

# State Interests and Cyberspace: A Theoretical Approach on Navigating Through Jurisdictional Problems on the Net

By Atty. Jose Luis C. Syquia\*

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\*LL.B. (U.S.T.); LL.M. (University of Pittsburgh, Cum Laude).

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#### I. INTRODUCTION

In any society around the globe, some form of regulation from the central governing body, or government, exists to maintain order among its constituents. This control has manifested itself in different ways, depending upon the type of society concerned, taking into account its level of advancement, culture, structure of government and political ideology. In democratic society's orderly way of life that a government's legitimacy depends upon the way it handles and asserts its governing powers. If the government is weak and submissive to the whims of the people, it will be disrespected and control over them will dwindle. On the other hand, if it is too harsh on the people, they will tend to rebel and question its authority. A good democratic government, therefore, always has to make a balancing test between what could be regarded as a right for it to act freely and what could be regarded as a license upon the rights of the people. One of the best and obvious examples of this balancing test is a State's exercise of its police powers, as against freedom of expression.

However, it seems that in some democratic societies, the body politic tends to regard the problem in a restricted and egocentric manner, wherein the government is regarded as an outsider always seeking to step on their rights. They see the government as a hindrance on their freedom to exercise these "rights". In such societies, the way of thought seems to be as follows: "the more rights the better". In the name of "democracy" they try to assert their rights as much as possible. For lack of a

better term, they will be referred to as "absolutists". It has to be remembered though that no person has absolute right to anything. It is a well known fact that if each person in a society regards his rights as absolute, and acts upon such belief, he then tramples upon other people's rights, and democracy turns into anarchy. Democracy and anarchy exist in a chiaroscuro, and conflicts arise either because people are not aware of this fact or, acknowledging it, they do not recognize the point of blur. It is therefore a truism that, in these societies, the government exists not to trample upon people's rights, but to maintain a workable democracy.

As society progresses technologically, this conflict finds a novel way of showing its face. The Internet, or Cyberspace, puts a whole new form to the problem. Absolutists find in the Internet a unique and potential instrument by which to shield themselves from the government's reach. The uniqueness of this instrument is founded upon the whole concept that Cyberspace is a distinct and boundless community. It raises whole new issues about the traditional and territorial reaches of the governments. The questions therefore arise: Is there really such a thing as a cyber-community? Are governments truly enabled to address this new problem with traditional concepts?

The last question is relevant, because one of the many contentions of absolutist cyber-users is that, for a government to effectively get a hold on the Internet, it has to give birth to a whole new legal body sensitive to its nature. A government faces the dilemma that once it seeks to regulate conduct on the Internet, it

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eventually affects users all around the globe, and this implies not only an overhaul of local laws, but of international law as well. Absolutist cyber-users know this and, as such, by arguing the regulating the Internet would mean regulating beyond one's jurisdiction, they contend that it would mean overstepping into another State's sovereignty. If governments do follow this argument, it would mean sacrificing several regulatory measures deemed necessary and effective for maintaining order in Cyberspace and the "real" world.

The problem could therefore be rephrased as follows: Do the traditional concepts of territoriality and jurisdiction truly prevent governments from effectively regulating the Internet?

This paper takes the position that the Internet offers an atmosphere that is very conducive to criminality, and this danger is highlighted when one considers its capacity for a diverse audience across the globe. As such, this paper argues for the need of effective governmental regulation. In discussing this, it will deal with the views and efforts of the opposing sides, as well as the flaws and inadequacies in the approaches of each side. The paper will then consider the consequences of treating the Internet as independent from governmental regulation, although not necessarily sovereign. It will also address the issues of whether or not there truly is such a thing as a cyber-community and whether the Internet truly exists outside "real" space.

Having established the need for effective regulation, this paper will then proceed to address the question of whether or not jurisdictional issues truly prevent governments from effectively

regulating the Internet, and whether or not governments are unable to apply jurisdictional concepts to the Internet. This paper takes the position that the whole problem of jurisdiction does not require a whole new body of local and international law. Such a feat would be insurmountable, because it would mean creating whole new body of international customary law, a process that would take a very long time as opposed to the fast-paced growth of the Internet. It does not mean, however, that States should address this problem individually. On the contrary, it takes the view that all civilized States have a legitimate interest in regulating the Internet and that, recognizing this, they must cooperate with one another. The ideal way would be for them to enter into some multilateral treaty dealing with the Internet. However, in the absence of such a treaty, this paper considers a solution that looks to the "traditional" bases of acquiring jurisdiction. It regards the whole notion of the absolutist cyber-users that traditional territorial rules are inapplicable to the Cyberspace as totally unfounded. It will further argue that, for States to effectively regulate Internet content, what is required is not an abandonment of "traditional" methods of applying such principles. It will then navigate through potential problems and conflicts that might arise under the existing rules, and tackle them point by point.

This paper does not say, however, that newer jurisdictional laws need not be developed. All it seeks to prove is that there already is a working foundation by which to develop existing rules. Its main thesis is dependent upon a call for

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global cooperation and sensitivity to the issues and threats posed by the Internet to the orderly governance of society. If governments take a step further and come up with a whole new body of laws meant to regulate the Internet, as long as they are effective, then the goal of this paper would be more than met.

## II. THE NATURE OF CYBERSPACE

### A. The Internet

Imagine a castle made of Lego bricks. Imagine further that this castle was built one day by a group of children in a house. In the middle of the day, these kids decide to play in another house. So, they disassemble the castle into several pieces, each one taking over again. As simple as it may seem, this is a good analogy to start within in explaining the intricate nature of Cyberspace.

Just like the children and the Lego castle, information in the Internet is broken apart into several packets. These packets are transmitted through different and separate routes made up of a variety of communication devices connecting several computer systems. The packets follow any of a number of different routes from computer to computer until they reach their destination, where they are reassembled by the recipient machine.<sup>1</sup> The computers through which information is transmitted are called "hosts," and the language by which they communicate to each other is called Internet Protocols (IP). By virtue of the IP, different computers from around the globe are able to "un-

derstand" each other, and thus transmit information from one end of the globe to the other in a matter of seconds or minutes- depending upon the "traffic". This is the reason why the Internet has been called a network of interconnected computers.<sup>2</sup> The Internet has been called a network of networks- local computer systems hooked to regional systems hooked to national or international high capacity "backbone" systems.<sup>3</sup> The case of *Intermatic, Inc. v. Toeppen* provides a more complete definition; "The Internet is a vast and expanding networks of computers and other devices linked together by various telecommunications media, enabling all the computers and other devices on the Internet to exchange and share data."<sup>4</sup>

Access to the Internet is distinguished from the methods by which information is retrieved therefrom. A person can obtain access to the Internet through one of the 'host' computers or affiliates. Once inside, the person can retrieve information, such as texts, sound, picture or video images, from the Internet through a wide variety of communication and information retrieval methods, the most common of which are the following;

1. Electronic Mail (e-mail);
2. Automatic Mailing List Services (mail exploders or listservs);
3. Newsgroups or Bulletin Board System (BBS);
4. Chat Rooms; and
5. The World Wide Web.<sup>5</sup>

The totality of these methods is what is called "Cyberspace." It is located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.<sup>6</sup> At a

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quick glance, it seems that the terms "Internet" and "Cyberspace" refer to the same thing. However, it appears that the difference actually lies in the manner of usage. While the former term refers to the whole physical network of hardware and software supporting to the interchange of information, the latter term is used in contrast with real space. As Dan L. Burk so aptly puts it: "[T]he totality of this international information structure is commonly referred to as 'cyberspace,' a cognitive realm that is conceptually separate from the real space that we physically inhabit."<sup>7</sup>

In view of the fact that each computer in the Internet acts independently from others in the network, there exists no centralized system. This system started in 1969 as a military program called Advanced Research Project Agency (ARPANET), which was developed by the U.S. military during the Cold War when fears were prevalent that a tactical nuclear strike might knock out the entire country's communication network. As a result, research program sponsored by the U.S. Department of Defense came up with a form of communication that could be relied upon even during a nuclear war, one that had no centralized control. This system provided for a network that connected various Universities to each other, where the research undertaken, as well as the military. As the ARPANET went out of the scene, the scientific community came in. This system for communicating and sharing computer resources became increasingly important to the scientific community, much of the funding, as well as management of the Internet's high speed backbone connection became

the responsibility of the National Science Foundation (NSF).<sup>8</sup>

At present, the Internet is widely used, not only by the academic and scientific communities, but by the business community as well as. The Internet has become an important tool of commerce. As such, there is presently no overall authority or ownership over the various aspects of the Internet. The U.S. government no longer controls the Internet for research purposes, especially since private Internet access providers cropped up, making the internet available to anybody outside the research community. For example, any person with a web browser, the program most commonly relied upon by users, can access innumerable sites on the internet all he has to do is "surf the web". In this regard, the NSF contracted Internic, a private enterprise, to provide information and services to the internet community. In the words of the U.S. Supreme Court : While the Arpanet no longer exist, it provided an example for the development of a number of civilian networks that, eventually linking which each other, now enables tens of millions of people to communicate with one another and to access the vast amounts of information from around the world."<sup>9</sup>

#### B. Distinctiveness of Cyberspace

Just as the children who built the Lego castles in the above example can imagine themselves as kings princesses and knights; so to can users of the internet. Cyberspace allows an individual to be someone different; in fact, someone he might have always wanted to be without the constraints of the real world. Of course, unlike the children in

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the example, an individual's act in Cyberspace would most probably have father-reaching effects than a mere game. In fact, those effects may even spill over to the real world. Thomas D. Brooks, in one of his articles, gives an interesting example of a mild mannered individual who goes by the name of Mr. Meeks.<sup>10</sup> By day, Mr. Meeks is your regular reporter who gathers and writes trade news for a certain paper. However, by night, he logs on to the internet and, seeing himself as a self-styled super hero, seeks to expose scams on the internet. Cyberwire Dispatch, a certain electronic newsletter, is his instrument. There is no heroic ending to Mr. Meeks' story though, because he was later sued by another user, Benjamin Suarez, for libel. Apparently, Mr. Meeks called Suarez a "Cybersucker" among other things. The case ended with a settlement.

The case of Mr. Meeks is a classic example of an act done on the internet, but its effects spilling over to the real world. It is also a good example of an individual who acts one way in the real world and another in Cyberspace. It is safe to say that had Mr. Meeks known that his articles in the electronic "newsletter" could hold him liable for libel, just as in the real world, he might not have been as courageous and tactless as he was.

At any rate, Cyberspace is seen by many, if not all, persons as a virtual world where anything is possible. The "virtuality" of Cyberspace is distinguished from the real space, and for the purposes of this paper, there seems to be three elements of Cyberspace which gives it this character, namely:

1. Its freedom from territorial

limitations;

2. Its intrusive nature; and
3. The opportunity for anonymity"

Going back to the example above, Mr. Meeks could have avoided the risk of liability if he remained anonymous. An individual need not use his real name whenever he joins a chat group or posts something on the Internet. Especially if a certain article or action of a public official or personality is concerned, this characteristic of anonymity can influence people to criticize it when they would otherwise remain silent. The question then arises as to whether this is a good thing or not. Some may see it as a good element of democracy, while others may see it as opening the floodgates to abusive and demeaning criticism. Still, others may come from a society that follows a different but equally sound and respected political ideology, like one that recognizes limited freedom of speech.

It is probably easy to see where all these points are leading too. As stated above, Cyberspace is regarded as a virtual world, separate and totally opposed to, or different from, the real world. The most significant element that distinguishes Cyberspace from the real space is its insensitivity to territorial boundaries or, in other words, its freedom from territorial limitations. Because information that is made available on the World Wide Web is, simultaneously, available to anyone with a connection to the global network, there is no localization of effects." The question is whether the global nature of the Internet naturally forms a separate legal arena.<sup>12</sup> It is in this regard that several views have cropped up proposing Cyberspace's indepen-

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dence from governmental regulation. Some argue that, especially in light of the international character of networks, we should not look to existing territorial governments but should instead create a self-regulatory regime that is articulated and enforced by system operators and users who understand the new media and wish it well.<sup>13</sup> At this point, it is useful to quote an excerpt from John Perry Barlow's "Declaration of the Independence of Cyberspace." Mr. Barlow is a "cognitive dissident" and the co-founder of the Electronic Frontier Foundation (EFF). He wrote the declaration in response to the signing into law of the Telecom Reform Act of the 1996 which passed the U.S. Senate and which, by the way, was declared unconstitutional by the U.S. Supreme Court in Reno v. ACLU. He says:

Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live... We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth... We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity... Your legal concepts of property, expression, identity, movement, and context do not apply to us, They are based on

matter. There is no matter here."

A reading of this particular excerpt will lead one to think that the Declaration actually calls for total freedom and independence of Cyberspace from governmental control or regulation. However, when personally asked if he viewed Cyberspace as having its own sovereignty, Mr. Barlow replied as follows: I think that Cyberspace is not so much sovereign as anti-sovereign. This doesn't mean that there can be no imposition of rules by existing political authorities, just as they have managed to formulate and enforce Law of the Seas. But it is social and commercial space that certainly resists the usual methods of control, most of which have to do with governmental ability to seize or restrain physical things whether bodies or property.<sup>15</sup>

It is therefore clear that there are those who view Cyberspace as independent from governmental regulation, not so much as having its own sovereignty, but that the present means of control used by governments are not adequate enough to address the specific concerns of Cyberspace. Although Mr. Barlow presents interesting and valid views, one should be critical about the alternative means that have been offered so far. These means will be discussed more thoroughly in the next chapter; but presently, suffice it to say that they involve self-help mechanisms and control from within the Internet. To reinforce this view, it is apt to quote a piece from the article of David R. Johnson and David

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Post. In it, they say:  
But established authorities may yet learn to defer to the self-regulating efforts of those who participate in and care most deeply about the new digital trade in ideas, information and services. Separated from geologically based doctrines, new rules will evolve, in a variety of differing online spaces, most appropriately to govern a wide range of new phenomena that will do the work of defining legal personhood and property, resolving disputes and crystallizing a collective conversation about core values." Paraphrasing and simplifying the whole argument for the "independence" of Cyberspace from governmental regulation, its proponents say that Cyberspace cannot be bound by the traditional territorial laws of the outside world, because it is free from the traditional concepts of territoriality. Owing to Cyberspace's freedom from geographical boundaries, the moment a government seeks to lay a finger upon the Internet, it would seem that it measures would inevitably extend to every computer with Internet access across the globe. The proponents then argue that since governments are ill equipped to regulate it, in this sense Cyberspace is independent. Now, this is not to say that they view Cyberspace as anti-sovereign, because they concede that it should be subject to some form of control. It is therefore apparent that one of the main premises by which cyber-user absolutists argue against governmental regulation is rooted upon a jurisdictional is-

sue. It is this premise that this paper intends to topple.

As stressed earlier, although Cyberspace is totally different realm from real space, it has to be conceded that its effects spill over into reality regardless of the fact that its interactions transcend physical location. Although it is a cognitive realm, it is not some mere imaginative game between two children pretending to be knights or what not. While an imaginative game ends when the two players decide to stop, an individual on the Internet may cause irreparable effects to other people a thousand miles away, even though he has already logged out of the system. In this connection, it seems that the means offered by those call for the independence of Cyberspace are not sensitive enough to the realities of cause and effect.

Going back to anonymity, this aspect of the Internet can be viewed either as a perfect tool of true democracy, or as a potent criminal weapon. The ability to appear invisibly on a network and slander, or harass or assault, certainly will increase the incidence of those on the network who slander, or harass, or assault.<sup>17</sup> This is a good example of the cause and effect mentioned above. When a person slanders someone using the Internet, with its capacity for anonymity, the effects of this act will be felt in the outside world. The Internet then becomes a tool. Moreover, the fact that the Internet is insensitive to territorial boundaries makes it more potent and dangerous weapon, because it could reach different people in a span of seconds or minutes. In this sense, its qualities make Cyberspace in fact more involved and intertwined with real space.

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**III. TWO SIDES OF A CONFLICT**

**A. Government Control of Cyberspace**

Around the world, governments are finding themselves faced with the perplexing problem of engaging in a balancing act, with the exception of countries such as China. This balancing act concerns a government's interest in protecting its citizens from materials on the Internet that they perceive as dangerous or offensive to public order and morals on the one hand; and the danger of trampling upon citizens' right to freedom of expression upon the other. According to an article written by the Human Rights Watch on May 1996: "Because the Internet knows no national boundaries, on-line censorship laws, in addition to trampling on the free expression rights of a nation's own citizens, threaten to chill expression globally and to impede the development of the Global Information Infrastructure (GII) before it becomes a truly global phenomenon."<sup>18</sup>

The most controversial and relevant effort ever made by a government to regulate content on the Internet has so far been that made by Germany. Its first significant effort was in 1995, when the Bavarian State prosecutor's office advised CompuServe that it was violating the country's pornography laws. CompuServe, the world's second largest on-line service, voluntarily blocked more than 200 discussion groups included in a list presented by the prosecutor's office as containing a pornographic materials. However, due to expensive criticisms from free speech and civil liberties groups, CompuServe decided to restore access to most of the Usenet groups. For

this reason, prosecutors in Germany indicted Felix Somm, the General Manager of the CompuServe Deutschland, for violating anti-pornography laws by failing to block the company's customers from using its network to access the Internet sites that offer child pornography.

The problem with the case above is that, although the list of prohibited Usenet sites included sexually explicit groups like alt.sex.bestiality, it is also included legitimate groups which discussed issues like breast cancer and AIDS, as well as bulletin boards in which victims of sexual abuse sought help and advice." But, of more relevance to this paper, the indictment also raises novel questions about national sovereignty and Cyberspace, because CompuServe was also charged with making Nazi material and certain violent games available from its own servers in the United States; such acts being illegal in Germany, but not in the United States.<sup>20</sup>

This is just an example of one of the several ways by which governments have tried to control Cyberspace. The manner by which these governments regulate Cyberspace depends upon the country concerned, as well as its political orientation and public policy. But more importantly, in discussing States' public policies and interests, a cursory view would show that government Internet regulations do not see to go beyond their territorial jurisdiction. In fact, Germany seems to be the only State in the discussion that had efforts with extraterritorial implications. The only logical reason for this is that governments are aware of the dangers arising from the potential extraterritorial reaches of their

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acts when it comes to dealing with the Internet. For this reason governments have been cautious not to overstep their jurisdictional limits emphasizing the importance of addressing this particular issue. While the subject of a country's political orientation belongs more to a political science class, this paper will consider and discuss the public policy element. Moreover, as in the case of CompuServe, governments always tend to look at the Internet server responsible for allowing access to the prohibited materials. As such, this paper will also devote some time on the role of Internet Service Providers (ISP's).

1. A State's Public Policy

The term "public policy" is used in this paper in its broadest sense to encompass the reasons or concerns expressed by States to justify their control of the Internet, because such reasons definitely arise from a State's perceived sense of public morals, health, safety, welfare, and the like.<sup>21</sup> A cursory review of the reasons given by States that have made efforts to regulate Internet behavior would show a common ground. Their reasons vary from a desire to protect children from sexually explicit materials to a desire to shield the government from criticism." But whether it be China, Singapore, the United States or any other country that have made such an effort, there is always the concern for morality and values on the Internet.

In China's case, the reasons given by the authorities for keeping the Internet in their grasp are, as announced by the New China News Agency,<sup>23</sup> to insure "healthier development of the exchange of international computer in-

formation." It further stated that "(n)either organizations nor individuals are allowed to engage in activities at the expense of state security and secrets. Users are also forbidden to produce, retrieve, duplicate or spread information that may hinder public order." The transmission of pornographic or obscene materials was also expressly banned.<sup>24</sup> To further these purposes, China requires people who want to open an Internet account to register with the Ministry of Posts and Telecommunications. In mid-February (1996), the Ministry of Public Security ordered all those who use the Internet and other international computer networks to register with the police within thirty days.<sup>25</sup> These two bodies maintain close supervision over Internet Service Providers. Another way by which China regulates use of the Internet is by offering access at high prices.

Although China could have simply prohibited Internet access, it opted to monitor its use instead, because it does recognize the importance of global computer links in accelerating its economic, scientific, technological and educational development.<sup>26</sup> Aside from the registration requirement, ISP supervision and the formulation of rules governing Internet use, it is further believed that China's security apparatus would actively monitor the enormous volume of telephone and fax connections.<sup>27</sup> Moreover, China clearly has no problem in dealing with the so-called right to freedom of speech. As reported by Seth Faison:

For all the free speech potential that the Internet portends,  
Robin Munro, Hong Kong di-

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rector of Human Rights Watch/Asia, said few if any dissidents within China had access to it, because of limited access to computers. He suggested that, with official monitoring, the Internet would not be an ideal route for transmitting politically sensitive information anyway.<sup>28</sup>

However, it is questionable that China would succeed in blocking access to unwanted information even if it tried. In fact, several reports from Chinese Human Rights groups based outside of China are still accessible within the country.

Germany, unlike China, has a democratic government, but it has been very active and vigilant in its concern with sexually explicit materials on the Internet, as well as with "youth endangering" materials such as violent computer games. Other materials on the Net considered by the German authorities as "youth endangering" are those that glorify violence or offends morals. The case involving CompuServe mentioned above deals with Usenet groups alleged to have violated anti-pornography laws. To further this end, Germany formally passed a law on July 4, 1997 regulating the Internet. It prides itself on the fact that the said law is the world's first attempt to give the Internet and other interactive information services a comprehensive legal framework.<sup>29</sup> According to a report by the Associated Press: Chancellor Helmut Kohl's government says the law makes Germany the first country to set rules for so-called digital signatures, codes used to secure communications in electronic commerce, and give

them the status of a legal document."<sup>30</sup> Also, it is said that this law will not only control illegal uses of cyberspace, but it will boost electronic commerce as well. Critics say the law is an example of Germany's urge to regulate and may in fact deter investors in Internet services because it does not state clearly to what extent the providers would be liable for content they do not control.<sup>31</sup> The government itself has acknowledged the fact that it is still has to be tested, but they rationalize its passage by they necessity to protect its children.

The report says that, under the law, online providers can be prosecuted for offering a venue for illegal content of they do so knowingly and if it is "technically possible and reasonable" to prevent it.<sup>32</sup> It is further said this could apply to forums and similar exchanges offered by online services without direct control over their content.<sup>33</sup> It is also interesting that the Munich police force has organized a small squad of officers, called the Cybersquad, which main duty is to surf the Web and search the Internet for illegal material.

Another German case in point is the indictment of Angela Marquardt for maintaining an Internet home page that provided an electronic link to a Dutch web site called XS4A11. The German police ordered all German ISP's to block access to this site because, among the 6,000 or so home pages it carries, there is one which publishes a leftwing newspaper called *Radikal*. The *Radikal* alarmed German authorities with its articles on how to make bombs and derail trains.<sup>34</sup> Anybody who want to post a personal home page can do so through this Dutch web site for a fee of about

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\$15.40 a month. Although the criminal charges against Ms. Marquardt were eventually dismissed by a local Berlin judge on very narrow inconsistencies, this case is very important, especially for this paper, because it is the first time that a government has ever tried to incriminate a user of the Internet.<sup>35</sup> It is unfortunate that the local judge did not address the issues of censorship or the accessibility of *Radikal* worldwide. The judge instead ruled that Ms. Marquardt could not be liable because she had established the link to *Radikal* on her home page before the newspaper material which incensed the German authorities had actually been published.<sup>36</sup> Going by the judge's reasoning, had Ms. Marquardt established the link later, it seems that she could have been held liable for it. However, a broader issue arises to all the other users around the world who, reacting to Germany's efforts against XS4A11 and the *Radikal*, set up new ways for people to view them by copying these sites unto their own web sites. What could the German government do about this?

In the case of CompuServe, it is interesting to note that the charge was brought against Felix Somm because he was the General Manager of CompuServe Deutschland. Moreover, the German prosecutors had personal jurisdiction over him because he is a German national and he resides thereon. A question then arises as to what would have happened if Felix Somm was neither a German national nor physically present in that country. In this case, would there have been a way for Germany to acquire personal jurisdiction over him?

In order to appreciate better the

firm stance of Germany against the above-mentioned illegal materials on the Internet, one must first understand the nation's efforts in dealing with its past experiences. It is also important to note that the state of Bavaria, where the CompuServe case arose, is very conservative and has very strong Roman Catholic beliefs. But most significant in this understanding is the nation's 50-year history of trying to ban distribution of neo-Nazi and National Socialist propaganda and literature.<sup>37</sup> Edmund L. Andrews, in his article, says:

Ms. Marquardt's case is not unique. German prosecutors and politicians are pushing harder than officials in other Western democracies to govern the seemingly ungovernable reaches of cyberspace. They have pursued individuals like Ms/Marquardt, they have tried to block access to other distributors of material they consider obscene violent or a danger to the society, they have assigned police who surf the Net looking for outlaw sites and they are pressing for a law that commercial online services fear could land on executives in jail.<sup>38</sup>

Another interesting State to look at is Singapore. This country presents an interesting twist because of its stand on the Internet. Before the government planned to regulate the Internet, it regarded criticism posted against in the Internet as not serious enough to deserve proper attention, Information Minister George Yeo even regarded postings on soc. culture. Singapore (SCS), a Usenet

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group devoted to discussions about Singapore and criticisms against its government, as equivalent to "reading graffiti in the toilet."<sup>39</sup> The country's plan to regulate the World Wide Web by requiring editors of Web sites containing political or religious material to register with its broadcasting authority received heavy criticisms posted on SCS. By requiring political and religious content providers to register with the broadcasting authority, Singapore treats the Internet as a broadcast medium. According to David F. Gallagher's article, dated May 18, 1996: "[C]ompanies providing Internet access will be required to block Internet sites at home or abroad that contain 'objectionable material.' Some sexually oriented sites have already been blocked."<sup>40</sup> The reason given by the government of Singapore for its plan to regulate the Web is not to limit freedom of expression, but to promote its responsible use, conceding that it is important to its trading and business interests. In connection with the case of Ms. Marquardt, it is also interesting to note that the government has come up with guidelines for Internet content providers. According to the preliminary guidelines, those with Web sites must ensure they do not encourage abuse or distribute objectionable information, such as sexually explicit material.<sup>41</sup>

In Vietnam, the government is worried about "spamming" (e-mail barrage) by anti-Communist dissidents, sexually explicit material from foreign countries and information transmitted by "foreign organizations."<sup>42</sup> Its government forwards, as one of the reasons, for controlling the Internet, its cultural aspect.

The efforts of the United States have

not been as successful as the aforementioned countries, if their attempts at regulating the Internet could even be considered as successes. The major step of the United States towards controlling the Internet was the passage of the Telecommunications Act 1996, particularly Title V thereof, known as the "Communications Decency Act of 1996" (CDA). While the dominant components of The Telecommunications Act of 1996 has nothing to do with the internet, its primary purpose being to reduce regulation and encourage rapid deployment of new telecommunications technologies, the CDA contains provisions which seek to regulate obscenity and offensive materials on the Internet.<sup>43</sup> The U.S. Supreme Court, in the case of Reno v. ACLU, declared Sections 2233 (a)(1) and 223 (d) of the CDA unconstitutional, primarily because the terms "indecent" and "patently offensive" were too vague to discount the danger of the chilling effect on free speech. While the two provisions clearly addressed the United States' interest and policy of protecting minors from harmful materials on the Internet, the Court noted that it would reduce adults to children's materials, precisely because the terms "indecent" and "patently offensive" may over-reach non-pornographic materials, like the card catalogue of Carnegie Museum. As such, the Court also ruled that the provisions of the CDA were too broad because, while obscenity is clearly unprotected by the U.S. Constitution's First Amendment on Freedom of Speech, the terms "indecent" and "patently offensive" includes speech that is otherwise protected, such as adult speech.

This case clearly demonstrates the

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balancing problem that some countries have to deal with in addressing and regulating the Internet. Obviously, the United States has a valid interest in shielding its youth from harmful and derogatory materials that are easily accessible on the Internet. The problem in this case is that the medium it used to protect that interest was fallible. Given the reasons presented by the Supreme Court in Reno, to pass judicial scrutiny, the U.S. legislature has to correct its mistakes, such as by clarifying the terms "indecent" and "patently offensive", among others. In fact, in a renewed effort to protect children from the Internet pornography, a Senate Committee, on March 12, 1998, approved two bills intended to limit children's access to obscenity on the Internet. Through the first bill, the Senate Commerce, Science and Transportation Committee targets the commercial distribution on pornography to minors on the World Wide Web. The second bill requires schools getting federal money for the Internet connections to install filtering software on their computers.<sup>44</sup> Already, Internet rights groups, such as the ACLU, the Center for Democracy and Technology, the Electronic Privacy Information Center, and the Electronic Frontier Foundation, are opposing the two bills. Of these two bills, the most controversial is the first, sponsored by Senator Dan Coats. The Coats bill has been dubbed as CD AIL. According to a report, "[t]his bill targets only commercial activity on the World Wide Web, which means that the chat rooms and Usenet groups would not be affected."<sup>45</sup> Under this bill, access to adult images will require either a credit card or access number. In defense

of the bill, Coats said: "In the current climate, our children can move from Web page to Web page, viewing and downloading free images with no restrictions. The bottom line is that without the restraint of law, the commercial pornographer online will have no incentive to restrict access by children to his products."<sup>46</sup> He insists that the bill was narrowed to consider the Supreme Court's concerns. On the other hand, the Electronic Frontier Foundation declared that the Coats bill has all of the same defects as the earlier CDA, and that they will vigorously rally the Net Community to oppose both bills.<sup>47</sup>

Another effort by the Clinton Administration's Information Infrastructure Task Force at regulating the Internet is the so-called White Paper, dealing with the copyright protection. The White Paper contains a survey of current intellectual property law - both domestic and international - with particular emphasis on copyright law in a digital or network environment.<sup>48</sup>

The instances mentioned herein are not meant to be an exhaustive list of all the countries that have made a move at regulating the Internet. Nor does it catalogue all the ways by which the governments have acted or reacted. However, those that have been mentioned make it evident that governments are beginning to realize the need for regulating Cyberspace. It is also evident that they realize the importance the potential of the Internet in the growing world of technology and telecommunications. This is the reason why even one of the most conservative nations could not simply ban its use altogether. As mentioned earlier, even China had admitted that the

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Internet is an important informative tool. But more importantly, from what has been discussed so far, one could also notice the concern and cautiousness of the government not to overreach their respective jurisdiction. As such, aside from the problem faced by some States in balancing the scales of Internet regulation and freedom of expression, it is safe to say that all States concerned with Internet content also have to balance their regulatory measures with the perceived danger posed by jurisdiction and territorial limitations.

This second balancing act is, as will be argued later in the paper, only a reaction to a danger which, at the most, is only ostensive. Moreover, if States finally realize that they all seek to achieve the same or similar goal, they would soon find it easier to deal with the problem of jurisdiction.

#### 2. The Role of Internet Service Providers:

It is evident that Internet Service Providers have an important role to play in a nation's quest for regulating the Internet. In attaining relief, governments seem to place most, if not, all of the burden upon them. The laws regulating Internet content address USP's one way or another. So important is their role that some nations, like Vietnam and Saudi Arabia, permit only a single, government-controlled gateway for Internet service.<sup>49</sup> In China's case, ISP's are required to register with the State. Two reasons are presented for this apparent role.

First of all, it would be easy for a state to acquire jurisdiction over an ISP, as well as enforce its judgements against

it, when the provider's offices are located within the State's territory. In the situation of Germany and CompuServe, the Bavarian prosecutors were able to force the latter to block more than two hundred discussion groups on the Internet with the threat of criminal prosecution. Indeed, when CompuServe ended its ban on majority of these sites, the German prosecutors did in fact prosecute its General Manager. The indictment marks a major turning point in the debate over controlling pornography on the Internet, because it appears to be the first time that authorities in any Western country have tried to prosecute a commercial online service for material it had no part in producing.<sup>50</sup> For this reason, CompuServe has threatened to move its office to France if it continues to be threatened by indictments.<sup>51</sup> In the United States, there have also been instances when suits were filed against ISP's. Moreover, a country need not face the problem of having to acquire jurisdiction, in the first place, in situations wherein the ISP is government owned or controlled, or if it is subjected to very strict conditions for operation.

The second reason is of more importance. It is easier and more practical for countries to regulate the influx of unwanted material on the Internet into their territory by controlling the service provider. In fact, it seems to be the only recognized way at this time. It also seems to be the common notion of governments that ISP's have the ability to screen the information passing through their lines. On the other hand, service providers argue that it is impossible to do this, in the case of CompuServe, it argued that it was not its duty to con-

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trol the Internet.<sup>52</sup> Again, this conflict between the State and the ISP does not exist in a situation wherein the latter is under the former's control, or one in which the latter is actually an agency of the former. In Singapore, for example, all ISP's and World Wide Web content providers have to register with the Singapore Broadcasting Authority. This makes it easier for the government to implement its regulatory schemes upon the service providers. In China, regulations require any network offering Internet service to be subject to close supervision by the Ministry of Post and Telecommunications or one of three other designated government agencies, by which the flow of information can be better monitored." Hong Kong's case in 1995 is quite interesting. At that time, there existed no legislation specifically addressing the problems of Internet censorship. Moreover, at that time, among the more than fifty ISP's, some of them voluntarily censored the Internet, particularly from sexually explicit materials on Usenet. The cases of SuperNet, one of the largest Hong Kong's ISP's, and Star Internet are good examples of this.<sup>54</sup>

However, regardless of how strong and effective a State's regulation over all ISP's in its jurisdiction may be, there is still no way for a State to totally block all unwanted Internet materials from entering into its territory. This is true even though only one ISP may exist in the country, and even though it were a governmental agency. This is expressed in a statement made by Singapore's Minister of Information and Arts to Parliament:

Censorship can no longer be

100 percent effective, but even if it is only 20 percent effective, we should still not stop censoring.. We cannot screen every bit of information that comes down the information highway, but we can make it illegal and costly for mass distributors of objectionable material to operate in Singapore.<sup>55</sup> It is therefore clear that the question should be not only as to how effectively can a State regulate and control ISP's, but also as to how effectively can it screen Internet content. Moreover, there is the question about the person responsible for the illegal material. It is true, and thus quite unfair, that ISP's have to take all the burden and suffer all the consequences when unwanted materials flow into a certain country via the Internet. What about the criminal, does he go scot-free?

There are two primary issues that have not been properly addressed by governments in focusing merely on the Internet Service Provider. First of all, they totally miss the point. If a person wants to chop a tree, he does not merely trim its leaves, he cuts it at its trunk. If the intention of the State is to stop the influx of illegal materials on the Internet, knowing the impossibility of effectively screening its contents, what is the use of punishing the ISP if the originator of such material remains free to fill the network with the same illegal work. Secondly, they seem to finish the wrong persons. True enough, there maybe situations when ISP's can be held liable, such as when they are informed of criminals, but do nothing to block it. However, by going after the ISP, they fail to pe-

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nalize the true criminal. As declared by Robert J. Massey, the president and chief executive of CompuServe: "Responsibility for Internet content lies with those create or put it on the Internet, not with the access provider."<sup>56</sup>

**B. The Threat of Government Regulation to the Interests of Cyber Users**

At the other side of the fence, there has been cries from several users that government regulation will stifle free speech on the Internet around the globe. Because the Internet is a worldwide system, a concern has been voiced that the rules of one government will restrict not just its own citizens but Internet users everywhere, thereby undermining the freedom of the entire network.<sup>57</sup> It seems that the most emphatic, if not potent, of all concerns is John Barlow's "A Declaration of the Independence of Cyberspace." In it he says:

Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know our world. Cyber space does not lie within your borders. Do not think that you can built it, as though it were a public construction project. You cannot. It is an act nature and it grows itself though our collective actions.... You have not engaged in our great gathering conversations, not did you create the wealth of our market places. You do not know our culture, our ethics, or the written codes that already provide our society more order than

could be obtained by any of your impositions.<sup>58</sup>

If Cyberspace were truly independent from government control, a question arise as to what body makes the rules that govern this entity and addressed all wrongs committed therein. This is an important concern because if there exists no such body, then Cyberspace can be considered no more than an anarchy. Barlow gives a clear answer to this question. According to him: "Right now the rules, such as there are any, are being made by the Internet Engineering Task Force, the companies that build the hardware and software that support the Internet, and the cultural ethics of the online community."<sup>59</sup> By this it appears that Barlow refers to individual contracts entered into by ISP's, system operators, as well as the hardware and software companies on the one hand, and the customer-users on the other.

Regarding his referral to the "cultural ethics" of the online community, Barlow seems to presume that a community could viably exist in Cyberspace. The case of U.S. v. Thomas<sup>60</sup> is relevant in this regard. In this case, the defendants were convicted in the United States District Court of federal obscenity charges, particularly for interstate transportation of obscene materials. The defendants, who were a married couple residing in California, operated a Bulletin Board Service, called the Amateur Action Computer Bulletin Board System (AABBS), through which members could view, download and print sexually-explicit pictures. The members could access these Graphic Interchange Format files (GIF files) through their

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personal computers, as long as they had a modem and telephone line. As such, since the AABBS was set up so that members in other jurisdictions could access the files, it was determined that under the obscenity statute, which establishes a continuing offense, venue was proper in the Western District of Tennessee. The United States Court of Appeals affirmed the conviction. One of the defendants' arguments was that the present state of the Internet required a new definition of "community." They argued that due to the broad-ranging connections among people in Cyberspace, the traditional concept of "community" based on geographic territoriality could not apply to it. Without a more flexible definition, they further argued that there will be an impermissible chill on protected speech because BBS operators cannot select who gets the materials they make available on their bulletin boards and, so as not to offend the standards of the most conservative community, they will be forced to censor these materials.<sup>61</sup> The U. S. Court of Appeals rejected these arguments by stressing the fact that screened applications, membership fees and passwords controlled access to the defendants' BBS. By this, the Court meant that the defendants had the capability to limit user access in jurisdictions known to have stricter obscenity laws than California. The Court then said that there was no need to adopt a new definition of "community" in this and similar cases. According to the Court, obscenity is determined by the standards of the community where the trial takes place, whether in the district of dispatch or that of receipt, not that of the Internet as a "community." It further recognized

that it was not unconstitutional to subject interstate distributors of obscenity to varying community standards. The fact that the Court referred the resolution of the case to real world communities, despite their varying standards, and not to the "standards" of the Internet as a "community," is enough to say that it rejected the later notion.

In an article by Oberding and Norderhaug, they said the prosecution in this case failed to recognize that the Bulletin Board Services is also a community similar to a town or village." However, by its ruling, the U.S. Court of Appeals made it clear that it does not consider Cyberspace as a distinct community, or as a place wherein several distinct communities could grow. By pointing to the fact that the defendants could have provided limited access in jurisdictions known to have stricter laws, the Court appears to have recognized the fact that activities in Cyberspace do have effects that spill over to the real world, and that Cyberspace is not just some intangible "community" made up of faceless people.

The concept of "community norms" created by individual contracts between users and service providers, as expressed by Barlow in his Declaration, has been discussed in several articles. According to this view, these contract arrangements also provide for enforcement mechanisms, such as disconnection from the BBS. Of course, other ways have been presented for regulating behavior in the Internet, such as self-help, self-policing, social pressures, "netiquette" and even virtual courts. In fact, some have even expected the development of customary laws among

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cyberspace users, using the historical Law Merchant as a parallel.<sup>63</sup> However, while some are only perceived rules that are hoped to arise in the future, such as the concept of Cyberspace customary norms, others are too informal to have teeth on them.

The most significant alternative presented by those pushing for Cyberspace "independence" remains to be the rules set forth by system operators (sysops) in individual contracts. The "local" Law of Cyberspace is already made by sysops and users in the form of contracts and rules applicable to particular systems.<sup>64</sup>

### 1. Sysops as Ouasi-Lawmakers and Ouasi-Judges:

It should be noted that when this paper uses the term "sysops," it refers to system administrators of Bulletin Board Services. Furthermore, this paper adapts the definition given by Trotter Hardy to "BBS", as a shorthand way of referring to any computer service available by way of electronic connection from users at distant sites, typically from users equipped with a modem.<sup>65</sup> As such, this definition is broad enough to cover large BBS" like CompuServe, small BBs' maintained by hobbyists, as well as any on-line service such as discussion list, newsgroup, or information respiratory like Lexis-Nexis and Westlaw.<sup>66</sup> While ISP's furnish general access to the Internet, a BBS is one of the several ways by which information can be retrieved from the Internet. However, both service intermediaries are considered similarly, because the both require a user to open an account or subscription with them, and this requires a contract.

As stated earlier, some form of con-

trol is already provided for in contracts entered into by users and particulars sysops. For example, access to Prodigy, CompuServe, America On Line, the Well, Genie, Lexis Counsel Connect, as well as the countless small desktop BBs' run by hobbyists, is already subject to contractual agreements.<sup>67</sup> Before the user could gain access to their services, he is made to agree to abide by certain rules and regulations, and these rules may stipulate certain conduct considered to be illegal, the commission of which would hold the said user liable to certain penalties. However, rules may not arise only as between sysops and users, for rules among the several sysops themselves is also contemplated. This becomes obvious when one considers the fact that the Internet is a network of networks wherein users with different service providers communicate, necessitating the latter to interconnect with each other for the messages to reach their destinations. Unilateral promulgation of rules for particular local electronic spaces simply does not work to control Internet listservs or other forms of cross-system communication.<sup>68</sup>

In the user-sysop scenario, without any outside regulation, these contracts seem to put the sysop in the best position to make the rules by which to regulate the Internet. As a corollary to this, since they make the rules, sysop also seem to be in the best position to determine if such rules have been breached. As such, in this setting, they seem to have the quasi role of both lawmakers and judges. The sysop acts as a quasi-legislator when it draws contracts of adhesion for the user to simply accept and thus be bound thereby. In that sense, the

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contract then becomes the law between them. Moreover, it would be the sysop to "judge" whether or not a user has violated a provision of the said contract. As to the concept of a globally agreed-upon set of rules among sysops, although a mechanism for such lawmaking has still to be provided for, it is safe to say that it also views sysops as both quasi-lawmakers and quasi-judges rolled into one. Going further and placing things into a wider perspective, this would leave the legitimate interests of particular nations vulnerable to and dependent upon on-line contracts.

There are perceived dangers to the view that governments should regard the Internet as a self-regulating regime governed by sysops and users. The Internet's intrusive nature upon a country's territory has effects too real to brush aside in the name of such concepts as ingenuity, modernity and even freedom of expression. These dangers will be discussed later.

### 2. Penalties and the Problem of Ad-

Another question to consider in the sysop-user scenario is that of penalty. When sysop "adjudges" a certain user to be in breach of certain regulations, what sort of punishment does the violator receive? Articles dealing on this matter seem to agree that the worst punishment that could ever be given to a violator under such a system is that of "banishment." Another method of enforcement on the Internet is that of social pressure, but this is hardly a penalty. By "banishment," the user is disconnected or unsubscribed by the sysop. It should be noted that when CompuServe blocked

access to more than 200 discussion groups on the Internet, it did so not as a form of penalty, but as a restrictive act under pressure from the German government. But since all of CompuServe's subscribers were barred from accessing them, these discussion groups were effectively disconnected during the whole interim. However, when it comes to the materials contained therein, even though a certain group or site was barred from access, there was no way to stop other users from copying its contents into their own Web sites. As such, the problem is compounded when Web sites are considered. In Germany, when the police ordered German ISP's to block access to the Dutch Web site XS4A11, supporters of that site quickly set up scores of new ways for people to read it, and it was copied into at least 58 other web sites.<sup>69</sup> Even in the case of the two hundred or so discussion groups barred by CompuServe under pressure from the German government, Internet sites have sprung up to replace those barred - a process that experts say is possible to stop, regardless of how vigilant a service provider monitors Cyberspace.<sup>70</sup>

Even in a smaller scale, the problem persists. When a user violates certain norms of a discussion group or of a BBS, the moderator of the discussion or the sysop itself may disconnect the violator. This prevents him from joining the discussion or further posting his materials on the BBS. However, this does not seem to solve the problem. Exile of a rule-breaker may not always work on mailing lists as technically adept users can re-subscribe from a new e-mail account.<sup>71</sup> By this means, the moderator of the BBS or mailing list will not be

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able to identify the violator under the new subscription, even if he uses the same name.

The question then is: How effective is the penalty of "banishment" from a BBS? Even in the case of ISP's, it is clear that if a certain site were barred from access by a service provider, the contents of that site could always be copied into another site. In the accident concerning Germany's renewed efforts to block access to XS4A11, the country's biggest academic Internet service, the Deutsche Forschungsnetz, unilaterally threw up its arms and declared the whole effort futile.<sup>72</sup> In the case of a BBS the rule-breakers can always resubscribe in another account. The issue of primary concern is the effectiveness of penalties presently imposed on the Internet, not only to bar access to illegal groups or sites, but also to deter criminality. This is the same as the problem mentioned earlier that punishing ISP's does not deter the true criminal. Truly, not only does disconnection fail to bar the wrongdoer from Internet access; moreover, it does not have enough teeth to effectively deter him from repeating his acts. This interest on deterrence is similar to U.S. Senator Dan Coats' concern in giving the on-line pornographer incentive to restrict access by children to his products, through the constraints of the law. True enough, this argument might be turned around and used as a justification against government regulation, by showing that it cannot work. However, the main thesis of this paper is to show exactly that there is a way by which governments can use jurisdictional principles to address this issue.

In view of the foregoing, if Cyber-

space were to be considered independent from the laws and regulations of "outside" governments, there arises the problem of adequate penalties for wrongdoers.

#### C. The Backdoor and the Need for Effective Governmental Regulation

The matter of punishment and regulation on the Internet should not be taken lightly, because, as already stated several times, activities in Cyberspace affect people in real space. It is now obvious that, as mentioned earlier, the means of regulation and control offered by absolutist cyber-users are not sensitive enough to the realities of cause and effect. Regulation from within the cyber realm is not enough.

#### 1. Defamation and Infringement through the Internet:

This point is best illustrated by the numerous defamation and infringement cases constantly being filed against those who use the Internet as a medium for these acts. Outside Cyberspace, there is no question that defamation and infringement are punishable, whether civilly or criminally. The fact that they are committed on the Internet raises novel questions of territoriality, freedom of speech, domain name policies, publisher's standard of liability and more. Cyber-users, who know this, also know that all these new concepts for old principles, together with the possibility of anonymity, offer the perfect veil of protection. Stripping government of their authority to regulate Cyberspace will leave the plaintiffs in these cases with no proper recourse. In fact, in their article, Oberding and Norderhaug recognize

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that when there is a violation of an Internet "community" norm, discussions on mailing lists and BBS' have applied real world legislation.<sup>73</sup> If any, this just seems to bolster the view that for the Internet to fully realize its potential as an instrument to link the countries of the world governments have to step in with their laws. They also use as an example the case of Stratton Oakmont, Inc. vs. Prodigy Services Co.<sup>74</sup> where an unidentified user poster libelous statements against Prodigy, the operator of the computer network, and the unidentified user. In this case, the New York Supreme Court addressed the liability of Prodigy, stating that it was liable as a newspaper publisher because it held itself out to the public as a service provider that exercised editorial control over the contents of materials posted on its bulletin boards. If no such representation had been made, Prodigy would have been considered similar to a newsstand. Such was the ruling in Cubby, Inc. v. CompuServe, Inc.<sup>75</sup> where the United States District Court held that CompuServe, as a news distributor, may not be held liable if it neither knew nor had reason to know of the allegedly defamatory statements.

The above cases are just two among a number of examples by which government laws and regulations have been applied to libel and defamation cases on the Internet in order to provide redress to victims who are themselves users. Also, it is clear that an ISP could be held liable for libelous content in its Bulletin Board in two instances; namely, when it represents itself to the public as exercising editorial control, or when it knows or has reason to know of defa-

matory statements therein. It should be remembered, however, that although ISP's could be held liable in these two instances, the true issue is not addressed - that is, what about the real wrongdoer?

Intermatic, Inc. v. Toeppen<sup>76</sup> is an infringement case that addresses this issue. This case involves the problem of cyber-squatters, individuals who attempt to profit from the Internet by reserving and later reselling or licensing domain names back to the companies that spent millions of dollars developing the goodwill of the trademark.<sup>77</sup> The legality of such a conduct is placed at issue, because registration of domain names with the Network Solutions, Incorporated is on a first come first served basis, regardless of whether or not that domain name constitutes an already registered trademark in the real world. As such, cyber-squatters like Toeppen seek to take advantage of this policy and exploit it to the detriment of legitimate businesses. This case is quite interesting, because the Court ruled that, under the Federal Dilution Act, Toeppen's use of the Internet to register the "intermatic.com" domain name for the purpose of selling it back to Intermatic met the "commercial use" requirement of that Act. This, together with the fact that Toeppen's use of "intermatic.com" was likely to cause dilution of Intermatic's mark, made him liable for violation of the Federal Dilution Act. It should also be noted that the Trademark Dilution Act of 1995 was intended by the U.S. Congress to address the specific issue of Internet domain names, for the benefit of owners of famous marks.

The relevance of this case is not in determining the legality or illegality of

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cyber-squatting. Rather, it is relevant to show that there are instances wherein laws have been successfully enforced on the Internet. In the Intermatic case, one sees a specific law enacted by the government to address a specific problem on the Internet, and a Court applying that law to protect a party from the effects of an act committed in Cyberspace and punish the wrongdoer accordingly. Had there been no such law enacted to address the domain name problem, Toepfen would have succeeded in his scheme, a scheme which the U.S. government considered unlawful.

#### 2. Pornography on the Internet:

In the absence of any real rule maker and enforcer within Cyberspace, if the view remains that governmental regulations are territorially ineffective therein, and the Internet is allowed to develop on its own, there is the danger that its progress could be dictated in some way by those with all intentions. In such event, the Internet could become an instrument that serves the criminal mind. These are not mere possibilities, for even now, if one were to browse through the World Wide Web, he would easily come across countless of pornographic, racial, infringing, defamatory, libelous, hate, destructive and other deleterious materials. These materials do not and cannot choose its viewers. It is available to all ages, regardless of their race, sex and religion. It is not mere coincidence that they exist on the Internet. They exist in the absence of any effective internal regulation and control. On the other hand, if these deleterious materials exist by reason of "community" norms or as a product of the freedoms of speech and ex-

pression vehemently declared by absolutist cyber-users, Cyberspace is then reduced to a mere state of anarchy. As stated by Johannes Singhammer, a conservative member of the German Parliament and head of its Children's Commission, referring to materials on the Internet: "Does it have anything to do with freedom of expression when you see images depicting sex with dead children? There is no doubt that passing on and distributing child pornography is a criminal act."<sup>78</sup> Moreover, Rita Suessmuth, president of the Bundestag, the German parliament, said: "The information superhighway must not be allowed to become a forum for those who defile children. Freedom of expression reaches its limit when human dignity is violated and violence is promoted."<sup>75</sup>

Truly, pornography occupies a central role in a government's interest to regulate the Internet-and rightly so. In all the State policies and laws discussed above, if there is one thing they all have in common, it is the problem of on-line pornography. A research team at Carnegie Mellon University conducted the very first systematic study of pornography on the Internet in 1995. The study revealed that 917, 410 pornographic images, animations, and text files obtained from commercial "adult" BBS' have been downloaded 8.5 million times.<sup>80</sup> The study also reported that the market for computer pornography is evolving rapidly because pornographers have begun to utilize the unprecedented distribution channels of computer networks "to penetrate markets throughout the world where public access to pornography has been historically restricted, including China, Saudi Arabia,

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Malaysia and Turkey."<sup>81</sup> As such, these materials have been downloaded in over 2,000 cities all over the world. Although this study has been subjected to criticism, the fact that it exists should raise valid concerns on Internet content. Its statistics might not be accurate, but it still proves the fact that the pervasiveness of Internet pornography is a reality to be dealt with.

What is more disturbing is the revelation made in the report that sophisticated computer pornographers are surveying their materials to determine which images they should pay more attention to, and that they are paying close attention to images depicting pedophilia and bestiality, as well as urophilic images, because they are the most lucrative. With newer and more advanced computer technologies becoming more available to anybody, the audience of on-line pornography is constantly growing. One feature of computer network pornography that appears to distinguish it from the rest of the pornography market is the fact that it is distributed free of charge.<sup>82</sup> Indeed, pornographers have reportedly been using the Usenet to advertise their products at no cost, and this leads audiences to subscribe to their "adult" BBS' after just seeing a few posted images. It is also a fact that on-line pornography gives the user the capacity to privately view and download just the images he wants. These give a better alternative to consumers who, previously, had to walk in an "adult" store in public and purchase an entire magazine or video just to see a few desired images or depictions. As such, the market for pornography on the Internet has been finding a receptive audience, an audience that re-

sponds well to images of children having sex, women being raped or tortured, and other life-degrading depictions. The article of Catherine A. Mackinnon further considers that computer networks are contributing significantly to abuse of women and children by facilitating access to child pornography and abusive pornography upon women.<sup>83</sup> She points to the fact that when a woman is marketed as being intensively physically harmed; consumer demand doubles.<sup>84</sup>

It is uncontested that the Internet has boundless potentials for global networking and information distribution, among others; but it is also a fact that it brings with it boundless dangers which have to be addressed properly. Already, pornography takes up much of the Internet's "space." As the Carnegie Mellon report indicates, over eighty percent of all pictures in the Usenet are pornographic, and three-quarters of the total space occupied by visual boards is pornographic as well.<sup>85</sup> If at the moment pornography already comprises a huge amount of activity in Cyberspace, what more in a couple of years from now? Given the borderless nature of the Internet. If it truly were to unite all civilized nations in a technological environment, more space has to be provided for materials with greater relevance, and less for obscenity. The only way to prevent the Internet from atrophying into a mere instrument to satisfy one's lascivious desires is for the government to overcome the ostensible limitations of jurisdiction.

The problem could not have been more adequately expressed than the wordings in the report itself

That many of the most popu-

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lar images of computer pornographers in the United States -pedo/hebephilia, bestiality, incest, urophilia, corpophilia, enema, fisting, he-she male, and B&D/S&M - are consumed by paying subscribers in at least 2,000 cities around the world raises complex and intriguing questions about "community standards" in Cyberspace.<sup>86</sup>

There are a couple of things to see on the Internet other than hard-core pornography. A few other locations one can come across therein are a site entitled "A Short Guide to Hindering Trains," a site that offers advice on how to commit suicide maintained by the Church of Euthanasia, numerous neo-Nazi, a marijuana home page and a site on how to make bombs.

#### 3. A Cyber-Community?:

Treating Cyberspace as having its own communal norms would be like turning a blind eye to its potential and far-reaching dangers upon real space. In fact, it seems wrong to even make a distinction between the concepts "Cyberspace" and "real" space. Cyberspace is a mere creation of man. Seen in its most fundamental nature and original purpose, Cyberspace is a mere tool for communication. It exists, not outside of the real world, but within and as a part of it. As such, it is not even right to talk about a "spilling over" of effects in the first place, because it is a basic philosophy that anything that occurs in the world causes an effect therein.

Without effective "real world" legislation, Cyberspace could serve as the backdoor for criminality, because while

a person runs a great risk of punishment when he commits a crime in the real world, that risk is greatly reduced when committed through the Internet. Without governmental regulation to control activity on the Internet, the gravest form of regulation that a wrongdoer would face in Cyberspace is either peer pressure or "banishment" from the "community," depending upon his contract with the system operator. Mr. Barlow, in his Declaration, states: "We believe that from ethics, enlightened self-interest, and the common-weal, our governance will emerge."<sup>87</sup> In his e-mail correspondence, he also says "(s)o far, it seems that the environment has shown a great capacity to be self-corrective."<sup>88</sup> But do these eliminate the need for an actual body representative of the collective thought of all users? How could see "a great capacity to be self-corrective" in an environment loaded with racial discrimination, hatred, defamation, copyright infringement and, most of all, intolerable and violating obscenity?

There is no question that there is a need for government regulation of the Internet. But that is not the issue here, for there is nothing that prevents a government from enacting laws addressing the Internet. The problem then that all governments face is how to enforce their laws on Cyberspace beyond their territorial boundaries effectively. In this regard, the problem can be reduced to one of jurisdiction. Owing to the Internet's insensitivity to physical boundaries, all governments feel restricted by the traditional territorial limits of their jurisdiction to make and enforce laws. For example, how can Germany enforce its laws against the owner of a web site that

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offers materials dealing with bestiality, incest and obscenity, if such owner resides in the United States? This is actually the situation in several cases, because most sites that offer neo-Nazi anti-Semitic materials, as well as other sites banned in Germany, are maintained in the United States.

IV. A WORLDWIDE PROBLEM REGARDING JURISDICTION AND A COMMON SOLUTION

There is a way to solve the problem of jurisdictional limitation without radically changing the whole concept of territoriality, at least for Cyberspace. But the only way for it to work is for all nations to recognize the true nature of Cyberspace. A government must realize that, for it to enforce its laws against a criminal using the Internet as a medium, the help and cooperation of other countries are needed. In the same respect, it must also realize that other countries will be seeking its assistance to enforce their own laws. In short, a stronger notion of international comity amongst nations is required. It should be noted that comity is a concept that finds balance between an absolute obligation and a mere courtesy. It has been defined by U.S. Supreme Court Justice Gray, in the case of *Hilton v. Guyot*,<sup>89</sup> as follows: 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international

duty and convenience, and the rights if its own citizens, or of other persons who are under protection of its laws.<sup>90</sup>

However, this notion of comity must be sensitive enough to the fact that, since Cyberspace has no borders, the action of one government can affect the access of users to the information highway around the world. This means that there must be a limit to the ability of a government to enforce its laws beyond its jurisdiction, in excess of which, the notion of comity no longer applies. In connection with this, Juergen Ruettggers, Germany's minister for science and technology, stated: "It is the responsibility of states to make clear where the boundaries of tolerance for the society lie."<sup>91</sup> It still remains a fact that all governments must understand the international character of a criminal act committed on the Internet, and that people distributing materials therein must be held accountable for their content. In relation to this, persons who post something on the Internet must be responsible enough to realize that whatever they upload to the system will be seen all across the globe, and that the Internet is not outside the reach of the law of any country. As stated by Chris Kuner, an American lawyer in Frankfurt who closely follows German Cyberspace issues: "The Internet created a universal jurisdiction, so that once you are on the Internet you are subject to the laws of every country in the world."<sup>92</sup>

A. Navigating through Jurisdictional Problems

Before beginning the difficult task of navigating through jurisdictional

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problems that a State would encounter in dealing with the Internet, it is important to take note of four preliminary concepts. First of all, it seems that there exists no hard and fast rule in international law that restricts a State's exercise of jurisdiction, except that no State can exercise its jurisdiction over persons, acts or events which do not affect or concern it. Secondly, it has been stated by the Permanent Court of International Justice (PCIJ) that a State's claim to jurisdiction need not be proven as being based on a principle of international law.<sup>93</sup> Instead, it is the duty of the party opposing the claim to show that a prohibition exists in international law. As adequately pointed out by Professor J. Starke: "It would appear to follow from the much discussed *Lotus* Case (1927), decided by the Permanent Court of International Justice, that there is no restriction on the exercise of jurisdiction by any state unless that restriction can be shown by the most conclusive evidence to exist as a principle of international law. Thirdly, although history shows that countries have been comfortable with the traditional territorial basis of jurisdiction, technological changes, even before the birth of the Internet, have paved the way for the adoption of other grounds of acquiring jurisdiction. Professor J. Starke mentions some of these changes as the increasing speed of communications, the more sophisticated structure of commercial organizations or enterprises with transnational ramifications, and the growing international character of criminal activities.<sup>94</sup> As such, there are now four bases of jurisdiction recognized in international law, although in varying degrees. These

three preliminary concepts are important, because they lay the legal foundation for justifying a more liberal interpretation of State jurisdiction, at least in Cyberspace. Moreover, the first two concepts have found legal justification in the *Lotus* Case.<sup>95</sup> In this case, the PCIJ ruled that:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.<sup>96</sup>

The *Lotus* Case was dispute between France and Turkey, submitted to the PCIJ. This case involved a collision between the French mail steamer *Lotus* and a Turkish cutter on the high seas, on August 2, 1926, resulting to the death of eight Turkish sailors. The dispute arose because, when the *Lotus* arrived in Constantinople, the French officer in charge was arrested by Turkish authorities and convicted by a Turkish court. France argued that the principles of international law prevent Turkey from instituting criminal proceedings against the French officer in charge under Turkish law. However, the PCIJ ruled that nothing in international law prevented Turkey from acquiring jurisdiction. This case finds its relevance, not only on the particular facts involved, but, moreover,

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on the basic rules and principles of international law expounded by the Court. The fourth preliminary concept has to do with the Territoriality Principle of Criminal Law. This principle generally states that countries, more or less, do not extend their criminal jurisdiction beyond their respective territories. Furthermore, there is another rule in the subject of Conflict of Laws that is related to this principle. It is the rule that States apply their own criminal laws to crimes committed within their own territory. This Conflicts rule is based on the premise that, using Curne's Interest Analysis Approach, when a crime is committed within a State, it is that State's policies and laws which are affected or violated by such conduct, thus giving it the closest connection and making it the most interested State in that particular case.<sup>97</sup> This rule will be discussed in more detail later. As to the Territoriality Principle of Criminal Law, it is relevant because of the amount of criminal conduct that could be perpetrated through the Internet. Stated otherwise, certain acts that are offensive to public policy and committed on the Internet are regarded by several States as criminal in nature. However, especially with increasing technological advance, this principle seems to be quite obsolete. It is also important to note that the Court in the *Lotus* case stressed that this principle is not absolute rule, and that it does not coincide with territorial sovereignty. Moreover, the Court also gave significance to the effects of the act, basing its decision on the fact that the effects of the offense occurred on the Turkish vessel by killing eight Turkish nationals on board. In the words of the

Court itself:

On the contrary, it is certain that the courts of many countries, even of countries which have been given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense and more especially its effects, have taken place there. Consequently... it becomes impossible hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offense was on board the French ship.<sup>98</sup>

Irrespective of this, a more pervasive problem regarding criminal jurisdiction exists. While some States might regard certain acts committed on the Internet as criminal, it may not be the case for others. Furthermore, as mentioned earlier, under Conflicts principles, States normally do not apply the criminal laws of other States.

### B. The Territorial Approach

The four bases of jurisdiction recognized in international law referred to above are the following:

1. Territorial Jurisdiction;
  2. Nationality Jurisdiction;
  3. Protective Principle; and
  4. Universal Jurisdiction
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Of these four, the Territorial Approach seems to offer the most viable and workable solution to the jurisdictional problem of enforcing a State's law over acts committed on the Internet. Moreover, it is the safest because, of all principles it is the most accepted.

The exercise of jurisdiction by a State over property, acts or events occurring within its territory is clearly conceded by international law to all members of the Society of States." This is what is called the principle of Territorial Jurisdiction- the most basic, working and accepted of all jurisdictional bases, considering that everything within a State must generally affect it. In this regard, when the national of a State creates an obscene web page within its territory, the State will encounter no problem in enforcing its laws against him. This was the situation in the Thomas case, as well as in other U.S. and German cases discussed so far in this paper. Even if the person who creates the web page is not a national of a particular State, as long as the act is committed within its territory and he is present therein, that State's courts can still exercise jurisdiction over him. The reason for this is that when the principle of Territorial Jurisdiction refers to "all persons," it makes no distinction between nationals and non-nationals. No presumption of immunity arises from the fact that the person against whom the proceedings are taken is an alien- an alien can claim no exemption from the exercise of such jurisdiction except so far as he may be able to show either: (i) that he is, by reason of some special immunity, not subject to the operation of the local law, or (ii) that the local law is not

in conformity with international law.<sup>100</sup> So far, under this principle, there exists no problem in the situations mentioned above. However, matters get more complicated when a State seeks to impose responsibility upon a person who is not its national, who does not reside therein and whose conduct occurred outside its territory. A good example of this would be the German government suing a U.S. citizen for maintaining a web site in California dedicated to child pornography.

There are two technical extensions to the Territorial Approach. The first one is the *Subjective Territorial Principle*, which says that States have jurisdiction to prosecute and punish crimes that are commenced within their territory, even though they are consummated in the territory of another State. This principle has not been accepted as a rule of international law, but it has been adopted by two Geneva Conventions, one on counterfeit currency, and the other on illicit drug trafficking. Even if this principle had the status of an international rule, it would have no relevance to this paper, because the concern here is not where the crime is commenced, but where it is consummated and felt, through the instrumentality of the Internet.

The second technical extension is the *Objective Territorial Principle*. In the words of Professor J. Starke, pursuant to this principle, "certain States applied their territorial jurisdiction to offenses or acts commenced in another State, but: —(i) consummated or completed within their territory, or (ii) producing gravely harmful consequences to the social or economic order inside their territory."<sup>101</sup> Before this principle could be made to

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apply to Cyberspace, it first has to be determined if illegal content on the Internet does produce "gravely harmful consequences to the social or economic order" within a State. It is argued in this paper that it does.

Chapter III of this paper provides the basis for saying that States do have an interest in regulating Cyberspace. In the numerous laws and governmental acts that have been discussed, legitimate public policies regarding the Internet have been declared therein. It has been seen in Chapter III that States have raised public policy concerns to justify the laws they have enacted to regulate the Internet at least within their borders. This shows that an act, otherwise wrongful in real space, does not shed off its character just because it is committed in Cyberspace. One need not go through a statistical chart of each and every government to come to a conclusion that a State's public policy is hopelessly intertwined with Cyberspace.

The absence of borders in Cyberspace makes it very difficult, if not impossible, for governmental authorities to screen off unwanted materials and prevent them from being viewed by the populace without shutting down the system totally. This intrusive nature adds to the fact that content on the Internet could have gravely harmful consequences on a State's social order and morality concerns. The only problem is determining with specificity which State public policies and laws could be considered as internationally acceptable.

One approach would be to distinguish between public policies which States have in common, on one hand, from those which should be considered

as distinctly local, on the other. This distinction is important because, as stated earlier, there must be a limit to the ability of a government to enforce its laws beyond its jurisdiction. In this regard, among the acts on the Internet that raise some concern, it is safest to say that all civilized States have a public policy in protecting their children from obscenity on the Internet, particularly child pornography - as used in the example. To further emphasize the pervasiveness of the problem of pornography on the Internet, it has been shown in the previous chapter that the more violent and degrading a material, the more it is wanted.

In view of the foregoing, the *Objective Territorial Principle* seems to give sufficient legal basis for a State to prosecute another State's national for an illegal web site, even if the site were setup in the latter State. If this approach were to be used on the example above, the German prosecutors would have authority to prosecute the U.S. national. However, it appears that this principle only gives an offended State the authority to prosecute the wrongdoer only if he enters its territory. Professor J. Starke, in explaining this principle, quotes the definition of Professor Hyde as follows: "The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein justifies the territorial sovereign in prosecuting the actor when he enters its domain."<sup>102</sup> If this definition were followed strictly, it would still not give the offended State the required jurisdictional effects it needs to enforce its laws, because it would have to wait until the offender enters its territory.

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The definition given by Professor Hyde above takes into account that a Court cannot prosecute a person who is beyond the reaches of its jurisdiction. This is the principle of personal jurisdiction, as contrasted to subject-matter jurisdiction over a case because of the fact that the crime has substantial effects in the forum State, it cannot entertain the suit if it has no personal jurisdiction over the wrongdoer. Otherwise, it would be overstepping its jurisdictional limits and intruding into another State's sovereignty. In the *Lotus* Case, the Turkish Court had no problem exercising personal jurisdiction, because after the collision the *Lotus* docked in Constantinople, at which point Lieutenant Demons, the French officer in charge, was immediately arrested by Turkish authorities. Thus, since the Turkish Court itself as totally invested with jurisdiction, subject-matter as well as personal, it applied Article 6 of its Penal Code. The relevant provisions of the said article, quoted in the text of the *Lotus* Case, are as follows:

[A]ny foreigner who...commits an offense abroad to the prejudice of Turkey or of a Turkish subject, for which offense Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code *provided that he is arrested in Turkey*.<sup>^</sup> (emphasis supplied) Note that Article 6 asserts the so-called *Passive Nationality* theory when it states that Turkish law would apply when a foreigner commits an offense

against a Turkish national, even if the act is committed abroad. This principle is a controversial and questionable issue. Although this principle is followed by some countries and adopted in several national criminal codes, due to the fact that other States have not accepted it, it cannot be considered as a sound principle of international law. It is regrettable that the PCIJ did not directly address this issue. The Court itself says: Neither the conformity of Article 6 in itself with the principles of International law nor the application of that Article by the Turkish authorities constitutes the point at issue; it is the very fact of the institution of proceedings which is held by France to be contrary to those principles... This being so, the Court does not think it necessary to consider the [French] contention that a State cannot punish offenses committed abroad by a foreigner simply by reason of the nationality of the victim. For this contention only refers to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based.<sup>104</sup>

Thus, in deciding this particular issue, the PCIJ confined itself to justifying the prosecution on the Territorial principle. Moreover, it does not address the problem that arises when the offender is outside the offended State's territory. In this regard, therefore, the *Lotus* Case offers no solution.

Going back then to the example of Germany and the U.S. national, how

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could Germany obtain redress against the wrongdoer if he resides outside its territorial boundaries?

At this point, all relevant issues and problems worth considering in navigating jurisdictional problems on the Internet have been stated one way or another. To indicate these problems more clearly, it is much better to enumerate them point by point:

1. It is proper for a State to enforce its laws beyond its jurisdiction?
    - 1.a. Are there limits to the power of States to prescribe laws with extraterritorial application?
    - 1.b. How does a State legally acquire personal jurisdiction over an offender?
  2. Is there a way for a State to have its extraterritorial laws enforced by foreign courts?
    - 2.a. Can a State file a civil case against the offender in a foreign court?
    - 2.b. Can a State file a criminal case against the offender in a foreign court?
    - 2.c. Is it proper for the Court of the forum State to apply the criminal laws of another state?
  3. Is there any benefit to be achieved from all these?
- C. Applying a State's Law Beyond its Territorial Jurisdiction
- In answering the first question, it

should be remembered that there exists no hard and fast rule in international law that restricts a State's exercise of jurisdiction, except that no State can exercise its jurisdiction over persons, property, acts or events which do not affect or concern it. This is the first preliminary concept above, and it leads the discussion of the *Substantial Effects Principle*.

### 1. The Substantial Effects Principle and the Reasonableness Standard:

Based on the *Objective Territorial Principle*, already discussed, there is a rationale for enforcing a State's law extraterritorially. It is called the *Substantial Effects Principle*. In substance it can be stated in the following manner. "A State may justify the application of the laws of its territory only insofar as an act occurring outside of its territory has a direct, substantial and foreseeable effect within its territory and the exercise of jurisdiction is reasonable."<sup>105</sup> The Restatement (Third) of Foreign Relations Laws, Section 402 (1987), paragraph (I), subparagraph (c) summarizes the United States' view on this matter by stating that "[s]ubject to Section 403, a state has jurisdiction to prescribe law with respect to...conduct outside its territory that has or is intended to have substantial effect within its territory." <sup>106</sup> The reference to Section 403 has made the exercise of jurisdiction subject to the requirement of "reasonableness," to be discussed later. The *Effects Principle* is further declared by the International Association as follows:

A State has jurisdiction to prescribe rules of law governing conduct that occurs outside its

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territory and causes an effect within the territory if:

- (a) the conduct and its effect are constituent elements of activity to which the rule applies
- (b) the effect within the territory is substantial; and
- (c) it occurs as a direct and primarily intended result of the conduct outside the territory.<sup>107</sup>

By the manner the *Effects Principle* has been expressed and applied, it seems to address a situation where State courts apply local laws to conduct committed in a foreign country. In this way, it sounds very similar to the *Protective Principle*. The *Protective Principle* recognizes that each State may exercise jurisdiction over crimes against its security and integrity or its vital economic interests.<sup>108</sup> It is, furthermore, contained in Section 402 (3) of the Restatement (Third) of Foreign Relations Law, which states that "a State has jurisdiction to prescribe law with respect to...certain conduct outside its territory by persons not its nationals that is directed against the security of the State or against a limited class of other State interests."

In view of the fact that the *Protective Principle* has not found wide acceptance in the international community, it seems that it cannot serve as a good foundation upon which a State may apply its laws on the Internet. It is also doubtful if majority, if not all, acts or crimes committed on the Internet would be so severe as to affect a country's national security and integrity, or have such an effect on its vital economic interests - at least not at the present. In the example, surely child pornography in Cyberspace cannot be considered as

having such standing.

This paper presents an approach that finds its applicability on the very principles of Territoriality, generally accepted in international law as the normal working rule, further strengthened by the principle of comity.

The *Effects Principle* and the *Protective Principle* seem similar to the extent that they both treat foreign conduct that causes or is intended to cause some effect within a State's territory. This is probably the reason why it is easy to use them interchangeably. However, there are several factors that make them significantly different.

First of all, a look at the Restatement (Third) will show that they are both contained in different subsections of Section 402. While the *Protective Principle* is found in paragraph (3), the *Effects Principle* could be found in paragraph (1), subparagraph (c). Moreover, the main difference is that, while the *Protective Principle* contains almost the same standards as the *Effects Principle*, it is more specific as to the activities it covers. In this regard, the *Protective Principle* is said to cover acts that are directed against the security of a State, or against certain interests, such as currency and visa fraud. On the other hand, the *Effects Principle* covers conduct that has or is intended to have a substantial effect within the territory of a State. For this reason, the *Effects Principle* is more open to different interpretations by different States.

By reason of its susceptibility to differing interpretations, the *Effects Principle* has been applied in one way or another by different States. For example, while some States, like the United King-

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dom, apply a restrictive interpretation such as requiring that an element of the offense occur within national borders; other States, like Germany and the European Union, rely on more expansive versions.<sup>109</sup>

Interpretations of the *Effects Principle* and its scope remain controversial. However, the controversy and confusion do not lie on an arbitrary extraterritorial application of a State's law, but rather, on the elements required for such application. Moreover, unlike the *Protective Principle*, the fact that the *Effects Principle* has been applied and interpreted by different States, in one form or another, provides enough room to apply it for the purposes of this paper. As such, it seems that the best way of using this principle to justify the application of a State's law upon Internet conduct is to interpret it as strictly as possible, so as to make its use acceptable wherever the forum may be. Taking into account the different ways by which the Effects Principle has been declared and applied, a number of elements seem to appear as the most relevant for satisfying, or at least approximating, international standards. Since satisfaction of these elements depends upon the circumstances of each particular case, for the Internet, due regard must be given to its nature as already discussed.

Firstly, the effect of the conduct upon the State must be *direct*. This seems to be satisfied by the intrusive nature of the Internet upon the territory of a State. In the absence of territorial borders in Cyberspace and given the speed of message transmission therein, not only is a country open to any Internet content, but moreover, when a crime such as

child pornography is committed through the Internet, it is in fact consummated in any country connected thereto. When a person uploads an obscene material on the World Wide Web, there is no way for a country's customs office or border patrol to prevent it from being viewed by its citizens. It is as direct as can be. As already discussed, because of the Internet's very nature, there is no localization of effects.

Secondly, the effect must be *substantial*. This also seems to be satisfied by the same reasons stated above, considering further the fact that one site could be viewed by all users in that State regardless of age, sex, religion and race. In other words, the fact that content on the Internet does not choose its viewers lays heavily upon the substantiality of its effects. As to child pornography on the Internet, it has already been seen that governments have expressed emphatic concerns about its threat to their public policies and interests in protecting their citizens.

Thirdly, the effect must be *foreseeable*. This is justified by the fact that anybody who uses the Internet knows that whatever he uploads onto it can be viewed by each and every person with access to the network. Such is the very nature of Cyberspace. In this regard, when a pornographer posts an image depicting pedophilia on the Internet, he knows and intends for people to see it. He further knows that even children could view it. The fact that on-line pornographers compile databases of information about consumers' buying habits and sexual tastes means that they are fully aware and foresee the effects of their actions. Moreover, they clearly intend

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their depictions to affect the people who see it. It is also a fact that present blocking programs do not offer effective protection from these sites.

Lastly, the application of the laws must be *reasonable*. This standard is excellently stated in Section 403 (1) of the Restatement (Third) of Foreign Relations Law of the United States, in the following manner: "[A] State may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another State when the exercise of such jurisdiction is unreasonable.

As regards this standard, Section 403 (2) of the Restatement (Third) offers a list of relevant factors that could prove very useful in determining whether the extraterritorial reach of a statute is reasonable. However, this list is not exhaustive. As will be seen later, the *Reasonableness Standard* offers the best protective justification against the laws of the most restrictive States. For this reason, the application of the *Effects Principle* does not necessarily mean that all Internet users and nations have to "dumb down" to the most repressive nations of the world, because once a law is seen by the international community as *unreasonable*, it would lose its extraterritorial enforceability. Using the obscenity example, a State might argue that, since its citizens viewed the material through the Internet, a crime was committed within its territory. Although this could be a valid argument for a court to acquire subject matter jurisdiction, the fact that the material was also viewed in other countries across the globe, gives it an international aspects that limits a State's prescriptive jurisdiction. Indeed, a State

might even go to the extent of saving that irrespective of the *Effects Principle*, owing to the nature of the Internet, not only were the effects of the crime felt in its territory, moreover, the crime was actually committed therein. Thus notwithstanding, because other states have also been affected by the material in the same way, the laws of the enforcing State now come under the international spotlight. Truly, Internet pornography is not some act that a State can claim as totally within its own territory and beyond that of others. By reason of this international aspect, there is a concern that the law being enforced by a State upon a wrongdoer should pass international standards. This is the reason why the *Effects Principle*, with its *Reasonableness Standard*, offers the best approach.

Among the factors listed in the Restatement (Third) are items (d) the existence of justified expectations that might be protected or hurt by regulation; (e) the importance of the regulation to the international, political, legal or economic system; and (f) the extent to which the regulation is consistent with the traditions of the international system. These items offer the best protection against laws that are too restrictive.

It should also be noted that, in comment (a) to Section 403 of the Restatement (Third), it is stated that the *Reasonableness Standard* has emerged as a principle of international law. Furthermore, the comment also states that there is a wide international consensus that the link of the activity to the territory and the connection of nationality, while listed among the factors to be considered in determining reasonableness, "are not in all instances sufficient conditions for

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the exercise of...jurisdiction." As such, the fact that the activity takes place within a State, or has substantial, direct and foreseeable effects therein, does not necessarily give that State jurisdiction to apply its laws extraterritorially. It also implies that there are times when it would not be proper for the Court of the forum State to apply its local laws on the sole justification that the wrongdoer involved is its national. This implication is relevant for the discussion on Conflict of Laws.

### 2. Application of the Substantial Effects Principle:

There is a line of U.S. cases that directly deal with the application of the *Substantial Effects Principle*. These cases apply the principle to justify the reach of U.S. laws to acts committed by foreigners abroad. The first is the case of American Banana Co. v. United Fruit Co.<sup>110</sup> In this case, the U.S. Supreme Court held that U.S. Antitrust laws cannot be applied to the acts of a defendant in Panama or Costa Rica. The rule declared here was that all legislation is prima facie territorial. Justice Holmes held that, as a general and almost universal rule, the "character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."<sup>111</sup> However, since this case, U.S. courts have increasingly applied U.S. laws extraterritorially when a person's acts have a substantial effect on the United States. Three of these cases deal with the Sherman Act and have, since then, reached a ruling different from American Banana. The cases in point are United States v. Aluminum Co. Of America<sup>112</sup> Continental Ore Co.

v. Union Carbide and Carbon Corp.<sup>113</sup> and Hartford Fire Insurance Co. V. California.<sup>114</sup>

These cases have made it clear that U.S. Antitrust laws can apply to foreign conduct that was meant to and did in fact affect trade and commerce in the United States. But more importantly, in a situation where there are two laws involved, the domestic law and a foreign law, the Hartford Fire Insurance case, applying Section 403 of the Restatement (Third) of the Foreign Relations Law, laid down the rule that no conflict exists when a person can comply with both. The Continental Ore case also declared the same rule. In effect, what this means is that, when the defendant raises a foreign law in his defense, a court in the United States will still apply domestic law if the foreign law does not explicitly require the conduct prohibited by the U.S. law. Furthermore, as pointed out by Justice Scalia in his Dissenting Opinion to Hartford decision, the Court has repeatedly held that Congress has the "legislative jurisdiction "to make laws applicable to persons or activities beyond the territorial boundaries, where U.S. interests are affected."<sup>115</sup>

The major criticism against these cases is that they give U.S. courts the discretion and power to determine what constitutes "substantial effects." However, it is due to this criticism that the *Reasonableness Standard* has been incorporated into the Restatement (Third). But a further criticism is expressed in Justice Scalia's dissent to the Hartford Fire insurance opinion. For him, had the *Reasonableness Standard* been truly applied, the Sherman Act should have been precluded from applying to conduct

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within a foreign jurisdiction. According to him, since United Kingdom had more interests in the case, its laws should have been applied.

Taking the above cases and criticisms altogether, what is important for this paper is that, as long as the *Reasonableness Standard* is properly applied, the *Effects Principle* could prove as a way of acquiring prescriptive jurisdiction for the State to enact laws with an extraterritorial reach. It is, however, important to note the presumption expressed in the American Banana case against extraterritoriality. As such, it is also as rule in American law that, for legislation to apply extraterritoriality, the intent of Congress should be expressed. There is also the rule that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>6</sup>

At any rate, while these rules have been discussed in relation to U.S. Antitrust laws, it does not mean that they are not applicable to the Internet. In fact, the criticism against the Court's determination regarding substantial effects loses its persuasiveness when the very nature of the Internet is taken to mind. A Court need not exercise any form of discretion in determining whether or not an obscene web site has substantial effects on a country. Unless that country has no connection to the World Wide Web, the fact that the material is transmitted to each and every computer linked thereto, and is made available even to minors, quite settles the issue. Given all the requisite elements of the *Effects Principle* as well as the corresponding characteristics of cyberspace discussed above, there seems to be stronger justi-

fication for applying it to the Internet. The only concern then would be determining the *reasonableness* of the law concerned. Moreover, to overcome the presumption against extraterritoriality, the lawmaking body of the State should make it clear that the law concerned is intended to address obscenity on the Internet and to have extraterritorial effect.

So far, all the cases that have been discussed under this section only deal with civil suits. Since criminal laws have been known to be territorial in nature, there has always been a constant question as to whether or not a State could apply them beyond its territory. It should be remembered though that the territoriality of criminal laws is not an absolute rule. This has been pointed out earlier as the fourth preliminary concept. Moreover, it has been pointed out that significance has been placed upon the effects of the act.

The same doubt has also been expressed in relation to whether or not the criminal provisions of the Sherman Act also have the same extraterritorial reach as its civil provisions. This question has remain unanswered until 1997, when it was finally settled by the U.S. Court of Appeals (1<sup>st</sup> Circuit) in the case of U.S. v. Nippon Paper Industries Co., Ltd.<sup>7</sup> Again, although this case deals with the Antitrust laws of the U.S., it serves as a perfect example that, indeed, criminal laws can have extraterritorial effect, as long as the intent of the legislative body is clear.

In the Nippon case, criminal proceedings were filed against Nippon Paper Industries, a Japanese corporation, for conspiring to fix prices of facsimile

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paper to be sold in the United States, in violation of the Sherman Act. The indictment was dismissed by the U.S. District Court for the District of Massachusetts, on the ground "that a criminal antitrust prosecution could not be based on -wholly extraterritorial conduct."<sup>118</sup> The Court of Appeals reversed the District Court's ruling and remanded the case for further proceedings. It held that, although there existed a presumption against extraterritoriality previously established in the American Banana case, previous cases have already clearly ruled that this presumption has been overcome by clear Congressional intent. As to the claim by Nippon Paper Industries that there has to be a distinction between the treatment of civil and criminal provisions of the statute, the Court ruled that there is "no comparable tradition or rationale for drawing a criminal/civil distinction on with regard to extraterritoriality."<sup>119</sup> It further ruled that the defendants can be convicted of participation in price-fixing conspiracies without any demonstration of a specific criminal intent to violate the antitrust laws.<sup>120</sup> This ruling was based on a previous ruling of the U.S. Supreme Court that intent need not be shown to prosecute criminally "conduct regarded as per se illegal because of its unquestionably anticompetitive effects."<sup>121</sup> What this means for this- paper is that, if it can be shown that the concerns raised regarding the Internet's obtrusive nature amount to the same degree as those expressed in antitrust laws, so much so that a crime committed therein should be regarded as per se illegal, then an argument could be raised that criminal intent also need not be proven in such case.

The Court in the Nippon case also ruled that it is upon a country's discretion to prosecute wholly foreign conduct. International comity was not sacrificed, because the conduct with which the defendant was charged is illegal under both Japanese and American laws. Moreover, it ruled that, in all events, the growth of comity in the antitrust sphere has been stunted by the Hartford Fire Insurance case, wherein it was suggested that comity concerns would only defeat the exercise of jurisdiction when the law of the foreign sovereign requires a defendant to act incompatibly with the Sherman Act, or when full compliance with both laws is impossible.<sup>122</sup> Further strengthening its claim, the Court said that comity is informed by the Reasonableness Standard.

What all these cases show is that the Substantial Effects Principle could serve as jurisdictional basis for a State to enact a law regulating the Internet. The State need not be overly concerned about the question of whether its law would have the extraterritorial reach needed to give it the desired effect. However, the two most important requisites should at least be satisfied, particularly, there should be a clear and express intent as to the extraterritorial reach of the law, and the law should be reasonable enough to pass international scrutiny.

As for Germany and the United States, it does appear that similar policies have been expressed in these two countries concerning child pornography on the Internet. Given that child pornography is illegal in both countries, as long as Germany's statute is clear about its reach and its application is reasonable, under the principles of the Nippon case,

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it appears that international comity would not be sacrificed.

Having discussed the power of a State to make laws that have extraterritorial reach, civil or otherwise, the next problem would then be acquiring personal jurisdiction over the wrongdoer. In the example given, how could Germany legally acquire personal jurisdiction over the U.S. citizen who uploads obscene pictures on the Internet?

There are ways by which a person could be brought illegally within the jurisdiction of a State. These illegal methods fall under the generic term "snatching," wherein government agents enter another State and secretly "snatch" the suspected offender, with or without the help of local authorities. Because "snatching" is considered as an intrusion upon a State's sovereignty, it has been widely rejected by the family of nations. Another option that is legal and widely accepted internationally is extradition.

3. Extradition:

Truly, extradition could be considered as one solution. It is the surrender of a person by one State to another State where he is wanted for prosecution or, if already convicted, for punishment.<sup>123</sup> There are a number of fundamental principles governing extradition, namely:

a. It should be based on consent of the State of asylum as expressed in a treaty or manifested as an act of good will;

b. The *Principle of Specialty*, which means that the crime should be one of those included in a list agreed upon;

c. Any person may be extradited whether he is national of the State of asylum on another State

d. Political and religious offenders are generally not subject to extradition;

e. In the absence of special agreement, the offense must have been committed within the territory or against the interests of the demanding State; and

f. The *Rule Of Double Criminality*, which means that the act must be punishable in both requesting and requested States.<sup>124</sup>

It seems that principles (e) and (f) do not offer any difficulty to Germany, because as already discussed, obscenity on the Internet affects the national interests of both the United States and Germany. It has also been mentioned that both countries have enacted criminal laws dealing with obscenity. Although the act of uploading the obscene material was committed in the United States, its effects were felt, not only in that State, but in Germany as well; thus offending the policies of both countries.

However, principles (a), (b) and (c) present obstacles that Germany, or any other State for that matter, will have to deal with. As to principles (a) and (b), if there exists no extradition treaty between the interested State and the State of which the on-line pornographer is a national or resident, there is no way that extradition can apply, discounting the exercise of goodwill. Moreover, even if there is such a treaty, extradition cannot apply if obscenity is not one of the crimes listed therein. It should also be noted that a treaty is only between two nations. So, even if there exists a proper treaty between Germany and the United States, it would be rendered useless if the wrongdoer were a national of another country, or if he were to travel to another State. Principle (c) also presents a

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problem, because it is now the practice of States not to extradite their own nationals but to punish them under their own laws in accordance with the Nationality principle of criminal jurisdiction.<sup>125</sup>

The obvious solution to these obstacles would be a multilateral treaty dealing with crime on the Internet, particularly with on-line obscenity, wherein all or most civilized nations agree to cooperate with one another by extraditing offenders. It is important that the treaty should define the particular acts contemplated as extraditable offenses. It should also be declared in the treaty that, if a State refuses to extradite a criminal, it would be bound to hold such person for trial. A good example of this kind of treaty is the Hague Convention of December 10, 1970,<sup>126</sup> ratified by over 140 States. Basically, this Convention makes hijacking an extraditable offense. Of particular interest are Articles 4 and 8 of the said convention.

However, reality bites and one realizes that to achieve this for Internet crime would be a Herculean goal. Although a multilateral treaty, at this point, would seem idealistic and far-fetched, at the most, it is not a total impossibility. It should be noted that the reason why the Hague Convention was entered into in the first place is that States had a common problem which, they believed, need a common solution. Previously, hijacking was not considered as a crime subject to *Universal Jurisdiction*.<sup>127</sup> However, in the light of global efforts to punish aircraft piracy and hostage taking, international legal scholars now agree that these crimes are heinous enough

for purposes of asserting *Universal Jurisdiction*. This does not mean that Internet obscenity should necessarily be considered in the same manner. Even if offenses committed on the Internet do not fall within the Universal Jurisdiction of international law, what is important is that nations, realizing the need for addressing a common problem, come up with a treaty that presents a common solution. In particular, what is proposed is a multilateral treaty dealing with the extradition of persons who commit certain acts on the Internet that are considered as extraditable offenses by the agreeing States. Of course, requisites such as the *Substantial Effects Principle* and the *Reasonableness Standard*, among others, are not discounted.

#### D. Filing Suit in a Foreign Country-A Theoretical Approach

Aside from the foregoing, and short of kidnapping the wrongdoer, military invasion, assassination and other terrorist measures by the government, it seems that another solution that might prove plausible would be for the interested State, Germany in the example, to file a case against a wrongdoer in U.S. courts. The U.S. Court would have no problem with personal jurisdiction, because the wrongdoer would be within its territorial boundaries. As to the issue of subject-matter jurisdiction, a look back at the *Objective Territorial Principle* might prove to be useful.

It should be remembered that the *Objective Principle* is based on two grounds. Under the second ground, a

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State acquires jurisdiction over an offense or act if it produced gravely harmful consequences to its social order. Now, considering that the United States has a policy against obscenity on the Internet, and that its courts have indeed imprisoned an offender for violating federal obscenity laws,<sup>128</sup> it is safe to say that it has subject-matter jurisdiction under the second ground. But justification for the use of this principle need not be limited to the second ground. In the example, the act of the wrongdoer not only produced harmful consequences to the social order of the United States, but it was most certainly committed within its territory as well. Stretching this theory a little bit further, even if the national were to travel to another country, say the Philippines, the principle could still apply.

Considering now that the suit is filed in the Philippines, because the offender traveled, thereto before Germany got to file its suit in the United States, the Philippine Court could still entertain the suit. It would have the prerogative of basing its jurisdiction on either of two grounds under the *Objective Territorial Principle*, namely:

- a. That the wrongful act was consummated within its territory; or
- b. That the wrongful act on the Internet produced consequences detrimental to its public policy of protecting its society against obscenity.

Any country could actually rely upon the first ground, as long as ISP exists therein and access to the site or material concerned has not been blocked in its territory. It has been stressed so many times in this paper

that the Internet knows no boundaries and, as such, any material upload unto the network could be viewed by any user wherever he may be found. So when a child in the Philippines has unrestricted access to an obscene web page and gets to view an image depicting bestiality or pedophilia, it could be said that a crime has been committed therein, under local laws dealing on the matter. Indeed, by creating a universal jurisdiction, the Internet cannot be regarded as a haven for criminal activity; on the contrary, it is one wherein a wrongdoer is subject to the laws of every country in the world. Moreover, in this manner, the jurisdictional argument of the absolutist cyber-users is thrown back at them by actually giving courts around the world jurisdiction over the case.

In theory the application of the *Objective territorial Principle* to Internet jurisdiction might seem quite uncomplicated. However, in practice it altogether loses much of its soundness. The primary reason for this is that, up to this moment, it has never really been done yet. The improbability is compounded when one considers a criminal suit. In this regard, this paper offers a three-step approach by which to go about the development of such a practice. The process would be summarized as follows:

1. File a Suit in a Foreign court and Apply Conflicts Rules;
2. A Special Approach for Criminal Cases; and
3. The Development of Similar Laws.

1. Stretching the Application of the

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#### Substantial Effects Principle in Conjunction with a Conflict of Laws Approach:

As mentioned above and as observed in the cases discussed, the *Substantial Effects Principle* appears to address a situation wherein a State court applies a local law to conduct committed in a foreign country. However, this does not prevent its use to justify the enforcement of Germany's laws in another State, because it does say that a State can prescribe laws that govern conduct outside its territory. It says nothing which explicitly says that these laws can be enforced only within the territory of the State that enacted such laws. In its general definition, the *Effects Principle* clearly justifies a forum Court's extraterritorial application of local laws when certain elements are satisfied, but there is nothing in the principle that limits it to this situation. As such, there seems to be nothing that would prevent the application or enforcement of a State's laws by another State. In other words, the forum Court could use this rationale to justify the enforcement of a foreign law.

Indeed, there are instances when the Courts of a State, using its Conflicts rules, end up applying the laws of another State. The only difference between these cases and the resent approach used in this paper is that, in the latter, it is the foreign State itself that comes to the Court of the forum State. Disregarding this difference, all the relevant factors and connections the foreign State would have with the suit it brings is enough to give rise to a true Conflicts problem in the forum

State.

The Internet offers an atmosphere which, by its very nature, interconnects countries with one another within a single network. It is therefore clear that there is more than one interested State in the suit. In fact, if such a suit were truly filed, there might be more than two interested States involved.

Using the same example, if the suit were filed in the Philippines, the United States might have an interest in applying its own obscenity laws, because the defendant involved is its national and he committed the act of posting the pornographic images in its territory. As such, there would be three interested States, namely; Germany, the Philippines and the United States. That is not all a fourth State-say China or Singapore- might step in and seek to apply its own law, claiming that it was also affected by the same act of the same defendant. This process may continue unless there is a way of declaring with finality and certainty which State's law should be applied.

It is now very obvious that the problem touches the subject of Conflict of Laws. In dealing with this, one could consider the several approaches or solutions offered, such as the Traditional Territorial or "Vested Rights" approach, the "Most Significant Relationship" approach and the "Governmental Interest Analysis" approach.<sup>129</sup> However, as any law student taking Conflict of Laws realize, adopting one or another approach, at the outset, will only lead to more confusion and unpredictability, especially since dif-

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ferent forum States might adhere to different approaches. Moreover, every approach has always been subjected to numerous criticisms-thus making it uncertain which among them would truly lead to certainty and sound policy.

In view, of the foregoing, because each State has its own Conflicts rule, it is not within the parameters of this paper to impose what choice of Law rule all States should follow. The only concern here is to determine the laws to choose from. Considering the nature of the Internet and the problem that numerous laws might be implicated, it would be best for the forum to consider only the following laws: (a) the law of the State that first brought the case (b) law of the forum State; and (c) the law of the defendant's State of nationality (if different from either the first two). Otherwise, if it considers the policies of the laws and interest of all interested States, it could find itself in a deadlock, for each State with access to the site would definitely have a policy and governmental interest affected by the Internet material under consideration, namely the obscene images. Moreover, owing to the nature of the Internet, it could end up having to account for the laws of all countries in the world connected to the Internet. Worse of all, problem would be unimaginatively unsolvable if the forum State adhered to the Traditional "Vested Rights" approach determines the applicable law by the "last act" necessary to the creation of the right to sue, all the aforementioned States' laws will be applicable, because the pornographic image would have

been viewed within all their territorial boundaries.

If the forum only considers the laws of the three interested States mentioned above, it significantly reduces the possibilities. This solution does not forego of such concepts as State interest, governmental policies and contacts, because the Court of the forum will still have to apply its own Conflicts rule; it just limits the choices. It should also be remembered that the forum State would have to consider the *Reasonableness Standard*, along with the other restrictions mentioned earlier.

It should be noted now that, under this approach, the plaintiff-State's main purpose in filing the suit is not to push for the application of its own law. Neither is its purpose to ask the Court to apply the law of the forum. Rather, the whole purpose for bringing the suit is to ask the Court of the forum State to apply its Conflicts rules and determine which law should be applied against the wrongdoer. This approach is in deference to the very nature of Conflicts cases. It is more sensitive to the reality that States simply do not go to a foreign Court and request the application of its law upon a foreign citizen. Instead of directly making such an arrogant request, it would be more proper for the State to file a case against the wrongdoer and leave the choice of law decision to the foreign State.

It is presumed that, if the Court of the forum State recognizes that the plaintiff-State has the most connections with and the strongest interest in the facts of the case, and that its

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law is reasonable under international law standards, it would apply the same. Otherwise, it would apply the more reasonable law of the State that has the most connections and strongest interest.

2. A Special Approach for Criminal Cases:

It is a truism that in most, if not all, legal systems, when a crime is committed, it is the State itself that prosecutes the criminal. As such, the prosecutor's office, or its equivalent in other countries, represents the State in filing a criminal case. Moreover, as mentioned earlier, a recognized exception to the application of foreign law under Conflicts rules is when the said foreign law is penal in character.<sup>130</sup> These two situations pose the most problematic potholes to the whole argument for the extraterritorial enforcement of a State's Law.

First of all, even though there are cases where courts have applied the laws of other countries using Conflicts principles, such as the *Renvoi* doctrine, these have only dealt with civil matters. The penal law exception has its roots in a statement made by U.S. Supreme Court Chief Justice Marshall that "the Courts of no country execute the penal laws of another."<sup>131</sup> Also, even though authority and rules have been cited earlier regarding the extraterritorial application of criminal laws, these appear to be feasible only when it is the forum State itself that applies its own law. This was the situation in the *Nippon* case. In the *Lotus* case, the PCIJ upheld the use by the Turkish Court of its own criminal law

upon a foreigner. On the other hand, this paper contains no authority dealing on a converse situation, wherein the Court of the forum State applies the criminal law of another State. Again, the very reason for this lies in the penal law exception to the application of foreign laws. As states in the fourth preliminary concept whenever an offense is committed in a State, it is considered that the act is a violation of that State's own criminal laws, thus giving it the strongest interest.

In view of the foregoing, the only way of going around the problem is to meet it on its face. This is a problem that would persist as long as States remain unwilling to defer to the criminal laws of the States. When a crime is committed in "real" space, it is very easy to say with definiteness where the act and effects occur. However, when the crime takes place on the Internet, even though the forum State may say that its own laws have been violated by the conduct, and that the effects were felt within its territory, it still remains a fact that other States have also been affected by the same conduct. Although this does not necessarily mean that the forum should defer to the plaintiff-State's criminal laws, it should, at the least, be enough to move it to apply its Conflicts rules to choose the better or more applicable law, as discussed in the prior section.

Considering the whole nature of the Internet, if a new manner of thinking should ever be developed, it has to be towards the recognition that crime therein is not localized. Once forum States recognize that other ju-

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risdictions and laws are also involved, it would be easier for them to apply the whole notion of Conflict of Laws and make a choice among competing criminal laws. It is interesting to note the opinion of Jorge R. Coquia on the matter:

It is worthwhile to ponder the application of the interest analysis approach to cases involving enforcement of foreign penal laws. Using this approach, the penal laws of another country undoubtedly express vital state interests. Together with the application of the principle of comity, can one not argue that foreign penal laws should be the first to be enforced?<sup>132</sup>

Another factor to consider is that criminal suits are filed by the State itself. That is also an outgrowth of the whole notion that, when a crime is committed, it is the State that is actually affected. Although the whole suit is initiated when a private party files a complaint, that party loses control over the case once the prosecutor's office, or its equivalent, decides to bring it to court. This poses another problem, because it would mean that the whole case of the foreign sovereign would have to depend upon the local prosecutor's determination of whether or not to sue.

However, considering that the foreign sovereign itself brings the complaint to the State's prosecuting office, the whole notion of comity among political bodies is once again highlighted. Other concepts, such as international politics and diplomacy, are also

brought to light. Given this, in the example used, it would be the State of Germany, through its foreign office, that would actually file the complaint in the U.S. or Philippine prosecutor's office. This also produces another effect. The fact that it is the State itself that files the complaint, gives more weight and importance to the case than if it were merely filed by an individual. This shows that the case not only involves the interests of one person, or a group of persons, but moreover, the interests of a sovereign State. This is an entire matter that involves political considerations and relations between and among States, one that is beyond a court's ambit.

It is again emphasized that, for States to effectively regulate Internet content, the whole concept of territorial jurisdiction need not be abandoned. Instead, what is required is a new way of applying old principles. In other words, what is required is not an abandonment of "traditional" principles, but rather, an abandonment of "traditional" methods of applying such principles, especially for Criminal Law

3. Development of Similar Laws:

Going back to the Restatement (Third), among the elements listed therein are items (c) the character of the activity to be regulated, the importance to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (g) the extent to which another state may have an interest in regulating the activity; and

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(h) the likelihood of conflict with regulation by another state. These items are relevant to the present discussion, because they offer a good foundation for States to recognize and apply foreign laws deemed to be *reasonable*.

It should also be remembered that comment (a) to Section 403 of the Restatement (Third) states that there is wide international consensus that the link of the activity to the territory and the connection of nationality, while listed among the factors to be considered in determining reasonableness, "are not in all instances sufficient conditions for the exercise of ...jurisdiction." As mentioned in passing earlier, this implies that there are times when it would not be proper for the Court of the forum State to apply local law on the sole justification that the wrongdoer involved is its national. In the example, this means that the Court in the United States may find the application of its law unreasonable, as compared to the law of another State, taking into consideration choice of law principles. This is also true for other links, like the territorial connection of the activity. Indeed, in stretching the application of the *Effects Principle*, Conflicts rules have a very important role to play in conjunction with the *Reasonableness Standard*

As such, States will have to realize that in order for their laws to gain the widest enforcement and application, at least for the Internet, these laws have to be acceptable under international standards. In a State's effort to regulate the Internet, a wider application and enforcement means a

more effective law. The enactment of Internet laws will then have these international standards in mind, not so much for the sake of comity, but moreover for the practical reason of gaining worldwide enforcement. As a consequence, this could lead to the enactment by several States of similar laws governing the Internet, because they will all be looking toward similar standards and goals. This is further strengthened by the fact that all civilized States have common policies and interests which they seek to enforce and protect.

In view of the foregoing, it is truly significant to remember the discussion earlier on different States and the laws they have so far enacted to address pornography on the Internet. These laws make it apparent that States do have a common concern against the dangers of pornography on the Internet.

In the end, the main concern of all governments could be achieved. In particular, once Internet users realize that they could be held accountable for their actions and sued, criminally or civilly, by any State with a connection to the global network, in the courts of any country where they happen to be, as long as that country is also connected to the Internet, they are then given the incentive to regulate their activities. In short, the best way to regulate activity in Cyberspace is to make users realize that their actions are not beyond the reaches of even the farthest government keeping in mind the *Reasonableness Standard*.

**V. CONCLUSION: COOPERATION AND THE ROLE OF NA-**

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**TIONS IN THE FACE OF A NEW TECHNOLOGY**

It is unquestionable that the Internet needs governmental regulation. The question lies on how such regulation is to be undertaken. This new technology forces nations to take each other into consideration, because its very nature is that involvement. Indeed, it is regarded as the modern instrument for uniting a diverse world. The problem of regulating the Internet emphasizes not the need for new jurisdictional laws, but the need for a new international perspective on existing laws and principles. To begin solving the problem by trying to develop a whole new body of law is to start on the wrong foot. When one enters new surroundings, whether it be a new school or a new office, he seeks familiarity. The same is true with the Internet. In the first place, it is not different from the rest of the "real" world. It exists in it and as a part of it. One of the main characteristics that distinguishes it from other means of communication is its over-reaching effect upon a wide user population throughout the world. This is a jurisdictional problem, plain and simple, and it is where familiarity could be found.

The foundation for addressing the problem of jurisdiction already exists—all that is required is cooperation and a stronger sense of international comity. There is legal basis for a State to apply its laws beyond its jurisdiction, and if this implies a more liberal interpretation by other States of "traditional" concepts, then so be it, as long as the State which seeks to apply

its laws does not offend basic international principles. This approach may stretch the notion of international comity a bit further, but if the Internet were to fully realize its potential, then it has to be so. Each and every nation must realize that if it wants to benefit from the Global Information Infrastructure, it has to regulate illegal activity therein; and if it wants to effectively regulate the Internet, it needs the help and cooperation of other nations. Recognizing this need, it would then be more sensitive to the needs of other nations as well. Professor Enrique P. Syquia best describes this notion in its most fundamental concept as follows:

All men constitute a single family, Mankind, and are all obliged to work for the common good. Man, however, to do good and to be done good, must seek society with his fellow-men, and this in a widening circle, and thus we have the family, the state, and the international society- *damnum, urbs, orbis*.<sup>m</sup>

True enough, numerous incidents and affairs throughout world history have led to international cooperation and comity among nations. All these events- the two World Wars, Piracy on the High Seas, War Crimes and Terrorism, to name a few- have earned such status, because of their recognized effects upon the world community, in general, and the States' interests, in particular. The question then is: What makes the problem of Internet regulation, with its conduciveness to criminality and its intrusive nature, any different? In the effort to regulate content on the Internet, the ex-

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isting principles of International Law on jurisdiction and Conflict Of Laws, discussed above offers the framework or atmosphere for international cooperation.

#### ENDNOTES

<sup>1</sup>Dan L. Burk, *Trademarks Along the Infobahn: A first Look at the Emerging Law of Cybermarks*, 1 RICH. J. L. & TECH. 1, p. 1 (April 10, 1995) <<http://www.urich.edu/~jolt/vlil/burk.html>>.

<sup>2</sup>See *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, at 2334 (1997).

<sup>3</sup>Burk, *supra* note 1, at 1, citing Vinton G. Cerf, *Networks* SCIAM., Sept. 1991, at 72.

<sup>4</sup>947F. Supp. 1227,1230 (N.D. 111. 1996).

<sup>5</sup>See *Reno*, 117 S. Ct. at 2334.

<sup>6</sup>*Id.* at 2335

<sup>7</sup>Burk, *supra* note 1, at 2.

<sup>8</sup>See Burk, *supra* note 1, at 2, citing M. Mitchell Waldrop, *Culture Shock on the Networks*, 265 SCIENCE 879 (1994).

<sup>9</sup>Rjem 117S. Ct. at 2334

<sup>10</sup>See Thomas D. Brooks, *Catching Jellyfish in the Internet: the Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER AND TECH L.J. 461, at 463 (1995), citing *Suarez Corp. Ind. V. Meeks*, No. 267513 (Ct. of Common Pleas, Cuyahoga Co., Ohio).

<sup>11</sup>David R. Johnson and David Post, *Law and Borders - The Rise of Law in Cyberspace*, p. 2. (visited on November 15,1996) <<http://www.law.syr.edu/Course.Materials/Chon/borders.html>>.

<sup>12</sup>Juliet M. Oberding and Terje Norderhaug, *A Separate Jurisdiction For Cyberspace?*, p. 1 (visited on February 20, 1998), <<http://www.usc.edu/dept/annenberg/vo!2/issue/juris.html>>.

<sup>13</sup>David R. Johnson, *Lawmaking and Law Enforcement in Cyberspace*, p. 1. (April 27,1994) <<http://www.eff.org/pub/Legal/cyberlaw/Johnson.article>>.

"John Perry Barlow, *A Declaration of the Independence of Cyberspace*, p. 2. (February 9, 1996) <[http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/barlow\\_0296.declaration](http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration)>.

<sup>15</sup>E-Mail correspondence of John Perry Barlow to Jose Luis C. Syquia Qanuary 21, 1998).

<sup>16</sup>Johnson, *supra* note 11, at 1.

<sup>17</sup>Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE LJ. 1743, p. 1750 (May 1995).

"Human Rights Watch, *Silencing the Net: The Threat to Freedom of Expression On-Line*, p. 2 (May 1996) <<http://www.nytimes.com/library/cyber/week/0910hrw.html>>.

"See Peter H. Lewis, *CompuServe to End Ban on Internet Sex Materials*, at 2 (February 14, 1996) <<http://search.nytimes.com/search/d...+site+site+9634+30+wAAA+CompuServe>>.

<sup>20</sup>See Edmund L. Andrews, *CompuServe Executive Indicted in Germany on Pornography Charges*, at 2 (April 17, 1997) <<http://search.nytimes.com/search/d...site+site+10684+17+wAAA+CompuServe>>.

<sup>21</sup>See Henry Campbell Black, M.A., *Black's Law Distionary*, Abridged 6<sup>th</sup> Ed., at 857 (West Publishing Co. 1991).

"Pamela Mendels, *Worldwide Internet Restrictions Are Growing*, p. 1 (September 10, 1996) <<http://search.nytimes.com/search/d...site+site+8927+125+wAAA+CompuServe>>.

"See Seth Faison, *China Issues Rules to Control Internet*, at 1 (February 5, 1996) <<http://www.nytimes.com/library/cyber/week/0205china-censor.html>>.

<sup>22</sup>*Id.*

"Human Rights Watch, *supra* note 18, at 12.

<sup>23</sup>See Faison, *supra* note 23, at 2.

<sup>27</sup>*Id.* at 1.

<sup>28</sup>*Id.* at 2.

<sup>K</sup>See Bruno Giussano, *Germany, Advancing Communications Law, Seeks to Give Internet a Legal Framework*, at 1 (June 17,

## The LAW REVIEW

### FEATURES

1997) < <http://search.nytimes.com/search/d...site+site+10286+53+wAAA+CompuServe> >.

<sup>32</sup>The Associated Press. *Germany Formally Approves Cyberspace Law*, p. 1. (July 5, 1997) < <http://search.nytimes.com/search/bi...Epolice%7Ethe%7Eweb%7Eupset%7EBusiness%22> >.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>34</sup>Edmund L. Andrews, *Germany's Efforts to Police the Web Upset Business*, p. 1 (June 6, 1996) <<http://search.nytimes.com/search/d...+site+site+9880+26+wAAA+CompuServe>>.

<sup>35</sup>See Edmund L. Andrews, *Internet-Related Charge Dismissed in Germany*, at 1 (July 1, 1997) <<http://search.nytimes.com/search/d...site+site+10361+108+wAAA+CompuServe>>.

<sup>36</sup>*Id.* at 2,

<sup>37</sup>Nathaniel Nash, *How Bavarian Prosecutors Forced CompuServe's Hand on Censorship*, p. 1 (January 15, 1996) <<http://search.nytimes.com/search/d...+site+site+8662+43+wAAA+CompuServe>>.

<sup>38</sup>Andrews, *supra* note 34.

<sup>39</sup>See David F. Gallagher, *Net Dumps Free Speech on Up-Tight Singapore*, at 2 (May 18, 1996) < <http://www.nytimes.com/library/cyber/week/0518singapore.html> >.

<sup>40</sup>*Id.* at 3.

•Human Rights Watch, *supra* note 18, at 14.

<sup>41</sup>*Id.* at 16.

<sup>42</sup>See Reno v. American Civil Liberties Union, 117 S. Ct. 2329, at 2337-2338.

<sup>43</sup>See Jeri Clausing, *Senate Panel Moves Again to Limit Children's Access to Net Porn* (March 13, 1998) <<http://www.nytimes.com/library/tech/98/03/cyber/articles/13senate.html>>.

<sup>44</sup>*Id.* at 3.

<sup>47</sup>See Barry Steinhardt, *Statement of Electronic Frontier Foundation President Barry*

*Steinhardt on the Senate Commerce Committee's Approval of Coats and McCain Internet Censorship Bills* (March 12, 1998) <[http://www.eff.org/pub/Censorship/Internet\\_censorship\\_bills/1998\\_bills/19980312\\_eff.statement~>](http://www.eff.org/pub/Censorship/Internet_censorship_bills/1998_bills/19980312_eff.statement~>)>.

<sup>48</sup>William A. Tanenbaum, *Lost in Cyberia: "Transmission" Under the Law of Copyright*, 431 PLI/PAT 61 p. 63 (March 1996).

<sup>49</sup>See Human Rights Watch, *supra* note 18, at 3.

<sup>50</sup>Andrews, *supra* note 20, at 1.

<sup>51</sup>*Id.* at 2.

<sup>52</sup>W.

<sup>53</sup>See Faison, *supra* note 23.

<sup>54</sup>See Human Rights Watch, *supra* note 18, at 12-13.

<sup>55</sup>*Id.* at 13, citing Reuters, *Singapore Defends Censorship in Internet Age* (July 7, 1995).

<sup>56</sup>See Lewis, *supra* note 19, at 3.

<sup>57</sup>Mendels, *supra* note 22, at 1.

<sup>58</sup>Barlow, *supra* note 14.

<sup>59</sup>*Supra* note 15.

<sup>60</sup>74 F.3d 701 (6th Cir. 1996).

<sup>61</sup>*Id.* at 771.

<sup>62</sup>See Oberding, *supra* note 12, at 6.

<sup>63</sup>See Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U.PITT L. REV. 993, at 1020 (Summer 1994).

<sup>64</sup>Johnson, *supra* note 13.

<sup>65</sup>Hardy, *supra* note 63, at 1000.

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 1029-1030.

<sup>68</sup>Johnson, *supra* note 13.

<sup>69</sup>See Andrews, *supra* note 34, at 4.

<sup>70</sup>See Andrews, *supra* note 20, at 2.

<sup>71</sup>Oberding, *supra* note 12, at 6.

<sup>72</sup>See Andrews, *supra* note 34, at 4.

<sup>73</sup>See Oberding, *supra* note 12, at 6.

<sup>74</sup>23 Med. L. Rptr. 1794 (1995).

<sup>75</sup>776 F.Supp. 135 (S.D.N.Y. 1991).

<sup>76</sup>947 F.Supp. 1227 (N.D.Ill. 1996).

<sup>77</sup>*Id.* at 1233.

<sup>78</sup>Nash, *supra* note 37, at 2.

<sup>79</sup>Human Rights Watch, *supra* note 18, at 21.

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### FEATURES

"See Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917, 410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1949 (1995).

<sup>></sup>*Id.* at 1851.

<sup>82</sup>Catherine A. MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959, p. 1965 (1995).

"See Mat 1965.

*Id.* at 1963.

<sup>15</sup>See Rimm, *supra* note 80.

*Id.* at 1912.

<sup>87</sup>Barlow, *supra* note 14.

<sup>15</sup>*Supra* note 15.

"159 U.S. 113 (1895).

*Id.*

"See Andrews, *supra* note 37, at 4.

*Id.* at 2.

"J. Starke, *Introduction to International Law*, in INTERNATIONAL LAW, 2<sup>nd</sup> Ed. 728, p. 729 (Barry E. Carter & Phillip R. Trimble, eds., Little, Brown and Company, 1995).

<sup>\*</sup>*Id.* at 728-729.

"See PCIJ, Series A. No. 10 (1927).

<sup>%</sup>*of.*

<sup>97</sup>See Lea Brilmayer, *Conflict of Laws: Cases and Materials*, 4<sup>th</sup> Ed. (Little, Brown and Company 1995).

<sup>n</sup>*Supra* note 95.

"Starke, *supra* note 93.

<sup>TM</sup>*Id.* at 733.

<sup>101</sup>*Id.* at 730-731.

<sup>m</sup>*Supra* note 95.

<sup>105</sup>Opinion of the Inter-American Juridical Committee on Resolution AG/Doc. 3375/96. *Freedom of Trade and Investment in the Hemisphere*, OEA/SER.G, CP/Doc. 2803/96 (Aug. 27, 1996), p. 7.

<sup>106</sup>See Restatement (Third) of the Foreign Relations Law of the United States, Sec-

tions 402 and 403 (1957).

"International Law Association, *Report of the Fifty-fifth Conference* 139 (1974).

<sup>108</sup>Starke, *supra* note 93, at 734.

<sup>109</sup>See Jeannette M.E. Trammel, *Helms-Burton Invites a Closer Look at Counter-Measures*, 30 GEO. WASH. J. INT'L L. & ECON. 3 17 at 335 (1997).

<sup>U0</sup>213 U.S. 347, 29 S. Ct. 511 (1909).

<sup>m</sup>*Id.* at 356, 29 S. Ct. at 512.

<sup>n2</sup>148 F.2d 416 (1945).

<sup>n3</sup>370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962).

<sup>114</sup>509 U.S. 764 (1993).

<sup>115</sup>See \*W.

<sup>116</sup>*Murray vs. The Charming Betsy*, 2 Cranch 64, 118, 2 L. Ed. 208 (1804).

<sup>n7</sup>109 F.3d 1 (1<sup>st</sup> Cir. 1997).

<sup>TM</sup>*Id.* at 3.

<sup>></sup>*Id.* at 7.

<sup>m</sup>*Id.*, citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 440, 98 S. Ct. 2864, 2875 (1978).

<sup>m</sup>*Id.* at 8.

"Isagani A. Cruz, *International Law*, p. 203 (Central Lawbook Publishing Co., Inc., 1989).

<sup>TM</sup>*Id.* at 203-206.

"See *id.* at 204.

<sup>126</sup>22 U.S.T. 1641, T.I.A.S. No. 7192.

<sup>127</sup>See *United States v. Yunis*, 859 F.2d 953 p.C. Cir. 1988).

<sup>122</sup>See *U.S. v. Thomas*, 74 F.3d 701 (6<sup>th</sup> Cir. 1996).

<sup>12</sup>See Brilmayer, *supra* note 97.

"See Jorge R. Coquia and Elizabeth Aguilin-Pangalangan, *Conflict of Laws*, at 173 (Central Professional Books, Inc., 1995).

<sup>n</sup>*Id.*, citing *The Antelope*, 23 U.S. (10 Wheat) 123 (1925).

<sup>m</sup>*Id.* at 174-175.

"Enrique P. Syquia, *On Nationalism and Internationalism*, in TWENTY PAPERS ON INTERNATIONAL LAW AND RELATIONS 256 (1992).