

JURISDICTION IN AN E-WORLD

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The Internet has virtually transformed the world into one huge electronic marketplace.¹ Moreover, the relatively low cost of computers, modems and telecommunications has dramatically lowered the cost of entry into international business. Anyone with a computer, a modem and a telephone line (or cable, satellite or wireless access) can immediately tap into to the global environment known as the “World Wide Web.” An entrepreneur can make his or her widgets, software or content available to the world with a few clicks of a mouse. The World Wide Web is wonderfully worldwide, and the Internet is indeed international. This reality is the source of great opportunity for online businesses; it also poses significant traps for the unwary.

Although some consciously target specific markets using the Internet as a means, others unwittingly do so. The fact is that the moment a business connects its computers to the World Wide Web, it is engaged in international commerce, whether it knows it or not. As users anywhere in the world with access to the Internet can access any other computer that is configured to provide access to others, it is up to a business to limit its market to only a region or country, if it so chooses. A Web site hosted on a server in Jamaica is just as accessible in Kansas City or Krakow, as it is in Kingston. This “shrinking” of the world and blurring of its borders creates a number of challenges to the application of our traditional notions of jurisdiction.

I. “Doing Business” In Other Countries

The issue of what constitutes “doing business” somewhere via the Internet is unsettled.² As the world of “cyberspace” has been described as being everywhere and nowhere at the same time, the traditional concepts of physical presence that the laws and courts have relied upon in the past are thrown into doubt. However, once the World Wide Web opened up the Internet to commerce, competing interests and demand for regulation created pressure for governments and courts to exercise jurisdiction over persons who use the Internet to do business or otherwise make available their content to others online.

Some recent pioneering cases of international jurisdiction involving the Internet are: an action by Playboy Entertainment against an Italian company that provided certain adult-oriented photographs online using a name that Playboy claims infringes its intellectual property rights³; the German government’s prosecution of the president of

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Compuserve's German operations for permitting access by German citizens to online content which, while legal in the U.S. and in other countries, is considered pornographic in Germany⁴; a French court's injunction against Yahoo! ordering it to block access from its ".com" site to certain auction areas which made available "hate" materials that France bans despite the fact that the "Yahoo!.fr" site had blocked such access from that portal⁵; a suit by Amazon.com against the operator of a similarly named site in Greece⁶; the very recent conviction by a federal court in New York of the operator of an offshore gambling Web site that targeted users in the U.S.A.⁷, and the hundreds of arbitrations under the new ICANN-imposed dispute resolution rules that govern registration of many domain names and which seek to eliminate "cybersquatting."⁸

II. A Brief Review—the Basic Cases

In the early days, jurisdictional cases were fairly clear cut, at least in the United States. Either one was physically present in the forum or not. If one was physically there, one was subject to jurisdiction; if not, no. In 1877, the Supreme Court held in Pennoyer v. Neff⁹ that "the authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed...an illegitimate assumption of power..." The common law, being a living body of law that adapts to changing realities, has demonstrated that adaptability when it comes to matters of jurisdiction. With the expansion of commerce in the industrial age, jurisdictional concepts began to expand. Thus, in 1945, the Supreme Court in International Shoe v. Washington¹⁰ declared that "due process requires only...certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." The fact that an entity with no physical presence in the forum had its salesmen exhibiting their samples and soliciting orders within the jurisdiction was sufficient "systematic and continuous contacts and connexity" to justify jurisdiction over the foreign company.

The trend toward expansion of jurisdiction has roughly paralleled the mobility of commerce in the United States. The Supreme Court itself recognized this evolution toward expanding jurisdiction in McGee v. International Life Ins. Co¹¹ in 1957 when it declared that the "trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents" and attributed this trend to "the fundamental transformation of our national economy over the years."

Such expansion, however, did not continue unabated. Some checks were put in place to prevent a full nationalization of jurisdiction. In Hanson v. Denckla,¹² the Court warned that "it is a mistake to assume that [the expansionary trend] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." The Hanson court emphasized that "purposeful availment" is the polestar of due process. As will be discussed below in the Internet context, some courts would hold the mere accessibility of a Web site as sufficient for jurisdiction. If such minority view were to become the law of the land, the day of "universal jurisdiction" will have arrived. However, that view has

failed to gain momentum and the trend is clearly developing against it, at least in the United States, with a resurgence of the notion of “purposeful availment” as the polestar of jurisdiction.

Of course, what constitutes “purposeful availment” is itself subject to debate and litigation. Accordingly, this concept was refined in 1980 in World-Wide Volkswagen v. Woodson.¹³ There, the Supreme Court elaborated that “purposeful availment” requires the “defendant’s conduct and connection with the forum [to be] such that he should reasonably anticipate being haled into court there” and that mere likelihood that defendant’s product might find its way into the forum is not enough. In the modern e-world, this case can be cited in support of the proposition that a merely passive Web site that can be accessed anywhere is no different than the “mere likelihood” rejected in Woodson.¹⁴

However, after Woodson, the Supreme Court continued to whittle away at restrictions on jurisdiction in certain circumstances, such as where conduct is specifically targeted at a resident of a foreign state despite there being no physical act or presence whatsoever in the forum. Thus, in 1984 in Calder v. Jones¹⁵, and in the companion Keeton v. Hustler Magazine¹⁶ case, the Court held that intentional conduct (in those cases, allegedly defamatory publications) expressly aimed at persons known by the Defendants to be within the forum is sufficient grounds for exercise of jurisdiction.¹⁷

Continuing the evolution of the economy from industrial to electronic, the Hanson concept was adapted to more modern commercial realities where business is conducted “solely by mail and wire communications across state lines” in Burger King Corp. v. Rudzewicz¹⁸ in 1985. In that case, the Court held that while purposeful availment protects one from being subjected to foreign jurisdiction due to “random, fortuitous or attenuated contacts or the unilateral acts of others,” where there are deliberate, significant activities or “continuous obligations” with forum residents, exercise of jurisdiction is permitted. In today’s reality, this case can be argued to preclude exercise of general jurisdiction where there are only isolated transactions with the forum via the Internet. In fact, one federal trial court has recently declined to exercise jurisdiction even where there exists a recurring online contract with a third party in the same forum where the plaintiff is domiciled and allegedly injured from tortious conduct arising in connection with such contractual relationship (the registration of an allegedly infringing domain name in the forum where the domain name registry operator and registrar also happened to be located), holding that there was no intentional, targeted conduct directed to the forum and that the contractual transactions were too insubstantial and automated to form a basis for jurisdiction.¹⁹

The closest the Supreme Court has so far come to departing from the purposeful availment requirement and opening up the jurisdictional borders was in a product liability setting in Asahi Metal Industry Co. v. Superior Court²⁰ where it split 4-4 in 1987 on the “stream of commerce” theory. The theory advanced there was that where a defendant puts “into the stream of commerce” a product which eventually injures someone, that defendant should be subject to suit wherever the injury occurs. Such a ruling would be

an ominous development for those engaged in online commerce. However, the court split on the issue, which remains open to this date. Ironically, Asahi is helpful in avoiding jurisdiction in the international environment. The Court expressed concern about the “severe burden” of requiring a non-U.S. defendant to defend itself in U.S. courts and held that such concern is entitled to “significant weight” in “assessing the reasonableness” of such jurisdiction. The Court warned that “great care must be exercised when considering personal jurisdiction in the international context.”²¹

In sum, no U.S. court, state or federal, can constitutionally exercise long arm jurisdiction in derogation of these traditional notions. However, as one can see these notions are not static, but are evolving and adapting to the economic and technological realities. However, these cases set forth the “outer limits” of jurisdiction—the constitutional constraints. Each state in the United States is free to exercise its power to the federal constitutional limits or to be more circumspect. If a jurisdiction enacts statutory “long-arm” provisions that are narrower than what the constitution permits, then even if these decisions might permit the exercise of jurisdiction under a particular set of facts, the local courts may be without authority to so act by reason of the limited empowerment by the local legislature.²²

In considering jurisdictional issues, the practitioner must also keep in mind the difference between “general jurisdiction” and “specific jurisdiction.” The former does not require a nexus between the contacts in the forum and the claim being asserted whereas the latter does. However, as the Supreme Court noted in the Helicopteros Nacionales de Colombia decision²³, “mere purchases, even if occurring at regular intervals, are not enough to warrant a State’s assertion of in personam jurisdiction over a non-resident corporation in a cause of action not related to those purchase transactions.” Few cases address general jurisdiction arising out of mere cyberspace activities without more—and those that do have mostly been cases declining to exercise general jurisdiction merely because of the online activity. Most of the cases deal with assertion of specific jurisdiction.

III. International Perspectives

The same facts that might subject a United States resident of one state to jurisdiction in a different state within the United States, may also subject that person to jurisdiction in a foreign land. Similarly, a non-citizen of the United States is subject to essentially the same analysis and protections as a citizen of another state within the Union when a long-arm claim is asserted against it.²⁴ However, other countries (such as France) have a more liberal view of their jurisdictional powers and are more aggressive in protecting its citizens, especially in consumer-related claims.

For example, within the European Union, jurisdictional issues are generally governed by the Brussels Convention.²⁵ Under the Brussels Convention, a person may be sued in the place of performance of a contractual obligation, in the place where the harm from a tort occurred, or where a defendant is domiciled. In commercial matters, parties can contractually select the forum, but a consumer can only be sued where he or she

resides and, if he or she was subject to specific advertising or solicitation in the forum, can elect to sue in his or her own domicile.²⁶ There is no requirement of “minimum contacts” or purposeful availment, provided the Convention provisions are met. The Rome Convention, which generally permits choice of forum clauses in contractual relationships, does not apply in consumer transactions.²⁷ (In contrast, such provisions are generally enforceable even in so-called “contracts of adhesion” involving consumers under United States law.²⁸)

There is currently pending a proposed Hague Treaty on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.²⁹ The version of the treaty recently debated would allow consumers to sue where they are domiciled regardless of forum selection clauses or other factors and would permit Copyright infringement, defamation and hate speech actions to be brought before a court where the injury arises, providing that if the offense is committed online, a suit can be filed anywhere. These provisions have met vigorous opposition, especially from the United States’ delegation.³⁰

In the Americas, there are as of yet no treaties expressly governing online jurisdiction. There is, however, an Inter-American Convention On Jurisdiction In the International Sphere For the Extraterritorial Validity of Foreign Judgments.³¹ That treaty does not apply to tort claims or arbitration. It does, however, recognize the validity of a choice of forum clause in an international business contract, “provided that such jurisdiction was not established in an abusive manner and had a reasonable connection with the subject matter of the action.”³²

Until an international treaty is reached on these issues, countries must rely on their own legal systems and policies³³. However, enforceability of a foreign judgment in another country will be subject to challenge under international precepts of comity. If a foreign court exercises jurisdiction over a United States entity and enters a default judgment against it, the issue will then likely be the enforceability of such foreign judgment in the United States. In this regard, the existence of specific treaties must be consulted as well as the adherence of the local jurisdiction to the Uniform Foreign Judgment Enforcement Act or a variant thereof. Absent express provision otherwise, international principles of comity will apply and the foreign judgment will generally be recognized and enforced by U.S. courts unless it can be shown that the foreign court failed to adhere to some minimum level of due process (not necessarily the same level we enjoy in this country) or that enforcement of such judgment would violate our public policy. This is precisely being tested in the Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme case pending in a California federal district court as this paper is written.³⁴

IV. The Recent U.S. Cases

Recently, the courts throughout the world, and especially in the United States, have been called upon more and more to address jurisdictional issues arising in connection with the Internet. The trend discernible from these cases, at least in the United States, is to apply an intentional/targeted test to tort actions including online

defamation and intellectual property infringements, while applying a sliding scale approach in a commercial environment, tying jurisdictional exposure to the level of interactivity. Under the sliding scale analysis, merely passive Web sites are on the one extreme and full e-commerce on the other. Of course, the bulk of the litigation, and the uncertainty, is in the middle. Thus, the key factors in analyzing a jurisdictional assertion appear to be the following:

- a) the nature of the electronic contact , e.g., Web site, e-mail, bulletin board posting;
- b) the nature of the claim asserted e.g., intentional tort, product liability, breach of contract;
- c) the level of passivity/interactivity , e.g., if is a Web site, is it an e-commerce site; does it have interactive order forms; does it have a “mailto” e-mail feature; does it provide a toll free number; or is it a merely passive advertisement or “electronic brochure?”
- d) the existence of other contacts with the forum in addition to the cyberspace contact;
- e) other factors such as the reasonableness of exercising jurisdiction in the specific case, including factors such as whether the defendant is a *pro se* individual residing on the opposite coast or a non-U.S. person who would be severely burdened by exercise of jurisdiction; whether there has been express targeting of persons in the forum in tort cases; and the relatedness of the claim to the in-forum activity.

V. Analysis and Identification of Trends

Not surprisingly, the cases are inconsistent. It is difficult at this still-early stage in the development of the case law to arrive at many hard and fast rules about jurisdiction in Cyberspace. However, certain trends do appear to have emerged or to be emerging. The one certain thing is that there will be lots of room for creative lawyering in these cases for years to come and that if one represents clients with a presence in the Internet, he or she needs to stay abreast of the developing case law in this area.

The general trends that can be extracted from the decisions to date are as follows:

- If one engages in conduct intentionally targeting the forum, one will likely be held subject to jurisdiction therein.³⁵
- If one’s Internet conduct does not expressly target the specific forum but the conduct is analogous to an intentional tort, one will likely be held accountable in the forum where the effect of such conduct is felt.³⁶

- If one does not target a specific forum but engages in electronic commerce and either derives significant benefits from the forum, or solicits such business in general but takes no steps to indicate that the particular forum is not targeted, one will likely be held subject to suit therein for claims having a nexus to such activity.³⁷
- If one engages in electronic commerce within a forum and has other contacts with such forum, one may be deemed to be doing business in that forum and subject to broader, general jurisdiction therein.³⁸
- If one has only a Web page and the site is not materially or commercially interactive,³⁹ one will likely not be subjected to being haled into court in a foreign jurisdiction absent other contacts with that jurisdiction.⁴⁰

Some individual examples: If the Web site features a toll free phone number, some courts have held that to be sufficient for specific jurisdiction.⁴¹ If the site has a “mailto” e-mail feature, that too has been held sufficient for specific jurisdiction.⁴² Similarly, a hyperlink on the “home” page to the sales department page, with order forms available on that page might be sufficient for specific jurisdiction, and if combined with other contacts, may be sufficient for general jurisdiction.⁴³ Existence of a merely passive home page on the Web may, however, be one factor, combined with others, in a determination of “minimum contacts” for due process purposes.⁴⁴

1. International Trends

Since many foreign countries have lower due process requirements than those applicable in this country, it is reasonable to extrapolate that conduct that would subject one to jurisdiction in a foreign state within the union under United States standards, will likely subject one to jurisdiction in foreign countries where the website or electronic communication is accessible.⁴⁵ Similarly, offshore companies and individuals are subject to suit in this country on the same basis as United States-based companies are subject to jurisdiction in a different state than that of their residence.⁴⁶ What does appear to be a clear trend outside the United States is to permit consumers to sue in the countries of their domicile, even if the defendant has no more than a Web site and despite any click-wrap agreements or other attempt to select a different forum for dispute resolution. There also appears to be an emerging trend to regulate content that is accessible to a country’s citizenry.

VI. Avoidance and Limitation

For the adventurous who wish to wish venture a ride on the online “trade winds,” certain steps can be taken to minimize the risks of foreign suit or regulation while maximizing the size of the available market. The best approach for such businesses is to attempt to avoid exposure by a combination of tactics.⁴⁷

- use disclaimers that announce the target market on the home page of the Web site and expressly disclaim any desire to reach users in a forum sought to be avoided. This tactic has been used in connection with offshore gambling websites.⁴⁸
- use filters to attempt to block users from other than the target market;
- use proper “clickwrap” or “click-through” agreements (screens that pop-up on the Web site and require the user to scroll through and click an “I Accept” button before proceeding)⁴⁹ which limit use to users from certain jurisdictions, select the law of the company’s home state as governing law, and provide for venue only in the local courts or arbitration centers;
- use registration or order forms that require a user’s address or postal code and permit only users from acceptable locations to use the site or to order products or content;
- avoid actions (such as targeted solicitation and advertising in the specific market; provision of content in the foreign language, registration of the domain name in the ccTLD of the foreign countries sought to be avoided, etc.) that might be deemed as targeting users in locations where you wish to avoid being subjected to regulation, taxation or suit.

Of course, none of this guarantees safety,⁵⁰ and in fact, the clickwraps are not valid in a “B2C” setting in the European Union, but a combination of these steps should go far in minimizing the risks.

VII. Conclusion

Our planet continues to rapidly evolve economically, if not politically, into a world without borders. The Internet, and particularly the World Wide Web, will play a major role in further creation and promotion of an international “cybermarket.” As this evolution accelerates, the courts of the world will be called upon to resolve disputes. In adversarial justice systems, advocates will advance novel arguments for and against jurisdiction in this developing environment. The old adage of hard cases making bad law will almost certainly play a role in the development of this jurisprudence (as was the case with Yahoo! in France). Depending on the development of such jurisprudence and on the national and international legislative actions and reactions, development of the electronic commerce market may be nurtured or aborted.⁵¹

Sensitivity for the creation and development of this cybermarket is essential. Already several courts have acknowledged the impact that their decisions may have on this developing market.⁵² Even domestically, decisions such as U.S. v. Thomas,⁵³ upholding a venue determination in an Internet pornography case, and Minnesota v. Granite Gate Resorts, Inc.,⁵⁴ holding the operators of a gambling Web site from Nevada with servers in Belize subject to the jurisdiction of the Minnesota courts,⁵⁵ are illustrative

of the potential impact of such decisions on the evolving market. Given cases such as these and the recent European decisions, it behooves the owner of a Web site to be aware of the laws of all jurisdictions in which its content will be accessible or its goods sold, both domestic and foreign. The debates now beginning in connection with the proposed Hague Convention on Jurisdiction and the release of the American Bar Association's Jurisdiction Project Report⁵⁶ will hopefully lead to adoption of an international framework that will reflect a reasonable compromise between the legitimate interests of regulators and consumers' advocates on the one hand, and online businesses and entrepreneurs on the other. At the very least, creation of "safe harbors"⁵⁷ whereby businesses can take steps to ensure it will not be unwittingly subjected to regulation and suit in a foreign land, will go a long way toward fostering the growth of international e-commerce.

Until treaties are adopted and at least safe harbors created, all businesses with an online component would do well to conduct a risk/benefit analysis with the aid of experienced counsel before diving into the uncharted waters of international e-commerce. Such businesses should implement carefully-designed risk management policies and measures. Otherwise, they risk becoming entangled in the brave, new e-world's "jurisdictional Web."

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¹ *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp.2d 824 (N.D. Ill.)("Cyberselling is here to stay. The Internet makes it possible for persons worldwide to buy, sell and ship goods to or from anywhere in the world from their own living room using a computer and an Internet hook-up.")

² *Id.* at 13 ("The concept of personal jurisdiction by virtue of a party's Internet activities is in a state of development.")

³ *Playboy v. Chuckleberry*, *infra*, note 25.

⁴ See Note 2_, *infra*.

⁵ See <http://www.cdt.org/speech/international/001120yahoofrance.pdf>

⁶ http://www.ulpiano.com/Domainnames_amazongreece-eng.htm

⁷ http://dailynews.yahoo.com/hlx/nm/20010731/wr/crime_gambling_dc_1.html

⁸ See <http://www.dnlr.com/searchindex.html>

⁹ 95 U.S. 714 (1877) <http://www.lawstudents.org/procedure/cases/95US714.html>

¹⁰ 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) <http://www.kentlaw.edu/legalaspects/internat.htm>

¹¹ 355 U.S. 220 (1957) <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=355&invol=220>

¹² 357 U.S. 235 (1958) <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=357&invol=235>

¹³ 444 U.S. 286, 100 S.Ct. 559 (1980) <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=444&invol=286#297>

¹⁴ See, *ESAB Group, Inc. v. Centricut, Inc.* 126 F. 3d 617, 626 (4th Cir. 1997) (Where personal jurisdiction is based on the place at which the Plaintiff feels the alleged injury, Plaintiff must also show that its injury is "accompanied by the defendant's own contacts with the state.") and *GTE New Media Srvs. Inc. v. BellSouth Corp.*, 199 F. 3d 1343, 1349-50 (D.C. Cir. 2000) (merely operating a Web site that may be accessed in the forum state is insufficient).

¹⁵ 465 U.S. 783 (1984)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/465/783.html>

¹⁶ 465 U.S. 770 (1984)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/465/770.html>

¹⁷ Note that these defamation cases involved actions against the active tortfeasors for commission of a tort that is “intentional” in the true sense of the word. One must keep in mind that while infringement of intellectual property rights is a tort, strict liability exists for such infringement and not all infringements are necessarily intentional. Cf., *No Mayo-San Francisco v. Memminger*, 1998 WL 544974 (N.D. Cal. Aug. 20, 1998) (unpublished disposition) (dismissing cybersquatting claim and distinguishing *Panavision* on basis that there was no evidence of cyberpiracy.)

¹⁸ 471 U.S. 462 (1985)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/471/462.html>

¹⁹ *America Online, Inc. v. Chih-Hsien*, 106 F. Supp 2d 848, 55 U.S.P.Q. 2d 1560 (E.D. Va. 2000) (Claim under the Anticybersquatting Consumer Protection Act).

²⁰ 480 U.S. 102 (1987)

<http://caselaw.findlaw.com/scripts/getcase.pl?navby=search&linkurl=<%LINKURL%>&graphurl=<%GRAPHURL%>&court=US&case=/us/480/102.html>

²¹ See also, *Euromarket*, *supra*, n.1, at p. 15.

²² This is the case for instance, in New York. See *Bensusan v. King*, 126 F. 3d 25 (2d Cir. 1997), *aff'g* 937 F. Supp. 295 (S.D.N.Y. 1996). District Court decision can be viewed at

<http://www.ljextra.com/maillinglists/netdecisions-forum/36.html> Second Circuit decision at:

<http://zeus.bna.com/e-law/cases/bensus2.html>

²³ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984) <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=466&invol=408>

²⁴ However, the reasonableness factor is given greater scrutiny if a non-U.S. party is involved. See, *Asahi* at Note 18, *supra*.

²⁵ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. (Sept. 30, 1968), 1998 OFFICIAL J. C027, 0001-0027.

²⁶ *Id.*, Articles 13 and 14.

²⁷ European Community Convention on the Law Applicable to Contractual Obligations (June 19, 1980), 80/934/EEC, 1980 OFFICIAL J. (L266), Article 5.

²⁸ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (forum selection clauses)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/499/585.html> ;

Haynsworth v. The Corporation, 121 F.3d 956 (5th Cir. 1997) *cert. denied*, 118 S. Ct. 1513 (1998) (choice of law clauses). See also, *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985)

(strong presumption in favor of freely negotiated contractual choice-of-forum provisions)

<http://caselaw.lp.findlaw.com/cgi-in/getcase.pl?navby=case&court=us&vol=473&invol=614&pageno=629>

²⁹ See <http://www.cptech.org/ecom/jurisdiction/hague.html>

³⁰ See <http://www.thestandard.com/article/0,1902,27176,00.html>

³¹ <http://www.oas.org/juridico/english/treaties/b-50.htm> The signatories are Bolivia, Brazil, Chile, Colombia, Dominican Republic, Ecuador, Haiti, Mexico, Nicaragua, Paraguay, Peru, Uruguay y Venezuela, and Mexico with a reservation.

³² *Id.* at Article 1. D.

³³ In the Americas, see the Conference Report, “Responding to the Legal Obstacles to Electronic Commerce in Latin America,” September 30-October 1, 1999 <http://www.natlaw.com/ecommerce/> Two countries in the region have pending decrees or laws that would address jurisdiction in the Internet environment. In Ecuador, its Proposed Law covering Electronic Commerce, Electronic Signatures and Data Messages 2000 <http://www.natlaw.com/ecommerce/docs/steceec1.htm> would provide an Article 46 on Jurisdiction. “Parties may freely agree to terms and conditions under which they establish electronic relations. In case of lack of agreement on a jurisdiction for resolving disputes, the standards stipulated in the Second Section of the First Part of the First Book of the Civil Procedure Code will apply. For identification of the source of a message, available technical means shall be used, and standards indicated in this law and in laws related to the judicial process will apply.”

³⁴ Case No. 00-CV-21275 (Judge Jeremy Fogel) . Some of the pleadings and prior orders from this case and from the French Court’s decision are available on the Internet at <http://www.cdt.org/jurisdiction> . Significantly, if the Proposed Hague Convention on Jurisdiction, in its current embodiment, were in effect between France and the United States, it appears that the United States would be bound to enforce the French order and could not subject a foreign judgment rendered in compliance with the Hague Convention to the usual due process analysis. Today, the concept of comity governs. See *Hilton v. Guyot*, 159 U.S.

113 (1895)

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/159/113.html>

³⁵ Intentional targeting cases: See, e.g., *American Network v. Access America*, 975 F. Supp. 494 (S.D.N.Y. 1997); *Digital Equipment v. Altavista, Inc.*, 130 F. 3d 414 (9th Cir. 1997); *Maritz v. Cybergold*, 947 F. Supp. 1328 (E.D. Mo. 1996)

³⁶ Effects Test cases: See, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *California Software, Inc. v. Reliability Research*, 631 F. Supp. 1356 (C.D. Cal. 1986); *Panavision v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996).

³⁷ See, e.g., *Minnesota v. Granite Gate Resorts*, 568 N.W. 2d 715 (Minn. Ct. App. 1997); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). Contrast, *Bensusan Restaurant Corp. v. King*, 126 F. 3d 25 (2d Cir. 1997) *aff'g* 937 F. Supp. 295 (S.D.N.Y. 1996):

³⁸ See, e.g., *Gary Scott Int'l v. Baroudi*, 981 F. Supp. 714 (D. Mass. 1997); *Haelan Products, Inc. v. Beso Biological*, 1997 U.S. Dist. LEXIS 10565; 43 U.S.P.Q. 2d (BNA) 1672:

³⁹ As to what is "interactivity" for jurisdictional purposes, see, *Westcode, Inc. v. RBE Electronics, Inc.* 2000 WL 124566 (E.D. Pa. Feb. 1, 2000) at p. 6 ("Plaintiff contends that Defendant's site is highly interactive because of the existence of 'hyperlinks,' 'e-mail addresses,' and a 'click-wrap' agreement. The Court finds that Plaintiff simply misunderstands the nature of the Internet and the character of Defendant's Web site.")

⁴⁰ Passive website cases: "Information provided by a passive website, whether it be advertising or a firm offer to sell, does not seek out the customer but merely resides in 'cyberspace' waiting to be visited on the initiative of the Internet explorer. A site's sponsor cannot purposefully direct the information to any particular jurisdiction merely through maintenance of a passive Web site. The site, if not restricted by subscription or other restrictions requiring password access, is available to all comers and cannot be practically blocked from access by the citizens of particular locations." *Agar Corp. v. Multi-Fluid, Inc.*, <http://www.bna.com/e-law/cases/agar.html> [citing *Shea v. Reno*, 930 F.Supp. 916, 929-30, 933-34 (S.D.N.Y. 1996).] *Bensusan Restaurant Corp. v. King*, 126 F. 3d 25 (2d Cir. 1997), *aff'g* 937 F. Supp. 295 (S.D.N.Y. 1996); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414 (9th Cir. 1997); *Gifford v. Bruce Stumpf, Inc.*, 1997 U.S. Dist. LEXIS 11876 (D. Maine 1997) *aff'd* 141 F. 3d 1149 (1st Cir. 1998); *SF Hotel Co. v. The Energy Investments, Inc.*, 985 F. Supp. 1032 (D. Kan. 1997); *Ia, Inc. v. Thermacell*, 983 F. Supp. 697 (E.D. Mich. 1997)

⁴¹ See, e.g., *Inset Systems, Inc v. Instruction Set*, 937 F. Supp. 161 (D. Conn. 1996); *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996)

⁴² See, e.g., *Maritz v. Cybergold*, 947 F. Supp. 1328 (E.D. Mo. 1996). However, note that *Cybergold* involved a site that, while under construction, was intended to become a full electronic commerce site. Thus, the e-mail feature was used as part of a plan to develop an e-commerce website. See also, *GTE New Media Services, Inc. v. Ameritech Corp.* 21 F. Supp. 2d 27; 1998 U.S. Dist. LEXIS 15413; 1998-2 Trade Cas. (CCH) P72,316 (D. D.C. 1998) (Antitrust case holding that hyperlink feature of Internet yellow pages rendered website "highly interactive" and asserting jurisdiction. However, note that this was an intentional conduct, "website as additional factor" case)

⁴³ *American Network v. Access America*, 975 F. Supp. 494 (S.D.N.Y. 1997). Note, however, that in that case not only were subscription forms mailed into the forum, the website stated a desire to serve customers anywhere and the defendant had actually entered into six contracts with residents of the forum.

⁴⁴ See cases at note 13, *supra*.

⁴⁵ See, Lindberg, Agne, "Jurisdiction On The Internet - The European Perspective An Analysis Of Conventions, Statutes And Case Law," <http://scratch.abanet.org/buslaw/cyber/jieujuris.html> See also, e.g., article concerning indictment of Compuserve officer in Germany as a result of content deemed pornographic by German authorities which was accessed via Compuserve in Germany: <http://www.news.com/News/Item/0,4,9751,00.html> Recently, Italy joined in along the same lines as the French court in *Yahoo! in re Dulberg*, (December 2000) <http://www.cdt.org/speech/international/001227italiandecision.pdf> . Also, the United Nations Convention on Contracts for the International Sale of Goods (CISG) may apply to e-commerce transactions in goods across international borders. It is deemed to govern as between entities in signatory countries (the U.S. is a signatory) unless expressly disclaimed.

⁴⁶ See *Playboy Enterprises, Inc. v. Chuckleberry*, 939 F. Supp. 1032 (S.D.N.Y. 1996)

<http://zeus.bna.com/e-law/cases/playmen.html>

⁴⁷ See the ABA's Proposed Jurisdictional Default Rules: "1.1,4. Good faith efforts to prevent access by users to a site or service through the use of disclosures, disclaimers, software and other technological blocking or screening mechanisms should insulate the sponsor from assertions of jurisdiction."
<http://www.abanet.org/buslaw/cyber/initiatives/juri-defaultrules.doc> See generally, note 56, *infra*.

⁴⁸ See, e.g., <http://www.casinoaustralia.com>

⁴⁹ Clickwraps, if properly set up and if not unreasonable, have generally been upheld in the United States. See, e.g., *Caspi v. The Microsoft Network LLC*, 1999 WL 462175, 323 N.J. Super. 118 (N.J. App. Div., July 2, 1999) (holding valid a forum selection clause in a "clickwrap" which appeared on the MSN screen and required users to scroll down and select the "Accept" button before they could proceed), *Specht v. Netscape Communications Corp.*, 2001 WL U.S. Dist LEXIS 9073 (S.D. N.Y. July 3, 2001)(distinguishing from a "browsewrap" which is a mere hyperlink to a terms of use that the user need not necessarily read and accept as a condition precedent); *In re Real Networks*, 2000 U.S. Dist. LEXIS 6584 (N.D. Ill. May 11, 2000); *Hotmail Corporation v. Van Money Pie, Inc.*, 1998 U.S. Dist. LEXIS 10729; 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. April 16, 1998). Contrast, *Williams v. America Online, Inc.*, 2001 Mass. Super. LEXIS 11, 43 U.C.C. Rep. Serv. 2d (Callaghan) 1101 (February 8,2001) (Clickwrap not required before the download occurs and thus held unenforceable). The MSN forum selection clickwrap has also been upheld under Canadian law. See:

<http://www.globetechnology.com/archive/gam/Specials/20000609/ECGEIS.html>

⁵⁰ See for example, the iCraveTV episode involving a Canadian Web site that attempted to limit access only to Canadians where no law was being violated, yet was restrained for alleged copyright infringement in Pennsylvania. <http://news.cnet.com/news/0-1004-200-1560999.html>

⁵¹ See President Clinton's 1997 *Presidential Directive on Electronic Commerce*: "Many companies and Internet users are also concerned that domestic or foreign governments will impose extensive regulations on the Internet and electronic commerce including taxes and tariffs, restrictions on the type of information transmitted, control over standards development, licensing requirements, and extensive regulation of Internet service providers. Indeed, signs of these types of commerce-inhibiting actions already are appearing in many nations. Governments can have a profound effect on the growth of electronic commerce. By their actions, they can facilitate electronic trade or inhibit it. Knowing when to act and -- at least as important -- when not to act, will be crucial to the development of electronic commerce. "

<http://www.doc.gov/ecommerce/presiden.htm>

⁵² See, e.g., *Chuckleberry*, *supra*, note 12. See also *Hearst Corp. v. Goldberger*, 1997 WL 97097 at *1 (S.D.N.Y., Febuary 27, 1997)("a finding of jurisdiction...based on an Internet web site would mean that there would be nationwide (indeed worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with personal jurisdiction case law...") <http://www.jmls.edu/cyber/cases/esqwire1.html> *Accord*, *Weber v. Jolly Hotels*, 977 F. Supp.327, 333 (D.N.J. 1997).) <http://www.bna.com/e-law/cases/weber.html> In *Digital Equipment Corp. v. Alta Vista Technology, Inc.*, 960 F. Supp. 456 (D. Mass. 1997) the court noted that "to impose traditional territorial concepts on commercial uses of the Internet has dramatic implications, opening the Web user up to inconsistent regulations throughout fifty states, indeed, throughout the globe. It also raises the possibility of dramatically chilling" the use of the Internet.

<http://www.law.seattleu.edu/chonm/cases/digital.html>

⁵³ 74 F.3d 701 (6th Cir. 1996), cert. Den. __ U.S. __, 117 S. Ct. 74 (1996)

<http://www.jmls.edu/cyber/cases/thomas.html>

⁵⁴ (Case C6-95-7227, Dist. Ct. Minn. 12/96)

<http://www.ag.state.mn.us/home/consumer/consumernews/OnlineScams/ggOrder.html>

⁵⁵ See the "Warning to All Internet Users and Providers" posted by the Minnesota attorney general regarding such websites at:

<http://www.ag.state.mn.us/home/consumer/consumernews/OnlineScams/memo.html> *Accord*, opinion of the Texas Attorney General at Tex. Atty. Gen. Op. DM-344.

⁵⁶ ABA Global Cyberspace Jurisdiction Project, "Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet." London Meeting Draft

<http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html>

⁵⁷ See, ABA's Proposed Jurisdictional Default Rules, note 48, *supra*, art Article 1.3