Choice of Forum / Choice of Law in Cyberspace  
_Thursday, September 20, 2001_

**READINGS**

**Knowing Where You've Clicked: Forum Selection Clauses Online**

As with their realspace counterparts, eCommerce businesses can (attempt) to limit their jurisdictional exposure through the use of agreements with their customers and users. First, we'll start with an example:

Yahoo! Inc. is perhaps the largest truly "online" business, with a market capitalization of about $75 billion (as of late August, 2000) and revenues of $498.5 million for the first six months of 2000.

The company describes itself as follows:

Yahoo! Inc. is a global Internet communications, commerce and media company that offers a comprehensive branded network of services to more than 120 million users each month worldwide. As the first online navigational guide to the World Wide Web, www.yahoo.com is a major guide in terms of traffic, advertising, household and business user reach, and is one of the most recognized brands associated with the Internet. The Company also provides online business services designed to enhance its clients' Web services, including audio and video streaming, store hosting and management, and Web site tools and services. Under the Yahoo! brand, the Company provides broadcast media, communications, and commerce services.

On many of the pages of the Yahoo! web site, the following "Terms of Service" is posted (edited for relevance to our inquiry here):

**Terms of Service**

1. ACCEPTANCE OF TERMS

Welcome to Yahoo!. Yahoo provides its service to you, subject to the following Terms of Service ("TOS"), which may be updated by us from time to time without notice to you. You can review the most current version of the TOS at any time at: http://docs.yahoo.com/info/terms/. In addition, when using particular Yahoo services, you and Yahoo shall be
subject to any posted guidelines or rules applicable to such services which may be posted from time to time. All such guidelines or rules are hereby incorporated by reference into the TOS. If you are a homesteader on Yahoo’s GeoCities Service, please note that Yahoo provides a different Terms of Service for you. Yahoo also may offer other services from time to time, such as Yahoo! Store and Yahoo! Site that are governed by different Terms of Services. These TOS do not apply to the Yahoo GeoCities Service, Yahoo! Store or Yahoo! Site or such other services.

[...]

24. GENERAL INFORMATION

The TOS constitute the entire agreement between you and Yahoo and govern your use of the Service, superceding any prior agreements between you and Yahoo. You also may be subject to additional terms and conditions that may apply when you use affiliate services, third-party content or third-party software. The TOS and the relationship between you and Yahoo shall be governed by the laws of the State of California without regard to its conflict of law provisions. You and Yahoo agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California. The failure of Yahoo to exercise or enforce any right or provision of the TOS shall not constitute a waiver of such right or provision. If any provision of the TOS is found by a court of competent jurisdiction to be invalid, the parties nevertheless agree that the court should endeavor to give effect to the parties’ intentions as reflected in the provision, and the other provisions of the TOS remain in full force and effect. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Service or the TOS must be filed within one (1) year after such claim or cause of action arose or be forever barred.

What do you think of this practice? Is it fair? Will it hold up in court?

Next, as you read the following, consider what the limitations -- both practically and legally -- of this practice are (or should be):

Margaret Jane Radin, John Rothchild and Gregory M. Silverman, Internet Commerce: Doing Business in a Networked World (2001) [excerpts from Chapter 16] [pdf, 133 kb]

Now consider the following example:


Finding the Law: Choice of Law Online

Under the doctrine established by *Erie R.R. Co. v Tompkins*, 304 US 64, 78 (1938), a case in federal court due to diversity jurisdiction must follow the choice of law rule established by the state in which it sits. Different states, of course, have different choice of law rules -- and this is where the problem arises.

For a very short introduction to the problems of choice of law in eCommerce, read SECTION IV.A.3 ONLY of

The International Dimension

Choice of law rules also present thorny problems in the international context. One debate (the terms of which are not limited to choice of law principles) has been the extent to which the rise of eCommerce justifies new choice of law principles. Some commentators have argued that:

Territorial regulation of online activities serves neither the legitimacy nor the notice justifications. There is no geographically localized set of constituents with a stronger and more legitimate claim to regulate it than any other local group. The strongest claim to control comes from the participants themselves, and they could be anywhere. And in Cyberspace, physical borders no longer function as signposts informing individuals of the obligations assumed by entering into a new, legally significant, place. Individuals are unaware of the existence of those borders as they move through virtual space.

The rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating entirely new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactorily, by any current territorially based sovereign. For example, although privacy on the Net may be a familiar concept, analogous to privacy doctrine for mail systems, telephone calls, and print publications, electronic communications create serious questions regarding the nature and adequacy of geographically based privacy protections. Communications that create vast new transactional records may pass through or even simultaneously exist in many different territorial jurisdictions. What substantive law should we apply to protect this new, vulnerable body of transactional data? May a French policeman lawfully access the records of communications traveling across the Net from the United States to Japan? Similarly, whether it is permissible for a commercial entity to publish a record of all of any given individual’s postings to Usenet newsgroups, or whether it is permissible to implement an interactive Web page application that inspects a user’s “bookmarks” to determine which other pages that user has visited, are questions not readily addressed by existing legal regimes - both because the phenomena are novel and because any given local territorial sovereign cannot readily control the relevant, globally dispersed, actors and actions.

Because events on the Net occur everywhere but nowhere in particular, are engaged in by online personae who are both "real" (possessing reputations, able to perform services, and deploy intellectual assets) and "intangible" (not necessarily or traceably tied to any particular person in the physical sense), and concern "things" (messages, databases, standing relationships) that are not necessarily separated from one another by any physical boundaries, no physical jurisdiction has a more compelling claim than any other to subject these events exclusively to its laws.


But does the Internet really make choice of law (in the international context or otherwise) any more difficult? For a contrary view, read SECTION III(F) ONLY of

[LEXIS ID REQUIRED - read SECTION III(F) ONLY]
1. Why do you think that Yahoo! wants to limit the fora in which it may be sued? Is it financial considerations, or something else? Setting aside the legal principles, is it fair to allow Yahoo! to establish the forum?

2. Given the services that Yahoo! provides, as well as the quantity of users, in which of the three Zippo categories would you place the company? Where, in your view, would jurisdiction be appropriate?

3. Review the Yahoo! web sites (starting with www.yahoo.com, etc.). How prominent is the above language? Do (non-lawyer) users know or understand that their forum to sue is being restricted? As you read the case law in the following part, think about how the Yahoo! agreement stacks up legally. Will it work?

4. The choice of forum cases in the online context raise contractual issues as well as jurisdictional issues. Should it matter whether the plaintiff in Decker or Groff read the forum selection clause? In Groff, the plaintiff claimed that he had never seen or read the clause before he clicked the "I Agree" button; in Decker, the court didn’t address this question. Also, should the prominence of the clause (or the contract itself) be a factor? In Groff, the entire sign-up process took numerous screens, totaling 94 pages of printed text. How prominent is the Yahoo! "Terms of Service"? Prominent enough? In Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997), Judge Easterbrook made the following statements in this light:

   A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent? . . .

   One of the terms in the box containing a Gateway 2000 system was an arbitration clause. Rich and Enza Hill, the customers, kept the computer more than 30 days before complaining about its components and performance. They filed suit in federal court arguing, among other things, that the product's shortcomings make Gateway a racketeer (mail and wire fraud are said to be the predicate offenses), leading to treble damages under RICO for the Hills and a class of all other purchasers. . . . The Hills say that the arbitration clause did not stand out: they concede noticing the statement of terms but deny reading it closely enough to discover the agreement to arbitrate, and they ask us to conclude that they therefore may go to court. Yet . . . [a] contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.

   ProCD, Inc. v. Zeidenberg . . . holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. Likewise, Carnival Cruise Lines, Inc. v. Shute . . . . enforces a forum-selection clause that was included among three pages of terms attached to a cruise ship ticket. ProCD and Carnival Cruise Lines exemplify the many commercial transactions in which people pay for products with terms to follow . . . . A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. . . . Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms.
before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.

What do you think of this discussion? Does the jurisdictional context change anything? Should it? [Note that we'll consider ProCD v. Zeidenberg a little more closely later in the course.]

5. Which choice of law doctrine -- lex loci delicti or "most significant relationship" -- is the best for disputes arising from online transactions or relationships?

6. What relevance, if any, should the location of the web server have on choice of law principles? What about routers? Assume for the moment that some 40% of all internet traffic routes through a series of routers in Virginia or California (at an earlier time, this was true). Does this have any impact on the choice of law analysis?
K. Forum-Selection Clauses

Parties to commercial transactions often seek to establish contractually which court shall have jurisdiction to decide disputes arising from their relationship. While “[f]orum-selection clauses have historically not been favored by American courts,” the modern view “is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-10 (1972). This rule applies, under federal law, both where the clause was the result of negotiation between two business entities, and where it is contained in a form contract that a business presents to an individual on a take-it-or-leave-it basis. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

Companies that offer goods and services online have an especially strong incentive to define contractually the forum for resolution of disputes, since they may be engaging in transactions with purchasers located in a multiplicity of jurisdictions, and defending lawsuits in scattered locations is very expensive. Furthermore, since courts typically (though not always) apply the law of the forum in which they sit, suit in foreign jurisdictions subjects sellers to various substantive laws, increasing their costs of complying with applicable law.

Providers of Internet access or other online services frequently include a forum-selection clause in the “Terms of Service” to which subscribers must indicate their assent as part of the process of gaining access to the service. The clause is often one element of a lengthy recitation of conditions that the subscriber may view by scrolling through an on-screen box. The subscriber is typically asked to indicate assent to the Terms of Service by clicking an on-screen button that says “I Agree.” Other online sellers may present the forum selection clause in other ways, such as through a hyperlink called “Terms and Conditions” or “Legal Notice,” or by text in greater or lesser proximity to the terms of the offer.

Should courts enforce online forum-selection clauses? Most courts that have ruled on the issue have enforced the clauses. Thus, in Groff v. America Online, Inc., 1998 WL 307001 (R.I. Super. May 27, 1998), the plaintiff, an individual in Rhode Island who subscribed to America
Online, sued the company in Rhode Island state court, alleging violations of state consumer protection legislation. The process of becoming a member of AOL includes a step in which the applicant must assent to AOL’s Terms of Service by clicking an “I Agree” button. The Terms of Service “contains a forum selection clause which expressly provides that Virginia law and Virginia courts are the appropriate law and forum for the litigation between members and AOL.” Citing M/S Bremen v. Zapata, the court looked to whether enforcement of the clause would be “unreasonable.” It did so by application of a nine-factor test, including such criteria as the place of execution of the contract, public policy of the forum state, location of the parties and witnesses, relative bargaining power of the parties, and “the conduct of the parties.” The court concluded that enforcement of the clause would not be unreasonable, and so dismissed the case.

In Kilgallen v. Network Solutions, Inc., 99 F. Supp.2d 125 (D. Mass. 2000), the court enforced a forum-selection clause on less supportive facts. Defendant Network Solutions, Inc., at the time the monopoly registrar of domain names ending with in the .com top-level domain, sent plaintiff a notice via e-mail stating that he would soon receive an invoice to pay his annual registration fee. The lengthy notice included a section titled “Domain Name Registration Agreement,” paragraph P of which contained a forum-selection clause. A month later, plaintiff received an invoice via e-mail, which stated: “In making payment for the invoice below, Registrant agrees to the terms and conditions of the current Domain Registration Agreement.” Plaintiff paid the invoice, but through a series of clerical errors NSI misapplied the payment, and subsequently cancelled the domain name for nonpayment, whereupon another person registered it. Plaintiff sued for breach of contract, and NSI sought to enforce the forum-selection clause. The court enforced the clause, finding that plaintiff had failed to demonstrate that it was reasonable.

But in America Online, Inc. v. Superior Court of Alameda County, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (Cal. App. 1 Dist. 2001), the court declined to enforce the contractual forum-selection clause. Plaintiff Mendoza sought to represent a class of former AOL subscribers, who alleged that AOL continued to debit their credit cards for monthly subscription fees even after they cancelled their subscriptions. The complaint alleged several causes of action, including violation of the California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 et seq., a consumer protection statute that prohibits unfair and deceptive trade practices. AOL filed a motion to stay or dismiss, based on the forum-selection clause contained in its Terms of Service. The clause stated: “You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of AOL resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute including any claim involving AOL or its affiliates, subsidiaries, employees, contractors, officers, directors, telecommunications providers and content providers . . .” The TOS also contained a choice-of-law provision: “The laws of the Commonwealth of Virginia, excluding its conflicts-of-law rules, govern this Agreement and your membership.” The trial court denied AOL’s motion, and AOL filed a petition for a writ of mandamus.

The appeals court affirmed. It agreed with the trial court that although “[n]ormally, the burden of proof is on the party challenging the enforcement of a contractual forum selection clause,” in this case the burden should shift to AOL, in view of the CLRA’s non-waiver
provision, which states: “Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.” Cal. Civ. Code § 1751. The court found: “Where the effect of transfer to a different forum has the potential of stripping California consumers of their legal rights deemed by the Legislature to be non-waivable, the burden must be placed on the party asserting the contractual forum selection clause to prove that the CLRA’s anti-waiver provisions are not violated.” The court continued:

AOL correctly posits that California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable. *** This favorable treatment is attributed to our law’s devotion to the concept of one’s free right to contract, and flows from the important practical effect such contractual rights have on commerce generally. This division has characterized forum selection clauses as “play[ing] an important role in both national and international commerce.” *** We *** view such clauses as likely to become even more ubiquitous as this state and nation become acculturated to electronic commerce. See [Carnival Cruise Lines]. Moreover, there are strong economic arguments in support of these agreements, favoring both merchants and consumers, including reduction in the costs of goods and services and the stimulation of e-commerce.

But this encomium is not boundless. Our law favors forum selection agreements only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement. Therefore, to be enforceable, the selected jurisdiction must be “suitable,” “available,” and able to “accomplish substantial justice.” (The Bremen v. Zapata Off-Shore Co. (1972) 407 U.S. 1, 17 ***) The trial court determined that the circumstances of contract formation did not reflect Mendoza exercised free will, and that the effect of enforcing the forum selection clause here would violate California public policy by eviscerating important legal rights afforded to this state’s consumers. Our task, then, is to review the record to determine if there was a rational basis for the court’s findings and the choice it made not to enforce the forum selection clause in AOL’s TOS agreement. * * * California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state’s public policy. * * *

The court reviewed Hall v. Superior Court, 150 Cal.App.3d 411, 197 Cal.Rptr. 757 (1983), which declined to enforce a forum-selection clause naming Nevada as the forum, on the ground that to do so would conflict with the anti-waiver provision of California’s Corporate Securities Law of 1968. The court continued:

The CLRA parallels the Corporate Securities Law of 1968, at issue in Hall, insofar as the CRLA is a legislative embodiment of a desire to protect California consumers and furthers a strong public policy of this state. * * * Certainly, the CLRA provides remedial protections at least as important as those under the Corporate Securities Law of 1968. Therefore, by parity of reasoning, enforcement of AOL’s forum selection clause, which is also accompanied by a choice of law provision favoring Virginia, would necessitate a waiver of the statutory remedies of the CLRA, in violation of that law’s anti-waiver provision * * * and California public policy. For this reason alone, we affirm the trial court’s ruling.
The court went on to compare the CLRA with its Virginia counterpart, finding that “Virginia’s law provides significantly less consumer protection to its citizens than California law provides for our own.” In particular, the Virginia statute does not permit class actions. The court said: “[W]e cannot accept AOL’s assertion that the elimination of class actions for consumer remedies if the forum selection clause is enforced is a matter of insubstantial moment. The unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the TOS forum selection clause.” The court went on to note that neither punitive damages, nor enhanced remedies for disabled and senior citizens are recoverable under Virginia’s law. More nuanced differences are the reduced recovery under the VCPA for “unintentional” acts, a shorter period of limitations, and Virginia’s use of a Lodestar formula alone to calculate attorney fees recovery. * * * Quite apart from the remedial limitations under Virginia law relating to injunctive and class action relief, the cumulative importance of even these less significant differences is substantial. Enforcement of a forum selection clause, which would impair these aggregate rights, would itself violate important California public policy. For this additional reason the trial court was correct in denying AOL’s motion to stay or to dismiss.17

17 Because we affirm on other grounds, we need not decide whether the trial court correctly concluded that the TOS was an unconscionable, adhesion contract * * * or Mendoza’s alternative contention that the forum selection clause is unenforceable because it was induced by fraud.

Notes

1. **Place of execution.** One of the reasonableness factors that the court applied in Groff was the place where the contract was executed. The court admitted to some perplexity on this point. “It is not clear,” the court observed, “in this electronic age, where the last place the contract was executed [sic]. Was it when plaintiff clicked the ‘I agree’ button . . . in Rhode Island or where the message was received, at defendant’s mainframe in Virginia?” The court concluded: “The place where the transaction has been or are [sic] to be performed appears to take place where defendant’s mainframe is located.” Does the location of the execution of the contract seem like a meaningful issue in this context? Should the location of AOL’s mainframe computer be determinative?

2. **Actual knowledge required?** Should it matter whether the plaintiff actually read the forum selection clause before clicking “I Agree”? The plaintiff in Groff claimed in his affidavit: “I never saw, read, negotiated for or knowingly agreed to be bound by the choice of law . . . .” The court was unmoved, reciting the “general rule that a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents.” Is clicking on an “I Agree” button displayed on a computer monitor the equivalent of signing a document, for purposes of indicating that the signing party recognizes the significance of his act? Should the prominence of the forum selection clause in the sign-up process be a significant factor? The sign-up process that the plaintiff in Groff underwent involved numerous screens full of text, taking up 94 pages in hard-copy format.
3. **Non-waivable provisions.** The holding in *AOL v. Superior Court* turned on the California legislature’s decision to make consumer rights under the CLRA non-waivable. Why would a legislature choose to interfere with consumers’ freedom of contract in this way? How can AOL (or any other online seller) respond to such legislation? Contracts in consumer transactions are typically non-negotiable, because the low value of the transaction cannot justify the costs of negotiation. Is the reverse true here: is AOL stuck with charging California subscribers the same price as subscribers in states that are willing to enforce its forum-selection clause?

4. **Contract of adhesion.** In *Spera v. America Online, Inc.*, Index No. 06716/97 (N.Y. Sup. Ct., Westchester Cnty. Jan. 27, 1998), the court enforced a forum selection clause against a defendant who claimed that AOL had engaged in misleading business practices. Applying New York law, the court rejected plaintiff’s arguments that the forum selection clause was “a contract of adhesion” and that enforcing the clause would be against public policy.

5. **Choice-of-law clauses.** A forum-selection clause is sometimes accompanied by a choice-of-law clause, as was the case in *AOL v. Superior Court*. Courts generally enforce contractual choice-of-law provisions, but complex issues can sometimes arise. See *Restatement (Second) of Conflicts of Laws* § 187.

**Note:** **Forum-selection clauses under European Union law**

The European approach to personal jurisdiction in cross-border disputes is rather different from the U.S. approach. The rules determining which country’s courts have jurisdiction over a defendant are set out in a regulation issued by the Council of the European Union, known as the Brussels Regulation.¹ The Regulation, which became effective on March 1, 2002, is an update of a 1968 treaty among European countries, known as the Brussels Convention.²

The Regulation establishes the general rule that “[p]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.” Art. 2. But there are a number of derogations from that general rule, allowing a person to be sued in the courts of a country other than the one where he is domiciled. For example, if the action relates to a contract, suit may be brought “in the courts for the place of performance of the obligation in question.” Art. 5(1)(a). If the action relates to tort, suit may be brought “in the courts for the place where the harmful event occurred or may occur.” Art. 5(3).

There are also special rules for certain consumer contracts. A consumer contract is one that is “concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession.” Art. 15(1). Certain types of consumer contracts are *per se* covered by the special rules: these are contracts for the sale of goods on installment credit, and

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contracts for a loan made to finance the sale of goods. Art. 15(1)(a), (b). Other types of contracts are covered if

the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

Art. 15(1)(c).

Two important special rules apply to actions relating to a covered consumer contract. First, the consumer may sue the seller either in the seller’s country or “in the courts for the place where the consumer is domiciled.” Art. 16(1). (But the seller still may sue the consumer only in the consumer’s country.) Second, contractual forum-selection clauses are usually unenforceable. A forum-selection agreement is enforceable only if it is “entered into after the dispute has arisen,” if it gives the consumer a choice of additional courts in which to bring the action, or if it confers jurisdiction on the courts of a country in which both the seller and consumer were “domiciled or habitually resident” at the time the contract was concluded. Art. 17. In other words, a forum-selection clause that deprives a consumer of the right to file suit in the courts of his own country is enforceable only if it is entered after the dispute has arisen. This prevents the use of take-it-or-leave-it contracts that deprive consumers of the home-court advantage — a technique that is quite commonly employed by sellers in the United States.

Is the Regulation’s disapproval of forum-selection clauses an unwarranted interference with freedom of contract?

The general definition of consumer contracts in Art. 15(1)(c) was quite controversial. The corresponding provision of the Brussels Convention defined a consumer contract as one as to which “in the State of the consumer’s domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising,” and “the consumer took in that State the steps necessary for the conclusion of the contract.” Brussels Convention, Art. 13(3). One impetus for revision of the Convention was the uncertain application of Art. 13 to consumer contracts concluded online. As the European Commission explained in its proposal for the Regulation:

The criteria given in Article 13(3) of the Brussels Convention have been reframed to take account of developments in marketing techniques. * * * The concept of activities pursued in or directed towards a Member State is designed to make clear that [Art. 15(3) of the Regulation] applies to consumer contracts concluded via an interactive website accessible in the State of the consumer’s domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction. * * * The removal of the condition in [Art. 13(3)(b) of the Convention] that the consumer must have taken necessary steps for the conclusion of the contract in his home State shall also be seen in the context of contracts concluded via an interactive website. For such contracts the place where the consumer takes these steps may be difficult or impossible to determine, and they may in any event be irrelevant to creating a link between the contract
and the consumer’s State. The philosophy of new Article 15 is that the cocontractor creates the necessary link when directing his activities towards the consumer’s state.


Does the revised wording of the Regulation make it clear under what circumstances a seller’s maintenance of a website will subject the seller to the consumer-contract exception, allowing the consumer to sue the seller in the consumer’s home country? When is a website “direct[ed] to” a particular country? If it is accessible in that country? If it is written in the national language of the country? If prices are quoted in the currency of that country? Is it clear that this formulation brings more contracts within the consumer-contract exception than the Convention did?

L. Statutes Providing Jurisdiction over Online Activities

In 1999, the Virginia legislature added a provision to the state long-arm statute that is aimed at extending jurisdiction to cover certain uses of computers. The provision states: “Using a computer or computer network located in the Commonwealth shall constitute an act in the Commonwealth.” This statement of what shall be deemed “an act in the Commonwealth” becomes operative when combined with other provisions of the long-arm statute, such as those granting jurisdiction over a claim arising from a person’s “[t]ransacting any business in this Commonwealth,” “[c]ontracting to supply services or things in this Commonwealth,” or “[c]ausing tortious injury by an act or omission in this Commonwealth.” VA. CODE § 8.01-328.1(A)(1) - (3). A person is deemed to “use” a computer if he “[a]ttempts to cause or causes * * * [1] a computer or computer network to perform or to stop performing computer operations; [2] the withholding or denial of the use of a computer [or] computer network * * * ; or [3] another person to put false information into a computer.” VA. CODE § 18.2-152.2. A “computer network” is defined as “as set of related, remotely connected devices and any communications facilities including more than one computer with the capability to transmit data among them through the communications facilities.” Id.

Does this provision succeed in overcoming the perplexities that result when attempting to ascertain the location of events that are accomplished through online communications? If a person in State A transacts business with a person in State B by sending an e-mail message that is routed through a server located in Virginia, is this “use” of the server that gives rise to jurisdiction over the person in State A? What if the person in State A defames a person in State B by posting a message in a newsgroup that is hosted on a server located in Virginia? Some of the computers that constitute America Online are located in Virginia. Under this statute, does jurisdiction arise in Virginia every time two AOL members, located anywhere in the world, transact business using their AOL accounts?

Note: Venue

The venue provisions generally applicable to cases brought in federal court allow a suit to be brought in “a judicial district in which a substantial part of the events or omissions giving rise
What special issues are presented when applying this provision to online activity?

1. In trademark infringement cases, venue may be proper where confusion of purchasers occurs. Cottman v. Transmission Systems, Inc. v. Martino, 36 F.3d 291, 295 (3d Cir. 1994). If the infringement occurs on a Web page, confusion of purchasers may occur wherever the website is accessed. Several courts have held that use of an infringing mark on a website may help to establish venue in districts where the site is accessible. See Telephone Audio Productions, Inc. v. Smith, 1998 WL 159932 (N.D. Tex. Mar. 26, 1998); Gary Scott Int’l, Inc. v. Baroudi, 981 F. Supp. 714 (D. Mass. 1997). Should it be relevant whether the site is actually accessed by potential purchasers in the district? Should it matter whether the site is “passive” or “interactive”?

2. The venue provision applicable to actions under the Securities and Exchange Act allows venue in any jurisdiction where the defendant “transacts any business.” 15 U.S.C. § 78aa. In Shapiro v. Santa Fe Gaming Corp., 1998 WL 102677 (N.D. Ill. Feb. 27, 1998), the court held that defendant’s operation of a passive website and a toll-free number does not constitute transacting business within the district. The court relied on cases holding that these contacts are insufficient to support jurisdiction. Should the term “transacts business” be interpreted the same way when it is a basis for venue as when it is a basis for jurisdiction?

Note: Subject matter jurisdiction

A court has subject matter jurisdiction over a case if the substance of a case brings it within the court’s adjudicatory authority. The involvement of online communications in the activities giving rise to a lawsuit rarely creates new issues with respect to subject matter jurisdiction.

One situation in which online communications may raise novel issues is where subject matter jurisdiction depends upon the existence of interstate commerce. The most general constitutional basis for exercise of federal legislative authority is the Commerce Clause, which authorizes Congress “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, Sec. 8. Many federal statutes apply in terms only to interstate activities — e.g., 15 U.S.C. § 1263 (prohibiting “[t]he introduction or delivery for introduction into interstate commerce of any misbranded hazardous substance or banned hazardous substance”); 16 U.S.C. § 824 (regulating “the transmission of electric energy in interstate commerce”). Federal statutes that do not contain an explicit commerce limitation, but draw their authority from the Commerce Clause, likewise may be applied consistently with the Constitution only if the case arises from interstate commerce.

Several federal statutes regulate certain types of communications that occur in interstate commerce. For example, the Wire Fraud statute makes it illegal to “transmit[] * * * by means of wire * * * communication in interstate or foreign commerce” any communication for the purpose of executing any scheme to obtain money by fraud. 18 U.S.C. § 1343. Similarly, the federal threats statute makes it illegal to “transmit[] in interstate or foreign commerce any
communication containing any threat to kidnap any person or any threat to injure the person of another.” 18 U.S.C. § 875(c). Normally these statutes are applicable in situations where a person in one state engages in a communication with a person in another state, thereby satisfying the “interstate commerce” requirement. But what if the two people who are communicating are located in a single state, and they communicate via an online medium that routes the communication through another state? Is the communication in “interstate commerce”?  

The court gave an affirmative answer to this question in U.S. v. Kammersell, 7 F. Supp.2d 1196 (D. Utah 1998), which involved a defendant who was charged with making a threat in violation of 18 U.S.C. § 875(c). Defendant had sent a threatening communication from his location in Utah to the target, also located in Utah. The communication, an America Online “insta-message,” was routed through AOL’s server in Virginia. The court found that this communication was in interstate commerce, on a plain reading of the statute. “‘Transmits *** in interstate commerce’ is not ambiguous. *** Its plain meaning encompasses the conduct in this case. *** The fact that the recipient of the threat was located in the same state is of no consequence.” 7 F. Supp.2d 1199-1200, 1202.

Do you agree with the court that the term “interstate commerce” unambiguously includes a communication between two people located in the same state, if it is routed through another state? Could the term be fairly read as encompassing only communications between people located in different states?

In concluding that the location of the two communicators is irrelevant, the court relied on (a) U.S. v. Whiffen, 121 F.3d 18 (1st Cir. 1997), finding that a call from a New Hampshire location to another New Hampshire phone number, which was automatically transferred so that the caller was speaking with a person located in Florida, was in interstate commerce; (b) U.S. v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997), which found it indisputable that e-mail transmissions between a person located in Ontario and a person located in Michigan are in interstate or foreign commerce; (c) and U.S. v. Kelner, 534 F.2d 1020 (2d Cir. 1976), which found the interstate commerce requirement satisfied by a threat transmitted via a television broadcast that was received outside the state where the broadcaster was located, though the target of the threat was located in the same state as the broadcaster. Do these three cases support the court’s conclusion?

If AOL happened to have a server located in Utah, through which the message was routed, the court would presumably have concluded that the communication was not in interstate commerce. Is it sensible for subject matter jurisdiction to turn on such a fortuity?

How would the court’s reasoning apply in a situation where a person accesses a website whose owner is located in the same state, but the server hosting the website is located in another state? What if the Web server and both communicators are located in a single state, but some of the packets constituting the communication are routed through a server located in another state? What if a person sends a threat via Federal Express to a recipient located in the same state, but the airplane carrying the letter touches down in Memphis, where Federal Express has its hub? See Katherine C. Sheehan, Predicting the Future: Personal Jurisdiction for the Twenty-First Century, 66 U. Cin. L. Rev. 385, 419 (1998) (noting that at one time “most Federal Express packages, regardless of origin or destination, were routed through Memphis, Tennessee”).
Enforcing a judgment obtained in a case involving online communications is, as a general matter, no different from enforcing a judgment obtained in any other case. But there are differences between enforcing a judgment against a defendant with assets located within the United States, and enforcing a judgment against a defendant whose assets are located outside the United States. Since cases featuring online communications may well involve parties located in different countries, the inherent difficulties of enforcing foreign judgments are of special salience in the online context.

A judgment issued by a state or federal court within the United States generally must be given the same effect in any other jurisdiction as it would receive in the forum jurisdiction. This is due to the U.S. Constitution’s Full Faith and Credit Clause, Art. IV, § 1, as implemented by 28 U.S.C. § 1738, and federal common law. Thus, a party who obtains a judgment from a state or federal court in the United States may seek to execute it against assets of the judgment debtor that are located anywhere in the United States.

When a party seeks to enforce a U.S. judgment against assets located outside the United States, matters are not so simple. Each country prescribes its own rules as to the circumstances under which it will enforce a judgment issued by a court located in another country. Historically, courts in other countries have been reluctant to enforce judgments issued by U.S. courts. This hostility towards U.S. judgments has been due, in part, to the propensity of U.S. courts to award damages (especially punitive damages) that seem excessive by the standards of courts in other countries, and by their willingness to assert personal jurisdiction on grounds that are considered exorbitant in other judicial systems.

Canadian courts have in recent years become more liberal in enforcing judgments issued by courts outside the jurisdiction where enforcement is sought — that is, by courts located in another Canadian province, as well as those located outside Canada. In Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 (Can.), the Supreme Court of Canada established the principle that provincial courts must recognize judgments of other provincial courts as long as there was a “real and substantial connection” between the rendering court and the action. McMickle v. Van Straaten, [1992] 93 D.L.R. (4th) 74 (B.C.S.C.), which enforced a default judgment rendered by a California court, extended this principle to encompass judgments from foreign courts. See Terry W. Milne & Terry I. Wuester, Recognition of American Judgments in Canada: Recent Canadian Law Moves Toward a “Full Faith and Credit” Standard, 74 Mich. B.J. 42 (1995).

But a Canadian court may still refuse to enforce a U.S. judgment in circumstances where another U.S. court would be required to honor the judgment. In Braintech, Inc. v. Kostiuk, 1999 BCCA 0169 (British Columbia Court of Appeal 1999), a British Columbia court refused to enforce a default judgment that a U.S. District Court in Texas had issued in a case based on alleged defamation posted on an Internet bulletin board. The plaintiff, a Nevada corporation with headquarters in British Columbia and a facility in Texas, obtained the judgment against defendant, an individual residing in British Columbia. The British Columbia court applied the
rule established in *Morguard v. De Savoye*, *supra*, according to which the critical inquiry was whether there was a “real and substantial connection” between the Texas court and the action. The court held that there was an insufficient connection. Applying the *Zippo* test, the court determined that the bulletin board on which the allegedly defamatory message was posted was “passive.” Referring to the *Zippo* criteria of “level of interactivity” and “commercial nature” of the communication, the court found: “In these circumstances the complainant must offer better proof that the defendant has entered Texas than the mere possibility that someone in that jurisdiction might have reached out to cyberspace to bring the defamatory material to a screen in Texas. There is no allegation or evidence [defendant] had a commercial purpose that utilized the highway provided by Internet to enter any particular jurisdiction.” The court concluded: “Such a contact does not constitute a real and substantial presence. On the American authorities this is an insufficient basis for the exercise of an in personam jurisdiction over a non-resident.”

Notes

1. As the court explained, the issue presented under Canadian law was whether there was a “real and substantial connection” between the Texas court and the lawsuit. Why did the court apply the *Zippo* test? Does use of the *Zippo* test imply that the Canadian requirement is met whenever the forum court had jurisdiction according to its own law?

2. The court also characterized the issue as whether “defendant has entered Texas.” Is this equivalent to the “real and substantial connection” criterion, or to the due process jurisdictional criterion?

3. Having concluded that a posting on a BBS was “passive” under the *Zippo* analysis, why did the court go on to consider the *Zippo* criteria of “level of interactivity” and “commercial nature” of the communication? Was the court correct in finding that “[o]n the American authorities” the Texas court did not have jurisdiction over the defendant?

U.S. courts have customarily been liberal in recognizing and enforcing foreign judgments. Enforcement of foreign judgments in U.S. courts is governed by state law. Some 28 states and the District of Columbia have adopted the Uniform Foreign Money-Judgments Recognition Act, which generally requires state courts to give full faith and credit to foreign judgments. Other states enforce foreign judgments under their own statutory schemes, or on common-law comity principles. [is this true?]

The Uniform Act specifies circumstances under which a court may not recognize a foreign judgment (absence of due process in the rendering court, lack of personal or subject matter jurisdiction) and other circumstances under which enforcement of a foreign judgments is discretionary (lack of notice to the defendant, fraud, inconsistency with public policy of the state, etc.). Uniform Foreign Money-Judgments Recognition Act § 4 (1962).

The public policy exception is one that holders of judgments from foreign courts may find particularly troublesome. Courts have invoked this provision to deny recognition to money judgments based on defamation, on the ground that the rendering court did not implement the intricacies of the First Amendment rules applying to defamation claims in this country. *See*
This matter comes before the Court on the motion of the defendant, Circus Circus Hotel, to dismiss the complaint of Janice and Robert Decker for lack of personal jurisdiction and for improper venue pursuant to Federal Rules of Civil Procedure. This action will be transferred to the United States District Court for the District of Nevada pursuant to 28 U.S.C. § 1406(a).

Background

The plaintiffs, Janice and Robert Decker, are New Jersey residents who have brought a personal injury action against the defendant Circus Circus Hotel, a Nevada corporation with its only place of business in Las Vegas, Nevada, for injuries arising from an alleged negligent condition on the defendant's premises. This complaint was originally filed in the Superior Court of New Jersey, Law Division, Morris County alleging negligence and seeking recovery for personal injuries. However, the defendant removed the action to this Court. In lieu of answering the complaint the defendant filed a motion to dismiss the complaint for lack of personal jurisdiction, pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(3), and to quash service of process, or, in the alternative, to transfer venue to the United States District Court for the District of Nevada.

Discussion

A. Applicable Law

Pursuant to Federal Rule of Civil Procedure 4(e), federal "district courts have personal jurisdiction over non-resident defendants to the extent authorized under the law of the forum state in which the district court sits." See Sunbelt Corp. v. Noble, Denton & Associates, Inc., 5 F.3d 28, 31 (3d Cir. 1993). New Jersey's long arm statute provides for personal jurisdiction as far as is permitted by the Fourteenth Amendment to the United States Constitution. See N.J. Ct. R. 4:4-4; Carteret Savings Bank, FA v. Shushan, 954 F.2d 141, 145 (3d Cir.1992); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 284 (3d. Cir. 1981). Therefore, the question of whether this Court has jurisdiction over the defendant is determined by federal constitutional law. See Mesalic v. Fiberfloat Corp., 897 F.2d 696, 698 (3d. Cir. 1990).
The Fourteenth Amendment permits a state to exercise jurisdiction over an out-of-state defendant only where "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239, 2 L. Ed. 2d 1283 (1958). It is the burden of the plaintiff to prove that the defendant has purposefully availed himself of the forum state. See Burke v. Quartey, 969 F. Supp. 921, 924 (D.N.J. 1997). [**4]

To prove that the defendant has purposefully availed himself of that state, a plaintiff may rely upon a defendant's specific contacts with the forum state. Personal jurisdiction pursuant to such contacts is known as specific jurisdiction. Specific jurisdiction is invoked when a claim is related to or arises of out the defendant's contacts with the forum. See, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416, 104 S. Ct. 1868, 1873, 80 L. Ed. 2d 404 (1984); Dollar Sav. Bank v. First Security Bank of Utah, 746 F.2d 208, 211 (3d Cir. 1984). A court must first determine whether the defendant had the minimum contacts with the forum necessary for the defendant to have "reasonably anticipated being haled into court there." World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) (citations omitted). What constitutes minimum contacts varies with the "quality and nature of defendant's activity." Hanson, 357 U.S. at 253, 78 S. Ct. at 1240. In assessing the sufficiency of minimum contacts for personal jurisdiction, the court must focus on the "relationship among [**5] the defendant, the forum and the litigation." Keeton v. Hustler, 465 U.S. 770, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984). Otherwise stated, there must be at least "a single deliberate contact" with the forum state that relates to the cause of action. United States Golf Ass'n v. United States Amateur Golf Ass'n, 690 F. Supp. 317, 320 (D.N.J. 1988). The unilateral acts of the plaintiff, however, will not amount to minimum contacts. Helicopteros, 466 U.S. at 414; Hanson, 357 U.S. at 253, 78 S. Ct. at 1240.

Second, assuming minimum contacts have been established, a court may inquire whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Burger King Corporation v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (quoting International Shoe Company v. Washington, 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95 (1945)); Pennzoil Products Co. v. Colelli & Assoc., Inc., 149 F.3d 197, 201 (3d Cir. 1998). For personal jurisdiction to comport with "fair play and substantial justice," it must be reasonable to [**6] require the defendant to defend the suit in the forum state. See World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. 286, 292, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490 (1980). To determine reasonableness, a court considers the following factors: the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering substantive social policies. Id. (internal quotation marks omitted). Only in "rare cases [do the] minimum requirements inherent in the concept of fair play and substantial justice ... defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." Asahi Metal Industry [*747] Co., Ltd. v. Superior Court of Cal., Solano County, 480 U.S. 102, 116, 107 S. Ct. 1026, 1034, 94 L. Ed. 2d 92 (1987) (internal quotation marks omitted).

If the plaintiff cannot establish specific jurisdiction, a court may exercise general jurisdiction over the defendant if the [**7] defendant has maintained "continuous and systematic contacts" with the forum state. Helicopteros, 466 U.S. at 416, 104 S. Ct. at 1873. To establish general jurisdiction the plaintiff must show significantly more than mere minimum contacts with the forum state. Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987). Moreover, the facts required to establish general jurisdiction must be "extensive and persuasive." Reliance Steel Prods. V. Watson, Ess, Marshall, 675 F.2d 587, 589 (3d Cir. 1982).

B. Personal Jurisdiction

Plaintiffs allege that the defendant Circus Circus Hotel has sufficient contacts with New Jersey to allow this Court to exercise in personam jurisdiction over the defendant and points to the following facts: (1) the defendant has had one television advertisement which consisted of a single spot that aired on a national cable network in the New York-New Jersey metropolitan area; (2) the defendant advertises in national magazines and newspapers such as USA Today, People Magazine, and various other travel magazines which are distributed nationwide; (3) the defendant mails promotional [**8] material to former guests in New Jersey and those New Jersey citizens who directly request information from it; (4) the defendant has an Internet site where customers can make reservations; (5) the defendant's sister corporation, Circus Circus New Jersey, Inc. has filed for a gaming license with the New Jersey Casino Control Commission; and (6) the defendant's parent corporation, Circus Circus Enterprises, Inc., has filed a breach of contract suit in New Jersey. The defendant claims that these contacts are too tenuous for this Court to exercise
specific or general personal jurisdiction over the defendant. The defendant further argues that specific jurisdiction over it is unwarranted because this cause of action did not arise out of nor is it related to any of the defendant's tenuous contacts to New Jersey. General jurisdiction is also unwarranted, the defendant contends, because the actions of the defendant's parent or subsidiary are wholly irrelevant, and because a national media campaign, an Internet site, and informational mailings to former customers do not amount to systematic and continuous contacts.

1. General Jurisdiction

Initially, this Court rejects the plaintiffs' contentions that the actions of the defendant's parent or sister corporation could be the basis for personal jurisdiction in this matter. It is irrelevant that Circus Circus Enterprises, Inc. has engaged in litigation in New Jersey. It is also irrelevant to our analysis that Circus Circus New Jersey, Inc. has applied for a gaming license from the New Jersey Casino Control Commission. This Court will not disregard the existence of separate corporate entities save some evidence that the defendant subsidiary is dominated or controlled by the parent corporation -- not such evidence exists in the record. The Third Circuit has advised that "a rule which imposes liability on a corporation which never exercised its general authority over its subsidiary ... may unduly penalize the corporation ..." Lansford-Coaldale Joint Water Authority v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993); see also, Culbret v. Amosa (Pty) Ltd., 898 F.2d 13, 14 (3d Cir.1990) (holding that party seeking to pierce corporate veil must establish that controlling corporation wholly ignored separate status of controlled corporation and so dominated and controlled its affairs that separate existence was a mere sham).

Personal jurisdiction can be exercised over a defendant which maintains an Internet site where customers can transact business. See, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Weber v. Jolly Hotels, 977 F. Supp. 327 (D.N.J. 1997); Zippo Mfg. Co. v. Zippo Dot Com, Inc. 952 F. Supp. 1119 (W.D. Pa. 1997). A court may exercise personal jurisdiction over a defendant based on the existence of an Internet site in two situations: (1) where the site is used to actively transact business; and (2) where a user can exchange information with the host computer. In the first situation, the court will exercise personal jurisdiction because the defendants are "entering into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet." CompuServe, 89 F.3d 1257, quoted in, Zippo, 952 F. Supp. at 1124. In the second circumstance, the exercise of personal jurisdiction is determined by "examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." Zippo, 952 F. Supp. at 1124 (citing Maritz Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996).

With regard to the defendant's Internet site, the plaintiffs' attorney attached a copy of printed pages from that site to his affidavit in this matter. From those pages it is clear that any customer can reserve a room through the Web site. This activity is certainly commercial in nature. Moreover, by making reservations available on the Internet, the defendants have effectively placed their hotel and its services into an endless stream of commerce. Under the "stream of commerce" theory, a forum state may exercise jurisdiction over a non-resident corporation "that delivers its product into the stream of commerce with expectation that they will be purchased by consumers in the forum state." World-Wide Volkswagen, 444 U.S. at 298.

However, the defendant's Internet site contains a forum selection clause requiring that by making a reservation over the Internet, customers agree to have their disputes settled in Nevada state and federal courts. This forum selection clause ought to be enforced. See Carnival Cruise Lines v. Shute, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991). "A clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions." Carnival, 499 U.S. at 593-94 (citing Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 33, 108 S. Ct. 2239, 2246, 101 L. Ed. 2d 22 (concurring opinion). This Court will not exercise personal jurisdiction over the defendant based on the maintenance of its Internet site.

What remains to establish the requisite contacts to the forum state are (1) a television advertisement which consisted of a single spot that aired on a national cable network in the tri-state area, (2) advertisements in national magazines and newspapers such as USA Today, People Magazine, and other travel magazines, and (3) the mailing of promotional material to former guests in New Jersey and New Jersey citizens who directly request information from the defendant.

National advertising and the mailing of information to former guests and those who request it, without more, is not enough to establish minimum contacts to the forum state. See Gehling v. St. George's School of Medicine Ltd., 773 F.2d 539, 542 (3d Cir. 1985); Scheidt v. Young, 389 F.2d 58, 60 (3d Cir. 1968); cf. Giangola v. Walt Disney World Co. 753 F. Supp.
148, 156 (D.N.J. 1990) (denying personal jurisdiction even where defendant placed advertisements in local newspapers and plaintiff relied on those ads); Rutherford v. Sherburne Corp., 616 F. Supp. 1456 (D.N.J. 1985) (finding personal jurisdiction where defendant advertised in four forum [*749] newspapers and where a "substantial number" of patrons hailed from the forum state). In the instant case, the record does not reflect that the defendant ever specifically targeted New Jersey for its advertisements. The defendant maintains no offices in New Jersey, does not own any property in New Jersey, has no phone book or yellow page listings in New Jersey, and has no bank accounts in New Jersey. Nor does it incur or pay taxes in New Jersey. Additionally, defendant does not have any agents in New Jersey authorized to receive service [**14] of process on its behalf. Defendant does not, and is not authorized to, conduct business in New Jersey defendant has no plans to obtain such authorization; defendant has never advertised in any local New Jersey newspaper or publication. Defendant has never advertised on local television stations in New Jersey.

Our Third Circuit has refused to find personal jurisdiction even when the contacts to the forum state are much stronger than those here. In Gehling, the Third Circuit refused to exercise personal jurisdiction over a West Indies medical school for a negligence and breach of contract claim even when the defendant college had placed advertisements in non-Pennsylvania newspapers circulated throughout Pennsylvania, six percent of the college's students came from Pennsylvania, Pennsylvania residents annually paid several hundreds of thousands of dollars in tuition, and even where the college directly sent a letter of acceptance to a prospective student. Gehling, 773 F.2d at 542-43. Furthermore, it has been clearly held by this Circuit that advertising in national or international newspapers or magazines does not constitute "continuous and substantial" contacts [**15] with the forum state. See Reliance Steel Products v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 589 (3d Cir. 1982).

As said, a party must have purposefully availed itself of the laws of the forum state. See Burger king Corp., 471 U.S. at 475; Keeton, 465 U.S. at 774; World-Wide Volkswagen Corp., 444 U.S. at 299. Also, the plaintiffs must show with reasonable particularity, the nature and extent of the defendant's contacts with the forum state so as to permit this Court to exercise its in personam jurisdiction over the defendant. Gehling, 773 F.2d at 542. The plaintiffs have not met their burden. The facts here do not meet this constitutionally required standard for a finding of in personam jurisdiction. From the present record, it appears as though plaintiffs assert that their unilateral act of going to Nevada is enough to invoke jurisdiction: the unilateral acts of the plaintiffs will not amount to minimum contacts. Helikopteros, 466 U.S. at 414; Hanson, 357 U.S. at 253, 78 S. Ct. at 1240. This Court constitutionally cannot exercise general personal jurisdiction [**16] over the defendant in this matter because the plaintiffs have not shown that the defendant has the requisite contacts with New Jersey.

2. Specific Jurisdiction

To establish specific jurisdiction, we must, initially, determine if this cause of action arose out of or is related to the defendant's above contacts with New Jersey. The record does not reflect precisely how the plaintiffs came to know of the Circus Circus Hotel in Las Vegas or how they came to make their vacation reservations. Plaintiffs have not alleged that they received promotional mailings from defendant, that they viewed defendant's television, newspaper, or magazine advertisements, or that they communicated to defendant through its Internet site. However, assuming that this litigation is related to one of the defendant's aforementioned contacts to the forum state, this Court cannot exercise its in personam jurisdiction because the defendant lacks the requisite minimum contacts with New Jersey.

[*750] Plaintiffs have failed to demonstrate facts sufficient for this Court to exercise personal jurisdiction. The burden to produce actual evidence of the defendant's contacts with the forum state rests on the plaintiffs. [**17] Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 67 (3d. Cir.); see also Stranahan Gear Co., Inc. v. NL Industries, Inc., 800 F.2d 53, 58 (3d. Cir.)(cursory allegation reiterated in a sworn affidavit is insufficient to satisfy the plaintiff's burden of proof). The plaintiffs have not met this burden.

Plaintiffs have not established that defendant has the minimum contacts with New Jersey necessary for specific personal jurisdiction. As stated, defendant's national advertising was not purposefully directed at New Jersey. The forum selection clause in defendant's Web site demonstrates that it could not reasonably anticipate being haled into court in New Jersey. Moreover, plaintiffs have not alleged that their action arises out of any of defendant's tenuous contacts with this state. This Court has neither general nor specific jurisdiction over the defendant.

C. Transfer of Venue to the District of Nevada

Finding a lack of personal jurisdiction, this matter will be transferred to the District of Nevada pursuant to 28 U.S.C. ß 1406(a). Dismissal would be burdensome and worthless in light of the inevitable [**18] re-filing of this action in Nevada where jurisdiction and venue clearly lie. Even without personal jurisdiction over the defendant, this Court transfers this action to the Federal

Conclusion

The Court finds that it may not exercise personal jurisdiction over the defendant in this matter. This matter is hereby transferred to the District of Nevada pursuant to 28 U.S.C. 1406(a).

SO ORDERED:

William H. Walls, U.S.D.J.

May 12, 1999

Dated

ORDER

This matter comes before the Court on the motion of the defendant, Circus Circus Hotel, to dismiss the complaint for lack of personal jurisdiction and for improper venue pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and to quash service of process, or, in the alternative, to transfer this action to the United States District Court for the District of Nevada. Upon consideration of the submissions of the parties, and for the reasons stated in the accompanying opinion, [*19]

It is on this day of May, 1999,

ORDERED that this action be transferred to the District of Nevada as this Court does not have personal jurisdiction over the defendant.

William H. Walls, U.S.D.J.
IV. Special Characteristics of the Online Medium

In some respects, the problem of deceptive marketing practices on the Internet is nothing new. "The swindles over the Internet are no different from the confidence games of the past; the only difference is the medium." n74 However, certain characteristics of the online medium give rise to special difficulties in controlling deceptive marketing practices that are absent, or are present only to an attenuated degree, with marketing methods that use other communications media. These same characteristics give rise to legal uncertainty for online sellers, making it difficult for them to structure their online activities so as to be consistent with trade practices laws. These characteristics fall into five categories.

[*912]

First, because the cost of making a communication over the Internet and the delivery time of a communication are independent of the geographic separation of the parties to the communication, the development of electronic commerce will result in a substantial increase in transactions involving a seller in one country and a buyer in another. Second, the nature of the medium enables the perpetrator of an online scam to evade law enforcement efforts by moving the operation relatively quickly and easily from one jurisdiction to another, and by disguising his identity. Third, because the costs of promoting a commercial activity via the Internet are relatively modest, the Internet opens the doors to an enormous flood of new entrepreneurs, some of whom will engage in illegal conduct. Fourth, in most cases it is impossible for the sender of a communication to identify the geographic location of the recipient of the communication, or to limit the availability of a communication to a
geographic or political subdivision of the online community. Fifth, it is often unclear how the existing regulatory structure applies to the online medium.

A. Increased Volume of Cross-Border Transactions

Because the cost of making a communication over the Internet is independent of the geographic separation of the parties to the communication, and because there is no significant time delay in receipt of an online communication regardless of the distance the message travels, the development of electronic commerce is likely to result in a substantial increase in transactions involving a seller in one country and a buyer in another. n75 Cross-border commercial transactions raise difficulties for both consumers and sellers that are absent in the domestic context.

* * * * *

[*918]

3. Choice of Law

A court with jurisdiction to adjudicate a particular controversy will not necessarily apply the law of the state in which it is located. If the parties are located in the forum jurisdiction, and all of the operative facts occurred there, a court will apply the lex fori. However, where the controversy has "a significant relationship to more than one state," n97 the court must resort to choice-of-law principles in order to determine which jurisdiction's laws it will apply to resolve the controversy.

Choice-of-law issues are notoriously difficult to resolve even in relatively simple contexts. n98 The complexities of transnational commercial activities conducted via the Internet may give rise to particularly thorny choice-of-law questions. Due to the nature of online communications, an online transaction may routinely involve several jurisdictions. For example, a person in State A may make a communication through a Web site hosted on a computer located in State B, that is received by a person in State C who obtains access to the Internet through a server located in State D (which is owned and operated by a company headquartered in State E), and that results in a transaction involving the shipment of physical goods or downloading of digital goods from a source located in State F.

Among states of the United States, the two most popular approaches to resolving choice-of-law issues are lex loci delicti and "most significant relationship." n99 Under the rule of lex loci delicti, the applicable law is the law of the place "where the last event necessary to make an actor liable for an alleged tort takes place." n100 But this approach does not work well in the context of fraud, since "there is often no one clearly demonstrable place of injury and at times injury will have occurred in two or more states." n101
The "most significant relationship" approach involves a balancing test that is dependent on a number of factors. One standard exposition of the test that applies where the cause of action is based on fraud or misrepresentation takes cognizance of six factors: (1) the place where the plaintiff acted in reliance upon the defendant's representations, (2) the place where the plaintiff received the representations, (3) the place where the defendant made the representations, (4) the residence and nationality of the parties, (5) the place where a tangible thing which is the subject of the transaction was situated, and (6) the place where the plaintiff was to render performance under the fraudulently induced contract. n102

[∗919]

Where the cause of action arises from contract, and the parties have not effectively selected the governing substantive law, n103 the relevant criteria in a choice-of-law analysis are (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the location of the parties. n104

The special characteristics of online communications create difficulties in the application of these criteria. For example, does a person "make" or "receive" an online communication (a) where the maker of the communication is located at the time he transmits it, (b) where the computer through which the maker of the communication connects to the network is located, (c) where the computer through which the recipient of the communication connects to the network is located, (d) where the computer from which the purchaser downloads his e-mail is located, or (e) where the recipient of the communication is located at the time he receives it? When performance consists of the delivery of a digital good, does performance occur at the sending end or the receiving end? Is the result different if the seller transmits the good by making it available for download from the seller's Web site? What is the situs of contracting or negotiation of a contract that is arrived at through online communications? n105

The novel issues raised by choice-of-law analysis of online transactions will thus center around what is deemed to be the location of various persons and events. As is the case with jurisdiction, the location of online events and the persons who bring them about can be difficult to assess.

FOOTNOTES:

n74 Cella & Stark, supra note 49, at 835.

n75 See [Australian] Federal Bureau of Consumer Affairs, Untangling the Web: Electronic Commerce and the Consumer 20 (1997) ("[T]he proportion of consumer transactions involving a foreign supplier is likely to increase significantly."). In most cases, however, international transactions remain constrained by the cost of international parcel delivery. According to a study by the OECD's Committee on Consumer Policy, the cost of delivering a parcel across an international border is two to four times the cost of a delivery of roughly the same distance within a domestic market. See International Parcel Delivery, at 10, OECD Doc. OCDE/GD(97)151, available at <http://www.oecd.org/dsti/sti/it/consumer/prod/ e 97-151.htm>; The Once and Future Mall,
Economist, Nov. 1, 1997, at 68. Delivery costs become irrelevant in the case of "digital goods," such as data, software, or digitized music, which may be delivered via the Internet over the same path through which the order was received. The volume of software delivered digitally in the United States is presently less than one percent of the total, but "most analysts believe that a large amount of software will eventually be distributed electronically." Lisa Bransten, On-Line Larceny Prompts Venture to Develop Lucrative New Business, Wall St. J., Aug. 4, 1997, at A11.


n77 A third aspect of jurisdiction, jurisdiction to enforce, concerns the authority of a state "to induce or compel compliance or to punish noncompliance with its laws or regulations." Restatement (Third) of the Foreign Relations Law of the United States 401(c) (1987) [hereinafter Restatement (Third) of Foreign Relations Law]. See discussion of enforcement of judgments infra text accompanying notes 106-09.

n78 Restatement (Third) of Foreign Relations Law, supra note 77, 401 introductory note; see id. 401(a).

n79 Id. 402 introductory note; see also Ian Brownlie, Principles of Public International Law 298 (3d ed. 1979).

n80 Restatement (Third) of Foreign Relations Law, supra note 77, 402(1)(c).

n81 Id. 403.

n82 See id.

n83 For example, these factors include: connections between the regulating state and the person responsible for the regulated activity or those the regulation is designed to protect; the importance of the regulation to the regulating state and to other states; impact of the regulation on justified expectations; importance of the regulation to the international system; consistency of the regulation with international traditions; and the likelihood of conflict with another state. See id. 403(2).


n85 Restatement (Third) of Foreign Relations Law, supra note 77, 401 introductory note; see id. 401(b).
n86 Id. 401 introductory note.

n87 Id. 421(2). The other reasonableness factors—domicile, residence, and nationality of a person; state pursuant to whose laws a corporation is organized or a vehicle is registered; and consent to exercise of jurisdiction—raise no special issues in the online context.


n89 Id. art. 13(3)(a), at 71.

n90 For example, long-arm statutes provide for jurisdiction over claims arising from "the causing of any injury within this state," Utah Code Ann. 78-27-24(3) (1995); breach of contract "by failing to perform acts required by the contract to be performed in this state," Fla. Stat. Ann. 48.193(1)(g) (West 1997); and "the transaction of any business within this State," 735 Ill. Comp. Stat. Ann. 5/2-209(1) (West 1992).

n91 See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-97 (1980) (noting that the factors in due process analysis include whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there").

n92 Hanson v. Denckla, 357 U.S. 235, 253 (1958); see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person,'" but rather only "where the contacts proximately result from actions by the defendant himself.") (citation omitted) (emphasis in original). The Justices of the Supreme Court have split over whether the "purposeful availment" requirement may be met merely by placing a product into the stream of commerce with the knowledge that it would be carried into the forum state. See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

n93 An alternative enforcement paradigm, which avoids the extraterritorial assertion of jurisdiction, involves the institution of an enforcement action, by a regulatory authority of the country in which the victim resides, in the courts of the country where the perpetrator is located. There are several difficulties with this approach: the court in which the action is instituted may not accord standing to a foreign regulatory authority, and the conduct forming the basis of the action may not constitute a violation of the law of the forum country. The European Commission has proposed a directive to address some of these difficulties. See Proposal for a European Parliament and Council Directive on Injunctions for the Protection of Consumers' Interests, COM(95)712 final [hereinafter Proposal for European Injunctions]. The EC's approach has been criticized as inadequate to the task, due to the limited scope of its applicability. See Michael Bogdan, Injunctions for the Protection of Cross-Border Consumer Interests: Comments on a Proposed E.C. Directive from a Nordic Viewpoint (unpublished manuscript, on file with author).


Restatement (Second) of Conflict of Laws 1 (1971).

"[O]ne federal judge I know maintains that his most effective technique to encourage settlement in unruly diversity cases is to suggest that the parties brief the choice of law issues." Seth F. Kreimer, The Source of Law in Civil Rights Actions: Some Old Light on Section 1988, 133 U. Pa. L. Rev. 601, 601 (1985).

Richard H. Acker, Choice-of-Law Questions in Cyberfraud, 1996 U. Chi. Legal F. 437, 447, 457. Thirteen states follow the rule of lex loci delicti, and twenty-two apply the "most significant relationship" test. Id. at 447, 457. In addition, five states follow the "choice-influencing considerations" approach, and three adhere to "governmental interest analysis." Id. at 450-52.

Restatement (First) of Conflict of Laws 377 (1934).

Restatement (Second) of Conflict of Laws ch. 7 introductory note (1971).

See id. 148(2).

III. Is Cyberspace Regulation Feasible?

This Section argues that the skeptics’ claims about the infeasibility of national regulation of cyberspace rest on an underappreciation of the realities of modern conflict of laws, and of the legal and technological tools available to resolve multijurisdictional cyberspace conflicts. From the perspective of jurisdiction and choice of law, regulation of cyberspace transactions is no less feasible than regulation of other transnational transactions.

F. Residual Choice-of-Law Tools

The skeptics’ implicit goal of eliminating all conflicts of laws that arise from cyberspace transactions is unrealistic. Private legal ordering, the limits of enforcement jurisdiction, indirect regulation of extraterritorial activity, filtering and identification technology, and international cooperation facilitate and rationalize legal regulation of cyberspace. These tools, however, will not eliminate all conflicts of laws in cyberspace any more than they do in real space. Transnational activity is too complex. As mentioned above, the elimination of conflict of laws would require the elimination of decentralized lawmaking or of transnational activity. n144 In this light, the enormous increases in the pervasiveness and complexity of conflict of laws in this century can be viewed as an acceptable cost to a world that wishes to expand transnational activity while retaining decentralized lawmaking. As persistent conflicts become prohibitively costly to private parties and regulating
nations, public or private international coordination or technological innovation becomes more attractive and thus more likely.

Short of these developments, transnational transactions in cyberspace, like transnational transactions mediated by telephone and mail, will continue to give rise to disputes that present challenging choice-of-law issues. For example: "Whose substantive legal rules apply to a defamatory message that is written by someone in Mexico, read by someone in Israel by means of an Internet server located in the United States, injuring the reputation of a Norwegian?" n145 Similarly,

which of the many plausibly applicable bodies of copyright law do we consult to determine whether a hyperlink on a World Wide Web page located on a server in France and constructed by a Filipino citizen, which points to a server in Brazil that contains materials protected by German and French (but not Brazilian) copyright law, which is downloaded to a server in the United States and reposted to a Usenet newsgroup, constitutes a remediable infringement of copyright? n146

It would be silly to try to formulate a general theory of how such issues should be resolved. One lesson of this century's many failures in top-down choice-of-law theorizing is that choice-of-law rules are most effective when they are grounded in and sensitive to the concrete details of particular legal contexts. This does not mean that standards are better than rules in this context. It simply means that in designing choice-of-law rules or standards, it is better to begin at the micro rather than macro level, and to examine recurrent fact patterns and implicated interests in discrete legal contexts rather than devise a general context-transcendent theory of conflicts. n147

With these caveats in mind, I want to explain in very general terms why the residual choice-of-law problems implicated by cyberspace are not significantly different from those that are non-cyberspace conflicts. Cyberspace presents two related choice-of-law problems. The first is the problem of complexity. This is the problem of how to choose a single governing law for cyberspace activity that has multijurisdictional contacts. The second problem concerns situs. This is the problem of how to choose a governing law when the locus of activity cannot easily be pinpointed in geographical space. Both problems raise similar concerns. The choice of any dispositive geographical contact or any particular law in these cases will often seem arbitrary because several jurisdictions have a legitimate claim to apply their law. Whatever law is chosen, seemingly genuine regulatory interests of the nations whose laws are not applied may be impaired.

The problems of complexity and situs are genuine. They are not, however, unique to cyberspace. Identical problems arise all the time in real space. In fact, they inhere in every true conflict of laws. Consider the problem of complexity. The hypotheticals concerning copyright infringements and multistate libels in cyberspace are no more complex than the same issues in real space. n148 They also are no more complex or challenging than similar issues presented by increasingly prevalent real-space events such as airplane crashes, mass torts, multistate insurance coverage, or multinational commercial transactions, all of which form the bread and butter of modern conflict of laws. n149 Indeed, they are no more complex than a simple products liability suit arising from a two-car accident among residents of the same state, which can implicate the laws of several states, including the place of the accident, the states where the car and tire manufacturers are headquartered, the states where the car and tires were manufactured, and the state where the car was purchased. n150

Resolution of choice-of-law problems in these contexts is challenging. But the skeptics overstate the challenge. Not every geographical contact is of equal significance. For example, in the copyright hypothetical above, the laws of the source country and the enduse countries have a much greater claim to governing the copyright action than the laws of the country of the person who built the server and the country of the server whose hyperlink pointed to the server that contained the infringing material. n151 The limits on enforcement jurisdiction may further minimize the scope of the conflict. n152 In addition, even in extraordinarily complex cases where numerous laws potentially apply, these laws will often involve similar legal
standards, thus limiting the actual choice of law to two or perhaps three options. Finally, these complex transactions need not be governed by a single law. Applying different laws to different aspects of a complex transaction is a perfectly legitimate choice-of-law technique.

The application of a single law to complex multijurisdictional conflicts will sometimes seem arbitrary and will invariably produce spillover effects. But as explained above, the arbitrariness of the chosen law, and the spillovers produced by application of this law, inhere in all conflict situations in which two or more nations, on the basis of territorial or domiciliary contacts, have a legitimate claim to apply their law. When in particular contexts the arbitrariness and spillovers become too severe, a uniform international solution remains possible. Short of such harmonization, the choice-of-law issues implicated by cyberspace transactions are no more complex than the issues raised by functionally identical multijurisdictional transactions that occur in real space all the time.

Like the problem of complexity, the situs problem is a pervasive and familiar feature of real-space jurisdictional conflicts. A classic difficulty is the situs of intangibles like a debt or a bank deposit. More generally, the situs problem arises whenever legally significant activity touches on two or more states. For example, when adultery committed in one state alienates the affections of a spouse in another, the situs of the tort is not self-evident. It depends on what contact the forum's choice-of-law rule deems dispositive. Similar locus difficulties arise when the tort takes place over many states, such as when poison is administered in one state, takes effect in another, and kills in a third. The situs problem even arises when a bodily injury occurs in one state based on negligence committed in another, for there is no logical reason why the place of injury should be viewed as the place of the tort any more than should the place of negligence. In all of these situations, the importance of any particular geographical contact is never self-evident; it is a legal rather than a factual consideration that is built into the forum's choice-of-law rules. As the geographical contacts of a transaction proliferate, the choice of any one contact as dispositive runs the risk of appearing arbitrary. But again, this problem pervades real-space conflicts of law and is not unique to cyberspace conflicts.

So the complexity and situs problems inhere to some degree in all transnational conflicts, and are exacerbated in real space and cyberspace alike as jurisdictional contacts proliferate. No choice-of-law rule will prove wholly satisfactory in these situations. However, several factors diminish the skeptics' concerns about the infeasibility of applying traditional choice-of-law tools to cyberspace. For example, the skeptics are wrong to the extent that they believe that cyberspace transactions must be resolved on the basis of geographical choice-of-law criteria that are sometimes difficult to apply to cyberspace, such as where events occur or where people are located at the time of the transaction. But these are not the only choice-of-law criteria, and certainly not the best in contexts where the geographical locus of events is so unclear. Domicile (and its cognates, such as citizenship, principal place of business, habitual residence, and so on) are also valid choice-of-law criteria that have particular relevance to problems, like those in cyberspace, that involve the regulation of intangibles or of multinational transactions.

The skeptics are further mistaken to the extent that their arguments assume that all choice-of-law problems must be resolved by multilateral choice-of-law methodologies. A multilateral methodology asks which of several possible laws governs a transaction, and selects one of these laws on the basis of specified criteria. Multilateral methods accentuate the situs and complexity problems. But the regulatory issues that are most relevant to the cyberspace governance debate almost always involve unilateral choice-of-law methods that alleviate these problems. A unilateral method considers only whether the dispute at issue has close enough connections to the forum to justify the application of local law. If so, local law applies; if not, the case is dismissed and the potential applicability of foreign law is not considered. For example, a jurisdiction typically does not apply foreign criminal law. If a Tennessee court has personal jurisdiction over someone from across the Virginia border who shot and killed an in-stater, the court does not consider whether Tennessee or Virginia law applies. It considers only whether Tennessee law applies. If so, the case proceeds; if not, it is dismissed.
Unilateral choice-of-law methods make the complexity and situs problems less significant. They do not require a determination of which of a number of possible laws apply. Nor do they require a court to identify where certain events occurred. What matters is simply whether the activity has local effects that are significant enough to implicate local law. By failing to recognize that courts can and will use unilateral rather than multilateral choice-of-law methods to resolve cyberspace conflicts, the skeptics again exaggerate the challenge of cyberspace regulation.

FOOTNOTES:

n144 See text accompanying notes 58-59.

n145 Perritt, 41 Vill L Rev at 3 (cited in note 78).

n146 Post and Johnson, Borders, Spillovers, and Complexity at 2-3 (cited in note 3).

n147 Many European conflict systems demonstrate that it is both possible and useful to design choice-of-law rules that are context-sensitive and not beholden to any grand choice-of-law theory. See, for example, Swiss Private International Law Statute of December 18, 1987, translated in Andreas Bucher and Pierre-Yves Tschanz, International Arbitration in Switzerland 225 (Helbing & Lichtenhahn 1988).


n150 See, for example, Rutherford v Goodyear Tire and Rubber Co, 943 F Supp 789, 790-91 (W D Ky 1996), affd, 142 F3d 436 (6th Cir 1998).


n152 See Section III.B.

n153 See Kramer, 71 NYU L Rev at 583 (cited in note 149).

n154 This is known as "depecage." See Brilmayer, Conflict of Laws at 366 (cited in note 32).


n156 See Larry Kramer, Vestiges of Beale: Extraterritorial Application of American Law, 1991 S Ct Rev 179, 190 n 36. A similar problem is presented by multistate contracts. When contractual negotiations and signings take place in two states, the place of the contract might be either state, depending on what contact the forum's choice-of-law rule deems dispositive for this purpose.

n157 See Lowenfeld, International Litigation and the Quest for Reasonableness at 5 (cited in note 48).

n158 See Dodge, 39 Harv Int'l L J at 108-10 (cited in note 36).

n159 The same analysis applies in the international context for the extraterritorial application of other regulatory laws like RICO and the antitrust and securities laws. The question in these cases is whether Congress
intended for federal law to apply to conduct abroad. If so, these laws apply. If not, the court dismisses the case without considering the application of foreign law.