

SHOULD FORUM SELECTION CLAUSES IN INTERNATIONAL WEBSITES BE ENFORCED? – A PROPOSED NEW MODEL

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A. Introduction

International websites often have online usage agreements, which must be accepted by the surfer, usually as part of the process of registration to the site. Occasionally the agreement may appear somewhere else on the website, not requiring express consent. These agreements contain **forum selection** clauses, which often select foreign courts to resolve disputes.¹ Unlike classic forum selection clauses between given parties (mostly businesses) to which the parties agree after negotiations, the clauses included in the online agreements are part of a “standard form contract” formulated in advance by the sites. The age of globalization and the rapid development of the Internet pose serious challenges to the law and raise a series of complex questions regarding the status of these forum selection clauses.

There is a substantial difference in the attitude of various legal systems toward such forum selection clauses. The systems adopt contradictory approaches that ascribe different weight to contractual aspects, consumer protection and considerations of sovereignty. It is clear that if the parties involved reside in different countries and are simultaneously subject to the international jurisdiction of several countries, it is important to ask which court is competent to resolve a legal dispute. This is especially true in light of the fact that the forum selection clause may end up deciding the fate of the lawsuit, even before it is filed. Such a situation can also lead to “forum shopping,” in which the plaintiff-consumer looks for the more convenient jurisdiction, where the clause’s validity is not recognized and will not be enforced. This has been especially true in the last two decades, when one of the greatest revolutions known to mankind in the field of communication has taken place, in the course of which a global arena of electronic communication has been created, accessible to all and making possible the instantaneous purchase of a product or service with a mouse-click. Consumers are daily signing cross-border contracts online, and entire trading markets are

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1. For a discussion of various types of forum selection clauses (also referred to as foreign jurisdiction clauses), see Otto Kahn-Freund, *Jurisdiction Agreements: Some Reflections*, 26 INT’L & COMPAR. L.Q. 825, 826-27 (1977); ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW, Ch. 6.01-.06 (2008).

currently being conducted on the web.

In the age of globalization and the Internet, it is necessary to reexamine foreign forum selection clauses that appear in online agreements on websites and apply special rules to them. This Article argues that a **balanced approach** is required that brings the various approaches, European and American, to a common denominator. Such an approach does not *a priori* deny the validity of forum selection clauses in online consumer agreements, but neither does it automatically validate and enforce them. Instead, it proposes a model that takes into account a set of specified parameters to determine whether or not to validate and enforce such forum selection clauses, with each parameter possibly leading to a different yet balanced outcome.

B. A Comparative Look at the Validity and Enforcement of Exclusive Forum Selection Clauses in Online Agreements: Absence of Internationally Agreed-upon Norms

As noted, there is a substantive difference in the way in which different legal systems treat forum selection clauses in online agreements. On the one hand, the **American legal system** adopts an economic approach, which generally respects the freedom of contracts and enforces forum selection clauses sweepingly, both in consumer and in business contracts, especially in the case of contracts referred to as “**clickwrap agreements**.”² The US courts have ruled that clickwrap agreements produce a binding legal relationship, because the dynamic of clicking a consent button in relation to the terms of the contract constitutes consent to the online contract (similar to signing “classic contracts”).³ By contrast, with regard to browsewrap agreements, some US courts have ruled that merely visiting the website does not create an intention to bind oneself by contract with respect to the “surfing” agreement, and does not create a binding legal relationship.⁴ Those

2. There is no specific U.S. legislation in relation to forum selection clauses in international consumer contracts; rather there is a general legislative framework wherein such clauses are analyzed. *See, e.g.*, U.C.C. (AM. L. INST. & UNIF. L. COMM'N 1977); Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(a) (2000); L UNIF. COMPUT. INFO. TRANSACTIONS ACT [UCITA] (NAT'L CONF. OF COMM'RS ON UNIF. STATE LS., A Proposed Model Law 1999); 28 U.S.C. § 1404(a); Federal Arbitration Act, 9 U.S.C. §2.

3. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006); *Forrest v. Verizon Comms., Inc.*, 805 A.2d 1007 (D.C. 2002); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007); *Burcham v. Expedia, Inc.*, No. 4:07-CV-1963-CDP, WL 586513 (E.D. Mo. Mar. 6, 2009); *Sandler v. iStockphoto LP*, No. 2:15-cv-03659-SVW-JEM, 2016 U.S. Dist. LEXIS 31330 (C.D. Cal. Feb. 5, 2016); *see also* *Wong v. PartyGaming, Ltd.*, 589 F.3d 821 (6th Cir. 2009); Ian Rambarran & Robert W. Hunt, *Are Browse-Wrap Agreements All They Are Wrapped up to Be*, 9 TUL. J. TECH. & INT'L PROP. 173, 186 (2007); Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter & Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 289 (2003).

4. SOPHIA TANG ZHENG, *ELECTRONIC CONSUMER CONTRACTS IN THE CONFLICT OF LAWS* 140 (2d ed. 2015).

courts are not willing to consider mere surfing on the site as a commitment to all the detailed terms of this agreement, including its foreign forum selection clause, which most probably the surfer has not even seen.⁵ US courts also recognize various **hybrid agreements**, which contain certain elements of clickwrap contracts and other elements of browsewrap agreements. The more similar a hybrid agreement is to a clickwrap contract, the greater the chances that it will be enforced because it provides more notice and requires clearer consent.⁶

By contrast, **EU law⁷ and Israeli law⁸** adopt an approach aimed at consumer protection that invalidates foreign forum selection clauses contained in online consumer contracts (business-to-consumer) as these are deemed to be unfair. At the same time, the courts validate such clauses contained in business-to-business contracts and enforce them.⁹ In an attempt to harmonize rules on jurisdiction, the Hague Convention on the Choice of Court Agreements was enacted in 2005, the only global treaty on the subject in the international arena to date.¹⁰ In practice, the Hague Convention is a thin one, narrow and limited in scope, from which many issues have been excluded. Since consumer agreements have been excluded, and because of the limited adoption of the convention, it does not solve the difficulties discussed in this Article.

As a result of the one-dimensional approach followed by individual legal systems, different and essential aspects concerning the complexity posed by the Internet age, and in particular in relation to forum selection clauses, are not taken into account. On the one hand, there are weighty considerations that affect the users' ability to read the online contract, identify forum selection

5. William J. Condon, Jr., *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433, 436 n.18 (2003); Alison S. Brehm & Cathy D. Lee, *From the Chair: "Click Here to Accept the Terms of Service"*, 31 COMM'NS LAW. 4, 5-6 (2015).

6. Brehm & Lee, *supra* note 5, at 7; *see also* Fteja v. Facebook, Inc., 841 F. Supp. 2d 829 (S.D.N.Y. 2012); E.K.D. v. Facebook, Inc., 885 F. Supp. 2d 894 (S.D. Ill. 2012); Nicosia v. Amazon.com, Inc., 834 F.3d 220 (2d Cir. 2016); Meyer v. Uber Techs., Inc., 868 F.3d 66 (2d Cir. 2017).

7. 2012 O.J. (L 351/1) art. 17-18; *see* Sophia Tang Zheng, *Multiple Defendants in the European Jurisdiction Regulation*, 34 EURO. L. REV. 80, 95-97 (2009); Council Directive 93/13, 1993 O.J. (L 95) (EC) (explaining forum selection clauses in consumer agreements are also subject to the EU Council Directive on unfair terms in consumer contracts); Case C-498/16, Maximilian Schrems v. Facebook Ir. Ltd., ECLI:EU:C:2018:37 (Jan. 25, 2018); EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW, BRUSSELS I REGULATION 322 (Ulrich Magnus & Peter Mankowski eds., 2007).

8. CivA 5860/16 Facebook Inc. v. Ben Hamo, Nevo Legal Database (May 15, 2018) (Isr.).

9. *See* Council Regulation 1215/2012, art. 25, 2012 O.J. (L 351) 1 (EU); *see also* Case C-322/14, Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH, ECLI:EU:C:2015:334 (May 21, 2015); Ryanair Ltd. v. Billigfluege.de GmbH [2010] IEHC 47 (Ir.), *aff'd*, Ryanair Ltd. v. Billigfluege de GmbH [2015] IESC 11 (Ir.).

10. Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

clauses, understand their meaning, and act on them. For example, the lack of a direct meeting between the user and the seller's representative, and the fear of providing personal information on the web, as well as the absence of a distinct act of signing a contract, create a lack of awareness in the user about entering into a binding legal relationship. In addition, the "flood of information" that is "hurled" at the consumer on the Internet, as well as various cognitive biases that are more pronounced in the online space, lead to the consumer not being in a cognitive state that facilitates understanding the contract and the need to beware of predatory clauses.¹¹ All this is even more true when it comes to an act that does not directly and clearly involve the purchase of a product or service for a tangible monetary consideration. For example, surfers on "free" sites (such as the social network Facebook),¹² in practice enter into a binding contractual relationship while registering, or merely by browsing, without necessarily being aware of it. This is especially true in view of the fact that digital markets are centralized and subject to the limited control by several sites operating in the online space.¹³ This monopolistic phenomenon is the result of the problem of trust that exists in the digital markets, which leads to brand loyalty to a limited number of sites. Under these circumstances, the user has no real choice in the online space.

Furthermore, the clauses are often buried deep within the wording of many agreements, which calls into question the deliberate consent of the users to them. According to empirical research, "click-happy" users at times do not read these online agreements at all but rush to click their consent so they can continue using the site.¹⁴ Electronic users have lower incentives to read the online agreement:

11. See, e.g., Shmuel Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 142-43 (2007).

12. These apparently "free" websites operate on the basis of a rating model, whereby the more "free" users they have, they can raise the prices for advertising space on the site. See Donica Mensing & Jackie Rejfeck, *Prospects for Profit: the (Un)evolving Business Model for Online News* (6th Int'l Symp. on Online Journalism, 2005); Neil Thurman & Jack Herbert, *Paid Content Strategies for News Websites: An Empirical Study of British Newspapers' Online Business Models*, 1 Journalism Practice 208 (2007). Facebook is an example of such a site that can raise ad prices the more free users it has, See Gennaro Cuofano, *How Does Facebook Make Money? Facebook Business Model in a Nutshell*, FOURWEEKMBA (Oct. 26, 2022) <https://fourweekmba.com/how-does-facebook-make-money/> [<https://perma.cc/5QTP-XMD2>]; see also Form 10-K Facebook Inc. (Jan. 31, 2019), <https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm> [<https://perma.cc/54NJ-6K6Y>].

13. Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?*, 11 INT'L ECON. & ECON. POL'Y 49 (2013); Cauvery Nair & Hansa Nigam, *Understanding Facebook as a Monopoly*, RESEARCHGATE (Oct. 2015), https://www.researchgate.net/publication/286836835_Understanding_Facebook_as_a_Monopoly [<https://perma.cc/P4F3-7U28>]; Steve Kovach, *Facebook Has Gotten So Big That No One Can Understand It, and It Could Be a Good Reason to Break It up*, BUS. INSIDER (Apr. 11, 2018), <https://www.businessinsider.com/is-facebook-a-monopoly-2018-4> [<https://perma.cc/AVB5-6GXX>].

14. Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-*

they are driven by the fast deals that characterize e-commerce and tend to be more impatient. Moreover, it is difficult to read a long and challenging legal document on a computer screen. Thus, electronic consumers are less likely to question the terms of the contract or transaction.¹⁵

The concern that the power gaps will be abused by the supplier increases in the case of international websites, where the local regulator has difficulty imposing sanctions and setting rules because the residence of the supplier is usually in a foreign country. It has been argued that this allows sites to determine the place of jurisdiction that will apply according to their own convenience, with users having to choose between accepting the agreement unconditionally or outright rejecting it. These are fundamentally “unfair contract terms” in a standard contract that deter users *ex ante* from taking legal action in the event of a breach of contract. Such terms infringe on the fundamental right to gain access to the courts.

At the same time, there are weighty considerations for enforcing forum selection clauses in online agreements precisely in the present day and age. Such clauses are often essential to operating websites in a “borderless” world. This is especially true for sites that are accessible to millions of people (if not billions) in hundreds of different countries, subject to multiple authorities, and open to endless possibilities of lawsuits against them. Therefore, failure to comply with the forum selection clause may have a chilling effect on the operation of international websites, and might result in websites not being established in the first place, or ceasing to operate because of their inability to withstand a flood of lawsuits in many countries. Compliance with forum selection clauses also encourages legal certainty and respects the agreement of the parties. It has also been argued that such clauses are justified because of their aggregate economic efficiency.¹⁶ Furthermore, if forum selection clauses are not honored, there will be a higher likelihood of divergent rulings and contradictory decisions in different countries regarding identical matters. In the age of globalization, given the increasing alternatives and the scant material costs and resources needed to set up a website (as opposed to a physical store), competition intensifies, and the concern that the consumers’ rights will be harmed is reduced.¹⁷ The fact that we are dealing with an online market heightens the degree of user involvement in consumer criticism: in the case of a failure in the consumer transaction, the customer can voice criticism using both legal and non-legal tools (for example, “shaming” the business). In this way, users can protest the outcome of the

Standard Terms Backfire?, 104 MICH. L. REV. 837, 840-42 (2006).

15. Robert A. Hillman & Jeffery J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 479-80 (2002).

16. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-94 (1991); see also Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992).

17. Severin Borenstein & Garth Saloner, *Economics and Electronic Commerce*, 15 J. ECON. PERSPS. 3, 4-6 (2001).

transaction through an effective, cheap, and efficient consumer review.¹⁸ Some have argued that Internet users have more time to go through the information contained in online agreements, as they can make careful decisions in privacy, from home, with fewer time constraints and at convenient times, without external environmental disruptions. Users can even leave the computers and return to the transaction later, before completing it at their leisure. Because we are dealing with an electronic medium, it is possible to find the relevant clauses easily, and even compare different contracts automatically.¹⁹

In light of the above, any extreme approach to the problem will not serve us well. Rather in the current era, a thriving economy must rely on an efficient, nuanced and multidimensional arrangement, which on the one hand provides a real solution and protection to users, and on the other hand does not have a chilling effect on suppliers, which would curb the development of the web, cause over-deterrence, and reduce commercial activity. These considerations are significant and essential for creating a paradigm that examines the forum selection clauses in online agreements in the age of globalization, and must occupy center stage in the formulation of an appropriate model. A balanced approach should strive to harmonize the approaches of the European and American legal systems. A virtual world without borders requires the establishment of new rules and laws that redefine the approach to foreign forum selection clauses included in online agreements.

*C. A Proposed Model for Handling Forum Selection Clauses
in International Websites*

Hence, this Article will outline the desired legal arrangement in the form of a multidimensional model regarding the rules by which the determination should be made on whether the forum selection clauses included in online agreements are valid and enforceable. This innovative model on the one hand defines parameters that outline the criteria for constructing judicial discretion; on the other hand, the parameters provide flexibility, as they address a wide range of different considerations relevant to the decision. Shaping the proper legal policy should be based on two cornerstones: the promotion of e-commerce and of the other services that the Internet offers, and consumer protection. It is submitted that this model offers broader, more balanced, more fair, and more effective solutions than the existing models do.

18. This has been dubbed the "Web 2.0 Revolution," allowing exchange of information between consumers and users. *See, e.g.,* Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303 (2008).

19. Robert A. Hillman, *On-Line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications* 1-3 (Cornell Legal Stud., Research Paper No. 05-012, 2005).

1. *The Nature and Type of Sites and Their Various Characteristics That Should Guide Forum Selection*

Many different types of websites exist in the enormous online space of the Internet. The websites differ from each other on the basis of different characteristics, such as: the type of product or service they provide, the structure of the site, interactivity vis-à-vis the user (active vs. passive), dominance relative to its competitors, the degree to which it is necessary for daily life, its economic model, and more. Yet, to date, when examining the validity and enforcement of foreign forum selection clauses, courts have usually treated the various sites and the standard contracts they offer in the same way. It is submitted that the significant differences between the sites require a new approach to foreign forum selection clauses included in online agreements.²⁰

2. *Types of Existing Sites*

Below I propose a general classification of websites into four different types. Each category and the proper approach to its forum selection clauses is discussed.

2.1 *Social Media and Blogs*

2.1.1 *Social Media*

Social media have been the focus of many discussions since they entered our lives a few decades ago. The term “social media” refers to sites whose main purpose is to share information on the part of the user, create content, and connect with other users.²¹ Social media networks have several key characteristics that should affect the question whether or not to enforce their forum selection clauses. These are: whether they have market power, their business model, and the nature of the use of social media.

2.1.1.1 *Market Power*

As noted, for social media to be a practical and valuable success, it must attract a population of real users as large as possible.²² Accordingly, social media

20. It should be stressed that this Article does not purport to examine types of technologies used by the sites because these change over time. Instead, it formulates general legal considerations that should guide the decision on whether to enforce the forum selection clause. See TiTi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L. J. 519, 536-38 (2004).

21. These sites are characterized by the fact that most of their content is produced by their users (“User Generated Content”). See Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM’N 210, 211 (2008).

22. This is known as “the network effect,” so that the more people use the service or the

networks estimate their value based on the number of people active on the network, both those who passively watch the content and those who actively upload content. The desire for the social network to have many users characterizes not only the site but also the users themselves, who prefer all the content to be concentrated under one social network.²³

On the one hand, the “network effect” drives users to rationally choose the large sites because they benefit more from a larger network than from one with fewer members. On the other hand, the network effect leads to inefficient monopolization.²⁴ The influence of a network helps the large sites increase their user base, thereby increasing their market share, to the point of creating a monopolistic dominant control precisely in these markets, in a way that leads to market failure.²⁵ Therefore, the main networks that exist in the online market are generally monopolies that hold a huge market share, almost without competitors.²⁶ In such a situation, one could argue that the user has no real option not to agree to the forum selection clauses of the social networks. This must be taken into consideration in determining whether a forum selection clause included in an online agreement is valid and enforceable. Notwithstanding the above, not all social networks are international network giants. Some cater to small niche issues and have a correspondingly limited audience. Even in the case of these networks, however, it may be argued that the members of the limited audience, who wish to gain access to the new database, have no alternative but to agree to the forum selection clause.

2.1.1.2 Business Model

Users are usually not required to make a tangible monetary payment for the “free” use of these platforms, from whose existence they benefit. It can be argued, therefore, that the validity of the forum selection clauses of these platforms should be recognized and enforced. The argument is reinforced by the fact that users can leave the site at any time and choose not to use it. Nevertheless, this

product, the more valuable it becomes to its users, and its utility for them increases. Adi Ayal, *Monopolization via Voluntary Network Effects*, 76 ANTITRUST L.J. 799 (2010).

23. Chao-Min Chiu, Hsiang-Lan Cheng, Hsin-Yi Huang & Chieh-Fan Chen, *Exploring Individuals' Subjective Well-Being and Loyalty Towards Social Network Sites from the Perspective of Network Externalities: The Facebook Case*, 33 INT'L J. INFO. MGMT. 539 (2013).

24. Jacob Goldenberg, Barak Libai & Eitan Muller, *The Chilling Effects of Network Externalities*, 27 INT'L J. RSCH. MKTG. 4, 12 (2010); Ayal, *supra* note 22.

25. Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985).

26. For instance, Facebook holds sixty-seven percent of the social media market, with the rest held mostly by Chinese companies that are relevant mainly for the Chinese market where Facebook cannot operate because of censorship. The significant market share of Facebook was mentioned by both Israeli and Canadian courts in their decisions not to enforce its forum selection clause. *See CivA 5860/16 Facebook Inc. v. Ben Hamo*, Nevo Legal Database (May 15, 2018) (Isr.). *Douez v. Facebook, Inc.*, [2017] 1 S.C.R. 751 (Can.).

free use is not an altruistic act that provides no economic return to the platform owner. Rather, the network benefits from the sale of advertisements, and without users devoting time to watch these advertisements, the social network cannot make a profit. Therefore, it makes no sense to deprive users of rights and subject them to forum selection clauses that would require them to litigate in a foreign forum (if a dispute arises between them and the network). This is especially true given the vast amount of knowledge the network accumulates about its users, information it collects and uses to generate profits through customer-targeted advertising. Therefore, this cannot really be called “free” use.

Another model that has been gaining momentum in recent years, especially in relation to social networks, is the non-profit collaborative community model. This model was created because of concern about the collection and interception of information about various users by the existing networks, and the use of personal data for commercial purposes.²⁷ Below I show that this model and social media networks of this type should be examined in a different light because they are not motivated by profit.

2.1.1.3 The Nature of the Use of the Social Media Network

The nature of social network usage may vary depending on the target audiences. The main target audience of social networks are “ordinary” people (flesh and blood) who make up the bulk of users. To safeguard their best interests, and given the parameters presented above, it is submitted that relatively broad defenses should be applied. At the other end of the spectrum, there are business owners who disseminate sponsored content on the same social network, both overtly and covertly, and they should be treated more rigorously. Between private individuals and business owners, there is a spectrum of customers who use social networks for both personal and business purposes. When someone uses a social network in a mixed way, both for private needs and for business benefits, it is necessary to examine the user’s main purpose in using that site, and we must ask whether the main purpose is private or business. Private users are weak and inexperienced in legal matters, and should therefore be protected from the strong side that dictates the content of the forum selection clause. Denying this protection from private users merely because they made minimal business use of Facebook or a similar site in parallel to their private usage runs counter to this purpose.

The following parameters should be examined to determine whether the forum selection clauses included in the online agreements of social network sites are valid and enforceable:

(1) Does the social network constitute a monopoly so that the user has no

27. For instance, the social network Mastodon declares that it does not implement any monetization strategies in its software and that its development is crowd-funded. See MASTODON, “Funding and Monetization”, <https://docs.joinmastodon.org/> [<https://perma.cc/DA35-2E2K>].

reasonable alternative in the market?

- (2) **Importance of the service provided by the social network.** There are different types of social networks, some of which are essential for the fundamental rights of the individual. Therefore, it is necessary to examine the importance of the service provided by the network, and whether the lifestyle or occupation of the user will be significantly harmed by not receiving the services of the social network. The more affirmative the answer, the more consideration should be given to not enforcing the forum selection clause.
- (3) **Business model.** Weight should be ascribed to the fact that the services provided by the network are “free” and that the user is not required to provide monetary consideration for using it. It should also be noted that the user may leave the network at any time without being subject to any fine. Yet, as noted, the social network model usually relies on advertisements and mass recruitment of users to the social network. Therefore, the weight ascribed to the fact that the service is free should be relatively low, and must be examined based on the size of the social network.²⁸ Another consideration that needs to be taken into account is whether the network is a purely social platform of a community wishing to incorporate as an independent non-profit platform. If so, this should weigh in favor of respecting the forum selection clause.
- (4) **Type of use made of the social network.** If the use made is private, the tendency should be to protect private users (even if they use the network minimally for business) and the foreign forum selection clause should not be enforced. Big businesses making use of social media is a different matter, and they do not require protection.
- (5) **Examining the identity of the community that is the object of the social network.** Is the user a part of the community for which the social network was established, or has the user surfed to a network that is not intended for him/her. For example, a social network intended for physicians should not be held responsible for misuse by a user who is not a physician. In such a case, the forum selection clause must be observed even more forcefully, provided that the identity of the community which is the object of the social media network was objectively clear to surfers on the platform.

2.1.2 Blogs

Another group of sites characterized by the fact that most of their content is created by the users are blogs.²⁹ The main difference between social media

28. For instance, for a huge corporation like Facebook, the fact that the service is “free” should not be a significant consideration in the decision whether to enforce a foreign forum selection clause. For a small social network, such as G-Med (a professional global network for physicians), this is a more significant consideration. See G-MED GLOBAL, <https://www.g-med.com/> [<https://www.g-med.com/>].

29. A blog (a truncation of “weblog”) is a discussion or informational website consisting of discrete, often informal diary-style text entries (posts). On the importance of the blog as a means

networks and blogs is their focus: whereas the focus of social media networks is interpersonal interaction, the focus of blogs is the content that the user produces, even without any interpersonal interaction.

Blogs have experienced growth in the last few years³⁰, which has led to a change in their legal status. In the early decades of the online network, blogs did not constitute an independent entity and existed mainly within larger data repositories; therefore, their forum selection clauses were subsumed under the online agreement of the site that aggregated the blogs. In these cases, where the blog is not an independent entity, but part of a large international site that hosts hundreds and possibly thousands of blogs, the considerations outlined above in relation to social networks should apply.

In recent years, however, there has been a significant decline of blogs on such platforms.³¹ Nowadays, most blogs are managed by a single person or a small group of people, where their main income is derived from advertisements and the marketing of products or services related to the content of the blog. It is obvious that the users who access these blogs do not have to do so, and in most cases these are esoteric sites of the type that are common on the web. Naturally, these independent blogs can formulate exclusive regulations and forum selection clauses for their purposes. Therefore, in these cases, the interest of the independent blogs in the enforceability of their forum selection clauses should be given added weight, as it is not reasonable for such a blogger to have to litigate and defend itself in a foreign country, where a person who has read the blog happens to reside.

Based on these observations, the blogs should be examined according to the following considerations:

- (1) **Type of blog.** If the blog resides inside a social network, the same considerations that have been presented above for social networks should apply. But in the case of an independent blog, which resides on an open source and has an independent forum selection clause, the validity and enforcement of the clause should be examined according to the parameters below.

for individual expression, see Jack M. Balkin, *How Rights Change: Freedom of Speech in the Digital Era*, 26 SYDNEY L. REV. 5, 8 (2004).

30. Adam Connel, “37 Latest Blogging Statistics for 2023: The Definitive List”, (Updated January 1st, 2023), <https://bloggingwizard.com/blogging-statistics/> (noting, based on Statista statistics, that the number of bloggers in the United States has grown between 2014 and 2020 from 27.4 millions to 31.7 millions, and over 2 million blog posts are published in the US alone on a daily basis).

31. In the past, it was more complicated and expensive to build your own website, and therefore bloggers tended to open their blogs on existing platforms, such as popular portals, with their general terms of use applying to everything published on the platform. Nowadays, with services such as Wordpress and Wix, it has become much easier to build a website, and these platforms serve more as tools to help bloggers and others to create and publish web pages. Hence, the website creator, whether blogger or not, will often formulate its own terms of use.

- (2) **Importance, size, and economic power of the blog.** As noted, most blogs are esoteric and not essential for the surfers, and do not generate high revenue for the bloggers. Therefore, remote litigation that deviates from the forum selection clause may exceed the revenues of the blog, which justifies recognition of the validity of the forum selection clause. By contrast, there are powerful blogs with considerable market power that are considered opinion leaders in their field.³² Such blogs should be examined according to the standards of passive data sites, presented below.
- (3) **Economic model of the blog.** In principle, there are two main types of economic models on which the various blogs are based:
- (4) **“Pure” non-profit blogs, which do not include advertisements.** In these cases, the forum selection clause should be complied with.
- (5) Blogs that use the rating model, that is, the content is made available to users for free, but **the blog contains advertisements** or sponsored content tailored to the topics of the blog that generate profit for the blogger. In these cases, some weight should be ascribed to the fact that the blog is a professional business, and that its profits are based on the entries of users who “paid” for the use of the product by viewing the advertisements.

2.2 *Search Engines, Storage Sites and Cloud Services, Email*

Search engines, storage sites, and email services are increasingly gaining in importance nowadays, especially as our dependence on the virtual universe grows. Email services like those by Google and Yahoo, search engines, like those of Google and Microsoft, and data storage sites, like Google Drive and Dropbox, are at the core of the activity of every business and individual in the modern world. It is virtually impossible today to lead a normal life in developed countries without communication by email, data storage sites and search engines.

2.2.1 *Search Engines*

The category of search engine sites³³ is characterized by several key features, as follows: centralization, browsewrap agreements, financial model, importance of the use of global search engines, and type of search engine usage.

32. For example, the blog of entertainment columnist Perez Hilton is an opinion leader and highly influential in the fields of entertainment. The blog has an exclusive forum selection clause for the courts in California. *See Terms of Use*, PEREZHILTON.COM, <https://perzhilton.com/terms-of-use/> [<https://perma.cc/4R5A-JLYZ>].

33. A search engine is a software system aimed at finding digital information of different kinds (e.g. websites) stored on the computer or on the web. The search engine arranges the findings in a certain order. *See* MARK LEVENE, *An Introduction to Search Engines and Web Navigation* 61 (2nd ed. 2010). Website owners are very keen on their website appearing among the first of these findings, as this is likely to bring them many visitors. Therefore, they are willing to pay the search engine to guarantee that they will appear early in the search. *See* Davis S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 *ISSUES COMPETITION L. & POL'Y* 667 (2008).

2.2.1.1 Concentration

The search engine market is characterized, among others, by massive concentration in the form of a limited number of search engines that have captured the vast majority of the market without any competition.³⁴ This centralization has been achieved deliberately, because searches become efficient by refining the algorithm based on previous entries and searches, producing a network effect. As a result, new companies cannot compete with old and powerful corporations like Google and Microsoft.³⁵ Moreover, the ability of these giant corporations to conduct remote litigation is particularly great, given that these are the largest companies in the world, which deploy legal teams and affiliates all over the world.

2.2.1.2 Browsewrap Agreements

Given this market dominance, it is not surprising that contracts with these sites are mostly browsewrap agreements, where users are not at all aware that they have entered into a binding contractual relationship.³⁶ In other words, users are not required to click on any contract to perform a search, but are ostensibly obligated to the exclusive forum selection clause in accordance with the existing terms of use of the site from the moment they enter it.³⁷

2.2.1.3 Financial Model

Admittedly, search engines generally do not charge users any tangible

34. The Google search engine holds around 92% of the world-wide market. See *Worldwide Desktop Market Share of Leading Search Engines from January 2010 to July 2022*, STATISTA, <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/> [perma.cc/76NU-6ASP]. Other popular search engines are Yahoo! and Bing that hold only 1.5% and 3%, respectively (as of January 2022). *Id.* In China, the leading search engine is Baidu and in Russia Yandex. *Id.*

35. U.S. House, Committee on the Judiciary, Subcommittee on Antitrust, *Investigation into Competition in Digital Markets*, (H. Rpt. 117-8, Part 1, July 2022), page 66. <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>

36. As anyone who has used the Google search engine knows, users are not required to first sign any agreement with the Google company regarding the terms of use or consent to a choice of law and forum selection clause. These clauses are found on the site, for those who look for them, but consent to them is assumed by the mere use of the Google search engine service. See the sources cited in note 38.

37. See, e.g., the exclusive forum selection clause that refers to California for every use of Google. *Google Terms of Service – Privacy & Terms*, GOOGLE, <https://bit.ly/337Z8jr> [https://perma.cc/MP6V-NE9W]. A similar clause, referring to Washington State, USA, can be found in relation to Microsoft's search engine. See *Microsoft Bing Maps Platform APIs Terms of Use*, MICROSOFT, <https://bit.ly/31HuFsV> [https://perma.cc/BV88-5F2U].

monetary consideration for using the site. At the same time, search engines promote “sponsored content” within the search response, which is presented in a similar way to regular search results. At present, this is one of the main sources of revenue of search engines,³⁸ and it has been referred to as “search engine marketing” (SEM).³⁹ Thus, in practice, users “pay” for every search they perform on the engine because the first results to which they are exposed are the sponsored ones, which are the source of profit for the search engines. Search engines also intercept information about users and their habits, and on the basis of this accumulated data, they tailor the product to the customer in targeted advertising.⁴⁰ This fact should serve as a key parameter when considering whether to enforce the forum selection clauses of these sites.

2.2.1.4 Importance of Global Search Engines

Most of the Western market relies on three main search engines: Google, Yahoo, and Bing, with Google holding around 90 percent of the market.⁴¹ These search engines are central to the daily life of every citizen. Therefore, significant weight should be given to the claim that strict adherence to the forum selection clause may unfairly deprive users of their rights. At the same time, in China and Russia, there are local search engines dedicated to those particular markets.⁴² If the search engine proves that the browsing user is not part of the target audience of that local search engine, this may serve as a parameter in favor of respecting the forum selection clause, provided that the clause has been brought to the user’s attention.

2.2.1.5 Type of Search Engine Usage

The nature of search engine usage varies between several target audiences. First, there is an audience of private individuals who should enjoy relatively broad protections, given the above parameters that justify not complying with the forum selection clause. At the other end of the spectrum, there are large commercial companies with international operations that make professional use of search engines. There is a presumption that these are repeat players, strong and sophisticated, with financial resources as well as business and legal experience,

38. Anindya Ghose & Sha Yang, *An Empirical Analysis of Search Engine Advertising: Sponsored Search in Electronic Markets*, 55 MGMT. SCI. 1605 (2009).

39. *Id.*

40. See *Investigation into Competition in Digital Markets*, *supra* note 35, at pp. 181-182.

41. See note 34.

42. In Russia, the most popular search engine is Yandex, holding more than 60% of the market in 2022 (*Statista*, <https://www.statista.com/statistics/1094920/leading-search-engines-by-visits-share-russia/>, visited on Feb. 8, 2023). In China, where Google is not active, the most popular search engines are Baidu and Sogou, controlling about 70 and 30 percent of the market, respectively (*Statista*, <https://www.statista.com/statistics/253340/market-share-of-search-engines-in-china-pageviews/>, visited on Feb. 8, 2023).

who are expected to be aware of the online agreements, in particular the forum selection clause. This is especially true if it transpires that these commercial companies include similar forum selection clauses in their agreements with their customers. As these are large commercial companies with international activity, the need to litigate in a foreign jurisdiction does not necessarily deprive them of the ability to exercise their legal rights. Therefore, this may be a consideration for complying with the forum selection clause.

2.2.2 *Storage and Data Sharing Sites (“Cloud Services”) and Email*

In the last decade, the phenomenon of information storage platforms and hosting sites on the Internet, known as the “cloud,” has gained momentum.⁴³ A study conducted at Queen Mary College of the University of London found that cloud companies tend to include in their online agreements exclusive forum selection clauses that suit their needs, referencing courts and a legal system convenient for the company, which grants them both geographic and legal advantage.⁴⁴

Another common phenomenon in the age of globalization and the Internet is electronic mail (email) service. The discussion of cloud services, storage sites, and email providers will be consolidated because of their similar characteristics, which include the importance of the service, number of competitors, and type of contract.

2.2.2.1 *Importance of the Service to Private and Business Users*

As noted, in the present age, it is difficult to maintain a proper lifestyle without these essential services. Email service is a basic and common means of communication for individuals and companies, used daily to keep in touch with customers, colleagues, friends, and family. This electronic means has almost completely replaced the outdated physical fax paper, not to mention letters written with pen and paper. In view of the large amounts of information accumulated by companies and individuals,⁴⁵ it is crucial that there be a place on

43. A “cloud” is a platform that provides users in different parts of the world access to a server where data can be stored, and where it can also be shared among several users. See Peter Mell & Timothy Grance, U.S. DEP’T OF COM., NAT’L INST. OF STANDARDS AND TECH, SPECIAL PUBL’N NO. 800-145, THE NIST DEFINITION OF CLOUD COMPUTING 2-3 (2010). Such remote access is provided to all types of electronic devices such as computers, tablets and smartphones. *Id.*

44. Simon Bradshaw, Christopher Millard & Ian Walden, *Contracts for Clouds: Comparison and Analysis of the Terms and Conditions of Cloud Computing Services*, 19 INT’L J. L. & INFO. TECH. 187, 192, 201-03 (2011).

45. Research estimates that in 2020, 2.5 quintillion bytes of data is generated each day, which is equivalent to about to 1.7MB data every second per person (*Data Never Sleeps 6.0* , <https://www.domo.com/solution/data-never-sleeps-6>), and <https://us.sganalytics.com/blog/2-5-quintillion-bytes-of-data-generated-everyday-top-data-science-trends-2020/> .

the network where such information can be stored securely without the risk of deletion. This understanding of the nature of cloud services is also important in characterizing the relationship created between users and the platform.

Thus, a distinction should be made between the use of hosting and email sites for private and for business use. Although the importance of the service is the same for individuals and businesses, the expected familiarity with forum selection clauses included in online agreements is likely to be different. When a business sets up email service for its employees or a large storage suitable for business, it is expected to compare different options and be aware of the clauses of the various online agreements, especially their forum selection clauses. A large business is also in a position to negotiate with the service provider the terms of the contract, including the forum selection clause, and to choose a competing provider if it does not get what it wants. By contrast, these expectations are not necessarily true for individuals who acquire an email address or store information for their personal use. Therefore, when dealing with a business, this parameter must be given weight in considering whether to enforce forum selection clauses.

2.2.2.2 *Number of Competitors*

At present, there are many sites offering email and storage services to both private and business customers.⁴⁶ Therefore, this market is characterized by competitiveness, and users have many alternatives in choosing a provider for these services. This consideration should be a parameter in determining compliance with the forum selection clause. This is especially true regarding business users, who are expected to be aware of the presence of forum selection clauses and of the competition that exists between suppliers. Therefore, if businesses object to the forum selection clause, they can choose another supplier, unlike private users, who are expected to be less familiar with existing alternatives in the market.

Nevertheless, the large number of competitors should not be a significant parameter in the set of considerations, because this is not “real competition,” as in other markets, and in practice, there are barriers that prevent users from leaving the company from which they have contracted these services. Neither private nor business users are likely to want to change their email address, which is associated with their name or brand. The difficulty in changing one’s email address has serious consequences because it forces users to retain the same services that they may have agreed to at a young age, without awareness of the forum selection clause contained in their agreement. The situation is similar with regard to storage services. Storage sites hold the users’ most private and intimate information, and there have been many instances of leaks that have occurred from

46. Most of these providers are huge global companies, such as Microsoft, Google and Apple, which provide both email and cloud storage services. See Abbey Rennemeyer, *The Best Free Email Providers: 2021 Guide to Online Email Account Services*, FREECODECAMP (Nov. 10, 2020), <https://www.freecodecamp.org/news/the-best-free-email-providers-2021-guide-to-online-email-account-services/> [<https://perma.cc/57SQ-3X6G>].

these servers.⁴⁷ The fear of exposing one's personal information or the trade secrets and business information of a company naturally makes customers want to reduce the risks and use a single provider to store their information rather than double the risks of such leaks by switching between cloud servers. Therefore, the effect of competition is limited.

2.2.2.3 *Type of Contract, Nature of the Service (as "One Package"), and Method of Payment*

In most cases, companies that offer cloud and email services provide these services in conjunction with other computer services and devices, which are bundled in a comprehensive package for the consumer. Yet, this package makes it difficult for users to choose other alternatives that exist in the market because the servers, hardware, and software automatically download the specific cloud or email of that hardware system.⁴⁸

Furthermore, setting up email services on a particular site generally does not require the payment of a tangible consideration. Similarly, most storage and cloud sites are ostensibly free up to a certain volume of storage space. For additional storage, however, the site charges a fee. The site expects to make a profit over time, when users will have to pay for the storage space.⁴⁹ Therefore, the fact that the basic service is free should not mislead us, because these sites make their profit from advertisements and information on the consumer. Moreover, the use of the set of services provided to customers in one package means that it is not necessarily possible to distinguish which service is provided free of charge and which one is paid for.⁵⁰ Moreover, it cannot necessarily be said that the person did

47. See Chaoshun Zuo, Zhiqiang Lin & Yinqian Zhang, Why Does Your Data Leak? Uncovering the Data Leakage in Cloud from Mobile Apps 1296 (IEEE Symp. on Sec. & Priv., 2019).

48. For a list of the fifteen top cloud storage companies and the services they offer see *15 Top Cloud Computing Service Provider Companies*, SOFTWARE TESTING HELP, (Sept. 24, 2022) <https://bit.ly/3jsaTYr> [<https://perma.cc/U3EV-YYE8>].

49. For instance, the popular storage website Dropbox provides the service for free for a trial period of one month, after which the customer must choose one of the site's payment options. *Start Your 30-Day Free Trial*, DROPBOX BUSINESS, https://www.dropbox.com/business/try?sku=std&_tk=paid_sem_goog_biz_=b&_camp=1743710588&_kw=dropbox%20business%20trial|b&_ad=632616272838||c&https://ad.doubleclick.net/ddm/trackclk/N1339415.3435685GOOGLEADS/B28652925.347291079;dc_trk_aid=538642523;dc_trk_cid=178685182;dc_lat=;dc_rdid=;tag_for_child_directed_treatment=;tfua=;ltd=&gclid=CjwKCAiA2rOeBhAsEiwA2PI7Q8YmaQILGIfb67RD_rdS8aK91oaMC0YpgsyGBrAQ5k16B6ix9qM9BoCUH8QAvD_BwE [<https://perma.cc/AH5H-66T7>]. Dropbox has an exclusive foreign selection clause that refers the users to San Francisco, unless they reside in countries with laws that give the consumer the right to bring disputes to their local courts. See *Dropbox Terms of Service*, DROPBOX (Oct. 29, 2021) <https://www.dropbox.com/terms> [<https://perma.cc/KZ5Q-CKBQ>].

50. For instance, when buying an Apple computer, one also gets free storage space on

not pay for the service, especially given the fact that cloud storage volume is limited, and users, who form a “captive audience,” soon find themselves paying additional fees to increase their storage volume. In other words, the limited “free” service is designed to attract customers who then continue to contract for services that cost money. The assumption is that at this point, the user becomes a captive audience that cannot figure out which alternative is better, certainly not from the point of view of the forum selection clause.⁵¹ Furthermore, cloud and email services are often characterized by clickwrap agreements.⁵²

Therefore, it is necessary to examine what use is made of such sites, that is, whether the use of the storage site or the email service is made by a private person for private purposes or whether it is a use made by a corporation for business purposes, based on the following two criteria:

- (1) In the case of private users for private purposes, given the above parameters (including the captive audience, importance of the service, bundled services, and fear of leakage of sensitive information), despite the ostensible “competitiveness” that prevails in this market, forum selection clauses should generally not be respected. This is especially true if we are dealing with the 15 most prominent hosting sites or the dominant email service providers mentioned above, which are among the most powerful giant corporations in the world. By contrast, in the case of “small” sites that are not among the giants, the other considerations presented in the article (interactivity, the test of intent to conduct business in the user’s country, etc.) should be examined.
- (2) In the case of business users, the tendency should be to enforce the forum selection clause, for the same reasons as articulated above.

2.3 Information and Content (“Passive”) Sites without Tangible Consideration

Information and content sites are characterized by being passive in their attitude toward the user. They do not interact with the user, but merely display content for the user to access. The user accesses some of the information provided by the site without performing any other action, as for example, in the case of popular news and content sites such as Yahoo or MSN. These sites include diverse and broad digital content that is regularly updated, and various types of information—financial, medical, and more. Most of the information today is distributed in digital form, and online information services have replaced physical information services that are in decline, such as printed newspapers, books, and encyclopedias.

Apple’s cloud, up to a certain limit (currently 5GB). See Jonny Evans, *How to Avoid Paying Apple for Extra iCloud Storage*, COMPUTERWORLD (May 19, 2022), <https://www.computerworld.com/article/2476176/mac-os-x-how-to-avoid-paying-apple-for-extra-icloud-storage.html> [<https://perma.cc/8AFK-9GDV>].

51. On the influence of giving free products as a temptation see Kristina Shampanier, Nina Mazar & Dan Ariely, *Zero as a Special Price: The True Value of Free Products*, 26 MKTG. SCI. 742 (2007).

52. See Bradshaw, Millard & Walden, *supra* note 44, at 204.

At the same time, the complexity of these sites is the result of the fact that occasionally, the information they contain, and on which the public relies, is not necessarily reliable, but rather sensational, designed to attract readers by extreme statements aimed at increasing traffic. This phenomenon is referred to as “click-bait.”⁵³ The inflated information is liable to lead to erroneous conduct on the part of users who rely on the information on the site; at the same time, the information (to the extent that it is reliable and accurate) can serve and assist the users.

Note that even for these sites, two main economic models prevail: the “rating model” of free sites, and a model that offers access to the site content for monetary consideration. This section examines information and content sites that are offered to users for free. Passive sites that rely on the second model will be discussed in the following section, together with shopping and commerce sites and paid service sites.

On the one hand, non-compliance with the forum selection clauses and the imposition of liability on passive sites by exposing them to judicial litigation in different parts of the world may encourage sites to be more reliable and careful in publishing content rather than focusing on increasing traffic and profits. Note that these are usually for-profit sites that use one of the above models and collect information about their users’ behavior. Based on this information, they often use customer-targeted advertising.⁵⁴ In addition, they usually use browsewrap contracts, so that surfers are not required to provide active consent to the forum selection clauses, other than by surfing the site.⁵⁵ This casts doubt on the user’s knowledge and consent regarding the forum selection clauses. Therefore, there are weighty considerations not to enforce the forum selection clause.

On the other hand, exposing online information and content sites to remote litigation by disregarding the forum selection clauses contained in the online agreements may result in a chilling effect and over-deterrence in creating passive sites. Sites may be afraid to share the information and knowledge in their

53. Yimin Chen, Niall J. Conroy & Victoria L. Rubin, *Misleading Online Content: Recognizing Clickbait as “False News,”* 17th ACM INT’L CONF. ON MULTIMODAL INTERACTION 15-19 (2015).

54. By tracing the third-party cookies on a visitor’s browser, the website can know the visitor’s browsing history, and thus customize the ads that will pop up on the site to the visitor’s interests and preferences (Khan Academy, *Computers and the Internet*, Unit 4, Lesson 3, “Browsing History”). For instance, a visitor that has visited many sites that carry pregnancy clothes, will likely be targeted with pregnancy products. This service is valuable to advertisers which are willing to pay well for it.

55. For instance, an examination of the most popular passive content sites in Israel shows that all of them include a browsewrap contract with an exclusive forum selection clause: Ynet (*See* YNET, <https://z.ynet.co.il/short/content/2018/privacypolicy/terms.html> [<https://perma.cc/3YYW-AW92>]); Mako (*See Privacy Policy and Terms of Use on the Mako Website*, MAKO (Oct. 9, 2008) <https://www.mako.co.il/help-terms-of-use/Article-d37908dd1674c11006.htm?Partner=footerLinks> [<https://perma.cc/B73Y-9AUM>]); Walla! (*See Terms of Use and Privacy Policy- Walla!*, WALLA! (May 27, 2018) <https://news.walla.co.il/item/316121> [<https://perma.cc/SM9H-9QFH>]).

possession, which will undermine the “information revolution” that is essential in the age of globalization and the Internet. A sweeping disqualification of forum selection clauses may at times expose small information sites to litigation in countries where they never intended to operate, which may cause catastrophic harm to them. This is all the more true when the site in question operates on a non-profit basis. Moreover, the site may not necessarily have agreed to serve surfers from foreign countries and to conduct litigation in a remote forum as a result. In itself, the fact that the site is accessible to all because of the nature of the web and the passive nature of content sites does not justify ignoring the forum selection clause and its stipulations.

To illustrate this dilemma, consider whether sites like Wikipedia or that of an Health Maintenance Organization (HMO) that provides extensive medical information to the public (and not necessarily to its members only) would be able to operate under a regime that does not comply with their forum selection clause and exposes them to various and changing forums worldwide and to multiple, complex, and expensive litigations. There is concern that this may have a chilling effect on these content and information sites, which may choose not to operate in countries that do not respect their forum selection clause. Hence, this issue may have far-reaching social significance for freedom of information.

Therefore, I propose ascribing considerable weight to forum selection clauses found in online content and information sites, and accordingly to comply almost absolutely with them, despite the great complexity presented above. As noted, exposing information sites to remote litigation may result in a chilling effect and over-deterrence in the creation of passive sites. Such an effect undermines the information revolution, which is essential in the age of globalization and the Internet. For various sectors and populations, this revolution created access to diversified and important information that increases awareness of their human and political rights, such as freedom of expression, the public’s right to know, etc. Additionally, this protection has economic importance, as access to information enables broad social leadership for classes of low socio-economic status, can expand their horizons, and allow them to gain access to opportunities that were not necessarily open to them in the past.

The need to respect forum selection clauses is all the more acute in relation to altruistic information and content sites, which do not operate for profit. Rather, these sites rely on surfer donations and crowdfunding (a model that is especially common online in the case of passive sites) for purposes such as making information available and disseminating it to the general public, or promoting their ideas and ideology.⁵⁶ The most prominent example of this model is the free encyclopedia, Wikipedia, the social encyclopedia based on an economic model

56. For instance, the social activism website Care2, which promotes activism on global issues such as sustainability and children’s rights, has a forum selection clause referring to California courts. *Help Center: Terms of Service*, CARE2, www.care2.com/help/general/tos.html [<https://perma.cc/2MKE-Q5DD>]. Similarly, the website Gifford that fights gun violence, has a forum selection clause referring to the District of Columbia courts. *Website Terms & Conditions*, GIFFORDS, <https://giffords.org/about/terms-conditions/> [<https://perma.cc/7KRZ-7MXV>].

in which its expenses (cost of servers, employees, etc.) are covered by donations from users who appreciate the service and are interested in maintaining it.⁵⁷ Therefore, unique protection should be given to these types of sites, and their forum selection clauses should be enforced because of their important contribution to modern life, and in particular to the preservation and dissemination of knowledge. For them, any unplanned financial outlay could lead to significant damage and even to their collapse.

2.4 Shopping and Commerce Sites for Payment in Tangible Consideration, and Sites Providing Services and Content for a Fee

In this category I include shopping and commerce sites that provide direct sales of products or services in exchange for a tangible monetary consideration by the user. Moreover, information and content sites that require a tangible monetary return from the users, who are their main customers, should also be included in this category. This is in addition to sites providing virtual services for monetary payment, which are similar to those provided in the physical world.

When the user is required to pay a tangible consideration as part of the engagement process with the site, the payment is a strong indication of the user's intention of being contractually bound. Yet, the question arises whether a distinction should be made between commerce and content sites for tangible consideration that use a clickwrap agreement and those that use a browsewrap agreement:

(1) **Commercial Agreements of Sites That Use Clickwrap Contracts** (for a tangible consideration). This category seems relatively simple, and it contains strong indications that a contract was formed and that the user was aware of the forum selection clause and agreed to it. This is because there is a definite consumer who pays for the service or product through a tangible monetary consideration and enters into a clickwrap agreement. *Vis-à-vis* the consumer is a definite supplier who receives a tangible return directly from the customer. Therefore, there is a presumption that the user understood that this was a situation in which a valid and binding commercial agreement was formed. This should be a key consideration in favor of the validity and enforcement of the forum selection clause, alongside the additional considerations and parameters detailed above, especially when it comes to small commerce sites where there are no real power gaps between the parties. Otherwise, the court acquiesces in an express infringement by the parties of the forum selection clause.

However, in the case of international retail sites where there are huge power gaps between the parties, forum selection clauses should not always be enforced, especially when it comes to personal claims, as detailed in this section. Nevertheless, there is a unique exception to online shopping, when the consumer

57. Carole Cadwalladr, *Wikipedia's Jimmy Wales: 'It's True, I'm Not a Billionaire. So?'* - Interview, THE GUARDIAN (Feb. 7, 2014), <https://bit.ly/3b8lfd4> [<https://perma.cc/J72S-DC2L>].

cheats and accesses sites that are not interested in operating in the user's country, as described below.⁵⁸ This complexity is apparently limited to virtual products or services, where consumers pay, for example, through PayPal, or whose credit card, which is associated with their country, is not blocked on the site for various reasons. In practice, this complexity is also possible in the case of physical products or services that appear to require delivery. For example, there is a widespread phenomenon of consumers who purchase products from cheap sites around the world but receive the shipment through a third party located in the country where the site operates.⁵⁹ In this case, greater weight should be assigned to this parameter in considering the validity of the forum selection clause, even if we are dealing with large sites.

(2) **Commercial Agreements of Sites That Use Browsewrap Contracts** (for a tangible consideration). In this situation, although a monetary consideration is paid and the consumer is aware of the payment and its details, it is submitted that the forming of the browsing agreement should not be recognized. As noted above, browsing and lingering on a website are not enough to form an objective basis for an intention to be bound in a browsing contract that includes a foreign forum selection clause.⁶⁰ This situation is exacerbated by the cognitive biases that consumers are liable to suffer from, which cause them to miss inconspicuous forum selection clauses. Thus, there is no real and conscious consent to these clauses.

3. Characteristics of the Various Sites

3.1 Examining the Degree of Interactivity of the Site: Active vs. Passive Sites

One of the significant characteristics in determining jurisdiction and the enforcement of forum selection clauses in online agreements is the level of interactivity of the site and the type of contracts concluded as a result.⁶¹ To this end, I propose several objective parameters in order to determine the degree of interactivity of the site.

- Users pay a **tangible monetary consideration** through the site, and **enter**

58. This is possible by using a "VPN Mixer" which enables the consumer to hide his country of origin when visiting the site. See Krishna Sampigethaya & Radha Poovendran, *A Survey on Mix Networks and Their Secure Applications*, 94 PROC. OF THE IEEE 2142, 2143-44 (2006).

59. For instance, there are many online retailers that do not ship outside their country. In such cases, a common solution for a foreign consumer is to have the product shipped by the retailer to a domestic parcel forwarding company, and order the international shipping through this company.

60. As discussed above in relation to U.S. law, *supra* notes 4, 5 and text.

61. This criterion of interactivity has been adopted also in U.S. jurisprudence. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (part of one of the three models determining jurisdiction in relation to online contracts); Annie Soo Yeon Ahn, *Clarifying the Standards for Personal Jurisdiction in Light of Growing Transactions on the Internet: The Zippo Test and Pleading of Personal Jurisdiction*, 99 MINN. L. REV. 2325, 2334-35 (2015).

their personal details.⁶²

- Use of the site requires the creation of a **username** as part of entering personal data. If so, it should be checked whether the site allows for **interactive contact** with the user, in a manner that indicates that the site makes use of the user's information and IP address.⁶³ For example, does the site offer to send the user automatic alerts about posts of relevant content (individual push notifications), or to put the user on some mailing list?
- The site uses **dedicated technology that identifies the location** of the community of site users, including that of the specific user involved in the lawsuit.⁶⁴ This is especially the case when the site uses this technology to provide surfers with information tailored to the destination country, and in particular, to the specific user (for example, through dedicated articles or advertisements, which the site believes will interest the user).⁶⁵
- The site uses **tools that help categorize and analyze the surfers**.⁶⁶ It should be checked, for instance, whether there are hyperlinks to these sites (for example, in the form of a button, image, object, or colored underlined text) pointing at them from sites operating in the forum country, monitoring whether the hyperlinks are effective and increase user exposure, use of the site by the surfers, as well as the country of origin of the surfers who follow such hyperlinks.
- **Number of visits to the site from the target country in question.**⁶⁷ For example, if the user is browsing a site that has almost no surfers from the same country, this may be a significant indication that the site is not active in the surfer's country.
- **Level of revenue of the site derived from the target country**, for example, determined by examining the revenues from advertisements of suppliers from

62. See *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999).

63. An IP address is the "ID" of the computer, which serves to identify the end-user when using communication protocols such as the Internet, e-mail, etc. See *Internet Protocol Address (IP Address)*, TECHOPEDIA (Jan. 11, 2017), <https://bit.ly/31FVPjQ> [<https://perma.cc/HN4P-U988>].

64. For instance, many websites use "cookies" which is a text file that a web browser stores on a user's machine, in order to provide information about the user's identity and preferences. See *What Does Cookie Mean*, TECHOPEDIA (May 2, 2013), <https://bit.ly/2QCrrAL> [<https://perma.cc/UYT3-MYQD>].

65. For instance, the news website MSN will automatically appear in the language and with content relevant to the user's origin. See *MSN*, <http://www.msn.com> [<https://perma.cc/H68E-H96B>].

66. For instance, through *Welcome to Google Analytics*, GOOGLE ANALYTICS, <https://bit.ly/3IZ0GVC> [<https://perma.cc/3FAN-43XD>].

67. There are several easy ways for a webmaster to know the countries from which the visitors come from. For instance, through analytical tools such as VISITORSDETECTIVE, <https://bit.ly/3byL2vi> [<https://perma.cc/G8XM-MYTG>].

that country.⁶⁸

- **Site attempts at blocking access to it from different countries**, in a way that indicates that the site has taken deliberate steps not to be interactive in the forum country. In general, it must also be examined whether the site as a whole accepts means of payment from the target country.
- Did the **site handle individual requests** from users from the same target country? For example, examining questions about the site or the services offered by it, the possibility to make purchases through the site in the target country, etc.⁶⁹

The more of the abovementioned parameters that are met in a way that attests to interactivity of the site with the user, the stronger the argument that the forum selection clauses are not valid and should not be enforced, and that the dispute should be adjudicated in the forum where the user resides.

3.2 Wish and Expectation on the Part of the Site to Maintain a Relationship in the User's Country, by Investigating the Target Population

The wish and expectation on the part of the site to maintain a relationship in the user's country by investigating the target population are crucial to determining jurisdiction, especially when dealing with the online space, where any small and esoteric company may be exposed to expensive litigation worldwide. Therefore, it is recommended to adopt some of the criteria suggested by Michael A. Geist, aimed at examining how the site operated in the target country.⁷⁰ Three key variables in the online relationship are crucial to the analysis in this regard: (a) the contract, (b) the technology, and (c) the knowledge of the parties to the contract.

3.2.1 The Technology Used by the Site to Identify the Target Public

Given that the Internet has no geographic restrictions, both users and sites have unprecedented access. This does not mean, however, that the site is necessarily interested in entering various markets, which may create legal or other risks that are not justified economically. Therefore, emphasis should be placed on the actions that the site undertakes through technology to be able to operate in a particular country or to actively avoid involvement there. Technology enables the identification of the target population that connects to the site even before the contract is concluded, and may even shift the burden to the site **to take preventive action insofar as it is not interested in operating in this forum**. Thus, examination of the technologies used by the site can be an effective and inexpensive parameter to avoid litigation about the competence of the forum and

68. See Ahn, *supra* note 61, at 2357-58.

69. This criterion was proposed also in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

70. Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001).

the legitimacy of the forum selection clause. To this end, Geist proposes several types of technological characteristics:

3.2.1.1 Does the Site use Various Technologies, Hidden from the User, to Identify Users' Geographic Location and Increase its Exposure in the Destination Country?

Several parameters must be examined regarding the technology used by the site. **First**, the use of active technologies by the site aimed at identifying and classifying the target population, based on the awareness on the part of the site of use of the site in certain countries, as well as encouragement of extensive activity on the site in a particular country.⁷¹ Such behavior constitutes an actual agreement on the part of the site that the users of that country will use the site, and will serve as a key consideration in case of non-compliance with the forum selection clause. **Second**, checking whether the site undertook preventive steps against activity in a particular forum,⁷² specifically, whether the site blocks users who indicate that they have a particular address, or whether the site prevents the completion of the purchase when the user specifies the destination country. It should also be examined whether the user had to bypass various technological devices to gain access to the site. If it turns out that the user employed such tools, the argument that the forum selection clause should not be complied with will not be heard, because the user did not act in good faith.

3.2.1.2 Providing Personal Information on the Site

This category focuses on voluntary information provided by users in response to requests of the site. If such information has been provided, the question is what the site did with the information about the user's geographical location: did it block access to a user from a country in which it does not wish to operate, or has it allowed the user to continue using the site? In the latter case, the site should not be able to claim that it has no interest in operating in that country. By contrast, if it transpires that the user has provided incorrect information, it will indicate awareness on the part of the user that the site is not interested in operating in the user's country. If users knew that the site was not interested in operating in their

71. A concrete example of such encouragement is the YouTube online video-sharing website. It makes use of the surfer's location, time-zone on his computer, IP address, language etc., in order to recommend videos that are popular in his country and provide targeted ads of suppliers interested to promote their products in this country. See Paul Covington, Jay Adams & Emre Sargin, *Deep Neural Networks for YouTube Recommendations*, 16 PROC. 10TH ACM CONF. ON RECOMMENDER SYS. 191 (2016).

72. For Instance, it is possible to block certain IPs using the Domain Name System that identifies every IP on the web based on its country of origin. See Daniel Kanchev, *You Can Now Block Country Traffic to Protect your Website*, SITEGROUND (Sept. 28, 2022) <https://bit.ly/3FrDcDa> [<https://perma.cc/8D34-R8CZ>].

country, they should not be heard in demanding to disregard the foreign forum selection clause.

3.2.1.3 Geographic Identification by Offline Technological Means

This consideration includes technologies that detect the user's geographic location.⁷³ The most prominent example is a requirement by the site to **provide the user's credit card information**. Another up-to-date technology is **mobile phone text messaging**. Note that the main distinction between this type of geographic identification and voluntary identification of personal details, as in the previous category, is that in the latter cases the user cannot lie or provide incorrect data, and therefore the database is significantly more reliable. Consequently, considerable weight should be ascribed to these technologies, especially if it can be established that the site relies on this information in all that concerns its target population, when planning its business and legal operations.

3.2.2 Knowledge of the Parties to the Contract

Geist suggested examining the intentions of the parties as expressed through their actions in real time.⁷⁴ Accordingly, one could suggest looking at the following parameters, several of which have been mentioned in the literature or in caselaw: (1) Does the site explicitly state that its services or products are provided in the user country?⁷⁵ (2) Does the site invest resources to attract surfers from the user's country? (3) Has the site created advertisements intended for users in the target country or on sites affiliated with the forum country? (4) Does the site offer promotions or discounts unique to the user's country, to encourage site activity? (5) Are there popular hyperlinks to the site from the user's country? (6) Does the site collaborate with local companies, including suppliers, in the user's country, to increase the exposure of their products or services and their sales in this forum? (7) In the case of sites that sell physical products, are deliveries made to the user's country? (8) Does the domain name of the site imply that the site is accessible in the user's country?⁷⁶ (9) In what language is the information presented on the site? Does the site provide an interface in the user's language? (10) Does the content displayed on the site provide information tailored to a particular geographic area? (11) Does the site allow payment by local credit card from the user's country?⁷⁷ (12) Did the activity of the site affect

73. Geist, *supra* note 70, at 1399.

74. *Id.* at 1403-04.

75. *See* Am. Info. Corp. v. Am. Infometrics, Inc., 139 F. Supp. 2d 696, 700 (D. Md. 2001).

76. *See* Starmedia Network, Inc. v. Star Media, Inc., 2001 U.S. Dist. LEXIS 4870 (S.D.N.Y. Apr. 23, 2001) (where the court found the domain named Starmediausa.com implied that the site intended to serve and operate all over the United States and refused to enforce a Washington state forum selection clause).

77. When a payment is made by a credit card, the website confirms with the bank that the card is authentic and verifies the identity of the payer. Thus, the site also knows his country of

people in the forum country or caused any reaction there? (13) How much of the site's revenues come from the forum country? (14) Does the site have employees in the forum country (even if they do not constitute a local branch but are employed only occasionally)? Is there a customer service department in the forum country? (15) Does the site adjust the exchange rate in the pricing of its products or services to the local currency of the user's country? (16) Are there any company warehouses in the forum country, which do not qualify as representation but still reflect a true intention to operate in the country?

3.3 The Existence of Official Representation and/or Branches of the Site in the Users' Territory

Another parameter that helps assess the intention and expectation of the site to form relationships in the user's country is whether the site has established branches in that country. This parameter should be ascribed the greatest weight. Many international websites, especially the large ones, have official representations in many countries in which they have users. The role of those agencies is, among others, to assist in providing customer service in the countries where the sites operate.⁷⁸ This is a true indication of the intention and expectation on the part of the site to form relationships in that country to which considerable weight should be assigned.

When the site operates extensively in the user's country through an agent/representative, this is quite likely to prevent the site from avoiding litigation in that forum through a forum selection clause. However, not every "local agency" of a site will void the forum selection clause, but only an agency or representative that meets the following criteria:⁷⁹ (a) it is permanent, and not a temporary or accidental one; (b) it is a representative that at the time of the service of the claim was engaged in the same business or the same work as the subject of the claim; (c) the representative is subject to the guidelines of the site and serves as an extension of it, and there is an intensive and ongoing connection between the two; and (d) the representative is presented on the site to users as a branch or a representative of the site.⁸⁰

origin. *See Geist, supra* note 70, at 1399.

78. For instance, Booking.com BV, which owns and manages the global travel and accommodations website Booking.com, is headquartered in Amsterdam but has "support companies" in most countries in order to assist customers in their language and during convenient working hours. *See Offices in the World*, BOOKING.COM, <https://bit.ly/335D1Kp> [<https://perma.cc/PT4B-5WKU>].

79. The term "representative" was analyzed in an early judgment of the CJEU, before the advent of electronic commerce. *See Case 33/78, Somafer SA v. Saar-Ferogas AG*, 1978 E.C.R. 2183.

80. ZHENG, *supra* note 4, at 69-75.

3.4 Size of the Site in the Market, Taking into Account the Extent of Competition

Another parameter that must be examined is the size of the site in relation to the market in which it operates. The extent of competition that exists between the various sites in the market and the power gaps between the site and the user are important variables for determining whether the user is a captive audience who had no choice but to accept the standard form contract formulated by the supplier, and in particular the forum selection clause that limits the ability of users to file suit in the place of their residence.

One of the salient phenomena in the online arena is the extreme differences in the extent of competition that prevails in the various online markets. At one extreme, there are many sites that constitute powerful monopolies in their field, which are currently among the most powerful corporations in the world.⁸¹ These companies are relatively resilient to the costs of litigation in remote locations, because they are stable corporations with huge incomes,⁸² and because of their large market share, they are likely to have local branches and legal counsel. At the other extreme, some online markets are characterized by commercial “cannibalism.” In these markets there is fierce competition from companies all over the world that take advantage of the web, the lack of geographic boundaries, cheap labor, absence of taxation, etc. These circumstances have affected the profitability of many companies and have driven many to insolvency.⁸³ It has a direct effect on users and companies, because while the user enjoys the multiplicity of products and information found on the web, the companies try to adapt and survive within a predatory market. One of the characteristics of these competitive markets is the presence of small websites, which may connect with users all over the world, and even make a profit. This, however, does not make them into powerful corporations, immune to the costs of remote litigation. In particular, it is not efficient for small sites of this type to deploy world-wide legal teams. Rather, these are generally small businesses, usually run by a limited number of people, who can appeal to a global clientele owing to advances in technology, rather than to the strength of the company.⁸⁴ This contrast in the

81. Prominent examples are: Google, Facebook, Amazon, and Apple. See Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?*, 11 INT'L ECON. & POL'Y 49 (2014); Steve Kovach, *Facebook Has Gotten So Big That No One Can Understand It, and It Could Be a Good Reason to Break It up*, BUS. INSIDER (Apr. 11, 2018, 7:00 PM), <https://bit.ly/3jnFDK4> [<https://perma.cc/7XE3-MKJC>].

82. For instance, the annual revenue of Amazon Inc. in 2022 was \$513.983 billion (which is about equal to the GDP of the State of Israel), (Amazon Revenue 2010-2022 | AMZN | MacroTrends.) and that of Facebook (Meta Platforms) was \$116, 609 billion.

83. Richard Partington & Julia Kollwe, *Asos Shock Shows UK's Economic Problems Extend Beyond High Street*, THE GUARDIAN (Dec. 18, 2018, 2:00 AM EST), <https://bit.ly/2QQrLMx> [<https://perma.cc/4EWS-LF69>].

84. One example of such small businesses is the Antshop, the world's first specialist ant shop, a business with around two dozen employees, a glass-cutting workshop, plastic and plaster modeling studios and a full-time social media manager. This and other small online retailers in

nature of the sites must also directly affect the attitude toward forum selection clauses.

If the site is a monopoly or has significant market power, the user has few options but to agree with the forum selection clause dictated by the site, in the absence of real alternatives. This consideration supports non-enforcement of the clause. Moreover, there is doubt as to whether in a concentrated market, the cost reduction realized by enforcing an exclusive forum selection clause is ultimately translated by the firm into lower prices for the consumer. A small site, in contrast, may not have the financial ability to afford remote litigation, despite the fact that its goods are accessible online to the world. Thus, the forum selection clause is a key economic tool for it to protect itself against unforeseen expenses, and as a result the site may provide its products at lower costs.

Therefore, **it is necessary to create a scale containing three main options:** (a) **forum selection clause of a corporate monopoly**, which serves as a key consideration for not respecting the clause; (b) **forum selection clause of a small business in a competitive market**, which serves as a key consideration of the court in support of enforcing the clause; (c) **at the center of the scale are large or medium-sized businesses in competitive markets**, in which case two parameters must be examined: (i) Is it reasonable to assume that the forum selection clause allows the site to offer lower prices to users? and (ii) Was the user aware (or should have been aware) of the forum selection clause, and did he actively consent to it?

4. *Type of Users of the Site*

In recent years, thanks to online commerce, cross-border shopping has become widespread. As a result, the argument has been voiced that consumers in international transactions need greater protection than those in transactions with corporations in their country. This is because such gaps as language, the customary contractual structure, consumer conventions, and differences in legislation are wider than in traditional consumer contracts and may render simple consumers unable to stand up for their rights.⁸⁵ Nevertheless, not all plaintiffs are born alike and have the same status and power. Therefore, this section describes several types of plaintiffs who enter into online agreements,⁸⁶ pointing out that

Berlin are described in a 2019 Guardian article: https://www.theguardian.com/cities/2019/apr/29/are-the-hyper-specialist-shops-of-berlin-the-future-of-retail?utm_source=pocket-newtab

85. ZHENG, *supra* note 4, at 4-6.

86. One important group of consumers is minors, who are very active on the web. However, they raise special problems and considerations which are outside the scope of the present Article. See, e.g., UNICEF East Asia and the Pacific Regional Office, *What Works to Protect Children from Online and Offline Child Sexual Exploitation and Abuse? Review of National Education Strategies in East Asia and the Pacific 2020* (2020) <https://www.unicef.org/eap/media/4706/file> [<https://perma.cc/37KN-QWQ7>]; Rachael Post, *Friend or Foe? The Rise of Online Advertising Aimed at Kids*, THE GUARDIAN (Feb. 28, 2014, 2:00 AM EST), <https://bit.ly/34KV4rV> [<https://perma.cc/>]

the difference between them should also be taken into account when considering whether or not to enforce the forum selection clause.

4.1 Professional vs. Non-professional Users

One of the significant characteristics that must be examined regarding the identity of the plaintiffs is their legal personality, that is, whether the plaintiff is a lay (“private”) person or a “business” that routinely and professionally engages in such transactions.⁸⁷ As explained below, when dealing with a **professional plaintiff or a business**, this consideration supports compliance with the forum selection clause. This is because a plaintiff who is a professional or business entity is expected to compare various alternatives and be aware of entering into a binding contractual relationship. Such a plaintiff is also expected to be aware of the possible implications of various clauses present in online agreements, and in particular of forum selection clauses, especially given that a business has greater resources than an ordinary lay person, and in most transactions it is a repeat player and therefore has experience in this type of commercial conduct.⁸⁸ I would also argue that this is especially true if it is shown that the business incorporates, in its own online agreements, forum selection clauses.

Professional users are also expected to meet a higher standard of rationality than non-professional private consumers. At the same time, large and small professional dealers should not be treated equally.⁸⁹ Small businesses may also be a weak party to the standard form contract, therefore consideration should be given to protecting them from unfair contracts. This is especially true when small businesses cannot bargain, their resources for financing litigation are limited, and the person who initiated the transaction had no legal knowledge. A large business with a legal department is able to deal with the foreign forum selection clause of another business more easily, and have its day in court. A large business may even be a repeat player in most transactions, as opposed to a small business that

QMY2-TLVUJ].

87. For a discussion of these aspects in the EU and in the US, see Christopher Bisping, *Consumer Protection and Overriding Mandatory Rules in the Rome I Regulation*, in EUR. CONSUMER PROT.: THEORY AND PRAC. 239, 239-40 (James Devenney & Mel Kenny eds., 2012); Woodrow Hartzog, *The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 COMM. L. & POL'Y 405, 419-20 (2010); Dan Jerker B. Svantesson, *The Choice Of Courts Convention: How Will it Work in Relation to the Internet and E-Commerce?*, 5 J. PRIV. INT'L L. 517 (2009).

88. This distinction is found in the EU Brussels Regulation, which regulates questions of jurisdiction over transboundary disputes in the EU (Council Regulation 1215/2012, art. 17, 2012 O.J. (L 351) 1, 9). This provision distinguishes between someone who enters the contract for his own private use, outside his trade or profession, who will be considered a consumer worthy of protection, and someone who does so as part of his trade or profession, who will not be protected even if he is a small business.

89. This distinction is not recognized by the Brussels Regulation, which only focuses on the purpose of the transaction. See *id.*

often carries out a one-time transaction. Thus, the size and nature of the business are significant parameters in considering whether to enforce the forum selection clause.

4.2. *Class Action vs. Individual Plaintiffs*

One of the key market failures that has become more prevalent in the age of globalization causes sole plaintiffs to “shy away” from asserting their rights and filing lawsuits in foreign forums owing to the many costs involved in foreign litigation. This situation deprives them of the ability to stand up for their legitimate rights. This is all the more true when we are dealing with lawsuits against giant corporations that are repeat players and experienced in such litigation, and even more so in consumer transactions because the relief the plaintiff is likely to receive is usually less than the expected high litigation costs.⁹⁰

A key tool for addressing these difficulties is the institution of class action, a legal instrument that allows an individual plaintiff to sue on behalf of a group. The class action lawsuit replaces the regular individual proceeding with a collective one, which enables the court to decide many lawsuits jointly, aimed at remedying the failure in which a great deal of damage was caused, but it was spread over a large number of victims. Filing such a claim is significant and weighty because although the damage to each victim is relatively small, the aggregate amount of compensation can be extremely high. The class action is not only a procedural instrument; the cumulative weight of tens and even thousands of lawsuits filed together, in a total amount that often reaches tens if not hundreds of millions of dollars, makes it a powerful weapon. In this case, consumers are not deterred from filing and managing the lawsuit in the foreign forum, in accordance with the terms of the forum selection clause, provided that this forum allows class actions. This reduces the difficulty inherent in remote litigation in compliance with the forum selection clause.⁹¹ The class action lawsuit also saves litigation expenses and costs because a large number of personal claims are grouped into one proceeding, in a way that significantly reduces litigation costs. Therefore, the lawyers and plaintiffs who are members of the injured group should use this tool even if the procedure will be conducted in a foreign forum, in compliance with the forum selection clause. Thus, the class action lawsuit is intended to provide, among others, a solution to the problem of under-enforcement, which is common at the consumer level. Moreover, in many cases filing a class action may yield a significant economic benefit, which does not exist in personal claims, to the class plaintiffs and the lawyer who filed it. It

90. ZHENG, *supra* note 4, at 10; see also Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974).

91. Sometimes, a similar class action has already been filed in the forum country on behalf of local claimants. This can enable claimants in non-forum jurisdictions to join the existing proceedings, if the court will permit amendment of the claim and depending on the stage the proceedings have reached.

serves as an incentive to take action despite difficulties concerning the place of jurisdiction imposed by the standard form contract to which the parties have agreed.

The question arises whether in view of the above, the fear of blocking the ability of the consumer to sue if we enforce the forum selection clause is still relevant.

On the one hand, it can be argued that the institution of class action provides a solution to the market failure in the form of negative externalization, in which plaintiffs are deterred from having their day in court because of the foreign forum selection clause. Even if the site dictates an inefficient forum selection clause that binds the consumer to an inconvenient forum, it will still be economically efficient for the consumer to file a lawsuit there through class action, if it is possible. This is all the more true in cases where the lawsuit requires special expertise, which could have deterred plaintiffs from filing an individual claim because of the costs involved. The class action, in contrast, allows for representation by professional counsel supported by expert opinions, if needed. This equalizes the power relations between the litigants.

On the other hand, it may be argued that the optimistic approach ignores the fact that the class action tool does not exist in all countries.⁹² Thus, enforcing foreign clauses concerning an agreed forum in which there are no class action lawsuits, may be a death sentence for the proceeding and provide no remedy for the market failure. Even if class actions exist in the agreed forum, it may still be problematic to enforce the forum selection clause. The problem lies in the fact that the local lawyer, who serves as a kind of entrepreneur for filing the class action, has no interest in filing it in the foreign forum, in compliance with the forum selection clause because such a lawyer is usually licensed only locally and cannot act in the foreign forum. Local lawyers do not want to share their fee with a foreign lawyer, and this deters them from pursuing a class action in a foreign jurisdiction. At the same time, local consumers have difficulty reaching a foreign lawyer who works in the foreign jurisdiction to file the lawsuit for them, and the chance that foreign lawyers would search and find such clients in a foreign country where the site is active (considering the lawyer-as-entrepreneur model) is relatively low. One could therefore argue that enforcing the forum selection clause greatly reduces the option for consumers in countries other than the forum country to pursue class actions.⁹³

92. In Europe, for instance, US style class actions do not exist yet, but many jurisdictions are considering various modes of collective redress. See *Collectivization of European Civil Procedure: Are We Finally Close to a (Negative) Utopia?*, in CLASS ACTIONS IN EUROPE: HOLY GRAIL OR WRONG TRAIL? 3 (Alan Uzelac & Stefaan Voet eds., 2021).

93. One should note that in the US, courts are divided on whether the fact that class actions are unavailable in the selected forum is a valid reason to refuse enforcement of the forum selection clause. See, e.g., *Dix v. ICT Grp., Inc.*, 161 P.3d 1016 (Wash. 2007) (refusing to enforce such a clause on these grounds). But see, e.g., *Am. Online, Inc. v. Booker*, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001) (enforcing a forum selection clause found in an on-line consumer contract that referred to Virginia, although the class action could not be pursued there); *Wong v. PartyGaming, Ltd.*, 589

Nonetheless, I believe that a distinction should be made between plaintiffs who file a class action and those who file a claim that is not a class action. This distinction is consistent with the fact that when the court decides on the issue of validity and enforcement of the forum selection clause, it is necessary to examine, among others, the power gaps between the parties to the standard form contract. In our context, it is necessary to take into account the fact that opting for a class action increases the power of the claimants. Moreover, in class actions there are significant advantages for the claimants, which do not exist in personal claims.⁹⁴ These advantages mean that the plaintiffs should not be deterred from filing class actions in accordance with the agreed-upon forum outside their country. The argument that the local lawyer (the initiator of the proceedings) would have no interest in filing class actions should be rejected, as the local lawyer is still entitled to compensation, even if this compensation is shared with the foreign lawyers whose services are retained.

In the Ben Hamo case, which came before the Israeli Supreme Court, there was a request for approval of a class action suit against Facebook in which compensation was requested for the group in the amount of USD 400 million.⁹⁵ If the claimants had confidence in their claim, the forum selection clause should not have deterred them from filing it in the agreed forum. Even if they had to litigate in California, the additional costs involved were still quite low relative to the amount of the lawsuit. Moreover, it is accepted in the US that the fees of attorneys representing plaintiffs in class actions are determined by the court as a percentage of the amount of compensation to the group. Therefore, in any case, the plaintiffs would not have to bear the costs of the lawyers' fees whether they win (in which case the fee is paid out of the amount of compensation to the group) or lose (in which case no fee is paid). The advantages of referring the parties to the agreed forum is even more apparent in light of the final outcome of the Supreme Court ruling in the Ben Hamo case, where while operatively the foreign forum selection clause was not enforced, the foreign (California) **choice of law clause** was.⁹⁶ The result was that the claim was litigated in the Israeli forum, but according to foreign law, which had to be proven by expert opinion. Litigating a case in this way makes a complex case even more complex, which further strengthens the position that the parties should have been referred to the agreed forum.

Furthermore, accepting the paternalistic approach set out in the Ben Hamo rule, which follows the position of the European Union, may deter many international sites from entering the local market. In particular, class action

F.3d 821 (6th Cir. 2009).

94. For instance, if the class action is accepted, the claimant is often entitled to a special reward, higher than his actual loss. Also, in Israel, for example, there is a special statutory fund to help finance class actions where there is public or social importance that they should be filed and heard. Art. 27, Class Action Law, 5776-2016, SH No. 2054 264 (Isr.).

95. CivA 5860/16 Facebook Inc. v. Ben Hamo, Nevo Legal Database (May 15, 2018) (Isr.).

96. *Id.*, para. 43.

lawsuits, which are huge, not only have significant economic exposure for the sites, but often prompt similar lawsuits to be filed in other countries. Indeed, international sites have a legitimate interest in conducting a single class action lawsuit in the agreed forum stipulated in the forum selection clause rather than having to defend against dozens of separate lawsuits, especially when dealing with issues that are fundamental to the site.⁹⁷ Therefore, accepting the nuanced position presented in this Article, which weigh heavily on the side of the validity and enforcement of the forum selection clause when dealing with a class action, is likely to signal to international sites that the domestic market is in favor of increasing commercial activity and eliminating the chilling effect as far as these sites are concerned. Hence, the fact that a claim is a class action should be a key parameter in the set of considerations in favor of enforcing forum selection clauses.⁹⁸

5. The Requirement for Agreement with the Form Selection Clause

The degree of user consent to the online contract, which indicates the intention to be contractually bound, constitutes a paramount component in the creation of the contractual agreement. In general, the forum selection clause is part of the *Terms and Conditions* in the contract. This is not necessarily information that is clearly and emphatically presented to the user. As a rule, this information is written in long and complicated paragraphs, in small letters and convoluted legal language, in a configuration that requires scrolling and in-depth study before carrying out simple operations. If this were not enough, the clause can be included in a browsewrap agreement where the terms of use are not automatically displayed to the user on the screen. Instead, there is a link on the site that leads to the page where these terms are displayed. Hence, user consent to the terms of use, and in particular to the forum selection clause contained therein, is questionable because it was achieved passively and inferred from the user's continued browsing of the site or continued use of whatever service is being offered.⁹⁹ This section will discuss the types of agreements that can exist, and subsequently determine, based on several typical situations and the relevant considerations, when the activity on the site does and does not meet the user's consent requirement, both to the contract in general and to the forum selection clause in particular. This is examined in light of two types of agreements on the site: browsewrap vs. clickwrap.

97. For instance, privacy and free speech issues.

98. One could of course argue that many of the arguments made here in favor of enforcing the forum selection clause could be applicable also to individual claims at very high amounts. However, individual consumer claims at such amounts are extremely rare, and in any case do not justify the creation of a special category of exceptions.

99. As held by several US courts: "the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014).

5.1 Between General Consent and Actual User Consent

First, we must distinguish between **online contracts in which the consumer provides a tangible monetary consideration** for the services or goods that the site provides, and **online contracts in which no such consideration is provided**. As noted above,¹⁰⁰ **browsewrap agreements** do not contain evidence of an intention to be contractually bound on the part of the user, especially when the user is not required to pay a tangible monetary consideration. Therefore, the fact that the forum selection clause is part of a browsewrap agreement without a tangible monetary consideration, should be a key reason for not enforcing or validating the forum selection clause.¹⁰¹ Under these circumstances, users pay no attention to issues such as the forum selection clause that obligates them to remote litigation. By contrast, in circumstances of tangible consideration, users may identify the consideration as a contractual transaction and be aware that they are entering into a legal relationship. In these circumstances, there are stronger reasons to enforce the forum selection clause. Nevertheless, the tangible consideration element should not be given exclusive weight in settling the question of the validity of the forum selection clause because the technology of e-commerce companies makes it possible to get through the payment stage relatively easily, often without having to enter credit card details and other information, which is saved from previous purchases. Also, if the payment is of a negligible amount, the consumer may not attach importance to entering into a binding contractual system. Therefore, courts must examine additional parameters, detailed below, which can enable them to elucidate comprehensively the nature of the understanding of the parties with regard to the binding relationship that has been created between them, with emphasis on the user.

However, the consent component can be problematic even in the case of **clickwrap agreements**. As noted above, most users do not read the contract to which they agree, and are aware only of the basic issue that is at the heart of the contract, not the other clauses, and in particular not of inconspicuous clauses such as the forum selection.¹⁰²

In response, the American Law Institute has formulated the ALI Principles,¹⁰³ a number of parameters that can strengthen the element of agreement in contracts, enabling compliance with clauses that are perceived as problematic and with those that the sites act to hide. The following are parameters formulated by ALI, as well as some additional parameters that I propose, which together indicate consent to the forum selection clause.

100. Notes 5-6, and text.

101. See Lemley, *supra* note 3, at 475-76.

102. Clickwrap agreements allow websites to “hide” problematic provisions through the use of manipulations with fonts in different sizes and exploitation of the online medium to mislead consumers. See Hillman & Rachlinsky, *supra* note 15.

103. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.01 (AM. L. INST 2010) (“ALI Principles”).

- (1) **Preventing missing the forum selection clause by emphasizing it.** The site highlights at the top of the contract the forum selection clause, and emphasizes it in relation to the rest of the contract by framing the clause in the box, or any other way that reduces the likelihood that the consumer would overlook it.¹⁰⁴ Attention should be paid also to the wording and length of the agreement that includes the forum selection clause: the shorter the agreement, the more prominent and accessible the forum selection clause is.
- (2) **Respecting the user's autonomy by including a clear step of clicking on the forum selection clause,** in a dedicated and separate manner from the online contract.¹⁰⁵
- (3) **The consumer had access to the contract after agreeing on the website.** After agreeing to the clickwrap contract, consumers receive a physical copy to their home address,¹⁰⁶ or the contract is clearly accessible on the relevant website. If consumers receive a copy of the agreement that includes the forum selection clause by email or to their mobile device, and are required to confirm by answering that they are aware of the clause and agree to it, this should be another consideration in favor of enforcing the forum selection clause.
- (4) **Publishing a full and early disclosure of problematic clauses.** According to the ALI approach, the most effective measure is to offer the option of a full disclosure by the site to users regarding key clauses that the user should know about.¹⁰⁷ Sites that choose to include the forum selection clause in this disclosure as well will be able to present this in court, increasing the likelihood that the court will enforce it. Indeed, an explicit "warning" notice on the site, which pops up when users visit the site and warns them that they are agreeing to a binding legal contract that contains a forum selection clause, definitely serves as an indication of consent to such a clause.
- (5) **Timing of the appearance of the forum selection clause.** It must be examined when the terms of use, including the forum selection clause, were presented to the users. If the terms of use were presented to the user only after the user registered on the site or started using it, it would be less appropriate

104. Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315, 355 (2017). There are however scholars who consider the idea of requiring websites to emphasize important clauses to be problematic, as the importance of clauses is a subjective issue that differs from one consumer to the other and would pose a challenge to regulators. See Robert A. Hillman, *Consumer Internet Standard Form Contracts in India: A Proposal*, 29 Nat'l L.S. India Rev. 70, at 76. (2017). There is also the concern that websites will emphasize most of the provisions, thus diluting the impact of the emphasis (*id.*).

105. Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 YALE J.L. & TECH. 1, 26 (2009).

106. In some jurisdictions, there is legislation that imposes such requirements. One example is the Illinois Dating Referring Services Act, which was discussed in *Doe v. Match.com*. *Doe v. Match.com*, LLC, No. 11 L 3249, 2012 Ill. Cir. LEXIS 3350, at *6-7 (Ill. Cir. Ct. Oct. 25, 2012).

107. See ALI Principles, *supra* note 103, §202(c)(2).

to consider the users as being bound by the forum selection clause.¹⁰⁸

- (6) **Translation** of the agreement or lack thereof, and in particular translation of the forum selection clause. If the agreement has not been translated into the user's language, this may serve as a consideration not to enforce the forum selection clause, especially if it is proven that the user does not speak the language in which the agreement is written.
- (7) **Payment of a tangible consideration** as a condition for using the site. If a tangible consideration has been paid, this may constitute a parameter indicating an intention to be contractually bound by the agreement including the forum selection clause, subject to the reservations noted above.

In addition, below are several other relevant parameters, some of which are suggested by Geist, which the courts should consider when analyzing the contract:¹⁰⁹

- (8) **How was the contract presented to the user?** Was it presented as an individual legal contract that the user must agree to, in a distinct and individual manner? Or was the contract presented as part of a sequence of actions to be carried out for downloading the software or starting to use the site?
- (9) Was the forum selection clause **included in the contract** to which the user agreed? Or was the forum selection clause included in the terms of use, **outside the contract**, whereas in the contract the user agreed generally to observe the terms of use, without further details?¹¹⁰
- (10) **Was the term "I agree"** used during the clicking? Or was some other term used, more vague, such as the common term in online contracts "To download"?¹¹¹
- (11) What is **the size of the text** in which the forum selection clause was written?

The main question to be examined using the parameters listed above is whether reasonable steps were taken to bring the agreement, and in particular the forum selection clause, to the user's attention in a way that the user had reasonable access and opportunity to read and understand the agreement.

108. A late disclosure of the problematic provision is less likely to cause the consumer to withdraw from the transaction because of the "sunken cost" effect, considering that they have invested much time and effort in finding the best product or service for the best price. See Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESS 124 (1985).

109. Geist, *supra* note 70, at 1387.

110. See, e.g., Ticketmaster Corp. v. Tickets.com, Inc., No. CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. Mar. 27, 2000) (dismissing one of the claims because the "terms of use" were at the bottom of the page in small print and the surfer was not required to click "I agree" to these terms).

111. See Specht v. Netscape Commc'ns. Corp., 306 F.3d 17 (2d Cir. 2002).

6. *Rationale of the Forum Selection Clause*

The final key parameter that must be examined is the purpose that the clause is intended to achieve. Is it intended to protect a legitimate interest of the site? Is the selected forum a natural and legitimate forum, or is it an unnatural one that serves primarily to block the consumer from suing? Or, perhaps, is the forum selection clause intended to gain some other legal advantage for the site?

Several relevant parameters must be considered in this context. **On the one hand**, it should be remembered that exclusive forum selection clauses are common for international organizations that conduct worldwide activities. An international entity with clients in dozens of countries is naturally interested in concentrating all disputes concerning its activities in one place. Otherwise, litigation in any of the countries around the world where the users of the site are located would eliminate legal certainty and impose costs and encumbrances on the management of the site's activities.¹¹² Note further that there should be no policy encouraging non-compliance with agreements to which the users have agreed, and in general courts should respect agreements that parties have entered freely and not take part in their violation.

On the other hand, as part of a desirable legal policy, international websites should not be able to choose a specific and remote forum, especially in the present age when there are no boundaries on the Internet. In the global village, an international company that markets its goods or services to users all over the world should expect to be sued in the forum where the user is located, all the more so if this is a gigantic international corporation that markets its products and services to millions of users. The fact that the activities of these huge corporations are conducted primarily or exclusively through the Internet does not confer immunity from litigation in the place where users reside. From the point of view of the ability to prepare and assess the risk in advance, the site has an advantage over the user, who is usually unaware of the risks and costs involved. A site aimed at international users often has greater access to local courts than the users have access to courts in a foreign country, where they have no connection or affiliation. This is especially true when these sites have agents or representatives in the countries in which the users reside.

Therefore, it should be examined whether the forum selection clause included in the terms of use of the site is intended to protect the legitimate interest of the site, and whether the forum stipulated in the forum selection clause constitutes a natural, legitimate forum, and has extensive factual and legal connections to the dispute. For that purpose, it is necessary to examine the following parameters: (a) the identity of the defendants; (b) the place of residence of the defendants; (c) the language in which the agreement with the forum selection clause was written; (d) whether the foreign forum offers a choice of law; (e) the place of the defendants' witnesses; (f) the place of the alleged incident. If it becomes clear that the chosen forum is a place of refuge from a legal system and from consumer lawsuits and

112. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-594 (1991); *see also* Goldman, *supra* note 16, at 709.

not the natural forum for the site, the tendency should be not to enforce the clause.

D. Summary

The age of globalization and the rapid development of the Internet pose a serious challenge to the law, raising a series of complex questions regarding the status of forum selection clauses included in international website usage agreements.

This Article has presented a multidimensional model for handling forum selection clauses included in online website agreements. This innovative model offers new criteria by adding clear considerations, with new specified parameters and criteria to be taken into account, when considering whether or not to enforce the forum selection clause. These considerations help construct the judicial discretion regarding the validity and enforcement of forum selection clauses, as follows:

First, the model proposes to examine the nature and type of the various sites as a factor in the question of whether to enforce foreign forum selection clauses. A general distinction is proposed between the different types of sites, namely: social networks and blogs; search engines, storage sites, cloud services, and email; free information and content sites without tangible consideration; shopping and e-commerce sites, and sites offering services and information for a fee.

Second, the model proposes to examine the characteristics of the website as a factor in settling the question of the validity and enforcement of the forum selection clause. The following parameters must be examined in this respect: (a) degree of interactivity of the site (active vs. passive site); (b) desire and expectation on the part of the site to maintain a relationship in the user's country; as part of this consideration, it is proposed to examine additionally whether the site has official representation and/or branches in the users' territory; (c) size of the site in the market, including the extent of competition that exists between the various sites that are active in the market, and the power gaps between the site and the user.

Third, the model also proposes to examine the type of users of the site as a factor in settling the question of the validity and enforcement of the forum selection clauses. It proposes to distinguish between professional and non-professional users. It further proposes to distinguish between class actions and personal suits. A class action should be a key parameter in the set of considerations in favor of enforcing the forum selection clause, provided that such actions are available in the foreign forum, and that it operates within a democratic and enlightened legal system.

Fourth, the model proposes to examine the intention to create a binding legal relationship on the part of the user, including active user consent and awareness of the forum selection clauses included in the online agreements. It proposes to examine the type of contract (browsewrap vs. clickwrap), and in particular the following parameters: whether the forum selection clause was emphasized on the site; whether it required a separate click on the forum selection clause; user access

to the contract after consenting on the site, and in particular, the publication of a full and early disclosure on the site regarding the forum selection clause; the timing of the appearance of the forum selection clause; translation of the agreement or the lack thereof; and payment of a tangible consideration.

Fifth, the model proposes to examine the purpose of the forum selection clauses, that is, whether the forum selection clause set forth in the terms of use of the site is intended to protect a legitimate interest of the site, and in particular, whether the stipulated forum constitutes a natural, legitimate forum, with extensive factual and legal affiliations to the dispute.

This model makes it possible to take into account a wide range of considerations, depending on the circumstances of the concrete conflict, including the nature of activity in the virtual space, the various players, the scope of the claim, and other factors. The model also takes into account the unique characteristics of the web, and provides flexibility as it addresses a wide range of different considerations relevant to the decision. It is submitted that consideration of the parameters defined within the model is likely to lead to a broader, fairer, and more efficient treatment of the topic, balancing the two basic objectives of promoting e-commerce and protecting the consumers. The model can be easily adapted to different legal systems given the universal set of rules that are part of it.