International Jurisdiction and Enforcement of Judgments in the Era of Global Networks: Irrelevance of, Goals for, and Comments on the Current Proposals

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INTERNATIONAL JURISDICTION AND ENFORCEMENT OF
JUDGMENTS IN THE ERA OF GLOBAL NETWORKS:
IRRELEVANCE OF, GOALS FOR, AND COMMENTS ON THE
CURRENT PROPOSALS

JONATHAN A. FRANKLIN* AND ROBERTA J. MORRIS**

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* Associate Law Librarian, Gallagher Law Library, University of Washington School of
Law. JAF wishes to thank Rochelle Dreyfuss, Graeme Dinwoodie, Jane Ginsburg, Josh
Sarnoff, and Jeffrey Kovar for their insightful comments, Kristy Moon for her assistance in the
preparation of this Article, and Louise Franklin for her rich substantive and editorial comments
on the penultimate draft of this Article. A special thanks to Eric Priest of the Chicago-Kent
Law Review for his work above and beyond the call of duty on this Article. This Article would
not have been possible without the extraordinary efforts of Roberta J. Morris.

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grateful to Jonathan Franklin for sending her an early draft and establishing this collaboration.
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I.  INTRODUCTION

Last fall a Symposium at Chicago-Kent College of Law entitled "Constructing International Intellectual Property Law: The Role of National Courts," held on October 18–19, 2001, brought together scholars interested in a group of problems related to the relationship between harmonized rules of international civil procedure and diverse nationally-based rules of intellectual property. Subsequently, extensive discussions between the authors developed this Article into its present form.

A.  Background and History of the Convention

The Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters\(^1\) has had a long and tumultu-
ous history. The concerns of the Convention are, first, jurisdiction over defendants in a country that is "foreign" to the defendant (if not also the plaintiff); and second, enforcement of judgments in the courts of a country other than the one that entered the judgment. These focuses indicate a litigation-centered worldview.

People who care about the terms of the Hague Convention envision having a civil cause of action (or having clients who have one) against a person they wish to sue in a country that is foreign to that person. If the outcome of the suit is not settlement, dismissal or loss, they want to be able to enforce that judgment in yet another foreign country. If that seems like a remote scenario for most of humanity most of the time, it is. For that reason (among others, perhaps), the Hague Convention has not been on the top of very many people's priority list. The importance of the Hague Convention, however,

available online at http://www.hcch.net/e/conventions/draft36e.html (last visited August 2, 2002) [hereinafter Hague Convention, 1999 Draft]. The 2001 draft is far more confusing, as it is full of bracketed language and multiple variants of the same section. In many cases, the 1999 draft is more illustrative. When discussing specific language used in either draft we will refer to them by date. We will also speak of "the Hague Convention" without a date as a useful shorthand for the general concept of a non-IP-specific convention covering foreign jurisdiction and recognition and enforcement of foreign judgments. Such a time-general term is needed when discussing prospective changes or ideas for modifying the existing drafts.


3. For official documents related to the recent drafts illustrating the substantial changes between drafts, see http://www.hcch.net/e/workprog/jdgm.html. For additional unofficial documents, see http://www.cptech.org/ecom/jurisdiction/hague.html. The previous draft is available at http://www.hcch.net/e/conventions/draft36e.html (last visited June 23, 2002). The latest news on the future of the Convention as of the final draft is:

With regard to the project of elaborating a Convention on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the Judgments Project), the delegations unanimously reconfirmed the great importance they attach to harmonising rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters on a worldwide basis. The delegations encouraged the Conference to continue to pursue common solutions for these issues in the area of private international law, especially given the increasing need for finding solutions in this difficult arena.

The Commission agreed that the best path forward on the Judgments Project at this point would be to have the Secretariat convene an informal working group and facilitate and conduct a transparent and flexible working process with a view to preparing a text to be submitted to a Special Commission during the first half of 2003. The Special Commission would then be followed by a Diplomatic Conference which would be held, if possible, by the end of 2003. Based on a paper to be prepared by the Permanent Bureau, the starting point for this informal process will be a discussion of a core area of possible grounds of jurisdiction as tentatively identified by the Commission, as well as the existing provisions on recognition and enforcement upon
goes well beyond what happens in courts: what is included, what is omitted, and how things are phrased in it, have a strong potential to chill certain activities and encourage others, because of fears of risks, or even of certainties, about lawsuits.

B. The Alternative Proposal of Dreyfuss and Ginsburg

The Hague Convention is of broad and inclusive scope, covering most of civil commercial litigation. By contrast, the proposal drafted by Professors Rochelle Dreyfuss and Jane Ginsburg deals exclusively with "intellectual property" (with the intention of excluding patents). Its real thrust is copyright. This narrower scope permits the Dreyfuss-Ginsburg proposal to more precisely address the specific concerns of copyright owners and other web actors who may have

which there is broad agreement. This core area might include choice of court agreements, defendant's forum, counter-claims, branches, submission, trusts and physical injury torts.


4. See discussion infra Section II.B.

5. Rochelle C. Dreyfuss & Jane C. Ginsburg, Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters, 77 CHI.-KENT L. REV. 1065 (2002) [hereinafter Dreyfuss-Ginsburg Draft Convention]. To avoid confusion between the Dreyfuss-Ginsburg Draft Convention and the draft Hague Convention, we sometimes refer to the Dreyfuss-Ginsburg Draft Convention as the proposal. When discussing points the two have in common, we refer to them jointly as the conventions or the proposals.

6. The term "intellectual property" should logically be restricted to matters that concern at least the three major areas, patents, copyright and trademark. It may also cover matters that concern secondary intellectual property-like areas: chips, databases, trade dress, right of personality, etc. We have attempted to avoid use of the phrase "intellectual property" when copyright is the real concern, or where, more generally, readers who mentally substitute for the genus the name of one of the species (patent, trademark or copyright) might reasonably be confused or disbelieving.

7. Dreyfuss-Ginsburg Draft Convention, art. 1.1:

The Convention applies to copyright, neighboring rights, [patents,] trademarks, other intellectual property rights, and rights against unfair competition, as covered by the Agreement on Trade Related Aspects of Intellectual Property, and its successor Agreements. In addition, this Convention applies to rights over communication to the public of Sound Recordings and to claims involving domain names.

Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1074. The brackets around the word "patents" reflect that preference to omit patent litigation from the scope of the Convention. See id. at 1068 (Executive Summary, § 1). See also the "Commentary" concerning "Arts. 1 and 2. Substantive and Territorial Scope," which says:

(b) Exceptions.

There are three exceptions to the general rule that the Convention covers TRIPS rights: patents, which are excluded, and rights of communication to the public in sound recordings, rights covered only in the Paris Convention, and domain names, which are included.

Id. at 1097 (emphasis added).
disputes over possibly copyright-protected material. In addition, by requiring signatories to be countries that have adopted TRIPs, variations in substantive law among member countries becomes a more tractable problem than it is under the more broadly framed Hague Convention.

C. Some Observations

1. The Internet

The web is unquestionably one of the factors responsible for the recent increase in interest in the language and scope of an international convention on foreign jurisdiction and enforcement. It therefore may be instructive to consider how the Internet is different from the technologies that preceded it. Certainly, information can be moved faster and more cheaply via the web than ever before. (And there will no doubt be even faster and cheaper methods in the future, as unimaginable to us as the web would have been to almost anyone thirty or forty years ago.)

Perhaps the most significant difference between the Internet and everything that came before it is that the web permits decentralized distribution of anything that can be digitized, without the constraints of physical distribution. This is vital for issues such as jurisdiction: once something can be sent to anyone on earth who has a computer

8. For example, see the Dreyfuss-Ginsburg Draft Convention's Executive Summary, Item 1, and "Preliminary Matters: coverage." Id. at 1068, 1073; see also Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement].

9. Information delivery systems can be compared based on the speed at which the message is received, the ability to deliver the message regardless of the form or content of the message in its physical embodiment, and the ability to do so despite obstacles and barriers to delivery placed by the intended recipient or third parties. The differences may not always be apparent. For example, from one's office, one can use mail, telephone, or E-mail to convey birthday greetings or the latest directive from headquarters, and the message will generally be received whether the recipient is next-door or halfway around the world. E-mail combines flexibility and openness because the sender can send all types of digitized content without being stopped at the borders crossed by physical mail. Paper mail will take longest and may have to go through customs or other screening. Telephone, until relatively recently, was only good for messages that were audible. Nowadays, of course, with faxes and modems, the telephone is not so limited at the sender's end. It still can encounter problems at the recipient's end, such as by control of the telephone lines by governments, answering machines, or human telephone answerers. Digitization, independent of the creation of the Internet, is responsible for much of the difference people perceive about the web. Digital communication over the Internet has another dimension, however, that digital telephones (by themselves) lack: more types of communication can be sent than ever before and more recipients can be reached, and reached concurrently, than ever before.
and a network connection, there is not much need for physically distributed warehouses and sales forces, thereby eliminating one traditional way of determining whether a particular country can assert jurisdiction. Although a business that conveys physical goods may need brick-and-mortar stores and warehouses if it wants to succeed, the fact remains that a distribution to people in hundreds of different nations instantaneously requires neither. What may be revolutionary is that never before have so many people been exposed to liability in so many places by doing so little to reach (and knowing nothing about) those places.

This broad exposure to liability will affect large and small entities differently. Large entities can more effectively research the law of foreign countries. This gives them an advantage over those who do not have the resources to determine whether their activities will make them liable to someone somewhere. Additionally, in cases of great uncertainty but great “upside potential,” better-capitalized firms may be more able, and more willing, to insulate themselves from risk through insurance or self-insurance. Then, too, large entities are more likely to have assets in numerous jurisdictions. This suggests that they may view foreign enforcement as a sword, rather than as something from which they need a shield. But smaller entities do innovate, and their contributions may be stifled if they are foreclosed from the Internet, E-commerce, and the latest technologies by reason of a too-harsh system of foreign jurisdiction and enforcement of judgments. These ideas are addressed more fully in Part III below.

2. Differences between Types of “Intellectual Property”

The Hague Convention must balance the rights of potential plaintiffs with those of potential defendants. These are mostly non-overlapping groups in the standard picture of web-related litigation: it is generally assumed that actors who are plaintiffs are rarely defendants, and vice versa. The concepts of a plaintiff’s bar and defense bar apply if a copyright cause of action is imagined: owners of copyright-protected material are pitted against users who have no copyright-protected material of their own. Of course, one competitor may sue its arch rival, or big companies in different industries who contract with each other may have reason to sue each other, but the typical litigation picture for a web-based suit is not one between, say, AOL Time-Warner and Disney-ABC. In defamation and right-to-
privacy suits, too, entities likely to be plaintiffs are not likely to be defendants, and vice versa.

Trademarks, and especially patents, may have less well-defined plaintiff and defendant groups. For trademark and trade dress, traditional rivals may sue each other, but, as with copyright, the alleged infringer is probably more likely to be a smaller or newer entity, such as a cybersquatter or a piggybacker on a well-known company's marks. Patent law is even farther along the spectrum: today's patent owner can easily be tomorrow's accused infringer, and vice versa. That is because all the players generally have their own patents, or can acquire some for leverage purposes when faced with a big lawsuit. Even an inventor who never practices the patent and only wants to license it must be concerned with the effect that other people's patents might have in discouraging potential licensees (including defendants after suit has been commenced) or reducing the perceived value of the license. These conditions are likely to apply to "business method" patents, as well as patents related to hardware and software components. A more significant difference between patents and registered trademarks, on the one hand, and all other intellectual property, on the other, may be that the former have "nationality"—a country of registration or issuance. They embody rights granted by a sovereign and as such they are only cognizable within that country. This fact may alleviate much of the need for an international convention on jurisdiction and enforcement.10

Copyright is somewhat different because of the Berne Convention.11 Under Berne, once a work is protected by copyright in one country, it is protected in all, subject to national treatment limitations on true uniformity. For works that are translated into different spoken languages, there may be some intrinsic nationality to the copyright, but for a host of other things—music, art, source code, etc.—the concept of nationality for copyright protection may be becoming

10. Consider a French company with both a US and a French patent licensing to a US company under the US patent. The license specifies that any disputes must be tried in French courts. If the US company fails to pay royalties, it can be sued for infringement under US law. If that suit is brought in France (as it would have to be by contract), the French court would, in theory, have to consider the language of US statutes and of the regulations of the US Patent and Trademark Office, defenses such as invalidity and unenforceability (inequitable conduct), and enhancement of damages for willfulness and an award of attorney fees as permitted by US statutes. An international convention stating that courts "must" give effect to such choices of forum would likely not find favor with the judges who would have to preside over such cases.

rather feeble. Thus, copyright suits may well be a focus of attention in the drafting of a convention, and one for which the rules, rather than any exceptions, are intended.

Secondary forms of intellectual property, such as trade dress and trade secrets, also may have a national quality, as do forms of *sui generis* intellectual property that are uniquely recognized in only one or a few countries: anti-circumvention,\(^{12}\) database legislation in the EU,\(^{13}\) and other niche rights in numerous other jurisdictions. But such rights may be the very ones for which foreign enforcement, after vindication in the owner's home location, is most sought. Foreign enforcement in such cases may be the only way to collect, too, because the existence of defendant assets in the owner's home location may be rather unlikely (at least compared to, say, a patent suit). Thus, these kinds of suits may be more in the mind's eye of convention drafters, and with more reason, than the more universal kinds of intellectual property.

Whether an international convention on jurisdiction and enforcement is framed broadly or directed to intellectual property, the drafters will have to consider how the differences among the kinds of intellectual property rights affect litigation of those rights. While this Article attempts neither to catalog those differences nor to address them systematically, their existence suggests that the task of drafting the Hague Convention is extraordinarily complicated.

The focus of this Article is, first, to explore why the importance of any international convention on jurisdiction and enforcement may be shrinking rapidly, as web actors find alternatives to, or are forced to do without, litigation as a way to obtain redress for civil wrongs.


\(^{13}\) As this Article was being completed, the *Wired* website published a news story on the precedential influence a German court's ruling on Internet search engine "deep linking" might have on EU law:

Using a search engine to locate stories on newspapers' sites violates European Union law, according to a recent ruling by judges in Munich's Upper Court.

The ruling is the latest legal decision in a two-year battle between German newspaper *Mainpost* and German search service NewsClub. *Mainpost* charges that NewsClub violated the law by searching through and linking directly to *Mainpost* content. . . .

[Legal experts believe that if the ruling is upheld, it could easily become a firm legal precedent across the European Union, drastically limiting the information that many European search engines are allowed to provide to their users.]

Next, assuming that a convention remains a necessity, regardless of its shrinking realm, this Article will address the values that should guide those drafting an ideal convention. Last, specific sections of the most recent drafts of the Hague Convention and of the Dreyfuss-Ginsburg proposal dealing with jurisdiction, choice of law, enforcement, and the special case of contracts, will be reviewed.

II. WHY NONE OF THIS MATTERS: WHY AN INTERNATIONAL CONVENTION ON JURISDICTION AND ENFORCEMENT (RESTRICTED TO WEB-RELATED CAUSES OF ACTION OR NOT) MAY BE UNIMPORTANT

A. Introduction

People who make decisions about doing or continuing to do business, make purchases, or offer or obtain services have a host of immediate concerns. These decisions are often tied to quality, quantity, cost, time of delivery, and other concrete aspects of the transaction. Determining what will happen if something goes wrong is usually a secondary concern. Thus, a system for resolving disputes through civil litigation, no matter how intelligently constructed or well regarded, is not the most important thing affecting initial decision making or preferences. Still, civilized people generally subscribe to the notion that a judicial system for dispute resolution is a good thing, much better than decision by physical contest or war.

Today, judicial systems are largely constrained by their geographical borders, but the web is making the whole concept of borders a little peculiar, if not obsolete. The draft Hague Convention and the Dreyfuss-Ginsburg proposal, both of which concern jurisdiction over non-nationals in a national court, and enforcement of judgments rendered by courts of other nations, are premised on the idea that civil litigation is important, and that enhancing the credibility and flexibility of litigating in other countries is a worthwhile endeavor.

It may be worthwhile, but how much? Civil litigation, particularly for web-related activities, is being marginalized by a variety of phenomena. Some are immune, untouchable, by any international convention on jurisdiction and enforcement. Others might be dis-

14. If foreign litigation and enforcement of judgments were a primary focus of those involved in distributing information or even physical goods, the pressure to conclude the Hague Convention negotiations would be far greater.
couraged, or, if they are deemed to be for the common good, encour-
gaged, by an appropriately drafted Convention. These phenomena
include: 1) inroads on tort and contract law: Private parties can avoid
possible tort litigation by drafting contracts, and they can avoid civil
litigation of their contracts by including a provision for alternate dis-
pute resolution, which could be mandatory and binding; 2) Criminali-
zation of torts: Public parties (governments) can declare certain
conduct criminal and can, in some cases, permit nonprofit associ-
tions to stand in the shoes of the government in prosecuting those
crimes; 3) Technological prevention of torts and breaches of contract:
In the case of web-related activities, there are technological "end-
runs" that content owners\textsuperscript{15} and distributors may devise to thwart ac-
tivities that are undesirable to the content owners, but for which there
might be no clear civil liability. Governments, too, can use technol-
ogy in such a way that private disputes and dissent are minimized or
controlled; 4) Non-participation: Governments can choose not to sign
on to an international convention on jurisdiction and enforcement.
Then their very existence, as well as their actions and omissions, can
affect activities that were supposed to be controlled in some sense by
the convention; and 5) Creation of non-national courts.

We begin, then, by examining the phenomena that might render
any convention less important, particularly in the context of copy-
right, than it might first appear. Underlying this investigation is a de-
sire to identify: areas where a convention would nevertheless retain
its relevance, areas that might be improved by an ideal convention,
and unConventional (literally) methods to enhance the legal frame-
work for a highly interconnected world with ever-decreasing transac-
tion costs.

B. Alternatives to Civil Lawsuits: Alternative Dispute Resolution

The draft Hague Convention addresses civil litigation. It ex-
cludes a few types of claims,\textsuperscript{16} mostly having to do with interpersonal

\textsuperscript{15}. The term "content owners" is used here as shorthand for those who claim a property
interest in something on the web, whether it is a copyright, trademark, domain-name, trade
dress, right of personality, database, or otherwise.

\textsuperscript{16}. Hague, art. 1.2 (1999 Draft):

2. The Convention does not apply to—
   a) the status and legal capacity of natural persons;
   b) maintenance obligations;
   c) matrimonial property regimes and other rights and obligations arising out of
      marriage or similar relationships;
   d) wills and succession;
or family matters. But one exception does affect commercial matters: arbitration. That could be construed as a loophole, and possibly as something that will decrease the importance of any international convention on jurisdiction and enforcement.

Tort and contract claims likely to arise in a commercial context are otherwise covered, at least in theory. But in practice they might escape the Convention. First, contract claims can—by the terms of the contract—be removed from judicial resolution and delivered to the world of arbitration. Second, tort claims can be converted into contract claims, at least when there is a preexisting relationship, by making what would have been an outright sale into a lease or license. The second factor will be discussed here first.

1. The Contractualization of Torts

The contractualization of torts may well circumvent some of the major benefits of the Hague Convention. The tort of copyright infringement is an obvious example of a tort becoming contractualized. Owners of a copyright-protected work who prefer not to rely on domestic infringement laws have an alternative: they can grant licenses instead of making sales. Licenses may have immediate economic and business advantages over outright sales, in addition to the litigation benefit. Licensing contracts, of course, can be subject to Hague rules, but if the drafters have any concern about the vagaries of litigation, they may draft a provision that prevents disputes from reaching the courts.

One of the fundamental benefits of the Dreyfuss-Ginsburg proposal over the draft Hague Convention is that it addresses a subset of such contracts, those that are, in the phrase of that proposal, nonne-

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18. The movement toward licensing rather than selling began before the web was a large presence, arguably as a response to the judicially created first sale doctrine. See Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).
gotiated contracts.\footnote{Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1103.} On the web, the most commonly encountered nonnegotiated contract may be what is known as a clickwrap license.\footnote{More specific comments about these Dreyfuss-Ginsburg proposal provisions are discussed at infra, Section IV.D.} By directly addressing jurisdiction and enforcement of such contracts, the Dreyfuss-Ginsburg proposal seeks to balance, on the one hand, the benefits both sides derive when a contract governs their interactions, and, on the other hand, the detriments to licensees from a clickwrap license. Thus, it has the potential to encourage the use of contracts to improve the position of both parties relative to existing tort law, while at the same time it may be able to avoid routinely validating clauses that unjustifiably benefit licensors. Depending on how the content owners respond to having a convention that may overrule the terms of nonnegotiated contracts, a Hague Convention incorporating this aspect of the Dreyfuss-Ginsburg proposal could give the Convention a stronger reason for being.

On the other hand, the contractualization of torts, whether by clickwrap contracts for copyright owners or otherwise, could mean a massive flight of tort disputes from the court system if those contracts specify alternative dispute resolution, the subject of the next Section.

2. Contractual Provisions Preventing Disputes from Reaching the Courts

Any contract that specifies alternative dispute resolution (ADR) does not need an international convention on jurisdiction and enforcement of foreign judgments. This is so whether or not the parties or the activity are of different nations or no nation at all. Some potential defendants may seek to have the contract nullified or reformed by a court, and so commence judicial proceedings as plaintiffs. Those cases may then invoke the Hague Convention.\footnote{Special problems under the Hague Convention for declaratory judgment actions are discussed infra, Subsection IV.A.2.} The vast majority of disputes over contracts specifying ADR, however, never reach the courts, and so will not be affected by what the Hague Convention does or does not say.

Given that the party drafting the contract can choose the method of dispute resolution, it is likely that a pro-drafter method will be chosen, if one is available. To the extent that mandatory arbitration favors the drafter of the contract, it is likely to be chosen in lieu of the
judicial system. This places the other party at a disadvantage that might not be present in the court system. Since “arbitration and proceedings related thereto” are excluded from the scope of the Hague Convention, this in and of itself makes the Hague Convention potentially less relevant than it would otherwise be.22

Arbitration commenced under a contract negotiated between equals differs from that arising out of a contract between parties of fundamentally different power and means. The former will employ a fairly balanced set of procedural and substantive rules, such as those for picking the arbitrators, determining which law will apply to the transaction, and which side will bear which costs. The latter, as the product of unilateral drafting, may not. The drafters of such an arbitration provision are free to define the method of dispute resolution, and when there is a choice between dispute resolution services, they are most likely to choose the one that offers them the greatest chance of success. If a service is seen as favoring defendants (the nondrafting side) more than its peers do, it is likely to go out of business.23 Additionally, if the dispute resolution is in a specific area, such as credit card chargebacks,24 the drafters become repeat players and gain additional knowledge of how to manipulate the process. The nondrafters rarely understand the underlying rules of the game at the start, and are not likely to be repeat players.

C. Technological “End-Runs”

Technological “end-runs” provide alternatives to litigation not limited to purely web-related activities. For example, a car could cease to work if its payment schedule were not met.25 But the more

22. The 2001 Hague Draft includes the following bracketed language:
   Art. 1.3. This Convention shall not apply to arbitration and proceedings related thereto, nor shall it require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to an arbitration agreement.

Hague Convention, 2001 Draft, supra note 1, art. 1.3.

Thus, there would be no requirement to enforce a judgment if the contract required arbitration without recourse to the legal system.

23. Michael Geist, Cyberlaw, Domain Dispute Bias Goes from Bad to Worse, GLOBE & MAIL, Mar. 7, 2002, B17 (“Montreal-based eResolution Inc. . . . closed its doors for good in December because it could not compete with rivals that tended to favour complainants.”)


familiar examples do relate to the web, and in particular to situations where there is material believed to be protected by copyright.

1. By Content Owners—Encryption and Other Technological Solutions

Those who launch products or services into the stream of E-commerce can encrypt them or otherwise prevent them from being used in ways inconsistent with what the launcher desires. A general term for such preventive mechanisms is digital rights management systems or DRM. For example, a CD could be made to be unplayable on a certain type of computer, or playable but not copyable, or playable only a limited number of times. These technological solutions to undesirable user acts expand the content owners' power beyond those rights recognized by legislatures or courts. They also act as prior restraints, freeing the content owners from having to act affirmatively to stop conduct by resort to the judicial system or ADR. This is an advantage whether or not the user would have incurred liability for those acts. Instead, the burden of challenging the technological limitations is placed on the users' shoulders. They must initiate suit (or ADR, if the launcher has also used contractualization and an ADR clause) to obtain or regain the missing or blocked features.

For example, suppose a business purchases an encrypted E-book in the US, and the encryption software prevents a display of the E-book on any computer other than the one to which it was first downloaded. The seller may harm its own market for the E-book, but it has certainly found a way to abrogate the first sale doctrine of copyright law. While this result could be reached through lobbying and legislative changes, or by contract, the technological method may of-

26. Stephen A. Booth, Access Denied!: How the Recording Industry's New Copy-Protection Schemes Could Keep You from Your Music, SOUND & VISION ONLINE ("Sony DADC says 10 million discs comprising 500 albums have been released with its key2audio system, which prevents PC playback or copying.") (last visited August 20, 2002).

27. See infra Section II.B.

28. The first sale doctrine was codified in the 1976 Copyright Act as 17 U.S.C. § 109(a). Audible.com, an online retailer of downloadable audio books, currently uses a technology similar in purpose and implementation to the one discussed here. Before purchasing an audio book, a customer must create a password-protected account at the Audible.com website. Each audio book electronic file is encrypted in the site's proprietary format so that even after purchase, the user may only play or manage (e.g., download to a portable audio player) a file using Audible.com's proprietary software. The technology built into the software tracks on which computer the user's account is installed and permits the user to play or manage files on that computer only. See generally www.audible.com.
fer the best combination of low cost and high likelihood of enforce-
ability. Under US law, it would be impermissible to break the
encryption.\textsuperscript{29} If the sale was fashioned as a license agreement it might
also be a breach of contract to do so. And if the contract specified
ADR, no court might ever have an opportunity to consider the mat-
ter.

In any case, an international convention addressing court-based
resolution of disputes based on technologically constrainable works
could be forced into early retirement if technological means can com-
pletely prevent much of the behavior that otherwise might have be-
come the subject of litigation. Right now, the technological solutions
are becoming more sophisticated and \textit{more} protected by govern-
ments.\textsuperscript{30} And while few people have the technological ability to
break the "locks," the few who can, wherever they do their work, are
able to distribute the keys globally in an instant. Transborder en-
forcement might then, at least in the short run, become more impor-
tant. But again, given the speed of distribution, content owners
would probably respond technologically, inventing better encryption
rather than abandoning technology in favor of litigation and arbitra-
tion.

The Hague Convention may, nevertheless, continue to have an
important role. First, such technological locks may meet with wide-
spread disfavor in the marketplace and (or because) competitors offer
similar products lock free. Second (and even less likely), govern-
ments in some countries might outlaw the use of locks,\textsuperscript{31} whether to
further access to information or to become a haven for copyright in-
fringement and other things.\textsuperscript{32}

\textsuperscript{29} \textit{Supra} note 12. Under the DMCA, it is possible that such a lock might be permissible
and not legally circumventable even when the underlying work is in the public domain, thereby
defeating the entire point of having a public domain.

\textsuperscript{30} \textit{Id.} In addition, the United States Trade Representative is promoting DMCA-style
legislation overseas through the threat of Super 301 designation. See http://www.ftaa-alca.org/
ftaadraft/eng/draft_e.doc for the export of the DMCA in the Free Trade in the Americas
Agreement.

\textsuperscript{31} For example, foreign countries might consider violating copyright law for educational
use acceptable, even if it is not permissible in a business context. Malaysian Domestic Trade
and Consumer Affairs Minister Muhuyiddin Yassin was quoted as saying, "[F]or educational
purposes and to encourage computer usage, we may consider allowing schools and social
organisations to use pirated software." \textit{Malaysia Says It May Allow Pirated Software in Schools}
at http://sg.tech.yahoo.com/reuters/asia-117456.html (last visited July 29, 2002); see also John
theregister.co.uk/content/4/26423.html.

\textsuperscript{32} \textit{See infra} note 46 and accompanying text.
2. By Content Users—Self-Running Peer-to-Peer Networks

Users, too, may have some weapons to place themselves outside the court system. For example again using copyright infringement as the cause of action of interest, users might establish peer-to-peer networks\(^3\) that do not have a home country.\(^3\) If the creators of the network are not interested in making money from it (such as from advertising) a network could be constructed so that once it was initiated, it would operate without subsequent human control and without a particular computer acting as server or controlling or monitoring the process in any way. It could even be self-sustaining and mutating. The desires of copyright owners to sue a major distributor or deep pocket and obtain an injunction (if not damages) would be stymied.\(^3\)

3. By Governments—National Filters

An international convention on jurisdiction and enforcement might be unimportant for web-related activities if governments become the only Internet service provider ("ISP"). ISPs are the conduits that help convey the digital information from the site that stores the information to the site that requests it. If governments become the ISPs for their national populations, they could limit and monitor the transactions in which their citizens can participate. This is already happening in some countries.\(^3\) If whole nations of consumers and businesses are eliminated from large sectors of the web, the need for

\(^3\) Peer-to-peer networks do not have a centralized server that can be shut down to disable the service. Instead, content providers are linked to content consumers though a potentially vast network of smaller computers. Peer-to-peer (P2P) networks are much like the interstate highway system, where closing one highway does not affect most traffic and for those affected, there are often detours that permit you to get where you want to go. Such networks could be created for socially beneficial uses, such as sharing scholarly articles or public domain works. Subsequent modifications might, however, be viewed by copyright owners as tortious. See Press Release, Electronic Frontier Foundation, EFF Defends MusicCity Peer-to-Peer Technology, November 6, 2001, at http://www.eff.org/IP/P2P/MGM_v_Grokster/20011106_eff_musiccity_pr.html.


\(^3\) This concern has been partially addressed by a recent bill that would permit content owners to hack peer-to-peer networks. At the time this issue went to press, the bill still lacked a number, but the most current version is posted online at http://www.politechbot.com/docs/berman.coble.p2p.final.072502.pdf.

an international convention will decrease. If those nations are, or become, important in world trade as consumers, that decrease could be significant.

D. Criminal Law

A substantial amount of concern about the Hague Convention has centered on the differences among the nations with respect to copyright laws and freedom of speech. Interestingly, these are both areas in which activities that previously were (merely) actionable by private parties are now being subject to criminal sanctions. Copyright infringement in many countries now may subject the infringer to criminal penalties. There is also an increasing trend towards criminalizing different types of speech, including hate speech, political speech, and other types of speech. The laws providing for criminal penalties apply not only to the speaker, but also to the conduits, such as newspapers and websites.

If a website is accessible to hundreds of jurisdictions, it could become subject to hundreds of criminal laws. The Hague Convention does not touch on such things. This means that even if the nonenforcement provisions of the Hague Convention would protect the defendant who reverse engineered a piece of software from civil litigation, or subsequent enforcement of a judgment, it could do nothing to save that party from criminal prosecution in a country with different public policy concerns that enacted laws criminally forbidding reverse engineering.


38. See Mikael Pawlo, Bloody Hard to Run a Forum in Sweden—Lawyer Speaks, REGISTER, Mar. 28, 2002, at http://www.theregister.co.uk/content/6/24632.html. Mikael Pawlo is an associate at Advokatfirman Lindahl, working with Internet law issues for Aftonbladet Nya Medier.

In a recent ruling by the district court of Stockholm, the publisher of the Swedish daily Aftonbladet was found guilty of hate speech and sentenced to a conditional sentence and fines. An anonymous user in a moderated forum on the Aftonbladet website uttered the hate speech.

It has been debated whether the speech was removed from the forum quickly enough or not, but that is an issue not dealt with in this case. According to the court the crime was committed immediately upon publication.

39. See infra Subsections IV.A.2 and IV.C.3.c (discussing the effect of public policy exceptions to enforcement of judgments on the values of uniformity of law and pluralism).
While possibly an extreme example, the *Elcomsoft* case is instructive.40 There a Russian programmer was criminally prosecuted when he came to the US for a conference.41 Had there been an international convention on jurisdiction and enforcement (whether that of the Hague Convention draft or that of the Dreyfuss-Ginsburg proposal), it would not have made one whit of difference.

E. The Civil-Criminal Interface Is Blurring

As copyright and freedom of speech give rise to new crimes, something else is happening, too. Just as assault can be both criminal and civil, many statutorily conferred rights permit both criminal actions by the government and civil actions by those injured. To make it even more complex, in certain countries, such as France, associations that meet certain criteria can gain standing to bring criminal actions, notably in discrimination suits,42 but also against those breaking French language laws.43 The use of the populace as a private police force heightens concerns about efforts to criminalize speech and copyright-related acts.44 If such actions are within the scope of a future draft of the Hague Convention, it will have to address a host of thorny new issues. If such actions are outside the scope of the Convention, then a range of new criminal actions between private parties will be much like civil suits, but without the Convention’s terms having any effect on them.

F. Actors Outside the Reach of the Convention

In any international convention, there is always a fear that non-member jurisdictions will somehow thwart the goals of the members in agreeing to the convention. The threat of nonsignatories is directly related to their power in other areas. For example, for a long time

42. See C. PEN. art. R. 645-2 (French penal code).
43. In certain cases, the victim’s consent is not even needed to bring such a case. Interestingly, class action cases do not exist in this context in France, so such cases must be brought on individual bases.
44. The absence of class actions in France, along with the difficulty of gaining attorney’s fees, makes such actions less enticing for groups that are economically motivated or not well capitalized.
US publishers were able to take advantage of the Berne Convention without the US becoming a party to it. But for a treaty addressing web-related activities, "power" may not mean what it has meant in other contexts. Giving power its usual sense, powerful signatories who wanted the Hague Convention to matter could further that goal by responding to nonsignatories in ways that made them join. Regardless of the power of the nonsignatory (whether a small country the size of Rhode Island or the US itself), economic pressure could be brought to bear to change national law that was inconsistent with the Hague Convention's principles. If the nonsignatory were a large player in world trade, the signatories might grant it concessions to bring it on board or to enhance the value of membership in some way. For example, if the Convention were to include a clause that litigation involving nationals of signatories were treated with "special dispatch" or provided for an efficient transnational appeal process, citizens of the nonsignatory might more strongly urge it to ratify the agreement.

But nonsignatories who did not want to join, and who did not have appreciable power in world trade except as nonsignatories, might be able to circumvent the Convention's goals, regardless of its powerful supporters. Such a prospect could actually encourage some countries to refuse membership in the Convention. Of course, as in so many situations in the international arena, they would only benefit if many other countries did join a convention. The situation would have a prisoner's dilemma quality: if the national advantage from not joining the Convention were such that others are encouraged not to join, the Convention would collapse. There would be a kind of Gresham's Law effect. Gresham's Law stands for the proposition that bad money drives out good. Here, vocal nonjoiners would drive out tentative joiners.

This appears to be the fear among the content owners—the music recording industry, the movie industry, and other entertain-

ment publishing industries. They are concerned that “data havens”\textsuperscript{46} will facilitate the widespread duplication and distribution of copyrighted content by a combination of lax or nonexistent enforcement of copyright laws, or \textit{no} copyright laws, and a refusal to enforce foreign judgments based on foreign copyright laws.\textsuperscript{47} Other types of havens besides data havens are possible, and even likely. One could easily imagine a nonsignatory jurisdiction with laws modeled on the US First Amendment that would be considered a speech haven by European jurisdictions. A privacy haven might also exist, raising substantial legitimate challenges to the Hague Convention’s goals.

Members of the Convention (when there is one and it has members) will be able to use coordinated electronic blockades to fence out nonsignatory havens if the standard weapons of political pressure, trade sanctions, or even physical blockades, do not work. Those weapons might also be used on jurisdictions that are friendly to the havens—providing them with physical necessities such as computers or telecommunications equipment. If the havens are not completely self-sufficient, measures against their trading partners might work. If they do not, the Hague Convention will be far less useful with respect to activities sheltered by the havens.

\textbf{G. International Alternatives of the Future (Nonconventional)}

The future may see other developments that eviscerate the importance of an international convention on jurisdiction and enforcement. One possibility is the creation of a non-nationally-based court system to deal with disputes between parties without an identifiable

\textsuperscript{46} For example, there is a new company called HavenCo. \textit{See generally} www.havenco.com (last visited July 12, 2002). Its story is as follows:

HavenCo has been providing services since May 2000 and is fully operational, offering the world’s most secure managed servers in the world’s only true free market environment, the Principality of Sealand. Our testing period is now over, and we can offer services to all businesses which comply with our Acceptable Use Policy. Setup takes approximately 3–5 days, and dedicated servers in managed colocation, with ample bandwidth, are competitively priced with other secure centers around the world. . . .

The Principality of Sealand is a former World War II anti-aircraft military fortress in the North Sea. Only authorized persons directly involved in the HavenCo project are permitted to land on the island. The Sealand Government is ideal for web business, as there are no direct reporting or registration requirements.\textit{Id.}

\textsuperscript{47} Data havens that are members of the Convention could at least invoke Article 28(f) of the Draft Convention on Jurisdiction and Foreign Judgments, \textit{supra} note 3, stating a public policy in favor of the most expansive language permitted by the Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994.
domicile, or concerning disputes about subject matter that lacks a connection to any geographic location.

Such a system might be attractive to companies that are the product of international mergers. These companies may be more nonnational than bi- or tri-national. For example, a company like DaimlerChrysler may become with the passage of time neither American nor German in its culture and expectations; a company like Reed-Elsevier may be neither as Dutch nor as British as its component parts were. Such organizations may want to have a court system that employs what they see as the best from everywhere. They could agree among themselves to create such courts for the purpose of resolving disputes between themselves. Organizations with a constituent entity from a common law country might prefer a system based on court-created precedent. ADR would not serve that purpose very well because, among other things, its decisions are often not rendered in the format of a reasoned judicial opinion and are frequently kept confidential. ICANN, although much maligned in its present incarnation,\(^\text{48}\) may be a harbinger of such institutionalized nonnational dispute resolution systems. They may build on the substance that the Hague drafters have struggled with, but at the same time they may render the Hague itself less important.

**H. Does It Matter or Not?**

Lawyers so often like the belt-and-suspenders approach. It may be wisest to continue to try to perfect the Hague Convention, and to employ as much creativity and intelligence as possible to make it meet the goals it should, even while knowing that the forces enumerated in this Part (as well, no doubt, as in other works) could render it less important, at least as it applies to copyright. Also, as noted above, the creators or enforcers of the alternatives to the Hague Convention may look to it for guidance (or to drafts, if there never is an “it”). The next Parts of this Article, therefore, address, first, the values the Hague should embody, and second, some of the specific terms of the draft and the Dreyfuss-Ginsburg proposal.

III. IF THE HAGUE CONVENTION DOES MATTER, WHAT VALUES SHOULD INFORM IT?

On the assumption that a new Hague Convention could matter, if not of itself then as a useful guide for other alternatives, the values that ought to be fostered by the Convention should be identified. This exercise may clarify which proposed provisions in existing drafts and proposals are better than others. It can also illuminate the sorts of provisions that have the greatest potential to solidify and expand support for any convention.

The values, in our view, are *uniformity, predictability, pluralism* and *openness*. Briefly, we define these terms as follows:

**Uniformity**: treating similarly situated parties similarly. In connection with enforcement of foreign judgments, it is similar to comity and reciprocity but not exactly identical with either. It is both more global and less bilateral than reciprocity, and more legal and less equitable than comity. The concept of *uniformity* offers courts the flexibility to treat similarly situated parties similarly, while permitting parties to urge that in a particular situation the dissimilarities are stronger and different treatment is appropriate.

**Predictability**: providing some degree of certainty (defining the realm of possibilities, though not the specifics of them, nor the odds) so that people contemplating an activity or observing an undesired event will have some idea of what the outcome will be if there is a lawsuit and a subsequent enforcement action. For example, *predictability* is enhanced by a largely uniform set of procedural rules.

**Pluralism**: respecting the differences in the legal systems of different countries, procedural as well as substantive, statutory as well as regulatory, custom, and the *absence* of statutes. This value has two benefits, a practical one and a philosophical one. The practical one is that by valuing *pluralism*, the Convention may be less objectionable to a wider range of countries, and will therefore be more likely to be

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49. Although many of the issues raised in this Section might minimize or negate the applicability of the Hague Convention and the Dreyfuss-Ginsburg proposal to digital information goods, it still is an important area for the control of analog information goods and other torts and contracts not as easily controlled through nonnegotiated contracts, mandatory arbitration, and criminal law as the digital goods discussed throughout this Article.

50. THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW 178 (2d ed. 1990). It is more than comity, because comity implies that the enforcing court is acting completely voluntarily.

51. It is not solely the reciprocity of a bilateral agreement's "I only enforce your judgments if you enforce mine."
widely ratified. The philosophical one is similar to that of "federalism" and "the states as laboratories" in the US. Over time, a solution favored in one country or group of countries may prove to be less beneficial than a solution favored elsewhere. If total uniformity is imposed, it will be impossible to "run the experiment" to make such a determination.

Openness: maintaining open electronic borders as well as being "open for business" as much as possible. In the bricks and mortar world, this is analogous to (1) removing barriers to trade between countries, and (2) having long hours and multiple locations. With regard to the first, the electronic world has more ways than customs, duties and taxation to close borders, even though its transaction costs may be a small fraction of their counterparts in the physical world. With regard to the second, the electronic world already provides "24/7" access but can close the door in ways that require no human intervention. Explicitly valuing openness may prevent efforts to create, in the electronic world, unnecessary parallels to the physical world.\(^{52}\)

These four values differ in the ways they would affect the drafting of an international convention on jurisdiction and enforcement. The values of uniformity and predictability can be embodied in the language of specific provisions. That is, those values revolve around litigation—actual or potential. The value of pluralism may lead to specific language, but may lead also to omissions in the Convention. Pluralism has a broader compass than uniformity or predictability and it is less tied to litigation.

The value of openness is the broadest: it relates to the world environment in which the actors do whatever they are doing (and most of the time that is not litigation). It is a value that can affect how and what the drafters choose to draft, but it mostly does that negatively, by identifying how certain language or provisions might foster the closing, rather than the opening, of electronic borders and doors. The value of openness may therefore suggest the deletion or redrafting of provisions that are facially conducive to uniformity, predictability and pluralism. Openness may be the hardest value to maintain in a convention drafted with a focus on decreasing the risks of the

\(^{52}\) For example, consider a system of electronic stamping: software that inserts in an electronic message the zip code and country of origin of the sender, and permits recipients to see the stamp when the message arrives. If a country recognized a cause of action making senders whose messages lack stamps liable to recipients, then providing jurisdiction and enforcement against foreign senders would adversely affect open E-commerce.
inherently risky process of litigation. Even though most actors only rarely resort to litigation to resolve disputes, the choices made to harmonize the rules for jurisdiction and enforcement could chill or freeze entire avenues of electronic activity.

We next explore these four values more fully, to illuminate some of the problems the drafters of an optimal convention will face.

A. Uniformity

For an international convention to be successful, it must be perceived as fair to all parties. To achieve that goal, burdens and benefits should be allocated fairly. If a US citizen successfully sues a French citizen in France on a cause of action that is recognized in both the US and French legal systems, and then seeks to enforce the judgment in the US, the rules about whether to accept the original basis of jurisdiction and whether to enforce the judgment should be the same as they would be if the nationalities of the courts and parties were reversed. We call this uniformity. It combines the notions of comity and reciprocity, concepts that have long informed the law of international enforcement of judgments. "Reciprocity" suggests a relationship between two parties, rather than a communal relationship, and "comity" is a more voluntary relationship that does not as directly address rules setting out bases for jurisdiction. "Uniformity" is meant to be more flexible than either of the other terms.

The desire for uniformity is central to the initial discussions surrounding the Hague Convention draft. Current law regarding the enforcement of foreign judgments is asymmetric. The US has a long tradition of enforcing foreign judgments on the basis of international comity.53 At the start of the Hague Convention negotiations, the US was seeking more uniform enforcement of US judgments abroad.54 Other jurisdictions were generally refusing to enforce US judgments because US courts took jurisdiction on too slim a basis55 or because the US remedy was not something the enforcing court could have


54. Brand, supra note 53.

55. When civil law courts choose not to enforce US judgments, it is often because they reject the US basis of initial jurisdiction, such as "doing business" and "tag jurisdiction." See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(2)(a) (1986) (rejecting tag jurisdiction).
awarded had it heard the original suit. To achieve greater uniformity in enforcement, signatories have to agree upon the bases of jurisdiction first.56 This is in part why a convention on enforcement must, as a necessary precondition, solve the jurisdiction issue by creating some uniformity.57

1. Uniformity and “Nationality Shopping”

Asymmetric enforcement of foreign judgments has the potential to harm the economies of enforcing countries and enhance those of nonenforcing ones. This is true whether the judgments are for money damages or for injunctions. If companies perceive that there is a real risk that their assets could be seized to satisfy foreign judgments, they may choose to relocate their assets to nonenforcing countries. If they perceive that there is a real risk that they could be shut down in their home country by the enforcement of a foreign injunction, they may choose to operate in a nonenforcing country. The presence of uniformity in a well-subscribed international legal system would reduce the incentive for nationality shopping.

Businesses that might be affected include both those that are considered legitimate (for example, manufacturers of generally safe but sometimes dangerous products, such as firecrackers or makers of new drugs or therapeutic devices) as well as those that are less legitimate (for example, sellers of snake oil or video pirates). Both types of businesses might try to find a country whose domestic laws would prevent them from being sued at all—perhaps because their laws prevent foreigners from suing nationals at all, or because they do not have a cause of action for product liability or copyright infringement. If the country also refused to be a member of an international convention, it would probably not enforce judgments of foreign courts against one of its nationals. Such a country would become the nationality of choice—as well as a desirable place to squirrel assets.58

Large multinational corporations with assets in numerous foreign jurisdictions may not see a need to alter their behavior, but smaller


57. Although absolute uniformity would require concrete lists of mandatory and impermissible grounds for jurisdiction, a gray list of permissible bases for jurisdiction could also be used; all signatories would have to agree to enforce judgments where the jurisdiction had been predicated on a basis from the list of permissibles, unless there was a separate reason supporting refusal.

58. See supra note 46 and accompanying text.
companies might. Without a convention, there could be an exodus of assets, businesses or both, from the enforcing countries—such as the US—to the nonenforcing countries. If a convention were adopted by many but not all countries, there might still be an exodus to nonmember states.59

2. Uniformity at Risk? The Public Policy Exception to Enforcement

Other actions and inactions of both members and nonmembers might also thwart global uniformity. Nonmembers might refuse to take jurisdiction over any cases with foreign parties (whether initial actions or enforcement actions). Nonmembers are also, perhaps, more likely to have laws, customs or policies embodying distinctive norms that would lead their courts to refuse enforcement of foreign judgments even when their national laws permitted some measure of enforcement.60 Nevertheless, assuming Gresham's law does not apply and a critical mass of signatories is achieved, countries who have not joined and whose policies are harming uniformity can be dealt with in other ways.61

Member countries, too, could reduce the level of uniformity in the global legal system. They might find a loophole on which to base wholesale refusal to enforce certain types of judgments or judgments issued by a particular jurisdiction. Assuming the convention included agreed-upon bases of jurisdiction, the most likely such loophole would be a public policy exception. Such an exception would further the goal of pluralism62 but, if overused, could undercut uniformity.63 A convention that sought absolute uniformity would lack such an exception, but would totally sacrifice pluralism. Substantial uniformity is therefore preferable to absolute uniformity.

Absolute uniformity of enforcement of foreign judgments is undesirable because national public policies will sometimes trump the policy favoring uniformity. Indeed, public policy is a well-settled exception to foreign enforcement.64 This is almost axiomatic, since en-

59. See supra Section II.E.
60. See infra Section III.C.
61. See supra note 46 and accompanying text.
62. See infra Section III.C.
63. See supra Section III.A.
64. Robert J. Sharpe, The Enforcement of Foreign Judgments, in DEBTOR-CREDITOR LAW: PRACTICE AND DOCTRINE 684–85 (M.A. Springman & Eric Gertner eds., 1985). In the United States context, see RESTATEMENT OF CONFLICT OF LAWS § 612 (1934) ("No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.").
forcement of a foreign judgment is (at least in the common law view of legal matters) an equitable issue.\textsuperscript{65} A court sitting in equity must do justice and must consider matters affecting the community, not just the parties.

The public policy exception has been widely recognized in other statutes and conventions concerning a wide array of topics. In the context of money judgments, for example, a substantial majority of US states\textsuperscript{66} have adopted the Uniform Foreign Money-Judgment Recognition Act.\textsuperscript{67} Those states agree to enforce foreign money judgments that are "final," "conclusive" and "enforceable where rendered,"\textsuperscript{68} but there are stated conditions by which the state's courts may refuse to recognize the judgment. One of those reasons is that "the [cause of action][claim for relief] on which the judgment is based is repugnant to the public policy of [the] state."\textsuperscript{69}

In the world of the web, there have already been instances of national laws that, to foreign eyes, are surprising. Many involve criminal, rather than civil, liability\textsuperscript{70} and so would not have been affected by the Hague Convention had it already been ratified. Still, these criminal prosecutions shed light on situations where the public policy exception might be invoked to prevent enforcement of a foreign judgment. In one well-publicized case, Yahoo encountered trouble with a French criminal statute\textsuperscript{71} that prohibits the sale of Nazi objects.\textsuperscript{72} Yahoo was forced to either police its auction website or make the Nazi artifact part of the site off limits to French citizens. In another case, criminal prosecution under the US's new Digital Millennium Copyright Act\textsuperscript{73} was used to stop foreign activities on the web.\textsuperscript{74}

\textsuperscript{65} "Comity—the respect that sovereign nations... owe each other—is a traditional, although in the nature of things a rather vague, consideration in the exercise of equitable discretion." Philips Med. Sys. Int'l B.V. v. Bruetman, 8 F.3d 600, 604 (7th Cir. 1993).


\textsuperscript{67} UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT OF 1962, 13 U.L.A. 80 (Supp. 1998) [hereinafter UFMJRA].

\textsuperscript{68} Id. § 2.

\textsuperscript{69} Id. § 4(b)(3). The bracketed language in this section includes two alternatives with one to be selected later in the drafting process.

\textsuperscript{70} See supra Sections II.D, E.

\textsuperscript{71} See supra Section II.E.


An example of a civil action that falls into this category is Germany's long-standing but recently repealed ban on comparative advertising, which also had the potential to affect global E-commerce.

But these are the exceptions. For many situations, the substantive law applicable to the behavior or events that form the basis for the cause of action is essentially universal. Examples include car accidents, breach of contract claims, or civil assault claims. These will most often be essentially the same in both the original forum country and the enforcing country. If substantially uniform grounds for jurisdiction and enforcement can be agreed upon, the Convention has the potential to gain momentum in its search for supporters and signatories.

B. Predictability

Predictability is necessary because an international agreement that does not permit parties to predict the likely effect of their legal and business actions will deter all but a few actors from the very kinds of activity—things having to do with the Internet—that are assumed here to be socially desirable and conducive to the good of everyone everywhere. (The undeterred few may include the most risk loving, the most compulsive, those with nothing to lose and those with no other choice.) The Convention must be as predictable as possible to gain the confidence of, and win support from, the maximum number of potential litigants, legislators, judges, lobbyists, trade representatives, governments, etc. First, the Convention should ensure that people are able to make informed decisions about whether or not to pursue various courses of action. Second, the Convention should ensure that people feel comfortable that they will always be able to make such decisions intelligently (if they ever need to) because the surprises are kept to an acceptable level.

To reach a predictable result there should be both substantive and procedural standards known to all parties at the outset. If the assertion of jurisdiction and the enforcement of judgments is what will happen "all other things being equal," then substantive predictability will flow from explicit statements in the Convention identifying the exceptions. The current proposals for such exceptions are discussed

74. See supra note 40 concerning Elcom distributing E-book related software in the US.
75. See Case C-126/91, Schutzverband gegen Unwesen in der Wirtschaft eV v. Yves Rocher GmbH, 1993 E.C.R. I-2361 (discussing the overbroad nature of German advertising laws in banning comparative advertising that is not misleading).
in the Section IV, below. Procedural predictability will flow from explicit international standards for procedural exceptions, such as due process or lack of judicial bias.

Procedural predictability in enforcement depends in part on substantive predictability in jurisdiction. Website owners want to be able to predict whether the actions of their sites will subject them to the jurisdiction of a particular country. If, under the harmonized rules, their websites’ mere existence cannot alone be the basis for jurisdiction in every country with a modem, and if their assets are all located in their home country, then they will have no reason to fear foreign enforcement of judgments. After all, what is the possibility of a court improperly taking jurisdiction, then issuing a judgment, and then, in an action for enforcement in another country where they do have assets, the second court ignoring their objections that the first court lacked jurisdiction to issue the judgment?

If, however, the jurisdiction rules are unpredictable, the website owner may rightly fear enforcement at home of an improper judgment entered by a foreign court. Potential defendants who want to stay in business will then have no choice but to try to keep abreast of the frequently changing rules of jurisdiction over websites throughout the world. None but the biggest multinational corporations are likely to be able to do this. Smaller innovators who cannot allay the fears of stockholders or potential investors might be frozen out. A convention with greater predictability would decrease risk and uncertainty, thereby encouraging investment in E-commerce in general and multinational E-commerce initiatives in particular.

C. Pluralism

A unified international legal system with trans- or nonnational courts and a single set of substantive and procedural laws and rules would have a high degree of uniformity and predictability. Everyone would know what to expect because all the world’s legal disputes would be tested by the same rule set. Borders would lose their importance and national character would become irrelevant. But there

76. See infra notes 167–70.
77. The scope of the Hague Convention is extremely broad, dealing with both jurisdiction and enforcement of judgments. If the Convention needs to be scaled back, a Convention limited to establishing uniform and predictable rules for jurisdiction and choice of laws in the electronic environment could be a worthwhile enterprise.
is little demand in the world as yet for a totally homogenized legal culture.

The value of pluralism permits individual nations to determine what is most important to them so that they can preserve what they hold most dear and harmonize away the rest. Pluralism is, therefore, a value that an international convention should honor. This is necessary, of course, to gain supporters: nations are not willing yet to surrender their sovereignty completely on the issues of jurisdiction or enforcement, nor to allow other countries' substantive law to be legitimized when it is contrary to the home country's law. But pluralism is also important on a philosophical level, regardless of its expediency.

1. The Nation-State As a Necessary Laboratory

The US's system of federalism values state sovereignty, states' rights and the ability of the states to try different solutions for legal and policy matters rather than imposing a uniform solution across the country. Most Americans, especially Americans who have completed a law degree, find the arguments in favor of such pluralism quite compelling, and the authors of this Article are no different. The metaphor most often associated with this outlook is that the states are "laboratories." Society can run "experiments" in social policy by having the laws be different in Michigan from what they are in New York or Louisiana.78

Nations are laboratories to an even greater degree because their legal systems differ from one another: civil v. common law, for example. In addition, their substantive laws vary, even in the relatively harmonized area of copyright. Examples from the specific to the general are easy to identify. At one end of that continuum is legislation (or lack thereof) concerning colorization of movies. The French had a very different view of the benefits of this technology than did the Americans.79 Whether to protect database compilers as copyright owners is an example of a policy with greater breadth. The Europe-

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ans saw this as a good thing, the US has not agreed. At the most general level, whether to have protection for copyright at all may be a national choice. Pluralism provides information on which to make the debate of scholars and historians less speculative and more based on reality.

In a world with a single legal system, there would be no opportunity to see how these differences play out for the citizens of the countries involved, or for the world. Governments as laboratories may provide more anecdotal evidence than empirical data, but that does not necessarily diminish the influence of the experiments. If the world had a single global legal culture, far more would be lost than gained. As new ideas, technologies and historical events challenge laws developed in earlier times, a variety of approaches may need to be tried before the optimal solution is found.

2. Law As Culture Bearer

A legal system embodies and perpetuates the values of the society in which it was created and in which it evolves. A culture that places a high value on individual property rights would have a fairly broad intellectual property regime and would generally honor freedom of contract. A culture that validates a high expectation of individual privacy would make different compromises with property rights than one that viewed privacy as less important. Some cultural values receive legislative support; others find their protectors in actions of the executive or decisions in the court system. Whether or not those with lobbying power dominate the legislative process, the legal system reflects the culture both in the process of making laws and in their substance.

The ability to survey the world's legal systems and compare other countries to one's own can, for the cultural majority, reinforce the legitimacy of the choices made. Cultural minorities, meanwhile, may find fuel for persuasive arguments for changing the status quo in the existence and success of laws they agree with in other jurisdictions. Additionally, cross-cultural understanding may improve

80. See supra note 13.
81. See supra note 46 (discussing “HavenCo”).
83. In extreme cases, individuals can "nation shop" by moving where the legal system is more parallel to their own personal values, in effect voting with their feet.
through a greater understanding of why different nations have made different legal choices. Explicitly placing a high value on legal pluralism has direct benefits for individuals and nations as well as for the world as a whole.

D. Openness

A convention that addresses jurisdiction and enforcement is obviously about litigation. The values of uniformity and predictability also focus on litigation, on what individuals, businesses, and countries want and expect from, and are willing to provide in, their judicial systems. The goal is to reduce litigation both by facilitating resolution of disputes prior to suit as well as encouraging settlement of existing suits.

The value of pluralism transcends litigation and acts as a check on an over-commitment to uniformity and predictability. The last value, openness (the free flow of goods, services, and information over the web, without borders constructed by public or private actors), checks the cross-border effect of pluralism, so that the laws of a single jurisdiction do not spread automatically beyond its borders.

Openness is a value that countries interested in having international agreements are likely to see as important to their nationals, too. A uniform, predictable system that is respectful of pluralism (one that routinely enforces foreign judgments) could encourage anti-openness behavior that might lessen such countries' support for the convention. For example, plaintiffs would choose to sue defendants in jurisdictions with the most pro-plaintiff laws. To counter that, potential defendants would avoid being accessible in distant jurisdictions for fear of such laws. The net effect would be that by encouraging pluralism, actors who saw themselves as potential litigants could begin to re-create national borders in the electronic environment. Such borders might well be unnecessary and due less to a real threat than to an aversion to imagined risk, but would still harm openness.

In an international convention on jurisdiction and enforcement, openness may be easier to address by its absence, or by reducing threats to its existence, than by its presence. Generally speaking, openness is lost when transaction costs become so high—or are feared to be so high—that the web-related activities are discouraged. We
will use the word "fences" to refer to barriers that close electronic borders.84

To understand how a convention can deter fencing and foster openness we will next consider various kinds of fences, and who will build them. The most obvious examples are private E-commerce companies building fences by blocking access to their website, using a filter that screens out users such as those who are not paying members, those with undesired Internet Protocol ("IP") addresses, or those from a particular jurisdiction.85 Sovereigns, too, may build fences by enacting laws or setting policies that prevent citizens from accessing certain sites or types of information. Sovereigns may act in response to lobbying by powerful E-commerce actors with a presence in the sovereign's territory, but their fence building may also reflect the culture or philosophy of the nation or a powerful segment of its society. Drafters of a good Convention need to anticipate fence building and create an environment where it is kept to a minimum.86 Fencing may be an appropriate method to avoid civil causes of action under laws that are known and foreign (in the sense of unfamiliar and dissimilar from the actor's own legal system), but overfencing due to less rational fears about civil litigation in the abstract and its risks can be discouraged. Fencing has many applications outside of the Hague

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84. There are substantial social costs to fences. For example, an individual blocked from a medical information website might become sicker, an individual blocked from a museum site might not be inspired to create new works that would enrich society, and a company wanting to purchase a widget might not be able to find it. Because of copyright as well as human variety and interest, much on the web may only be available from a single source. This makes limiting access (on a pay-per-view basis, for example) easier to accomplish. This loss of info-diversity on the web could quickly become substantial. Fencing also diminishes some of the benefits of the medium, particularly those that improve understanding between different cultures and nations. The "State of the Internet Report," produced jointly by the US Internet Council and International Technology & Trade Associates Inc. (ITTA), found that new users—mainly from the South Pacific region—helped shrink the share of native English speakers online to roughly 45 percent of the estimated total of 500 million Web users. US INTERNET COUNCIL AND INT'L TECH. & TRADE ASSOC'S., INC., STATE OF THE INTERNET (3d ed. 2001), available at http://www.itta.com/internet2001.exsum.htm.

85. Kathleen M. Sullivan, First Amendment Intermediaries in the Age of Cyberspace, 45 UCLA L. REV. 1653, 1676 (1998). These active measures are in contrast to monitoring or tracking, in which movement is tracked, but not blocked. The IP address identifies the specific computer connected to the Internet and locates it relative to other computers on the Internet, much the way a street number, street name, city name, state, and country identifies the location of a house in the physical world.

86. There will always be tension between openness and pluralism but philosophical, as well as practical, coexistence is worth striving for.
Convention, as well, such as to avoid known criminal liability in a foreign jurisdiction.87

Openness and overfencing are incompatible, but openness combined with uniformity, predictability and pluralism means that the jurisdictional and enforcement rules should not encourage underfencing. Openness respects fencing done in good faith and with a reasonable expectation of effectiveness.88 Before understanding how to strike this balance, one must understand the various types of fencing and their underlying rationales.

1. Private Fences in E-Commerce: Gatekeepers, Cashiers, Bouncers, Language Barriers, and Warning Signs

   a. Why: Fear of Foreign Litigation

   Website owners without fenced sites potentially subject themselves to jurisdiction in hundreds of nations simultaneously. They might be sued for libel in Britain, sending spam in Denmark,89 sale of copyright-protected goods in the US, etc. Whether the website owner does not understand the other countries' substantive laws or jurisdictional rules, does not want to have to bother understanding them, does know about them or finds them dangerous or costly, prudent owners may decide that the best course is to fence out any jurisdiction where the costs of litigation are likely to outweigh the benefits of operating in that jurisdiction.

   b. Where: Fencing at the Door or the Cash Register?

   The location of these different kinds of fences may be at the electronic equivalent of the door or that of the cash register. The fence at the door prevents would-be customers from entering at all; the fence at the cash register prevents them from completing the purchase. Sites that fence at the door can make themselves inaccessible to indi-

87. Criminal liability, as discussed in Part II, supra, is not something a Hague Convention is designed to address, but increasing criminalization of traditionally civil actions is another area of tension between openness and pluralism.

88. Applying the goal of openness to the draft Hague Convention and the Dreyfuss-Ginsburg proposal is discussed infra Part IV.

89. The Danish Marketing Practices Act, Consolidated Act No. 699, July, 17 2000, available at http://www.fs.dk/uk/acts/ukmfl.htm (banning unsolicited E-mail); see generally http://www.euro.cauce.org/en/countries/c_dk.html#MPA (last visited July 30, 2002) (discussing the Danish Marketing Practices Act, stating that E-mail in Denmark "has been placed on the same footing as fax and automated calling systems. A sender of advertising material via these media must have the prior consent of the recipient.")
viduals or groups. Sites that fence at the cash register can permit access to the site, but then refuse to trade when they find out where the would-be customer is from or who the customer is.

It is not all that hard for webmasters to make sure their websites are not accessible from particular jurisdictions. They can do it themselves, or they can purchase software that enables the webpage's server to trace an accessing party's location and to exclude those users who appear to come from particular jurisdictions. Website owners could fence by jurisdiction at the cash register by asking for the user's country, viewing the shipping address, the zip code, or the E-mail address to which product shipping information is to be sent. If it were a forbidden country, the customer would be told that the transaction could not be completed. Although none of these methods are foolproof and all are subject to fraud, they are all likely to be considered good faith fencing efforts.

c. Who: Fencing Out Individuals or Whole Jurisdictions

This fence could apply to all visitors from outside the website's domicile, nationals of a specific foreign jurisdiction, or specific individuals or groups of individuals (for example, a blacklist of those known to be particularly litigious). Individuals can be blocked at the door by IP address, but this would not prevent the same individual using another computer or an anonymizer. A credit card number, shipping address, or another account number could be used to block an individual at the cash register.

d. How: Picket Fences and Concrete Walls

Webmasters can use different types of fences, low-level protection for general fear of liability and high-level protection for imminent threat of suit. These fences can be used at either the door or the cash register and with entire jurisdictions or with individuals.

One easy form of low-level protection for website owners is to use a language that is unique to a particular country. For example, a

90. See generally, Michael A. Geist, Is There a There There? Towards Greater Certainty for Internet Jurisdiction, 16 BERKELEY TECH. L.J. 1345 (2001).
91. This is generally achieved through IP lookups that use the unique IP address to determine the user's location. Several companies, such as Quova (www.quova.com) and Akamai (www.akamai.com) offer such services.
92. An anonymizer is a service that permits someone using the web to not be linked to a particular IP address or individual by routing the uploads and downloads through an intermediary site.
Swedish company whose site is only in Swedish would not be likely to be sued in Turkey, even though the site was accessible in Turkey. Such fencing-by-language-barrier, however, could be rendered ineffective if universal translation software becomes better and omnipresent.

Other examples of low-level protection include the following: placing printed warnings on the site but not otherwise enforcing what the warning says, requiring users to confess their location or affiliation but not checking their veracity, screening users on the basis of the country code in their E-mail address, or limiting transactions to a particular currency. While persistent users could undoubtedly glide through the gaps in these picket fences, the fences might be enough to save the website owner from subjecting itself to jurisdiction in, or enforcement of judgments from, the courts of the fenced-out country.

Higher-security fences would provide more protection from feared jurisdiction or enforcement. They would also, however, require more effort or sophisticated software. For example, a website might require verifiable information, such as a passport number or export license, and would check it prior to physical or electronic shipment. It could also require some type of electronic certificate representing one’s country of origin or a digital document that had been notarized.

Private fencing is an important tool in E-commerce that acts as a buffer when openness and pluralism collide. By better understanding why sites fence, the Convention can better discourage under- and overfencing.

2. Public Fences

Sovereigns have fencing mechanisms not available to private entities. Often their fences will take the form of criminal legislation. Although that is outside the scope of the Hague Convention, such fencing is nevertheless important because it might stimulate private fencing.

93. The same could probably not be said if the site was in English rather than Swedish. English is so widely understood that its use could be construed as an attempt to solicit business on a global scope.
94. See infra Subsection IV.A.1.b; see also infra note 154 and accompanying text. Instead of relying on overfencing to prevent foreign courts from asserting jurisdiction over a website, see Subsection IV.A.1.c for a proposal that achieves the same goal while eliminating the incentive to overfence.
Sovereigns also have reasons to fence that do not motivate private parties. Governments might fence to protect the national economy: they might block electronic competition in order to protect domestic industries, just as they erect trade barriers to build up nonelectronic businesses. Governments also might want to protect their citizens from social harm, blocking websites on political, religious, or any other grounds. Domestically operated sites may be subject to criminal prosecution, but foreign sites may not be, depending on the nation’s jurisdictional statutes. So governments may seek to block undesirable sites (or all foreign sites) by having all Internet traffic come through a single state-controlled proxy server or otherwise control the only Internet access to sites outside the country.

3. Blocking the Street: ISPs and Liability

When ISPs act as (passive) conduits rather than as (active) website owners, they convey vast amounts of Internet traffic of all sorts. In the US, people accept that ISPs do not know, and should not know, what is traveling through their network, and should not be liable for the information conveyed over their networks. In part, this reflects a concern for—and a valuing of—privacy rights. The long-standing belief of Americans—dating back at least to Ben Franklin, inventor of the penny post—is that mail is confidential. Citizens should not read someone else’s mail, and certainly the government must not, unless it gets a warrant. ISPs are mail carriers, and even downloading documents from the web, while not personal E-mail, has


96. See supra Subsection II.C.3.

97. Internet traffic continues to double every ten to fourteen months. Jason Krause, Has the Net Stopped Growing?, INDUSTRY STANDARD, June 26, 2001. In 2001, Time Magazine reported that every forty-five minutes, AT&T transmitted a quantity of data—meaning everything from E-mail to streaming video—equal to thirty-four times the contents of the Library of Congress. John Greenwald, Busted by Broadband, TIME, Mar. 26, 2001, at 34. Later that same year, a consulting company, Ryan, Hankin & Kent, San Francisco, forecast that Internet traffic would increase by a factor of forty-three between 1999 and 2003 (from 350,000 terabytes per month to over 15 million terabytes per month). Tom Grahame & David Kathan, Internet Fuels Shocking Load Requests, ELECTRICAL WORLD, May-June 2001, at 25.


99. United States v. Maxwell, 45 M.J. 406, 419 (C.A.A.F. 1996) (“Since an expectation of privacy exists in e-mail transmissions made on the AOL service, we must look at the validity of the warrant in order to determine whether it was properly obtained and executed.”)

100. Anne Fadiman, Mail, 69 AM. SCHOLAR 7 (2000).
much in common with receiving mail. Americans don’t want the mail carrier to be a cop and don’t want ISPs to be cops. Other countries have dealt with ISP liability in different ways, but have generally granted them some type of immunity from suit.\textsuperscript{101}

At the same time, passive ISPs are particularly vulnerable to suit because they generally have deeper pockets than website owners and are easier to find and sue. The cost of policing what the ISP is passively forwarding to another ISP would be massive, without any substantial benefits that cannot be achieved in other ways. Aside from the practical benefits of absolving passive conduits of liability, removing such liability also removes their incentive to fence by source, location, or other overinclusive criteria, out of fear of suit.

4. The Benefits and Drawbacks of Fencing

Fence makers undoubtedly weigh the costs and benefits of erecting the fence. A fence on a private website that keeps out whole nations of consumers obviously costs the website owner the profits from all those foregone sales. There may also be additional costs, such as loss of first mover advantage\textsuperscript{102} or harm to a trademark otherwise known worldwide.\textsuperscript{103} The benefits of greater certainty about litigation and less need to budget for litigation may, however, outweigh those costs.

The benefits of public fencing may be less about money and more about preserving national values or norms. Still there are costs. Nations preventing their citizens from gaining access to sites from around the world will have a less informed and potentially less productive and innovative population. A less educated populace will be less well equipped to play an active role in the global economy.

The proponents of an international convention on jurisdiction and enforcement likely will want to deter overfencing to the extent possible. By understanding the mechanisms for fencing, and the costs and benefits, it may be easier to fashion better deterrents, to justify


\textsuperscript{102} The first mover advantage means that the first to market with a particular product or service in a market becomes known for that product or service and will only lose market share to later comers who make improvements.

\textsuperscript{103} If a trademark owner creates a prominent mark on a global scale, but avoids doing business in a specific country, someone else in that country—whether a competitor or not—might start using the mark due to its recognition and good will.
the preference for *pluralism*, and to increase the acceptability of the convention as a whole.

IV. HOW THE DRAFT HAGUE CONVENTION AND DREYFUSS-GINSBURG PROPOSAL STACK UP: WHAT IS RIGHT (AND WRONG) WITH THE HAGUE CONVENTION AND DREYFUSS-GINSBURG PROPOSAL

For those situations where an international agreement on jurisdiction and enforcement of judgments might matter, what should that agreement say? We next evaluate the Hague Convention and the Dreyfuss-Ginsburg proposal in light of the values of uniformity, predictability, pluralism and openness (discussed in the preceding section). We consider litigation in general, and then address the special situation created by clickwrap contracts.

Like the draft Hague Convention and the Dreyfuss-Ginsburg proposal, we discuss both jurisdiction and enforcement. Jurisdiction is mostly a concern in what we will call the "first country," the one where an initial judgment on the merits is sought. Enforcement is largely an issue for the "second country"—the country whose courts are asked to enforce the first country's judgment. The second country's courts are not so likely to have a jurisdiction problem, because the second country is probably where the first-action loser has substantial assets or at least business operations, or, in the case of *in rem* jurisdiction, where the first-action winner has located the thing (goods, perhaps) over which enforcement of the judgment is sought. 104

A. Choice of First Country: Jurisdiction

The US and Europe 105 take very different approaches to jurisdiction. 106 The Brussels and Lugano Conventions 107 try to assign "exclu-

104. Thus, jurisdiction over the person or *in rem* is very likely to be present in the second country.

105. Unfortunately, a discussion of how legal systems outside the US and Europe deal with jurisdiction is beyond the scope of this Article. It will, however, be essential to consider the rules of all potential signatories surrounding asserting jurisdiction for the Hague Convention, or any other global jurisdiction agreement, to be a success. It will be particularly important to consider the rules and needs of developing countries for the convention to gain acceptance beyond the most developed nations of the world.

106. The comparison lacks total symmetry because US law applies among the states of a single country, while the comparable provisions in Europe apply among countries.

sive jurisdiction” to a single country, most often the defendant’s domicile.108 In cases dealing with “registered rights,” only the country of registration has jurisdiction.109 An exception is the case of torts, in which the court where the injury occurred can have jurisdiction. The European goal of exclusivity, however, can become a loophole when there is more than one defendant. Then any country that is the proper jurisdiction for one defendant is proper for all.110

In contrast, US law permits multiple state and federal courts to assert jurisdiction over the same matter. Under US law, courts in many geographical locations may have jurisdiction but (and the “buts” are big ones) the court must have proper jurisdiction over each defendant when there is more than one;111 it must also be a proper venue for each defendant.112 Where the court does have personal jurisdiction and venue over all the parties, a challenge (a motion to
dismiss or transfer) can still be brought under the doctrine of *forum non conveniens*. The possibility of such motions, and their increasingly frequent success, as well as something of a guarantee that the jurisdictional choice will be fair. Under the Brussels Convention, there is nothing analogous to venue or to *forum non conveniens*. Thus, the exceptions to the exclusive jurisdiction and domicile rules provide little protection to defendants sued in distant foreign forums in multidefendant litigation.

1. The Proposals

   a. The Hague Convention

   The Hague Convention is a hybrid convention, incorporating some features of the US system and some features of the Brussels Convention. It deals with the multitude of possible bases for jurisdiction by creating white, gray, and black lists of required, permissible and impermissible grounds for jurisdiction respectively. Some US grounds, such as "doing business" and "tag jurisdiction" are deemed impermissible. Jurisdiction is proper if there is personal jurisdiction over the defendant(s), but like article 5(3) of the Brussels Convention, it permits courts located where the injury occurred to assert jurisdiction. Due to the possibility of multiple courts having jurisdiction, the Hague Convention adopts a form of *forum non conveniens* in article 22. Choosing the required, permissible, and impermissible bases of jurisdiction will be an astoundingly complex issue for a convention with as many signatories from diverse legal systems as the Hague Convention. The lists will have to consider a wide array of scenarios such as defective hairdryers purchased online, libel on a

114. Robert C. Casad, Jurisdiction in Civil Actions at the End of the Twentieth Century: *Forum Conveniens and Forum Non Conveniens*, 7 TUL. J. INT'L & COMP. L. 91, 106 (1999). When foreign cases are dismissed on *forum non conveniens* grounds, one study showed only 4 percent of those cases were subsequently brought in another jurisdiction. David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 419 (1987). 
116. Tag jurisdiction is based on serving defendants when they are in the State, regardless of their domicile. Burnham v. Superior Court, 495 U.S. 604 (1990). It is rarely used in the United States and is disfavored in many other countries. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* 307 cmt. (1987). 
118. *Id.* art. 10.
website, identity theft, and civil assault actions. In addition, there are competing special interests in each potential signatory country that have strong feelings about which jurisdictional bases should be impermissible.

Harmonizing the bases of jurisdiction is vital to the Hague effort. Without it, enforcing jurisdictions may tend to scrutinize the assertion of jurisdiction by the first court in light of their own jurisdictional rules, and may opt for nonenforcement more regularly. The wider diversity of legal systems outside the EU further adds to the complications faced by the Brussels Convention drafters. Web-related causes of action make harmonizing jurisdictional rules even more difficult, especially if a quasi-exclusive jurisdiction model like the Brussels Convention is the starting point. Finally, the challenge of multiple defendant suits involving multiple websites raises many of the same concerns discussed in the context of the Brussels Convention.119

b. The Dreyfuss-Ginsburg Proposal: Infringement Actions

The Dreyfuss-Ginsburg proposal begins by adopting the rule shared by Brussels and US law that a defendant can be sued in its domicile,120 a provision not likely to be controversial. Since the Dreyfuss-Ginsburg proposal focuses on intellectual property, its jurisdictional rules for infringement cases are particularly important. Infringement actions are discussed specifically in article 6. When determining what court has jurisdiction when infringement by a web-related activity is claimed, a threshold issue is: where is a website "located"? The provisions of the Dreyfuss-Ginsburg proposal's infringement jurisdiction article move away from the exclusive jurisdiction model and focus on activities rather than the entity's location. Article 6 focuses on activities that can be pinned down to a particular

119. We have similar concerns regarding the consolidation provisions of the Dreyfuss-Ginsburg proposal, article 13. See Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1080-81 (art. 13).

120. See id. at 1075 (art. 3):
1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.
2. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State—
   a. where it has its statutory seat,
   b. under whose law it was incorporated or formed,
   c. where it has its central administration, or
   d. where it has its principal place of business.

Id.
geographical location to avoid exposing potential defendants to suit in every jurisdiction in which a website is viewed, for example.121

Article 6.1 sets forth three permissible grounds for jurisdiction:

Article 6 Infringement Actions
1. A plaintiff may bring an infringement action in the courts of—
   a. any State where defendant substantially acted (including preparatory acts) in furtherance of the alleged infringement, or
   b. any State to which the alleged infringement was intentionally directed, including those States for which defendant took no reasonable steps to avoid acting in or directing activity to that State, or
   c. any State in which the alleged infringement foreseeably occurred unless the defendant took reasonable steps to avoid acting in or directing activity to that State.122

The first two clauses contain phrases that attempt to curb jurisdiction over activities that reach the four corners of the earth solely because the web does, as long as the potential defendant has exhibited no special desire to be in that particular corner.

In article 6.1(a), the phrase “substantially acted” is limiting, but “preparatory acts” may remove some of the limits. The discussion of this article suggests it only applies to affirmative acts by the defendant, such as setting up a server or running the business in a jurisdiction.123 It does not, however, explicitly exclude basing jurisdiction on acts by third parties. For example: consider someone who creates a file-sharing network, permitting users to download the file-sharing software anywhere in the world and then link their computer to the network. If people in Japan add their computers to the network, would article 6.1(a) confer Japanese jurisdiction over the network creator in a suit unrelated the actions of the Japanese linkers? It seems likely that something the network creator did could be construed as a preparatory act, thereby making the network creator liable everywhere the software could be used. Once the network creator makes sure the network is accessible everywhere, infringe-

121. This preference may underlie the statement in the Executive Summary Item 2, that “intangible rights and infringements can be reified in too many locations to make personal jurisdiction an effective limit on potential fora.” Id. at 1069.
122. Id. at 1077 (emphasis added). Articles 6.2 and 6.3 contain limitations so that adjudication on the merits is restricted to the injury upon which jurisdiction is based, unless there is some other basis for jurisdiction for any other causes of action. Id.
123. Id.
ment and therefore jurisdiction could occur anywhere under article 6.1(a).

The official notes on this article present a hypothetical that is somewhat different:

For example, defendant may reside in State A, but make the alleged infringement available to the public through a website located in State B. When jurisdiction is asserted on this basis, the forum is competent to hear all infringement claims arising out of the communication of the infringement from the forum, whatever the territorial extent of the resulting infringements.\textsuperscript{124}

The "forum" presumably refers to State B. Two questions remain: what if defendant and site are in State A, but the infringement is in State B, and the infringement occurs there because of the action of a third party? And perhaps more important, where is a website located? Is it the location of the owner's web-connected computer or is it anywhere anybody else's computer accesses the site? If a user operates a computer that is physically in State B in order to access a site, does that make the site located in State B? An affirmative answer would seem to overexpose network designers and operators to foreign jurisdiction and would serve to discourage openness.

The second ground (article 6.1(b)) confers jurisdiction wherever "the alleged infringement was intentionally directed, including those States for which defendant took no reasonable steps to avoid acting in or directing activity to that State."\textsuperscript{125} This standard is framed in an unusual way, permitting the plaintiff who cannot show positive (infringement-causing) acts by a potential defendant to demonstrate jurisdiction by showing the absence of negative (infringement-avoiding) acts.

The "positive acts" part of the second ground requires that the defendant must have "intentionally directed" infringement to a state. Putting aside how a person can "intentionally direct" an act of copyright infringement "to" a country, the word "intentionally" looks like it protects defendants from suits being filed in unexpected places. Yet maybe this is not the case. For example, is a site in Portuguese intentionally targeted at Brazil? Does it need to take payment in Brazilian currency? If it accepts credit cards, then presumably all currencies handled by major credit cards are possible. Does that make Brazilian infringement "intended"? Some copyright infringe-

\textsuperscript{124} Id. at 1109.
\textsuperscript{125} Id. at 1077 (emphasis added).
ment activities, such as sending a digital copy of a file to another computer, will not require any delivery to Brazil of a physical object (other than streams of electrons or photons). But when a good is sold, would “free shipping worldwide” create the intention to direct infringement to Brazil? Websites employing English that do not require any payment are even more problematic. For example, a library or museum might operate a site that allowed people anywhere in the world to download text or images that the library or museum believed were not copyright protected at all or where the library or museum announced that users were honor bound only to download if they had a defense to any charges of infringement in their home countries (such as fair use in the US).\textsuperscript{126} Would the owner of such a site be subject to jurisdiction everywhere in the world under the “intentionally directed” standard?

Creating a jurisdictional hook based on web-related activity that is “intentionally directed to” countries seems likely to encourage overfencing. The phrase needs to be tempered by the idea that the “intentional directing” standard is not met by simply hooking up to the web. That is an act “intentionally directed” to the world in general, but not, by itself, proof of an intentional direction to any one country in particular. Such a clarification would move this part of the proposal\textsuperscript{127} closer to safeguarding openness and predictability.

But regardless of the breadth of the “intentionally directed” clause when read alone, the “including” clause suggests that “intent” can be proven by proving lack of intent to not do the act: a defendant who “took no” reasonable steps to avoid infringement will be held, for jurisdictional purposes, to have intended to infringe. The use of the language “took no” instead of “failed to take” seems to betray a bias in favor of taking jurisdiction wherever the plaintiff would like. The two phrases are not identical: “failed to take” invokes a condition of some kind of duty on the defendant; “took no” is broader. For example, a defendant without any knowledge (nor duty to obtain that knowledge) that “reasonable steps” were needed, would be guilty of having “taken no steps,” though not necessarily of having “failed to take any” steps. Imagine that a country wants to be a haven for copyright owners and enacts some new pro-owner statutes that have no counterpart anywhere else in the world. A website

\textsuperscript{126} For example, supplying international interlibrary loans, which is permissible under US law, might constitute infringement under the laws of the country of the receiving library.

\textsuperscript{127} Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1077.
owner with no reason to know of the country's new acts will not take any steps to avoid infringing those laws, so the country will have jurisdiction under article 6.1(b). The adjective "reasonable" may not necessarily be construed so that it both invokes the notion of duty to act when one knew or should have known, as well as negates the notion of duty to inquire.\textsuperscript{128} It would reduce the tension between pluralism and openness if the article 6.1(b) standard required actual infringement and direction at that country in particular, rather than generalized access.

The third ground, article 6.1(c), has a structure almost parallel to that of article 6.1(b) but with a twist. Both article 6.1(b) and article 6.1(c) use the phrase "acting in or directing activity to that State," words that cover far more kinds of conduct than simply infringing. While this may assist in keeping the merits of the charge of infringement separate from the jurisdictional issue, it seems inappropriately broad. The charge of infringement must be accepted as true during the jurisdictional analysis, but if it is the basis of jurisdiction, then the examination of the defendant's conduct should be limited to infringement, not to anything that might constitute "acting in" a State, or "directing activity to" it. Such breadth seems calculated to encourage substantial fence building by website owners.

Articles 6.1(b) and 6.1(c) employ a parallel structure, having two clauses, the first of which opens a defendant to jurisdiction if the defendant did something that shows an awareness that it will be operating in that country. Article 6.1(b) requires that an alleged infringement be "intentionally directed to" a country, while article 6.1(c) permits jurisdiction in countries where the "alleged infringement foreseeably occurred."\textsuperscript{129} "Foreseeability" is a loaded word. On the one hand, it suggests that the tort must in some sense have been intentional, or at least that the defendant had knowledge of the existence of the plaintiff's claim to rights in the subject matter. For patent infringement, for example, that could eliminate some causes of action.\textsuperscript{130} On the other hand, courts wishing to gain jurisdiction could

\textsuperscript{128} Even with the Internet and its successors, website owners cannot be expected to keep up-to-date with worldwide copyright law developments, unless they are gluttons for punishment.

\textsuperscript{129} Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1077.

\textsuperscript{130} Under US law a defendant who had no knowledge whatsoever that there was a patent on the thing in question can nevertheless infringe that patent. This is different from copyright:

If 100 monkeys are given 100 word processors and somehow they type out \textit{A Painted House}, John Grisham has no cause of action for copyright infringement because the monkeys did not copy. But if those 100 monkeys are given a fully equipped
liberally construe the word “foreseeable” because any page posted and unfenced on the web could foreseeably be seen anywhere in the world. To the extent that copyright infringement is becoming a matter that everyone must worry about all the time and because, in the realm of text, music and art, the appropriative nature of creation is such that posting almost anything could be infringing at least the copyright owner’s exclusive right to create derivative works, the foreseeability of copyright infringement merely by having a website may be virtually a foregone conclusion.

But article 6.1(b) and 6.1(c) take different tacks in their second clauses. Whereas 6.1(b)’s second clause begins with the word including—that is, conferring jurisdiction in—those cases where a defendant “took no reasonable steps to avoid” infringing, the second clause in 6.1(c) removes jurisdiction with an “unless” clause. Foreseeability of infringement will not create jurisdiction if the defendant “took reasonable steps to avoid” infringement. This phrasing seems like an open invitation to kill openness with defensive overfencing.

Depending on how courts interpret (a) and (b) of article 6.1, paragraph (c) could either be invoked fairly frequently or rarely. Most cases falling under (c) would also seem to fall under (a) or (b), and (a) and (b) have the global reach that (c) may lack. If the usual rules of statutory interpretation were applied, then 6.1(a) and 6.1(b) should require high levels of action and intent respectively, and (c) should require neither. Paragraph (c), then, would appear to be included as an olfactory test: where the acts and intent are not terrible but the defendant’s behavior still has a fishy odor, jurisdiction will lie. Yet the breadth of (c) is such that if there is agreement that (c) is a good basis for jurisdiction, then (a) and (b) are not necessary.

pharmaceutical lab and somehow they make Claritin, Schering does have a cause of action for patent infringement (that is, if Schering has claims in a patent that is in force and that “reads on” the monkeys’ composition or process). The fact that the monkeys did not “copy” is irrelevant.


131. With the Internet, things as simple as forwarding E-mail, posting deep links, and viewing framed content all raise complex copyright issues.


133. Both article 6.1(b) and article 6.1(c) use the phrase “acting in or directing activity to that State,” not “infringing.” Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1077. As explained supra p.1259, however, the added breadth of the former phrase may introduce more bias than fairness in jurisdictional analysis. This term also covers far more than “infringing” and may be less useful for purposes of discussion of these proposed provisions.

134. Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1077.
Articles 6.2 and 6.3 of the Dreyfuss-Ginsburg proposal limit 6.1(b) and all of 6.1, respectively. Again, they are in somewhat parallel form, but there are interesting differences as well as some distinctive similarities:

[6.2] If an action is brought in the courts of a State only on the basis of the intentional direction of the alleged infringement to that State, then those courts shall have jurisdiction only in respect of the injury arising out of unauthorized use occurring in that State, unless the injured person has his habitual residence or principal place of business in that State.

[6.3] If an action is brought in the courts of a State only on the basis of the occurrence of the infringement in that State, then those courts shall have jurisdiction only in respect of the injury arising out of unauthorized use occurring in that State.135

The notable similarity is the phrase “the injury arising out of unauthorized use.” It is unclear if a court would interpret it as narrower or broader than “the infringement,”136 so the latter might be preferable for clarity’s sake.

It is also interesting to note that 6.2 has the “unless” clause but 6.3 does not. If “intentional direction” permits a court to adjudicate matters other than infringement (or “injury arising out of the unauthorized use” if that is less than infringement), why should “the occurrence of the infringement” give the court less latitude than does “intentional direction”? This difference suggests that the authors of the proposal see the defendant’s conduct in (c) as less culpable than that of (b) yet “intentional direction” would seem to refer to a possibly incomplete action, albeit one where there was “culpable” intent, while “occurrence” refers to an unequivocally completed action, albeit possibly done innocently. If these two provisions are meant to

135. Id.
136. It would appear that the “injury” is certainly the “infringement.” If “use” is also a synonym for “infringement” (that is, if one cannot infringe except by “using”), then what does the longer phrase do? On the other hand, “use” may be narrower than “infringement.” It certainly is in US patent law, where there is a quintet of verbs for actions that, if not authorized by the patent owner, can subject the doer to liability for infringement. The five verbs are: “make, use, offer to sell or sell, or import.” See e.g., 35 U.S.C. §§ 154(a)(1), 271(a). Prior to changes enacted in connection with GATT in 1994, the quintet was the trio of “make, use or sell.” Either way, “using” has never been the only action that literally and directly infringed a patent. Thus, the injury arising out of unauthorized use might not be the injury for which the patent owner seeks redress. A competitor who simply manufactured a machine, for example, might perform very few unauthorized uses other than for quality control purposes, but might do a substantial amount of damage via unauthorized “making” and “selling.” Even a software patent embodied in some downloadable software sold over the web might not be “used” by the patent owner’s competitor so much as “sold,” after having been made (in the sense of the computer code) only once and “used” by the competitor not at all except during testing. Thus the phrase in 6.2 and 6.3 would nullify the court’s jurisdiction almost entirely.
limit jurisdiction when the cause of action is for enforcement of a judgment from another state, rather than adjudication on the substance of a claim, this approach could be interpreted in very different ways by different courts, thereby thwarting predictability.

c. Ideas for a Somewhat Different Approach

In an international convention limited to litigation over web-related activities, it would seem that the system might be made more open and more predictable (and less litigious, too), if jurisdiction were not permitted until the parties had conferred (or the potential plaintiff had made a reasonable effort to have a conference, and could demonstrate that the potential defendant had resisted or been unreachable). Such a system would be predicated on website owners (the primary group expected to be defendants) providing a way for the public to communicate with them. Registering a domain name generally does just that. People who thought they had a cause of action against a (foreign) website owner would have to make a good-faith effort to notify that person and permit the site to take remedial action first, as a prerequisite to jurisdiction. This would eliminate the incentive to overfence while fostering pluralism and facilitating suits against unresponsive defendants.

2. Two “First” Countries: The Special Case of Declaratory Judgment Actions

If there is no single forum with exclusive jurisdiction, a potential plaintiff will likely forum shop. It might choose the court nearest its headquarters or the one most likely to apply favorable laws. Both the Hague Convention and the Dreyfuss-Ginsburg proposal assume that the court “first seized” (meaning the court whose lawsuit was filed earlier) is probably the right court, but do provide exceptions.

137. One analogy that comes to mind is the requirement in the Federal Rules of Civil Procedure that motions cannot be filed until after an attempt has been made to confer and resolve the issue. FED. R. CIV. P. 37(a)(2)(A).

138. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002) (permitting alternate service by E-mail).

139. The phrase used is “the court first seized.” The Dreyfuss-Ginsburg proposal goes into detail about determining the date a court is seized. See Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1080 (art. 12.7).

7. For the purpose of this Article, a court shall be deemed to be seized—

a. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
They also give defendants some protection against an onerous choice of forum by a plaintiff, because both employ *forum non conveniens*-type language.\(^4\) However, what they give to defendants there they take away by disfavoring first actions if they are for a declaratory judgment.\(^3\)

One reason for this is a fear that a potential defendant will initiate a declaratory judgment action in a court that is known to move very slowly, in order to buy time while the plaintiff is powerless. In

\[\text{b. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.}\]

*Id.*


140. One of the exceptions to the preference for the first court is when the second court has exclusive jurisdiction—for example, if a registered right (trademark) is at issue and the first court is not the jurisdiction in which the contested mark was issued. Hague Convention, 2001 Draft, *supra* note 1, art. 12; Dreyfuss-Ginsburg Draft Convention, *supra* note 5, at 1081 (art. 14.2).


143. Hague Convention article 21(6) states:

> If in the action before the court first seized the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seized—
> 
> a. the provisions of paragraphs 1 to 5 [defining *lis pendens* procedures] above shall not apply to the court second seized; and
> 
> b. the court first seized shall suspend the proceedings at the request of a party if the court second seized is expected to render a decision capable of being recognised under the Convention.

Hague Convention, 2001 Draft, *supra* note 1, art. 21(6).

Article 12.5, *Lis Pendens*, of the Dreyfuss-Ginsburg proposal is almost identical:

> 5. If in the action before the court first seized, the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seized
> 
> a. the provisions of paragraphs 1–4 above shall not apply to the court second seized, unless the declaratory judgment plaintiff has advanced its claim as part of an action initiated before the court first seized by the declaratory judgment defendant, and
> 
> b. the court first seized shall suspend the proceedings at the request of a party if the court second seized is expected to render a decision capable of being recognized under the Convention.

*Dreyfuss-Ginsburg Draft Convention, supra* note 5, at 1080 (art. 12.5). Both provisions suffer from the infelicitous use of the preposition "before" with the object "court" *not* to mean "before in time" but to mean "before the court" in the sense of "in front of a judge in a courtroom setting." This forces many a reader to have to read the provision several times. The opening clause, "If in the action before the court first seized, the plaintiff seeks a determination" might perhaps be changed to something like, "If the plaintiff in the first action (defined as that brought in the court 'first seized') seeks only a determination. . . ."
the European Community, this tactic has been called an "Italian torpedo" or "Belgian torpedo" because both countries have slow legal systems. Another fear is that whichever court hears the action will choose to apply its own law. The underlying assumption that this choice will be less appropriate in a declaratory judgment action than an action for substantive relief seems biased in favor of traditional plaintiffs.

Consider this situation: the declaratory judgment action is brought (1) first chronologically, (2) in a country with a reasonably fast legal system, and (3) in the country that has the closest relationship to the case. The action for substantive relief is brought (1) second chronologically, (2) in a country that has a "rocket docket," and (3) in a country with a more tenuous relationship to the case. In such a situation, there should be no reason to remove the case from the court first seized, even though it was for a declaratory judgment action.

To improve uniformity and predictability, the presumption in favor of the first court seized should not be burst simply because the first action is for a declaratory judgment. Instead, it should be rebuttable. Proceedings should not be suspended in favor of a later-filed action pending in a court in a different country unless the second court has a proper basis for jurisdiction and has a substantially greater connection to the dispute than the first court. Because of the "torpedo" experience in Europe, the presumption might also be rebuttable "where justice requires"—to cover such cases as where the first country's courts will prevent the declaratory judgment defendants/substantive relief plaintiffs from having their underlying action adjudicated in a timely fashion.

A more objective standard would replace the weighing of the connections between the various forums and the cause of action with an examination only of the connection to the first court. Unless that connection was insubstantial, the first-filed action would proceed.

The idea here is to avoid outlandish forum shopping by either party, and to encourage forum choice that makes sense on the facts of the case without making any assumptions about which status (sub-

145. See infra Section IV.B.
146. Franzosi, supra note 144.
147. For an example of how such a standard could be applied, see the jurisprudence surrounding Uniform Commercial Code article 1-105 and the "reasonable relation" test.
stantive relief plaintiff or declaratory judgment plaintiff) is more likely to make a choice that is legitimate. The values of uniformity and pluralism may be given somewhat more weight here than the value of predictability, but the value of openness is also respected.

B. Choice of Law (and Using Enforcement As a Stick)

In web-related causes of action, there may be a dispute about what country's laws to apply. Indeed, no matter who it is who is forum shopping, whether a plaintiff with several forums to choose from or a potential defendant deciding to institute a declaratory judgment action before the plaintiffs file their substantive suit, one factor that will be considered is the substantive law likely to be chosen in each possible forum. Litigants undoubtedly assume that most judges will resolve any doubts about which law to apply in favor of their own. It is a reasonable assumption. It is the law they are most comfortable with and they may also be convinced that it is normatively the "best," based on acculturation, training, or even an extensive study of comparative law.

Each forum has and is permitted, consistent with the Hague Convention, to have its own rules to determine the choice of law. It makes sense to encourage judges to apply the law of the country with the greatest connection to the action even when it is not the forum, and the Dreyfuss-Ginsburg proposal embraces this idea in an intriguing way. It does not break with the Hague Convention. Countries may still have their own choice of law rules, and those rules will be applied for cases subject to the Hague Convention/Dreyfuss-Ginsburg proposal just as they are applied to any other cases brought in that country's courts. But the choice of law determination may have an impact beyond the initial lawsuit if an enforcement action is likely. That is because the Dreyfuss-Ginsburg proposal uses enforcement as a stick (or a small wand in the hand of a party wishing to convince a court to make a particular choice of law). The section on


149. An alternative would be for the convention to include a general choice of law rule instead of addressing the issue only in connection with enforcement actions. This has some appeal, since it would enhance predictability. Of course it would lead to courts having two sets of choice of law rules—one for Hague-governed cases, and one for other international cases. But this may not be so troubling. In the vast majority of cases, the two will very likely yield the same result. Where they diverge, enforcing courts probably will defer to the decisions made by the original courts.
enforcement—there is no section on choice of law itself, though it is mentioned in the Executive Summary—permits nonenforcement of judgments when the choice of law by the original court is "arbitrary or unreasonable." 150

If a court that properly has jurisdiction chooses to apply its own law, it seems highly unlikely that another court will determine that the first court failed the "arbitrary and unreasonable" test. Judges are not, and should not be, suspicious of the wisdom and decency of other judges, even if they are in "enemy" countries. Branding fellow judges "arbitrary and unreasonable" is likely to be distasteful, especially to non-appellate judges. There will thus be a subtle pressure on the judge in the second country to brush off any motion against enforcement based on choice of law unless it is truly egregious. Moreover, evaluation of another court's choice of law analysis is difficult: imagine an Indian court trying to determine whether a German court correctly applied German choice of law rules when it decided to apply German law instead of Portuguese. The "arbitrary or unreasonable" standard may simply telegraph to the judge that deep analysis is unnecessary.

Another way the Dreyfuss-Ginsburg proposal seeks to affect the choice of law decision is in the suggestion that the court choose a law with "sufficient significant relationship" to the dispute. 151 Although this is fine in principle, once websites are accessible everywhere, every country in which a site is viewed could arguably be considered related to the dispute, negating this as a narrowing factor.

A better standard might be one where a court could refuse to enforce a judgment from another country when the judgment was predicated on a choice of law that was not "justified." This would encourage judgment-issuing courts to provide an explanation for the law they chose. Only if that explanation were entirely lacking or fundamentally incoherent would the enforcing court be permitted to reopen the entire choice of law analysis.

150. Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1086 (art. 25.1(h)).
151. Id. (art. 25.1(h)).
C. Choice of Second Country: Enforcement of Judgments

1. The Goal of Routine Enforcement

After a court in a first country has rendered a judgment, the plaintiff may wish to enforce the judgment in another jurisdiction. The Hague Convention begins with the presumption that enforcement is the rule, specifically prohibits a review on the merits by the second country's courts, and then carves out some exceptions. The idea is to make enforcement routine, honoring the values of uniformity and predictability at some possible expense to pluralism.

An underlying rationale for permitting transnational enforcement actions is judicial economy: if a court has already held a full trial on the merits of the action and come to a decision, then another court should not have to do the same thing all over again. Another rationale is justice or fairness (and economy) to the winning party (what we may call "winner take all"). The winner in the first court has gone through the expense of time, money and energy to prevail in the first action, and should not have to do the same thing all over again.

The concept of routine enforcement of foreign judgments may feel simultaneously familiar and surprising to US actors. "Expected, but not engraved in stone" might better represent our expectations. On the one hand, in common law jurisprudence an action to enforce another court's judgment is directed to the equity jurisdiction of the second court. Routine and equity can coexist, but not completely peacefully. Equity suggests a case-by-case, all-the-facts-and-circumstances kind of analysis, including, perhaps, *sua sponte* decisions by the judge. Routine suggests that no analysis is necessary or, anyway, that none will be done. On the other hand, the US Constitution has the Full Faith and Credit Clause, which ensures that enforcement among the states is expected—subject to the defendant in the

152. Hague, *supra* note 1, art. 28.2: "Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin." This is one of the places where the Hague uses the "thou shalt not" model rather than the "encouragement" model.


154. See *Fed. R. Civ. P.* 60(b).

second action showing lack of equity. The principle of comity between the state and federal court systems cements our expectations about mutual enforcement. Comity also governs courts in the federal system enforcing judgments of courts of other countries. In addition, many states have enacted the Uniform Foreign Money-Judgments Recognition Act. Thus, US actors thinking about their rights against others, rights they might have to assert in foreign courts, might guess that those judgments would routinely be enforceable in the US. If they thought about their own vulnerability to a judgment an opponent might win and then might seek to enforce against the US actors' foreign assets (if they had any) and if they assumed a symmetric world, they would also expect routine enforcement around the world. What they might not appreciate is that foreign countries may well refuse to enforce US judgments, not because of lack of reciprocity, but because those countries reject the jurisdictional philosophy of US courts.

Reciprocal enforcement presupposes that both the judgment-issuing court and the judgment-enforcing court share basic views about all relevant matters leading up to the judgment, in particular the substantive law of the liability issues. That is often not true. But because a strong motive to have a convention at all arises from the fairly universal view that not having to retry every case on the merits is better than its opposite, the Convention needs to confront the disparity between assumption and reality. To respect pluralism while striving for uniformity, the enforcing court should accept the findings of the original court, determine which law would apply had the case been brought in the enforcing jurisdiction, and determine what remedies would have been available. By accepting the findings of the original court, the enforcing court can often avoid retrying the case and losing the judicial economy while respecting the cultural basis for rejecting certain types of damages.

The supposition that the judgment-issuing and judgment-enforcing courts are applying parallel laws is true in at least one situation: where the subject matter of the lawsuit is covered by TRIPs


157. UFMJRA, supra note 67. Thirty of the fifty states, as well as the District of Columbia and the US Virgin Islands, have adopted the UFMJRA, including almost all the most populous ones: California, New York, Texas, Illinois, Massachusetts, Pennsylvania, Ohio, Michigan. Uniform Law Comm’rs, supra note 66.

158. TRIPs Agreement, supra note 8; International Union for the Protection of Literary and Artistic Works, signed at Berne, Sept. 9, 1896 (additional act and declaration signed at Paris,
and both courts are in countries that belong to TRIPs. In such cases, one would expect the enforcing court to find laws that map closely to the laws applied in the original case. This plus the TRIPs enforcement obligation means that transnational enforcement, at least at the TRIPs baseline if not above it, could become routine.

2. What Is Being Enforced?

An action for enforcement asks the second court to respect *everything* the first court did, starting with its initial decision (or assumption, if there is no challenge) that it had jurisdiction over the defendant, and continuing all the way to whatever remedy is under consideration in the enforcement action. The action for enforcement thus is based on many things that may or may not be worthy of respect, and may or may not have been done the way courts in the second country would have done them if the action had been brought there originally. There is a whole "tree" of issues (litigated or not) where national differences may be lurking. One way to identify the branches is to think of a lawsuit both in the abstract but also chronologically from complaint to judgment, and to make successive divisions. First there is "procedure" and "substance." "Procedure," which is rife with "due process" considerations, can be divided in turn between "jurisdiction" and "the process thereafter." "The process thereafter" can be divided between "theory" and "practice": "theory" applies to whether the rules in general are fair; "practice" looks at whether what happened in the specific case was fair. "Substance" (which is that which is not procedure) can be divided into "liability" and "remedies." "Liability" examines the substantive law governing the cause of action. "Remedies" can be divided into "money" and "non-money."159

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159. See infra tbl. 1 ("Issue Tree").
Other or additional divisions may be possible or better but in any case the idea is to observe which branches are given specific attention by the Hague Convention and the Dreyfuss-Ginsburg proposal, and which are not. One question to ponder is whether the difference in attention reflects sensible choices about when to honor pluralism and when to honor predictability (and judicial economy), or simply reflects ease of articulation, or embodies the concerns of a specific constituency, or is what is politically necessary for a workable multilateral convention on the topic. If the difference in attention is not justified by what is at stake for the parties or the nations (whose laws will be disrespected), what changes should be made?

Every branch of the tree may embody deeply held national beliefs, but undoubtedly some branches could be the subject of compromise and harmonization for countries motivated by the promise of the benefits of the Convention. Other branches represent potential compromises that nations are not willing to give up. The position on the tree does not determine whether that branch is harmonizable or not.

A convention that values pluralism\(^{160}\) will need to tread lightly when it addresses the enforcement of foreign judgments as well as the harmonization of substantive law. Compromises will be needed with regard to defining those bases of jurisdiction that will be acceptable internationally, as well as identifying largely acceptable types of remedies. The proposals acknowledge the need for pluralism in substantive law and choice of law, but boldly attempt to harmonize the similarly challenging area of procedural law.

\(^{160}\) See supra Section III.C.
3. Provisions for Nonenforcement

a. The Hague Approach

The Hague Convention’s enforcement provisions, articles 26161 and 28,162 are written in “thou shalt not” (or “thou may not”) rather than “thou shalt” or “thou ought” form. This may be a reflection of the preference that enforcement should be routine and nonenforcement be the exception. It is also the way the UFMJRA is phrased.163

161. Hague article 26:
A judgment based on a ground of jurisdiction which conflicts with Article 4, 5, 7, 8 or 12, or whose application is prohibited by virtue of Article 18, shall not be recognised or enforced.
The footnote for this provision, Hague footnote 149, states that the cross-referenced articles are still under consideration. The currently referenced articles are: 4: agreements on choice of forum; 5: time limits on contesting jurisdiction; 7: consumer contracts; 8: employment contracts; 12: exclusive jurisdiction for proceedings in rem, declaratory judgments concerning “legal persons,” and those involving registered rights; and 18: prohibited grounds of jurisdiction. Two of these articles, 4 and 7, are discussed below at Subsections IV.D.1 and IV.D.2, respectively.

162. Hague Convention, 2001 Draft, supra note 1, art. 28.
Article 28 Grounds for refusal of recognition or enforcement
1. Recognition or enforcement of a judgment may be refused [only] if—
   a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seized in accordance with Article 21;
   b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed;
   [c) the [judgment results from] proceedings [in the State of origin were] incompatible with fundamental principles of procedure of the State addressed, [including the right of each party to be heard by an impartial and independent court];
   d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence [, or was not notified in accordance with [an applicable international convention] [the domestic rules of law of the State where such notification took place]], unless the defendant entered an appearance and presented his case without contesting the matter of notification in the court of origin, provided that the law of that court permits objection to the matter of notification and the defendant did not object.
   e) the judgment was obtained by fraud in connection with a matter of procedure;
   f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

Id.

163. Section 4 of the UFMJRA provides:
SECTION 4. [Grounds for Non-recognition]
(a) A foreign judgment is not conclusive if
   (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
   (2) the foreign court did not have personal jurisdiction over the defendant; or
   (3) the foreign court did not have jurisdiction over the subject matter.
(b) A foreign judgment need not be recognized if
The similarities and differences between the UFMJRA and the Hague, and the reasons behind them, are beyond the scope of this Article, but the straightforward comparison is instructive.\footnote{164}

Article 26 covers situations (mostly defined by the subject matter of the suit) where the assertion of jurisdiction would conflict with some other provision of the Convention.\footnote{165} A few of these—contracts specifying choice of law, and contracts involving consumers—are discussed below.\footnote{166}

General grounds for nonenforcement are enumerated in article 28.\footnote{167} Article 28.1(a) and (b) address what may be the easy cases: those where either a parallel action on the merits is pending in the same country as that in which the enforcement action has been brought (28.1(a)) or where there are two conflicting judgments (28.1(b)). Article 28.1(d) addresses due process concerns at the complaint stage. Article 28.1(e) permits nonenforcement in cases of procedural fraud. Although 28.1(d) and 28.1(e) are important, they require inquiry into the facts of a particular case and thus are unlikely to conflict with national procedural rules.

The two other grounds, 28.1(c) and 28.1(f) are the ones that come closest to a requirement simply that enforcement be “equita-
ble” (or rather, “not inequitable”) while also honoring pluralism. Article 28.1(c) permits nonenforcement where the proceedings in the first country were “incompatible with fundamental principles of procedure” of the second country. Article 28.1(f) permits nonenforcement when to do otherwise would be “manifestly incompatible with the public policy” of the second country.

The “procedural incompatibility” clause, article 28.1(c), has not received agreement by the drafters, as shown by the fact that it is completely in brackets: “[c) the [judgment results from] proceedings [in the State of origin were] incompatible with fundamental principles of procedure of the State addressed, [including the right of each party to be heard by an impartial and independent court].”

Article 28.1(c) is an attempt to address the wide variety in rules of civil procedure among the countries likely to be contracting parties to the Convention. It also might reassure citizens of nations who fear they could lose a case because of foreign civil procedure that is unfair but not so bad as to meet the higher standards of procedural fraud (28.1(e)) or “manifest[] incompatib[ility] with the public policy” of the country where the enforcing court is located (28.1(f)). If some version of the first part of 28.1(c) is retained, the second part—specifying as an example of “incompatibility” the absence of an “impartial and independent court”—is in additional brackets. Depending on the generality of any first part that is agreed to, the need to provide the example may be less pressing.168

If the entire procedural incompatibility section is deleted, those who feel they have been the victims of foreign procedure may have two169 fallback provisions. Their case may fall into one of the categories of article 26, but if it does not, then they may be able to argue that “recognition or enforcement [of the judgment tainted by procedural incompatibility] would be manifestly incompatible with the public policy” of the country of the enforcing court (article 28.1(f)). This would broaden the scope of the public policy exception to include procedure as well as substance. That should not be objected to, but the narrowness of the language of 28.1(f) (manifest incompatib-

168. Lurking behind the “impartial and independent court” clause in 28.1(c) may be the concern that some entire court systems may be so flawed that routine non-enforcement is preferable. Such a concern might reflect hubris, arrogance or prejudice on the part of the enforcing court/country, but it also might reflect substantial differences in the worldview between the two legal systems. If the drafters’ lack of agreement jettisons all of 28.1(c), or jettisons this clause, there may still be a need for language to address this specific situation.

169. Or three provisions, if general equitable principles remain available. See supra text accompanying notes 65, 153–54.
ity, the public policy) suggests that defendants will meet with little success when they urge nonenforcement of a judgment founded on procedural flaws unrelated to lack of jurisdiction.\(^{170}\)

### b. The Dreyfuss-Ginsburg Proposal

The Dreyfuss-Ginsburg proposal in articles 24 and 25 follows fairly closely the Hague Convention’s grounds for nonenforcement of foreign judgments.\(^{171}\) It provides due process in connection with procedural incompatibility and the public policy exception, much like the Hague Convention.\(^{172}\) The Dreyfuss-Ginsburg proposal expands into some new areas, however, providing exceptions for nonnegotiated contracts\(^{173}\) and nonenforcement based on choice of law.\(^{174}\)

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170. *See supra* note 161 (quoting Hague art. 26); Art 28.1(f) is discussed further below. *See infra* Subsection IV.C.3.d.

171. The Dreyfuss-Ginsburg proposal says:

- **Article 24. Judgments Not to be Recognized or Enforced**
  - A judgment based on a ground of jurisdiction which conflicts with Articles 4, 5, 7 [or 8], or whose application is prohibited by virtue of Article 16, shall not be recognized or enforced.

- **Article 25. Grounds for Refusal of Recognition or Enforcement**
  1. Recognition or enforcement of a judgment may be refused if—
     a. proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seized in accordance with Article 12 or if consolidated in accordance with Article 13;
     b. the judgment is inconsistent with the judgment of the court first seized, or if the actions were consolidated in accordance with Article 13, the judgment is inconsistent with the judgment of the court of consolidation;
     c. the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable the defendant to arrange for a defense;
     d. the rendering court’s jurisdiction was based on a nonnegotiated contract whose forum designation was unreasonable under Article 4.3.
     e. The judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;
     f. the judgment was obtained by fraud in connection with a matter of procedure;
     g. recognition or enforcement would be manifestly incompatible with the public policy of the State addressed;
     h. where the rendering court’s choice of law was arbitrary or unreasonable, for example, where it applied a law lacking sufficient significant relationship to the dispute. The conformity of the forum to the jurisdictional terms of this Convention does not necessarily, of itself, suffice to establish a significant relationship between its laws and the dispute.
  2. Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.


172. *Compare* Hague Convention, 2001 Draft, *supra* note 1, art. 28.1(c) & (f), *with Dreyfuss-Ginsburg Draft Convention, supra* note 5, at 1086 (arts. 25.1(e) & (g)).

173. *Dreyfuss-Ginsburg Draft Convention, supra* note 5, at 1086 (art. 25.1(d)); *see also infra* text accompanying notes 206–34.
c. The Public Policy Exception and Pluralism

While the Hague Convention and the Dreyfuss-Ginsburg proposal attempt to harmonize procedural rules related to jurisdiction, there is no attempt to harmonize substantive national law. To some extent the Dreyfuss-Ginsburg proposal's requirement of TRIPs membership achieves that, but there will always be variations between countries.\(^{175}\) To balance pluralism with the need to avoid having the most lax or restrictive national law become the global norm, there must be a safety valve. The public policy exception is just that.

The fear is that the valve will be either overused or underused. Among the reasons for underuse are (1) that the legislative history of the Hague Convention showed that the goal was to make enforcement routine, and (2) public policy as applied by civil law courts as \textit{ordre public} is often an even more stringent standard than public policy as interpreted by US courts. Once the conventional wisdom is that the public policy exemption is toothless, it will only be invoked by the most desperate. If it is underinvoked, then national values will suffer whenever monsters created in the laboratories of other nations are enforced elsewhere, effectively exporting bad laws. Additionally, forum shopping for the first country will be encouraged and defensive fencing will increase. These results will be to the detriment of openness, as well as pluralism, although uniformity and predictability could benefit.

The public policy exception may not be able single-handedly to preserve pluralism. Still, trying to define additional exceptions, perhaps topical\(^ {176}\) or geographic\(^ {177}\) exceptions, seems only to complicate

\(^{174}\) Id. (art. 25.1(h)); supra text accompanying notes 232–33 (discussing article 25.1(h)).


\(^{176}\) Topical exceptions could include amending the public policy nonenforcement subsection to permit nonenforcement when “health and safety are at issue.” Dreyfuss-Ginsburg article 31 proposed this in the context of nonenforcement of final injunctions. See Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1088 (art. 31). Other topical exceptions might permit nonenforcement when enforcement would “discourage innovation or basic research” or “would conflict with fundamental social or cultural (or socio-cultural) or policies in the State where enforcement is sought.” The problem with all these examples is that it is hard to know how, when and if courts might apply them. They are as subject as the public policy exception to
matters. Other related standards, such as the exceptions in the Uniform Foreign Money-Judgment Recognition Act\textsuperscript{178} and the judicially constructed public interest or fundamental interest\textsuperscript{179} test might be added or substituted, but they do not seem any better calculated to preventing over- or underuse of the exception while protecting against the exportation of bad laws.

over- and underuse, and to repercussions from singular (in both senses) court decisions that grab the public's attention.

177. If the concern is that some courts have considered sub-federal policy as public policy, Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997), aff'd, 1998 U.S. App. LEXIS 10628, thereby overusing the exception, a solution might be to change the phrase to \textit{public policy or national values}. This broadens the exception from \textit{ordre public} while narrowing it by excluding sub-federal policies. Unfortunately, geographic limitations work no better than topical limitations. Trying to constrain the public policy to the higher threshold of international public policy or national public policy does not improve the exception's ability to limit enforcement of extreme national laws.

178. “A foreign judgment need not be recognized if the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this State.” UFMJRA, \textit{supra} note 67, § 4(b)(3). The bracketed options permit the state to choose one or the other. Most of the states that have enacted the UFMJRA have chosen “cause of action” rather than “claim for relief.” Two have chosen to use both of the bracketed phrases. At least one has substituted “contrary to” for “repugnant to” (Iowa).

The focus on cause of action/claim for relief limits the public policy exception (apparently) to the substantive law applied to liability issues. One distinction between the Hague/Dreyfuss-Ginsburg version and the UFMJRA version is that the phrasing of the Hague/Dreyfuss-Ginsburg version permits a defendant to argue that the particular public policy deserving of respect is embedded in the remedies or even the procedure related to a given judgment.

179. A revised version of article 28 that incorporates these tests could read: “Article 28 Grounds for refusal of recognition or enforcement[:] 1. Recognition or enforcement of a judgment may be refused if: recognition or enforcement would be prejudicial or contrary to important [public] [fundamental] interests of the State addressed.”

United States courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interests. \textit{See} Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), \textit{cert. denied}, 405 U.S. 1017 (1972) (“Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.”); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 931 (D.C. Cir. 1984) (“[A] state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests.”); Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (“[R]equirements for enforcement of a foreign judgment expressed in \textit{Hilton} are that . . . the original claim not violate American public policy, . . . that it not be ‘repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.’” (citations omitted)).

It is assumed that all scenarios that would have met the public policy exception would also meet this one. By escaping the traditionally underused “public policy” rubric, this test might be able to serve as a more effective safety valve to permit nonenforcement when a law does not meet the “public policy” threshold. Additionally, there is less concern about overuse because the interests are required to be both important and public, preventing a private interest or an unimportant interest from meeting this standard. Nonenforcement under article 28.1(f) should be based only on broad societal values, such as promoting research, education, innovation, or competition, rather than protecting the citizens of their jurisdiction. To the extent that public policy exceptions are rarely invoked, the hope is that the important public interests test will serve as an exception with bite.
d. Parsing the Public Policy Exception

Articles 28.1(f) of the Hague Convention and 25.1(g) of the Dreyfuss-Ginsburg proposal both permit a second country’s court to refuse to recognize or enforce a judgment if doing so would be “manifestly incompatible with the public policy of the State addressed.”

The clause employs a very strong adverb, “manifestly,” and a definite article, “the public policy,” to keep the exception narrow. That is in accordance with the idea that transnational enforcement should be routine (and that enforcement should be uniform and predictable). It also suggests that the drafters see underuse of the exception as preferable to overuse.

The use of the definite article “the” for “public policy” might suggest to an observer from another planet that there is some very well-defined group of concepts that anybody who wanted to understand the applicability of this exception could study. Yet we know of no such archive in any country. This detracts from predictability, unless, of course, all players understand the subtext—that the exception should never be used. That could certainly be the case if nobody successfully argues the exception during the early years of the Convention.

If “manifestly” were deleted, or replaced with something milder (“substantially”?), and if “the” were replaced with “a,” the public policy exception would have more teeth. But then the exception might be subject to overuse, with detrimental effects on public perception about uniformity and predictability. Those detriments would, however, likely be short-term, assuming that judges were careful, intelligent and fair in applying the exception, and applied the exception to cases that objective observers would agree are appropriately respectful of pluralism. (For example, the US would not enforce libel judgments that violated the First Amendment and France would not enforce contracts conveying moral rights.)

180. Hague Convention, 2001 Draft, supra note 1, art. 28.1(f); Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1086 (art. 25.1) (emphasis added).

181. To counteract the effect of removing “manifestly” it might be advisable to replace “incompatible” with something stronger and more pointed, such as “inconsistent,” or even to recast the clause to use a verb instead of an adjective, and one that speakers of American English associate with public policy, something like “recognition or enforcement may be refused when recognition or enforcement would violate a public policy of the State addressed.”
Public policy is an amorphous concept, particularly when applied to all substantive and procedural aspects of a foreign legal system. How does one know if a foreign law violates domestic public policy? To help focus this inquiry, it is helpful to look at how the relevant law of the first country differs from the most similar law of the second country. For example, suppose the first country prohibits distribution of tools that can be used for copyright infringement if they have "a substantial likelihood of an infringing use" and the enforcing country has a standard that permits tools that have "a substantial noninfringing use." It is reasonable to suggest that although similar, there is a policy difference between the two. In the first, there is more of a presumption of guilt, whereas in the enforcing country, there is a presumption of innocence. By considering the differences between the laws, the court can better expand upon the policy issues in the case and increase predictability in future cases.

Clearly, if the two laws are identical, very similar, or the latter is broader than the former, then the two countries have similar public policies and enforcement is almost certain. If the enforcing country does not have a similar law, has a narrower law, lacks a law in that area, or has a law with fundamentally different standards or burdens of proof, then the question is whether the difference embodies a public policy of the enforcing jurisdiction. If that is the case, then the enforcing country should consider nonenforcement.

There are, of course, situations where looking for a counterpart law is not all that helpful to the public policy analysis. There may even be some situations where the counterpart analysis points one way but "all the facts and circumstances" suggest the opposite result. This would be most likely to occur when the substantive law would lead to the counterpart analysis result, but an equitable doctrine, such as unclean hands, leads the enforcing court to not enforce the judgment.

A last comfort for plaintiffs is that enforcement is the rule, not the exception, and the language in article 28 employs the permissive may, rather than the mandatory shall. Thus, judges can enforce judgments that are incompatible with an important public interest: they are allowed to do equity in this regard either way.

If the Convention is a success and frequently used, then within a few years sufficient jurisprudence will develop to enhance the predictability of enforcement.
4. Remedies and Their Subsequent Enforcement Transnationally

Like other areas of substantive and procedural law, each nation's law on remedies embodies particular cultural views about litigation and justice, views that may not resonate with everyone all over the world. For example, the US awards punitive damages in some tort cases, issues preliminary injunctions in intellectual property cases with a fair degree of regularity, may grant statutory damages in copyright cases and, in patent cases, may multiply damages by a number between one and three for "willful" infringement. In intellectual property cases, a court may award attorney fees to the prevailing party, including to an accused infringer when the intellectual property rights are invalid and the asserting owner's conduct warrants that remedy. Payment of the other side's attorney fees is otherwise the exception in US jurisprudence, but in Great Britain it is standard. While a US court might be willing to enforce a money judgment for attorney fees entered by a British court, a British court might balk at awarding punitive damages for deliberate copyright infringement, and many countries might be reluctant to enforce any kind of injunction awarded by another country but affecting conduct or things in their own country.

As these examples suggest, remedies can be divided into two and two again: money damages and injunctions are the two main branches. Money damages come in two kinds. First, there are those such as compensatory damages that are widely accepted (or mutually accepted, if we are thinking in terms of a particular case with an issuing court and an enforcing court, rather than the more abstract situation of an international convention). Second, there are those such as punitive damages, or damages for "pain and suffering" that are rare (or in a two-country hypothetical, those with no counterpart in the enforcing country). Injunctions also come in two kinds: provisional ones like preliminary injunctions or temporary restraining orders, and permanent ones issued after a full trial on the merits.

In the discussion that follows, the focus will be on substantive matters (the basis for liability and the determination of the remedy). It will be assumed that there are no procedural defects (jurisdiction; procedures that to the second country look unfamiliar in a bad, unfair, unjust way; actual facts in the particular case that created unfairness or bias). If there were, other provisions of the Hague/Dreyfuss-Ginsburg proposal already provide the loser with leverage to stop enforcement.

a. Noncontroversial Monetary Damages

The situation where "noncontroversial money damages" are at stake is likely to be something like this: A party wins a money judgment compensating it for damages suffered because of the other party's tort or breach of contract. That action happens to have been in a country where the loser does not have sufficient assets, so the winner goes to a country where more assets are located. Routine enforcement makes sense if the substantive law on liability and on damage calculations is quite similar in both countries. But if the cause of action has no counterpart in the second country, then the winner could not have obtained a claim to the loser's second-country assets by suing in the second country directly. This suggests that equity might bar enforcement.

Inasmuch as the existence of a counterpart cause of action can be determined by the second court without having to reopen the whole proceeding, it seems only fair to permit it to make that determination. In situations where the claim has no counterpart, but enforcement would not rise to the level of a public policy or important public interest, the draft Hague Convention and the Dreyfuss-Ginsburg proposal would enforce the judgment. In the intellectual property arena this is not an issue so long as all the signatories are TRIPs members. In the broader context of the Hague Convention, the determination of whether there is a counterpart cause of action or not in the enforcing country could become a frequently contested point. Additionally, enforcing courts would have to determine whether a lax standard is a counterpart of an extremely strict standard, or if they were fundamentally different.

The assumption that these are noncontroversial money damages means that the method of calculation is not to be a source of great differences between the two countries involved. If it is, then article 33 of the Hague Convention and article 30 of the Dreyfuss-Ginsburg
proposal permit downward adjustments of damages to the level that would have been awarded had the entire action been brought in the second country.\textsuperscript{187}

\textit{b. Controversial Monetary Damages}

In most cases, a damage award will not have "rare" damages unless it also includes "ordinary" damages.\textsuperscript{188} This suggests that enforcement should not be an all-or-nothing proposition.\textsuperscript{189} A court should be able, for example, to enforce the compensatory damage award but not the punitive damage award, if such an award is unavailable in the enforcing country. Hague's article 33 permits just that.\textsuperscript{190} The Dreyfuss-Ginsburg proposal has similar, but not identical, provisions.\textsuperscript{191} For jurisdictions that abhor punitive damages, the enforcing court could enforce the entire award less the punitive damages. Even for simple compensatory damages, there may be different methods of calculation and some methods of calculation may be abhorrent to some countries to such a level that awards are scaled back prior to enforcement.

\textit{c. Final Injunctions}

Final injunctions issued by foreign courts are rarely enforced.\textsuperscript{192} The Dreyfuss-Ginsburg proposal assumes enforcement,\textsuperscript{193} but then whittles away at that assumption. Because the Dreyfuss-Ginsburg

\textsuperscript{187.} \textit{Dreyfuss-Ginsburg Draft Convention}, supra note 5, at 1088 (art. 30.2(b)); Hague Convention, 2001 Draft, supra note 1, art. 33.2(b).

\textsuperscript{188.} There are exceptions, such as civil rights cases. \textit{Alexander v. Riga}, 208 F.3d 419, 430 (3d Cir. 2000).

\textsuperscript{189.} Note that this is in direct contrast to the requirement that the court either enforce the judgment or not enforce the judgment on some substantive or procedural basis, but not retry the substantive aspects of the case.

\textsuperscript{190.} Hague article 33.1: A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the State addressed could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.

Hague Convention, 2001 Draft, supra note 1, art. 33.1.

\textsuperscript{191.} It adds the following sentence to article 30.1: "This rule does not apply to damages that are intended to compensate the plaintiff but without requiring proof of actual damages." \textit{Dreyfuss-Ginsburg Draft Convention}, supra note 5, at 1087 (art. 30.1).


\textsuperscript{193.} \textit{Dreyfuss-Ginsburg Draft Convention}, supra note 5, at 1088 (art. 31) (as distinguished from preliminary injunctions addressed in article 19).
The proposal starts by requiring that all signatories be TRIPs members, and because the Dreyfuss-Ginsburg proposal covers primarily causes of action under TRIPs, there is a reasonable likelihood that the two countries' laws are similar on most relevant issues. This means that enforcement of a foreign injunction begins to seem more like enforcement of an injunction between states of the US. TRIPs, however, does not require that final injunctive relief be available, so long as remuneration is. In the Dreyfuss-Ginsburg proposal, the enforcing court is required to consider whether its laws offer the same kind of relief: "In no event must a State recognize an award of injunctive relief if such would not be required under the TRIPs agreement, unless the State addressed would have awarded injunctive relief under the same circumstances."

The next sentence of the Dreyfuss-Ginsburg proposal is more problematic. It states: "Should the rendering court decline to enter injunctive relief pursuant to this article, it must award compensatory damages." Although this parallels TRIPs in some ways, injunctions are generally thought to be appropriate because money cannot adequately compensate for the injury. Requiring a court to calculate a monetary award when it declines to enter an injunction is likely to lead to numerous valuation disputes.

As with unusual monetary damages, the best solution for determining when to enforce a final injunction might be the "existing counterpart" test: enforce if a similar kind of order would be granted were a suit on the merits instituted in the second country, otherwise do not. Such a test will (usually) permit the court to reach a decision without having to adjudicate the underlying facts of the case. It also parallels the national treatment type analysis for monetary damages. Most

194. Id. at 1074 (art. 1.1).
195. Id. at 1067.
196. TRIPs Agreement, supra note 8, art. 44, § 2.
197. Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1088 (art. 31.2). The number of negatives in this provision makes it hard to interpret. Stated affirmatively, it says (we think): Awards of injunctive relief required under the TRIPs Agreement shall be recognized in all States. Other awards of injunctive relief shall be recognized by other States in accordance with the same rule that applies to money judgments.

The last phrase relates to the fact that article 30 of the Dreyfuss-Ginsburg proposal says that money judgments will not be recognized unless there is a counterpart damage provision in the laws of the country of the enforcing court. The "shall" in the second sentence could be a "may," but if the desire is to force the court to do the analysis, rather than simply to decline enforcement because of the attractiveness of the loser's overall position or importance in the second country's society, then "shall" is better. Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1087-88 (art. 30).
198. Id.
remedies will thus be granted enforcement, honoring the value of uniformity, but pluralism in the law of remedies will also be respected.

d. Preliminary Injunctions

For provisional remedies, the rationale of "judicial economy" makes much less sense: there has not been a full trial on the merits. If the second court can properly act in the matter at all, assuming jurisdiction and applicable law, then the plaintiff ought to commence ordinary litigation in the second court and move for the provisional remedy. In such cases, the second court will often have jurisdiction because the defendant's assets are where the enforcement action is being brought.

The fact that preliminary injunctions are such a regular feature of intellectual property litigation may explain why this is a particularly important topic for any treaty related to civil procedure and intellectual property. As of the 2001 draft, it is unclear if the Hague Convention will support any provisional or protective measures. Protective measures are discussed in the scope section,199 the jurisdiction section,200 and the enforcement section.201 Depending on which bracketed clauses are selected, the result could lead to either enforcement of a fairly wide range of preliminary injunctions, or no enforcement of foreign preliminary injunctions.202 This is one of the many complicated and pivotal parts of the Hague Convention negotiations.

The Dreyfuss-Ginsburg proposal, with its focus on intellectual property, would permit enforcement of transborder preliminary injunctions.

Article 19 Provisional and Protective Measures

3. Courts in other Contracting States not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that—

   a. their enforcement is limited to the territory of that State;

   and

199. Hague Convention, 2001 Draft, supra note 1, art. 1.2(k). If it is covered in the scope section, the jurisdiction section might be deleted and vice versa. Id. nn. 8, 89.
200. Id. art. 13.
201. Id. art. 23A.
202. See, e.g., id. art. 13, alternative b.
b. their purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.\textsuperscript{203}

Thus, the Dreyfuss-Ginsburg proposal would limit a court without jurisdiction to enforcement in the territory of the State. This prevents a court not having jurisdiction from issuing a transborder injunction, such as a pan-European injunction based on a Berne-copyright. It also requires that the injunction be temporary, pending the resolution of the underlying case.

Seeking a preliminary injunction should be as easy (or as difficult) as seeking enforcement of a previously issued foreign preliminary injunction. This suggests that routine enforcement of foreign preliminary injunctions should not be very important. And TRIPs really does not point the other way: TRIPs countries are required to grant preliminary injunctions as part of the TRIPs enforcement obligation.\textsuperscript{204} Routinely enforcing foreign preliminary injunctions could be detrimental to both openness and pluralism. And to the extent that we want all TRIPs countries' courts to develop expertise in dealing with the substantive issues of TRIPs, we should encourage litigants to bring fresh actions in countries where there is infringement, not enforcement actions.

\textit{D. Contracts, and Especially Clickwrap Agreements}

Parties negotiating a contract might want to have some of the benefits of an international convention on jurisdiction and enforcement (routine enforcement, for example, if they expect that their own behavior will be exemplary but the other side is not as trustworthy). They will likely, however, prefer not to leave things to chance, and so will try to specify things by contract that benefit them beyond the law that would apply in the absence of a contract. For example, two parties from California might decide that they both prefer Nevada law for a transaction that has some relationship to Nevada, whereas, absent a contract, California law would have applied.

\textsuperscript{203} Dreyfuss-Ginsburg Draft Convention, \textit{supra} note 5, at 1084 (art. 19).

Paragraphs 1 and 2 of article 19 state:
\begin{itemize}
\item 1. The court having jurisdiction under the rules of this Convention to determine the merits of the case has jurisdiction to order any provisional or protective measures, including trans-border injunctions.
\item 2. The courts of a State in which intellectual or tangible property is located have jurisdiction to order any provisional or protective measures in respect of that property.
\end{itemize}

\textit{Id.}

\textsuperscript{204} TRIPs Agreement, \textit{supra} note 8, art. 50.
Contracts raise distinct issues from torts because contracts are binding on the parties and hence raise choice of forum and choice of law issues that arise from the forum and law being selected in the contract itself. Courts routinely give effect to the "agreed to" terms. The choice of law specified in the contract, especially if it is the law of the chosen forum, may be applied as well.

Within the realm of contracts, there are two types: negotiated and nonnegotiated. In a traditional negotiated contract between two parties of relatively equal bargaining strength, the notion of freedom of contract permits the parties to include these choices. They may be part of the consideration for the contract, since the choices may provide a highly valued advantage, or at least convenience, to one of the parties. They also provide predictability: both parties benefit from knowing in advance the laws that will apply.

The second type of contract, the nonnegotiable contract, also sometimes called a contract of adhesion, does not permit negotiation. Examples of these include the text on the back of the ticket when you park in an automated garage and the license that falls out of the box when you open a new software package.

The web has seen the creation of a new kind of nonnegotiable contract—the "clickwrap" agreement. Like any other contract, clickwrap contracts may establish some of the parameters of future litigation, in particular choice of forum and choice of law. But clickwrap contracts are different from negotiated contracts. They generally fit the definition of a "contract of adhesion" although they need not be limited to "consumers" but instead are between parties of unequal bargaining strength, and drafted entirely by the stronger one. If the weaker party does not want to "leave it"—or is paying

205. Of course, if a party asserts fraud, duress, or any of the other traditional reasons not to enforce a contract, the provisions may be nullified—but if the nullification is asserted as a defense, rather than in a declaratory judgment action in a forum chosen by the would-be nullifier, then chances are the action will have been brought in the forum specified in the contract.

206. See generally Mark A. Lemley, Intellectual Property and Shrinkwrap Licenses, 68 S. CAL. L. REV. 1239 (1995). Clickwrap is distinguished from browsewrap because clickwrap licenses require some affirmative, if nominal, assent, while browsewrap licenses might state contractual language, such as in a link on a website, without requiring affirmative assent to those terms.

207. BLACK'S LAW DICTIONARY 40 (6th ed. 1990) (defining "contract of adhesion" as "standardized contract forms offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain").

208. See infra Subsection IV.D.2.

209. If someone in a big corporation encounters a clickwrap contract for something the corporation may want to use or buy in quantity, the corporation may simply contact the owner
no attention to the terms, since they seem unlikely ever to matter—it manifests its assent\textsuperscript{210} by clicking a button that says, “I agree.”

Should it turn out that terms did matter, the clicking party might be stuck with the forum, and choice of law, that the web-owner specified. There are many reasons for drafters to choose a particular forum or law for those clauses. They might choose to have the forum be one that is hard to reach (the South Pole, say, or Tahiti—pleasant for the programmers and even for any defendant rich enough and idle enough to be able to participate in a trial). Or they might choose to locate in a jurisdiction with the most favorable laws for some aspect of its business—a data haven if initially the drafters’ business is built on possibly-infringing uses of someone else’s intellectual property. In those situations, the drafters’ choice of the home forum will have a legitimate relationship to the transaction, but will still have a bad odor, leaving the scent of nonnegotiation.

Defendants may then challenge the clickwrap terms, asking the court to refuse enforcement of the contract, or at least to strike the offending terms, on the grounds of lack of assent,\textsuperscript{211} unconscionability,\textsuperscript{212} or violating the public policy of the state.\textsuperscript{213} US courts have started struggling with these issues and, so far, have come out both ways.\textsuperscript{214}

Standard form contracts may not seem like objects worthy of deepest sympathy, but they are efficient for the drafters and the businesses using them. The efficiencies (and comfort level) these con-
tracts provide may in the longer run contribute to the variety and plenty of products and services available to other businesses and consumers, a social benefit to all. Thus, the terms of standard form contracts should be binding like any other contract’s terms, and standard clauses should be interpreted the same way regardless of the identity of the other party. If the interpretation varies based on later-occurring facts peculiar to specific defendants, their status or the way they use the product, the benefits of having standard form contracts may be reduced.

1. The Hague Convention

Against this backdrop, the Hague Convention addresses contracts in several locations, notably articles 4 (Choice of Court), 6 (Jurisdiction), 7 (Consumer Contracts), and 8 (Individual Contracts of Employment). In addition, one of the prohibited grounds of jurisdiction is "the signing in that State of the contract from which the dispute arises." Article 4 states that if a choice of court is made in a contract, that forum has exclusive jurisdiction. One important exception to the exclusive jurisdiction in article 4 is if it is a "consumer contract" as defined in article 7, in which case the jurisdiction is the consumer’s domicile, whether the consumer is a plaintiff or a defendant.

Article 7 draws, in part, on the Rome Convention, which governs judicial action resolving contract disputes among citizens of the European Community. Both define limitations when such contracts are between businesses and consumers. The reasoning is that substantive and procedural terms in a contract that a consumer has no reason to know about because they are "regarded as being outside his trade or profession..." should not be enforced against him.

216. A consumer contract is a "contract for a purpose which is outside its trade or profession, hereafter designated as the consumer." Hague Convention, 1999 Draft, supra note 1, art. 7.1. The 2001 draft amended it to define it as a "contract[] between a natural person acting primarily for personal, family or household purposes." Hague Convention, 2001 Draft, supra note 1, art. 7.1.
218. See Hague Convention, 2001 Draft, supra note 1, art. 7.
219. Rome Convention, supra note 217, art. 5.1 ("This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.").
For standard form contracts presented to web customers via software, software could also be used to restore at least some of whatever the contract drafter might otherwise lose because of an international legal system that gives consumers special rights.221

2. The Problem of Consumer Contracts

The Hague Convention does not distinguish between negotiated and nonnegotiated contracts. To the extent that clickwrap agreements are often used in electronic contexts, it is hard for a contracting business to know it is contracting with a consumer, a nonprofit, or a Fortune 500 corporation. Additionally, if a consumer licenses the work for consumer use and then starts using the product for a home business, the consumer treatment of Article 7 could be lost.

The Dreyfuss-Ginsburg proposal explicitly rejects the notion of consumer contracts222 and we agree. The idea of a special rule for contracts between businesses and consumers is not all that adaptable to the world of clickwrap licensing. It presupposes that a web business, as it drafts a clickwrap contract and floats it into the stream of commerce to find some takers, actually knows who will use the subject matter of the contract, and how they will use it. The drafter of a clickwrap license has no idea, however, who will be doing the clicking, or why, and may not even know (in the sense of knowing by human intelligence, apart from software bookkeeping) until well after the fact that there was a click at all. If three people take a clickwrap license, the first may be using the subject matter of the license for personal use, the next may be an individual using it in connection with a home office, and the third may be in business. Drawing the line to encircle only consumers using a web-based item for personal use is tricky.

For the clickwrap drafters, this loss of predictability might be manageable. By the time they have made the decision to institute suit, they will very likely know whether or not the potential defendant was a consumer using the licensed subject matter for household use. If the potential defendant will receive the protection of article 7, the

221. If the Rome Convention, supra note 217, rule were in effect, the clickwrap window could be preceded by a window that said “Are you a consumer who will use this for personal use?” and then the software would branch. The program could offer a contract optimized for consumer rules for those who answer “Yes” and a contract optimized for business rules for those who answer “No.”
222. Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1102.
plaintiff can forget about the (unenforceable) choice of law provision and institute the suit where jurisdiction over the defendant is proper. Or, if the choice of forum provision is very important to winning, the plaintiff can tough it out, in hopes that a novel legal argument on its own part, early settlement, a less than thorough or not so skillful defense by the defendant, or the vagaries of litigation, will protect the choice of forum provision from any challenge.

Article 7 leaves unprotected many businesses, as well as non-profit institutions such as universities and libraries, subjecting them—but not consumers—to possibly egregious provisions when in fact everyone uses the web-provided item in the same way, and with the same inability to negotiate a fairer bargain than what the clickwrap specifies.

Consumers, universities, libraries, and businesses are not in a position to negotiate every clickwrap contract, nor are they able to assume the risk of having to go to a foreign forum. They may have legitimate, indeed weighty, defenses in a lawsuit on the clickwrap license such as first sale, fair use, and other rights. Still, those for whom article 7 provides no protection may be well advised to do without clickwrap products and services.

A more desirable solution for both the clickwrap drafters and the clickwrap users would be to have a rule about whether to give effect to clickwrap litigation specifications (a shorthand term for choice of law and choice of forum clauses) that was based on the text and type of the license, rather than the initially unknowable attributes of a potential adversary and the initially unknowable type of use.

The Uniform Computer Information Transactions Act, not otherwise known for its elegance and consumer-friendliness, takes a better approach to defining the group of contracts that get some kind of special consumer-oriented treatment when it defines "mass-market transaction."223 The Hague Convention would meet the objections of

223. See, for example, the Uniform Computer Information Transactions Act (UCITA), Section 102(45) (2001 Draft); not otherwise a model of intelligent draftsmanship, UCITA at least does not suffer from the Rome Convention's defect when it defines a "mass-market transaction":

(45) "Mass-market transaction" means a transaction that is:
   (A) a consumer contract; or
   (B) any other transaction with an end-user licensee if:
   (i) the transaction is for information or informational rights directed to the
       general public as a whole, including consumers, under substantially the same terms for
       the same information;
business concerning predictability and uniformity of the judicial interpretation of litigation specifications in clickwrap licenses if it were to define something like a mass-market clickwrap. The result, however, would be that when a mass-market clickwrap product or service was licensed by another business, or an individual for sole-proprietor business use, the rules would be the same as if the person clicking was a consumer making personal use of the clickwrapped item.

Of course, if the public—whether consumers alone or joined by small businesses and nonprofits—begins to pay attention to choice of law and choice of forum provisions in clickwrap contracts and refuses to click, such provisions may begin to disappear. This is an unlikely result in today’s world because a person would have to read each agreement. In the future, however, we might have electronic agents\textsuperscript{224} contracting for us and they might be able to take such actions and alter business patterns through market forces. Additionally, if opposition to the very idea of these terms gains media attention through a few vivid examples, reforms might be accomplished through legislation.

3. The Dreyfuss-Ginsburg Proposal and Contracts Governing Intellectual Property Transactions

Whether or not a mass-market transaction concept is adopted in the Convention, the problem of when to invalidate choice of forum clauses remains. Although not addressed in the draft Hague Convention, it is addressed in the Dreyfuss-Ginsburg proposal. This is unsurprising because intellectual property contracts are frequently clickwrap agreements, necessitating a rule to determine when the clause is enforceable. In the Dreyfuss-Ginsburg proposal, the relevant article is article 4, Choice of Court. It includes an important sec-

\begin{itemize}
  \item[(ii)] the licensee acquires the information or informational rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and
  \item[(iii)] the transaction is not:
    \begin{itemize}
      \item[(I)] a contract for redistribution or for public performance or public display of a copyrighted work;
      \item[(II)] a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose;
      \item[(III)] a site license; or
      \item[(IV)] an access contract.
    \end{itemize}
\end{itemize}


tion, article 4.3 on nonnegotiated contracts, which are defined as those "arising in transactions for information products where the terms are entirely pre-packaged." The phrase "information products" reflects the fact that the Dreyfuss-Ginsburg proposal is limited to intellectual property matters.

The proposal sets forth a multifactor balancing test for determining when to give effect to choice of forum clauses in such nonnegotiated contracts:

Article 4. Agreements Pertaining to Choice of Court ...  
3. In nonnegotiated contracts, an agreement within the meaning of paragraph 1 shall be valid if the designated Contracting State or forum is reasonable in light of—
   a. the location of the non-contract-drafting party,
   b. the availability of online dispute resolution or other forms of virtual representation,
   c. the resources of the parties; in particular, of the non-contract-drafting party,
   d. the sophistication of the parties; in particular, of the non-contract-drafting party,
   e. the substantiality of the connection between the designated forum, and the parties or the substance of the dispute, including whether the designated forum would have had jurisdiction over the non-drafting party in the absence of a forum-selection clause
   f. for registered rights, whether the designated forum was established by the State to foster expertise in adjudicating disputes of this type.
   g. whether the terms of the agreement were sufficiently apparent with respect to accessibility, typographic readability, and national language so as not to cause surprise.

Clickwrap contracts appear to be especially vulnerable with regard to factors (a), (c), (d), (e) and, of course, (g). Factor (f), addressing the designated forum for registered rights, is relevant to countries where an agency has been charged with making specific adjudications and the agreement circumvents that agency's authority and expertise.

225. Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1103.
226. See supra Section I.B.
227. Paragraph 1 does not define "choice of forum" agreements. It recites a rule—that such agreements shall confer jurisdiction (emphasis ours). While 4.1 in view of 4.3 can be understood to mean that in nonnegotiated contracts, automatic enforcement is not the rule, this is unclear.
228. Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1075-76 (art. 4).
4. Simplifying the Dreyfuss-Ginsburg Proposal Multifactor Test

Article 4.3 addresses an important concern, but its approach, elaborating several factors upon which to judge reasonableness, is problematic. Different courts applying different weights to the different factors could easily come to different results. A single broad statement might better meet the needs of judges faced with new situations, new technology, and new substantive laws in unfamiliar forums.

A simpler version of Dreyfuss-Ginsburg proposal article 4.3 would just stop with the word "reasonable":

In a nonnegotiated contract, a "choice of forum" provision shall be valid if the designated Contracting State or forum is reasonable.

If the Commentary referred to the multiple factors specified in the current version, as well as ideas behind the Rome Convention, the Uniform Commercial Code, and even UCITA, that would guide a court to understand what was "reasonable" without etching those factors in stone.

A stronger alternative might say something like:

In nonnegotiated contracts, "choice of forum" provisions cannot independently confer jurisdiction.

This means that the jurisdiction chosen would have to be proper under the jurisdictional rules of the Convention. For example, if a contract specifies Argentina as the forum, but Argentina would not otherwise be able to assert jurisdiction, we would require Argentina to decline jurisdiction. This formulation essentially adopts Dreyfuss-Ginsburg article 4.3(e)(2), but inverts it to permit jurisdiction only when there is another basis for it. Permissive language, encouraging courts to decline jurisdiction, instead of prohibitive language, forbidding them from asserting it, could lead to de facto enforcement of almost all such clauses. If an escape hatch were necessary, a phrase could be added at the end of the sentence such as: "unless there is no forum that has jurisdiction [for the odd case where somehow what the defendants do and where they do it mean that nowhere in the world can they be sued]" or "except when such jurisdiction or [giving effect to such agreement] is in the public interest."

229. See supra note 217.
231. Supra note 223.
Would it harm predictability to have a rule that nonnegotiated forum choices would never be enforced? Depending on whether the idea of a mass-market transaction replaces the idea of a consumer contract, it is unclear how much jurisdictional latitude clickwrap drafters will have in enforcing choice of forum clauses.

If consumer contracts are expanded to encompass all mass-market transactions and the exclusive jurisdiction remains the domicile of the nondrafting party, the number of times Dreyfuss-Ginsburg proposal 4.3 will have to be applied will ideally decrease, driving those who want to choose another forum to negotiate the contract.

5. Clickwrap Choice of Law Clauses

Unlike the Hague Convention, which does not address choice of law clauses, the Dreyfuss-Ginsburg proposal includes an exception that permits nonenforcement if the choice of law chosen by the original court was “arbitrary or unreasonable.” In the context of contracts, the question is whether a court choosing a law solely on the basis of the choice of law clause would be considered “arbitrary or unreasonable.” We would hope that the inquiry would consider the nature of the contract formation in determining whether or not the choice of law met the standard.

Article 25.1(h) continues: “The conformity of the forum to the jurisdictional terms of this Convention does not necessarily, of itself, suffice to establish a significant relationship between its laws and the dispute.”

The effect of this sentence is to prevent a forum that has jurisdiction from applying its own law when that law does not bear a significant relationship to the dispute.

We would suggest a parallel sentence in addition to this one, stating something like:

In nonnegotiated contracts, “choice of law” agreements do not, independent of other factors, create a sufficient relationship between the chosen laws and the dispute.

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232. Dreyfuss-Ginsburg Draft Convention, supra note 5, at 1086 (art. 25.1); see also supra text accompanying note 150.

233. We propose inserting the phrase “facts of the” here.

234. See supra text accompanying notes 205–09.
V. CONCLUSION

Harmonizing bases of jurisdiction and making enforcement of foreign judgments routine threatens the relevance of domestic laws in an interconnected world. By relying on the four guideposts of uniformity, predictability, pluralism, and openness, the Hague Convention can achieve the proper balance, providing for the redress of electronic wrongs without stifling innovation and national experimentation. The technology itself, assisted by governmental actions, may permit private parties to protect their rights, especially copyright, without having to resort to civil litigation, thus undermining the importance of the Hague Convention. The ability and flexibility of the web and its users around the world, however, may lead to greater reliance on the balance found in an improved Hague Convention or Dreyfuss-Ginsburg proposal. This suggests that we are not at a dead end, but at a new beginning.