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L'IMPACT D'INTERNET SUR LE PROJET SUR LES JUGEMENTS : NOUVELLES PISTES DE REFLEXION

établi par Avril D. Haines
pour le Bureau Permanent

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THE IMPACT OF THE INTERNET ON THE JUDGMENTS PROJECT: THOUGHTS FOR THE FUTURE

submitted by Avril D. Haines
for the Permanent Bureau

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INTRODUCTION

1 This Note is focused on the impact of the Internet on the draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Judgments Project). Section I discusses the growth of e-commerce and its underlying importance to the success of the Judgments Project. The remaining sections attempt to identify what work must be done in order to successfully accommodate the Internet within the context of the Judgments Project. In order to move forward, this Note identifies two remaining challenges. First, and most importantly, certain policy determinations are to be made with regard to Internet jurisdiction. These policy questions are described in detail in Section II. Once the policy decisions have been made, there will be various drafting issues to be confronted. The difficulties to be faced in this area are discussed briefly in Section III.

SECTION I

THE IMPACT OF E-COMMERCE

2 The importance of e-commerce in the context of cross-border transactions and therefore within the context of the Judgments Convention, cannot be overemphasised. While estimates with regard to the Internet are at best an inexact science, all studies agree that economic activity in this arena continues to experience phenomenal growth.[1] Commerce over the Internet is expected to reach as much as 7.64 trillion EUR[2] in 2004, worldwide,[3] having reached 214 billion EUR[4] in 2000.[5] In addition, the number of users is rapidly increasing with a corresponding increase in the number of purchases made on-line. Since 1992 the number of computers with access to the Internet increased from 1.3 million[6] to 625 million in 2001,[7] with approximately 40% of all Internet users having made at least one

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[1] Reports have signalled a slow down in that growth since the events of September 11, 2001, however, surveys suggest that the lack of consumer confidence was temporary and the e-commerce industry continues to grow. *See* Keenan Vision Research, E-Merchant 2001: Accelerating Free Trade, Nov. 7, 2001 *at* http://www.keenanvision.com/doc/em01/em01-7.asp.

[2] Approximately 6.8 trillion (USD). This Note when referring to a "trillion" is referencing the United States "trillion", which is equal to a thousand billion, and not the traditional British "trillion".

[3] Forecast by Forrester Research, reported in Matthew R. Sanders, *Global eCommerce Approaches Hypergrowth*, April 18, 2000 *available at* http://www.forrester.com/ER/Reseach/Brief/Excerpt/ 0,1317,9229,00.html (last visited November 14, 2001). This estimate includes both business to business (B2B) and business to consumer (B2C) transactions, however it should be noted that B2B transactions account for more that four-fifths of all transactions conducted on-line. *See* Organization for Economic Co-operation and Development (OECD), *Business-To-Consumer E-commerce Statistics* 14 (Mar. 2001) *available at* http://www.oecd.org/oecd/pages/home/ displaygeneral/0,3380,EN-statistics-44-1-no-no-no-44--no-,FF.html.

[4] Approximately 190 billion (USD).

[5] According to Keenan Vision, e-commerce activity has doubled since 1999. Keenan Vision Research *at* http://www.keenanvision.com/doc/em01/em01-4.asp (Nov. 2001).

[6] *Towards Digital eQuality,* U.S. Government Working Group on Electronic Commerce, 2nd Annual Report, 1999 (citing the Internet Software Consortium-Domain Survey *at* http://www.isc.org).

[7] Computer Industry Almanac, Press Release: There will be 625 Million Computers-in-Use Year End 2001-July 2001 *at* http://www.c-i-a.com/200107cu.htm (last visited November 15, 2001). Different surveys quote different numbers, but the trend is clear. For example, NUA Internet Surveys reports over 500 million users world-wide as of August 2001. NUA Internet Surveys, *available at* http://www.nua.ie/ surveys/how_many_online/.

on-line purchase.[8] It is gradually apparent that the Internet is revolutionising the face of trade and disputes relating to the Internet will make up a significant portion of what would fall within the scope of the Judgments Project.

3 Many States have made it a priority to encourage the development of e-commerce, having recognised the enormous potential contained in this new medium.[9] The Internet can help create new jobs, new industry and service sector opportunities, promote international trade, attract foreign investment and generally contribute to the creation and sharing of knowledge. In addition, the Internet may offer a unique opportunity to developing countries by providing their industries with direct access to a global marketplace.[10] It is, therefore, critical that the Convention not be an impediment to the continued growth of the e-commerce industry, but rather serve to cultivate its development. A predictable framework for jurisdiction and the recognition and enforcement of foreign judgments would support such a broad policy goal, provided it takes into account the new Internet environment.[11] Such a framework would allow businesses to more accurately manage the risks and costs associated with litigating in foreign courts as a result of their use of the Internet and enhance the confidence of consumers.

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[8] OECD, *Business-To-Consumer E-commerce Statistics* 3 (Mar. 2001) (citing Angus Reid, 2000).

[9] For example, the European Parliament and the European Council have repeatedly stated their commitment towards the development of e-commerce which is reflected in the Directive 2000/31/EC of the European Parliament and of the Council on certain aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. L. 178/1 [hereinafter E-commerce Directive] of June 8, 2000, stating that "[t]he development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet." In April of 2001 the U.S. Secretary of Commerce noted in a speech confirming his commitment to supporting e-commerce growth, that "President Bush recognizes, as do I, that e-commerce will continue to be one of the driving forces of economic growth in the 21st century." Donald L. Evans, Address before the Latin American/Caribbean E-Commerce Summit (April 4, 2001). Australia and Japan made a joint statement on e-commerce which noted that "[t]he Government of Australia and the Government of Japan accept that the growth of the information economy is a significant development in global economic relations and benefits both countries, especially in the conduct of international business. Electronic commerce, in particular, allows access to new markets, improves the quality of services, encourages innovation, and fosters more efficient supply and distribution." The Ministry of Foreign Affairs of Japan, *Australia-Japan Joint Statement on Electronic Commerce* (July 6, 1999) *at* http://www.mofa.go.jp/policy/economy/e_commerce/ statemt9907.html.

[10] There has been a great deal written on this subject. *See generally* Peter Cukor & Lee McKnight, *Knowledge Networks, The Internet, and Development* 25 FLETCHER F. WORLD AFFAIRS 43 (Winter 2001) (describing the implications of e-commerce technology in the developing nations of Africa, Asia, Eastern Europe, and Latin America.); Robert Kossick, *The Internet in Latin America: New Opportunities, Developments, and Challenges* 13 FLA. J. INT'L L. 263, 275 (Summer 2001) (noting that "[t]he internet presents one of Latin America's most important developmental opportunities."); Onelia Collazo, E-tailing, LatinFinance, June 1999, at 48 (describing the Internet's impact on international commerce as having levelled the playing field between large and small firms).

[11] *See e.g.*, Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. INT'L ECON. L. 563, 563 (2000) (noting that "[e]xperience 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.").

4 Legal uncertainty with regard to jurisdiction and the recognition and enforcement of judgments may have two consequences. On the one hand, companies conducting business over the Internet may limit their product offerings in an attempt to reduce the chances of being haled into court in various jurisdictions or they may decide not to do business over the Internet at all, which may in turn frustrate consumers who would prefer to have access to the goods and services at a more competitive price than they can ordinarily obtain. On the other hand, consumers may be wary of purchasing goods and services over the Internet from websites based outside of their jurisdiction, because of a lack of certainty that they will be able to obtain a remedy should difficulties arise.

5 Nevertheless, the negotiations in June illustrated the difficulties inherent in producing a draft that is both widely acceptable and workable in the Internet environment.[12] International groups and experts representing private sector interests in the e-commerce arena have expressed considerable apprehension. Their comments have raised the concern that the Convention as currently drafted, would be detrimental to the growth of the e-commerce industry, rather than of benefit.[13] While some of these concerns may be overstated, the fact remains that the enormous growth of the Internet has led to new issues which must be thought through and carefully resolved in order to avoid producing a Convention which would serve to undermine the goal of encouraging the nascent e-commerce industry. Yet, despite the many difficulties presented by the Internet, at the first experts meeting organised by the Government of Canada with the participation of the Hague Conference to examine the impact of e-commerce on the draft Convention, none of the experts gathered thought that it would be appropriate to exclude e-commerce from the scope of the project as a way of moving forward. [14]

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[12] The Interim Text that was produced during the June 2001 Diplomatic Session held in the Hague is available on the Hague Conference's website at www.hcch.net.

[13] Many formal statements have been made by organisations representing private sector interests suggesting that the Judgments Project could, as it stands, inhibit e-commerce growth rather than encourage the industry. *See e.g.*, the statement issued by the Internet Law and Policy Forum, Working Document No 15, for the Nineteenth Session, stating that "subjecting on-line merchants to global jurisdiction will have a chilling effect on the growth of e-commerce. We must take care not to adopt a jurisdictional framework which will be extremely difficult to amend before we understand all its ramifications on this new medium." *See also* The International Chamber of Commerce Comments on the draft Hague Convention on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters on December 7, 2001 (stating that "the jurisdictional rules relating to the Internet and electronic commerce within many of the negotiating States are evolving. Our Members believe that it would be unwise, in many circumstances, to disregard the evolution of legal principles currently underway within many negotiating States, and prematurely set rules that may not work, via an international convention."). In addition there have been a number of articles written on the subject. *See e.g.*, Paul Hofheinz, *EU Notebook - Cross-Border E-Commerce Continues to Raise Concerns*, WALL ST. J., August 16, 2001; Jovi Tanada Yam*, Global treaty tames the Web*, BUSINESS WORLD, August 16, 2001.

[14] *See The Summary of Discussions on Electronic Commerce and International Jurisdiction* prepared by Catherine Kessedjian with the co-operation of the private international law team of the Ministry of Justice of Canada, Preliminary Document No 12 of August 2000, for the attention of the Nineteenth Session, [hereinafter OTTAWA REPORT] p. 11 stating that "at no time was it suggested, during the discussions in the Ottawa working group, that electronic commerce should be excluded from the draft Hague Convention on jurisdiction and foreign judgments. On the contrary many experts said everything possible should be done to adapt the Convention to the needs of electronic commerce. In this respect, the point was made, as it has been in all the meetings in which we have been able to participate since then, that what electronic commerce needs is certainty and predictability." This view has since been consistently maintained during the subsequent expert meetings and the negotiation in June 2001.

6 There are essentially two steps in the process of accommodating the Internet within the context of the Convention. The first involves making a determination of what the appropriate balance is with regard to jurisdiction over Internet users and businesses. This is essentially a policy decision that must be made by States. The second step involves drafting the agreed upon balance in such a way as to produce clarity and predictability with regard to implementation. An explication of some of the problems encountered in these two steps may be useful as a way of furthering discussions among delegates on possible solutions.

SECTION II

POLICY ISSUES

7 In general, international and national debates with regard to jurisdictional approaches over Internet users have focused on whether or not to take a "country of origin" or a "country of destination" approach. A "country of origin" approach is one in which jurisdiction is only exercisable by the courts of the country in which the source of the transmission is located.[15] A "country of destination" approach is one in which jurisdiction can be exercised anywhere the information, goods or services are received.[16] First, there is the clash between businesses and consumers, each group coming to opposite conclusions as to which approach will in the end support e-commerce. Second, and not entirely unrelated, are public policy concerns implicated in the distribution of information through the Internet. These issues arise with regard to the application of States' laws dealing with such fields as intellectual property, defamation, libel, obscenity, privacy, racism and freedom of speech. The October 1999 draft of the Convention takes a "country of destination" approach with regard to the plaintiff's choice in B2B contracts,[17] B2C contracts[18] and torts[19]. The 2001 Interim Text,

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[15] The expression is also used with regard to choice of law, in which case the law of the country where the transmission originated from is the law that applies.

[16] The expression is also used with regard to choice of law, in which case the law of the country of destination applies.

[17] In the case of B2B contracts that do not include a valid choice of forum clause, Article 6 provides white list jurisdiction wherever the "goods were supplied in whole or in part" or "in matters relating to the provision of services, the services were provided in whole or in part." In the context of the Internet difficulties may arise in identifying where electronic performance of the contract has taken place. *See* OTTAWA REPORT 4-6. The problem stems from the fact that many on-line contracts deal with electronic goods and services in which performance is effected through a download of software onto the buyer's computer. In this age of laptops and mobile internet users (m-commerce), such performance can occur anywhere. Companies that provide information in exchange for a subscription to their service over the Internet are yet another instance of an industry that would find it difficult to manage the risks associated with this approach. It would be impossible for a company selling, for example, statistical information over the Internet to determine or restrict where their customers downloaded the information and if the business were to try to contractually limit the number of places the buyer could access the information, it would clearly decrease the utility of the service. At the Geneva Round Table on the Questions of Private International Law Raised by Electronic Commerce and the Internet, the problem was discussed and the group agreed that "if the performance takes place on-line, the place of performance is not appropriate as a connecting factor." See The Hague Conference on Private International Law and the University of Geneva*, Press Release: Geneva Round Table on Electronic Commerce and Private International Law* (1999) *available at* http://www.hcch.net/e/events/press01e.html*.* Nevertheless, no agreed upon alternative basis for jurisdiction has been found. In addition, even if on-line performance should be assumed to take place wherever the buyer is located when concluding the contract, it is not always easy to determine the location of the buyer. With regard to determining the location of the buyer, *see* comments of the Software & Information Industry Association (SIIA) submitted to the U.S. Patent and Trademark Office on January 12, 2001 (stating that "[i]n many instances it will be impossible for a seller to determine where the buyer or user of a digitised product is located at the time of the sale or where electronic performance of the contract took place …. For instance, when an Internet Software Vendor (ISV) makes its products or services available to users through an Application Service Provider (ASP) business model the ISV will likely have no idea who the users are or where they are located. Further, under the ASP model users of such software could give one address as their billing address, but may access the software products or services from any location in the world that they can get access to the Internet. That jurisdiction, which is never disclosed to the seller, could become the place where disputes are litigated. In short, ISVs and other software and content providers could find themselves being sued anywhere their products and services can be found or accessed."). *See also* International Chamber of Commerce, *Jurisdiction and applicable law in electronic commerce* (June 6, 2001), *available at* http://www.iccwbo.org/home/statements_rules/statements/2001/

however, has softened this approach by including language that states that a defendant shall not be subject to white list jurisdiction if he or she takes "reasonable steps" to avoid such jurisdiction.[20] No consensus was reached with regard to this last suggestion, which was seen by some as ambiguous and ineffective. In sum, no agreement has been reached on which approach is appropriate. This Note will briefly describe the different positions taken in these discussions in an effort to define the scope of the debate.

Businesses and consumers

8 A "country of origin" approach is generally favoured by business interests and other Internet users who are concerned that they will be forced to defend themselves against actions in a multitude of jurisdictions with no ability to narrow the scope of such expansive

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jurisdiction_and_applicable_law.asp (stating that "[t]he complexity of applying the "country of destination" principle is exacerbated when it is applied where consumers use "infomediaries" or other interposing technologies to purchase goods or services that are digitally transmitted, and pay with digital cash or any other payment mechanism that does not identify the purchaser. In this situation, a business would never know the law and forum to which it subjects itself as the "infomediary" prevents a company from knowing the identity and location of an individual consumer.").

[18] In the case of B2C contracts, Article 7 provides white list jurisdiction in the courts of the State in which the consumer is habitually resident (whether or not there is a choice of forum clause in the contract, entered into before the dispute arose assuming 1) that the business has conducted professional activities, "in particular in soliciting business through means of publicity" in the consumer's residence or directed such activities to that State, 2) that activity is linked to the conclusion of the contract in dispute, and 3) that the consumer has "taken the steps necessary for the conclusion of the contract in that State." In the case of an on-line B2C contract, the first two conditions will always be met and as pointed out by the experts group in Ottawa, with regard to the third condition "present-day means of telecommunication enable a consumer to conclude the contract in a place other than his habitual residence, but this does not carry any special implications for the purpose of deciding which courts have jurisdiction." OTTAWA REPORT 6. This jurisdiction is, of course, in addition to any grounds of jurisdiction available to the consumer under Article 6 if there is no choice of forum clause in the contract and thus serves to widen the scope of white list jurisdiction that the seller would be subject to under the Convention.

[19] Article 10, dealing with jurisdiction over disputes relating to torts, allows a plaintiff to bring an action in tort in the courts of the State in which the injury arose. With regard to the Internet, an injury may "arise" with regard to such torts as defamation, copyright infringement, reverse domain name hijacking, passing off, unfair competition, "hate speech," obscenity and libel anywhere the offending information appears on a computer screen. It should be noted that paragraph a of Article 10 takes a "country of origin" approach, but when combined with paragraph b, the final result is a "country of destination" approach with the additional option of being able to bring suit where the "act or omission that caused the injury occurred."

[20] This language was initially proposed with regard to consumer contracts and has since been incorporated into proposals with regard to Article 6 and 10 as well.

jurisdictional claims since a website is globally transmitted and it is virtually impossible to determine where a customer is located with certainty. [21] Closely connected to this problem is the concern that each jurisdiction will apply its own, uncoordinated choice of law rules, which will in a large proportion of cases result in the application of the forum's substantive law, thereby subjecting e-commerce businesses and Internet users to a considerable number of potentially conflicting legal frameworks.[22] This situation is made more difficult in light of the remarkable proliferation of legislation in various countries concerning the Internet and the recent development of new legal doctrines specific to the Internet.[23] In other words, it is

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[21] *See e.g.,* International Chamber of Commerce, *Jurisdiction and applicable law in electronic commerce* (June 6, 2001), *available at* http://www.iccwbo.org/home/statements_rules/statements/2001/ jurisdiction_and_applicable_law.asp. (stating that the "country of destination" approach which has been taken by some governments (notably Europe under the Brussels Regulation) severely limits greater consumer choice and more favourable prices on the Internet because businesses have responded by limiting the use of their websites through closed systems with established partners or sales to residents of the territories where the companies are already established).

[22] The number of possible conflicts one can imagine are immense. Consider, for example, trademark disputes. Playboy magazine obtained a trademark injunction in the United States against an Italian magazine called "Playmen." Publication of the magazine in Italy, however, was lawful. The Italian publisher then made the magazine available over the Internet from a server in Italy. A federal district court in the U.S. found the publisher liable for violating the injunction and required the defendant to "either shut down PLAYMEN Lite completely or prohibit United States users from accessing the site in the future." Playboy Enterprises Inc. v. Chuckleberry Publishing Inc., 939 F. Supp. 1032 (S.D.N.Y. July 16, 1996). Unfortunately, blocking technology is highly imperfect and it is not possible for a website to effectively block all users from a particular jurisdiction from downloading information - especially with regard to mobile internet use. *See e.g.,* On-line Policy Group, *Why Blocking Technology Can't Work* (last visited December 3, 2001) *at* http://www.onlinepolicy.org /outreach/blockcantwork.htm (stating that blocking technology underblocks and overblocks, does not permit local control without great difficulty, is subjective, error-prone, is easily bypassed and causes problems with computers during installation, maintenance, upgrades, and removal). *See also* comments made by a representative of Commercial Internet Exchange at the June 2001 Diplomatic Session who "drew attention to the impact of provisional measures on Internet Service Providers (ISP). Especially injunctive measures could create severe problems. She explained that it was technologically difficult to limit the execution of an injunction to only one country. Consequently a national court could block activities of a company throughout the whole world." Minutes, No. 14, Commission II, Nineteenth Session (June 14, 2001). *See also* John T. Delacourt, *The International Impact of Internet Regulation,* 38 Harv. Int'l L. J. 207, 213 (1997).

Another example would be the conflicting legal frameworks that exist with regard to privacy issues between Western Europe and the United States. Under the Data Protection Rules of the European Union personal information should not be transferred outside of the European Union to a country that does not have adequate privacy protection. *See* Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. L 281/31, art. 25 *available at* http://europa.eu.int/eur-lex/en/lif/dat/1995/en_395L0046.html. The United States, on the other hand, has avoided the promulgation of comprehensive privacy protection statutes and the possibilities for conflicts between the European Union Directives and various laws in the United States are considerable. *See* F. LAWRENCE STREET & MARK GRANT, LAW OF THE INTERNET 252 (2001). For a more thorough discussion, *see* Julia Gladstone, *The U.S. Privacy Balance and the European Privacy Directive Reflections on the United States Privacy Policy*, 7 WILLIAMETTE LAW REVIEW 10 (2000). Although a compromise solution has been found with the so-called Safe Harbour provision, developed by the European Commission and the U.S., conflicts are still possible to the extent that companies do not voluntarily embrace these principles.

[23] Consider, for example, these seven new issues that have arisen with regard to Internet use: 1) Cybersquatting, which is typically a situation in which a "cybersquatter" registers a famous trademark as a domain name and later attempts to sell or license the domain name to a company that has invested a significant amount of money in developing goodwill in the mark. 2) Meta-tagging, which is when computer codes are used by a search engine to identify which websites should be listed as part of an Internet search result. Metatags are perfectly legal when used properly, but can be illegal if, for example, companies use metatags which contain the trademark or trade name of a competitor as a way of indexing their site. *See e.g.,* Hanseatic, 6 U 4123/99 (April 6, 2000) (The Munich Court of Appeal held that use of a trademark in the meta-tag of an internet page can infringe the mark); Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456 (7th Cir. 2000) Plaintiff, a drug manufacturer, brought suit against Natural Answers, alleging that the defendant's HERBROZAC product infringed and diluted its Prozac trademark. The U.S. Court of Appeals of the Seventh Circuit affirmed the lower court's decision to grant a preliminary injunction for the plaintiff. The fact that Natural Answer's website contained a source code which included the term "Prozac" as a meta-tag, was considered to be evidence of the defendant's intent to confuse and mislead consumers. 3) Linking, which is a process whereby a user connects from one site to another by clicking on a designated space on the original site. Linking can be problematic if, for example, the link suggests some sort of connection to the linked site that is false. 4) Web Crawlers, which are programs that query other computers over the Internet to obtain information. In *eBay Inc. v. Bidder's Edge, Inc*. a United States district court issued a preliminary injunction, enjoining Bidder's Edge from using software robots or other automated programs to access eBay's computer

particularly burdensome for users to remain appraised of all of these new developments in numerous jurisdictions and it is also difficult for States to assess the impact of the Judgments Convention as it now stands, in light of the rapidly changing legal landscape which may implicate Internet users in their jurisdiction. By contrast, a "country of destination" approach would potentially provide greater consumer protection, allowing buyers to bring suit in their own country and presumably take advantage of their own laws, thereby providing consumers with protection similar to what they would enjoy in making a retail purchase from a store in their own neighbourhood.[24] Consumers would likewise be concerned that a "country of origin" approach would lead to a "race to the bottom" in which Internet companies flock to the countries that have the most lax rules with regard to sellers. Many countries are still deciding which approach is preferable and some of their deliberations are contingent upon the growth of, for example, on-line dispute resolution techniques which may provide a valid alternative by which a consumer can obtain an effective remedy.[25] In addition, the Internet may require lawmakers to re-evaluate the

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systems without permission in order to obtain information on ongoing auctions. *See* 100 F. Supp. 2d 1058 (N.D. Cal. 2000). The court issued the injunction on the grounds that such activity is likely to constitute a prohibited trespass to chattels. The court further held that the defendant's conduct interfered with eBay's possessory interest in its computer system. 5) Framing, which allows a web page author to build a frame or border of text or graphics and pull another web page from another site into that frame or border. The creation of the "new" page may constitute a derivative work of the original page which would create a copyright infringement or a number of other claims including trademark infringement, false designation of origin, or unfair competition. 6) Post-Domain URL Paths, which are not part of a domain name but nevertheless appear as users enter further into a website, illustrating how the website is organised. Occasionally protected trademarks may be used in the post-domain path, and although in most cases it appears that such uses fall under nominative fair-use or under statutory limitations or exceptions, there has been the suggestion that if the trademark were to be used gratuitously, it could be seen as an infringement. 7) Political Cybersquatting, which are situations in which someone advocating a certain opinion registers a domain name that will induce individuals with the opposite opinion to visit his or her website. One can see how these new practices would implicate both Internet businesses and individual users.

[24] *See* for example, comments made by a representative of Consumers International at the June 2001 Diplomatic Session: "The principle that consumers should have the possibility to seek redress before their home courts … was especially important in the electronic marketplace, where consumers could be at a considerable disadvantage if they are subjected to the jurisdiction of distant courts when disputes arise." Minutes, No. 14, Commission II, Nineteenth Session (June 14, 2001).

[25] *See* the OECD's First Report: Government and Private Sector Initiatives To Promote and Implement the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 9 (Feb. 2001) *available at* http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/DSTI-CP(2000)7-FINAL. As the report stated: "[r]ecognising that

traditional legal doctrines as applied to consumers and businesses which are based on an assumed bargaining power differential. Because Internet businesses may be quite small[26] and Internet consumers have instant access to enormous amounts of information, highly sophisticated analytical tools and substantial choice on-line, the relative strength of the two parties is not always obvious. The ability of consumers to make enforceable choices of law and fora might be reconsidered.

9 One possibility put forward at the experts meeting on e-commerce in Ottawa was the inclusion of the concept of targeting in a separate, supplementary rule to deal with transactions on-line.[27] While this idea is not without problems,[28] it suggests that there are more nuanced approaches that might be taken to reach a compromise between the two very extreme positions represented by a "country of destination" or a "country of origin" approach. Nevertheless, none of the approaches suggested thus far resolve the information issues that are raised in the next section.

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the global network environment challenges the ability for consumers to obtain effective redress for transactions that occur across national borders, the Guidelines raise alternative dispute resolution (ADR) as a means to provide effective redress and thus encourage continued work. Beyond the OECD Conference in the Hague on 11-12 December 2000, hosted by the Dutch government and co-organised with the Hague Conference on Private International Law and the International Chamber of Commerce, OECD Member countries, other international bodies, and the private sector have been busy holding workshops and conferences, exploring principles for fair and effective on-line ADR, and developing on-line ADR mechanisms. As of December 2000, more than 40 on-line ADR mechanisms had been identified." *See also* Kaufmann-Kohler, Schultz, Langer & Bonnet, *On-line Dispute Resolution: State of the Art and Issues*, Dec. 2001, *available at* http://www.online-adr.org/reports/TheBlueBook-2001.pdf. The Report is part of an ongoing research project conducted by Gabrielle Kaufmann-Kohler, Law School and Professor Jürgen Harms, Centre universitaire informatique, both of Geneva University, and their research team.

[26] *See e.g.*, Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. INT'L ECON. L. 563 (2000).

[27] OTTAWA REPORT 7 (stating that "[a]nother idea has been put forward: to include in the rule of conflicts of jurisdiction the concept of a "target." If the enterprise has specifically targeted consumers in a particular country, it would be consistent to decide that the courts of that country have jurisdiction for consumers residing on its territory …. However, this development has been criticised by some experts, and is not unanimously endorsed as yet.").

[28] One of the difficulties with targeting can be illustrated by way of an actual case. iCraveTV, a small Canadian company provided Internet users with the ability to view television programs over the Internet as they were being broadcast. iCrave's activities were in fact legal in Canada, but illegal in the United States. iCraveTV "targeted" Canadians, ostensibly limiting its distribution by conditioning access to its site through three stages of verifications and clickwrap agreements to ensure that only persons located in Canada would access the service. In one of the steps, the potential user was asked to enter their local area code. If the area code was not a Canadian area code, the user was denied access to the service. The difficulty with this seemingly appropriate "targeting" device is that iCrave's own Toronto area code was posted on the site. In reality, there were a phenomenal number of users within the United States (U.S.), and thus the impact of iCraveTV was enormous in the U.S., despite the fact that iCraveTV was ostensibly targeting Canada. In the final analysis, a U.S. court took jurisdiction over the case and the parties reached a settlement. For a thorough discussion of this case and other internet jurisdictional cases, *see* Michael Geist, *Is There A There There? Toward Greater Certainty for Internet Jurisdiction*, (2001) *available at* http://www.ulcc.ca/en/cls/internet-jurisdiction.pdf.

The information society

10 Beyond the business and consumer debate, there exists a number of other public policy concerns related to States' laws dealing with information. States are naturally concerned that their courts have jurisdiction over disputes relating to information and activity that although perhaps was not consciously directed at their forum, nevertheless has an impact in their jurisdiction.[29] A "country of destination" approach would allow countries to have jurisdiction over such cases, but if the Judgments Convention is brought into force using a "country of destination" approach, judgments relating to Internet use within the scope of the Convention will be recognisable and enforceable within all Contracting Member States and will have an effect on the information and activity conducted over the Internet on a worldwide basis.[30] Either countries will end up utilising the public policy exception in order to avoid the recognition and enforcement of controversial decisions, or it will be a race to the courthouse, since the *lis pendens* rule will require the court second seised to suspend proceedings. Neither situation is ideal. On the one hand, if the countries opt out of such decisions by utilising the public policy exception, the Convention remains useless in this arena. If on the other hand, the rules are established by whatever court happens to get the case first, the result will be unpredictable and potentially destructive to a particular country's policies.

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[29] One might ask why these concerns are voiced mainly with regard to the Internet and not with regard to traditional print media like newspapers or magazines or even television and radio. It is true that some of the problems discussed here relate to print, video and audio media, but these issues are marginal ones in comparison to the Internet implications. The Internet is a global marketplace that at this point already represents a substantial part of most countries' economic landscape. If the Convention has a negative impact on the Internet the effect will be magnified because of the number of transactions involved and the scope of the problem. Second, States have already worked out their law and policy with regard to these older forms of communication media to a large extent. Third, it is generally possible to restrict the scope of the targeted audience by limiting, for example, the distribution of a magazine or newspaper or by printing a separate edition for different jurisdictions or by effectively blocking channels. Fourth, while it is possible for any individual or very small business to set up shop on the Internet, there is not the same access to these other forms of media.

[30] Consider, for example, the much publicised Yahoo! case in which French law was applied, utilising a "country of destination" approach. *See* Tribunal de Grande Instance de Paris, Ordonnance de référé, May 22, 2000, N°RG 00/05308. A French court, required Yahoo! Inc., a U.S. company, to remove Nazi memorabilia from the on-line auction site of its U.S. based site on the grounds that it breached a French criminal statute barring the public display in France of Nazi-related material. Nouveau Code Pénal Art. R.645-2. Yahoo! brought suit in California, seeking a declaration that the French Court's judgment was unenforceable in the United States. Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 145 F.Supp. 2d. 1168 (2001). Yahoo!'s U.S. based site purportedly does not impose restrictions on the display of Nazi-related material because to do so might infringe upon the First Amendment of the Constitution of the United States. *See id*. at 1171. While the French court's order only required that Yahoo! block access to the Nazi-related material to end-users in France, the reality of blocking technology is that it is highly imperfect and Yahoo! chose instead to ban the material from the website. (Even so, the filters are far from perfect. While goods where "Nazi" is used in the description are banned, goods described as "Iron Cross" and "Third Reich" stay in. The difficulty, of course, is that people will always be able to find creative ways in which to circumvent such filters). The fact that the French court's judgment had an impact on all other jurisdictions does not lessen the interest of France in regulating the importation of information over the Internet in France. Nevertheless, there is no question that the judgment had an effect in other jurisdictions and could be seen as undermining, for example, the strong public policy the United States has with regard to freedom of speech. On November 7, 2001, the California federal district court granted a motion for summary judgment in favour of Yahoo!, finding that the "enforcement of the French order by a United States court would be inconsistent with the First Amendment." *See* 2001 WL 1381157 (N.D.Cal.) (2001).

11 The situation with regard to policy is made more complicated by the fact that through the advent of the Internet, the field of intellectual property has undergone a dramatic change. Legislators and interest groups have been forced to re-examine the current structure of rights in this arena in order to determine whether or not the same policies should apply, what rights should exist in which work products and how the legal framework for such rights can be maintained and enforced in light of the rapidly changing technology and the many difficulties it poses with regard to enforceability. In addition, the stakeholders in this ongoing debate have changed.[31] It used to be that the people most interested in copyright for example, were authors, publishers, record and film producers, broadcasters, librarians and educators. New interests have been added to this list, including software designers, on-line service providers, Internet access providers and electronics manufacturers. These new important players have an impact on domestic policy decisions which States must have an opportunity to assess before negotiating international issues that will clearly have an effect on these various industries.[32]

12 Europe provides us with an example of how these issues might be worked out in the long run, but also serves to demonstrate the difficulties in obtaining a balance that satisfies businesses, consumers and those concerned with the distribution of information over the Internet. The Brussels Regulation,[33] which will enter into force on March 1, 2002, takes a "country of destination" approach and has been the subject of some of the same controversies discussed within the context of the Hague Judgments project. [34] However, within the European Union, the Member States have attempted to address these concerns through legislation that is meant to harmonise choice of law rules and substantive law where possible and necessary.[35]

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[31] What might be considered a subset of this debate is waged among legislators who are focused on the Internet and technology and are looking for a liberal regime therein versus those who are traditional jurists, keen to establish a legal framework in this new medium. Some new reports appear to suggest this split within governments. *See e.g.,* Deborah Hargreaves, *Light Touch on the Web: Europe's Liberalisers are Gaining the Edge in the Debate Over E-commerce Regulation*, FINANCIAL TIMES, December 7, 1999.

[32] This point is illustrated and discussed in an article by Shira Perlmutter. *See Convergence and The Future of Copyright,* 24 COLUM-VLA J.L. & ARTS 163 (2001).

[33] *See* Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. L 12/1, Art. 5, 16 (December 22, 2000) [hereinafter Brussels Regulation]. The Brussels Regulation is based on the Brussels and Lugano Conventions. *See* Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. L 299/32, as amended by 1978 O.J. L 304/1, 1982 O.J. L 388/1, 1989 O.J. L 285/1, 1997 O.J. C 015/1, 1998 O.J. C 027/1, 2000 O.J. C 160/1, 2001 O.J. L 012/1 [hereinafter Brussels Convention] *available at* http://europa.eu.int/eur-lex/en/lif/dat/1968/en_468A0927_01.html; Lugano Convention on Jurisdiction and Enforcement of Judgments on Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. L 319/9, reprinted in 28 I.L.M. 620 (1989) [hereinafter Lugano Convention]. For a thorough explication of how these two Conventions operate, *see* ALEXANDER E. ANTON & PAUL R. BEAUMONT, CIVIL JURISDICTION IN SCOTLAND: BRUSSELS AND LUGANO CONVENTIONS (2d. ed. 1995); Jan KROPHOLLER, *Europäisches Zivilprozessrecht, Kommentar zu EuGVÜ und Lugano-Übereinkommen*, 1998; Hélène GAUDEMET-TALLON, *Les Conventions de Bruxelles et de Lugano – compétence internationale, reconnaissance et exécution des jugements en Europe*, L.G.D.J. 1993.

[34] It should be recalled that the Brussels Regulation in principle only applies when the defendant is domiciled within the European Community, however there are exceptions to this rule. *See Note on the Relationship Between the Future Hague Judgments Convention and Regional Arrangements, in Particular the Brussels and Lugano Instruments*, drawn up by the Permanent Bureau, Annex D to the agenda of the experts meeting (electronic commerce) held in Ottawa, 26 February - 2 March 2001.

[35] Examples of such legislation include the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. L 167/10; the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999

For example, in response to criticism from business groups, one European consumer representative replied that "[i]t is unfortunate that some of the critics of the Regulation have argued that business will be paralysed by the legal risks presented by being subject to the trading laws of all of the member states. This is untrue. In fact all advertising, sales promotion, etc. "public law" will fall within Article 3 of the draft e-commerce directive which makes it clear that the "country of origin" principle should apply."[36] It is apparent that the E-commerce Directive's "country of origin" approach to the choice of law for the regulatory regime[37] is critical to the balance struck with regard to jurisdiction in Europe as far as the consumer/business debate is concerned and also with regard to the distribution of information.[38] As the preamble of the Directive points out: "[t]he development of information society services within the Community is hampered by a number of legal obstacles … [which] arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, … legal uncertainty exists with regard to the extent to

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on a Community framework for electronic signatures, 1999 O.J. L 13/12; the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. L 281/31; the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. L 77/20; the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, 1991 O.J. L 122/42 and of course the E-commerce Directive, for which Member States "shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive before January 17, 2002." E-commerce Directive, art. 22. If one visits the EUR-Lex website at http://europa.eu.int/pol/infso/index_en.htm, it is possible to view a list of all the legislation in force with regard to the Information Society, along with legislative proposals made by the Commission. Listed on the site are 137 laws in force and 22 proposed laws that have yet to be brought into force. This gives one an idea of just how complex the framework is that attempts to co-ordinate between the member States in the Internet arena. Newer initiatives currently underway include distance selling of financial services and the proposed project, known as Rome II, which is intended to harmonise Member State rules relating to conflict of laws in extra-contractual obligations. *See infra* footnote 40.

[36] *See* Denis T. Rice, 2001: *A Cyberspace Odyssey Through U.S. and E.U. Internet Jurisdiction Over E-commerce*, 661 PRAC. L. INST. 421, 495 (2001) (quoting a representative of a United Kingdom Consumer Association).

[37] For example, the E-commerce Directive limits the liability of information society service providers (ISSPs) by stating that "Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission." *See* E-commerce Directive, art. 12. In addition, the E-commerce Directive notes that "Information society services should be supervised at the source of the activity … such information society services should in principle be subject to the law of the Member State in which the service provider is established." Thus, the E-commerce Directive takes the "country of origin" approach with regard to choice of law as applied to information society service providers and information society services. *See id.* at Recital 22. Whether this "country of origin" approach only applies to public law or substantive private law is still an open question which is being debated within the European Union as Member States attempt to implement the E-commerce Directive.

[38] *See* P. Mankowski, *Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-Richtlinie,* ZvglRWiss 100 (2001), 137, 175-6 (with numerous references); Gerald Spindler, *E-Commerce in Europa. Die E-Commerce-Richtlinie in ihrer endgültigen Fassung*, MultiMedia und Recht MMR-Beilage 7/2000, 4,19. *See also,* Erik Jayme & Christian Kohler, *Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?*, 6 IPRax 2001, p. 501.

which Member States may control services originating from another Member State."[39] While Directives such as the E-commerce Directive[40] are intended to provide greater certainty in this arena and minimize the potential for conflicting and overlapping prescriptive jurisdiction of legal frameworks for Internet users, there are no comparable mechanisms currently in force on a world-wide basis. In addition, e-commerce in Europe is still in a relatively early stage of development.[41] This means that it may be premature to assess whether or not the European Community's (EC) solution, mixing a "country of destination" approach to jurisdiction with a "country of origin" approach for the regulatory regime will allow for the development of e-commerce while at the same time protect consumers effectively and States' values as incorporated into their laws with regard to information.

13 Finally, one should not automatically assume that the same balance that is acceptable for the European Community will be appropriate on a world-wide basis. European integration has meant less disparity with regard to economic policy[42] and has provided parties from within the EC with greater insights into and confidence in the various Member States' legal systems. Europe's policies with regard to consumers and privacy are, for example, not shared by countries outside of Europe who favour self-regulation and freedom of speech. These are both issues that have an impact on the balance one strikes in the e-commerce world with regard to Internet users. In addition, it is easier for the EC to amend legislation that becomes outdated or is seen to have too great a cost on the development of e-commerce than it is for Contracting Parties to amend the Convention. States who join the Convention must be sure that the balance they have obtained will stand the test of time.

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[39] *See* E-commerce Directive, Recital 5.

[40] Rome II which is intended to harmonise Member State rules relating to conflict of laws in non-contractual matters exemplifies this difficult debate. It too has been the subject of considerable controversy within Europe and has alternatively been drafted to take a "country of origin" or a "country of destination" approach to choice of law. *See* Paul Meller, *Europe Panel is Rethinking How it Views E-commerce*, N.Y. TIMES, June 27, 2001. The most recent unofficial draft from September 2001 takes a "country of destination" approach and thus, businesses have been extremely critical, noting that "[i]f adopted in its current form, [Rome II] would leave a patchwork quilt of national rules which are quite different from each other -- in some cases even contradictory." Paul Meller, *Proposed Law Stirs Concern on Europe E-Commerce*, N.Y. TIMES, Feb. 8th, 2001 (quoting Thomas Vinje, a partner at a law firm in Brussels). In particular, there have been concerns that the regulation would be inconsistent with the "country of origin" approach taken in the E-commerce Directive. *See* Peter Chapman, *Vitorino Shelves 'Rome II' plan following attacks*, EUROPEAN VOICE, Vol. 6, No. 29 (July 20, 2000). It should be noted that if the European Community and its Member States were to join the Judgments Convention, legislation such as Rome II would have a significant impact on States Parties to the Hague Judgments Convention outside of the European Union, as it would clearly impact the choice of law a party from outside of the European Union would be faced with when sued or suing in a European forum.

[41] The European Community has not yet advanced with regard to e-commerce to the extent that North America and the Asia-Pacific region has. The *Opinion of the Economic and Social Committee on the "Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market"*, 1999/C 169/14 (April 15, 1999), in fact states that "around 80% of electronic commerce is, according to OECD figures, US generated."

[42] *See* Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573, art. 3 [hereinafter Consolidated EC Treaty], incorporating changes made by Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam] (stating that the activities of the Community shall include the strengthening of economic and social cohesion and, among other common policies, a "common commercial policy.")

14 All of this is not to say that there are no solutions. In fact, there are a number of mechanisms by which the problems described can be reduced,[43] including, for example, harmonised conflict of law rules with regard to Internet users along with greater harmonisation of substantive law with regard to e-commerce.[44] Many different international organisations are currently promulgating model codes, laws and conventions that deal with substantive law and choice of law rules with regard to the Internet.[45] These rules, once adopted, will serve to lessen the potential conflicts that Internet users will be subject to in various jurisdictions and thereby reduce the concerns that users have with regard to being

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[43] For example, thus far, the discussion has focused on the problems caused by jurisdiction, with the assumption that judgments issued pursuant to these jurisdictional principles would enjoy mandatory recognition and enforcement, but it is possible to devise a mechanism by which recognition and enforcement can be denied if the court of origin doesn't apply the same law as the court addressed would have under the circumstances and if there were a meaningful difference in the outcome as a result. Nevertheless, one can already see that this solution is far from perfect as it would still allow the case to be brought and businesses, for example, may feel uncomfortable with the uncertainty that a judgment would provide under such circumstances. In addition, it is interesting to note that although the Brussels Convention included a similar but not identical provision in article 27(4), stating that a judgment shall not be recognised "if the court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State," this provision does not exist in the Brussels Regulation which will be coming into force on March 1, 2002. *See* art. 34.

[44] It should be noted, in fact, that Commission I decided in June to include in the agenda for future work of the Conference "questions of private international law raised by the information society." Minutes, No 1, Commission I, Nineteenth Session (June 21, 2001).

[45] For example, the International Chamber of Commerce (ICC) has formulated Uniform Rules on Electronic Trade Settlements (1999) Parts I, II and III; Model clauses for use in contracts involving transborder data flows (1998); Guidelines on Internet Advertising and Marketing (1998); A Recommended Code of Practice for Competition Authorities on Searches and Subpoenas of Computer Records (1998); General Usage for International Digitally Ensured Commerce; International Customs Guidelines (GUIDEC I) (1997). In addition, the ICC is currently formulating Uniform Rules on Electronic Trade Settlement, an E-terms Repository, an International Electronic Sales Model Contract and an updated guide for the General Usage for International Digitally Ensured Commerce (GUIDEC II). The OECD has promulgated Guidelines for Consumer Protection in the Context of Electronic Commerce (Mar. 2001); The World Intellectual Property Organization (WIPO) has produced a Digital Agenda which sets out a series of guidelines and goals for WIPO in seeking to develop practical worldwide solutions to the challenges raised by the impact of e-commerce on intellectual property and of particular interest, the General Assembly and the Assembly of the Paris Union have adopted a *Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet,* Doc. A/36/8 (June 18, 2001) *available at* http://www.wipo.int/eng/document /govbody/wo_gb_ab/doc/a36_8.doc. To view the organisation's work, visit its website at http://ecommerce.wipo.int/index-eng.html. United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on Electronic Signatures (2001) and the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), with additional article 5*bis* as adopted in 1998. In addition, they are currently working on a draft convention dealing with legal aspects of electronic contracting and are discussing future work in the area of electronic transfer of rights in tangible goods and other rights in the context of e-commerce. The World Trade Organization (WTO) has adopted a work programme on electronic commerce that requires the WTO Councils on Goods, Services, TRIPS (intellectual property) and Trade and Development to examine issues raised by electronic commerce. The various Councils' Reports on their progress can be found on their website *at* http://www.wto.org. It is interesting to note, however, that they are proceeding with care. For example the December 4, 2000 report from the Council for Trade-Related Aspects of Intellectual Property Rights stated that "[t]he TRIPS Council continues to hold the view expressed in the Council's earlier Progress Report that the novelty and complexity of the intellectual property issues arising in connection with electronic commerce are such that continued further study is required by the international community to better understand the issues involved." Paragraph 9 of Document IP/C/20.

haled into a court with unfamiliar laws. Simultaneously, States will be more comfortable with a narrowly defined scope of jurisdiction, since judgments coming from other States with harmonised legal principles will be less likely to create policy concerns.

15 New technology will offer innovative and creative solutions to problems that now seem insurmountable. The development of international legislation recognising and regulating electronic signatures is an excellent example of a solution to a legal problem through the advent of new technology.[46] Similarly, more advanced targeting software or blocking technology may provide solutions to some of the jurisdictional issues described. Finally, as mentioned above, the further development and subsequent evolution of on-line alternative dispute resolution mechanisms may help to mitigate consumer protection concerns and allow for a compromise position to be reached with businesses on what jurisdictional balance should be struck.

SECTION III

DRAFTING DIFFICULTIES

16 Once sufficient agreement is reached on what the proper scope of white and black list[47] jurisdiction is with regard to Internet users, it is necessary to translate this decision into a viable text. While the extensive task of identifying all of the problems with regard to drafting has yet to be dealt with, this Note will point out a few of the difficulties in order to highlight the number and types of complexities that have been raised during various stages in the negotiation.

17 At the experts meeting organised by the Government of Canada with the participation of the Hague Conference to examine the impact of e-commerce on the preliminary draft Convention, it was noted that a number of issues were raised by electronic commerce in relation to the Convention and required examination. Among the problems discussed were several drafting problems with regard to Articles 6, 7, 9 and 10 dealing with B2B contracts, B2C contracts, torts, branch offices and regular commercial activities. For example, the experts group attempted to address problems related to identifying and locating parties in the context of on-line contract disputes. It was suggested that a provider of goods or services could ask the purchaser for details of his or her location and identity in the course of the transaction. The purchaser would then be bound by the information he or she supplied with regard to jurisdiction, which would be based on this information. However, some experts pointed out that this system could be easily abused by purchasers who would simply "declare" themselves to be located in a particular State as a way of conferring jurisdiction on

[46] A digital signature is a type of encryption technology that uses asymmetric cryptography to create unique digital keys that, when used together, provide both data security and authenticity. The development of digital signatures in e-commerce has produced a proliferation of legislation governing digital signature transactions with the purpose of increasing the confidence of businesses and consumers in the security of transactions conducted electronically.

[47] For example, the suggestion was made at the experts group meeting in Ottawa that jurisdiction asserted solely on the accessibility of an Internet site with nothing more, might be added to the black list and thus prohibited. *See* OTTAWA REPORT 9. Nevertheless, this suggestion was rejected in the second experts group meeting in Ottawa held in February 2001.

that State's courts. Other, similar, drafting issues need to be addressed if the Convention is to apply to disputes relating to the Internet, however, in essence these are technical problems.

A brief survey of some of the other problems raised with regard to drafting various Articles may be helpful:

Articles 6 and 7

Many question whether the supply of information on a website would be considered to be "frequent [and][or] significant activity", thereby subjecting the provider of the information to white list jurisdiction under the Convention. In addition, is information (such as downloaded software, or information containing trademarks or copyrighted information that can be copied from a subscription site) considered to be a "good" or a "service" supplied in the State, and thus enough for the assertion of jurisdiction?

Article 8

Under Article 8, could an independent contractor be considered an employee? Under a particular country's law, this might be the case. This is of particular interest to companies that contract with software developers for their services electronically. Frequently the company will not even know where the contractor is physically located when forming such a contract, and thus, again, the question of identity and location must be dealt with.

Article 9

Would a website be considered "regular commercial activity"? While the experts group meeting in Ottawa agreed that website "cannot constitute a branch office or establishment," there was no agreement on whether or not a website could constitute "regular commercial activity."[48] This is of particular importance to the bracketed language in Article 9 of the Interim Text which would allow for jurisdiction "where the defendant has carried on regular commercial activity" provided that the dispute in question related to that "regular commercial activity."

Article 10

In addition to the problems faced with regard to identifying where the "act or omission" causing the injury occurred and where the injury "arose," a defendant would have difficulty, given the nature of the Internet, in proving that it was not "foreseeable" as required by this Article, that someone would be able to pull up the content of his or her web page in any country. In the context of the Internet, the issue of foreseeability requires an all or nothing approach. Either every jurisdiction is foreseeable or no jurisdiction is foreseeable. Some courts and academics have suggested that "targeting" may be a way of dealing with this issue, however the case law is still developing.[49]

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[48] *See* OTTAWA REPORT 9.

[49] *See supra* footnote 27.

Article 13

Provisional and protective measures are problematic in the context of the Internet. If jurisdiction is granted under Article 10 for defamatory material or because of a violation of a copyright law in Country X for material residing on a server in Country Y, then theoretically a provisional order could be issued in country X that would prevent a person responsible for the server from transmitting his or her material to any other country. Part of the reason for this is that limitations to new technologies as "blocking" make it difficult if not impossible to limit the effect of such orders on the Internet.[50] In addition, it is not always easy to determine where "property" is located in the Internet context and in Article 13, a court in a Contracting State can order a provisional and protective measure in respect of "property" in that State. For example, it may be that a reproduction of a copyrighted work is considered to be "property" located in a State, because it can be accessed in that State. Finally, provisional measures that are arguably limited to the territory of one country may have permanent effects on global electronic commerce. For example, a blocking order such as that issued in the Yahoo case may affect other jurisdictions because of the technical problems with blocking.

18 Another, perhaps more difficult problem is the fact that the law is currently in flux in many countries with regard to Internet jurisdiction, thereby making it very difficult to draft a predictably applied Convention. For example, the Interim Text produced in June 2001, attempted to deal with problematic tort cases over the Internet, by adding a paragraph 3 to Article 10 that reads: "[t]he preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State."[51] What is obvious from the substantially different case law in various States, is that what is considered "reasonable" in Internet cases fluctuates widely from State to State and is *still changing*.

Courts and legislatures around the world have been struggling, attempting to translate traditional jurisdictional norms into doctrines that effectively apply in this new medium. The trend in different countries appears to begin with cases exercising jurisdiction over defendants in a State on the basis of simple accessibility of a website in the forum. While this remains the standard used in many jurisdictions, others have adopted a more nuanced approach. As Internet use has increased and more disputes relating thereto have found their way to court, several jurisdictions have adjusted their definition of what is "reasonable" and have held that the mere accessibility of a website, by itself, is not enough to support a claim for jurisdiction. New doctrines relating to the interactivity of the website, the targeting of the forum and the actual effect had in the forum have been incorporated into the law of different jurisdictions.[52] In sum, the law with regard to jurisdiction over

[50] *See supra*, footnote 22.

[51] A substantially similar provision was added to Article 6 and 7 with the same purpose of attempting to deal with the onerous extension of jurisdiction over Internet users, however clearly the same problem described here with regard to its interpretation in Article 10 applies to these other provisions as well.

[52] It is interesting to note that the WIPO General Assembly and the Assembly of the Paris Union have recently adopted a *Proposed Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet* which is intended to "facilitate the application of existing laws relating to marks and other industrial property rights in signs, and existing laws relating to unfair competition, to the use of

defendants in cases relating to the Internet is in various stages of development and still evolving in many States.

In the United States, for example, the law varies considerably with regard to Internet jurisdictional principles from state to state; however there are some interesting trends that can be described. Initially some courts exercised jurisdiction over companies that had passive websites.[53] However there was no consensus on this point and fairly soon after, a new approach was taken.[54] In 1997 the Pennsylvania District Court in the so-called "Zippo decision" developed a new approach to Internet jurisdiction: a sliding scale commonly referred to as the "Zippo continuum".[55] In essence, the more "active" the website in a particular forum, the more likely the court is to find a basis for exercising personal jurisdiction over the defendant. The Zippo approach to Internet jurisdiction was widely cited in the U.S., however only two years later, cases began to emerge with yet another way of dealing with Internet jurisdiction. By 2001, although courts have not abandoned the Zippo standard, there has been a shift towards a broader, effects-based approach. Rather than examining the specific characteristics of a website and its potential impact, courts are focusing on the actual effects that the website has had in the jurisdiction. Take, for example, *Mattel, Inc. v. Adventure Apparel* in which Mattel sued a website business for cybersquatting, trademark dilution, trademark infringement, and a common law unfair competition claim.[56] The Court in New York exercised jurisdiction over Adventure Apparel, based on one transaction in the state of New York, which was initiated by a Mattel investigator. The court stated that "[o]ccupying the middle ground are cases in which the defendant maintains a web site that is interactive insofar as it permits the exchange of information between users in another State and the defendant, and in which situation whether there is personal jurisdiction depends on the level and nature of the exchange."[57] In essence, the court appeared to be focused on where the website actually had an impact. Consider, also, Blakey v. Continental Airlines, Inc., an online defamation case involving an airline employee living in Seattle and based out of Houston.[58] The employee filed suit in New Jersey against her co-employees, alleging that they published defamatory statements

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signs on the Internet." Doc. A/36/8, Preamble (June 18, 2001) *available at* http://www.wipo.int/eng/document /govbody/wo_gb_ab/doc/a36_8.doc. The provisions designed by WIPO focus on the "commercial effect" of a sign, noting that the "[u]se of a sign on the Internet shall constitute use in a Member State … only if the use has a commercial effect in that Member State as described in Article 3." *Id*. at art. 2. While these provisions deal with the harmonized interpretation of existing substantive law and do not deal with jurisdiction, the fact that these guidelines look at the "commercial effect" is significant.

[53] *See e.g.*, Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (finding that the posting of information on the internet could be likened to a continuous advertisement purposefully directed into the forum).

[54] *See e.g.,* Bensusan Restaurant Corporation v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* (holding that "the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York.").

[55] *See* Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).

[56] 2001 WL 286728 (S.D.N.Y 2001).

[57] *Id.* at 4.

[58] 751 A.2d 538 (2000).

on the employer's electronic bulletin board. The New Jersey Supreme Court found jurisdiction over the defendants to be proper, since they had published the defamatory electronic messages with the knowledge that the messages would be published in New Jersey. The court noted that it is "fair to posit jurisdiction where the effects of the harassment were expected or intended to be felt." In sum, although there appear to be trends in jurisdictional doctrines with regard to the Internet, different states within the United States are at different points in their development and there is no uniformity in their application of jurisdiction in the Internet context.

In Canada the law has undergone a similar pattern of development. In 1998 in *Alteen v. Informix Corp.* the Newfoundland Supreme Court asserted jurisdiction based strictly on information provided via the Internet in a tort case.[59] The case involved allegations that a U.S.-based maker of data storage media issued false and misleading statements that led to an inflated stock price. The U.S. company did not trade shares on a Canadian public exchange, did not issue public statements to the Canadian press, and did not maintain direct contact with the shareholders bringing the case that resided in Newfoundland. In 1999 the British Columbia Court of Appeals heard a case involving allegedly defamatory messages posted on a stock chat site by a British Columbia resident. Braintech, a British Columbia company sued the person who posted the messages in a Texas court and was awarded approximately $400,000 USD in damages. When Braintech tried to enforce the judgment in British Columbia, the court determined that the Texas court had improperly exercised jurisdiction since the postings were "passive" in nature.[60] Clearly a shift from the Newfoundland case only a year earlier.

Other countries have taken a different approach. When one looks at various cases dealing with such things as defamation, libel and intellectual property disputes, many countries have exercised jurisdiction in cases in which the website was essentially "passive." Recently the German Supreme Court ruled that any web publisher, no matter what his or her country of origin, is liable under German criminal law for any pro-Nazi or Holocaust denial information on their pages which can be accessed from Germany.[61] Before this case, it was thought that web publishers were only liable if the web material had originated in Germany. The court ruling rejected the appeal of Frederick Toben, an Australian Holocaust revisionist who denied that millions of Jews died during the Second World War. He attempted to claim that since his Internet material was "printed" outside of Germany it was not subject to German legislation, but was unsuccessful. An Italian appellate court asserted jurisdiction over a libel case brought by an Italian citizen based on statements and images that had been posted on a website hosted outside of Italy.[62] In France, a court took jurisdiction over the American Yahoo! company located in California with no presence in France in order to adjudicate a complaint by French residents that they could access the U.S. based Yahoo! Auction site on which Nazi memorabilia were being offered for sale.[63] In

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[59] [1998] 164 Nfld. & P.E.I.R. 301, 507 A.P.R. 301.

[60] Braintech, Inc. v. Kostiuk, [1999] B.C.C.A. 0169.

[61] BGHZ 46, 212 (Case Az.: 1 StR 184/00) decided on December 12, 2000.

[62] In re Dulberg, reported on World Internet L. Rep. (February 2001). The Italian case can be found, translated into English, at http://www.cdt.org/ international/001227italiandecision.pdf.

[63] *See supra*, footnote 30.

China a law dealing with Internet copyright disputes was adopted at the 1144th meeting of the Judgment Committee of the Supreme People's Court on November 22, 2000.[64] Article 1 of this new law provides for jurisdiction in cases dealing with Internet copyright infringement where the infringing act is committed or where the defendant is domiciled. The law goes on to state that when it is difficult to ascertain where the infringing act has been committed or where the domicile of the defendant is situated, the computer terminal at which the plaintiff discovered the infringement shall be deemed to be the place where the infringing act is committed. In essence, this law regards mere accessibility of a website as being enough for the exercise of jurisdiction. In Australia, the Supreme Court of Victoria exercised jurisdiction over an American defendant publisher who was sued for defamation by an Australian for material put on a website which was then downloaded by subscribers around the world.[65] The court held that the information on the site was legally published in Victoria, Australia when the plaintiff and others downloaded it, and thus the court had jurisdiction over the case.[66]

CONCLUSION

19 In sum, the Internet disturbs conventional notions of private international law, has created policy shifts within the scope of the project and presents considerable challenges for Member States in the drafting and negotiation of a Convention on jurisdiction and the recognition and enforcement of judgments. Nevertheless, it is clear that these challenges are worth overcoming. The e-commerce industry is becoming an increasingly vital part of economic and intellectual development in the Member States of the Hague Conference. As cross-border activity expands through Globalisation and the Conference continues to add more Member States, the pressure will only increase to obtain global solutions to the many problems faced by countries in their attempts to create a legal framework within the context of the Internet. It is worth searching for solutions with regard to these many issues in order to support the rapidly developing global marketplace.

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[64] *See* The Supreme People's Court Interpretation on the Law Application in the Trial of Internet Copyright Disputes, *available at* http://www.lawinfochina.com/LegalForum/ChineseLawInterpreted/ displayContent.asp?ID=29 (Nov. 22, 2000).

[65] Gutnick v. Dow Jones, [2001] VSC 305.

[66] The High Court of Australia on December 14, 2001 granted special leave to appeal on the issues of where the tort of defamation on the Internet had been committed and whether the law of New Jersey or that of Victoria was applicable. The appeal is likely to be heard in August or September of 2002.