The Phenomenon of Delocalisation in Cyberspace and its Influence on International Dispute Resolution

"Minor-Dissertation" in International Commercial Law

by

Peter von Ondarza

VNDMAN001

Faculty of Law
University of Cape Town

UNDER SUPERVISION OF ASSOCIATE PROFESSOR

John Hare

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

17.02.1997

University of Cape Town

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"The trouble with cyberspace,
lawyers say,
is
that there's no 'there' there[1]."

[1] Rosaland Resnick, 'Cybertort: The New Era', Nat'l L. J., July 18, 1994, at A1.

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1 INTRODUCTION

The rise of Cyberspace[2] / the Internet[3] has opened a new source for legal issues. Beside issues of contract[4], tort[5], free speech, fundamental rights, privacy and anonymity, crime

[2] The expressions "Cyberspace" and "Internet" will both be used. They have the same meaning.

[3] "*Cyberspace* is an expression which comes from a novel called *Neuromancer*, written by *Willian Gibson* in 1984, which was very influential on the Computer- and Telecommunication Scene. That is why it established as the collective term for the net of networks and the communication infrastructure arising therefrom (= also called the *Internet* - see below). The story of *Neuromancer* is about a future in which it is possible to connect the human thinking directly to a computer. Thus it is possible to get access to a completely virtual world which has no counterpart in the real physical world but only exists in the ideas of the connected people. Today there are still a screen and a keyboard in between Cyberspace and the human, but still, this virtual world appears to be increasingly a seperate and independant dimension. The wording *Cyberspace* comes from the expression *Cybernetics* which was influenced by the mathematician *Norbert Wiener* in 1948. Cyberspace is in effect 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". *See* Matthew R Burnstein, 'Conflicts On the Net: Choice of Law in Transnational Cyberspace', Vanderbilt Journal of Transnational Law, Vol. 29:75 (1996), 77-116. The expression ***Internet*** is being used in the same sense like *Cyberspace*. As mentioned above, the Internet is a decentralised network of networks which development began in the beginning of the 70's: initially the Internet was built up in the USA to combind civil and military research stations. Its name was correspondingly the *Arpanet* (ARPA = Advanced Research Project Agency). This was an establishment of the US Ministry of Defense which was grounded in the 50's as the counter-answer to the sovjet Sputnik success - its aim was to save costs by connecting research stations, see H Rheingold, *The Virtual Community*, 1993, pp 70 ff. Although it was initially built to transfer research data it casually came out to be a very successful medium to send electronic mail (*E-mail*). This was the starting point for new kinds of communication like we have today. In the course of the years civil research places have been connected to the system increasingly and thus the *Arpanet* was substituted by the *Internet* which today combines millions of users all over the world: in 1981only 213 computer-systems were connected together. In the last years this amount shot up by more than 1000% to approximately more than 40 million, see P Elmer-De Witt, 'Welcome to Cyberspace', TIME Spring 1995 (Special Issue), p 9; Today the Internet is used by estimated 60 million people in 160 countries; this amount doubles every year. Its best-known, fastest growing and most innovative feature is the World Wide Web (www), which protocolls were developed in Europe and which is already the standard - medium for the publishing of information and electronoc commerce. The estimated 10 million so called web-sites world-wide in 1995 have been grown by 1600% compared to the year before. Therefore the Internet is the most important new medium for communication and commerce in the world. Its influence on the world's commerce will be immense. According to estimations performed by Forrester Research the Internet core-commerce was estimated up to 2,2 Mrd. $ only in the USA. In the year 2000 this amount will go up to 45 Mrd. $. *For more information see:* 'Illegale und schädigende Inhalte im Internet' (a website also available in English), at: http://www2.echo.lu/legal/de/internet/content/communic.html. For a good introduction into the technical world of Cyberpace / the Internet see: Preston Gralla, *How The Internet Works*, 1996. The decentralised structure of the Internet is its most characterising and legally relevant feature. There is no central point / headquarter / switch-board or the like from which the Internet could be controlled or switched off. Because of its specific technical structure it is not even possible to foresee which way the parts or packags of an information takes by getting from one user to the other: this is because of the Protocoll which enables the transfer of information. This so called TCP/IP (*Transmission Control Protocoll / Internet Protokoll*) breaks the sent data into small packages. Each packet is sent independently of one another through a series of switches called routers. Once all the packets arrive at the receiving end, they are recombined into their original, unified form. It is not foreseeable which way the routers choose. They determine the most efficient path for sending each packet to the next router closest to its final destination. The advantage of this method is the little vulnerability of the information transfer: even if parts of the web are destroyed (e.g. by an atomic strike) the tranfer of the information still remains possible. Furthermore there is no headquarter which could get destroyed. Accordingly there is no control authority which could enforce whatever kind of laws and the idea of geographic boundaries does not work any more in this virtual world. This was already being proved by the fact that informations about occurences in the Gulf War, about the revolt in Moscow and the war in Jugoslavia could pass any attempts of censorship in Cyberspace. Censorship is technically interpreted as damage and therefore avoided by bypassing. Thus Cyberspace / the Internet is a new type of a public and social place.

[4] *See* Fred M Greguras, Trudy A Golobic, Robert A Mesa and Rebecca Duncan, 'Electronic Commerce: On-line Contract Issues', updated version of a presentation made at Law Seminars International Electronic Commerce; Doing Business On-line, September 21, 1995, at: http://www.batnet.com/oikoumene/ec_contracts.html.

[5] *See Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) available at: http://www.cpsr.org/cpsr/free_speech/cubby_v_compuserve.txt; *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), available at: http://www.cpsr.org/cpsr/free_speech/so_v_prodigy_1995.txt; *Stern v. Delphi Internet Services Corp.*, 626 N.Y.S.2d 694 (N.Y. Sup. Ct. 1995), available at: http.www.jmls.edu/cyber/cases/stern.txt; Rosalind Resnick, 'Cybertort: The New Era', National Law Journal, July 18, 1994, at A1; David J Loundy, 'Holding the Line, On-line, Expands Liability', Chi. Daily L. Bull., June 8, 1995, at 6; Mike Godwin, 'Libel, Public Figures, and the Net', Internet World, June 1994, at 62, also available at: http://www.eff.org/pub/Legal/net_public_figures_godwin.article; *ibid* 'Internet Libel: Is The Provider Responsible?', Internet World, Nov./Dec. 1993 available at: http://www.eff.org/pub/Legal/net_libel_godwin.article; George B Trubow, 'System Operator Liability for Defamatory Statements Appearing on an Electronic Bulletin Board', 19 J. Marshall L. Rev. 1107 (1986); Francis Auburn, 'Usenet News and the Law', 1 Web J. Current Legal Issues (1995); Henry H Perritt, Jr., 'Tort Liability, the First Amendment, and Equal Access to Electronic Networks, 5 Harvard J. L. & Tech. 65 (1992); Timothy Arnold-Moore, 'Legal Pitfalls in Cyberspace: Defamation on Computer Networks', 1 J. L. & Info. Sci. 165 (1990).

and security[6], intellectual property[7], governance and regulation[8], procedural issues are of predominant interest. This is because procedural law is the "last link" the chain in the exercise of state power. It follows that location-oriented, territory-oriented and sovereignty-oriented aspects play an important role in procedural provisions. Especially those aspects, however, seem to be most challenged by Cyberspace because of a new phenomenon: *delocalisation.*

After giving a brief explanation of this phenomenon the most important legal problems arising therefrom will be outlined. This will entail on examination of the most important rules relating to jurisdiction of certain states and of the European Union. Those rules will be tested against their compatibility with delocalisation and it will be argued that the phenomenon of delocalisation in Cyberspace does not render those rules superfluous or inapplicable. Their validity and relevance remains unaffected. It will be shown, however, that those rules will not be sufficient to handle another new phenomenon necessarily connected with the phenomena of delocalisation: the increasing *quantity* of international disputes.

[6] *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991); Mitchell Kapor, 'Civil Liberties in Cyberspace: Computers, Networks, and Public Policy', Scientific American, Sept. 1991, at 158, also at: http://www.eff.org/pub/Legal/cyberliberties_kapor.article; John Perry Barlow, 'Crime and Puzzlement: In Advance of the Law on the Electronic Frontier', Whole Earth Review, Fall 1990, at 44, also at: http://www.io.com/SS/crimpuzz.html; Clinton Wilder & Bob Violino, 'Online Theft', Information Week, Aug. 28, 1995, at 30, also at: http://www.techweb.cmp.com/techweb/programs/registered/search/cmp-wais-index.html; Vic Sussman, 'Policing Cyberspace', U.S. News & World Report, Jan. 23, 1995, at 54; Wade Roush, 'Hackers: Taking a Byte Out of Computer Crime', Technology Review, Apr.1995, also at: http://web.mit.edu/afs/athena/org/t/techreview/www/articles/apr95/Roush.html; Joseph P Daly, Comment, 'The Computer Fraud and Abuse Act - A New Perspective: Let the Punishment Fit the Damage', 12 J. Marshall J. Computer & Info. L. 445 (1993); Michael P Dierks, 'Computer Network Abuse', 6 Harv. J. L. & Tech. 307 (1993); Glenn D Baker, note, 'Trespassers Will Be Prosecuted: Computer Crime in the 1990s', 12 Computer/L.J. 61 (1993); Eileen S Ross, Note, 'E-mail Stalking: Is Adequate Legal Protection Available?', 13 J. Marshall J. Computer & Info. Law 405 (1995); Bruce Sterling, *The Hacker Crackdown: Law and Disorder on the Electronic Frontier*, Bantam Books 1992, also at: http://www.mit.edu:8001/hacker/hacker.html; Lance Rose, 'Crime and the Online System' in *NetLaw: Your Rights in the Online World*, 187-208 (1995); Lance Rose, 'Searches and Seizures' in *ibid* at 209-43;

[7] Bruce A Lehmann and Ronald H Brown, 'Intellectual Property and the National Information Infrastructure', Report of the Working Group on Intellectual Property Rights (Green Paper) available at: http://www.uspto.gov/text/pto/nii/ipwg.html and http://www.cirrus.mit.edu/met_links/iitf_draft.html; *ibid* (White Paper) at: gopher://ntiant1.ntia.doc.gov/00/papers/documents/files/ipnii.txt (plain text) and http://www.uspto.gov/web/ipnii/ (PDF format); Peter Lyman, 'Copyright and Fair Use in the Digital Age', EDUCOM Review, Jan./Feb. 1995, at 32; Michael D McCoy & Meedham J Boddie II, Cybertheft: 'Will Copyright Law Prevent Digital Tyranny on the Superhighway?', 30 Wake Forest L. Rev. 169 (1995); Trotter Hardy, 'Contracts, Copyright and Preemption in a Digital World', 1 Richmond J. L. & Tech. (1995); Dan L Burk, Transborder Intellectual Property Issues on the Electronic Fromtier, 6 Stan. L. & Pol'y Rev. (1994) also at: gopher://gopher.gmu.edu/00/academic/colleges-depts-insts-schools/law/working/dburk2; *ibid*, 'Trademarks Along the Infobahn', 1 Richmond J. L. & Tech. (1995); Mark A Lemley, 'Rights of Attribution and Integrity in Online Communications', 1995 J. Online L., art. 2, also available at: http://www.law.cornell.edu(jol/lemley.html and gopher://gopher.wm.edu/00/MWSL/LJ/JoOL/article2; Lance Rose, 'Owning and Using Online Property', in: *NetLaw: Your Rights in the Online World* (1995), 83-130; Edward A Cavazos & Gavino Morin, 'Intellectual Property in Cyberspace: Copyright Law in a New World', in: *Cyberspace and the Law: Your Rights and Duties in the Online World* (1994), 47-65; Michael Mensik and Gary Fresen, 'Vulnerabilities of the Internet' at: http://www.baker.com.hk/publicat/s_namer/alrt17/t-alrt17.html.; NAFTA and GATT - Intellectual Property Issues, available at: http://www.ladas.com./BULLETINS/1994/NAFTAGATT.html; Mary Holden, 'Intellectual-Property Disputes Flare on the Electronic Frontier', Chi. Daily L. Bull., Apr.22, 1995, at 1; John Perry Barlow, 'The Economy of Ideas: A Framework for Rethinking Patents and Copyright in the Digital Age', Wired 2.03, Mar. 1994, at 85, available at: http://www.digex.net/hrrc/barlow.html and http://www.hotwired.com/Lib/Wired/2.03/features/economy.ideas.html; David J Loundy, 'Trademark Attorneys Discover Cyberspace', Chi. Daily L. Bull., Feb. 9, 1995; CASES: *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), available at: http://www.jmls.edu/cyber/cases/frena.txt; *Sega Enterprises v. Maphia*, 857 F. Supp. 679 (N.D. Cal. 1994) available at: http://www.jmls.edu/cyber/cases/sega.txt; *MTV Networks v. Curry*, 867 F. Supp. 202 (S.D.N.Y. 1994), available at: http://www.jmls.edu/cyber/cases/mtv.txt; *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), available at: http://www.jmls.edu/cyber/cases/lamacchi.txt; *Religious Technology Center v. F.A.C.T.Net, Inc.*, available at: http://www.jmls.edu/cyber/cases/rtc-fact.html; *Religious Technology Center v. Netcom On-line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), at: http://www.jmls.edu/cyber/cases/netcom.txt.

[8] *See* Henry H Perritt, Jr., Regulation and the National Informtion Infrastructure, available at: http://www.law.vill.edu/chron/articles/regulation_and_public_access.html;

Possible remedies will therefore be discussed. Besides discussing the role of international agreements and alternative forms of dispute resolution, the extent to which global communication systems themselves (epecially the Internet) can be used in the resolution of international commercial disputes will be emphasised in particular: the excellent feasibility of the Internet itself as a new forum for dispute resolution, especially commercial arbitration.

2 THE PHENOMENON OF DELOCALISATION IN CYBERSPACE

Cyberspace dismantles physical distances. In Cyberspace there are no territorially-based boundaries, because the cost and speed of message transmission is almost entirely independent of physical location: messages can be transmitted from one physical location to another without degradation, decay, or substantial delay, and without any physical barriers that might otherwise keep certain geographically remote places and people separate from one another. It enables transactions between people who do not know, and in many cases cannot or do not even want to know, the physical location of the other party, the distance and the route the information takes.

Global networks[9] interconnect users locally, regionally, and globally: just as one uses the mailbox at the comer, 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)[10]. Like cork boards and thumbtacks, which pass information from one person to many, electronic bulletin board systems (BBSs) and "newsgroups" allow users to "post" a message and disseminate it across the globe to be read by anyone with access to the group[11]. Bulletin boards have literally millions of subscribers. Teleconferencing and the advent of multimedia allow "real-time" interaction among parties sometimes continents apart[12]. Users can aquire files and computer programms from computers half a world away using the File Transfer Protocoll (FTP)[13] or use the World Wide Web (www) with all its features for international entertainment and commerce, enabled by the Hypertext Markup Language (html) for building web-pages and the Hypertext Transfer Protokoll (http)[14]. Remote log-on[15], telnet[16], gopher[17], and the World Wide Web all render political borders obsolete to some extent[18]. For example users can "visit" one location (called one "page" or a "site") on the www , where they are then presented with an opportunity to visit any of a number of

[9] The main global networks include Internet, BITNET, UseNet, FidoNet, and AT&T mail.
[10] Linda M Harasim, 'Global Networks: An Introduction', in Linda Harasim, *Global Networks* (1993) 3, 4.
[11] UseNet for example 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 Tulane Law Review I, 8 (1993).
[12] Several companies now offer software products that provide a method of voice telecommunication. By using the Internet, these companies avoid longdistance 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, 67; Matthew R Burnstein, 'Conflicts on the Net: Choice of Law in Transnational Cyberspace', 78 Vanderbilt Journal of Transnational Law, Volume 29:75, 1996, 79.
[13] See Joshua Eddings, *How The Internet Works* (1994) and Preston Gralla, *How The Internet Works* (1996). Those books are an excellent introduction in the technical world of the Internet.
[14] For more information and explanation *see* Gralla, *ibid* at 73 and 74.
[15] *See* Eddings, *supra* at 3.
[16] Telnet allows users to "log on" to a remote host computer as if they were sitting in front of that computer. *See ibid* at 19.
[17] 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, *ibid* at 131.
[18] See Matthew R Burnstein, *supra* at 82.

other locations - in any of a number of other countries. Frequently, users are unaware that they have even "crossed" a political border in the course of their virtual travels[19].

Cyberspace is therefore not localised. Cyberspace is international in its nature and indifferent to geographic boundaries, a phenomenon described as *delocalisation*.

3 EMERGING QUESTIONS FROM THE PHENOMENON OF DELOCALISATION IN THE CONTEXT OF PRIVATE INTERNATIONAL PROCEDURAL LAW

Systems of law are still territorially limited and vary from state to state. Their application is strictly dependent on where a case arises - they are localised. The procedural rules of law especially reflect this principle of localisation:

- The fundamental bases for the exercise of **jurisdiction**[20] by a state is rooted in two aspects of the modern concept of the state itself: defined territory and permanent population[21]. It is generally accepted therefore that a state is entitled to exercise jurisdiction in respect of persons and events within its territory, and in respect of its nationals (including corporations) even when they are outside its territory, although in that case enforcement may not be possible so long as they remain abroad[22]. That is why domicile and residence are sometimes used instead of nationality as the basis of founding jurisdiction, particularly in the fields of private law and tax law and with regard to immigrants[23]. Since territoriality is the basis of jurisdiction in general, the geographic scope of that jurisdiction is of considerable importance[24]. This close relationship between territorial power and judicial authority has led to the localisation of judicial authority. Jurisdiction is therefore in principle geographically determined[25].

- The **enforcement** of laws is dependent on the availability of executive organs which derive their right to act from the legislative power which in turn is geographically bound by its scope of sovereignty. Therefore the enforcement of laws is in principle also geographically based because the principle of sovereignty precludes enforcement outside a state.

[19] *Ibid.*
[20] Jurisdiction is the legal power, established by the governing instrument, of courts or tribunals within their scope of competence to take cognisance of and to deal with matters actually brought before them. *See* Helmut Steinberger, 'Judicial Settlement of International Disputes', in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume 1, 1981, p 128.
[21] Bernhard H. Oxman, 'Jurisdiction of States', in: *ibid*, Volume 10, p 279.
[22] Clive Parry, John P Grant, Anthony Parry and Arthur Watts (ed.), *Encyclopaedic Dictionary of International Law*, 1986, p 199.
[23] *Encyclopedia of Public International Law, supra* at 279.
[24] Similar: *ibid.*
[25] Similar: Henry H Perritt, 'Jurisdiction in Cyberspace: the role of intermediaries', at: http://www.law.vill.edu/harvard/article/harv96k.htm.

Thus there seems to be a dicrepancy between the traditional principle of localisation in international procedural law and the phenomenon of delocalisation in Cyberspace.

This discrepancy has led to much discussion for it is doubtful whether traditional concepts of law systems which refer to location / territory / geographic boundaries are still adequate at all as far as Cyberspace is concerned. A new legal regime for Cyberspace, which is supposed to be valid world-wide, has as aresult been proposed[26].

It is, however, not the scope of this work to philosophise about the need for a world-wide legal regime for Cyberspace. It is rather my intention to look at some concrete legal questions arising out of the abovementioned discrepancy in the field of private international procedural law:

- the *legal* question of the compatibility of delocalisation and the traditional rules on private international procedural law and
- the related *factual* question of the effectivity of the present court system for dealing with the increasing number of Cyberspace matters[27].

The significance of these questions can be illustrated by some examples:

An American www[28]-user posts a collective defamatory message on a South African bulletin board. This message can be read by thousands or millions of people in the world. Thus the user might infringe several laws of

[26] This topic will not be dealt with more intensively. But *see* for further information: Matthew R. Bernstein, 'Conflicts on the Net: Choice of Law in Transnational Cyberspace', 29 Vand. J. Transnatl L. 75, 93 (1996); Trotter Hardy, 'The Proper Legal Regime for Cyberspace', 55 U. Pitt. L. Rev. 993, 1019 (1994); Ethan Katsh, 'Law In a Digital World: Computer Networks and Cyberspace', Villanova Law Review 38 (April 1993), 403-485; Owen Fiss, 'In Search of a New Paradigm', The Yale Law Journal 104, 1613-1618; Cass R Sunstein, 'The First Amendment in Cyberspace', The Yale Law Journal 104, 1757-1793; David G Post, 'Anarchy, State and the Internet: An Essay on Law-Making in Cyberspace, 1995, J. Online L., art. 3, an article published on a website at: http://warthog.cc.wm.edu/law/publications/jol/post.html; Lawrence Lessig, 'The Path of Cyberlaw', The Yale Law Journal 104, 1742-1755; John D. Faucher, Comment, 'Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Defamation Cases', 26 U.C. Davis L. Rev. 1045 (1993); Mike Godwin, 'The Long Arm of the Law', Internet World, March 1995, at 78 (was also available at: http://www.internetworld.com/1995/03/law.htm); Dennis H Hernandez & David May, 'Personal Jurisdiction and the Net: Does Your Website Subject You to the Laws of Every State in the Union?', L.A. Daily J., July 15, 1996 (was also available at: http://www.gse.ucla.edu/iclp/dhdm.html); David J Loundy, 'Chi. Daily L. Bull., Aug. 8, 1996 (was also available at: http://www.leepfrog.com./E-Law/CDLB/Jurisdiction.html - available in LEXIS, News library, Chidlb file, and Westlaw 8/8/96 CHIDLB 6); David J Loundy, 'Whose Standards? Whose Community?', Chi. Daily L. Bull., Aug. 1, 1994, at 5 (was also available at: http://www.leepfrog.com/E-Law/CDLB/AABBS.html); William S Byassee, 'Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community', Wake Forest L. Rev. 197 (1995); Fred H Cate, 'The First Amendment and the National Information Infrastructure, 30 Wake Forest L. Rev. 1, 1995; David R Johnson and David G Post, 'The Rise of Law in Cyberspace', Stanford Law Review (forthcoming 1996); James DeFelice, 'Dispute Resolution in Cyberspace', CyberLaw Newsletter, Vol. 1, No. 2, 1 Sept. 1996 (was also available at: http://www.fplc.edu/CyberLaw/CN12.htm); Henry H Perritt, Jr., 'Regulation and the National Information Infrastructure - Conference on Business and Legal Aspects of the Internet and Online Services', New York - 30 September 1994 (http://www.law.vill.edu/chron/articles/regulation_and_public_access.htm); Bill D. Hicks, 'Choice of Law Issues in Cyberspace', at: http://www.law.ttu.edu/cyberspc/jourl3.htm; Henry H Perritt, Jr., 'Computer Crimes and Torts in the Global Information Infrastructure: Intermediaries and Jurisdiction' at: http://www.law.vill.edu/chron/articles/oslo/oslo12.htm; Joanna Zakalik, 'International Jurisdiction and Conflict of Laws in Cyberspace, at: 'http://www.libraries.wayne.edu/~jlitman/pzakalik.html; David R Johnson and David G Post, 'And How Shall the Net Be Governed? - A Meditation on the Relative Virtues of Decentralized, Emergent Law', at: http://www.cli.org/emdraft.html; *German literature:* Franz C. Mayer, 'Recht und Cyberspace', NJW 1996, 1782-1791; Thomas Stäheli, 'Kollisionsrecht auf dem Information Highway. In: Hilty, Reto M.: Information Highway. Beiträge zu rechtlichen und tatsächlichen Fragen. Bern, München 1996, 597-623.

[27] The capacity for litigation arising from behaviour on the Internt is essentially a function of the *quantity* of human interaction, which will likely increase. *See* Matthew R Burnstein, *supra*, 83.

[28] The World Wide Web (www) is the fastest growing part of the Internet. It is a globally connected Network which communication is effected by the Hypertext Markup Language (HTML). For further details see: Preston Gralla, *supra* at 73 ff.

different countries in a few seconds at one time. Or he runs a commercial website under a certain domain name. He might infringe several copyrights or trade marks just because his website is visible throughout almost the whole world.

Assuming that a software company offers software through the Internet for sale and downloading and the object of purchase is defective. Several purchasers in the world might try to sue the seller according to their law, provided that no choice of law is evident.

Such cases could conceivably flood the judiciary with the increasing use of the Internet for entertainment, commerce and politics.

Would this mean that potentially all states have jurisdiction over the American user although he or she had never been in the particular state nor even knew of the existence of that state? Or is he /she absolutely immune from jurisdiction since he / she does not fall under the sovereignty of any other state? If the latter, how can a possible judgment be achieved and enforced? How will the states' courts handle the increasing number of actions?

The answer will necessarily depend on

- whether the concerned courts have jurisdiction over foreign individuals (*question of compatibility*)
- whether the present court system is able to handle then increasing amount of actions (*question of quantity*).

3.1 Compatibility of the traditional rules of private international procedural law and the phenomenon of delocalisation

In this context it must be mentioned that transnational legally relevant behaviour is not new. International transactions have for decades been conducted by means of global communication systems and have influenced most legal systems. The most important traditional procedural rules for the regulation of transnationally relevant behaviour will now be examined.

3.1.1 Rules on international / extra-territorial Jurisdiction[29]

Most states' international procedural law permits of international / extra-territorial jurisdiction under the so-called "effects-doctrine"[30]. Extra-territorial jurisdiction means

[29] The term "international jurisdiction" or "extra-territorial jurisdiction" will be used as a generic term for jurisdiction over non - residents.
[30] See *Encyclopedia of Public International Law, supra* at 280.

that, by extension of the accepted territorial basis for jurisdiction, a state purports to enforce its laws in respect of conduct outside its territory by non-nationals, on the basis that the conduct, although occuring abroad, had certain 'effects' within the forum[31]. In the following it will be shown how this principle was transformed into national law.

3.1.1.1 Overview of the principles of American law concerning extra-territorial jurisdiction:

The jurisdiction of American courts over non-resident defendants is determined by

- state law, and
- the *Due Process Clause* of the Fourteenth Amendment to the U.S. Constitution[32].

Most states' laws contain so called *"long-arm" statutes*[33], which permit courts to enter judgements against non-resident defendants[34].

The "*Due Process Clause*"[35] of the Constitution protects defendants from being forced into out-of-state courts. The starting point for jurisdiction cases under it has been the U.S. Supreme Court's 1945 ruling in *International Shoe Co. v. Washington*[36] according to which, in order for a court to establish jurisdiction over a non-resident defendant, he or she must have had

- "substantial, continuous and systematic" presence in the forum state, which would give the court general jurisdiction over the defendant, **or**
- at least certain "minimum contacts" with the forum state such that he/she would reasonably anticipate being hauled into Court there[37] **and** that maintenance of the suit does not offend "traditional notions of fair play and substantial justice"[38].

To determine whether a person or business is continuously and systematically present in a forum state, courts have to evaluate the "totality of circumstances" to evaluate the relationship between the defendant, the forum and the litigation[39].

[31] See *U.S. v. Aluminium Company of America* 148 F 2d 416 (1945); *Encyclopaedic Dictionary of International Law, supra* at 199.
[32] Eugene F Scoles and Peter Hay, *Conflicts of Law* (1982), 384 ff.
[33] Robert A Leflar, Luther L McDougal and Robert L Felix, *American Conflicts Law* (1986), 97-130.
[34] For example: New York's Civil Practice Law Rules (CPLR) ß302 (a) (2) which permits a court to exercise personal jurisdiction over any non-domiciliary who "commits a tortuous act within the state" as long as the cause of action asserted arises from the tortuous act. Furthermore CPLR ß302 (a) (3) (ii) which permits a court to exercise personal jurisdiction over any non-domiciliary for tortuous acts committed outside the state that cause injury in the state if the non-domiciliary "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce". An Ohio long-arm statute allows an Ohio court to exercise jurisdiction over a non-resident if he is "transacting business" in the state.
[35] The need for *due process* - principles in Cyberspace and its applicability is dealt with by David R Johnson, 'Due Process in Cyberspace', at http://www.cli.org/DRJ/dproc.html.
[36] 326 U.S. 310 (1945).
[37] *World-Wide Volkswagen, Corp. v. Woodson*, 444 U.S. 286, 297 (1980).
[38] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). *See* also Leflar / McDougal / Felix, *supra* at 43-58, 60, and 97-136.
[39] *Calder v. Jones*, 465 U.S. 783.

To determine whether there are "minimum contacts" case law requires the courts to analyse the following issues[40]:

- whether the defendant has purposefully availed himself of the benefits of the forum state (the quality, nature and quantity of the contacts with the forum)
- whether the cause of action arises from the defendant's activities in the forum state
- whether the acts of the defendant or consequences caused by the defendant have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable / fundamentally fair. To determine whether the assertion of jurisdiction is fundamentally fair, five factors are to be taken into account[41]:

  - the burden on the defendant
  - the forum state's interest in adjudicating the dispute
  - the plaintiff's interest in obtaining convenient and effective relief
  - the interstate judicial system's interest in obtaining the most efficient resolution of controversies
  - the shared interests the several states have in furthering fundamental substantive social policies.

3.1.1.2 Overview of the principles of English law concerning extra-territorial jurisdiction[42]

A generally called "assumed" jurisdiction was introduced many years ago by the Common Law Procedure Act 1852, which gave the courts a discretionary power to summon absent defendants, whether English or foreign. The exercise of this jurisdiction is now governed by Order 11 of the Rules of the Supreme Court. This Order has been altered over the years, and following the Civil Jurisdiction and Judgements Act 1982 substantial amendments have been made to it[43]. Order 11 permits service of a writ upon a defendant who is outside of jurisdiction of the court in circumstances that will be considered below. In some cases service is only permissible with the leave of the court; in others, it is permissible without the leave of the court. The new Rules of the Supreme Court have greatly increased the number of cases where service out of the jurisdiction is permissible without the leave of the court. In

[40] *Marquette Nat'l Bank v. Norris*, 270 N.W. 2d 290, 295 (Minn.1978); *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F. 3d 816, 820 (8th Cir.1994); 1996 WL 405356 (6th Cir. of Ohio) / 89 F3d 1257; *Minnesota v. Granite Gate Resorts Inc.* (December 1996) - see: http://www.ag.state.mn.us/consumer/news/onlinescams/ggOrder.html.
[41] Richard S. Zembek, 'Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace', 6 Alb. L. J. Sci & Techn., 339 at 352-353; *Marquette Nat'l Bank, Etc. v. Norris*, 270 N.W. 2d 290, 295 (Minn. 1978).
[42] The following content is partly adapted from Cheshire & North, *Private International Law*, 11th ed. (1987), 193-205.
[43] RSC (Amendment No 2) 1983 (SI 1983/1181). The new Rules came into force on 1 January 1987 when the Bruessels Convention came into force.

England leave is still required in many cases, whereas some common law jurisdictions have dispensed with the requirement altogether[44].

3.1.1.2.1 The following examples show where the service of a writ outside court's jurisdiction is permissible only with the leave of the court[45]:

3.1.1.2.1.1 General:

- Where relief is sought against a person "domiciled"[46] within court's jurisdiction[47],
- where an injunction is sought ordering the defendant to do or refrain from doing anything within court's jurisdiction[48], and
- where the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto[49].

3.1.1.2.1.2 Contract:

- Where the claim is for the enforcement, rescission, dissolution, annulment or otherwise of a contract, or for damages or other relief pursuant to a breach of contract, in the following instances[50]:

  * where the contract was made within its jurisdiction,
  * where the contract was concluded by or through an agent trading or residing within its jurisdiction on behalf of a principal trading or residing outside its jurisdiction,
  * where the contract is by its terms, or by implication, governed by English law[51],
  * where the contract contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action arising of a contract[52].

[44] For Canada, *see* McLeod, *Conflict of Laws* (1983), 88-89; Castel, *Canadian Conflict of Laws*, 2nd edn (1986), 122. Leave was never required in the USA, *see* Leflar / McDougal / Felix, *supra* at 59-85 and the comments of the author of this dissertation about the American jurisdiction rules.

[45] For a detailled illustration *see* Cheshire & North, *supra* at 194-205. Only those aspects which are most important for this topic will be mentioned here.

[46] In this context, domicile is determined in accordance with the definition contained in the Civil Jurisdiction and Judgements Act 1982. This definition is used primarily in cases arising within the Brussels Convention, and is a very complex one. In broad terms, it provides that an individual is domiciled in a state if: (a) he is a resident in that state; and (b) the nature and circumstances of his residence indicate that he has a substantial connection with it. *See* Cheshire & North, *supra* at 194.

[47] Ord 11, r 1 (1) (a).

[48] Ord 11, r 1 (1) (b).

[49] Ord 11, r 1 (1) (c). This rule regulates circumstances like the following: when a tort has been committed in a foreign country by two persons jointly but only one of them is subject to the court's jurisdiction.

[50] Ord 11, r 1 (1) (d).

[51] This means that what is called the *proper law* of the contract must be English law. *See* Cheshire & North, *supra* at 200 (with further comment and a listing of cases).

[52] Ord 11, r 1 (1) (d) (IV).

- Where the claim concerns a breach committed within the jurisdiction of the court, irrespective of whether the contract was concluded within the court's jurisdiction, or whether the breach was preceded or accompanied by a breach committed outside the court's jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the court's jurisdiction[53].

3.1.1.2.1.3 Tort:

- When the claim is founded on a tort and the damage was sustained or resulted from an act committed within the court's jurisdiction[54].

3.1.1.2.1.4 Enforcement of Judgments or Arbitral Awards

- Where the claim is brought to enforce any judgement or arbitral award[55].

3.1.1.2.2 The following are cases where the service of a writ outside of the court's jurisdiction is permissible without the leave of the court:

- where the court has jurisdiction by virtue of the Civil Jurisdiction and Judgements Act 1982[56],
- where the court has power to hear and determine the claim by virtue of any other enactment[57].

All these criteria, as developed by the English Supreme Court, require a close connection between the defendant and the forum, similar to the "contact" rule in the United States. That shows that the principal idea of the American "contact rule" is also existent in English law.

[53] Ord 11, r 1 (1) (e).

[54] Ord 11, r 1 (1) (f). Order 11, rule 1 (1) (f) avoids an old definitional problem which was created by asking where a tort was committed (in cases, for example, where a product was defectively manufactured in New York and subsequently caused injury in England - the solution adopted was to look for where the wrongful act was done OR where the cause of action arose) by making it clear that jurisdiction can be taken in England if *either* the damage was sustained *or* the act (from which the damage resulted) was committed in England. The result is to make the tort a very wide one, and to bring tort cases under Order 11 into line with tort cases under the jurisdiction rules contained in the Brussels Convention. *See* Cheshire & North, *supra* at 201-202 (with further comments).

[55] Ord 11, r 1 (1) (m).

[56] Ord 11, r 1 (2) (a). This statute is concerned with cases coming within the Brussels Convention of 1968 and the Modified Convention.

[57] Ord 11, r 1 (2) (b).

3.1.1.3 Overview of the principles of German law concerning extra-territorial jurisdiction[58]

The German Code of Civil Procedure (ZPO) contains the following principle: whenever the court has jurisdiction in a national context (§§ 12 ff. ZPO) it has jurisdiction in an international context as well[59] (only a few provisions regulate the matter explicitly: §§ 38 II, 606a, 640a, 641a ZPO). Therefore we have to look at the rules on jurisdiction in a national context:

* Exclusive place of jurisdiction according to §§ 24, 29a ZPO (*in rem* jurisdiction)
* Prorogated place of jurisdiction according to §§ 38, 40 ZPO
* Submission according to §§ 39, 40 II ZPO
* Supplementary places of jurisdiction according to e.g. §§

  21 ZPO (the place of branch establishment)
  22 ZPO (place of membership)
  29 ZPO (the place of performance)
  32 ZPO (*forum actus* in tort cases)

* The place of general jurisdiction (§§ 12, 17 ZPO - the defendant's place of domicile or general residence).

By setting up criteria like "*forum actus*", "place of performance" or "place of membership" to determine the court's jurisdiction the German rules also require a "contact" with the forum as the basis of jurisdiction. Thus, the principal requirement in German law is similar to the American and English rules.

3.1.1.4 Europe - overview of the principles of the Brussels Convention on Jurisdiction

The six original member states of the European Economic Community entered into a Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters in 1968 - the Brussels Convention, and into a Protocol on Interpretation in 1971[60]. The purpose of the Convention is to provide for the

[58] For the definition of extra-territorial jurisdiction („internationale Zuständigkeit") see BGH (German Federal Supreme Court of Justice) GSZ 44, 46; NJW 53, 222; Kurt Schellhammer, *Zivilprozeß - Gesetz, Praxis, Fälle - Ein Lehrbuch*, 6 ed (1994), 647; Gerhard Kegel, *Internationales Privatrecht* (1995), 804-808; Heinz Thomas and Hans Putzo, *Zivilprozeßordnung mit Nebengesetzen*, 11 ed (1981), Vorbem § 1 II 4.

[59] BGH (German Federal Supreme Court of Justice) GSZ 44, 46; 63, 220; 94, 157; NJW 79, 1104; 86, 1438; 87, 1324, 3081; 88, 966; 89, 1154: § 23; 91, 3092: but for § 23 an „effect" on the territory is necessary; Schellhammer, *ibid* at 647; Christian v. Bar, *Internationales Privatrecht* (1987), volume I, at 357.

[60] Both the original Convention and the Protocol are to be found in the Official Journal of the European Communities, OJ 1978, L 304, pp77 and 97. For commentaries see Hartley, *Civil Jurisdiction and Judgements* (1984); Collins, *The Civil Jurisdiction and Judegements Act 1982* (1983); Dashwood, Hacon and White, *A Guide to the Civil Jurisdiction and Judements Convention*

enforcement of judgments throughout the Community, thereby promoting business confidence and generally encouraging conditions for trade. To achieve this aim there had to be harmonisation of the law on international jurisdiction throughout the Community[61]. The principles contained in the Convention take precedence over the internal laws of the member states. In other words, the rules of the Convention are compulsory: the courts are not only entitled to exercise jurisdiction in accordance with the Convention, they are obliged to do so[62]. The Convention allocates jurisdiction without regard to the law which will have to be applied to the substance of the case[63].

3.1.1.4.1 Applicability

The Convention applies *only* to the national territories of the member states, regardless of the nationality of the parties[64]. Furthermore, the Preamble to the Convention specifies that its aim is to 'determine the international jurisdiction of the courts [of the contracting states]'. It follows that the Convention only applies where the case comprises an international element[65].

3.1.1.4.2 Mechanisms of the Convention as to jurisdiction

Sections 1 to 9 of the Convention deal with jurisdiction. Section 1 (Articles 2 to 4) contains general provisions concerning jurisdiction: article 2 provides that, unless otherwise permitted[66], persons domiciled in a contracting state must be sued in the courts of *that* state, whatever their nationality. Persons who are not nationals of the state in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of the domiciliary state. According to Article 3, persons domiciled in a contracting state may be sued in the courts of *another* contracting state only by virtue of the rules set out in Sections 2 to 6 of the Convention[67]. According to Article 4, however, a defendant not domiciled in a contracting state shall be subject to

(1987); Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgements* (1987); Lasok and Stone, *Conflicts of Laws in the European Community* (1987); Cheshire & North, *supra* at 282.

[61] See the Preemble to the Convention; the Jenard Report, OJ 1979 C 59, pp3-8; Cheshire & North, *supra* at 282.

[62] This explains, for instance, the inapplicability of the common law doctrine of *forum non conveniens*: see Schlosser, 'Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice', OJ 1979 C59/71to 144, at 100, § 87; L. Collins, T.C. Hartley, J.D. Mc Clean and C.G.J. Morse, *Dicey and Morris on the Conflicts of Laws*, Sweet & Maxwell, London, 1993 (12th edn.) (*'Dicey and Morris'*), rule 28, 350; S. Cromie, 'Some Current Problems Relating to Jurisdiction and Enforcement of Judgements', *10th Commonwealth Law Conference, Cyprus Bar Association*, Asselia Publishers, Nicosia, 1993, at 161; Jooris, 'Infringement of Foreign Copyright and the Jurisdiction of English Courts', 3 EIPR 127 (1996).

[63] Eric Jooris, 'Infringement of Foreign Copyright and the Jurisdiction of English Courts', 3 EIPR (European Intellectual Property Review) (1996), 127 (132); A Briggs and P Rees, *Norton Rose on Civil Jurisdiction and Judgements* (1993), at 59.

[64] Articles 2 and 4 (2). See also P Jenard, 'Report on the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters', OJ 1979 C59/1, at 14; Eric Jooris, *ibid* at 132.

[65] Jenard, *ibid* at 8; P Schlosser, 'Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters and to the Protocoll on its Interpretation by the Court of Justice', OJ 1979 C59 / 71, at 81 § 21; Cheshire & North, *supra* at 289; Eric Jooris, *supra* at 133.

[66] Artcle 3 (1): this covers the rules of jurisdiction set out by Articles 5 to 18.

[67] See below.

the jurisdiction of the contracting state concerned (*lex fori*) without prejudice of the application of Articles 16 to 18[68]. The various provisions of Article 16 confer exclusive jurisdiction regardless of the defendant's domicile[69]. Sections 2 to 6 contain special provisions concerning jurisdiction: section 2 (Articles 5 and 6) of the Convention contains rules of special jurisdiction according to which a defendant domiciled in a contracting state may be sued before the courts of another state in cases arising out of *inter alia* contract, maintenance, tort, civil claims out of criminal proceedings, etc. While Article 5 is concerned with various situations in which the most appropriate forum might be different from the state where the defendant is domiciled, by reason of the close relationship between the proceedings and the forum in question, Article 6 deals (generally speaking) with the cases of joint parties, co-defendants and counterclaims[70]. Sections 3 and 4 (Articles 7 to 12A) of the Convention provide specific rules of jurisdiction to be applied in matters related to insurance, and Articles 13 to 15 in matters involving consumer contracts. They are only applicable if the defendant is domiciled in a contracting state. Section 5 (article 16) allocates jurisdiction regardless of domicile in the cases dealing with rights *in rem*, immovable property, the validity of companies or other legal persons, entries in public registers, the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered and proceedings concerning the enforcement of judgements. Sections 6 to 9 deal with prorogation, admissibility and jurisdictional conflicts, *lis pendens* and provisional and protective measures.

3.1.1.5 Provisional Conclusion: identifying the common principle of the different rules on international jurisdiction

The rules on jurisdiction in every legal system are concerned with the criterion of localisation, as is shown by the common jurisdictional rules requiring either "contact to a certain forum", a "place of performance" or a "place of where the wrongful act was done or its damage arose". Each of these criteria seek to identify a certain physical location. The determination of the "where" is therefore the traditional starting point in transnational dispute resolution.

[68] When the *lex fori* is to be applied in this context, this must however still be in respect of the rules of the Convention dealing with *lis alibi pendens* (Article 21) and the exercise of discretion as to jurisdiction.
[69] Eric Jooris, *supra* at 136 with further references. Article 19 subsequently obliges any court to declare of its own motion that is has no jurisdiction where the claim is principally concerned with a matter over which the court of another contracting state would have exclusive jurisdiction under Article 16, which it follows, only applies to such claims whose effects or aims are irrelevant. See Eric Jooris, *ibid* at 136 with further references.
[70] See Eric Jooris, *ibid* at 136 with further references.

3.1.1.6 Case-related investigation on how the common principle of the rules on international jurisdiction is compatible with the phenomenon of delocalisation

To investigate the compatibility of the traditional rules on international jurisdiction with the phenomenon of delocalisation we need to look to existing case law and, where this is absent, apply the traditional rules to Cyberspace cases ourselves.

3.1.1.6.1 American case law

It was the task of American courts to first apply the traditional principles for international / extra-territorial jurisdiction in their inquiries to resolve jurisdictional disputes in cases involving Cyberspace, cases in which the defendants had not entered the state physically. Their "contact" with the state was only via Cyberspace - it consisted only in the fact that their conduct was visible / accessible in the corresponding state because of the global accessibility of Cyberspace-related activities. Some cases shall be mentioned to give an idea of the issue:

3.1.1.6.1.1 CompuServe, Inc. v. Patterson[71]

Patterson[72], was engaged in a shareware registration agreement (SRA) with CompuServe[73], an Ohio-based on-line service provider[74]. He also assented to CompuServe's standard service agreement and rules of operation. The agreement was first manifested at Pattersons's own computer in Texas and then transmitted to the CompuServe computer system in Ohio. It stated expressly that the agreement was entered into in Ohio and provided that it was governed by Ohio law. CompuServe then started marketing its own Internet navigation software with a name and function similar to Pattersons's software. Therefore a dispute arose as to whether CompuServe had violated Patterson's trademark rights: Patterson threatened to sue CompuServe for trademark infringement and deceptive trade practices and CompuServe, in turn, brought an action for a declaratory judgement that it was not infringing upon the defendant's trademarks or otherwise engaged in unfair competition. The district court of Ohio dismissed CompuServe's complaint for lack of personal jurisdiction in 1994[75]. It found that the dispute did not arise directly out of Patterson's user agreement with CompuServe, and that Patterson did not otherwise have sufficient contacts with Ohio to justify asserting jurisdiction. On appeal, the Sixth Circuit was asked to answer whether predominantly "electronic contacts" are sufficient to give a state personal jurisdiction over someone conducting such an on-line business. The Sixth Circuit's answer was yes. It held that there were clearly sufficient contacts with Ohio because Patterson entered into agreements by connecting to Ohio computers, he sent his software and communications with CompuServe to computers in Ohio, he advertised his software on CompuServe's Ohio computers and he in effect used Ohio-based CompuServe to distribute his wares in an on-

[71] 1996 WL 405356 (6th Cir. of Ohio) / 89 F3d 1257.

[72] = a Texas attorney and software author.

[73] CompuServe, a computer information service, allows ist subscribers to use ist network to distribute „shareware" (=software for which an end user pays a fee upon the expiration of a trial license. CompuServe keeps a percentage of the license fee and remits the balance to the creator of the software = here: Patterson).

[74] He placed his Internet navigation shareware on CompuServe's system in order to market and sell his product. When he connects to CompuServe, he connects, presumably through a local Texas phone number, to CompuServe's computers, which happen to be located in Ohio.

[75] Docket No. C2-94-0091 (S.D. Ohio, August 11, 1994).

going business relationship - even though there was no "physical" contact with Ohio. Therefore it reversed the action in 1996.

3.1.1.6.1.2 *Panavision v. Toeppen*[76]

In this case the Central District of California had asserted personal jurisdiction over a "cybersquatter"[77] living in Illinois. Mr. Toeppen had registered „PANAVISION.COM“ as a domain name. Plaintiff Panavision International, L.P., discovered this when it attempted to establish a Web site under its own name. The plaintiff held that Toeppen intentionally bought up the names, and those of other companies as well, to extort money for relinquishing the names[78]. The court found personal jurisdiction based on the defendant's contacts with the forum state. The court applied a tort rather than a contract analysis, to rule that Toeppen had "expressly aimed his conduct at California" where Panavision's principal place of business lay, and had therefore satisfied the "effects test" of purposeful availment: (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered -and which the defendant knows is likely to be suffered- in the forum state[79]. The Court specified that it *did not* hold that Toeppen was "doing business" in California via the Internet. It was further found that Panavision's loss arose out of Toeppen's forum-related activities (registering Panavision's marks as domain names), and that the intentional causing of injury within the state made local jurisdiction "presumptively not unreasonable" in this "era of fax machines and discount air travel"[80]. The Court made it clear that this case was about a tort and not a commercial presence, and as long as it constitutes a harm in California the Court need not decide if the mere presence of a web page subjects him to a lawsuit anywhere else.

3.1.1.6.1.3 *Bensusan Restaurant Corp. v. King*[81]

The Court considered the impact of rapidly developing technology on historic principles of long-arm jurisdiction. In this case, it held that the defendant's maintenance of an Internet Web site accessible by users in New York was not sufficient to confer personal jurisdiction over the defendant in New York. This action was for trademark infringement and was brought by the creator of The Blue Note jazz club in New York against the owner of a music club in Missouri, also called The Blue Note. The defendant posted a site on the World Wide Web of the Internet to advertise his club. The judge assessed the defendant's motion to dismiss under the two relevant provisions of New York's long-arm statute. Civil Practice Law and Rules 302 (a)(2) permits a court to exercise personal jurisdiction over any non-domiciliary who "commits a tortuous act within the state" as long as the cause of action asserted arises from the tortuous act. In trademark infringement cases, Judge Stein maintained, the tortuous conduct occurs where the defendant offers to sell the infringing product. The judge acknowledged that a New York resident with Internet access could view information concerning The Blue Note located in Missouri.

[76] No. 96-3284 (C. D. Cal. September 20, 1996) / 938 F. Supp. 616 (C.D.Cal.1996). The following content is partly adapted from: Scheinfeld / Bagley, 'Long-Arm Jurisdiction'; Cybersquatting' in: The New York Law Journal, November 27 (1996).
[77] A *"cybersquatter"* is an Internet user who has registered multiple *"domain names"* with the hope of selling them to the businesses who own trademarks identical to those names. *"Domain names"* are Internet adresses which use easily recognizable letters and words instead of numbers. For further description see Preston Gralla (fn 2), at 16 ff.
[78] 938 F. Supp. 619 (C. D. Cal. 1996).
[79] *ibid* at 620-21.
[80] *ibid* at 622.
[81] 937 F. Supp. 295 (SDNY 1996) (No. 96 Civ. 3992, 1996 WL 509716). The following content is largely based on literature available at: Silberberg, 'Personal Jurisdiction and the Internet', The New York Law Youmal, November 6 (1996).

He held, however; that the "mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York". The second jurisdictional basis asserted by plaintiff, CPLR 302 (a)(3)(ii), permits a court to exercise personal jurisdiction over any non-domiciliary for tortuous acts committed outside the state that cause injury in the state if the non-domiciliary "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce". The judge asserted two reasons that the defendant's conduct did not fall under this provision: (1) Plaintiff did not allege that the defendant derived substantial ***revenue*** from interstate commerce, it merely alleged that the defendant participated in interstate commerce by hiring bands of national stature; and (2) the financial loss alleged by the plaintiff was not foreseeable; the plaintiff merely made conclusory allegations of indirect loss to its New York club based on the plaintiff's Web site.

3.1.1.6.1.4 *Maritz v. CyberGold*[82]

Maritz alleged that the Berkeley-based CyberGold (which was apparently starting up a type of advertiser-paid free email service, although the actual nature of the business is unclear) infringed Maritz's trademarks and sued CyberGold in Maritz's home state of Missouri. Both parties essentially agreed that CyberGold's sole contact with Missouri was its Web site, through which it solicited advertisers and clients to sign up for its service and from which it emailed out automatic replies to everyone who did. CyberGold, naturally, argued that merely setting up a Web site accessible to all did not constitute conduct directed at Missouri. But the Court found that actively recruiting subscribers and advertisers with the automatic reply was sufficient contact with the state to justify the concerns of due process:

> With CyberGold's Web site, CyberGold automatically and indiscriminately responds to each and every Internet user who accesses its website. Through its website, CyberGold has consciously decided to transmit advertising information to all Internet users, knowing that such information will be transmitted globally". In short, since CyberGold was not merely posting passive information upon which viewers would act in another context, it was making an offer to sell in an area where Maritz had a valid trademark.

The Court very carefully avoided stating whether setting up a Web site constituted doing business in the state:

> It is unnecessary to decide whether defendant's activities satisfy the "transaction of any business" test because the Court concludes that the defendant is amenable to service under the "commission of a tortuous act" provision in Missouri's long-arm statute....Plaintiff asserts that the injury from infringement is occurring in Missouri, because the allegedly infringing activities have produced an effect in Missouri as they have allegedly caused Maritz economic injury.

3.1.1.6.1.5 *Inset v. Instruction Set*[83]

[82] No. 4: 96CV01340 (E. D. Mo. Aug. 19, 1996). The following content is partly adapted from a summing up of the case on a website of the VTW Center for Internet Education: http://www.vtwctr.org/casewatch/Toeppenjur_case.

This case is another example of a company (in this case, a Connecticut software company with a trademark in the name "Inset") applying for its company name (companyname.com) and discovering someone else already had it. After finding its preferred domain name pre-empted by *Instruction Set*, a Massachusetts company without a trademark in the name "Inset" and with no business dealings in Inset's native state of Connecticut other than a web page at "www.inset.com" listing as a phone number 1-800-US-INSET, Inset sued Instruction Set in Connecticut. Instruction Set moved to dismiss the lawsuit or move it to Massachusetts, arguing that hits by Connecticut residents on its web page did not amount to sufficient contacts with Connecticut and that, even if they did, venue had be changed to Massachusetts because, under all the facts and circumstances of the case, it was more convenient to decide it there. The Court decided that a web page with an 800 number on it meant that it was fair for *Instruction Set* to defend itself in the same state of Connecticut. The Court also found that it was both fair and convenient to subject *Instruction Set* to a lawsuit in Connecticut because of the proximity of Massachusetts and Connecticut, and therefore decided that both jurisdiction and venue were proper in Connecticut.

It is true that none of the above cases deal with international matters. The principles of the inquiry, however, remain the same. If the litigants are from foreign countries, an additional criteria must be considered:

- the court must also consider the policies of the foreign countries, as well as U.S. foreign policy, in determining whether exercising jurisdiction would be fair[84]. Case law in this matter has not arisen yet.

As we have seen the issues with which the (American) courts were mainly concerned centered around the "contact-rule" (which is a unique American creation). The American lawsuits demonstrate that:

- the issue demands a due process inquiry which rests rather more upon the totality of the circumstances than any upon mechanical criteria,
- the mere existence of electronic contact with the forum state is not sufficient: the courts made detailed, fact-specific findings, each of which required evidence of an affirmative intent to produce a desired effect in the forum state; notably to earn money through a contract in *CompuServe,* to force payment of money in *Panavision,* to facilitate ordering of a product from Connecticut in *Inset Systems,* and to compile a mailing list in the course of promotional activities in *Maritz,*
- the only novel issue before the courts was the phenomenon of Cyberspace,
- this phenomenon of delocalisation affected the American rules only insofar as it tested the suitability of the minimum contact rule in cases involving electronic contacts: it has been shown that electronic contacts can in fact be sufficient to

[83] No. 3:95CV-01314 (D.C.Conn. April 17, 1996) (U.S.Dist. LEXIS 7160). The following content is largely taken from *ibid.*
[84] *Asahi Metal Ind. Co. v. Superior Court* 480 U.S. 102 (1987).

constitute a "minimum contact" if contact is initiated for the reasons outlined in the cases mentioned earlier,

- whether the minimum contact rule can accomodate other Cyberspace-related cases, and how it will be applied, is uncertain. Until now courts have had to deal mainly with tort cases in which the contact rule presented itself as obviously applicable. In other cases it might be less obviously appropriate. Nervertheless, the minimum contact rule appears extremely broad and flexible, and as such will also have an influence on cases with an international element.

3.1.1.6.2 English, German and European law

No cases on the subject have as yet been heard in either England or Germany or under the Brussels Convention. Therefore we can only attempt to apply the English, German and European rules about extra-territorial jurisdiction to the content of the American cases.

Let us assume *CompuServe* was London-based. Would English courts have had jurisdiction over the matter?

CompuServe concerns trademark infringement. The English jurisdictional rules on tort (Order 11, rule 1 (1) (f) of the Rules of the Supreme Court) must be applied. As has been stated, jurisdiction in tort cases is founded if *either* the damage was sustained *or* the act (from which the damage resulted) was committed in England. Thus English courts would have jurisdiction.

Ascertaining 'where' the wrongful act was committed if undertaken via Cyberspace is thus not necessary - the jurisdictional problem can be solved merely by applying the rules of the Supreme Court for extra-territorial jurisdiction.

Assuming *Panavision* was located in England, the same rule would apply with the same result.

Similarly in the case of *Bensusan Restaurant Corp. v. King* no problem would arise with the application of the traditional rules for jurisdiction. Assuming that the New York Jazz Club was based in England, the infringement of English trademark rights would clearly give English Courts jurisdiction by virtue of rule 1 (1) (f) of Order 11 of the Supreme Court Rules.

The same principle applies to *Maritz v. Cybergold* and *Inset Systems Inc. v. Instruction Set Inc.*

Those matters, therefore, do not raise difficulties in applying traditional rules on international jurisdiction because of the wording of Order 11, rule 1 (1) (f) of the Supreme Court which provides for the *place of effect* as the decisive aspect for determining jurisdiction. Since it is easy to determine the place of effect even in Cyberspace, the existing rules of the Supreme Court may readily be applied.

In other cases, however, the applicability of traditional rules on the phenomenon of delocalisation in Cyberspace might be unclear. Contract cases in particular raise interesting questions concerning the "where" of certain behaviour in Cyberspace. For example, Order 11 rule 1 (1) (d) refer to "where" a contract was made within the jurisdiction[85] or "where" a breach of a contract was committed[86]. But how is the location of the "where" to be determined - if we consider that nowadays contracts are being entered into in Cyberspace and being formed in Cyberspace. Breache of contract occurs in Cyberspace too. How then can we continue to rely on rules which in turn rely on the determination of the "where" in the age of delocalisation? If we take our software company example in which software was sold via the Internet, with downloading and payment via virtual accounts, this problem becomes apparent.

Similar problems arise if one applies German law or the rules of the Brussels Convention.

For example, under the Brussels Convention the same location-related problems arise in the context of the delocalised nature of Cyberspace. Article 16 (2) for instance provides that the courts of the contracting state in which the company, legal person or association has its seat will have jurisdiction. But how is the location of seat to be determined if the company exists solely in Cyberspace and its business transactions can be performed via any computer in the world?

Insofar as the german rules are concerned it is questionable how § 32 ZPO (German Code on Civil Procedure) which stipulates the *forum actus* as the decisive criteria in tort cases, is applicable to tort cases in Cyberspace in which it is often difficult to determine "where" the *forum actus* is.

3.1.1.6.3 Provisional Conclusion

[85] Order 11, rule 1 (1) (d) which provides for English jurisdiction in cases like where the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract in the following cases: (i) where the contract "was made within the jurisdiction" (...). *See* Cheshire & North, *supra* at 198-199.

[86] Order 11, rule 1 (1) (e) which provides for English jurisdiction where "the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction". *See* Cheshire & North, *supra* at 201.

It is true that the Internet allows many more people to have "contact" with a jurisdiction in which they do not reside and which they may never physically visit. The informality and unpredictability of communications across interconnected networks may make it rather more difficult to determine when there has been a voluntary "contact" sufficient to found jurisdiction. It might be also more difficult to determine "where" on-line acts occur or, in some cases, "where" some types of injury are suffered[87].

These questions, however, cannot be answered only by reference to the law itself, as the American case law has shown. The answer depends also upon a proper assessment of the factual circumstances. A two-fold approach is thus required.

The fact that the contract was concluded and performed in Cyberspace does not affect the applicability of traditional rules, nor does it render those rules insufficient. The rules remain the same. The only new consideration is the changed circumstances. One must thus now ask how any requirement which is location-orientated ('contact', 'place of performance', 'where the contract was entered into', etc.) may be satisfied with regard to Cyberspace-related acts. But this question does not require new jurisdictional rules. Instead it requires no more than an understanding of how Cyberspace works in order to apply the legal rules properly.

For instance: to identify the place of performance we have to look at how someone acts via the Internet and where the main actions take place.

For this reason a solution must be found whereby behaviour in Cyberspace can be subsumed under the *location-related requirements* of the law of jurisdiction.

The main problem is how we can speak of a 'place' or 'location', when all conduct in Cyberspace is delocalised?

It is important that these issues be resolved because, as yet, no law has developed to cater for the phenomenon of delocalisation in Cyberspace.

To determine the "where" in Cyberspace, we have to take a proper look at the mechanism of this transferring medium. Only by doing so may be hope to find the answer.

[87] *See* also: Michael Mensik and Gary Fresen, 'Vulnerabilities of the Internet: an Introduction to the Basic Legal Issues that impact your Organisation', a publication on the world wide web: http://www.baker.com.hk/publicat/s_namer/alrt17/t-alrt17.html.

3.1.1.6.4 Is behaviour in Cyberspace tangible? - the role of intermediaries[88]

Is it really impossible to determine aspects like 'location' or 'place' or 'time' in Cyberspace?

To answer this question we need to examine how Cyberspace operates. This might give some insight into how accurate the term "delocalisation" really is.

All Internet applications such as Gopher and the World Wide Web rely on a web of *intermediaries* to make it possible for users and publishers to find resources of information scattered around the world wide information infrastructure.
Since the Internet is a web of various different computer networks, there is no person, group or organisation running it. Information sent through the Internet does not flow in a determined way. It runs by itself - through a vast, globe-spanning network of single intermediaries which help in the dissemination of the information by pointing to information resources located on other computers connected to the Internet.

Intermediaries can be both content servers and pointers to other content servers.

If information is sent from place A to place B it will flow through a labyrinth of intermediaries guided by routers which choose the fastest way. Which route the information will take is not foreseeable. What is foreseeable is where the information will end, and which intermediary, as the "last link of the chain", will get the information. Correspondingly it is easy to ascertain from which intermediary the information was sent: each computer connected to the Internet must be identified by a fixed location. Whereas you only need to know the physical address of the person to whom you are writing in order to send him mail, a computer must know the Internet address of the machine from which data will be transmitted. If you want to access information available on a server connected to the Internet, you must supply a request for its unique address on the network.

Each computer on the Internet uses the Internet Protocol, which requires a unique address represented by groups of numbers separated by dots. Each IP address corresponds to a domain name. Domain names are attributed and managed by different entities depending on their origin. There is a group for each country connected to the Internet, and these national groups are identified by a two letter code such as "za" for South Africa or "uk" for United Kingdom. A domain name is a mailing zone, like a

[88] *See* Henry H Perritt, Jr., 'Computer Crimes and Torts in the Global Information Infrastructure: Intermediaries and Jurisdiction' at: http://www.law.vill.edu/chron/articles/oslo/oslo12.htm; Henry H Perritt, Jr., 'Jurisdiction in Cyberspace: the role of intermediaries', at http://www.law.vill.edu/harvard/article/harv96k.htm; Valérie Sédallian, 'Controlling illegal content over the Internet: the French situation' at: http://www.argia.fr/lij/english/control.html.

street in a postal address. The complete address of a document in the Internet is called a URL, for Universal Resource Locator.

Example: http://www.uct.ac.za

"uct" is the domain name of the computer (=server) on which the document is loaded .

When a domain name is registered, certain information must be supplied. This includes the name, address, administrative and technical contacts, and the addresses of name servers. This information on the domain name owner is recorded in databases maintained by each organisation which manages a domain name group. These databases can be searched on-line.

Even if the service you are looking for does not have its own domain name, it would be hosted by a server with a known domain name. You can communicate with the administrative contact for the known domain name and inquire about the identity of the editor of the service: he or she should know the identity of editors of services the server is hosting on its computers.

Although there is no necessary connection between an Internet address and a physical location (because the machine associated with an particular Internet Protocol address [e.g. a ".uk" domain name extension] may move in physical space without any movement in the logical domain name space of the Net) it is in most cases at least determinable where the physical location of the intermediary is.

It is thus apparent that intermediaries constitute a static base in the otherwise delocalised world of data, and as such are helpful in the assessment of the localisation of the "where".

In investigating "where" a contract was entered into or "where" a breach of contract occurred, a proper look at the system of intermediaries might assist in finding the answer. Even if a software company or its equivalent is located outside of the plaintiff's country and if all the contracts were conducted in Cyberspace, the physical locations of the contract parties are determinable to some degree: every individual user is contractually bound to an intermediary who provides him or her with access to the Internet. All the relevant information flows through these intermediaries. They constitute a kind of floodgate. Even though the parties can make use of these intermediaries from anywhere in the world the intermediaries constitute the main local transferring media for the contractually relevant behaviour such as fax machines, telephone, local post offices, etc.

Therefore questions dealing with "where a contract was entered into", "where a company / branch / agency has its seat" , etc. are not fundamentally affected by the phenomenon of Cyberspace, only the circumstances are. The rules of private international law concerning the law applicable to contracts for example, had to deal with the phenomenon of delocalisation long before the advent of Cyberspace. A contract concluded by using fax machines raises the same questions. The only difference is the medium. Identifying the location can be achieved by focusing on the system of intermediaries, instead of focusing on the location of the fax machine.

3.1.2 Provisional conclusion

Behaviour in Cyberspace is not entirely intangible. It is capable of being traced back to its source. When data arrives at at a certain point[89] it carries with it information about itself and its source. This makes it possible to determine both *forum actus* and the place where performance was efected. As a result the transmission medium "Internet" does not render the rules on (international) jurisdiction redundant. Rather it demands a better understanding of the medium itself to ensure that the rules are used accurately. As a result the traditional rules on international jurisdiction are compatible with the phenomenon of delocalisation in principle.

3.2 The Problem of Quantity - is the present court system effective enough to handle an increasing amount of actions?

As more people communicate and do business by means of the global electronic network, disputes will inevitably arise. It is likely that the number of disputes will inrease rapidly. Therefore we have to investigate whether the present legal systems is effective enough to cope with this increase.

The ability of states or courts to cope with a flood of Cyberspace-related litigation depends on three main factors:

- factual issues, such as the financial constraints of the courts to provide the necessary amount of personel and equipment,
- the complexity and flexibility of the procedural rules on international jurisdiction
- the degree of harmonisation between the substantive law of different states.

The phenomenon of Cyberspace and its potential as a medium for committing international wrongdoing might put pressure on states to harmonise their different

[89] Those are called "gateways".

substantive law in the future. The *status quo,* however, is still far from this. It is even doubtful whether every state would participate in this process of harmonisation in the future - cultural, political and legal differences may constitute obstacles.

These factors will impede the speedy, inexpensive resolution of disputes. Litigation will cost time and money. For these reasons the present system is not adequate to the task of coping with the potential volume of litigation arising from Cyberspace-related disputes.

Alternative means of resolving disputes will need to be found.

4 Remedies

4.1 Bilateral and Multilateral Agreements

It is likely that states will enter into bilateral or multilateral agreements to govern procedural issues in certain spheres of law, as they were doing in the field of intellectual property.

4.1.1 The example of Intellectual Property

Most of the tort cases relating to commercial matters in cyberlaw concerns the infringement of intellectual property. As we have seen with the American case law Cyberspace offers many opportunities for infringing intellectual property rights.

The importance of intellectual property in an international context has increased as a result of the globalisation of commerce. A number of bilateral and multilateral trade agreements have therefore been conducted to harmonise the rules of the different legal systems concerning intellectual property.

It was in order to achieve this aim that, in 1883, eleven states established the International Union for the Protection of Industrial Property by signing the *Paris Convention for the Protection of Industrial Property,* which guarantees the possibility of obtaining intellectual property protection in foreign states. The intention behind the establishment of the Union was to strengthen co-operation among sovereign nations in the field of industrial property. In the field of copyright the *Berne Convention for the Protection of Literary and Artistic Works* (1886) introduced some measure of international harmonisation. These conventions were not the only attempts to achieve

international co-operation in the field of intellectual property rights, but were only the forerunners of a number of other agreements[90].

Another milestone on the way to international harmonisation was the establishment of the *World Intellectual Property Organisation* (WIPO) in 1970, which became a specialised agency of the United Nations in 1974. WIPO promotes the protection of intellectual property throughout the world through co-operation among states and, where appropriate, by collaborating with any other international organisation. WIPO also ensures administrative co-operation among the intellectual property Unions, that is, the "Unions" created by the Paris and Berne Conventions and by the several sub-treaties concluded between members of the Paris Union. It further encourages the conclusion of new international treaties and the modernisation of national legislation, it gives technical assistance to developing countries, it assembles and disseminates information, it maintains services for facilitating the obtaining of protection of inventions, marks and industrial designs for which protection in several countries is desired and promotes other administrative co-operation among member states. In January 1996, WIPO concluded an agreement with the *World Trade Organisation* (WTO) which provides for co-operation between the International Bureau of WIPO and the Secretariat of the WTO[91].

UNESCO[92] and UNCTAD[93] have over the past five years passed the largest number of resolutions calling for and setting down guidelines for intellectual property rights protection. UNCTAD had been working with countries during the Uruguay Round in order to reach a compromise on this issue. The drafting of the International Code of Conduct on the transfer of technology under the auspices of UNCTAD included

[90] *Madrid Agreement for the Repression of False or deceptive Indications of Source of Goods* (1891) 31 States were party to this Convention on January 1, 1996; *Nairoby Treaty on the Protection of the Olympic Symbol* (1981) 36 States were party to this Convention on January 1, 1996; *Trademark Law Treaty ("TLT")* (1994) not yet in force, by October 27, 1995, the date until which it was open to signature, it had been signed by 50 States; *Patent Co-operation Treaty ("PCT")* (1970) 83 States were party to this Convention on January 1, 1996; *Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure* (1977) 35 States were party to this convention on January 1, 1996; *Madrid Agreement Concerning the International Registration of Marks* (1989) 46 States were party to this Convention on January 1, 1996; *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989) 9 States were party to this Convention on January 1, 1996; *Lisbon Agreement for the Protection of Appelations of Origin and their International Registration* (1958) 17 States were party to this Convention on January 1, 1996; *Hague Agreement Concerning the International Deposit of Industrial Designs* (1925) 25 States were party to this Convention on January 1, 1996; *Strasbourg Agreement Concerning the International Patent Classification* ("IPC") (1971) 32 Sates were party to this Convention on January 11, 1996; *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* (1957) 45 States were party to this Convention on January 1, 1996; *Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks* (1973) 6 States were party to this Convention on January 1, 1996; *Locarno Agreement Establishing an International Classification for Industrial Designs* (1968) 24 States were party to this Convention on January 1, 1996; *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)* 50 States were party to this Convention on January 30, 1996; *Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms* (1971) 53 States were party to this Convention on January 1, 1996; *Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974) 19 States were party to this convention on January 1, 1996.

[91] The information of this paragraph is received from the official bureau of the WIPO, headquarters in Geneva, Switzerland.

[92] = United Nations Educational, Scientific and Cultural Organisation.

[93] = United Nations Conference on Trade and Development.

provisions protecting intellectual property by dealing with internationally transferable patents.

The most significant attempt by the UN in order to combat intellectual property rights violations was the establishment of the WTO during the URUGUAY Round of negotiations. The Round provided a forum where conflicts and complaints against members concerning issues such as tariffs and intellectual property could be mediated. However, the decisions of the WTO are not binding.

The Uruguay Round also produced *Trade Related Aspects of Intellectual Property* (TRIPS), which established improved standards for the protection of a wide range of intellectual property rights. TRIPS provided guidelines for the introduction of legislation within member states of the WTO. TRIPS came into effect for developed countries in January 1996 and for developing states the deadline for the implementation of intellectual property protection legislation is the year 2000.

4.1.2 Comment

Even if these agreements are not binding upon private legal subjects, they provide a basis for the harmonisation of different laws concerning intellectual property. Improved compliance with these agreements will then give rise to an acceptable system of agreements concerning jurisdiction and enforcement. It is both desirable and possible that inconsistencies in the evidentiary and procedural requirements of various countries' judicial systems (which give rise to problems in enforcing certain intellectual property rights - for instance, in establishing proof of ownership in foreign enforcement actions) will be resolved by agreement. Creating international standards of proof with respect to at least certain basic issues in intellectual property rights will facilitate the enforcement of rights abroad. Such projects could be conducted by the WIPO.

This is, however, likely to be a slow process.

4.2 Alternative Dispute Resolution (ADR)

As we have seen, a court or other adjudicatory body has the power to resolve disputes only when it follows relatively formal and complex procedures prescribed for it by the sources of its power, codified in rules of procedure and evidence. Since such procedures differ from legal system to legal system, it gives rise to uncertainty for the parties involved. The best means of reducing this uncertainty is to use alternative

methods of dispute resolution, especially international arbitration[94], because these methods are independent of sovereignty.

Historically, alternative commercial dispute resolution mechanisms, which are effectively independent of traditional sovereign-based adjudicatory powers, developed with the dawn of modern international commerce[95]. Later, the rising interest in commercial arbitration led to the establishment of a number of non-governmental adjudicatory organisations for the resolution of international commercial disputes. These organisations provide a mechanism for the resolution of commercial disputes on a wide variety of subject matter. For example, the *International Chamber of Commerce* (ICC), based in Paris, France, administers a significant proportion of international arbitrations, particularly cases involving complex commercial transactions. Other organisations include the *London Court of International Arbitration* and the *Arbitration Institute of the Stockholm Chamber of Commerce* (SCC). Recently, the *World Intellectual Property Organisation* (WIPO), based in Geneva, Switzerland, also started an arbitration centre, which could be of particular interest in the context of disputes arising on the Internet due to its incorporation of computer technology into its arbitral procedures. The *American Arbitration Association* (AAA) also administers international commercial disputes[96].

The use of alternative forms of dispute resolution to settle international commercial disputes has grown tremendously in recent years. Between 1987 and 1992 the AAA nearly doubled its international commercial arbitration caseload, from 106 to 204 cases. The ICC has handled 7,500 international arbitration cases since it was founded in 1923[97]. Of this number, 3,500 have taken place in the last 10 years. In fact, alternative dispute resolution is now the most used method of international commercial dispute resolution.

The resolution of modern commercial disputes outside of the sovereign courts of individual nations can take a number of forms[98]. In addition, types of disputes can be typically classified as *"interest disputes"* or *"rights disputes"*. The nature of the dispute and the type of resolution used will often have a determinative effect on the ultimate enforceability of any award or agreement reached - an issue of great concern in the development of Internet-based dispute resolution. *Interest disputes* involve the

[94] Henry H. Perritt, Jr., 'Electronic Dispute Resolution an NCAIR Conference', http://www.law.vill.edu/ncair/disres/PERRITT.HTM.
[95] Both the Law Merchant, which developed from the actions of arbitration commissions of merchants organised by the courts, and the Law of Nations (International Law) evolved into uniform bodies of trade customs and practices that were independent of any one sovereign nation. Although of lesser substantive importance today, the effect of the Law Merchant is evident in modern international arbitration, commercial arbitration, and the Uniform Commercial Code. *See* Frank A. Cona, 'Internet Arbitration of International Commercial Disputes', at: http://vmag.law.vill.edu:8080/~fcona/arb_art.htm.
[96] *ibid.*
[97] International Chamber of Commerce, The ICC International Court of Arbitration (1992).
[98] The following content is largely based upon the liteature available at a website of Frank A. Cona, 'Internet Arbitration of International Commercial Disputes', at: http://vmag.law.vill.edu:8080/~fcona/arb_art.htm.

adoption and formulation of new codes of conduct or procedure, which disputes are normally resolved by collective bargaining, legislation, and contract drafting. *Rights disputes* usually involve claims that arise under existing codes or procedures, which are normally resolved by litigation or contractual arbitration. Thus, interest disputes require the exercise of a rulemaking function, while rights disputes require the exercise of adjudicatory power[99]. The following are several types of dispute resolution techniques, some of which are more suitable for resolving rights disputes, and others more suitable for resolving interest disputes[100]:

Arbitration:

Arbitration is a private form of dispute resolution, in which a non-governmental neutral party hears presentations by the disputants and makes a decision that is more or less legally binding on them. Traditionally, arbitrators have drawn their power from contracts. However, court-annexed arbitration is growing in popularity. In such cases an arbitrator draws power from a court order or rule. Arbitration agreements may declare in advance a willingness to arbitrate a class of disputes that may arise in the future (an agreement "*ex ante*"). They may also be entered into after a particular dispute has arisen, and apply only to that dispute (an agreement "*ex post*").

Negotiation:

Negotiation is the most common form of dispute resolution. Most disputes are resolved this way without ever appearing in the public records of court systems, and even those disputes that do make it to the court dockets are mostly resolved this way. Negotiation is a two party process. The disputants themselves communicate with each other seeking to find common ground and to persuade the other side of the advantage of consensual settlement rather than resort to other legal or coercive processes.

Mediation:

Mediation is similar to negotiation. A mediator, unlike an arbitrator, does not have the power to decide a dispute, but only to assist the disputing parties to negotiate a resolution. Mediators facilitate communication between disputants by helping them to discover their mutual interests, and try to induce settlements by making the disputants aware of the potential costs of continued dispute.

Ombuds:

An ombudsperson is not an authoritative or final decision-maker but is "a confidential and informal information resource, communications channel, complaint-handler and

[99] Henry H. Perritt, Jr., 'Electronic Dispute Resolution an NCAIR Conference', http://www.law.vill.edu/ncair/disres/PERRITT.HTM.
[100] These descriptions are taken by Frank A. Cona from Henry H. Perritt, Jr., 'Electronic Dispute Resolution an NCAIR Conference', http://www.law.vill.edu/ncair/disres/PERRITT.HTM.

dispute-resolver[101]". Some public agencies and corporations ın the United States appoint an ombudsperson to serve as a kind of high level complaints desk, with the power to receive complaints, to investigate these complaints at least informally and to publicise their findings.

4.3 Regulatory Framework of Modern Arbitration

The resolution of disputes by modern arbitration takes place within a regulatory framework consisting of four levels:[102]

4.3.1 Contract Law:

The extent of the arbitrator's powers and the effect of any arbitration award is ordinarily defined in the arbitration agreement. Virtually every aspect of arbitration is definable in an arbitration agreement. An arbitration agreement is a provision in a contract in which the parties to a contract agree to resolve by arbitration certain disputes that arise out of or relate to the contract.

4.3.2 Procedural Arbitration Rules:

The second layer of legal regulation is the procedural arbitration rules, that are issued by various bodies sponsoring arbitration, such as the American Arbitration Association, the International Chamber of Commerce, or the UN Commission on International Trade Law (UNCITRAL)[103]. Arbitral rules add a certain authority to the arbitration process. They regulate all aspects of procedure, such as the appointment of arbitrators, pleadings, discovery, hearings, and the form of the final award. They are adopted with the consent of the parties and are usually specified in the arbitration agreement.

4.3.3 National Arbitration Law:

The national arbitration law of a sovereign nation is the next level in the regulatory framework. Its main objective is to insurie the enforceability of arbitral awards by providing for the national enforcement of arbitration agreements. In the United States, for example, the *Federal Arbitration Act* obliges feveral courts to enforce arbitration

[101] Mary Rowe, 'Options, Functions, and Skills: What an Organizational Ombudsperson Might Want to Know', Negotiation Journal (April, 1995), at 103.

[102] The content of the following discourse is dealt with at: Jack Goldsmith and Lawrence Lessig, 'Grounding the Virtual Magistrate': http://www.law.vill.edu/ncair/disgres/groundvm.htm; Henry H. Perritt, 'Electronic Dispute Resolution', an NCAIR Conference, Washington D.C., May 22, 1996: http://www.law.vill.edu/ncair/disres/PERRITT.HTM; Frank A. Cona, 'Internet Arbitration of International Commercial Disputes', at: http://vmag.law.vill.edu:8080/~fcona/arb_art.htm.

[103] American Arbitration Association Arbitration Rules Art. 20 (1995) (Evidence); American Arbitration Association Rules Art. 24 (1995) (Default Provision); UNCITRAL Arbitration Rules Art. 24-25 (1976) (evidence and hearings); UNCITRAL Arbitration Rules Art. 28 (1976) (Default); International Chamber of Commerce Art. 24 (1975) (finality and enforceability of award).

agreements affecting interstate commerce[104]. This Act, adopted in some form in virtually every state, applies to state courts as well. Similar legislation has been adopted in England and Germany. Great Britain has the English Arbitration Act, 1996. In Germany this law is embodied in the 10th book of the German Code on Civil Procedure which deals with arbitration[105]. Under these statutes, courts may not refuse to enforce arbitration awards except in in narrowly defined circumstances such as where the award in tainted by fraud, gross procedural irregularity or if the arbitrator acted without the necessary power conferred by the arbitration agreement. In addition to the expedited procedure under these arbitration statutes, parties seeking to enforce an arbitration award also can file a common law breach of contract action, because a contract to submit to arbitration is also in effect a contract to obey the award resulting from arbitration.

4.3.4 International Enforcement Treaties:

There are two main international conventions that can assist parties in enforcing ADR awards. Most countries involved in international trade are signatories to the *New York Convention*[106] which provides for the enforcement of international arbitration agreements. By signing the New York Convention, countries agree to recognise and enforce arbitral awards made in the territory of other signatories.

The *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID Convention) is the second major ADR enforcement convention[107]. The ICSID Convention applies only to awards given by ICSID, whose jurisdiction is limited to disputes between states and foreign investors. Awards rendered pursuant to the ICSID Convention are binding on the parties and are subject to appeal within the structure provided by the ICSID Convention. More importantly, an award must be recognised and enforced by the courts of any ICSID Convention contracting state as if the award were a final judgement of that state's highest court. This avoids the necessity of domestic court proceedings to enforce the judgement.

Under both Conventions, an unsuccessful party retains certain defences to enforcement of an award, but these defences are limited and have generally been strictly interpreted by national courts.

[104] 9 U.S.C. § 1 et seq.
[105] §§ 1025 ff of the Zivilprozeßordnung (ZPO), especially § 1044 ZPO.
[106] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958).
[107] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2157, 330 U.N.T.S. 38; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159; Inter-American Convention on International Commercial Arbitration, January 30, 1975, U.S. Treaty Doc. 97-12, 18 I.L.M. 1224.

The New York Convention contains only two defences[108]. The first is that the grounds of a dispute are not arbitrable under the domestic law of the state where enforcement is sought. In such a case, a court may refuse to enforce an international award. The second defence is the more general defence of *ordre public*. Under the New York Convention, a domestic court is permitted to refuse enforcement of an arbitral award where enforcement would violate the public policy of the forum[109]. However, the Convention does not provide guidance as to when this defence can be invoked, so national courts may have widely varying notions of what their "public policy" is.

Under the ICSID Convention, the two major defences to enforcement are the *doctrine of sovereign immunity* and the *act of state doctrine*[110].

4.4 Advantages of Modern Arbitration

Conventional ADR has significant advantages over court-based litigation:

- Arbitration is generally quicker and less expensive than going to court, because there are fewer lawyer hours involved, no court costs and less money spent on preparation for trial[111].
- The majority of awards are observed by the parties without the need to resort to judicial assistance[112]
- Whereas the record of court proceedings is available to the public, the parties can make confidentiality a condition of arbitration.
- Arbitration is typically less confrontational than a trial in court, for it ordinarily takes place in a hearing room or conference room before one or more arbitrators and does not involve the formal procedures and evidentiary rules mandated in courtroom settings.
- Arbitration allows for the appointment of arbitrators with expertise in the area of the particular dispute, whereas most judges are not specialists in a particular area of

[108] See New York Convention, *supra* at art. V.
[109] See New York Convention, *supra* at art. V(2) (b).
[110] *Ibid* at Art. 55. *Sovereign immunity* embodies the idea that sovereign states cannot be subjected to the jurisdiction of a foreign court without their permission. In the context of ADR, its major effect is to make enforcement of an award against a sovereign impossible. In its traditional form, a sovereign is immune from any assertion of jurisdiction by a national court. Many nations have rejected the traditional concept of absolute immunity in favour of restrictive immunity, which distinguishes between governmental acts, which are immune, and commercial acts by governments, which are not immune from a foreign court's jurisdiction. Since commercial acts of governments are subject to a foreign court's jurisdiction, the foreign court can, in theory, uphold ADR awards against a foreign sovereign. The concept of restrictive immunity is embodied in England's State Immunity Act of 1978 and the U.S. Foreign Sovereign Immunity Act. The *act of state doctrine* prohibits foreign courts from examining the validity of the acts of sovereign nations. Although the ICSID Convention purports to permit foreign courts to enforce ADR awards against sovereign states, these two defences do provide exceptions for some government acts. The courts of one country still cannot force a foreign government to pay an ADR award. Private parties and companies, therefore, must continue to rely on the goodwill of national governments in paying adverse ADR awards.
[111] One possible exception to this is in complex commercial transactions which necessitate the review of large numbers of documents and the testimony of expensive experts. For example, complex transactions can often arise in intellectual property disputes, particularly when patent infringement is involved. However, even in these situations, ADR can provide significant savings. In 1995, the American Intellectual Property Law Association reported that the average total cost of a patent infringement suit through trial in the United States was between about $500 thousand and $1.9 million. In sharp contrast, the total cost through binding arbitration of a patent infringement claim was between about $99 thousand and $500 thousand. *See* Committee on Economics of Legal Practice, 'Report of Economic Survey 1995', American Intellectual Property Law Association, 1995, pp. 61-64.
[112] The ICC estimates that 90-95% of its awards are spontaneously paid without the assistance of a national court[112]. Other ADR institutions report similar figures. *See* Richard J. Graving, 'The International Commercial Arbitration Institutions: How Good a Job Are They Doing?' 4 Am. U.J. Int'l L. & Pol'y 319, 333 (1989).

law. Since the disputants may themselves choose the arbitrators, their confidence in obtaining a more just solution than a court might otherwise provide is increased.

- Arbitration allows parties to select a neutral forum in which to resolve their dispute. Thereby they can avoid the problems attendant upon "forum shopping" which has become a feature of international litigation.
- Arbitration further allows for greater flexibility in the resolution of disputes. Whereas jurisdictions impose certain legal remedies for a given type of dispute, and limit the options available to the judge in resolving the dispute, this is not the case with arbitration. Since the case is resolved privately, the parties are for the most part free to establish the boundaries of acceptable remedies.
- Foreign arbitral awards are often easier to enforce: while issues of comity and international law often make the enforceability of legal judgements uncertain, most nations, including the United States, are signatories to international conventions (such as the New York Convention), which provide for the enforcement of foreign arbitral awards.

These advantages are of even greater importance following the emergence of Cyberspace:

4.5 Why ADR suits to Cyberspace

The present court system for public litigation, especially in an international context, is inaccessible, expensive and slow. It is therefore unlikely to be able to cope with the increasing amount of cases arising in Cyberspace, most of which will involve litigants of different countries. As a result, ADR will become more important, because of its flexibility and its independence from national rules of civil procedure, jurisdiction and enforcement.

The flexibility of the procedure of ADR is better suited to the diverse and novel claims arising in Cyberspace than are the fixed and definite rules of procedure in public courts.

The enforcement of an arbitration award involving an international dispute enjoys greater certainty under the present treaty framework than does the enforcement of regular judgements.

Arbitration services are available for computer networks anywhere in the world provided only that the parties agree to participate.

4.6 Why ADR by itself is not enough - the need to make use of modern information technology for ADR

The ever-increasing number of multinational corporations and the technological revolution in banking and financial services has led to a sharp increase in the volume of international commercial litigation and arbitration. Nowadays, many litigants have both the global network and the body of advisers needed to make meaningful decisions respecting the choice of a forum or the choice of a suitable arbitral system. It is not uncommon to find that a contract made between parties residing in two different countries includes a clause providing for arbitration in yet a third country, or selecting a court in a neutral country as the forum for dispute resolution. Modern information technology such like the Internet and its World Wide Web will intensify this trend rapidly and will bring new forms of disputes. This, however, requires new methods of alternative dispute resolution which suit to the modern kind of disputes arising in the Internet and its phenomena of delocalisation.

Regardless of which alternative dispute resolution method a business may use to resolve an international commercial dispute, enforcement of an ADR award is sometimes very difficult. Currently, there is no supranational machinery in place to enforce awards. There is no "World Supreme Court" which can require a citizen of one country to pay an award to a citizen of another country. A party seeking enforcement of an award must rely on national court systems. Although many nations routinely recognise and enforce arbitral awards, enforcement via national court systems can, by itself, be a costly and time-consuming endeavour.

> "Millions of people all over the world communicate and conduct business on networks," said Timothy C. Leixner, chairman of the NCAIR board. "Disputes are inevitable, and existing courts can be too slow, too cumbersome, and too local to have global effect. We need to explore new forms of dispute resolution, provide timely relief, and develop appropriate sanctions that are suitable for World-Wide computer networks (...)"[113].

The Net environment is unlike any other. People all over the world interact in real time and take actions that affect the rights, interests, and feelings of others. When conflicts arise over similar activities in the "real" world, regular courts are available to resolve resulting formal complaints. But the court system is too slow, too expensive, and too inaccessible to address all problems that arise on the Net. Also, with people from many countries communicating on the Net, traditional, nation-based legal remedies are especially difficult to apply.

[113] *See* Cindy Fazzi, 'AAA Moves Deeper into Cyberspace', at: http://www.adr.org/cyberspace_article.html.

Information recorded and transferred on paper has come to dominate much dispute resolution. Even in the simplest arbitration or small claims court procedure, written materials must be submitted before the hearing. In modern court litigation, the paper records of pleading, discovery, and pre-trial documentation fill entire filing cabinets. Some commentators have observed that court litigation is shifting from a single-event oral tradition to a multiple-event, paper-based tradition[114]. Alternative dispute resolution has also become paper intensive. Indeed, some commercial arbitration has become nearly indistinguishable from litigation in court in terms of the amount of paper involved at pre-trial stages.

To some only limited extent, these traditional methods have been supplemented by telephone contact, although telephonic hearings are uncommon[115]. Mostly, however telephones are used to schedule hearings and to clarify specific and relatively narrow questions about facts or legal positions rather than as substitutes for a face to face hearing[116]. However, the hearing or trial remains the focal point of dispute resolution, and any strategy for using information technology for dispute resolution must address the hearing process.

As Professor Perritt remarks[117], the potential for electronic dispute resolution has already been realised by a growing number of federal administrative agencies. The Department of Transportation has made a major commitment to establish a paperless docket for its rulemaking and adjudicatory procedures in all of the operating agencies[118]. The Nuclear Regulatory Commission has similarly launched a number of experiments, including the use of the World Wide Web for notice and comment rulemaking[119].

The new information technology provides several technological advantages that can significantly aid in the resolution of international commercial disputes:

[114] Richard L. Marcus, Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure, 50 U. Pitt. L. Rev. 725 (1989).

[115] A WESTLAW search on 15 March turned up 1057 federal and state cases referring to telephonic hearings, in administrative, criminal, and civil contexts. See, e.g. *Williams v. Office of Personnel Management*, 70 F.3d 129 (Fed. Cir. 1995) (rejecting challenges to administrative agency determination based on telephone hearing); *Lee v. Pfeifer*, 916 F.Supp. 501, 503 (D.Md. 1996) (telephonic hearing, recorded on audio tape, regarding removal jurisdiction); *State v. Clarke*, 1996 WL 45199, *2 (Neb. Ct. App. Feb. 6, 1996) (two telephonic hearings on petition for mandamus).

[116] But see *United States v. Contreras*, 63 F.3d 852, 856 (9th Cir. 1995) (scrutinizing telephonic hearing substituted for in-person deportation hearing, but finding no due process violation).

[117] Henry H Perritt, 'Electronic Dispute Resolution, an NCAIR Conference, Washington D.C., May 22', 1996: http://www.law.vill.edu/ncair/disres/PERRITT.HTM

[118] *See* Henry H. Perritt, Jr., 'Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication' - Report to the Administrative Conference of the United States (October 19, 1995), http://www.law.vill.edu/chron/articles/electronic_dockets/acuscut.htm .

[119] Henry H. Perritt, Jr., 'The Electronic Agency and the Traditional Paradigms of Administrative Law', 44 ADMIN.L.REV. 79 (1992); 'Public Information In the National Information Infrastructure', Report to the Regulatory Information Service Center, General Services Administration, and to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, May 20, 1994, http://www.law.vill.edu/Fed-Agency/OMB/pub.info.NII/ombtoc.html.

- it facilitates the storage, retrieval, review, and reuse of existing information[120] and therefore the avoidance of significant amounts of paper one finds in the arbitration of a complex international intellectual property dispute[121],
- technologies like the World Wide Web make it easy for potential participants to find the starting point for service with the simple click of a button: it is easier for a disputant to submit a dispute: he or she need not go to the office of the AAA or a lawyer, but only to fill out the Web form or send an email message,
- delays associated with waiting for paper forms to be received and processed are eliminated, as well as registering a complaint, appointing a decisionmaker, and serving other parties with the complaint,
- additionally, dockets can be visible to participants, changes to it would be immediately available, and the full contents of all materials could be directly available from the docket itself - no telephonic or written face to face request would be necessary for documents,
- an archival record of arbitration awards and of the filings can be made easily available to public participants in other cases without the need for any investment of additional labour or capital,
- conversely, records for a specific case can be sealed, simply retaining the requirement for user authentication step,
- time required to participate is less for the filing docket-checking and hearing stages although not for document preparation and review,
- moreover, the use of video conferencing and the exchange of video files will greatly expand the power of electronic hearings and conferences, permitting oral and non-verbal messages to be sent and received both synchronously and asynchronously around the world,
- amounts of money could be saved in addressing a dispute between two parties that are half-way around the world from each another. This method eliminates travel expenses of parties and their attorneys. The parties could find a highly qualified mediator or arbitrator, and would only have to pay that person's fee, again no travel expenses and paper transferral costs.

4.7 Using Cyberspace for ADR

The use of the Internet to resolve international disputes involves two distinct areas:

- using Internet-related technology to resolve "real world" disputes on-line or partially on-line,
- and using the Internet to resolve disputes arising in Cyberspace itself.

[120] Henry H. Perritt, Jr., 'Electronic Dispute Resolution an NCAIR Conference', http://www.law.vill.edu/ncair/disres/PERRITT.HTM.
[121] This is why information technology is now widely being used by traditional courts to manage documents and docketing of their cases, as well as by attorneys and litigants in handling large amounts of discovery documents. *See* Frank A Cona (fn 113).

The advent of the Internet as a global means of communication and its numerous legal conflicts arising therefrom has led to the fact that a number of dispute resolution organisations have made use of the Internet[122].

This has not only resulted in the presence of arbitrating authorities in Cyberspace but even in the rapid evolution of on-line dispute resolution systems: in addition to the establishment of conventional arbitrators in Cyberspace, several new organisations and pilot projects have emerged whose functionality is intertwined with the technology of the Internet itself. These organisations are developing new ways of resolving both conventional, "real-world" disputes, and disputes arising in Cyberspace.

One example of these new organisations is the Virtual Law Firm ("http://www.dnai.com/tvlf/index.html") which comprises a network of arbitrators having highly specialised backgrounds in specific, conventional practice areas who can be reached via the Internet to resolve disputes. This system is something of an enhanced referral service. Other projects however, are developing ways to resolve disputes directly on-line.

Three of these projects, sponsored largely by the National Centre for Automated Information Research (NCAIR) are[123]:

- the *Virtual Magistrate*,
- the *On-Line Ombuds Office*,
- and the *On-Line Mediation Project*.

4.8 The Virtual Magistrate[124]

Parties in computer network-related disputes may now choose to resolve their disagreements through on-line arbitration or fact finding under the Virtual Magistrate Project, which is funded by the National Centre for Automated Information Research (NCAIR) and administered by the AAA. The project was designed to assist in the speedy, initial resolution of computer network-related disputes.

[122] For example, the ICC has a web site at "http://www.ibnet.com/icchp.html", where users can go to find out about the ICC, its procedures, and how to contact them. The *American Arbitration Association (AAA)* also has a web site at "http://www.adr.org/". This site contains information on the AAA, its practices, and an HTML formatted version of the AAA rules and codes. The *Global Arbitration Mediation Association*, Inc. (GAMA) has a site at "http://www.gama.com/".

[123] It is worth to note that parts of the following content (about the Virtual Magistrate and the Online Ombuds Office) can also be found at the official websites of those institutions (as it will be quoted in the footnotes). The text is almost identical in some parts. Nevertheless, an overview shall be given here by putting together the most important features instead of only quoting the Internet adresses of those homepages.

[124] The information of the following discourse is adapted from the official website of the VM - Project: http://vmag.law.vill.edu:8080/. Electronic Addresses for the Virtual Magistrate Project: *VM Web Page:* http://vmag.law.vill.edu:8080/; *AAA Web Page:* http://www.adr.org/; *Complaints via email:* vmag@mail.law.vill.edu; *Complaints via web:* http://vmag.law.vill.edu:8080/forms/dispute.form.html; *Help:* vmag-question@mail.law.vill.edu; *Help:* vmag-help@mail.law.vill.edu; *M Operations:* vmag-admin@mail.law.vill.edu; *AAA Administrator:* vmag-aaa@mail.law.vill.edu; *VM Executive Director:* rgellman@cais.com.

It was initiated in discussions held on October 25, 1995 and announced that it was open for business on March 4, 1996.

Arbitrators who have experience in the law (but not necessarily lawyers) and in the use of computer networks serve as impartial "virtual magistrates." The virtual magistrates are selected jointly by the AAA and the Cyberspace Law Institute (CLI).[125]

4.8.1 Its Goals

- establish the feasibility of using on-line dispute resolution for disputes that originate on-line,
- provide system operators with informed and neutral judgements on appropriate responses to complaints about allegedly wrongful postings,
- provide users and others with a rapid, low-cost, and readily accessible remedy for complaints about on-line postings,
- lay the groundwork for a self-sustaining, on-line dispute resolution system as a feature of contracts between system operators and users and content suppliers (and others concerned about wrongful postings),
- help to define the reasonable duties of a system operator confronted with a complaint,
- explore the possibility of using the Virtual Magistrate Project to resolve other disputes related to computer networks,
- develop a formal governing structure for an ongoing Virtual Magistrate operation.

4.8.2 Appointment of Virtual Magistrates

A single magistrate will be selected randomly from a pool of qualified and trained arbitrators. Some cases may be referred to a panel of three magistrates. Initially, the pool of magistrates will consist of those selected jointly by the American Arbitration Association and a subcommittee of CLI Fellows. Prerequisites are familiarity with the law and on-line systems. The pool is not limited to lawyers, although some cases may be assigned to lawyers or to others with specialised knowledge or experience.

Panel members will be asked to respond immediately (by email and other means) to a dispute assigned to them. Panel members are required to avoid direct conflicts of interest.

[125] See Cindy Fazzi, 'AAA Moves Deeper into Cyberspace', at: http://www.adr.org/cyberspace_article.html; Henry H Perritt, 'Electronic Dispute Resolution' - an NCAIR Conference, Washington D.C., May 22, 1996: http://www.law.vill.edu/ncair/disres/PERRITT.HTM

The pool of magistrates, and the identity of the magistrate responsible for each proceeding, will be disclosed publicly.

4.8.3 What Will the Virtual Magistrate Decide?

The Virtual Magistrate Project will accept complaints about messages, postings, and files allegedly involving copyright or trademark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate (obscene, lewd, or otherwise violative of system rules) materials, invasion of privacy, and other wrongful content.

The Virtual Magistrate will decide whether it would be reasonable for a system operator to delete, mask, or otherwise restrict access to a challenged message, file, or posting. Other cases may call for decisions about the disclosure of the identity of an individual to a person other than the government. In extreme cases, the Virtual Magistrate may rule on whether it is appropriate for a system operator to deny a person access to an on-line system.

The Virtual Magistrate Project will not decide questions about billing or financial obligations as between users and system operators.

The Virtual Magistrate Project may broaden the scope of its rulings if all relevant parties identify themselves and agree to be bound by an arbitration decision.

4.8.4 How Will Decisions be Reached?

The filing of complaints and communications between the parties and the Virtual Magistrate Project will normally take place by e-mail. The Virtual Magistrate Project will make reasonable efforts to provide notice to all parties and persons having interest. Each Magistrate will attempt to reach a decision within 72 hours (three business days) after acceptance of a complaint.

The 72 hour time period does not start until all necessary parties have agreed to participate in the process. There can be a significant delay before other necessary parties have been contacted and have agreed to participate. In some cases, the process of contacting other parties and informing them about the complaint and the Virtual Magistrate process has actually resulted in settlement of a dispute without the need for a formal decision.

Delays in communications and other factors may make it impossible to meet the 72 hour target for a decision in all cases. When appropriate, a Magistrate may issue interim decisions more quickly. At the request of the parties or for good cause, the decision schedule may be extended. The Magistrate will normally issue written opinions.

4.8.5 Standard for Decisions

Decisions by the Virtual Magistrate Project will determine whether, in light of available information, network etiquette, applicable contracts, and appropriate substantive laws, a system operator would be acting reasonably if it withheld messages, files, or postings from public access pending resolution of claims between the parties in interest in any applicable legal jurisdiction.

In making a decision, the Virtual Magistrate Project will not automatically apply the law of any specific legal jurisdiction. It will consider the circumstances of each complaint, the views of the parties about applicable legal principles and remedies, and the likely outcome in any ultimate litigation or dispute resolution.

4.8.6 Effect of Decisions

Any system operator may (1) require users (by means of the standard user contract) to refer complaints to the Virtual Magistrate Project; (2) require users to agree that any complaints about their messages, files, or postings will be referred to the Virtual Magistrate Project and may be handled in accordance with its decisions; (3) promise as part of its contractual undertakings to take actions consistent with the decision of a Magistrate in particular cases; or (4) agree with a particular user to refer a particular matter to the Virtual Magistrate Project.

The Virtual Magistrate Project expects system operators to support and enforce decisions as with other private arbitration decisions. When the Virtual Magistrate Project decides that a message, file, or posting should be deleted, masked, or otherwise restricted pending further determination of the rights of all concerned, a system operator will normally be directed to comply.

The Virtual Magistrate Project will seek to persuade third parties (such as copyright owners whose works may have been infringed by network postings) to agree, in consideration of access to the dispute resolution process, to be bound by the decisions. This means that they will be asked to agree that submission of a complaint to the Virtual Magistrate Project, and handling of the matter in compliance with the resulting decision, fulfils any duty the system operator may otherwise have had to respond to the

complaint in the interim before more conclusive determination of the respective rights of the sender of a message and the complaining parties. The goal is to have all parties to a proceeding agree to comply with the decision pending additional legal actions.

Decisions by the Virtual Magistrate Project may be reconsidered but will not be subject to appeal. All system operators, users of on-line systems, and others participating in the Virtual Magistrate's proceedings agree by virtue of their participation to waive any claim against the Virtual Magistrate Project and/or its participants for any liability as a result of the proceedings. Some states and some systems provide immunity to neutral arbitrators. The AAA will defend and indemnify Virtual Magistrate Project participants in the event of litigation for their activities on behalf of the Virtual Magistrate Project.

4.8.7 Governance and Funding

The Cyberspace Law Institute is the convening body for the Virtual Magistrate Project. The National Centre for Automated Information Research (NCAIR) is providing initial funding for the pilot project and will administer the disbursement of the funds. NCAIR and the Working Group will be responsible for administration of the project. Eventually, operations of the Virtual Magistrate Project may be funded through assessments against system operators or from other external funding sources.

The American Arbitration Association will act as the administrative arm of the Virtual Magistrate Project, charged with establishing systems to assure appropriate receipt and routing of complaints. The Villanova Centre for Law and Information Policy will provide on-line facilities that will allow public access to the work of the Virtual Magistrate Project.

4.8.8 Training and Payment of Virtual Magistrate Panel Members

A candidate for magistrate must be knowledgeable about the law and on-line systems. Magistrates must comply with a code of conduct that requires neutrality and provide for refusal from cases in which they may be perceived to have an interest. The AAA and the Virtual Magistrate Project will provide training and orientation regarding the applicable procedures and protocol for arbitration on the Net. Magistrates will be paid $250 per dispute.

4.8.9 Publication and Significance of Decisions

Decisions of the Virtual Magistrate Project will be made public, provided however that the panel may rule that specified matters be kept under seal or that publication of specific matters be delayed for good cause shown. The Virtual Magistrate Project will

keep filings in a case confidential until the decision is rendered. Complaints and other submissions relating to a proceeding will then made public, unless the Magistrate in the case rules that the filings may be sealed for good cause. Virtual Magistrate Project panel may conduct private deliberations.

Published decisions and proceedings will be made available through a World Wide Web site maintained by the Centre for Law and Information Policy at Villanova Law School.

Decisions by one Magistrate will necessarily not be treated as binding precedent for other cases. Eventually, a body of cyberlaw may develop from the decisions and form the basis for resolving additional disputes. The parties to a proceeding will be bound by the decision and will not be permitted to relitigate identical matters through the Virtual Magistrate Project.

4.8.10 The first case[126]

The first case brought before the Virtual Magistrate, *"Tierney and Email America"* [127] involved a complaint by an Internet user against a company that posted an advertisement on America On-line (AOL). The ad posted by Email America promised millions of E-mail addresses in a format that could be used easily for sending bulk mailings through the Internet. The prices ranged from $99 for 5 million E-mail addresses to $359 for 20 million addresses. James Tierney, an AOL subscriber and former attorney general of Maine, wanted the ad removed from America On-Line, claiming that the ad was deceptive and that it promoted unsolicited bulk "E-mailing," a practice which he said invades the privacy of Internet users like him. AOL, which voluntarily participated in the case, said in its submission that its terms of service agreement permits removal of messages that are harmful or offensive or otherwise in violation of its rules. AOL said it does not encourage indiscriminate, unsolicited bulk mail on its system. AOL considers such mailings inconsistent with Internet custom and practice, an impediment to service, and potentially deleterious to its system. Unsolicited bulk mail has also been the subject of numerous complaints from AOL subscribers.

The virtual magistrate for the case, N.M. Norton, a partner with the law firm of Wright, Lindsey & Jennings in Little Rock, Ark., ruled that the determination of what constitutes harmful, offensive activity can take into account the limitations of the AOL system, Internet custom and practice, and customer complaints. Norton determined

[126] Some of the following information is adapted from the official VM - website: http://vmag.law.vill.edu:8080/docs/vmpaper.html.
[127] VM Docket No. 96-0001 (08 May 1996). The date of the decision is May 20, 1996. The full text and related materials and correspondence are available through the Virtual Magistrate Home Page at "http://vmag.law.vill.edu:8080".

that removal or blocking of the message in question would be permissible under the AOL terms of service agreement and that AOL should remove the message from its system. Norton is one of eight individuals selected so far to serve as virtual magistrates.

Virtual Magistrate Executive Director Robert Gellman said "The Virtual Magistrate Project is off to a good start with this decision. We expect the Project to demonstrate how computer networks can police themselves. The decision supports the right of system operators to establish appropriate rules governing their services. We were disappointed that Email America did not respond to repeated requests to participate in this case. But since there was an active complaint and a participating system operator, we proceeded with the case."

William K. Slate II, President and Chief Executive officer of the American Arbitration Association, said: "This first decision of the Virtual Magistrate is truly the birth of on-line alternative dispute resolution. The case demonstrates that on-line technology can be used to resolve disputes with impressive speed and efficiency, while maintaining the fairness and integrity associated with ADR. The American Arbitration Association is pleased to be playing a leading role in developing this leading-edge technology[128]."

4.8.11 Miscellaneous

The Virtual Magistrate Project will direct requests for mediation services to other appropriate sources of such assistance, report publicly on its experiences, attempt to establish a protocol for on-line dispute resolution that can be emulated by others and may also seek to educate the public about network policies, practices, and conduct. NCAIR and the Cyberspace Law Institute may convene a conference or workshop in Washington D.C., in late May, 1996 to evaluate the Project to that date and to accelerate the process of delivering the pilot project to its permanently funded administrative home.

The jurisdiction of the Virtual Magistrate is the same as that of the Net, and the Net does not map neatly onto the jurisdiction of any existing sovereign entity. This is a strength of the Virtual Magistrate as well as a problem. Disputes can be accepted and decided without the need for resolving potentially complex conflict of law questions for which there may be no existing legal precedent. Given the limited nature of the decision that the Virtual Magistrate will make, this is less of a barrier than it would be for a traditional, full-fledged legal dispute. On the other hand, the problem is that the Net does function within other jurisdictions and is not completely divorced from

[128] Frank A. Cona, 'Internet Arbitration of International Commercial Disputes',at: http://vmag.law.vill.edu:8080/~fcona/arb_art.htm.

existing laws. The ultimate resolution of this broad and basic jurisdictional conflict between the Net and the rest of the world will likely continue for the rest of this century and beyond. But the Virtual Magistrate should be able to arbitrate individual cases in the interim. As arbitration decisions reached with the agreement of the parties, decisions should be enforceable in regular courts[129].

At this early stage in the Virtual Magistrate Project, it is difficult to assess its direction. The Virtual Magistrate represents an attempt by the Net community to police itself. Since there are no formal police powers, success must come through acceptance in the community. If the Net community sees the Virtual Magistrate as useful and fair, then it will find a place. But if the marketplace decides that the Virtual Magistrate is not acceptable or that other remedies are preferable, then the Project may not succeed[130].

It is apparent, however, from the enthusiastic response so far that the Virtual Magistrate has struck a chord in the Net community. There is a perceived need for a simple, rapid, and inexpensive dispute resolution mechanism for network disputes. Time will tell if the Virtual Magistrate is the best response to that need. The commitment from the Virtual Magistrate Project is to give the experiment every chance to be useful and to succeed[131].

4.9 The On-Line Ombuds Office (OOO)[132]

The On-Line Ombuds Office (OOO) is another project whose goal is to develop Internet-based dispute resolution. The OOO is also funded by NCAIR, and has a Web site at "http://www.ombuds.org". The OOO is operated by the University of Massachusetts. The OOO project is primarily interested in disputes arising out of on-line activity.

The OOO provides users with two types of assistance. Users can help themselves by browsing through the OOO Web site to retrieve information that is helpful in dealing with their dispute. Users can also ask for the assistance of one of the on-line ombudspersons. These persons have considerable experience in dispute resolution and will communicate with users about what strategies might be appropriate.

The OOO operates as follows. A user provides the OOO with information about their dispute. An ombudsperson is assigned to the case and usually contacts the user via e-mail. The ombudsperson may ask questions about what has happened or about what

[129] Robert Gellman, 'A Brief History of the Virtual Magistrate Project: The Early Months", at http://www.law.vill.edu/ncair/disres/GELLMAN.HTM.
[130] *ibid.*
[131] *ibid.*
[132] The following information is completely adapted from the On-Line Ombuds Office Web site at http://www.ombuds.org.

the user wants. The ombudsperson may also have questions about the other party. If both parties are co-operating in using the On-line Ombuds Office, then the ombudsperson will mediate the dispute. If one party refuses to co-operate, she will suggest some other strategy.

The OOO also has the On-line Ombuds Conference Room where, using technology like Internet Relay Chat (IRC) and chat rooms, the ombudspersons can have real time discussions with the parties. The ombudsperson can meet with all the parties in one of these rooms or can put each party in a different room and shuttle back and forth. The OOO intends to also experiment with the use of video-conferencing. More information on the On-Line Ombuds Office is contained in the Appendix.

4.10 The On-Line Mediation Project[133]

The third NCAIR sponsored project is much more narrowly focused in its subject matter jurisdiction. The On-Line Mediation Project is based at the Centre for Law Practice Technology at the University of Maryland School of Law and is a pilot project for determining the feasibility of resolving family domestic and health care disputes over the Internet or through on-line systems. Cases mediated by the On-Line Mediation Project are limited to family domestic and health care disputes arising in Maryland, although the techniques and technology developed by the project may have much broader application.

The On-Line Mediation Project is currently creating a Web site which will act as a gateway to its mediation service. It advertises the availability of the service on the World Wide Web; contains information about the process for prospective parties; collects contact information from prospects in order to assess the suitability for participation in the project; contains mediation rules, a copy of the agreement to mediate, information about the backgrounds of the mediators, and a copy of the mediation handbook.

The project intends to develop a web site for each category of dispute that contains substantive legal information. Work is currently underway to create a Maryland Family Law Information Centre, which is supported by a separate grant to the Law School. This web site will contain general discussions of Maryland family law, supported by visual enhancements and graphics; sample forms and instructions for litigants, and tools, such as a child support calculator and judicial standards for alimony and spousal support awards. Flow charts and graphics will be used to explain complex legal

[133] The following information is completely adapted from Richard S. Granat, 'Creating An Environment for Mediating Disputes On the Internet: A Working Paper for the NCAIR Conference on On-Line Dispute Resolution', Washington, DC, May 22, 1996 and Frank A Cona, 'Internet Arbitration of International Commercial Disputes', at: http://vmag.law.vill.edu:8080/~fcona/arb_art.htm.

concepts. The generalised discussion will also be annotated with case and statutory references, and there will be links to other sites that provide information on a variety of family law issues. Easy access to cases and other legal materials can be used by the parties to support arguments and clarify their negotiating positions. A similar web site will be created to support health-related mediations.

The legal Web sites will also be supported by a staff person with expertise in the underlying substantive law. This person will guide the parties to relevant legal materials in the web site, but will refrain from providing actual legal advice. Another staff person will also provide technical assistance, either by telephone or by e-mail, to help the parties and the mediator utilise the software programs and master any technical barriers that might detract from the mediation itself.

The project will also use multi-threaded discussion group software as a mechanism for structuring lines of arguments between the parties, and providing the primary vehicle for the mediator to facilitate discussion and negotiation between the parties. E-mail will be used by the mediator to communicate with each of the parties and will enable each of the parties to consult with the mediator as they shaped their negotiating positions. All filings of exhibits and documents will also be conducted by E-mail.

5 Comment and Outlook

ADR is a voluntary system, requiring all parties to consent to the submission of a dispute. Therefore, it must be in the interest of all parties before the Virtual Magistrate can participate in the process. That will generally be difficult to achieve in the tort context: in the tort context, the parties rarely have the opportunity to bargain before the dispute arises, and, because delay almost always favours the defendant, it is unlikely that they will agree to use private ADR after a dispute has arisen.

This suggests that ways have to be explored to bind potential participants ex ante, i.e., before disputes have arisen, by contractual means. One way would be to suggest content suppliers to specify "terms of service" on their web pages and thereby make clear that a user who is given access to the page is bound by those terms of service. Such terms of service could provide for arbitration and the Virtual Magistrate. Furthermore, system operators could agree among themselves on certain rules and adopt them in their subscriber - contracts. Their violation will also be met with standard enforcement strategies, including banishment. Furthermore, system operators should not connect with other systems that do not enforce those rules agreed upon. That means that the system operators agree to require all registrants to resolve all disputes regarding use of the net by means of the same international arbitration process they use to resolve disputes among themselves. This might increase efficiency, of

course, but its other primary positive effect would be to produce a consistent "law" applicable to all participants in the net.

While information technology can be used to reduce the time and cost involved in some of the traditional mechanisms of international arbitration, it cannot, however, (yet) replace oral discussion and a face-to-face examination of witnesses. In many disputes, the necessary frequency of such in person events may make the implementation of Internet-enhanced dispute resolution impractical. In a large number of cases, however, this technology can be used to significantly reduce cost. Moreover, video-teleconferencing might be a solution.

The enforceability of Internet-based regulations is currently significantly hampered by the fact that this type of dispute resolution is not yet formally recognised at other levels of enforcement, the most important of these in the international context being international conventions such as the New York Convention. That means that national arbitration laws and international treaties like the New York Convention have to be modified to include dispute resolution in Cyberspace by e.g. changing the provisions concerning the requirement for the agreement to be drawn up in writing.

> "Eventually, the individual nations may be forced to give up their sovereignty over Cyberspace to some new international body. The duty of this international body will be to regulate and govern Cyberspace. This new international body will establish courts of their own. These courts will exclusively hear cases that arise out of cyber-law disputes and issues. It is possible that this information based cyber court system will be the basis, or catalyst, for an eventual breakdown of all international borders allowing for the free flow of people and goods to follow the free flow of ideas and words now pouring across those borders via the Internet"[134].

[134] Vision of Bill D. Hicks, 'Choice of Law in Cyberspace', at: http://www.law.ttu.edu/cyberspc/jour13.htm.