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THE DEATH OF ROMANCE

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Cyberspace: the dawn of a new age of freedom, of unlimited access to information, to a world market, to a place unfettered by the restrictions both democratic and tyrannical governments could and did impose within the geographical space they controlled. To the extent that regulation in this virtual world might be necessary, it would be minimal and self-imposed by consensus of those who understood the need to maintain its borderless (and thus unique) nature. Just as some philosophers in past centuries glorified the state of nature, many in the late twentieth century glorified the state of cyberspace. But in every romantic[2] Eden lurks a serpent.

Not surprisingly, governments that had long acted to protect their citizens against what the governments perceived as evil were frequently unwilling to allow all voices to be heard within their territories. A state that rigidly controlled gambling or pornography or access to Nazi memorabilia within its borders saw no difference between a bricks-and-mortar establishment offering games of chance, lewd materials or *Mein Kampf* and a web site, accessible by its citizens in its territory, offering the digital equivalent. However, the state's continued desire to control what its citizens could do or learn required that it be able to control not only people and things within its physical borders but also at least some of those outside its borders. It required assertions of extraterritorial jurisdiction, both personal[3] and prescriptive.[4] And in many cases it also required that other states be willing to enforce foreign judgments against their nationals. Whether such jurisdiction could be claimed under accepted notions of (in the United States) due process and international law was (and is) at least debatable.[5]

PERSONAL JURISDICTION

In the beginning, personal jurisdiction was defined strictly with respect to geographical boundaries. Assertions of jurisdiction are expressions of sovereign power; a sovereignty had complete control over persons and things within it and, as a corollary, no control over those outside its boundaries (where another sovereign had parallel complete control).[6] As a practical matter, this system worked well in a world where, for the most part, people were stationary and business local. However, increased mobility and the rise of corporations multiplied the number of situations in which those involved in a legal dispute lived in different states and in which the defendant was not physically present in the forum when the suit was filed. While numerous fictions were originally used in an attempt to overcome a growing problem,[7] in 1945 the Supreme Court held that presence at the time of

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2 Romance is defined as "adventurous, heroic, or picturesque; strange and fascinating appeal; the *romance* of faraway places." Funk & Wagnalls *Standard College Dictionary*, Funk & Wagnalls Company, Inc., New York 1963.

3 Personal jurisdiction is the authority of a state to insist that a defendant who has received proper notice of a claim brought against her in the state's court appear and defend the merits of the claim or suffer the entry of an enforceable default judgment against her.

4 Prescriptive jurisdiction is jurisdiction to regulate conduct, to determine the substantive law with which actors must comply and which will be used to determine the actors' liability in the absence of such compliance.

5 The following discussion will focus on principles of United States law with only occasional references to the understanding of countries of the European Union ("EU") when the results under the two systems would be markedly different.

6 *Pennoyer v. Neff*, 95 U.S. 714 (1877). The *Pennoyer* Court assumed that the due process requirements of the 5th and 14th Amendments incorporated the requirements of international law and, therefore, imposed on the states the same restrictions public law imposed on nation-states. Only if a defendant consented to the state's exercise of jurisdiction over it or if the defendant was a citizen (or possibly resident) of the state could the state assert jurisdiction over a defendant not personally served with process in the state. If the defendant were not so "found" within the state, the state could nonetheless seize property belonging to the defendant in the state and exercise in *rem* jurisdiction to determine ownership of the property seized.

7 In *Hess v. Pawloski*, 274 U.S. 352 (1927), for instance, a defendant was found to have consented to a state's jurisdiction pursuant to a state statute that defined driving in the state as consent to the appointment of the Secretary of State as the driver's agent for service of process in cases arising out of his driving in the state.

service was not the only way[8] a state could assert jurisdiction over a non-citizen: due process was satisfied as long as there were such "minimum contacts" between the defendant and the forum that the exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice."[9] Whether those contacts existed, in turn, depended upon the "quality and nature" of the defendant's acts in the forum "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[10] The jurisdictional inquiry was thus twofold: what had the defendant done in the state and what was the relationship between what it had done and the claim that was being brought against it. The first focus was later held by the Court to require some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[11] The formula, of course, presupposed that the defendant had in the past been present in the forum. The jurisdictional inquiry remained tied to geography and intuitively might seem irrelevant in borderless cyberspace.

Long before the advent of a dot.com world, however, legally significant relationships could be and were created without the parties encountering one another in the physical world. In three instances, the Supreme Court, focusing on the invocation by the defendant of the benefits and protections of forum law, had approved assertions of jurisdiction over a defendant never present in the forum in a jurisdictionally significant way. These cases provide the template for jurisdiction in the context of web-based contacts and claims. One, however, is a red herring. A second, while usable on parallel facts, is so fact-specific that it can not provide answers in most contexts. The third, however, does provide a workable analogy - an analogy, however, that makes the continuing existence of a borderless cyberspace problematic.

Once substantive tort law no longer required privity of contract between an injured consumer and a defendant manufacturer, it became possible for the consumer to file a claim against the manufacturer of a part whose malfunction allegedly led to the product's causation of injury. Such a parts manufacturer, however, was unlikely to have a physical presence in the consumer's state; while she could, of course, bring suit against it in the state where it had its principal place of business or where the specific part had been manufactured, she would much prefer to be able to proceed at home, where she had been injured.[12] A doctrine first crafted by the Illinois Supreme Court known as "the stream of commerce" permitted precisely that result.[13] Later approved by the U.S. Supreme Court,[14] the rationale focused on economic reality. While the parts manufacturer sold its product to another manufacturer for use in another product, the sale would not have occurred but for the ability of the product manufacturer to sell the product to a consumer. Thus the true, if indirect, economic benefit to the parts manufacturer accrued at the time of the consumer purchase and, if injury occurred in the same forum, jurisdiction was proper because the consumer purchase had been facilitated by the laws of the forum that governed contract sales; the fact of forum injury made the exercise of jurisdiction convenient[15] and, therefore, the jurisdictional assertion would comport with the fair and orderly administration of the laws.

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8 In the U.S., personal service while in the forum remains a valid basis for the assertion of personal jurisdiction, *Burnham v. Superior Court*, 495 U.S. 604 (1990); in the EU, "tag" jurisdiction is prohibited when the defendant is a citizen of a member state, although the national laws of a number of member states permit its use against other defendants. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 30, 1968, 1978 O.J. (L 304) 36 (hereinafter Brussels Convention) art. III.

9 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940).

10 *Id*. at 319.

11 *Hanson v. Denclka*, 357 U.S. 235, 253 (1958). This focus on the defendant's chosen, purposeful contact is not shared by the EU, where jurisdiction is proper where the harm occurred. Brussels Convention, *supra* note 8, art. 5(3).

12 *Id*.

13 *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961).

14 In *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court apparently approved the concept, though holding it inapplicable to the facts before it; the consumer had purchased a car in New York but was injured in an accident in Oklahoma where the suit was brought. The Court held that the stream ended with the consumer purchase in New York, not with the injury in Oklahoma. In a later case, *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102 (1987), at least some members of the Court questioned whether mere use of any stream of commerce, without targeting by the parts manufacturer of the forum in which the final product was purchased, was sufficient to satisfy due process.

15 Witnesses and at least evidence regarding the injury were there, and forum law was likely to apply. Brussels Convention *supra* note 8, art. III.

At first blush, it would seem that the *Gray* logic could be applied to jurisdictional issues raised when a web site put up in one forum is accessed in another. Just as the parts manufacturer, after selling its part to the product manufacturer, has no control over where the product including its part is sold, so too the web site author has no control,[16] after putting up the site, over where it is accessed. In both cases, the actor made an initial decision it knew might place its good anywhere, but thereafter was at the mercy of others.

However, there are two problems with the analogy, one theoretical and one practical. The theoretical problem is that the web site author obtains no benefit from the accessibility of its web site per se in the forum. True, forum law facilitates access, but the critical point in *Gray* was that the economic benefit the parts manufacturer obtained was protected by that law. The practical problem is that to assert jurisdiction anywhere the web site can be accessed would be to assert jurisdiction over every web site author globally. One of two things would then result: either people would stop using the technology, fearing the need to answer for their conduct anywhere in the world, or judgments rendered in foreign fora against local citizens would not be enforced by local courts, calling into question the efficacy of the judicial system generally.

The second situation in which the U.S. Supreme Court has approved an assertion of jurisdiction over a defendant never present in the forum involved a long-term contractual relationship between the parties. In *Burger King Corp. v. Rudzewicz*,[17] a Michigan franchisee was found subject to jurisdiction in Florida, the home state of the franchisor. The defendant had solicited and negotiated a long-term, valuable and closely supervised contract with the plaintiff which specified that it was to be governed by Florida law. While making clear that not all contracts subjected each party to jurisdiction in the other's home forum, the affiliation between these parties was much different than the momentary contact created by most contractual sales. When identical situations arise in the context of cyberspace, identical jurisdictional decisions result.[18]

The most valuable pre-internet case, however, is undoubtedly *Calder v. Jones*.[19] Shirley Jones sued a newspaper and two individuals for libel in California. Jurisdiction over the newspaper was unquestioned; it was sold in the forum. The individual defendants (the editor and reporter), however, had never been in California and argued that they lacked the requisite contacts with the state as a result. The Court, however, reasoned that they had intentionally targeted the state: they had produced a story about a citizen of California, knowing that that was where she lived and worked and detailing actions that had supposedly taken place in the state.[20]

Jurisdiction based on targeting provides guidance in many situations where the contacts between the defendant and the forum are digital. Some are blessedly straightforward. Libel in cyberspace works like libel in real space.[21] Cybersquatting cases can also be explained by analogy to *Calder*.[22] The difficult issue is what constitutes targeting.

As noted above,[23] a web site may ordinarily be accessed anywhere. If mere use of the web means that the author has targeted the globe, the concept is useless.[24] While one

16 At least in the beginning of the internet explosion, such control was assumed to be lacking and, to the extent that some blocking software existed, it was hardly fool-proof. Changes in the technology, however, may well make it possible to block access efficiently; indeed, that is the premise behind the "death of romance." *See* note 32, *infra*, and accompanying text.
17 471 U.S. 462 (1985).
18 *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).
19 465 U.S. 783 (1984).
20 The traditional example of this kind of jurisdiction involves a defendant standing in New York who shoots a plaintiff standing in Canada.
21 *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.C. 1998).
22 *See, for example, Panavision Int'l, L.P. v. Toeppen*, 938 F.Supp. 6161 (C.D. Cal. 1996), *aff'd*, 141 F.3d 1316 (9th Cir. 1998).
23 See text following note 17, *infra*.
24 It may be tempting to ask the web site author, "what part of *world wide web* didn't you understand," but the temptation needs to be resisted. *Id*.

very early decision seemed to take this approach,[25] the decision is now widely regarded as wrong. Courts instead have increasingly adopted the tack taken by a Pennsylvania district court in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[26] Recognizing that some distinctions needed to be drawn between web sites, the *Zippo* court focused on the nature of the site:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmissions of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site that is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the Web site.[27]

At least one caveat needs to be noted at the out set: a passive site might nonetheless target a forum and result in the author's amenability to jurisdiction there. As already noted, libel of a forum citizen would subject the author to jurisdiction. So too, for example, would a passive off-shore site targeting U.S. citizens as buyers of securities.[28] More importantly, however, it is necessary to underline the *Zippo* court's assumption that the defendant who has the capacity to do business over the internet actually does so knowingly with residents of the forum and to make clear that the resultant jurisdiction exists only with respect to claims related to that business.[29]

It is true that an entity that decides to do business via a web site may intend to target as its relevant market the entire wired world. But it may not. A small, local business may decide that it is cost effective to supplement or abandon a bricks-and-mortar operation without intending to expand its market. An offer to purchase software from it that comes from a faraway source might well be rejected by the seller, reasoning that the cost of potential litigation away from home outweighs the benefit from sporadic sales. If the number of offers increases, the analysis may change but, until it does, it makes no sense to assume that the business has targeted the distant forum simply because its site is accessible there and is technologically capable of completing a transaction.[30]

If targeting is critical to the jurisdictional inquiry, it is necessary to determine what steps a site must take to restrict the targeted market if it chooses to do so. The recent furor over France's claim against Yahoo!.com for offering Nazi memorabilia on a site Yahoo! meant to target the U.S.[31] demonstrates the difficulty. The French court held that Yahoo! argued it

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25 *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F.Supp. 161 (D.Conn. 1996). The judge was clearly amazed at the technology: "Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user." 937 F.Supp. at 164. Conspicuously absent from the opinion is any discussion of whether any Connecticut citizen had accessed the site and of whether the defendant had any intention of attracting Connecticut viewers.

26 952 F.Supp. 1119 (W.D.Pa. 1997).

27 *Id*. at 1124 (citations omitted).

28 *See* ABA Report, *supra* note 1, at 1931 et seq.

29 The *Shoe* jurisdictional inquiry, as noted in the text accompanying note 10, *supra*, focused not only on what the defendant had done in the forum but also on the relationship between those activities and the claim. While some contacts between a defendant and a forum may be so strong that jurisdiction is permissible there on any claim whatsoever (so-called general jurisdiction), at the least the defendant must be a resident of the forum, if not a citizen, unless she was personally served with process while in the forum. It is clear, however, that accessibility of a web site in a forum does *not* subject the author to general jurisdiction there, no matter how often the site is accessed. *See* ABA Report, *supra note* 1, at 1855 et. seq.

30 The need for actual sales to the forum was acknowledged in *GTE New Media Services, Inc. v. BellSouth*, 199 F.3d 1343 (D.C. Cir. 2000). *See also Rothschild Berry Farm v. Serendipity Group LLC*, 84 F.Supp.2d 904 (S.D. Ohio 1999) and *Millennium Enterprises, Inc. v. Millennium Music L.P.*, 33 F.Supp.2d 907 (D. Or. 1999).

31 Yahoo!.fr, targeted to France, did not offer the materials for sale.

had not done enough to block access to the site by non-U.S. nationals; Yahoo! argued that it had done as much as was reasonable. As blocking technology improves, however, checkpoints at which access can be denied except to the target fora may be as effective as borders in the real world.[32] Thus, the death of romance.

A second issue raised by sites attempting to restrict access is presented when the good sold is digital and the purchaser (a citizen or resident of a targeted forum) is not present in the forum when the good is delivered to her computer. While the same software that would allow sellers to restrict access would also permit sellers to know the location of the receiving computer, should it be relevant? While no one has as yet any answer, it would seem logical that the citizenship[33] of the purchaser, not her location at the moment of delivery, would be the critical factor.

PRESCRIPTIVE JURISDICTION

From the point of view of business, the critical initial issue is with what states' regulatory law must it comply. Any sustained growth in electronic commerce demands predictability, particularly with respect to businesses that are highly regulated, such as banking and securities. There is an obvious relationship between this issue and personal jurisdiction: governments who wish to subject businesses to their regulation rely not only on voluntary compliance but also on their courts to assess penalties for non-compliance.[34] Such use is possible only if the business is subject to personal jurisdiction in the regulating forum.

In the U.S., due process demands that there be a reasonable connection between the forum and the activity being regulated.[35] The hurdle is surprisingly low, perhaps because the personal jurisdiction hurdle is relatively high.[36] With respect to activities involving two nation-states, international law[37] and the U.S. Restatement [Third] of Foreign Relations Law acknowledge three primary bases of prescriptive jurisdiction: the nationality of the actor, the territorial location of the act, and the effects (substantial and intentional) within the forum of actions taken outside it. The latter is by far the most controversial. Perhaps equally controversial is the question of whether the forum need balance the interests of other sovereigns in regulating conduct which it could, in theory, control. The Restatement, section 403, precludes the assertion of jurisdiction on any basis if it would be unreasonable, and the list of relevant factors includes reference to those interests. On the other hand, the Supreme Court has held that such consideration is necessary only if there is a "true conflict" between the laws of the relevant sovereigns such that a defendant could not comply with both.[38]

In the context of the internet, it seems likely that the most frequently depended upon basis of prescriptive jurisdiction will be the existence of intentional substantial effects within the forum. Of course, states retain jurisdiction over web sites originating within their

32 *See* Lisa Guernsey, "Welcome to the World Wide Web. Passport, Please?," The New York Times, March 15, 2001 at http://www.nytimes.com/2001/03/15/technology/15BORD.html.

33 The Brussels Convention, *supra* note 8, refers to the place of habitual residence, which may actually more accurately reflect the relevant relationship; a citizen of the U.S. living in Germany would be targeted by a company seeking to serve Germany, not the U.S.

34 A claim by a private plaintiff that the defendant failed to follow applicable law may, of course, be brought in the home forum of the defendant; however, local courts tend to apply local law, supporting the convenience of suit at home as a reason for the plaintiff, if possible, to sue in its own forum.

35 *Allstate Ins. Co. v. Hague*, 499 U.S. 302 (1981); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). While there is some debate about the role the full faith and credit clause, U.S. CONST. art. IV, section 1, plays in this context, the better view would seem to be that it only compels a state to use the law of another state when the forum lacks law of its own to apply to the controversy; in that situation, the forum may not dismiss the case merely because it is to be governed by the law of another state.

36 Indeed, the case that held a defendant must purposefully avail itself of the privilege of conducting activities in the forum, *Hanson v. Denckla*, 357 U.S. 235 (1958), itself involved a questionable use of Florida substantive law by a Florida court. At issue was the validity of a trust entered into by a then-citizen of Pennsylvania and a Delaware bank acting as trustee. After the trust was created, the donor moved to Florida, where she exercised her reserved power of appointment. According to Florida law, she thus republished the trust, converting it into one created under Florida law (according to which it was invalid).

37 The U.S. Supreme Court has never held that the Constitution prevents jurisdictional assertions contrary to international law, but legislation is assumed to be enacted in compliance with it. *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804).

38 *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

territory or maintained by their nationals, but the jurisdictional issues are thought to be different here precisely because they so much more often include cross-border contacts. Here too, then, the critical inquiry involves the intent of the actor to target a given forum. While it remains possible for a forum to be able to properly exercise personal but not prescriptive jurisdiction,[39] it is difficult to conceive of a situation in which prescriptive jurisdiction is permissible but personal jurisdiction is not.[40]

This multiplicity of potentially applicable regulatory regimes provides another incentive for users of the web to limit the fora they target, using emerging software to block access to disfavored states.

IS A BORDERLESS CYBERWORLD A PRACTICAL POSSIBILITY? OF CHOICE AND ENFORCEMENT

The jurisdictional landscape described above is one which states may impose, not one they must impose. The ability of multiple states to subject defendants to their laws and their courts dramatically increases the incentive for users of the new technology to limit the audience they seek to reach. Of course, this prevents the technology from full exploitation, but, more troubling, it may well cut off precisely those populations that in theory stand to gain the most from it. The poor, the rural, those remote from the highly developed countries of North America, Europe and Asia are the ones least likely to be targeted by those concerned about distant litigation and unfamiliar legal systems. Cyber-anarchy is not a solution, but cyber-choice might be.

To the extent that contacts between parties are reflected by contract, party choice may play a role in the jurisdictional dance under traditional law. Contractual clauses choosing applicable law and an exclusive court in the case of disputes are routinely enforced both in the U.S. and by member states of the EU when the contracting parties are businesses.[41] There is no agreement, however, about their validity when one party to the contract is a consumer.

In the U.S., under federal law such clauses are enforceable unless they are unfair or unconscionable, even if the contract is one of adhesion.[42] Pursuant to the Brussels Convention, choice of forum clauses are enforceable only if they favor the consumer; article 5 of the Rome Convention[43] places a similar restraint on choice of law clauses. While the difference is thought by many to be stark, in fact the U.S. may be less willing to enforce such clauses than it initially appears. States, of course, need not follow the federal contract law applicable to admiralty disputes, and not all will honor a clause that defeats the state's own mandatory consumer protection laws.[44] Furthermore, the fairness or reasonableness of a choice of forum or law clause that binds a U.S. consumer to foreign law and litigation may be much less obvious to a U.S. court than one that binds such a consumer to the law and forum of a state of the United States.

Driving the concern with choice clauses in business-to-consumer contracts is the long held assumption that the business/seller is in a more powerful position than is the consumer/purchaser. This assumption underlies the understanding in traditional jurisdictional case law that, although a consumer who purchases a product while at home may

39 If, for example, a defendant is subject to personal jurisdiction in the forum because he was personally served with process there, but if he lacks any other contacts with the forum, the forum could not use its own law to determine his liability without violating due process.

40 Citizens are always subject to personal jurisdiction, so if the basis of prescriptive jurisdiction is nationality the inquiries are identical. A person who acts within a territory has purposefully availed herself of the privilege of conducting activities there. And one who targets a forum is subject to personal jurisdiction there via *Calder* and has intended to cause effects there.

41 The *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S.1 (1972); the Brussels Convention, *supra* note 8, art. 17.

42 *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

43 The Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 80/934/EEC, 1980 O.J. (L266) 2.

44 *See, for example, State ex rel Meierhenry v. Spiegel Inc.*, 277 N.W.2d 298 (S.D. 1979).

sue the seller at the consumer's home, the seller may not sue the purchaser at the seller's home.[45] In a bricks-and-mortar world, the assumption is usually valid. Sellers define the markets they wish to serve and the terms upon which they are willing to sell. Buyers are limited as a practical matter to the finite number of sellers interested in serving their market and compelled to either accept or reject offered terms. Arguably, technology might reverse or at least equalize the classic disparity in power.[46]

A cyberspace merchant does retain the final choice. It is up to her whether to agree to sell a product to the consumer who requests it. And, through targeting, she can still define a limited market she chooses to serve. But such software at the moment is not completely effective, may be expensive, and need not be installed. If it is not, the consumer, rather than the merchant, may become the aggressor. Search engines permit him to locate all sources of the good he desires; technology may also permit him to program a cyber-robot, or 'bot, to undertake the search for him.[47] While he may still not be able to negotiate the terms of sale, the possibility increases as the size of the merchant decreases. L.L.Bean may not be willing to consider changing the price of a down coat; a small manufacturer of such coats in Finland might. But in any event, the ability to comparison shop on a scale never before possible empowers the seller in an equivalent way.

If the power imbalance between the buyer and seller is rectified by technology, the need for the law to favor the consumer/buyer recedes. Therefore, the justification for disallowing contractual choice clauses falls away and, with it, the perceived practical need for merchants to limit the number of markets they target. Agreeing to sell to the world is a much less scary choice if the merchant can limit its exposure to a single set of laws and courts, presumably its own. The distant seller, aware of the clause, can weigh the potential cost of faraway or effectively non-existent legal recourse in determining whether to purchase from a local or remote seller, in much the way travelers weigh the cost of purchases in foreign lands.

Governments, on the other hand, are understandably sympathetic to claims made by their nationals about wrongs incurred by contact with foreigners, even when the national has initially agreed to terms now seen as odious. Contractual choice clauses are effective in re-opening cyberspace only to the extent courts will enforce them. But a judgment rendered by a consumer's home forum against a foreign merchant is also meaningless unless a forum in which the defendant has assets is willing to enforce the judgment.

Both these realities fuel an on-going search for agreement both with respect to substantive law (harmonization) and jurisdictional principles.[48] One state is much more likely to accept the applicability of another state's law if the second state's regulations parallel those of the first. And the willingness of a state to enforce a judgment rendered by another depends on the state's acceptance of the rendering state's personal (and possibly prescriptive) jurisdiction.[49]

Cyberspace cannot exist outside any legal regime. Nor can it be governed by itself, as a separate nation-state. It is possible that, over time, sovereign states will accept party choice as a way to allow advantages the technology makes possible to flourish. But at the moment, the sovereign authority to subject those who target its nationals to personal and prescriptive jurisdiction provides an incentive to reproduce in cyberspace the same kind of barriers to access familiar historically. The lurking serpent has come into the open.

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45 To the extent that the result in *Burger King, supra* note 17, might have been read to question this long-standing understanding, the Court was clear that it did not.

46 *See generally* ABA Report, *supra* note 1, at 1829 et seq.

47 *Id.*

48 *Id.* at 1822 et seq.

49 In the U.S., one state's enforcement of another's judgment, if the rendering state comported with due process, is mandated by the full faith and credit clause, *supra* note 35. With respect to foreign judgments, courts of the U.S. generally enforce them if they comport with general Anglo-American notions of due process and are not in conflict with a fundamental policy of the forum. On the whole, foreign courts are less willing to enforce U.S. judgments; procedures in each country, of course, vary widely. *See generally* ABA Report, *supra* note 1 at 1874 et seq.