/8498910/p1./article.jhtml.

court has jurisdiction over a case, the 1980 Rome Convention ("Rome I") deals with the substantive choice of law that applies once a court is chosen to hear the contractual dispute in B2B or B2C transactions.⁹⁶ It permitted consumer contracts to include a forum selection clause, as long as the consumer was not denied protections of his local consumer law.⁹⁷ This consumer protection was allowed, provided that the contract was preceded by a specific advertisement or invitation targeted at the consumer or the consumer's member state and that the contract was concluded in the consumer's domicile.⁹⁸ In a similar move to update Rome I, the EU has drafted a proposal, Rome II, which is intended to harmonize the member states' rules regarding conflict of laws.⁹⁹ While Rome I applied to both contractual and non-contractual matters, Rome II applies to non-contractual matters only.¹⁰⁰ Specifically, Rome II would apply to cross-border liability for disputes in which there are no contracts. Its tentative proposal also embraces a country-of-destination approach¹⁰¹ and applies the law of the country where the injured person (consumer plaintiff) resides in non-contractual obligations.¹⁰²

Rome II has not yet passed, for its subject—substantive choice-of-law—is a more complicated issue to find agreement. As Mark Bohannon of the Software and Information Industry Association remarks, "Rome II deals with substantive law. The notion that they're going to be able to transpose the country-of-destination rule into a substantive law theory is going to be much different than when you're talking about, basically, a venue-jurisdiction

⁹⁶ Rome I, *supra* note 5.

⁹⁷ Rome I, *supra* note 5, art. 5.

⁹⁸ These provisions are similar to those mandated in Brussels I. Rome I, *supra* note 5, art. 5(2).

⁹⁹ Rome I, *supra* note 5.

¹⁰⁰ Dr. ECommerce, Apr. 29, 2001, available at <http://europa.eu.int/ISPO/ecommerce/drecommerce/answers/000331.html>.

¹⁰¹ *But see* Green Paper, *supra* note 6, at 31 (explaining how streamlining Rome II with Brussels I is still difficult because of the bifurcation between non-consumer and consumer categories); *see also* Dickie, *supra* note 85, at 131 ("[T]he divergence of foci within Community law between consumer-protection measures and non-consumer-protection measures reduces its coherence.").

¹⁰² Proposal of Council Regulation on the Law Applicable to Non-Contractual Obligations, art. 3 [hereinafter Rome II Draft Proposal] (describing application of provisions to non-contractual obligations), available at <http://pub.bna.com/eclr/romeeng.htm> (last visited Feb. 24, 2004).

question.”¹⁰³ In July 2003, business representatives from the International Chamber of Commerce (“ICC”) expressed serious reservations about the Rome II draft and its country-of-destination approach.¹⁰⁴ As Michael Hancock, an internet law expert who co-heads ICC’s work on e-commerce jurisdiction issues, comments, “Companies providing services to customers outside the European Union could be sued under a variety of laws, depending on where the claimant happened to live or simply has a product.”¹⁰⁵ As a result, “[Rome II] would be a nightmare for any business offering services on the internet,” says Jonas Astrup, ICC’s policy manager for Commercial Law and Practice.¹⁰⁶

4. WEAKNESSES OF THE U.S. AND EU APPROACHES TO INTERNET JURISDICTION AND THE DIFFICULTY OF A HYBRID APPROACH

While the United States has relied on its courts and the EU has relied on legislation to determine jurisdiction in cases involving consumers’ internet transactions, there are significant weaknesses with each approach that become significantly compounded when a trans-Atlantic approach is attempted for uniformity purposes.

4.1. *Weakness of the U.S. Approach to Internet Jurisdiction*

The fundamental weakness of the U.S. approach is its lack of predictability. As opposed to bright-line rules established in the EU, businesses must interpret whether or not their web sites reach the level of interactivity courts will find to suffice for minimum contacts. Because judicial decisions are the only measure by which businesses have to go by, the infancy of e-commerce means that the two current tests, Zippo Continuum and effects-based, are unlikely to be permanent or bright-line rules. As Thomas Vartanian, former chair of the American Bar Association Global Cyberspace Jurisdiction Project, noted:

“Anyone doing business in cyberspace needs to know what

¹⁰³ Anandashankar Mazumdar, *EU Actions on Jurisdiction, Choice of Law Watched Closely by E-Commerce Interests*, 7 BNA, INC. ELEC. COM. & L. 251 (2002).

¹⁰⁴ *Rome II Gets “Thumbs Down” From Business*, ICC (INTERNATIONAL CHAMBER OF COMMERCE): THE WORLD BUSINESS ORGANIZATION, July 25, 2003, at http://www.iccwbo.org/home/news_archives/2003/stories/rome_2.asp.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

laws to obey, whether it be a question of what taxes are due and where, or what consumer protections apply to the sale of their products or services. . . . [A] legal infrastructure that can provide the requisite elements of certainty and predictability. . . will allow electronic commerce to flourish as efficiently as market forces dictate."¹⁰⁷

Because the United States relies on its private sector to push the boundaries on what should and should not be regulated in this internet sector,¹⁰⁸ legal rules are constantly in flux.

4.2. Weakness of the EU Approach to Internet Jurisdiction

While the EU's Brussels I and draft Rome II proposal both emphasize bright-line rules for consumer transactions, there remain significant weaknesses with this regulatory approach. First, the statutes, as they are written, still remain ambiguous in their interpretation as applied to the internet. Second, the country-of-destination approach hampers the growth of e-commerce in the EU which is precisely the opposite effect intended by the EU.¹⁰⁹

4.2.1. Ambiguity of the "Directed" Intent

Article 15 of Brussels I requires that a supplier specifically direct advertising or invitation towards a consumer.¹¹⁰ In addition, the Commission's proposal made clear that consumer contracts that were entered into via an interactive web site activated Brussels II's special consumer protection clauses.¹¹¹ Essentially, these country-of-destination protections were to prevent the passive consumer from becoming subject to foreign jurisdiction and foreign laws merely by participating on the web. However, "e-

¹⁰⁷ ABA Group Releases Study on Internet Jurisdiction; Ground-Breaking Report Calls for the Creation of a Multinational Jurisdiction Commission, Encourages New Forms of Online Dispute Resolution, PR Newswire, July 10, 2000, <http://library.northernlight.com/FC20000710800000135.html?inid=ZzM8J2V%2BciMWbR>.

¹⁰⁸ See The White House, *A Framework for Global Electronic Commerce* (July 1, 1997) (stating that the private sector should lead in internet regulation, and governments should avoid undue restrictions on e-commerce), available at <http://www.technology.gov/digeconomy/frameworkr.htm>.

¹⁰⁹ Rosner, *supra* note 21.

¹¹⁰ Brussels I, *supra* note 4, art. 15.

¹¹¹ Commission Proposal, *supra* note 89, at 16.

commerce blurs the definition of the passive consumer."¹¹² It could be argued that the typical passive consumer is the person who is solicited by email to purchase a product made by a foreign supplier. But what about the internet user who arrives at a foreign web site by clicking on various links? Is she deemed to be a passive consumer worthy of special consumer protection under Brussels I or actively making foreign contact?

Michael Cordera, in his comment titled *E-Consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet*, argues that the drafters of Brussels II misinterpreted the nature of e-consumer transactions and subsequently, wrote an overly broad regulation in Brussels II when they adopted the country-of-destination approach.¹¹³ First, the concept that a contract entered into via an interactive web site qualifies as having been "directed" towards a consumer is flawed. Cordera uses the example of a German consumer responding to an advertisement placed by a French seller in a German newspaper.¹¹⁴ Under Brussels I, article 15 would apply. However, if the advertisement were placed in an international newspaper like the *Financial Times*, the special consumer transaction rules would not apply.¹¹⁵ One could make the argument that placing a web site on the internet is more analogous to placing an advertisement in the *Financial Times* than in a German newspaper.¹¹⁶ Second, not all consumer contracts entered interactively are *directed* at those consumers completing such contracts. Consumers could click through various links to reach a foreign web site and complete a contract that would qualify for special consumer protection under Brussels II, but it could not be said that the foreign web site owner directed any of his activities towards those consumers.¹¹⁷ A consumer has greater capability to determine the seller's location than a seller has to determine the consumer's location.¹¹⁸ As a result, the consumer

¹¹² See Benoît De Nayer, *The Consumer in Electronic Commerce: Beyond Confidence*, in CONSUMER L. INFO. SOC., 117, 121 (Thomas Wilhelmsson et al. eds., 2001) (arguing that the latter consumer also deserves protection because by being invited to click through various web links, he has lost any initiative in the buying process).

¹¹³ Cordera, *supra* note 75, at 249.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 250.

¹¹⁸ See Council and Parliament Directive 97/7, art. 4, 1997 O.J. (L 144) 19, 22

should carry the risk of being subject to foreign jurisdiction since he is more likely to be aware that he is availing himself of goods/services provided by a foreign web site than the web site owner to be aware that the consumer resides in a foreign member state.

It is assumed that mere accessibility to a web site in another member state is not enough to mean the web site is directing its activities towards another member state. However, other seemingly harmless actions can mean this. According to the Consumer & Competition Policy Directorate in the United Kingdom ("U.K."), advertising in magazines meant for all EU member states, offering a choice of languages on the web site, or giving prices in Euros can all serve as indicators that a web site was directing its activities to another member state.¹¹⁹ Furthermore, providing in the contract's Terms and Conditions that the goods/services on the web site are not meant for purchase outside the U.K., for example, is not enough to protect a seller from being subject to litigation in a foreign consumer's forum state.¹²⁰

Ultimately, the country-of-destination approach embraced in all consumer contracts taking place through interactive web sites is overly broad and an unfair burden on sellers.

4.2.2. *Hampering of E-Commerce*

There is significant criticism of the country-of-destination approach adopted in Brussels I and the draft proposal of Rome II. Because this approach subjects sellers to increased litigation costs, sellers may be tempted to pass these costs on to consumers by way of higher prices. Sellers may also choose to decrease the number of choices available to consumers by limiting the use of their web sites to certain consumers through closed computer systems, or by simply shutting down their web presence. For an example of increased litigation harassment, in Germany, consumer protection groups such as the Federation of German Consumer Organizations ("VB") surf the web to see which web sites are not in compliance

(requiring the seller provide the consumer with the identity of the seller and other contract information).

¹¹⁹ *Cross Border Consumer Contractual Disputes within the European Union: Which Country Has Jurisdiction? – Frequently Asked Questions*, U.K. Dep't of Trade and Industry Web site, at http://www.consumer.gov.uk/ccp/topics1/guide/jurisdiction_faq.htm (last visited Mar. 2, 2004).

¹²⁰ *Id.*

with the new laws that regulate distance sales. Then, VB sues the web site companies for failing to meticulously comply with regulations in which the web site owners are not well-versed.¹²¹ It does not even matter if the web site *does not sell* anything.¹²²

In Spain, the government recently decided to require all Spanish-based web sites engaged in commerce to register with the government in the name of consumer protection.¹²³ As a result, more than 300 web site owners have taken their pages offline.¹²⁴ Some have merely suspended their web presence temporarily in protest, but others have left for good.¹²⁵ As Georgeos Diaz-Montexano, the owner of a web site providing an online course in Egyptian hieroglyphics, says, "With this law, as always, it's the little guy that gets hurt."¹²⁶ The International Chamber of Commerce in response to the Spanish law published a statement remarking that "[e]xcessive domestic regulation of internet content creates significant uncertainties for business operating in this global medium, and has a chilling effect on commercial communication."¹²⁷

The EU approach significantly affects small- and mid-sized companies which may view the internet as the perfect medium to grow their businesses. Large conglomerates that operate throughout the EU or on a global basis can more easily afford legal expertise to avoid the various legal pitfalls involved with a worldwide practice. Small- and mid-sized companies do not have that same luxury and may choose to shut down their web sites in light of the potential for increased litigation where the cost of even one lawsuit in a foreign jurisdiction may cause them to go out of business. Ironically, a measure meant to promote consumer

¹²¹ See Thomas Schmitt, *Internet Retailers Feel Brunt of New Law*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 10, 2003 (describing how consumer groups are taking active measures to ensure web site owners comply with new regulations), at <http://www.faz.com/in/intemplates/efaz/archive.asp?rub={F040FFD3-897B-46DF-9603-752DD6405389}&doc={978682B0-061B-4E82-BF1D-E1985EA42554}>.

¹²² *Id.*

¹²³ See ICC, *New Spanish Internet Law Will Stymie E-Commerce*, Nov. 22, 2002 (arguing that the Spanish law inhibits e-commerce growth), at http://www.iccwbo.org/home/news_archives/2002/stories/spanish-internet.asp.

¹²⁴ Associated Press, *Spanish Net Law Sparks Protests*, Wired News, Oct. 25, 2002, at <http://www.wired.com/news/culture/0,1284,56021,00.html>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Astrup, *supra* note 123.

confidence in internet transactions then actually reduces consumer choices.

4.3. *Difficulty of a Hybrid Approach to Internet Jurisdiction*

While the United States and EU have adopted different approaches in determining jurisdiction over consumer internet transactions, the largest obstacle concerns trans-Atlantic, or global transactions. If a French consumer purchases a product from an American web site or vice versa, where should a dispute be heard? The obvious solution is for the United States and the EU to cooperate and develop an international framework to follow. The first issue is whether disparate substantive laws between the United States and the EU can be forged into an international framework. The second issue is whether two fundamentally different approaches towards governing the internet and e-commerce development can be reconciled to reach consensus.¹²⁸

4.3.1. *Risk of an International Regime*

Three cases involving Yahoo! Incorporated ("Yahoo!"), a search engine and auction web site, Dow Jones, a publisher, and Kazaa, a music-sharing company, demonstrate the risks posed by the creation of an international framework.

In 2000, a French court required Yahoo!, a U.S. company, to remove Nazi memorabilia from its auction web site because it violated French criminal law which barred the public display of Nazi-related materials in France.¹²⁹ This decision ignored Yahoo!'s claim that the French court had no jurisdiction because Yahoo!'s servers housing its web site were located in the United States.¹³⁰ Yahoo! subsequently counter-sued in the United States,¹³¹ claiming that the French judgment was unenforceable because obeying the French order would violate free speech guaranteed by the First Amendment.¹³² The Northern District of California granted a

¹²⁸ See FRANDA, *supra* note 65, at 83 (demonstrating how the United States is content to let the private sector play a leading role in developing e-commerce, whereas the EU prefers to regulate such development).

¹²⁹ See *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² U.S. CONST. amend. I.

motion for summary judgment in favor of Yahoo!.¹³³ However, civil liability was not the only penalty for Yahoo!. Yahoo!'s former executive, Timothy Koogle, was prosecuted for criminal violations in France, as well.¹³⁴ If found guilty, France would ask the United States to extradite Koogle, which the U.S. State Department would allow only if Koogle was found to have broken a similar U.S. law, which is not the case.¹³⁵ The U.S. protection of free speech guaranteed by the First Amendment is much more liberal than many European nations allow within their own countries. If an international framework adopts the substantive law of a nation like France, U.S. companies could be subject to similar foreign liabilities, whereas if an international framework adopts American law, companies could directly contravene European laws.¹³⁶

While an international framework is easy to pontificate, the reality of creating laws that both the United States and EU can live by is much more difficult. There is evidence of resentment in foreign courts about American hegemony and dominance and adherence to U.S. law which ought to worry U.S. companies with an internet presence. Last December in *Dow Jones v. Gutnick*, the

¹³³ See *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, *supra* note 129. *But see Dow Jones & Co., Inc. v. Harrods Ltd.*, No. 02 CIV.3979, 2002 U.S. Dist. LEXIS 19516 (S.D.N.Y. Oct. 11, 2002) (noting that a federal court lacked subject matter jurisdiction to issue an order precluding Harrods Ltd. from pursuing a libel suit against Dow Jones in the U.K. and holding that *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme* did not apply because enforcing the French judgment would be inconsistent with the First Amendment).

¹³⁴ See *French Prosecutor Argues for No Sentence for Former Yahoo! Boss on Trial*, Jan. 8, 2003 (reporting that Koogle risked a possible fine of 46,000 euros and five years' imprisonment if found guilty), available at <http://sg.news.yahoo.com/030107/1/36ajx.html>.

¹³⁵ *Id.* But the situation may be different if Koogle were to travel to France for any reason, including vacation, whereupon France could claim personal jurisdiction and arrest him.

¹³⁶ Quoting an amicus curiae brief filed by several public interest groups,

If French law can be enforced here, Yahoo could likewise be required to block access to information that 'sabotages national unity' in China, undermines 'religious harmony and public morals' in Singapore, offends 'the social, cultural, political, media, economic and religious values' of Saudi Arabia, fosters 'pro-Israeli speech' in Syria, facilitates viewing unrated or inappropriately rated Web sites in Australia, or makes available information 'offensive to public morality' in Italy. . . ."

See also Jason Hoppin, *French Order is Greek to 9th Circuit*, *The Recorder*, Dec. 3, 2002, available at <http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1036630517051&live=true&cst=1&p=0&pa=0>.

High Court of Australia ruled that an Australian plaintiff could bring suit in Australia against Dow Jones, a U.S.-based publisher who allegedly posted defamatory statements on the web.¹³⁷ The Court held that an internet article is “published” wherever it is read, instead of adopting the United States “single publication” rule that says an internet article is published only once at a particular time and place.¹³⁸ This case signals the willingness of foreign courts to apply local standards to cases involving American parties when it is believed that the harm suffered in the dispute is local.¹³⁹ Given that U.S. companies dominate the e-commerce canvas, the trend to ignore American law and principles can negatively impact e-commerce’s growth should these companies deign to go offline.¹⁴⁰

¹³⁷ Dow Jones v. Gutnick, (2002) H.C.A. 56 (Dec. 10, 2002) (Austl.), at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html.

¹³⁸ *Id.*

¹³⁹ Quoting David R. Johnson of Wilmer, Cutler & Pickering,

[The Australian High Court] did show some recognition of the fact that in some sense that either American law was going to be imposed on Australia or Australian law was going to imposed on the U.S. It’s an important case in part because there is an inescapable tension between the jurisdictions and there is no global supremacy clause to solve that.

Anandashankar Mazumdar, *Gutnick Decision Said to Create Need for Treaty, Tech Fix to Limit Libel Risks*, 4 BNA, Inc. Computer Tech. L. Rep. 35, 36 (2003); see Michael Geist, *Courts Poised to Decide Internet “Borders,”* TORONTO STAR, Jan. 13, 2003 (surveying important cases coming in 2003 concerning internet jurisdiction), at http://www.torontostar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1035776558381&call_page=TS_News&call_pageid=968332188492&call_pagepath=News/News. In another case,

Andrew Meldrum, an American reporter, was prosecuted this year by Robert Mugabe’s repressive government in Zimbabwe for ‘publishing a falsehood’ in an article published on the web site of the *Guardian*. . . . It is the possibility of global liability, in both criminal and defamation law, which now worries big media companies.

A Jurisdictional Tangle, ECONOMIST, Dec. 10, 2002, available at http://www.economist.com/agenda/displayStory.cfm?story_id=1489053.

¹⁴⁰ [T]he ruling has thrown internet publishers into disarray and left them facing a choice between two equally costly and undesirable options: restricting access to their web sites to prevent people in potentially difficult legal jurisdictions reading them; or employing international legal teams to vet all content to ensure that it complies with the libel laws in each of the countries it is likely to be read.

David Fickling & Stuart Miller, *How Diamond Joe’s Libel Case Could Change the Future of the Internet*, GUARDIAN UNLIMITED, Dec. 12, 2002, available at <http://www.guardian.co.uk/online/netnews/story/0,12582,857749,00.html>.

However, U.S. companies are not the only ones that have reason to be concerned with the risks of an international legal system. In a recent decision, U.S. District Judge Stephen Wilson held that a lawsuit could proceed against Sharman Networks, the parent company of Kazaa,¹⁴¹ despite Sharman being headquartered in Australia and incorporated in the Pacific Island nation of Vanuatu.¹⁴² While Sharman expanded its commercial activities and advertising within the Kazaa program, it backed away from a plan to offer a paid subscription service as many of the potential subscribers would have been U.S. residents.¹⁴³ That move failed to protect it from liability in the United States since the Court found that the number of Kazaa users in the United States satisfied minimum contact to justify the Court's exercise of personal jurisdiction against Sharman.¹⁴⁴

The risk accompanying the creation of an international legal framework to determine jurisdiction is that the law adopted in that framework may be less advantageous than a company's current forum state. While predictability may be of some comfort to companies, one could also argue that the lack of uniformity currently protects companies from exploding global liability.

4.3.2. *Different Ideological Stances between the United States and EU*

Assuming that a common legal framework is desired, it is still extremely difficult for the United States and the EU to come to an agreement as to how that framework should be and what that framework should look like. An example of this predicament is the proposal to revise the Hague Convention.¹⁴⁵ The proposed Hague Convention on Jurisdiction and Foreign Judgments was first proposed in 1992 and, if passed, would be significant because there are potentially fifty signatory countries ranging from China to the United States and the EU.¹⁴⁶ The private sector has raised

¹⁴¹ Kazaa is a popular online file-swapping software service.

¹⁴² *MGM Studios, Inc. v. Grokster, Ltd.*, 243 F. Supp. 1073, 1073 (D. Cal. 2003).

¹⁴³ See John Borland, *U.S. Liability Looms Over Kazaa*, CNET NEWS.COM, Nov. 25, 2002 (reporting on the Kazaa case), at <http://news.com.com/2100-1023-971086.html>.

¹⁴⁴ *Id.*

¹⁴⁵ Hague Convention Draft Revision, *supra* note 7.

¹⁴⁶ See *Risks to an E-Business of Being Sued Abroad Under Foreign Law* (giving a "brief overview of what currently determines when a foreign court will accept

several concerns that the Draft Proposal of the Hague Convention would impede the growth of e-commerce.¹⁴⁷ While the U.S. delegation originally initiated the impetus for a revision of the Hague Convention in order to allow individuals who won judgments in American courts to enforce them in Europe, as the global impact of e-commerce has expanded, it has quickly backpedaled and tried to limit the scope of the revision.¹⁴⁸ Currently, the delegations have scaled back the scope of the Hague Convention by limiting it to B2B transactions,¹⁴⁹ but there is no guarantee that any final revision will pass.

5. BUSINESS STRATEGIES TO AVOID JURISDICTIONAL DISPUTES

There are several strategies e-businesses can employ in an attempt to either limit or avoid foreign liability. A company could write into its Terms and Conditions of the contract that a good/service is only intended for sale in certain countries or both the consumer and seller could agree to a forum selection clause.¹⁵⁰ However, Terms and Conditions may not allow a seller to avoid EU regulations, such as Brussels I.¹⁵¹ In a twist of irony, however, U.S. state laws that have restricted the reach of out-of-state internet web sites by prohibiting shipments of wine from such internet retailers are now being found unconstitutional and in violation of the U.S. Constitution's Commerce Clause.¹⁵² So while it is clear that individual retailers can restrict the reach of their business, governments cannot.¹⁵³

A rather risky gambit is a new-fangled business called

jurisdiction over a UK e-business") Int'l Centre for Commercial Law, Legal500.com (Sept. 2001), at http://www.legal500.com/devs/uk/it/ukit_077.htm (Sept. 2001).

¹⁴⁷ Haines, *supra* note 86, at 6.

¹⁴⁸ Anandashankar Mazumdar, *Congress Rests While Treaty Drafters Move on Jurisdiction, Contracts, Securities Issues*, 7 ELEC. COM. & L. REP. (BNA) No. 47, at 1181-82 (Dec. 11, 2002).

¹⁴⁹ Anandashankar Mazumdar, *Consumer Advocate Worries that Hague Treaty Language Covers Consumer Contracts*, 7 Electronic Com. & L. Rep. (BNA) No. 49, at 1246-47 (Dec. 25, 2002).

¹⁵⁰ FRASCOGNA, JR. ET AL., *supra* note 1, at 150-51.

¹⁵¹ *Cross Border Consumer Contractual Disputes*, *supra* note 19.

¹⁵² U.S. Const. art. I, § 8, cl. 3.

¹⁵³ Declan McCullagh, *Court Strikes Down State E-Commerce Law*, CNET NEWS.COM, Apr. 9, 2003, at http://news.com.com/2110-1028_3-996242.html; see also *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003).

regulatory arbitrage that “involves exploiting differing rules in different jurisdiction—for a profit.”¹⁵⁴ For a fee, regulatory arbitrage companies will determine where a company should incorporate, headquarter, and store its server and data to best take advantage of different rules and regulations in various jurisdictions. There has been no conclusion on whether this is effective, though wealthy individuals have taken advantage of offshore jurisdictions for decades.

If a company knows what material on its web site is offensive in another jurisdiction (e.g., Yahoo! and France), it can employ filtering technology to search for and block out key words or phrases.¹⁵⁵ In the Yahoo! case, filtering technology could block out words related to Nazi memorabilia such as “Nazi,” “Third Reich,” or “Hitler.” The problem with filtering is that it is imperfect. Too much information travels on the internet¹⁵⁶ and to search all of it is time consuming. In the example provided, a more creative search could still turn up Nazi memorabilia prohibited in France if one used the words “Aryan” or “supremacy.” A company could also simply delete the material that foreign governments find offensive, as Google.com, a search engine, has been doing from its French and German domains (google.fr and google.de).¹⁵⁷ The long-term effect of this could be significantly detrimental and, taken to an extreme, the internet could become the most censored publication in the world.

Technology that can be employed to restrict web site use to specific consumers is called “blocking.” Blocking is software that either grants or denies a user access based upon its IP address. For example, Yahoo! dropped access to its auction sites in Britain, France, Germany, Italy, Ireland and Spain rather than appeal the

¹⁵⁴ Stewart Taggart, *Fast, Cheap and Out of Control*, Aug. 14, 2000, INDUS. STANDARD, at <http://www.thestandard.com/article/0,1902,17365,00.html>.

¹⁵⁵ *But see* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 405 (E.D. Pa. 2002) (ruling that the Children's Internet Protection Act requiring public libraries to install filtering programs that prevent minors from accessing information on the internet harmful to minors is unconstitutional).

¹⁵⁶ *See* Steven M. Hanley, *International Internet Regulation: A Multinational Approach*, 16 J. MARSHALL J. COMPUTER & INFO. L. 997, 1009 (1998) (advocating a multinational approach to regulate internet content).

¹⁵⁷ *See* Declan McCullagh, *Google Excluding Controversial Sites*, CNET NEWS.COM, Oct. 23, 2002 (reporting that Google has been deleting web sites from its German and French domains, google.de and google.fr, when it receives specific complaints from foreign governments), at <http://news.com.com/2100-1023-963132.html>.

French judgment.¹⁵⁸ The unfortunate effect of this is that consumer choices become limited. For example, as a result of the *Dow Jones v. Guttnick* case, “many U.S. websites [will block] access to non-American readers, destroying a rich resource for the rest of the world.”¹⁵⁹

The most drastic strategy to employ is to simply go offline altogether. This move is most detrimental to small- and mid-sized businesses. These businesses rely upon the internet to grow their sales volume and increase their market share. Unfortunately, one lawsuit or a drawn-out litigation dispute could easily bankrupt these businesses, as well. For business owners who refuse to “bet the company” on this possibility, avoiding a presence on the internet is the easiest way to avoid any potential liability from foreign jurisdictions. However, the profits from putting a company online may outweigh the increased risk of being sued,¹⁶⁰ so while going offline is absolute protection from foreign liability, it could be detrimental to the growth of the business.

6. CONCLUSION

The technological composition of the internet and its decentralized nature makes it extremely difficult to establish clear rules on jurisdiction or even determining the domicile of a party. The U.S. approach towards jurisdiction has been piecemeal, focusing on the Zippo sliding scale of interactivity and the effects-based test, while the EU approach has been regulatory, embracing the country-of-destination approach that seems to favor consumers. Neither approach is particularly satisfying to companies with a web presence, but then, formulating an integrated framework is equally, if not more, difficult, as proven by the lack of agreement on the Hague Convention. There are various contractual, entrepreneurial and technological strategies that can

¹⁵⁸ See *French Prosecutor Argues for No Sentence for Former Yahoo! Boss on Trial*, Jan. 8, 2003 (reporting that Google risked a possible fine of 46,000 euros and five years' imprisonment if found guilty), at <http://sg.news.yahoo.com/030107/1/36ajx.html>.

¹⁵⁹ See Fickling & Miller, *supra* note 140, (quoting Ian Brown, director of the London-based internet think tank, the Foundation for Information Policy Research).

¹⁶⁰ See Mike France, *Now You Can Sell Anywhere – and Get Sued Anywhere*, July 26, 1999, BUS. WEEK ONLINE (explaining that increased liability is simply a risk e-businesses must take), at <http://www.businessweek.com/technology/content/9907/ep0726.htm?scriptFramed>.

be employed to limit or avoid legal liability from foreign jurisdictions, but aside from taking a business offline, there is no absolute avoidance of increased legal liability. Companies may, as a result of foreign courts being more willing to assert jurisdiction over international non-residents, choose to simply deny access to their web site to internet users not located in their local jurisdiction as best technology can detect. Ironically enough, this may mean that the internet will be as bordered as traditional geographic boundaries are today.