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By E-MAIL AND FACSIMILE

Mr. Nicholas P. Godici
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Dear Mr. Godici:

These Comments are submitted on behalf of The Internet Coalition on Jurisdiction (the "Coalition") in response to the request for comments ("Request") by the United States Patent and Trademark Office ("USPTO") on recent developments in the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters currently being negotiated by the Hague Conference on Private International Law (the "Convention"). The Coalition is comprised of AT&T; Cable & Wireless USA, Inc.; the Computer and Communications Industry Association; Verizon Communications; the U.S. Internet Industry Association; and Yahoo! Inc. The Coalition represents a cross section of computer communications, online service provider and electronic commerce companies, many of which have interests that extend around the globe.

I. INTRODUCTION AND SUMMARY[1]

The Coalition appreciates the opportunity to submit these comments on the Convention. The Coalition also wishes to express its appreciation for the efforts of Jeff Kovar, Jennifer Lucas, and the entire U.S. delegation who have worked hard to represent all private sector organizations with an interest in these proceedings and to negotiate on their behalf.

Generally, the increasingly global nature of commerce calls for fair, predictable, global rules on jurisdiction and enforcement and, where consensus exists, a Convention for such rules would be desirable. Increasing the reliability of judgments at the international level could benefit all economic operators and individuals. Such solutions need to strike a fair balance between the interests of plaintiffs and defendants, however. But the characteristics of the

[1] This section responds to Questions 2 and 15 of the Request.

Internet call into question existing jurisdictional rules and their underlying policy objectives and it is not clear at this time, how in the context of electronic commerce a fair balance between those interests should be struck. Consequently, consensus on these issues in the context of electronic commerce does not yet exist at the national or international level.

The Convention thus puts the cart before the horse by trying prematurely to set out global rules for jurisdiction that will also apply to electronic commerce. The Coalition's concerns extend far beyond torts (Article 10) to consumer contracts (Article 7) and provisional measures (Article 13). These concerns are compounded by the as yet unresolved relationship between the Convention and other international instruments, such as the Brussels Regulation.[2]

For these reasons, the Coalition recommends that the U.S. Government pursue a multi-staged, scaled-back Convention, one that focuses, as a first step, on issues where international consensus may exist, such as choice of forum issues in B2B contracts. We agree with suggestions that Articles 7 and 13 be deleted from the Convention and that Article 10 either be limited to torts involving physical injury or deleted entirely. As national and then international consensus develops on these and other issues, provisions dealing with these issues can be added to the Convention in subsequent rounds of discussions. Although we urge the USPTO at this time to pursue a narrow convention limited to areas of likely international consensus, such as B2B contractual situations, we also recommend that USPTO reject efforts to address any particular area, such as intellectual property, in a separate Convention.[3] It makes far more sense for all jurisdictional issues ultimately to be resolved in this one Convention, rather than dealt with in a piecemeal fashion in multiple fora.

II. GLOBAL JURISDICTIONAL RULES CAN BENEFIT INTERNATIONAL COMMERCE BUT ADOPTING SUCH RULES FOR ELECTRONIC COMMERCE IS PREMATURE AND WILL THREATEN THE FUTURE DEVELOPMENT OF ELECTRONIC COMMERCE[4]

A. Global Jurisdictional Rules are Beneficial if They Provide Fairness, Certainty, and Predictability

The increasingly global nature of commerce calls for fair, predictable global rules on jurisdiction and enforcement. Such rules would allow businesses greater certainty as they evaluate the risks and benefits in any transaction. But while rules that yield certainty and predictability are important, they are only a legal tool for achieving certain policy objectives that

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[2] *See infra* notes 28 and 29.

[3] This responds to Question 14 of the Request.

[4] This section responds to Question 15 of the Request.

rulemakers deem desirable. Those policy objectives need to be defined and agreed upon before rules that achieve them can be crafted. At a very general level, we can probably agree that the goal should be to provide for jurisdictional *fora* that strike a just and fair balance between the legitimate interests of the parties. But we are far from agreement on what a just and fair balance would look like in the electronic commerce environment.

The emergence of electronic commerce fundamentally changes the parameters and assumptions on which current policies are based and makes it necessary to reconsider such policies in light of changed circumstances. This process in still underway at the national level. Jurisdictional doctrines for electronic commerce continue to evolve in the U.S. and Canada and those adopted by the European Union have been severely criticized and the subject of much controversy. Adopting rules in a global convention and effectively engraving them in stone before consensus exists at the national level on whether such rules or even the underlying policies are the correct ones is a risky enterprise. It may result in an unworkable convention and cripple the future development of electronic commerce.

B. Adopting Global Jurisdictional Rules Applicable to Electronic Commerce at This Time Provides No Assurances of Fairness and May Threaten the Future Development of Electronic Commerce

The emergence of electronic commerce calls into question whether traditional approaches to jurisdiction ensure a fair balance between plaintiffs' and defendants' legitimate interests. As Lawrence Lessig has stated: Cyberspace is ubiquitous – "everywhere if anywhere and hence no place in particular."[5] What made jurisdictional sense in the physical world does not readily translate to cyberspace. The Internet also increases substantially the likelihood that the parties to a transaction may be located at great distances from each other. The Internet also makes the parties' geographic locations irrelevant in many instances and in any event difficult to determine. And, for the small cost of erecting and maintaining a web site, small and medium-sized merchants may transact business with consumers around the world whose physical locations are irrelevant and often unknown. It means we can no longer assume that those businesses involved in international trade are large multinational companies.

Allowing consumers to bring actions in the courts where they live, as proposed in the Convention, merely because a web site is available may cripple the development of electronic commerce. Such allowance means that even the smallest merchant may be subject to jurisdiction and the expensive burden of defending lawsuits around the world.[6] And because of the close

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[5] Lawrence Lessig, *The Zones of Cyberspace*, 48 Stan. L. Rev. 1403, 1404 (1996).

[6] *See* Paul Miller, *Europe Panel is Rethinking How It Views E-Commerce*, N.Y. Times, June 27, 2001 at W 1, indicating that European Commission officials have recognized the validity of these concerns in the choice of law context.

relationship between choice of forum and choice of law,[7] worldwide jurisdiction may also mean that merchants will have to go to the expense of being compliant with laws around the world. At the same time, allowing consumers to serve in the courts where they live provides plaintiffs with an illusory remedy since they still have to go to the foreign jurisdiction to get the judgment enforced, an unrealistic proposition given the small dollar value of most electronic commerce transactions. Accordingly, many policymakers have urged that development of more practical approaches to handle disputes arising online, such as alternative dispute resolution ("ADR") mechanisms.[8]

Similar problems also arise in the information tort context. Information on the Internet is generally available everywhere, which means that the defendant arguably has some sort of contact with every jurisdiction. At the same time, those contacts may be so attenuated as to render them meaningless and unfit to serve as a fair and just basis for personal jurisdiction over the defendant. Allowing plaintiffs to sue wherever the harm has arisen in the electronic commerce context, subjects an alleged tortfeasor to jurisdiction in any country of the world,[9] regardless of whether there have been meaningful contacts with the particular jurisdiction. It also allows unlimited forum shopping.[10]

C. U.S. Jurisdictional Rules for Electronic Commerce are Still Evolving

1. Traditional U.S. Jurisdictional Analysis

U.S. jurisdictional analysis is generally a two-step process. In the first step, the forum applies its long-arm statute.[11] Such statutes may either contain a list of specific bases of jurisdiction or simply state that the exercise of jurisdiction is proper to the extent allowed by the Due Process Clause of the United States Constitution.[12] The analysis also must involve a second

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[7] *See infra* Section IV(C).

[8] *See* the U.S. Government Working Group on Electronic Commerce 3rd Annual Report 2000 at 35-37; OECD Workshop on Building Trust in the Online Environment: Business-to-Consumer Dispute Resolution, December 11-12, 2000; Commission Working Document on the Creation of a European Extra-Judicial Network, March 20, 2000; Communication from the Commission on "the out-of-court settlement of consumer disputes," COM (1998) 198 Final; OECD Guidelines for Consumer Protection in the context of Electronic Commerce, December 9, 1999; and Secretary of Commerce William M. Daley, Closing Remarks at the Global Business Dialogue on E-Commerce (September 13, 1999).

[9] *See*, for example, the recent example of the Supreme Court of Victoria's decision in *Gutnick v. Dow Jones* (2001) VSC 305 (28 August 2001) (asserting jurisdiction over a U.S. defendant based on the accessibility of defaming content in Australia).

[10] *See infra* Section IV(C).

[11] Federal courts typically "borrow" the long-arm statute of the State in which they sit, *see, e.g.*, Fed. R. Civ. P. 4(k). *See* Gary B. Born, International Civil Litigation in United States Courts, 171-75 (3d ed. 1996).

[12] *See, e.g.*, Cal. Code Civ. Proc. § 410.10 (2001). ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.")

step, the minimum contacts analysis required by the Fifth and Fourteenth Amendments' Due Process Clauses.

The modern minimum contacts test was first formulated by the Supreme Court in *International Shoe Co. v. Washington.*[13] There, the court stated that to exercise personal jurisdiction over a defendant who is not present in the forum state, due process requires that the defendant "have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[14] *Hanson v. Denckla* further refined the test, adding the "purposeful availment test," and holding that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[15] *World-Wide Volkswagen v. Woodson* emphasized the reasonableness of the defendant being haled into court in a remote forum, reiterating that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."[16] Finally, *Burger King Corp. v. Rudzewicz* held that the "'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts."[17]

In the U.S., there is neither a general rule that would always allow consumers to sue in their home courts, nor one that would prohibit a third party from suing consumers in a forum other than their home state. Consumer contracts, as all other cases, are subject to the general rules concerning personal jurisdiction, namely the minimum contacts test under the Due Process Clause. Application of this test often allows a consumer to bring an action in her home courts, but the analysis is fact specific and there may be cases that warrant a different result. In fact, it appears to be settled law that the *mere* existence of a contract with an-out-of state plaintiff does not by itself establish jurisdiction at the plaintiff's domicile.[18] And, choice of forum agreements generally are regarded as enforceable in the U.S. *unless* they are invalid for reasons such as fraud, overreaching, undue influence or overweening bargaining power, or are unreasonable or contravene a strong public policy of the forum where the suit is brought.[19] The latter may, but by

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[13] 326 U.S. 310 (1945).

[14] *Id.* at 316.

[15] 357 U.S. 235, 253 (1958), reh'g denied, 358 U.S. 858 (1958).

[16] 444 U.S. 286, 295 (1980).

[17] 471 U.S. 462, 475 (1985).

[18] Id. at 479; *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1362 (7th Cir. 1985); *Precision Laboratory Plastics Inc. v. Micro Test, Inc.*, 981 P.2d 454, 457 (Wash. Ct. App. 1999).

[19] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), *appeal after remand*, 934 F.2d 1091 (9th Cir. 1991). *See also* Born, *supra* note 11, at 378; Restatement (Second) of Conflict of Laws § 80 (1988) (The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable").

no means always need, be the case in online consumer transactions, as recent decisions indicate.[20]

2. *U.S. Jurisdictional Rules Applicable to Electronic Commerce Continue to Evolve*

U.S. courts, as required, generally apply due process analysis to Internet cases, but the law in this context is by no means settled and continues to evolve. While some early decisions did in fact base jurisdiction on the fact that information can be accessed in the forum,[21] later courts have mostly followed the so called "*Zippo* Continuum." In its decision in *Zippo Manufacturing Co. v. Zippo Dot Com* the court distinguished between "active" and "passive" web sites in an attempt to establish clear rules on when the exercise of jurisdiction is proper.[22] Under the *Zippo* Continuum, courts generally find purposeful availment and exercise personal jurisdiction over businesses that enter into contracts through the Internet with residents of the forum that involve a knowing and repeated transmission of computer files over the Internet.[23]

Now, U.S. courts are moving away from the *Zippo* cases. These cases have been criticized as outdated and irrelevant. [24] And, indeed, more recent decisions indicate a shift from the *Zippo* analysis towards a broader contacts-based approach, suggesting that mere "interactivity" of a web site by and in of itself is not a sufficient basis for jurisdiction.[25] Currently, there are no bright line rules in the U.S. (or Canada) with respect to jurisdiction and electronic commerce. The law continues to evolve as courts appear to have returned to a more fact-specific case-by-case analysis under the general minimum contacts test. In sum, there is not yet consensus in the U.S. (or Canada) on what the jurisdictional rules applicable to electronic

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[20] *See, e.g., Caspi v. Microsoft Corp.*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999) (upholding a clickwrap choice of forum clause). *But see America Online, Inc. v. Super. Ct. Alameda County*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) (finding unenforceability of clickwrap choice of forum clause).

[21] *See Inset Systems, Inc. v. Instruction Set*, Inc., 937 F. Supp. 161 (D. Conn. 1996).

[22] *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

[23] In addition, under the *Zippo* Continuum, they decline jurisdiction where a defendant simply posts information on a "passive" Internet web site that is accessible to users in the jurisdiction. And, where it is possible to exchange information over an interactive web site but not enter into contracts, the cases go both ways.

[24] *See* Michael Geist, *Is There a There There? Toward Greater Certainty for Internet jurisdiction* 26-35 (last visited Oct. 16, 2001) *available at* <http://aix1.uottawa.ca/~geist/geistjurisdiction-us.pdf> (discussing recent developments and criticizing the *Zippo* test). *See also, Impediments to Digital Trade: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce*, 107th Cong. (2001) (statement of Barbara Wellbery) *available at* <http://energycommerce.house.gov/107/hearings/05222001Hearing231/Wellbery346print.htm>.

[25] *Digital Control Inc. v. Boretronics Inc.*, No. C01-0074L, 2001 U.S. Dist. LEXIS 14600 (W.D. Wash. Sept. 6, 2001) at 7. ("[T]he mere existence of a worldwide web site, regardless of whether the site is active or passive, is an insufficient basis on which to find that the advertiser has purposefully directed its activities at residents of the forum state.")

commerce should be or even if traditional jurisdictional policies continue to make sense in the electronic commerce context.

III. THE CONVENTION'S PROPOSED CONSUMER CONTRACT AND TORT RULES BORROW FROM EUROPEAN RULES THAT HAVE BEEN SEVERELY CRITICIZED IN EUROPE AND WILL OFTEN LEAD TO FINDINGS OF JURISDICTION THAT FAIL THE U.S. CONSTITUTIONAL TEST[26]

A. The Convention's Proposed Rules on Consumer Contracts and Torts Have Been Severely Criticized in the EU

Conventional wisdom holds that civil law countries, in the interest of greater predictability and certainty, accept the possibility of unjust results in particular cases and that common law countries emphasize reasonableness, fairness, and justice in each individual case at the expense of predictability and certainty. Both approaches ultimately, however, need to strike a proper balance between predictability and justice.[27] The Internet has the potential to distort significantly the balance that previously has been struck by the civil law as well as by the U.S. approach to jurisdiction. Current European rules, which form the basis for the Convention's approach, have been much criticized in Europe when applied to electronic commerce.

1. Consumer Contract Jurisdiction Rule in Europe

Article 7 of the 1999 Draft of the Convention (the "1999 Draft") adopts the approach to jurisdiction for disputes arising out of consumer contracts found in the Brussels Convention. The Brussels Convention,[28] which will be superceded on March 1, 2002 by the almost identical Brussels Regulation,[29] follows the civil law approach to jurisdiction. The Brussels Convention prescribes grounds of jurisdiction that must be made available to plaintiffs to whom the Brussels Convention applies.[30] Jurisdiction is always proper in the courts of the defendant's country of residence. In fact, a plaintiff can bring suit in other Member States' courts only when expressly permitted by the Brussels Convention. These special fora include, for example, in tort actions,

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[26] This section responds to Question 15 of the Request.

[27] *See* Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 Alb. L. Rev. 1283, 1288 (1998) ("jurisdictional rules should provide both fairness and predictability").

[28] 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter Brussels Convention), Sept. 27, 1968, 1972 O.J. (L 299) 32, as last amended by the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden thereto, Nov. 29, 1996, 1997 O.J. (C 15) 1. For a consolidated version see 1998 O.J. (C27) 1.

[29] Council Regulation (EC No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1 (hereinafter Brussels Regulation).

[30] Generally, those are persons domiciled in a Member State and being sued in the courts of another member state, *see id.* at Art. 2.

the place where the harmful event occurred.[31] In actions arising out of consumer contracts, bringing suit in the place where the consumer resides is proper so long as the defendant "pursues commercial activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State."[32] The Brussels Convention also bars enforcement of choice of forum agreements where one party is a consumer unless it is entered into after the dispute has arisen.[33] A Member State may not exercise jurisdiction over a defendant to whom the Brussels Convention applies on grounds other than those it recognizes,[34] and it may not decline jurisdiction where a statutory basis is satisfied.

Application of the rule has been sharply criticized in Europe when applied in the electronic commerce context. Permitting consumers to sue in their home courts has been at the core of a heated and polarized debate in Europe about how to deal with consumer contracts in the electronic commerce context. Strenuous objections were raised to the "country of destination" approach as the Brussels Convention was transposed into the Brussels Regulation.[35] Critics were concerned that, if applied broadly to Internet transactions, the consumer contracts provision could create EU-wide jurisdiction for companies engaged in electronic commerce. The European Parliament shared critics' concerns about the Regulation's potential impact on electronic commerce and proposed requiring explicitly that an online merchant's activities actually be directed towards a Member State for that Member State to have jurisdiction. The Parliament also favored a more flexible rule with respect to the prohibition of choice of forum clauses that would allow room for development and implementation of ADR mechanisms.[36]

The European Commission, however, chose to resolve these ambiguities by taking a different position and making clear that the Brussels Regulation would apply to consumer contracts concluded via an interactive web site accessible in the State of the consumer's domicile.[37] The Commission stated that it "will review the system as soon as the Regulation has come into force on the basis of a stock-taking of alternative dispute-settlement schemes."[38] The Commission also announced it would revisit the concerns that have been raised in the course of the mandatory evaluation of the Brussels Regulation,[39] which is to take place within two years

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[31] *Id.* at Art. 5(3).

[32] *Id.* at Art. 15(1)(c).

[33] *Id.* at Art. 17.

[34] *Id.* at Art 3(1) (Persons domiciled in a Member State may be sued in the courts of another Member State *only* by virtue of the rules set out in Sections 2 to 7 of this Chapter.) (emphasis added).

[35] *See* Brussels Convention, *supra* note 28 and Brussels Regulation, *supra* note 29.

[36] *See* Amended proposal for a Council Regulation on jurisdiction and enforcement of judgments in civil and commercial matters, COM (2000) 689 final at 5-6.

[37] *Id.*

[38] *Id.*.

[39] *Id.*

after its entry into force.[40] In short, rather than resolve concerns over the regulation's potential effect on electronic commerce, the European Commission left to a later day concerns that the Brussels Regulation fails to take into account the specific legal problems and economics that pertain to electronic commerce.

2. Tort Jurisdiction Rule in Europe

Article 10 of both the 1999 Draft and the June 2001 Draft of the Convention (the "Revised Draft")[41] would encompass all torts including content torts, such as privacy, defamation, and copyright infringement.[42] As now drafted, Article 10 would permit plaintiffs to bring tort actions in courts of the state:

- in which the act or omission occurred that caused the injury; or
- where the injury arose unless the defendant is able to establish that the result could not have been reasonably foreseen.

Article 10 adopts the European rule on tort jurisdiction embodied in Article 5(3) of the Brussels Convention. The European Court of Justice has not yet addressed the issue of tort jurisdiction in electronic commerce, but its interpretation of the similar tort provision in the Brussels Convention does indicate that a place where the harmful event occurred can be found anywhere where the "harmful" information can be accessed.[43] Under this approach, anyone who makes information accessible over the Internet could potentially be subject to tort jurisdiction in any country around the world. Suits for all kinds of torts, copyright infringement, privacy, and defamation could be brought wherever the "harmful" information is accessible as that would be where the damage occurred.

The approach has been severely criticized in Europe on the grounds that it creates exorbitant jurisdiction in the electronic commerce context. The approach would create worldwide jurisdiction for content providers,[44] since injury would be viewed as arising wherever

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[40] Brussels Regulation, *supra* note 29, Art. 65.

[41] As a result of the June 2001 meeting, the Convention has distributed a revised and annotated version of the 1999 Draft. *See* Hague Conference on Private International Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Nineteenth Session, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference* 6-20 June 2001, Interim Text (last visited Oct. 17, 2001) *available at* <ftp://hcch.net/doc/jdgm2001draft_e.doc>.

[42] We note with concern that the text remains unbracketed despite a footnote noting that it remains under consideration given (among other issues) the e-commerce and intellectual property issues it raises.

[43] *See, e.g., Shevill v. Presse Alliance S.A.*, 1995 E.C.R. I-415 (with respect to a print publication).

[44] *See, e.g.*, Birgit Bachmann, *Der Gerichtsstand der unerlaubten Handlung im Internet*, IPRax 1998, 179, 184 (agreeing); Haimo Schack, *Internationale Urheber-, Marken- und Wettbewerbsrechtsverletzungen im Internet—Internationales Zivilprozessrecht*, MMR 2000, 135, 139 (concluding that the content provider is subject to

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the material is downloaded. In short, Article 10 would therefore take a rule that has been much criticized in Europe and make it a global jurisdictional rule that would allow Internet content and service providers to be sued anywhere in the world where material they transmitt is accessible.

IV. THE CONVENTION'S PROPOSED CONSUMER CONTRACT AND TORT RULES WILL OFTEN LEAD TO FINDINGS OF JURISDICTION THAT FAIL THE U.S. DUE PROCESS TEST

A. Jurisdiction Founded on the Convention's Consumer Contract Provision Would Often Fail the Constitution's Due Process Test[45]

It is also likely that the Convention's default rule, which virtually always allows consumers to sue in the courts of their domicile for disputes arising online,[46] will lead to jurisdictional findings that often fail the U.S. due process test where electronic commerce transactions are involved. This rule will create ambiguities about whether U.S. courts will enforce such judgments when they are brought to the U.S. for enforcement.[47] It would be unclear whether U.S. courts would refuse jurisdiction of those foreign judgments as incompatible with U.S. public policy, because such judgments fail the U.S. Constitution's Due Process standard.[48] Adopting this rule then would create the very ambiguities in the U.S. about enforcement of judgments rendered under Article 7 that a global Convention is designed to eliminate or at least minimize.[49]

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worldwide jurisdiction under German law and under Art. 5(3) of the Brussels Convention). *See generally* Rufus Pichler, *Internationale Gerichtszuständigkeit im Online-Bereich, in* Handbuch Multimedia Recht pt. 31 (Thomas Hoeren & Ulrich Sieber eds., 2000) (criticizing the current state of the law in Europe and discussing alternatives to reasonably limit jurisdiction).

[45] This section addresses Question 13 of the Request.

[46] *See* text associated with footnote 32.

[47] *See Ronald A. Brand, Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention,* 24 Brook. J. Int'l 125, 127 (1998). ("For the United States, every provision of the convention must be tested against the Fifth and Fourteenth Amendments' Due Process Clauses. We can neither agree to assume jurisdiction over foreign defendants on bases that would not be within the limits of due process, nor accept an obligation to recognize judgments based on jurisdictional grounds that would not be acceptable under the due process jurisprudence of the U.S. Supreme Court.")

[48] The Convention permits recognition or enforcement to be refused where they "would be manifestly incompatible with the public policy of the State addressed." Art. 28(f) of the Convention. It is not clear, however, which U.S. public policies would meet this test. In addition, concerns about international reaction could influence the extent to which U.S. courts invoke this exception.

[49] Currently, where a party seeks enforcement or recognition of a foreign judgment in the United States, the U.S. court may examine whether the foreign court had personal jurisdiction over the defendant. A defendant may resist enforcement or recognition on the basis of lack of personal jurisdiction if the defendant neither appeared in the

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The June 2001 Draft of the Convention (the "Revised Draft") tries to improve on the 1999 Draft. It appears evenhanded and includes almost every conceivable option for addressing choice of forum clauses. The Revised Draft also proposes as an option deleting Article 7 in its entirety. But, problematically, all but the proposal to delete Article 7 entirely leave in place as the default rule the controversial European approach that consumers can sue in the courts of their domicile.

The efforts of the Revised Draft to address the concerns of electronic commerce providers with respect to "freedom of contract" are also ultimately unsuccessful, because such efforts are unworkable. For example, the Revised Draft would allow electronic commerce service providers to avoid jurisdiction if they can demonstrate that they took reasonable steps to avoid contracts with consumers from certain states. But this allowance would balkanize the Internet and undercut one of its main attributes, global ubiquity, while leaving business with no certainty about what would constitute "reasonable steps." And leaving to contracting states whether they will enforce choice of forum clauses, one of the options included in the Revised Draft, raises serious reciprocity problems without effectively addressing significant concerns about Article 7's impact on traditional freedom of contract or effective and efficient ways, such as alternative dispute resolution, to address business/consumer cross border disputes.[50]

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foreign court to contest jurisdiction, nor waived jurisdiction. For example, a defendant against whom a foreign court has entered a default judgment may argue that he or she was not subject to personal jurisdiction in the foreign court. When a defendant asserts that the foreign court lacked personal jurisdiction, U.S. courts generally inquire whether the foreign court's exercise of personal jurisdiction conformed to standards of due process as recognized in the United States. *See, e.g., Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986). This means that U.S. courts will apply the "minimum contacts" test, under which a defendant is subject to personal jurisdiction if he or she purposefully availed him/herself of the benefits of the forum state. *See Mercandino v. Devoe & Raynolds, Inc.*, 436 A.2d 942, 943-44 (N.J. App. Div. 1981) (enforcing Italian default judgment where defendant had sent a representative to Italy to discuss with plaintiff marketing of defendant's products in Italy). Few U.S. courts consider whether the foreign court had jurisdiction over the defendant under the laws of the foreign country. *See Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1253 (S.D.N.Y. 1995) (noting that personal jurisdiction was proper under both Quebec and New York law).

Exceptions to enforcement based on "jurisdictional defects or procedural unfairness [are] construed especially narrowly 'when the alien jurisdiction is...a sister common law jurisdiction with procedures akin to our own.'" *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1252 (S.D.N.Y. 1995), *aff'd.*, 104 F. 3d 352 (2d Cir. 1996) (quoting *Clarkson Co. v. Shaheen*, 544 F.2d 624, 630 (2d Cir. 1976)); *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 894 (N.D. Tex. 1980), *supp. op.*, 580 F. Supp. 304 (N.D. Tex. 1998) ("Where, as here, the rendering forum's [England's] system of jurisprudence has been a model for other countries in the free world, and whose judges are of unquestioned integrity independent of the political winds of the moment, the judgment rendered is entitled to a more ministerial and less technocratic, recognition decisional process.").

[50] The U.S. probably takes the most liberal approach regarding enforceability of choice of forum clauses involving consumers. Accordingly, one likely consequence of this proposal is that U.S. companies could be sued in Europe, while European companies could not be sued in the U.S., since chose of forum clauses would be enforced in the

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In sum, the Revised Draft of Article 7 leaves in place as the default rule the European approach to jurisdiction on consumer contracts, a rule, which in the context of electronic commerce, has engendered tremendous controversy in the European Union. In addition, this rule will often lead to judgments that fail to the U.S. constitutional due process test and, which may not be enforceable in the U.S. Moreover, the multiplicity of proposed solutions demonstrate how little consensus exists on how to approach disputes arising out of consumer/business transactions in cyberspace. For these reasons, the wiser course would be to defer including consumer contract issues in the Convention at this time.

B. Jurisdiction Founded on the Convention's Tort Rule Would Often Fail the Constitution's Due Process Test

Article 10 of the Convention in its current form would allow courts to assert jurisdiction based on contacts with the forum (namely the mere accessibility of online content) that do not have the "purposeful availment" necessary to satisfy the minimum contacts test under the Due Process Clauses of the Fifth and Fourteenth Amendments. Accordingly, as explained above, if adopted in its present form Article 10 also would create ambiguities in the U.S. about enforcement of judgments rendered on the grounds the article contains. It would be unclear whether U.S. courts would refuse recognition of those foreign judgments as incompatible with U.S. public policy[51] because they failed to meet the U.S. Constitution's Due Process standard.

Adding the element of foreseeability, which (in contrast to Article 5(3) of the Brussels Convention) has been included in Article 10 of the Convention, does not eliminate the potential for worldwide jurisdiction or U.S. constitutional problems with Article 10. It is widely acknowledged that worldwide accessibility of online content, as a general matter, *is* always foreseeable.[52] And, as noted above, the U.S. Supreme Court has expressly held that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."[53]

U.S. but not in Europe. And, if that is the case, the due process issues created by Article 7 and lack of clarity on enforcement will not be resolved by the Revised Draft of Article 7.

[51] *See* Revised Draft, *supra* note 41, Art. 28(1)(f).

[52] *See, e.g.*, Catherine Kessedjian, Electronic Commerce and International Jurisdiction, Ottawa, 28 February to 1 March 2000, Summary of Discussions, Hague Conference on Private International Law, Enforcement of Judgments, Prel. Doc. No. 12, at 8 (August 2000), *available at* <ftp://hcch.net/doc/jdgmpd12.doc>. ("Several experts pointed out that in the cyber-world, the proof required in Article 10.1(b) can never be adduced. Internet sites, it is true, operate somewhat like newspapers which are distributed world-wide. A person who uploads defamatory information onto a site can reasonably foresee that it may be read anywhere in the world.")

[53] *Supra* note 16.

As with consumer contracts, the June 2001 meeting did not result in progress or consensus on Article 10.[54] Article 10 in its entirety remains under consideration, particularly with respect to electronic commerce, intellectual property, and due process concerns.[55] Proposals on Article 10 made during the June meeting that remain to be discussed in the course of the negotiations include: (1) activity based jurisdiction with respect to torts in addition to the concept of jurisdiction where the act or the injury occurred;[56] (2) limitations on jurisdiction if the defendant has taken reasonable steps to avoid acting in or directing activity into a specific forum, which limitation is aimed, in particular, at protecting parties in the context of electronic commerce;[57] (3) the deletion of Article 10(3) of the 1999 Draft, which provided for jurisdiction where the act or omission, or the injury *may* occur; and (4) the deletion of Article 10(4) of the 1999 Draft.

As noted above, no consensus has been reached on any of those issues. Efforts to fix the provision by allowing defendants to take reasonable steps to avoid directing activity to the state are also problematic. First, as noted above, these efforts run the risk of balkanizing the Internet and undercutting one of its main attributes, global ubiquity, while leaving business with no certainty about what would constitute "reasonable steps." Second, it is difficult to see how service providers will be able to take such steps since it is not they, but other entities, that make much of the content available on the Internet who would be in the position to take such steps. It is also unclear if actions to limit jurisdiction by those who made the material available online will operate to service providers' benefit. And, finally, even if service providers are able to benefit from the steps taken by content providers to limit jurisdiction, service providers may have no ability to require that content providers take the necessary steps to avoid acting in a state or directing activity to the state. For these reasons, we recommend limiting Article 10 to physical torts or deleting it from the Convention.

C. The Tort Provision Would Encourage Forum and Law Shopping[58]

There is also no question that through choice of forum, plaintiffs may affect the choice of the applicable substantive law. One of the main reasons for forum shopping is that courts apply their own choice of law rules, which, as a matter of law or fact, often lead to the choice of the substantive law of the forum.[59] Forum shopping is particularly troubling in the context of the

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[54] *See* Revised Draft, *supra* note 41, Art. 10 and notes thereto.

[55] *See id.* n.66.

[56] *See id.* Art. 10(2).

[57] *See id.* Art. 10(3) and n.68.

[58] This section responds to Question 12 of the Request.

[59] Commentators have often observed a "homeward trend" of courts. *See, e.g.*, Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553, 559 (1989); Haimo Schack, Internationales Zivilverfahrensrecht, para. 224 (2d. ed. 1996); Eugene F. Scoles & Peter Hay, Conflict of Laws § 2.12 (2d. ed. 1992)

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Convention, which operates against the background of widely divergent substantive laws. Consequently, the choice of forum and application of its choice of law rules may lead to a choice of substantive law that the plaintiff considers more favorable than that of another forum. Obviously, jurisdictional rules that recognize jurisdiction anywhere and everywhere the material can be accessed on the Internet provide plaintiffs with unlimited jurisdictional choices and thus unlimited opportunities to influence the choice of applicable law.

Article 10 of the Convention could thus upset the careful balance between copyright and service provider interests that was struck by the Digital Millennium Copyright Act (the "DCMA"), which lays out steps service providers may take in specified circumstances to insulate themselves from monetary damages and limit their liability for injunctive and other equitable relief for copyright infringement. For example, in determining applicable law, many courts look to the law of the country for which copyright protection is sought. In an infringement action, this would be the law of the protecting country or where the infringement took place. Other courts will apply the law of the country where the work originated (generally where the work was first published). And still other courts follow a combined approach. France, for example, usually (but not always) determines initial ownership of a work according to the law of the country of origin; all other aspects are governed by the law of the protecting country. The U.S. approach is to apply the law of the country that has the most significant relationship to the issue in question.[60] This may require application of the law of the country of origin where issues of initial ownership are concerned and the law of the protecting country where issues of infringement are concerned. German copyright choice of law rules apply the law of the protecting country (i.e., where the infringement occurred) to all copyright issues (such as ownership, infringement and others).[61]

Accordingly, many countries will apply the law of the protecting country, or where the infringement took place. When information is distributed via the Internet, the infringement can

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(pointing to the "homeward trend . . . with its consequences of law-selection through forum shopping"). *See also*, Paul Goldstein, International Copyright; Principles, Law and Practice (2001), Section 3.3 at 89 ("The procedural rules of the forum in which a copyright case is heard can determine the outcome of the case. Forum rules govern not only the procedural aspects of a case, from pretrial procedures through exhaustion of appeals; forum rules on choice of law--also called conflicts of law, or private international law--will control the substantive law that applies to the dispute."); and Section 3.3.1 at 90 ("Choice of forum can significantly affect the outcome of a copyright infringement or breach of contract case. Apart from the fact that a forum's choice of law rules will determine the substantive law applicable to the case, forum law will govern the availability and scope of personal jurisdiction and other procedural incidents affecting the cost, efficiency, and completeness of the litigation such as discovery, jury trial, res judicata, and enforcement of judgments.").

[60] For example, in Itar-Tass *Russian News Agency v. Russin Rurrier, Inc.*, 153 F. 3d 82, 90 (2d Cir. 1998), the court looked to the country of origin to determine issues of initial ownership.

[61] Paul Katzenberger, in Urheberrecht [Copyright] vor 120 ff. par. 129 (Gerhard Schricker ed., 2d ed. 1999); Federal Supreme Court of Germany, 1998 GRUR Int. 427, 429.

take place wherever the information is downloaded, and the information can be downloaded virtually anywhere. Plaintiffs will be able to choose virtually any forum and therefore the applicable law. The result may well be that plaintiffs can avoid the DMCA in copyright infringement suits by bringing their suits in contracting countries around the world that apply the law of the country for which copyright protection is sought. In such cases, the statute's bar to monetary relief for Internet service providers in certain circumstances as well as the limitations on injunctive relief when they have taken the requisite steps will easily be end-run.

V. THE PROBLEMS IN ARTICLES 7 AND 10 OF THE CONVENTION ARE COMPOUNDED BY THE PROVISIONS ON PROVISIONAL AND PROTECTIVE MEASURES AND THE UNRESOLVED RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS.

A. Provisional and Protective Measures[62]

Article 13, which deals with provisional measures, such as preliminary injunctions, establishes that a court that has jurisdiction to hear a case may also order provisional measures. While the Convention limits the effect of such provisional measures to the territory of the state in which the relevant court is located, that limitation may likely prove meaningless on the Internet where an injunction ordering removal of material from a web site cannot be limited geographically. Accordingly, a temporary injunction could be entered for any action, including copyright infringement, in a foreign court, and a U.S. court would be expected to enforce it. The due process concerns described above with respect to Articles 7 and 10 of the Convention apply and are indeed exacerbated by Article 13. Often less "due process" is provided in the context of provisional and protective measures than in litigation on the merits. Again, this provision would create additional ambiguities about enforcement in the U.S. of provisional or protective measures issued under the Convention. It would not be clear when U.S. courts would enforce such judgments. For these reasons, we advocate deleting Article 13 from the Convention.

B. Relationship with Other International Instruments

We also address the question of the Convention's relationship with other international instruments. This issue could have serious implications for U.S. companies for several reasons. First, under the Brussels Regulation, the Member States are free to assert *exorbitant* bases of jurisdiction with respect to defendants to whom the Regulation does not apply, namely residents of the U.S.[63] In fact, the Brussels Convention and Regulation significantly worsened such

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[62] This section responds to Question 11 of the Request.

[63] *See* Art. 4(1) Brussels Regulation. *See also* Frederick Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 Mich. L. Rev. 1195, 1211 ("In stark contrast, the Brussels Convention openly discriminates against outsiders. While article 3 outlaws recourse to the member states' exorbitant

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defendants' position. Judgments based on exorbitant national bases of jurisdiction will benefit from the prohibition in the recognizing State of review of jurisdiction of the court of the Member State of origin. Such judgments will generally be recognized and enforced pursuant to the Regulation.[64] Consequently, a judgment in one Member State rendered upon assertion of exorbitant jurisdictional rules subjects assets of the non-Member State defendant to enforcement in *all* Member States. Understandably, this has been heavily criticized in the U.S.,[65] especially as the U.S. does not discriminate against foreigners in applying the Fifth and Fourteenth Amendments due process test. There has been little discussion of this issue at Convention negotiations and thus no resolution of the issue. Nonetheless, two of the four proposals on this issue,[66] would result in application of the Brussels Regulation rather than the Hague Convention even where the defendant is not domiciled in a Member State. Accordingly, we urge the U.S. Government to insist on an evenhanded approach in the Convention to jurisdiction. Exorbitant and discriminatory grounds of jurisdiction should not form the basis of jurisdiction in any instance among contracting states to the Convention.

VI. CONCLUSION

For the foregoing reasons, we strongly urge the U.S. government to pursue a multi-staged scaled back Convention that focuses as a first step on issues where international consensus is likely to exist, such as choice of forum clauses in B2B contracts. Articles 7 and 13 should be deleted from the Convention and Article 10 limited to physical torts or deleted entirely. The Convention should also bar exorbitant bases of jurisdiction among contracting states to the Convention. And, as noted above, we object to any efforts to sever intellectual property issues from other jurisdictional issues by placing them in a separate convention. Relegating intellectual property issues to a separate convention is a troubling precedent that could form the basis for other separate and perhaps conflicting Conventions. Nor is there any reason to believe that consensus on these difficult issues would be any easier to achieve in different fora unless the

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jurisdictional bases in actions brought against Common Market domiciliaries and corporations, article 4 expressly authorizes the continued use of such provisions against parties domiciled outside the Common Market.") (footnotes omitted).

[64] *See id.*, at n.119 ("In particular, the Convention requires the enforcement of judgments of other member states against 'outsiders' even if such judgments are premised on exorbitant jurisdictional bases."). *See also* Jan Kropholler, Europäisches Zivilprozessrecht [European Law of Civil Procedure] Art. 3 para. 3 (6th ed. 1998).

[65] Friedrich Juenger, *La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale,* 72 Revue Critique de Droit International Privé [R.C.D.I.P.] 37 (1983); Arthur T. von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States,* 81 Colum. L. Rev. 1044, 1059 (1981); Kurt H. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft,* 67 Colum. L. Rev. 995 (1967).

[66] *See* Proposals 2, 3, and 4 of Article 37 of the Revised Draft.

reason for selecting such fora is that they are *less* open to the views and concerns of all stakeholders.

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Thank you for the opportunity to comment on these important issues. If you have any questions concerning these comments or we can otherwise be of assistance in connection with this matter, please do not hesitate to contact me at (202) 887-1549 or by e-mail (bwellbery@mofo.com). We look forward to working with you in the future toward a Convention that resolves many of these difficult issues.

Sincerely,

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