ESSAYS

RETHINKING CYBERSPACE JURISDICTION IN INTELLECTUAL PROPERTY DISPUTES

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1. INTRODUCTION

Protection of intellectual property is essential to the conduct and success of e-commerce. A website is, in many respects, little more than intellectual property. A location on the World Wide Web is comprised of content—text, sound, graphics, video, visual images, and other material—protected by copyright law (if original and minimally creative), which potentially incorporates trademarks and implicates rights of publicity. The site itself is merely a software application, which is protected by copyright law and, under certain conditions, patent and/or trade secret law. Similarly, a particular business model may be patentable, or it may incorporate ideas that may be protected under state trade secret laws or particular statutes and caselaw in California and New York that protect mere ideas (to the extent not preempted by federal law).

Intellectual property ("IP") law is primarily national in origin. Except where international treaties apply, IP rights in cyberspace are contingent on the laws of individual countries or regions, such as the European Union. By contrast, cyberspace does not recognize national boundaries. The local nature of protection—combined with the

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transnational nature of the Internet—affords opportunities for international forum shopping. For all these reasons, e-businesses must think strategically in order to protect their rights internationally.

To date, there has been only one coordinated effort at international cooperation to develop uniform international standards for IP protection and jurisdiction in cyberspace. In late 1999, the International Corporation for Assigned Names and Numbers ("ICANN") implemented a system for mandatory arbitration of domain name disputes. ICANN requires complainants to consent to jurisdiction in the places where the domain name registrant and affected registrar are located, as a precondition for filing a complaint. The rules for ICANN arbitration, however, permit domain name registrants to derail proceedings by allowing them to initiate litigation in their local jurisdictions. In this way, ICANN arbitration rules encourage registrants to engage in forum shopping.

Website owners may adopt a number of practical solutions to reduce their risk of being subject to jurisdiction overseas. No uniform rules exist, however, for doing so—or to reduce the incentives created by the current system for parties with adequate financial resources to engage in forum shopping.

2. THE NATIONAL NATURE OF IP RIGHTS

Except to the extent recognized by international treaties, IP rights generally are national in origin. A U.S. patent, copyright, or trademark, therefore, generally confers rights within the United States, but nowhere else. Rights owners typically must register their IP assets internationally in order to enjoy international protection. The need for international registration, however, may be more pronounced in cyberspace where a rights owner's online activities may increase the risk of infringement (or litigation) in countries where its rights are uncertain.

Although patents, copyrights, trademarks, and trade secrets generally are protected under the legal systems of most major trading countries, certain forms of intellectual property are recognized only in specific jurisdictions. In particular, businesses should consider:

- *Sui generis database protection*, which is available to residents of the European Union or (by treaty) certain countries which

recognize equivalent rights.[1] By contrast, under U.S. law, factual databases are merely entitled to thin copyright protection for the selection, arrangement, or organization of the database (but not underlying facts), which frequently is subject to a high standard of proof under the virtual identicality test, essentially allowing third parties to copy large portions of factual databases.[2]

- *Patent protection for Internet business methods*, which may be obtained in the United States[3] but not in most other countries.
- *Rights of publicity for deceased celebrities*, which are recognized under the laws of certain U.S. states, such as California,[4] but not under the laws of other countries.[5]

Where rights may be recognized in some, but not all, jurisdictions, the incentive to engage in international forum shopping is great.

In addition to protecting and/or registering IP rights internationally, online businesses may seek to structure their websites to avoid directing their conduct to residents of particular countries. Suggested strategies for limiting the reach of a website are considered in Section 6 of this Essay.

3. THE INDIRECT EXTENSION OF REGULATORY JURISDICTION

The borderless nature of cyberspace means that legal developments in one part of the world may have the effect of indirectly regulating conduct in other jurisdictions. To date, legal precedents in the United States—such as caselaw affirming the rights of trademark owners in disputes involving cybersquatters—have proven influential

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[1] *See* Council Directive No. 96/9 of 11 March 1996, Legal Protection of Databases, art. 7, 1996 O.J. (L 77) 19, 25-26 [hereinafter Database Directive].

[2] *See* IAN C. BALLON, E-COMMERCE & INTERNET LAW: A LEGAL TREATISE WITH FORMS § 9.02 (2000) (summarizing U.S. caselaw).

[3] State St. Bank & Trust Co. v. Signature Fin. Group, Inc., 149 F.3d 1368, n.13 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

[4] *See* CAL. CIV. CODE § 3344 (West 1997 & Supp. 2000). Only a few U.S. states expressly recognize posthumous publicity rights. *See* BALLON, *supra* note 2, § 16.03 (summarizing state laws).

[5] Even where publicity rights are not expressly recognized, U.S. law may afford remedies broader than those available overseas. *See, e.g.*, Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1031 (C.D. Cal. 1998) (holding that a false designation of origin and false endorsement claim could be stated on behalf of the Estate of Diana, Princess of Wales, based on her public persona and/or the rights of her Estate or assignees, even though a right of publicity claim would not be cognizable under either California or U.K. law).

in shaping the legal standards in other countries.[6] Over time, it is likely that developments in other countries will be increasingly influential in the evolution of U.S. Internet law. Correspondingly, EU Internet law is likely to exert greater influence on international e-commerce law than it has to date.[7]

Although EU Directives technically apply only to EU member states and their 368 million residents (and by treaty to certain other countries in central and northern Europe), they in fact expressly or implicitly regulate other states' conduct in cyberspace.[8] The Directive on Distance Selling, for example, applies to any distance sales contract entered into with an EU resident, and therefore affects foreign vendors.[9] The Directive invalidates choice-of-law provisions that select the laws of countries that do not provide adequate consumer protections.[10] The Privacy Directive, likewise, compels adherence to EU legal standards by prohibiting the transfer of data outside the European Union, except to countries that meet EU standards.[11] The EU's Database Directive may prove influential in the eventual adoption of a U.S. statute on database protection.[12] Other EU initiatives relating to intellectual property are also likely to indirectly regulate the conduct of e-commerce beyond the boundaries of the European Union.

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[6] *See, e.g.*, British Telecomms. PLC v. One in a Million Ltd., 4 All E.R. 476, 483-84 (C.A. 1998) (holding defendants liable for "passing off" or registering plaintiff's marks and names as domain names); Cellcom Israel Ltd. v. T.M. Aquanet Computer Communications Ltd., MF 54749/99, OM 10909/99 (Tel Aviv, Israel Dist. Ct. Sept. 1999), as translated and explained by Haim Ravia, *First Israeli Decision in the Contest Between Trademarks and Domain Names* (1999), *available at* http://www.law.co.il/articles/cellcom_en.htm (last visited Oct. 24, 2000) (producing a "result . . . the same as in the majority of cases in the USA—the registered trademark owner emerged with the upper hand").

[7] *See* BALLON, *supra* note 2, § 41.03.

[8] *See* David Mirchin, *EU Database Directive Has Global Ramifications*, NAT'L L.J., June 9, 1997.

[9] Council Directive No. 97/7 of 20 May 1997, Protection of Consumers in Respect of Distance Contracts, arts. 1-2, 1997 O.J. (L 144) 19, 21.

[10] *See id.* art. 12, at 24.

[11] Council Directive No. 95/46 of 24 October 1995, Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 32, 1995 O.J. (L 281) 31.

[12] *See* Database Directive, *supra* note 1.

4. THE RELEVANCE OF PHYSICAL LOCATION AND TARGETING

4.1. In General

Much of the caselaw that has developed on the scope of judicial jurisdiction—both in the United States and other countries—has arisen in the context of disputes where one or more parties allege IP rights in a domain name or website content. In general, U.S. courts will assert jurisdiction more broadly over nonresident defendants than courts in other countries. In most cases, physical presence is not required to obtain judicial jurisdiction over a defendant that has directed its conduct towards residents of the jurisdiction. Physical presence is required, however, to register domain names in the top-level domains of many countries, including, for example, Japan. Physical presence also may be important as a practical matter if a plaintiff hopes to be able to enforce any judgment obtained.

Intentional acts of IP infringement, including cybersquatting,[13] generally have been found to be directed at a forum resident whose IP rights have been violated.[14] Where website content is alleged to be infringing, U.S. courts generally apply the *Zippo Dot Com* test, assessing the level of interactivity of the site in order to evaluate whether it may be deemed to have been directed at U.S. residents.[15] Interactivity, however, is merely a proxy for evaluating the contacts between the defendant and the forum state and does not fully account for other permissible grounds for asserting jurisdiction over a defendant, such as intentional torts directed at forum residents or personal service in the forum state.[16] Foreign entities need to be especially attentive to the

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[13] The term "cybersquatter" used to refer to people who register third party trademarks as domain names and effectively squat on other people's property in cyberspace. It was coined in mid-1996 by *L.A. Times* reporter, Greg Miller. *See* BALLON, *supra* note 2, § 11.01.

[14] *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1327 (9th Cir. 1998) (holding that Toeppen was subject to personal jurisdiction, as his scheme to extort money from Panavision by registering its trademarks as his domain names was "aimed at Panavision in California and the brunt of the harm was felt in California").

[15] Zippo Mf'g Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1126-27 (W.D. Pa. 1997); *see also* Mink v. AAAA Dev. L.L.C., 190 F.3d 333, 336 (5th Cir. 1999) (finding the *Zippo Dot Com* reasoning persuasive and adopting it); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999) (adopting the *Zippo Dot Com* test); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997).

[16] *See* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (regarding transient jurisdiction); Calder v. Jones, 465 U.S. 783, 789-90 (1984) (regarding intentional

risk of jurisdiction being asserted based on personal service when a company executive visits the United States on business or for pleasure.

4.2. The Broad Reach of U.S. Jurisdiction

A U.S. resident seeking to exercise personal jurisdiction over a foreign entity under the minimum contacts test may benefit from an often overlooked provision of the Federal Rules of Civil Procedure, which actually may make it easier for a U.S. resident to obtain jurisdiction over a foreign defendant than over a fellow U.S. resident. Specifically, Rule 4(k)(2) provides that a federal court may properly exercise personal jurisdiction over a non-U.S. defendant in a suit brought under a federal statute based on the defendant's contacts with the United States as a whole, if there is not otherwise a single state where jurisdiction could obtain.[17] A similar national aggregation of contacts is permissible in suits brought against foreign governmental entities under the Foreign Sovereign Immunities Act.[18]

In evaluating whether jurisdiction may obtain under Rule 4(k)(2), a court must determine that: (i) the defendant has sufficient contacts with the United States as a whole to satisfy due process (based either on substantial and continuous contacts, or if the provision has been invoked, more likely based on the minimum contacts test); (ii) the case arises under federal law and is not before the court based on diversity jurisdiction; and (iii) the foreign defendant lacks sufficient contacts with any single state to subject it to personal jurisdiction in any state.[19] The Rule may be justified because only Fifth Amendment Due Process Clause protections would apply to non-Americans sued in the United States.[20] The effect of the Rule, however, is that it is often

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torts); BALLON, *supra* note 2, § 58.05[5] (noting the limitations of the *Zippo Dot Com* test).

[17] FED. R. CIV. P. 4(k)(2) states,

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Id.

[18] *See* Argentina v. Weltover, Inc., 504 U.S. 607, 609 (1992).

[19] *See* United States v. Int'l Bhd. of Teamsters, 945 F. Supp. 609, 620 (S.D.N.Y. 1996).

[20] When the defendant is a foreign entity, contacts may be aggregated on a nationwide basis to determine whether it has sufficient contacts with the United States

easier to sue non-Americans in U.S. courts than to sue Americans (or others) overseas.

4.3. In Rem Jurisdiction

Pursuant to the Anticybersquatting Consumer Protection Act ("the Act"), which took effect on November 29, 1999, U.S. courts may obtain in rem jurisdiction in disputes concerning forfeiture or cancellation of a domain name, or for an order transferring the domain name to the mark owner,[21] where a domain name registrant allegedly registered, trafficked in, or used the name with a bad faith intention to profit. The Act affords mark owners in rem relief against the domain name itself (rather than the owner) under two conditions:

(1) if the domain name violates the rights of the owner of a registered mark or a mark protected generally under the Federal Trademark Dilution Act[22] or under section 1125(a) of the Lanham Act;[23] and
(2) if a court expressly finds that the owner either was unable to obtain personal jurisdiction over the defendant, or even through due diligence, could not find her by:
   (a) sending a notice to the postal and e-mail addresses that the defendant provided to a domain name registrar;
   (b) alerting the defendant of the alleged violation and intent to proceed with an in rem action under the statute; and
   (c) publishing a notice of the action "as the court may direct promptly after filing the action."[24]

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as a whole to be subject to jurisdiction consistent with the requirements of the Due Process Clause of the Fifth (rather than Fourteenth) Amendment. *See, e.g.*, Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 100 (1987) (finding jurisdiction over a foreign defendant after examining the quality and nature of his activities in the United States under the Due Process Clause of the Fifth Amendment). By contrast, jurisdiction over U.S. residents is generally determined under the Due Process Clause of the Fourteenth Amendment by aggregating the defendant's contacts with the forum state (rather than the nation as a whole) to determine whether either general or specific jurisdiction may obtain. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (declaring that the exercise of jurisdiction over Volkswagen would be inappropriate because its total contacts with the forum state are not substantial).

21 15 U.S.C.A. § 1125(d)(2)(D)(i) (West Supp. 2000).

22 15 U.S.C. § 1125(c) (1994).

23 *Id.* § 1125(a).

24 15 U.S.C.A. § 1125(d)(2)(A) (West Supp. 2000). These additional procedures are intended to assure due process. As a general rule, courts may exercise in rem

For purposes of an in rem action, the domain name is deemed to be situated in the judicial district where the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located, or the court where "documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited."[25]

4.4. Limiting Doctrines

Various doctrines and rules mitigate the effects of the broad assertion of U.S. jurisdiction. For example, the doctrine of forum non conveniens gives judges discretion to dismiss suits where an overseas venue would be more convenient to the parties or witnesses—even if the courts there have no authority to grant equivalent relief.[26] Choice of law principles similarly may compel a U.S. court to apply foreign law. The scope of U.S. jurisdiction remains quite broad, however, which may disadvantage IP rights owners engaged in international e-commerce who do not adequately protect their rights in the United States.

5. POWER PARAMETERS: ICANN MEDIATION

5.1. Overview

In 1999, the Internet community adopted, through self-regulation, binding arbitration rules for resolving domain name disputes involving cybersquatters.[27] ICANN arbitration may potentially benefit individuals and small entities by affording quick and inexpensive relief. Proceedings may be derailed by initiating litigation, however, which creates risks for IP owners in international disputes with alleged cybersquatters from countries where a complainant owner does not have legal rights in its name.

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jurisdiction to adjudicate the status of property only if due process would have permitted personal jurisdiction over those who had an interest in the res (i.e., the underlying property). Shaffer v. Heitner, 433 U.S. 186, 207 (1977).

[25] 15 U.S.C.A. § 1125(d)(2)(C) (West Supp. 2000).

[26] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 261 (1981) (rejecting the lack of a remedy in Scotland as a basis for adjudicating a claim dismissed on the grounds of forum non conveniens).

[27] *See* ICANN, RULES FOR UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, *at* http://www.icann.org/udrp/udrp-rules-24oct99.htm (as approved by ICANN on Oct. 24, 1999) [hereinafter ICANN RULES].

Under the terms of ICANN's first Uniform Domain Name Dispute Resolution Policy (the "Policy"), which was adopted on August 26, 1999, and fully implemented in early 2000, any complainant alleging trademark rights in a name that is identical or confusingly similar to a domain name (whether or not it owns a federal registration) may initiate a complaint.[28] To do so, a mark owner must file a complaint with the registrar responsible for the disputed name, alleging that it was registered and is being used in bad faith. The complaint may be resolved by mandatory administrative dispute resolution (conducted by third party providers), agreement of the parties, or litigation.

5.2. Contract-Based Jurisdiction and Remedies

ICANN dispute resolution procedures are enforced by contract. By registering a domain name, a registrant is deemed to represent that:

- the statements set forth in its registration agreement are complete and accurate;[29]
- to the best of the registrant's knowledge, the registration will not infringe upon or otherwise violate the rights of any third parties;[30]
- the domain name is not being registered for an unlawful purpose;[31] and
- the registrant will not knowingly use the domain name in violation of any applicable laws or regulations.[32]

Under the terms of the Policy, an ICANN registrar reserves the right to cancel, transfer, or otherwise change domain name registrations in response to: (1) an order issued by a court or arbitral tribunal;[33] (2) ICANN Administrative Panel;[34] or (3) written or appropriate electronic instructions from the registrant.[35] An ICANN registrar can

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[28] *See* ICANN, UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, *at* http://www.icann.org/udrp/udrp-policy-24oct99.htm (Oct. 24, 1999) [hereinafter POLICY].

[29] *Id.* ¶2(a).

[30] *Id.* ¶2(b).

[31] *Id.* ¶2(c).

[32] *Id.* ¶2(d).

[33] *Id.* ¶3(b).

[34] *Id.* ¶3(c).

[35] *Id.* ¶3(a).

also reserve its rights pursuant to the terms of an applicant's registration agreement or other legal requirements.[36]

Registrants are contractually required to submit to mandatory administrative proceedings if a third party complainant asserts that: "(i) [the registrant's] domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;[37] (ii) [the registrant has] no rights or legitimate interests in respect of the domain name;[38] and (iii) the domain name has been registered and is being used in bad faith."[39]

An administrative proceeding may be initiated by a third party mark owner, who must select a particular dispute-resolution service provider from among those approved by ICANN.[40] The World In-

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[36] *Id.*

[37] *Id.* ¶ 4(a)(i).

[38] *Id.* ¶ 4(a)(ii). This element may be negated by evidence that:

- before any notice of the dispute, the registrant used or had made "demonstrable preparations to use" either the domain name or a name corresponding to it "in connection with a bona fide offering of goods or services";
- the registrant (either individually or as a business or organization) has been "commonly known by the domain name" even if it "acquired no trademark or service mark rights"; or
- the registrant is "making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain" by misleadingly diverting consumers or tarnishing the mark at issue in the dispute.

Id. ¶ 4(c).

[39] *Id.* ¶ 4(a)(iii). Bad faith registration and use may be evidenced by any of the following circumstances, among others:

- registering or acquiring a domain name "primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name";
- registering a domain name in order to prevent a mark owner "from reflecting the mark in a corresponding domain name," but only in cases where the registrant has engaged in "a pattern of such conduct";
- registering a domain name "primarily for the purpose of disrupting the business of a competitor"; or
- using a domain name to intentionally attempt "to attract, for commercial gain," Internet users to a website or other online location "by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement" of the website or location (or product or service offered at such site or location).

Id. ¶ 4(b).

[40] *Id.* ¶ 4(d).

tellectual Property Organization ("WIPO"), as well as the CPR Institute for Dispute Resolution, Disputes.org/eResolution Consortium, and the National Arbitration Forum, are deemed to be "Approved Providers."[41] Under the applicable rules of procedure, the complainant will generally be required to consent to jurisdiction in either the location of the registrar's principal office or the address for the registrant, as listed in the WHOIS database.[42]

The remedies available from administrative panels are limited to either canceling a domain name registration or transferring it to the mark owner.[43] The mandatory proceedings, however, do not preclude judicial relief— either party may submit the dispute to a court of competent jurisdiction.[44] In fact, registrars are prohibited from implementing any cancellation or transfer order for ten business days after being notified of a decision, in order to allow an adversely affected registrant the opportunity to initiate litigation.[45] If, during the ten day period, a registrant provides evidence that it has initiated a lawsuit (such as a file-stamped copy of a complaint), the registrar will take no further action until notified of a judicial decision, settlement, dismissal, or withdrawal.[46]

5.3. Preservation of Jurisdiction During Dispute Resolution

Jurisdiction to resolve domain name disputes is preserved by rules prohibiting the transfer of a domain name registration during the pendency of: (i) an administrative proceeding (or for fifteen business days following its conclusion);[47] or (ii) a court proceeding or arbitration (unless the transferee agrees in writing to be bound by the outcome).[48]

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41 ICANN, APPROVED PROVIDERS FOR UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, *at* http://www.icann.org/udrp/approved-providers.htm (last updated May 21, 2000) (noting that ICANN may approve additional providers in the future).

42 *See* ICANN RULES, *supra* note 27. The WHOIS database lists the identity and contact information of all domain name registrants, and is available at http://rs.internic.net/whois.html.

43 *See* POLICY, *supra* note 28, ¶ 4(i). According to the Policy, all disputes other than those that qualify for administrative proceedings must be resolved in litigation between the affected mark owners and registrants. *See id.* ¶ 5.

44 *Id.* ¶ 4(k).

45 *Id.*

46 *Id.*

47 *Id.* ¶ 8(a)(i).

48 *Id.* ¶ 8(a)(ii) (stating that registrars reserve the right to cancel any transfer made in violation of this provision).

A registrant likewise may not transfer its domain name to a new registrar during the pendency of an administrative proceeding (or for fifteen business days thereafter).[49] A registrant may transfer a domain name registration while litigation or arbitration is pending, however, provided that the name continues to be subject to the court or arbitral proceedings and the terms of the Policy.[50] In the event a domain name is transferred to a new registrar while a court action or arbitration is pending, the dispute shall remain subject to the dispute policy of the transferor-registrar, not the transferee-registrar.[51]

5.4. Limitations of ICANN Alternative Dispute Resolution and Incentives for Forum Shopping

ICANN dispute resolution proceedings offer a potentially uniform, quick, and inexpensive mechanism for resolving international disputes involving cybersquatting. Dispute resolution may be valuable in cases involving foreign registrars not otherwise subject to local jurisdiction (although not necessarily foreign registrants of names registered with U.S. registrars, because of the potential availability of in rem relief under the Act discussed earlier in this Essay), or where neither party challenges the outcome. Dispute resolution procedures also may prove effective when a registrant seeks to transfer a domain name because ICANN has the authority to ensure that the name remains subject to the proceedings (whereas, under the Act, the complainant must notify registrars and registries directly).

On the other hand, the ability of both trademark owners and domain name registrants to derail dispute resolution or prevent implementation of an order by initiating litigation potentially means that, in some cases, the remedies offered through ICANN dispute resolution could be more time-consuming and costly than simply filing suit in the first instance. Moreover, where a mark owner's name has been registered in a country where it has no trademark rights, the domain name registrant would have an affirmative incentive to file local litigation against the complainant, who, as a precondition for bringing an ICANN complaint, must provide contractual consent to jurisdiction in the registrant's home jurisdiction (where it otherwise might not have been amenable to suit). For rights owners in countries where jurisdiction may be broadly asserted over foreign defendants, such as

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[49] *Id.* ¶ 8(b).

[50] *Id.*

[51] *Id.*

in the registrant's home jurisdiction (where it otherwise might not have been amenable to suit). For rights owners in countries where jurisdiction may be broadly asserted over foreign defendants, such as the United States, litigation therefore may be less risky (albeit more expensive) than ICANN-sponsored alternative dispute resolution.

6. MINIMIZING RISKS BY CONTRACT AND THROUGH USE OF LOCALIZED SITES[52]

The risks of being subject to international jurisdiction may be mitigated in part through the use of choice-of-law and choice-of-forum clauses and/or by restricting access to or localizing a site. Choice-of-law and choice-of-forum clauses may be effective in reducing the risk of being subject to foreign jurisdiction, although such provisions may not be universally enforceable—especially in connection with consumer sales[53]—and not all Internet contacts involve contracts. Alternatively, in some jurisdictions, forum selection clauses may be invalid, but arbitration provisions will be enforced.[54] Where appropriate, a business should identify its target audience (or purport to exclude unintended visitors) in the Terms and Conditions section of its website.

Businesses should consider structuring their websites to reduce the risk of being subject to jurisdiction in countries where their IP rights may be uncertain by using local languages (where applicable) in their websites, by using country-specific domain names, and by including notices or other features to identify the intended target audience of the site (and by extension, exclude other jurisdictions). For example, a Korean language website registered in the .kr top-level domain that contains a disclaimer stating that it is directed only to residents of South Korea, is less likely to expose its owner to jurisdiction in the United Kingdom than an English language website registered in the .com top-level domain that contains no warnings or restrictions on a U.K. resident's ability to purchase goods from the site. Likewise, an English language .com site that requires visitors to select their state of residence from a pull-down menu that does not include the United Kingdom, and which will not process transactions from

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[52] This section is excerpted with permission from BALLON, *supra* note 2, § 41.06 and Glasser LegalWorks, *supra* note *.

[53] BALLON, *supra* note 2, §§ 31.05, 31.06.

[54] *Id.* § 61.02.

visitors compelled to select "other," may serve to insulate a company from U.K. jurisdiction.

In more extreme cases, a website owner may affirmatively block access to visitors who identify themselves as residents of particular jurisdictions. Automatic blocking would be difficult to implement because of the widespread use of generic domain names (such as .com) that typically do not identify the country of origin of a visitor. Accordingly, the most effective way to restrict access is to use a pop-up menu that affirmatively requires visitors to select a particular country of origin (including "other," which could be used for non-qualifying jurisdictions).[55] Most e-commerce sites, needless to say, would prefer not to use any mechanisms that defer people from easily accessing their sites.

7. CONCLUSION

The current system for resolving international IP disputes arising in cyberspace encourages forum shopping by entities financially able to do so. While there are many practical solutions that businesses may adopt to reduce their risk of being subject to regulatory or judicial jurisdiction in foreign countries, there are no universally applied standards. Moreover, since IP disputes frequently arise between strangers, forum selection clauses may be ineffective.

The problems created by international forum shopping frequently affect foreign entities to a greater extent than American companies because of the broad scope of U.S. jurisdiction. Unless and until there is an international consensus that change is needed—and no such consensus exists today—American businesses are likely to continue to enjoy a jurisdictional advantage in many Internet-related IP disputes.

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[55] For a discussion of specific ways to structure a website to minimize liability, see BALLON, *supra* note 2, § 29.05 & chs. 26-27. Regulations governing state Blue Sky securities offerings over the Internet may provide additional guidance on how to structure a website to restrict access to residents of particular jurisdictions. *See id.* § 38.07.