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# ***STUDENT ARTICLE***

## **Identity Theft, Computer Fraud and 18 U.S.C. § 1030(g): A Guide to Obtaining Jurisdiction in the United States for a Civil Suit Against a Foreign National Defendant**

*Michael C. McCutcheon*

### **I. INTRODUCTION**

There are very few people who would venture to say the proliferation of computers and the Internet into the world economic system has been anything but beneficial to the planet, both socially and economically. Communications over the Internet allow unparalleled opportunities for education, research, commerce and entertainment.<sup>1</sup> However, there are a few individuals who no longer see the Internet and its opportunities through rose-colored spectacles. They are the unfortunate, but steadily growing, number of individuals who have fallen victim to what is being called the signature crime of the digital era; identity theft.<sup>2</sup> Identity theft is the illegal use of another's personal identification numbers. For example, one might use a stolen driver's license, credit card, or social security number to purchase goods, apply for loans, or rent an apartment for themselves. While this sort of crime has been perpetuated by criminals for as long as there have been identifying documents in existence, the Internet is making easier and more lucrative to commit this crime.

As the Internet's potential to serve as a powerful medium for international commerce expands, so too does its attractiveness as a tool for those who wish to commit illegal acts.<sup>3</sup> Indeed, the Internet has enhanced criminals' abilities to commit traditional crimes more efficiently and anonymously. It has also created new opportunities for crime.<sup>4</sup> Specifically, identity thieves are no longer hampered by the existence of national or international boundaries. Nor are they limited to perpetuating their crime by stealing physical embodi-

ments of the information they require, such as credit card receipts, drivers licenses, and check books. On the Internet, there are no faces and no signatures. There is literally nothing that prevents one individual from posing as another on the Internet except security codes and passwords, which are often intercepted or cracked. Just as telephones were used by traditional boiler-room operators to defraud victims from a distance, a computer server running a web page designed to defraud consumers might be located in Thailand and victims of the scam could be scattered throughout numerous different countries.<sup>5</sup>

The federal government and many state governments have passed new legislation to address the problem of identity theft and computer related crime. In some cases the government has created entirely new statutes to cope with the problem. In others it has merely increased the penalties or added amendments to existing legislation to deal with these newer, more sophisticated versions of fraud. One example that has gained much attention is the federal Identity Theft and Assumption Deterrence Act of 1998 which makes it a crime to knowingly possess with the intent to use or unlawfully transfer a means of identification of another person.<sup>6</sup> While this statute, and other similar state versions, are steps in the right direction for law enforcement, there are still very few instances of successful prosecution and even fewer instances of redress for the individual victims who are often left with enormous unearned debt, ruined credit ratings, and in some cases unwarranted criminal records.<sup>7</sup>

The damage done to identity theft and computer fraud victims is measured not only in terms of dollars, but also in pain, embarrassment, and frustration. The remedy provided by the criminal statutes like the Identity Theft and Assumption Deterrence Act is often inadequate for two reasons. First, it is not an extraterritorial statute. Its specific language does not allow for its use against a foreign criminal in United States courts. Due to the international nature of the Internet and the ever increasing number of personal computers in the world, it should come as no surprise that crimes like identity theft, financial institution fraud, and other computer related crimes are being committed worldwide. For example, an American purchasing a patio set with his credit card over the Internet from his personal computer in Chicago can become a victim of fraud almost instantly when his personal information is

intercepted and used without permission by a French national in Berlin, Germany. Second, and perhaps more importantly for the victim, the Act does not provide a private right of action for the victim to maintain a civil action for compensatory damages and injunctive relief against the perpetrator. Civil relief may be just what a victim will want and, due to the difficulty law enforcement agencies have in prosecuting digital identity thieves, it may be the only kind a victim can possibly get.

Usually, suing a criminal for compensatory damages is considered a futile act because most criminals are judgment proof. In most cases of identity theft this will probably be true as well. However, there are reasons for pursuing a civil lawsuit in identity theft cases that do not exist in most other criminal cases. First, most identity thieves will use a person's identity to purchase goods that may still be available if a victim can obtain a judgment. Second, many victims are faced with having to explain to their creditors, the creditors of their illegal-twin and possibly law enforcement officials what has happened and why. This is one of the most difficult things for victims to deal with since many creditors and police are unwilling to believe them at their word. Maintaining a civil suit and eventually obtaining a judgment against the defendant may make the job of cleaning up the mess left behind much easier. Finally, there is the psychological benefit that comes from doing something pro-active about an individual's status as a victim. Many identity theft victims complain of feeling overwhelmed and helpless to do anything about their situation. As with victims of other crimes, these individuals feel angry, confused, guilty and often ashamed about what has happened. Turning to the police for help is the first step, but being able to file and maintain a lawsuit through judgment may be the best possible redress for the victim emotionally.

This article will address one avenue, of the few available, that an identity theft victim may take in pursuit of a civil remedy against his offender.<sup>8</sup> Specifically, this article will address the jurisdictional issues that arise when an American citizen attempts to sue a foreign national in a U.S. court claiming damages resulting from fraud under the Computer Fraud and Abuse Act as amended by National Information Infrastructure Protection Act of 1996, 18 U.S.C. § 1030(g) ("section 1030"), which provides a civil remedy for plaintiffs injured as result of computer related crime.

## II. THE AMENDED COMPUTER FRAUD AND ABUSE ACT: 18 U.S.C. § 1030

The Counterfeit Access Device and Computer Fraud and Abuse Act of 1984 was intentionally narrowly tailored to protect classified United States defense and foreign relations information, financial institution and consumer reporting agency files, and access to computers operated for the government.<sup>9</sup> Section 1030 was originally adopted by Congress in 1984 for the purpose of protecting government computer networks and databases from criminals, rogue foreign states and computer hackers. However, as the use of computers in the private sector grew so did the scope of section 1030.<sup>10</sup> Originally, section 1030 only protected from crime those computers, and their owners, which were located in more than one state.<sup>11</sup> In 1996, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, was amended by the National Information Infrastructure Act to extend protection to all computers used in interstate and foreign commerce or communication.<sup>12</sup> Therefore, section 1030 now protects the user of each and every computer in America that is connected to the Internet.<sup>13</sup> What once was an Act centered on national defense is now a consumer protection device that is available to virtually anyone who surfs the net.

Subsection (a)(4) of section 1030 is most applicable to victims of identity theft. It states, "whoever knowingly and with intent to defraud, accesses a protected computer without authorization...and by means of such conduct furthers the intended fraud and obtains anything of value..." has committed a federal offense.<sup>14</sup> Under this subsection, anyone who obtains identification information by either tapping into an individual's home computer or the computer system of a web-based retailer or service provider for the purpose of conducting fraudulent transactions can be prosecuted under section 1030. Violation of section 1030(a)(4) can result in a fine or imprisonment for up to five years, or both.<sup>15</sup> A repeat offense can result in a ten year jail sentence.<sup>16</sup>

More important for the purposes of this article is subsection (g), which provides that "[a]ny person who suffers damage or loss by reason of violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief..."<sup>17</sup> The damages must be in excess of \$5000 over the course of one year.<sup>18</sup> In addition, section 1030 also contains a two year statute of limitations.<sup>19</sup> Subsection (g) makes the Act a more

effective tool than most statutes designed to curb the spread of identity theft for two reasons. First, subsection (g) encourages the reporting of identity theft and other computer related crimes, which leads to more efficient law enforcement. Second, it puts the victim in control of his affairs and it allows an individual who often feels helpless to actively pursue a private remedy for his injury.<sup>20</sup>

Although on its face section 1030 is a powerful tool for combating computer related crime such as identity theft, to date there are very few published opinions that have discussed the statute. This is surprising considering the wide applicability the few courts that have ruled on section 1030 have given it.<sup>21</sup> Unfortunately, there are even fewer opinions which have discussed subsection (g) as it applies to domestic defendants and there are currently no opinions that have discussed its application to foreign national defendants. Consequently, much hypothesis and many assumptions must be made in analyzing this statute's potential application. However, it is hoped that through taking these measures, section 1030(g) will emerge as a viable and practical federal cause of action.

The first step in filing a suit against a perpetrator of identity theft is locating him and discovering his true identity.<sup>22</sup> If the offender is a resident of the victim's state or a citizen of the United States, obtaining the proper jurisdiction will not ordinarily be exceedingly difficult to file and maintain a lawsuit against him. Generally speaking, even though it may be inconvenient to establish jurisdiction in the plaintiff's home forum over a domestic defendant, there is substantial case law at every judicial level to turn to for guidance. However, when the defendant is a foreign national who has possibly never left his home country, the question of how to properly obtain jurisdiction for a lawsuit can become complicated, or at least it appears that way.<sup>23</sup>

Since section 1030 is a federal statute, a plaintiff could choose to sue in either state or federal court. A plaintiff may want to sue in state court for a number of reasons ranging from better familiarity with the state court system to pure convenience. However, for the purposes of this article we will assume the plaintiff will file in federal court, which then makes it necessary to discuss subject matter jurisdiction, an issue which is intertwined with the substantive law that will apply to a foreign national who has been haled into United States court (legislative jurisdiction is discussed in Section V, *infra*). In addition, federal courts are generally considered

to be better versed in the law pertaining to foreign defendants, and are generally more familiar with deciding constitutional law issues. Furthermore, there is a preference in American jurisprudence, albeit a fading one, to settle international disputes in federal rather than state courts.<sup>24</sup>

### III. SUBJECT MATTER JURISDICTION: FEDERAL QUESTION JURISDICTION AND ALIENAGE

There are two options for claiming that subject matter jurisdiction is available to the practitioner who wants to file a federal lawsuit against a foreign individual under section 1030(g). Before discussing these options in detail, it will be helpful to set up a quick hypothetical scenario from which to conduct the analysis.

The plaintiff in this fictional case is named Dave and he is a graduate student in business at the University of Lemont in Illinois. In early August of 1999, Dave conducted a credit check on himself and realized that over the last six months someone had incurred close to \$80,000 in debt in his name. Shocked, Dave looked into the matter further and discovered that over a dozen credit card accounts had been fraudulently opened in his name and had subsequently been used to purchase thousands of dollars of sophisticated computer equipment from on-line computer sellers. Dave, being a resourceful graduate student, acquired the records of these sales from the on-line retailers and noticed that all of the addresses for the delivery of the equipment were in Germany. After further investigation, Dave tracked down the perpetrator, a 55 year-old German citizen named Dieter.

Thinking back, Dave remembered that in January of 1999 he had used the Internet from his home to purchase some rare "techno-dance" records from a music distributor located in England. Dave used his credit card to purchase these records and also gave his home address, e-mail address, social security number, and other identification information to the music store to keep him abreast of the latest in "techno-dance" music. Dave contacted the United States Secret Service<sup>25</sup> which conducted an investigation of the crime. After a few months the Secret Service concluded that Dieter intercepted Dave's on-line business transaction, and stole his credit card number, address and social security number. Dieter subsequently tapped into his e-mail account to find the rest of the

necessary information he needed to use Dave's identity and credit history to purchase computer equipment.

Dave is very upset, and he has significant economic and legal troubles as a result of Dieter's actions. The Secret Service says it will prosecute Dieter to the full extent that section 1030 provides, but that does little to help Dave's piece of mind or his pocket book. Dave wants to sue Dieter for damages exceeding \$100,000 in the federal district court under 18 U.S.C. § 1030(g).

The first thing that Dave's attorney must decide is whether or not the federal court has subject matter jurisdiction over his case. In contrast to state courts which have virtually unlimited subject matter jurisdiction, the federal judiciary was created with limited subject matter jurisdiction.<sup>26</sup> A federal court cannot exercise jurisdiction over a case unless both the Constitution and a valid federal statute grant such jurisdiction.<sup>27</sup> There are five general federal statutory grants of subject matter jurisdiction within the limits of Article III of the United States Constitution that are applicable to international disputes, however only federal question and alienage jurisdictional grants will apply in a situation like this.<sup>28</sup>

#### **A. Federal Question Jurisdiction: 28 U.S.C. § 1331**

Federal question jurisdiction is derived from Article III of the United States Constitution and is the most significant of the federal grants of subject matter jurisdiction.<sup>29</sup> Article III creates jurisdiction over "cases...arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."<sup>30</sup> This grant of federal jurisdiction has been codified in 28 U.S.C. § 1331, which repeats the language quoted above, in order to confer original jurisdiction on the lower federal courts.<sup>31</sup> Most of section 1331's actions are brought into federal court via a specific federal substantive statute that creates a federal cause of action.<sup>32</sup> Whether or not a cause of action arises under section 1331 is determined by using the "well-pleaded complaint" analysis. The "well-pleaded complaint" analysis requires the court to examine the plaintiff's complaint to determine if it asserts a claim created by federal law rather than merely predicting a federally based defense by the defendant.<sup>33</sup>

In this case, Dave must plead the civil cause of action that is specifically created by federal statute 18 U.S.C. § 1030(g).<sup>34</sup> The



court must then decide whether Dieter committed computer fraud against Dave, causing damages in excess of \$5000 as it is defined in section 1030. A claim based on section 1030 "arises under" federal law because section 1030 is a "Law of the United States." Thus, it is a claim within the meaning of section 1331 and the court will have subject matter jurisdiction to hear it. Having federal question jurisdiction is enough for the court to decide the case. In this particular situation however, the court will also have alienage jurisdiction over the defendant. In practice, if a plaintiff chooses not to sue under section 1030(g) or any other available federal statute, but instead sues a foreign defendant under a common law theory, alienage jurisdiction will also allow the case to be heard in federal court.

### **B. Alienage Jurisdiction: 28 U.S.C. § 1332(a)(2)**

Article III of the United States Constitution also grants alienage jurisdiction to the federal courts.<sup>35</sup> Thus, the federal courts have subject matter jurisdiction over cases and controversies "between a State, or the Citizens thereof, and Foreign States, Citizens or Subjects."<sup>36</sup> The reasoning behind this grant of jurisdiction lies in the Founders' belief that disputes involving foreigners were likely to concern issues of national importance which federal courts were considered best able to decide.<sup>37</sup> However, the Supreme Court has narrowed the interpretation of alienage jurisdiction to include only suits between United States citizens and an alien, and not suits between two aliens.<sup>38</sup>

Alienage jurisdiction has been codified in 28 U.S.C. § 1332(a)(2), which provides federal district courts with original jurisdiction over civil actions in which more than \$75,000 is at stake and the controversy is between "citizens of a State and citizens or subjects of a foreign state." Thus, in a situation like Dave's, where he is seeking to sue one individual who is an exclusive citizen of Germany, section 1332(a)(2) grants the necessary subject matter jurisdiction, assuming Dave is suing for more than the \$75,000 minimum.

In reality, there may be cases of international computer fraud that arise under section 1030 that affect several people, all of whom may want to be parties to any ensuing civil litigation. In cases like this, it is necessary to closely examine who the plaintiffs and defen-

dants will be, as well as the law of the particular district court the case is being filed in.

Under section 1332(a)(3), the district courts have jurisdiction over cases between citizens of different states where foreign nationals are additional parties.<sup>39</sup> Thus, if in Dave's case it turned out that Tony, a citizen of New York, had aided Dieter in the commission of his crime the federal court would have jurisdiction to hear the case of Dave(Illinois) v. Tony(New York) and Dieter(Germany). Furthermore, some United States courts have ruled that section 1332(a)(3) also applies to cases where a United States citizen and a foreign national are suing a diverse United States citizen and another foreign national.<sup>40</sup> For example, if Dave(Illinois) and the music store owner Ian(Britain) decided to sue Tony(New York) and Dieter(Germany), some federal courts see this minimally diverse case as falling within the bounds of section 1332(a)(3) and will agree to hear it.<sup>41</sup> However, if Tony was an Illinois citizen instead of a New York citizen, section 1332(a)(3) would not provide jurisdiction because the U.S. litigants are not diverse.<sup>42</sup> While these variations are subject to differing judicial opinion, the original Dave hypothetical is unanimously considered to be within the original alienage jurisdiction of the United States.

#### **IV. OBTAINING PERSONAL JURISDICTION OVER A FOREIGN NATIONAL DEFENDANT**

A United States court cannot adjudicate cases and render binding decisions on the parties unless it also has "personal jurisdiction" over the defendant.<sup>43</sup> There are two requirements that must both be met before a court will have personal jurisdiction over a party. First, there must be a specific statutory grant of jurisdiction to the forum's courts.<sup>44</sup> Second, that statutory grant must be consistent with the Due Process Clause of the Constitution.<sup>45</sup> Further, it is important to note that personal jurisdiction over foreign defendants is decided under the same long-arm and constitutional "minimum contacts" analysis as domestic defendants.<sup>46</sup>

State and federal courts have distinct approaches to personal jurisdiction analysis. All of the states in the union have created "long-arm" personal jurisdiction statutes that are either specific as to when and how a court can assert jurisdiction,<sup>47</sup> or phrased generally by granting jurisdiction "consistent with the requirements of

Due Process."<sup>48</sup> In either case, the state's assertion of jurisdiction must comply with Due Process in order to be deemed constitutional. State long-arm statutes are usually used to obtain jurisdiction over parties located in different states, but they are equally applicable to parties who are foreign nationals.<sup>49</sup>

Unlike the state courts, federal courts do not have general jurisdictional long-arm statutes.<sup>50</sup> Instead, the federal courts use Federal Rule of Civil Procedure 4 ("Rule 4") to determine whether they have personal jurisdiction in both domestic and international disputes. Rule 4 provides the federal courts with five ways to assert personal jurisdiction, three of which are discussed later in Section A.<sup>51</sup>

In addition to Rule 4, the federal court may also look to the Restatement (Third) Foreign Relations Law § 421, which explains the limitations that contemporary international law imposes upon courts in determining whether or not to exercise personal jurisdiction.<sup>52</sup> Although the Restatement (Third) is not binding authority on the federal courts, many courts will take into consideration Restatement(Third) § 421 because of the belief that Congress never intends to legislate rules of procedure that purposefully conflict with principles of international law.

Section A of this article will discuss three pertinent grants of jurisdiction that Federal Rule 4 provides in the context of Dave's case. Specifically, Section A will address the issues of general versus specific jurisdiction, minimum contacts analysis, purposeful availment analysis, and the effects doctrine. Next, Section B will examine decisions regarding personal jurisdiction over defendants in Internet cases. Finally, Section C will briefly discuss Restatement(Third) § 421 and its application to the hypothetical. While the majority of the decisions discussed in Section B do not involve international defendants, the courts use virtually the same analysis whether the defendants are from different states or from different countries than that in which the court presides.<sup>53</sup>

### **A. Federal Rule of Civil Procedure 4(k): Statutory Grants of Personal Jurisdiction in Federal Court**

Federal Rule 4, revised in 1993, provides for personal jurisdiction in three distinct ways.<sup>54</sup> First, Rule 4 allows federal courts to borrow the long-arm statute of the state which embraces the court regardless of whether the case is based on diversity, alienage, or

federal question.<sup>55</sup> Second, Rule 4 gives federal courts the power to exercise specific grants of jurisdiction conferred on the courts by an applicable federal statute.<sup>56</sup> Third, Rule 4(k) permits federal courts to assert jurisdiction in cases involving a federal question to the extent that it is consistent with the Constitution, where the defendant is not subject to the jurisdiction of the federal courts of any particular state.<sup>57</sup>

All three of these are possibilities for asserting jurisdiction in a situation like Dave's where an non-corporate individual is sued under a federal statute. The likelihood of the federal courts asserting jurisdiction over a foreign defendant under any one of these options depends on the particular federal district in which the plaintiff files his suit. This is due to the fact that the district court will use the law of the state in which it is located for long-arm purposes, and different courts may analyze the second and third options differently. In this article, because Dave is an Illinois resident, we will examine the Illinois' long-arm statute. As for the second and third options, an examination of the relevant court decisions from across the nation will yield a better understanding of the requirements a court will have to meet in order to assert personal jurisdiction.

### *1. Using Illinois' long-arm statute to obtain personal jurisdiction over a defendant in federal court*

Under most state long-arm statutes, a court may exercise general jurisdiction over a nonresident when the defendant is physically present in the forum.<sup>58</sup> In addition, general jurisdiction is permissible when a nonresident defendant conducts routine, continuous, or systematic business in the forum.<sup>59</sup> When general jurisdiction is appropriate, the nonresident may be sued on any cause of action that arises anywhere in the world, even if the defendant's presence in the forum is unrelated to the cause of action.<sup>60</sup>

Furthermore, most long arm statutes permit specific jurisdiction over a nonresident defendant for causes of action that arise out of the nonresident's forum-related activity.<sup>61</sup> Generally, long-arm statutes confer specific jurisdiction over nonresidents who: (1) transact business in the forum; (2) commit tortious acts in the forum; or (3) commit a tortious act outside the forum resulting in

injury within the forum. Specific jurisdiction is crucial in a situation where a defendant, like Dieter, does not conduct routine, continuous, or systematic business in the forum state.

Illinois Compiled Statutes 735 ILCS 5/2-209 provides Illinois' requirements for exercising long-arm jurisdiction.<sup>62</sup> Subsection (a) contains examples of jurisdictional submissions by the defendant to Illinois' state courts and the federal district courts of Illinois vis-a-vis Federal Rule 4(A)(1).<sup>63</sup> In addition, subsection (b) describes four situations in which a court located in Illinois may actively assert jurisdiction over an individual.<sup>64</sup> However, this section will not apply where the defendant is a non-corporate individual who is not a resident of Illinois or present when served with process. Finally, subsection (c) allows the court to exercise jurisdiction on any basis allowed under the Illinois Constitution and the United States Constitution.<sup>65</sup> Thus, under subsection (c), if the contacts between the defendant and Illinois are sufficient to satisfy the Due Process requirements, then the requirements of both the Illinois long-arm statute and the United States Constitution have been met, and no other analysis is necessary.<sup>66</sup>

Nonetheless, finding a "hook" for jurisdiction in Illinois under subsection (a) is the preferable avenue to pursue because, even though the court must still consider the Due Process requirements of the United States Constitution and section 2-209(c), there may be considerable case law available to back a claim of jurisdiction under one of these exceptions. Under subsection (a)(2), a court will consider a defendant like Dieter to have submitted to the jurisdiction of Illinois by committing the tortious act of fraud if it finds that the act of electronically entering Dave's home computer to steal information was an act committed "within the state" under Illinois law. Since the act of electronically entering a computer located within the state to further a fraud is an issue that has not yet been specifically litigated in Illinois, there currently is no definitive answer to this question in existing Illinois case law regarding section 2-209(a)(2). However, examining existing decisions in Illinois containing similar facts and circumstances may allow us to accurately predict what the courts would consider in deciding an issue like this.

In *FMC Corp. v. Varonos*, the Seventh Circuit held that the defendant's act of sending communications in the form of telexes and telecopies from Greece that contained misrepresentations

designed to defraud the plaintiff in Illinois were tortious acts committed in Illinois.<sup>67</sup> The court relied on *Club Assistance Program, Inc. v. Zuckerman*, where the California defendants were subjected to personal jurisdiction in Illinois as a result of their sending mail and placing telephone calls to Illinois to further a scheme of fraud.<sup>68</sup> The *FMC Corp.* court ruled that it saw no reason to distinguish communications to Illinois made through the mail or by telephone from communications made via telex or telecopier.<sup>69</sup> Further, the court addressed the Due Process requirements and held that the defendant should have foreseen that her communications, which were intended to defraud an Illinois resident, would require her to answer for her actions in Illinois.

More recently, in *International Star Registry of Illinois v. Bowman-Haight Ventures, Inc.*, an Illinois federal court held that it had personal jurisdiction over a defendant whose web site contained information that constituted trademark infringement and violations of the Lanham Act, a federal statute, against the plaintiff in Illinois.<sup>70</sup> The court held that under the Illinois Constitution, a court must consider whether it is "fair, just, and reasonable" to require a nonresident defendant to defend an action in Illinois in light of the "quality and nature of the defendant's acts which occur in Illinois... or which affect interests in Illinois."<sup>71</sup> Noting that the Seventh Circuit Court of Appeals had yet to address the novel issue of what type of Internet activity is sufficient to establish personal jurisdiction in a particular forum, the district court reasoned that the Seventh Circuit Court of Appeals had given consideration to where the injury was felt and had found personal jurisdiction in cases where a plaintiff's intellectual property rights had been harmed by out of state acts.<sup>72</sup> The court also ruled that it is the quality of the contacts with Illinois, not the number, that is determinative for the "purposeful availment" analysis.<sup>73</sup> Furthermore, it held that a single act may be sufficient to find personal jurisdiction under the Illinois long-arm statute.<sup>74</sup>

If the acts committed by Dieter do not constitute tortious acts "committed within the state" for the purposes of section 2-209(a)(2), Dave may claim that Dieter is subject to the personal jurisdiction of Illinois by way of meeting the Due Process requirements of section 2-209(c).<sup>75</sup> Whether or not one is successful in claiming jurisdiction under any of the exceptions in section 2-209(a) or (b), the court must still consider the constitutionality of the claim via the Due

Process Clause of the United States Constitution.<sup>76</sup>

Under the Due Process Clause, a nonresident defendant may not be sued in a forum unless he has established sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>77</sup> Further, the nonresident's "conduct and connection with the forum [must be] such that he should reasonably anticipate being haled into court there."<sup>78</sup> Although courts have developed several tests to determine if sufficient minimum contacts exist, all of them generally hold that minimum contacts are present if the nonresident "purposefully availed" himself of the benefits of doing business in the forum state.<sup>79</sup>

Furthermore, an "effects test" has emerged in cases involving intentional torts such as defamation, fraud, tortious interference with contract, libel and conversion situations.<sup>80</sup> Under the "effects test," jurisdiction may be exercised over a defendant based on the effect his conduct had within the forum.<sup>81</sup> Under this test, a defendant may be subject to the personal jurisdiction of a forum if he commits an act outside the forum that is intended to have an effect within it.<sup>82</sup> However, the defendant must "purposefully" engage in the conduct that creates the effects because mere foreseeability of such effects is not enough to establish minimum contacts.<sup>83</sup>

In *Klump v. Duffus*, the Seventh Circuit Court of Appeals held that a defendant's intentional act which occurred outside of Illinois caused harm to the plaintiff in Illinois and therefore, under section 2-209(c) the defendant was under the personal jurisdiction of the court.<sup>84</sup> The defendant argued that his negligent failure to act occurred in North Carolina and that he had committed no tort within Illinois.<sup>85</sup> The court ruled that constitutional standards allow jurisdiction over a defendant who acts outside a state's boundaries, but causes harm to an individual within the state, provided that the assertion of jurisdiction comports with "traditional notions of fair play and substantial justice."<sup>86</sup> Ruling that the defendant had purposefully availed himself of the laws of Illinois and had "fair warning" that he would be required to defend in Illinois, the court found there was no evidence that exercising Illinois jurisdiction would be unreasonably burdensome.<sup>87</sup>

From the cases decided in Illinois interpreting section 2-209, it appears that Dieter's intentional act of electronically entering a computer located in Illinois to further a scheme of fraud will sub-

ject him to the federal court's jurisdiction. The effects test would apply to Dieter because his illegal conduct has had the effect of destroying Dave's credit rating, potentially subjecting him to numerous civil and criminal repercussions. Further, there is little doubt that Dieter purposefully engaged in the identity theft that created the effects felt by Dave in Illinois. Dieter did not accidentally or unforeseeably break into Dave's computer, steal his personal information and subsequently buy several thousands of dollars of goods.

In most cases, conduct that satisfies a long-arm statute will also satisfy the minimum contacts requirement.<sup>88</sup> However, jurisdictional analysis is highly fact-specific, with each case having the potential to reach the Supreme Court of the United States.<sup>89</sup> The specific facts of the Dave hypothetical, or any situation in which the Internet has been used to establish contacts with a forum, are particularly troublesome for the courts. Therefore, an analysis of recent federal court decisions will help reveal the criteria the courts look at in determining whether personal jurisdiction exists over a defendant whose contacts with the forum state were established primarily through an Internet connection. As the cases suggest, the "effects test" is emerging as an important criteria by which to determine the availability of personal jurisdiction in a given forum. This analysis is contained in Section B, *infra*.

## ***2. Personal jurisdiction conferred via specific federal statute***

Federal Rule of Civil Procedure 4(k)(1)(D) provides that serving a summons on a defendant is effective to establish personal jurisdiction "when authorized by a statute of the United States."<sup>90</sup> There are several federal statutes containing provisions that explicitly authorize personal jurisdiction and service of process. Similarly, some federal statutes authorize personal jurisdiction based on national contacts.<sup>91</sup> Examples include the Foreign Sovereign Immunities Act of 1976, the Clayton Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and RICO.<sup>92</sup> To establish personal jurisdiction, some of these statutes explicitly allow "world-wide" service of process from any United States district court to any place the defendant may be found or where the defendant transacts business.<sup>93</sup> Other statutes allow for service upon the defendant anywhere in the nation.



In both of these situations, the issue of “minimum contacts” is “whether the party has sufficient contacts with the United States, not with any particular State.”<sup>94</sup> Some courts have construed “world-wide” service provisions as legislatively allowing service of process abroad and the use of “national contacts” tests for the purpose of establishing personal jurisdiction over a foreign defendant.<sup>95</sup> Additionally, lower courts have almost uniformly rejected Due Process challenges in these circumstances.<sup>96</sup>

A cursory review of this particular jurisdictional grant under Rule 4(k) is all that is necessary here since 18 U.S.C. § 1030 does not contain a specific provision authorizing service or personal jurisdiction over foreign or domestic defendants. Nonetheless, it is important to note that Rule 4(k)(1)(D) does exist and may be available if a plaintiff chooses to sue under a federal statute other than section 1030. Using Rule 4(k)(1)(d), plaintiffs may sue in a forum entirely unrelated to the cause of action for any number of reasons.

Turning to the hypothetical, Dieter could easily conduct activities within the United States that have a substantial effect on Dave, yet never have had any effect on him in the forum in which he chooses to sue. For example, Dave may have recently moved or he may choose a specific district because he believes the law of that district is particularly favorable and well developed. Rule 4(k)(1)(D) allows Dave this freedom provided he sues under a qualified federal statute. Dave may want to find a statute that contains a specific jurisdictional provision under which to sue because section 1030 does not contain one. Computer related crime has taken on many faces that can be prosecuted or litigated under a number of statutes, like RICO for example, which contain a specific provision granting personal jurisdiction over a foreign defendant. In fact, computer related crimes can be charged under at least forty different statutes.<sup>97</sup>

### ***3. Obtaining personal jurisdiction under Rule 4(k)(2)***

Rule 4(k)(2) states “[I]f the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also available, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.”<sup>98</sup> This

rule was adopted in 1993 for the specific purpose of reaching international defendants who had sufficient contacts with the nation as a whole to satisfy the Due Process requirements but did not have sufficient contacts with any one particular state to be subject to a long-arm statute.<sup>99</sup> This section has significantly extended the personal jurisdiction of federal courts.<sup>100</sup>

For example, in the Dave hypothetical, suppose the contacts that Dieter has made with Illinois do not satisfy any provision of section 2-209, including the "catch-all" subsection (c).<sup>101</sup> Prior to the adoption of Rule 4(k)(2), neither the Illinois federal court nor the state court would have had personal jurisdiction to hear the case. However, because section 1030 creates a federal question, Rule 4(k)(2) allows the federal court to consider Dieter's contacts with the entire United States in order to satisfy the requirements of Due Process.<sup>102</sup>

Therefore, if the facts were such that Dieter has contracted with numerous retailers in New York, Arizona, and California to purchase goods and services, even if these contracts were unrelated to his fraudulent conduct, this actually could create sufficient contacts with the United States to satisfy the minimum contacts test for Illinois. The court must comport with all of the normal "minimum contacts" requirements of Due Process such as finding purposeful availing, reasonableness, and fair warning.<sup>103</sup> However, under Rule 4(k)(2), these contacts may not be so prevalent as to render Dieter subject to the personal jurisdiction of any of the above mentioned states, for if they did, the cases would have to be heard in that forum. Rather, the court considers the defendant's contacts with all of the states in the union together to determine if he should be subject to the personal jurisdiction of the United States. If Dieter's contact with the nation in sum is determined by the court to comport with Due Process, he can be subject to the personal jurisdiction of any federal court in the United States. However, it cannot be stressed strongly enough that this rationale applies only where no single state forum would have jurisdiction over the defendant.

Rule 4(k)(2) has raised some vexing issues regarding its application to tag service, burden of proof, consent to jurisdiction, and nationality and incorporation, to name a few.<sup>104</sup> These issues are out of the scope of this article but a practitioner should address all of them before deciding to base jurisdiction on Rule 4(k)(2). As a

practical matter, while Rule 4(k)(2) is a powerful grant of jurisdiction, it is a very narrow one that will apply only in rare situations where international defendants are involved. However, in an increasingly global economy where technology has made the Internet a major commercial medium, the instances of a foreign defendant having several contacts with the United States in general but none so predominant as to satisfy the requirements of any one state long-arm statute will undoubtedly increase. Further, a given court might not believe a cyber-thieves' like Dieter's intermittent electronic contacts with computers across the nation are sufficient enough to create jurisdiction in a given forum. However, 4(k)(2) allows the federal courts to consider the totality of the contacts across the fifty states in determining whether the requirements of Due Process have been met.

## B. Recent Internet Jurisdiction Cases

The Internet is a multi-jurisdictional medium for obtaining information that crosses territorial boundaries and allows people to access information in one place which may not be located in any particular geographical area but is available to anyone anywhere in the world.<sup>105</sup> The proliferation of the Internet into commerce and every day life has proposed new challenges to the traditional methods by which the courts have determined personal jurisdiction. However, advances in technology have not in the past, nor will they likely in the future, signal the extinction of the Due Process limits on the exercise of personal jurisdiction.<sup>106</sup>

A few recent law review articles have comprehensively discussed the cases decided regarding personal jurisdiction and Internet contacts.<sup>107</sup> These cases indicate that the current law is unsettled and in flux.<sup>108</sup> One thing is clear, until the world develops a more appropriate method by which to decide issues of jurisdiction as they apply to the Internet, the courts will continue to use traditional long-arm and constitutional minimum contacts analysis, even when dealing with foreign defendants.<sup>109</sup> The majority of this section is a synopsis of the cases discussed in these articles that may be analogized to the Dave hypothetical.

In a very recent case, *Euromarket Designs, Inc. v. Crate & Barrel, Ltd.*, a federal court sitting in Illinois found specific personal jurisdiction over an Irish Internet retailer in a Lanham Act suit

alleging infringement of the trademark "Crate & Barrel."<sup>110</sup> In this case, the plaintiff was an Illinois corporation with its principle place of business in Illinois.<sup>111</sup> The defendant was an Irish corporation with its principle place of business located in Dublin.<sup>112</sup> The defendant used the plaintiff's well known trade name "Crate & Barrel" to establish its own store and Internet site selling home furnishings.<sup>113</sup> The defendant's Internet site was interactive and available to residents within Illinois.<sup>114</sup>

In taking the allegations in the complaint as true, the court ruled that the defendant's alleged tortious activities established personal jurisdiction over the defendant under the "effects doctrine."<sup>115</sup> Specifically, the court found three reasons why the defendant's actions subjected it to the jurisdiction of the court: (1) if the Crate & Barrel trademark had been infringed, the injury will be felt mainly in Illinois; (2) the defendant intentionally and purposefully directed its actions towards Illinois and Crate & Barrel, an Illinois corporation, allegedly causing harm in Illinois; and (3) the defendant knew that the harm would likely be suffered in Illinois.<sup>116</sup> Further, the court held that if the tort of trademark infringement was found at trial, the primary injury would have been felt in Illinois and that the defendant would have known that the injury would likely be felt in Illinois.<sup>117</sup> Therefore, the court ruled that personal jurisdiction was proper under the effects doctrine.<sup>118</sup>

In *Playboy Enterprises, Inc. v. Asiafocus International, Inc.*, a Virginia district court upheld jurisdiction in a trademark infringement and unfair competition case against foreign corporations and individuals residing in Hong Kong.<sup>119</sup> Applying the Virginia long-arm statute, the court held that the exercise of personal jurisdiction was proper when the defendant causes tortious injury in Virginia, or the defendant regularly did business, or engaged in any other persistent course of conduct in Virginia. The court claimed specific jurisdiction because it determined that each act of a Virginia resident accessing the defendant's Internet site by a Virginia computer completed a tortious injury in Virginia. This decision is consistent with the established notion that a court in the United States can exercise personal specific jurisdiction over a defendant from a foreign country if that defendant has committed an act having a substantial, direct, and foreseeable effect within the United States.<sup>120</sup>

Other decisions in which the defendants were diverse but

still United States citizens are just as important to consult, since as mentioned before, the courts will analyze an international defendant in the same way.<sup>121</sup> In *California Software, Inc. v. Reliability Research, Inc.*, a California company sued the defendant for making communications that constituted tortious interference with the plaintiff's business.<sup>122</sup> The communications took place via mail and computer bulletin board.<sup>123</sup> While the court held that the defendant's computer contacts were not enough to create general jurisdiction, the court did find that the defendant had subjected itself to the specific jurisdiction of California.<sup>124</sup> The court found that the defendant could foresee that they would be summoned into the California court because the defendant had aimed its electronic contacts at the forum state, the communications were intended to harm the plaintiff, and the defendant's actions had caused an injury in the forum state.<sup>125</sup> The court further found that the defendant's intentional tortious statements constituted sufficient forum-related activity to subject the defendant to the jurisdiction of the court.<sup>126</sup>

The court's reasoning in *California Software, Inc.* was similar to the U.S. Supreme Court's reasoning in *Calder v. Jones*, a non-Internet case, where the Court expanded personal jurisdiction to include tortious acts directed at a state from outside its borders.<sup>127</sup> In *Calder*, the plaintiff was an entertainer who worked and resided in California.<sup>128</sup> The defendants, residents of Florida, were journalists for the *National Enquirer*, a Florida corporation.<sup>129</sup> The plaintiff alleged that the defendants authored a libelous article about her that was heavily circulated within California.<sup>130</sup> The defendants challenged the jurisdiction of the court claiming that they did not have sufficient contacts with California to be haled into court there.<sup>131</sup> The appellate court agreed that neither petitioner had sufficient contacts with California to fall within the general jurisdiction of the state.<sup>132</sup> However, the appellate court concluded that the valid basis for jurisdiction existed on the theory that the defendants intended to, and did, cause tortious injury to the plaintiff in California.<sup>133</sup>

The Supreme Court affirmed the appellate court's decision holding that because California was the focal point of the story and the harm suffered, jurisdiction over the defendants was proper based on the "effects" of their conduct in California.<sup>134</sup> The Court reasoned that the defendants were not accused of mere untargeted negligence.<sup>135</sup> Rather, the Court held that the defendant's tortious

acts were intentional and expressly aimed at California.<sup>136</sup> Further, the Court held that the defendants committed a tort they knew would have a potentially devastating impact on the plaintiff and that they knew the brunt of that injury would be felt in the state in which the plaintiff lived.<sup>137</sup> Therefore, under the circumstances, the defendants should have reasonably anticipated being haled into court in California to answer for their tort.<sup>138</sup> The Court concluded that an individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused the injury in California.<sup>139</sup>

More recently in *Panavision International, L.P. v. Toepfen*, an Illinois defendant who had no substantial, systematic, or continuous contacts with California was nonetheless subjected to the personal jurisdiction of the state via its long-arm statute that allowed extension of jurisdiction up to the limits of the Constitution.<sup>140</sup> The court likened the defendant's acts of "cyber-squatting" to extortion and stated that it amounted to a "scam directed at California."<sup>141</sup> The court noted that it was not holding that the defendant was doing business in California, but that he was acting in a manner that was "intended to, and did, result in harmful effects in California."<sup>142</sup> This decision, along with *European Designs, Calder and California Software, Inc.*, contains an important and prominent thread in the case law regarding the Internet and personal jurisdiction.<sup>143</sup>

Moreover, in *EDIAS Software International, L.L.C. v. BASIS International Ltd.*, the plaintiff sued the defendant for breach of contract, libel, defamation, tortious interference with contract, and trademark infringement after the defendant sent e-mail messages to the plaintiff's employees and customers expressing the defendant's dissatisfaction with the plaintiff.<sup>144</sup> The defendant was a New Mexico company and the plaintiff had offices in Arizona, Germany, and the Netherlands.<sup>145</sup> The court ruled that the defendant was subject to the personal jurisdiction of Arizona as a result of its contract and subsequent dealings with the plaintiff.<sup>146</sup> In addition, under a specific jurisdiction analysis the court directly addressed the e-mail messages and determined that they constituted minimum contacts because they contained defamatory statements that were intentionally directed at Arizona and caused foreseeable harm in Arizona.<sup>147</sup>

Finally, in *Maritz, Inc. v. CyberGold, Inc.*, a federal court in Missouri found the presence of the defendant's Web site in Mis-

souri was enough to satisfy the "commission of a tortious act" provision of the Missouri long-arm statute.<sup>148</sup> In its reasoning, the court held that the defendant's web site content combined with its availability to Missourians was a violation of the Lanham Act, which is tortious in nature, and that the exercise of personal jurisdiction was appropriate due to the three way nexus between the web site, the alleged tort, and the forum.<sup>149</sup> The court stated that the defendant's activities produced an effect in Missouri because they allegedly caused the plaintiff economic injury.<sup>150</sup>

It is relatively clear from the decisions discussed above that the courts seem very willing to exercise their personal jurisdiction in situations where the court believes that the defendant has acted tortiously in an intentional manner within the forum state. It is also apparent that the courts are willing to blur the territorial line when it comes to intentional torts by allowing jurisdiction where the tort may not have actually occurred in the state but where the effect of it was intended to be felt in the forum state. The similarities between the facts of the above cases and those the Dave hypothetical suggest the court will use the "effects test" to determine if personal jurisdiction should be exercised over Dieter. Given that fraud is an intentional tort, and that the act of entering an Illinois resident's computer electronically to steal information in order to commit a fraud is an act more pervasive and intrusive than any of those regarding Internet sites discussed above, one could reasonably expect a court to construe a long-arm statute which allows jurisdiction where a tort is committed within Illinois in the plaintiff's favor.

However, even if the court does not find that the tort in Dave's case occurred in Illinois, and thus finds section 2-209(a)(2) inapplicable, it could still find that the effect of the torts committed in Germany were intended to be felt within Illinois. When a person commits fraud they do so with intent and they do so knowing that the effect of it will be felt in the place where the victim resides.<sup>151</sup> In the case of fraud or theft, there is no question that Dieter intended the plaintiff to feel the effects of the tort. Under constitutional analysis, and section 2-209(c) of Illinois' long-arm statute, this intended and undoubtedly foreseeable effect is enough to allow a federal court in Illinois to exercise personal jurisdiction over Dieter. However, it is important to note that in some cases the courts have found that the defendant's actions, while tortious, occurred entirely

outside of the state and were not intended to have effect in the forum state.<sup>152</sup>

### C. International Law and Personal Jurisdiction: Restatement (Third) Foreign Relations Law

Section 421 of the *Restatement (Third)* outlines principles of international law relating to the assertion of personal jurisdiction in cases having international implications.<sup>153</sup> However, international law, as the *Restatement* provides, does not address the exercise of jurisdiction between national and local courts in a federal system like the United States, nor does it address the issue of subject matter jurisdiction. The *Restatement* is a culmination of years of customary international law designed to provide guidelines for the exercise of jurisdiction across national borders.<sup>154</sup> The *Restatement* is not the law in the United States. The courts in the United States are not required to follow its guidelines, nor consult it in cases involving international defendants being sued within the United States.<sup>155</sup> In cases of private civil litigation, if a federal court finds personal jurisdiction exists under Rule 4(k), it will exercise it barring some special circumstances involving foreign state sovereignty.<sup>156</sup> However, even though the courts are not required to decide cases according to what the *Restatement* provides, they often do consult it when it suits them.

As mentioned above, in private civil lawsuits, international law regarding personal jurisdiction has been reduced to an afterthought in most situations. In contrast, international criminal prosecutions remain a very delicate situation for courts around the world.<sup>157</sup> When identity theft is committed through use of the Internet, and a subsequent violation of section 1030 is prosecuted, many international law issues such as investigation and extradition must be addressed by the Secret Service before the criminal can be brought to justice in the United States.<sup>158</sup> The international jurisdictional law pertaining to a civil action initiated under section 1030, however, is clearly provided for in the *Restatement*.<sup>159</sup>

Section 421(1) explains: “[a] state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise reasonable.”<sup>160</sup> Section 421(2) continues: “[i]n general, a state’s exercise of jurisdiction to adjudicate with respect



to a person or thing is reasonable if, at the time jurisdiction is asserted. . . (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity; . . . (j) the person, whether natural or juridical, had carried on outside the state an activity having substantial, direct, and foreseeable effect within the state, but only in respect of such activity. . . ."<sup>161</sup> Jurisdiction under section 421(2)(i), and (j) is considered specific jurisdiction, allowing the courts of the forum state to adjudicate only with respect to claims arising out of a contact with the forum.<sup>162</sup>

From the language above it is apparent that section 421's requirements for the assertions of jurisdiction by a state over a foreign national are substantially similar to those the United States courts would use in conducting a Due Process analysis.<sup>163</sup> Subsections (i) and (j) are virtually identical to many long-arm statutes of the states of this country, including Illinois. Subsections (i) and (j) also appear to represent the increasing acceptability of the "effects test" as it is applied by United States courts. Considering the similarity between section 421's and domestic state long-arm statutes, combined with section 421 overall reasonableness requirement, a foreign defendant who has committed an intentional tort against a United States citizen, the effects of which were felt in Illinois, should be subject to the personal jurisdiction of Illinois.<sup>164</sup> In this situation, an assertion of personal jurisdiction by a United States court will not offend customary international law. Indeed, some decisions have suggested, and international law does not expressly forbid, that the court should consider a foreign defendant's contacts with the nation as a whole like Rule 4(k)(2) provides.<sup>165</sup>

## V. LEGISLATIVE JURISDICTION: APPLYING 18 U.S.C. § 1030 TO FOREIGN DEFENDANTS

To this point this article has explained how a plaintiff can assert subject matter and personal jurisdiction over a foreign defendant under 18 U.S.C. § 1030(g) in a manner which will leave the federal court with little choice but to exercise their power to decide the case. If obtaining subject matter and personal jurisdiction are considered the first two steps in maintaining a lawsuit in the United States, having the proper jurisdiction to impose United States substantive law may be considered the third step. There are generally two basic constraints on the United States legislature to

enact laws that apply to international persons and their conduct. First, international law has traditionally been thought of as restricting assertions of legislative jurisdiction by sovereign states. Second, the legislature must overcome the United States Constitution's limits on Congress and the states regarding legislative jurisdiction.

During the nineteenth century, American courts believed that international law created strict territorial limits on national assertions of legislative jurisdiction.<sup>166</sup> However, this belief began to erode at the beginning of the twentieth century as courts in the United States and abroad began to assert legislative jurisdiction over foreign defendants based on the "effects test" and other bases.<sup>167</sup> One classic work of a American commentator discussed the effects test, stating, "the methods which modern invention has furnished for the performance of criminal acts...has made this principle one of constantly growing importance and increasing frequency of application."<sup>168</sup>

In essence, the "effects test" applies to legislative jurisdiction in the same manner it applies to personal jurisdiction in that foreign states may exercise legislative jurisdiction over defendants who have committed acts outside a state but the effects of which are felt within it.<sup>169</sup> For example, the "effects test" has been used to justify the extraterritorial application of the Sherman Antitrust Act and various other federal criminal laws.<sup>170</sup> In cases like this, courts no longer hesitate to exercise legislative jurisdiction.

In the last century, the United States and other countries have adopted expansive views of national legislative jurisdiction under international law. The *Restatement (First) Conflicts of Law* § 65, adopted in 1934, expressly provides for an "effects test," stating: "[I]f consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction."<sup>171</sup> The *Restatement (Second) Foreign Relations Law* § 18 allows a state to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if its effects are recognized as elements of a crime or tort under the laws of states with reasonably developed legal systems.<sup>172</sup> More recently, the *Restatement (Third) Foreign Relations Law* § 402 allows a state to exercise legislative jurisdiction with respect to "(1)(a) conduct that, wholly or in substantial part, takes place within its territory;. . .(c) conduct outside its territory that has or is intended to have substan-

tial effect within its territory."<sup>173</sup> What at one time was considered a very stringent international interdiction on assertions of legislative jurisdiction has now become a more flexible and tolerant policy, under the pressures of a more interconnected world economy.

As the above discussion suggests, international law has become more receptive to United States assertions of legislative jurisdiction. The question that remains is how willing are United States courts to apply the substantive law of the nation to foreign defendants in light of constitutional restraints? It has long been believed that federal legislation may constitutionally be applied to conduct outside the United States.<sup>174</sup> Moreover, Congress may enact legislation that violates international law principles, and if so, United States courts must disregard the international law principles and apply the domestic statute.<sup>175</sup> This is true despite the presumption that Congress does not intend to violate international law, and that the Supreme Court has stated that unless a contrary intent appears, congressional legislation is meant to apply only within the territorial jurisdiction of the United States.<sup>176</sup> Therefore, Congress has the power to exercise its legislative jurisdiction over foreign persons and their actions. Whether Congress wants to do so is determined only by looking to the language of the specific statute that is being applied, and the intent of the lawmakers in enacting it.

Finally, the Due Process clause may forbid the exercise of legislative jurisdiction over certain foreign defendants if their contacts are not sufficient with the United States or the court finds that application of the statute would be "arbitrary or fundamentally unfair."<sup>177</sup> In practice, this constitutional requirement is rarely relied upon to refute a court's exercise of legislative jurisdiction and there are no reported federal decisions that have held extraterritorial application of substantive federal law unconstitutional for lack of Due Process.<sup>178</sup>

In *United States v. Davis*, the court held that a federal criminal statute could be applied substantively to a foreign national because the statute explicitly stated that it intended the statute to apply extraterritorially and its application was not fundamentally unfair.<sup>179</sup> The court ruled that compliance with international law did not determine whether the United States may prosecute the defendant under the statute.<sup>180</sup> Instead, it ruled that the only considerations that need be taken into account were whether (1) Congress

made clear its intent to give extraterritorial effect to the statute, and (2) the application was consistent with Due Process.<sup>181</sup> The court ruled that when an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its legislative jurisdiction.<sup>182</sup> The court then took notice of the fact that the lower court found sufficient facts to support the conclusion that the defendant intended to smuggle drugs into the United States.<sup>183</sup>

Proving that legislative jurisdiction exists in the Dave hypothetical is particularly important because if section 1030 does not apply extraterritorially then there will be no federal question subject matter jurisdiction over the case. Therefore, this issue must be carefully addressed. Unlike the language of the statute in *Davis*, the language of section 1030 is not as direct in asserting extraterritorial legislative jurisdiction. There is no specific sentence within section 1030 that indicates that the statute "applies extraterritorially." However, there is language within the language that suggests it is meant to apply to foreign defendants.

For example, in section 1030(a) Congress protects "...information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations..." if there is reason to believe that "such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation . . ." <sup>184</sup> Further, subsection (a)(7) states that whoever acts "with intent to extort from any person, firm, association, educational institution, financial institution, [or] government entity...any money or thing of value. . ." commits an offense.<sup>185</sup> Subsection (e)(9) defines the term "government entity" used above as including "any state or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country."<sup>186</sup>

This language can reasonably be read as extending the scope of the statute to include foreign individuals who have acted in a foreign nation to extort money from a United States ambassador, law firm, or any foreign political subdivision. Since the amendments in 1996 added computers used in "foreign commerce" as computers protected by the statute, section 1030 appears to cover virtually every act of computer related criminal activity that can be committed domestically or extraterritorially. Legislative analysis

indicates that the inclusion of computers used in "foreign commerce" confers jurisdiction over international computer crime cases.<sup>187</sup> Unfortunately, subsection (g) is silent as to its extraterritorial application. However, construing subsection (g) consistently with the rest of the statute's language may allow it to be applied to foreign defendants outside of the United States.

To date, there have been no reported cases discussing extraterritorial enforcement of section 1030. However, there have not been many cases reported that discuss section 1030 at all. Since the original reason behind the enactment of this statute was to provide protection to United States government computers that were used for national defense, one can anticipate that a court would decide that Congress intended this statute to have legislative jurisdiction over foreign defendants.<sup>188</sup> Any other interpretation would appear to conflict with the design of the statute. Moreover, domestic and international legal principles support the extraterritorial application of statutes designed to defeat criminal activity directed at a country from outside its borders.<sup>189</sup> There should be no Due Process limitations on this exercise of legislative jurisdiction.

## VI. CONCLUSION

This article demonstrates how a victim of identity theft and computer fraud can obtain the necessary jurisdiction in United States courts to successfully sue a foreign national defendant pursuant to 18 U.S.C. § 1030(g). Article III of the Constitution and 28 U.S.C. § 1331 and 28 U.S.C. § 1332 allow federal courts to assert subject matter jurisdiction over a foreign defendant by establishing a federal question or by claiming alienage. Federal Rule of Civil Procedure 4(k) provides a plaintiff with several options by which personal jurisdiction can be exercised over a defendant located outside the forum, many of which will be successful under the facts of typical identity theft and computer fraud cases. In addition, recent decisions discussing Internet contacts with the forum state as grounds for asserting personal jurisdiction can reasonably be read to support such an assertion of jurisdiction over a defendant who has intentionally committed a tortious or criminal act via the Internet that has an effect in the forum. Finally, although United States courts have yet to do so, the language of section 1030 suggests that Congress has created legislative jurisdiction over extrater-

ritorial defendants.<sup>190</sup>

If carefully applied, section 1030(g) can become a powerful tool for victims nationwide to recover their financial and legal integrity. There are significant hurdles to overcome when suing an foreign defendant, such as obtaining proper service of process, collecting evidence, and enforcing judgement. However, obtaining the required jurisdiction is certainly possible and much less difficult than one might expect.

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1. *See generally* The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of The Internet, A Report of the President's Working Group on Unlawful Conduct on the Internet (March 2000) at <http://www.usdoj.gov/criminal/cybercrime/unlawful.htm> [hereinafter Frontier].

2. Timothy L. O'Brian, *Officials Worried Over Sharp Rise in Identity Theft*, N.Y. TIMES, April 3, 2000, at A1 [hereinafter *Identity Theft*].

3. *See generally* Frontier, *supra* note 1.

4. *Id.*

5. *Id.* at page 20.

6. *See generally* 18 U.S.C. § 1028(a) (2000).

7. Hatcher, Michael, et al., *Computer Crimes*, 36 AM. CRIM. L. REV. 397, 410 (1999) [hereinafter Hatcher].

8. There are several common law torts that a victim could sue a defendant for including fraud, unjust enrichment, impersonation, or conversion. The scope and purpose of this article is to highlight the availability of 18 U.S.C. § 1030 and to discuss the jurisdictional issues that accompany maintaining a civil suit in federal court. Except for the subject matter jurisdiction portion of this article, the analysis contained in the following pages can be applied just as effectively in state court. *See generally* Sinrod, Eric, J. and William P. Reilly, *Cyber-Crimes: A Practical Approach To The Application Of Federal Computer Crime Laws*, 16 SANTA CLARA COMPUTER & HIGH TECH. L. J. 177 (2000) (discussing the criminal application of 18 U.S.C. § 1030 and other federal statutes).

9. Hatcher, *supra* note 7, at 402.

10. 18 U.S.C. § 1030 (2000).

11. Hatcher, *supra* note 7, at 403.

12. *Id.*

13. *Id.* Under section 1030(e)(2), a “protected computer” means a computer “...(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or (B) which is used in interstate or foreign commerce or communication. . . .” 18 U.S.C. § 1030(e)(2) (2000).

14. 18 U.S.C. § 1030(a)(4) (2000).

15. *Id.* § 1030(c)(3)(A).

16. *Id.* § 1030(c)(3)(B).

17. *Id.* § 1030(g).

18. *Id.* § 1030(e)(8)(A).

19. *Id.* § 1030(g).

20. *Identity Theft*, *supra* note 2, at A19; THE CHICAGO SUN-TIMES, Sunday, September 5, 1999, 1A, 6A, discussing the frustration and helplessness many victims of identity theft feel in the months and sometimes years after discovering the crime.

21. *See generally* *Yournetdating, LLC v. Mitchell*, 88 F. Supp. 2d 870, 872 (N.D. Ill. 2000) (granting plaintiff’s temporary restraining order where allegations suggested that defendant’s act of intercepting and rerouting plaintiff’s customers’ Internet transmissions violated 18 U.S.C. § 1030); *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 926, 930-37 (holding that a “transmission” under section 1030(a)(5)(A) may include the sale of defective microcode in floppy-diskette controllers if accompanied by the intent to cause harm, thus, a civil suit under section 1030(g) was proper); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 450-51 (E.D. VA 1998)(holding defendants violated section 1030(a)(2)(C) which prohibits accessing a computer without authorization and thereby obtaining information from any protected computer if the conduct involved an interstate or foreign communication when the defendant used its America Online account membership to harvest other members information via “extractor software programs”);

22. *Identity Theft*, *supra* note 2, at A19, discussing a situation in which a victim, without the help of law enforcement, was able to discover the individual that stole her identity by checking out the addresses that were given on two bogus credit applications that were filled out in her name and then checking them with a real estate agency; *see also*, Michael Higgins, *Identity Thieves*, ABA JOURNAL, October, 1998, discussing a case in which a victim successfully tracked down his offender without police assistance at pages 43-45.

23. As this article will explain, and the relevant case law suggests, the requirements for obtaining personal jurisdiction over a foreign national is basically the same as those for exercising personal jurisdiction over a diverse domestic defendant. The true difficulty in conducting this sort of litigation lies in the acts of serving of process, collecting evidence, and enforcing judgement. While all of these topics cannot be discussed at length in this article, a practitioner should be aware of the significant hurdles that must be overcome.

24. GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 11 (3rd ed. 1996) (referencing *THE FEDERALIST* NO. 23 (Alexander Hamilton)) [hereinafter BORN].

25. The United States Secret Service is the agency that has been specifically put in charge of handling the investigation of computer fraud complaints under section 1030. 18 U.S.C. § 1030(d) (2000).

26. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).

27. BORN, *supra* note 24, at 9, citing *Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

28. *Id.* at 11-12. Included in these grants are cases involving federal questions arising under the U.S. Constitution, statutes and regulations; diversity of citizenship cases between citizens of different states within the U.S.; alienage jurisdiction over actions between U.S. citizens and foreign parties; the Alien Tort Statute where an alien is the plaintiff; and actions under the Foreign Sovereign Immunities Act. *Id.*

29. *See generally* C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §3522 (1984).

30. U.S. CONST. art. III, §2 cl.1.

31. 28 U.S.C. § 1331 (2000).

32. BORN, *supra* note 24, at 35.

33. *Id.*

34. *See generally* 18 U.S.C. § 1030 (2000). Subsection (a)(2)(C) makes it a crime to intentionally access a computer without authorization and obtain information from any protected computer if the conduct involved an interstate or foreign communication. Further, subsection (a)(4) also makes it a crime to knowingly and with intent to defraud, access a protected computer without authorization. Dave could potentially plead violations of both of these sections in order to back up his civil claim under subsection (g).



35. U.S. CONST. art. III, §2.

36. *Id.*

37. BORN, *supra* note 24, at 25, referring to Alexander Hamilton's reasoning in THE FEDERALIST No. 80, at 476, "an unjust sentence against a foreigner. . .would..if unredressed, be an aggression upon his sovereign . . ."

38. *Hodges & Thompson v. Bowerbank*, 9 U.S. 303 (1809).

39. 28 U.S.C. § 1332(a)(3) (2000).

40. BORN, *supra* note 24, at 27, citing to federal courts that recognize this brand of minimal diversity.

41. *Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297 (9th Cir. 1985); *Timco Engineering, Inc. v. Rex & Co.*, 603 F. Supp. 925 (E.D. Pa. 1985); *K&H Bus. Consultants Ltd. v. Cheltonian, Ltd.*, 567 F. Supp. 240 (D.N.J. 1983).

42. BORN, *supra* note 24, at 27-8.

43. *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977).

44. BORN, *supra* note 24 at 67.

45. *Id.*

46. Dale M. Cendali, *Personal Jurisdiction and the Internet*, 520 PLI/PAT 975, 996 (1998)[hereinafter Cendali].

47. Illinois' long-arm statute provides several situations in which a party may be subject to the jurisdiction of Illinois' state courts. *See* 735 ILL. COMP. STAT. 5/2-209 (West 2000).

48. Many states have adopted only this general grant of personal jurisdiction, whereas several states, including Illinois, have chosen to adopt a "hybrid" approach which combines specific and general long-arm statutes.

49. BORN, *supra* note 24, at 68.

50. *Omni Cap. Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).

51. BORN, *supra* note 24, at 69.

52. *Id.* at 78.

53. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 421 Reporters' Note 1 (1987) ("the criteria for exercise of judicial jurisdiction are basically the same for

claims...involving a non-resident alien as a party” as the criteria for domestic cases).

54. Federal Rule 4 actually grants personal jurisdiction to the federal courts in five different ways, but for the purpose of this article there is need only to discuss three. Fed. R. Civ. P. 4(k).

55. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1075, at 495 (1987).

56. FED. R. CIV. P. 4(k)(1)(D).

57. FED. R. CIV. P. 4(k)(2). This section was enacted to address a loop hole where certain defendants were not subject to the personal jurisdiction of any one particular state since they did not maintain sufficient contacts with any one state enough to establish the Constitutionally required “minimum contacts” but were thought to have sufficient minimum contacts with the nation as a whole.

58. Cendali, *supra* note 46, at 978.

59. *Id.*

60. *Id.*

61. *Id.*

62. 735 ILL. COMP. STAT. 5/2-209 (West 2000).

63. *Id.* at 5/2-209(a).

64. *Id.* at 5/2-209(b). If a defendant like the one in this hypothetical were extradited and brought to the U.S. for criminal prosecution, a plaintiff would be able to serve him personally and thereby achieve personal jurisdiction according to (b)(1). This situation is remote considering the foreign country in which the criminal resides will have a greater interest in prosecuting the defendant there, and because it is unlikely that he would come to the U.S. on his own.

65. *Id.* at 5/2-209(c).

66. Klump v. Duffus, 71 F.3d 1368, 1371 (7th Cir. 1995).

67. 892 F.2d 1308, 1313 (7th Cir. 1990).

68. *Id.* at 1312.

69. *Id.* at 1313.

70. 1999 U.S. Dist. LEXIS 7009 (1999).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 735 ILL. COMP. STAT. 5/2-209(c) (West 2000) states "a court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States."

76. Regardless of whether a specific jurisdiction "hook" like 2-209(a)(2) applies or not, the court must consider the Due Process requirements of the Constitution. As a practical matter though, a plaintiff filing in a state with a hybrid long-arm statute should attempt to claim personal jurisdiction under a "hook" in the long-arm statute if one applies *and* claim the clean-up clause granting jurisdiction to the extent that the Constitution allows.

77. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

78. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

79. Cendali, *supra* note 46, at 979 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1974)); *see also*, *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 467-77 (1985)(comporting with "fair play and substantial justice" requires courts to consider the burden on the defendant, the forum state's interest in adjudication, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in efficient resolution of the dispute, and the shared interest of the several states in furthering fundamental substantive social policies.)

80. Michael Traynor, *Personal Jurisdiction and the Internet: 1999 and Looking Ahead*, 564 PLI/PAT 109, 117 (1999) (citing *Keeton*, 465 U.S. 770 (1974); *Calder v. Jones*, 465 U.S. 783 (1984); *Blumenthal v. Drudge*, 992 F.Supp. 44, 53-58 (D.D.C. 1998)) [hereinafter Traynor].

81. BORN, *supra* note 24, at 91(citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)); RESTATEMENT (SECOND) CONFLICTS OF LAW § 37 (1971). Section 37 states: "a state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from the effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

82. BORN, *supra* note 24, at 91.

83. *Id.*

84. 71 F.3d 1368, 1372-3 (7th Cir. 1995).
85. *Id.* at 1371.
86. *Id.* (quoting *International Shoe Co.*, 326 U.S. at 316 (1945)).
87. *Id.* at 1371-3.
88. Cendali, *supra* note 46, at 979.
89. Traynor, *supra* note 80, at 112.
90. F. RULE CIV. P. 4(k)(1)(D).
91. BORN, *supra* note 24, at 174.
92. *Id.*
93. *Id.* An example is the long-arm provision of Section 12 of the Clayton Act, which states: "Any suit ...under the antitrust laws against a corporation may be brought...in any district wherein it may be found or transacts business; and all process in such case may be served in the district of which it is an inhabitant, or wherever it may be found." 15 U.S.C. § 22 (2000).
94. *Go-Video, Inc. v. Akai Electric Co.*, 885 F.2d 1406 (1989).
95. BORN, *supra* note 24, at 174-5.
96. *Id.*
97. Hatcher, *supra* note 7, at 410.
9897. F. RULE. CIV. P. 4(k)(2).
99. BORN, *supra* note 24, at 195.
100. *Id.*
101. Section 2-209(c) provides the court with the power to exercise personal jurisdiction "on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States."
102. BORN, *supra* note 24, at 195-6 n.1(a).
103. F. RULE CIV. P. 4(k)(2)'s language: "If the exercise of jurisdiction is consistent with the Constitution...."
104. *See generally* BORN, *supra* note 24, at 195-7 n. 1-3.

105. See generally Andrew E. Costa, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law*, 35 HOUS. L. REV. 453, 458 (Summer 1998)(quoting David R. Johnson & David Post, *Law and Borders & Mdash; The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) and David G. Post, *Anarchy, State, and the Internet: An Essay on Law Making in Cyberspace*, 1995 J. ONLINE L. art. 3, p. 36 at [http:// www.law.cornell.edu/jol/post.html](http://www.law.cornell.edu/jol/post.html))[hereinafter Costa].

106. Costa, *supra* note 105, at 458.

107. See generally Costa, *supra* note 105; Cendali, *supra* note 45; Traynor, *supra* note 80.

108. Costa, *supra* note 105.

109. Cendali, *supra* note 46, at 979, 996.

110. 96 F. Supp. 2d 824, 836 (N.D. Ill. 2000).

111. *Id.* at 828.

112. *Id.* at 828-29.

113. *Id.* at 829.

114. *Id.*

115. *Id.* at 836.

116. *Id.*

117. *Id.*

118. *Id.* at 837.

119. 1998 U.S. Dist. LEXIS 10359.

120. Traynor, *supra* note 80, at 117 (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)).

121. Cendali, *supra* note 46, at 996.

122. Costa, *supra* note 105, at 476-7(citing 631 F. Supp. 1356 (C.D. Cal. 1986)).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*
127. 465 U.S. 783, 789 (1984).
128. *Id.* at 784.
129. *Id.* at 785-86.
130. *Id.*
131. *Id.* at 787.
132. *Id.* at 786-87.
133. *Id.* at 787.
134. *Id.* at 789.
135. *Id.*
136. *Id.*
137. *Id.* at 789-90.
138. *Id.* at 790.
139. *Id.* at 790.
140. 938 F. Supp. 616 (C.D. Cal. 1996).
141. *Id.* at 622.
142. *Costa, supra* note 105, at 480.
143. *Id.*
144. *Id.* at 485 (citing 947 F. Supp. 413 (D. Ariz. 1996)).
145. *Id.* at 486.
146. *Costa, supra* note 105, at 486.
147. *Id.*
148. *Id.* at 488.
149. *Id.*

150. *Costa*, *supra* note 105, at 489.

151. In fact, intent is an element of any cause of action for fraud. It must be proved for the purposes of substantive law and, under the “effects test”, procedural law as well.

152. *See generally*, *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997).

153. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 421, cmt b (2000). Section 421 in principle applies to the exercise of criminal as well as of civil jurisdiction; *see also* BORN, *supra* note 24, at 88 n. 8.

154. *Id.*

155. *Id.* at 89 n. 8(b). The United States is not a party to any international treaties or agreements that deal directly or indirectly with judicial jurisdiction. Other nations have entered into jurisdictional agreements. The most important of them is the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, O.J. Eur. Comm. (No. L 304 77) (1978), a.k.a. The Brussels Convention, of which the countries of the European Union are members. The United States is not bound to the provisions of this convention.

156. *Id.* at 89 n. 8(d).

157. *See generally* Frontier, *supra* note 1.

158. *Id.*

159. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 421, cmt. b (2000). Section 421 in principle applies to the exercise of criminal as well as of civil jurisdiction.

160. *Id.* § 421(1).

161. *Id.* § 421(2).

162. *Id.* at rep. note 3.

163. *Id.* at rep. note 1.

164. *Id.* at rep. note 7, (“Except where nationwide jurisdiction is conferred by statute, e.g. § 27 of the Securities Exchange Act of 1934...the jurisdiction of a federal court in the United States to adjudicate claims against foreign parties depends on the laws of the State where the court sits, and the jurisdiction in accordance with Subsection (2)(h), (i), or (j) depends therefore on the contacts of the defendant with that State. There is no international law impediment, however, to aggregating a foreign defendant’s contacts with the United States as a whole, and a number of decisions have supported such aggregation, even

without an express federal statute.”)

165. *Id.*

166. BORN, *supra* note 24, at 493.

167. *Id.* at 497-8.

168. *Id.* at 498, (quoting J. Moore, *Report on Extraterritorial Crime and the Cutting Case* (1887), reprinted in II J. Moore, *A Digest of International Law* 244 (1906)).

169. *Id.* at 497.

170. *Id.* at 498, (citing *Ford v. United States*, 273 U.S. 593 (1927)).

171. RESTATEMENT (FIRST) CONFLICTS OF LAW § 65 (1934).

172. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW § 18 (1965).

173. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 402 (1987).

174. BORN, *supra* note 24, at 513, (citing *EEOC v. Aramco*, 499 U.S. 24 (1991)); Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 *LAW AND POL'Y INT'L BUS.* 1 (1992)).

175. *Id.* at 510.

176. *Id.* at 511, (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

177. *United States v. Davis*, 905 F.2d 245, 249 (9th Cir. 1990).

178. BORN, *supra* note 24, at 513-14.

179. *Davis*, 905 F.2d at 248-49.

180. *Id.* at 248.

181. *Id.*

182. *Id.* at 249.

183. *Id.*

184. 18 U.S.C. § 1030(a) (2000).

185. *Id.* § 1030(a)(7).

186. *Id.* § 1030(e)(9).



187. See Hatcher, *supra* note 7, at 403, (citing *Computer Crime and Intellectual Property Section*, U.S. Dep't of Justice, *The National Infrastructure Protection Act of 1996: Legislative Analysis* (last modified June 10, 1998)).

188. See generally *United States v. Rodriguez*, 182 F. Supp. 479 (1961), *aff'd in part, rev'd in part on other grounds*, 288 F.2d 545, *cert. denied*, 366 U.S. 948. (holding visa fraud statute to be applicable to foreign defendants because violation was directed at the United States and intended to have effect within its borders even though express language that statute applied extraterritorially was not present in the statute).

189. The United States law supporting the exercise of personal jurisdiction over defendants who have directed their tortious or criminal acts at the United States suggest the application of substantive United States law. The *Restatement (Third) Foreign Relations Law* § 421 (i) and (j) apply equally to criminal prosecutions and support the exercise of personal jurisdiction in the case of intentional tortious or criminal acts.

190. See generally *United States v. Rodriguez*, 182 F. Supp. 479 (1961), *aff'd in part, rev'd in part on other grounds*, 288 F.2d 545, *cert. denied*, 366 U.S. 948.

