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Y2K …Who Cares? We Have Bigger Problems: Choice of Law in Electronic Contracts

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Table of Contents:

I. INTRODUCTION

A. *Story of a Simple Net Transaction*

"Every day it becomes more certain that the Internet will take its place alongside the other great transformational technologies that first challenged, and then fundamentally changed, the way things are done in the world."[1]

{1}According to Gary R. Bachula, Acting Under Secretary for Technology for the U.S. Commerce Department, the number of Internet users and webpages are doubling every 100 days.[2] By the beginning of 1999, it was estimated that the Internet was being used by more than 200 million people around the world.[3] This rapid growth becomes far more astonishing when recognizing that, in 1994, the total number of Internet users was only three million people.[4] This statistical increase far exceeds the growth rate of other past technological innovations, such as radio, television and cable.[5] Statistics show that this Internet and

information technology boom is closely tied to the growth of the U.S. economy as a whole.[6] Analysts cited by the Department of Commerce's National Telecommunications and Information Administration predict that, in 2000, there will be over a trillion dollars spent on equipment and services alone in the global telecom industry.[7] E-business or e-commerce, which is a segment of the industry, is predicted to grow twice as fast as the industry as a whole, into a $600 billion industry in its own right by 2002.[8] Among businesses alone, it is anticipated that e-commerce will account for over $300 billion in the early part of this decade.[9]

{2}This potential market for emerging Internet-based businesses can create as many conundrums as opportunities in this new, worldwide marketplace. Imagine the following scenario: upon learning of the booming economic trend in e-commerce, Scott, a computer programmer who lives in San Jose, California, designs a virus detection and removal program called "Vir-All." Vir-All is specifically designed to detect and to remove Internet-based computer viruses. In order to cut down on costs, Vir-All is made available only on the Internet through a website; thus, it is not sold in any stores. The virus software sells for a whopping $500, but is guaranteed to detect and to eradicate any and all viruses, both current and future.

{3}The Vir-All website has several innovative features, including a fully-automated ordering system. The automation feature works as follows: (1) customer purchases Vir-All over the Internet using an electronic order form (containing no choice of law provision) and pays for it with a credit card; (3) the order is then routed to a central processor where the customer's credit card is processed - unbeknownst to Scott, this processor is located in Ohio; (4) upon approval, the customer is allowed to download Vir-All directly onto their computer. Scott is not notified of each individual purchase, nor is he aware of the routing of the order.

{4}The site is an overnight success. Scott receives orders from across the United States and from far-reaching corners of the globe. One day, Scott receives a letter from a customer who purchased Vir-All. The customer lives in New York; however, records indicate that he downloaded Vir-All onto his laptop computer while visiting an aunt in London. The letter contains a summons to appear in an action filed in New York for breach of contract. In this case, Scott is being asked to defend a suit in New York. Scott has never been physically present in New York. Moreover, he has never had any contact with anyone in New York.

{5}Therefore, should Scott be subject to suit in New York? If the suit were filed in California, the California court would undoubtedly have personal jurisdiction over Scott, solely based on the fact that he is a resident of California. Moreover, California's substantive law would likely be applied to the suit. However, the question here is whether a court in New York should entertain a suit, and, if so, whether it should apply New York's substantive law or the substantive law of another jurisdiction.

{6}The Vir-All scenario provides an example of an electronic contract that is formed, paid for, and performed in cyberspace; thus, rendering traditional choice of law doctrines inapplicable. Scott's situation involved a simple Internet transaction that turned out to be not so simple. Due to varying legal doctrines among states and countries, net users may find themselves subject to lawsuits and the laws of far away places. In short, nothing about electronic commerce is simplistic.

B. *Overview of the Article*

{7}The purpose of this article is to demonstrate how conventional choice of law doctrines are ill-adapted to resolving disputes arising out of electronic contracts. This is due, in large part, to the heavy reliance that contract law places on the notions of contracting, performance, and other similar factors. The conclusion of the article will combine the relevant portions of the analyses from each of the preceding sections, while providing an overview of how federal legislation will resolve the choice of law dilemma in electronic commerce by referencing the Vir-All example.

{8}This article is divided into seven sections. Section II provides an overview of how the Internet works, and

provides statistical information about Internet users with respect to electronic contracting, along with a synopsis of what electronic contracting is, how it works, the issues surrounding it, and several pieces of legislation drafted to address these issues. Section III suggests the regulation of electronic commerce is strictly a matter of federal law pursuant to the Commerce Clause. This section also demonstrates that choice of law problems surrounding electronic commerce are significantly reduced if Congress enacts a federal law that effectively preempts the states from regulating electronic commerce in any manner.Section IV traces the history of personal jurisdiction to recent cases analyzing the constitutionality of jurisdiction over defendants present in a forum via the Internet. Section V discusses a variety of choice of law doctrines utilized by courts across the nation. That section further explores several alternative doctrines that may apply to conflict of laws with respect to electronic contracts. Section VI briefly analyzes the constitutionality of choice of law doctrines applied by courts to resolve contractual disputes. Section VII of this article provides suggestions onpromulgating an international choice of law system by means of a treaty. This article concludes with Section VIII, combining analyses from each of the preceding sections, and providing an overview of how federal legislation resolves the electronic commerce choice of law dilemma by referencing the Vir-All example.

II. ELECTRONIC CONTRACTING AND THE INTERNET.

A. *Facts about the Internet*

1. The Internet: What Is It and How Does It Work?

{9}When someone goes on-line to search the Internet for information on the chief export of Angola, for example, they assume that their PC does most of the work.[10] The truth is that only a very small part of this on-line activity is actually handled by each individual PC.[11] Most the work is performed by huge computer systems in "the network."[12]

{10}The Internet is only one part of the "Information Superhighway" that is blazing the trail to the future.[13] This Information Superhighway includes many forms of electronic communication, ranging from telephone lines to satellites.[14] In its most basic form, the Internet is a series of interconnected computers that talk to each other via wires much like how we talk to each other on the telephone. These wires connect to something inside the computer called a "network interface" which is analogous to a person's mouth. Most people would recognize this as a modem or ethernet card. Usually, each modem has one or more IP addresses associated with it. Essentially, an IP address is a set of numbers that identify an address on the Internet, which then connects a particular computer to that address.[15] Much like we use a telephone number to contact a friend or loved one, computers use IP addresses to communicate with one another.

{11}When compared to traditional methods of communication, one of the many differences with the Internet is that there is often no identifiable sender of information. Moreover, it is only in very rare instances that the author of information published on the Internet directs his message to a particular recipient. That is to say, senders do not control the means by which the message is distributed. When messages are sent over the Internet, they are routed through a series of "protocols and packet switches."[16] This means that the data is broken up into small pieces and then systematically routed through a series of phone lines.[17] Each piece of data travels down a different path and is then put back together once it reaches its final destination, namely the receiving computer. This systemof routing makes it virtually impossible to determine the exact geographic path of a message.[18]

{12}Most people logging onto the Internet do so through an Internet service provider, like America Online or CompuServe.[19] When logged on, the computer connects to other computers all over the world.[20] When a customer fills out a contract or places a purchase order on the Internet, the information leaves the computer

and travels to a nearby router.[21] Routers are analogous to postal substations that route mail to the appropriate area post office.[22]As such, when A sends a letter from California to B in New York, the letter does not leave California and magically appear in New York; instead, it is routed through a variety of substations on its path to its final destination in New York. The most pertinent fact is that A has no idea where the letter has been on its way to New York. The same is true with the Internet.

2. Users of the Internet

{13}According to current estimates, there are more than "thirteen million host computers in ninety countries linked by more than fifty-thousand connected computer networks."[23] Moreover, there are an estimated 650,000 websites currently in existence.[24]In terms of demographics, a majority of Internet users are trained professionals, between the ages of twenty-one and forty-five years-old, who have attained a college degree or higher.[25] Many of these individuals obtain access to the Internet either through school or work;[26] while, others rely on Internet service providers or commercial online services.[27]

{14}Notwithstanding how an individual logs onto the Internet, once online, he enjoys access to more information than contained in the New York City Public Library.[28] Yet, with very limited exception, the Internet is not regulated.[29]

3. Future of the Internet

{15}With "not just a billion connected people, but a trillion connected devices," failure to regulate this immense industry could prove disastrous.[30] Over time, computers have found a way into every facet of our lives. Everyday household items, like cars, roads, vending machines, and houses, contain computing devices.[31] The good old days of taking apart the engine of the 1972 family Volkswagen Beetle are no more. The Internet, or "the network computing revolution," will connect all of these components, so that one day we will be able to complete tasks our fathers could never imagine.[32]Now consider wielding this tremendous power without any rules or regulations whatsoever.

B. *Electronic Contracting*

{16}The number of people conducting business and making purchases over the Internet is growing at an exponential rate. Approximately thirty-two percent of all individuals making Internet purchases spend between $100-500. Moreover, a startling 38% of all individuals making purchases on the Internet spend more than $500 per purchase.[33]Yet, on-line shopping is expected to soar.

{17}Given the large number of Internet transactions transpiring on a daily basis that amount to millions of dollars in revenue, disputes between customers and businesses are an inevitable consequence.[34]Thus, there is a clear need for a uniform system of choice of law.

- **Background**

1. What is Electronic Contracting?

{18}There are several types of electronic contracts. One type of electronic contracting is Electronic Data Interchange ("EDI").[35]In its most basic form, EDI simply transfers information between a series of networked computers.[36]However, EDI presupposes that trading partners have a prior working relationship.[37]For instance, a purchaser's computer senses that inventory levels are low, and as a result, initiates a sales transaction with the seller's computer using an agreed-upon purchase order.[38]Upon receiving the confirmation of a purchase order from the purchaser's computer, the vendor's computer directs the shipping department to send the requested goods to the purchaser, again using an agreed-upon form.[39]This series of transactions can be completed without any human interaction whatsoever.[40] Consequently, EDI is an

attractive option for businesses because it cuts down on printing, personnel, and other costs ordinarily incurred.[41] Nonetheless, EDI is not the optimal choice for everyone.

{19}For instance, EDI will not work in the case of two trading partners who have no prior business interaction, such as customers visiting the Vir-All website. However, due to the nature of modern day computer networks, prior business relationships are not always necessary.[42] Whether dealing via networks, or face-to-face negotiations, many traditional contracting elements, such as authenticity, integrity, and non-repudiation, still exist.[43]In some cases, the purchaser may use an "intelligent agent," a program that executes a search on the Internet given the user's search parameters, to search out goods or services.[44]In other cases, a private individual browsing the Web, might discover a vendor's homepage on which the vendor offers goods and/or services.[45] In either situation, the purchaser may wish to contract with the seller, thus raising issues of contract enforceability.

{20}The nature of the open network is also the difficulty with electronic commerce.[46]In the case of a purchaser and seller who have no prior dealings, it is difficult to identify the parties to the contract.[47]Moreover, open networks also raise the issue of jurisdiction, which is dealt with in-depth later in this article.

2. Electronic Contract Formation

{21}One of the greatest concerns respecting electronic contracting is satisfying the Statute of Frauds. Returning to the Vir-All example, when a customer in New York or London completes the contract on Vir-All's website, the question arises whether there is a valid contract. If so, when and where was the contract formed? When a customer fills out an order form on a website, is it an offer or an acceptance? Most importantly, which forum has jurisdiction to enforce the contract, and which forum's substantive laws apply to resolve the claim?

a. Statute of Frauds

{22}The Statute of Frauds in Article 2 of the U.C.C. was drafted in an attempt to encourage parties to reduce their agreements to writing, as well as to avert a party's ability to introduce perjured testimony at trial.[48]As a consequence, when a party reduces an agreement to writing, he is essentially precluded from denying that the contract was made.[49] Subject to a number of exceptions, Article 2 provides:

> [A] contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.[50]

{23}As previously mentioned, thirty-eight percent of all Internet purchases exceed $500, thus falling within the purview of the Statute of Frauds. When the Statute of Frauds is implicated, the primary issue regarding electronic contracts is the classification of electronic text, like e-mail and websites, that should be classified as writings.

{24}A "writing" is defined as a "printing, typewriting or any other intentional reduction to tangible form."[51]Additionally, the U.C.C. only provides that the writing be signed by the party against whom enforcement is sought.[52] However, the writing does not require communication or receipt by the other party.[53] "Signed" is defined as being "any symbol executed or adopted by a party with present intention to authenticate a writing."[54]

{25}Thus, the question is whether the electronic text of an email message or website constitutes a "signed writing" under U.C.C. Article 2. The "signature" requirement may be satisfied by confirmation,

acknowledgment, or separate agreement. Otherwise, "the sufficiency of the electronic message depends on the manner in which one finds it stored or produced."[55]Professor Nimmer states that, "[i]n purely electronic transmissions that d[o] not begin or result in printed or other tangible manifestations adequate for the statute of frauds, the enforceable status of the transaction remains unclear."[56] For purposes of Article 2, one way to support an electronic message's status as a "writing" is to print and retain a hard copy for recording purposes. Another issue is determining whether the text of the website satisfies the Statute of Frauds. Once again, if a hard copy of the text is retained, the Statute of Frauds is satisfied.

{26}Thus, it appears that under Article 2, a court will construe an Internet transaction between a buyer and seller as a binding contract. Moreover, an on-line buyer is well advised to print out a "hard copy" of the relevant pages of the site for record keeping purposes in the event that a dispute arises over the contract. Finally, in light of the fact that thirty-eight percent of people surveyed spend more than $500 on Internet purchases a six month time period,[57] the Statute of Frauds is an important consideration.

b. U.C.C.

{27}Is the electronic text of an email message or website an offer or an invitation to make an offer? Turning to the U.C.C. for guidance, "a contract for [the] sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties recogniz[ing] the existence of such a contract."[58]Article 2 continues, stating, "[u]nless otherwise unambiguously indicated by the language or circumstances … an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."[59] The essential question is deciphering whether the seller or buyer made the offer.

{28}The court will likely distinguish a webpage as an invitation to make an offer, rather than an offer itself.[60] On any given webpage, the seller usually disclaims any guarantee that the goods offered on the site will be available at published prices. Thus, unless the seller makes it absolutely clear, the potential buyer's order will likely be viewed as "inviting acceptance [,] either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods."[61] The court may construe the website content as an offer, thus inviting the buyer to accept, if its language specifically calls for acceptance by a specified act (*e.g.*, phone, fax, or e-mail) of the buyer.[62]

{29}Historically, Article 2 is viewed as applying only to tangible products, not intangibles like information.[63] The problem with current Article 2 is its limited scope. Article 2 § 102 specifically states that "[u]nless the context otherwise requires, [Article 2] applies to transaction[s] in goods."[64] Furthermore, goods are defined as "all things …which are moveable at the time of identification to the contract."[65] Thus, the need arose to revise Article 2 so that it addresses the requirements of the information age and the changing world of commerce. From the ashes, with laptop in hand, arose proposed U.C.C. Articles 2 and 2B.

c. Proposed U.C.C. Articles 2 and 2B

{30}Proposed Articles 2 and 2B are a direct response to the fear that the current Article 2 fails to provide a suitable body of law to protect online consumers and merchants.[66]The scope of newly proposed Article 2 is broader than the current Article 2. The general scope of proposed Article 2B states that, "[t]his Article applies to licenses of information and software contracts whether or not the information exists at the time of the contract …."[67]The drafters hoped that the practical effect of enacting proposed Article 2B would broaden the scope of proposed Article 2, since a number of previously excluded contracts, specifically electronic contracts, now fall within its purview.

{31}Proposed Article 2 was drafted more broadly with the hope that courts would recognize the validity of electronic contracts under Article 2's current scope.[68] By definition, electronic contracts are not made using pen and paper. Thus, courts may find that an electronic contract is not valid due to the lack of a signed

writing.[69]Nevertheless, courts are willing to recognize facsimile transmissions and telegrams as valid signed writings.[70]

{32}The authors of proposed Articles 2 and 2B deleted the terms "writing" and "signed."[71]Instead, the term "writing" was replaced with "record," and "signed" was replaced with "authenticate."[72]The term "record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."[73]The practical effect is to include electronic transactions as "writings."[74]Moreover, the term "authenticate" is defined as ""a signature], or … a symbol [that is adopted] … in whole or part with the intent to identify the party…."[75]Again, the practical effect is to allow for any encryption process used by a contracting party to identify themselves or others in electronic contracts.[76]

{33}One of the major issues with electronic contracts is the validity because invalid documents may be denied legal effect. In response to this problem, Section 2B-114 provides that electronic records cannot be denied validity based solely on their electronic nature.[77]Historically, courts have denied electronic records validity because fraudulent records can be easily created.[78]To alleviate this problem, the drafters included specific evidentiary provisions called "attribution procedures" in Section 2B-1150 of proposed Article 2B.[79]

{34}An "attribution procedure" is "a procedure established by law or agreement or adopted by the parties" and is used to verify electronic records and messages, provided that the "procedure is commercially reasonable."[80]The drafters did not include a specific attribution procedure within Section 2B-1150. The provision, however, does state that it may include "any security devices that are reasonable under the circumstances."[81]Thus, if the parties use an pre-agreed attribution procedure that is deemed to be commercially reasonable, any disputes arising out of the transaction create a rebuttable presumption that the electronic message originated from the specified party.[82]

{35}Under Section 2B-1161, there are three circumstances when an electronic message is attributable to a party: (1) when a sender or their agent, either electronic or human, sends an electronic message to a receiver;[83](2) when the receiver detrimentally relies on an electronic message sent by a sender or her agent, either electronic or human;[84]and (3) when a third party fraudulently sends an electronic message to a receiver, but the message is attributed to the sender because the third party obtained access to the sender's attribution procedures as a result of the sender's failure to exercise due care.[85]Section 2B-1161 also provides that the burden of proof falls on the party claiming detrimental reliance on an unsent message.[86]The party's reliance must be reasonable to uphold the claim.[87] The party accused of sending the message must show that they used reasonable care in the transmission of the message.[88] However, it is unclear whether a party would succeed even if the burden of proof is met.

d. UNCITRAL Model Law

{36}The United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Electronic Commerce was adopted on December 16, 1996.[89]The Model Law generally applies to "data messages as defined in paragraph (1) of Article 2 where the data message relates to international commerce."[90]The law seeks to provide "basic rules on the validity, attribution and effect of computer-based and other forms of electronic messaging in commerce."[91] The Model Law consists of two chapters. The first chapter contains rules of general application, while the second chapter contains a number of special rules for particular areas of commerce.[92] Most notably, its provisions essentially mirror those of proposed U.C.C. Articles 2 and 2B.

{37}The Model Law is a comprehensive document that addresses various aspects of electronic commerce, some of which apply in a conflict of laws analysis. Thus, given the brevity of this article, the following sections primarily address the relevant portions of the Model Law applicable to a choice of law analysis.

{38}Beginning with Article 2, the Model Law provides a list of definitions relevant to understanding its scope and applicability.[93]Articles 5 and 6 enable the legal recognition of data messages.[94]Essentially, electronic data messages produce the same legal effect as messages written in traditional format, such as on paper. Article 7 focuses on authentication, one of the foremost concerns of electronic contracting.[95] In the context of the traditional contract, the signature functions as a means of authentication. Since electronic contracts offer no room to sign, authentication of electronic messages proves problematic. Article 7 asserts that any "method used to identify [a] person" constitutes a signature.[96] The formation and validity of electronic contracts emerge as another predominant issue facing electronic contracts. Article 11 states that both, the offer and acceptance of the terms of a contract can be made via electronic messages.[97]

{39}Attribution is the process of attributing an electronic message to the sender. With respect to electronic contracts, the problem arises when A obtains access to B's e-mail account and then sends a message to C. Although A sent the message, the message is attributed to B. At first glance, one might think that this is merely bothersome. However, if A accesses B's account and proceeds to order $100,000 worth of Vir-All, the situation becomes more than just bothersome. In addressing this issue, Article 13 establishes criteria that provide guidance to a judicial body, either a court or an arbitration panel, in determining whether an electronic message is attributable to a particular party. [98]

{40}The location and timing of contract negotiation and consummation play a pivotal role in conflict of law analysis for contracts. The location where the contacting occurs provides the substantive law that governs the agreement; hence, the place of contracting determines the outcome. Since electronic contracts are often negotiated and executed in cyberspace, problems similar to determining personal jurisdiction on the Internet arise. In addressing this issue, Article 15 sets out a series of criteria for determining when and where an electronic message is sent and received.[99]

{41}With regard to the question of "when" a contract is negotiated and/or executed, Article 15 provides that an electronic message is deemed simultaneously dispatched and received if sent by means of an information system specified by the parties.[100]In cases where the parties do not specify an information system, a message is deemed received at the instant it is retrieved.[101]

{42}With regard to "where" an electronic contract is negotiated and/or executed, Article 15 states that a message is "deemed dispatched at the place where the originator has its place of business, and is deemed received at the place where the addressee has its place of business."[102]Article 15 also provides for cases where the dispatcher or receiver of the electronic message has more than one place of business or does not have a place of business.[103]In the event that either party has more than one place of business, for purposes of this section, the place of business is the one bearing the closest relationship to the transaction.[104]If a party does not have a place of business, then the party's habitual place of residence is substituted for the place of business.[105]

e. The Singapore Model: Electronic Transactions Act of 1998

{43}In response to the explosive growth of electronic commerce, Singapore enacted the Electronic Transactions Act of 1998 ("ETA").[106]

{44}The aim of the ETA was to create a legal framework for the regulation of electronic commerce in Singapore. In conceiving the ETA, the drafters sought to address four important concerns: (1) creation of an integrated global framework for electronic commerce; (2) avoidance of over-regulation; (3) flexibility and neutrality to facilitate change and maintain pace with a "fluid global environment"; and (4) clarity and predictability in the law.[107] It is worth noting that some of these provisions mirror those of UNCITRAL and proposed U.C.C. Articles 2 and 2B.

{45}The most pertinent goal of the ETA, at least with respect to this article, is the enactment of a commercial code specifically written to address electronic transactions. Part IV of the ETA deals specifically with Electronic Contracts and addresses issues of formation.[108]In addition, the ETA also initiated a "public key infrastructure" to assist in the use of digital signatures.[109] The public key infrastructure was designed to provide a means by which government agencies can electronically issue permits and licenses. Lastly, it provides immunity for network service providers, like America On-line and CompuServe, from criminal or civil liability for materials distributed by third parties.[110]

{46}Part IV, Section 11 of the ETA specifies that an offer and acceptance can be made via electronic message.[111] However, the central issue with electronic contracts is determining the exact moment of formation. In other words, when is an offer and an acceptance deemed offered and accepted? Section 15 provides that the message, whether it is an offer or acceptance, is sent at the "[moment] it enters an information system outside the control of the originator."[112] Essentially, this means the instant the message is sent.

{47}However, according to Section 15(2), the time of acceptance varies.[113]If the dispatcher, who is the offeror, designates a specific information system to which the message containing the offer will be sent, the offer is deemed received at the instant the message enters said information system.[114]If, however, the dispatcher does not specify an information system, the offer is deemed received at the instant the recipient (*i.e.*, the offeree) retrieves the message.[115]

{48}Another important consideration in electronic contracts is the location of the offeror and the offeree. Specifically, where is the offer sent from and where is the acceptance made? Section 15(4) states that, subject to a prior agreement to the contrary, the place of dispatching is the sender's place of business.[116]If, however, the sender or dispatcher has more than one place of business, then the situs for the transmission of the electronic message is the place that has the closest relationship with the underlying transaction.[117]If, on the other hand, the sender does not have a place of business, then the sender's usual place of residence is the situs for the transmission.[118]In the case of a corporation, the "usual place of residence" refers to the place of incorporation.[119]

{49}As the preceding sections demonstrate, the Internet is a vast and complicated area requiring regulation. The area of electronic contracts is one requiring special attention, given the number of persons with access to the Internet, and the billions of dollars spent on products and services purchased through the Internet. Several bodies have proposed numerous ways to deal with the issues raised by electronic contracting. These laws serve as excellent models upon which federal legislation regulating electronic contracts can be based.

III. SUBJECT MATTER JURISDICTION: A MATTER OF FEDERAL LAW.

{50}Federal legislation governing electronic commerce must be enacted. Enacting federal legislation eliminates the need for a choice of law analysis. However, the issue becomes whether Congress has the authority to pass such legislation, and, if so, from where it possesses such authority. Moreover, does this authority violate the Tenth Amendment? The other issue needing resolution, at least in the context of the Vir- All example, is whether transfers of electronic data qualify as goods in interstate commerce, and are thus subject to federal legislation.

A. *Commerce Clause: Authority of Congress to Regulate Interstate Commerce*

{51}The Commerce Clause provides that "Congress shall have the power to regulate commerce with foreign nations, and among the several states and with the Indian tribes."[120]Traditionally, Congress has broad power to regulate interstate commerce. In *Maryland v. Wirtz*,[121]Justice Douglas stated, in his dissent, that Congress may regulate "[a]ll activities affecting commerce."[122]However, with the advent of the Court's

decision in *U.S. v. Lopez*,[123] many scholars felt that Congress' commerce power shrank.

{52}Many legal scholars believed that the *Lopez* decision sounded the death knell for Congress' ever-expanding commerce power.[124]In a sharply divided 5-4 decision, the Court struck down the Gun Free School Zone Act of 1990 ("GFSZA"),[125]stating that it exceeded Congress' commerce power under the Commerce Clause.[126]The GFSZA forbade "any individual to knowingly posses a firearm at a place that [he] knows … is a school zone."[127]The Court reasoned that the GFSZA was a criminal statute that did not in any way regulate economic activity, no matter how broadly defined.[128] However, the *Lopez* decision did not restrict the expansive view of Congress' commerce power wielded by nearly every Court since *Wickard v. Filburn*.[129]

{53}In reality, the *Lopez* decision carved out a very narrow exception to the historically expansive interpretation of Congress' commerce power. *Lopez* essentially held that Congress possessed the authority to regulate three broad categories of activity: channels of interstate commerce; instrumentalities, persons, or things in interstate commerce, even when purely intrastate in nature; and those activities having a "substantial" relation to interstate commerce.[130] The only real change that *Lopez* effectuated is that the regulated activity must have a "substantial" effect on interstate commerce.[131] Moreover, the statute in *Lopez* exceeded Congress' commerce power simply because it bore no relation to an economic activity.[132] Thus, even with the *Lopez* decision lurking in the shadows, the Court will likely uphold a federal statute regulating an economic activity that substantially affects interstate commerce.

{54}With this in mind, the question is whether electronic commerce falls within the definition of an economic activity having a substantial effect on interstate commerce**.** As the following section illustrates, it clearly does.

B. *Defining Commerce: Tangible v. Intangible Goods*

{55}One of the issues Congress must resolve in drafting this legislation is whether downloaded computer programs constitute interstate commerce. If commerce is defined as the flow of goods from point A to point B, then whether software sold on the Internet constitutes a "good" is a key question. The Department of Commerce has specifically stated that "software on a carrier medium exhibits characteristics of both concrete property and abstract knowledge."[133] Thus, it follows that data downloaded onto a medium (*e.g.*, a hard-drive) fits within this definition of goods.

{56}Moreover, the number of Internet users and the number of webpages double every 100 days.[134] There are "thirteen million host computers in ninety countries linked by more than fifty thousand connected computer networks."[135] More than six-hundred fifty thousand websites are currently in existence.[136]At any given point in time, the Internet is used by more than 140 million people around the world. e-business or e-commerce will grow into a $600 billion industry by 2002.[137]

{57}Most notably, electronic commerce transcends all physical boundaries, including state and national borders. This is true even in cases where the product is sold and shipped to the same state. In the Vir-All example, when the customer initially logged onto the Internet, his connection was routed through several servers and networks located throughout the United States and, in some cases, the world. Thus, due to its nature and given the amount of money spent on products bought on the Internet, electronic commerce is clearly an economic activity having a substantial effect on interstate commerce.

{58}Therefore, there is no question that Congress has the authority to regulate electronic commerce on the Internet pursuant to its commerce power. However**,** the issue does arise as to whether this right infringes upon the rights reserved to the states under the Tenth Amendment**.**

C. *Precluding State Regulation of Electronic Commerce*

{59}The Tenth Amendment provides that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the United States, are reserved to the States respectively, or to the people."[138]In 1997, Congress passed the Internet Tax Freedom Act that essentially placed a three-year moratorium on the ability of states to tax electronic commerce, with very limited exceptions.[139]Moreover, in *American Library Association v. Pataki*,[140]the court stated that the Internet is "analogous to a highway or railroad," and therefore, it is an instrument of interstate commerce, governed by the Commerce Clause.[141] Yet, it is not certain that when the three-year moratorium is lifted, whethersubsequent federal legislation will take place.

{60}The Dormant Commerce Clause provides that, where there is no uniform system of regulation required by the federal government, the states are free to regulate commerce.[142] Subject to some exceptions and nuances, the state regulation must satisfy a two-part test to avoid violating the Commerce Clause. First, the state regulation must be non-discriminatory. In essence, the state regulation must not discriminate against interstate commerce in favor of local interests. Second, the state law must not unduly burden interstate commerce. Courts are required to balance the state's interest in regulating the activity against the burden on interstate commerce. Additionally, there must not be less intrusive means of regulation available to the state.[143]

{61}A number of state legislators have attempted to regulate content on the Internet, and some are considering regulating electronic commerce on the Internet. New York's Internet Decency Law[144]is one such example. A federal district court struck down the statute in *American Library Association v. Pataki*[145] because it was found to violate the Dormant Commerce Clause. The court stated that the New York statute concerned interstate commerce given the nature of the Internet, despite the fact that it was aimed at regulating the content of information entering the state.[146]The court reasoned that the Internet is an area requiring national regulation, since attempts at regulation by the states would result in inconsistent laws, thereby subjecting users of the Internet to conflicting obligations.[147]Based upon this reasoning alone, states may be preempted from electronic commerce and Internet regulation.

D. *Addressing the Choice of Law Issue*

{62}As the following sections illustrate, the problem with choice of law in electronic commerce cases is that several states often have competing interests in the application of their own substantive law. This presents a problem when claims are either filed in or removed to federal court under diversity jurisdiction. The constitutional grant of jurisdiction to federal courts based on diversity of citizenship extends to "[c]ontroversies … between citizens of different states … and between a state, or the citizens thereof, and foreign states, citizens or subjects."[148]In diversity actions, federal courts are forced to apply the "substantive" laws of the state in which they sit pursuant to the *Erie* doctrine.[149]Moreover, the U.S. Supreme Court, in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[150]specifically held that choice of law is considered "substantive" rather than "procedural."[151] Therefore, where choice of law is an issue, diversity cases in federal court face the same uncertain outcome as cases filed in state courts because different state laws produce varying outcomes.

{63}The simplest way to resolve this matter is through a federal statute. A federal statute would provide uniform application to, and results in, the same cause of action, regardless of where the claim is filed. Federal law would preempt all state laws, providing fair and consistent results.

{64}This federal question jurisdiction is derived from Article III of the U.S. Constitution.[152]Article III grants jurisdiction over "[c]ases … arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."[153]In turn, pursuant to 28 U.S.C. § 1331,

Congress states that "[federal] district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."[154] Thus, if Congress passes a law regulating electronic commerce, federal courts retain original subject matter jurisdiction to hear all claims challenging the federal laws. Any claims citing to the federal laws, however, would still be governed by laws in state court. Again, a fair and uniform result is achieved. The courts would not be bound to apply the substantive choice of law rules of any state.

IV. PERSONAL JURSIDICTION: THE PROBLEM OF PRESENCE.

{65}With respect to personal jurisdiction, electronic contracting raises the problem of presence. However, jurisdictional disputes do not arise in every Internet-related lawsuit. There are cases where the defendant has established sufficient minimum contacts with the forum. The problem of jurisdiction only arises where the defendant is not physically present in the forum, or when there is no continuing relationship with the forum. Referring back to the Vir-All example, Scott was asked to defend a suit in a state in which he was neither present, nor had any contact. The Vir-All example illustrates how the advent of electronic commerce allows parties to negotiate, sign, and consummate a contract over the Internet without having any contact with a forum state.

{66}Nearly all court opinions on personal jurisdiction first discuss how the court obtains subject matter jurisdiction, and then engage in a due process analysis by applying the minimum contacts test and all relevant fairness factors.[155]In keeping with this format, this article discussed the relevant subject matter jurisdiction analysis in the preceding section. Beginning with the historical development of personal jurisdiction from *Pennoyer v. Neff*[156] to *Burnham v. Superior Court of California*,[157] subsequent sections of this article discuss issues surrounding personal jurisdiction.

A. *The Evolution of Personal Jurisdiction*

{67}Personal jurisdiction is the power of a court to adjudicate a claim against a defendant and to render a judgment enforceable against the defendant or any of his assets.[158]Personal jurisdiction traces its roots to the landmark decision in *Pennoyer v. Neff*,[159] dating back to 1877. Since *Pennoyer*, courts have struggled to define the precise constitutional limitations finding personal jurisdiction over defendants. *Pennoyer* made it clear that presence within a forum confers in-personam jurisdiction over a defendant, while the presence of property confers in-rem jurisdiction.[160]Writing for the majority, Justice Field reasoned that personal jurisdiction over a defendant can only be found where the defendant was present or voluntarily appeared within the forum's borders.[161] Needless to say, the technological advancements over the past 120 years have rendered *Pennoyer*'s definition of "presence" outdated and obsolete.

{68}In 1877, a vast majority of contracts were both negotiated and consummated in face-to-face dealings. With the advent of the telephone and the fax machine, however, the standard course of dealing changed. This created the need for an expansive view of the permissible reach of the Court's jurisdictional boundaries. The Court's response to the changing business environment was *International Shoe v. Washington*. [162]*International Shoe* expanded the reach of a court because it conferred personal jurisdiction over defendants located outside the forum's territorial jurisdiction.[163]

{69}Justice Stone, writing for the majority, held that the defendant shoe company was subject to personal jurisdiction in the State of Washington, even though it was based outside of thatstate's borders.[164] The Court's reasoning was based in part on the fact that the defendant sent sales associates to Washington. The salesman then proceeded to conduct business in Washington, thereby establishing contact with the state. [165]This became known as the "minimum contacts test."[166]However, this significant expansion of the Court's jurisdictional reach under *International Shoe*'s minimum contacts test raised the question of due process.[167] Did this new expansive reach violate the defendant's due process rights? The Court concluded

that the defendant's due process rights would not be violated if the defendant's minimum contacts with the forum state were "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[168]In 1957, the Court, in *McGee v. International Life Insurance Co.*,[169] further expanded the minimum contacts test. In *McGee*, the Court found jurisdiction over a defendant insurance company with only one policyholder in the forum state.[170]The *McGee* decision is viewed by many as bordering on the fringes of unconstitutionality.[171]

{70}Many lower courts are split on the issue of whether the defendant in *McGee* had sufficient contacts with the forum to permit a finding of jurisdiction.[172]Due to badly fractured lower court interpretations of *McGee*, personal jurisdiction was categorized into general and specific jurisdiction.[173] What followed, some twenty-three years later, was one of the most influential decisions on personal jurisdiction.

{71}In 1980, the Court pronounced the landmark decision of *World-Wide Volkswagen Corp. v. Woodson*.[174]*World-Wide Volkswagon* resolved some of the complexities of balancing the factors in the "fair play and substantial justice" prong of the *International Shoe* test.[175]In *World- Wide Volkswagen*, the Robinsons purchased a car in New York.[176]As they passed through Oklahoma on their way to Arizona, they were injured in a car accident allegedly caused by a defect with their new car.[177]

{72}The Robinsons filed suit in Creek County, Oklahoma, naming the dealership, importer, distributor, and manufacturer - none of whom were based in Oklahoma - as defendants.[178]

{73}World-Wide, the regional distributor, and Seaway, the dealer, were both based in New York and consequently had no connection or contact with Oklahoma.[179] Both World-Wide and Seaway moved to dismiss for lack of personal jurisdiction, but the Oklahoma court denied their motions. Upon review, the United States Supreme Court found that even though New York-based Seaway could have anticipated that one of its cars would end up in Oklahoma, it would be unfair to subject it to jurisdiction there because it could not have foreseen being haled into Oklahoma to defend a lawsuit.[180]

{74}The manufacturer, on the other hand, had dealerships in Oklahoma that sold Volkswagens.[181] The Court reasoned that the manufacturer placed a large number of automobiles into the stream of commerce whereby some of these automobiles would enter the state of Oklahoma. Thus, the manufacturer was subject to personal jurisdiction in Oklahoma.[182]This expansive view of personal jurisdiction in *World-Wide Volkswagen* evidenced the Supreme Court's acknowledgment of the technological advancements made in the areas of transportation and communication.[183]

{75}The Supreme Court, in *World-Wide Volkswagen*, articulated a two-prong due process test for determining personal jurisdiction.[184] The first prong, often described as the "minimum contacts test," focuses on two factors: (1) the non-resident defendant's connection or affiliation with the forum state; and (2) the nexus between the defendant's connection to the forum and the litigation.[185]The second prong looked at a series of relevant factors in determining whether an assertion of jurisdiction comports with notions of "fair play and substantial justice."[186]

{76}As applied, there are several factors employed by the Court to implement the minimum contacts test. These factors include: (1) whether "the defendant has 'purposefully directed' his activities at residents of the forum" and [whether] "the litigation results from alleged injuries that 'arise out of or relate to' those activities;"[187](2) whether the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws;"[188] and (3) whether the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[189]The Court considers each of these factors separately, giving courts some leeway in determining whether a defendant's contacts with the forum state satisfy the minimum contacts test.[190]

{77}The notions of "fairness and substantial justice" from *International Shoe*[191]were more specifically addressed forty years later in *Burger King v. Rudzewicz*.[192]In *Burger King,* the Court expanded on the factors it first considered in *International Shoe* to determine whether a finding of personal jurisdiction offends notions of "fairness and substantial justice."[193]

{78}In *Burger King*, the Court specifically held that, if a defendant purposely directs his activities toward the forum**,** then it is "presumptively not unreasonable to require the defendant to submit to the burdens of litigation in that forum …."[194]The Court further stated that this presumption might either be enhanced or overcome by an evaluation of other factors in determining whether an assertion of jurisdiction by the forum comports with "notions of fair play and substantial justice."[195] The factors that the Court looked to in making this determination include: (1) the burden on the defendant; (2) the adjudicative interest of the forum state; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the systemic interest of the national judicial system in obtaining the most efficient resolution of the litigation; and (5) the systemic interest in furthering substantive social policies.[196]In an attempt to distinguish between a fair and unfair finding of jurisdiction, the *Burger King* Court noted that, "a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state…."[197]

{79}Two years after the *Burger King* decision, the Court handed down its decision in *Asahi Metal Industry Co. v. Superior Court*,[198] which is the leading case to date on the stream of commerce doctrine. In a split, four-justice plurality, the *Asahi* Court narrowly refused to assert jurisdiction over a Japanese company whose defective tire valve was swept into the stream of commerce while making its way to California.[199]The *Asahi* Court relied heavily on *Burger King*'s factors; yet, reached a different result.[200]The Court held that the mere foreseeability that the stream of commerce might carry a product into the forum was insufficient to confer jurisdiction over the defendant without additional conduct on the part of the defendant.[201]The Court illustrated several types of "additional conduct of the defendant" that might be suitable to allow a court to assert personal jurisdiction, such as specifically designing, advertising, or marketing a product with specific reference to the forum state.[202]

{80}By 1984, increasing advancements in technology resulted in splintered lower court decisions on the issue of personal jurisdiction. In an attempt to clarify the issue, the Supreme Court in *Helicopteros Nacionales De Colombia v. Hall*[203]reiterated the distinction between general and specific personal jurisdiction.[204]The *Helicopteros* Court held that "general personal jurisdiction" equates to "continuous and systematic contacts" with the forum, whether or not the contacts relate to the suit.[205]Specific personal jurisdiction, on the other hand, may arise from even a few contacts with the forum related to the suit.[206]

{81}In one of the most tenuous personal jurisdiction cases in recent history, the Court, in *Burnham v. Superior Court of California*,[207] affirmed the exercise of personal jurisdiction over a defendant based upon his transitory presence in the forum. In *Burnham*, Dennis and Francie Burnham, along with their two children, were residents of New Jersey. When Mrs. Burnham took the children and moved to California, Mr. Burnham filed for divorce in New Jersey, but failed to serve Mrs. Burnham with service of process. Shortly thereafter, Mrs. Burnham filed for divorce in California.[208]

{82}While on a business trip to California, Mr. Burnham decided to visit his children at his wife's home. While at her home, Mr. Burnham was personally served with a summons. In a special appearance, Mr. Burnham moved to quash the service of process for lack of personal jurisdiction. The Superior Court of California denied the motion despite the fact that the petitioner's only contacts with California were occasional business trips and visits with his children.[209]Upon review, the California Court of Appeals affirmed the trial court's ruling.[210]The Supreme Court of California declined to review the case.[211] The United States Supreme Court subsequently granted certiorari.[212]

{83}In an unanimous decision,the U.S. Supreme Court held that the trial court's assertion of personal jurisdiction over the petitioner did not violate the Due Process Clause.[213]In addressing the constitutionality of "transient,"[214]or tag jurisdiction, the Court recounted that courts have historically asserted general jurisdiction over defendants served within the forum.[215]Despite the Court's unanimous decision to uphold the California trial court's ruling, only four justices agreed that personal service within the forum satisfied due process requirements.[216]Four justices stated that each case required an analysis under the minimum contacts test, while one justice agreed with the assertion of jurisdiction, but disagreed with the breadth of the opinion.[217] After the dust settled, it remained unclear whether tag jurisdiction based upon personal service within the forum was a constitutionally valid basis for the assertion of personal jurisdiction. To date, the U.S. Supreme Court has not issued a subsequent ruling on this matter.

B. *Other Bases of Jurisdiction*

{84}There are some instances where the minimum contacts test is not satisfied. For instance, in the Vir-All example, assume that the New York court's ruling that it did not have jurisdiction over Scott was due to the fact that Scott's contacts with New York were not sufficient to satisfy the minimum contacts test. Pursuant to Section 402 of the Third Restatement first subsection, the court could have found jurisdiction through the application of the effects principle or a number of other bases of jurisdiction, discussed in detail in subsequent sections of this article.[218]

1. Territoriality principle

{85}The territoriality principle is by far the most common basis for the exercise of jurisdiction to prescribe, and is generally free from controversy.[219]

{86}The principle allows a state to proscribe the conduct of persons (*e.g.*, Internet service providers) located within the state's territorial boundaries. Moreover, under international law, states can be held responsible for allowing their territory to be used for unlawful activities directed against other states.[220]

{87}However, the territoriality principle does not allow a state to apply its national laws extraterritorially. For example, Syria or any Islamic country may legally ban the use of any products either made or originating from Israel. However, this principle does not allow Syria to ban all Israeli products from entering Jordan because this is contrary to international law. The case of *American Library Association v. Pataki*, [221]provides another illustration of the limitations of the territoriality principle. Note, however, that *American Library* deals with a dispute between a state and nation, as opposed to two sovereign nations.

{88}In *Pataki*, the Federal District Court for the Southern District of New York overturned a New York state law aimed at protecting children from receiving obscene and indecent material over the Internet.[222]The statute, in its practical effect, applied to Internet users located both in and out of New York state.[223]In the opinion, the court stated that, "Internet users have no way to determine the characteristics of their audience that are salient under the New York Act--age and geographic location."[224]*Pataki* made it clear that the territoriality principle is not an adequate basis for jurisdiction over Internet transactions.

2. Nationality Principle

{89}The nationality principle is the right of a state to regulate the conduct of its citizens or nationals, regardless of whether they are within the state's territory.[225]

{90}For example, the sexual exploitation of children is illegal in the U.S. Any adult who engages in sexual intercourse with a child can be punished by the U.S., even if the act is performed within the jurisdictional boundary of a state where it is legal or tolerated.[226]It is important to note that both the nationality and territoriality principles are applicable to both natural persons and legal entities (e.g. corporations).[227]

Although it has yet to be applied to the Internet, it is doubtful that the nationality principle provides an adequate basis for jurisdiction on the Internet.

3. Effects Principle

{91}The effects principle is invoked when a person or entity commits an act in one state that causes injury in another state.[228]In such cases, jurisdiction is not grounded in the act or omission, but rather in the injurious effects the act has on the forum territory.[229]The effects principle is the most controversial principle.[230]At the heart of the controversy is the situation where the act is legal in the state in which it is performed.[231]The effects principle has general application in US antitrust laws but has provoked considerable controversy due to the US' attempts to regulate the activities of foreign states.[232]Despite worldwide criticism, the effects principle has become increasingly accepted as a basis for jurisdiction.[233]

{92}The U.S. Supreme Court addressed the effects principle in *Calder v. Jones*.[234]In *Calder*, the Court upheld a California court's assertion of jurisdiction over two defendants from Florida.[235]Although the defendants' activities were performed in Florida, the Supreme Court found that they were deliberately targeted and calculated to cause injury to the plaintiff in California.[236]In doing so, the Supreme Court expressly approved the "forum effects" test of the Second Restatement of Conflicts of Laws.[237]The defendants, the author, and the editor of a libelous article had no material personal contact with California.[238]Accordingly, the Court had no basis to find that either defendant "purposefully availed" themselves of the benefits and protections of California law.[239]Notwithstanding, the Court held that it was reasonably foreseeable that the defendant's conduct in Florida would cause harm in California, and that they would be hailed into California to defend a suit.[240]The first cyberspace case to invoke the effects principle was *United States v. Thomas*.[241]In *Thomas*, the defendants were operators of a computer bulletin board system based out of their home in California.[242]They posted sexually explicit materials onto the bulletin board, including scenes depicting bestiality, sadomasochistic abuse, and urination.[243]Access to the bulletin board was limited to members required to pay a membership fee and to submit biographical information including age, address, and telephone number.[244] As long as a member had maintained access to the Internet, they could access the bulletin board and download pictures from anywhere in the world. After becoming a member, an undercover agent gained access to the bulletin board and downloaded some of the explicit material available to a computer in Memphis, Tennessee.[245]The defendants were subsequently charged with transportation of the sexually illicit material, and subsequently indicted in the federal district court of Tennessee.[246]The defendants moved to dismiss the action for improper venue, claiming that the illegal act occurred in California, not Tennessee.[247]

{93}The Sixth Circuit held that "the effects of the defendants' criminal conduct reached the Western District of Tennessee, and that district was suitable for accurate fact-finding."[248] As such, the court found that venue was proper. Incidentally, within a month of the sentencing in Tennessee, Mr. Thomas was also indicted in federal district court in Utah for similar crimes. Thomas moved to dismiss the charges in Utah on the grounds of collateral estoppel and double jeopardy, due to his conviction in Tennessee, but was denied.[249]

{94}Critics of the *Thomas* decision are quick to point out that the case sets bad precedent. At first glance, the *Thomas* decision seems to exacerbate the fear that, on any given day, an Internet-user can be hauled into court in Angola. However, it should be noted that, the defendants in *Thomas* knew the jurisdiction in which their files were most likely to be accessed because of the application that members were required to complete before bulletin board access was granted. Therefore, the assertion of personal jurisdiction in *Thomas* is not as tenuous as it may first appear.

{95}At first blush, it appears that the court could find jurisdiction over Scott in the Vir-All example using the reasoning of *Thomas*. However, Scott's situation is different. Recall that in Scott's case, he neither had knowledge, nor direct input in processing the orders from contracts. The whole process in the Vir-All

example was automated, requiring no human intervention. The facts of the *Thomas* decision did not mention whether the defendants had any direct input in processing the membership applications.[250] Therefore, the *Thomas* decision cannot be applied to Scott.

4. Universality Principle and the Protective Principle

{96}The "universality principle" allows a state to assert jurisdiction over a defendant extraterritorially in cases involving crimes that are universally condemned, such as terrorism.[251]The "protective principle" permits a court to assert jurisdiction over defendants who commit crimes that threaten the security of a nation or state.[252]Both the universality and protective principles are seldom used in civil litigation.[253] Thus, their application to electronic contracts is highly unlikely.

C. *Personal Jurisdiction and the Internet*

{97}The United States Supreme Court has not yet ruled on the issue of personal jurisdiction with respect to the Internet. However, with relatively few exceptions, the circuit courts have generally held that a telephone call directed into the forum satisfies the minimum contacts test.[254]

1. Judicial Opinions on Internet Jurisdiction

{98}In 1995, CompuServe again filed suit against a subscriber from Texas, in federal district court in Ohio.[255]In *Patterson*, the court granted the defendant subscriber's motion to dismiss for lack of personal jurisdiction.[256] The defendant in *Patterson* was a Texas resident who was never physically present in Ohio, but routed through Ohio via modem. Patterson sold an on-line computer program through CompuServe that customers could purchase and download off the Internet. As a result of the defendant's on-line business, CompuServe asserted that Patterson was amenable to process in Ohio. CompuServe reasoned that since Patterson was a party to the subscriber agreement, all of the products he sold were essentially sold through Ohio, since CompuServe was based in Ohio.[257]

{99}The district court held that there was no adequate basis for specific personal jurisdiction.[258]The trial court reasoned that since the defendant was not physically present in Ohio, the fact that the defendant sold products via a server based in Ohio was of little consequence, since his contacts with Ohio customers were very limited.[259]The Sixth Circuit reversed, holding that the defendant's contacts with Ohio were sufficient for the court to assert jurisdiction.[260]The circuit court stated that the defendant's use of CompuServe's services in Ohio constituted sufficient contacts for a finding of personal jurisdiction, despite a lack of physical presence in Ohio.[261]

{100}This decision flies squarely in the face of the Supreme Court's ruling in *Asahi*. Recall, that the Court in *Asahi* held that the mere foreseeability, without "additional conduct," that the stream of commerce might carry a product into the forum, was insufficient to confer jurisdiction over a defendant.[262] Arguably, Patterson's products came into Ohio, not through any purposeful actions on his part, but rather, by reason of the stream of commerce. Thus, according to the *Asahi* decision, the court of appeals incorrectly found that Patterson's contacts were sufficient to confer jurisdiction upon the court. Moreover, the finding of the court in *Pres-Kap, Inc. v. System One, Direct Access, Inc.*[263] supports this conclusion.

{101}In *Pres-Kap*, the defendant contracted to provide a network information service for airline and travel reservations for the plaintiff.[264]Both the defendant and the defendant's server computer providing the data service were physically located in Florida.[265] The plaintiff signed and negotiated the contract with the defendant in New York, where the defendant kept a local office. The plaintiff had no knowledge of the whereabouts of the defendant's server computer. At some point during their relationship, a dispute arose over the performance of the network. System One filed a complaint in Florida, but Pres-Kap challenged the court's

jurisdiction.[266]The court of appeals held that personal jurisdiction over Pres-Kap was improper, since computer contact, with nothing else, is an insufficient basis to establish jurisdiction.[267]The court reasoned that the ambiguity as to where the computer was actually present made personal jurisdiction unfair because it raised the prospect of subjecting private citizens to litigation in distant fora.[268]

{102}Thus, under *Asahi*, it follows that if a defendant advertises, and then sells a product over the Internet to a customer in New York, the court could not constitutionally find jurisdiction over said defendant. However, the Court in *Asahi* also stated that jurisdiction is proper in cases where the defendant specifically designs, advertises, or markets his product with specific reference to the forum state.[269]

2. Non-Judicial Opinions on Internet Jurisdiction

{103}As the preceding cases indicate, the courts have reached widely varying results despite similarities in the nature of the lawsuits. Uncertainty about the jurisdictional reach of territorially-defined courts over the trans-territorial Internet is slowly becoming a headache both for scholars and practitioners. Most legal scholars consider the Internet to be a new kind of place, a place called "cyberspace."[270]Cyberspace is a place where no territorial court can properly exercise personal jurisdiction over any cyber-defendant until the law either adapts or develops to address this new territory.[271]

V. TRADITIONAL CONFLICT OF LAWS ANALYSIS IN CONTRACTS.

{104}The modern conflicts of law or choice of law era did not begin until 1963.[272]In 1963, a compilation of the writings by the late Professor Brainerd Currie's was published.[273]Within the same year, the landmark decision of *Babcock v. Jackson*[274] was handed down by Judge Fuld of the New York Court of Appeals. Since then, conflict of laws doctrines have developed over time as courts have been confronted with facts requiring them to consider the application of another jurisdiction's laws. For instance, assume that there are two parties: party A located in New York and party B located in California. The two parties enter into a contract in Virginia. Some time later, A files suit against B for breach of contract in New York. The New York court may find that the proper law to apply is that of Virginia, or in the alternative, that of California. In such cases, the court may also invoke the laws of more than one jurisdiction.

{105}There are several subsets of the doctrine more generally known as conflict of laws. Jurisdictional issues are one such subset. However, the determination of which substantive laws to apply in resolving the issue is a wholly separate subset. The question of jurisdiction involves the determination of whether a court can exercise power over a party or the subject matter of the case. Substantive law questions, on the other hand, concern the law that a court will apply to the case, and arise only after the court has properly determined that it has jurisdiction over the parties and the issues before it.[275]

{106}Upon a proper finding of jurisdiction, a court then determines which law to apply substantively to the case by utilizing choice of law rules. This process is procedural in character and is traditionally made without regard to the substance of the laws that are in conflict. The court's conflict of laws or choice of law determination is a critical factor, as it is outcome determinative. Looking back to the earlier example, if the New York court applies the substantive law of Virginia, it may reach a different conclusion than if it applied the substantive law of California. Thus, when contractual disputes arise, courts are free to apply any number of rules.[276] Some of these doctrines are described in the succeeding sections of this article.

A. *Restatement (First) Conflict of Laws*

{107}Historically, the Restatement (First) Conflict of Laws (First Restatement)[277] was the primary

reference for choice of law decisions in the United States. The First Restatement focused on the geographic location of the place where the contract was formed.[278]In the landmark case of *Milliken v. Pratt,*[279] the court applied the First Restatement's doctrine of law to the place of contracting. In *Milliken*, the defendants executed and performed the contract in question in Portland, Maine. The plaintiffs were residents of Massachusetts; whereas, the defendants were residents of Maine. The defendants sued for payment in Massachusetts on a guarantee signed and executed by the defendant in Maine. The court held that the law of the place of contracting applied to resolve the case, provided that the law did not offend the public policy of the forum.[280]

{108}The rationale behind the First Restatement's Section 332 is considered in the following excerpt from Justice Story's *Commentaries*:

> Generally speaking, the validity of a contract is to be decided by the law of the place, where it is made. If valid there, it is by the general law of nations, *jure gentium*, held valid everywhere, by the tacit or implied consent of the parties. The rule is founded not merely in the convenience, but in the necessities of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse and commerce with each other.[281]

{109}Under this rule, the substantive law of the place of contracting determines the validity and construction of a contract.[282]More specifically, the place of contracting is where "the principal event necessary to make a contract occurs."[283] In most cases, the places of contracting and performance are the same. However, in some cases, the court's characterization of the issue as one of validity or performance of the contract becomes crucial in the choice of law process.

{110}The First Restatement approach remained largely unchanged until 1945, when the Indiana Supreme Court adopted the "significant contacts" test in *W. H. Barber Co. v. Hughes*.[284]Then, in 1954, the New York Court of Appeals in *Auten v. Auten*,[285] embraced the "center of gravity" approach. Though similar to the significant contacts test, the center of gravity approach emphasizes the policy considerations of conflicting laws. Nonetheless, it was not until 1963**,** that the choice of law revolution took flight with *Babcock v. Jackson*.[286]In the years following the *Babcock* decision, courts have become increasingly reluctant to apply the First Restatement when looking at choice of law issues.[287]

B. *Restatement (Second) Conflict of Laws*

{111}Following the erosion of the First Restatement's "place of contracting" approach, lower courts were badly splintered with regard to a uniform approach to choice of law.[288]A significant number of lower courts have embraced the "most significant relationship" analysis under the Restatement (Second) Conflict of Laws.[289] Under this approach, where a choice of law provision is absent from a contract, the court has to determine whether to apply the substantive laws of one state over another in resolving the issues presented before it. The following are factors that courts look to in making this determination: (1) the place of contracting; (2) the place where the contract was negotiated; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation or place of business of the parties.[290]

{112}The *Lilienthal v. Kaufman*[291]court specifically rejected the Second Restatement's place of contracting approach in favor of one form of the Second Restatement's "interest analysis" approach.[292]The *Lilienthal* case was based on a dispute over two promissory notes that the defendant signed in favor of the plaintiffs.[293] Subsequent to signing the notes, the defendant was declared a spendthrift and placed under guardianship by an Oregon court. The guardian then declared the defendant's entire obligations void. The plaintiff's contention was that the notes were executed and delivered in California, and thus should be governed by California law, which incidentally did not recognize the defendant's spendthrift status.[294]

{113}The Supreme Court of Oregon held that the substantive law of Oregon would be applied in the case, and accordingly, dismissed the plaintiff's claims.[295]The court also noted that the interests of neither state were more important than the other since both states had a significant interest in the transaction.[296]Despite this mutual interest in the underlying transaction, the court noted that the public policy of Oregon necessitated the application of Oregon law in the case.[297]

C. *Center of Gravity Test*

{114}Closely related to the Second Restatement's most significant relationship test is the "center of gravity" test.[298] It is the oldest of the contemporary choice of law doctrines. In applying the center of gravity test, the court first looks at all of the significant factors that might logically influence the decision of which law to apply.[299]The court then applies the substantive law of the state with the most significant connection to the transaction and/or to the parties in the case.[300] Ironically, the center of gravity test's greatest asset is ironically also its biggest weakness. Consequently, proponents of the center of gravity test contend that its flexibility is its greatest asset, while critics view this as its most notable weakness. For many years, the center of gravity approach was almost exclusively applied by the New York Court of Appeals. However, New York courts no longer follow this approach.

D. *Interest Analysis*

{115}In the 1950's, Professor Brainerd Currie of Duke University, introduced a new choice of law doctrine that became known as the "governmental interest" analysis, or simply "interest" analysis.[301]The goal of Professor Currie's interest analysis doctrine was to ensure that the law, as applied by the forum, serves the purposes for which that law was created.[302] In applying the interest analysis approach, courts follow the series of steps illustrated in the following example.

{116}Scott, a resident of California, and Kris, a resident of New York, enter into a contract in London. A dispute arises and Kris sues Scott over the contract in New York. The court first identifies the corresponding law in each state that addresses the issue in the case. The court then evaluates the policy considerations underlying each of the laws. Finally, the court examines each interested jurisdiction's relationship to the parties as well as issues in the case, and determines whether or not the application of a particular state's law is consistent with the policy considerations underlying each law. Once the court has made a determination, the choice of law analysis that follows is routine. However, if the court finds that the application of either law does not serve the underlying policy behind each of the laws, the forum applies its own substantive law as a matter of convenience. This raises the issue of a false conflict vis a vis a true conflict.

1. False Conflicts

{117}One of the greatest virtues of interest analysis is its ability to reveal false conflicts. A false conflict arises where only one state has an interest in having its substantive law apply to a case. The 1892 Alabama Supreme Court's decision in *Alabama Great Southern Railroad Co. v. Carroll*[303] provides an excellent illustration of this concept. In *Carroll*, the plaintiff was a citizen of Alabama and an employee of Great Southern, which also happened to be incorporated in Alabama.[304]Additionally, the negligent conduct that became the basis of the suit also occurred in Alabama.[305]Carroll alleged that a fellow employee negligently failed to properly inspect a train that contained a defective link between two cars, while the train was in Alabama.[306] However, Carroll was not injured until the train reached Mississippi.

{118}At the time of the suit, Mississippi followed the common law rule that an employer could not be held liable for injuries to a servant that were caused by the negligent act of a fellow servant.[307]Alabama, on the other hand, recognized employers' liability for the acts of its employees acting within the scope of employment.[308]The negligent act occurred in Alabama, and both the employees and the defendant

corporation were domiciled in Alabama. Nonetheless, the Supreme Court of Alabama mistakenly chose to apply the substantive law of Mississippi, reasoning that the cause of action arose in Mississippi, rather than Alabama.[309]

{119}Although a case may have a territorial connection to two or more states whose laws seem to be in conflict with one another, there is really no real conflict.[310] For this reason, the dispute is termed a false conflict. In the *Carroll* case, Mississippi had no interest in having its own law applied; thus, what appeared to be a conflict under the traditional approach was, in fact, a false conflict.

2. True Conflicts

{120}Unfortunately, not every conflict of laws situation turns out to be a false conflict. True conflicts exist where two or more states have an interest in having their substantive law applied. When faced with a true conflict, a court can choose to proceed in a number of ways: (1) to follow Professor Currie's view and apply the forum's law;[311](2) to determine whether "a more moderate and restrained interpretation" of the forum law reveals that its application does not accord with the purposes underlying it;[312](3) to ly the law of the state with the most significant interests, in other words the state most affected by non-application of its substantive law;[313] or (4) to ly a myriad of other choice of law doctrines.[314]

{121}One of the strengths of the interest analysis doctrine is its sensitivity to the substantive laws of non-forum states. Conversely, one of the historical problems with interest analysis is its failure to resolve true conflicts. Thus, the question remains, "what to do when the purposes behind all of the substantive laws being considered by the court are served by its application?" It has been suggested that there is no satisfactory answer to this question. Moreover, interest analysis, at least in its purest form, heavily favors the application of forum law.[315]

a. Leflar Model

{122}In 1966, Professor Robert Leflar published a law review article in which he endeavored to summarize all of the factors that influenced courts in their choice of law analyses.
[316] In his article, Leflar proposed the following factors: (1) predictability of outcome; (2) maintenance of order; (3) administrative burden on the court; (4) advancement of the forum's interests; and (5) application of the best rule of law.[317] Although Leflar's factors are hailed as extremely flexible, unfortunately, the theory tends to favor application of the forum law.

b. Contractual Choice of law Clauses

{123}Under the First Restatement, the traditional view of choice of law clauses in contracts was that they were presumptively unenforceable.[318]Presently, however, the Second Restatement espouses the contemporary view of a majority of courts that contractual choice of law clauses are generally enforceable.
[319]However, this general acceptance is subject to the "substantial relationship" exception, which holds that there must be some connection between the chosen law and the parties or transaction.[320]

{124}When a contemporary court is confronted with a choice of law provision in a contract, three issues must be resolved in determining whether the clause is enforceable: (1) whether the agreement is enforceable; (2) if so, whether it is subject to any exceptions; and (3) how the court should interpret the agreement.
[321]As in the problem with the Vir-All form contract, where there is no choice of law clause in the contract, the court will generally apply the law of the state most closely connected with the relevant contractual issue, or the parties to the case.[322]

c. Contemporary Trends in Choice of Law Doctrines

{125}There is no doubt that there is substantial disagreement among the courts with respect to choice of law methodology. There is, however, a clear trend away from the traditional common law rules of *lex loci contractus*. The Second Restatement, in one form or another, finds a home in a majority of states because it provides an alternative to the harshness of traditional conflicts rules.[323]However, due to the overwhelming acceptance of the Second Restatement, courts are increasingly reluctant to formulate new choice of law theories or to adapt existing theories to fit new developments like electronic commerce.[324] For example, Professor Currie's governmental interest analysis is largely relegated to a secondary role in modern conflicts analysis. Similarly, Professor Leflar's factors have assumed a secondary role, and are no longer considered primary sources for conflicts of law analyses.

{126}There is little doubt that the Second Restatement is far superior to the First Restatement, both in form and substance. Unfortunately, courts have arrived at mixed results in implementation. The question remains as to whether courts should adapt existing choice of law systems, or create a new doctrine to address electronic commerce issues. The best way to resolve this choice of law issue is through the use of contractual choice of law provisions in this author's opinion.

{127}However, as the Vir-All example demonstrates, some electronic contracts do not have choice of law provisions. In the case of Vir-All, the court will be forced to decide which state's substantive law applies to the case. The court's analysis will likely mirror one of the previously discussed choice of law doctrines. However, like Section 188 of the Second Restatement, the application of the governmental interest analysis under the Second Restatement is inadequate. Again, the inherent problem with the governmental interest analysis, and most other conventional choice of law doctrines, is that they are geared toward conventional contracts.

VI. CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW DOCTRINES.

{128}There are two constitutional principles that may have application in constraining domestic state choice of law rules; namely, the Privileges and Immunities Clause[325]and the Full Faith and Credit Clause.[326] These clauses constrain choice of law rules because they set limitations on permissive choice of law principles. Notwithstanding, most of the contemporary doctrines violate one or both of these principles. In addressing these constitutional issues, the United States Supreme Court, in *Sun Oil v. Wortman*, [327]specifically stated that, "neither the full faith and credit clause, nor the due process clause, bars a forum state from applying its own statute of limitations to claims that are governed in substance by the law of a different state."[328] Thus, both the Due Process and Full Faith and Credit Clauses have no practical application in limiting domestic state choice of law rules.

A. *Privileges and Immunities Clause*

{129}As applied, the Privileges and Immunities Clause holds that the forum state may not arbitrarily apply choice of law rules that favor its own citizens over the citizens of a sister state.[329] Practically speaking, courts rarely consider constitutional issues when conducting a choice of law analysis. Taking a closer look at the interest analysis approach, it is arguable that it violates the Constitution in a number of ways. For instance, courts have, at times, disregarded contractual provisions, asserting instead the forum state's law in deciding the case.[330] On its face, this seems to clearly infringe upon a party's freedom of contract.

B. *Full Faith and Credit Clause*

{130}Under the Full Faith and Credit Clause, the forum may not arbitrarily prefer its own laws over the laws of another state.[331] Again, it is arguable that the interest analysis, as applied by most courts, violates the Privileges and Immunities Clause because it discriminates against out-of -state citizens. One commentator notes that, the "[i]nterest analysis is discriminatory because it effectively creates three sets of rules. There is

the local rule, the other state's rule, and the local rule for outsiders, which is the least advantageous of the three."[332]

{131}Thus, in terms of contracts, "there is [California's] rule for [Californians], [New York's] rule for [New Yorkers], and [California's] rule for [New Yorkers]."[333] This clearly violates the Full Faith and Credit Clause.

VII. FOUNDATIONS OF LAW FOR CYBER-CONFLICTS.

{132}There are a number of alternative methodologies that apply to the resolution of cyber-conflicts resulting from electronic contracts. Some of these methodologies are borrowed from other areas of law, such as admiralty. The following sections of this article discuss these alternative methodologies, and how they apply in the context of electronic contracts.

A. *Lex Mercatoria: Customary Law*

{133}During the Middle Ages, cross-boundary trade rapidly changed the face of international trade.[334]Contractual provisions were useful tools to deal with the differences among jurisdictions, but often required parties to enter into extensive negotiation, thereby substantially increasing the costs of conducting business.[335]As trade stretched across several legal jurisdictions, merchants quickly realized the need for a uniform body of law that addressed their changing needs.[336] The result was Lex Mercatoria.

{134}Lex Mercatoria, or law merchants, were special courts consisting of judges who were themselves merchants. These special courts applied customary trade practices to resolve disputes between merchants.[337] The traditional courts primarily dealt with disputes over land, and thus were not able to fully appreciate the specialized needs of the merchants.[338]The law merchants, on the other hand, recognized these needs, emphasizing "the speedy resolution of disputes" and applying a flexible set of rules to accommodate the changing nature of customary practices.[339]

{135}However, Lex Mercatoria is not without its critics.[340] One of the criticisms of Lex Mercatoria is that it is more of a "gap filler" than an independent body of law.[341] Nonetheless, it is still relevant to address some of the issues arising in contracts, whether paper or electronic. If nothing else, the modern day Lex Mercatoria may be applicable as a set of relevant customary practices considered when adjudicating disputes arising out of electronic contracts. This is particularly relevant when parties appear before arbitration tribunals.[342] Therefore, Lex Mercatoria may well have a place in today's electronic marketplace. It has the flexibility and freedom from the conflicting laws of multiple jurisdictions. Most importantly, it has capable adjudicators who are experts in their fields.

B. *Multilateral Choice of Law Treaty: A Uniform Approach*

{136}The federal legislation proposed earlier in this article, providing for a uniform choice of law system addresses only cases that are brought in the United States. It does not cover choice of laws issues that arise in foreign courts. Therefore, a multilateral cyber-conflict choice of law treaty is necessary. Drafted under the auspices of the United Nations, the treaty would provide a means of resolving the conflict of laws in foreign courts. However, nations have historically refused to surrender their sovereignty, either in whole or in part.[343] Thus, the next best solution is the unification of conflict of laws rules. The United States is party to more than twenty multilateral treaties affecting private international law.[344]

{137}One of the most notable multilateral treaties governing private international law is the United Nations Convention on the International Sale of Goods ("CISG").[345]The United States is also party to two multilateral conventions that provide a means for accommodating service of process and the gathering of

evidence abroad, including the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("Hague Service Convention")[346] and the Inter-American Convention on Letters Rogatory.[347] The Hague Service Convention was the international community's answer to the problem of varying rules and regulations governing the service of process in foreign jurisdictions.[348]Critics claimed that the service mechanisms in some civil jurisdictions did not provide adequate notice to defendants.[349] These same concerns are evidenced in the Vir-All example.

{138}Recall that in the Vir-All example, Scott was asked to defend a suit in Budapest. In addressing the Budapest claim, Scott has the option of either defending the suit there, or ignoring the suit entirely. The authorities in Budapest could petition the California courts for assistance under a treaty like the Hague Convention. The California court, on the other hand, would not entertain the suit. As previously mentioned, this result is due to the varying laws of each jurisdiction. However, if an international accord is in place, this problem is avoided.

{139}In addition to the previously mentioned treaties, there are also several multinational accords that address conflict of laws.[350] For example, there are laws applicable to traffic accidents among foreign nationals,[351]and for the determination of the status of aliens.[352]With this in mind, several authors have addressed the need for a uniform choice law regime in "sovereignless" regions like cyberspace.[353] All of these authors espouse the need for uniform choice of law rules. Moreover, many of these authors agree that the best way to provide for a uniform system is through a multinational treaty.

VIII. CONCLUSION.

{140}Conflict of laws is one of the most challenging aspects of law, both in theory and practice. It is a tangled web of jurisdiction, legal doctrines, and judicial discretion. Many legal scholars believe that the Internet should be regarded as a separate legal jurisdiction. However, in this rapidly changing age of communication, it is doubtful that any state could effectively regulate this veritable leviathan. Based upon this conclusion, traditional choice of law doctrines are ill-suited to resolve conflicts arising out of electronic contracts. However, the choice of law puzzle may be reconciled through the implementation of federal legislation providing an effective means of remedying disputes arising out of electronic contracts, such as the Vir-All example.

{141}First, the court would determine whether it properly exercises personal jurisdiction over Scott, the defendant in this case. The court may only exercise personal jurisdiction, provided that his contacts with New York are such that they satisfy the minimum contacts test. Pursuant to the decision of the Supreme Court in *Asahi*, Scott would have to purposefully direct his advertising and/or the Vir-All product itself to a New York consumer audience.[354] Moreover, merely advertising the product on the Internet, with nothing else, constitutes insufficient contact with New York. For purposes of personal jurisdiction alone, assume that Scott purposefully directed Vir-All at the New York market, thus supporting a finding of personal jurisdiction. The court now has the authority to resolve the dispute. In this case, a choice of law analysis is not necessary because any court resolving the issue would apply federal law, since this area is preempted. As the Court in *Klaxon* pointed out, choice of law is "substantive" in nature.[355] Therefore, the federal court is free to apply substantive federal law, in this case, federal law governing electronic commerce, in resolving the issues. The proposed federal legislation provides a solution for domestic disputes, but does not address international disputes. Thus, federal legislation could be used as a model for international legislation, similar to the UNCITRAL model, that foreign courts apply in resolving choice of law issues arising from electronic contracts.

{142}The Internet is ripe for legislation, but no one is exactly sure how to regulate it. Experts warn that the issue is significant. Legal authors, activists, and Congressmen are all scrambling in an attempt to control the virtual wild west.[356]

{143}Technology is breaking down the barriers of boundaries and borders. As the world changes, the courts must face the daunting task of dealing with a virtual nightmare. With the advent of the automobile came *International Shoe*.[357]Then, in *Burger King,* we saw the fledgling subsidiary straying farther away from its parent, thanks to the technological marvels of the time.[358] As technology marches ahead, it seems to push us farther away from our homes and into a foreign land with foreign laws. The Internet provides an opportunity to redraw the lines of the minimum contacts test, and to reevaluate when and what type of contact leads to personal jurisdiction in distant courts. The question is not whether something should be done, but rather how to do it.

ENDNOTES[**]

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Aristotle G. Mirzaian, *Y2K . . . Who Cares? We Have Bigger Problems: Choice of Law in Electronic Contracts*, 6 RICH. J.L. & TECH. 20 (Winter 1999-2000), *at* http://www.richmond.edu/jolt/v6i4/article3.html.

[1]. Louis V. Gerstener, Jr., Letter of the Chairman and Chief Executive Officer, International Business Machines ("IBM"), Inc., 1998 Annual Report 2 (1999] (visited January 16, 2000) <http://www.ibm.com/annualreport/1998/letter/ibm98arlsen01.html>.

[2]. *See* Gary R. Bachula, Remarks on Information Technology Products and their Usability, Address Before the Government/Industry Executive Breakfast Usability Professionals' Association (June 23, 1998), *at* 1 (visited January 16, 2000) <http://www.ta.doc.gov/Speeches/produsab.htm>.

[3]. *See id*

[4]. *See id.*.

[5]. *See id.*

[6]. *See* Department of Commerce, National Telecommunications and Information Administration Strategic

Plan: 1999 to 2004, at 5 (January 1999).

[7]. *See id.* at 6.

[8]. *See id.*

[9]. *See id.*

[10]. *See* IBM, *supra* note 1, at 6.

[11]. *See id.*

[12]. *Id.*

[13]. Richard D. Pomp & Oliver Oldman, State and Local Taxation, Second Edition, Volume II, Chapter Twelve (12): The Taxation of Electronic Commerce 1073 (1997).

[14]. *See id.* at 1072.

[15]. *See IP Address*, at 1 (visited January 16, 2000)<http://whatis.com/ipaddres.htm>.

[16]. Daniel C. Lynch & Marshall T. Rose, Internet System Handbook 478-81 (1993).

[17]. *See id.* at 87.

[18]. *See Pataki, infra* note 136, at 170.

[19]. *See id.* at 165.

[20]. *See id.* at 164.

[21]. *See id.* at 171.

[22]. *See id.*

[23]. Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over the World Wide Web Communications*, 65 Fordham L. Rev. 2241, 2243 (1997) (citing Shea ex rel. Am. Reporter v. Reno, 930 F. Supp. 916, 925 (S.D.N.Y. 1996)).

[24]. *See* Graphic, Visualization, & Usability Center's ("GVU") 10th WWW User Survey (visited Dec. 1, 1999) <http://www.gvu.gatech.edu/user_surveys/survey-1998-10/>. GVU runs the Survey as a public service and as such, all results are available online. The 10th Survey ran from October 10 - December 15, 1998.

[25]. *See id.* at <http://www.gvu.gatech.edu/user_surveys/survey-1998-10/graphs/general/q54.htm>; <http://www.gvu.gatech.edu/user_surveys/survey-1998-10/graphs/general/q46.htm>.

[26]. *See* Kalow, *supra* note 20, at 2234 (citing Steve O'Keefe,Publicity on the Internet 29-30 (1997)).

[27]. *See* Shea ex rel. Am. Reporter v. Reno, 930 F. Supp. 916, 926 (S.D.N.Y. 1996).

[28]. This is not documented, and is intended for illustrative purposes only.

[29]. *See* Reno, *supra* note 24, at 926. One exception is a ban on Internet-based child pornography.

[30]. IBM, *supra* note 1, at 7.

[31]. *See id.*

[32]. *See id.*

[33]. *See* Graphic, *supra* note 21, at <http://www.gvu.gatech.edu/user_surveys/survey-1998-10/graphs/shopping/q049.htm>.

[34]. *See* Henry H. Perritt, Jr., *Access to the National Information Infrastructure*, 30 Wake Forest L. Rev. 51, 68-72 (1995) (discussing legal implications of online transactions).

[35]. *See*, *e.g.*, Peter N. Weiss, *Security Requirements and Evidentiary Issues in the Interchange of Electronic Documents: Steps Toward Developing a Security Policy*, 12 J. Marshall J. Computer & Info. L. 425, 425 (1993) (showing that EDI is the fastest growing means of transferring documents for U.S. businesses).

[36]. *See* Robert W. McKeon, Jr., *Electronic Data Interchange: Uses and Legal Aspects in the Commercial Arena*, 12 J. Marhsall J. Computer & Info. L. 511, 511 (1994) (establishing EDI as the exchange of information between computers). The technical definition is "the use of computers to share information between vendors and purchasers who engage in contractual relations, often in the absence of human intervention." Michael S. Baum, *Legal Issues in Electronic Data Interchange*, 13th Annual Computer Law Institute 1991, 579-80 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 322, 1991).

[37]. *See* 48 C.F.R. § 552.216-73 (1996); *see also*, Raymond T. Nimmer, *Electronic Contracting: Legal Issues*, 14 J. Marshall J. Computer & Info. L. 211, 213 (1996).

[38]. *See* John C. Yates, *Recent Legal Issues in Electronic Commerce and Electronic Data Interchange*, 16th Annual Institute on Computer Law 1996, 414 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-444, 1996).

[39]. *See id* at 413.

[40]. *See id.*

[41]. *See* McKeon, *supra* note 33, at 513-16, 535-36.

[42]. *See* Kent D. Stuckey, *Market Without Bounds - So Far: Could Old Laws Put a Crimp on Cyberspace?*, 5 Bus. L. Today 52, 54 (1996).

[43]. *See id.*

[44]. *Id*. at 55.

[45]. *See* GTE, Internet Yellow Pages (visited Dec. 1, 1999) <http://www.yp.gte.net> (listing multiple businesses that provide goods and services on Internet).

[46]. *See* Dave James, *Barbarians at the Gate: Internet Security in the Law Firm/Corporate Environment*, Managing the Private Law Library 1995, 277, 284-85 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3944, 1995).

[47]. *See id.* at 303.

[48]. *See* James J. White & Robert S. Summers, Uniform Commercial Code 66-67 (3d ed. 1988) (commentary on the background and purpose of the statute of frauds).

[49]. *See* U.C.C. § 2-201 cmt. 1 (1996).

[50]. U.C.C. § 2-201(1) (1996).

[51]. U.C.C. §1-201(46) (1996).

[52]. *See* U.C.C. §2-201 cmt. 6 (1996).

[53]. *See id.*

[54]. U.C.C. §1-201(39) (1996).

[55]. Nimmer, *supra* note 34, at 227.

[56]. *Id.*

[57]. *See* Graphic, *supra* note 21, at <http://www.gvu.gatech.edu/user_surveys/survey-1998-10/graphs/shopping/q049.htm>.

[58]. U.C.C. §2-204(1) (1996).

[59]. U.C.C. §2-206 (1)(a) (1996).

[60]. *See, e.g.,* Kiley v. First Nat'l Bank of Md., 649 A.2d 1145, 1153 (Md. Ct. Spec. App. 1994) (holding that advertisements are not offers unless they clearly state that they are, while not discussing web pages specifically).

[61]. U.C.C. §2-206(1)(b) (1996).

[62]. *Seegenerally* Lefkowitz v. Great Minneapolis Surplus Store, Inc., 86 N.W.2d 689, 691-92 (Minn. 1957) (holding that a newspaper advertisement was an offer for sale as it was clear and definite on its face); *seealso* Litton Microwave Cooking Prod. v. Leviton Mfg. Co., Inc., 15 F.3d 790, 794-95 n.178 (8th Cir. 1994) (holding that a price quote or catalog may be construed as an offer if it leaves nothing open to negotiation). An example of a website that can be construed as an offer to sell is Amazon Books boasting the largest selection of books on the Internet (visited November 23, 1999) <http://www.amazon.com>.

[63]. *See* John D. Calamari & Joseph M. Perillo, The Law of Contracts §1-7 (3d ed. 1987).

[64]. U.C.C. §2-102 (1997).

[65]. U.C.C. §2-105 (1997).

[66]. *See* Raymond T. Nimmer, *U.C.C. Revisions: Article 2 in the Information Age*, 416 PLI/Pat 1005, 1012 (1995).

[67]. U.C.C. §2B-103 (Proposed Draft Sept. 1997).

[68]. *See id.*

[69]. *See id.*

[70]. *See id.*

[71]. *See* U.C.C. §2B-102 (Proposed Draft Sept. 1997).

[72]. *See id.* §2B-102 (a)(35).

[73]. *Id.* §2B-102.

[74]. *See id.* §2B-102 (a)(35).

[75].*Id.*

[76]. U.C.C. §2B-102 (Proposed Draft Sept. 1997).

[77]. *See id.* § 2B-114.

[78]. *See id.* §§ 2B-114 -120.

[79]. *See* U.C.C. § 2B-1150 (Proposed Draft Sept. 1997).

[80]. *Id.*

[81]. *Id.*

[82]. *See* U.C.C. §§ 2B-1150-1161.

[83]. *See id.* § 2B-1161 (Proposed Draft Sept. 1997).

[84]. *See id.*

[85]. *See id.*

[86]. *See id.*

[87]. *See id.*

[88]. *See id.*

[89]. United Nations: UNCITRAL Model Law on Electronic Commerce, 36 I.L.M. 197 (1997). [hereinafter Model Law].

[90]. *Id.* at FNa1. The Commission further provides that "the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not." *Id.* at FNaaa1.

[91]. *Id.* at 197.

[92]. *See id.* at 198.

[93]. *See id.* at 202-03. Article 2 provides: For the purposes of this Model Law: (a) "Data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy; (b) "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed

standard to structure the information;
(c) "Originator" of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message; (d) "Addressee" of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message; (e) "Intermediary", with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message; (f) "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages. *Id.*

[94]. *See id.* at 203. Article 5 provides that "[i]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message." *Id.* Article 6 provides: (1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference. (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing. (3) The provisions of this article do not apply to the following: [...]. *Id.*

[95]. *See id.* at 204. Article 7 provides: (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if: (b) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (c) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.
(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature. (3) The provisions of this article do not apply to the following: [...]. *Id.*

[96]. *Id.*

[97]. *See id.* at 205. Article 11 provides: (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose. (2) The provisions of this article do not apply to the following: [...]. *Id.*

[98]. Article 13 provides: (1) A data message is that of the originator if the originator sent it. (2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent: (c) by a person who had the authority to act on behalf of the originator in respect of that data message; or (d) by an information system programmed by or on behalf of the originator to operate automatically. (3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if: (e) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or (f) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own. (4) Paragraph (3) does not apply:
(g) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or (h) in a case within paragraph (3) (b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator. (5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled

when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received. (6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate. *Id.*

[99]. *See id.* at 207-08. Article 15 provides: (1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator. (2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (c) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs: (iv) at the time when the data message enters the designated information system; or (v) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee; (f) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee. (3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4). (4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph: (g) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business; (h) if the originator or the address*see* does not have a place of business, reference is to be made to its habitual residence. (5) The provisions of this article do not apply to the following: [...]. *Id.*

[100]. *See id.* §§1-2.

[101]. *See id.* § 2(a)(ii).

[102]. *Id.* § 4.

[103]. *Seeid.*

[104]. *Seeid.* § 4(a).

[105]. *Seeid.* § 4(b).

[106]. Electronic Transactions Act of 1998. (visited Nov. 22, 1999) <http://www.cca.gov.sg/eta/index.html>>.Part IV of the Electronic Transactions Act of 1998 provides: PART IV: ELECTRONIC CONTRACTS 11. Formation and validity (1) For the avoidance of doubt, it is declared that in the context of the formation of contracts, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of electronic records. (2) Where an electronic record is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that an electronic record was used for that purpose. 12. Effectiveness between parties As between the originator and the address*see* of an electronic record, a declaration of intent or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record. 13. Attribution (1) An electronic record is that of the originator if it was sent by the originator himself. (2) As between the originator and the addressee, an electronic record is deemed to be that of the originator if it was sent a. in order to ascertain whether the electronic record was that of the originator, the address*see* properly applied a procedure previously agreed to by the originator for that purpose; or b. the data message as received by the address*see* resulted from the actions of a person whose relationship with the originator or with any

agent of the originator enabled that person to gain access to a method used by the originator to identify electronic records as its own. (4) Subsection (3) shall not apply a. from the time when the addressee has both received notice from the originator that the electronic record is not that of the originator, and had reasonable time to act accordingly; b. in a case within subsection (3)(b), at any time when the addressee knew or ought to have known, had it exercised reasonable care or used any agreed procedure, that the electronic record was not that of the originator; or c. if, in all the circumstances of the case, it is unconscionable for the addressee to regard the electronic record as that of the originator or to act on that assumption. (5) Where an electronic record is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the electronic record received as being what the originator intended to send, and to act on that assumption. (6) The addressee is not so entitled when the addressee knew or should have known, had the addressee exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the electronic record as received. (7) The addressee is entitled to regard each electronic record received as a separate electronic record and to act on that assumption, except to the extent that the addressee duplicates another electronic record and the addressee knew or should have known, had the addressee exercised reasonable care or used any agreed procedure, that the electronic record was a duplicate. (8) Nothing in this section shall affect the law of agency or the law on the formation of contracts. 14. Acknowledgment of receipt . (1) Subsections (2), (3) and (4) shall apply where, on or before sending an electronic record, or by means of that electronic record, the originator has requested or has agreed with the addressee that receipt of the electronic record be acknowledged. (2) Where the originator has not agreed with the addressee that the acknowledgment be given in a particular form or by a particular method, an acknowledgment may be given by -- a. any communication by the addressee, automated or otherwise; or b. any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received. (3) Where the originator has stated that the electronic record is conditional on receipt of the acknowledgment, the electronic record is treated as though it had never been sent, until the acknowledgment is received. (4) Where the originator has not stated that the electronic record is conditional on receipt of the acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed within a reasonable time, the originator -- a. may give notice to the addressee stating that no acknowledgment has been received and specifying a reasonable time by which the acknowledgment must be received; and b. if the acknowledgment is not received within the time specified in paragraph (a), may, upon notice to the addressee, treat the electronic record as though it has never been sent or exercise any other rights it may have. (5) Where the originator receives the addressee's acknowledgment of receipt, it is presumed, unless evidence to the contrary is adduced, that the related electronic record was received by the addressee, but that presumption does not imply that the content of the electronic record corresponds to the content of the record received.

(6) Where the received acknowledgment states that the related electronic record met technical requirements, either agreed upon or set forth in applicable standards, it is presumed, unless evidence to the contrary is adduced, that those requirements have been met. (7) Except in so far as it relates to the sending or receipt of the electronic record, this Part is not intended to deal with the legal consequences that may flow either from that electronic record or from the acknowledgment of its receipt. 15. Time and place of d[i]spatch and receipt (1) Unless otherwise agreed to between the originator and the addressee, the d[i]spatch of an electronic record occurs when it enters an information system outside the control of the originator or the person who sent the electronic record on behalf of the originator. (2) Unless otherwise agreed between the originator and the addressee, the time of receipt of an electronic record is determined as follows:

a. if the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs

i. at the time when the electronic record enters the designated information system; or ii. if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record is retrieved by the addressee; or b. if the addressee has not designated an information system, receipt occurs when the electronic record enters an information system of the addressee.

(3) Subsection (2) shall apply notwithstanding that the place where the information system is located may be different from the place where the electronic record is deemed to be received under subsection (4). (4) Unless otherwise agreed between the originator and the addressee, an electronic record is deemed to be d[i]spatched at the place where the originator has its place of business, and is deemed to be received at the place where the address*see* has its place of business. (5) For the purposes of this section if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business; if the originator or the addressee does not have a place of business, reference is to be made to the usual place of residence; and "usual place of residence", in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted. (6) This section shall not apply to such circumstances as the Minister may by regulations prescribe. *Id.* at Part IV.

[107]. *See* ETA, *supra* note 104.

[108]. *Seeid.*

[109]. *See id.*

[110]. *Seeid.*

[111]. *See id.* § 11(1).

[112]. *Id.* § 15.

[113]. *See* ETA, *supra* note 104, § 15 (2)(a)(i) - (ii).

[114]. *See id.* § 15 (2)(a)(i).

[115]. *See id.* § 15 (2)(a)(ii).

[116]. *See id.* § 15 (4).

[117]. *See id.* § 15 (4)(a).

[118]. *See* ETA, *supra* note 104, § 15 (5)(b).

[119]. *Id*. § 15 (5)(c).

[120]. U.S. Const. art. I, § 8, clause 3.

[121]. 392 U.S. 183 (1968) (Douglass, J., dissenting).

[122]. *Id.* at 204 (citation omitted).

[123]. 514 U.S. 549 (1995).

[124]. *See generally id.*

[125]. 18 U.S.C. § 922 (1990).

[126]. Lopez*,* 514 U.S. at 549.

[127]. *Id.* (quoting 18 U.S.C. § 922(q)(1)(A)(1988 ed., Supp. V)).

[128]. *Id*.

[129]. 317 U.S. 111 (1942).

[130]. Lopez, 514 U.S. at 558-59.

[131]. *Id.* at 559.

[132]. *Id.* at 551.

[133]. Dept. of Commerce, *Preliminary Affirmative Countervailing Duty Determination: Certain Computer Aided Software Engineering Products from Singapore*, 55 FR 1596, 1597 (January 17, 1990).

[134]. *See generally* House of Representatives website, *supra* note 2 (depicting the explosive growth statistics of the Internet).

[135]. Kalow, *supra* note 20.

[136]. *See* GVU, *supra* note 21.

[137]. *See id.*

[138]. U.S. Const. amend. X.

[139]. Internet Tax Freedom Act Pub.L. 105-277, § 1101 (1998).

[140]. 969 F. Supp. 160 (S.D.N.Y. 1997).

[141]. *Id.* at 161; *see also* U.S. Const. art. I, § 8, cl. 3. For further discussion of *Pataki,* please refer to section III.B. of this article.

[142]. *See generally* Steven L. Emanuel, *Constitutional Law* 66 (16th ed. 1998) (highlighting the balance of federal and state regulation of commerce).

[143]. *See generally* Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (finding that there existed less intrusive measures of regulation, where Arizona had other options available).

[144]. N.Y. Penal Law § 235.12(3).

[145]. Pataki, 969 F. Supp. at 169.

[146]. *See id*.

[147]. *See id*.

[148]. U.S. Const. art III, § 2.

[149]. *See*Erie v. Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[150]. 313 U.S. 487 (1941).

[151]. *See id.* at 496.

[152]. U.S. Const. art. III.

[153]. *Id.* § 2.

[154]. 28 U.S.C.A. § 1331 (1999).

[155]. *See* Taylor v. Phelan, 912 F.2d 429, 431-32 (10th Cir. 1990). In *Taylor*, a Missouri defendant challenged the Kansas court's jurisdiction. The Tenth Circuit Court of Appeals required a two-step analysis of the state long-arm statute before the due process analysis. The Tenth Circuit agreed with the district court's finding that the long-arm statute was properly invoked. It disagreed with the district court finding that defendant's contacts were insufficient and unrelated, holding instead that tort-related contacts were present to invoke specific personal jurisdiction under the minimum contacts test. *See id.* at 433-34.

[156]. 95 U.S. 714 (1877).

[157]. 495 U.S. 604 (1990).

[158]. *See* Restatement (Second) Conflicts of Laws Ch. 3, Introductory Note (1971); *see also* Shaffer v. Heitner, 433 U.S. 186, 199 (1977) "If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated 'in personam' . . . If jurisdiction is based on the court's power over property within its territory, the action is called 'n rem' or 'quasi in rem.'" *Id.*

[159]. 95 U.S. 714; *see also*U.S. Const. art. III.

[160]. *See* Pennoyer, 95 U.S. at 726-28.

[161]. *See id.* at 733.

[162]. 326 U.S. 310 (1945).

[163]. *See id.* at 319.

[164]. *Seeid.* at 319-20.

[165]. *Seeid.*

[166]. *Id.* at 316.

[167]. *See id.* at 319.

[168]. *Id.* at 316.

[169]. 355 U.S. 220 (1957).

[170]. *See id.* at 223.

[171]. *See* Russell J. Weintraub, *A Map Out of the Jurisdictional Labyrinth*, 28 U.C. Davis L. Rev. 531, 535 (1995).

[172]. *See*, *e.g.*, Washington Scientific Indus., Inc. v. Polan Indus., Inc., 302 F. Supp. 1354, 1358 (D. Minn. 1969) (holding that there is not a sufficient basis for jurisdiction where the defendant's contacts with the forum are unrelated to the suit). *But see* Jetco Elec. Indus. v. Gardiner, 473 F.2d 1228, 1234 (5th Cir. 1973) (holding that there is a sufficient basis for jurisdiction even where the defendant's contacts with the forum are

unrelated to the suit).

[173]. Both specific and general jurisdiction are discussed later in this article. *See infra* note 199.

[174]. 444 U.S. 286 (1980).

[175]. *Id.* at 297-98.

[176]. *See id.* at 288.

[177]. *See id.* at 288-90.

[178]. *See id.* at 288-89 n.3.

[179]. *See id.* at 288-90. However, neither Audi, the manufacturer, nor Volkswagen, the importer, challenged the jurisdiction of the Oklahoma courts. *See id.*

[180]. *See id.* at 297-99.

[181]. *See id.* at 298.

[182]. *See id.* at 297-98.

[183]. *See id.* at 293 (citing McGee, 355 U.S. at 222-23).

[184]. *See id.* at 291-92.

[185]. *See*, *e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-10 (1987) (holding that the courts had jurisdiction over an international corporation); *seealso*, Hanson v. Denckla, 357 US. 235, 251 (1958) (holding that a Florida court had no personal jurisdiction over a trust created in Delaware, where the trustee was also in Delaware).

[186]. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (quoting International Shoe, 326 U.S. at 320).

[187]. *Id.* at 472-73.

[188]. *Id*. at 474-75 (quoting Hanson, 357 U.S. at 253).

[189]. *Id.* at 474 (quoting World-Wide Volkswagen Corp., 444 U.S. at 297).

[190]. *See*, *e.g.*, Calder v. Jones, 465 U.S. 783, 787 & n.6, 789 (1984) (finding personal jurisdiction over the defendants applying only the forum effects test).

[191]. 326 U.S. 310, 316 (1945).

[192]. 471 U.S. 462 (1985). Only a relatively small number of cases considered this language from International Shoe between 1945 and 1985. *Seegenerally* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 413 (1984) (finding a Texas court had no jurisdiction over a Columbian corporation where only one plane was linked to the U.S.); *seealso* Shaffer v. Heitner, 433 U.S. 186 (1977) (finding no jurisdiction based on statutory presence of property); Hanson, 357 U.S. at 251.

[193]. 471 U.S. at 476-77 (citing International Shoe, 326 U.S. at 316).

[194]. Burger King, 471 U.S. at 476.

[195]. *Id.* (quoting International Shoe, 326 U.S. at 320).

[196]. *Id.* at 477 (quoting World-Wide Volkswagen, 444 U.S. at 292).

[197]. *Id.* at 476.

[198]. 480 U.S. 102 (1987).

[199]. *See id.* at 115-16.

[200]. *See id.* at 112.

[201]. *See id.*

[202]. *Id.*

[203]. 466 U.S. 408 (1984).

[204]. *See id.* at 414.

[205]. *Id.* at 415 n.9; s*ee also* Calder v. Jones, 465 U.S. 783, 785-86 (1984) (holding that the defendant's numerous contacts with forum, though unrelated to the suit, permitted a finding of jurisdiction).

[206]. *See id.* at 414 n.8.

[207]. 495 U.S. 604 (1990).

[208]. *See id.* at 608.

[209]. *See id.*

[210]. *See id.*

[211]. *See id*.

[212]. *See id.* at 608.

[213]. *See id*. at 619. While technically an unanimous decision, three groups of justices issued opinions disagreeing on the proper basis for asserting personal jurisdiction in this case.

[214]. *Id*. at 629 (Brennan, Marshall, Blackmun, and O'Connor, JJ., concurring).

[215]. *See id.* at 610-17 (discussing the tradition of personal jurisdiction based on presence in the forum in American and English law).

[216]. *See id.* at 619.

[217]. *See generally id*. (discussing, as noted *supra,* while the court unanimously agreed that jurisdiction was proper in this case, the justices issued three concurring opinions, and each opinion based its conclusion on different reasoning).

[218]. Restatement (third) foreign relations law of the united states § 402 (1934) [hereinafter Third Restatement] . § 402: Bases of Jurisdiction to Prescribe. Subject to § 403, a state has jurisdiction to prescribe law with respect to: (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory; (2) the activities , interests, status, or relations of its nationals outside as well as within its territory; (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.Section 402(1) - (3) illustrates the territoriality principle, the nationality principle, the effects principle, and the protective principle. These broad bases of jurisdiction enumerated in Section 402 are limited by Section 403 which imposes a general requirement of reasonableness. § 403: Limitations on Jurisdiction to Prescribe. (1) Even when one of the bases of jurisdiction under [section] 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connection with another state when the exercise of jurisdiction is unreasonable. *Id.* § 403 Section 403(2) of the Restatement designates different factors that have to be evaluated in determining the reasonableness of a court's assertion of jurisdiction: (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (c) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and fore*see*able effect upon or in the territory; (d) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (e) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (f) the existence of justified expectations that might be protected or hurt by the regulation; (g) the importance of the regulation to the international political, legal, or economic system; (h) the extent to which the regulation is consistent with the traditions of the international system; (i) the extent to which another state may have an interest in regulating the activity; and (j) the likelihood of conflict with regulation by another state. *Id.* § 403

[219]. *See id.* § 403 (2).

[220]. *See generally* Corfu Channel (*U.K. v. Albania*), 1949 I.C.J. 33, at 57 (Apr. 9) (discussing responsibility for explosion of mines in territorial waters; Albania's control of territory as ground for responsibility).

[221]. 969 F. Supp. 160 (S.D.N.Y. 1997).

[222]. *See id.* at 161.

[223]. *See id.* at 167

[224]. *Id.*

[225]. *See* Gary B. Born, International Civil Litigation in United States Courts 680 (1996).

[226]. *See generally* Margaret A. Healy, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 Fordham Int'l L.J. 1852 (1995) (offering a comparison of laws in Sweden, Australia, and the United States to protect children from sexual exploitation at home and abroad).

[227]. *See* Third Restatement, *supra* note 213, § 402 cmt. e.

[228]. *See id.* § 402(1)(c).

[229]. *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945).

[230]. *See* Born, *supra* note 220, at 506.

[231]. *See id.* (citing R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 Brit. Y.B. Int'l L. 146 (1957); I. Brownlie, *Principles of Public International Law* 299-303 (4th ed. 1990)).

[232]. *See* Born, *supra* note 220, at 506-07.

[233]. *See* Third Restatement, *supra* note 213, § 402 reporters n2.; Jason Coppel, *A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law*, 6 Leiden J. Int'l L. 73 (1993); Margaret Loo, *IBM v. Commissioner: The Effects Test in the EEC*, 10 B.C. Int'l & Comp. L. Rev. 125 (1987) (detailing a discussion of the competition rules o the European Economic Community ("EEC")).

[234]. 465 U.S. 783 (1984).

[235]. *See id.* at 791.

[236]. *See id.* at 787 n.6, 788-89.

[237]. *See id.* at 787 n.6, 789.

[238]. *See id.* at 788-90.

[239]. *Id.* at 790 (citing World-Wide Volkswagen Corp., 444 U.S. at 297).

[240]. *See id.* at 788-90.

[241]. 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996).

[242]. *See id.* at 705.

[243]. *See id.*

[244]. *See id.*

[245]. *See id.*

[246]. *See id.*

[247]. *See id.* at 709-10.

[248]. *Id.* at 710.

[249]. United States v. Thomas, 113 F.3d 1247 (10th Cir. 1997).

[250]. *See generally* Thomas, 74 F.3d 701 (1996) (omitting any information pertaining to defendants knowledge).

[251]. Born, *supra* note 220, at 506 (citing Restatement (Third) Foreign Relations Law § 404 (1987)).

[252]. *Id.* (citing Restatement (Third) Foreign Relations Law § 402(3) (1987)).

[253]. *See id.*

[254]. *See* Grand Entertainment Group v. Star Media Sales, Inc., 988 F.2d 476, 482 (3d Cir. 1993) (holding that telephone communications by the defendant directed into the forum state sufficed as minimum contacts to support an assertion of jurisdiction."); *see also* Sinatra v.National Enquirer, Inc., 854 F.2d 1191, 1197 (9th Cir. 1988) (holding that California court properly asserted jurisdiction over a Swiss health spa for making false statement over the telephone about the plaintiff). *But see* Wilson v. Belin, 20 F.3d 644, 649 (5th Cir. 1994) (holding no jurisdiction existed over nonresident defendants who received telephone calls without knowledge of particular forum where calls were made).

[255]. *CompuServe, Inc. v. Patterson*, No. C2-94-91, slip op. at 3-4 (S.D. Ohio Mar. 23, 1995), *rev'd*, 89 F.3d 1257 (6th Cir. 1996).

[256]. *See id.* at 9.

[257]. *See id.* at 1, 3, 5-6.

[258]. *See id.* at 8-9.

[259]. *See id.*

[260]. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1268-69 (6th Cir. 1996).

[261]. *See id.* at 1268.

[262]. Asahi, 480 U.S. at 112.

[263]. 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).

[264]. *See id.* at 1351-52.

[265]. *See id.*

[266]. *See id.* at 1352.

[267]. *Id.* at 1353.

[268]. *Id.*

[269]. Asahi, 480 U.S. at 112.

[270]. *See*, *e.g.*, G. Burgess Allison, *A Bestiary of Internet Services*, 21 No. 2 L. Prac. Mgmt. 28 (1995).

[271]. *See* M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 Yale L.J. 1681, 1683 (1995); *seealso* Sean M. Flower, *When Does Internet Activity Establish the Minimum Contact Necessary to Confer Personal Jurisdiction?*, 62 Mo. L. Rev. 845, 851 (1997); Teresa Schiller & Stephen Wilske, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 Fed. Comm. L.J. 117, 125 (1997).

[272]. *See* Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics"* 34 Mercer L. Rev. 593, 593 (1983).

[273]. *See* Brainerd Currie, Selected Essays on the Conflict of Laws (1963).

[274]. 191 N.E.2d 279 (1963).

[275]. *See* Robert A. Leflar, *The Nature of Conflicts Law*, 81 Colum. L. Rev. 1080 (1981).

[276]. *See id.*

[277]. First Restatement, *supra* note 214.

[278]. *See id.*

[279]. 125 Mass. 374 (1878).

[280]. *See* Born, *supra* note 221, at 666-69 (citing *Milliken v. Pratt*, 125 Mass. 374 (1878)).

[281]. *Id.* at 672 (quoting Story, J., Commentaries on Conflict of Laws § 242 (2d ed. 1841)).

[282]. First Restatement, *supra* note 214, §§ 377-97.

[283]. *Id.* § 377.

[284]. 223 Ind. 570, 63 N.E.2d 417 (1945).

[285]. 308 N.Y. 155, 124 N.E.2d 99 (1954).

[286]. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[287]. *See* Born, *supra* note 221, at 674 (citing Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 Am. J. Comp. L. 599, 606-610 (1994)).

[288]. *See id.* at 674.

[289]. *Id.*

[290]. Restatement (Second) Conflict of Laws § 188 (1971). These contacts are to be evaluated according to their relative importance with respect to the particular issues before the court. Restatement (Second) Conflict of Laws provides: § 188: (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6. (2) In the absence of an effective choice of law by the parties (*see* § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (c) the place of contracting, (d) the place of negotiation of the contract, (e) the place of performance, (f) the location of the subject matter of the contract, and (g) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.
§ 206 Issues relating to details of performance of a contract are determined by the local law of the place of performance.
Id. §§ 188, 206.

[291]. 395 P.2d 543 (Ore. 1964)

[292]. *See id.* at 546.

[293]. *See id.* at 544.

[294]. *See id.* at 545.

[295]. *See id.* at 549.

[296]. *See id.* at 548-49.

[297]. *See id.* at 543-44, 549.

[298]. *See generally* Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954) (describing the process by which the courts use the center of gravity test).

[299]. *See id.*

[300]. *See id.*

[301]. *See* Currie, *supra* note 258.

[302]. *See id.*

[303]. Alabama Great S. R. R. Co., 11 So. 803 (Ala. 1892).

[304]. *See id.* at 803.

[305]. *See id.*

[306]. *See id.*

[307]. *See id.* at 804.

[308]. *See id.* at 805- 06.

[309]. *Id.* at 806.

[310]. *See* Joseph William Singer, *Real Conflicts*, 69 B.U. L. Rev. 3, 3 (1989).

[311].*See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, Duke L.J. 171, 178 (1959).

[312]. Brainerd Currie, *The Disinterested Third State*, 28 Law & Contemp. Probs. 754, 757 (1963).

[313]. *See generally* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976) (weighing Texas and California's competing interests in having a case dealing with innkeeper's liability in an auto accident decided in their jurisdiction).

[314]. *See generally* Casey v. Manson Constr. and Eng'g Co., 247 Or. 274, 428 P.2d 898 (1967) (determining whether Washington or Oregon should govern in a loss of consortium case).

[315]. *See* Currie, *supra* note 282, at 178.

[316].*See* Robert Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267, 282 (1966).

[317]. *See id.* at 282.

[318]. *See* Born, *supra* note 221, at 654 (citing J. Beale, A Treatise on the Conflict of Laws 1080, 1083 &

1084 (1935)).

[319]. *See* Born, *supra* note 221, at 655.

[320]. *Id.* (citing Restatement (Second) Conflict of Laws § 187 (1971)). The Second Restatement Section 187 provides: (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (c) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the laws of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. Second Restatement *supra* note 274, § 187.

[321]. *See* Born, *supra* note 221, at 653.

[322]. *See* Second Restatement, *supra* note 274, § 188.

[323]. *See supra* Sections 3 and 4 and accompanying notes.

[324]. *See id.*

[325]. U.S. Const. art. IV, § 2, cl. 1.

[326]. *Id.* § 1.

[327]. 486 U.S. 717 (1988).

[328]. *Id.* at 717.

[329].*See* U.S. CONST. art. IV, § 2, cl. 1.

[330]. *See generally* Instructional Sys. v. Computer Curriculum, 130 N.J. 324 (1992)(highlighting a judicial disregard of contractual choice of law provisions in favor of applying the law of the forum state). In *Instructional Sys.*, the plaintiff was an exclusive distributor of the defendant's product, a computerized educational-learning system. The plaintiff filed suit under the New Jersey Franchise Practices Act because the defendant failed to renew the their distribution contract. The defendant alleged that this constituted unreasonable standards of performance. The choice of law provision in the distribution contract stated that "the agreement shall be construed and interpreted, and the legal relations created by it shall be determined, in accordance with the laws of the State of California." *Id.* at 328-41. Notwithstanding the choice of law provision in the contract, the court applied the forum's substantive law to decide the case. *See id.* at 343.

[331]. *See* U.S. CONST. art. IV, § 1.

[332]. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 276-77 (1992).

[333]. *Id.*

[334]. *See* Leon Trakman, The Law Merchant: The Evolution of Commercial Law 1-21 (1983).

[335]. *See* Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. Pitt. L. Rev. 993, 1021 (1994).

[336]. *See id.*

[337]. *See* Trakman, *supra* note 301, at 2, 15.

[338]. *See* David Johnson & David Post, *Law and Borders-The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1389 (1997).

[339]. Hardy, *supra* note 302, at 1021.

[340]. *See* Filip De Ly, International Business Law and Lex Mercatoria 8 (1992).

[341]. *See* Harold J. Berman & Felix J. Dasser, The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy, in Lex Mercatoria and Arbitration 53, 54 (Thomas E. Carbonneau ed., 1990).

[342]. *See* Trakman, *supra* note 301, at 42.

[343]. *See* Jonathon Blum, *The Deep Freeze: Torts, Choice of Law, and the Antarctic Treaty Regime*, 8 Emory Int'l L. Rev. 667, 695-96 (1994).

[344]. *See* Eugene Scoles & Peter Hay, Conflict of Laws 153, 154 (2d ed. 1992).

[345]. 19 I.L.M. 668 (1980), U.N. Conference on Contracts for the International Sale of Goods, Final Act (April 10, 1980), U.N. Doc. A/Conf. 97/18, reprinted in S. Treaty Doc. No.98-9, 98th Cong., 1st Sess.

[346]. *See* Born, *supra* note 221, at 795 (citing 20 U.S.T. 361-73, T.I.A.S. No. 6638, 658 U.N.T.S. 163).

[347]. *See id.* (citing Inter-American Convention on Letters Rogatory, signed in Panama on January 30, 1975, reprinted in 14 Int'l Leg. Mat. 339 (1975)).

[348]. *See id.* at 799 (citing S. Rep. No. 2397, 85th Cong., 2d Sess. at 7 (1958), *reprinted in*, 1958 U.S.C.C.A.N., at 5206)).

[349]. *See id.* (citing S. Exec. Rep. No. 6, 90th Congress, 1st Sess. 6 1967)).

[350]. *See* Scoles & Hay, *supra* note 311, at 153.

[351]. *See* Road Traffic Convention (Geneva, 1949), 3 UST 3008, 125 UNTS 22.

[352]. *See* 46 Stat. 2573, 132 U.N.T.S. 301.

[353]. *See*, *e.g.*, Helen Shin, *Oh, I Have Slipped the Surly Bonds of Earth: Multinational Space Stations and Choice of Law*, 78 Calif. L. Rev. 1375, 1411-12 (1990); s*ee also* I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. Pitt. L. Rev. 993, 1052-53 (1994); Michael Kirby, *Legal Aspects of Transborder Data Flows*, 11 Computer L.J. 233, 243 (1991); Robert J. Sciglimpaglia, Jr., *Computer Hacking: A Global Offense*, 3 Pace Y.B. Int'l L. 199, 247-50 (1991).

[354]. *See* Asahi, 480 U.S. at 112 (1987) (analyzing what additional steps must be taken to find purposeful availment to jurisdiction).

[355]. *See* Klaxon, 304 U.S. 64 (1938).

[356]. *See*, *e.g.*, Robert L. Dunne, *Deterring Unauthorized Access to Computers: Controlling Behavior in Cyberspace Through a Contract Law Paradigm*, 35 Jurimetrics J. 1, 3 (1994); *see also*, Nat Hentoff, Editorial, *Can Gingrinch Rescue Cyberspace?*, Sacramento Bee, July 1, 1995, at B6 (stating that proposed Communications Decency Act would have a chilling effect on free speech).

[357]. 326 U.S. 310 (1945).

[358]. *See* 471 U.S. 462 (1985).

Return to this Issue's Index

Return to *The Journal's* Homepage

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