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## Introduction to the Symposium on Jurisdiction and the Internet

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## Introduction to the Symposium on Jurisdiction and the Internet\*\*

In March 1998, Southern Methodist University School of Law was pleased to host *The International Lawyer Symposium on Jurisdiction and the Internet*. The Internet, "a unique and wholly new medium of worldwide human communication,"<sup>1</sup> is raising challenging new issues in international law. The Internet has unleashed powerful forces that threaten to erode the importance of territorial sovereignty, and it remains unclear what impact those forces will ultimately have on established legal doctrines governing the authority of national courts to exercise jurisdiction with regard to actions taken over the Internet. As the papers in this symposium issue indicate, answers to these questions are not nearly as theoretical or unclear as they were only a few years ago.

The Internet existed for many years before it became a mass phenomenon in the mid-1990s. As the number of people using it and the number of uses to which it is put have increased in recent years, thinking about the impact of the Internet on existing social and legal institutions has undergone a rapid transformation. In the 1980s, Internet users formed a small, technologically-sophisticated community. The dynamic, fluid quality of the Internet as an open network of computers prompted debate regarding the special characteristics of the virtual community of users it created. With the development of the World Wide Web in the early 1990s, the number of users began to expand rapidly. This explosion in number of individuals using the Internet and debating its significance changed the terms of the debate. The Internet was now seen as a mass communication medium, and the relevance of legal issues such as free speech and intellectual property rights was recognized.<sup>2</sup> For example, the Cyberia-L listserv for discussion of

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1. *Reno v. ACLU*, 117 S. Ct. 2329, 2334 & n.4 (1997).

2. *See, e.g.*, Symposium, *Surveying Law and Borders*, 48 *STAN. L. REV.* 1037 (1996) (articles on jurisdictional issues raised by the Internet).

cyberspace legal issues was established in 1992 by Trotter Hardy, a professor at William and Mary College of Law, creating a public space in which the application of traditional legal principles to Internet activities was hotly debated.

It was not until the mid-1990s, when control of the Internet backbone had shifted from the National Science Foundation to private service providers, that commercial exploitation of the Internet became possible, creating yet another explosion of interest in the Internet.<sup>3</sup> When the Internet was not just a communications medium, but a global marketplace, problems of transnational application of laws and competing or overlapping claims of jurisdiction became mainstream legal issues.

The articles in this symposium take a pragmatic look at the jurisdictional issues raised by the wide range of activities now conducted over the Internet.

- Stewart Baker looks at how different jurisdictions have dealt with digital signature technology. Public key encryption holds the promise of resolving many of the security problems created by the open architecture of the Internet, and thus clears the way for conducting commercial activities on a global scale over the Internet. But this promise will never be realized if different jurisdictions adopt conflicting standards for regulating this technology.
- Professor Catherine Kessedjian and Sandrine Cahn consider the claims of those who believe that the natural solution to disputes that arose in an on-line environment should be the creation of on-line dispute resolution mechanisms, and find that they are unlikely to be realized. Examining several European examples, Kessedjian and Cahn conclude that information technology is more likely to modify the way that territorially-based dispute resolution processes operate than to replace them.
- Professor Peter Swire examines the choice of law rules that apply under the new European Union Data Protection Directive, which entered into effect in October 1998. Swire then generalizes his analysis to show how choice of law rules will have a major effect on the “elephants” (large organizations) that operate on the Internet, but much less effect on the many “mice” (small organizations) that may cause harm through copyright violations, pornography, or in other ways.
- Professor Pierre Trudel offers a Canadian perspective on Internet jurisdiction issues, noting that while territorial sovereigns will face serious challenges in retaining their authority in cyberspace, it is unlikely that they will simply surrender such authority in the face of new technologies. In light of Canadian and other precedents, Trudel speculates that a variety of strategies will be

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3. With the shift to private control of core network facilities, the National Science Foundation (NSF) “Acceptable Use Policy” that prohibited commercial activity on NSF-provided facilities no longer applied to most Internet users. See Maureen O’Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 624 (1998).

found useful, including revising existing statutes and treaties, and making efforts to harmonize the substantive laws of jurisdictions.

- Professor Amelia Boss discusses the legitimacy and efficacy of choice of law and choice of forum clauses in commercial contracts in light of the work of the drafting committee working on proposed Uniform Commercial Code Article 2B governing software contracts and information licensing. Article 2B includes provisions dealing with electronic contracting that would apply to Internet commerce, and Boss shows that the debate surrounding these sections reveals the degree to which traditional commercial law principles can still resolve issues raised by new technologies.
- Professor Jack Goldsmith uses pending Internet gambling legislation as a jumping off point to show why it is wrong to claim, as many do, that Internet regulation is illegitimate or unfeasible.
- Dean Henry H. Perritt, Jr. argues that the hardest problems raised by the Internet are not whether existing jurisdiction doctrines can be expanded to cover Internet activities, but whether litigants seeking remedies for harms suffered as a result of Internet activities will be able to enforce the judgment of a territorial sovereign. Perritt suggests that litigants may be able to gain the leverage they need within the Internet itself if elements of the architecture of the Internet—such as domain names—can be incorporated into systems for enforcing foreign judgments.
- Professor Allan Stein reviews some leading cases in light of the types of disputes likely to arise as a result of Internet activities, and argues that existing jurisdiction doctrines are flexible enough to deal with these new factual contexts.

The papers collected in this symposium issue provide concrete, pragmatic assessments of some of the jurisdictional issues raised by the Internet. No matter how insightful, however, the papers in this symposium cannot hope to address more than a small portion of the concrete issues practicing lawyers will face in this area. In recognition of the magnitude and frequency with which the Internet can be expected to raise jurisdictional problems, the American Bar Association (ABA) is now organizing a large scale project to assist practicing lawyers in finding concrete guidance in this area.

One of the first forums in which the jurisdictional issues raised by the Internet were debated in a systematic manner within the ABA was by the Cyberspace Law Committee of the Business Law Section.<sup>4</sup> Transnational business transactions conducted over computer networks did not originate with the Internet, but became widespread in the 1970s with electronic funds transfers and in the 1980s through the use of electronic data interchange (EDI) technology. Attorneys familiar with

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4. The Cyberspace Law Committee, then known as the Committee on the Law of Commerce in Cyberspace, was formed in 1995 through the consolidation of many separate subcommittees and working groups working on similar issues throughout the Business Law Section.

some of the jurisdictional issues raised by those closed network transactions began to debate the significance of the more open architecture of the Internet. In the course of these debates, the idea emerged that inconsistent or unclear rules governing jurisdictional issues could be regarded as a barrier to international electronic commerce, and that the ABA might provide a platform for work by members of the bar to reduce or eliminate some of those barriers.

In August 1998, Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction was launched.<sup>5</sup> This project is a joint undertaking of the Business Law Section, Section of Science and Technology, the International Section of Law & Practice, the Section on Public Utilities, and the Section of Intellectual Property. The work for the project has been divided up among nine working groups: taxation; payment systems/banking; sale of goods; sale of services; securities; advertising/consumer protection; public law; intellectual property; and privacy. The working groups will collect information about current electronic commerce practices in each area as well as survey applicable law in an effort to identify viable strategies for overcoming the problems created by uncertainty surrounding jurisdictional issues and Internet activities. A formal report of the findings of the project are due to be released at the ABA Annual Meeting in the year 2000.

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5. The formal launch of the project was preceded by a year of preliminary organizational work spearheaded by John Morgan working on the International Transactions Subcommittee of the Cyberspace Law Committee. Professor Margaret Stewart of the Chicago-Kent School of Law will act as director of the project. The website for the project is at <<http://www.kentlaw.edu/cyberlaw>>, and a copy of the August 12, 1998 press release formally announcing the project is available at <<http://www.kentlaw.edu/cyberlaw/press.htm>>.