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## Conflicts on the Net: Choice of Law in Transnational Cyberspace

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# NOTES

## Conflicts on the Net: Choice of Law in Transnational Cyberspace

### ABSTRACT

*No recent technological advance has captured the attention and imagination of the United States and the international community like the advent of global communications networks—the Internet, Cyberspace, the Information Superhighway. While the technology advances daily, a legal regime for ordering cyberspace has not yet evolved. Already, cases are reaching the courts in which plaintiffs complain of improper and unlawful activities by defendants in cyberspace. Both cyberspace's growing ubiquity and the anonymity found online will increase international use of the networks for interaction and commerce. This Note considers the conflict of laws implications of transnational cyberspace. The need to consider choice of law in the networked world arises because conventional choice of law approaches—such as *lex loci delicti* and the most-significant relationship test—are location-oriented. This orientation falters in a cyberspace arranged not by countries, states, and provinces, but by networks, domains, and hosts. The author concludes that many choice of law questions should be resolved in contracts between users and access-providers. Other conflicts questions might require a whole new approach, perhaps using admiralty laws, the *lex mercatoria*, or choice of law in Antarctica as a model. Finally, a multinational choice of law accord might be required to solve choice of law conflicts in cyberspace.*

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## I. INTRODUCTION

That Other World is vast too; to its inhabitants, their System is limitless.

The Electronic World enmeshes the Earth, and reaches beyond it. Information is moved through the computer systems and processed by the artificial intelligences. The programs compute and search, retrieve and collate; they are already indispensable to science, industry, education, and government—to society in its present form.<sup>1</sup>

It was not long ago that smoke signals and drums represented the quickest means of communication.<sup>2</sup> In the latter half of the twentieth century, global electronic networks have revolutionized communication, spawning technology that is still in its infancy. The popular press is replete with articles about “cyberspace,”<sup>3</sup> “the information superhighway,” and “the

1. BRIAN DALEY, *TRON 7* (1982) (a science fiction novel, which the Walt Disney Studio made into a movie in 1982).

2. Linda M. Harasim, *Global Networks: An Introduction*, in *GLOBAL NETWORKS* 3, 4 (Linda M. Harasim ed., 1993). See also ARTHUR C. CLARKE, *HOW THE WORLD WAS ONE: BEYOND THE GLOBAL VILLAGE* 2-3 (1992).

When Queen Victoria came to the throne in 1837, she had no swifter means of sending messages to the far parts of her empire than had Julius Caesar—or, for that matter, Moses. . . . The galloping horse and the sailing ship remained the swiftest means of transport, as they had for five thousand years.

CLARKE, *supra*, at 203. Harasim and Clarke reveal how revolutionary the communicative possibilities of global communications networks are, particularly when viewed against the backdrop of historically slow-moving advances in communication.

3. William Gibson coined “Cyberspace” in *NEUROMANCER* 51 (1984) (a science fiction novel).

Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators, in every nation. . . . A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non-space of the mind, clusters and constellations of data.

Internet."<sup>4</sup> It is unusual to read a newspaper or newsmagazine without finding at least a passing reference to these new technologies. Although some authors have begun to address the legal implications of the interconnected planet, the legal world has not yet crafted a jurisprudence of cyberspace.<sup>5</sup>

This Note illustrates the varieties of disputes that arise in this new technological world, then focuses on the choice of law implications of a nongeographical, nonterritorial cyberspace.<sup>6</sup> Part II analyzes the architecture, contours, and dynamics of transnational cyberspace.<sup>7</sup> Part III surveys legal problems that arise in the context of cyberspace, particularly with regard to contracts and torts.<sup>8</sup> Part IV articulates a new paradigm for choice of law in transnational cyberspace that is compatible with the architecture of transnational cyberspace described in Part II.

## II. TRANSNATIONAL CYBERSPACE

Cyberspace is a globally networked, computer-sustained, computer-accessed, and computer-generated, multi-dimensional, artificial, or virtual reality. In this world, onto which every computer screen is a window, actual, geographical distance is irrelevant. Objects seen or heard are neither physical nor, necessarily, presentations of physical objects, but are rather—in form, character, and action—made up of data, of pure information. This information is derived in part from the operation of the natural, physical world, but is derived primarily from the immense traffic of symbolic information, images, sounds, and people, that constitute human enterprise in science, art, business, and culture.<sup>9</sup>

4. A survey of the Westlaw ALLNEWS database, performed September 30, 1995, revealed 20,209 stories in newspapers and newsmagazines containing "Internet," "Superhighway," or "Cyberspace" in the title.

5. A survey of the Westlaw JLR (Journals and Law Reviews) database, performed October 25, 1995, revealed 84 articles discussing legal issues in cyberspace.

6. Professor Dan L. Burk, cited regularly in the popular and academic presses for his work on the law of cyberspace, has termed jurisdictional issues "the\* major issue for the net." Dan L. Burk, RE: *US Jurisdiction over Cyberspace*, e-mail message to the CYBERIA-L listserv, Jan. 16, 1995 (copy on file with author).

7. The author presumes the reader's general familiarity with cyberspace, and Part II serves only to highlight the international dimensions of these computer networks. For the novice, a recommended introduction to cyberspace is JOSHUA EDDINGS, *HOW THE INTERNET WORKS* (1994).

8. This Note presumes that all defendants in hypothetical tort and contract litigation are individuals, so that acts of state and public international law are beyond the Note's scope.

9. Willard Uncapher, *Trouble in Cyberspace: Civil Liberties at Peril in the Information Age*, HUMANIST, Sept.-Oct. 1991, at 5, 9 (quoting CYBERSPACE: FIRST STEPS (Michael Benedikt ed., 1991)); SCI. AMER., Sept., 1991 (The September issue

Global networks interconnect "users locally, regionally, and globally for business, research, education, and social interaction."<sup>10</sup> Just as one uses the blue mailbox at the corner,<sup>11</sup> one can now send a letter or file nearly instantaneously to another user—perhaps thousands of miles away—by way of electronic mail (e-mail).<sup>12</sup> Like cork boards and thumbtacks, which pass information from one person to many, electronic bulletin board systems (BBSs) and "newsgroups" allow a user to "post" a message and disseminate it across the globe to be read by anyone with access to the group.<sup>13</sup> Bulletin boards have literally millions of subscribers. Teleconferencing and the advent of multimedia allow "real-time" interaction among parties sometimes continents apart.<sup>14</sup> Users can acquire files and computer programs from computers half a world away using the File Transfer Protocol (FTP).<sup>15</sup> Finally, the World Wide Web (the Web), which introduced a user-friendly, full-color graphical interface, has recently become tremendously popular.<sup>16</sup>

#### A. Cyberspace as the Global Village

The earth is now an interconnected planet that some have termed a "global village."<sup>17</sup> Cyberspace has a remarkable capacity

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is dedicated to discussing cyberspace and its impact on future global communications.).

10. Harasim, *supra* note 2, at 5-6. See generally David J. Loundy, *E-Law: Computer Information Systems and System Operator Liability*, 3 ALB. L. J. SCI. & TECH. 79 (1993) (providing a comprehensive introduction to both the technology and legal issues) (E-law version 2.0 is available at <ftp://infolib.murdoch.edu.au/pub/subj/law/jnl/elaw/refereed/loundy.txt>).

11. Communication sent via the U.S. Postal Service is termed "snail mail" by Internet users.

12. See generally Harasim, *supra* note 2, at 6.

13. UseNet is an international message-exchange network with almost 10,000 different "newsgroups" ranging from "misc.legal" to "alt.sex.bestiality." See Dan L. Burk, *Patents in Cyberspace*, 68 TUL. L. REV. 1, 8 (1993) [hereinafter Burk, *Patents*].

14. Several companies now offer software products that provide a method of voice telecommunication. By using the Internet, these companies avoid long-distance charges. Thus, live voice conferencing is now available through cyberspace. See Kevin Savetz, *Net as Phone: Kiss Long Distance Charges Good-Bye*, INTERNET WORLD, July 1995, at 67, 67.

15. See EDDINGS, *supra* note 7, at 69-73 (explaining FTP and "anonymous FTP," which allow remote log-in and downloading of files).

16. See *id.* at 129, 141-43; see generally J. ONLINE L., published at <http://www.law.cornell.edu/jol/jol.table.html> (a journal of law in cyberspace published on the World Wide Web). The Web is a segment of the Internet that organizes information into a series of menu pages linked to other pages. See EDDINGS, *supra* note 7, at 41-43.

17. University of Toronto professor Marshall McLuhan coined the term "global village" in the 1960s. See also Mitchell Kapor and John P. Barlow, *Across*

for unifying the world. Understanding the legal implications of this interconnectivity requires some appreciation for the global architecture of cyberspace. The main global networks include Internet, BITNET, UseNet, FidoNet, and AT&T mail.<sup>18</sup> For shorthand, many people speak simply of the Internet (the net), the "meganetwork."<sup>19</sup> Essentially, "[t]he Internet is a network of networks; each individual network is administrated, maintained, and paid for separately by individual educational institutions and other organizations."<sup>20</sup>

While the United States government subsidizes the Internet in part, it has no real central management or ownership.<sup>21</sup> Professor Dan L. Burk provides this architectural overview:

Information flow on the Internet resembles that in a river, highway, or circulatory system: local networks funnel information traffic into larger regional networks, which in turn are connected to high capacity "backbone" linkages. This network of computers, its electronic traffic enabled and directed by host computers at each interconnected site, links literally millions of users in dozens of countries all over the world.<sup>22</sup>

The crucial point is that the Internet, although globally accessible, is not a single network: it is a *network of networks*. This fact has important consequences for the choice of law issues to be considered *infra*.

In summary, cyberspace is the first communications medium that allows remote users to readily access information and equipment across the world.<sup>23</sup> According to estimates, the

the *Electronic Frontier*, July 10, 1990, available at [http://www/eff/org/pub/EFF/electronic\\_frontier.eff](http://www/eff/org/pub/EFF/electronic_frontier.eff) ("Whatever it is eventually called, it is the homeland of the Information Age, the place where the future is destined to dwell.")

18. Harasim, *supra* note 2, at 6.

19. *Id.*

20. EDDINGS, *supra* note 7, at 13.

21. Rex S. Heinke & Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, COMPUTER LAW., July 1994, at 1, 1, available in Westlaw, CLW Database.

22. Dan L. Burk, *Transborder Intellectual Property Issues on the Electronic Frontier 2* (1994) (unpublished manuscript, on file with author) [hereinafter Burk, *Transborder IP Issues*]. Major research networks exist in many nations. In Great Britain, there is the Joint Academic Network, Starlink, and UKnet; in Germany, DFN and Dnet; in France, FNET, ARISTOTE, and REUNIRI; in Canada, CDNnet; in Japan, JUNET; and in Korea, SDN. See Burk, *Patents*, *supra* note 13, at 17-20 (detailing the interconnectivity of worldwide networks). See generally EDDINGS, *supra* note 7, at 14-15 (graphical depiction of "The Global Internet").

23. Burk, *Patents*, *supra* note 13, at 3 (noting that an authorized user anywhere in the world can control computers and even electron microscopes remotely).

Internet unites more than 20 million users<sup>24</sup> in 146 countries.<sup>25</sup> Electronic census takers expect this population to double each year in the foreseeable future.<sup>26</sup> Anyone with a computer terminal, modem, rudimentary knowledge, and access to the Internet can download information from, communicate thoughts to, and virtually visit anywhere else in the world.<sup>27</sup> The advent of global computer networks has made the global village a reality.

### B. Cyberspace and Territoriality

"The trouble with cyberspace, lawyers say, is that there's no 'there' there."<sup>28</sup>

Like any human endeavor, the Internet presents seemingly endless legal issues. The law has not yet met this technology with a coherent doctrine that takes into account the transnational dimensions of global computer networks.<sup>29</sup> Traditional notions of jurisdiction are outdated in a world divided not into nations, states, and provinces but networks, domains, and hosts.<sup>30</sup> Cyberspace confounds the conventional law of territorial jurisdiction and national borders.<sup>31</sup> In cyberspace, it does not

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24. Heinke & Rafter, *supra* note 21, at 1. See also message from Dan L. Burk, *Subj: Worldwide Internet Growth*, November 5, 1994, to the CPSR LISTSERV (reporting international Internet statistics detailing 21% growth in the third quarter of 1994) (copy on file with author).

25. Rosaland Resnick, *Cybertort: The New Era*, NAT'L L.J., July 18, 1994, at A1.

26. Stephen Steinberg, *Travels on the Net*, TECH. REV., July 1994, at 20, 22.

27. One organization attempts to keep statistics regarding worldwide Internet participation. The data is available on the Web at <http://www.nw.com>. The survey tracks 24 nations. *Id.*

28. Resnick, *supra* note 25, at A1.

29. See Michael Kirby, *Legal Aspects of Transborder Data Flows*, 11 COMPUTER/L.J. 233, 233 (1991) ("National laws are developed which are ineffective to deal with multinational issues.").

30. Many authors have noted this phenomenon, though few have written on its legal implications. For prior treatments of choice of law in cyberspace see Linda O. Smiddy, *Choosing the Law and Forum for the Litigation of Disputes*, in TOWARD A LAW OF GLOBAL COMMUNICATIONS NETWORKS 299 (Anne W. Branscomb ed., 1986) (addressing, to a limited extent, the international choice of law implications of tort and contract actions, but focusing more on the implications for jurisdiction when nations themselves are parties); John D. Faucher, Comment, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045 (1993) (considering United States conflict of laws principles).

31. See David Johnson, *Addressing the Daunting New Problems that Will Arise with Universal Communication*, COMPUTERGRAM, Reuters Info. Svcs. (June 23, 1994), available in Westlaw, CGRAM database ("Jurisdiction based on place can no longer be viable.").

matter at all whether a site lies in one country or another because the networked world is not organized in such a fashion. Remote log-on,<sup>32</sup> telnet,<sup>33</sup> gopher,<sup>34</sup> and the World Wide Web all render political borders obsolete, to some extent.<sup>35</sup> For example, hypertext<sup>36</sup> on the World Wide Web enables users to "visit" one location (called a page or a site), where they are then presented with an opportunity to visit any of a number of other locations—in any of a number of other countries.<sup>37</sup> Frequently, users are unaware that they have even "crossed" a political border in the course of their virtual travels.<sup>38</sup>

Well-known jurisdictional doctrines such as "purposeful availment" lose meaning in cyberspace.<sup>39</sup> While sovereignty has traditionally been a function of territoriality,<sup>40</sup> the Internet is not conducive to this paradigm. Should cyberspace be stretched on a procrustean bed of conventional jurisdictional and choice of law paradigms that are wedded to yesterday's world of easily drawn and easily demarcated political borders? The networked world is different and requires a different approach.

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32. See EDDINGS, *supra* note 7, at 3.

33. Telnet allows users to "log on" to a remote host computer as if they were sitting in front of that computer. See *id.* at 19.

34. Gopher is a menu-based way to navigate the Internet by allowing the users to quickly access information elsewhere and download that information to their own computers. See EDDINGS, *supra* note 7, at 131.

35. See *e.g.*, Burk, *Transborder IP Issues*, *supra* note 22, at 3 ("Computers on the Internet can be linked together to simultaneously process different parts of complex problems, creating in effect a giant supercomputer. These features of the network make distance and political borders invisible to users of the electronic universe. . . .").

36. Hypertext describes a document with nonlinear links (or connections) to other parts of the document or other documents. One can jump around in hypertext to explore other documents at one's own pace. EDDINGS, *supra* note 7, at 141.

37. A Web site at the University of Kansas allows a user to "spin" a graphical roulette wheel and then be "transported" to the site in any state or country on which the pointer lands. Available on the Web at <http://kuhttp.cc.ukans.edu/cwis/organizations/kucia/uroulette/uroulette.html>.

Most World Wide Web addresses contain no indication of the nationality of the site. How can one be fairly said to have accepted jurisdiction from a nation that one is unaware of having entered?

38. See, *e.g.*, Danny Hillis, *Kay & Hillis*, *WIRED*, Jan. 1994, at 103 ("The point is that pretty soon you'll have no more idea of what computer you are using than you have of where your electricity is generated when you turn on the light.").

39. When people "purposefully [avail themselves] of the privilege of conducting activities within the forum State," they are effectively "on notice" that they are subject to being sued there. See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980) (asking whether a defendant can "reasonably anticipate being haled into court" in a given jurisdiction).

40. Burk, *Transborder IP Issues*, *supra* note 22, at 3 ("Law is in general territorial, extending no farther than the borders of the jurisdiction whose government has enacted the law.").

## III. OBLIGATIONS IN TRANSNATIONAL CYBERSPACE

Before analyzing the choice of law implications of a transnational cyberspace, one must recognize the possibility of disputes regarding on-line conduct and net-related activity. Contracts and torts—the law of obligations—provide the best analytical framework for a choice of law discussion.<sup>41</sup>

Cyberspace presents a unique medium for the commission of inter- and multi-state torts. Professor Trotter Hardy notes that cyberspace makes it dramatically easier for citizens in one nation to become acquainted with citizens of other nations.<sup>42</sup> Additionally, the low cost of cyberspace communications makes wide-scale distribution of wrongful communications possible.<sup>43</sup> Thus, “the issue of international torts is likely to be much more significant in cyberspace than it has been to date in real space.”<sup>44</sup>

The capacity for litigation arising from behavior on the Internet is essentially a function of the *quantity* of human interaction, which will likely increase. Moreover, the caution ordinarily exercised in face-to-face real space tends to recede in the world of anonymity and solitude that one finds in front of computer terminals.<sup>45</sup> The temptation to engage in otherwise reckless behavior increases the probability of “cybertorts.”

Defamation<sup>46</sup> is typical of tortious conduct in the realm of transnational cyberspace.<sup>47</sup> Cyber-defamation can occur in any

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41. Johnson and Marks list a number of situations that, for the purposes of this Note, present the possibility for legal dispute in cyberspace. Both over- and under-inclusive, this list provides an excellent overview of the sorts of disputes that may give rise to choice of law issues in litigation. David R. Johnson & Kevin A. Marks, *Mapping Electronic Data Communications onto Existing Legal Metaphors: Should We Let Our Conscience (and Our Contracts) Be Our Guide?*, 38 VILL. L. REV. 487, 490-91 (1993).

42. I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993, 1053 (1994).

43. *Id.* at 1052.

44. *Id.*

45. See, e.g., Devin Shawn Edwards, *Jurisdiction in Cyberspace* (unpublished manuscript, on file with the author) (describing an Internet Relay Chat (IRC) session in which a young college woman engaged in a sexually explicit private conversation with another remote user). Usenet newsgroups such as “alt.tasteless.jokes” (frequently sexist, racist, and scatological humor) demonstrate this phenomenon. Inhibitions about posting such potentially offensive matter are dramatically lower in an anonymous cyberspace than in real space.

46. Defamation is a communication that tends to harm the reputation of another so “as to lower [the individual] in the estimation of the community or to deter third persons from associating or dealing with [the individual].” RESTATEMENT (SECOND) OF TORTS §§ 558-59 (1976).

47. Heinke & Rafter, *supra* note 21, at nn.9-14 (collecting cyber-defamation cases).

number of forms—a message posted to a newsgroup or BBS, a file available via FTP or a database, or a note in e-mail.<sup>48</sup> The following hypothetical case exemplifies the transnational flavor of a dispute in cyberspace: X could defame Y in a Usenet newsgroup moderated by a Canadian whose data is stored on a U.S. computer. The communication might be made while X was in Great Britain accessing a French computer and Y was in Australia accessing a Norwegian computer.<sup>49</sup>

Business-related cybertorts could become common. For example, a case has arisen in which a Canadian company tampered with computer tapes stored in a U.S. firm's computers, effectively rendering the tapes useless.<sup>50</sup> Similarly, in 1988 a computer virus infected commercially available computer programs, leading to international concern for the integrity of software.<sup>51</sup> The infected software was copied from a computer in Canada, transferred to commercial software in Ohio, and injured the Aldus Company in Seattle, Washington.<sup>52</sup>

Many nations regulate and criminalize computer crime,<sup>53</sup> but such conduct is also tortious if viewed as conversion, trespass, or negligence. Various offenses collectively known as hacking, such as unauthorized access to a computer system, unauthorized access to particular computer-based information, and trafficking in stolen passwords or credit card account numbers,<sup>54</sup> might all be actionable in tort.

The computer virus poses an increasing threat to cyberspace. A virus is an intentionally created destructive computer program that can spread either through networked computers or by

48. See generally Kimberly Richards, *Defamation Via Modern Communication: Can Countries Preserve Their Traditional Policies?*, 3 TRANSNAT'L L. 613 (1990).

49. Cyber-defamation cases have already been litigated. See, e.g., Hardy, *supra* note 42, at 1052 (citing *Rindos v. Hardwick*, unreported judgment 940164 (Sup. Ct. West. Austr. Mar. 31, 1994) (defamatory message circulated to approximately 23,000 members of a cyberspace discussion group)).

50. Anne W. Branscomb, *Jurisdictional Quandaries in Global Communications Networks*, in TOWARD A LAW OF GLOBAL COMMUNICATIONS NETWORKS 92 (Anne W. Branscomb ed., 1986) (discussing TRANSNAT'L DATA REP., Feb. 1987, at 7).

51. See Branscomb, *supra* note 50, at 94.

52. *Id.*

53. See generally Robert J. Sciglimpaglia, Jr., *Computer Hacking: A Global Offense*, 3 PACE Y.B. INT'L L. 199 (1991) (outlining criminal laws for computer-related activities in Canada, the United States, and Great Britain).

54. Conversion often occurs with credit card numbers. Faucher, *supra* note 30, at 1078 n.16.

sharing disks among computers.<sup>55</sup> The capacity to do substantial damage to another's proprietary information is obvious.<sup>56</sup>

An example of a computer crime with potential tort consequences is the arrest of three Australians in 1990 on charges of tampering with computers in the United States and Australia via the Internet.<sup>57</sup> Similarly, a Cornell University graduate student unleashed a "worm"<sup>58</sup> that invaded thousands of computers across the United States.<sup>59</sup> The student was convicted<sup>60</sup> under the Computer Fraud and Abuse Act,<sup>61</sup> but not before he paralyzed and shut down a number of major computer systems, causing millions of dollars in losses.<sup>62</sup> Although probably "judgment-proof," Morris' actions exposed him to considerable tort liability, even though "his intention was not to disable systems."<sup>63</sup> In one frightening incident, hackers accessed the records of an intensive-care ward in a hospital in Los Angeles, California and doubled all patients' doses of medication.<sup>64</sup> The potential tort liability for such activities is staggering.<sup>65</sup>

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55. See, e.g., Dawn Stover, *Viruses, Worms, Trojans and Bombs: Computer Infections*, POPULAR SCIENCE, Sept. 1989, at 59. See also EDDINGS, *supra* note 7, at 175-81.

56. For a transnational perspective on computer viruses, see Chuck Sudetic, *Bulgarians Linked to Computer Virus*, N.Y. TIMES, Dec. 21, 1990, at 9. Sudetic reports that during the late 1980s, Bulgaria was the focal point for the transmission of computer viruses. *Id.*

57. Sciglimpaglia, *supra* note 53, at 201-03.

58. A worm is a computer instruction or hidden program wrongfully inserted into legitimate software. The worm may reproduce itself, infect multiple programs, and cause damage to other software. EDDINGS, *supra* note 7, at 180-81.

59. *Id.* at 181.

60. *United States v. Morris*, No. 90-1336 (D.C.N.Y. 1990), *aff'd* 928 F.2d 504 (2d Cir. 1991).

61. 18 U.S.C. § 1030 (1988). The Act prohibits unauthorized access to computers, unlawful computer transmissions, and makes it illegal to damage computer networks and data. The Act also gives injured parties a civil cause of action for damages or injunctive relief.

62. The worm harmed a significant number of businesses, universities, and even computers at the National Aeronautics and Space Administration (NASA). One author estimates the damage at \$97 million. Kirby, *supra* note 29, at 239.

63. Mr. Morris did not attempt to alert anyone until after his worm had gone out of control. *Id.*

64. J. FRASER MANN, *COMPUTER TECHNOLOGY AND THE LAW IN CANADA* 158-59 (1987). Fortunately, the error was caught before any damage was done.

65. These activities, like many others treated in this discussion, are illegal under United States and foreign law. See, e.g., 18 U.S.C. §1030(a)(5)(B) (1994) (prohibiting the alteration of medical records in a section entitled "Fraud and related activity in connection with computers"). The focus of this Note, however, is the civil realm.

Other wrongs that may be committed in cyberspace include the dissemination of hate speech and threats.<sup>66</sup> In one situation, a computer bulletin board operated by the Aryan Nations Net in the United States promoted white supremacy and maintained a list of targets for extermination.<sup>67</sup> These messages were illegal in Canada, which prohibits the circulation of racially offensive literature.<sup>68</sup> While Canadian nationals could access the material, only through the cooperation of U.S. authorities could Canadian courts have obtained extradition orders or jurisdiction.

Beyond torts, the myriad contractual arrangements made through and in connection with the net have striking legal implications. Contracts can be formed, performed, and broken in cyberspace.<sup>69</sup> Offer and acceptance occurs in e-mail. On-line catalogs and order forms are readily found on the Web.<sup>70</sup> Disputes will certainly arise regarding the formation, performance, and payment of contractual obligations.

The following message culled from the "misc.legal" UseNet newsgroup presents an example of just such a situation:

#69979

From: [author's name omitted]

Subject: Internet deals gone awry: MAIL FRAUD or SMALL CLAIMS COURT

Date: Mon, 13 Feb 1995 15:07:29 GMT

When Internet deals go bad, what can be done to fight back?  
(One of you lawyers send me email, I think I have a case.)

Recently I made a "deal" with someone in another state. I thought I was getting a motherboard populated with 16MB of SIMMs, but after giving the Federal Express COD delivery person a money order for about \$600, I opened the box to find a broken board with no memory.

I called the Post Office and tried to cancel the Money Order: no such luck. I called Federal Express and tried to stop the delivery of the money order: no such luck.

Now what can I do? (Legally, that is. . . .)

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66. In one prominent case, officials charged a University of Michigan student with a federal crime for describing the torture and rape of a character named after a female classmate in a message posted to the Usenet newsgroup "alt.sex.stories." Robert Davis, *Graphic "Cyber-Threats" Land Student in Court*, USA TODAY, Feb. 10, 1995, at 3A. For a comprehensive treatment of this case, see [http://www/efi/org/pub/Legal/Cases/Baker\\_UMich\\_case/](http://www/efi/org/pub/Legal/Cases/Baker_UMich_case/).

67. See Branscomb, *supra* note 50, at 90.

68. *Id.*

69. For example, a recent newspaper article noted that a British company aims to begin "the first formal electronic stock exchange on the Internet." Richard L. Hudson, *British Start-Up to Trade Stocks on the Internet*, WALL ST. J., Feb. 3, 1995, at A7A.

70. For just a sampling of the shopping available on the World Wide Web, see <http://www.yahoo.com> and search for "Shopping." Sites include the Internet Shopping Network, the Internet Shopping Page, and the All-Internet Shopping Directory.

Sue him in Small Claims court... in his state? [I]n my state?  
 Report it as Mail Fraud (but it was FedEx, not US Postal Service. . . )  
 Or am I flat-out scrod [sic]?  
 Has any legal precedent been set yet in this area?  
 Have any cases like this been fought and won? Lost?  
 How do you fight brick-in-the-mail Internet fraud?  
 [author's name omitted]

#### IV. A UNIFIED APPROACH TO CHOICE OF LAW IN TRANSNATIONAL CYBERSPACE

##### A. Introduction

One of the thorniest issues in a law of cyberspace is in the domain of private international law.<sup>71</sup> Whose laws apply when litigation arises from activity in a transnational cyberspace? *Private* international law—or conflict of laws<sup>72</sup>—is concerned exclusively with private disputes among individuals (or analogous entities like corporations), while *public* international law addresses issues such as state recognition, treaties, and war.<sup>73</sup> The multistate nature of cyberspace reveals the importance of conflict of laws questions in international civil litigation arising from Internet participation. Choice of law is “particularly difficult in the case of international computer networks where, because of dispersed location and rapid movement of data, and geographically dispersed data processing activities, several connecting factors could occur in a complex manner involving elements of legal novelty.”<sup>74</sup>

##### 1. A Note on Jurisdiction

Jurisdiction concerns the ability of a particular forum to *hear* a particular case (adjudicative jurisdiction) or *legislate* about a

71. This term originated in JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 9 (1st ed. 1834) (It is “fitly denominated private international law, since it is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations, or national controversies.”).

72. The terms “private international law” and “conflict of laws” are roughly synonymous. BLACK’S LAW DICTIONARY 1196 (6th ed. 1990).

73. ANDREAS F. LOWENFELD, CONFLICT OF LAWS 853-54 (1986).

74. Burk, *Patents*, *supra* note 13, at 5 (quoting Organization for Economic Cooperation and Development, explanatory memorandum, in GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER DATA FLOWS OF PERSONAL DATA 13, 36 (1980)).

particular matter (legislative jurisdiction). Personal jurisdiction<sup>75</sup> may lie wherever the defendant's conduct in connection with the forum indicates that the defendant reasonably anticipated being subject to the court there.<sup>76</sup> Unless otherwise noted, jurisdictional competence shall be assumed<sup>77</sup> because cyberspace "makes contact" with literally hundreds of nations, and cyber-defendants have acquired at least a virtual presence in these jurisdictions. Because material is accessible universally, jurisdiction might lie almost anywhere.

Conversely, choice of law considers *whose* law a state or nation with jurisdiction is to apply to the action. For example, in a defamation action, a plaintiff might sue (i.e., have jurisdiction) in any state in which the plaintiff can prove that someone received the defamatory message.<sup>78</sup> However, that forum's law<sup>79</sup> will not necessarily govern the suit.<sup>80</sup> It is that forum's choice of law rules that direct the court to the applicable law.

## 2. Why Develop a Choice of Law Regime?

The main objectives of choice of law are (1) to achieve "maximum fairness to the parties" and (2) to achieve "effective implementation and coordination of state or country policies."<sup>81</sup>

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75. Personal jurisdiction is "the power of a court over the person of a defendant" and refers to the ability of a particular jurisdiction to sanction a particular defendant. BLACK'S LAW DICTIONARY 1144 (6th ed. 1990). Other authors have studied personal jurisdiction in cyberspace, but that discussion is beyond the scope of this Note. See, e.g., Richard Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6.2 ALB. L.J. SCI. & TECH. (forthcoming Spring 1996); Edwards, *supra* note 45.

76. George A. Zaphiriou, *Basis of the Conflict of Laws: Fairness and Effectiveness*, 10 GEO. MASON U. L. REV. 301, 303-04 (1988) (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980) (asking whether a defendant can "reasonably anticipate being haled into court there.")).

77. It is possible that some nations' courts would decline jurisdiction on *forum non conveniens* grounds, but that doctrine is beyond the scope of this Note. *Forum non conveniens* is the discretionary power of a court to decline jurisdiction if justice would be better served were the case to be heard in a different forum. BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

78. See, e.g., *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) (finding sufficient contacts to support jurisdiction where defendant had sold less than one percent of its magazines). In *Keeton*, the plaintiff was a resident of New York suing an Ohio corporation with its principal place of business in California. *Id.* See also Faucher, *supra* note 30, at 1049 (suggesting that the victim of libel carried on computer bulletin boards may sue in any state in which the message was received).

79. The law of the forum state is termed *lex fori*. BLACK'S LAW DICTIONARY 910 (6th ed. 1990).

80. Faucher, *supra* note 30, at 1049.

81. See, e.g., Zaphiriou, *supra* note 76, at 303.

The *Restatement (Second) of Conflict of Laws* highlights these principles in its opening section:

§ 1. Reason for the Rules of Conflict of Laws

The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.

A consistent choice of law methodology achieves a just and uniform application of law.<sup>82</sup> One author notes three consequences of the absence of a coherent choice of law regime:<sup>83</sup> (1) forum shopping, which leads to the inconsistent application of law and inconsistent results, especially in the international context;<sup>84</sup> (2) diminished predictability due to the difficulty in ascertaining what law will apply, particularly in novel situations such as those occurring in cyberspace; and (3) reduced deterrence because uncertainty as to the applicable law leads to inefficient risk-taking.<sup>85</sup>

### 3. The Nexus Requirement: Which Cyber-Disputes Require a New Choice of Law Regime?

The purpose behind the formulation of a new conflicts regime for cyberspace is to resolve those tricky choice of law questions that arise in this brave new world. But not all disputes that involve cyberspace call for law chosen by this new regime. As Professor Hardy has noted, "Some cyberspace issues seem wholly unremarkable: it is evident to any legal eye that they are readily governed by the same rules applicable to other forms of communication."<sup>86</sup> Just as Hardy asks, "What makes a legal issue new?"<sup>87</sup> one must ask, "When is the choice of law question for a particular cyber-dispute appropriately determined by this new model?"

82. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. d (1971) ("Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them.").

83. Helen Shin, *Oh, I Have Slipped the Surly Bonds of Earth: Multinational Space Stations and Choice of Law*, 78 CALIF. L. REV. 1375, 1382-84 (1990).

84. Forum shopping enables a plaintiff to achieve more favorable results by choosing to sue in one forum and receiving the benefit of that forum's substantive law. BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

85. Shin, *supra* note 83, at 1383-84.

86. Hardy, *supra* note 42, at 998.

87. *Id.* at 996.

In the broadest, most unsophisticated sense, the dispute must be "internet-related" to be governed by this new model. But that does not go far enough. The law of property asks whether an interest or right "touches and concerns" the land so as to run with the land.<sup>88</sup> Simply "touching and concerning" cyberspace, however, is not a sufficient reason to invoke an entirely new choice of law methodology. There must be something about the dispute that evokes or typifies those failings of traditional choice of law regimes (i.e., some reason why old methods are not helpful).<sup>89</sup>

Admiralty law might help draw that line between a new cyber-dispute and a dispute that just happens to involve cyberspace. To be considered a maritime tort, so as to invoke the jurisdiction of admiralty courts and the choice of maritime law for the action, the tort must have a "significant connection to traditional maritime activity" (i.e., a "maritime nexus").<sup>90</sup> In the past, "[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, [was] of admiralty cognizance."<sup>91</sup> Even if the tort bore no relationship to navigation or maritime commerce, it was deemed a maritime tort.<sup>92</sup>

However, in *Executive Jet Aviation, Inc. v. City of Cleveland*,<sup>93</sup> a case involving a plane crash into Lake Erie, the U.S. Supreme Court wrote:

[T]he mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.<sup>94</sup>

Although the U.S. Supreme Court has made almost no attempt to define "traditional maritime activity" or "a significant connection to maritime commerce," the Fifth Circuit Court of

88. JON W. BRUCE ET AL., *CASES AND MATERIALS ON MODERN PROPERTY LAW* 419 (2d ed. 1989) ("['T]ouch and concern' requires that the covenant directly relate to the land in some way and not concern merely a collateral matter of a personal nature.").

89. For a discussion of the failings of conventional approaches, see *infra* Part IV.B.

90. 1 STEVEN F. FRIEDEL, *BENEDICT ON ADMIRALTY* 11-1 (7th ed. 1992).

91. *Id.* at 11-2 (quoting *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865)).

92. FRIEDEL, *supra* note 90, at 11-2, 11-3.

93. 409 U.S. 249, 268 (1973).

94. Likewise, in *Crosson v. Vance* the Fourth Circuit held there to be no admiralty jurisdiction over a water-skiing accident. 484 F.2d 840 (4th Cir. 1973).

Appeals established a test for this nexus requirement in *Kelly v. Smith*.<sup>95</sup> Four factors are considered to find a "maritime nexus": (1) the functions and roles of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and type of injury, and (4) traditional concepts of the role of admiralty law.<sup>96</sup>

These decisions indicate that when both parties are essentially land-based and the same behavior would have given rise to tortious responsibility on land, courts tend to deny admiralty jurisdiction.<sup>97</sup> Thus, "[c]laims by painters or automobile drivers who fell from a bridge fail the nexus test, [and a] products liability suit by a passenger on a pleasure craft against a manufacturer of a gun that misfired while in the boat is non-maritime."<sup>98</sup>

Likewise, only contracts that relate "to ships and vessels, masters and mariners, as the agents of commerce" qualify for admiralty jurisdiction over contract actions.<sup>99</sup> Generally, the only contracts in the purview of admiralty law are those relating to (1) ships used in commerce or navigation on navigable waters, (2) the transport of items across the water, or (3) employment for maritime services.<sup>100</sup> The key principle is that it does not matter whether the contract is made or performed on land or water; what is relevant is the "admiralty nexus."<sup>101</sup>

To return to Professor Hardy's point, one should not be quick to treat all disputes that in some way—no matter how attenuated—touch and concern cyberspace as a new species of dispute. Not every dispute need be controlled by the new choice of law regime. For example, if User X in the United States writes a letter to the editor of *The New York Times* in which British User Y is defamed regarding Y's management of a bulletin board, no "cyber-case" has arisen; it is simply a real-space defamation suit and real-space conflicts rules can handle the choice of law. Likewise, an automobile accident between two people who happen to have Internet accounts is not a cyber-dispute and not relevant

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95. 485 F.2d 520 (5th Cir. 1973). Several other circuits have adopted the Kelly formulation. FRIEDEL, *supra* note 90, at 11-9 n.29.

96. FRIEDEL, *supra* note 90, at 11-10. See also *Molett v. Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987) (adding other factors to the *Kelly* test: (1) the impact of the event on maritime shipping and commerce, (2) the desirability of a uniform national rule to apply to such matters, and (3) the need for admiralty "expertise" in the trial and decision of the case).

97. FRIEDEL, *supra* note 90, at 11-13.

98. *Id.* at 11-14, 11-15 (citations omitted).

99. *Kossick v. United Fruit Co.*, 365 U.S. 731, 736 (1961) ("The boundaries of admiralty jurisdiction over contracts . . . being conceptual rather than spatial have always been difficult to draw.")

100. FRIEDEL, *supra* note 90, at 12-4.

101. *Id.*

to application of the new model. The torts have occurred in real space and the current choice of law processes are sufficient to deal with these scenarios.<sup>102</sup>

In sum, just as admiralty requires a "maritime flavor," so too does the new choice of law model require a "cyberspace flavor" to govern the choice of law for a particular action. The difficulties in line-drawing (illustrated by the *Kelly v. Smith* multi-factor test) between maritime and nonmaritime torts applies with equal force in cyberspace. Perhaps the expertise rationale for admiralty jurisdiction articulated in *Molett v. Penrod Drilling Co.*<sup>103</sup> should emerge as the most salient factor in deciding whether an action is a cyber-tort or simply a generic tort. In *Molett*, the court found admiralty jurisdiction especially proper when the action should be heard in a court competent to exercise "admiralty expertise." In the ever-changing technical and legal environments of cyberspace, users will increasingly depend upon expertise in applying law and customs. The law of the forum that is best able to grasp those issues might be the best choice. Indeed, these considerations suggest the development of a substantive legal regime not unlike admiralty or the Law Merchant, which this Note discusses in Part IV.C., or the creation of the "cyber-courts" advocated by some writers.<sup>104</sup> All references to cyber-disputes, torts, and contracts are, by definition, those disputes with the required nexus to cyberspace so as to justify invoking the new model.

### B. Why are Conventional Regimes Insufficient in Cyberspace?

#### 1. Choice of Law for Actions in Tort

Because no multinational agreement exists with regard to torts in cyberspace, courts seeking to choose law will resort to conventional choice of law principles. Traditional choice of law for torts has focused on two theories: (1) the *lex loci delicti* approach of the *Restatement of Conflict of Laws* (the First Restatement) and (2) the most significant relationship approach of the *Restatement (Second) of Conflict of Laws* (the Second Restatement).

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102. It is also appropriate here to note that even true cyber-disputes that arise between two individuals subject to the same real-space jurisdiction's laws do not need to be included in the new choice of law model. It is probably fair to say that both parties could expect to be subject to the law of their "common ground."

103. 826 F.2d 1419, 1426 (5th Cir. 1987). See *supra* note 96.

104. See *infra* note 217 and accompanying text.

a. *Lex Loci Delicti*

The First Restatement applies a simple choice of law rule that is almost mechanical in its operation—the rule of *lex loci delicti*, the law of the place of the wrong.<sup>105</sup> The place of the wrong is the state where “the last event necessary to make an actor liable” for an alleged tort takes place.<sup>106</sup> Some nations still follow the *lex loci delicti* approach.<sup>107</sup>

In transnational cyberspace, however, the place of the wrong might be any of the 145-plus nations that are on-line.<sup>108</sup> More accurately, there is no *lex loci delicti*.<sup>109</sup> The state of the last act is ordinarily the state where injury occurs.<sup>110</sup> If injury occurs in cyberspace, it can be said that the place of the wrong is cyberspace itself.<sup>111</sup> Because there is no single answer to this choice of law problem, the forum will likely apply its own law to the dispute.<sup>112</sup> This *lex fori* default rule, of course, encourages forum shopping.<sup>113</sup>

The traditional rule is an adequate one in real space because of its certainty and ease of application. But the numerous examples in Part III of this Note reveal that one cannot easily identify “where” events transpire on the Internet.<sup>114</sup> *Lex loci delicti*, therefore, is not a sound choice of law regime for cyberspace.<sup>115</sup>

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105. See generally J.D. LEE & BARRY A. LINDAHL, *MODERN TORT LAW: LIABILITY & LITIGATION* § 13.03 (Rev. ed. 1994).

106. *Id.*

107. See Shin, *supra* note 83, at 1392-93.

108. Faucher, *supra* note 30, at 1056-57 n.69.

109. See Hamilton DeSaussure & P.P.C. Haanappel, *A Unified Multinational Approach to the Application of Tort and Contract Principles to Outer Space*, 6 SYRACUSE J. INT'L L. & COM. 1, 12 (1978) (“For outer space, there is no *lex loci delicti commissi*. Thus, this venerable rule, so generously applied in both common and civil law countries, is impossible to follow for space related torts.”).

110. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 7 introduction.

111. For example, many users employ pseudonyms on the Internet. Conceptually, if true anonymity exists and the pseudonymous character in cyberspace is defamed, is there any injury per se in real space? In this light, cyberspace creates the possibility for injury only in the virtual sense.

112. See, e.g., Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (applying New Hampshire law to nationwide libel).

113. See *supra* note 84 and accompanying text.

114. See *supra* notes 41-70 and accompanying text.

115. See Smiddy, *supra* note 30, at 305 (discussing unsuitability of *lex loci* approach in the transborder data flow context).

## b. Most Significant Relationship

The Second Restatement adopts a "most significant relationship" approach to choice of law.<sup>116</sup> Section 145(2) lists the variety of contacts to be considered: the place of injury, the place where the conduct causing the injury occurred, the place of domicile or residence of the parties, and the place where the parties' relationship is centered.<sup>117</sup> These geographically-oriented principles are confounded by cyberspace.

It is apparent that this approach does not afford much guidance to a court attempting to choose the appropriate law; some factors might weigh toward one forum, others to another.<sup>118</sup> The Second Restatement offers seven criteria to weigh these factors: (1) the needs of the interstate and international system, (2) the relevant policies of the forum, (3) the relevant policies of the interested states, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty and uniformity of result, and (7) ease in determining and applying the law.<sup>119</sup> It is not clear, however, that these vague and boundless criteria add anything to the discussion.<sup>120</sup>

The Second Restatement's balancing approach to choice of law is certainly more flexible than the First Restatement's rule, but its utility in cyberspace suffers from the same debilitating weaknesses. How are the relevant factors to be considered in transnational cyberspace? More importantly, how are contacts such as the place of injury, place of conduct causing injury, and nationality determined in the networked world?

Comment (e) to Section 145 of the Second Restatement notes: "Situations do arise, however, where the place of injury will not play an important role in the selection of the state of the applicable law . . . such as in the case of multistate defamation, [where] injury has occurred in two or more states." Section 150 considers the vexing problem of choice of law for multistate defamation, but the result is the same—the court should balance and weigh, but ultimately pick the "fair" law. This case-by-case search for fairness, of course, sacrifices certainty and simplicity.

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116. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

117. *Id.* § 145(2).

118. Faucher, *supra* note 30, at 1063 ("The Restatement (Second) articulates another theory that is ill-suited to electronic torts . . . [and] offers courts little substantive guidance concerning choice-of-law decisions.").

119. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971).

120. *See, e.g.*, Faucher, *supra* note 30, at 1065 n.114 (citing Rene David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 8 (1969) (The most significant relationship test "means nothing except, perhaps, that the answer is not ready at hand.")).

A new choice of law regime for transnational cyberspace should serve the twin goals of conflict of laws: certainty and fairness.<sup>121</sup>

## 2. Choice of Law for Contracts Without a Forum Selection Clause

Without a forum selection clause, the choice of law for a contractual dispute devolves upon the law of that nation most closely connected with the relevant contractual issue.<sup>122</sup> Scoles and Hay believe that “[c]hoice-of-law in contract, in the absence of a valid stipulation of the applicable law by the parties, is even more difficult than in tort.”<sup>123</sup> Section 188 of the Second Restatement addresses choice of law for contractual disputes, absent a clause in the contract:

§ 188. Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relation to the transaction and the parties. . . .

(2) . . . [T]he contacts to be taken into account in . . . determin[ing] the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Thus, if the dispute arises over the formation of the contract, presumably the law of the nation in which the contract was made would apply. Likewise, if the dispute is performance-related, the applicable law is that where performance was to occur.<sup>124</sup>

The obvious fallacy with Section 188’s method for choosing law for contractual disputes is its continual reference to the “place” and “location” of certain events. This Note demonstrates that cyberspace confounds notions of place and location. Relying on the place of contracting, the place of performance, and similar factors leads to the inevitable conclusion that *place* or *location* mean little or nothing when it comes to cyberspace contracts. It is easy to envision a scenario in which a contract between a commercial Internet provider and a newsgroup manager is formed

121. Zaphiriou, *supra* note 76, at 302-03.

122. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

123. EUGENE SCOLES & PETER HAY, CONFLICT OF LAWS 678 (2d ed. 1992).

124. See Zaphiriou, *supra* note 76, at 316 (“Thus the place of negotiation, place of execution, place of performance of the contract, place of residence, or place of business of the parties are all connecting factors that will point” to the choice of forum.).

in cyberspace, payment is electronically made in cyberspace, and performance is accomplished by services rendered in cyberspace.<sup>125</sup>

Other attempts to resolve choice of law questions in contractual disputes by reference to "close connections" are equally unhelpful. The 1980 Convention on the Law Applicable to Contractual Obligations (Rome Convention) is binding in several European countries with respect to contracts.<sup>126</sup> Article 4(1) requires that, in the absence of express or implied choice, a contract be "governed by the law of the country with which it is most closely connected."<sup>127</sup>

The multifactor tests of the Second Restatement and the Rome Convention do little to solve the choice of law problems in cyberspace, especially when the factors relied upon are geared toward and suited for a real-space world of easily drawn political boundaries.

### C. *The Unified Approach to Choice of Law in Cyberspace*

Choice of law for disputes arising from transnational cyberspace will rarely be a simple matter. Conventional choice of law paradigms for tort actions—*lex loci delicti*<sup>128</sup> and the most significant relationship analysis<sup>129</sup>—break down on a globally interconnected information superhighway. The choice of law for contract disputes, in the absence of a forum selection clause, poses difficulties as well.<sup>130</sup> This Subsection will outline the author's proposed regime for a reconciled private international law of cyberspace.

Part II of this Note considers the transnational architecture of cyberspace.<sup>131</sup> Recalling the notion of cyberspace as a network of networks, there are two levels of "connectivity." At the first level, a user is connected to an "access provider." Each user in cyberspace must gain access to the Internet through an access

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125. For example, in the well-known case *Cubby v. Compuserve*, 776 F.Supp. 135 (S.D.N.Y. 1991) (a cyber-defamation case), Compuserve had contracted with Cameron Communications, Inc. for Cameron to assume editorial control over the content of the information transmitted on the bulletin board. Cameron then subcontracted this work to another company, DFA. Heinke & Rafter, *supra* note 21, at 2-3.

126. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) 1. Contracts relating to wills, marriage, commercial paper, and certain other contracts are excluded. *Id.* art. I.

127. *Id.* art. 4(1).

128. See *supra* notes 105-15 and accompanying text.

129. See *supra* notes 116-21 and accompanying text.

130. See *supra* notes 69-70 and accompanying text.

131. See *supra* notes 28-40 and accompanying text.

provider, which essentially serves as an "on-ramp" to the Information Superhighway. Today, commercial Internet providers such as Prodigy, the Microsoft Network, CompuServe, and America Online (AOL) provide a gateway to cyberspace.<sup>132</sup> All users might be considered "citizens" of their access provider. Thus, by reaching cyberspace through an access provider, it is possible to assign a "cyber-domicile" to each user. As a graduate student at Vanderbilt University, this Note's author is, in a sense, a cyber-domiciliary of the Vanderbilt network system; AOL users are cyber-domiciliaries of America Online, and so forth. This cyber-domicile concept can be used to resolve interuser choice of law problems.

At the second level, a user—through the access provider—becomes part of the larger cyberspace. This bi-level access scheme provides for three general species of cyberspatial disputes: 1) the dispute can arise between two users<sup>133</sup> who access cyberspace through either the same Internet provider<sup>134</sup> or providers in contractual privity with one another; 2) the dispute can arise between two users who access cyberspace through different Internet providers that are not in contractual privity with one another; and 3) the dispute can arise between a user in a cyberspatial capacity and a nonuser in real space.

## 1. Case 1: Resolving Choice of Law for Cyber-Disputes via Contracts

### a. The Use of Forum Selection Clauses

Litigation will arise from contracts formed, performed, and broken in cyberspace. Because certainty in contractual obligations is of paramount importance to the parties, the practice of choosing the law by way of a forum selection clause in the contract has become the generally accepted means of handling choice of law for contractual disputes. A forum selection clause specifies which nation's law will apply.<sup>135</sup> Generally, a choice of law clause is joined with a choice of forum clause.<sup>136</sup> This

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132. Internationally, Internet access provider competition is increasing rapidly. On November 28, 1995, American Online unveiled its service in a joint venture with Bertelsmann AG. Douglas Lavin, *American Online Enters a Crowded Europe*, WALL ST. J., Nov. 28, 1995, at B6.

133. Users include individuals as well as entities, such as corporations.

134. Typically, a contract governs the relationship between the individual and the provider.

135. See Smiddy, *supra* note 30, at 303.

136. Zaphiriou, *supra* note 76, at 315.

ensures that the litigation forum will uphold the choice of law clause.<sup>137</sup> The choice of law contained in a contract encompasses that forum's substantive law and not its conflicts law.<sup>138</sup>

"[P]redictability is served, and party expectations are protected, by giving effect to the parties' own choice of the applicable law (party autonomy)."<sup>139</sup> This "party autonomy" objective is "especially prominent" when the contract is to be performed in several different jurisdictions.<sup>140</sup> Section 187 of the Second Restatement recognizes and encourages the practice of law and forum selection:

§ 187. Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.

The language of the Second Restatement and its interpretation by courts indicate that forum selection clauses are generally honored in the United States and abroad, so long as the choice is reasonable.<sup>141</sup> There are two important aspects of reasonableness as that term applies to contractual choice of law in cyberspace: (1) the requirement of "connecting factors" to the forum selected, and (2) the lack of a gross inequality of bargaining power, such that the choice appears to be oppressive to one party.

Traditionally, the parties' choice of the law of the place of contract formation, the place of performance, the domicile of

137. *Id.*

138. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. h (1971).

139. SCOLES & HAY, *supra* note 123, at 657.

140. *Id.* at 657 n.3 (citing *Lauritzen v. Larsen*, 345 U.S. 571, 588 (1953) (seaman hired to sail to several countries)).

141. *Zaphiriou*, *supra* note 76, at 315; see also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (authorizing the use of forum selection clauses); cf. U.C.C. § 1-105(1) (1994) ("[W]hen a transaction bears a reasonable relationship to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.").

either party, the location of the corporate headquarters, or state of incorporation of a party would satisfy Section 187's reasonableness requirement.<sup>142</sup> In cyberspace, it is unclear where some of these locations might be, but reasonable arguments can be made for choosing the law of the domicile of either party.

The second aspect of reasonableness requires that the contract's choice of law accurately reflect the intention of both contracting parties; in other words, courts view the selection of law in adhesive contracts<sup>143</sup> suspiciously.<sup>144</sup> In *Carnival Cruise Lines v. Shute*,<sup>145</sup> however, the U.S. Supreme Court upheld a forum selection clause even when bargaining parity between the cruise line and its aggrieved passenger was lacking.<sup>146</sup> This case suggests that a forum selection clause between a large-scale Internet service provider and its customer is enforceable, even if the access contract between them is a standardized form contract or, perhaps just a visual notice on the log-on screen to the system.

#### b. Forum Selection Clauses in Cyberspace

The networked world is replete with already-existing contractual relationships between access providers and their cyber-domiciliaries. Professor Hardy notes that "access to Prodigy, Compuserve, America Online, the Well, Genie, Lexis Counsel Connect, as well as the countless small desktop BBSs run by hobbyists is already subject to contractual arrangements."<sup>147</sup> Universities incorporate rules of use before allowing students and faculty access to the Superhighway. The ease and simplicity with which choice of law problems may be disposed of through the use of forum and law selection clauses in these contracts is striking. Some access providers have already taken this route. Section 9.3 of America Online's Terms of Service

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142. See SCOLES & HAY, *supra* note 123, at 671-72.

143. A contract of adhesion is a standardized contract offered exclusively on a "take it or leave it" basis without giving the consumer an opportunity to bargain. BLACK'S LAW DICTIONARY 40 (6th ed. 1990).

144. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971) ("[T]he forum will scrutinize [adhesive] contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent."); see also SCOLES & HAY, *supra* note 123, at 666.

145. 499 U.S. 585, 593-94 (1991).

146. Justice Brennan in *Carnival Cruise* acknowledged that a complaining party, by satisfying a "heavy burden of proof," could show that a forum selection clause should not stand because it would be grossly onerous to that party. *Carnival Cruise*, 499 U.S. at 592-93.

147. Hardy, *supra* note 42, at 1029-30.

Agreement (TOS) contains a simple forum and law selection clause to handle disputes between its users and AOL:

The TOS shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia, except with regard to its conflicts of law rules. Each party irrevocably consents to the exclusive jurisdiction of the courts of the Commonwealth of Virginia and the federal courts situated in the Commonwealth of Virginia in connection with any action arising under the TOS or relating to the AOL Service or AOL Software. . . .

Interuser disputes could quite easily be subsumed into this contractual arrangement. In this scenario, Virginia law would govern the lawsuit arising when AOL User X commits a tort against or breaks a contract with AOL User Y. This clause achieves the desired certainty, and eliminates forum shopping (assuming that all jurisdictions recognize the validity of forum and law selection clauses).

Cyberspace's choice of law problems would be accounted for if the access contract also contained language selecting a forum and law for disputes arising between one user and a second user of any other access provider with whom the first user's provider is in contractual privity. For example, AOL and CompuServe might require forum selection clauses in all users' service contracts. In turn, AOL and CompuServe would contract to the effect that disputes arising between an AOL user and a CompuServe user would be governed by a particular forum's law. Following this method, an association of access providers could work in unison to bring much needed certainty to the choice of law issues that will face their users when disputes arise among them.<sup>148</sup>

This contractual approach is the tidiest choice of law methodology possible because the parties are free to select the law that shall apply to disputes.<sup>149</sup> Typically, system operators set the terms of their "business."<sup>150</sup> Networks are highly decentralized;<sup>151</sup> rulemaking occurs at the lower network level, where the university, corporation, or commercial provider is "both the legislator and enforcer."<sup>152</sup> Thus, "[a] user can either comply with the ground rules, or find another system that will allow the

148. Professor Hardy, therefore, prematurely rules out the ability of the "contract approach" to deal with tortious conduct between citizens of one nation and those of another who use separate access providers. See Hardy, *supra* note 42, at 1051-52 ("[International torts are] wrongful conduct typically directed toward strangers, so the contract approach is ruled out."). This Note's model shows that even strangers may be bound by contractual arrangements.

149. See *supra* notes 133-46 and accompanying text.

150. See Johnson & Marks, *supra* note 41, at 488 n.4.

151. Henry H. Perritt, *Dispute Resolution in Electronic Network Communities*, 38 VILL. L. REV. 349, 352 (1993).

152. *Id.* at 352.

desired activity."<sup>153</sup> The user who is dissatisfied with a particular access provider's choice of law selection may simply "vote with his or her mouse" and seek a new provider.<sup>154</sup> This "de facto voting power gives users as a group substantial strength in this arrangement."<sup>155</sup>

Professor Perritt views this approach as analogous to the governance of private associations.<sup>156</sup> He notes that private associations—like fraternities, churches, and country clubs—are largely self-governing, and that courts generally enforce the associational rules.<sup>157</sup>

Comment (f) to Section 187 of the Second Restatement states:

The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship. For example, when contracting in countries whose legal systems are strange to them as well as *relatively immature*, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed. . . . So parties to a contract for the transportation of goods by sea between two countries with relatively undeveloped legal systems should be permitted to submit their contract to some *well-known and highly elaborated commercial law*.<sup>158</sup>

Forum selection clauses can bring order and stability to cyberspatial contracts by substituting the highly-developed real-space legal order for the uncertain and almost haphazard regime likely to result if courts are left to choose law in cyber-disputes.

Recall that Case 1 disputes arise between two users who access cyberspace through the same access provider or providers in contractual privity with one another. It appears that the

153. Johnson & Marks, *supra* note 41, at 488 n.4.

154. See generally *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593 (1991).

155. Johnson & Marks, *supra* note 41, at 489.

Facially, contracts between sysops and users may appear to be contracts of adhesion, with the users possessing no negotiation or bargaining power. However, once the sysop has clearly and candidly articulated the applicable rules and obligations of the contract, the users are on notice of the nature of the contract. At this point, the users can choose to accept the terms as stated or walk away and find another system whose terms are more favorable. Moreover, online rules do evolve in response to complaints by communities of users—there is genuine collective negotiation over time.

*Id.* at 489 n. 7. "Sysop" is a contraction for the "system operator."

156. Perritt, *supra* note 151, at 361.

157. *Id.* at 361 n.33. In such situations, courts have "based their jurisdiction on the property, contract, or personal rights of members." *Id.* at 361-62.

158. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, cmt. f (1971) (emphasis added).

inclusion of a forum and law selection clause in the access contract between user and provider and, at the next level, between provider and provider, solves Case 1's choice of law problems.<sup>159</sup> Associations of providers might contract for choice of law, or even some arbitration scheme.<sup>160</sup> The ease with which the contractual approach disposes of choice of law problems in cyberspace has led several authors to conclude that "[c]yberspace is, and should be, ruled mostly by contract."<sup>161</sup>

## 2. Case 2: Conceptual Analogies for a New Jurisdiction of Cyberspace

Case 2 involves a cyber-dispute between members of the Internet community at large, but no contractual nexus exists between plaintiff and defendant. The contractual approach this Note advocates is not helpful in this scenario. Professor Perritt agrees, noting that the decentralized rulemaking and enforcement that solves Case 1 disputes<sup>162</sup> becomes problematic when the Internet is viewed as a larger network community.<sup>163</sup> This scenario might require substantive law, not just conflict of laws rules.

A standard set of terms for resolving choice of law in cyberspace might be found in admiralty and maritime law,<sup>164</sup> the *lex mercatoria*,<sup>165</sup> or in a negotiated multinational choice of law treaty. The essence of these analogies is that an altogether new jurisdiction has emerged—the jurisdiction of cyberspace. These regimes answer the choice of law question because either: (1) the new jurisdiction has a substantive law of its own, and that law is the obvious “choice,” or (2) the nations agree on a prescription for choosing law in such disputes. Under either scenario, the resolution of Case 2 disputes in this model depends on the

159. A sample law selection clause might be like the following:

Choice of law. Disputes with another Subscriber or a Subscriber to a Provider with whom [name of contracting provider] has contracted shall be governed by the law of [the choice of law] and such disputes shall be pursued only in [choice of forum]. This clause applies only to disputes arising out of events or conduct in or concerning the subscriber's participation on the Internet.

160. Perritt, *supra* note 150, at 391 (suggesting that nonjudicial dispute resolution techniques, such as arbitration by the American Arbitration Association, be used for resolving cyberspace disputes). See also Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403 (1993).

161. Johnson & Marks, *supra* note 41, at 515.

162. *Supra* notes 132-33 and accompanying text.

163. Perritt, *supra* note 151, at 395-96.

164. See *infra* notes 166-207 and accompanying text.

165. See *infra* notes 208-18 and accompanying text.

unification, to some extent, of either substantive law or private international law.

a. Admiralty and Cyberalty<sup>166</sup>

Appropriate conceptual analogies to the notion of transnational cyberspace are found in legal environments in regions where states typically may not assert sovereignty. One of the more appealing analogies arises in admiralty law.<sup>167</sup> Some writers have made aspirational references to a new doctrine of "cyberalty."<sup>168</sup> The high seas are conceptually very similar to cyberspace. Just as the territory a ship traverses is not subject to any one state's exclusive jurisdiction, so too the user in cyberspace traverses a sovereignless region that is not subject to any state's exclusive jurisdiction. Cyberspace as a domain itself—strangely multinational yet non-national<sup>169</sup>—and the analogy between choice of law for cybertorts and choice of law for torts on the high seas should be explored.

No state may claim sovereignty over the high seas.<sup>170</sup> How, then, is choice of law accomplished in the maritime cause of action? Initially, a distinction must be drawn between injuries on the high seas and those in territorial waters.<sup>171</sup> The cyberspace analogy applies to the former. When collisions occur on the high seas, the *lex maritima* is applied—the "general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."<sup>172</sup> When the colliding ships fly the same flag of registry, courts apply the laws of that common flag.<sup>173</sup>

166. This Section owes much to the thoughtful analysis in William Tetley, *The Law of the Flag, "Flag Shopping," and Choice of Law*, 17 TUL. MAR. L.J. 139 (1993).

167. See *id.* at 143 ("Modern maritime transport, being essentially international or interjurisdictional, is subject to frequent problems concerning the appropriate choice of law. . . . Thus, maritime law is particularly suited as a source of material for the study of conflict of laws.")

168. See, e.g., THE EFFECTS OF ELECTRONIC MAIL ON LAW PRACTICE AND LAW TEACHING (I. Trotter Hardy ed., 1994). Hardy proposes that "[m]aybe 'cyberspace' should really be treated as a PLACE and like the oceans, generate its own brand of 'admiralty' (cyberlaty? [sic]) law." *Id.* at 95; see also A NEW JURISDICTION FOR CYBERSPACE? TRANSCRIPT OF NEWJURIS: AN ELECTRONIC CONFERENCE HELD SEPT.-OCT. 1993 21 (Trotter Hardy ed., 1994) ("Is the Internet like the ocean?").

169. See *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953) (noting that shipping is "an enterprise conducted under many territorial rules and under none").

170. Shin, *supra* note 83, at 1381.

171. 2 J.D. LEE, MODERN TORT LAW § 23.24 (Rev. ed. 1988).

172. *Id.* § 23.26 (quoting *The Belgenland*, 114 U.S. 355, 369 (1885)).

173. *Id.*

The most important principle to recognize is that "the general maritime law is not the law of any particular country but is part of the law of nations."<sup>174</sup> The analogy is clear: cyberspace, like the high seas, calls for a unified, common understanding of the law to be chosen to adjudicate disputes.

Many nations follow the general principle that "[t]he only safe and practical rule which can be followed [in maritime law] is to adopt the law of the ship's flag to govern in nearly all matters relating to a vessel, its captain and its crew."<sup>175</sup> Indeed, Justice Jackson has stated that "the weight given to the [ship's flag] overbears most other connecting events in determining applicable law."<sup>176</sup> This principle guides many nations' maritime choice of law rules.<sup>177</sup> Likewise, numerous provisions in international conventions resolve choice of law questions with the law of the flag.

Thus, the law of the flag has traditionally played a key role in the resolution of choice of law questions arising from conduct on the high seas. Under this approach, choice of law in cyberspace might be decided by reference to the law of the state in which the access provider is located. In this sense, one's cyber-domicile becomes one's domicile for choice of law purposes. There is precedent for such a view. *Lauritzen v. Larsen* noted that "the nationality of the vessel for jurisdictional purposes was attributed to all her crew."<sup>178</sup>

The law of the flag as a choice of law signpost suffers from serious difficulties when vessels fly flags of convenience or when collisions occur between vessels of different flags. Both of these problems persist in the adaptation of admiralty to cyberalty.

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174. GRANT GILMORE & CHARLE L. BLACK, JR., *THE LAW OF ADMIRALTY* 482 (2d ed. 1975); see also *Lauritzen v. Larsen*, 345 U.S. 571, 581-82 (1953) ("[C]ourts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law . . . from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.").

175. Tetley, *supra* note 166, at 140 (quoting E. LAFLEUR, *THE CONFLICT OF LAWS IN THE PROVINCE OF QUEBEC* 185 (1898)).

176. *Lauritzen*, 345 U.S. at 585.

177. Tetley, *supra* note 166, at 147-49 (cataloging nations that stipulate the law of the flag as the appropriate conflicts rule).

178. 345 U.S. 571, 586 (1953).

### i. Different Access Providers, Different Flags

Simple law of the flag analysis is not adequate to handle the choice of law problem of a transnational tort in cyberspace because the parties are unlikely to be traveling on the same "ship," or access provider. But how is maritime choice of law resolved when torts arise in two-ship collisions?<sup>179</sup> If the ships are of the same flag, the national law of the common flag should apply.<sup>180</sup> If the ships fly different flags, and both nations are parties to the Collision Convention of 1910, the terms of that convention apply.<sup>181</sup> The most interesting case results when ships of different flags collide and no multinational agreement is in force to resolve the conflicts question. In the United States, one writer has noted:

If a general rule is demanded, all that can be said is that on the whole [U.S.] courts will apply the internal law common to both ships if there is one. If not, the courts have vacillated between the choice of the law of the defendant vessel and the law of the plaintiff vessel and when apparently unable to make the choice have applied the *lex fori*. . . .<sup>182</sup>

In cyberspace, the implications are obvious. If two users (sharing neither nationality nor access provider) "collide," the simplest choice of law decision is to apply (1) the *lex fori*, (2) the law of the plaintiff's domicile, or (3) the law of the defendant's domicile. Of course, this result might sacrifice fairness to one of the parties in the name of simplicity. This unsatisfying result drove the drafters of the Second Restatement to compose a better regime for nonmaritime actions.

The more sophisticated multifactor analysis of the Second Restatement is reflected in a U.S. maritime case with a multinational flavor similar to cyber-disputes, *Lauritzen v. Larsen*.<sup>183</sup> The issue in *Lauritzen* was which nation's law would apply to a maritime tort. Larsen, a Danish seaman, while temporarily in New York, joined the crew of the *Randa*, a ship of Danish flag and registry, owned by Lauritzen, a Danish citizen.<sup>184</sup> Larsen had signed the ship's articles (including a forum selection

179. See generally Tetley, *supra* note 166, at 168-71.

180. *Id.*

181. International Convention for the Unification of the Rules Relating to Collisions at Sea, Sept. 23, 1910, art. 12, 212 Consol. T.S. 178, 183, reprinted in IGNACIO ARROYO, INTERNATIONAL MARITIME CONVENTIONS 1541 (1991).

182. Tetley, *supra* note 166, at 169 (quoting D. Winter, *Maritime Torts: The Choice-of-Law Principles*, 3 INT'L & COMP. L.Q. 115, 124-25 (1954)). In England, the *lex fori* is applied to this situation. *Id.*

183. 345 U.S. 571 (1953).

184. *Id.* at 573.

clause), which provided that the rights of the crew would be governed by Danish law.<sup>185</sup> Larsen was injured by negligent acts aboard the *Randa* in Havana Harbor.<sup>186</sup> He then sued his employer under the U.S. Jones Act<sup>187</sup> in the Southern District of New York.<sup>188</sup> A conflict of laws existed because Danish law imposed a damage limitation on his action, while the Jones Act did not.<sup>189</sup>

The U.S. Supreme Court held that Danish law, not the Jones Act, applied to the case.<sup>190</sup> In reaching this conclusion, the court balanced several factors: (1) the place of the wrongful act (*lex loci delicti*), (2) the law of the flag, (3) the allegiance or domicile of the plaintiff, (4) the allegiance of the defendant, (5) the place of contract, (6) the inaccessibility of a foreign forum, and (7) the law of the forum.<sup>191</sup>

Larsen argued strenuously that the shipowner's "frequent and regular" contacts with the United States justified application of the U.S. statute to the case.<sup>192</sup> Justice Jackson wrote:

But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws. . . . [I]t aims at stability and order. . . .<sup>193</sup>

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185. *Id.*

186. *Id.*

187. At the time of *Lauritzen*, 46 U.S.C. § 688 (now located at 46 U.S.C. app. § 688 (1988)) read in pertinent part:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.

188. *Lauritzen v. Larsen*, 345 U.S. 571, 573 (1953).

189. *Id.* at 575.

190. *Id.* at 592-93.

191. *Id.* at 583-92.

192. *Id.* at 581-82.

193. *Id.* at 581-83 (citation omitted).

Justice Jackson's writing clearly applies to cyberspace. Cyberspace represents a dramatic leap forward in global interconnectivity and has the capacity to revolutionize global communications and commerce. Much of cyberspace's "virtue and utility" lies in its "frequent and important contact with more than one country."<sup>194</sup> A balancing approach, like that in *Lauritzen*, relieves parties of a mechanical approach to choice of law methodology. In short, *Lauritzen v. Larsen* teaches that, according to U.S. law, the flag is only one relevant point of contact in the balancing scheme.<sup>195</sup> But as desirable as the *Lauritzen* multifactor approach is for its flexibility, the balancing approach really gives no clear answer, and fails to resolve choice of law in a region that is both transnational and non-national.

## ii. Flags of Convenience in Cyberspace

Another problem that arises in the cyberality framework is that of "flag shopping" and "flags of convenience."<sup>196</sup> A flag of convenience is a flag, literally "chosen" by a vessel, with which the vessel has little connection.<sup>197</sup> Reasons such as tax avoidance and preferable treatment under the state's substantive laws guide this choice, called flag shopping.<sup>198</sup> But attempts to gain favorable treatment by flag shopping have not been entirely successful.<sup>199</sup> Many nations will ignore a vessel's flag and, instead, examine the ownership of the vessel for purposes of contact analysis.<sup>200</sup> The domicile of the owners is one important contact to consider in choosing the applicable law.<sup>201</sup>

The analogy in cyberspace is easily seen. Offshore havens might arise that have favorable laws for Internet access providers. Professor Burk notes that some information-poor countries have "moved towards becoming 'data havens.'"<sup>202</sup> The laws of these havens might eliminate liability for contributory infringement of

194. *Id.* at 581.

195. *Id.* at 584-86.

196. See generally Tetley, *supra* note 166, at 168-71.

197. See generally *id.* at 173 n.224 (citing BOLESŁAW A. BOCZEK, *FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY 2* (1962)).

198. Tetley, *supra* note 166, at 173-74 (estimating that 40% of the world's vessels fly flags of convenience).

199. See *id.* at 180-84.

200. *Id.* at 180. See *Rainbow Line, Inc. v. M/V Tequila*, 480 F.2d 1024, 1027 (2d Cir. 1973) ("[I]t is well settled that the courts will look through the facade of foreign registration and incorporation to the [U.S.] ownership behind it."); *Hellenic Lines v. Rhoditis, Ltd.*, 398 U.S. 306, 309-10 (1970) (applying U.S. law to Greek-flagged ship because its owner had substantial and continuing contacts with the United States, its "base of operations.").

201. Tetley, *supra* note 166, at 179. See also *Lauren v. Lauritzen*, 345 U.S. 571, 583-93 (1953) (contact analysis).

202. Burk, *Patents*, *supra* note 13, at 52, 53 nn.386, 388.

intellectual property<sup>203</sup> or make "cyber-defamation" nonactionable. Given the above discussion, however, it is not certain that other nations would honor the providers' flags of convenience.<sup>204</sup>

Professor Tetley believes that the problems of flag shopping and flags of convenience have eliminated the usefulness of the law of the flag as a choice of law device.<sup>205</sup> He agrees with the *Lauritzen v. Larsen*<sup>206</sup> approach: the flag is only one contact in a multifactor test.<sup>207</sup> Flag shopping only reaffirms the conclusion that the law of the flag does not entirely solve the choice of law conundrums in cyberspace.

#### b. The Law Merchant and Law Cyberspace

Cyberspace's unique legal issues have inspired some authors to point to the medieval *lex mercatoria*—the Law Merchant—as a conceptual framework for a new body of cyber-law (the Law Cyberspace).<sup>208</sup> The Law Merchant was a collection of customary practices among traveling merchants in Medieval Europe and Asia that was enforceable in "all the commercial countries of the civilized world."<sup>209</sup> The Law Merchant existed "in some sense apart from and in addition to the ordinary rules of law that applied to non-merchant transactions."<sup>210</sup> The *lex mercatoria* has been described as follows:

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203. Professor Burk notes that some nations have no patent system at all. *Id.* at 33. With regard to software patents, some nations, such as Brazil and Bulgaria, grant no protection whatsoever. *Id.*

204. See *supra* note 94 and accompanying text.

205. Tetley, *supra* note 166, at 183.

206. 435 U.S. 571 (1953).

207. *Id.* at 584-85.

208. See, e.g., Anne W. Branscomb, *Overview: Global Governance of Global Networks*, in TOWARD A LAW OF GLOBAL COMMUNICATIONS NETWORKS 1, 21 (Anne W. Branscomb ed., 1986); Hardy, *supra* note 42, at 1019 (1994). Much of this Part's analysis is owed to Professor Hardy, who moderates an Internet listserver, CYBERIA-L, that focuses on law in cyberspace.

209. Hardy, *supra* note 42, at 1020 n.60 (quoting *Bank of Conway v. Stary*, 200 N.W. 505, 508 (N.D. 1924)).

210. *Id.* at 1020. See generally Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, in LEX MERCATORIA AND ARBITRATION 37, 54-55 (Thomas E. Carbonneau ed., 1990) (listing 20 "rules" of the Law Merchant).

The law merchant has been for centuries and continues to be today an international body of law, founded on the shared legal understandings of an international community composed principally of commercial, shipping, insurance, and banking enterprises of all countries. . . . We believe that the shared legal understandings of the international mercantile community should be seen as an *autonomous body of law, binding in appropriate cases upon national courts.*<sup>211</sup>

Why is the *lex mercatoria* a satisfying analogy to the legal problems posed by transnational cyberspace? Simply, the Law Merchant abrogates the need for the choice of law inquiry and the attendant balancing and weighing of interests. Part III of this Note concludes that traditional paradigms in choice of law analysis are inadequate on the transnational and non-national Internet. The Law Merchant is a body of law in itself, which enables an easy resolution to the choice of law question. The laws of the various nations are displaced, in a limited fashion, by the laws of a collection of merchants (here, users) with their own customs and usages of trade. Importantly, the customary Law Merchant is not a complete legal system. Nevertheless, because virtually all legal systems accept the binding nature of trade usages in contracts between merchants, there should be no fundamental obstacle to the general recognition of a customary law of international trade.<sup>212</sup>

In cyberspace, Case 2 disputes are ripe for such a conflicts model. Just as the merchants knew the customs and usages in the *lex mercatoria*, so too should users in cyberspace be charged with a knowledge of the customs and usages of the online world. The concept falters, however, in Case 3 disputes in which torts are committed and contracts broken between a user and a person or entity not subject to the Law Cyberspace.

One of the most appealing aspects of the Law Merchant as an analogy to cyberspace is its ability to respond and adapt rapidly to changes in the technical and legal environments.<sup>213</sup> Conventional sources of law are "generally . . . unable to adjust to changing commercial custom with the same ease as could a commercial system. . . . Strict rules lack[] the flexibility to vary in response to the peculiarities of the merchants, to their trade background and to their form of bargaining."<sup>214</sup>

211. Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy*, in *LEX MERCATORIA AND ARBITRATION* 21-24 (Thomas E. Carbonneau, ed. 1990) (emphasis added).

212. *Id.* at 32.

213. Hardy, *supra* note 42, at 1021.

214. *Id.* at 1022 n.63 (quoting LEON E. TRACKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 16 (1983)).

In this age of cyberspace and global connectivity, reliance on statutes and *stare decisis* simply cannot keep up with a rapidly evolving technological environment. Traditional law, then, might condemn rules regulating conduct in cyberspace to perpetual obsolescence. Professor Hardy argues that “[a] ‘Law Cyberspace’ co-existing with existing laws would be an eminently practical and efficient way of handling commerce in the networked world.”<sup>215</sup>

Professor Hardy notes that special courts sprung up in the Middle Ages to enforce the customs and usages of trade that comprised the Law Merchant. The jurisdiction of these courts was limited to disputes arising from commercial transactions.<sup>216</sup> The creation of cybercourts, as some have advocated, is a drastic step.<sup>217</sup> However, even in the absence of these special tribunals, a Law Cyberspace ameliorates the choice of law problems that Part III of this Note discusses. Simply, when a forum state seeks to apply a set of rules, it would look to the Law Cyberspace; the chosen law would be the collection of customs and accepted practices—codified or not—that had grown up with cyberspace.<sup>218</sup>

### c. Choosing Law in Sovereignless Regions

#### i. Outer Space

As Part II of this Note illustrates, cyberspace is transnational, yet non-national. In a similar vein, outer space is a region within the reach and use of many nations, but not easily demarcated into jurisdictions. The coming years will no doubt see an increased use of the multinational space station (MSS) as a common way to investigate and utilize outer space. Helen Shin notes, however, that no agreement or treaty has addressed the issue of choice of law in space, even though conflict of laws questions are sure to arise.<sup>219</sup> Shin notes that disputes between individuals arising out of torts committed aboard a MSS must be resolved according to some state’s laws, since the station “presumably [would] have no such laws of its own.”<sup>220</sup> Shin also

215. Hardy, *supra* note 42, at 1021.

216. *Id.* at 1020-21.

217. *See, e.g., id.* at 1052-53 (suggesting that “cyberspace users form their own virtual courts”).

218. *Id.* at 1036-41 (explaining the process for determination and acceptance of customs by courts).

219. Shin, *supra* note 83, at 1375.

220. *Id.* at 1378.

considers the choice of law implications for outer space, where sovereignty and jurisdictional analysis fail.<sup>221</sup>

Shin concludes that choice of law should be made through arbitration undertaken according to the Model Law on International Commercial Arbitration promulgated by the United Nations Commission on International Trade Law (UNCITRAL), which established procedures for binding arbitration of disputes.<sup>222</sup> The signatories to this multinational accord and their nationals would thereby be bound to the jurisdiction of the arbitration panel. Thus, while conventional choice of law processes are probably insufficient for the multinational space station, new proposals hold promise.

## ii. Antarctica

Another analogy to the transnational, yet non-national "region" of cyberspace is the "world's last sovereignless continent, Antarctica."<sup>223</sup> Although the Antarctic Treaty<sup>224</sup> governs public international law issues, no provision has yet been made with respect to jurisdiction and choice of law issues for tort and contract actions among individuals of different nations. In short, "Antarctica remains a 'jurisdictional no-man's land.'"<sup>225</sup> Traditional choice of law methodologies break down in Antarctica because "there is no *lex loci delicti*" and "Antarctica is the only land mass on the planet not subject to a unified private legal system."<sup>226</sup> Similarly, cyberspace is an example of a non-land mass without a choice of law regime.

In Jonathon Blum's analysis, the governing law in an action in which there is no proof of foreign law becomes the law of the forum in which the suit is brought (the *lex fori*). Thus, if *lex loci delicti* fails because the *lex loci* has no legal system, then *lex fori* is the answer. For example, in *Beattie v. United States*,<sup>227</sup> an Air New Zealand plane crashed in Antarctica. The D.C. Circuit held that choice of law was not an issue because there were no alternate legal systems from which to choose.<sup>228</sup> U.S. law was

221. Shin notes two regions where states may not assert sovereignty: Antarctica and the High Seas. Shin, *supra* note 83, at 1379-81. This Note considers both of these "sovereign-less" regions for their intractiveness on the choice of law in cyberspace.

222. *Id.* at 1378.

223. Jonathon Blum, *The Deep Freeze: Torts, Choice of Law, and the Antarctic Treaty Regime*, 8 EMORY INT'L L. REV. 667, 667 (1994).

224. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 (entered into force June 23, 1961).

225. Blum, *supra* note 223, at 668.

226. *Id.* at 680.

227. 756 F.2d 91 (D.C. Cir. 1984).

228. *Id.* at 104, 105.

applied as the *lex fori*. In another case, the court applied U.S. law to a tort in Antarctica because the United States has a great deal of control over that area.<sup>229</sup>

Blum suggests two ways to resolve the Antarctic choice of law conundrum: (1) the parties to the Antarctic Treaty could develop a body of law specifically designed to apply to tortious conduct in Antarctica, or (2) the parties could promulgate a choice of law code that would decide such questions.<sup>230</sup> Blum's first option approximates the *lex cyberspace* or *cyberalty* concepts this Note discusses previously. In these scenarios, a new jurisprudence might arise that would obviate the need for choice of law. The choice is made simply by applying the "new" law. Blum is skeptical, however, that the parties to the Antarctic Treaty would divest themselves of sovereignty (whatever of it exists) over Antarctic actions.<sup>231</sup>

Blum's second option offers a multinational choice of law accord: a "Protocol on Choice of Law for the Commission of Torts in Antarctica."<sup>232</sup> This agreement would call for the application of either (1) the law of the plaintiff's home state in all tort cases, or (2) the *lex fori* in all cases. These two analyses, then, devolve into simplistic answers to the choice of law question—answers that revert to the most primitive choice of law decisions a court can make. Simplicity is elevated over both fairness and reason; however, the goal of fairness in choice of law deserves more than just simple results.

#### d. Prospects for a Multilateral Choice of Law Treaty for Cyberspace

The adoption of a supranational corpus of law, such as the Law Merchant or admiralty law, would obviate the need for a conflict of laws regime in cyberspace. The obvious political improbability of such a tack leads most authors to conclude that nations will refuse to surrender their sovereignty, their power to make law, or their power to control adjudication.<sup>233</sup> The next best solution to the choice of law conundrum, one might suppose, would be the unification of conflict of laws rules. Rather than

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229. See *Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

230. Blum, *supra* note 223, at 690.

231. *Id.* at 690-95.

232. *Id.* at 695.

233. See, e.g., Blum, *supra* note 223, at 694-95 ("In all likelihood, it was a foregone conclusion . . . [that nations] will not stand for the establishment of any body that threatens their (albeit frozen) sovereignty on [Antarctica].").

crafting a new jurisdiction's entire substantive law, the nations need only agree on this jurisdiction's private international law.

Ample precedent exists for such a multinational conflict of laws accord. The Hague Conference on Private International Law and the Rome Institute for the Unification of Private Law (UNIDROIT) are dedicated to just such a mission. The Hague Convention is a permanent multinational group charged with preparing texts that unify choice of law rules.<sup>234</sup> The International Institute for the Codification of Private Law in Rome focuses primarily upon the unification of substantive rules of law.<sup>235</sup>

In recent years, the United States has actively participated in the global unification of certain areas of law.<sup>236</sup> Scoles and Hay list more than twenty multilateral treaties affecting private law that the United States has ratified,<sup>237</sup> four of which originated in the Hague Conference. Hague Conference agreements cover service of process and obtaining evidence abroad.<sup>238</sup> The United Nations Convention on the International Sale of Goods (the Sale of Goods Convention),<sup>239</sup> one of the more important multilateral treaties, entered into force in the United States on January 1, 1988. The Sale of Goods Convention essentially "revitalizes the ancient *lex mercatoria*."<sup>240</sup> Although a discussion of the Sale of Goods Convention is beyond the scope of this Note, the significance of ratifying an accord that unifies, to some extent, private international law should not be missed.

Just as a multinational accord has been reached on conflict of laws with regard to a number of subjects,<sup>241</sup> such as the law applicable to traffic accidents among nationals of different countries<sup>242</sup> and the law determining the status of aliens,<sup>243</sup> an agreement might be forged to unify choice of law rules for cyberspatial disputes. Indeed, the authors who have considered choice of law in sovereignless regions have prescribed just such a

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234. Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT'L L. REV. 487, 488 (1988).

235. *Id.* at 488-89.

236. SCOLES & HAY, *supra* note 123, at 154.

237. *Id.* at 153-54 n.1.

238. *Id.*

239. U.N. Conference on Contracts for the International Sale of Goods, Final Act (April 10, 1980), U.N. Doc. A/Conf. 97/18, *reprinted in* S. Treaty Doc. No.98-9, 98th Cong., 1st Sess. and 19 I.L.M. 668 (1980).

240. Francis A. Gabor, *Stepchild of the New Lex Mercatoria: Private International Law from the United States Perspective*, 8 NW. J. INT'L L. & BUS. 538, 539 (1988).

241. *See generally* SCOLES & HAY, *supra* note 123, at 153 n.1.

242. Road Traffic Convention (Geneva, 1949), 3 UST 3008, 125 UNTS 22.

243. 46 Stat. 2573, 132 U.N.T.S. 301.

course: Blum recommends a "Protocol on Choice of Law for the Commission of Torts in Antarctica";<sup>244</sup> Faucher proposes a federal statute to unify U.S. defamation law and preempt state choice of law decisions in United States cyber tort actions;<sup>245</sup> Shin advocates a convention incorporating the provisions of the UNCITRAL Model Law on International Commercial Arbitration for torts in outer space;<sup>246</sup> Kirby suggests that the member countries of the Organization for Economic Cooperation and Development (OECD) "work towards the development of principles . . . to govern the applicable law in the case of transborder [data] flows";<sup>247</sup> Sciglimpaglia leans toward an OECD approach to unifying "choice of law and extradition procedures" for transnational computer hacking;<sup>248</sup> and Hardy looks to the possible formation of "virtual courts" to devise appropriate rules for choosing or unifying the law respecting international torts in cyberspace.<sup>249</sup>

The common thread in each of these suggestions is that a coherent choice of law regime might be established through a multinational treaty for actions in transnational settings where conventional choice of law is impracticable. In the end, such a treaty might provide the easiest solution to the vexing problem of choice of law in transnational cyberspace. It should be recalled, however, that simple, easily articulated rules for choice of law sometimes sacrifice fairness. Blum's two options for the Antarctic protocol rely on only one factor—either the *lex fori* or the law of the plaintiff's domicile.<sup>250</sup> Unfortunately, ameliorating these simplistic rules inevitably sacrifices their "cleanliness" and ease of application.

### 3. Case 3: Where Conventional Choice of Law Must Still Reign

In Case 3, a cyberspace nexus exists, but both parties to the action cannot be said to have "availed" themselves of a law of cyberspace. It would be fundamentally unfair for the new model to encompass the action. Choice of law must derive from either the traditional modes of conflicts analysis or from the signing of a multinational choice of law accord by which the nationals of all

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244. Blum, *supra* note 223, at 695-98.

245. Faucher, *supra* note 30, at 1066-73.

246. Shin, *supra* note 83, at 1411-12.

247. Kirby, *supra* note 29, at 243 (suggesting that the Hague Conference might help clarify some issues).

248. Sciglimpaglia, *supra* note 53, at 247-50 (suggesting that the OECD accomplish such a task).

249. Hardy, *supra* note 42, at 1052-53.

250. Blum, *supra* note 223, at 695-98.

signatories become bound to the choice of law process in the agreement.<sup>251</sup>

Adapting novel choice of law strategies to disputes in cyberspace works well when both parties are users. However, the solutions considered in Case 1 and Case 2 are ineffective when harm to noncyberspace parties is involved.<sup>252</sup> It would be a poor policy to allow entities in cyberspace to control the forum for disputes involving those without connection to the Internet.<sup>253</sup> These real-space entities are not party to a cyberspace contract and have no reason to suspect that causes of action will be governed by a law chosen on account of cyberspace.<sup>254</sup>

It is easy to envision the data haven<sup>255</sup> whose service contract chooses the law of a state with no privacy, intellectual property law, or recovery for defamation. Defendants could thereby easily "immunize" their tortious conduct. Recall this Note's discussion regarding flags of convenience in the admiralty setting: it is fundamentally unfair to allow such tactics to strip a plaintiff of a remedy because the defendant has "outsmarted" the law in behaving strategically.<sup>256</sup>

We may simply be resigned to the traditional modes for choice of law in certain cyber-disputes.<sup>257</sup> The *Lauritzen v. Larsen*<sup>258</sup> approach, while imperfect, probably represents the current state of choice of law in transnational but non-national regions where points of contact are plentiful. The *Lauritzen* approach is adaptable and somewhat well-suited to resolving choice of law in cyberspace.

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251. See *supra* notes 232-44 and accompanying text (discussing multinational conflict of laws agreements).

252. See Perritt, *supra* note 151, at 365 n.54 ("Contract cannot, however, bind third parties, which leaves a major gap in regulating liability for injury resulting from messages.").

253. See also Johnson & Marks, *supra* note 41, at 513 n.104:

The contracts [approach to dispute resolution] cannot solve the problems associated with harm to third parties because a third party who may be harmed by libel, fraud, theft, etc. is not party to the contract. No bargain between a user and a system provider can, in itself, alter the responsibility of either one to a third party harmed by action of one or the other.

254. The Sale of Goods Convention reflects this reluctance to bind nationals of nonsignatory parties. The United States ratified the Convention on the condition that it apply only if both contracting parties have their places of business in signatory countries. Gabor, *supra* note 240, at 539.

255. See *supra* notes 202-03 and accompanying text (regarding forum and flag shopping).

256. See *supra* notes 196-204 and accompanying text.

257. See *supra* notes 105-27 and accompanying text (describing conventional approaches to choice of law in tort and contract actions).

258. 345 U.S. 571 (1973).

## IV. CONCLUSION

Conflict of laws is a subject that is difficult for both law students and practitioners. The advent of new technologies threatens to aggravate the problem by defying the concepts of sovereignty, territoriality, and even location. Cyberspace is, at its foundation, both multinational and non-national. Cyberspace challenges the world to somehow reconcile a geographical real-space with a nongeographical cyberspace. Many writers believe cyberspace should be treated as a separate jurisdiction. It is doubtful, however, that nation-states in real-space will relinquish control over the communications medium of the twenty-first century.

This Note suggests that the reconciliation of the choice of law conundrum in cyberspace might be accomplished by a three-pronged model based on three different situations: (1) disputes involving parties in privity with each other who act in their cyberspatial capacities; (2) those involving two users not in privity but acting in their cyberspatial capacities; and (3) those involving cyberspace with regard to the defendant, but not the plaintiff. For each of these scenarios, a different choice of law regime should be implemented. The new technologies mandate the synthesis of these approaches. If cyberspace does represent the arrival of the global village, then a new paradigm will be necessary to satisfy the conflict of laws that will arise in a village confused by a sovereign on every block.

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