JURISDICTION IN CYBERSPACE:
WHICH LAW AND FORUM APPLY TO
SECURITIES TRANSACTIONS ON THE INTERNET?

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1. INTRODUCTION

The Internet, as a novel medium of commerce and communication, raises two fundamental jurisdictional issues. First, the Internet diminishes the significance of the physical location of parties involved in a transaction. Such diminution results from the fact that transactions in cyberspace, strictly speaking, do not take place in any particular geographic location or jurisdiction. Second, the Internet alters the balance of power between buyer and seller. It arms buyers with masses of information and new analytical tools, such as cyberagents known as “bots.” Also, by rendering geographical limitations almost entirely irrelevant, the Internet shifts the balance of power between buyer and seller.

In order to understand how the new Internet tools relate to the expectations and obligations of securities’ issuers, traders, and investors, this article examines basic jurisdictional principals. Then it considers how the Internet frustrates these traditional principals. Finally, this article will discuss how buyers and investors can better fend for themselves on the Internet than they can in traditional commercial settings.

As our understanding of this new medium increases, legislators, regulators, and courts may come to recognize that consumers have gained substantial power due to the Internet. In July 2000, the Jurisdiction in Cyberspace Project of the American Bar Association (“ABA”) presented recommendations that, in part, sought to dispel

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the myth that all consumers are unable to make informed and binding
decisions on choice of law and choice of forum.² The ABA’s recom-
mendations acknowledge that the Internet, in many ways, has engen-
dered a breed of “super-consumers” that should be viewed on par
with business customers.² Prior to the advent of the Internet, regula-
tory bodies, in some contexts, recognized that certain qualified con-
sumers needed less protection than ordinary investors. The U.S. Se-
curities and Exchange Commission, for example, has recognized that
more sophisticated and informed individual investors, such as “ac-
credited investors,” need less protection than ordinary investors.³
“Qualified institutional buyers,” being businesses acting as investors,
need even less protection.⁴ The rise of the Internet, which brings with
it the ascent of the “super-consumer,” could greatly reduce the dis-
tinction between ordinary investors and sophisticated investors.

2. Basic Jurisdictional Principles

2.1. Basic Jurisdictional Principles Under International Law

International law limits a country’s authority to exercise jurisdic-
tion in cases involving the interests or activities of nonresidents.⁶ Be-
fore determining whether it may assert jurisdiction over a particular
claim, a court must engage in a fairly rigorous analysis. First, the court
must find that it possesses “jurisdiction to prescribe.”⁷ If the court
does in fact have jurisdiction to prescribe, it must further determine
whether it holds “jurisdiction to adjudicate” and “jurisdiction to en-
force.”⁸ These three types of jurisdiction, though separate and dis-

¹ See ABA, ACHIEVING LEGAL AND BUSINESS ORDER IN CYBERSPACE: A
REPORT ON GLOBAL JURISDICTIONAL ISSUES CREATED BY THE INTERNET (2000),
available at http://www.kentlaw.edu/cyberlaw (draft) ¶ 1.2.4 [hereinafter ABA
REPORT]. The author served as Chair of the Working Group on Securities for this
project.
² See id.
⁴ See Jean Gleason & Robert Rosenblum, Current Developments in Regulation D and
Rule 144A: The SEC’s Efforts to Increase the Effectiveness and Liquidity of the U.S. Priv-
⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §
401 cmt. a (1987).
⁷ Id.
⁸ Id.

https://scholarship.law.upenn.edu/jil/vol21/iss3/5
Jurisdiction to prescribe exists where the substantive laws of the forum country are applicable to the particular persons and circumstances involved in the case. Simply stated, a country has jurisdiction to prescribe law with respect to:

(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; (d) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (e) certain conduct outside its territory by non-nationals that is directed against the security of the country or certain other national interests.

Overarching the foregoing international law criteria is a general requirement of reasonableness. Thus, even when one of the foregoing bases of jurisdiction is present, a country may opt not to exercise jurisdiction to prescribe law with respect to a person or activity connected to another country if the exercise of jurisdiction would be unreasonable. In effect, courts applying the "reasonableness" standard require a closer contact between foreign defendants and the for-

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9 See id. § 421.
10 See id. § 442.
11 See id. § 402.
12 See id. § 403(1).
13 See id. In addition, Section 403(2) enumerates different factors that must be evaluated in determining the reasonableness of the assertion of jurisdiction: (1) 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 a substantial, direct, and foreseeable effect in or upon the territory; (2) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (3) 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; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another state may have an interest in regulating the activity; and (8) the likelihood of conflict with regulation by another state. See id. § 403(2).
rum country than do courts applying a traditional "due process" standard.14

2.2. Basic Jurisdictional Principles in the United States

Traditionally, U.S. state courts have asserted two types of personal jurisdiction: general and specific.15 The distinction between general and specific jurisdiction is crucial to any discussion on jurisdiction in cyberspace. The topic of in rem jurisdiction16 and the requirement that firms qualify as foreign corporations in order to do business in a given state are also germane to the discussion here.17

2.2.1 General Jurisdiction

General jurisdiction has thus far been accorded less attention than specific jurisdiction in the evolution of the Internet, but it may gain importance as e-commerce evolves. General jurisdiction may extend to a nonresident defendant whose contacts with the forum are unrelated to the particular dispute in issue.18 General jurisdiction is therefore applied narrowly, because of constitutional due process limitations. General jurisdiction applies only if the defendant's contacts with the forum are systematic and continuous enough that the defendant should anticipate defending any type of claim there.19

2.2.2 Specific Jurisdiction

A court has specific jurisdiction over any defendant whose contacts with the forum relate to the particular dispute at issue. In 1945, the U.S. Supreme Court held that personal jurisdiction over a nonresident defendant by a forum state requires only that the defendant "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair

14 See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987) (finding that "a careful inquiry into the reasonableness of the assertion of jurisdiction" is necessary in cases involving foreign defendants); see also Gary B. Born, Reflections on Judicial Jurisdiction in International Cases, 17 GA. J. INT'L. & COMP. L. 1, 33 (1987) (discussing the need for heightened scrutiny of assertions of judicial jurisdiction over foreign entities).


17 See, e.g., CAL. CORP. CODE § 2105 (West 1990) ("A foreign corporation shall not transact intrastate business without having first obtained ... a certificate of qualification.").

18 See Helicopteros Nacionales de Columbia, 466 U.S. at 414.

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The existence of the required minimum contacts is demonstrated according to the following three-part test:

(1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum; thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

The Supreme Court articulated the meaning of "purposeful direction" in *Calder v. Jones*, in which several Florida residents wrote and edited an article in the *National Enquirer* defaming a California resident. The *Enquirer* enjoyed its largest readership in California, which was "the focal point of the article and of the harm suffered." The U.S. Supreme Court concluded that there was sufficient evidence to establish that the defendants' actions were aimed at California and had a potentially devastating effect on the California resident; the defendants, therefore, could have reasonably foreseen being haled into a California court.

In *Burger King Corp. v. Rudzewicz*, the Court elaborated upon the "purposefully availing" element of the test, which it defined as opening oneself to the privilege of conducting business in another forum so as to "create continuing relationships and obligations with citizens of another state." Under this analysis, it seems clear that a single contract between a resident of the forum state and an out-of-state...

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20 *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
21 *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1485 (9th Cir. 1993) (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).
22 *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("[P]etitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.").
23 *Id.* at 789.
24 *Id.* at 789-90.
party would not establish sufficient minimum contacts to support personal jurisdiction. However, if there are additional contacts, such as telephone calls and postal deliveries to the forum state, the total contacts may collectively form a basis for jurisdiction over the nonresident.\textsuperscript{26}

2.2.3. \textit{In Rem Jurisdiction}

In rem jurisdiction involves jurisdiction over things rather than persons.\textsuperscript{27} Such jurisdiction gives the court the power to determine parties' rights and interests in any given thing. For example, a court asserting in rem jurisdiction might resolve disputes over the title to a particular tract of land.\textsuperscript{28} Following its decision in \textit{International Shoe},\textsuperscript{29} the U.S. Supreme Court, speaking ex obiter in \textit{Shaffer v. Heitner}, imported the notion of fundamental fairness into in rem cases.\textsuperscript{30}

\textsuperscript{26} See \textit{Burger King Corp.}, 471 U.S. at 476; accord \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286, 292 (1980) (explaining that once a nonresident has either purposefully directed activities to the forum state or has purposefully availed himself of the privilege of conducting activities in the forum, the question of fairness must be considered).

The Supreme Court has articulated five separate “fairness factors” that may require assessment to determine whether or not specific jurisdiction should apply. These factors include:

(1) the burden on the defendant of defending in the forum;
(2) the forum state’s interest in adjudicating the dispute;
(3) the plaintiff’s interest in obtaining convenient and effective relief;
(4) the interstate judicial system’s interest in ... efficient resolution of controversies; and
(5) the shared interest of the ... states in furthering ... substantive social policies.

\textit{World-Wide Volkswagen Corp.}, 444 U.S. at 292.

\textsuperscript{27} See \textit{Shaffer v. Heitner}, 433 U.S. 186, 187 (1977) (“In order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in the thing... when claims to the property itself are the source of the underlying controversy...”).

\textsuperscript{28} See \textit{id}.

\textsuperscript{29} \textit{Int'l Shoe Co. v. Washington}, 326 U.S. 310 (1945).

\textsuperscript{30} See \textit{Shaffer}, 433 U.S. at 206. (“We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in \textit{International Shoe} should be held to govern actions in rem as well as in personam.”).
2.2.4. Need to Qualify to Do Business

California, like many other states, defines "intrastate business" as "entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce." A foreign corporation that seeks to transact intrastate business in California must first qualify with the Secretary of State. Generally, e-commerce companies avoid qualifying to do business in states other than the state of their incorporation and the state of their principal office, if different from their place of incorporation, in order to avoid paying local use and sales taxes. Thus, eBay, Yahoo!, Amazon.com, and other large Internet portals and online vendors have yet to qualify in non-domestic states, where their websites are accessed thousands of times each day by residents of such states. Presumably, large Internet portals and online vendors take the position that all transactions outside their home jurisdiction take place in intrastate commerce, or they claim that they are not engaging in business in any other state.

3. COMPARING THE AMERICAN AND EUROPEAN APPROACHES TO CHOICE OF LAW

3.1. Choice of Law Differences Generally

If more than one country can, consistent with domestic and international law, assert prescriptive jurisdiction, then the choice between the laws is determined by the forum's choice of law doctrine. The United States and Europe, however, have different approaches to this

31 CAL. CORP. CODE § 2105 (West 1990) § 191.
32 See id.; cf. DEL. CODE ANN. tit. 8, § 371 (1974) (saying that engaging in business for purposes of the qualification requirement usually requires "some permanence and durability").
33 See Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (reaffirming that a state's power to impose a use tax collection responsibility on an out-of-state seller is circumscribed by the Commerce and Due Process Clauses of the U.S. Constitution).
37 Nat'l Union Indem. Co. v. Bruce Bros., 38 P.2d 648 (Ariz. 1934) (noting that merely sending in agents is not sufficient to bring the particular defendant into interstate commerce).
38 See Burnham v. Superior Court, 495 U.S. 604 (1990) (holding that "exercise of personal jurisdiction based on service on the defendant while in the state comports with traditional notions of fair play and substantial justice").
doctrine. United States courts have adopted a rather flexible choice of law formula—one that analyzes the contacts between the forum and the dispute at issue and tries to balance the interests of the different forums in having their own law applied—and have jettisoned earlier, more rigid formulas. It is not surprising, therefore, that most U.S. courts follow Section 6 of the Restatement (Second) of Conflict of Laws, which directs a court's attention, absent a statutory directive, to concerns similar to those found in Section 403 of the Restatement (Third) of Foreign Relations Law.

In contrast, Europe, particularly Germany, continues to take a more formal and rigorous approach, such as the one applied earlier in the United States. European courts, like Japanese courts, tend to focus on the place of the relevant act, without considering "various nexuses." In tort cases, for instance, the applicable law is that "of the place of the relevant act." Choice-of-law rules should seek to further [harmonize] relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and the values of certainty, predictability, and uniformity of result.

39 Compare Restatement (First) of Conflict of Laws (1934) (the formal American approach), with Restatement (Second) of Conflict of Laws (1969) (the newer flexible approach).

40 See Restatement (Third) of Foreign Relations Law § 403 (1986) for a list of relevant factors used in evaluating whether exercise of jurisdiction is appropriate. These factors include:

(a) the needs of the interstate and international systems;
(b) the relevant policies of the forum;
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
(d) the protection of justified expectations;
(e) the basic policies underlying the particular field of law;
(f) certainty, predictability and uniformity of result; and
(g) ease in the determination and application of the law to be applied.

Id. Also see Restatement (Second) of Conflict of Laws § 6 cmt. d (1969) for a discussion of the needs of the interstate and international systems.

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Id.


place where the facts giving rise to the claim [arose].

Whereas in contract cases, absent party choice, the law of the place where the offer was dispatched governs. 43

The American approach to torts is summarized in Section 145 of the Restatement (Second) of Conflict of Laws: the law of the state with the most significant relationship to the occurrence and the parties is to be applied, taking into account such factors as where the injury occurred, where the conduct causing the injury occurred, where the parties reside, and where any relationship between the parties is centered. 44

Under the U.S. approach to contracts, summarized in Sections 186-88 of the Restatement (Second) of Conflict of Laws, contractual choice of law clauses will control unless the selected forum has no substantial relationship to the parties or transaction and is otherwise unreasonable, or use of the chosen law would violate a fundamental policy of a forum with a materially greater interest in the issue than that chosen and whose law would have applied under Section 188 of the Restatement had there not been a contractual choice. 45

Under the Rome Convention, contractual choice of law clauses are generally enforceable, except where the contract is entered into by a consumer or where only one country is connected to the issues in dispute; in the latter situation, the contract will not preclude the use of that country’s mandatory rules. 46 Thus, both the United States and European approaches embrace party autonomy as the basic rule, allowing contracting parties to choose the law to be applied to contract disputes. 47 Both approaches allow significant exceptions for public policy. The European Union, under the Rome Convention, observes mandatory rules regarding the state of the consumer or the location of the party with the most significant contact to the dispute, while the

43 See id.

44 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969). The differences between the U.S. and European approaches are arguably more theoretical than real. The substantive law applied under modern contacts or interests analysis in the United States most frequently is the same law that would get applied under the doctrine of lex loci delicti. See id. Under the purportedly formal European approach, questions regularly arise as to the where the harm occurred, for application of the tort choice of law rule. See Rome Convention on the Law Applicable to Contractual Obligations, 80/934/EEC, 1980 O.J. (L 266) 1 [hereinafter Rome Convention].


46 Rome Convention, supra note 44, art. 5 (defining a mandatory rule that cannot be derogated from by contract).

47 See id art. 3.
United States takes the further step of crafting an exception to the basic choice of law rule where there is no contact with the chosen law.48

When the parties have not expressly chosen the law to be applied to contract disputes, Restatement Section 188 again provides that the law of the state with the most significant relationship to the issue should apply, taking into account where the contract was negotiated, entered into, and to be performed, as well as where the subject matter of the contract is and where the parties live.49 Corresponding provisions of Article 4 of the Rome Convention provide that, absent contractual choice, the applicable law shall be that of the country with which the contract is most closely connected, which is presumed to be the habitual residence or principal place of business of the party who is to effect the performance characteristic of the contract.50 Article 4 also presumes that if the contract involves immovable property, the country where the property is located has the closest connection to it and that with respect to the carriage of goods, the most closely connected country is the carrier’s principal place of business if it is also where the goods are loaded or discharged or the principal place of business of the consignor.51

3.2. Consumer Contracts and Differing U.S. and European Views on Choice of Law

The differences between the European and American approaches regarding choice of law are most salient where consumer disputes are involved. The principal difference arises from the contrast between Articles 5 and 7 of the Rome Convention, relating to consumer contracts and mandatory rules, and the doctrine of Carnival Cruise Lines, which permits the enforcement against consumers of reasonable choice of forum clauses, even in an adhesion contract.52 Article 5 of

48 See id. art. 4.
49 RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 186-88 (1969). If the site of contract negotiations and the place of performance are in the same state, the local law of that state will usually be applied, except as otherwise provided in Sections 189-199 and 203. See id.
50 Rome Convention, supra note 44, art. 4.
51 See id.
the Rome Convention does not enforce the waiver by consumers\textsuperscript{53} of mandatory laws of their habitual residence designed for their protection, although a choice of law clause may apply a different law to other aspects of the contract and dispute.\textsuperscript{54} If there is no choice of law clause, Article 5 provides that the law to be applied is that of the consumer's habitual residence, unless the contract is one for carriage (other than an inclusive contract for travel and accommodation) or for provision of services exclusively in another forum.\textsuperscript{55} In the United States, it is also possible for public policy to override choice of law in consumer contracts.\textsuperscript{56} Nonetheless, European courts tend to invoke the public policy option much less frequently than their American counterparts.

4. HOW THE INTERNET AFFECTS TRADITIONAL BASES OF JURISDICTION

4.1. The Internet As It Exists in 2000 Diminishes Territoriality

The basic principles of jurisdiction are essentially geography-based. As a result, jurisdictional principles are difficult to apply to the Internet, which is a largely boundless medium. A website may be viewed from any place in the world where there is access to the Internet.\textsuperscript{57} Websites may be interconnected, regardless of location, by the

\textsuperscript{53} Covered consumers are those who were solicited, either individually or through advertising, in their forum and who there completed steps necessary by them for the formation of the contract and those who traveled elsewhere to place an order for goods at the arrangement of the seller for that purpose. See Rome Convention, supra note 44, art. 5.

\textsuperscript{54} Id.

\textsuperscript{55} See id.

\textsuperscript{56} See State ex rel. Meinheery v. Spiegel, 277 N.W.2d 298 (S.D. 1979), which involved an action by South Dakota to recover interest charged by a nonresident seller which violated South Dakota's usury laws. The defendant, an Illinois-based mail-order enterprise, had offered credit sales through catalogues available in South Dakota. See id. at 299. Because the credit agreements provided that they were to be governed by Illinois law, the trial court granted summary judgment for the defendant, ruling that the interest rates allowed by Illinois law, rather than those under South Dakota law, applied. See id. at 299, 301. The Supreme Court of South Dakota held that the general rule that parties to a contract may effectuate their own choice of law was trumped by the public policy as expressed in the South Dakota usury statute and voided the choice of law provision, ordering the lower court to enter summary judgment for the plaintiffs. See id. at 300-01.

use of hyperlinks. Information that arrives on a website within a given jurisdiction may flow from a linked website entirely outside that jurisdiction. Moreover, the actual location of computers is irrelevant to either the providers or recipients of the information, and there is no necessary connection between an Internet address and a physical location.

Information over the Internet passes through a network of networks, some of which are linked to other computers or networks, others of which are not. Not only can messages between and among computers travel through many different routes, but packet switching communication protocols allow individual messages to be subdivided into smaller packets that are then sent independently to a destination where they are automatically reassembled by the receiving computer. For example, one packet of an e-mail message sent from California may travel via telephone lines through several different states and countries, or even through a satellite in space, on its way to Italy. Meanwhile, another packet of the same message may travel by fiber optic cable, arriving in Italy before the first packet. (Both transmissions would be completed in nanoseconds.) Notwithstanding its complex structure, the Internet is predominately a passive system; Internet communication only occurs when initiated by a user.

4.2. Increased Conflicts Between Traditional Principles and Future Development of the Internet

At present, the rules of jurisdiction over activities on the Internet are evolving from principles that predate the personal computer age. Repeatedly, courts and regulators, when analyzing jurisdictional ques-
tions, have analogized the Internet to telephone or print media. Whether this approach should continue in the future is a serious issue, because the Internet of today is but a glimmer of what lies ahead in digital communications.

4.2.1. New and Futuristic Technologies Should Further Diminish Territoriality

The new world of bots poses especially difficult problems for the traditional, geography-based jurisdictional principals. Bots are artificial intelligence devices that can be programmed with enormous

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64 Not only is the new global marketplace incredibly complex, but the communications industry is growing and changing more rapidly than ever before. Each minute, millions of e-mail messages are being sent around the world. For decades, Silicon Valley was guided by Moore’s Law, which states that the capacity of semiconductors will double every twelve to twenty-four months. See No Kingdom for Moore’s Law—Will Technology Keep Extending Processor Capacity and Bandwidth? Does It Even Matter? Yes, Yes, and Yes. COMPUTER SHOPPER, Oct. 1, 2000, at 76 (“Moore’s Law has accurately predicted a doubling of transistor density every 12 to 24 months in integrated circuits.”). But in 1999 the numbers started to change: by 2001, the semiconductor industry is expected to add as much capacity as has been created in the entire history of the chip. See id.

Two other technologies that are pushing the expansion of information-carrying capacity are photonics and wireless. Photonics, which employs light to move communications, is doubling the capacity of fiber optic cable every twelve months. See Craig Matsumoto, The Pace of Things to Come, ELECTRICAL TIMES, May 30, 2000, at 28 (“Phototronics have been the key to a surge in the capacity of fibre optic cables.”). See generally The Microphotronics Revolution: Technology Information, 103 TECH. REV. 38 (July 1, 2000) (explaining photonic switches redirect complex light streams at speeds necessary for “tomorrow’s all-optical Internet”).

This technology is dramatically changing the way networks are deployed. Bandwidth (the amount of space available to carry the data and voice traffic that all these networks are building up) is also expanding exponentially. See id. Instead of a resource in short supply, bandwidth may soon be an unlimited one. See id.

Wireless technology is also fueling the communications revolution. While cell phones have gone from curiosity to commonplace, the real revolution will come when wireless broadband networks begin to serve as “fiberless” fiber to bring high-speed conductivity to places where it has been too expensive or too difficult to lay fiber optic lines. See Lucent CEO Peg Bandwidth Hopes on Photonics, COMPUTER DEALER NEWS, Oct. 8, 1999, at 1. Fixed wireless systems can now carry information about eight times more quickly than a computer’s 56K modem. New technology will boost that capacity by another ten to twenty times, opening up wide pipelines to carry voice, data, video, and all of the pieces that comprise the growing network of networks. See The Microphotronics Revolution, supra note 64.

amounts of information about the goals, preferences, attitudes, and capabilities of their “cyberprincipals.” Bots can roam in virtual space without human intervention and apply their artificial intelligence to conduct all sorts of commercial, social, and intellectual “transactions” with other bots and agents, day and night, while their principals are asleep or working on other things. Such bots can appoint subagents, capable of speaking in multiple languages, or ultimately communicating through a universal computer-speak. Some expect that an infinite number of shopping bots will show up as e-commerce expands; these bots, it is posited, will be able to respond to slight changes in Web-based auctions in a fraction of a second.

In contrast to the relatively linear lines between buyers and sellers that have characterized traditional commerce and early e-commerce, e-commerce transactions in the future will occur outside of any geographical place, in a truly “virtual world,” by highly programmed agents without human intervention. The use of bots and other non-geographically-based intermediaries will be somewhat like an investor sending highly-programmed, computer-driven spaceships into outer space to locate and dock at space stations for the purpose of conducting a transaction. In this situation, it becomes harder to argue that the investor’s home jurisdiction should prevail over that of the space station’s owner. The Web participant who unleashes a bot into a digital environment, awash with other bots and virtual proxies, arguably leaves his geographical home, elects to transact in a different environment, and ceases to hold a reasonable belief that the laws or courts of his or her home jurisdiction will apply to the transaction. This makes it necessary to consider new, non-geographical or less geographical paradigms.

4.3. New and Future Technologies Are Changing the Power Parameters

4.3.1. Power Gains for Consumers Generally

Many existing jurisdictional rules applicable to commercial transactions reflect presumed power imbalances between buyers and sell-

67 See Anne Eisenberg, In E-Commerce, Bots Will Slug It Out for Us; Researchers Focus on How Buying Habits Will Change When Software Agents Shop, INT’L HERALD TRIB., Aug. 21, 2000, at 11.
68 See infra Section 4.
Sellers are traditionally thought to seek out buyers (manifesting their desire to benefit from a connection with the buyers’ forum) and to set the terms of a purchase contract. Those presumptions, however, are constantly being challenged and revamped in the Internet age.

The Internet gives more and more power to consumers vis-à-vis sellers. Power in a commercial relationship depends upon knowledge and choice. E-commerce in the worldwide marketplace inherently expands consumer choice by opening up every market to every buyer regardless of where the seller is located. Likewise, e-commerce strengthens buyers vis-à-vis sellers because buyers gain more possibilities. Thus, the implied concern that buyers will be taken advantage of by sellers to whom they are tied by geographic or other limitations is less appropriate.

The Internet not only empowers consumers but also reduces a seller’s power to define its market. In traditional commerce, a seller defines its market, usually more local than global, by its advertising strategy and budget, its investment in distribution channels, the physical locations of its delivery points, and its processes for taking orders. E-commerce changes all of that. Unless a seller takes substantial measures, every website is worldwide. Now, the buyer is likely to seek a relatively passive distributor, just as an active distributor is likely to search out a passive consumer. Moreover, the Internet’s inherently lower economic barriers to entry have already resulted in smaller distributors transacting business beyond a single geographic location. While this trend traces its roots back to the catalogue and telephone businesses, the scale by which the Internet can reduce costs is unprecedented. All of these factors undermine the assumption that most distributors are more powerful than most consumers. In e-commerce, indeed, many transactions may occur between very small enterprises and individuals. This suggests that the consumer law’s concern with an imbalance in bargaining power may be less significant for Internet-based commerce.

The Internet also enables more buyers to purchase goods directly from the manufacturer. In the past, intermediaries such as distributors almost inevitably intervened between manufacturers and consumers, adding costs to the transaction without adding a clear value. By making market pricing transparent, the Internet substantially reduces

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69 Legal regulation may block some sellers from some markets.
the role of, and the transaction fees levied by, the merchant-
intermediary.

Admittedly, such a vast increase in online sellers could present
consumers, as well as business buyers, with information overload,
thereby canceling out the improved leverage consumers would have
otherwise generated under the new market structure. Moreover, the
same database technologies that increase consumer choice can also
help sellers more precisely target consumers, enabling sellers to trade
on the fact of simple convenience. Nonetheless, technology may also
address these problems.

4.3.2. Power Gains for Investors

In assessing the ability of investors to make informed decisions on
choice of law and choice of forum, we must recognize how online of-
ferings and trading, electronic networks of securities traders, and the
online access to vast stores of information are producing major
changes in the attitude and role of individual investors. As in other
areas of e-commerce, the consumer is now much more empowered. 70

Internet-fueled electronic communications networks ("ECNs"), a
form of alternative trading system ("ATS"), are seen by some as hav-
ing produced "the greatest upheaval in the financial marketplace since
the present structure arose from the ashes of the Depression." 71 Trad-
itionally, brokers forwarded orders from retail customers to middle-
men such as market-makers on Nasdaq and specialists on the New
York Stock Exchange's ("NYSE"). The middlemen bought stock
from an investor at one price and resold it to someone else at a higher
price, generating a profit. In contrast, the ECNs are systems that
automatically match buy and sell orders. However, ECNs only deal in
limited orders, such as orders to buy a designated number of shares at
a specific price. They do not accept market orders. Except in situa-
tions where there are large numbers of buyers and sellers seeking to
trade specific stocks, order matching on the ECN can be overly frag-
mented.

ECNs now handle 30% of the volume in Nasdaq-traded securi-
ties. 72 In 1999, Schwab, Fidelity Investments, and Donaldson, Lufkin
& Jenrette formed a partnership for an electronic market. 73 Merrill

70 See Justin Schack, Cost Containment, 33 INSTITUTIONAL INVESTOR 43 (1999).
71 Greg Ip, Trading Places—The Stock Exchanges, Long Static, Suddenly Are Roiled by
72 See id.
Lynch also announced that it had taken a 14.3% stake in Archipelago, thereby following E*Trade, Goldman Sachs, J.P. Morgan, American Century, and Instinet.74 According to former Securities and Exchange Commission ("SEC") Commissioner Richard Roberts, electronic trading by individuals on Nasdaq will "increase exponentially for the foreseeable future."

In the summer of 1999, two ECNs, Archipelago Holdings, LLC and Island ECN (a subsidiary of Datek Online Holdings) announced that they would seek to become self-regulated, for-profit securities exchanges.75 By becoming exchanges, the entities will be able to trade NYSE-listed stocks. Furthermore, the new ECN proposed by Schwab and Fidelity will, due to its sheer size, make it easier for buyers to find sellers, attracting more volume and generating more liquidity.76

The advent of after-hours trading further threatens traditional stock exchanges. E*Trade offers after-hours trading through Instinet, which runs for two-and-a-half hours following the close of NYSE and Nasdaq trading.77 Datek Online Holdings also offers after-hours trading Nasdaq stocks between 8 A.M. and 8 P.M. eastern standard time.78

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74 See Mark Hendrickson, Archipelago Stake Latest in Merrill's E-Trading Plan, SEC. INDUS. NEWS ONLINE, Sept. 13, 1999, at http://www.securitiesindustry.com/issue.cfm?id=1238&aid=4673. In January 1999, both Goldman-Sachs & Co. and E*Trade Group, Inc. confirmed that they had each agreed to take stakes of slightly under 25% in Archipelago Holdings, L.L.C. See Kenneth N. Gilpin, Archipelago Sells a Stake to Instinet, Risks Build Challenge to Established Markets, N.Y. TIMES, July 28, 1999, at Cl. At this time, Archipelago was the fifth largest ECN, trailing Island and Instinet, the two industry leaders, and several others. See Rebecca Buckman, Goldman, E*Trade Take Stake in Firm Expanding Bets on Electronic Trading, WALL ST. J., Jan. 9, 1999, at C20.


76 See Gilpin, supra note 74, at Cl. In contrast, Instinet, which agreed to buy a 16.4% stake in Archipelago, had no inclinations to become an exchange itself. See id.

77 See Greg Ip &Rebecca Buckman, Four Trading Giants to Form Electronic Market, WALL ST. J., July 22, 1999, at Cl.

78 See After-Hours Trading FAQs, at http://www etrade.com80/cgi bin/gx.cgi/ AppLogic+ResearchSymbol?pm=AfterHours.html (last visited Sept. 26, 2000) ("We offer after hours trading from 4:05 and 6:30 p.m."); see also E-Trade To Offer After-Hours via Instinet, supra note 73.

The Internet has given individuals more opportunities to participate in public and private offerings. Through the W.R. Hambrecht "dutch auction" and the Wit Capital-style participation in IPO syndicates, more individual investors are being afforded opportunities once reserved for institutions and "heavy hitters." Smaller investors can now invest in mutual funds that focus on venture capital investments.

The NYSE consideration of a new electronic trading system that will automatically execute small orders further illustrates the new consumer empowerment. It has been dubbed "one of its most radical changes in twenty years." Currently, all orders that arrive on the floor of NYSE are executed manually by a specialist after floor brokers have had a chance to bid on the order. The proposal would allow for orders of less than one thousand shares to be immediately executed by the investor at the price then available on the Exchange, rather than joining the floor auction managed by a specialist. The

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The NYSE has been under great competitive pressure due to the Internet. The CEO of the NYSE, Richard Grasso, has conceded that major Wall Street firms have been pressuring the NYSE to move to electronic trading, because they want "faster, cheaper, more-frictionless executions," hence the NYSE is looking at all sorts of combinations of technology. See id. Moreover, ATSs, such as Archipelago and Primex Trading NA, have threatened NYSE's primacy. See id. Even Goldman Sachs Group and Merrill Lynch have invested in such systems. See id. Indeed, some fear that stock trading will fragment before the secondary trading systems begin to consolidate. See id. Moreover, Warburg Dillon Read, L.L.C, Lehman Brothers Holdings, Inc. and other investment banks are also building a cooperative ATS called Nyfix Millennium that will scan "from the orders that dealers send to the NYSE floor any [orders] that could be masked internally among the consortium partners." Id.

The pressure on exchanges from electronic competitors has resulted in enormous savings to investors. The average cost of executing a trade on the Nasdaq fell by 23% in 1998—the third consecutive year of decline. See Schack, supra note 70, at 73. On the NYSE, execution costs fell even more, i.e., by 25%. See id. For the first time, the NYSE-listed shares were less expensive to trade than any other exchange-listed share in the world. See id. These developments saved Nasdaq and NYSE investors about $11.8 billion in costs between 1997 and 1998. See id. One major money manager called the increased use of ECNs the "single biggest driving force" in the declining exchange trading costs. Id. at 44.

82 Ip, supra note 81, at C6.

83 See id. This does not include odd lots, i.e., orders of less than 100 shares, which are automatically executed. See id.

84 See id.
proposal would be a major change for the NYSE, and its first effort to bypass the specialist.\textsuperscript{85}

In early 2000, the NYSE proposed to rescind its rule preventing members from tracking NYSE-listed securities away from the Exchange, a move which stimulated the SEC to initiate consideration of a central limit order book which would include all ECN prices as well as those of exchanges like NYSE and Nasdaq.\textsuperscript{86}

At the same time as electronic communications have made faster and cheaper execution available to individuals, the Internet has also given individuals the chance to take full responsibility for managing their investments. They now can initiate their own trades without the aid of a broker.\textsuperscript{87} They even type in the order—a task formerly done by the broker even in an unsolicited transaction. A subsequent and even more significant change is the delivery of information of all kinds by mutual funds, brokers, and Internet-based research firms.

Knowledge is power in the field of investing. The more the Internet expands the individual investor’s access to vast amounts of information at a tremendous speed, the more it serves as an empowering tool. The Internet provides small investors with access to information and methods of trading previously available only to licensed brokers or investment advisors. In the words of SEC Chairman Arthur Levitt, Jr.:

One of the tools that is giving investors unprecedented opportunities is the Internet. Information and ideas are flowing constantly over an affordable, accessible system giving individuals the same access to market information as large institutions. The Internet is a supremely powerful force for the democratization of our marketplace.\textsuperscript{88}

\textsuperscript{85} See id.


\textsuperscript{87} See infra Section 4.3.2.a.

In an effort to level the playing field further, the SEC in August 2000 adopted new rules designed to make material information on issuers available as readily to the public marketplace as to the market analyst.\(^8\)

Thus, increased competition among online discount brokers has resulted in their offering individual investors more services than simply electronic execution. E*Trade,\(^9\) for example, remodeled its website in 1998 to allow its users to obtain financial information and to access links to other providers; it reportedly spent $150 million promoting the new website.\(^9\) Likewise, Charles Schwab\(^2\) began promoting “full service electronic investing.”\(^3\) Schwab considered introducing moderated chat rooms and message boards to its website by early 1999 in order to build a sense of community with its customers.\(^4\) Thus, many electronic discount brokers operate a supermarket of data, including real-time stock quotes, and recommendations.

The Web also provides ordinary investors with sophisticated investment research tools that were once available exclusively to institutions and securities professionals.\(^5\) Now almost any investor can become his or her own securities analyst by using free or low-cost websites containing enormous quantities of data as well as tools that help investors to identify securities and design portfolios. By Septem-

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\(^3\) Schwab to Launch Chat Rooms, Message Boards, FIN. NET NEWS, Nov. 2, 1998, at 1, 11.

\(^4\) See id.

\(^5\) Hoover's Stockscreener displayed only eight thousand stocks, but they could be screened for twenty-two variables with the results presented in spreadsheet form. See http://www.stockscreener.com. (Sept. 25, 2000). Microsoft Investor has an "Investment Finder" program that can evaluate 17,000 securities. See http://www.investor.msn.com/home.asp (Sept. 25, 2000); http://moneycentral.msn.com/investor/finder/welcome.asp (Sept. 25, 2000). If the viewer asks for stocks to be rated by price ratios, the “finder” offers sub-criteria: price to book value; price to earnings, either currently or on several historical bases; and price to sales. Finder's criteria can be set as high or low as possible, and the twenty-five stocks that best fit the criteria will be presented in chart form. See id. Possibly the broadest assemblage of data among these websites is Wall Street City, which can search as many as 120,000 stocks and options. See http://www.wallstreetcity.com (Sept. 25, 2000).
ber 1997, the number of such stock-screening websites had risen from zero to fifteen.96

Some financial websites offer their users a mix of market information, financial data, and general news,97 while other websites, like Plane Business,98 which focuses only on the aircraft industry, are more narrowly focused. Industry-specific websites furnish individual investors with the kind of insight on current developments that was formerly only available to institutions.99 Another specialty firm, Securities Pricing and Research, Inc., offers free information on thousands of closely-held businesses.100

Users also flood bulletin boards and chat rooms on many popular online investment-related websites, including Yahoo! Finance, the Motley Fool, and Silicon Investor.101 The information provided by these chat rooms is hardly in depth and most of it consists of individual or group speculation. Sometimes Internet users send intentionally misleading information, as when short sellers post false rumors about stocks that refuse to drop.102

In addition to information from intermediaries, investors are able to use special online services to receive information directly from issuers. An issuer posts financial information and news on its own web-

97 An example is Bloomberg Online, which offers a twenty-four hour worldwide financial information network. See http://www.bloomberg.com.
102 Typical of the chat rooms or bulletin boards for investors is Stock-Talk. See http://www.stock-talk.com. Stock-Talk boasts on its home page about its forums covering over 7,800 different specific stocks; it also mentions its two more general forums. See id. The SEC and the National Association of Securities Dealer Regulation ("NASDR") have staffs that regularly monitor the World Wide Web, including bulletin boards and chat rooms. According to Stock-Talk's Webmaster, the NASDR monitoring was so extensive, scanning some ten thousand Stock-Talk pages daily, that it slowed down traffic to the point where the website could not function. See NASDR Will Limit Net Monitoring Access on Investor Site, INT. COMPLIANCE ALERT, May 18, 1998, at 1, 11. Stock-Talk then blocked NASDR's access to the website, after which NASDR agreed to monitor only the "Hot Stocks" and "IPO" sections of the website. See Ellen Jovin, Investors Get A Dose of Reality Online for Company Information, SEC. INDUS. NEWS, Nov. 17, 1997, at 16. Since most of the rumors communicated on Stock-Talk appear on these two sections, the NASDR decision is probably a good choice of priorities.
site, and then expands the universe of potential readers by setting up links to a service provider such as Reality Online.\textsuperscript{103} Reality Online, which operates Inc.Link,\textsuperscript{104} can generate up to twenty-five pages of enhanced financial content for a given issuer’s website.\textsuperscript{105} Inc.Link will then link the issuer’s website to a detailed profile of the issuer posted at 110 “hub” websites, which are mostly brokerage firms’ home pages.\textsuperscript{106} Thus, an investor is able to move from a profile of an issuer located at a brokerage website to the issuer’s website where there is different material generated by Reality Online, or in reverse order.\textsuperscript{107}

Some new online entrants provide investor relations services to micro-cap companies that cannot afford to hire expensive outside firms. Thus, OTC Financial Network\textsuperscript{108} channels press releases and analyses to what it claims are 350,000 pre-qualified small-cap individual and institutional investors, brokers, analysts, and others.

Hyperlinks are widely-used devices that enhance a broker-dealer’s website. Just as Microsoft offers its viewers links to online brokerage firms, brokerage firms frequently link their users to research reports. It should be noted, however, that problems arise when firms link their users to reports containing misleading information. In order to shield themselves from liability, linking firms insert broad disclaimers on their sites. Once a user accepts the conditions of the disclaimer, the referring website keeps a record of the agreement.\textsuperscript{109}

Other tools can be integrated with financial analysis and execution software. For example, the software maker Intuit, which publishes the most widely-used personal financial management program, has formed online partnerships with a number of brokerage firms so that investors can download brokerage account and market information into their personal financial program.\textsuperscript{110}

\textsuperscript{104} Jovin, supra note 102, at 16.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} http://www.otcfn.com.
\textsuperscript{109} An example is the disclaimer used by the National Discount Brokers at its website, http://www.ndb.com. See also Discount Broker Records Disclaimer Hit, INTERNET COMPLIANCE ALERT, Oct. 20, 1997, at 1, 13.
\textsuperscript{110} See Borzov Daragahi, E*Trade Teams Up with Intuit, SEC. INDUS. NEWS, Nov. 17, 1997, at 5.
Financial information providers have recently been forced to deal with the increased burden of administering millions of contracts in order to use real-time stock quotes over the Internet. All of the information exchanges have different requirements for real-time information. Some financial information providers, as a means of protecting themselves from liability, require customers to undergo lengthy sign-up procedures.\footnote{111}

The SEC is keenly aware of the extent to which the use of electronic technology, including the Internet, enhances the ability of investors to make informed investment decisions.\footnote{112} Technology offers such benefits by giving investors information faster, by reducing the disparities between large and small investors’ ability to access information, and by helping investors communicate with each other and with companies.\footnote{113}

In view of the accelerating speed and power of the Internet, it is probable that a bright high-schooler in 2000 is better equipped from the standpoint of data and tools (putting aside experience) to analyze securities than a professional was just a few years ago. In fact, some commentators argue that because the Internet gives the “average” investor the same access to information once reserved for wealthy and sophisticated investors, the “average investor should be treated as ‘sophisticated’ under the federal securities laws.”\footnote{114}

\footnote{111 For example, Fox News requires a viewer to accept conditions by clicking on several successive screens which set forth the terms under which the real-time information will be furnished. \textit{See} http://www.foxnews.com; \textit{http://www.invest.foxmarketwire.com/accman/join_member_news.htm}. The Uniform Computer Information Transactions Act (“UCITA”), available at \textit{http://www.ar.org/info/fm/copy/ucitapg.html}, requires information providers continue to retain their extensive records showing the viewers’ agreement to the terms and conditions. \textit{See} Sarah Stirland, \textit{Net-Based Data Rules Still in Progress}, \textit{SEC. INDUS. NEWS}, Aug. 3, 1998, at 4. Proposed Article 2B of the Uniform Commercial Code, \textit{U.C.C.} art. 2B (Proposed Official Draft 1999), was withdrawn as of early 1999 but was replaced by UCITA.


\footnote{113} SEC REPORT, \textit{supra} note 112.

4.4. The Impact of Changed Power Parameters on Contractual Choice

Many disputes involving e-commerce arise between parties who are bound by a contract that specifies the terms and conditions upon which they have agreed to interact. Frequently, the contract itself may provide that any dispute arising from it is to be heard in the courts of a specified state (i.e., choice of forum or forum selection clause) and is to be determined under the substantive law of a specified state (i.e., choice of law clause). If parties to the contract are presumed to have equal bargaining power and, therefore, an equal ability to accept or reject such clauses, the clauses are generally uncontroversial and enforced. Equality between buyer and seller, however, is not presumed when one party to the contract is a consumer. Rather, the seller is presumed to define the market and set the terms of the contract for its own benefit. The buyer, in contrast, is presumed to be confronted with either (a) accepting the terms imposed by one of a limited number of sellers serving the buyer's market, or (b) foregoing the purchase. In an attempt to protect the consumer from disadvantageous choice of forum and law clauses, the European Union will enforce them only if they favor the consumer, although in the United States they are enforced unless they are "unreasonable."

Contract terms themselves, of course, also supply a set of substantive rules to govern the transaction, which will be used by a court unless they violate the public policy of the forum.


Id. at 593 (recognizing that purchasers of cruise line tickets were recognized as having no negotiating power with the cruise line).

Italy, for example, provides that the choice of any forum other than the consumer's domicile is deemed unfair and, therefore, unenforceable unless the seller can demonstrate the existence of dealings over that clause with the consumer. See Emilio Tosi, Consumer Protection Under Italian Law (1999), available at http://www.kentlaw.edu/cyberlaw/docs/foreign/. Similarly, the choice of the law of a non-EU country is void if the chosen law is less favorable to the consumer and the contract's closest connection is to an EU country. See id.

For an excellent discussion of these clauses and their treatment in Europe, see Gabrielle Kaufmann-Kohler, Choice of Court and Choice of Law Clauses in Electronic Commerce, in Vincent Jeanneret (dir.), Aspects Juridiques du Commerce Electronique, Zurich (Schulthess) 2000.

Carnival Cruise Lines, 499 U.S. at 585. However, individual states, when their law is applicable, may as a matter of public policy refuse to enforce such a clause. (Carnival Cruise Lines was an admiralty case, so federal law controlled.) See, e.g., Jones v. GNC Franchising, Inc., 211 F.3d 495 (9th Cir. 2000) (refusing to enforce a Pennsylvania choice of forum clause against a California franchisee).
An individual buyer still may not be able to negotiate the terms of sale, but the ability to scour the Internet to find all available terms and prices for a product or service anywhere in the world empowers the buyer in ways that may surpass the benefits of negotiation. Absent the maintenance by the seller of an interactive website programmed to accept offers in compliance with its terms from any buyer, it is difficult to conclude that, by merely agreeing to sell something to a buyer located elsewhere, the seller ought to be subject to jurisdiction at the buyer’s home. Indeed, it is at least arguable that the buyer has targeted the seller and ought to be answerable (for nonpayment, for instance) at the seller’s home.

To the extent that the Internet both limits the ability of a seller to define its market and, consequently, dramatically widens the options available to buyers, the presumption of inequality in business-to-consumer transactions is called into question. Therefore, the policy reasons for refusing to enforce contractual choice of forum and law clauses in that context are correspondingly weakened.

5. How Traditional Jurisdictional Principles Have Been Applied to the Internet

5.1. Precedents Available from Print, Telephone, and Radio

In the past few years, courts assessing Internet jurisdiction used precedents from cases involving print, telephone, and radio media to determine whether asserting jurisdiction over Internet activities would...

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120 The change may also affect default rules respecting applicable law. In Switzerland, for example, a contract is subject to the law of the state with which it is most closely connected, presumed to be the ordinary residence of the party called upon to provide the characteristic performance, i.e., the seller. See Bernard Meyer-Hauser, ABA Cyberspace Jurisdiction Project § A (1999), available at http://www.kentlaw.edu/cyberlaw/docs/foreign/Switzerland-MeyerHuser.html [hereinafter Meyer]. But to the extent that the buyer defines its purchase, activates delivery, etc., its control may surpass that of the seller, resulting in the use of the law of the buyer’s residence. This assumes, of course, that the buyer utilizing a bot is still seen as the buyer; a bot might lack legal standing. See id. § A. Article 4 of the Rome Convention also mandates use of the law of the country with which the contract is most closely connected, which is presumed to be the habitual residence of the party who is to effect the performance characteristic of the contract. See Rome Convention, supra note 44, art. 4.

Such bots might also be seen as trespassing on third-party websites. The disruption such a result would cause is severe, since search tools in common use rely on accessing deep links. See Telecommunications—Internet: Automated Queries to Every Site Preliminarily Enjoined As Likely Trespass, 68 U.S.L.W. 1734 (2000).
offend constitutional due process. These courts focused primarily on
the intent with which the Internet was used. For example, if an Inter-
net-based news service were to send a number of messages specifically
addressed to residents of a forum, the court would likely find a "pur-
poseful direction" into the forum, even where no physical goods have
been shipped.121

E-mail over the Internet bears comparison to traditional postal
mail and to phone calls, but bulletin boards and websites are not di-
rected to a place, nor do they even point to a spot in virtual space.
The person who posts bulletin board messages knows that the mes-
sages may be re-sent by others elsewhere in the world, but cannot
control such redistribution. A website is an even more passive me-
dium, because it sends nothing specifically directed to the forum state.
The website merely posts general information that is made available to
all viewers.

As the courts have increasingly recognized, websites are similar to
advertisements beamed worldwide over television.122 Perhaps an
analogy to the size of the forum state circulation in the National En-
quirer case123 could be made to the number of hits a website receives
from viewers in a forum state. A website operator can identify the
source of hits on his or her website, and is therefore able to determine
what percentage of those hits stem from viewers in a specific region.
Under National Enquirer, if information about a California resident is
posted on a website with a large number of hits in California, an ad-
dversary could argue that the operator purposefully directed the infor-
mation to California residents.124 That argument, however, would not
triumph, unless it were conceded that a court could assert jurisdiction
over a telecast based on the number of television viewers in a given
jurisdiction.

[shippers] can 'foresee' that the article will be circulated and have an effect in Cali-
ifornia is not sufficient for an assertion of jurisdiction.").

122 See Minnesota v. Granite Gate Resorts, Inc., 568 N.W. 2d 715, 719 (8th Cir.
1997) ("Internet advertisements are similar to broadcast and direct mail solicitation
in that advertisers distribute messages to Internet users, and users must take af-
firmative action to receive the advertised product.").

123 See Calder, 465 U.S. at 783.

124 See id.
5.2. Early Evolution of Internet Caselaw in the United States

The early evolutionary stage of cyberspace jurisdiction in the United States has been marked by inconsistencies and several bad decisions. One of the first decisions was Inset Systems, Inc v Instruction Set, Inc. Inset Systems sued Instruction Set ("ISI") in Connecticut (Inset's home) for trademark infringement, even though ISI had no assets in Connecticut and was not physically transacting business there. The Connecticut district court nonetheless asserted specific personal jurisdiction over ISI, basing its adjudicative authority on ISI's use of a toll-free telephone number and the presence of ten thousand Internet users in Connecticut, all of whom could access ISI's website. The court claimed that the defendant purposefully "availed" itself of the privilege of doing business within the state by directing its advertising and phone number to the ten thousand or so subscribers in Connecticut. The court held that the advertisements satisfied the requirements of Connecticut's long-arm statute and satisfied the "minimum contacts" test of the Due Process Clause of the Fourteenth Amendment, because they constituted "solicitation[s] of a sufficiently repetitive nature." The district court's reasoning was faulty because it failed to acknowledge that websites can be accessed worldwide by anyone at any time, nor did the court have any evidence that Connecticut residents had actually accessed the website or called ISI.

Fortunately, subsequent caselaw has shown that most courts are increasingly reluctant to grant jurisdiction merely on the ground that potential customers in the forum jurisdiction may be able to access the passive website. Indeed, as the number of cases involving jurisdictional issues has increased, courts have become more reluctant to find specific jurisdiction over a nonresident defendant where an accessible website is accompanied by few other contacts with the website by residents of the forum. Internet-based jurisdiction has resulted more from the defendant's purposeful availment of the privilege of doing

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126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
business in the forum jurisdiction or the defendant's purposeful direction of electronic communications to the forum jurisdiction. 131

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131 Personal jurisdiction was found to exist in the following cases: CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (describing repeated transmission of software and messages over the Internet to forum state); Archdiocese of St. Louis v. Internet Entm't Group, Inc., 34 F. Supp. 2d 1145 (E.D. Mo. 1999) (dealing with the operator of an adult website intended to reach Missouri residents in connection with papal visit to St. Louis); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (ruling in favor of asserting personal jurisdiction in District of Columbia over Drudge, a California resident, based on: (1) interactivity of the website between defendant Drudge and D.C. residents; (2) the regular distribution of the "Drudge Report" via AOL, e-mail, and the World Wide Web to D.C. residents; (3) Drudge's solicitation of and receipt of contributions from D.C. residents; (4) the availability of Drudge's website to D.C. residents twenty-four hours a day; (5) Drudge's interview with C-SPAN in D.C.; and (6) Drudge's contacts with D.C. residents who provided gossip for his Drudge Report, added up to a "persistent" course of contact with D.C.); GTE New Media Serv., Inc. v. Ameritech Corp., 21 F. Supp. 2d 27 (D.C. 1998) (describing how telephone companies increased advertising revenue by channeling District of Columbia viewers to their websites); Bunn-O-Matic Corp. v. Bunn Coffee Serv., Inc., 1998 US. Dist. LEXIS 7819 (C.D. Ill. Mar. 31, 1998) (finding the following: infringing marks used on defendant's passive website that provided only general information did not allow customers to place orders by accessing the website, that no Illinois resident who accessed website for contest to obtain free coffee or used its toll-free telephone numbers, and that defendant did not advertise, sell, or ship any of its goods or services to Illinois); Clipp Designs, Inc. v. Tag Bags, Inc., 996 F. Supp. 766 (N.D. Ill. 1998) (finding personal jurisdiction in trade dress infringement action where defendant was alleged to have solicited orders for its locket tag protector in Illinois and advertised the device on its website and through a national magazine); Mieczkowski v. Masco Corp., 997 F. Supp. 782 (E.D. Tex. 1998) (ruling that the nature of the manufacturer's website, which had a "Shop Online" page offering customers an opportunity to check the status of their purchases and providing for direct online communications with sales representatives, combined with other factors, such as the volume of business conducted in the state, provided a basis for asserting general personal jurisdiction over a bunk bed manufacturer); Tel. Audio Prod., Inc. v. Smith, 1998 US. Dist. LEXIS 4101 (N.D. Tex. Mar. 26, 1998) (stating that although defendants' acts failed to rise to the level necessary for the court to have general jurisdiction over the defendants, they were sufficient for specific jurisdiction where defendants maintained a website to promote their business with a registered trademark owned by plaintiff; the webpage with the allegedly infringing mark was accessible to Texas residents and defendants used the infringing mark at a trade show in Texas and received orders from distributors in Texas, hence the combination of the website and other contacts with Texas were sufficient for jurisdiction); Cody v. Ward, 1997 U.S. Dist. LEXIS 1496 (D. Conn. Feb. 4, 1997) (deciding that California defendant's telephone and e-mail transmissions to a Connecticut plaintiff for the purpose of inducing the plaintiff to purchase securities was enough to exercise personal jurisdiction under Connecticut statute); Resuscitation Techs., Inc. v. Cont'l Health Care Corp., 1997 WL 148567 (S.D. Ind. Mar. 24, 1997) (finding that although plaintiff initiated contacts with its website posting, subsequent extensive e-mail and phone contacts by Michigan defendants warranted Indiana jurisdiction); Hasbro Inc. v. Clue Computing Inc., 994 F. Supp. 34 (D. Mass. 1997) (asserting jurisdiction over Rhode Island website operator who listed a Massachusetts client on its website, which was accessible to Massachusetts

Among an increasing number of cases declining to find personal jurisdiction are: 3D Sys., Inc. v. Aarotech Labs., Inc., 160 F.3d 1373 (Fed. Cir. 1998) (finding no jurisdiction over parent of alleged patent violator where it only maintained a passive website accessible by California residents and did not purposefully direct any of its activities at California residents); Cybersell Inc. v. Cybersell Inc. 130 F.3d 414 (9th Cir. 1997) (stating that mere accessibility by Arizona resident to passive, Florida-based website did not suffice for specific jurisdiction); Chiaphua Components Ltd. v. West Bend Co., 95 F. Supp. 2d 505 (E.D. Va. 2000) (granting motion to dismiss for lack of jurisdiction); Pheasant Run, Inc. v. Moyse, 1999 WL 58562 (N.D. Ill. Feb. 3, 1999) (discussing an advertisement on website containing defendant's telephone number); Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc., 35 F. Supp. 2d 507 (E.D. La. 1999) (holding that an advertisement on website was essentially "passive"); Origin Instruments Corp. v. Adaptive Computer Sys., Inc., 1999 WL 76794 (N.D. Tex. Feb. 3, 1999) (finding no jurisdiction where there was "moderate level of interactivity"); ESAB Group, Inc. v. Centricut, L.L.C., 34 F. Supp. 2d 323 (D.S.C. 1999); Advanced Software, Inc. v. Datapharm, Inc., 1998 U.S. Dist. LEXIS 22091 (C.D. Cal. Nov. 3, 1998) (finding no jurisdiction over Datapharm in California where it had website with the domain name of datapharm.com and links to other pharmaceutical websites such as the FDA, offered visitors to the website the ability to send it e-mail by clicking on a hyperlink, listed Datapharm's address,
and provided an “800” telephone number); No Mayo-San Francisco v. Memminger, 1998 U.S. Dist. LEXIS 13154 (N.D. Cal. Aug. 19, 1998) (ruling that merely registering someone else’s trademark as a domain name and posting it on a website are not sufficient, by themselves to subject a party in Hawaii to jurisdiction in California); CFOs 2 Go, Inc. v. CFO 2 Go, Inc., 1998 WL 320821 (N.D. Cal. June 5, 1998) (finding that defendant’s website and e-mail addresses for communication over the Internet were insufficient in a trademark suit to establish that the defendant had purposefully availed itself of the privilege of conducting activities within plaintiff’s home state); Edberg v. Neogen Corp., 17 F. Supp. 2d 104 (D. Conn. 1998) (explaining how the defendant’s website had hypertext links that permitted users to learn about Neogen products, order product information through an online catalog, e-mail specific comments or questions to Neogen representatives, and order products through a toll-free “800” telephone number; but there was no act purposefully directed towards the forum state, nor was there evidence that anyone in Connecticut purchased any Neogen products through the company’s website or that any Neogen advertisements were directed to residents of Connecticut); Osteotech, Inc. v. GenSci Regeneration Sci., Inc., 6 F. Supp. 2d 349 (D.N.J. 1998) (holding that Internet advertisements and websites easily accessible from computers in New Jersey were insufficient proof by themselves of purposeful availment in New Jersey, even with a phone number and e-mail address on the website); K.C.P.L., Inc. v. Nash, 49 U.S.P.Q. 2d 1584 (S.D.N.Y. 1998) (lacking personal jurisdiction over alleged cyberpirate who allegedly registered domain name for sole purpose of extorting money from plaintiff in exchange for the assignment of all rights in the name, where the defendant resided in California and had no contacts with New York whatsoever, and there were no allegations that defendant sought to encourage New Yorkers to access his website or that he conducted business in New York); Blackburn v. Walker Oriental Rug Galleries, 999 F. Supp. 636 (E.D. Pa. 1998) (holding that website illustrating various types of rugs without option to purchase was passive advertisement and therefore did not constitute sufficient contacts to establish personal jurisdiction); Patriot Sys., Inc. v. C-Cubed Corp., 21 F. Supp. 2d 1318 (D. Utah 1998) (finding that although C-Cubed transacted business with Utah by virtue of its license relationship with Folio, headquartered in Utah, and paid royalties to Folio in Utah, there was insufficient nexus between the claims in the lawsuit and C-Cubed’s other contacts with Utah for specific personal jurisdiction over the Virginia company; website was passive advertisement, merely providing information to those interested in it); Black & Decker (U.S.) Inc. v. Pro-Tech Power, Inc., 26 F. Supp. 2d 834 (E.D. Va. 1998) (holding that where defendants in patent suit advertised their products on website accessible to Virginia residents and provided interested customers in Virginia with their e-mail addresses, there was not enough evidence to establish purposeful availment for personal jurisdiction); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (finding no general jurisdiction where Hong Kong manufacturer of artificial Christmas tree advertised on the Web and it was purchased from a retailer in Arkansas); Transcraft Corp. v. Doonan Trailer Corp., 1997 U.S. Dist. LEXIS 18687 (N.D. Ill. Nov. 17, 1997) (holding that in trademark infringement action, website was just a general advertisement accessible worldwide, with no particular focus on Illinois); Hearst v. Goldberger, 1997 WL 97097 (S.D.N.Y. 1997) (finding no specific jurisdiction where New Jersey website was accessible to and visited by New Yorkers, where no sales of goods or services had occurred); McDonough v. Fallow McElligott, Inc., 40 U.S.P.Q. 2d (BNA) 1826 (S.D. Cal. 1996) (finding mere accessibility of Missouri website by Californians insufficient for general personal jurisdiction); Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) (finding no jurisdiction over Missouri defendant based on a website
The first decision in the United States to articulate an overall analytical framework for specific personal jurisdiction based on Internet activity came in *Zippo Manufacturing Co. v. Zippo Dot Com Inc.* Under *Zippo*, there is a "continuum" or sliding scale for measuring websites, which fall into one of three general categories: (1) passive; (2) interactive; or (3) integral to the defendant's business. The "passive" website is analogous to an advertisement in *Time* magazine; it posts information generally available to any viewers, who have no on-site means to respond to the website. Courts ordinarily would not be expected to exercise personal jurisdiction based solely on the presence of a passive Internet website, as doing so would grate against the traditional notion of personal jurisdiction law. An "integral" website, on the other hand, is at the other end of the three categories. An integral website is used actively by a defendant to conduct transactions with persons in the forum state, to receive online orders, and to push messages directly to specific customers. Using the traditional analysis, a court could reasonably justify its decision to assert personal jurisdiction over a defendant who operates an integral website. The middle category, or "interactive" website, falls between passive and integral. It allows a forum state viewer to communicate information back to the website. Under *Zippo*, exercise of jurisdiction in the "interactive" context is determined by examining the level of interaction and the commercial nature of the website. In *Zippo*, for instance, the defendant, a Cali-
fornian, operated an integral website that had contracts with 3000 Pennsylvania residents and Internet service providers; the Pennsylvania court had no difficulty finding jurisdiction over the nonresident defendant.135

The first federal appellate decision on jurisdiction in cyberspace was *Cybersell, Inc. v. Cybersell, Inc.* 136 In this case, the Ninth Circuit Court of Appeals, in contrast to the Connecticut federal court in the *In re* case, rejected the notion that a defendant “purposely avails” itself of the privilege of conducting business within a jurisdiction merely because its homepage can be accessed there.137 In *Cybersell*, the plaintiff was an Arizona corporation that advertised its commercial services over the Internet.138 The defendant was a Florida corporation offering webpage construction services over the Internet.139 The Arizona plaintiff claimed that the alleged Florida trademark violator should be subject to personal jurisdiction of the Federal court in Arizona, since the defendant online advertisements were targeted to a worldwide audience.140

In declining to assert jurisdiction, the Ninth Circuit used a *Zippo*-type of analysis without specifically adopting *Zippo*. First, the court articulated a three-part test for determining whether a district court may exercise specific jurisdiction over a nonresident defendant:

The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections[.] (2) [t]he claim must be one which arises out of or results from the defendant's forum-related activities[;] and] (3) [e]xercise of jurisdiction must be reasonable.141

Applying the foregoing principles, the Ninth Circuit concluded that the Florida defendant had conducted no commercial activity over

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135 *Id.*
136 130 F.3d 414 (9th Cir. 1997).
137 *Id.* at 420.
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.* at 416.
the Internet in Arizona.\textsuperscript{142} Posting an "essentially" passive home page on the Web using the name "Cybersell" was insufficient for personal jurisdiction.\textsuperscript{143} Even though anyone could access defendant's home page and thereby learn about its services, the court held that the Florida defendant had not deliberately directed its merchandising efforts toward Arizona residents.\textsuperscript{144} In other words, defendant's activities over the Internet were insufficient to establish "purposeful avail-
m ent." The Ninth Circuit, in rendering its decision, observed that every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located if the defendant happened to have a website.\textsuperscript{145}

The \textit{Cybersell} court was correct in its policy. It is vital to remember that constitutional due process allows potential defendants to structure their conduct in a way to avoid the forum state.\textsuperscript{146} At the same time, to assume that a website operator can entirely avoid a given jurisdiction is unrealistic. Because the Web overflows all boundaries, the only way to avoid contact with a specific jurisdiction would be to stay off the Internet.\textsuperscript{147} For that reason, mere accessibility of a website should not properly be deemed to satisfy the Fourteenth Amendment minimum contacts requirements, and website operators should be able to structure their website use to avoid a given state's jurisdiction.

Whether specific jurisdiction will be found and a website put in the "interactive" or "passive" category may turn more on a court's perception than on any real differences in the manner in which the user employs the Internet. Subsequent cases tend to support that ob-

\textsuperscript{142} \textit{Id.} at 419.
\textsuperscript{143} \textit{Id.} at 420.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{See} \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286, 297 (1980).
\textsuperscript{147} The use of filtering devices is theoretically possible, but the efficacy of these devices has not yet been proven. \textit{See}, e.g., CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1019 (S.D. Ohio 1997) (describing CompuServe's attempts to set up filters to keep defendant from sending bulk junk e-mails which were thwarted by defendant falsifying the point of origin information on its e-mail and by configuring its network servers to conceal its actual domain name); ACLU v. Reno, 929 F. Supp. 824, 844-47 (E.D. Pa. 1996) (describing the problems and lack of availability to non-commercial, not-for-profit-entities of age-filtering devices for sexually explicit materials under the \textit{Community Decency Act}); \textit{see also} Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (noting that mere foreseeability that a website will be seen in the state, and failure to avert that, is not sufficient to establish personal jurisdiction).
servation, although the three-category method of analysis is not universally employed. Moreover, even many courts which invoke a Zippo analysis largely ignore the "integral" category and focus only on whether a website is "passive" or "interactive." Which of the two labels is used can often determine the jurisdictional issue.

5.3. Applying the "Effects" Test

If the website operator intends to cause an effect in a given forum and actually does, he arguably avails himself of the privilege of doing business there in the same manner as occurred in the National Enquirer case. For example, a nonresident of California allegedly operated a scheme consisting of registering exclusive Internet domain names for his own use that contained registered trademarks. The defendant allegedly demanded fees from Panavision, a well-known California resident, and other businesses that asked him to discontinue his unauthorized use of their trademarks. The Ninth Circuit affirmed a finding of specific personal jurisdiction in California federal court over the defendant by the defendant's having committed a tort "expressly aimed" at California. It reasoned that the defendant could foresee the harm done in California and therefore satisfied the minimum contact requirement.

5.3.1. General Jurisdiction

Given its strict requirements, it is not surprising that to date there has been no reported decision finding general jurisdiction based solely on advertising on the Internet. Nonetheless, some courts have used

152 Id. at 1321-22.
153 See id.
only little additional activity as a crutch to support a general jurisdiction finding. One Texas case found general jurisdiction over the manufacturer of a bunk bed in a wrongful death action involving a three-year old child where the manufacturer's website allowed customers to shop online, check status of purchases, and contact sales representatives, and where the manufacturer had 3.2% of its sales in Texas. This volume might have been insufficient for general jurisdiction in some other courts. For example, the Eastern District of Virginia has rejected general jurisdiction, even though sales in the state by defendants were close to $4 million in the prior three years, and defendant had an interactive website.157

5.3.2. In Rem Jurisdiction

As noted earlier, in rem jurisdiction requires that fundamental fairness be satisfied.158 In Porsche Cars North America, Inc. v. Porsh.com, a federal district court declined to exercise in rem jurisdiction over 128 registered Internet domain names, citing Supreme Court dicta for the proposition that "courts generally cannot exercise in rem jurisdiction to adjudicate the status of property unless the Due Process Clause would have permitted in personam jurisdiction over those who have an interest in the res."159 Thereafter, in passing the Anticybersquatting Consumer Protection Act (“ACPA”) in 1999, Congress specifically made in rem proceedings available in cases involving cybersquatting, if the owners of alleged infringing websites could not be found within the plaintiff’s jurisdiction.160 Passage of the ACPA led the Fourth Circuit in June 2000 to vacate the district court’s order, thus dismissing California residents via telephone and letters, allegedly denigrating plaintiffs’ right to market software. The Court held that general jurisdiction could not be based on the “mere act of transmitting information through the use of interstate communication facilities...” where defendant had no offices in California and did not otherwise conduct business there except to communicate with California users of the national bulletin board. Id at 1360. In Panavision, the federal court rejected general jurisdiction in California over an Illinois defendant who used a California company’s trademark in a website address in order to compel the plaintiff to buy out his domain rights. See Panavision Int’l, 938 F. Supp. at 620.

156 Id. at 788.
158 See supra Section 2.2.4.
the case in *Porsche*, in order that the result could be revisited in the context of ACPA.\(^\text{164}\) The same district court subsequently held that the in rem provisions of the ACPA were constitutional, ruling that the U.S. Supreme Court’s analysis only required sufficient minimum contacts in those in rem actions where the underlying cause of action is unrelated to the property located in the forum.\(^\text{162}\) However, if in personam jurisdiction over a defendant was available in the forum, an in rem action under ACPA will not be available.\(^\text{163}\)

6. CYBERJURISDICTIONAL ISSUES IN THE CONTEXT OF SECURITIES LAWS

6.1. Interpretations by the SEC

Under international law, a country may assert jurisdiction over a nonresident so long as the assertion of jurisdiction is reasonable.\(^\text{164}\) Included in that “reasonable standard” are, among other things, whether the nonresident carried on activity in the country solely with respect to such activity and whether the nonresident carried on, outside the country, an activity having a substantial, direct, and foreseeable effect within the country with respect to such activity. Observing the “reasonable standard,” a court in one country could assert jurisdiction over a foreign company under the “doing business” or “substantial and foreseeable effects” tests if the company directs financial information into the country via e-mail. A court may also find it reasonable to assert personal jurisdiction over an individual or company that maintains a website capable of being accessed by residents within the court’s jurisdiction.

In 1998, the SEC issued an interpretive release on the application of the U.S. federal securities laws to offshore Internet offerings, securities transactions, and advertising of investment services.\(^\text{165}\) The SEC


\(^{164}\) See supra Section 2.1.


https://scholarship.law.upenn.edu/jil/vol21/iss3/5
sought to "clarify when the posting of offering or solicitation materials" on websites would not be deemed activity taking place in the United States for purposes of federal securities laws. The SEC adopted a rationale that resembles one adopted earlier by the North American Securities Administrators Association ("NASAA") in determining the application of state blue sky laws. In effect, the SEC stated that it would not subject issuers, broker-dealers, exchanges, and investment advisers to the registration requirements of the U.S. securities laws if they "implement measures that are reasonably designed to guard against sales or the provision of services to U.S. persons." Thus, the SEC generally will not consider an offshore Internet offer made by a non-U.S. offeror as targeted at the United States if: (1) "the website includes a prominent disclaimer making it clear that the offer is directed only to countries other than the United States;" and (2) "[t]he website offeror implements procedures that are reasonably designed to guard against sales to U.S. persons in the offshore offering."

There are several ways in which an offeror could exclude the United States from its Web-based offering. For example, the offeror could state, in a prominent position on its webpage, that the securities being offered are available neither to U.S. citizens nor within the United States. Alternatively, the offeror could list the countries in which the securities are being offered.

There are likewise several ways to guard against sales to U.S. persons. For example, the offeror could determine the buyer's residence by obtaining the purchaser's mailing address or telephone number (including area code) before sale. If the offeror is put on notice that the purchaser might be a U.S. resident—for example, it receives a U.S. taxpayer identification number or a payment drawn on a U.S. bank—it would need to take additional steps to verify that a U.S. resident is not involved. Offshore offerors who use third-party Web services to post offering materials would be required to act with a similar level of precaution, and would have to install additional pre-

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166 Id. pt. I. The release applies only to postings on websites, not to targeted kinds of communication such as e-mail.
167 Id. pt. I.
168 Id. pt. III.B.
169 See id.
170 See id.
171 See id.
172 See id. pt. III.C.
cautionary measures when dealing with a third-party website claiming an interest in the offering. The offshore offeror using a third-party website with a substantial U.S. client-base would be required to restrict access to the offering materials to those who could demonstrate that they are not U.S. residents.173

Stricter measures are required in the case of U.S. issuers making offshore offerings, because U.S. residents are more easily able to access the offer. Accordingly, the SEC requires a U.S. issuer to install a password system that limits the Internet offering to those who have obtained a password to the website by demonstrating that they are not U.S. citizens.174 Foreign investment companies making Internet offerings must take similar precautions against targeting U.S. persons in order to avoid registration and regulations under the 1940 Act.175 From a practical standpoint, the SEC's historical reluctance to allow foreign investment companies to register under the 1940 Act means that foreign investment companies can only make private placements in the United States.176 When an offer is made offshore on the Internet and with a concurrent private offer in the United States, the offeror must guard against indirectly using the Internet offer to stimulate participants in the private U.S. offer.177

The SEC's interpretation requires that a broker-dealer seeking to avoid U.S. jurisdiction must take reasonable measures to ensure that it does not affect securities transactions with U.S. persons as a result of its Internet activity.178 For example, the use of disclaimers coupled with actual refusal to deal with any person whom the broker-dealer has reason to believe is a U.S. person will afford an exemption from U.S. broker-dealer registration. A foreign broker-dealer, therefore, should require potential customers to provide sufficient information on residency. By the same token, the SEC will not apply exchange registration requirements to a foreign exchange that sponsors its own website advertising its quotes or allowing orders to be directed through its website so long as it takes steps reasonably designed to prevent U.S. persons from directing orders through the website to the exchange. Regardless of what precautions are taken by the issuer, the SEC will view solicitations as being subject to federal securities laws if

173 See id. pt. III.D.
174 See id. pt. IV.B.
176 See Release 33-7516, supra note 165, pt. V.A.2.
177 See id. pt. IV.A., V.A.
178 See id. pt. I.
their content appears to be targeted at U.S. residents—offers such as those “that emphasize the investor’s ability to avoid U.S. income taxes on the investments.”

6.2. U.S. State Blue-Sky Administrators

From the outset, the Internet posed the issue of whether an offering posted on a website would be subject to the blue sky laws of every state in the United States from which it could be accessed. Certainly, whether an Internet offer “originates” in a given state should not be based on the physical location of the passive circuits carrying the message. Although an electronic message may travel through a multitude of networks and mainframes, its natural point of origination is the place at which it is entered onto a website or into an e-mail. Whether an Internet-based offer to buy or sell securities is “directed” to a given state is a more complex factual inquiry. If an offer to sell securities were mailed or communicated by telephone to a person in a forum state, personal jurisdiction in that state should apply. Similarly, an offer made over e-mail directly to the resident of a state would constitute a basis for jurisdiction over the offeror in the offeree’s state, as would the acceptance by an out-of-state issuer of an e-mail from a person within the forum state subscribing to a general offering posted on the Internet.

NASAA recognized early on that merely advertising the existence of an offering on the Internet, without more, is different. Standing alone, it constitutes insufficient evidence that the offer is specifically “directed” to persons in every state. NASAA became the first regulatory entity to adopt a jurisdictional policy that purports to facilitate e-commerce in securities. Under its model rule, a state should not attempt to assert jurisdiction over an Internet offering if the offeror’s website contains a disclaimer stating that no offers or sales are being made to residents of that state, the website prevents such residents from accessing the purchasing screens, and no sales are in fact made to residents of that state.

As of mid-2000, thirty-eight states had adopted some version of the NASAA safe-harbor, either by statute, regulation, interpretation,

179 Id. pt. III.B.
182 See id.
Commonly, the disclaimer is contained in a page linked to the home page of the offering. A preferred technique is to request entry of the viewer’s address and ZIP code before the viewer is allowed to access the offering materials. If the viewer resides in a state in which the offering has not been qualified, access is denied. Of course, the viewer might choose to lie, but it can be argued with some logic that a website operator cannot reasonably “foresee” that viewers would lie.

NASAA also adopted in 1997 a practical approach to jurisdiction over Internet-based broker-dealers and investment advisors. NASAA’s policy exempts from the definition of “transacting business” within a state for purposes of Sections 201(a) and 201(c) of the Uniform Securities Act communications by out-of-state broker-dealers, investment advisers, agents, and representatives that involve generalized information about products and services; provided, however, that the person clearly indicates that it may only transact business in the state if it is registered or otherwise exempted from registration, and the person does neither attempts to effect transactions in securities nor render personalized investment advice, uses “firewalls” against directed communications, and uses specified legends.

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183 See Blue Sky L. Rep. (CCH) ¶ 6481.
184 The policy is available on the Internet at http://www.nasaa.org/bluesky/guidelines/internetadv.html. See also Interpretive Order Concerning Broker-Dealers, Investment Advisers, Broker-Dealer Agents and Investment Adviser Representatives Using the Internet for General Dissemination of Information on Products and Services (Apr. 27, 1997) CCH NASAA Reports ¶ 2191 [hereinafter NASAA Interpretive Order].
185 The Uniform Securities Act was drafted in 1956 and later adopted by in approximately forty states. See Unif. Sec. Act, §§ 201(a), (c), 35 U.S.C. § 1 (1956).
186 As of February 2000, twenty-seven states had adopted a version of the NASAA policy, which declares the following:

1. Broker-dealers, investment advisers, broker-dealer agents (hereinafter “BD agents”) and investment adviser agents/representatives (hereinafter “IA reps”) who use the Internet... to distribute information on available products and services... directed generally to anyone having access to the Internet, and transmitted through [the Internet]... shall not be deemed to be “transacting business” in the state the following conditions are observed:

   A. The Internet communication contains a legend in which it is clearly stated that:

      (1) the broker-dealer, investment adviser, BD agent or IA rep in question may only transact business in this state if first registered, excluded or exempted from state broker-dealer, investment adviser, BD agent or IA rep registration requirements, as may be; and
NASAA's approach should facilitate the use of the Internet by smaller or regional securities professionals whose activities are limited to distinct geographical areas.

6.3. Jurisdictional Developments in Some Other Countries

Regulators outside the United States are still in the midst of sorting out the multifarious jurisdictional challenges raised by the Internet. Joanna Benjamin, Deputy Chief Executive of the U.K.'s Financial Law Panel, contends that the traditional, geography-based system of jurisdiction is undermined by global networks and remote access. At the same time, she sees the International Organization of Security Commissions ("IOSCO"), the United States, United Kingdom, and Australia all moving toward a regulatory environment in which the "effects" principle of jurisdiction is given greater emphasis. According to Christopher Cruickshank of the European Commission, his

(2) follow-up, individualized responses to persons in this state by such broker-dealer, investment adviser, BD agent or IA rep that involve either the effecting or attempting to effect transactions in securities, or the rendering of personalized investment advice for compensation, as case may be, will not be made absent compliance with broker-dealer, investment adviser, BD agent or IA rep registration requirements, or an applicable exemption or exclusion;

B. The Internet Communication contains a mechanism, including and without limitation, technical "firewalls" or other implemented policies and procedures, designed reasonably to ensure that prior to any subsequent, direct communication with prospective customers or clients in this state, said broker-dealer, investment adviser, BD agent or IA rep is first registered in this state or qualifies for an exemption or exclusion from such requirement. Nothing in this paragraph shall be construed to relieve a state registered broker-dealer, investment adviser, BD agent or IA rep from any applicable securities registration requirement in this state;

C. The Internet Communication does not involve either effecting or attempting to effect transactions in securities, or the rendering of personalized investment advice for compensation, as may be, in this state over the Internet, but is limited to the dissemination of general information on products and services; and

D. In the case of a BD agent or IA rep:

(1) the affiliation with the broker-dealer or investment advisor of the BD agent or IA rep is prominently disclosed within the Internet Communication . . .

NASAA Interpretive Order, supra note 184.


188 See id.
agency hopes to clarify the regulatory issues facing the European securities industry by promulgating a directive that will help define where an electronic organization is based and what contract laws apply to U.S. business.\textsuperscript{189}

6.3.1. \textit{Canada}

Governmental initiatives have shown that the Canadian government is interested in promoting rather than regulating e-commerce and the Internet. Thus, initiatives directed at the development and regulation of the Internet in Canada have proceeded without a formal jurisdictional determination, and have primarily been governmental. In September 1998, Industry Canada launched a national e-commerce strategy.\textsuperscript{190} Also in Fall 1998, the Canadian Radio-Television and Telecommunications Commission ("CRTC") conducted public hearings\textsuperscript{191} on "new media" with a view to exploring the obligations that the Internet and other new technologies may place on the regulator under the Broadcasting Act (1991)\textsuperscript{192} and Telecommunications Act (1993).\textsuperscript{193}

Canada requires a "real and substantial connection" between the cause of action and the forum province, based on a long-established principle of order and fairness.\textsuperscript{194} This is like the "minimum contacts" test in the United States.\textsuperscript{195} The leading Supreme Court of Canada case on the doctrine\textsuperscript{196} was interpreted by the Supreme Court in a later case not to be "a rigid test" but rather one "intended to capture the idea that there must be some limits on the claims to jurisdiction."\textsuperscript{197}

\textsuperscript{189} See \textit{id} at 13.


\textsuperscript{191} See The Call for Comments for These Hearings (Telecom Public Notice CRTC 1998-20 and Broadcasting Public Notice CRTC 1998-82 (on file with author).

A formal decision has not been issued, but expectations are that the CRTC will either forbear from regulation, or impose light cultural regulation only. This might include priority placement for Canadian services on Canadian search engines and portals, or development funding through a tax on service providers.


\textsuperscript{193} Telecommunications Act, ch. 38, 1993 S.C. (Can.)


\textsuperscript{195} Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).


modern era when international transactions involve a constant flow of products, wealth and people across the globe," and further prescribed that "jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections."\textsuperscript{198}

In the application of the "real and substantial connection" test generally to Internet jurisdiction, two recent and relevant cases offer substantial clarification. In \textit{Craig Broadcast Systems},\textsuperscript{199} the Manitoba Court of Queen's Bench commented ex obiter on the difficulty of determining whether an action had a "real and substantial connection" with the forum in cyberspace and suggested that "the issue will not be resolved by one or two factors, but by looking at the accumulation of factors in the particular case."\textsuperscript{200} More recently, the British Columbia Court of Appeal bore out this approach when it upheld North Carolina jurisdiction following a breach of a sale of goods contract by a Canadian company.\textsuperscript{201} The court noted, inter alia, that the defendant company had "portrayed itself as a corporate citizen that operated internationally... by virtue of its Internet advertisements."\textsuperscript{202} The court also noted that the purchase had been made, the equipment installed, and the losses suffered in North Carolina.

The Canadian government has demonstrated a strong commitment to the promotion of e-commerce, including the removal or resolution of legal barriers. A federal task force on e-commerce was formed in 1998 to coordinate developments in particular industry areas.\textsuperscript{203} The June 1998 conference of federal, provincial, and territorial ministers responsible for the information highway agreed to promote and support the removal of legal, policy, or regulatory obstacles to e-commerce.\textsuperscript{204} By the end of 1998, Canada was one of the first coun-

\textsuperscript{198} \textit{Id.} at 39, 42.


\textsuperscript{200} \textit{Id.} ¶ 23.


\textsuperscript{202} \textit{Id.} ¶ 31.


\textsuperscript{204} \textit{See Federal-Provincial-Territorial Conference of Ministers Responsible for the Information Highway held in Fredericton, New Brunswick, June 1998, available at} http://www.scics.gc.ca/cinfo98/83061209_e.html.
tries to have set out a comprehensive e-commerce agenda addressing policy development in most key areas of legal concern.\(^{205}\)

Like the United States, Canada provides for reciprocal enforcement of judgments given by provincial courts within its borders.\(^{206}\) Moreover, where a foreign court has exercised jurisdiction legitimately, Canada normally follows the principle of comity and voluntarily submits to the jurisdiction of friendly nations and enforces foreign judgments in exchange for the promise of similar treatment.\(^{207}\) However, in the Internet context, fulfillment of other conditions may be required. In the only Canadian Internet jurisdiction case relating to enforcement to date, the British Columbia Court of Appeal overturned the summary decision of the Supreme Court of British Columbia which enforced the default judgment of a Texas court on an action for libel.\(^{208}\) Both the appellant and the respondent were domiciled in British Columbia, but the respondent had filed in Texas on the basis that alleged defamatory statements posted on an Internet discussion group affected its interests vis-à-vis existing and potential investors in Texas.\(^{209}\) The British Columbia Court of Appeal disagreed, finding no “real and substantial connection” in the “mere transitory, passive presence in cyberspace of the alleged defamatory material,” and the “mere possibility that someone . . . might have reached out to cyberspace to bring the defamatory material to a screen in Texas.”\(^{210}\) In effectively “second-guessing” the Texas court, the British Columbia Court of Appeals was echoing the same rule that generally applies in the United States, namely, a passive website accessible in the forum is not enough to confer jurisdiction on the forum.

Given the ease with which less cooperative nations (the so-called “Internet paradises”) can be used as e-commerce domiciles, the enforceability of Canadian and foreign judgments will likely be a key issue in future Canadian jurisprudence on e-commerce.

Cyberspace jurisdiction in Canada raises special problems in securities law. Unlike the United States, Canada has no body of caselaw (beyond general jurisdictional principles) dealing expressly with its extraterritorial reach. Because securities law in Canada is a provincial, rather than national matter, and jurisdiction over securities matters is

\(^{205}\) See generally id. § IV.


\(^{207}\) Cf. Old North State Brewing Co., B.C.J. No. 2474.


\(^{209}\) See id. at 49.

\(^{210}\) Id. at 61-62.
divided among the provincial and territorial governments; there is no uniform national securities law. The Internet poses unique questions, such as when one must submit to the requirements of other jurisdictions. It is questionable whether the Ontario Securities Commission ("OSC") can enforce its registration requirements against websites operated from outside Canada even by a Canadian, much less by a foreign national.

In contrast, the British Columbia Securities Commission deems its securities laws to apply when either the person making a communication or the person to whom a communication is directed is located in British Columbia. Where the communication is simply posted and not directed (e.g., by e-mail) into the province, British Columbia regulation can be avoided by a disclaimer at the outset that either expressly excludes British Columbia or directs the communication exclusively to other specified jurisdictions. In June 1997, the Canadian Securities Administrators ("CSA"), whose role roughly parallels NASAA, promulgated a request for comment on the concept of issuers delivering documents using electronic media. The Canadian proposal attached SEC Release 33-7233 as an example of an approach to regulatory issues involved in electronic versus paper delivery. In December 1998, the CSA published for comment two national policies that attempt to clarify the application of securities law principles in the context of the Internet and other electronic channels of communication. National Policy 11-201 relates to the ability of issuers and registrants to deliver documents electronically, while National Policy 47-201 relates to the use of the Internet to facilitate distributions of securities. As statements of CSA rather than rules, the Na-

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212 See BSSC, NEWS RELEASE NO. 97-09 (Mar. 11, 1997).

213 See id.


216 Id. pt. 1.2.

tional Policies do not have the force of law; however, they are useful indicators of how Canadian securities laws may be applied.218

National Policy 11-201 addresses whether documents requiring disclosure under securities legislation may be delivered through electronic channels, such as e-mail or the Internet.219 The Policy would apply the delivery of prospectuses, financial statements, trade confirmations, and account statements;220 it would not apply to the delivery of documents that are required by legislation to be transmitted in a specified manner, e.g., take-over circulars.221 Policy 11-201 would require four components of electronic delivery to be satisfied in order for an electronic delivery to be considered effective under securities legislation: (1) the recipient of the document must receive notice that the document is either about to be sent or is now available; (2) the recipient of the documents must have easy access to the document; (3) the deliverer of the document must have evidence that the document has been delivered or otherwise made available to the recipient; and (4) the document cannot be altered or corrupted in transmission.222

The first three criteria are similar to the SEC’s delivery criteria discussed earlier. Perhaps the most important recommendation is that deliverers of electronic information obtain the consent to electronic delivery from each proposed recipient.223 The consent effectively enables the deliverer to describe the proposed methods of delivery, the technical requirements for receipt of the documents, and other material aspects of the delivery, as well as to obtain agreement to that approach from the recipient.224 Once a recipient’s consent is obtained, a deliverer that delivers documents electronically in accordance with the terms of the consent is entitled to infer that the first three conditions described above are satisfied.225 Policy 11-201 notes that deliverers

218 See Al Hudec, Corporate Disclosure Policies and Corporate Websites, available at http://www.davis.ca/topart/disclosur.htm (“Although these policies are not currently law, they reflect the receptiveness of Canadian securities regulators to the adoption by issuers of electronic methods to disseminate corporate information and to distribute securities over the Internet.”).

219 CSA NP 11-201 pt. 1.2.

220 See id. pt. 1.3(2).

221 See id. pt. 1.3(3). Deliverers of documents would also have to regard any applicable requirements of specific corporate legislation imposing specific delivery requirements. See id.

222 CSA NP 11-201.

223 Id. pt. 2.1.4.

224 See id.

225 See id.
may send documents electronically without obtaining the consent of recipients but do so at the risk of bearing a more difficult evidentiary burden of proving that the conditions described above were satisfied on the delivery.\(^{226}\)

National Policy 47-201 states the views of the CSA on a number of issues relating to the use of the Internet and other electronic means in connection with trades and distributions of securities.\(^{227}\) The policy primarily deals with two matters: jurisdictional issues and the transmission of roadshows over the Internet.\(^{228}\) CSA has chosen to view the jurisdictional issue much like NAASA. The Policy in effect provides that a party who posts an offering document on the Web that is available in a Canadian jurisdiction is considered to be trading in the jurisdiction.\(^{229}\) However, the CSA will take the view that the posting does not constitute trading in the jurisdiction if the document prominently describes the locations in which the relevant securities are being offered, and if steps are taken to ensure that no securities are sold within the jurisdiction.\(^{230}\)

The CSA also addressed the issue of transmission of roadshows over the Internet in National Policy 47-201.\(^{231}\) Specifically, the CSA indicated its approval to these transmissions, but attempted to ensure that the transmissions would comply with "the 'waiting period' requirements and securities legislation generally."\(^{232}\) Accordingly, National Policy 47-201 proposes the following guidelines: (1) everyone receiving a transmission must have received a preliminary prospectus; (2) access to a transmission should be controlled; and (3) everyone receiving a transmission should agree not to retransmit or reproduce the transmission.\(^{233}\) In October 1998, the CSA issued an information bulletin warning investors of the potential on the Internet for fraud, unregistered trading, misrepresentations, manipulation, illegal distributions, and conflicts of interest.\(^{234}\) The CSA also assembled a committee to address the regulatory issues stemming from the use of the Internet and other electronic media by market participants. The

\(^{226}\) Id. pt. 2.1(5).
\(^{227}\) CSA NP 47-201, pt. 1.2.
\(^{228}\) Id. pt. 2.
\(^{229}\) Id. pt. 2.2(1).
\(^{230}\) Id. pt. 2.2(2).
\(^{231}\) Id. pt. 2.7.
\(^{232}\) Id. pt. 2.7(2).
\(^{233}\) See id.
committee’s primary goal is to foster development and innovation without compromising investor protection or investor confidence.\textsuperscript{235} Regulators will likely have to make extensive changes to rules developed for a physically delimited environment.

Surprisingly, there have been some fairly straightforward solutions. The British Columbia Securities Commission indicated that a clear warning about jurisdictions from which an enterprise will or will not accept customers would be sufficient to suspend the registration and prospectus requirements of British Columbia securities law.\textsuperscript{236} Absent such a disclaimer, however, Canadian courts have shown a willingness to subject foreign defendants to Canadian jurisdiction. In \textit{Alten v Informa, Corp.},\textsuperscript{237} the Newfoundland Supreme Court allowed an action against an American company to proceed in Newfoundland even though the company had issued no public statements in Canada, made no direct solicitation in Newfoundland, and had no contact with investors in the province. This case should be contrasted with \textit{Brainsitech, Inc v Kostie},\textsuperscript{238} in which the Court of Appeal for British Columbia found that the passive dissemination of information via an Internet bulletin board to individuals in another jurisdiction was insufficient to ground jurisdiction for a tort action.

6.3.2. United Kingdom

The jurisdictional issues affecting e-commerce in the United Kingdom have surfaced most prominently in the context of its securities laws. Thus, the United Kingdom has invoked a targeting test in enforcing its ban against solicitations that may be characterized as “investment advertisements” under Section 57(1) of the Financial Services Act (“FSA”)\textsuperscript{239} unless the regulatory authorities have previously approved the contents of such solicitations. The key jurisdictional issue is whether online offering materials accessible in the United Kingdom have been “directed at” or “made available” in the United Kingdom for purposes of Section 207(3) of the FSA.\textsuperscript{240} U.K. securities regulators, including the Securities and Futures Authority (“SFA”),

\textsuperscript{235} See CSA Notice, supra note 214.
\textsuperscript{237} 1998 Nfld. & P.E.I.R. 301.
\textsuperscript{238} 1999 D.L.R (4th) 46.
\textsuperscript{239} Financial Services Act, 1986, c.60, pt. I, c.V § 56(1)(Eng.).
\textsuperscript{240} See id. pt. X, § 207(3).
and the Investment Management Regulatory Organization Ltd.
(“IMRO”), have issued guidelines that address this question.  

The U.K. criteria under the FSA largely resemble the SEC standards, which place a heavy emphasis on the “effects” test. The FSA guidelines issued in May 1998 provide that any material categorized as an “investment advertisement” that is disseminated over the Internet shall be deemed to “have been issued in” the United Kingdom if “directed at people in” the United Kingdom or “made available” to them other than by way of a periodical published and circulated primarily outside the United Kingdom.

The FSA’s enforcement policy takes into account the agency’s mandate to protect domestic investors, the extent to which U.K. investors are targeted, and the effectiveness of a firm’s system for ensuring that only persons who may lawfully receive investment services do so. Like the SEC, the FSA seeks to base its enforcement decisions over Internet solicitations on several factors, including whether the alleged violator has previously been convicted of a prior offense, such as fraud.

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241 See generally IMRO, NOTICE TO REGULATED FIRMS (May 1997); SFA, BOARD NOTICE 416 (Apr. 25, 1997). Note that under the new Financial Services and Markets Act discussed infra note 245 and surrounding text, the SFA is being replaced by the Financial Services Authority.


243 See id. § B(16). The FSA policy considered the following factors particularly relevant when evaluating whether enforcement action is warranted:

(a) whether the website is located on a server outside the United Kingdom (note that the SFA would not deem the existence of a website on a U.K. server to be conclusive evidence that material on that website was aimed at the United Kingdom);

(b) the degree to which the underlying investment or investment service to which the website posting refers is available to U.K. persons who respond to the solicitation;

(c) the extent to which the offerors have undertaken to ensure that U.K. persons do not receive the investment or service as a result of having viewed the solicitation, such as specific measures to prevent U.K. persons from opening an account to purchase or to request further information regarding investment services on the website;

(d) the extent to which any solicitation is directed at U.K. investors; and

(e) the extent to which positive steps have been taken to limit access to the website (though the absence of access controls on a website will not, of itself, trigger enforcement action). The similarity of these criteria to those adopted in the U.S. by the SEC is readily apparent.

Id.
In determining what type of Internet solicitations are “directed at persons in the United Kingdom,”244 the FSA examines the content of the offeror’s website, searching disclaimers and warnings stating that the offeror’s investment services are only available in specified jurisdictions or that the services are unavailable in jurisdictions where the firm is not authorized by local law to promote or sell the product.245 The FSA also takes note of technical details such as whether the disclaimers are posted on the home page, capable of being accessed by hyperlinks, and capable of being viewed in the same browser format as the rest of the website.246 In addition, the FSA scours the website for clues suggesting that the offer being made is aimed at U.K. investors—e.g., the financial projections are stated in pounds sterling, the website has been listed under the “U.K.” section of a search engine, the website has been promoted in a U.K. chat room or similar facility, or the website has been advertised in the U.K. media market.247

In June 2000, Parliament passed the Financial Services and Markets Act (“FSMA”).248 The FSMA replaced the Financial Services Act, and it regulates banks and insurance companies. Once the FSMA has been fully implemented, there will be one securities, banking, and insurance regulator—the FSA—which will absorb the regulatory roles of existing self-regulatory organizations.249

Under the FSMA, a person must not in the course of business communicate an invitation or inducement to engage in investment activity, unless the communication is approved or is made by an authorized person.250 A communication originating outside the United Kingdom, however, does not fall under the ban unless it is “capable of having an effect in the United Kingdom.”251 The restrictions will apply to “communications,” which means they will apply to e-mails and pages on a website. Unless an exemption applies, financial promotion communications must either be issued by a FSMA-authorized firm or be approved by such a firm. In either case, the communications must contain specified disclosures and risk warnings.

244 Id. § B(ii)(a) ¶ 16(d).
245 See id. § B(ii)(b) ¶ 17(i).
246 See id. § B(ii)(b) ¶ 17(ii).
247 See id. § B(ii)(b) ¶ 17(iii)-(vi).
248 Financial Services and Markets Act, 2000 C.8 (Eng).
249 The FSA is in practice the only securities and banking regulator in the United Kingdom.
250 See Financial Services and Markets Act, supra note 248, § 21(1).
251 Id. § 21(3).
The phrase "communication originating outside the physical boundaries of the United Kingdom," while vague and unclear, more than likely refers to items published by an offeror whose principal operations are located outside the United Kingdom. To determine the point of origin of an electronic communication, the FSA may look at the physical location of the offeror rather than the server.

Another point of ambiguity stems from the FSMA's failure to specify what types of communications are "capable of having an effect in the United Kingdom." The phrase could, it seems, cover any communication that relates to the purchase or sale of investments situated in the United Kingdom, such as shares in U.K. companies.

Some of the apparent jurisdictional sting under FSMA is being remedied by the Treasury, which is entitled to wield its exemptive authority. The Treasury indicated in a draft Financial Promotion Exemptions Order that it would exempt from regulation communications that are sent from locations outside the United Kingdom and that are not "directed at" persons in the United Kingdom. The proposed measure, Article 15, would thus exempt non-U.K. websites—which can be visited by persons in the United Kingdom—so long as the investments or investment services being offered are not made available to U.K. residents. To meet the exemption, the websites would have to state expressly that they are not addressed to, and should not be relied on by, persons in the United Kingdom. The person who publishes or originates the communication may take the further precautionary step of establishing a system or procedure that prevents people in the United Kingdom from engaging in the investment activities featured on the website. The Treasury's safe harbor will not apply if any of these conditions are not met. The Treasury will, however, look to see if one or more of the conditions is present when determining whether or not a communication is "directed at" persons in the United Kingdom.

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252 See id.
253 Id.
254 See id. §§ 21(4), (5) & (7).
256 See id. § 2.17.
257 See id.
258 See id.
6.3.3. The Netherlands

Securities trading in the Netherlands is subject to the supervision of the Stichting Toezicht Effectenver-Keer ("STE"), or Securities Board of the Netherlands.

In 1999, the STE adopted policy rules with respect to the use of the Internet in the securities markets.\(^{259}\) The STE asserted its authority over the issuance, dealing, and stock brokering of securities over the Internet in or from the Netherlands. The words "in or from the Netherlands" cover all Dutch entities, along with foreign entities that direct their activities towards Dutch residents.\(^{260}\) The STE assesses on a case-by-case basis whether or not activities carried out on the Internet are directed at Dutch residents, using the following indicators: (a) the absence of disclaimers or the use of inadequate disclaimers; (b) the fact that no list of countries towards which the activities are directed is included on the website, or such list is inadequate; (c) the Dutch language is used; (d) Dutch residents are addressed by e-mail; (e) information on Dutch tax aspects of the offer is given; (f) information on the applicability of foreign tax rules to residents of the Netherlands is given; (g) reference is made to Dutch law or related information is given; and (h) the site includes hyperlinks directing users to a website where services regarding stock brokering or securities dealing are offered or carried out.\(^{261}\) The STE noted that the foregoing list is not exhaustive.\(^{262}\)

Also in 1999, the other Dutch regulator of financial services, De Nederlandsche Bank N.V. ("DNB"), published its policies with regard to the offering of financial services via novel electronic media.\(^{263}\) In the policy rules of the DNB, the term "media" is defined to embrace electronic media, including the Internet, and paper-based media.\(^{264}\) The term "Internet" is defined as the different methods of distributing information electronically, including the World Wide Web, bulletin


\(^{260}\) See id. at 2.

\(^{261}\) See id. The criteria are based on IOSCO. See Securities on the Internet: Report of the Internet Task Force to the Technical Committee (Sept. 19, 1998).

\(^{262}\) See id. at 2, n.4.


\(^{264}\) See id.
boards, e-mail, the personal broadcast network, and push media.\textsuperscript{265} The central issue is whether activities are exercised in or from the Netherlands. The policy rules specify the same factor that will be used to determine whether activities are exercised in or from the Netherlands, which is whether or not a person or entity is active in the Dutch market, as described in the STE list above. The DNB, though, adds three additional criteria: (1) the Netherlands is included in the normal area of distribution of the media used; (2) the mentioning of contact points in the Netherlands; and (3) the actual conclusion of agreements with Dutch residents.\textsuperscript{266}

6.3.4. Belgium

In 2000, the Belgian Banking and Finance Commission ("BFC") issued a circular interpreting the effect of the Internet on investment services.\textsuperscript{267} The BFC noted that other supervisory authorities had viewed services or securities being offered from abroad as being offered locally where "directed at or made available to investors there."\textsuperscript{268} It noted that in determining this issue, a check is generally made as to whether residents of the country concerned are being targeted.\textsuperscript{269} The circular suggests that an institution seeks to prevent is website from being misunderstood in "non-targeted" countries can take on or more of the following measures as precautions: (1) stating on the website that the offer is made to investors of a well-defined geographic "zone" and using methods to verify a potential investor’s location; (2) ensuring that the website content does not include information about places other than the zone, e.g., does not refer to pounds sterling if Britain is not in the zone; (3) limits access to all or parts of the website by passwords assigned only to the target group; and (4) contacts local authorities to make sure the site does not breach local regulations.\textsuperscript{270}


\textsuperscript{266} Id.


\textsuperscript{268} Id. ¶30.

\textsuperscript{269} Id.

\textsuperscript{270} Id. ¶31.
6.3.5. Germany

German laws to protect potential investors in securities include the Sales Prospectus Act. Both acts apply when a "public offering" is made in Germany. If an offer of securities is actually being made in Germany, notification of the prospectus for the offer itself are both required. As in most other countries, Germany also has some exemptions. These include the "professional investor's exemption" and the exemption for the holders of a European passport. (These correspond to exemptions also available under Dutch law.)

In 1999, the German Federal Supervisory Office for Securities Trading (Bundesaufsichtsamt für den Wertpapierhandel or "BAWe") published revised interpretations dealing with offers over the Internet. The BAWe had already defined "public offer" as any form of public advertising, in particular in the media or by way of leaflets, seeking to have the persons targeted by the advertisement place a buy offer for the securities. The BAWe expressly acknowledged that a public offer may also be made through electronic media, e.g., over the Internet.

The BAWe stated that a public offer is deemed to be made in Germany irrespective of where it is placed, and that the test for Internet offerings is whether the offer is meant to address investors in Germany, not where the server is located.

6.3.6. Hong Kong

Hong Kong’s financial market acts as a major financial center in Asia, particularly after its reversion to China in 1997. There are three major sources of securities law regulation in Hong Kong: the Securities and Futures Commission of Hong Kong ("SFC"), the Stock Exchange of Hong Kong ("SEHK"), and the Hong Kong Futures Exchange ("HKFE"). Of these, the SFC is the primary regulator of

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271 Wertpapier-Verkaufsprospektgesetz (Verkaufsprospektgesetz), [Act on the Prospectus for Securities Offered for Sale (Prospectus Act)] v.9.9.1998 (BGBL. I S. 2701) [hereinafter Prospectus Act].

272 See id. § 1.


275 The websites for these organizations are as follows: SFC is http://www.hksfc.org.hk; SEHK is http://www.sehk.com.hk; HKFE is http://www.hkfe.com.hk.
The SFC supervises self-regulatory organizations—including the SEHK and the HKFE securities clearing-houses—as well as the financial intermediaries other than members of the exchanges. The SFC Ordinance,277 the Securities Ordinance,278 and the Stock Exchanges Unification Ordinance279 provide the fundamental framework within which dealings in securities are conducted and regulated. Apart from these and other statutory instruments, the operation of the securities market is governed by the regulations, administrative procedures, and guidelines promulgated by the SFC, as well as by the rules and regulations introduced and administered by the exchanges. The two exchanges are responsible for maintaining the integrity, efficiency, and fairness of their markets; they are also charged with ensuring that their members remain financially sound and adhere to proper business standards.

The SFC’s primary function is to administer the laws relating to the trading of securities, futures, and leveraged foreign exchange contracts in Hong Kong. The SFC, which also is charged with facilitating and encouraging the development of Hong Kong’s markets, has oversight responsibility for the exchanges and their clearinghouses, which in turn regulate their own members. Hong Kong’s regulatory system places great emphasis on the cooperation and participation of market practitioners in the regulatory process. In 1999, the SFC issued a Guidance Note on Internet Regulation that clarifies its regulatory approach regarding Internet activities.280 These activities include securities dealing, commodity futures trading, leveraged foreign exchange trading, and related advisory businesses;281 the issuing of advertisements or other documents relating to securities, investment arrange-
ments, and investment advisory services, and the making of offers of securities and investment arrangements by way of an electronic prospectus.

The SFC believes that its fundamental regulatory principles are not based on the use of a particular medium of communication or delivery. Rather, regulated activities should be uniformly regulated regardless of whether such activities are conducted by paper-based or electronic media. Recognizing the Internet's potential, the SFC is encouraging its legitimate use and the development of new mechanisms to facilitate offering and trading activities. The Guidance Note, though, has neither the force of law nor the authority to override the provisions of other laws. Generally, the SFC states that it "will not seek to regulate securities dealing, commodity futures trading and leveraged foreign exchange trading activities that are conducted from outside Hong Kong, and over the Internet, provided such activities are not detrimental to the interests of the investing public in Hong Kong." Regardless of the medium of communication or delivery, the SFC registration and licensing requirements apply to all businesses that deal, trade, and provide advisory services in Hong Kong. The same requirements apply to persons who persuade Hong Kong residents to deal in securities, trade in commodity futures contracts or engage in leveraged foreign exchange trading, as well as those who hold themselves out as conducting such business activity in Hong Kong.

To determine whether a person conducts activities in Hong Kong, a fact and circumstance analysis must be made. Relevant facts and circumstances may include the physical location or presence of the business, the nature and manner of the activities that have been carried out in Hong Kong, and the motives for and circumstances surrounding the conducting of those activities. Unless exempt, persons may not issue advertisements or documents purporting to give investment advice or manage investors' portfolios for remuneration. If the advertisement or document is sent over the Internet and is tar-

282 See id. § 2.1.2.
283 See id. § 2.1.3. The Guidance Note does not cover every activity, such as trade matching facilities for financial instruments and methods of payment or fund transfers. See id. §§ 2.2-2.3. The SEHK intends to address concerns relating to electronic application instructions for initial public offerings. Id. § 2.3.
284 See id. § 1.3.
285 Id. § 5.2.
286 See id.
287 See id. § 6.13.
geted at Hong Kong residents, it may trigger registration require-
ments.\textsuperscript{288} To determine whether an activity conducted on the Internet
is targeted at Hong Kong residents, the SFC will consider the nature
of the business activities as a whole and the following factors:
whether the information is targeted via “push” technology to inves-
tors whom the financial services provider knows, or should reasonably
know, reside in Hong Kong,\textsuperscript{289} and whether the information available
over the Internet is presented or provided in a manner which gives the
appearance that Hong Kong residents are targeted.\textsuperscript{290} The SFC may
consider the following factors as giving the appearance that Hong
Kong residents are targeted: using local distribution agents, reference
to Hong Kong dollars, using the Chinese language, using hyperlinks to
the website of a distributor who possesses the above characteristics, or
publishing the website address in a Hong Kong newspaper or other
Hong Kong publication where such information may be accessed.\textsuperscript{291}

The SFC may, taking into account the activities of the business as
a whole, regard activities conducted over the Internet as not targeted
at Hong Kong residents if: “[t]he information presented includes a
prominent disclaimer clearly indicating that the subject services or
products are not available to people residing in Hong Kong.”\textsuperscript{292} The
disclaimer should be “viewed with or before the advertisement or de-
scription of the services or products.”\textsuperscript{293} This may be achieved by ei-
ther (i) stating affirmatively in which countries the services or prod-
ucts are available; or (ii) stating that the services or products are not
available to Hong Kong residents.\textsuperscript{294} A statement that the service or
product is not available in any jurisdiction in which it would or could
be illegal does not satisfy this requirement.\textsuperscript{295}

Reasonable precautions are taken to guard against the accep-
tance of purchases from or provision of services to people re-
siding in Hong Kong. Precautions may include the checking

\textsuperscript{288} See id. § 7.4.
\textsuperscript{289} See id. § 7.4.1. For this purpose, the SFC defines push technology as “any
technology which spams [sic], broadcasts, or directs information to a particular per-
son or group of persons, via, for example, e-mail.” Id.
\textsuperscript{290} See id. § 7.4.2.
\textsuperscript{291} See id.
\textsuperscript{292} Id. § 7.4.3.
\textsuperscript{293} Id.
\textsuperscript{294} Id.
\textsuperscript{295} See id.
telephone numbers and mailing addresses (including e-mail addresses) of potential clients; the use of firewall, password, blocking or other limiting device to restrict access to the information and services provided; or not providing the means for applying for the services.296

Precautions that simply require persons to identify whether they are Hong Kong residents alone are not sufficient.297 The use of precautions or disclaimers, however, will not necessarily preclude the SFC from taking enforcement action.298 In general, an offer of securities or investment arrangements using a prospectus cannot be made until certain requirements have been met.299 The SFC considers that these requirements apply regardless of the medium used to distribute the prospectus.300 Thus, the SFC “would generally permit the distribution of electronic prospectuses provided that the relevant requirements have been met.”301 Unfortunately, The SFC has taken a conservative approach to the Internet by asserting its belief that paper-based information remains the primary means by which many investors assess complex disclosure information.302 This means that if electronic prospectuses are distributed, the SFC expects paper copies of the prospectus to also be made available to investors.303 The SFC also expects “issuers to state prominently in the electronic prospectus (i) that a paper prospectus is also available, and (ii) the location which must be a location convenient for collection of such documents where copies of the paper prospectus can be obtained.”304

6.3.7. Australia

In February 1999, the Australian Securities & Investments Commission (“ASIC”) issued a policy statement governing offers of secu-

296 Id. § 7.4.4.
297 See id.
298 See id.
299 See id. § 8.2.
300 See id.
301 Id. The Guidance Note does not deal with the requirements governing the communication of information between listed issuers and their shareholders. See id § 8.1.
302 See id. § 8.3.
303 Id.
304 Id.
The policy covers "offers, invitations, and advertisements of securities . . . that (a) appear on the Internet; and (b) can be accessed in Australia."

ASIC does not plan to regulate offers, invitations, or advertisements of securities available on the Internet in Australia if: "(a) the offer, invitation or advertisement is not targeted at persons in Australia; (b) the offer or invitation contains a meaningful jurisdictional disclaimer; (c) the offer, invitation or advertisement has little or no impact on Australian investors; and there is no misconduct."

ASIC emphasized that it did "not generally seek to regulate offers, invitations and advertisements that have no significant effect on consumers or markets in Australia." It observed that "if every regulator sought to regulate all offers, invitations and advertisements for financial products that were accessible on the Internet in their jurisdiction, the use of the Internet for transactions in financial products would be severely hampered." ASIC noted that since an offer is made in Australia if it is received in Australia, its securities laws could apply to an offer or invitation of securities on a website accessible from Australia irrespective of where the offeror is located. Moreover, since the word "offer" is not limited to a technical or contractual meaning, but includes the distribution of material that would encourage a member of the public to enter into a course of negotiations calculated to result in the issue or sale of securities, the implications are significant. ASIC requires that the offering material and advertisements not be targeted at persons in Australia and that they contain a meaningful jurisdictional disclaimer.

In order not to target persons in Australia, ASIC set forth the following safeguards:

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306 Id. at 141.1.
307 Id. at 141.5.
308 Id. at 141.8.
309 Id.
311 See PS 141, supra note 305, at 141.11.
312 Id. at 141.13.
Precautions reasonably designed to exclude subscriptions being accepted from persons in Australia and to check that the precautions are effective by monitoring the number of applications made (if any) by persons in Australia. . . . Examples of precautions are not sending notices to, or not accepting applications from, persons whose telephone numbers, postal or electronic addresses or other particulars indicate that they are resident in Australia.313

Under Australian law, the offering material or advertisement cannot be calculated to attract Australians. "This includes, for instance, e-mail to addresses which indicate that the notice will be read in Australia, posting to newsgroups in the aus.* hierarchy and websites maintained in Australia, or with Australian content."314 The offering material and advertisement also cannot contain material specifically relevant to Australians.315 "The offer or invitation to which the offering material or advertisement relates must not be made or issued in Australia by any other means" absent some other exemption from the Australian laws.316

ASIC also outlined the requirements of Class Order 99/4331 for a meaningful jurisdictional disclaimer as:

The offering material must contain a statement that the offer or invitation to which it relates is not available to Australian residents. This may be explicit, or it may be conveyed by a statement that the offer or invitation is available only to residents of certain other countries, naming them. A statement that "the offer is not being made in any jurisdiction in which the offer could or would be illegal" does not satisfy our requirement. This is because it does not clearly state the jurisdiction in which the securities are available.318

313 Id. at 141.14(a).
314 Id. at 141.14(b).
315 See id. at 141.14(c).
316 Id. at 141.14(d).
317 Id. at 141.15(a).
318 Id.
According to the Class Order, the statement is only effective if a potential investor could not overlook it before they had decided to invest. ASIC said it would also be concerned if an Internet offer, invitation, or advertisement has a significant effect on consumers or markets in Australia. A finding of significant effect is a factual determination. Accordingly, if ASIC believes "that an Internet offer, invitation, or advertisement has had a significant effect on consumers or markets in Australia, [it] will consider taking regulatory action on the basis that the offeror may not have complied with the requirements of Class Order 99/43 . . . even if the offeror used safeguards or disclaimers." Thus, the safeguards and disclaimers could be ineffective or superficial.

Finally, ASIC will try to remedy any significant non-compliance with Australian or overseas laws or regulations, including non-disclosure and fraud, whether or not it occurred in Australia or overseas.

ASIC also plans to continue cooperating with international regulators, including the IOSCO, to achieve uniformity regarding the offer and advertisement of securities on the Internet.

7. Future Directions and Recommendations

7.1. Possible Approaches to Jurisdictional Criteria

Promotion of the Internet is important, because the Internet increases individual empowerment, broadens markets, increases speed, makes prices more transparent, and enhances efficiencies. In the future, we may find that our jurisdictional models are inadequate for the

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319 Id. at 141.15(b).
320 Id. at 141.16.
321 See id. Factors used to determine significant effect include "whether an Internet offer, invitation, or advertisement has a significant effect on consumers or markets in Australia include the number of: (a) enquiries that an issuer receives from investors in Australia about investing in the securities being offered; (b) investors in Australia to whom securities are issued; (c) complaints which we receive from investors in Australia." Id.
322 Id. at 141.17.
323 See id. at 141.17 ("[T]he safeguards and disclaimers were either so poorly designed as to be ineffective, or were used to provide the appearance of satisfying the requirements of Class Order without real compliance.").
324 See id. at 141.18.
325 See id. at 141.29.
dramatic changes in how business is and will be done. Traditional tests should therefore be reexamined.

7.1.1. The Direction Test

One trend in jurisdiction cases has been to focus on the place where information on securities is directed. The question is whether this approach will fit the Internet down the line, where highly sophisticated bots will be moving through a wholly non-geographic virtual space to both communicate and transact business, frequently with other bots, and without human intervention. For a purchaser, seller, or an investor to engage in the use of bots and other non-geographically grounded intermediaries is somewhat like sending a note in a bottle out to sea: it becomes harder to argue that the note writer’s home jurisdiction should control in preference to the residence of whoever picks up the note or the place where it is picked up. Similarly, a Web participant who unleashes a bot into a digital environment awash with other bots and virtual proxies has voluntarily left his or her geographical area and elected to travel and transact in a wholly different environment. It is harder to argue that such a person can have a reasonable belief that the laws or the courts of his home jurisdiction will apply.

Perhaps tests such as the Zippo horizontal continuum will need another dimension in the future. The test might not be based solely on the “passive-interactive” gradations of Zippo, but might also include a vertical component, based on how far the entire process is removed from direct human involvement. For example, processes involving bots are more likely to be removed from direct human involvement and arguably should be scrutinized differently. Because of the sophistication of the environment in which the bots operate, jurisdiction should be highly consensual, i.e., affected by any and all click-wrap terms or conditions imposed or accepted by the bots. In the absence of click-wrap acceptance, an activity by a bot representing someone in Forum A should not necessarily establish jurisdiction in Forum A when the bot deals with another bot in Forum B. This would, in a way, be the obverse of the stream of commerce theory: a person who sends a bot into the Internet world can be deemed to foresee that, absent understandings to the contrary, it would be en-

 Paging in transactions that subject the person to the laws and courts of foreign jurisdictions.

7.1.2. Aspects of Targeting

Applying traditional principles of securities jurisdiction, jurisdiction is being extended to persons who use the Internet to target residents of a given jurisdiction. Along with access to information, other factors that may apply include:

Specific Transactions Directed to the Jurisdiction. Under current cases, when a person located outside a given jurisdiction uses a website to conduct transactions with residents of that jurisdiction, the website operator has availed himself or herself of the jurisdiction and should reasonably expect to be subject to its courts in matters relating to the transactions. However, the inception of a bot dealing with other bots and avatars in cyberspace is not necessarily availing itself of a jurisdiction.

Push Technology. The conscious pushing of information into a given jurisdiction, whether by a bot or any other complex agents, should probably still be viewed as a targeting activity that warrants specific jurisdiction in the location of the pushee.

Language. The selection of language on which information is cast can also be relevant to the targeting issue. As of 1997, approximately 80% of Internet communication was being conducted in English (even though that may be expected to decrease over time). This, together with the fact that English is the standard commercial language, make its use on a website insufficient ordinarily to establish jurisdiction of an English-speaking country. However, an Internet offering in Tagalog may reasonably be considered to be targeted at Philippines investors, just as offerings in Dutch are considered in the Netherlands to be offered to its residents. Again, bots alter the equation. A bot need not communicate in any human language, and indeed could be programmed to communicate in every principal language. Thus, languages other than English become less evidence of targeting.

Currency. When the offering price of a security is quoted in a currency other than that of the issuer's place of incorporation, this is arguably some evidence of targeting. Currencies such as the Euro are intended to be generic and should not be evidence, taken alone, of targeting any jurisdiction. Nor should widely-used currencies be seen,

taken alone, as evidence of targeting. For example, U.S. dollars are almost akin in their pervasiveness to the use of English on the Internet. Pounds Sterling and Swiss Francs are likewise universal currencies. If an offer is expressed in Spanish Pesetas and available in Spain, Spanish law should arguably apply. On the other hand, an offering expressed in Spanish Pesetas and accessed in Italy would probably not be deemed directed to Italian offerees.

However, as bots and agents can change the significance of this factor as well. They will be able to translate one currency into another in a nanosecond, making currency identification a less significant factor.

**Tax and Special Laws.** If Internet securities information which goes into detail on the tax laws or other laws of a particular nation could be deemed targeted to that particular audience by pointing out that, regardless of the precautions adopted, if the content appeared to be targeted to the United States (e.g., by a statement emphasizing the investor's ability to avoid U.S. income tax on the investments) then it would view the website as targeted at the United States. Arguably, the intervention of bots and agents would not affect this factor.

**Pictorial Suggestions.** An offering denominated in French Francs and made on a background of the Eiffel Tower might be said to be aimed at French investors. But can the offering be said to be aimed at a French investor's multilingual bot? The answer would depend on how nearly the bot's information system was programmed to include the principal's patriotic sensibilities.

**Disclaimers.** Disclaimers are already a regular part of international paper-based securities offerings. While typically lengthy with respect to U.S. securities laws, disclaimers are often much shorter and less specific for other jurisdictions and may amount to no more than a statement that an offer is not made in any jurisdiction in which it would be illegal to make an offer unless registered. The SEC Release comments:

The disclaimer would have to be meaningful. For example, the disclaimer could state, "This offering is intended only to be available to residents of countries within the European Union." Because of the global reach of the Internet, a disclaimer that simply states, "The offer is not being made in any jurisdiction in which the offer would or could be illegal," however, would not be meaningful. In addition, if the disclaimer is not on the same screen as the offering material, or is not on a
screen that must be viewed before a person can view the offer-
ing materials, it would not be “meaningful.”

The proliferation of bots could actually make the use of disclaim-
ers even more meaningful. Common types of software protocols
could efficiently screen out properly-programmed bots before they
even accessed a screen. Acting like a long-range radar, the disclaim-
ers would deter certain bots from even approaching certain areas of cy-
erspace.

7.2. The “Effects” Test

Courts have applied the “effects” test in cyberjurisdictional cases.
They have invoked forum jurisdiction when the conduct can be found
designed to have an impact in the forum (e.g., the Panavision case).
Perhaps in the future, as the use of bots and other agents increases,
courts should require clear and convincing evidence of an intended
impact before making a foreign entity subject to forum jurisdiction.
Just because there is some effect does not necessarily mean that effect
was actually intended, especially when a piece of data can be circulated
millions of times over in a matter of seconds.

7.3. The “Jurisdiction Project” of the American Bar Association: London

2000

7.3.1. The ABA Report Finds the Power of the Consumer Vis-à-Vis
the Supplier Has Increased

In July 2000, after a two-year study, a group within the ABA pre-
sented an analysis and recommendations regarding jurisdiction in cy-
erspace. The ABA Report stressed the change in power among
buyers, intermediaries and sellers.

The ABA Report noted that “[m]any jurisdictional rules as they
are applied to commercial transactions reflect presumed power imbal-

328 Statement of the Commission Regarding Use of Internet Websites to Offer
Securities, Solicit Securities Transactions, or Advertise Investment Services Off-
3071 n.21 (Mar. 23, 1998).
329 Panavision Int’l, L.P. v. Toeppen, 938 F.Supp. 616 (C.D. Cal. 1996), aff’d,
141 F.3d 1316 (9th Cir. 1998).
330 See the ABA REPORT, supra note 1.
331 Id.
ances between buyers and sellers." The traditional concept on which much jurisdictional analysis is based is that sellers ordinarily "seek out buyers (manifesting their desire to benefit from a connection with the buyers' forum) and to set the terms of the purchase contract. Those presumptions may well be subject to challenge, if not today, in the very near future." First, the Internet generally empowers consumers vis-à-vis sellers, because "[p]ower in a commercial relationship depends upon knowledge and choice." The Internet expands choice by opening "up every market to every buyer regardless of where the seller is located. A priori, therefore, electronic commerce strengthens buyers with respect to sellers because it opens up more possibilities for the buyer. Thus, the implied concern that buyers will be taken advantage of by sellers to whom they are tied by geographic or other limitations is less appropriate." Moreover, the ability of the Internet to lower economic barriers to entry has, in the past few years, resulted in a dramatic rise in the ability of smaller sellers to transact business beyond a single geographic location. Although not entirely different from catalogue and telephone businesses, the scale attainable on the Internet with lower costs presents an entirely new phenomenon. This phenomenon expands consumer choice and undermines the assumption that most sellers will be much larger than most buyers. In e-commerce, many transactions may occur between very small enterprises and individuals... [T]he consumer law's concern with an imbalance in bargaining power may be less significant for Internet-based commerce, because technology has substantially affected the leverage between buyer and seller. Market pricing is now transparent, and intermediaries and the costs they add to the product have become irrelevant. The ABA Report also sees the advent of bots as adding further to the power of consumers: an individual buyer still may not be able to negotiate the terms of sale, but the ability to find all available terms and prices for a product or service empowers the buyer in ways that may surpass the benefits of negotiation. Absent the maintenance by a seller of an interactive site programmed to accept offers in compliance with its terms from any buyer, it is difficult to conclude that, by merely agreeing to sell something to a buyer lo-

332 Id § 2.3, at 32.
333 Id
334 Id
335 Id at 32-33.
336 See id at 33.
337 Id
cated elsewhere, the seller ought to be subject to jurisdiction at the buyer's home. Indeed, it is at least arguable that the buyer has "targeted" the seller and ought to be answerable (for nonpayment, for instance) at the seller's home. 338

7.3.2. The ABA Report Details how Critical It Is to Avoid Uncertainties in E-Commerce

"It is not simply a matter of reconciling sharply contrasting European and American approaches to choice of law; the question is whether characteristics of Internet transactions necessitate new approaches to choice of law, which have not been adopted under the pressure of earlier forms of commerce." 339 The Internet makes things more complex. 340 Whether the law of the place of origin or the consumer applies is unclear with commercial Internet transactions: "[W]here is a webpage located, where it is viewed, on a client computer, or where the server transmitting the code is located?" 341 When is a transaction completed: "when the server transmits a webpage, or when a client transmits the URL that automatically causes the page to be transmitted from a remote server?" 342

The Internet's global reach necessitates a uniform system of choice of law. 343 As compared to pre-Internet modes of doing business,

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338 Id. at 34. The ABA report comments:

The change may also affect at least default rules respecting applicable law. In Switzerland, for example, a contract is subject to the law of the state with which it is most closely connected, presumed to be the ordinary residence of the party called upon to provide the characteristic performance, i.e., the seller. But to the extent that the buyer defines its purchase, activates delivery, etc., its control may surpass that of the seller, resulting in the use of the law of the buyer's residence.

Id.; see also Rome Convention, supra note 44, art. 4 (mandating the use of the law of the country with which the contract is most closely connected, presumed to be the habitual residence of the party who is to effect the performance characteristic of the contract).

339 Id. § 3.2.7, at 89.

340 See id.

341 Id.

342 Id.

343 See id.
an Internet seller must undertake extraordinary steps to limit the reach of its solicitation of customers and receipt of customer orders; the Internet does not naturally associate either sellers or buyers with physical places. However, technology may be used to redress the jurisdictional issues raised by the technological efficiencies and global reach of the Internet. The existence and continuing development of [super-intelligent bots], which can be deployed by sellers and purchasers to evaluate the relative product, price and jurisdictional terms of the potential relationship, provide a basis for a global standard, as long as the underlying legal 'code' can be agreed upon.344

8. CONCLUSION

The recommendations and findings of the ABA Report confirm what the SEC and a number of others have observed: the Internet empowers consumers, including investors, in ways not imagined previously. Moreover, the advance of bot technologies and other developments will further these powers. It is time to reanalyze existing paradigms and determine whether existing rules need some adjustment to recognize the new realities. Certainly, the capability of an "accredited investor" (under the SEC's Regulation D) and a "qualified institutional buyer" can be deemed capable of an informed decision on choice of law and jurisdiction, provided there is no deceit exercised by the other party. Beyond such re-evaluation, the time is now for organizations such as IOSCO to increase pressure on their members to move closer to common minimal regulatory standards, and support development of public and private ADR for cyber-based disputes involving securities.

344 See id. at 90.
APPENDIX†

The ABA Report arrived at certain recommendations regarding jurisdiction that recognize the new consumer power and the more level playing field. Among these are six jurisdictional "default" rules, reproduced below:

(a) Personal or prescriptive jurisdiction should not be asserted based solely on the accessibility in the state of a passive website that does not target the state.

(b) Both personal and prescriptive jurisdiction should apply to a website content provider or application service provider ["sponsor"] in a jurisdiction, assuming there is no enforceable contractual choice of law and forum, if: (i) the sponsor is a habitual resident of that jurisdiction; (ii) the sponsor targets that jurisdiction and the claim arises out of the content of the website; or (iii) a dispute arises out of a transaction generated through a website or service that does not target any specific jurisdiction, but is interactive and can be fairly considered to knowingly engage in business transactions there.

(c) Users (purchasers) and sponsors (sellers) should be encouraged to identify, with adequate prominence and specificity, the jurisdiction in which they habitually reside.

(d) Sponsors should be encouraged to indicate the jurisdictional target(s) of their websites and services, either by: (i) defining the express content of the website or service, or listing destinations targeted or not targeted; and (ii) by deciding whether or not to engage in transactions with those who access the website or service.

(e) Good faith efforts to prevent access by users to a website or service through the use of disclosures, disclaimers, software and other technological blocking or screening mechanisms should insulate the sponsor from assertions of jurisdiction.

† Permission to reprint sections of the ABA REPORT, supra note 1, has been granted by the American Bar Association.
(f) Personal and/or prescriptive and/or tax jurisdiction should not be exercised merely because it is permissible under principles of international law. Rather, the application of such jurisdiction should take into account: (i) the interests of other states in the application of their law and the extent to which laws are in conflict; (ii) the degree to which application of a state’s own law will impede the free flow of e-commerce; (iii) whether the regulatory or tax benefits to be gained through the assertion of jurisdiction are sufficiently material to warrant the additional burden on global commerce that it will impose; and (iv) principles recognized under national abstention doctrines, such as forum non conveniens, where the interests of justice or convenience of the parties or witnesses point to a different place as the most appropriate one for the resolution of a dispute.345

As to contractual choice of law and forum, the following three principles should apply between buyers and sellers:

(a) Absent fraud or related abuses, forum selection and choice of law contract provisions could be enforced in business-to-business e-commerce transactions;

(b) In business-to-consumer contracts, courts should enforce mandatory and non-binding arbitration clauses where sponsors have opted to use them, and should permit the development of a “law merchant,” in exchange for: (i) the sponsor’s agreement to permit enforcement of any resulting final award or judgment against it in a state where it has sufficient assets to satisfy that award or judgment; and (ii) the user’s acceptance of an adequately disclosed choice of forum and choice of law clauses.

(c) Jurisdictional choices should be enforced where the consumer demonstrably bargained with the seller, or the choice of the consumer to enter into the contract was based on the use of a programmed, intelligent agent or robot, deployed by or on behalf of the consumer and whose programming included such

345 ABA REPORT §§ 1.1.1-.1.6, at 20-22.
terms as the nature of the protections sought, the extent to which such protections are enforceable and other factors that could determine whether the user should enter into the contract. 346

In addition, we should encourage “safe harbor” agreements, such as the one negotiated between the United States and the European Union in the context of personal data protection . . . as models for the resolution of jurisdictional conflicts in cyberspace, to the extent that they include a public law framework of minimum standards, back-up governmental enforcement, and the opportunity for a multiplicity of private, self-regulatory regimes that can establish their own distinctive dispute resolution and enforcement rules. 347 Moreover, robots and other electronic agents could readily be employed to assist users to resolve jurisdictional issues by allowing such agents to communicate and/or compromise jurisdictional preferences preprogrammed by users. To do so, global protocol standards would have to be developed to allow such agents to operate universally.

Looking to the future, the ABA has proposed empanelling a multinational Global Online Standards Commission (“GOSC”) to study jurisdiction issues and develop uniform principles and global protocol standards by a specific sunset date, working in conjunction with other international bodies considering similar issues. 348 The GOSC would, in addition to the principles enumerated earlier, follow these precepts:

(a) In the interests of encouraging the growth of e-commerce on a fair, universal and efficient basis, governmental entities should be cautious about imposing jurisdictional oversight or

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346 Id. § 1.2, at 22.
347 Id. § 1.3, at 24.
348 For example, the Global Business Dialogue Hague Conference on Private International Law, the Internet Law and Policy Forum, the International Chamber of Commerce, the United Nations Commission on International Trade Laws (“UNCITRAL”), the World Intellectual Property Organization (“WIPO”), the World Trade Organization (“WTO”), and others are studying jurisdiction issues in Cyberspace. Moreover, the Committee of Experts on Crime in Cyberspace of the Council of Europe released a draft treaty that would require all participating nations to adopt new laws requiring government access to encrypted information, expanding copyright, and criminalizing possession of common security tools. This draft treaty is available at http://conventions.coe.int/treaty/en/cadreprojets.htm. The Global Internet Project has issued recommendations for businesses and organizations to follow and measures for governments to consider regarding cybercrimes, which may be found at http://www.gip.org/publications/papers/gipjuris.asp.
protections that can have extra-territorial implications in cyberspace.

(b) Technological solutions, such as universal protocol standards, employed by intelligent electronic agents may be developed so that users and sponsors may electronically communicate jurisdiction information and rules (including rules relating to taxation), enabling such preprogrammed agents to facilitate the user’s or sponsor’s automated decision to do business with each other.

(c) In the interests of fairness, jurisdictional rules should be developed by and/or only after full consideration of the views of those who must abide by them and/or those substantially impacted by them.

(d) The creation of responsible, private sector, contract-based regimes to which local governments may defer can reduce jurisdictional uncertainty and be more readily adapted to the needs of e-commerce.

(e) Global regulatory authorities of highly regulated industries, such as banking and securities, should reach agreement regarding either the uniform application of laws, rules and regulations to the provision of such products and services, or develop rules as to whose laws will be applied in an electronic environment.

(f) Any use of private network junctures in the flow of electronic information, commerce and money, such as Internet Service Providers and payments systems, to regulate commercial behavior and to enforce jurisdictional principles impose significant, new legal burdens on those private entities and should require very careful exploration before being proposed for adoption.

(g) Cyberspace may need new forms of dispute resolution—to reduce transaction costs for small value disputes, and to erect structures that work well across nation boundaries. Voluntary industry councils and cyber-tribunals should be encouraged by governmental regimes to continue developing private sector
mechanisms to resolve e-commerce disputes. Government-sponsored online cross-border dispute resolution systems may also be useful to complement these private sector approaches. The disputes resolution machinery established under ICANN rules to resolve trademark/domain name disputes is a promising example. Credit card chargebacks are another good example, which deserve elaboration for Internet e-commerce.

(h) Cyberspace may need new forms of dispute resolution—to reduce transaction costs for small value disputes, and to erect structures that work well across national boundaries. The disputes resolution machinery established under ICANN rules to resolve trademark/domain name disputes is a promising example. Credit card chargebacks are another good example, which deserve elaboration for Internet e-commerce.

(i) The global benefits of reciprocal enforcement of judgments should be explored.

(j) Businesses consortia that can forge workable codes of conduct, rules and standards among a broad spectrum of e-commerce participants may provide an efficient and cost-effective jurisdictional model that governments can adopt and embrace. 349

349 Id. §§ 1.4.1.-.4.9., at 24-26.