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COMMENTS

THE DRAFT HAGUE CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS AND THE INTERNET—A NEW JURISDICTIONAL FRAMEWORK

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INTRODUCTION

In November 2000, the Internet and e-commerce communities in the United States[1] received the French court's shocking declaration finding criminal liability against Yahoo! and Yahoo! France for the sale of Nazi material to French citizens.[2] Despite the fact that the Nazi material was available only for auction on Yahoo!'s U.S. auction site, the French court found that it had jurisdiction.[3] The court ordered Yahoo! to restrict access to the Nazi material by French citizens, and reserved the right to issue a $12,000 per day fine in U.S. dollars if Yahoo! refused to comply.[4] This action by the French Court raises serious questions about Internet jurisdiction, and how Internet and e-commerce companies may protect themselves against liability abroad for actions that are legal under U.S. law.[5]

The Draft Hague Convention on Jurisdiction and Foreign

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1. [Hereinafter U.S.]

2. Mahasti Razavi & Thaima Samman, *Yahoo! And Limitations of the Global Village*, 19 SPG COMM. LAW 27, 27 (2001).

3. *Id.*

4. *Id.* at 28.

5. *Id.* at 27.

Judgments in Civil and Commercial Matters, in the negotiation stages since 1992, would answer some of the questions surrounding international jurisdiction.[6] The Hague Convention would, among other things,[7] provide for enforcement of judgments abroad.[8] In other words, a decision rendered in one signatory State would be enforceable in any member State of the Hague Convention.[9] The draft Convention would also standardize jurisdictional requirements for the signatory states.[10]

In recent articles in the *Economist*[11] and *The Washington Post*,[12] the e-commerce and Internet communities expressed concerns over the draft Convention's jurisdictional framework.[13] The e-commerce and Internet communities fear that the draft Convention "would allow copyright owners to shop around the world for friendly courts and then seek enforcement in the United States or other countries that have a different approach to the same laws."[14]

Why all the fuss about the seemingly innocuous Hague Convention? According to the Economist and The Washington Post, one of the e-commerce and Internet communities' fears is that the Hague Convention would result in cross-border liability

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6. Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 94 (1999).

7. *See* discussion *infra* notes 189-91 and accompanying text (arguing that the Hague Convention would simplify internet jurisdiction and provide a simpler framework for U.S. jurisdiction).

8. *See* discussion *infra* notes 31-35 and accompanying text (discussing the jurisdiction and enforcement procedures under the draft Hague Convention).

9. Clermont, *supra* note 6, at 90.

10. *Id.* *See* Hague Conference on Private International Law *at* http://www.hcch.net/e/members/members.html (last visited Sept. 18, 2002) (listing specific member countries of the Hague Convention). The members of the Hague Convention are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, The former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Latvia, Luxembourg, Malta, Mexico, Monaco, Morocco, Netherlands, Norway, Peru, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, and Yugoslavia. *Id.*

11. *Tied up in Knots*, ECONOMIST, June 9, 2001.

12. Christopher Stern, *Copyright Holders vs. Telecoms; Interests Clash in Debate on Regulating Global Commerce*, WASH. POST, May 16, 2001.

13. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *adopted by a special commission of the Hague Conference on Private International Law* Oct. 30, 1999, *available at* http://www.hcch.net/e/conventions/draft36e.html (last visited Nov. 11, 2002) [hereinafter Hague Convention or Convention].

14. Stern, *supra* note 12.

from the exercise of First Amendment rights in this country.[15] The Internet communities also fear that the draft Convention would frustrate the free-market approach to e-commerce by requiring that e-commerce companies either block users from countries whose laws would be inhospitable to business, or force the e-commerce companies to discontinue business.[16]

This Comment addresses the fears of the e-commerce and Internet community, and further argues that the draft Hague Convention offers a better framework for jurisdiction and the Internet. Part I of this Comment explores the draft Hague Convention, its history, its purposes, and the roadblocks that stand in the way of negotiation. Part II examines the various devices used in International law and Internet contracts and their efficacy. Part II also examines the current status of the law of global Internet jurisdiction by focusing on two recent cases, the French *Yahoo!* decision and the U.S. *iCraveTV* case. Part III proposes that the e-commerce and Internet community should advocate the adoption of the Hague Convention, and provides two hypotheticals to illustrate the pragmatic operation of the Hague Convention.

I. THE DRAFT HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

A. What is a Hague Convention?

The Hague Conventions[17] are multilateral treaties that encompass a variety of substantive and procedural areas of law. The goal of these treaties is to provide a uniform basis for the application of the substantive law among the signatory countries.[18] Examples of Hague Conventions include the Convention on the Civil Aspects of International Child Abduction,[19] the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[20] and the Hague Convention on the Taking of

15. *Id.*

16. *Tied up in Knots*, *supra* note 11.

17. Named "Hague" for the Hague, Netherlands where the treaties were born.

18. *See supra* note 10 (listing the member states of the Hague Convention).

19. *See generally* Susan Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief - Can Something More Be Done?*, 8 N.Y. INT'L L. REV. 95, 100-13 (1995) (discussing the history, requirements, and application of the Hague Abduction Convention).

20. *See generally* Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict - Is It Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49 (1999) (discussing the provisions, obligations, and enforcement procedures of the Hague Cultural Property Convention).

Evidence Abroad in Civil or Commercial Matters.[21] This Comment will focus on the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, currently in the negotiations stage.

B. The Basics of the Treaty

The draft Hague Convention would build upon the principles set forth in the Brussels Convention. The Brussels Convention is a treaty between the European Union countries.[22] Under the Brussels Convention, the jurisdictional requirements are standardized and uniformly applied, affording member countries the security of knowing they are not advocating exorbitant jurisdiction[23] in recognizing the judgment.[24] Since the jurisdictional requirements are standardized, the European countries give their neighboring countries "full faith and credit,"[25] similar to the full faith and credit standard required by the U.S. Constitution of all states.[26] The Brussels Convention is the product of negotiation, combining the best jurisdictional standards under the civil law system.[27]

The Hague Convention would build on these principles and those of the civil law tradition by providing for jurisdiction based on the defendant's forum.[28] The draft Convention would validate forum selection clauses[29] and would provide for exclusive

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21. *See generally* James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trail Court Decisions Post-Aerospatiale*, 8 TUL. J. INT'T & COMP. L. 189, 190-95 (2000) (discussing the history, purpose, and procedures of the Hague Evidence Convention).

22. Clermont, *supra* note 6, at 90.

23. *Id.* at 92. For example, in order to join the Brussels Convention, France was forced to forfeit its traditional notion of jurisdiction that allowed a French plaintiff to bring suit against any defendant on any cause of action in the French courts. *Id.*; C. CIV., art. 14 (Fr.). This jurisdictional provision also prohibited any other State to exercise jurisdiction over a French defendant who had not consented to that jurisdiction. Clermont, *supra* note 6, at 92.

24. Clermont, *supra* note 6, at 91.

25. *Id.* at 90.

26. U.S. CONST. art. IV § 1.

27. Clermont, *supra* note 6, at 90-91.

28. Hague Convention, *supra* note 13, chapter II, art. 3 (1) provides in relevant part: "subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident."

Art. 3 (2) provides:

> For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State -
>
> a) where it has its statutory seat,
>
> b) under whose law it was incorporated or formed,
>
> c) where it has its central administration, or
>
> d) where it has its principle place of business.

29. Hague Convention, *supra* note 13, chapter II, art. 4 (1) states in

jurisdiction for certain actions.[30]

The purpose of the Hague Convention would be to provide for recognition of judgments delivered in one signatory country by the courts of another signatory country.[31] The Convention would also provide for the uniform application of jurisdictional standards in each signatory country.[32] The Hague Convention would operate in a similar fashion to the Brussels Convention[33] and the Lugano Convention,[34] already adopted among European countries.[35]

C. The Pitfalls to Negotiation

The U.S. has been advocating for the Hague Judgments Convention since 1992.[36] However, the negotiation process has not been smooth.[37] The European Union countries have been reluctant

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relevant part:

> If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

30. *See id.* at chapter II, art. 12 (1) (addressing in rem proceedings); *see also id.* at chapter II art. 12 (4) (discussing patents and trademarks).

31. Clermont, *supra* note 6, at 90.

32. *Id.*

33. Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, *available at* http://www.curia.eu.int/common/recdoc/convention/en/c-textes/brux-idx.htm (last visited Nov. 5, 2002) [hereinafter Brussels Convention]. For a discussion of the Brussels Convention see generally Denis T. Rice, *2001: A Cyberspace Odyssey through U.S. and E.U. Internet Jurisdiction Over E-Commerce*, PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order No. GO-OONC, 2001 at 434-35 (discussing jurisdictional principles under the Brussels Convention).

34. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, *available at* http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_lug-textes.htm (last visited Nov. 11, 2002) [hereinafter Lugano Convention].

35. Friedrich K. Juenger, *A Hague Judgments Convention?* 24 BROOK. J. INT'L L. 111, 116 (1998). Mr. Juenger notes:

> The Brussels Convention has been a resounding success. Each and every day of the week, member state judgments are enforced across legal and linguistic barriers with minimal transaction costs. . . . Indeed, the Brussels Convention—the single most important private international law treaty in history—works so well that the remaining European Free Trade Association nations have entered into the parallel Lugano Convention.

Id.

36. Clermont, *supra* note 6, at 94.

37. *Id.* at 94-95.

to enter into such a treaty with the United States for several reasons.[38] First, the European Union countries already enjoy comity in the U.S. courts by way of common law or under the Uniform Foreign Money and Judgments Recognition Act.[39] Second, European countries typically snub their noses at what they perceive to be extraordinary jury verdicts, complete with large punitive damage awards.[40] Lastly, and most importantly, European countries take issue with the messy state of U.S. jurisdictional law.[41]

Through *International Shoe*[42] and its progeny, the U.S. Supreme Court created a legal morass of jurisdictional standards including minimum contacts, the doing business requirement,[43] the fair play and substantial justice requirement,[44] and transient jurisdiction.[45] Another potential doctrinal clash involves the U.S.

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38. Juenger, *supra* note 35, at 116.

39. *Id.* at 113. For a more complete discussion of the Uniform Foreign Money Judgments Act see Sarah Hudleston, *Preserving Free Speech in a Global Courtroom: The Proposed Hague Convention and The First Amendment*, 10 MINN. J. GLOBAL TRADE 403, 406-09 (2001).

Hilton v. Guyot, 159 U.S. 113 (1895) set out the common law comity principles federal courts should use in determining whether to enforce a foreign court's judgment. *Id.* at 122; Hudleston, *supra* at 405-06. The five elements that a court looks to determine whether a judgment will be enforced are: 1) whether there was a final and complete judgment; 2) made with proper personal jurisdiction; 3) made with proper subject matter jurisdiction; 4) defendant was served with proper notice and was given an opportunity to defend; and 5) made and recorded in a civilized manner. Hudleston, *supra,* at 406.

40. Juenger, *supra* note 35, at 119-20. *See also* Clermont, *supra* note 6, at 95 (discussing the U.S.'s lack of bargaining power in Hague negotiations). *But see* Peter Hay, *The Recognition and Enforcement of American Money Judgments in Germany - The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729, 729-35 (1992) (discussing the German Bundesgerichtshof Court's decision upholding a large American judgment award).

41. Juenger, *supra* note 35, at 115; Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1030-37 (1995). "There is no longer any doubt: American jurisdictional law is a mess." *Id.* at 1027.

42. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

43. *Id.* at 318-19.

44. World-Wide Volkswagen, Corp. v. Woodsen, 444 U.S. 286 (1980).

45. Burnham v. Superior Court, 495 U.S. 604 (1990); Clermont, *supra* note 6, at 95. Jurisdiction in the U.S. is a historical journey from *Pennoyer v. Neff*, 95 U.S. 714 (1877) to *International Shoe*, and its progeny. *Pennoyer*, the beginning of the U.S. jurisdictional journey, held that the Oregon did not have personal jurisdiction over Neff who had property located in Oregon because Neff was not personally served with process. *Pennoyer*, 95 U.S. at 735-36. *International Shoe* went on to create the "minimum contacts" standard. *Int'l Shoe*, 326 U.S. at 316.

Roughly, U.S. jurisdictional law can be seen as a three-prong requirement. In order to satisfy the first prong of the test, the defendant must "purposefully avail" his or herself to privileges and protections of the forum state, so that it is reasonable and foreseeable to expect that the defendant may be hailed into

doctrine of forum non conveniens.[46] Forum non conveniens allows a court to dismiss a case that it otherwise has jurisdiction to adjudicate based on notions of fairness—that another forum would be more convenient forum for adjudication.[47] The most likely result is that jurisdiction under the Hague Convention would resemble jurisdiction under the Brussels Convention, and allow for general jurisdiction based on the defendant's residence.[48]

If negotiations succeed, the U.S. would gain not only foreign recognition of judgments, but also relaxed jurisdictional standards, unlike the exorbitant ones now exercised by individual European countries on the U.S. because of its "outsider" status.[49] Another

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the forum state's court. Hanson v. Denckla, 357 U.S. 235, 253 (1958); *World-Wide Volkswagen*, 444 U.S. at 297. The party must deliberately reach out to the forum state and create continuous and substantial ties. Burger King v. Rudzewicz, 471 U.S. 462, 475-76 (1985). The ties must be something more than "fortuitous" and "random" in order for personal jurisdiction to be proper. *Id.* In order to satisfy the third prong of the test, the U.S. Supreme Court in *World-Wide Volkswagen* set out factors that should be considered in determining the reasonableness of personal jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 292. These factors are: the burden on defendant to litigate in a foreign forum; the plaintiff's interest in adjudicating in a convenient forum; the state's interest in adjudicating the dispute; the shared interests of the states in furthering the substantive policies; and the interstate judicial system's interest in efficiency. *Id.*

Indeed, if these factors are not met there is still the rogue idea of transient jurisdiction that was upheld in *Burnham*, and the problem of a defendant foreign corporation. *Burnham*, 495 U.S. at 635-39. In *Burnham*, the U.S. Supreme Court held that the California courts had jurisdiction over the defendant who was served with process while traveling in the state. *Id. Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) further complicates the scene where there are multiple defendants. Juenger, *supra* note 41, at 1036. Under *Asahi*, jurisdiction is uncertain when one defendant is a foreign corporation. *Id.* at 1035, 1037. For a complete discussion on U.S. jurisdiction see generally Juenger, *supra* note 35 and Rice, *supra* note 33.

46. Clermont, *supra* note 6, at 118. England was required to forfeit its forum non conveniens doctrine in order to participate in the Brussels Convention, and it is likely that the U.S. would have to do so as well. *Id.*

47. *Id. See generally* Clermont, *supra* note 6, at 118-21 (discussing forum non conveniens and the ramifications underlying its troublesome application).

48. Clermont, *supra* note 6, at 115. In general jurisdiction, the defendant's contacts with the forum state are so significant that the defendant must answer any claim, regardless of whether the cause of action arose out of the defendant's activities within the forum. Mellon Bank v. Farino, 960 F.2d 1217, 1221 (3rd Cir. 1992). The defendant must have "systematic and continuous" activities with the forum in order to warrant the exercise of general jurisdiction. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1122 (W.D. Pa. 1997). On the other hand, specific jurisdiction "arises when the plaintiff's claim is related to or arises out of the defendant's contacts with the forum." *Mellon Bank*, 960 F.2d at 1221.

49. Juenger, *supra* note 35, at 111-23. To illustrate this concept, consider the French exorbitant jurisdictional standard discussed *supra* note 23. Since the U.S. is not a signatory to the Brussels Convention, the French courts are

incentive, and potentially the most far-reaching and beneficial to U.S. involvement in the Hague Convention, would be more lucid standards for jurisdiction in the U.S.[50] The U.S. could enact legislation adopting the Treaty's jurisdictional standards to replace the *International Shoe* standards.[51]

However, the U.S. does have substantial objections of its own.[52] Since *Pennoyer v. Neff*,[53] the U.S. Supreme Court has pronounced its jurisdictional standards as deriving its force from the U.S. Constitutional requirement of due process.[54] Therefore, under U.S. jurisprudence, these constitutionally mandated requirements are non-negotiable.[55] Also, the Brussels Convention provides for derivative jurisdiction.[56] Derivative jurisdiction allows personal jurisdiction over co-defendants, provided that the forum is the habitual residence of one defendant.[57] This idea is especially repugnant to Americans accustomed to determining personal jurisdiction separately for each defendant.[58]

D. Adding Internet Jurisdiction to the Mix

The jurisdiction issue[59] becomes more complicated when the global complexities of the World Wide Web are thrown into the mix.[60] Traditionally, jurisdictional notions, both in the U.S. and

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under no obligation to exercise jurisdictional restraint and may find jurisdiction over U.S. citizens or corporations if the plaintiff is a French citizen. Clermont, *supra* note 6, at 92. This has the potential to impose a heavy burden on a U.S. citizen or corporation to defend in a foreign forum where they may have no business contacts and on a cause of action that did not arise there. *See id.* (explaining that French courts may retain jurisdiction whether or not the events relate to France, the defendant has a connection to France, or there exists a stronger interests in litigating in another forum).

50. Clermont, *supra* note 6, at 121. "It is this domestic front where the treaty efforts really could pay off." *Id.*

51. *Id.* This is in fact what the Italian government did after becoming a member of the Brussels Convention. *Id.*

52. Juenger, *supra* note 35, at 118.

53. 95 U.S. 714 (1877).

54. Juenger, *supra* note 35, at 118.

55. *Id.*

56. Clermont, *supra* note 6, at 96.

57. *Id.*

58. *Id.*

59. Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, Practicing Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order No. GO-OONC, July 9-10, 2001, at 570. Internet jurisdiction has three layers. *Id.* The first layer is the application layer that determines whether a court is authorized to apply its rule of law. *Id.* The next layer is the substantive layer that determines whether the court may apply its substantive law. *Id.* Third, the enforcement layer determines whether the court's decision can be enforced online. *Id.*

60. *Id.* at 563.

internationally,[61] have been grounded on the idea of sovereignty.[62] In other words, a government has jurisdiction over its own territory and population.[63] However, with the advent of the Internet,[64] the location of the host computer does not affect where the information is viewed, and information may be viewed in one country while the host computer is located on the other side of the world.[65]

In the U.S., there are two Internet jurisdictional tests that have gained prominence; the "passive versus active test"[66] and the effects based approach.[67] The passive versus active test, which

61. There are three prongs to International jurisdiction: 1) jurisdiction to prescribe; 2) jurisdiction to adjudicate; and 3) jurisdiction to enforce. Denis T. Rice, *Jurisdiction in Cyberspace 2001: Trying to Pour New Wine Into Old Flasks - Part I*, 3 No. 6 E-COMMERCE L. REP. 14 (2001).

62. *See* Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 COMM. L. & POL'Y 445, 449-50 (2001) (analyzing the unique questions posed by Internet regulation in a comparative study of the different cultural, economic, social, and political contexts in various countries around the world).

63. *Id.*

64. For a good discussion of the Internet's infrastructure and how information travels through its channels see Brian E. Daughdrill, *Poking Along in the Fast Lane on the Information Super Highway: Territorial-Based Jurisdiction in a Technological World*, 52 MERCER L. REV 1217, 1219-21 (2001).

65. Rice, *supra* note 61.

66. Zippo Mfg. Co. v. Zippo Dot Com., Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). In situations where personal jurisdiction turns on the level of Internet activity, the mere existence of a website is not conclusive to establish jurisdiction over the defendant. Morantz v. Hang & Shine Ultrasonics, Inc., 79 F. Supp. 2d 537, 539 (E.D. Pa. 1999); Standard Knitting, Ltd. v. Outside Design, Inc., No. 00-2288, 2000 U.S. Dist. LEXIS 8633 at *5 (E.D. Pa. June 21, 2000). A sliding scale is used to determine whether the Internet activity satisfies the minimum contacts requirement of the due process clause. *Zippo*, 952 F. Supp. at 1124. On one end of the scale are defendants who conduct business over the Internet. *Id.* When defendants conduct business through the use of highly interactive sites that require the repeated exchange of files and information, jurisdiction is proper in all of the jurisdictions where these exchanges take place. *Id.* Through these sites, deliberate exchanges take place and parties often conclude contracts. *Morantz*, 79 F. Supp. 2d at 540. On the other end of the scale are sites that are "passive," where information is made available for viewing, but no exchange takes place. *Zippo*, 952 F. Supp. at 1124. In the middle ground, there are interactive sites where a user may choose to transact business and exchange information with the host computer. *Morantz*, 79 F. Supp. 2d at 540. Courts examine the nature and level of the activity of web sites in the middle category to determine whether jurisdiction is proper. *Zippo*, 952 F. Supp. at 1124. In determining the nature and level of the activity, the mere "presence of an e-mail link or form for placing orders does not create the kind of minimum contacts required to establish personal jurisdiction." *Morantz*, 79 F. Supp. 2d at 541.

67. Under the effects test, if a web site causes an effect in the forum, then the website will be deemed to have submitted itself to the jurisdiction of the forum by virtue of doing business there. Denis T. Rice, *Jurisdiction In*

received wide approval—including approval in the Canadian courts—focuses on whether a user may exchange information with the website.[68] In 2001, courts began to move away from the passive versus active test and towards the effects based approach[69] pursuant to the U.S. Supreme Court's decision in *Calder v. Jones*.[70] The effects approach focuses on the effects that the website has on the jurisdiction, rather than the level of activity of the website, as in the passive versus active test.[71] However, both tests have their drawbacks.[72]

The better approach to jurisdiction questions is to implement a "targeting approach."[73] In a targeting analysis, the central jurisdictional question would be whether the Internet or e-commerce company specifically aimed its activity at the particular forum.[74] The court would also consider whether the Internet or e-commerce company had taken any measures to avoid the particular forum.[75] The targeting approach has gained approval from U.S. courts,[76] as well as validation abroad.[77] Most

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Cyberspace 2001: Trying to Pour New Wine into Old Flasks - Part II, 3 No. 6 E-COMMERCE L. REP. 12 (2001). In *Calder v. Jones*, 465 U.S. 783 (1984), the U.S. Supreme Court held that the California court had proper jurisdiction over a Florida publisher in a libel action. *Id.* at 791. The court's holding was based on the fact that the plaintiff had suffered injurious effects in California and that defendant had specifically targeted the plaintiff in California. *Id.* at 789-90. *See also* Geist, *supra* note 59, at 589 (discussing the application of the effects test set forth in *Calder*).

68. Geist, *supra* note 59, at 588-90. *See also* Braintech Inc. v. Kostuik, 171 D.L.R. (4th) 46 (1999) (refusing to enforce a Texas judgment in Canada because the Texas court did not have jurisdiction under the passive versus active test).

69. Geist, *supra* note 59, at 588.

70. 465 U.S. 783 (1984); *see also* Euromarket Designs, Inc. v. Crate & Barrel, Ltd., 96 F. Supp. 2d 824 (N.D. Ill. 2000) (holding jurisdiction proper over an Irish defendant because defendant targeted Illinois and the injurious effects of the trademark infringement would be felt in Illinois); Blakey v. Cont'l Airlines, Inc., 751 A.2d 538 (N. J. 2000) (holding jurisdiction proper over a Washington defendant because the effects of the defamation could be felt in New Jersey online).

71. Geist, *supra* note 59, at 588-89.

72. *Id.* at 595-98. The passive versus active test falls short for four reasons. First, determining whether a site is passive or active is inherently vague. *Id.* at 596. Second, some sites may not easily be classified as passive or active. *Id.* Third, the standard for what is passive and what is active is continually changing. *Id.* at 597. Fourth, most sites are moving towards increased activity. *Id.* Also, under the effects based approach, jurisdiction may always be found because the site usually effects the forum in some way. *Id.* at 598.

73. *Id.* This is Geist's proposal for the World Wide Web's jurisdictional problem. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*; *see also* Bancroft & Masters v. Augusta Nat'l Inc., 223 F.3d 1082 (9th Cir. 2000) (reasoning that in order to assert jurisdiction the defendant's

importantly, during the February 2001 Hague Conference at the Hague Convention on Jurisdiction and Foreign Judgments in Ottawa, the delegation focused on targeting as a solution for the e-commerce and Internet jurisdictional question.[78] In order for a targeting approach to be successful, the forseeability requirement must be at its core.[79] The question under the targeting approach is whether it was foreseeable that the forum would be targeted by the Internet activity.[80] Moreover, in order to withstand constant technological advancements, the factors used to determine whether a forum has been targeted must remain technology neutral.[81]

E. The Constitutional Rider Provision

In spite of these steps to ensure that jurisdiction under the Hague Convention is exercised with discretion, what if something goes wrong? What if the court's exercise of jurisdiction is appalling to the country where enforcement of the judgment is sought? Must the country enforce the judgment notwithstanding its own Constitutional mandate? This is one of the concerns that the Internet and e-commerce communities expressed in *The Washington Post*[82] and *The Economist*.[83]

Article 28 of the Hague Convention (Grounds for refusal of recognition or enforcement) specifically addresses this issue.[84] Article 28 allows a court to refuse recognition of a judgment that contravenes the public policy of the State.[85] Article 28 does not

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site must have specifically targeted the forum state).

77. Geist, *supra* note 59, at 599. Canada, UK, and the American Bar Association have endorsed the targeting approach. *Id.* at 600-01; *see also* OECD, Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce (Paris, Dec. 9, 1999), *available at* http://www.oecd.org/publications/e-book/9300023E.pdf (last visited Oct. 9, 2002).

78. Geist, *supra* note 59, at 599. Version 0.4a of Article 7(3)(b) provides: "activity by the businesses shall not be regarded as being directed to a State if the business demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in that State." *Id.* at 600.

79. Geist, *supra* note 59, at 602.

80. *Id.*

81. Geist, *supra* note 59, at 601. Technology neutral language would, in Geist's opinion, rule out any of the Internet and technical buzz words du jour. *Id.* at 602. Geist would also add that the targeting approach must not be biased towards any one group. *Id.*

82. Stern, *supra* note 12.

83. *Tied up in Knots*, *supra* note 11.

84. Hague Convention, *supra* note 13, at art. 28.

85. Article 28 provides:

1. Recognition or enforcement of a judgement may be refused if -
   a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first

allow, however, an enforcing court to review the judgment on the merits.[86] These two provisions of Article 28 read together would require a narrow interpretation of the public policy exception, only allowing such a refusal in the most extreme circumstances.[87] Before a court refuses to enforce the judgment, a court should consider the facts, context, and circumstances of the case, and carefully weigh the Constitutional issues against the principles of the Hague Convention.[88] In the U.S. however, "a treaty is still subordinate to the Constitution, and its rules must conform to this

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seized in accordance with Article 21;

b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognized or enforced in the State addressed;

c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;

d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defense;

e) the judgment was obtained by fraud in connection with a matter of procedure;

f) *recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.*

2. Without prejudice to such review as is necessary for the purpose of application of the provisions of the Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.

Id. (emphasis added).

86. *Id.*

87. Hudleston, *supra* note 39, at 431. The New York Convention of 1958 on Enforcement of International Arbitral Awards has a similar provision in Article V(2)(b). Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions*, 24 INT'L LAW. 487, 508 (1990). Article V(2)(b) allows a signatory country to refuse enforcement of an arbitral award if "the award would be contrary to the public policy of that country." *Id.* (quoting The New York Convention at art. V(2)(b)). Few parties have successfully invoked this defense under the New York Convention because the public policy exception is very narrowly construed. *Id.* U.S. Courts have only recognized this exception "where recognition and enforcement of the award would violate the 'most basic notions of morality and justice'." *Id.* (quoting Fotochrome Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975) and Parson & Whitmore Overseas Co. v. Societe Generale d'Industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974)). Moreover, domestic public policy must be viewed in conjunction with international public policy. *Id.* Since the public policy refusal provision of the Draft Hague Convention is very similar to article V(2)(b) of the New York Convention, it is likely that the public policy exception under the Draft Hague Convention will be similarly applied. *See supra* note 85 (detailing the text of Art. 28's refusal provisions).

88. *Id.*

inferior position."[89] Therefore, a judgment that is contrary to the U.S. Constitution and blatantly violates U.S. notions of Free Speech may not be enforced in a U.S. court under Article 28 of the Hague Convention.[90]

II. INTERNATIONAL AND INTERNET AGREEMENTS

Part II of this Comment focuses on the common devices used in International and Internet contracts to limit liability and control the form and forum of the dispute, specifically: arbitration clauses and forum selection clauses within browse-wrap and click-wrap agreements. Arbitration clauses, forum-selection clauses, and click and browse-wrap agreements are popular devices because they allow one or both of the parties to control some of the format and procedure of the dispute. Part II also looks at two recent cases, the French *Yahoo!* decision and the U.S. *iCraveTV* decision, and analyzes how effective these devices were in these cases and their future efficacy.

A. Common Contractual Devices Used in International and Internet Agreements

1. Arbitration Clauses

An Arbitration clause is a common contractual device used in International agreements.[91] An arbitration clause represents a binding agreement on the parties to submit their dispute to an independent arbitor or agency, therefore taking the dispute out of a court system.[92] There are many benefits to including forum selection clauses in International and Internet agreements.[93] Arbitration is cost and time effective and provides confidentiality not provided with public, and often publicized, court proceedings.[94] Arbitration may also provide the parties the flexibility to stipulate choice of law provisions,[95] or allow the arbitrator to choose the most appropriate substantive law under the circumstances of the case.[96]

89. *Id.* at 422.

90. In fact this is being done currently. *See infra* notes 129-33 and accompanying text (describing Yahoo!'s challenge to the French court's decision in U.S. federal court).

91. Celia R. Taylor, *National Iranian Oil Co. v. Ashland Oil, Inc.: All Dressed Up and Nowhere to Arbitrate*, 63 N.Y.U. L. REV. 1142, 1145 (1988).

92. *Id.*

93. *Id.* at 1146.

94. *Id.*

95. *See infra* note 101 and accompanying text (distinguishing between a choice of law provision and a forum selection clause); *see also infra* Part III (describing the drawbacks to arbitration clauses in international agreements).

96. Taylor, *supra* note 91, at 1146.

The U.S. began enforcing international arbitration clauses in 1970 when it became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[97] In the context of International and Internet agreements, arbitration clauses offer the enhanced benefits of certainty and predictability.[98] However, arbitration clauses become more effective when paired with a forum selection clause.[99]

2. Forum Selection Clauses

A forum selection clause is an agreement stipulating the forum or fora for the litigation (or arbitration) of a dispute.[100] The forum selection clause differs from a choice of law provision that determines which state's substantive law applies.[101] A forum selection clause allows parties to contract for convenient and agreeable forums and provide certainty in litigation.[102] Also, a forum selection clause may automatically solve any jurisdictional question when a party appears before a court.[103] In the context of International and Internet jurisdiction, this contractual provision has the added benefit of solving any jurisdictional questions.

General enforcement of forum selection clauses began in the

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97. *Id.* at 1148-49; *see also* Pub. L. No. 91-368, 84 Stat. 692 (codified at 9 U.S.C. §§ 201-208 (2002)). For a discussion of *National Iranian Oil Co. v. Ashland Oil Inc.*, 641 F. Supp. 211 (S.D. Miss. 1986), a case which refused to allow an arbitration clause stipulating arbitration in Tehran, Iran, see Taylor, *supra* note 91, at 1155-72.

98. Taylor, *supra* note 91, at 1152.

99. *Id.*

100. *Id.* at 1151.

101. *Id.* The distinction between a choice of law provision and a forum selection clause is an important one. *Id.* A forum selection clause alone only determines the situs of the litigation or arbitration. *Id.* For example, if a contract contained only a forum-selection clause designating Italy as the forum, but no choice of law provision, then Italy would be the location of the dispute, and Italian substantive law would most likely govern. *Id.* at 1152. With the addition of a choice of law provision, a party could designate Italy as the forum and stipulate that U.S. law applies. *See id.* (discussing the benefits of including a choice of law clause in a contract). Used in conjunction, the parties are able to contract for greater certainty by determining the location of the litigation or arbitration and by determining the substantive law that will govern. *Id.* However, the choice of law provision will not be enforced under the Rome Convention if one of the parties is a consumer. Rice, *supra* note 61; *see also* discussion *infra* Part III (discussing how the draft Hague Convention would make jurisdictional questions simple, especially when paired with choice of law provisions).

102. Rice, *supra* note 61.

103. Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, PLI Commercial Law and Practice Course Handbook Series, PLI Order No. A4-4354, 1991 at 72. When a party appears before a court as the result of a forum contractual provision, the court receives the appearance as a submission to its jurisdiction. *Id.*

U.S. with the 1972 Supreme Court case *The Bremen v. Zapata Off-Shore Co.*[104] However, forum selection clauses are subject to the traditional safeguards of contract law.[105] Notwithstanding this caveat, policy dictates the strict enforcement of forum selection clauses, especially those in international agreements.[106]

3. Click-Wrap Agreements[107]

Click-wrap agreements are contracts formed completely online.[108] These agreements are usually used to establish the terms of agreement for browsing or using a site, to establish the terms of user agreements for downloading software or the terms of an online sale,[109] to give notice of the type of material on the site and the trademarked, patented, or copyright proprietary interests,

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104. 407 U.S. 1 (1972); Gruson, *supra* note 103, at 85. The *Bremen* case was an admiralty suit to recover for breach of contract and damages that resulted from negligent towing. *Id.* The contract contained a forum-selection clause that designated London as the situs of litigation. *Id.* The U.S. Supreme Court enforced the forum-selection clause and held that there was a strong presumption in favor of the enforceability of choice of forum clauses. *Id.* at 86-87. Similarly, in *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), the Supreme Court reaffirmed the enforceability and validity of forum-selection clauses. *Id.* at 595; David Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 845 (1993). In *Shute*, Mrs. Shute brought suit in Washington federal court against Carnival Cruise Lines for injuries she received while on-board the ship. *Id.* at 842. Carnival Cruise Lines defended by pointing out the forum selection clause that designated Florida as the location for litigation. *Id.* The choice of forum clause was located on back of the non-refundable tickets that the Shutes had purchased from their travel agent, and received only after they had paid. *Id.* In spite of these factors and the boilerplate terms, the Supreme Court held the forum-selection clause to be valid. *Id.*

105. Gruson, *supra* note 103, at 101. Enforceability may be challenged on the basis of fraud or overreaching or on the basis that enforceability would be unreasonable. *Id.* In addition, courts have also refused to enforce choice of forum provisions based on the "nature of the contractual forum, the public policy of the excluded forum in which litigation was commenced, statutory restrictions on forum-selection clauses, and the fact that the contractual forum is inconvenient." *Id.* at 102.

106. Taylor, *supra* note 91, at 1153-54.

107. "The term 'click-wrap' is derived from the fact that such online agreements often require clicking with a mouse on an on-screen icon or button to signal a party's acceptance of the contract." Francis M. Buono & Jonathan A. Friedman, *Maximizing the Enforceability of Click-Wrap Agreements*, 4-FALL J. TECH. L. & POL'Y 3, *1 (1999) *available at* www.westlaw.com.

108. *Id.* There are two kinds of click-wrap agreements, the "type and click" and the "icon clicking." *Id.* at *4. Under the type and click agreement, the user must actually type the words "I accept" and then click the "send" button before proceeding. *Id.* Under the icon clicking agreement, the user clicks a button labeled "I accept" or "I agree" and then proceeds. *Id.* The icon clicking variety also offers a "No" or an "I do not agree" button. *Id.*

109. *Id.* at *1.

and to limit the liability of the Online Service Provider (OSP).[110]

The use of click-wrap agreements to form binding user agreements has become the standard practice in the Internet and e-commerce community.[111] In the U.S., courts are divided as to the enforceability of click-wrap agreements.[112] Many courts analogize to the shrink-wrap[113] cases when deciding the enforceability of click-wrap cases.[114] Although courts are divided, the trend is moving toward enforceability.[115] However, click-wrap agreements

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110. *Id.* at *2.

111. *Id.* at *5.

112. *Id.*

113. Shrink-wrap agreements are packaged agreements that accompany new software bought in the store. Megan E. Gray & Brian A. Ross, *Drafting Stronger Clickwrap Agreements*, 6 No. 6 INTERNEWS 1 (2001). In recent years, shrink-wrap agreements have generally been held to be enforceable. Buono & Friedman, *supra* note 107, at *5. The courts usually enforce shrink-wrap agreements reasoning that, under the Uniform Commercial Code (UCC), shrink-wrap agreements meet the contract formation requirements in much of the same way as the contract requirements on the back-side of airline and event tickets. *Id.*; *see* U.C.C. § 2-204(1) (2001) (a contract may be formed "in any manner sufficient to show agreement, including conduct" by the parties); *see also* U.C.C. § 2-206 (2001) (acceptance of goods provision). The consumer must have notice of the agreement and an opportunity to return the software if the consumer does not wish to consent to the terms. Gray & Ross, *supra.*

The leading case on shrink-wrap agreements is *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996). In *ProCD*, the court held that shrink-wrap agreements were valid and enforceable if: 1) the box unambiguously announced the inclusion of the software user agreement inside; 2) the use of the software was expressly conditioned on the acceptance of the agreement; 3) the consumer had opportunity to review the agreement; 4) and opportunity to return the product if the consumer did not agree to the terms. Buono & Friedman, *supra* note 107, at *7; *see also* Hill v. Gateway 2000, Inc., 105 F.3d. 1147, 1148 (7th Cir. 1997) (holding shrink-wrap agreements to be enforceable); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 571 (N.Y. App. Div. 1998) (holding shrink-wrap agreements to be enforceable).

114. Buono & Friedman, *supra* note 107, at *5.

115. Gray & Ross, *supra* note 113. One important case that determined the validity and enforceability of click-wrap agreements was *Caspi v. The Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. Sup. 1999). In *Caspi*, the "type and click" click-wrap agreement was held enforceable. *Id.* at 529. The court reasoned that the consumers were not out bargained because there were many other competitors offering similar services. *Id.* at 531. Moreover, the agreement did not inconvenience the parties or contravene public policy. *Id. But see* Williams v. America Online, Inc., No. 00-0962, 2001 WL 135825 (Mass. Sup. Ct. Feb. 8, 2001) (refusing to honor a forum-selection clause contained in a click-wrap agreement when the user did not have notice of the agreement before installation); Specht v. Netscape Communications Corp., 150 F.Supp.2d 585, 596 (S.D.N.Y. 2001) (refusing to enforce an agreement where the user was not required to review the conditions of the agreement before downloading the software).

Another factor weighing in favor of enforceability is the Uniform Computer Information Transactions Act (UCITA). Gray & Ross, *supra* note 113. UCITA adopts the validity of click-wrap agreements, as long as the user has notice of

must still meet the traditional requirements of contract law in order to form a binding contract.[116]

B. *The French* Yahoo! *Decision*

In November 2000, the French Tribunal de Grande Instance of Paris held the U.S. website Yahoo! criminally liable for the sale of Nazi memorabilia on its auction site.[117] The Union des Etudiants Juifs de France (UEJF)[118] and the Ligue Contre le Racisme et L'antisemitism (LICRA)[119] brought the action against U.S. Yahoo! and its subsidiary Yahoo! France.[120] Specifically, Yahoo! was charged with violations of Article 24 bis of the July 29, 1881 Act[121] and Article 645-1 of the French Criminal Code.[122]

Yahoo! defended by objecting to the French court's exercise of jurisdiction over the U.S. based company, pointing out that Yahoo!

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the agreement prior to acceptance of the terms. *Id.* at 2. However, currently only a handful of states have adopted UCITA. *Id.*

Although the enforcement of click-wrap agreements is becoming more commonplace, the validity of browse-wrap agreements has an uncertain future. *Id.* at 3. This uncertainty is illustrated in *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000). In *Pollstar*, the user was not required to affirmatively express consent to the terms of the user agreement before proceeding, despite the provision that all users were bound by the terms-of-use agreement. *Id.* at 981-82. The court referred to this type of agreement as a browse-wrap agreement and refused to enforce it because it did not afford sufficient notice to the user, or offer the user an opportunity to express his or her assent. *Id. See also* Ticketmaster Corp. v. Tickets.com Inc., No. 99 CV 7654, 2000 U.S. Dist. LEXIS 4553, at *8 (C.D. Cal. Mar. 27, 2000) (holding unenforceable the user agreement contract that was posted somewhere on the website without requiring affirmative assent on the part of the user).

116. Gray & Ross, *supra* note 113, at 2. Examples of contract requirements are offer, acceptance, and consideration. *Id.* at 4. The contract must also be conscionable. *Id.* In order to ensure enforceability, click-wrap agreements should be obvious to the user and require the user to affirmatively assent to the terms of the agreement, ideally clicking or typing "I agree." *Id.* at 5. The website should refuse to allow the user to proceed unless the terms are affirmatively agreed to and the website should offer the user an opportunity to save or print the agreement for their records. *Id.*

117. Razavi & Samman, *supra* note 2, at 27; *see also* UEJF et LICRA v. Yahoo! Inc. et Yahoo France, Tribunal De Grande Instance De Paris, May 22, 2000, N RG: 00/05308, *translated at* http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm (last visited Sept. 24, 2002).

118. The Jewish Students Union of France.

119. The Anti-Racism and Antisemitism League.

120. Razavi & Samman, *supra* note 2, at 27.

121. *Id.* Article 24 bis of the July 29, 1881 Act prohibits the denial of crimes against humanity. *Id.* In particular, UEJF claimed that Yahoo! provided access to French citizens through its site to photos that allegedly cooberated the non-existence of Nazi gas chambers. *Id.*

122. *Id.* Article 645-1 of the French Criminal Code makes it illegal to sale or publically display Nazi or Nazi related materials. *Id.*

is an American company organized under U.S. law, and the site content was protected speech under the First Amendment of the U.S. Constitution.[123] Yahoo! also asserted that its servers were maintained in the U.S. and that the auction site was provided primarily for the benefit of U.S. users.[124] The court explicitly rejected Yahoo!'s argument, reasoning that the French court could exercise jurisdiction simply because French users could access the site.[125] It ordered Yahoo! to pay US $1,500 to each plaintiff plus the costs of the action.[126] The court required Yahoo! to control the access of French users.[127] Furthermore, the court required Yahoo! France to post a message to French users that tried to enter the Yahoo! auction site warning of the availability of Nazi material for viewing and admonishing French users to discontinue the search.[128]

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123. Razavi & Samman, *supra* note 2, at 27.

124. *Id.*

125. *Id.*

126. Eko, *supra* note 62, at 472.

127. Razavi and Samman, *supra* note 2, at 28. For a discussion of the technologies available to target or avoid a particular jurisdiction, see Geist, *supra* note 59, at 609-18.

Currently, at Yahoo.com's auction site *(available at* http://auctions.yahoo.com) there is a terms of service agreement. The terms of service agreement includes a disclaimer that Yahoo! will not be responsible for any content uploaded or posted by the user, and warns the user that Yahoo! will not be liable for exposure to any objectionable material. Terms of Service, *available at* http://docs.yahoo.com/info/terms/. In addition, there is an International provision that reads:

> SPECIAL ADMONITIONS FOR INTERNATIONAL USE Recognizing the global nature of the Internet, you agree to comply with all local rules regarding online conduct and acceptable Content. Specifically, you agree to comply with all applicable laws regarding the transmission of technical data exported from the United States or the country in which you reside.

Id. Interestingly, the Additional Terms of Service agreement contains a forum-selection clause that provides that the user agrees to submit to the exclusive jurisdiction of the courts in Santa Clara County, California. *Id.*

In Yahoo.com's additional Auction Site Guidelines, the following provision can be found: "Any item that promotes, glorifies, or is directly associated with groups or individuals known principally for hateful or violent positions or acts, such as Nazis or the Ku Klux Klan. Official government-issue stamps and coins are not prohibited under this policy." Currently, the only Nazi memorabilia available at Yahoo.com's auction site are coins and stamps from the era (results of a search conducted Nov. 1, 2001 by typing in the search word "Nazi"). The results of a search on the French Yahoo site yielded no matches for the word "Nazi." The French Yahoo site is available at http://www.fr.auctions.yahoo.com/0-category.html (last visited Nov. 1, 2001) [hereinafter French Yahoo Reference]. The French Yahoo! auction site has now been closed. *See* http://fr.docs.yahoo.com/auctions/notice (last visited Nov. 13, 2002) (recommending Yahoo! customers to use eBay).

128. Razavi & Samman, *supra* note 2, at 28. As a result of the Yahoo! decision, Amazon.com and eBay have also altered the content of their sites.

Yahoo! filed suit in a California federal court to challenge the French court's ruling.[129] The French defendants moved to dismiss the action claiming that the California court lacked jurisdiction over the French citizens.[130] The U.S. court rejected this argument and held that the effects[131] of the French defendants' activities could be felt in California; therefore, the federal court's exercise of jurisdiction over the French defendants was proper.[132] In response to the defendants argument that the U.S. suit would undermine French sovereignty, the court replied that the "French have an interest in enforcing the orders of their courts, but that interest must be weighed against the United States' interest in protecting the constitutional and statutory rights of its residents."[133]

The French *Yahoo!* decision is not surprising when considered in the context of French culture and law.[134] In France, the Internet is viewed as a cultural vehicle, rather than a commercial opportunity.[135] The French government has always sought to protect the French language and culture through legislation and agencies.[136] "From the outset, the legal action against Yahoo! was framed as a struggle between French legal culture and excessive American online commercialism."[137]

The implications of the *Yahoo!* decision are far-reaching.[138] The French court exercised its jurisdictional reach in spite of the user agreement that provided the site was controlled by U.S.

Id.

129. Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

130. *Yahoo! Can Proceed with Challenge to French Decision Banning Nazi Materials*, 18 No. 20 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 6, June 19, 2001.

131. *Id.*

132. *Yahoo! Can Proceed with Challenge to French Decision Banning Nazi Materials*, *supra* note 130. The court specifically pointed to three different instances, a cease and desist letter sent to Yahoo! prior to the French proceeding, the requirement that Yahoo! comply by altering its service in California, and the use of U.S. Marshals to effect process on Yahoo!. *Id.*

133. *Id.*

134. Eko, *supra* note 62, at 470-71. France fits into a "Culturist" model that emphasizes cultural promulgation and protection. *Id.* The U.S. fits into the "Neo-Merchantilist or E-commerce" model that emphasizes open channels for information and goods to flow. *Id.* at 464.

135. *Id.* at 470.

136. *Id.* at 468. For example, France often negotiates special French or French language exceptions in International treaties. *Id.* at 468. The French government views the Internet as "a new, very serious Anglo-American threat to French language, culture and values." *Id.*

137. *Id.* at 472.

138. William Crane, *The World-Wide Jurisdiction: An Analysis of Over-Inclusive Internet Jurisdictional Law and An Attempt By Congress to Fix It*, 11 DEPAUL-LCA J. ART & ENT. L. 267, 305 (2001).

law.[139] Under the French court's reasoning, any web-page author anywhere in the world could be hauled into a foreign court to defend activities perfectly legal in his or her home country.[140] In other words, if other courts follow the lead of the French court in *Yahoo!*, a court could adjudicate a cause of action simply because that Internet site and information is available there, even though that country was not specifically targeted.[141] Furthermore, prices of goods sold via the Internet will increase as a result of the possibility of limitless liability.[142] As a result of these increases, the Internet would not be likely to grow and modernize.[143]

C. *The* iCraveTV *case*

It is interesting to compare the *iCraveTV* case along side the *Yahoo!* case. In *Twentieth Century Fox v. iCraveTV*,[144] the U.S. district court exercised jurisdiction over a Canadian website, and ordered an injunction against the Canadian company to prevent airing TV broadcasts that U.S. users could access.[145] As a result, iCraveTV shut down its site, and thereby prevented Canadians from viewing material that was legal in Canada.[146]

Specifically, the iCraveTV site allowed users to watch seventeen channels of television on their personal computers.[147] The channels included programming by Canadian and U.S. broadcasters.[148] In order to access the site, the user needed to pass through a series of click-wrap agreements.[149] To indicate acceptance of the first agreement, the user was required to enter their area code, if the area code was not Canadian, the user could not continue accessing the site.[150] If the user succeeded in passing

139. Geist, *supra* note 59, at 566; *see also* Razavi & Samman, *supra* note 2, at 27.

140. *Id.*

141. Rice, *supra* note 61. In fact, a German court has already followed the lead of the French court. Razavi & Samman, *supra* note 2, at 28. The German Supreme Court (the Bundesgerichthof) found jurisdiction over an Australian website for posting pro-Nazi speech. *Id.* Similarly, an Italian court also determined that it can exercise jurisdiction over any online information "that could be read by an Italian." *Id.*

142. Crane, *supra* note 138, at 306-07. Any company that does any form of business online will be forced to purchase insurance and hire attorneys and engage in costly foreign litigation. *Id.* at 307. These costs will be passed along to the users and consumers. *Id.*

143. *Id.*

144. No. 00-121, 2000 U.S. Dist. LEXIS 11670 (W.D. Pa. Feb. 8, 2000).

145. Crane, *supra* note 138, at 287-88.

146. *Id.* at 288.

147. Michael Geist, *iCraveTV and the New Rules of Internet Broadcasting*, 23 U. ARK. LITTLE ROCK L. REV. 223, 225 (2000).

148. *Id.* The U.S. broadcasters were NBC, ABC, PBS, and WB. *Id.*

149. Geist, *supra* note 59, at 568.

150. *Id.*

through the first step, the second step required a confirmation that the user was in Canada.[151] Finally, the user was presented with a third click-wrap which included the terms of service agreement.[152] The user was required to affirmatively assent to this agreement by clicking on the "I agree" icon.[153] Therefore, in order for U.S. users to access the site, they had to fraudulently enter into the series of click-wrap agreements.[154]

Yahoo! and *iCraveTV* are similar in that they both resulted in termination of services to users that were perfectly legal in the site's home country. As a result of the *Yahoo!* decision, U.S. users are no longer allowed to exercise First Amendment rights to buy or sell French-prohibited Nazi memorabilia on Yahoo!'s auction site.[155] As a result of the *iCraveTV* case, Canadian users can no longer view the web casts that are legal in Canada.[156] However, unlike Yahoo!'s posted user agreement, the iCraveTV site required users to affirmatively enter into click-wrap agreements.[157]

The U.S. federal court's exercise of jurisdiction in *iCraveTV* is ironic considering how vehemently Yahoo! argued that the French court did not have jurisdiction over U.S. Yahoo!'s activities.[158] Part III addresses this inconsistency, and offers a suggestion to reconcile both decisions: the Hague Convention on Jurisdiction and Enforcement of Judgments.

III. THE HAGUE CONVENTION—A SOLUTION FOR INTERNATIONAL INTERNET JURISDICTION?

The Hague Convention on Jurisdiction and Enforcement of Judgments, if adopted in its current form, would simplify international Internet jurisdictional questions. The Hague Convention would provide a uniform standard for determining

151. *Id.* The user was presented two icons, one labeled "In Canada" and the other "Not in Canada." *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. French Yahoo Reference, *supra* note 127; Razavi & Samman, *supra* note 2, at 28.

156. Geist, *supra* note 147, at 224.

157. *See supra* notes 147-54 and accompanying text (describing the iCraveTV site's various click-wrap agreements).

158. *See supra* notes 129-32 and accompanying text (describing Yahoo!'s suit in the California federal court). *But see* Winfield Collection Ltd. v. McCauley, 105 F. Supp. 2d 746, 751 (E.D. Mich. 2000) (refusing to exercise jurisdiction over a Texas defendant merely based on the availability of the product and website in Michigan). "In stark contrast to the Paris court, the court in Michigan refused to broadly hold that the mere act of maintaining a web site that includes interactive features *ipso facto* establishes personal jurisdiction over the sponsor of that web site anywhere in the United States." Rice, *supra* note 67.

jurisdiction in Internet and e-commerce cases among the signatory countries. Additionally, the Convention would ensure that the judgment was properly decided when enforced.

Forum-selection and arbitration clauses fail to reach the contractual level of certainty needed in International contracts. The substantive contract laws vary from country to country,[159] and various problems may arise under contract interpretation.[160] Click-wrap agreements may also encounter problems of contract enforcement such as assent. For example, a question may arise as to whether a party properly understood the terms and therefore assented to the exercise of jurisdiction.[161] Furthermore, arbitration clauses may not be enforced, depending on the interpretation of the contract,[162] or the situs of arbitration may no longer be a suitable location.[163]

Similarly, U.S. legislation[164] designed to protect U.S. Internet

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159. For example, Article 1134 of the French Civil Code states that the provisions of a contract become the governing law between the parties. In other words, the provisions of the contract become the substantive law between the parties. In addition, under the Rome Convention, choice of law provisions will not be enforced if a consumer is a party or one party is a country that is not connected to the issues in dispute. Rice, *supra* note 61. Moreover, the Rome Convention provides added protection for consumers, it does not permit consumers to waive the consumer protection laws of his or her home country. *Id.* Generally, in the U.S., choice of law provisions are more freely enforced, however, a public policy exception does exist under U.S. law. *Id.*

160. Although the *MCC Marble v. Ceramica Nuova D'Agostino*, 144 F.3d 1384 (11th Cir. 1998), was a case decided under the CISG (Convention on International Sale of Goods), it is illustrative of the problems that can arise when interpreting an international contract. In *MCC Marble*, MCC Marble, a Florida corporation, arranged for the purchase of tile from Ceramica Nuova D'Agostino (D'Agostino), an Italian corporation. *Id.* at 1385. An oral contract was agreed upon, and later was transferred to one of D'Agostino's standard form contracts. *Id.* The standard form contract was printed in Italian and contained various terms and conditions. *Id.* MCC Marble argued that the terms and conditions in Italian on the standard form contract were not a part of the agreement between the parties. *Id.* at 1386. The Court held that extrinsic evidence was admissible under the CISG to interpret the terms of the contract between the parties. *Id.* at 1392.

161. *Id.*.

162. *Id.*

163. *See, e.g.*, *Nat'l Iranian Oil Co.*, 817 F.2d at 334 (holding that the arbitration provision of the contract allowed a change situs if the original situs became inconvenient or unacceptable to one or both parties).

164. In January of 2001, a bill was introduced in the U.S. House of Representatives as a result of the French decision against Yahoo!. Crane, *supra* note 138, at 305. The bill was aimed at protecting U.S. Internet companies from foreign jurisdiction by opposing the actions of Foreign Governments to impose criminal liability on U.S. Internet companies that publish material that is legal under the First Amendment of the U.S. Constitution. *Id.*

companies is not the solution. While U.S. legislation may in the short-run relieve the worries of U.S. Internet companies, there is no guarantee that in the long run, U.S. legislation would protect Internet companies abroad. In fact, as stated above,[165] foreign jurisdictions do not often respect U.S. judgments, or find the statutory laws compatible with their own.[166] Moreover, the U.S. cannot expect foreign jurisdictions to respect U.S. mandates when the U.S. does not afford foreign jurisdictions the same respect that the U.S. demands.[167]

The Hague Convention is the better solution for several reasons. First, U.S. Internet companies would no longer be subject to exorbitant jurisdictional principles because of U.S.'s "outsider status."[168] Second, jurisdiction would only be exercised in Internet cases when the website at issue targeted the particular jurisdiction.[169] Third, in the rare instance where a decision conflicted with the Constitutional provisions of a signatory country, that country could refuse to enforce the judgment.[170]

Targeting jurisdiction under The Hague Convention provides the most protection for Internet companies. Under a targeting analysis, jurisdiction would only be proper if a website directed its activities toward a particular forum.[171] A targeting analysis would overcome the limitations of the passive versus active test[172] and the

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165. *See supra* notes 40-47 and accompanying text (describing other countries' opinions of U.S. jurisdictional law and U.S. punitive damage awards).

166. *Id.* This problem is illustrated in the *Yahoo!* case. The French Court rejected the idea that the content of the website was protected under the First Amendment to the U.S. Constitution. *See supra* notes 123-24 and accompanying text (describing the French court's reasoning in the *Yahoo!* decision). Since this argument was rejected in *Yahoo!*, U.S. Internet companies cannot rely on U.S. legislation to protect them abroad.

167. For example, in the same breath that the U.S. condemned the French court for its decision against Yahoo!, the U.S. courts shut down a Canadian website in the *iCraveTV* case. *See supra* notes 144-54 and accompanying text (describing the U.S. decision in *iCraveTV*). The U.S. acted the same way that it complained the French Court did.

168. *See supra* note 49 and accompanying text (explaining exorbitant jurisdiction and providing an example). For example, in the *Yahoo!* case, had the U.S. been a signatory to the Brussels Convention, France would not have been allowed to exercise its exorbitant jurisdiction on U.S. Yahoo! simply because the plaintiffs were French. *Id.*

169. *See supra* note 78 and accompanying text (noting that the draft Hague Convention adopts this targeting approach).

170. *See supra* notes 82-90 and accompanying text (explaining the conditions where a court may refuse to enforce a judgment).

171. *See supra* notes 73-81 and accompanying text (explaining the targeting approach to jurisdiction with internet companies).

172. *See supra* note 66-72 and accompanying text (explaining the passive versus active test and the effects based approach and their drawbacks).

effects test,[173] and provide more certainty in Internet jurisdiction disputes.[174]

There are several factors[175] to consider when determining if a website targets a jurisdiction. Forseeability is central to the targeting analysis.[176] The question is whether it is foreseeable that the jurisdiction was targeted by the website at issue.[177] In determining whether a website targets a jurisdiction, the court should look to the user agreements, the language of the website,[178] the currency accepted,[179] the existence of pictorial suggestions,[180] and disclaimers.[181]

What if the *Yahoo!* case and the *iCraveTV* case had been decided under the targeting jurisdiction principles of the Hague Convention?[182] The author proposes that if targeting jurisdiction had been applied, a different result would have occurred in both cases.

In *Yahoo!*, the French Court would not have found jurisdiction under the Hague Convention. First, assuming that both France and the U.S. would be signatories to the draft Hague Convention, France would not have been allowed to use its exorbitant jurisdiction against the U.S.[183] Therefore, the issue of jurisdiction would be determined under a targeting analysis.

Under the targeting analysis, the factors would be weighed against a French Court's jurisdictional findings. First, a "terms of use agreement" specifically stated that the site was governed by

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173. *Id.*

174. Geist, *supra* note 54, at 598.

175. This list does not claim to be definitive; the factors are merely suggestions in making a targeting determination.

176. *See supra* note 79-80 and accompanying text (describing the targeting test for jurisdiction).

177. *Id.*

178. Rice, *supra* note 61. Currently, English is the most common language on the Internet and the most common commercial language. *Id.* The fact that the website language is English should not be dispositive to establishing jurisdiction. *Id.* However, if the dominant language is for example Italian, this factor would weigh towards the finding of jurisdiction only for Italian speaking countries. *Id.*

179. *Id.* Common currencies should not alone determine jurisdiction. *Id.* However, if, for example, the Italian Lire is the currency on the website, this would weigh in favor of a finding that the website targeted Italy. *Id.*

180. Does the website contain patriotic symbols, e.g. a country's flag, the Statue of Liberty, the Eiffel Tower? *Id.*

181. *Id.* A Disclaimer would say something like "This website is intended to be available only to U.S. residents." *Id.* However, this would be more effective if imbedded in a click-wrap agreement. *Id.*

182. The Hague Convention on Jurisdiction and Enforcement of Judgments reaches only Commercial and Civil issues. Although the French court imposed criminal liability on Yahoo!, for illustrative purposes the hypothetical will only focus on the civil fines imposed on Yahoo!.

183. Clermont, *supra* note 6, at 93.

U.S. law and intended for U.S. users governed the Yahoo! auction site.[184] Second, the website's servers were located in the U.S. Finally, the auction site only accepted U.S. currency, and all written instructions and information were in English. Based on these facts, it was not foreseeable that U.S. Yahoo! was directing its activities to the French users; thus subjecting them to being hauled into a French court. Therefore, under the draft Hague Convention, the French court would not have had jurisdiction over U.S. Yahoo!.

Similarly, in *iCraveTV*, if the U.S. court had applied a targeting analysis under the Hague Convention a different result would have occurred.[185] The iCraveTV site had more protections than the Yahoo! site. The iCraveTV site required the user to enter into three separate click-wrap agreements to ensure that only Canadian users would have access to the site.[186]

Assuming that both Canada and the U.S. would be signatories to the draft Convention, the U.S. would be precluded from applying an *International Shoe* minimum contacts analysis to the case.[187] The U.S. would be required to apply a targeting analysis under the draft Hague Convention. Under a targeting analysis, the factors would be weighed against a finding of jurisdiction by the U.S. court. First, the website unambiguously displayed the fact that the site was organized under Canadian law and that the user must be Canadian in order to access the website. Second, the servers and antennae for the TV reception were located solely in Canada. Based on the above facts, it is not foreseeable that the Canadian website was targeting U.S. users; in fact, based on the click-wrap agreements, iCraveTV was specifically not targeting U.S. users. Thus, under the draft Hague Convention's targeting analysis, the U.S. court would not have had the jurisdiction that resulted in a shutdown of iCraveTV.

The draft Hague Convention's jurisdictional principles would greatly benefit Internet and e-commerce companies. Internet and e-commerce companies could be more certain of which activities would and would not expose them to cross-border liability. In addition, Internet and e-commerce companies could be even more certain of where and how litigation would take place when used in conjunction with arbitration clauses, forum-selection clauses, and

184. Geist, *supra* note 59, at 566.

185. For a discussion of how the iCraveTV website would have been regulated under Canadian law see Geist, *supra* note 147, at 228-37 (discussing the legality of the iCraveTV website under the Canadian Broadcasting Act and the Canadian Copyright Act).

186. Geist, *supra* note 147, at 225-26.

187. Similarly, the U.S. court would be precluded from applying a passive versus active test or an effects test to the case.

click-wrap agreements.[188] This benefit would reduce the costs of services on the Internet and provide for more growth within well-defined boundaries.[189] The draft Hague Convention's targeting test for jurisdiction would also be flexible enough to adapt to new technologies.[190] Finally, and most significantly, the U.S. could incorporate these jurisdictional principles into new domestic jurisdictional principles that could provide more certainty for U.S. citizens and corporations.[191]

CONCLUSION

The draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters offers a better jurisdictional framework, one that can ensure uniformity and predictability in internet liability, and one that the U.S. and Internet and e-commerce communities should advocate. Not only would the Convention allow for enforcement of U.S. judgments abroad, it would provide a uniform jurisdictional standard for all signatory countries. This uniform jurisdictional standard would allow the Internet and e-commerce companies to be more certain of what activities will expose them to liability in another country, especially when combined with arbitration and forum selection clauses. Internet and e-commerce companies would thus be able to allocate extra resources to better serve the eager Internet users of the world.

188. *See supra* note 29 and accompanying text (noting that the draft Hague Convention validates forum selection clauses).

189. Crane, *supra* note 142 and accompanying text.

190. "In the battle between technology and the law, the law must adapt to new technologies by learning to work with new developments rather than directly oppose such developments." Geist, *supra* note 147, at 241-42.

191. *See supra* note 50-51 and accompanying text (suggesting that the U.S. could codify the simpler Hague Convention jurisdictional principles in lieu of the tests that grew out of *International Shoe* and its progeny).