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ECONOMIC AND OTHER BARRIERS TO ELECTRONIC COMMERCE

HENRY H. PERRITT, JR.*

1. INTRODUCTION

Experience has erased most doubts about the Internet's value as an important new global marketplace and political arena. This new marketplace presents low economic barriers to entry, but uncertainty about remedies when electronic deals go bad may impede full realization of the Internet's potential. Deployment of new hybrid forms of international regulation of commerce can reduce these non-economic barriers.

2. ECONOMIC CHARACTERISTICS OF THE NEW MARKETPLACE

The Internet is but the latest collection of electronic tools for engaging in commerce at a distance. A century and a half ago, the Morse telegraph reinforced railroad and other transportation technology breakthroughs to enlarge the geographic reach of buyers and sellers. These breakthroughs led to the standardization of consumer goods and the creation of national and international markets in agricultural commodities and raw materials. Harmonization of commercial law regimes and development of commodities and stock exchanges resulted.¹

During the last century, acceptance of the telephone, for point-to-point communication, and radio and television broadcasting improved coordination within large-scale enterprises. This reduced their relative transaction costs in comparison with the transaction costs of market-coordinated transactions and created incentives for enterprise consoli-

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¹ See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 231 (1973) (reporting on "unification" of commercial law as an economic development that occurred in nineteenth century).

dation.² The same technological innovations made it possible for mass advertising to stimulate consumer demand.³

In the last fifty years, diffusion of digital computer and telecommunications technologies has allowed enterprises to automate their accounting, inventory, and operations management functions, thus improving productivity and profitability.

The Internet, first significant to business-to-consumer and business-to-business commercial relationships in the mid-1990s, has characteristics that shape the first comprehensive electronic marketplace suitable for exchanges of most goods and services.

2.1. *Lower Economic Barriers to Entry*

Declining prices for basic components of networked computing⁴ combined with increasing speeds of data transfer and the wide scale acceptance of universal, mostly nonproprietary layered⁵ technical standards,⁶ allow for lower economic barriers to entry for merchants and consumers. Consumers can shop worldwide for little more than one thousand dollars for a personal computer and ten to twenty dollars per month for Internet service. They no longer need to take the

² See ALFRED D. CHANDLER, JR., *STRATEGY AND STRUCTURE* 27-28 (M.I.T. Press 1978) (1962) (analyzing effect of technology on expanding markets and enterprises); Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306, 311-15 (1999) (summarizing transaction cost theory of firm).

³ See generally Frank X. Taney, *Rewriting the Law of Resale Price Maintenance*, 143 U. PA. L. REV. 321, 372 n.262, 377 (1994) (discussing the effect on treatment of resale price maintenance of the courts' adopting a transaction cost economics perspective); YANNIS BAKOS, *REDUCING MARKET SEARCH COSTS: IMPLICATIONS FOR ELECTRONIC COMMERCE*, at <http://www.stern.nyu.edu/~bakos/emkts.html> (July 1996) (noting that new forms of information can serve as intermediaries between buyers and sellers).

⁴ Basic components include: processors, storage, and digital communication interfaces, including network interface cards and routers.

⁵ The Open Systems Interconnection ("OSI") model exemplifies a layered network architecture. Layer 7 defines the application layer. Layer 6 defines the presentation layer. Layer 5 defines the session layer. Layer 4 defines the transport layer. Layer 3 defines the network layer. Layer 2 defines the data link layer. Layer 1 defines the physical layer. IP operates at Layer 3. Transition Control Protocol ("TCP") operates at Layer 4. Ethernet operates at Layers 1 and 2. See *OSI*, at <http://whatis.com/WhatsDefinitionPage/0,4152,212725,00.html> (last updated July 27, 2000) (defining and explaining OSI).

⁶ Such standards include: Internet Protocol ("IP") and TCP, which define the Internet; http and html, which define the World Wide Web; and Simple Mail Transfer Protocol ("SMTP") and Post Office Protocol 3 ("POP3"), which define Internet-based e-mail.

time or bear the expense of traveling by automobile to a variety of physical stores and confronting increasing costs as they wish to expand the geographic scope of their shopping.⁷

Concerns about “the digital divide”⁸ and “information redlining”⁹ are often overblown. While not everyone in the world—or even the United States—can afford an Internet connection, the cost of bringing electronic commerce (“e-commerce”) to a poor person, or one located in a rural area with poor infrastructure, is much lower with Internet technology than with any preceding alternative. Now businesses can set up shop with little more investment than that required of a consumer. Wares can be visible and available for purchase by consumers anywhere in the world. Costs of the Internet enterprise are indifferent to the distance between consumer and merchant, except for shipping costs for physical goods.¹⁰

⁷ The attractiveness of the Internet to consumers, compared to other markets, can be expressed as $dC = f(d, I, p)$, where dC is the relative cost advantage of Internet-based markets compared to the most attractive alternative. d is a function of the average distance to the most relevant sellers, i represents relative search costs of the Internet market compared with search costs for obtaining the same information without the Internet, and p represents the composite price difference between products offered on the Internet and comparable products available in alternative markets. The search cost variable is likely to be a linear function of the number of relevant sellers. The price difference variable may be zero or negative, because most current Internet vendors price at or above the levels for conventional sellers selling the same products. The distance variable represents travel costs for the consumer to visit the physical location of the merchant. It is not a linear function of distance between buyer and seller. Most consumers would be indifferent to variations in distance, up to, for instance, five miles. Beyond five miles, resistance to distance would increase with distance, until one has to travel to another continent, when the resistance to further travel would diminish. The shape of the distance function, then, would be a flattened S-curve, with the first derivative positive throughout, and the second derivative positive for shorter distances, zero for the middle range, and negative for the longest distances.

⁸ See R.C. Longworth, *Digital Efforts Encounter Web of Challenges*, CHICAGO TRIB., Aug. 5, 2000, at 3 (defining problem of a “digital divide” as unequal access to new technologies and summarizing efforts to address this problem on a global level).

⁹ See Eric R. Columbus, *Civilizing Cyberspace: Policy, Power and the Information Superhighway*, 34 HARV. J. ON LEGIS. 519, 521 (1997) (book review) (providing definition of “information redlining” as “the systematic market-based alienation of the poor from the sources of information needed to participate in democracy, earn an education and compete for employment”).

¹⁰ By using the Internet, an e-commerce vendor avoids the need to develop its own network protocols, arrange for proprietary points of presence, and deliver client software to potential consumers. All of these features are provided by the universal standards of the Internet protocol suite and rapidly spreading coverage of generic Internet backbones and Internet Service Providers.

New intermediaries have arisen to make the global electronic marketplace more efficient. Search engines make it easier to find businesses and other Internet participants.¹¹ New auction markets, such as eBay,¹² have sprung up, making it possible to buy and sell almost anything, regardless of the size and sophistication of buyer or seller. Automated shopping agents, such as Priceline,¹³ reduce search costs for buyers and sellers.

To be sure, the costs of doing business on the Internet are not zero nor is success assured, as many young entrepreneurs in Silicon Valley and its imitators are learning—along with their venture capitalists.¹⁴ The technologies that make it easier to reach broader markets and sell to a much larger class of purchasers do not eliminate the need for good strategies for sources of supply, inventory management, and other logistical functions, such as order fulfillment. Merely because an electronic storefront can be reached by any consumer in the world does not mean that, as a practical matter, it will be audible above the increasing noise levels of other merchants struggling to reach their customers.

The new Internet marketplace makes it possible to deliver services desired by customers. These services include travel planning and reservations; information products, such as news, music, and video entertainment; and computer products, such as software. The Internet also eliminates the need for warehousing and delivery of physical merchandise. Nevertheless, business models for new products and services are embryonic.

Despite entrepreneurial risk, the evidence, in terms of volume of business conducted through the Internet and market capitalization of Internet enterprises, overwhelmingly supports the proposition that the Internet already has revolutionized global commerce and will continue to draw a greater portion of trade under its umbrella.

Lower economic barriers to entry draw more small entities into electronic markets because the minimum economic scale of doing

¹¹ See, e.g., Altavista, at <http://www.altavista.com> (last visited Sept. 30, 2000); Excite, at <http://www.excite.com> (last visited Sept. 30, 2000); Lycos, at <http://www.lycos.com> (last visited Sept. 30, 2000); Yahoo!, at <http://www.yahoo.com> (last visited Sept. 30, 2000).

¹² eBay, at <http://www.ebay.com> (last visited Sept. 30, 2000).

¹³ Priceline, at <http://www.priceline.com> (last visited Sept. 30, 2000).

¹⁴ See, e.g., Craig Bicknell, *Bankruptcy Lawyers Smell Blood*, WIRED, <http://www.wired.com/news/print/0,1294,19850,00.html> (May 27, 1999) (describing how the number of troubled loans at Silicon Valley Bank jumped to a six-year high in the first quarter of 1999).

business is less. Lower technical transaction costs for making deals and for delivering services and software in information products draw lower value transactions into electronic markets. The result is a set of markets in which many more small entities do business with individuals and each other. Transactions in such markets are of lower average value.

3. NEW TRANSACTION COSTS ASSOCIATED WITH GLOBAL ELECTRONIC MARKETS

When all markets are global, both buyers and sellers encounter new uncertainties that blunt some of the economic and technological inducements to participate fully in the market. Trust associated with established relationships is less available in a global market. Long established mechanisms for resolving disputes are less affordable and less effective.¹⁵

3.1. *Trusting Strangers*

Markets that employ little technology rely on personal relationships. When a consumer does business with his cousin or with a neighbor of twenty-five years, experience and reputation reduce uncertainty. One knows one's buyer and seller and easily can assess the likelihood of being cheated or disappointed by merchandise or the service being rendered.

The potential value of expanding the geographic scope of markets is that buyers and sellers can reach beyond their cousins and neighbors; however, as they do so, informal mechanisms of trust become less available and uncertainty increases. The devil you know is replaced by the devil you don't, and conventional wisdom suggests that risks are lower when dealing with the devil you know.

In the past, market economies have constrained the uncertainties associated with expanding commerce beyond the universe of acquaintances in two ways. First, enterprises with institutional reputations for quality and customer satisfaction, such as Sears & Roebuck, McDonald's, and Holiday Inn, have developed. Second, legal dispute resolution machinery has evolved so that disappointed and cheated buyers and sellers can get economic relief against strangers. Such pre-

¹⁵ The structure of the transaction costs can be expressed as $C = s + d + n$, where C is the total transaction cost; s is a function of the familiarity and reputation of the other party; d is a function of distance between buyer and seller; and n is a function of the number of different political entities which may become involved in the transaction.

Internet legal machinery includes: consumer protection offices attached to state attorneys general and the Federal Trade Commission, small claims court, local registration requirements for foreign businesses, bonding requirements for some classes of service providers, building permits, and governmental inspection services.¹⁶ These government-based mechanisms have always been supplemented by private trust-enhancing associations, such as Underwriters Laboratory seals on electrical products, membership and listings on stock and commodities exchanges, and intermediation and guarantees by retailers with established reputations.¹⁷

Most formal legal dispute resolution machinery, however, is anchored in geographically based concepts of legal sovereignty. The building inspector has jurisdiction within one municipality but not beyond. The attorney general can operate in her own state but not elsewhere. The small claims court must have "personal jurisdiction" over a defendant before it can afford meaningful relief.

Reputation and third party guarantees or seals are not inherently tied to geographic sovereignty, but the value of a guarantee is correlated with the reputation of the guarantor, and reputation historically has been inversely correlated with distance.¹⁸

¹⁶ See, e.g., CONSUMER PROTECTION, FEDERAL TRADE COMMISSION ("FTC"), BUREAU OF CONSUMER PROTECTION PROFILE, at <http://www.ftc.gov/bcp/bcp.htm> (last updated Aug. 2, 2000) (describing resources of FTC Bureau of Consumer Protection); BUREAU OF CONSUMER PROTECTION, PENNSYLVANIA OFFICE OF THE ATTORNEY GENERAL, at <http://www.attorneygeneral.gov/ppd/bcp/index.shtml> (last visited Sept. 30, 2000) (describing function of state Bureau of Consumer Protection); DEPARTMENT OF LICENSES AND INSPECTION, CITY OF PHILADELPHIA, BUILDING PERMIT APPLICATIONS, at <http://www.phila.gov/summary/license/building.html> (last visited Sept. 30, 2000) (outlining process and necessity of obtaining building permits in Philadelphia).

¹⁷ See, e.g., UNDERWRITERS LABORATORIES, INC, ABOUT UL, at <http://www.ul.com/about/index.html> (last visited Sept. 30, 2000) (describing mission of Underwriters Laboratories, Inc, a private safety testing organization); NASDAQ, NASDAQ LISTING REQUIREMENTS, available at <http://www.nasdaq.com/about/listing.stm> (last visited Sept. 30, 2000) (listing safety precautions on NASDAQ stock exchange); SEARS, RETURNS/CANCELLATIONS, available at <http://www.sears.com> (last visited Sept. 30, 2000) (discussing Sears's "Satisfaction guaranteed or your money back" policy).

¹⁸ When reputation is established by word of mouth, the geographic scope of reputation is limited by the geographic scope of conversations. When reputation is established by print or radio or television, the geographic scope of reputation is limited by the circulation of print publications and the range of radio and television broadcast stations.

3.2. *Law's Embrace of Geography*

All modern legal systems limit formal choices by a practical exercise of power.¹⁹ In public and private international law, this translates into the concept of sovereignty. A state's power within its own boundaries is plenary,²⁰ only recently limited by universal conceptions of human rights.²¹ Outside its boundaries, exercise of coercive power is aggression²² because it necessarily intrudes upon the sovereign prerogatives of other states. These linkages between sovereignty and geography are codified in the *Restatement (Third) of Foreign Relations Law of the United States*.²³ The *Restatement* is generally acknowledged to express worldwide doctrines of international law as understood by the United States.²⁴ The linkages are also internalized into interstate jurisprudence within the United States in case law limiting legitimate exercises of legal power by individual states under the Commerce and Due Process Clauses.²⁵ Legislatures and other rulemakers may not extend their

¹⁹ See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (discussing how, in the United States, each state enjoys sovereignty over persons within its territory, except as limited by the Constitution).

²⁰ See U.N. CHARTER art. 2, paras. 4, 7 (stating that the United Nations does not have the authority to interfere with a state's domestic sovereignty).

²¹ See *Regina v. Bartle, Ex Parte Pinochet*, 38 I.L.M. 581 (H.L. 1999) (allowing extradition of former head of state for violation of torture convention), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>; Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1752-53 (2000) (offering interpretation of U.N. Charter that reconciles conflict between sovereignty and human rights law); Elizabeth E. Ruddick, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429, 449 (1997) (discussing conflict between human rights law and sovereignty).

²² See John Linarelli, *An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes Against the Peace and Security of Mankind*, 18 SUFFOLK TRANSNAT'L L. REV. 1 (1995) (explaining difficulty in defining aggression in international law); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 440 (2000) (explaining concept of aggression in evolution of humanitarian law); Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411, 426 (1997) (explaining difficulty in justifying enforcement of prohibition against war crimes in territory of another state).

²³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

²⁴ *Id.* § 3 (describing the Restatement's derivation from customary international law and international agreements to which the United States is a party).

²⁵ See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (ruling that due process limits the exercise of personal jurisdiction by courts); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (explaining that the Due Process and Commerce Clause limit choice of local law); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)

law to persons lacking relevant connections to the (geographically defined) state of the rulemaker.²⁶ Courts and other dispute resolution bodies may not make decisions or apply rules to persons lacking connections with their “geographically defined” venues.²⁷

3.3. *The Internet's Challenges to Sovereignty*

Despite the importance of rule certainty and dispute resolution to the efficiency of impersonal markets, the very characteristics that make the Internet an attractive marketplace also make it difficult to govern under traditional concepts of sovereignty. Concepts of prescriptive and adjudicative jurisdiction have evolved to accommodate commerce extending beyond the boundaries of a particular sovereign, but the jurisdictional concepts still depend upon localizing conduct. Tort law rules can be applied to injuries that occur within a particular sovereign jurisdiction.²⁸ Contract law rules can be applied to contracts that are made or to be performed in a particular place.²⁹ Property rules apply where the property is located.³⁰

The Internet makes it more difficult to localize legally relevant conduct than preceding commerce technologies. Where is a contract made when it is executed by the invisible interaction of server and client software on computers located in two different countries, neither of which may be the habitual residence of the buyer or seller?³¹ Where does tortious injury occur when a wrongdoer located halfway around the world pirates intellectual property?³² Where does tortious

(holding that activities within a forum by a salesman for a corporation were sufficient to subject the corporation to jurisdiction within the forum).

²⁶ See *Phillips Petroleum*, 472 U.S. at 804 (requiring connection between controversy and state whose law is to be applied).

²⁷ See *Asahi*, 480 U.S. at 102 (requiring purposeful availment of the benefits of the sovereign asserting jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (refining the “minimum contacts” standard set forth in *Int'l Shoe Co.*); *Zippo Mfg. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997) (holding that the defendant purposefully availed itself of doing business in the forum state).

²⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (providing general rules for choice of law in torts cases).

²⁹ *Id.* § 188 (enunciating a general rule for choice of law in contracts cases, in absence of a choice by parties).

³⁰ *Id.* § 222 (stating a general rule for choice of law in property cases).

³¹ See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (holding that an agreement to offer software on the plaintiff's computer subjected the defendant to jurisdiction in plaintiff's home forum).

³² See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (rejecting fair use defense made by Internet distributor of copyrighted works).

injury occur when a hacker launches a denial of service attack that clogs up the routers representing the only gateway to an e-commerce vendor but located in another place arbitrarily determined by network engineers? Do the courts of Virginia have *in rem* jurisdiction over everyone doing business on the Internet through a domain name merely because the domain names are "located" on a root domain server in Virginia?³³

Because of the difficulties of localizing conduct in Internet markets, allocating jurisdiction to a formal public institution is uncertain, even as a theoretical matter.³⁴

3.4. *Beyond Theory—Enforcing Decisions*

The law is adaptive and creative in working out theoretical solutions to problems arising from new technologies. It is not intellectually difficult, when working from established principles of localizing trans-border activities, to formulate rules that localize Internet conduct.³⁵

Concluding that the rules emanating from a particular legislature govern a transaction in a formal sense, or that a court or administrative tribunal has personal jurisdiction over a foreign e-commerce vendor, is not the end of the matter. The rules still must be enforced and the adjudicative decisions turned into monetary relief or practical cessation of illegal conduct.³⁶ Meaningful enforcement and application

³³ Compare *Porsche Cars N. Am., Inc. v. AllPorsche.com*, Nos. 99-1804, 99-2152, 2000 WL 742185 (4th Cir. June 9, 2000) (allowing in rem jurisdiction over domain name), with *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 529 S.E.2d 80 (Va. 2000) (holding that domain name registration agreements for services were not subject to garnishments).

³⁴ See ABA JURISDICTION IN CYBERSPACE PROJECT, *ACHIEVING LEGAL AND BUSINESS ORDER IN CYBERSPACE: A REPORT ON GLOBAL JURISDICTION ISSUES CREATED BY THE INTERNET 8* (2000); at <http://www.kentlaw.edu/cyberlaw> [hereinafter CHICAGO-KENT/ABA JURISDICTION PROJECT].

³⁵ See *Digi-Tel Holdings, Inc. v. Proteq Telecomms., Ltd.*, 89 F.3d 519, 523 (8th Cir. 1996) (noting that telephone calls and faxes into the forum state are insufficient by themselves to establish personal jurisdiction); *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383 (8th Cir. 1995), cited in *Initiatives, Inc. v. Korea Trading Corp.*, 991 F. Supp. 476, 479 (E.D. Va. 1997) (holding that Spanish company had sufficient contact with the United States to bring the foreign corporation under U.S. jurisdiction); *TSA, Inc. v. Nass*, No. CIV.A.96-4509, 1997 WL 47612, at *2 (E.D. Pa. Feb. 4, 1997) (finding that telephone calls by themselves are insufficient to establish personal jurisdiction).

³⁶ See Henry H. Perritt, Jr., *Will the Judgment-Proof Own Cyberspace?*, 32 INT'L LAW. 1121, 1123 (1998) ("The real problem is turning a judgement supported by jurisdiction into meaningful economic relief.").

depend upon the practicality of asserting coercive control over property or persons located within the boundaries of the rule issuing or adjudicating sovereign³⁷ or the willingness of other sovereigns to recognize and enforce foreign rules and decisions.³⁸ Whether such persons or property can be located, and whether transnational recognition and enforcement will occur, are additional, and potentially large, sources of uncertainty, in comparison to the uncertainty regarding theories of jurisdiction.

3.5. *The Relationship Between Jurisdiction and Intermediary Liability*

Although the Internet's virtual marketplace is indifferent to national borders, and therefore to sovereignty, it does depend upon physical devices, such as modems, telephone switching equipment, routers, radio transmitters, receivers, antennas, and computers, that function as servers and clients. While participants in small states conceivably can use the public switched telephone system to connect to Internet service providers and to other physical artifacts comprising the Internet located entirely outside their states,³⁹ the typical merchant or consumer uses a local Internet service provider. The local provider has leased lines, routers, and servers, and may have radio transmitting and receiving apparatus in the same jurisdiction where the merchant or consumer is located. Any legal system will focus on locally present property as a justification for jurisdiction and, more importantly, as the means for enforcing rules and decisions. This encourages legal institutions to impose liability on intermediaries as a way of reducing uncertainty with respect to jurisdiction and enforcement power over

³⁷ See *Apostolic Pentecostal Church v. Colbert*, 173 F.R.D. 199 (E.D. Mich. 1997) (discussing whether the federal marshal or state sheriff should execute a federal judgment); *Dorwart v. Caraway*, 966 P.2d 1121 (Mont. 1998) (discussing judgment execution procedure in context of constitutional due process); THE BRUSSELS CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF FOREIGN JUDGMENTS: PAPERS AND PRECEDENTS FROM THE JOINT CONFERENCE WITH THE UNION DES AVOCATS EUROPÉENS (Gerald Moloney & Nicholas K. Robinson, eds. 1989), <http://www.maths.tcd.ie/pub/IrishLaw/table.htm> (discussing the practical application of the Brussels Convention to enforce foreign judgments).

³⁸ Compare *de la Mata v. Am. Life Ins. Co.*, 771 F. Supp. 1375, 1383 (D. Del. 1991) (holding that reciprocity is not a prerequisite to recognition of a judgment), with *Hilton v. Guyot*, 159 U.S. 113, 228 (1895) (holding that comity requires reciprocity).

³⁹ An example would be a consumer located in Skopje, Macedonia, who places a long distance telephone call to a Microsoft Network point of presence in Frankfurt, Germany.

more remote actors who may bear more direct responsibility for disputed conduct.⁴⁰

While intermediary liability represents a potential solution to the legal uncertainty considered in Section 3.1., it is also a source of additional transaction costs.⁴¹ When intermediaries face liability for conduct engaged in by their customers, they have an incentive to exclude customers who may increase their risk. Intermediaries who are risk averse can undermine the Internet's potential as much as risk averse end users.

4. SOLUTIONS FOR REDUCING LEGAL BARRIERS AND UNCERTAINTY

4.1. *Targeting Concepts*

The concept of targeting is the best solution to the theoretical challenge presented by difficulties in localizing conduct in Internet markets.⁴² Targeting entails a market participant directing its sales or purchasing activity to a particular jurisdiction.⁴³ An Internet merchant wishing to reduce the uncertainty associated with potential regulation by nearly two hundred national sovereigns and thousands of subordinate governmental entities can target only one or a few jurisdictions whose legal regime it understands and accepts. Alternately, if such a participant wishes to avoid the requirements or enforcement mechanisms of a particular sovereign, it can exclude or "de-target" that jurisdiction. A growing number of judicial decisions in the United

⁴⁰ See Kim L. Rappaport, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765, 790-91 (1998) (describing prosecution of CompuServe executive for material on Internet site that violated German Information and Communications Services Act). In mid-2000 an anti-Nazi group in France sued Yahoo! for making available material through an American Internet site that contravened French law. See Steve Bold, *Yahoo! In Online Auction Legal Spat with French Authorities*, NEWSBYTES NEWS NETWORK, May 16, 2000, available at 2000 WL 21177244.

⁴¹ When intermediaries are concerned about potential liability, they include the expected value of liability into their costs of doing business.

⁴² See *Zippo Mfg. v. Zippo Dot Com.*, 952 F. Supp. 119, 1123 (W.D. Pa. 1997), *construed in Millennium Enter. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 915-16 (D. Or. 1999) (explaining the *Zippo* continuum as a "sliding scale" 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" and suggesting that jurisdiction exists over websites only when the forum state is targeted).

⁴³ See *Neogen Corp. v. Neo Gen Screening, Inc.*, 2000 WL 1199949 (W.D. Mich. Aug. 21, 2000) (analyzing case law in terms of targeting); CHICAGO-KENT/ABA JURISDICTION PROJECT, *supra* note 34, § 2.2.

States⁴⁴ and guidance issued by administrative agencies such as the Securities and Exchange Commission⁴⁵ are refining formulas for targeting and de-targeting.

The targeting concept avoids the uncertainty associated with subjecting an Internet merchant to the jurisdiction of any place where its website is visible,⁴⁶ which is usually everywhere in the world. On the other hand, extensive de-targeting has the effect of excluding consumers in de-targeted states from the benefits of global e-commerce.

4.2. *Hybrid Regulatory Frameworks*

The geographic limitations on new application and enforcement of regulations apply to public institutions exercising sovereign powers. They do not apply to private entities.⁴⁷ Accordingly, jurisdictional uncertainties associated with transnational commerce on the Internet can be reduced when rules are made and enforced by private rather than public institutions.

The traditional difficulty with private regulation is that it may not express the political consensus of democratic societies with respect to values to be enforced⁴⁸ or the balance of power to be struck between

⁴⁴ See, e.g., *Miller v. Asensio*, 101 F. Supp. 2d 395, 405 (D.S.C. 2000) (characterizing cases as uniformly rejecting jurisdiction based on availability of passive website).

⁴⁵ SECURITIES AND EXCHANGE COMMISSION, INTERPRETATION; USE OF ELECTRONIC MEDIA (Apr. 28, 2000), <http://www.sec.gov/rules/concept/34-42728.htm> (providing guidance in applying federal securities law to electronic media); see also SECURITIES AND EXCHANGE COMMISSION, INTERPRETATION; STATEMENT OF THE COMMISSION REGARDING USE OF INTERNET WEBSITES TO OFFER SECURITIES, SOLICIT SECURITIES TRANSACTIONS, OR ADVERTISE INVESTMENT SERVICES OFFSHORE (Mar. 23, 1998), <http://www.sec.gov/rules/concept/33-7516.htm> (explaining registration obligations for websites disseminating information about the offshore sale of securities and investment services).

⁴⁶ See *Inset Sys. Inc., v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (finding that the defendant satisfied the minimum contacts component of personal jurisdiction based on the availability of defendant's website in the forum state).

⁴⁷ See Daniel Bodansky, *The Role of International Law in Human Rights Litigation in the United States*, 82 AM. SOC'Y INT'L L. 456, 470 (1998) (noting that, even though international law's limitations on adjudicative jurisdiction apply only to states, federal courts strive to interpret domestic jurisdictional statutes and rules to comport with international law); Kathleen Hixson, Note, *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT'L L.J. 127, 130-31 (1988) (explaining international law's limitations on jurisdiction in terms of limitations on states).

⁴⁸ See generally Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395 (2000) (arguing that selective

stronger and weaker market participants.⁴⁹ As a result, few legal systems rely entirely on private regulation to protect consumers and small businesses.⁵⁰

Combining the jurisdictional strengths of private regulation with the greater political legitimacy of public regulation requires development of new hybrid frameworks. Public law can set minimum, and relatively general, standards of conduct and provide backup enforcement. Used in this way, public law defines the boundaries within which a multiplicity of private regulatory regimes can work out detailed rules, first-level dispute resolution, and rule enforcement machinery.⁵¹

The relatively general character of public law rules makes it easier to achieve consensus among multiple sovereigns with different legal traditions and varying political alignments. At the same time, it can “trim the tails” off the distribution of private regulatory regimes⁵² that might be insufficiently protective of weaker parties, or too restrictive of competition and innovation in the absence of the public law framework.⁵³

The space for private regulation allows not only the benefits of contract-based jurisdiction that easily crosses national boundaries. It also allows for a closer fit between regulatory details and technological

government regulation of cyberspace is warranted to protect and promote liberal democratic ideals).

⁴⁹ See European Commission Data Protection Working Party, *Working Document: Judging Industry Self-Regulation: When Does It Make a Meaningful Contribution to the Level of Data Protection in a Third Country?* (Jan. 14, 1998) (directing compliance with non-legal rules that may be in force in the third country in question), http://www.europa.eu.int/comm/internal_market/en/media/dataprot/wpdocs/wp7en.htm.

⁵⁰ BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, CONSUMER PROTECTION IN THE GLOBAL ELECTRONIC MARKETPLACE: LOOKING AHEAD 15 (Sept. 2000) (calling for an increase in hybrid public and private efforts towards regulation of e-commerce), available at <http://www.ftc.gov/bcp/icpw/lookingahead/electronicmkpl.pdf>.

⁵¹ See generally Henry H. Perritt, Jr., *The Internet Is Changing the Public International Legal System*, 88 K.Y. L.J. 885 (2000) (discussing the role of public international law as a framework for private treaties).

⁵² A set of regulatory regimes can be viewed along a continuum ranging from least protective to most protective. “Tails” in a statistical distribution refer to the extremes: in the example, the handful of most protective regimes would be one tail, and the handful of least protective regimes would be the other tail. “Trimming the tails” thus signifies eliminating the statistical extremes and retaining only those regulatory regimes that are moderately protective.

⁵³ See Perritt, *The Internet Is Changing the Public International Legal System*, *supra* note 51, at 891 (discussing generally the nature of public international law).

and market realities, thus enlisting the energy of competition and innovation in the service of regulatory efficacy.⁵⁴

Three promising examples of hybrid approaches are: (1) The Internet Corporation for Assigned Names and Numbers' ("ICANN's") regulation of Internet domain name assignment⁵⁵ and its associated resolution of controversies between domain name holders and trademark holders; (2) the acceptance by the United States government and the European Commission of a safe harbor for privacy protection of data allowing basic norms for privacy protection to be extended through private self-regulatory regimes;⁵⁶ and (3) credit card charge-back mechanisms that provide a cheap and readily available dispute resolution mechanism for virtually all credit card based Internet commerce.⁵⁷

4.3. *Enlisting Intermediaries in Support of Self-Regulation*

Private regulatory regimes are a form of government. As such, they must have legislators, judges, and sheriffs.⁵⁸ Private intermediaries usually provide these quasi-governmental services. ICANN, for instance, the new intermediary for the domain name regulatory regime, promulgates rules for issuance and retention of domain names and for adjudication of trademark/domain name controversies.⁵⁹ New dispute resolution intermediaries, such as administrative panels formed under the World Intellectual Property Organization's ("WIPO's") dispute resolution rules adjudicate these controversies

⁵⁴ See generally Henry H. Perritt, Jr., *Cyberspace Self-Government: Town-Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413 (1997) (discussing the desirability of self-governance for the Internet and private contract as a source of authority for electronic communities).

⁵⁵ See Perritt, *The Internet is Changing the Public International Legal System*, *supra* note 51, at 940-44 (discussing the scope of ICANN's regulatory responsibilities).

⁵⁶ See *id.* at 932-40 (commenting on the procedures envisioned by the European Commission and the United States in enforcing compliance with the safe harbor rules).

⁵⁷ See Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 675, 691-92 (2000).

⁵⁸ See Perritt, *Cyberspace Self-Government*, *supra* note 54, at 432 (asserting that electronic communities must offer normative rules for conduct, institutionalize rule-making, and sanction rules violators).

⁵⁹ See ICANN, UNIFORM DOMAIN-NAME DISPUTE RESOLUTION POLICY, at <http://www.icann.org/udrp/udrp.htm> (last updated June 17, 2000) ("Under the policy, most types of trademark-based domain name disputes must be resolved by agreement, court action or arbitration before a registrar will cancel, suspend or transfer a domain name.").

under the ICANN regulations.⁶⁰ Other intermediaries, such as domain name registrars, enforce administrative panel decisions by revoking or transferring domain names.⁶¹

In the credit card charge-back regime, credit card issuers are intermediaries adjusting disputes between merchants and consumers. They can decline to credit merchants who fail to deliver promised merchandise or services and revoke credit for consumers who refuse to pay for merchandise or services that are delivered pursuant to agreement.⁶²

Private privacy regulatory regimes depend upon intermediaries who can revoke membership or the seals that immunize members or holders from direct action by public authorities.⁶³

The role of these intermediaries is different from the role of unwilling intermediaries, such as Internet service providers or telecommunications entities, drawn into regulatory roles by the threat of liability imposed on them for the conduct of users of their services. These differences may mitigate some of the harm to the Internet's future development that would result from adding to the uncertainty of intermediaries, as considered in Section 3.1. After all, intermediaries whose primary purpose is rulemaking, enforcement, and dispute resolution have volunteered for these tasks and are unlikely to curtail their investment because their experience will be in line with their expectations.

⁶⁰ See WIPO, SUPPLEMENTAL RULES FOR UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (in effect as of Dec. 1, 1999) ("These supplemental rules are to be read and used in connection with the Rules for Uniform Domain Name Dispute-Resolution Policy approved by [ICANN] on Oct. 24, 1999."), at <http://arbiter.wipo.int/domains/rules/supplemental.html>.

⁶¹ See ICANN, REGISTRAR ACCREDITATION AGREEMENT § II(K), at <http://www.icann.org/nsi/icann-raa-04nov99.htm> (approved Nov. 4, 1999) (last modified Nov. 9, 1999) ("During the term of this Agreement, Registrar shall have in place a policy and procedure for resolution of disputes concerning [Second-Level domain] names. In the event that ICANN adopts a policy or procedure for resolution of disputes concerning SLD names that by its terms applies to Registrar, Registrar shall adhere to the policy or procedure.").

⁶² See Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63, 99-102, 101 n.137 (1987) (describing the rights of card issuers to cancel cardholder's account under certain circumstances); Perritt, *Dispute Resolution in Cyberspace*, *supra* note 57, at 690.

⁶³ See, e.g., BBBOnline, at <http://www.bbbonline.org> (last visited Sept. 30, 2000) (offering a process by which to file a complaint against an offending website for use of personally identifiable information); TRUSTe, at <http://www.truste.org> (last visited Sept. 30, 2000) (certifying a subject website with a visible logo and inclusion of privacy statement that adheres to privately established privacy policies).

Three kinds of intermediary roles exist. The first role is performed by seal organizations that require members and users of their seals to disclose member policies and then adhere to them.⁶⁴ The intermediary in the first role performs no rulemaking function, but simply ensures that members have followed their own rules.⁶⁵ This role involves little risk of private censorship because both members and intermediaries simply follow their own rules. The second role involves intermediaries who perform obligations to enforce rules adopted by public institutions.⁶⁶ While there are transaction costs that may, at the margin, exclude some potential intermediaries, there is little risk of private censorship. The third role involves the greatest risk of private censorship and exclusion of risky content and commerce.⁶⁷ This role involves intermediaries who are subject to liability for harm caused by content originators. To reduce the risk of liability, intermediaries performing the third role have a strong incentive to exclude any content or commerce that poses a risk.

Private intermediaries who perform a rulemaking function have always stimulated questions about legitimacy and fairness.⁶⁸

How can accountability be assured in rulemaking? What is the right balance between majority will and minority rights? When constituencies are too large for the members to express themselves individually, what are permissible representation arrangements? These are the questions that always challenge makers of constitutions for public

⁶⁴ See, e.g., BBBOnline, *supra* note 63 (providing a procedure through which to file complaints against websites that have invaded personal privacy); TRUSTe, *supra* note 63 (claiming to promote trust and confidence on the Internet by helping users find trustworthy websites).

⁶⁵ See, e.g., TRUSTe, HOW TO JOIN THE TRUSTe PROGRAM, at http://www.truste.org/webpublishers/pub_join.html (last visited Sept. 30, 2000) (describing how to become eligible for a TRUSTe seal).

⁶⁶ See FTC Children's Online Privacy Protection Rules, 16 C.F.R. § 312.10 (2000) (providing a safe harbor to intermediaries that enforce statutory and regulatory limitations on the acquisition and use of information from children).

⁶⁷ See H.R. CONF. REP. NO. 104-458, at 193-94 (1996) (analyzing § 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230).

⁶⁸ See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (proposing a conception of governance as a set of negotiated relationships between public and private actors.)

institutions.⁶⁹ They also challenge the designers of private regulatory regimes and may yet wreck ICANN.⁷⁰

Additionally, what are the rules for private dispute resolution? Is the impartiality of decisionmakers assured? Did both parties receive appropriate notice and opportunity to participate? Were appropriate rules of evidence applied? Did the record develop in the formal proceeding justify the decision? These are questions that regularly challenge writers of civil practice statutes and civil procedure and evidence rules.⁷¹ These same questions confront designers of private arbitration machinery,⁷² designers of the Virtual Magistrate,⁷³ the WIPO dispute resolution machinery,⁷⁴ and the plethora of other virtual dispute resolution bodies connected with e-commerce.⁷⁵ Constitutional contro-

⁶⁹ See, e.g., CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, 69-74 (1966) (describing how Constitutional Convention delegates settled on a method for electing members of Congress); ALEXANDER HAMILTON, ET AL, *THE FEDERALIST PAPERS* (Benjamin Fletcher Wright, ed., Belknap Press 1974) (arguing, in part, that government is a matter of choice).

⁷⁰ See ICANN, *PRELIMINARY REPORT: MEETING OF THE ICANN BOARD IN YOKOHAMA* (July 16, 2000) (reporting on changes in ICANN bylaws to resolve disagreements about at-large members and selection of board members by them), <http://www.icann.org/minutes/prelim-report-16jul00.htm>; ICANN, *PUBLIC COMMENT FORUM, AT-LARGE ELECTIONS: PROPOSED RULES FOR SELF-NOMINATION* (Comments through July 7, 2000) (discussing, in a participatory forum, at-large membership selection and representation), at <http://www.icann.org/mbx/selfnomination>.

⁷¹ See Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 *STAN. L. REV.* 1447, 1467 (1994) (reporting on the controversy over the balance between local rules and the Federal Rules of Civil Procedure); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 *F.R.D.* 139, 140 (1993) (describing the controversies over the content of civil discovery and sanctions rules).

⁷² See *Publicis Communication v. True North Communications, Inc.*, 206 F.3d 725 (7th Cir. 2000) (affirming judicial confirmation of an arbitration order decided under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards); *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 478-79 (7th Cir. 1997) (discussing the relationship between the New York Convention and domestic United States arbitration).

⁷³ See *VMAG: The Virtual Magistrate: Online Dispute Resolution*, at <http://www.vmag.com> (last visited Sept. 30, 2000) (providing dispute resolution among online computer users, computer operators and persons harmed by the posting of defamatory online messages).

⁷⁴ See *WORLD INTELLECTUAL PROPERTY ORGANIZATION ARBITRATION AND MEDIATION CENTER, MEDIATION RULES*, <http://www.arbiter.wipo.int/mediation/mediation-rules/index.html> (last visited Sept. 30, 2000) (providing supplemental dispute resolution rules).

⁷⁵ See, e.g., *Internet Neutral*, at <http://www.internetneutral.com> (last visited Sept. 30, 2000) (offering online dispute resolution services); see also *WEBdispute*, at <http://www.webdispute.com/> (last visited Sept. 30, 2000) (offering online dispute

versies in developing the framework for democratic rulemaking and for fair adjudication do not evaporate when these governmental functions are privatized. The controversies simply occur in private arenas rather than public ones. However, the inadequacies of private rule-making will inevitably spill over into the public arena. This must be taken into account when public institutions determine their willingness to cede power to private regulatory networks.⁷⁶

4.4. *Other Forms of Trust Enhancement*

Commerce does not only depend only on formal legal rules and the availability of formal dispute resolution machinery. It also, sometimes predominantly, depends upon informal mechanisms of enhancing trust. Personal and familial relationships facilitate possible transactions in many local markets. Traditional transnational business mechanisms, such as standby letters of credit,⁷⁷ performance bonds,⁷⁸ and accounts receivable financing,⁷⁹ oiled the wheels of international business transactions long before the ascendance of the Internet by providing trustworthy guarantees.

New enhancing mechanisms also facilitate e-commerce. eBay is especially innovative in this regard. Their innovations include online consumer reports of seller reliability⁸⁰ available with the click of a mouse in the same space where a transaction can be consummated, escrow mechanisms to assure seller and buyer performance,⁸¹ and pri-

resolution services); iLevel, at <http://www.ilevel.com> (last visited Sept. 30, 2000) (offering online dispute resolution).

⁷⁶ See 146 CONG. REC. S4297-02 (daily ed. May 23, 2000) (statement of Sen. Hollings) ("Internet industry self-regulation efforts have failed to protect adequately consumer privacy.")

⁷⁷ See *San Diego Gas & Elec. Co. v. Bank Leumi*, 50 Cal. Rptr. 2d 20, 23 (Cal. Ct. App. 1996) (stating that standby letters of credit have evolved into guarantees of a customer's promised performance to a third party).

⁷⁸ See *United States Fid. & Guar. Co. v. Braspetro Oil Servs., Co.*, 199 F.3d 94, 98 (2d Cir. 1999) (describing performance bonds).

⁷⁹ See Mara E. Trager, Note, *Towards A Predictable Law on International Receivables Financing: The UNCITRAL Convention*, 31 N.Y.U. J. INT'L L. & POL. 611 (1999) (describing accounts receivable financing).

⁸⁰ EBAY, WHY EBAY IS SAFE, at <http://pages.ebay.com/help/basics/n-is-ebay-safe.html> (last visited Sept. 30, 2000) (describing the company's feedback forum where users can read comments on the reputations of previous buyers and sellers).

⁸¹ EBAY, ESCROW OVERVIEW, at <http://pages.ebay.com/help/community/escrow.html> (last visited Sept. 30, 2000).

vate insurance to compensate for nonperformance.⁸² These mechanisms are developed and deployed unilaterally, motivated by an entrepreneurial desire to enhance buyer and seller trust in a new kind of auction space.

5. INITIATIVES TO TRANSLATE THEORY INTO REALITY

It is not enough for a law professor or a policymaker to conceive of ways to reduce legal barriers to e-commerce. Good ideas must be translated into public law and commercial practice. The boundary between public and private law must be expressed in public law that defines the respective roles of different institutions in hybrid regulatory regimes.⁸³

The Hague Conference on Private International Law⁸⁴ has one hundred years of experience in facilitating multilateral agreement among nations on public law frameworks for private law.⁸⁵ Presently,

⁸² EBAY, FRAUD PREVENTION AND INSURANCE, at <http://pages.ebay.com/help/community/insurance.html> (last visited Sept. 30, 2000).

⁸³ See Perritt, *Cyberspace Self-Government*, *supra* note 54, at 413 (discussing the political and legal limitations of contract law as a sole source of governance). See generally Christopher Wilkinson, Internet Domain Name Administration, Address to the Center for Information Law and Policy Conference (Oct. 8, 1997), at <http://www.ispo.cec.be/eif/dns/dnsadmin.html> (discussing the need for political oversight and dispute resolution in self-governing communities).

⁸⁴ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FUTURE HAGUE CONVENTION ON INTERNATIONAL JURISDICTION AND THE EFFECTS OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, <http://www.hcch.net/e/workprog/infosheet.html> (last visited Sept. 21, 2000) (describing the Hague Conference on Private International Law as an inter-governmental organization founded in 1893 to focus on the progressive unification of the rules of private international law).

⁸⁵ See, e.g. Hague Conference on Private International Law, Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relation to Adoptions (Nov. 15, 1965) (establishing common provisions on adoption among signatory states), <http://www.hcch.net/e/conventions/menu13e.html>; Hague Conference on Private International Law, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Nov. 15, 1965) (agreeing on rules governing transmission of judicial and extra-judicial documents for service abroad), <http://www.hcch.net/e/conventions/menu14e.html>; Hague Conference on Private International Law, Convention on Recognition of the Legal Personality of Foreign Companies, Associations, and Foundations (June 1, 1956) (establishing international rules for legal recognition of business entities), <http://www.hcch.net/e/conventions/menu07e.html>; Hague Conference on Private International Law, Convention Relating to the Settlement of the Conflicts between the Law of Nationality and the Law of Domicile (June 15, 1955) (establishing guidelines for harmonizing conflicts regarding of nationality of domicile), <http://www.hcch.net/e/conventions/menu06e.html>; Hague Conference on Private International Law, Convention on Civil Procedure (Mar. 1, 1954) (establishing guidelines for international judicial procedures), <http://www.hcch.net/e/conventions/menu02e.html>.

the Conference is considering a comprehensive treaty for judicial jurisdiction and enforcement of foreign civil judgments.⁸⁶ The Conference has an opportunity to work out basic ground rules for localizing conduct in Internet markets, through targeting and other mechanisms.⁸⁷ It also has an opportunity to define the relationship between private regulation and public enforcement.⁸⁸

The Chicago-Kent/American Bar Association Internet Jurisdiction Project, completed in August 2000,⁸⁹ defined the basic challenges presented by e-commerce technology to traditional legal conceptions of prescriptive and adjudicative jurisdiction.⁹⁰ The Project also considered the differing needs, balances of power, and traditional industry practices in some nine areas of concern such as consumer protection,⁹¹ privacy,⁹² intellectual property,⁹³ financial services and banking,⁹⁴ and sale of professional services.⁹⁵

The U.S. Congress, the Clinton/Gore Administration, and the European Commission have embraced some core principles that they are translating into actual law-framing hybrid regulation. Most of the new federal legislation for e-commerce at the close of the century em-

⁸⁶ See Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters (Oct. 30, 1999) (proposing international rules of personal jurisdiction), <http://www.hcch.net/e/conventions/draft36e.html>.

⁸⁷ See Catherine Kassedjian, *Electronic Commerce and International Jurisdiction* (2000) (summarizing discussions at an expert meeting organized in Ottawa by the Hague Conference on Private International Law at the invitation of the Canadian government), <http://www.hcch.net/e/workprog/jdgm.html>.

⁸⁸ In an experts conference convened by the Hague Conference in Ottawa in 2000, the author suggested that the draft convention exception for choice of forum clauses enforceability for consumer contracts could be conditioned on the consumers not having available to them an acceptable private dispute resolution alternative. See *id.* (noting that countries want to encourage e-commerce, but that consumers will be less apt to use the Internet if they are not confident).

⁸⁹ CHICAGO-KENT/ABA JURISDICTION PROJECT, *supra* note 34.

⁹⁰ *Id.* at 26-36 (analyzing how technology has changed jurisdictional paradigms).

⁹¹ *Id.* at 93-103 (discussing difficulties in ensuring consumer protection on the Internet).

⁹² *Id.* at 103-19 (examining the jurisdictional aspect of laws that concern the collection of personal information for commercial purposes).

⁹³ *Id.* at 119-30 (discussing the impact of internationalization on intellectual property).

⁹⁴ *Id.* at 130-43. (discussing jurisdictional aspects of banking and payment systems as applied to the Internet).

⁹⁵ *Id.* at 157-64 (discussing the example of the sale of online medical services).

braces some form of safe harbor for private regulation.⁹⁶ Europe has become more sympathetic to the contribution that private dispute resolution can make to protect legitimate interests in e-commerce and appears open to a mix of public and private regulation.⁹⁷

6. PROSPECTS FOR SUCCESS

What once seemed like intractable legal theoretical problems now seem not so intractable. While it would be unduly optimistic to say there is no work left for legal theorists and authors of law review articles, it is reasonable to assert that the basic outlines of useful regulatory approaches to enhance trust, reduce transaction costs, and allow e-commerce to flourish on the Internet are available.⁹⁸

Now it is the turn of real world actors to put their muscle where their mouth is. Proponents of private regulation must now occupy the space afforded them by public policy. They must actually deploy and honor private regulatory systems that are linked to widely embraced norms that provide real enforcement with teeth against rule violators and offer accessible and fair dispute resolution machinery to consumers and other small entities.⁹⁹

⁹⁶ See Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6503 (2000) (stating that an operator of an online service may satisfy the requirements of the Act by following a set of self-regulatory guidelines); see also Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2868-69 (1998) (providing that, under certain prescribed conditions, it is not a violation of the Act for a person to circumvent a technological measure that controls access to a work protected under the act).

⁹⁷ See, e.g., European Commission, *EEJ-NET Towards a European Extra-Judicial Network for Resolving Consumer Disputes—Lisbon Conference on 5-6 May 2000*, at http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just07_en.html (last visited Sept. 30, 2000) (describing how the development of EEJ-NET will enhance consumers' rights and confidence regarding cross-border cases within the EU); see also European Commission, Working Party on the Protection of Individuals with Regard to the Processing of Personal Data, Working Document: Judging Industry Self-Regulation (Jan. 14, 1998) (analyzing the role of industry regulation of privacy issues), http://europa.eu.int/comm/internal_market/en/media/dataprot/wpdocs/wpten.htm.

⁹⁸ See, e.g., CHICAGO-KENT/ABA JURISDICTION PROJECT, *supra* note 34 (providing an outline of regulatory approaches for enhancing trust, reducing transaction costs, and allowing e-commerce to flourish on the Internet).

⁹⁹ See *The Internet and Federal Courts: Issues and Obstacles: Oversight Hearing Before the House Comm. on the Judiciary*, 106th Cong. (June 29, 2000) (statement of Henry H. Perritt, Jr., Dean of Chicago College of Law) (advocating new initiatives for private self-regulation), at <http://www.house.gov/judiciary/perr0629.htm>; *Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, Testimony Before the Federal Trade Commission and the U.S. Dep't of Commerce* (June 6, 2000) (statement of Henry H. Perritt, Jr., Dean of Chicago-Kent College of Law) (discussing the role of

Public policymakers must follow through on their commitments, in principle, to hybrid regulation and allow reasonable diversity and innovation in regulatory regimes even when they differ from traditional public agency approaches.¹⁰⁰

alternative dispute resolution in online marketplaces), at <http://www.kentlaw.edu/perritt/professorperritt/ftcadrtesty3.html>.

¹⁰⁰ See Henry H. Perritt, Jr., *International Administrative Law for the Internet: Mechanisms of Accountability*, 51 ADMIN. L. REV. 871, 871-74 (1999) (proposing a framework for an international Internet regulatory regime that does not violate the U.S. Constitution).