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**ELECTRONIC COMMERCE: ISSUES IN PRIVATE INTERNATIONAL LAW
AND THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION**

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I. INTRODUCTION.¹

1. The Internet has heightened interest in private international law and in alternative dispute resolution. The Internet's low economic barriers to entry invite participation in commerce and politics by small entities and individuals who cannot afford direct participation in many traditional markets and political arenas. These low barriers to entry, and greater participation by individuals and small entities, also encourage a greater incidence of small transactions. When dispute resolution costs are high, as they are for traditional administrative and judicial procedures, the transaction costs of dispute resolution threaten to swamp the value of the underlying transaction,² meaning on the one hand that victims are less likely to seek vindication of their rights and, on the other hand, that actors and alleged wrongdoers may face litigation costs that outweigh the advantages of their offering goods and services in the new electronic markets. To realize the potential of participation by small entities and individuals and of small transactions, it is necessary to reduce the costs of dispute resolution.

2. Second, the geographic openness of electronic commerce makes more likely stranger-to-stranger transactions. The absence of informal means of developing trust, as when one shops regularly at the local bookstore, means that both merchants and consumers will be inhibited in engaging in commerce unless they have some recourse if the deal goes sour. Some accepted form of dispute resolution must be available to establish the requisite confidence for commerce to occur at all.

3. Third, the Internet is inherently global. Goods offered for sale on a Web page published on a server physically located in Kansas are as visible to consumers in Kosovo as in Kansas. In other words, it is difficult to localize injury-producing conduct or the injury itself in Internet-based markets or political arenas. Traditional dispute resolution machinery and private international law rules depend upon localization to determine jurisdiction.³ Impediments to localization create uncertainty and controversy over assertions of jurisdiction. That uncertainty has two results. It may frustrate communities who resent being unable to reach through their legal machinery conduct occurring in a far off country. It also subjects anyone participating in the Internet to jurisdiction by any one of nearly 200 countries in the world, and in many cases, to their subordinate political units.

4. Even if negotiations succeed over an international treaty on civil judgment enforcement,⁴ that is not enough. A treaty will help reduce uncertainty. But a treaty will not solve the problem of a furniture manufacturer in Thomasville, North Carolina, who sells furniture through the Internet. The treaty may say that the furniture manufacturer must litigate

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² It is irrational to spend \$5,000 or \$10,000 for a lawsuit over a \$300 transaction.

³ See Restatement (Third) of the Law of Foreign Relations of the United States § 401 (1987) (describing bases for jurisdiction).

⁴ See § II(C).

in, let's say, Tirana, Albania where one of his customers is. That is not a very attractive proposition if the manufacturer sold \$1,000 worth of furniture, because it will cost it more to litigate there than the transaction was worth. And if the treaty says that the furniture manufacturer gets to litigate at home, in North Carolina, that won't be a very attractive proposition for the purchaser of the furniture in Tirana, Albania. New forms of dispute resolution can cross boundaries easily and reduce uncertainty with respect to applicable law and enforceability.

5. For electronic commerce and political discourse to flourish in the Internet, new forms of alternative dispute resolution must be designed and deployed. While much of the responsibility for creative design and practicable deployment depends on private initiative rather than governmental mandates, attention also must be paid to the position of private regulation in an overarching legal framework.

6. The Internet needs not only alternative dispute resolution in the adjudicatory sense—as in arbitration and mediation. It also needs rules made by private entities which get applied in alternative dispute resolution forums. Private rulemaking is much more common than many people assume. America Online and Microsoft Network make rules for subscribers; “Internet Corporation for Assigned Names and Numbers” (“ICANN”) makes rules for application in domain name disputes; seal organizations such as Truste make rules for those who wish to use the seal or maintain their membership in a private ordering regime; increasingly, filters and blacklists are being developed that embody rules for conduct in computer code. For these private rulemaking activities, even more than for private adjudicatory activities, public institutions must determine what is permissible and what is not; what will subject the rule maker to liability and what should be privileged.

7. Dispute resolvers outside the context of pure mediation where only party-identified interests count, must be able to make enforceable decisions. Once the dispute resolver has made a decision, that decision must be enforced against the losing party. Absent any possibility for coercive enforcement, the losing party has little incentive to comply voluntarily.⁵

8. Many arbitration systems allow the parties, the arbitrators, and analysts of the process to take the rules and the enforcement for granted. The arbitrator looks to a contract or ordinary law as the source of rules to be applied. The New York Convention and/or national arbitration statutes provide for judicial enforcement for any arbitration award.

9. But alternative dispute resolution systems for the Internet offer new sources of rules and of enforcement, making it desirable to think more deeply about rulemaking and enforcement as part of the overall matrix of alternative dispute resolution for the Internet. Within the analytical framework of private international law, one needs to think about choice of law⁶ and enforcement⁷ as well as forum selection.⁸

⁵ Exceptions may exist when the dispute arises and is resolved in the context of an ongoing relationship. Then, the losing party may comply in order to avoid damage to the relationship.

⁶ What systems of substantive law may be reference points for deciding cases: systems originating with private entities as well as with states? If so, what qualifies as a legitimate private source of law?

⁷ What kinds of private decisions are eligible for enforcement by public officers backed up by coercion? When enforcement takes place privately, what kinds of private enforcement actions give rise to civil or criminal liability?

II RECENT DEVELOPMENTS IN PRIVATE INTERNATIONAL LAW

A. Localization

10. All modern legal systems are pragmatic, in the sense that they limit formal prerogatives according to the practicability of exercising power which is subject to physical limits of space.⁹ In public and private international law, this translates into the concept of sovereignty. A state's power within its own boundaries is plenary,¹⁰ only recently limited by universal conceptions of human rights.¹¹ Outside its boundaries, exercise of coercive power is aggression¹² because it necessarily intrudes upon the sovereign prerogatives of other states. Legislatures and other rule makers may not extend their law to persons lacking relevant connections to the (geographically defined) state of the rule maker.¹³ Courts and other dispute resolution bodies may not make decisions or apply rules to persons lacking connections with their "geographically defined" venues.¹⁴

11. Concepts of prescriptive and adjudicative jurisdiction have evolved to accommodate commerce extending beyond the boundaries of a particular sovereign, but the jurisdictional concepts still depend upon localizing conduct. Tort law rules depend on where injuries

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⁸ What is the class of permissible forums the parties can select and have their selection respected by the regular courts?

⁹ See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (discussing how, in the United States, each state enjoys sovereignty over persons within its territory, except as limited by the Constitution).

¹⁰ See U.N. CHARTER art. 2, paras. 4, 7 (stating that the United Nations does not have the authority to interfere with a state's domestic sovereignty).

¹¹ See *Regina v. Bartle*, (H.L. Mar. 24 1999), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm> (allowing extradition of former head of state for violation of torture convention); Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1752-53 (2000) (offering interpretation of U.N. Charter that reconciles conflict between sovereignty and human rights law); Elizabeth E. Ruddick, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429, 449 (1997) (discussing conflict between human rights law and sovereignty).

¹² See John Linarelli, *An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes against the Peace and Security of Mankind*, 18 SUFFOLK TRANSNAT'L L. REV. 1 (1995) (explaining difficulty in defining aggression in international law); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 440 (2000) (explaining concept of aggression in evolution of humanitarian law); Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?* 7 DUKE J. COMP. & INT'L L. 411, 426 (1997) (explaining difficulty in justifying enforcement of prohibition against war crimes in territory of another state).

¹³ See *Phillips Petroleum*, 472 U.S. at 804 (requiring connection between controversy and state whose law is to be applied).

¹⁴ See *Asahi*, 480 U.S. at 102 (requiring purposeful availment of the benefits of the sovereign asserting jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (refining the "minimum contacts" standard set forth in *International Shoe Co. v. Washington*); *Zippo Mfg. V. Zippo Dot Com*, 952 F. Supp. 1119 (W.D.Pa. 1997) (holding that the defendant purposefully availed itself of doing business in the forum state).

occur;¹⁵ contract law rules depend on where contracts are made or performed.¹⁶ Property law rules depend on where the property is located.¹⁷

12. The Internet makes it more difficult to localize legally relevant conduct than preceding technologies of commerce. Where is a contract made when it is executed by the invisible interaction of server and client software on computers located in two different countries, neither of which may be the habitual residence of the buyer or seller?¹⁸ Where does tortious injury occur when a wrongdoer located halfway around the world pirates intellectual property?¹⁹ Where does tortious injury occur when a hacker launches a denial of service attack that clogs up the routers representing the only gateway to an e-commerce vendor but located in another place arbitrarily determined by network engineers? Do the courts of Virginia have in rem jurisdiction over everyone doing business on the Internet through a dot-com domain name merely because the domain names are “located” on a root domain server in Virginia?²⁰

13. Because of difficulties in localizing conduct in Internet markets, allocating jurisdiction to a formal public institution is uncertain, even as a theoretical matter.²¹ The law is adaptive and creative, however, and making good progress in working out theoretical solutions to problems arising from new technologies. It is not intellectually difficult, when working from established principles of localizing trans-border activities, to formulate rules that localize Internet conduct.²²

14. The concept of targeting is one such solution to the difficulties in localizing conduct in Internet markets.²³ Targeting entails a market participant directing its sales or purchasing

¹⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (providing general rules for choice of law in torts cases).

¹⁶ See *id.* § 188 (enunciating a general rule for choice of law in contracts cases, in absence of choice by parties).

¹⁷ See *id.* § 222 (stating a general rule for choice of law in property cases).

¹⁸ See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (holding that an agreement to offer software on computer of plaintiff subjected defendant to jurisdiction in plaintiff's home forum).

¹⁹ See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (rejecting fair use defense by Internet distributor of copyrighted works).

²⁰ Compare *Porsche Cars North America, Inc. v. AllPorsche.com*, Nos. 99-1804, 99-2152, 2000 WL 742185 (4th Cir. June 9, 2000) (allowing in rem jurisdiction over domain name), with *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 529 S.E.2d 80 (Va. 2000) (holding that domain name registration agreements for services were not subject to garnishments).

²¹ See ABA JURISDICTION IN CYBERSPACE PROJECT, ACHIEVING LEGAL AND BUSINESS ORDER IN CYBERSPACE: A REPORT ON GLOBAL JURISDICTION ISSUES CREATED BY THE INTERNET 8 (2000), at <http://www.kentlaw.edu/cyberlaw> (last visited Sept. 30, 2000).

²² See *Digi-Tel Holdings, Inc. v. Proteq Telecomms., Ltd.*, 89 F.3d 519, 523 (8th Cir. 1996) (noting that telephone calls and faxes into the forum state are insufficient by themselves to establish personal jurisdiction); *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383 (8th Cir. 1995) *cited in* *Initiatives, Inc. v. Korea Trading Corp.*, 991 F. Supp. 476, 479 (E.D. Va. 1997); *TSA, Inc. v. Nass*, No. CIV.A.96-4509, 1997 WL 47612, at 2 (E.D. Pa. Feb. 4, 1997).

²³ See *Zippo Mfg. Co.*, 952 F. Supp at 1123 *construed in* *Millennium Enter. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 915-16 (D. Or. 1999) (explaining *Zippo* continuum as a “sliding scale” under which the “likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet” and suggesting that jurisdiction exists over Web sites only when the forum

activity to a particular jurisdiction.²⁴ An Internet merchant wishing to reduce the uncertainty associated with potential regulation by nearly 200 national sovereigns and thousands of subordinate governmental entities can target only one or a few jurisdictions whose legal regime it understands and accepts. Alternately, if such a participant wishes to avoid the requirements or enforcement mechanisms of a particular sovereign, it can exclude or “de-target” that jurisdiction. A growing number of judicial decisions in the United States²⁵ and guidance issued by administrative agencies such as the Securities and Exchange Commission²⁶ are refining formulas for targeting and de-targeting.

15. The targeting concept avoids the uncertainty associated with subjecting an Internet merchant to the jurisdiction of any place where its Web site is visible,²⁷ which is usually everywhere in the world. On the other hand, extensive de-targeting has the effect of excluding consumers in de-targeted states from the benefits of global e-commerce.

B. Enforcement against Intermediaries

16. Concluding that the rules emanating from a particular legislature govern a transaction in a formal sense, or that a court or administrative tribunal has personal jurisdiction over a foreign e-commerce vendor, is not the end of the matter. The rules still must be enforced and the adjudicative decisions turned into monetary relief or practical cessation of illegal conduct.²⁸ Meaningful enforcement and application depends upon the practicality of asserting coercive control over property or persons located within the boundaries of the rule issuing or adjudicating sovereign²⁹ or the willingness of other sovereigns to recognize and enforce

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- state is targeted).
- ²⁴ See *Neogen Corp. v. Neo Gen Screening, Inc.*, 2000 WL 1199949 (W.D. Mich. Aug. 21, 2000) (analyzing case law in terms of targeting); ABA, *supra* note 34 §2.2.
- ²⁵ See, e.g., *Miller v. Asensio*, 101 F. Supp. 2d 395, 405 (D.S.C. 2000) (characterizing cases as uniformly rejecting jurisdiction based on availability of passive Web site).
- ²⁶ SECURITIES AND EXCHANGE COMMISSION, INTERPRETATION; USE OF ELECTRONIC MEDIA (April 28, 2000), <http://www.sec.gov/rules/concept/34-42728.htm> (last visited Sept. 30, 2000) (providing guidance in applying federal securities law to electronic media). See also SECURITIES AND EXCHANGE COMMISSION, INTERPRETATION; STATEMENT OF THE COMMISSION REGARDING USE OF INTERNET WEB SITES TO OFFER SECURITIES, SOLICIT SECURITIES TRANSACTIONS, OR ADVERTISE INVESTMENT SERVICES OFFSHORE (March 23, 1998), <http://www.sec.gov/rules/concept/33-7516.htm> (last visited Sept. 30, 2000) (explaining registration obligations for Web sites disseminating information for offshore sales of securities and investment services).
- ²⁷ See *Inset Sys. Inc., v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (finding that defendant satisfied minimum contacts component of personal jurisdiction based on availability of Web site in forum state).
- ²⁸ See Henry H. Perritt, Jr., *Will the Judgment-Proof Own Cyberspace?*, 32 INT'L LAW. 1121, 1123 (1998) (“The real problem is turning a judgement supported by jurisdiction into meaningful economic relief.”).
- ²⁹ See *Apostolic Pentecostal Church v. Colbert*, 173 F.R.D. 199 (E.D. Mich. 1997) (discussing whether federal marshal or state sheriff should execute federal judgment); *Dorwart v. Caraway*, 966 P.2d 1121 (Mont. 1998) (discussing judgment execution procedure in context of constitutional due process); THE BRUSSELS CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF FOREIGN JUDGMENTS: PAPERS AND PRECEDENTS FROM THE JOINT CONFERENCE WITH THE UNION DES AVOCATS EUROPÉENS (Gerald Moloney & Nicholas K. Robinson, eds. 1989) <http://www.maths.tcd.ie/pub/IrishLaw/table.htm> (last visited Sept. 30,

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foreign rules and decisions.³⁰ Whether such persons or property can be located, and whether transnational recognition and enforcement will occur, are additional, and potentially large, sources of uncertainty, in comparison to the uncertainty regarding theories of jurisdiction.

17. Although the Internet's virtual marketplace is indifferent to national borders and therefore sovereignty, it does depend upon physical devices, such as modems, telephone switching equipment, routers, radio transmitters, receivers, antennas and computers that function as servers and clients. While participants in small states conceivably can use the public switched telephone system to connect to Internet service providers located entirely outside their states,³¹ the typical merchant or consumer uses a local Internet service provider, who has leased lines, routers, and servers, and may have radio transmitting and receiving apparatus, in the same jurisdiction where the merchant or consumer is located. The legal system focuses on locally present property as a justification for jurisdiction and, more importantly, as the means for enforcing rules and decisions. This encourages legal institutions to impose liability on intermediaries as a way of reducing uncertainty with respect to jurisdiction and enforcement power over more remote actors who may bear more direct responsibility for disputed conduct.³²

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2000) (discussing the practical application of the Brussels Convention to enforce foreign judgments).

³⁰ *Compare* de la Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1383 (D. Del. 1991) (holding that reciprocity is not a prerequisite to recognition of a judgement) *with* Hilton v. Guyot, 159 U.S. 113, 228 (1895) (holding that comity requires reciprocity).

³¹ An example would be a consumer located in Skopje, Macedonia, who places a long distance telephone call to a Microsoft Network point of presence in Frankfurt, Germany.

³² See Kim L. Rappaport, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765, 790-91 (1998) (describing prosecution of CompuServe executive for material on Internet site that violated German Information and Communications Services Act). In mid-2000 an anti-Nazi group in France sued Yahoo! for making available material through an American Internet site that contravened French law. See Steve Bold, *Yahoo! In Online Auction Legal Spat with French Authorities*, NEWSBYTES NEWS NETWORK, May 16, 2000, available at 2000 WL 21177244. On November 20, 2000, in LICRA and French Union of Jewish Students v. Yahoo! Inc., the Country Court of Paris ordered Yahoo! Inc. to comply with a May 22 order within 3 months from notification, subject to a penalty of 100,000 Francs per day of delay effective from the first day following the expiration of the 3 months period. The May 22, order stated that Yahoo! Inc. must 1) take all necessary measures to make impossible access to Nazi merchandise or any other site or service that may be construed "as an apology for Nazism or contesting the reality of Nazi crimes;" 2) to warn all Internet surfers before proceeding with searches on yahoo.com of the risks involved in continuing to view such sites; and 3) continued the proceeding to allow Yahoo to submit for deliberation by all the interested parties the measures it proposes to take to "put an end to the trouble and damage suffered and to prevent any further trouble." To do so, Yahoo must not allow surfers of French nationality or calling from French territory to access Nazi merchandise or any other site or service that may be construed "as an apology for Nazism or contesting the reality of Nazi crimes." Yahoo is also required to warn all Internet surfers before proceeding with searches on yahoo.com of the risks involved in continuing to view such sites. Furthermore, the Court ordered a three month continuance of the proceeding to allow Yahoo to submit for deliberation by all the interested parties the measures it proposes to take to "put an end to the trouble and damage suffered and to prevent any further trouble." Furthermore, Yahoo is ordered to make payment of 10,000 Francs to each of the plaintiffs. The Court reasoned that even though the "Yahoo Auctions" site does generally target surfers based in the United States, auctions involving symbols of Nazi

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18. While intermediary liability represents a potential solution to the legal uncertainty, it is also a source of additional transaction costs.³³ When intermediaries face liability for conduct engaged in by their customers, they have an incentive to exclude customers who may increase their risk. Risk averseness by intermediaries can undermine the Internet's potential as much as risk averseness by end users.

C. Hague Negotiation

19. Both localization and enforcement are under active discussion in the Hague Conference on Private International Law,³⁴ which has 100 years of experience in facilitating multilateral agreement among states on public law frameworks for private law.³⁵ Now, the Conference is considering a comprehensive treaty for judicial jurisdiction and enforcement of foreign civil judgments.³⁶ An October draft convention on international civil judgments is modelled closely on the European Brussels and Lugano Conventions. The Conference has an opportunity to work out basic ground rules for localizing conduct in Internet markets, through targeting and otherwise.³⁷ It also has an opportunity to define the relationship between private regulation and public enforcement.³⁸

20. As of this writing, the main controversies preventing agreement on the draft convention involve U.S. objections to limitations on general doing business jurisdiction, U.S. objections to extension of tort jurisdiction to the place of injury without regard to the purposefulness test

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ideology "may be of interest to any person." Furthermore, Yahoo is aware of addressing French viewers because French parties making connections to Yahoo auction site from a terminal located in France receive Yahoo advertising banners written in the French language. The Court stated that the act of displaying objects of Nazi ideology in France is a violation of Article R645-1 of the Penal Code and thus is a "threat to internal public order." The Court also stated that the technical measures and the initiatives at its disposal "in the name of the simple public morality" give Yahoo an opportunity to satisfy the injunctions of the May 22, order. The two technical procedures identified by the Court, geographical identification and user declaration of nationality, would allow Yahoo! Inc. to filter out French IP addressed at a success rate of 90 %.

³³ When intermediaries are concerned about potential liability, they include the expected value of liability into their costs of doing business.

³⁴ <http://www.hcch.net/e/workprog/jdgm.html>.

³⁵ See, e.g. Convention relating to civil procedure 1 March 1954; Convention relating to the settlement of the conflicts between the law of nationality and the law of domicile 15 June 1955; Convention concerning the recognition of the legal personality of foreign companies, associations and institutions 1 June 1956; Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions 15 November 1965; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 15 November 1965; Convention on the Choice of Court 25 November 1965; Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 18 March 1970.

³⁶ <http://www.hcch.net/e/workprog/jdgm.html> (draft convention and associated analyses).

³⁷ http://www.ali.org/ali/Intl_Juris_Proj.htm (analyses of Hague Conference efforts by ALI)

³⁸ In an experts conference convened by the Hague Conference in Ottawa in 2000, the author suggested that the draft convention exception for choice of forum clauses enforceability for consumer contracts could be conditioned on the consumers not having available to them an acceptable private dispute resolution alternative .

of World Wide Volkswagen,³⁹ and the exclusion of consumer and employment contracts from choice of forum clauses. The last issue is of particular importance to the evolution of Internet-related ADR. Usually, the legal position of arbitration is determined with reference to forum selection clauses in contract. Disabling consumers from being able to agree on forum selection would be a setback for consumer ADR on the Internet.

D. The Role of Privately Made Law

21. Private international law long has held a place for private regulation through its acceptance of forum selection and choice of law clauses. A forum selection clause in the contract permits the contracting parties to waive their right to present a dispute to a public court and instead to present it to another tribunal—sometimes a court in another country; sometimes arbitration. A choice of law clause permits parties to a contract to legislate, in the sense that they select a sovereign whose law should be applied to their dispute other than the sovereign whose laws otherwise would be applied.

22. Long standing controversies exist over the kinds of forums that qualify for deference in forum selection clauses. Uncertainty over whether private arbitration qualifies for forum selection was the stimulus for enactment of the Federal Arbitration Act in the United States and a negotiation of the New York Convention. The Internet renews the debate and increases uncertainty because of the proliferation of new kinds of dispute resolution mechanisms that do not qualify under traditional criteria for arbitration.

23. Party autonomy expressed through choice of law clauses traditionally has been even more limited. Some legal systems and commentators do not permit the parties to select as a source of law anything other than a state bearing some relationship to the transaction. Others would allow designation of any state, but disallow designation of private sources of law. On the other hand, as a matter of contract law, it is difficult to understand why the parties would lack legal competence to incorporate by reference the rules of a private standard setting body. If they can do that, logically they must be able to incorporate by reference the rules of any private body unless the content of a particular rule offends public policy. In a sense, defining the position of new dispute resolution systems—what one might call private regulatory systems—within traditional legal frameworks is a matter of elaborating private international law's forum selection and choice of law concepts. But even when this is done, that will not be enough; private regulation of the Internet is not limited to situations in which contractual relations exist.

III CATEGORIES OF PRIVATE REGULATION

24. As the introduction explained, private dispute resolution systems are but a subset of private regulation, which also includes rulemaking and enforcement. Developing the most appropriate legal framework for private dispute resolution requires understanding the available legal frameworks for private regulation in general.

³⁹ World Wide Volkswagen v. Woodson, 444 U.S. 286, 295 (1980) (foreseeability of contacts with forum state insufficient to support personal jurisdiction; contacts must be purposeful).

25. Private regulation occurs in four basic situations: when public institutions delegate rulemaking and adjudication authority to private institutions or defer after the fact to private decisions, when those subject to private regulation consent in advance to the private regulatory regime, when private decisions are sufficiently acceptable to those affected by them that they acquiesce after the fact rather than presenting their disputes to public institutions, and when persons or entities in control of valuable resources issue rules and enforce them by threatening denial of access to the valuable right. The fourth situation presents greater challenges for structuring hybrid regulation because it lacks the enforcement and judicial-review connections inherent in the first two situations.

26. Few legal systems rely entirely on private regulation to protect consumers and small businesses. The traditional difficulty with private regulation is that it may not express the political consensus of democratic societies with respect to values to be enforced⁴⁰ or the balance of power to be struck between stronger and weaker market participants.⁴¹

27. Combining the jurisdictional strengths of private regulation, and the greater political legitimacy of public regulation requires development of new hybrid frameworks. Public law⁴² can set minimum, and relatively general, standards of conduct and provide backup enforcement, representing the boundaries of a space within which a multiplicity of private regulatory regimes can work out detailed rules and first-level dispute resolution and rule enforcement machinery.⁴³

28. The relatively general character of the public law rules makes it easier to achieve consensus among multiple sovereigns with different legal traditions and varying political alignments, while also excluding private regulatory regimes that might be insufficiently protective of weaker parties or too restrictive of competition and innovation in the absence of the public law framework.

A. Public law delegation and deferral

29. The first category of private regulation begins with public power to make and apply law, which is transferred to private entities.

30. Notwithstanding the “non delegation doctrine” which questions the loss of accountability resulting when public institutions performing legislative functions delegate

⁴⁰ See Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View From Liberal Democratic Theory*, 88 Calif. L. Rev. 395 (2000).

⁴¹ European Commission, Data Protection Working Party, Working Document: Judging industry self-regulation: when does it make a meaningful contribution to the level of data protection in a third country? (14 Jan. 1998), http://europa.eu.int/comm/internal_market/en/media/dataprot/wpdocs/wp7en.htm.

⁴² Terminology is a problem in talking and writing about these issues. "Public law" as the phrase is used to describe hybrid regulation, signifies law emanating from legislatures and courts. "Private law" in contrast signifies law emanating from private rule makers and adjudicators. Both of these categories arguably belong to the superset of private international law. Public international law involves relations between sovereigns, and that is not the subject of this paper at all.

⁴³ See Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 Ky. L. Rev. 885, 931 (2000).

their authority to private decision makers,⁴⁴ delegation of rulemaking power is commonplace in the modern regulatory state, including federal delegation to states,⁴⁵ delegation of authority to set standards for health care to the Joint Commission on Accreditation of Healthcare Organizations (“JCAHO”),⁴⁶ delegation of authority to approve minimum price orders to agricultural cooperatives,⁴⁷ delegation of rules and enforcement of airport security arrangements under the Federal Aviation Act, and delegation of authority over railroad trucking rates to Rate Bureaus. Newer examples include the COPPA Safe Harbor Statutory Provisions, and the US/EU Privacy Safe Harbor Agreement.

31. Deferral to private decisions is a slightly different concept. Public adjudicatory institutions have the power to decide disputes, but they abstain from deciding them in favor of private decisions when certain criteria are met. “National Labor Relations Board” (“NRLB”) deferral to collectively bargaining arbitration, suspension of judicial litigation in favor of private arbitration, and eventual enforcement of private arbitration awards under the Federal Arbitration Act and the New York Convention, and abstention by court in cases involving private association decisions all are examples.

32. In this context for private regulation, the inherent power of the public rulemaking and adjudicatory institutions represent the public law framework, while the exercise of delegated power and the making of decisions to which public institutions will defer, represent the private activity within the framework.

33. This context provides a robust source of criteria for making private decisionmaking accountable. The Delegation Doctrine in Administrative Law ensures accountability by requiring “channeling” of private decisionmaking through limits on the scope of the subject matter of the private actors, by enforcing procedural regularity, and by assuring judicial review of decisions.⁴⁸

⁴⁴ Schechter Poultry Corp. v. U.S. 295 495 (1935); Panama Refining Co. v. Ryan 293 U.S. 388 (1935), Henry H. Perritt, Jr., *International administrative law for the Internet: mechanisms of accountability* 51 Admin.L.Rev. 871 (1999) (all discussing delegation doctrine). Dean Krent offers a working definition of delegation: “any congressional act which empowers those outside Congress to enforce or implement a legislative objective and backs those efforts with the coercive force of the federal government.” Harold J. Krent, *Fragmenting The Unitary Executive: Congressional Delegations Of Administrative Authority Outside The Federal Government*, 85 Nw. U. L. Rev. 62, 67 (1990). [hereinafter “Krent on Delegation”].

⁴⁵ Krent on Delegation at 80-84.

⁴⁶ Krent on Delegation at 86; Freeman at 610-613 (citing Inspector General reports calling for greater HCFA oversight of accreditation: www.medicare.gov/nursing/home.asp; www.dhhs.gov/progorg/oei/reports/a381.pdf; www.dhhs.gov/progorg/oei/reports/a382.pdf)

⁴⁷ Krent on Delegation at 86-87.

⁴⁸ See Harold J. Krent, *Fragmenting The Unitary Executive: Congressional Delegations Of Administrative Authority Outside The Federal Government*, 85 Nw. U. L. Rev. 62, 67 (1990); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L.Rev. 543, 543 (2000); A. Michael Froomkin, *Wrong Turn In Cyberspace: Using ICANN To Route Around the APA and the E Constitution*, 50 Duke L.J. 17 (2000).

B. Consent/waiver

34. Most private regulation occurs within a contractual framework, in which those bound by private regulatory decisions agree in advance to be bound. Private associations such as the Boy Scouts,⁴⁹ churches, condominium associations, AOL and Microsoft network all are examples. In this form of private regulation, contract identifies the legislators, judges, and sheriffs, and also defines subject matter, the processes for making, applying, and enforcing rules. The parties bound by private regulatory decisions are congruent with the parties to the contract.

35. Many private privacy regulatory regimes depend upon intermediaries to revoke membership or seals that immunize members or holders from direct action by public authorities.⁵⁰ In these circumstances, also, the legal framework is contractual.

36. While consent-based private regulatory regimes may appear purely private, they are not. Contract law developed and applied by public institutions provide a public law framework within which the private regimes operate. While usually denominated “private law” rather than “public law,” the frameworks nevertheless represent judgments by public institutions as to the permissible scope of private regulation.

37. Controversies over this kind of private regulation for the Internet center on the meaning of “consent.” Often, the terms of the contractual framework are determined not through negotiation among all affected parties, but by unilateral decision of one party. The law must specify what kind of conduct by the other party(ies) represents assent to the unilaterally developed terms. Whether subjecting oneself to the private regime represents legally effective consent turns on adequate notice of the terms, and on the availability of alternatives to a particular regime. This, in turn, invites evaluation of the “switching costs” for leaving one regime in favor of another.⁵¹

C. Acquiescence

38. Regardless of the construction of public law frameworks some private regulation will occur, in circumstances where participants voluntarily accept it, after the fact.

39. In many cases the effect of private decisionmaking depends, not on explicit delegation by public institutions, and not on before-the-fact consent to the private regulatory regime, but on the practical acceptability of the private decisions. Employees denied promotions or dismissed often accept the employer decisions—supervisory or appellate—rather than suing in court or filing charges with the NLRB or the Equal Opportunity Commission. Private litigants often accept the result of advisory arbitration or other dispute resolution mechanisms rather than pressing for a decision by a jury or judge. Most parties to credit card disputes apparently accept the result of the chargeback process rather than suing in court.

⁴⁹ See *Boy Scouts v. Dale*, 530 U.S. 640 (2000).

⁵⁰ <http://www.truste.org/>; <http://www.bbbonline.org/>

⁵¹ See Neil Weinstock Netanel, *Cyberspace Self Governance: A Skeptical View from Liberal Democratic Theory*, 88 *Calif. L. Rev.* 395, 451 (2000).

40. This category of private regulation definitionally assures accountability, because those adversely effected by private decisions can take their dispute to another level, eventually ending up before a public institution. Their power to acquiesce or to withhold acquiescence assures accountability to them.

D. Self-enforcing; direct deprivation of valuable right

41. The fourth category of private regulation presents the greatest accountability challenges. In this context, the power of private decision makers stems not from explicit or easily implied consent by those subject to the private governance, nor from explicit delegation of legal authority possessed by public institutions, but from de facto control over a valuable resource by private persons or entities. Self-help repossession of tangible chattels and private control of range land⁵² are pre-Internet examples.

42. Domain name regulation, regulation by private Internet and service content providers, and “Mail Abuse Prevention System” (“MAPS”) are examples in the Internet context.⁵³ The authority of ICANN and of domain name registrars derives not so much from the Department of Commerce/ICANN Memorandum of Agreement, as from the de facto control over the databases that translate domain names into IP addresses. By refusing to list a domain name in authoritative domain name servers, ICANN and domain name registrars can deprive one of access to the Internet. AOL and Microsoft Network can exclude subscribers from access to other subscribers under rules developed privately by the service providers.

43. MAPS represents an extension of this category of private regulation. The RBL is machinery for blocking access to the Internet. It was created by private unilateral action. It is a valuable resource in the negative sense that one can use the Internet only by not being listed in the RBL.

44. This category of private regulation overlaps the first two categories to some extent. One can argue that electing to use a private resource represents legal consent to the private regulatory regime associated with the private resource. But this is an attenuated form of consent. Because the resource is valuable, switching costs may be so high as to be infinite. The consent question resolves into a switching cost question, which, in turn, resolves into questions whether the resource to which access potentially is denied can easily be duplicated by others.⁵⁴

45. How the law should provide a framework for this form of private regulation is problematic. U.S. law long has drawn a sharp distinction between public and private actors.

46. In *Flagg Brothers v. Brooks*,⁵⁵ the Supreme Court rejected the idea that self-help repossession represented state action, entitling the adversely affected party to the protections

⁵² See Terry L. Anderson & J. Bishop Grewell, Property Rights Solutions For The Global Commons: Bottom-Up Or Top-Down? 10 Duke Envtl. L. & Pol'y F. 73 (1999) (describing private regulation of cattle ranges).

⁵³ See § V of this paper for concrete description.

⁵⁴ See Henry H. Perritt, Jr., Law and the Information Superhighway § 2.10[F] (2d ed. 2000) (describing essential facilities doctrine and citing cases).

⁵⁵ 436 U.S. 149 (1978).

of the due process clause of the Fourteenth Amendment.⁵⁶ It referred to the “essential dichotomy between public and private acts.”⁵⁷ “While as a factual matter any person with sufficient physical power may deprive a person of his property, only a State or a private person whose action may be fairly treated as that of the State itself, may deprive him of an interest encompassed within the Fourteenth Amendment’s protection.”⁵⁸

47. The central question with respect to this category of private regulation is what form the public law framework should take. That depends, in turn, on the existence of a private right of action to challenge decisions by this category of private regulator, and on the criteria that would entitle the private regulator to a privilege or immunity. These questions cannot be resolved without also considering the appropriate prerogatives of those who control private property.

48. Buried beneath these questions of how past causes of action and models for controversies can be mapped to the Internet is the question whether access to the Internet represents a new kind of interest that should be entitled to legal protection; in other words, should access to the Internet be a right? Even if such a right should be recognized by legal systems, much heavy intellectual lifting remains to define the boundaries of that right.

E. Defensive private regulation

49. Private regulation often occurs as a defensive measure by intermediaries potentially subject to liability for information they handle. Usually these intermediaries find themselves in the fourth situation -- in control of valuable resources.

50. Internet service providers or telecommunications entities may be drawn into a regulatory role by the threat of liability imposed on them for the conduct of users of their services. To reduce the risk of liability, intermediaries who are subject to liability for harm caused by content originators have a strong incentive to exclude any content or commerce that poses a risk.⁵⁹ Defensive private regulation involves great risk of private censorship and exclusion of risky content and commerce.

IV. LEGAL ANCHORS FOR ALTERNATIVE DISPUTE RESOLUTION

51. Appropriately designed dispute resolution mechanisms offer lower costs, reassure participants, and solve jurisdictional problem because use of them manifests consent.

52. The experience of WIPO in adjudicating nearly a thousand domain name disputes shows the willingness of Internet users to submit their disputes to private dispute resolution institutions applying rules developed by private bodies.⁶⁰

⁵⁶ 436 U.S. at 153.

⁵⁷ 436 U.S. at 165 (internal citations and quotations omitted).

⁵⁸ 436 U.S. at 157 (internal quotations and citations omitted).

⁵⁹ The incentive is reduced by 47 U.S.C. § 233, immunizing certain intermediaries from liability as “publishers.”

⁶⁰ See Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OH. ST. J. DIS. RES. 675 (2000).

A. The New Enforcement

53. Larry Lessig has helped us understand that Internet regulation can be profoundly different because enforcement of rules occurs through code rather than by the human intervention of judges and sheriffs.⁶¹

54. This means the elimination of the usual opportunity for public legal institutions to assure accountability of private rulemaking, adjudication, and enforcement at the point when an ADR decision is enforced in a regular court.

55. When code-based enforcement is involved, as often is the case in Internet disputes, new mechanisms, and some new criteria, must be used to assure accountability of private regulatory decisionmakers.

56. The need for new thinking and new doctrine is most obvious with respect to the development of causes of action to permit review of MAPS rules and rule application, but some commentators believe the same is necessary to reform ICANN rulemaking and adjudication as well.

V. THREE NEW CASES

57. Three cases involving Internet disputes make more concrete some of the open issues relating to choice of law and enforcement. All three of them involve enforcement or the possibility of enforcement through technical means, not requiring coercion by public authorities. Two of them involve revocation of domain names by domain registrars; the other involves enforcement by blocking IP addresses of rule violators.

58. The three cases differ in the source of rules applied. The first involved application of a rule developed and promulgated by ICANN, and adjudication by the WIPO domain name dispute resolution process—one of the most successful alternative dispute resolution systems for the Internet.

59. The second involved application of a criminal statute of the State of Illinois to a Web server based in Austria. The adjudicator in this case was a regular Illinois court of general jurisdiction.

60. The third case is the most interesting because it raises the most novel issues and presents the greatest challenges for designing hybrid regulatory systems for the Internet. In it, the rule maker was a private individual, with no contractual relationship with those to whom the rule is applied, and there was no independent adjudicator.

A. Walmartcanadasucks

61. Wal-Mart Stores, Inc v. walmartcanadasucks.com, Case No. D2000-1104, was the third case involving disputes between the respondent and Wal-Mart. The two earlier cases, involving domain names confusingly similar to the Wal-Mart trademark, were resolved in Wal-Mart's favor. The third case involved a much narrower question: whether a domain

⁶¹ Lawrence Lessig, *Code and Other Laws of Cyberspace*, 218-219 (2000).

name including the suffix “sucks” can be confusingly similar to the text string to which “sucks” is appended. The sole panelist, the author of this paper, concluded that a domain name including the word “sucks” cannot be confusingly similar, and that a privilege for criticism and parody reinforces that conclusion.

62. The respondent hardly had clean hands. He had been found in the past to be a cybersquatter with respect to this complainant.

63. But, the panel concluded, distasteful conduct should not stampede UDRP decision makers into an unwarranted expansion of the domain name dispute process. The UDRP has a narrow scope. It is meant to protect against trademark infringement, not to provide a general remedy for all misconduct involving domain names. Posting defamatory material on a Web site would not justify revocation of a domain name under the UDRP. Posting child pornography on a Web site would not justify domain name revocation. While a domain name registrar may be privileged to revoke a domain name for “illegal use” under § 2 of the Uniform Registration Agreement, whether a use is illegal in general is beyond the subject matter jurisdiction of an administrative panel under the UDRP.

64. Transfer or revocation of a domain name as a remedy in a dispute panel proceeding is authorized only when the panel finds (1) that the domain name is identical to or confusingly similar to a trademark and (2) when there is bad faith.

65. Bad faith, no matter how egregious, cannot supply a likelihood of confusion where it does not otherwise exist. Suppose the owner of the trademark Acmebytes registers and uses the domain name Acmebytes.com. Suppose further that the proprietor is named Agnes. If someone registers the domain name “agnesisawitch.com” and offers to surrender it in exchange for the payment of money, the bad faith elements of the ICANN policy no doubt would be satisfied. But Agnesisawitch.com is not confusingly similar to Acmebytes.com and the presence of bad faith cannot make it so.

66. I do not see how a domain name including “sucks” ever can be confusingly similar to a trademark to which “sucks” is appended. But whether or not a per se privilege for use of “sucks” is appropriate, the record in this case did not support a finding that the ICANN policy was violated.

67. Thus whether walmartcanadasucks is effective criticism of Wal-Mart, whether it is in good taste, whether it focuses on the right issues, all are immaterial; the only question is whether it is criticism or parody rather than free-riding on another’s trade mark.

68. Because the accused domain name was not identical or confusingly similar to a trademark or service mark in which the complainant has rights, I concluded that the complainant did not establish the elements of a violation of the ICANN Policy.

B. Voteauction.com

69. In October, 2000, the Chicago Board of Election Commissioners became concerned that a Web site located in Austria, voteauction.com, had the potential to corrupt or, at least, to undermine confidence in the general election subsequently held on 7 November 2000 in Chicago and elsewhere in the United States. voteauction.com solicited voters in the then forthcoming election to offer to sell their votes, and also solicited persons interested in buying those votes. The Web site was constructed so that offers to sell and offers to buy were made

by filling out a form that included the address, with a pull down list including Illinois as an option. Moreover, the Web site also included a summary of outstanding offers with Illinois as a specific listing. There was, thus, little difficulty in concluding that Illinois courts could exercise jurisdiction over the Web site under the Zippo Continuum⁶² and the targeting concept of Millennium Enterprises.⁶³

70. Accordingly, the Board of Election Commissioners filed a civil lawsuit in the Circuit Court of Cook County against voteauction.com and its individual organizers and managers.

71. But the existence of theoretical jurisdiction was not enough; any judgment also must be enforced, and the procedures for transnational enforcement of judgments not only are uncertain, they would take months. The election was scheduled in weeks.

72. So, the Election Commissioners thought about practicable enforcement measures that might be taken against property located in the jurisdiction, or at least in the United States. One possibility was to target the domain name, "voteauction.com." Such an approach had been suggested by the author of this article in "Will the Judgment Proof Own Cyberspace."⁶⁴ The offending domain name was present in Illinois—and hundreds or thousands of domain name servers supporting hundreds or thousands of Internet service providers in the vicinity of Chicago. But litigating against all those ISPs quickly was ruled out. Instead, voteauction.com's domain name registrar, Domain Bank, was named as a defendant in the lawsuit, and the draft injunction attached to the complaint included a paragraph ordering that the domain name be withdrawn or cancelled. In October 2000, Judge Murphy of the Circuit Court of Cook County Illinois signed the injunction after a hearing.

73. Domain Bank had been notified of the lawsuit, and had engaged in extensive telephonic discussions with counsel for the Election Commissioners. Domain Bank had, in its standard domain name registration agreement, a provision prohibiting the use of domain names for "illegal purposes." After the injunction was issued, signifying a judicial determination that the domain name was being used illegally, Domain Bank cancelled the voteauction.com domain name, shutting down voteauction.com all over the world.

74. But celebrations of victory in Chicago were tentative, and sure enough, about a week later voteauction.com opened up under a new domain name, "vote-auction.com," and this domain name was registered in Switzerland with CORE. But CORE had a similar prohibition against illegal use in its standard domain name registration agreement. After extensive telephonic and email discussions between counsel for the Election Commissioners and counsel for CORE, CORE also cancelled the vote-auction.com domain name, once again shutting the site down. Subsequently, voteauction.com sought to publicize its IP address, the

⁶² Zippo Mfg. V. Zippo Dot Com, 952 F. Supp. 1119 (W.D.Pa. 1997) (holding that the defendant purposefully availed itself of doing business in the forum state).

⁶³ Millennium Enter. v. Millennium Music, LP, 33 F. Supp. 2d 907, 915-16 (D. Or. 1999) (explaining *Zippo* continuum as a "sliding scale" under which the "likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet" and suggesting that jurisdiction exists over Web sites only when the forum state is targeted).

⁶⁴ Henry H. Perritt, Jr., *Will the Judgment-proof Own Cyberspace?* 32 INT'L LAWYER 1121 (1998).

use of which would avoid the domain name system all together, but by then, the election had been held.

75. The *voteauction.com* litigation illustrates an interplay between public and private regulation different from *walmart*. The lawsuit and the injunction obviously were traditional adjudicatory processes by a court—a paradigmatic public institution. But an important part of the overall result turned on the private rule, promulgated by a private institution—the domain name registrars—that prohibited illegal use of the domain name. Based on the determination of illegality by the public institution, the private institution used its power over an asset—the domain name—to achieve the result desired by the complainant. *Voteauction.com* can be understood to be an interesting case about judicial jurisdiction, but it also is about enforcement of a very broad rule by a private intermediary.

76. *Voteauction.com* involved the inverse of the usual relationship between public and private institutions. In *voteauction.com*, the public courts in Illinois performed the adjudicatory function, and the private domain name registrars decided whether to enforce the judicial decision. Because no injunction clearly supported by personal jurisdiction bound either of the domain name registrars, their actions in revoking *voteauction.com*'s domain name privileges is best understood as purely private action, informed by the public determination by the Circuit Court of Cook County.

77. *Voteauction.com* also showed the importance and practicability in working out the boundary between public and private regulation. In some theoretical sense, it would have been better to have enforced the injunction against domain name translation in or near Chicago. That would have kept the enforcement action within the sovereign whose laws were being enforced. It also would have comported more comfortably with geographic limits on the jurisdiction of the court issuing the injunction. But doing that was impracticable, given the large number of ISPs and uncertain patterns of use. It was much easier under tight time deadlines imposed by the proximity of the election, to focus enforcement efforts on a single intermediary, the first located in another state but within the United States, and the second located in a foreign country. The theoretical jurisdictional grounds were shakier, but enforcement at this level was practicable.

C. The MAPS Controversy

78. The MAPS⁶⁵ is a form of private regulation that operates completely outside a public law framework. MAPS is a nonprofit California corporation that allows ISPs and email service providers to exclude spam⁶⁶ from their systems. MAPS maintains a list of IP addresses, known as the “Realtime Blackhole List” (“RBL”),” and permits MAPS subscribers automatically to exclude from their systems any email message originating from one of the listed IP addresses. Some 20,000 ISPs, corporations, government agencies and individuals, comprising some 40% of the Internet, subscribe to MAPS.⁶⁷

⁶⁵ <http://maps.vix.com>

⁶⁶ Spam is unsolicited email broadcast to hundreds or thousands of email addresses.

⁶⁷ *Harris Interactive, Inc. v. Mail Abuse Prevention System*, No. 00-CV-6364L(F) (W.D.N.Y. cplt filed Aug. 9, 2000) [hereinafter “Harris Complaint”] at para. 50. MAPS subscribers include Microsoft, BellSouth, Qwest, Micron, and AltaVista. *Id.* at para. 62.

79. MAPS has published rules, known as “Basic Mailing List Management Principles for Preventing Abuse” (BMLMPPA”),⁶⁸ which purport to state Internet standards and best current practices for proper mailing list management. Among other things the rules require use of a “double opt-in procedure”⁶⁹ before mail can be sent to a particular addressee. Complaints about mailers not complying with the rules result in the mailer being put on the RBL,⁷⁰ and owners of IP addresses on the RBL can be removed only by satisfying MAPS they will comply in the future.⁷¹

80. MAPS illustrates the fourth type of private-regulation identified in § III -- regulation enabled by control of a valuable private resource. And MAPS starts, not with ownership of the valuable private resources; the resources are owned by thousands of private internet service providers. MAPS uses technology, “code” in Professor Lessig’s parlance, to extend its private decisions into control of resources owned by others.

81. In August 2000, Harris Interactive, Inc., a public opinion survey organization used MAPS and a number of its subscribers in the United States District Court for the Western District of New York.⁷² The complaint alleges tortious interference with business and contractual relations,⁷³ commercial disparagement,⁷⁴ negligent breach of a duty to administer the RBL in a fair and evenhanded manner,⁷⁵ violation of New York general business law prohibiting deceptive and confusing consumer communications,⁷⁶ defamation per se,⁷⁷ conspiracy to interfere tortiously with plaintiff’s business,⁷⁸ federal antitrust violations for concerted refusal to deal,⁷⁹ attempted monopolization,⁸⁰ monopolization,⁸¹ conspiracy to monopolize by refusal to deal,⁸² forming and operating a trade association that unreasonably restricts competition,⁸³ and violation of the New York “Donnelly Act.”⁸⁴ The suit requests compensatory damages in excess of \$50 million and punitive damages.

The Harris lawsuit reveals the dilemmas faced by a self-regulatory intermediary. The lawsuit alleges that MAPS placed Harris on the RBL without good cause,⁸⁵ and without reasonably investigating facts or giving Harris an opportunity to be heard,⁸⁶ that it promulgated standards

⁶⁸ Harris complaint appendix; <http://maps.vix.com>.

⁶⁹ The double opt-in procedure requires a recipient to indicate affirmatively that it wishes to be on a mailing list and then to respond affirmatively to an email message sent to confirm the subscription. BMLMPPA Rule 1; Harris Complaint para. 47.

⁷⁰ Harris Complaint para. 49.

⁷¹ Harris Complaint para. 51.

⁷² Harris Interactive, Inc. v. Mail Abuse Prevention System, No. 00-CV-6364L(F) (W.D.N.Y. cplt filed Aug. 9, 2000) [hereinafter "Harris Complaint"].

⁷³ Harris Complaint paras. 77-82 (First cause of action); id. at paras. 114-119 (Seventh Cause of Action); id. at paras. 130-135 (Tenth Cause of Action).

⁷⁴ Id. at paras. 83-88 (Second cause of action); id. at paras. 120-124 (Eighth Cause of Action).

⁷⁵ Id. at paras. 89-93 (Third Cause of Action)

⁷⁶ Id. at paras. 94-98 (Fourth Cause of Action).

⁷⁷ Id. at paras. 99-105 (Fifth Cause of Action); id. at paras. 125-129 (Ninth Cause of Action).

⁷⁸ Id. at paras. 106-113 (Sixth cause of action).

⁷⁹ Id. at paras. 136-142 (Eleventh Cause of Action).

⁸⁰ Id. at paras. 143-146 (Twelfth Cause of Action).

⁸¹ Id. at paras. 147-149 (Thirteenth Cause of Action).

⁸² Id. at paras. 150-152 (Fourteenth Cause of Action).

⁸³ Id. at paras. 153-157 (Fifteenth Cause of Action).

⁸⁴ Id. at paras. 158-159 (Sixteenth Cause of Action).

⁸⁵ Harris Complaint para. 92(4).

⁸⁶ Id. at para. 60.

that interfered with legitimate communications,⁸⁷ and that it imposed conditions for removal from the RBL that were arbitrary and unreasonable.⁸⁸ The suit thus challenges the content of the private rules, claims absence of due process in applying them, and illegality in the sanctions imposed for violating the rules.

82. On November 15, 2000, Exactis.com, Inc. sued MAPS in the United States District Court for the District of Colorado,⁸⁹ alleging claims under the Colorado Wiretapping Act, blocking communications in violation of state law,⁹⁰ the Colorado Organized Crime Control Act,⁹¹ the Sherman Act,⁹² the Colorado Unfair Trade Practices Act,⁹³ intentional interference with contractual relations,⁹⁴ intentional and negligent misrepresentation and extortion,⁹⁵ trade disparagement, and unfair competition. Exactis alleged that among the services blocked by MAPS was requested confirmations of brokerage transactions by Charles Schwab.⁹⁶ The complaint alleges a disagreement over the specific procedures to be used to ensure that a recipient wishes to receive email transmitted through Exactis's service, MAPS insisting on double opt in, Exactis utilizing measures "different from, but not less effective than" double opt in.⁹⁷

83. One can only speculate as to possible outcomes of the litigation. One obvious possibility is that the MAPS self-regulatory regime be allowed to continue according to the desires of its owners and subscribers. Another possibility is that the regime will be shut down under an injunction or because of the magnitude of damages imposed or sought. Or, the court might impose conditions on continued operation of the regulatory regime, analogous to those imposed in the past on private standard-setting organizations,⁹⁸ requiring substantive support for the content of rules and due process in their application and enforcement. Finally, the controversy, and others like it may stimulate legislative action to channel such private self-regulatory activities.

84. The MAPS form of private regulation easily could be extended to other areas. The Christian Right could organize a blacklist for ISPs that handle material that undermines family values. The intellectual property community could organize a blacklist for ISPs that do not have sufficiently stringent policies to discourage infringement. Consumers groups could organize blacklists for ISPs that allow online merchants to operate without appropriate return and refund policies.

85. In all of these cases, ISPs could be coerced into "subscribing" to the blacklist by threats that any non-subscribing ISP will be treated like an ISP that handles offending material.

⁸⁷ Id. at para. 91.

⁸⁸ Id. at para. 64.

⁸⁹ Exactis.com, Inc. v. Mail Abuse Prevention System, LLC, No. 00-K-2250 (D. Colo. cplt. filed Nov. 15, 2000).

⁹⁰ Id. Paras 65-72.

⁹¹ Id. Paras. 73-88.

⁹² Id. Paras. 89-101.

⁹³ Id. Paras 49-56.

⁹⁴ Id. Paras. 38-48.

⁹⁵ Id. Paras. 57-64.

⁹⁶ Id. At para. 16.

⁹⁷ Id. At para. 31.

⁹⁸ See *Radiant Burners, Inc. v. Peoples Gas Light & CokeCo.*, 364 U.S. 656, 658 (1961) (arbitrary and capricious application of standard by trade association violated Sherman Act).

Confronted with the threat of being blacklisted, most ISPs would prefer to subscribe and thus become a part of an ever-expanding governance regime, adopting the rules unilaterally determined by the organizer of the blacklist.

86. Now David Post thinks all of this is just fine: “The MAPS ‘vigilantes’ (bad) can just as easily be characterized as ‘activists’ (good), and the kind of ‘bottom-up,’ uncoordinated, decentralized process of which the RBL is a part strikes me as a perfectly reasonable way to make ‘network policy’ and to ‘answer fundamental policy questions about how the Net will work.’”⁹⁹

87. For Post, it is sufficient that the government does not administer the RBL; a private entity does.

88. Post’s preference for private ordering over what he calls “collective” regulation apparently is premised on the possibility of Internet participants freely choosing which regulatory regime they prefer. It is not clear how this process of choice is supposed to work with MAPS. Presumably, Post would say that ISPs are free to subscribe to MAPS or not. That freedom may be illusory if MAPS itself or a future elaboration of MAPS were to blacklist any ISP who does not subscribe.

89. Moreover, an interest conflict exists between subscribing ISPs and ISPs handling “Unsolicited Commercial E-mail” (“UCE”). The former want to eliminate the costs of handling certain types of inbound email; the latter want to use the Internet as a unified whole, any part of which is reachable from any other part. Why should one side of the value argument get to make the decision, because it is in a position to use code to enforce its decision? If the UCE handlers develop code that will circumvent the RBL, should that reverse the value decision? That apparently is the world that Post would prefer.

D. Mechanisms of Accountability

90. Internet-related private regulation and alternative dispute resolution is a reality. As these new legal regimes make rules and apply and enforce them, some affected parties will be disappointed. Every dispute resolution panel proceeding produces a loser. Blacklists implemented through code adversely affect those on the blacklist. Lawsuits in the regular courts provide new data for advocates of different approaches to transnational jurisdiction and judgment execution. Consider the three cases reviewed. Wal-Mart is free to file a trademark infringement action in court and seek a result different from that in Case Number 2000-1104. The case against voteauction.com is still pending in the Circuit Court of Cook County. Further proceedings may complicate the initial outcomes. In any event, as the case becomes better known, domain names registrars may be pressured to change their responses to judicial findings like that in the voteauction.com case.

91. MAPS provides the most fertile ground for development of hybrid regulatory concepts further. Because the MAPS blacklist is self enforcing, it is not obvious how courts or other public institutions can assure accountability by MAPS. The pending litigation, however, and other possible reactions to MAPS should illuminate causes of action and standards of review that can enable judicial scrutiny of the objective rationality and procedural transparency of

⁹⁹ Post, 52 Stan.L.Rev. at 1441.

private regulatory regimes. As these legal doctrines evolve, it also may be appropriate to develop a better understanding of the interests of Internet participants in having access to the Internet as a whole and how those interests might be legally protected without turning Internet service providers—including those who want access—into common carriers.

VI. CONCLUSION

92. Greater use of alternative dispute resolution is necessary to allow the Internet to fulfill its potential. Hybrid legal frameworks always have been necessary to make alternative dispute resolution effective, and the same is true for Internet-oriented ADR. In designing these hybrid frameworks for the Internet, however, greater attention must be paid to the source of rules and to enforcement because new rulemaking institutions have arisen, and code permits enforcement without the involvement of publicly accountable sheriffs and judges. MAPS provides especially fertile ground for exploring and eventually adopting some new techniques for assuring accountability of private regulators.

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