

## It's a Small World After All: Personal Jurisdiction, the Internet and the Global Marketplace

Michael S. Rothman

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## COMMENT

### IT'S A SMALL WORLD AFTER ALL: PERSONAL JURISDICTION, THE INTERNET AND THE GLOBAL MARKETPLACE

#### INTRODUCTION

Has the Internet really broadened the power of courts to exercise personal jurisdiction over a foreign defendant? This is the question that has recently faced courts across this country for the first time. As judges and jurors have grappled with the difficult issues surrounding this revolutionary form of communication, new and interesting patterns are emerging. As expected, the results are mixed. On the one hand, electronic contacts are finally being accorded legal effect in courts around the world. On the other hand, individuals are incurring liability in places and countries they never dreamed possible.

When the United States Department of Defense began a project to link military computers with computer networks in industry and academia in 1969, its creators could have hardly envisioned today's Internet.<sup>1</sup> Incorporating such varied technologies as the World Wide Web, electronic mail, chat rooms, video conferencing, and newsgroups, the modern day Internet has blossomed into a powerful, global communications medium. Yet, as this medium has reached mainstream acceptance, its users have begun to turn to the courts to protect their "on-line" rights. As a result, the first wave of Internet-based cases has reached the courts, announcing the legal maturation of this medium. Not coincidentally, it has also elevated the threshold legal issue of personal jurisdiction to primary importance.

Because courts, both foreign and domestic, have set forth few concrete rules concerning the exercise of personal jurisdiction based on Internet-related contacts, the battle has centered around two emerging models—one theoretical and one traditional. In the theoretical model, Internet visionaries claim that interaction in "cyberspace"<sup>2</sup> does not involve any

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1. The Internet can best be described as an intangible network of networks interconnecting millions of computers around the world. See discussion of the Internet, *infra* PART II.

2. See EDWARD A. CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD* 1 (1993) (defining "cyberspace"). The term "cyberspace" was originally coined in the early 1980's by science-fiction writer William Gibson in his award-winning science fiction novel, *Neuromancer*. See *id.* Today, the word

contact with the physical world and, as a result, traditional notions of personal jurisdiction do not apply.<sup>3</sup> Under the other model, traditionalists note that cyberspace does not lack a physical location any more than does the telephone system.<sup>4</sup> As cyberspace is really interconnected lines and hardware based in fixed locations around the world, courts have the power to exercise personal jurisdiction over a cyberspace-based action in the same manner as it would any other case.

This Comment attempts to illustrate how courts are applying existing personal jurisdiction precedent in today's electronic world. Although the Internet provides a revolutionary new medium by which a party may engage in sophisticated transactions across state and national borders without leaving home, a new body of law is not needed to decide issues of personal jurisdiction. Courts have faced and surmounted similar obstacles after inventions such as the telephone, radio, and television. While the Internet may pose novel questions with regard to the medium used to connect to a jurisdiction, fundamental fairness to the defendant remains the guiding principle in any personal jurisdiction analysis, foreign or domestic.<sup>5</sup>

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"cyberspace" more commonly refers to the collection of on-line virtual communities as a whole. See William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 199 n.5 (1995) ("s commonly used today, cyberspace is the conceptual 'location' of the electronic interactivity available using one's computer.").

3. See David R. Johnston & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370-71 (1996) ("Cyberspace has no territorially based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location. Messages can be transmitted from one physical location to any other location . . . without any physical cues or barriers that might otherwise keep geographically remote places and people separate from one another."); see also Byassee, *supra* note 2, at 198 n.5 ("Cyberspace is a place 'without physical walls or even physical dimensions' in which interaction occurs as if it happened in the real world and in real time, but constitutes only a 'virtual reality.'" (quoting Lawrence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, THE HUMANIST, Mar. 26, 1991, at 15)).

4. See Byassee, *supra* note 2, at 199 (stating that although cyberspace transcends geographical boundaries, "it cannot exist independently of the real world"); see also Erik J. Heels & Richard P. Klau, *Let's Make a Few Things Perfectly Clear: Cyberspace, the Internet, and That Superhighway*, STUDENT LAWYER, May 1995, at 17 ("Never forget that the Internet is simply a bunch of interconnected wires, with computers at the ends of the wires, and with people in front of the computers.").

5. In the United States, the Due Process Clause provides the outermost limits for the exercise of personal jurisdiction. U.S. CONST. amend. XIV, § 1, cl. 3. For the exercise of personal jurisdiction over foreign defendants, reasonableness is the guiding standard under the Restatement (Third) of the Foreign Relations Law of the United States. For a more detailed discussion, refer to Part III [A], *infra*.

In the United States, the Supreme Court's 1945 decision in *International Shoe Co. v. Washington*<sup>6</sup> ushered in the modern era with regard to the personal jurisdiction analysis. The *International Shoe* Court recognized that advances in communications, travel, and commerce were putting immense pressure on the old territorial notion of personal jurisdiction articulated most famously by the Court in *Pennoyer v. Neff*.<sup>7</sup> In *International Shoe*, the Court announced a new standard for the exercise of personal jurisdiction in the United States. This standard foresaw the rapid changes taking place in the country and sought to address this new transience with a flexible standard. In addition this standard balanced the convenience of the forum against the fairness to the defendant. Eventually, the modern personal jurisdiction analysis came to rest upon these two prongs.

Today, those two prongs are once again in conflict. The Internet, in all its forms, permits a user, for a minimal investment, to literally broadcast his or her message to the entire world. This property has meant revolutionary changes for communication as well as commerce. But there has been a price. Although more people can now communicate and purchase goods and services electronically, more people can now be injured electronically as well. The causes of action have not changed, only the medium has changed. And that is where we find ourselves today—at the threshold of an information revolution with only past precedent to guide us. But as this Comment will argue, we need not abandon the existing personal jurisdiction models. In fact, those models are still viable and need only to be adapted to the new communications medium.

This Comment will discuss the exercise of personal jurisdiction by countries around the world based on Internet-related contacts. As there are no concrete international standards guiding international courts other than “reasonableness,” this Comment will extrapolate from the United States’ standards. In analyzing the existing case law, this Comment will argue that existing personal jurisdiction standards are flexible enough to adequately protect the rights of defendants based on Internet contacts. However, this Comment will also suggest that, when Internet-related contacts are implicated, the second prong of the traditional personal jurisdiction analysis, the factors of “fair play and substantial justice,” will become the primary consideration for courts. As a defendant can conduct business or cause effects in a variety of distant forums with little more than a telephone, a modem, and an Internet connection, the “minimum contacts” prong of the due process analysis will wither. Consequently,

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6. 326 U.S. 310 (1945).

7. 95 U.S. 714 (1877).

courts will analyze the bulk of Internet-related cases using “other factors” in the due process analysis.

In Part I, this Comment will describe recent incidents, both in the United States and abroad, involving the exercise of personal jurisdiction. Part II will describe the medium known as the Internet, in all its forms, and discuss why it is creating questions regarding the exercise of personal jurisdiction. Part III will describe the standards for the exercise of personal jurisdiction, internationally and here in the United States. Part IV discusses the existing case law regarding the exercise of personal jurisdiction based on Internet contacts. In Part A, the Comment will discuss how the existing distinctions between active and passive web pages are an inadequate model for determining whether to exercise jurisdiction. Part B divides the case law into three categories based on the holdings in those cases. Part V discusses how the Internet is decreasing the significance of the “minimum contacts” analysis to the exercise of personal jurisdiction. As defendants can now “purposefully avail” themselves of the benefits and protections of a foreign state either inadvertently or accidentally, courts must now look to the “other factors” to determine whether the exercise of jurisdiction over a foreign defendant is reasonable. Finally, in Part VI, this Comment argues that “purposeful availment” remains a viable standard, even in this new electronic age. Although an electronic posting may be received world-wide, it is still possible to conduct a “purely local” business on the Internet while not subjecting oneself to jurisdiction everywhere the posting can be received.

## PART I: RECENT INCIDENTS

### A. *Minnesota*

#### WARNING TO ALL INTERNET USERS AND PROVIDERS

[P]ersons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws.<sup>8</sup>

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8. Warning to All Internet Users and Providers, Mem. Minn. Att’y Gen. (visited May 14, 1999) <<http://www.ag.state.mn.us/home/consumer/consumernews/OnlineScams/memo.html>> [hereinafter Minnesota Memorandum]. The assertion of jurisdiction rested on the Minnesota general criminal statute which provides that “[a] person may be convicted and sentenced under the law of this State if the person. . . (3) Being without the state, intentionally causes a result within the state prohibited by the criminal laws of this state.” MINN. STAT. ANN. § 609.025 (West 1987).

In July 1995 the Minnesota Attorney General's Office posted this warning statement to the Internet. On July 18, 1995, Minnesota Attorney General Hubert "Skip" Humphrey, III, announced the filing of six civil lawsuits against Internet advertisers.<sup>9</sup> Proceeding under the state's consumer fraud and deceptive trade-practices laws, Humphrey attacked a variety of fraudulent schemes including: "credit repaid" operations, pyramid schemes, and a promotion for a "miracle drug" for cancer and AIDS.<sup>10</sup>

Amongst the many online consumer protection actions, Attorney General Humphrey filed suit against Granite Gate Resorts, Inc., an Internet sports wagering site based in Belize.<sup>11</sup> Drawing on the classic scenario of international criminal jurisdiction regarding someone acting outside the state causing effects in the state,<sup>12</sup> the Attorney General of Minnesota filed the first in a series of consumer protection lawsuits.<sup>13</sup> Just as Minnesota could exercise jurisdiction over someone outside the state who fired a rifle at someone in the state, the Attorney General argued in the Minnesota Memorandum, so Minnesota had the power to enforce its laws against purveyors of online fraud.<sup>14</sup> A Minnesota trial court and the Minnesota Court of Appeals agreed, permitting the Attorney General to exercise personal jurisdiction over the defendant based strictly on the availability of its web site within the State.<sup>15</sup>

### B. *France*

In January 1997, two private French organizations filed suit against the Georgia Institute of Technology's European campus in Metz, France ("Georgia Tech-Lorraine").<sup>16</sup> The two organizations claimed that Georgia Tech-Lorraine's web site, which advertised its French campus, violated

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9. See Mark Eckenwiler, *States Get Entangled in the Web*, LEGAL TIMES, January 22, 1996, at S35.

10. See *id.*

11. *Id.*

12. LEAGUE OF NATIONS, COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW, REPORT TO THE COUNCIL OF THE LEAGUE OF NATIONS (1926).

13. See Eckenwiler, *supra* note 9.

14. The power to enforce presupposes jurisdiction to enforce. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 432 Introductory note (1987). [*hereinafter* RESTATEMENT]

15. *State v. Granite Gate Resorts, Inc.*, 1996 WL 767431 (Minn. Ramsey County Dist. Ct. Dec. 11, 1996), *aff'd*, 568 N.W. 2d 715 (Minn. Ct. App. 1997), *aff'd by an equally divided state supreme court*, 576 N.W. 2d 747 (Minn. 1998).

16. See Tom Lander, *The French Say Non to English Language Website*, (visited May 14, 1999) <<http://www.wired.com/news/story/911.html>>.

Article 2 of France's Toubon Law.<sup>17</sup> That language purity law required French, or a French translation, be used in all advertisements for goods or services that appeared in France.<sup>18</sup> This suit marked the first time the Toubon Law was applied to the Internet.<sup>19</sup>

The prosecutors argued that the Toubon Law applied to the Georgia Tech-Lorraine web site because the Metz campus was incorporated and operated under French law.<sup>20</sup> In addition, the Web site was accessible in France over the Internet.<sup>21</sup> Georgia Tech defended on the ground that the law did not apply to the web site because it was private. The Web site was intended for students enrolled in the Lorraine program, who were required to be fluent in English and to attend classes in English.<sup>22</sup> As penalty for violation of the Toubon Law, Georgia Tech faced fines of as much as 25,000 francs (\$4,300 US) for each time the English-only page was accessed.<sup>23</sup>

On June 9, 1997, the Tribunal del Police de Paris dismissed the suit against Georgia Tech on procedural grounds.<sup>24</sup> In particular, the court declined to move forward with the prosecution because of the plaintiff's initial failure to report the violations to the police, as required by law.<sup>25</sup> In addition, the court concluded that prosecutions under the Toubon Law could only be initiated by the government and not by private organizations.<sup>26</sup> Despite the favorable ruling, Georgia Tech has redesigned its web

17. The Toubon Law was enacted on July 1, 1994. See Law No. 94-665 of Aug. 4, 1994, Relative a l'emploi de la langue francaise. J.O., Aug. 5, 1994 [hereinafter *Toubon Law*]. Article 2 requires the use of French for the name, offer, presentation, or instruction of goods, including any written, spoken, or audio-visual advertising. Slogans and messages associated with registered trademarks are also encompassed by Article 2. See Stacy Amity Feld, *Language and the Globalization of the Economic Market: The Regulation of Language as a Barrier to Free Trade*, 31 VAND. J. TRANSNAT'L L. 153, 167 (1998).

18. The Georgia Tech-Lorraine web site was located on a French web server and had a French domain name: <<http://www.georgiatech-metz.fr/>>. See *French Internet Suit Dismissed English-Only Web Site Illegal, Groups Charge*, Chicago Tribune, June 10, 1997, at 1, available in 1997 WL 3557201.

19. *Id.* See also Tom Ladner, *The French Say Non to English-Language Web Site*, (visited November 14, 1999) <<http://www.wired.com/news/story/911.html>>.

20. *Id.*

21. *Id.*

22. See Chicago Tribune *supra* note 18.

23. See Feld, *supra* note 17, at 171.

24. See Chicago Tribune, *supra* note 18.

25. See *id.*

26. See *id.* at 171 n. 88. See also Multimedia Docket Sheet: Recent and Pending Cases, Multimedia and Web Strategist, June 9, 1997, at 8, available in LEXIS, News Library, NWLTRS File. Additionally, it was reported that the suit was dismissed because the prosecuting organization was not authorized to bring such a claim on behalf of the government.

site to include French translations.<sup>27</sup> However, it still remains to be seen whether the French language purity law applies to the Internet.

## PART II: DON'T KILL THE MESSENGER

### A. *The Medium*

To understand why the Internet represents a challenge to the exercise of personal jurisdiction, one must first understand the medium. The Internet was originally designed by the United States Department of Defense to operate as a nation-wide communications medium for the exchange of information in the event of an attack.<sup>28</sup> Designed to be a decentralized, self-maintaining series of redundant links, the Internet was capable of rapidly transmitting communications between connected computers without human involvement.<sup>29</sup> Regardless of the size of the file, the transmission of every message occurred in the same manner.

The transmission of information occurred in a number of steps. First, the information would be broken down into smaller packets of information, and each packet would be independently sent to a unique address located on the network. To get to that address, the information would travel over a series of linked computers through dedicated communications lines. If any one link in the network was damaged, the information would be re-routed until it eventually reached its unique destina-

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27. See Feld, *supra* note 17, at 170 n.89.

28. The forerunner of the Internet was created in the summer of 1969 by the Department of Defense's Advanced Research Project Agency ("DARPA"). Originally termed the "RPANET," this network linked defense researchers with remote computer centers, allowing them to share hardware and software resources such as computer disk space, databases, and computers. As the Internet continued to grow, the National Science Foundation subsumed the project when it contracted with private corporations to upgrade and expand the national network to create the National Science Foundation Network ("NSFNet"). NSFNet was intended for non-commercial use by research and educational institutions. See TRACY LAQUEY, *THE INTERNET COMPANION* 3-6 (1993). For one of the best descriptions of the Internet and its inception, see *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) [hereinafter *ACLU*]. Today an estimated 40 million people have access to the Internet, and 60 percent of those computers are located in the United States. The government has speculated that the number of users will grow to 200 million by the year 1999. See *ACLU*, 929 F. Supp. at 831; See also *Shea v. Reno*, 930 F. Supp. 916, 926 (S.D.N.Y. 1996). At least 75 countries have full Internet access, and another 77 countries can send and receive e-mail. *The Internet Affects All Areas of Modern Life*, ONLINE PRODUCT NEWS, May 1995, available in LEXIS, Market Library, IACNWS File. For a comprehensive discussion of the Internet and its origins, see generally PETER H. SALUS, *CASTING THE NET* (1995); Edwin Diamond & Stephen Bates, *The Ancient History of the Internet*, AM. HERITAGE, Oct. 1995, at 34-35.

29. See *ACLU*, 929 F. Supp. 831.



tion. Once at the destination, the receiving computer would automatically re-assemble the message packets into their original order.<sup>30</sup> Using this method, no two parts of a single message might ever have traveled the same route to arrive at its eventual destination.

As ARPANET grew in popularity, similar networks were developed to link universities, research facilities, businesses, and individuals around the world. Eventually, these networks were all linked together, allowing users from any computer linked to any one of the networks to transmit communications to any other user on any other linked network. This series of redundantly linked computers comprises what is commonly referred to today as the Internet.<sup>31</sup>

Today, access to the Internet is fairly simple and occurs in one of two ways. The first type of connection occurs when individuals can use a computer that is directly (and most likely permanently) connected to the computer network that is connected to the Internet. This type of connection is usually found at universities, research institutions, or, increasingly, at many large corporations. The other type of access occurs remotely, where an individual uses a personal computer and a modem to connect over an existing telephone line to a larger computer or computer network that is itself directly or indirectly connected to the Internet.<sup>32</sup> This type of access is most commonly provided by commercial or non-commercial Internet Service Providers, or ISPs. Other methods of access in this category include the "online" service providers, such as America Online, which provide indirect access to the Internet through their own proprietary networks.

As access has become easier, the growth of the Internet has been nothing short of explosive. According to recent estimates, "In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked. Today, over 9,400,000 host computers worldwide . . . are estimated to be linked to the Internet."<sup>33</sup> Some estimate that world-wide Internet access is greater than 180 million users, with over 82 million users accessing the Internet from non-English speaking countries.<sup>34</sup>

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30. *See id.* at 831-32.

31. *See id.*

32. *See id.* at 832-33.

33. *Id.* at 831. Host computers are the computers which are permanently linked to the Internet. The host computers do not give an actual indication as to the real number of users because a university or a corporation might count as a single host.

34. *Global Internet Statistics (by Language)* (visited May 14, 1999) <<http://www.euromktg.com/globalstats/>>.

### B. *The Many Faces of the Internet*

The Internet consistently defies categorization mainly because it is really a generic term for a number of very different methods of communications. The most common methods of communication on the Internet (as well as within the online services) can be roughly organized into six categories: (1) point-to-point messaging (such as "e-mail"); (2) point-to-multipoint messaging (such as "listserv"); (3) distributed message databases (such as "USENET newsgroups"); (4) real time communication (such as "Internet Relay Chat" or IRC); (5) real time remote computer utilization (such as "telnet"); and (6) remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").<sup>35</sup>

*Point-to-Point Messaging*—One of the most basic communications mediums on the Internet is electronic mail, or "e-mail." In the first category, e-mail functions much like a letter through the postal service. It is addressed and sent to one or many unique addresses. However, unlike a letter delivered through the postal service, e-mail is not routed through a central control point and is not secure unless it is encrypted.

*Point-to-Multipoint Messaging*—In this category, an individual can use e-mail to send a message to an automatic mailing list service, called a "listserv." In this type of communication, an individual subscribes to a listserv mailing list on a topic of interest. Then, a subscriber can send messages on the topic to the listserv and that message will be forwarded, either automatically or through a human moderator, to all members of that list (via e-mail). There are thousands of mailing listservs on the Internet, with thousands of subscribers.

*Distributed Message Databases*—This group of communications functions similarly to the listserv mailing, but it operates quite differently. Like listservs, USENET newsgroups are open discussions and exchanges on particular topics. Unlike the listservs, however, users of the USENET newsgroups need not subscribe to the discussion group in advance, but can access the database at any time. When an individual with access to a USENET server posts a message to a newsgroup, the message is automatically forwarded to approximately 200,000 USENET servers around the world.<sup>36</sup> The message is then temporarily stored on that server where it is available for viewing by subscribers. There are newsgroups on more than 15,000 different subjects, and more than 100,000 new articles posted to newsgroups each day.<sup>37</sup>

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35. *ACLU*, 929 F. Supp. at 834.

36. *Id.* at 835.

37. *Id.*

*Real time communication*—In addition to sending messages that can be later read or accessed, individuals can also engage in an immediate dialog with others in “real time.” The Internet Relay Chat program, or IRC, allows two or more people to type messages to each other, and those messages will appear almost instantly on the other’s computer screen. IRC is analogous to a telephone party line, using a computer and a keyboard in place of the telephone.<sup>38</sup> Additionally, commercial online providers, such as America Online, have their own “chat” systems, allowing their members to converse.

*Real time remote computer utilization*—Using a program called “telnet,” individuals can access and remotely operate another computer in “real time.”

*Remote information retrieval*—The final major category of communication has undoubtedly become the most popular and, in some cases, has become virtually synonymous with the term Internet. One type of program in this category is called “ftp” (or file transfer protocol). Using this program, an individual accesses another computer at a designated address and the lists of files available on that remote computer. The individual can then use the program to transfer one or more of those files to the individual’s local computer. Another type of communication in this category is named “gopher.” This program uses a unique format to guide an individual’s search through a remote computer. The third type of Internet communication, and undoubtedly the most popular, is the “World Wide Web.”<sup>39</sup> In this form of communication, information is stored in a special formatting language on remote computers with their own unique address. Individuals then access this information using a program called a “browser.” Such a document can contain text, images, sound, animation, and video to be viewed by users on their local computer. More impor-

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38. *Id.*

39. “[The World Wide Web] is currently the most advanced information system deployed on the Internet.” AN EXECUTIVE SUMMARY OF THE WORLD WIDE WEB INITIATIVE (visited May 14, 1999) <<http://www.w3.org/pub/WWW/summary.html>>. The information contained in these documents, called “Web pages,” can be stored in different formats such as text, sound, graphics, or video. Each Web page has its own “address” indicating on which “server” computer the page is stored. Web pages often contain “links,” which are highlighted sections of text or images that refer to a related Web page. *See id.* When a person viewing the Web page “clicks” on the link (or selects the link with a mouse), the browser automatically contacts the server upon which the selected page is stored and allows the user to view the linked Web page. *See id.* The World Wide Web is the creation of a European think tank, Conseil European pour la Recherche Nucleaire (“CERN”) made up of computer scientists, for the purpose of facilitating the work of physics researchers. Bryan Pfaffenberger, PUBLISH IT ON THE WEB 32-33 (1996).

tantly, this information is available to a person with access to the Internet at any time, day or night, during any day of the year.

Increasingly, these web documents have become very sophisticated. In fact, the author of a web page can program a particular link to automatically execute instructions when accessed. These instructions may include executing a search on a defined database, compiling information and mailing it to a user, or even conducting a commercial transaction. It is these complex activities, in particular, which are causing courts great consternation with regard to personal jurisdiction.

### C. *Why the Internet is Unbalancing the Personal Jurisdiction Analysis*

As one might expect, commentators and practitioners who have been watching the development of the Internet fall into two distinct camps with regard to the exercise of personal jurisdiction based on Internet-related contacts—the theorists and the realists. Some theorists have argued that the Internet raises unique questions about the proper forum for an electronic contact because such contacts occur in “cyberspace.” As electronic contacts over the Internet do not involve any contact with the physical world, they argue, traditional notions of personal jurisdiction do not apply.<sup>40</sup> These theorists argue that an entirely new set of rules, based entirely on the type of contacts that occur over the Internet, is needed to bridge this gap.<sup>41</sup> Understandably, such arguments have fallen on deaf ears as courts around the world have begun to move forward with claims resulting from Internet-related contacts.

Other theorists have more correctly noted that the Internet does not lack a physical location any more than does the telephone system.<sup>42</sup> The

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40. See Johnston & Post, *supra* note 2 at 1370-71 (“Cyberspace has no territorially based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location. Messages can be transmitted from one physical location to any other location . . . without any physical cues or barriers that might otherwise keep geographically remote places and people separate from one another.”); see also Byassee, *supra* note 2, at 198 n.5 (“Cyberspace is a place ‘without physical walls or even physical dimensions’ in which interaction occurs as if it happened in the real world and in real time, but constitutes only a ‘virtual reality.’” (quoting Lawrence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, THE HUMANIST, Mar. 26, 1991, at 15)).

41. See Johnston & Post, *supra* note 3, at 1400-02 (arguing that “cyberspace” has created new spaces without territorial boundaries in which a distinct set of rules applies).

42. See Byassee, *supra* note 2, at 199 (stating that although cyberspace transcends geographical boundaries, “it cannot exist independently of the real world”); see also Erik J. Heels & Richard P. Klau, *Let's Make a Few Things Perfectly Clear: Cyberspace, the Internet, and That Superhighway*, STUDENT LAWYER, May 1995, at 17 (“Never forget that

information that appears on a web page still travels through communications lines and hardware, in fixed locations around the globe. Web sites and information are not stored in "cyberspace," but rather on computers and servers located in some country, state, or municipality. Furthermore, users connect to the Internet from physical locations around the globe. While these users might be accessing the Internet remotely, the call still emanates from a fixed location and ends at a fixed location.<sup>43</sup> Finally, the harm created by these Internet contacts must produce effects in some tangible place. Accordingly, Internet contacts do not require the courts to deviate from its precedent in any significant way. The only foreseeable difficulty for courts is applying existing precedent correctly to an analogous situation.

So why has the Internet stirred up such a hornet's nest with regard to jurisdiction? The answer is simple. Using the various technologies of the Internet, an individual can electronically visit another forum, transact business in that forum, and cause effects in that forum—yet still be unaware that he has subjected himself to the laws of any particular forum. Even more perplexing is the fact that all of these seemingly sophisticated transactions can be accomplished using little more than a personal computer, a telephone, a modem, and a connection to the Internet. While the telephone, television, or radio might be as pervasive as the Internet, none can approach the ease or efficiency with which an individual can communicate using the Internet.

An advertisement placed on the web would be available to anyone who could find it, twenty-four hours a day, seven days a week. An Internet advertisement could reach an individual (e-mail), a specifically defined user group (point-to-multipoint messaging), or a community of users extending around the world with some common interest (distributed message database) all with a few strokes on the keyboard. This is where the similarities with traditional forms of media end.

First, Internet media is more durable than traditional media. Traditional media advertisements or content in a newspaper, magazine, or periodical could easily be thrown away and thereby lost forever. Internet media, on the other hand, is accessible every hour of every day and can be transmitted to anyone who can find it. Next, Internet media is much more pervasive than traditional media. Traditional media in a newspaper, magazine, or periodical is often directed towards a market with limited subscribership, such as a newspaper which serves a city or a magazine

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the Internet is simply a bunch of interconnected wires, with computers at the ends of the wires, and with people in front of the computers.").

43. See Ryan Yagura, *Does Cyberspace Expand the Boundaries of Personal Jurisdiction*, 38 IDEA: J. L. & TECH. 301, 302 (1998).

which serves a particular audience base. Internet media, on the other hand, is available to anyone around the world capable of connecting to the information. Subscribership is irrelevant to the Internet medium. Finally, while some traditional forms of media approach the durability and pervasiveness of the Internet medium, such as a toll-free number, none are as self-supportive. Toll-free numbers often depend upon other forms of media to advertise its existence, thereby limiting its reach. In contrast, the Internet is self-advertising. It offers all the durability and communicative force of traditional media, without a large investment and without any advertisement.

### PART III: PERSONAL JURISDICTION LAW

#### *A. International Limitations on the Exercise of Personal Jurisdiction*

Without a doubt, the power of United States courts to exercise jurisdiction over foreign defendants incorporates special considerations of territoriality and sovereignty, not otherwise indicated in solely domestic cases. Unfortunately, there are no international treaties regarding the exercise of personal jurisdiction over a foreign interest, although one has been proposed numerous times.<sup>44</sup> As a result, the standards for the exercise of jurisdiction remain rather amorphous, relying on the discretion of the individual nations and the precepts of international comity. Oddly, in the four United States Supreme Court cases that have dealt with personal jurisdiction over foreign interests in civil cases during the modern era, the Court has simply assumed that the United States Constitution provided the limits on the exercise of jurisdiction.<sup>45</sup> This has led some commentators to suggest that any customary international law of jurisdiction is now devoid of content.<sup>46</sup> But while the content of international jurisdiction law is perhaps unclear, most authorities agree that this category

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44. See Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237 (1998) (discussing the prospects of a Hague Convention to develop standards for personal jurisdiction in international cases) [hereinafter Strauss, *Hague Convention*].

45. Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L. J. 373, 386-87 (1995) [hereinafter Strauss, *Neglected Role*]. This note examined four Supreme Court cases in the minimum contacts era: *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952); *Insurance Corporation of Ireland, Ltd., v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

46. See Strauss, *Neglected Role*, *supra* note 44 at 375 n.9.

of international law does exist.<sup>47</sup>

As the Restatement (Third) of Foreign Relations Law explains, a State's authority to subject foreign interests or activities to its laws is bounded by certain limitations.<sup>48</sup> A state's judicial power over a foreign party can be said to hinge on its power to adjudicate.<sup>49</sup> Jurisdiction to adjudicate has been described as a State's authority to subject persons or things to the process of its courts or administrative tribunals, whether in civil or criminal proceedings, whether or not the State is a party to the proceedings.<sup>50</sup> This power over a defendant requires a sufficient or reasonable relation with the forum state.<sup>51</sup> However, it is important to note

47. *Id.*; see also RESTATEMENT, *supra* note 14 § 401 cmt. a (1987).

48. RESTATEMENT, *supra* note 14 § 401 cmt. a. The Restatement divides the exercise of jurisdiction over a foreign defendant into three different categories: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. These roughly fall along the traditional divisions of government—namely, the legislative, judicial, and executive branches. However, the fit is not exact and it is important to note that power of jurisdiction over foreign parties differs significantly from that over domestic parties. As it is used in the Restatement and this Comment, the three categories of jurisdiction will be described by the following: (a) *jurisdiction to prescribe, i.e.*, the authority of a state to make its laws applicable to persons or activities; (b) *jurisdiction to adjudicate, i.e.*, the authority of a state to subject particular persons or things to its judicial process; and (c) *jurisdiction to enforce, i.e.*, the authority of a state to use the resources of government to induce or compel compliance with its law. These categories of jurisdiction are often interdependent.

49. *Id.*, at § 401(b).

50. *Id.*

51. *Id.*, at § 421(1). This section of the RESTATEMENT states, "(1) A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable." According to subsection (2) of section 421 of the RESTATEMENT, a state's exercise of jurisdiction to adjudicate is generally reasonable, if at the time jurisdiction is asserted:

- (a) the person or thing is present in the territory of the state, other than transitorily;
- (b) the person, if a natural person, is domiciled in the state;
- (c) the person, if a natural person, is resident in the state;
- (d) the person, if a natural person, is a national in the state;
- (e) the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state;
- (f) a ship, aircraft or other vehicle to which the adjudication relates is registered under the laws of the state;
- (g) the person, whether natural or personal, has consented to the exercise of jurisdiction;
- (h) the person, whether natural or juridical, regularly carries on business in the state;
- (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect to such activity;
- (j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in

that this standard under the Restatement—reasonableness—differs in some significant ways from the United States' standard, crafted in *International Shoe Co. v. Washington*.<sup>52</sup> As a result, jurisdictional analyses over foreign defendants will almost always require closer prelitigation contacts between the defendant and the forum than would otherwise be required in a domestic case.<sup>53</sup> And, as in domestic cases, there is no clear boundary as to which activities subject a foreign defendant to jurisdiction in the United States. The court's determination will always be on a case-by-case basis and "cannot be simply mechanical or quantitative."<sup>54</sup>

But international cyberspace cases that call for international law principles relating to jurisdiction are rare. For guidance, then, this Comment will extrapolate from the "minimum contacts" standard in domestic cases. This will provide a starting point for determining how to apply the limiting factor of "reasonableness" in the international context.

#### B. *United States Limitations on the Exercise of Personal Jurisdiction*

Ironically, United States constitutional limitations on the exercise of judicial jurisdiction in United States courts can be traced to 19th century perceptions about public international law. In *Pennoyer v. Neff*,<sup>55</sup> the Supreme Court relied on two related principles of international law in articulating constitutional limits on state court judicial jurisdiction: (1) "every State possesses exclusive jurisdiction and sovereignty over persons and

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respect of such activity; or

- (k) the thing that is the subject of adjudication is owned, possessed, or used in the state, but only in respect of a claim reasonably connected with that thing. RESTATEMENT § 421(2).

52. 326 U.S. 310, 316 (1945). In *International Shoe*, the Supreme Court first enunciated what was to become the modern standard for personal jurisdiction analysis. "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 35-36 (1987). Noting that transitory presence, for instance, is not a sufficient basis for the exercise of jurisdiction to adjudicate under international law, see RESTATEMENT, *supra* note 14, § 421 cmt. e; even though "tag" jurisdiction may be in accordance with U.S. law. Cf. *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 615 (1990) (Scalia, J.) ("We do not know of a single state or federal statute, or a single judicial decision resting upon state law, that has abandoned in-state service as a basis of jurisdiction. Many recent cases affirm it.")

53. Born, *supra* note 52, at 36.

54. *International Shoe*, 326 U.S. at 319.

55. 95 U.S. 714 (1877).



property within its territory;”<sup>56</sup> and (2) “no State can exercise direct jurisdiction and authority over persons and property without its territory.”<sup>57</sup> The Court reasoned that these principles of international law also applied to every state in the Union, limiting the judicial jurisdiction of state courts. Under this territorial theory of sovereignty, a state court could exercise personal jurisdiction over any defendant who was served with process within the territory of the state.<sup>58</sup> According to *Pennoyer*, however, the Constitution provides limitations on the ability of a state to exercise personal jurisdiction over persons located outside the state’s territory, regardless of that person’s connection to the state.<sup>59</sup> The Supreme Court cited the Fourteenth Amendment’s Due Process Clause as the source of this limitation.<sup>60</sup> This limitation accorded with the dual system of federalism and was intended to preserve the sovereign power of the independent states.<sup>61</sup>

The twentieth century brought dramatic expansion in the amount of interstate communication and transportation, placing increasing strain on the territorial limitations of state court jurisdiction. Gradually, the rigid territorialism of the *Pennoyer* model gave way to the “minimum contacts” standard for personal jurisdiction announced in *International Shoe Co. v. Washington*.<sup>62</sup> This shift allowed the lower courts to concentrate on the activities of the defendant in relation to the forum state, rather than relying on the old fictions of the strict territorial model under *Pennoyer*. The results were dramatic and made sense for a rapidly expanding, newly mobile society.

In *International Shoe*, the Supreme Court shifted the focus of the personal jurisdiction analysis to the defendant’s activities and its relationship to the forum state. The Court noted that a foreign party may be sued in a state if the party has “certain minimum contacts with [the state] such that maintenance of the suit does not offend “traditional notions of

56. *Id.* at 722.

57. *Id.*

58. Writing for the Court in *Pennoyer*, Justice Field was greatly influenced by the theories of Joseph Story. See Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 262. Story urged a strong relationship between territory and legal authority. One of the ideas he advanced was that the geographical origin of case facts determined whether legal authority existed. This idea gained increased cache during the second half of the nineteenth century. See GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 12[A] at 43 (2nd ed. 1994).

59. *Pennoyer*, 95 U.S. at 727 (“Process from the tribunals of one State cannot run into another State”).

60. See *id.* at 733.

61. See *id.*

62. 326 U.S. 310 (1945).

fair play and substantial justice.”<sup>63</sup> Dispensing with the legal fictions of the past, the Court announced that the personal jurisdiction analysis should focus upon the “nature and quality” of the activities of the defendant.<sup>64</sup> In such an analysis, courts should consider both the quantity of the party’s contacts with the state and the relationship between those contacts and the party’s claims when determining whether the court could exercise personal jurisdiction over the party.<sup>65</sup>

In dicta, the Court also indicated that courts should also consider relevant an “estimate of the inconveniences,”<sup>66</sup> to the defendant in defending a suit away from its principal place of business.<sup>67</sup> In the end, the Court held that the appellant was properly amenable to suit in the State of Washington because its activities there were “systematic and continuous” and the suit arose out of those activities.<sup>68</sup>

After a brief period in which the exercise of personal jurisdiction expanded rapidly,<sup>69</sup> the Supreme Court refocused its analysis on the activities of the defendant in *Hanson v. Denckla*.<sup>70</sup> Brushing aside the con-

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63. *Id.* at 316.

64. *Id.* at 318.

65. *Id.*

66. *Id.* at 317.

67. *Id.* This second prong of the analysis, which received only glancing treatment in *International Shoe*, would live on in later opinions. This theory focused on the logic or convenience of a forum. The Court fleshed out the logic/convenience theory in *Traveler’s Health Ass’n v. Virginia*, 339 U.S. 643 (1950). In that case, defendant Travelers sold insurance in Virginia without registering as required by state law. Virginia sued for an order forbidding Travelers from doing business in the state. Travelers was served by mail in its home state of Nebraska. The corporation appeared specially to challenge jurisdiction in Virginia. Virginia’s highest court upheld jurisdiction over Travelers and the United States Supreme Court affirmed, holding the result to be “consistent with fair play and substantial justice” and “not offensive to the Due Process Clause.” *Id.* at 649. The Court found that the “state has a legitimate interest in all insurance policies protecting its residents against risks,” *id.* at 647, an interest sufficient to support personal jurisdiction even if the defendant cannot be found and served within the forum state. In addition, *Travelers* expanded upon *International Shoe*’s suggestion that courts address the actual degree of inconvenience to the defendant when evaluating minimum contacts in each case. The Court indicated that an examination of both sides of the convenience question might be in order, and that the inquiry might be expanded to take into account reasons why the present forum might be more convenient to plaintiff. *Id.* at 649.

68. *Id.* at 320.

69. *See McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957) (finding the exercise of jurisdiction by a California state court over a Texas insurance company to be permissible although the insurance company neither solicited nor conducted business in California, except for the single policy with McGee, and its only contact with the state was the single policy with McGee).

70. 357 U.S. 235 (1958).

venience of the forum reservations expressed in the dissent, the Court concluded that there were no minimum contacts between the nonresident defendant and the forum.<sup>71</sup> Simply stated, the majority found that the unilateral activities of the plaintiffs alone could not transform this into a case where Florida could exercise jurisdiction.<sup>72</sup> In addition, the Court refused to attach any importance to Florida's interest in adjudicating this kind of lawsuit.<sup>73</sup> In the end, the Court left no doubt that future personal jurisdiction analyses based on minimum contacts should focus on two aspects: (1) the relationship between the forum and the defendant; and (2) the contacts which reflected purposeful action by the defendant.<sup>74</sup> However, the Court left unanswered important questions regarding how the

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71. Dissenting from the Court's refusal to permit personal jurisdiction, Justice Black argued the logic/convenience theory—that Florida would be a logical and convenient place for the lawsuit. "Florida, the home of the principal contenders for Mrs. Donner's largess, was a reasonably convenient forum for all." 357 U.S. at 259 (Black, J., dissenting). The majority found that it was unnecessary to even reach that question of the logic or convenience of the forum because there were no minimum contacts between the defendant and the forum state. *See id.* at 251

72. *See id.* at 253. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* *Hanson* was a complicated case involving a nonresident trust based in Delaware. In that case, the two factions fought over distribution of a \$400,000 estate. The Denckla group claimed that the money passed to them through the decedent's will. The Hanson group claimed that the funds were not affected by the will because they were the subject of a trust (with the Hanson group as beneficiaries) created by the decedent before her death. The Denckla group brought suit in Florida to have the trust declared invalid. Most of the Hanson-group defendants were Florida domiciliaries and were served there. However, the Delaware-trustee defendants were foreign corporations who maintained no office in Florida and had to be served out-of-state by mail. The Florida Supreme Court eventually declared the trust invalid. It also ruled that personal jurisdiction existed over two Delaware trust companies, defendants in the case who had been appointed trustees for the disputed trust. On review, a narrowly divided Supreme Court disagreed, finding that the Florida courts lacked personal jurisdiction over the trustees. Although the settlor and most of the appointees and beneficiaries of the trust were domiciled in Florida, this still did not unilaterally move the Delaware trustee in charge of the trust to Florida. Thus, the Court found the exercise of jurisdiction impermissible.

73. *See id.* at 253. The *Hanson* Court entertained the possibility that the facts of the controversy might so involve Florida State interests as to justify application of Florida law, but instead found that Florida "does not acquire [] jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law." *Id.*

74. *See id.* at 253. "The application of that rule will vary with the nature and quality of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.*

“quality and nature of defendant’s activity” should be measured.<sup>75</sup>

Almost twelve years later, the court answered at least some lingering questions about the minimum contacts analysis in *World-Wide Volkswagen Corporation v. Woodson*.<sup>76</sup> In this product liability suit, the plaintiffs, New York residents, brought suit in Oklahoma based on a car they had purchased from the defendants in New York.<sup>77</sup> The Court found that the exercise of personal jurisdiction over the New York regional distributor and retailer would offend due process.<sup>78</sup> The Court held that because the defendants did not conduct or solicit business from Oklahoma in any way, shape, or form, the mere fact that their product ended up there is not sufficient to make them liable to suit there.<sup>79</sup> Rather, it was the defendant’s “conduct and connection” with the forum state that was important.<sup>80</sup> When courts adhered to this standard, defendants could find some minimal level of assurance when their conduct would render them liable to suit in a foreign jurisdiction.<sup>81</sup> In the end, the Court found that a defendant’s contacts with a forum must not be “fortuitous,”<sup>82</sup> “isolated,”<sup>83</sup> or “attenuated.”<sup>84</sup> Rather, the contract must “arise from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States. . . .”<sup>85</sup> At that point, it would not be “unreasonable” to subject a defendant to suit in one of those States.<sup>86</sup>

Five years later in *Burger King v. Rudzewicz*, the Supreme Court began to explore the second part of the due process analysis—namely, when granting personal jurisdiction would not offend “traditional notions of fair play and substantial justice.”<sup>87</sup> Although the defendant did not physically enter the forum State, the Court nonetheless found that the defendant had “purposefully” established the requisite minimum contacts with the state of Florida.<sup>88</sup> The Court listed five factors which it would

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75. *Id.*

76. 444 U.S. 286 (1980).

77. *Id.*

78. *See id.* at 298-299.

79. *See generally id.* at 295-98.

80. *See id.* at 297.

81. *See id.* (“The Due Process Clause, by ensuring the ‘orderly administration of the laws,’ gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.”) (citation omitted). *Id.* at 297.

82. *Id.* at 295.

83. *Id.* at 297.

84. *Id.* at 299.

85. *Id.* at 297.

86. *See id.*

87. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

88. *Id.* at 478.

consider when determining whether assertion of jurisdiction was fundamentally fair: (1) "the burden on the defendant;" (2) "the forum State's interest in adjudicating the dispute;" (3) "the plaintiff's interest in obtaining convenient and effective relief;" (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies;" and (5) "the shared interests of the several States in furthering fundamental substantive social policies."<sup>89</sup> In the end, the Supreme Court permitted Florida to exercise personal jurisdiction over the nonresident defendant from Michigan who had voluntarily contracted with a Florida corporation.<sup>90</sup>

Finally, any discussion of personal jurisdiction over a nonresident foreign defendant would be incomplete without mention of *Asahi Metal Industry Company v. Superior Court of California*.<sup>91</sup> Although the significance of *Asahi* as a minimum contacts case is, at best, uncertain,<sup>92</sup> the Court did invalidate jurisdiction over a foreign, nonresident defendant in a due process holding.<sup>93</sup>

In *Asahi*, seven justices joined in Justice O'Connor's conclusion that whether or not minimum contacts existed between the forum and *Asahi*, California's attempt to exert personal jurisdiction exceeded a so-called "reasonableness" standard, which incorporated the same five factors of "fair play and substantial justice" listed in *Burger King*.<sup>94</sup> Yet, in this

89. *Id.* at 477. Most of the balancing factors mentioned in *Burger King* previously appeared as factors to be considered in a "reasonableness" analysis. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) [hereinafter *World-Wide Volkswagen*]. Factors two through five appeared as factors to be weighed against the burden on the nonresident defendant of defending suit in a foreign jurisdiction. These factors in *World-Wide Volkswagen* are clearly a surviving remnant of the logic/convenience analysis begun in *International Shoe* and continued in *Hanson*. See *supra* note 71. However, when these factors reappeared in *Burger King* in a "fair play and substantial justice" analysis, the Court had added factor one, "burden to the defendant," to the list of countervailing factors to be weighed against the minimum contacts. See *Burger King v. Rudzewicz*, *supra* note 87, at 476.

90. *Id.* at 487.

91. *Asahi Metal Indus. Co. v. Supreme Court of California*, 480 U.S. 102 (1987).

92. Only the Chief Justice and Justices Powell and Scalia joined Part II-A of Justice O'Connor's opinion which concluded that the California forum lacked the minimum contacts to exercise personal jurisdiction over the defendant. See *id.* at 105. Justice Brennan (joined by Justices White, Marshall, and Blackmun) argued in a concurring opinion that there were minimum contacts. See *id.* at 116. Justice Stevens (joined by Justices White and Blackmun) suggested in another concurring opinion that California may have had minimum contacts, but it was unnecessary for the Court to rule on this issue. See *id.* at 121.

93. See *id.* at 113-16.

94. *Id.* at 113.

case, the Court reached the opposite conclusion with regard to jurisdiction. Moreover, the Court remained sharply divided over the stream of commerce analysis with regard to products liability cases.<sup>95</sup> At this point, however, it remains unclear whether the holding of *Asahi* is limited to its unique factual situation.<sup>96</sup>

#### PART IV: PERSONAL JURISDICTION AND THE INTERNET

##### A. *Misleading Models*

As the Supreme Court aptly noted in *International Shoe*, "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a [nonresident defendant] to suit, and those which do not, cannot be simply mechanical or quantitative."<sup>97</sup> Amazingly, after over fifty years, we still have not escaped the fact-dependent nature of the due process analysis. Despite all of the advances in communication, travel, and commerce, the courts are still left with a fact-specific test which must be analyzed on a case-by-case basis. This is the only way to assure that the defendant receives the minimum guarantees of fairness under the law.

Presently, as courts begin to wade into the Internet medium, judges and practitioners around the world are looking for a shorthand analysis to gauge if, and when, Internet activity will subject a defendant to specific jurisdiction in a foreign forum. This search has led courts to a very confusing model, dividing web sites into two fuzzy categories and a broad, indeterminate middle ground.<sup>98</sup>

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95. Four Justices (Justice O'Connor, joined in the majority opinion by the Chief Justice, and Justices Powell and Scalia) believed that mere foreseeability or awareness that a product would enter into the stream of commerce was not an act purposefully directed at the forum state. In fact, Justice O'Connor believed that some additional conduct was required by the defendant to indicate an intent or purpose to serve the marketplace. *See id.* at 112. Four other Justices (Justice Brennan, joined by Justices White, Marshall, and Blackmun) suggested in a concurring opinion that the "additional conduct" requirement suggested by Justice O'Connor's opinion was an unnecessary addition to the stream of commerce analysis. As long as a defendant was aware that the final product was being marketed in a forum State, the possibility of a lawsuit there could not come as a surprise. In such a case, the defendant had clearly inured himself of the benefits of that State's laws and it would not be unfair to subject the defendant to jurisdiction there. *See id.* at 117.

96. In this case, the California Court may have had minimum contacts over a non-resident defendant, yet was unable to exercise personal jurisdiction without offending notions of "fair play and substantial justice." Even to the Court this case seemed an anomaly. *See id.* at 116 ("one of those rare cases.") (Brennan, J., concurring).

97. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

98. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa.

At one end of the scale are web sites where a defendant clearly does business over the Internet. If the defendant entered into contracts with residents of a foreign jurisdiction that involved the knowing and repeated transmission of files to another computer, personal jurisdiction would be proper.<sup>99</sup>

At the other end of the scale are web sites where a defendant has posted information which is simply accessible to users in foreign jurisdictions. According to this model, a passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise of jurisdiction.<sup>100</sup>

The middle ground is occupied by "interactive" web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and the information that gets exchanged.<sup>101</sup> While these three categories might put courts on notice about what to watch for when examining a web site in a personal jurisdiction analysis, these categories are hardly determinative. In fact, they are downright misleading.

These categories are enigmatic for two main reasons. First, the categories do not take into account contacts from other Internet communications medium, such as e-mail and distributed message databases.<sup>102</sup> Even the most interactive web page will often require additional contacts to demonstrate that "something more" which courts have found necessary for the exercise of jurisdiction.<sup>103</sup> As it now stands, these categories only consider web site contacts in the personal jurisdiction analysis. Second, the categories do not take into account the cause of action. The harm in an intentional tort action is quite different from the injury caused in a breach of contract suit. Generally speaking, the injury is the key. The harm in a trademark infringement case may come from a press release on

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1996) ("[O]ur review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles.") (footnote omitted).

99. *See id.* *See also, e.g.,* *Compuserve, Inc. v Patterson*, 89 F.3d 1257 (6th Cir. 1996) and discussion *infra* nn. 170-90 and accompanying text.

100. *See Zippo*, 952 F. Supp. at 1124. *See also, e.g.,* *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y.), *aff'd* 126 F.3d. 25 (2d Cir. 1997) and discussion *infra* nn. 110-28 and accompanying text.

101. *See Zippo*, 952 F. Supp. at 1124. *See also, e.g.,* *Maritz, Inc. v. CyberGold, Inc.*, 947 F.Supp. 1328 (E.D. Mo. 1996) and discussion *infra* nn. 303-25 and accompanying text.

102. *See* discussion *infra* note 35.

103. *Blumenthal v. Drudge*, 992 F. Supp. 44, 57 (D.D.C. 1998).

a “passive” web site, whereas a breach of contract case may require a persistent course of conduct between the participants before a court will exercise jurisdiction. Accordingly, the nature of the web site is often not a very good indicator as to whether the exercise of jurisdiction is permissible.

As the next section will indicate, personal jurisdiction is often dependent upon whom the nonresident defendant determined was the intended audience. While the case law is muddled in many respects, there is at least one unifying concept the intent of the defendant. Oftentimes, this intent is quite clear from the nature of the advertisement or content.<sup>104</sup> Sometimes it is not and other affiliating circumstances are required.<sup>105</sup> The next section classifies the existing personal jurisdiction cases based on Internet contacts into three categories—each defined by the end result of the personal jurisdiction question.

### B. Cases

As the cases below demonstrate, the existing body of decisions regarding in personam jurisdiction based on Internet contacts is inconsistent and incoherent on many levels. First, there is an openly acknowledged split between the districts regarding the weight to be afforded to electronic contacts over the Internet.<sup>106</sup> Next, it is uncertain why some courts seem to require additional contacts with the forum state while others seem to find that the web site alone is sufficient to confer jurisdiction.<sup>107</sup> Finally, and most importantly, the very significance of Internet contacts is in dispute. The court in *Zippo* analyzed the defendant’s contacts by looking at the number of Pennsylvania residents using the defendant’s In-

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104. See *State v. Granite Gate Resorts, Inc.*, 568 N.W. 2d 715, 721 (Minn. Ct. App. 1997) (finding the defendant intended to advertise its wagering service to an American market).

105. See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (1997) (illustrating that in the cases finding jurisdiction over a nonresident defendant based on Internet advertisements or solicitations, “something more” is required to subject the advertiser to jurisdiction in the plaintiff’s home state).

106. See *Hearst Corp. v. Goldberger*, 1997 WL 97097, 19-20 (S.D.N.Y. 1997) (U.S. Magistrate Peck declining to follow the holdings in *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D.Conn. 1996); and *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996)).

107. Compare *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (finding that “something more” than simply an Internet advertisement is required for personal jurisdiction), with *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1, 5 (D.D.C. 1996) (although the court declined to decide whether the web site alone would confer jurisdiction, it is clear from the analysis that it would).



ternet-based service.<sup>108</sup> On the other hand, the court in *Granite Gate* looked at the number of residents from the State of Minnesota accessing the site as well as which States produced the most frequent users of the service.<sup>109</sup>

For ease of analysis, the following cases have been divided into three categories based on how the jurisdictional question was resolved. These categories include: (1) electronic contacts not supporting the exercise of jurisdiction; (2) electronic contacts plus “something more” supporting personal jurisdiction; and (3) electronic contacts alone supporting the exercise of jurisdiction.

1. *Electronic Contacts Not Supporting Exercise of Personal Jurisdiction*

a. *Bensusan Restaurant Corp. v. King*

One of the most widely cited cases in which the court found that a web site did not constitute the necessary minimum contacts is *Bensusan Restaurant Corporation v. King*.<sup>110</sup> Bensusan was the operator of “The Blue Note” jazz club in New York City. King was the owner and operator of the “The Blue Note” club in Columbia, Missouri.<sup>111</sup> Even though Bensusan owned the rights to the federally registered mark “The Blue Note,” nonetheless, King posted a web site that advertised his Columbia Blue Note club.<sup>112</sup> The web site included a local Missouri telephone number and ticket information.<sup>113</sup> Bensusan brought an action in the U.S. District Court for the Southern District of New York. In that suit he claimed that King’s web site, which had both “The Blue Note” name and a logo similar to Bensusan’s, constituted trademark infringement.<sup>114</sup>

The court granted King’s motion to dismiss for lack of personal jurisdiction.<sup>115</sup> First the court examined Bensusan’s assertion of jurisdiction

108. See *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125 (1997).

109. See *State v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 720-721 (1997).

110. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2d Cir. 1997).

111. See *id.* at 297.

112. See *id.*

113. See *id.*

114. See *id.* King’s web site did contain a disclaimer stating that it was not to be confused with the club’s namesake in New York, and recommended that its web site viewers visit the New York club when in that city. See *id.* at 297. Bensusan’s action also asserted claims for trademark infringement, trademark dilution, and unfair competition. See *id.* at 298.

115. See *generally id.* at 299-301 (holding that the New York long-arm statutes did not confer jurisdiction over the defendant, and, even if it did, asserting jurisdiction would

under the New York long arm statute.<sup>116</sup> The court found that due to the nature of the infringement cause of action, the deception occurred in Missouri and not New York.<sup>117</sup> Accordingly, the injury could not have occurred in New York, fulfilling a precondition of the long-arm statute.<sup>118</sup>

The court noted that if a customer wanted to attend a show at the defendant's club in Missouri, he would have had to find the web site, order tickets from a Missouri phone number, and pick the tickets up in Missouri (because King did not mail or transmit the tickets).<sup>119</sup> Even if there was confusion about the product, that confusion occurred in Missouri, not New York.<sup>120</sup> Additionally, the court also did not accept Bensusan's argument that King should have foreseen that the web site would be viewed in New York and have consequences in that State.<sup>121</sup>

Finally, the court found that even if New York's long-arm statute conferred jurisdiction, the exercise of jurisdiction would have violated the limits of the Due Process Clause.<sup>122</sup> King did nothing to purposefully avail himself of the benefits and protections of the laws of New York. Borrowing from the Supreme Court's plurality opinion in *Asahi*, the *Bensusan* court compared creating a web site to "placing a product into the stream of commerce," in that its effects "may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed towards the forum state."<sup>123</sup> In the end, there was no indication that King sought or encouraged New Yorkers to access his site.<sup>124</sup>

Almost two years later, the Second Circuit Court of Appeals affirmed the district court's holding on fairly narrow grounds.<sup>125</sup> This hold-

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violate the Due Process Clause because the defendant had not purposefully availed himself of the benefits of New York).

116. *See id.* at 299-300. Bensusan asserted jurisdiction under New York's long-arm statute, C.P.L.R. § 302(a)(2) and (a)(3)(ii). Section 302(a)(2) allows jurisdiction over a non-resident defendant who commits a "tortious act within the state" when the cause of action arises from the tortious act. Section 302(a)(3)(ii) allows a court to exercise jurisdiction over a non-resident defendant for tortious acts committed outside the state that cause injury in the state if the non-resident "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." *Id.* at 299.

117. *See id.* at 299.

118. *See id.*

119. *Id.* at 299.

120. *Id.*

121. *See id.* at 300.

122. *See id.*

123. *Id.* at 301 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion)).

124. *Id.*

125. *See Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 29 (2d Cir. 1997).

ing was not very instructive, however, because the court decided the case strictly on the basis of New York's long-arm statute.<sup>126</sup> The Second Circuit found that if any tortious acts were committed by King, under the New York long-arm statute, they occurred in Missouri.<sup>127</sup> Moreover, King's club should be considered a local operation because it did not "derive substantial revenue from interstate commerce."<sup>128</sup>

This case remains one of the premier examples of the entirely "local" use of a web site. As the court found, the defendant used his Internet web site in a manner which solicited only local business. Defendant made no attempt to market to anyone outside the State of Missouri. This type of local business solicitation is consistent throughout this category.

b. *Cybersell, Inc. v. Cybersell, Inc.*

A recent Ninth Circuit opinion reinforced the notion, begun in the *Bensusan* line of cases, that a web site or other electronic contact alone, was not purposeful availment of the benefits and protections of the laws of a forum state. In *Cybersell, Inc. v. Cybersell, Inc.*,<sup>129</sup> the plaintiff, an Arizona corporation ("Cybersell Arizona"), sued a Florida Corporation ("Cybersell Florida"), for the latter's trademark infringement through a web site.<sup>130</sup> When the defendants placed their home page on the web in October 1995, the page included a logo and a local Orlando telephone number.<sup>131</sup>

The court's analysis began with a nod to the Arizona long-arm statute, which extended to the full limits of the Due Process Clause.<sup>132</sup> Essentially, Cybersell Arizona argued that because the harm of trademark infringement occurs where the "passing off" of the mark occurs, jurisdiction was permissible over the defendants based on their solicitation over the Internet.<sup>133</sup> In response, Cybersell Florida argued that this would mean they would be subject to nationwide, or even worldwide, jurisdic-

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126. *See id.* at 27 ("Because we believe that the exercise of personal jurisdiction in the instant case is proscribed by the law of New York, we do not address the issue of due process.").

127. *See id.* at 29.

128. *See id.*

129. 130 F.3d 414 (9th Cir. 1997).

130. *See id.* at 415. Interestingly, the principals of Cybersell Arizona are Laurence Canter and Martha Siegal, known among web users as the first "spammers" of the Internet. Spamming refers to the posting of indiscriminate advertisements to newsgroups on USENET.

131. *Id.*

132. *Id.* at 416.

133. *Id.*

tion simply for using the Internet.<sup>134</sup>

In its analysis, the court reasoned that while “anyone, anywhere could access [defendants] home page,” that fact alone could not demonstrate that Cybersell Florida was trying to target Arizona residents.<sup>135</sup> Examining the existing Internet personal jurisdiction cases, the court found that “no court has ever held that an Internet advertisement alone [was] sufficient to subject the advertiser to jurisdiction in the plaintiff’s home state.”<sup>136</sup> The Ninth Circuit noted that in each case where the court exercised jurisdiction on the basis of a web site, there was always “‘something more’ to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.”<sup>137</sup> The court found that Cybersell Florida did nothing to encourage people in Arizona to access its site, and did not seek or gain any business in Arizona.<sup>138</sup> Additionally, the court found the “‘effects’ test” employed by the Supreme Court in *Calder v. Jones* to be inapplicable to the case at bar.<sup>139</sup>

c. *Other cases of note*

In *Hearst v. Goldberger*, the Southern District of New York reinforced its decision in *Bensusan* by declining to exercise personal jurisdiction over a lawyer residing in New Jersey.<sup>140</sup> That case also involved a domain name dispute in which the court also held that the exercise of jurisdiction was limited by the New York long arm statute.<sup>141</sup> Ironically, the

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134. *Id.*

135. *Id.* at 419.

136. *Id.* at 418.

137. *Id.*

138. *Id.* at 419. The court found that Cybersell Florida didn’t receive any money, telephone calls, e-mails, or hits on its site from Arizona. In addition, it didn’t have an 800 number on its web site. *See id.*

139. *See id.* at 420 (quoting *Calder v. Jones*, 465 U.S. 783 (1984)). In *Calder v. Jones*, the Court looked to whether the effects of out-of-state actions prevented a State “from asserting jurisdiction over a cause of action arising out of those effects.” *See Calder*, 465 U.S. at 788.

140. *See Hearst Corp. v. Goldberger*, 1997 WL 97097, at \*1 (S.D.N.Y. 1997). This case is somewhat distinguishable because it reached its conclusion based entirely on the basis of the New York long-arm statute, much like the *Bensusan* cases, and did not even reach the minimum contacts analysis. In addition, this case was based on very unique facts. The defendant was operating a web site using the plaintiff’s trademark as the domain name. But the defendant’s web site advertised a service it would offer in the future. Based on these facts, the court fully admitted that it would have likely had jurisdiction if the plaintiff had filed suit after defendant had begun selling his services to New Yorkers. *Id.* at \*11.

141. *See generally id.* at \*7-15

court also noted that jurisdiction might well have been proper if the plaintiff had just waited until the defendant's business was operational and New Yorkers had begun to respond to the advertisement.<sup>142</sup>

Another case in which the court found that a web site could not confer jurisdiction over a foreign non-resident defendant was *Weber v. Jolly Hotels*.<sup>143</sup> In that case, a New Jersey plaintiff was injured in a fall while at one of the defendant's hotels in Italy and attempted to bring suit against the defendant in the United States District Court for the District of New Jersey.<sup>144</sup> The plaintiff tried to assert general jurisdiction over the defendant hotel chain based on a "passive" web site.<sup>145</sup> The court analogized the plaintiff's claim to advertising in a national magazine and refused to exercise jurisdiction on that basis.<sup>146</sup>

Finally, the case of *McDonough v. Fallon McElligott, Inc.*,<sup>147</sup> involved a suit over copyright infringement and unfair competition regarding the misuse of a photograph.<sup>148</sup> The plaintiff, McDonough, was a California sports photographer and the defendant, Fallon McElligott, Inc., was an advertising agency based in Minnesota.<sup>149</sup> The plaintiff claimed that the defendants knowingly reproduced a photo taken by the plaintiff without its permission for use in one of its national advertising campaigns and then never gave the plaintiff credit for taking the photograph.<sup>150</sup> Although the defendant's principal place of business was in Minnesota, the plaintiff brought suit in the United States District Court for the Southern District of California.<sup>151</sup> Plaintiff asserted that although the defendant had no clients in California and didn't maintain any employees in California, the court should nonetheless find jurisdiction over the defendant.<sup>152</sup> The plaintiff reasoned that because the defendant operated a web site which was accessible in California, its operations in California were sufficient to support general jurisdiction.<sup>153</sup> Refusing to exercise either general or specific jurisdiction, the court stated that "allowing

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142. *See id.* at \*11. Defendant's web site advertised a litigation support business to be offered in the future. *Id.* at \*10.

143. 1997 WL 574950 (D.N.J. Sept. 12, 1997).

144. *See id.* at \*1.

145. *See id.* at \*5.

146. *See id.* at \*6.

147. 40 U.S.P.Q. 2d 1826 (S.D. Cal. Aug. 5, 1996).

148. *See id.* at 1827.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.* at 1828.

153. The court found that defendant's contacts were not sufficiently "substantial, systematic or contiguous to warrant the exercise of general jurisdiction." *Id.* at 1829.

computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists.”<sup>154</sup>

## 2. *Electronic Contacts Plus “Something More” Supporting Personal Jurisdiction*

In *Cybersell*,<sup>155</sup> the court examined the trend in personal jurisdiction decisions involving the Internet, explaining that courts have not found Internet advertising alone to be sufficient to confer personal jurisdiction.<sup>156</sup> In the cases finding jurisdiction, the *Cybersell* court noted that there was always “‘something more’ to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.”<sup>157</sup> The “something more” that the court pointed to was an additional fact or affiliating contact by the defendant which indicated that the defendant intended to serve or intended to direct its activities towards the forum. This section looks at those cases in which the courts identified additional contacts, beyond the contact cited in the cause of action, to exercise personal jurisdiction.

### a. *California Software, Inc. v. Reliability Research, Inc.*

In perhaps the first case to address the issue of electronic contacts and its effect on the “minimum contacts” analysis, *California Software, Inc. v. Reliability Research, Inc.*, foreshadowed the analytical problems of the new information age.<sup>158</sup>

In this case, California Software, Inc. (“California Software”), a California corporation, sued Reliability Research, Inc., (“RRI”) a Nevada corporation with its principal place of business in Vermont, for alleged false statements made by the latter. California Software claimed that RRI made false statements to prospective California Software customers over the telephone, through the mail, and over a distributed message database<sup>159</sup> known as the Computer Reliability Forum (“CRF”), which constituted tortious interference with their right to contract.<sup>160</sup> The court

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154. *Id.* at 1828.

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

156. *See id.* at 418.

157. *Id.*

158. *California Software, Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356 (C.D. Cal. 1986).

159. *See id.* at 1360-64.

160. *See id.* at 1358. More specifically, California Software claimed intentional interference with prospective economic advantage, slander of title, libel, slander, civil conspiracy, unfair competition, and intentional interference with their right to pursue a lawful

ultimately refused to confer general jurisdiction over the defendants based on the CRF, but did find specific jurisdiction based on the telephone calls, the mail, and the CRF.<sup>161</sup>

Using the Supreme Court's analysis in *Calder v. Jones*,<sup>162</sup> the court found that the use of the mail and the telephone by the defendants provided specific jurisdiction in California because those communications were purposefully directed to cause harm in California.<sup>163</sup> The court also found that the communications over the CRF by the defendants conferred specific jurisdiction.<sup>164</sup> Although RRI argued that it was just responding to a question posed on the CRF by a third person outside of California, the court found that the defendants intended for their communication to have a direct effect in California.<sup>165</sup> The communication over the CRF by the defendant was intentionally designed to manipulate others to not buy the plaintiff's product in California, thereby causing harm in California.<sup>166</sup>

In a bit of foreshadowing, the court discussed how modern technology was again pressing the boundaries of personal jurisdiction outwards.<sup>167</sup> Noting the expansion of personal jurisdiction that the Supreme Court had exercised in *McGee v. Int'l Life Ins. Co.*,<sup>168</sup> the court stated, "[W]hile modern technology has made nationwide commercial transactions simpler and more feasible, even for small businesses, it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts."<sup>169</sup>

#### b. CompuServe, Inc. v. Patterson

Regularly recognized as the prototypical electronic "minimum contacts" case, the Sixth Circuit in *CompuServe, Inc. v. Patterson*<sup>170</sup> also used the "something more" approach to exercise jurisdiction. In this

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business as a result of two sets of communications made by defendants. *Id.*

161. *See id.* at 1359-64.

162. 465 U.S. 783 (1984).

163. *See California Software, Inc.*, 631 F. Supp. at 1361.

164. *Id.*

165. *Id.* at 1361-62. One of the defendants placed a message on the CRF in response to inquiries made by prospective buyers of the plaintiff's software package. That message warned users of the plaintiff's software package about a potential software license dispute with the defendants. The message by the defendant warned that anyone who purchased the plaintiff's software package would be held financially liable for its misuse if the defendants ultimately prevailed in their suit. *See id.* at 1358-59 n.2.

166. *Id.*

167. *Id.* at 1363.

168. 355 U.S. 220 (1957).

169. *See California Software, Inc.*, 631 F. Supp. at 1363.

170. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

case, CompuServe, Inc. ("CompuServe"), an Ohio corporation and on-line service provider, sought a declaratory judgment in a matter involving Richard Patterson, a Texas resident and CompuServe subscriber.<sup>171</sup> Patterson claimed that CompuServe was marketing and distributing "shareware" on its system in violation of the common law trademarks which he and his company owned and enjoyed.<sup>172</sup> After Patterson demanded money to settle his potential claims, CompuServe filed a declaratory judgment action in the United States District Court for the Southern District of Ohio.<sup>173</sup> In response, Patterson filed a motion to dismiss for lack of personal jurisdiction in which he claimed to have never visited Ohio.<sup>174</sup>

In 1991, Patterson placed his shareware on CompuServe's system for others to use and purchase.<sup>175</sup> When Patterson became a shareware provider, he entered into a "Shareware Registration Agreement" ("SRA") with CompuServe.<sup>176</sup> From 1991 through 1994, Patterson transmitted (from Texas) thirty-two master software files to CompuServe (in Ohio), which CompuServe then placed on its server for all of its subscribers to access.<sup>177</sup> In December 1993, Patterson notified CompuServe by e-mail that it was infringing on his common law trademarks.<sup>178</sup> CompuServe changed the name of its program, but to no avail. Patterson continued to complain and CompuServe brought this declaratory judgment.<sup>179</sup>

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171. *See id.* at 1259.

172. *See id.* at 1261. Shareware is a type of software which is created by anyone, including CompuServe, and distributed free. Once a person downloads shareware, the end user is expected to pay the creator the suggested licensing fee if the user keeps and uses the software beyond the specified trial period. *Id.* at 1260. Defendant Patterson claimed that the terms "WinNav," "Windows Navigator," and "Flashpoint Windows Navigator" were all common law trademarks which he and his company owned. *Id.* At 1261.

173. *Id.* at 1261.

174. *Id.*

175. *Id.* at 1260.

176. *Id.* Under the SRA, CompuServe agreed to provide its subscribers with access to the software that the creator had written. The SRA purported to create an independent contractor relationship with the creator, in this case Patterson. The SRA did not mention the software by name, but rather left the content and the identification to Patterson. The SRA incorporated both a Service Agreement and a Rules of Operation. Both have a "choice of forum" clause expressly providing that the contract was entered into in Ohio, and the Service Agreement further provides a "choice of laws" clause which states that the contract is to "be governed and construed in accordance with" Ohio law. *Id.*

177. *See id.* at 1261. Patterson claimed that he sold less than \$650 worth of his software to only twelve Ohio residents. *See id.*

178. *See id.* Patterson's software product was a program designed to help people navigate around the Internet. CompuServe began to market a similar product that Patterson took to be too similar to his own.

179. *See id.*



The district court granted Patterson's motion to dismiss for lack of personal jurisdiction.<sup>180</sup> Subsequently, the Sixth Circuit reversed.<sup>181</sup>

The Sixth Circuit began its opinion by noting that technology has dramatically expanded commerce, communications, and, consequently, the limits on the exercise of personal jurisdiction.<sup>182</sup> "[T]here is less perceived need today for the federal constitution to protect defendants from 'inconvenient litigation,' because all but the most remote forums are easily accessible for the pursuit of both business and litigation."<sup>183</sup> Driving this most recent expansion of the courts' power over nonresident defendants, the court noted that the Internet is "perhaps the latest and greatest manifestation of these historical, globe-shrinking trends."<sup>184</sup>

In its analysis, the court reasoned that Patterson purposefully contracted with an Ohio company to distribute his product.<sup>185</sup> Far from being "random," "fortuitous," or "attenuated," Patterson perpetuated the relationship with CompuServe by repeatedly communicating with its system in Ohio.<sup>186</sup> This relationship was intended to be ongoing in nature and not merely a "one-shot affair."<sup>187</sup> The court also made special note that it was not deciding this case based on simply the existence of the contract with CompuServe or the fact that Patterson put his software on CompuServe's system. The court noted that while either of these activities, taken alone, might not subject Patterson to jurisdiction, deliberately doing both plus the other factors mentioned supported the exercise of jurisdiction.<sup>188</sup>

These "plus factors" included the repeated e-mail and regular mail messages, a message about the infringement action on one of CompuServe's distributed message forums, and Patterson's demand for money.<sup>189</sup> In addition, the court had no problem finding that the cause of action arose from Patterson's forum-related activities and that the exercise of jurisdiction was reasonable.<sup>190</sup>

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180. *See id.*

181. *Id.* at 1269.

182. *See id.* at 1262 (citation omitted).

183. *Id.*

184. *Id.*

185. *Id.* at 1263.

186. *Id.* at 1263-64 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

187. *Id.* at 1265 (citation omitted).

188. *Id.*

189. *Id.* at 1266.

190. *Id.* at 1267-68. Yet, the court did explicitly note the limited precedential value of its holding. The court stated that it was not holding that Patterson could be subject to

## c. Panavision International, L.P. v. Toeppen

In *Panavision International, L.P. v. Toeppen*,<sup>191</sup> Panavision (a California corporation) sued Dennis Toeppen (an Illinois resident) for his registration and appropriation of the corporation's trademark as a domain name. Of particular interest in this decision is the court's approval of the lower court's findings that Toeppen's registration of Panavision's trademark was part of a larger scheme to obtain money from Panavision.<sup>192</sup> As the Ninth Circuit noted, this deliberate scheme to extort money from Panavision provided the "something more" which was conspicuously absent in the court's earlier case in *Cybersell*.<sup>193</sup>

Using the "effects doctrine" first announced in *Calder*,<sup>194</sup> the court found that Toeppen had met the "purposeful availment" requirement necessary for personal jurisdiction.<sup>195</sup> Distinguishing the present case from its holding in *Cybersell*,<sup>196</sup> the *Panavision* court found that Toeppen had purposefully registered Panavision's trademarks "to force Panavision to pay him money."<sup>197</sup>

In an analysis of the harm caused by Toeppen's infringement, the court found that Toeppen knew that the brunt of the harm to Panavision would be in California because that was where they conducted their business.<sup>198</sup> Toeppen countered by arguing that if an injury occurred at all, it

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suit in any state where his software was purchased or used; or that Patterson could be subject to suit in Ohio from an injury by the software in a third state; or that CompuServe could sue any regular subscriber in Ohio. *See id.*

191. 938 F. Supp. 616 (C.D. Cal. 1996), *aff'd*, 141 F.3d 1316 (9th Cir. 1998).

192. *See id.* at 1318. Panavision accused Toeppen of being a "cyber pirate" who steals valuable trademarks and registers domain names on the Internet using these trademarks. The object of such a scheme was to sell the domain names to the rightful trademark owners for money. In this case, Toeppen offered to "settle the matter" if Panavision would pay him \$13,000 in exchange for the domain name. *See id.* at 1319. The court found that Toeppen had registered other domain names for various other companies including Delta Airlines, Neiman Marcus, Eddie Bauer, Lufthansa, and over 100 other marks. *See id.*

193. *See id.* at 1320-21 (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 n.6 (9th Cir. 1997)).

194. *See Calder v. Jones*, 465 U.S. 783 (1984) (establishing an "effects test" for intentional action aimed at the forum state).

195. *See Panavision*, 141 F.3d at 1322.

196. *See supra* text accompanying notes 155-57. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).

197. *See Panavision*, 141 F.3d at 1321.

198. *Id.* Although Panavision was incorporated in Delaware, its principal place of business was in California, at "the heart of the theatrical motion picture and television industry." *Id.* (citation omitted).

occurred in "cyberspace."<sup>199</sup> As he had not entered the State of California and did not direct any activity there, the injury could not have occurred in California.<sup>200</sup> The *Panavision* court disagreed. They found that the "something more," which the Ninth Circuit required in *Cybersell*, was provided by the evidence that Toeppen was running a scheme directed at California.<sup>201</sup> The court also found that the cause of action arose out of Toeppen's forum-related activities and that the exercise of jurisdiction over Toeppen, an Illinois resident, would not be unreasonable.<sup>202</sup> Although the burden on Toeppen to litigate in California would be significant, the burden would not be so great as to deprive him of due process.<sup>203</sup>

d. *Zippo Manufacturing Co. v. Zippo Dot Com*

In *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*,<sup>204</sup> Zippo Manufacturing Co. ("Manufacturing"), a Pennsylvania Corporation, brought suit against Zippo Dot Com, Inc. ("Dot Com"), a California corporation, for the latter's alleged violations of federal and state trademark protection laws.<sup>205</sup> The claims arose from Dot Com's use of the trademarked word "Zippo" in the domain names "zippo.com," "zippo.net," and "zipponews.com," on its web site; and in the headers of the news service messages it posted.<sup>206</sup> In its analysis, the court acknowledged that most of Dot Com's contacts with Pennsylvania occurred almost exclusively over the Internet<sup>207</sup>—but not entirely.<sup>208</sup>

199. *See id.* at 1322 & n.2.

200. *See id.* at 1322. Toeppen claimed that all he had done was register Panavision's trademark as a domain name in Illinois and post a web site using that mark. *Id.*

201. *See id.* In this case the court found that the "something more" was provided by the defendant's obvious attempt to extort money from the defendants using their name.

202. *See id.* at 1322-24.

203. *Id.*

204. 952 F. Supp. 1119 (W.D. Pa. 1997).

205. *See id.* at 1121. Manufacturing filed a five-count complaint against Dot Com alleging trademark dilution, infringement, and false designation under the Federal Trademark Act as well as state trademark dilution. *Id.*

206. *See id.*

207. *See id.* Dot Com's employees, offices, and equipment are all located in California. Dot Com's advertising about its service occurs over its web site, which was accessible to Pennsylvania residents over the Internet. At the time of the trial, defendants had about 140,000 paying customers, of which 3,000 were Pennsylvania residents. To become a subscriber of Dot Com, customers needed to fill out a subscription form located on Dot Com's web site. Payment was made by credit card over the Internet or by telephone. *Id.*

208. *Id.* The court noted specifically that Dot Com had entered into agreements with seven Internet Service Providers ("ISP's") in Pennsylvania to permit their subscribers to access Dot Com's news service. Two of these providers were located in the Western District of Pennsylvania. *Id.*

In *Zippo*, the court found that the cause of action arose out of the defendant's contact with the forum and that the exercise of jurisdiction over the defendant was reasonable.<sup>209</sup> On its behalf, Dot Com argued that although its web site was accessible by Pennsylvania residents, "advertising" or "operating a Web site" was not equal to "doing business in Pennsylvania."<sup>210</sup> The court found Dot Com's argument that it had not purposefully availed itself of the laws of Pennsylvania to be "wholly unpersuasive."<sup>211</sup> Dot Com had sold passwords to about 3,000 Pennsylvania subscribers and entered into seven contracts with ISPs to provide their service to customers.<sup>212</sup> Defendant also asserted that its contacts with the forum were "fortuitous" within the meaning of *World Wide Volkswagen*.<sup>213</sup> But again the court disagreed.<sup>214</sup> Dot Com "repeatedly and consciously" chose to process the applications from Pennsylvania residents and assign them passwords. The transmission of those files was entirely within the defendant's discretion.<sup>215</sup>

*Zippo* is a fairly unique opinion because the court attempted to fashion a three-category, sliding scale framework to help future courts analyze personal jurisdiction suits involving Internet contacts.<sup>216</sup> Under this classification system, the court felt that this case was most analogous to the line of cases which included "doing business over the Internet," evident in *Compuserve, Inc. v. Patterson*.<sup>217</sup>

e. *Heroes, Inc. v. Heroes Foundation*

In *Heroes, Inc. v. Heroes Foundation*,<sup>218</sup> the plaintiff Heroes, Inc. ("Heroes") sued Heroes Foundation ("Foundation") for trademark in-

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209. *Id.* at 1127.

210. *Id.* at 1126.

211. *Id.*

212. *Id.*

213. *Id.* (quoting *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)).

214. *Id.* The court provided here an excellent example of what a fortuitous contact in the context of *World Wide Volkswagen* might look like. Dot Com's contacts with Pennsylvania would be fortuitous "if it had no Pennsylvania subscribers and an Ohio subscriber forwarded a copy of a file he obtained from Dot Com to a friend in Pennsylvania or an Ohio subscriber brought his computer along on a trip to Pennsylvania and used it to access Dot Com's service. That is not the situation here." *Id.*

215. *Id.*

216. *See id.* at 1124. This is the same classification system determined to be misleading. *See supra* text accompanying notes 97-105.

217. *See id.* at 1125. *See supra* text accompanying notes 170-90.

218. 958 F. Supp. 1 (D.D.C. 1996).

fringement and unfair competition.<sup>219</sup> Plaintiff Heroes was a District of Columbia charity begun in 1964 which registered and owned the service mark “Heroes.”<sup>220</sup> The defendant Foundation was a New York charity begun in 1990 which began using the “Heroes Foundation” name and logo in 1993.<sup>221</sup> Claiming that Foundation’s use of the name “Heroes Foundation” and related names was likely to cause potential contributors to be confused, Heroes brought this lawsuit raising state and federal claims of trademark infringement and unfair competition.<sup>222</sup>

First, the court examined the defendant’s contacts with the forum state to ensure that it met the District of Columbia’s long-arm statute. Foundation claimed that its only contact with the forum was a newspaper advertisement published in *The Washington Post* and a web site with the trademarked name and logo.<sup>223</sup> The court found that both of these contacts, taken together, were sufficient to indicate that Foundation had purposefully availed itself of the “privilege of conducting activities within the District.”<sup>224</sup> Even without the newspaper advertisement, however, the court implied that the District of Columbia could assert personal jurisdiction over Foundation as its “home page [was] certainly a sustained contact within the district.”<sup>225</sup>

Initially, the court found that the newspaper advertisement sufficiently indicated that Foundation intended to solicit donations in the District.<sup>226</sup> Although the advertisement in *The Washington Post* was actually placed by Proctor & Gamble, it had the Foundation’s name and telephone number.<sup>227</sup> The court found Proctor & Gamble’s involvement insignificant. Because the Foundation “knew the advertisement was placed, approved of it, and received publicity and substantial contributions as a result of it,”<sup>228</sup> the placement of the advertisement met the requirements for

219. *Id.* at 2.

220. *Id.*

221. *Id.*

222. *See id.* at 2.

223. *Id.* at 3.

224. *Id.*

225. *Id.* at 5.

226. *See id.* at 3.

227. *See id.* at 3-4. The advertisement invited readers to “Help Donate \$100,000 to Boomer Esiason’s Heroes Foundation and Find a Cure for Cystic Fibrosis.” *Id.* at 3. The advertisement displayed a photograph of Boomer Esiason, a quarterback for the National Football League at the time, and his son who suffers from cystic fibrosis. Attached to the advertisement, which appeared in the insert in the newspaper’s Sunday edition, were coupons for several Proctor & Gamble products. The advertisement explained that Proctor & Gamble would donate up to \$100 to the Heroes Foundation for each redeemed coupon. It also gave a toll-free telephone number for Foundation. *See id.*

228. *Id.* at 3.

purposefulness under *Asahi*.<sup>229</sup>

With regard to the web page, the court found Foundation's web page equally as indicative of the charity's intent to operate in the District of Columbia.<sup>230</sup> The Foundation tried to characterize its home page as "essentially passive" and "not really targeted at any particular forum."<sup>231</sup> However, the court was unconvinced.<sup>232</sup> As the web site was not the only contact with the forum the court declined to decide if the web site alone would provide the "minimum contacts" necessary to establish personal jurisdiction.<sup>233</sup> Taking a page from *Inset Systems, Inc. v. Instruction Set, Inc.*,<sup>234</sup> the court emphasized the durable nature of the information contained on web sites. While hard copy advertisements are quickly disposed of and reach a limited number of potential customers, Internet advertisements can be accessed again and again by many potential customers.<sup>235</sup> As a result, the court found that its exercise of jurisdiction in the District of Columbia based on the newspaper advertisement, and especially the web site, would not be unreasonable.<sup>236</sup>

f. American Network, Inc. v. Access America/Connect Atlanta

In another case from the United States District Court for the Southern District of New York, a New York Internet Service Provider, American Network, Inc. ("ANI"), brought this suit for trademark infringement and unfair competition against Access America/Connect Atlanta, Inc. ("Access"), a Georgia Internet Service Provider.<sup>237</sup> In its suit, ANI claimed that a mark used by Access, "America.Net," had infringed upon a mark that ANI owned, "American.Net."<sup>238</sup> The defendant moved to dismiss for lack of personal jurisdiction.<sup>239</sup> The court found that the exer-

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229. *See id.* Distinguishing this case from the others that Foundation cited, the court found that this case involved an advertisement "placed specifically in the forum's local newspaper, not in a national newspaper or a trade publication which happen[ed] to circulate there." *Id.*

230. *See id.* at 4-5.

231. *Id.* at 4.

232. *Id.* at 4. The home page contained the trademarked name, logo, and a toll free telephone number for soliciting contributions. *Id.* at 5.

233. *Id.* at 5.

234. 937 F. Supp. 161 (D. Conn. 1996).

235. *See Heroes*, 958 F. Supp. at 5 (quoting *Inset*, 937 F. Supp. at 164-65).

236. *See id.* at 5.

237. *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, No. 96 Civ. 6823 (LLS), 1997 WL 466507 (S.D.N.Y. Aug. 14, 1997).

238. *Id.* at \*1.

239. *Id.*

cise of personal jurisdiction was proper both under the New York long-arm statute and the Due Process Clause.<sup>240</sup>

As the cause of action arose from Access' web site, ANI claimed that the New York court had personal jurisdiction over the defendant based on the New York long-arm statute.<sup>241</sup> Access reduced its argument to two simple points: (1) ANI did not suffer an injury in New York, and (2) it was not reasonably foreseeable that Access' acts in Georgia would have New York consequences.<sup>242</sup> The defendant argued that all of its offices, employees, and business facilities, including its server, were located in Georgia.<sup>243</sup> In addition, it owned no property in New York.<sup>244</sup> Contrary to that position, ANI claimed that Access' home page contained the allegedly infringing mark and provided the minimum contacts with the forum.<sup>245</sup> The court agreed with ANI on both points.

First, the court found that ANI suffered injury in New York because New York users had seen the mark on the defendant's web site on their computer screens in New York and had been "confused and deceived" by the mark.<sup>246</sup> With regard to the defendant's second contention, the court found that it was reasonably foreseeable that ANI would suffer consequences in New York by Access publishing its home page.<sup>247</sup> Access stated twice on its home page that it could help customers "across the U.S." and it had signed up six New York subscribers.<sup>248</sup> Access argued that it had 7500 subscribers worldwide and only six in New York, which constituted only 0.08% of its membership.<sup>249</sup> These six New York customers contributed only \$150 per month out of its monthly revenue of \$195,000.<sup>250</sup> As a result, the court found that Access was trying to reach a New York market.<sup>251</sup>

With regard to the due process analysis, the court found that Access had sufficient contacts with New York to demonstrate that it had purposefully availed itself of that State's laws.<sup>252</sup> Access had signed up six New York subscribers to its service and derived \$150 a month from

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240. *See id.* at \*7.

241. *See id.*

242. *See id.* at \*3.

243. *See id.* at \*1.

244. *See id.* at \*1.

245. *See id.* at \*2.

246. *Id.* at \*3.

247. *Id.* at \*4.

248. *Id.* at \*4.

249. *See id.* at \*2.

250. *See id.*

251. *See id.* at \*4-5.

252. *See id.* at \*5.

those subscribers.<sup>253</sup> Moreover, the court assumed from the information contained on Access' web site that it had mailed those six New York customers a copy of its software package and a written copy of the service agreement.<sup>254</sup> From this information, the court determined that Access had sought to serve a nationwide market which lent support to the inference that the New York contacts were not "random or fortuitous."<sup>255</sup> Finally, the court found that the other portions of the due process analysis did not prevent the exercise of jurisdiction over the defendants.<sup>256</sup> The court found: (1) there was a nexus between Access' contacts with New York residents and the cause of action; (2) that Access could have reasonably foreseen going to court in New York to defend itself from claims arising from the mark; and (3) that other reasonableness factors did not weigh against holding Access amenable to suit.<sup>257</sup>

In distinguishing this opinion from the court's holding in *Bensusan*,<sup>258</sup> the court found that Access derived "substantial revenue from interstate commerce."<sup>259</sup> From the language on its home page, Access made clear that it was able to serve customers across the United States.<sup>260</sup> By enrolling six New York customers in its service, sending them software and agreements, providing them service, and receiving revenue from them, Access had made it clear that it was doing business in New York.<sup>261</sup>

g. *Blumenthal v. Drudge*

In another case from the United States District Court for the District of Columbia, *Blumenthal v. Drudge*,<sup>262</sup> two White House employees ("Blumenthals") who were also District of Columbia residents, brought a defamation action against the now infamous Internet reporter Matt Drudge ("Drudge"), a State of California resident.<sup>263</sup> In 1995 the defendant Drudge created an electronic gossip column focusing on news from Hollywood and Washington, D.C., known as the *Drudge Report*.<sup>264</sup> Origi-

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253. *See id.*

254. *See id.*

255. *Id.*

256. *Id.*

257. *See id.* at \*6-7.

258. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

259. *American Network*, 1997 WL 466507, at \*8.

260. *See id.* at \*8.

261. *See id.*

262. 992 F. Supp. 44 (D.D.C. 1998).

263. *See id.* at 46-47.

264. *See id.* at 47. Drudge's base of operations has been an office in Los Angeles, California. The *Drudge Report* is available on the Internet at <<http://>



nally, Drudge distributed his column by means of his web site and by e-mail.<sup>265</sup> Later, in late May or early June 1997, Drudge signed an agreement to began distributing his column over America Online, an online service provider.<sup>266</sup> On August 10, 1997, Drudge wrote and transmitted the edition of the Drudge Report that contained an allegedly defamatory statement about the Blumenthals.<sup>267</sup> After receiving a letter from the Blumenthals' counsel the next day, Drudge retracted the story.<sup>268</sup> The Blumenthals then brought this defamation action.

In its analysis, the court relied primarily on the District of Columbia's long-arm statute,<sup>269</sup> but it also claimed that the exercise of jurisdiction comported with due process.<sup>270</sup> Initially, the court found that

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[www.drudgereport.com](http://www.drudgereport.com)>.

265. *See id.* at 47. At the web site, Drudge has a hyperlink link that caused the most recently published addition to be displayed when activated. Drudge had also developed a list of regular e-mail subscribers to whom he e-mailed each new addition of the Drudge Report. By March 1995, Drudge had 1,000 regular e-mail subscribers. Plaintiffs alleged that by 1997, Drudge had 85,000 subscribers to his e-mail service.

266. *See id.* America Online (or "AOL") claims more than nine million subscribers. According to the written license agreement between Drudge and AOL, Drudge would receive a flat monthly royalty payment and Drudge managed the content of his column. Drudge would then e-mail each new edition of the column to AOL, which would then post the new edition on its service.

267. *See id.* Drudge transmitted the report from Los Angeles, California by e-mail to his direct subscribers and by posting both a headline and the full text to his web site. He then transmitted the text, but not the headline, to AOL which then made it available to its subscribers.

268. *See id.* at 48. Drudge retracted the story through a special edition of the Drudge Report posted on his web site and e-mailed to his subscribers on August 11, 1997. Drudge e-mailed the retraction to AOL on August 12, 1997 which then posted the column to its service. Drudge later publicly apologized to the Blumenthals.

269. *See id.* at 53. The Blumenthals relied on the long-arm statute which conferred jurisdiction over an entity causing tortious injury inside the District by an act or omission outside the District. D.C. Code 13-423(a)(4). Drudge conceded that the allegedly defamatory edition of the Drudge Report was published outside the District and that the tortious injury was caused within the District. Thus, the only question before the court was whether Drudge regularly conducted business, derived substantial revenue, or engaged in a persistent course of conduct in the District of Columbia as defined under the D.C. Code. *Id.* at 53-54.

270. *See id.* at 57-58. The Court found that the exercise of jurisdiction was permissible under the D.C. long-arm statute. Because the long-arm statute didn't reach the outer limits of due process and that sufficient "plus factors" were met, the Court concluded that there was also sufficient minimum contacts to satisfy due process. In its analysis, the court applied the "plus factors" noted in Justice Ginsburg's opinion in *Crane v. Carr*, 814 F.2d 758, 762 (D.C. Cir. 1987). The court noted that these "plus factors" do not themselves confer jurisdiction, but rather the court relies on them to "filter out cases in which the inforum impact is an isolated event and the defendant otherwise has no, or scant, af-

Drudge's connections with the District were significant: Drudge's web site was available to D.C. residents continuously, his e-mail list was sent to D.C. residents, he solicited money from D.C. residents, he traveled to D.C. twice for interviews to promote his publication, and he had regularly been in contact with D.C. residents (via e-mail, telephone, and the U.S. mail).<sup>271</sup>

The defendant claimed that his course of conduct was not persistent and did not specifically target the District of Columbia.<sup>272</sup> But the court disagreed. First, examining the case law, the court found that Drudge's web site was "interactive" rather than "passive."<sup>273</sup> Drudge had a web site where users could add their e-mail addresses to the service subscription list.<sup>274</sup> Next, the court found that subject of the column was uniquely targeted to the District.<sup>275</sup> As the column dealt almost exclusively with "inside the Beltway gossip and rumor," Drudge knew that the brunt of his statement would be felt in the District of Columbia.<sup>276</sup> Furthermore, Drudge solicited money for his Report on his web page and received money from fifteen D.C. residents.<sup>277</sup> Finally, the court found that Drudge had other non-Internet related contacts that made the exercise of jurisdiction reasonable. He had an interview with C-Span in Washington, D.C., a nationally distributed cable show, and visited the District of Columbia on at least one other occasion.<sup>278</sup> He also regularly maintained contacts with D.C. residents as the source of his column's news.<sup>279</sup> As a result, the court found that the Internet contacts coupled with the non-Internet contacts made the exercise of jurisdiction permissible.<sup>280</sup>

As the cases in this category illustrate, many courts are still uncertain whether electronic contacts alone can provide the minimum contacts

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filiation with the forum." *Id.* at 54 (quoting *Crane*, 814 F.2d at 763).

271. *See id.* at 54.

272. *See id.*

273. *See id.* at 55; *see also* *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (*comparing* *Maritz, Inc. v. CyberGold*, 947 F. Supp. 1328, 1332-33 (E.D. Mo. 1996) (exercise of jurisdiction warranted where defendant's interactive web site encouraged browsers to add their address to mailing lists that subscribed users to the service) *with* *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 299-300 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (passive web site which only posted information for interested persons who may have accessed the web site not sufficient for exercise of jurisdiction)).

274. *See id.* at 54.

275. *See id.* at 57.

276. *Id.* at 57.

277. *See id.*

278. *See id.*

279. *See id.*

280. *See id.*

necessary to exercise personal jurisdiction. The “something more” analysis allows courts to place a finger on the scale in favor of the exercise of jurisdiction. This “something more” analysis can quite rightly be seen as the first timid steps into the world of Internet-related contacts.

As the courts have become more comfortable applying the minimum contacts test of *International Shoe* to personal jurisdiction cases involving the Internet, the opinions demonstrate a reduced reliance on these affiliating factors. For example, some courts needed very little additional supporting evidence to find the exercise of jurisdiction reasonable.<sup>281</sup> Other times, a court went to great lengths to ensure that the alleged harm in a suit actually was felt in the district.<sup>282</sup> Despite these often contradictory results and the open split between the districts regarding the significance of an electronic contact, courts are beginning to find their footing in cases that involve internet-related contacts.<sup>283</sup>

The next section showcases a number of cases which have completely severed their reliance on the affiliating circumstances. Far from being aberrational, these cases actually represent the “high-water” mark of the Internet-related contact, much like the case of *McGee v. International Life Insurance Co.* was the logical outer limits of the Court’s doctrine under *International Shoe*.

### 3. *Electronic Contacts Alone Supporting the Exercise of Jurisdiction*

#### a. *Inset Systems, Inc. v. Instruction Set, Inc.*

The United States District Court for the District of Connecticut’s decision in *Inset Systems, Inc. v. Instruction Set, Inc.*<sup>284</sup> is a prime example of a broader, more expansive framework for personal jurisdiction. In that

281. See *Heroes*, 958 F. Supp. 1 (D.D.C. 1996) (finding that the web page with the offending trademark and logo was “certainly a sustained contact with the District.” *Id.* at 5.).

282. See *Blumenthal*, 992 F. Supp. 44 (D.D.C. 1998) (finding that the defendant had a web site that was accessible in the District; that the defendant had visited the District twice; that the defendant solicited money from individuals within the District; that the defendant’s column was sent to e-mail addresses in the district; and that the defendant regularly contacted individuals by telephone, mail, and e-mail for the news that filled his column).

283. See *Hearst Corp. v. Goldberg*, No. 96 Civ. 3620, 1997 WL 97097, at 19-20 (S.D.N.Y. 1997) (U.S. Magistrate Peck declining to follow the holdings in *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D.Conn. 1996); and *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996).

284. 937 F. Supp. 161 (D. Conn. 1996).

case, Inset Systems, Inc. ("Inset"), a Connecticut corporation, sued Instruction Set, Inc. ("ISI"), a Massachusetts company, for the latter's use of "Inset" as its domain name (INSET.COM) and toll-free number (1-800-US-INSET).<sup>285</sup> Inset alleged that Instruction's domain name and toll-free number both constituted violations of federal and state trademark law.<sup>286</sup> The defendant ISI moved to dismiss the action for lack of personal jurisdiction and improper venue.<sup>287</sup> The defendant asserted that it did not have the requisite minimum contacts with Connecticut to make it amenable to suit in Connecticut.<sup>288</sup> It had no offices in Connecticut nor did it conduct businesses there on a regular basis.<sup>289</sup> Inset claimed that ISI was using the Internet and the toll-free telephone number to try to conduct business within the State of Connecticut.<sup>290</sup>

Turning to the State's long arm analysis, the court found that ISI was soliciting business within Connecticut via its Internet advertisement and its toll-free number.<sup>291</sup> The court compared the near-constant availability of ISI's web site to a case in which a company placed "six franchise ads over a six-month period in a newspaper whose circulation clearly include[d] Connecticut."<sup>292</sup> With regard to the durability of an Internet solicitation the court noted, "[U]nlike hard-copy advertisements . . . which are often quickly disposed of and reach a limited number of potential customers, Internet advertisements are in electronic printed form so that they can be accessed again and again by many more potential consumers."<sup>293</sup>

Turning to the minimum contacts analysis, the court found that ISI "purposefully availed" itself of the privileges of conducting business within the State of Connecticut through use of its web site and a toll-number.<sup>294</sup> The court compared ISI's solicitation of Connecticut residents with a case in which a company had advertised in thirty (non-Internet) publications known to have been circulated in Connecticut over the course of a year and a half, had delivered thirty allegedly infringing catalogs to Connecticut residents, and had made two sales to Connecticut re-

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285. *See id.* at 162-163.

286. *See id.*

287. *See id.* at 162.

288. *See id.* at 164.

289. *See id.*

290. *See id.*

291. *See id.*

292. *See id.* (quoting *McFaddin v. National Executive Search, Inc.*, 354 F. Supp. 1166, 1169 (D. Conn. 1973)).

293. *Id.*

294. *See id.*

sidents which may or may not have been due to the solicitation.<sup>295</sup> In its comparison, the court noted that ISI had not only directed its advertising activities to Connecticut but “to all states.”<sup>296</sup> In this case, ISI’s solicitation could not only reach 10,000 Connecticut residents with its advertising, but moreover this advertising was available to residents “continuously.”<sup>297</sup>

Finally, the court examined the “fair play and substantial justice” factors which might have worked to limit the exercise of jurisdiction.<sup>298</sup> The court noted that travel from Natick, Massachusetts, to Hartford, Connecticut, was not so excessive as to render suit in the forum inconvenient.<sup>299</sup> In its analysis, the court engaged in a limited “something more” analysis by including mention of the 1-800 number on the web site. Courts deciding this case today would almost certainly have inquired into the actual sales or contacts with Connecticut residents. This does not make this case an aberration. Rather, it marks an early leap of faith in the application of the minimum contacts analysis to a case based on Internet-related contacts.

#### b. *Maritz, Inc. v. CyberGold, Inc.*

In *Maritz, Inc. v. CyberGold, Inc.*,<sup>300</sup> Maritz, Inc. (“Maritz”) brought this action against CyberGold, Inc. (“CyberGold”) to enjoin the latter’s alleged trademark infringement.<sup>301</sup> Maritz claimed that CyberGold’s web site contained an allegedly infringing trademark.<sup>302</sup> Although CyberGold disputed that it had the minimum contacts necessary for the court to exercise specific jurisdiction, the court disagreed. It noted that the disputed web site was “continually accessible to every internet-connected computer in Missouri.”<sup>303</sup> Moreover, the web site was primarily used for advertising and any one of 12,000 Internet users in Missouri could access the site.<sup>304</sup>

In the long-arm portion of the analysis, Maritz suggested that the court could exercise jurisdiction using the “transaction of any business”

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295. *See id.* (citing *Whelen Engineering Co. v. Tomar Electrics*, 672 F. Supp. 659 (D. Conn. 1987)).

296. *See id.* at 165.

297. *See id.*

298. *See id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

299. *See id.*

300. 947 F. Supp. 1328 (1996).

301. *See id.* at 1329.

302. *See id.* at 1330.

303. *See id.*

304. *See id.*

requirement.<sup>305</sup> CyberGold's use of its web site to advertise its business, it argued, was analogous to the use of mass mailings to advertise a business.<sup>306</sup> The court disagreed.<sup>307</sup> Such a comparison was unnecessary as the presence of the web site satisfied the "commission of a tortious act" provision of Missouri's long-arm statute.<sup>308</sup> Even assuming the allegedly infringing activities were wholly outside of Missouri, the court concluded, the activities produced a tortious effect in Missouri.<sup>309</sup>

Turning to the due process analysis, the court explained the unique properties exhibited by Internet communications and disavowed any comparisons to more traditional forms of media.<sup>310</sup> The court explained how the due process standards for mail or the telephone were not applicable to Internet communications.<sup>311</sup> While telephone numbers (such as a toll-free number) still relied on print media to advertise its existence, Internet web sites were "a tremendously more efficient, quicker, and vast means of reaching a global audience."<sup>312</sup> Unlike the limited information provided by toll-free numbers, Internet web sites offered a more comprehensive level of information exchange, including downloading and printing.<sup>313</sup> In addition, once an Internet web site had been published, anyone could find its location using a simple search.<sup>314</sup>

In its five-part analysis of minimum contacts, the court rejected CyberGold's characterization of its activities as "merely maintaining a "passive website."<sup>315</sup> First, the court found that CyberGold used its web site to attract business to its service, "regardless of [the user's] geographic location."<sup>316</sup> CyberGold "consciously decided to transmit adver-

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305. *See id.* at 1331.

306. *See id.*

307. *See id.*

308. *See id.*

309. *See id.*

310. *See id.* at 1332.

311. *See id.*

312. *See id.*

313. *See id.*

314. *See id.*

315. *See id.* at 1333. CyberGold operated a web site located at <<http://www.cybergold.com>>. The website provided information about CyberGold's upcoming service which included maintaining a mailing list of Internet users (no geographic restrictions on membership were mentioned). An Internet user who wanted to participate in the service would provide CyberGold with his or her particular areas of interest. CyberGold would then provide the user with a personal electronic mailbox and would forward to the user advertisements that match the users' interests. CyberGold would then charge advertisers for access to the Internet users on its mailing list. At the time of the suit, CyberGold's service was not yet in operation, but it was soliciting customers. *Id.* at 1330.

316. *Id.* at 1333.

tising information to all internet users, knowing that such information [would] be transmitted globally.”<sup>317</sup> Secondly, based on the quantity of contacts with the State, the court found that CyberGold used its web site as a promotional tool to solicit Missouri Internet users.<sup>318</sup> CyberGold transmitted information regarding its web site to Missouri 131 times since the site became operational.<sup>319</sup> Thirdly, the cause of action arose out of the defendant’s allegedly infringing activities. The defendant was using its web site to promote its upcoming service, and that web site contained the allegedly infringing trademark.<sup>320</sup> Finally, the court concluded that CyberGold, based on its Internet activities, should have “reasonably anticipate[d] the possibility of being haled into court [in Missouri].”<sup>321</sup> Maritz and the State of Missouri had an interest in resolving the case in the State. Moreover, CyberGold did not demonstrate that it would be burdened by having to defend in Missouri.<sup>322</sup>

c. State v. Granite Gate Resorts, Inc.

In *State v. Granite Gate Resorts, Inc.*,<sup>323</sup> the Minnesota Attorney General’s office sued the provider of an online wagering service, alleging that it engaged in deceptive trade practices, false advertising, and consumer fraud when it asserted that online gambling was “legal” in Minnesota.<sup>324</sup>

Granite Gate Resorts, Inc. (“Granite Gate”) was a Nevada corporation doing business as On Ramp, an Internet advertising service providing Nevada tourism information.<sup>325</sup> Among the advertisers on this Nevada site was WagerNet, an online wagering service.<sup>326</sup> Upon visiting the

317. *Id.*

318. *Id.*

319. *See id.* The court here is using the converse of the traditional “pull” model of web sites. *See* Mark Eckenwiler, *Criminal Law and the Internet*, LEGAL TIMES, Jan. 23, 1995, at S32. In that model, information passively resides on a web site until accessed by a user. Here, the Missouri court used the converse theory to demonstrate that CyberGold consciously transmitted information from its California server to Missouri 131 times. *See id.*

320. *See id.*

321. *Id.* at 1334.

322. *See id.*

323. No. C6-95-7227, 1996 WL 767431 (Minn. Ramsey County District Ct. Dec. 11, 1996), *aff’d*, 568 N.W.2d 715 (Minn. Ct. App. 1997), *appeal granted*, No. C6-97-89, 1997 Minn. LEXIS 829 (Minn. Oct. 31, 1997), *aff’d by an equally divided court*, 576 N.W.2d 747 (Minn. 1998).

324. *Granite Gate*, 568 N.W.2d at 717.

325. *See id.* On Ramp’s site was located at <<http://www.vegas.com>>.

326. *See id.*

WagerNet home page, a user would enter his or her name into a mailing list or use a toll-free number (or a Nevada telephone number) to obtain information about the soon-to-be-available wagering service.<sup>327</sup> A linked web page listed the terms and conditions of becoming a member, and stated that any claim against WagerNet by a customer must be brought before a Belizian court.<sup>328</sup>

In July 1995, an investigator from the Minnesota Attorney General's office called the toll-free number listed on the On Ramp site, and expressed an interest in subscribing to the online gambling service.<sup>329</sup> An On Ramp employee told the investigator to call the Nevada number, the same one listed on the WagerNet site.<sup>330</sup> At that number, an officer of WagerNet told the investigator that the gambling service was "legal" and would be up and running in a few months.<sup>331</sup> Shortly thereafter, the Attorney General's office filed suit against Granite Gate and its related companies for misrepresenting that online gambling was lawful in Minnesota.<sup>332</sup> Thereafter, in October 1995, the investigator subscribed to the WagerNet mailing list and received an online confirmation.<sup>333</sup>

The defendant moved for dismissal, asserting lack of personal jurisdiction.<sup>334</sup> The district court granted limited discovery to determine the quantity and quality of Granite Gate's contacts with the State of Minnesota.<sup>335</sup> Subsequently, the defendant refused to produce the names of the persons on the WagerNet mailing list, claiming that the information was the sole property of a Belizian corporation.<sup>336</sup> As a sanction, the trial court found that the mailing list contained at least one Minnesota resident,<sup>337</sup> and eventually denied Granite Gate's motion to dismiss.<sup>338</sup> On appeal, the Minnesota Court of Appeals affirmed the ruling of the district court. In affirming, the appeals court applied a five-factor minimum con-

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327. *See id.* A note on the web page also advised users to consult with local authorities regarding restrictions on offshore sports betting by telephone before registering with WagerNet. *See id.*

328. *See id.*

329. *See id.*

330. *See id.*

331. *Id.* A Granite Gate agent did not request the caller's home state to confirm whether online gambling was in fact "legal" in that jurisdiction. *See id.*

332. *See id.*

333. *See id.*

334. *See id.*

335. *See id.*

336. *See id.* at 717-18.

337. *See id.* at 718.

338. *See id.*



tacts test formulated by the Minnesota Supreme Court<sup>339</sup> and determined that the totality of the evidence weighed in favor of asserting personal jurisdiction over Granite Gate.<sup>340</sup>

With regard to the quantity of contacts, the court followed the United States district court's reasoning in *Maritz, Inc. v. CyberGold, Inc.*<sup>341</sup>. That court found that each time a Missouri user accessed defendant's web site in California, it was conversely a transmission of information into the State of Missouri.<sup>342</sup> Similarly, the *Granite Gate* court of appeals cited with approval the findings of the Minnesota district court. Specifically, that court found that: (1) Minnesota computers had indeed accessed Granite Gate's web site, (2) during a two week period in 1996 at least 248 Minnesota computers accessed and received transmissions from Granite Gate's web site, (3) computers located in Minnesota were among the 500 most frequent accessors of Granite Gate's web site, (4) persons throughout the United States and Minnesota called Granite Gate's telephone numbers advertised on its web site, and (5) the WagerNet mailing list contained the name and address of at least one Minnesota resident.<sup>343</sup>

Next, in its assessment of the quality of Granite Gate's contacts with Minnesota, the court noted that Granite Gate's web site amounted to advertising in Minnesota, thus subjecting them to suit in that state.<sup>344</sup> Although Granite Gate argued that it had not actively solicited business in Minnesota, the court noted that a web site demonstrated an affirmative intent to solicit business from all Internet users.<sup>345</sup> This intent to serve a broad geographic market was buttressed by the WagerNet site itself which advertised that it was "open to International markets."<sup>346</sup> Moreover, the fact that WagerNet had paid for advertising in English on an American commercial web site and included a toll-free number indicated

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339. *See id.* (citing *Rostad v. On-Deck, Inc.*, 372 N.W.2d 717, 719-20 (Minn. 1985)). The five factors included: "(1) the quantity of the defendant's contacts; (2) the nature and quality of the defendant's contacts; (3) the connection between the cause of action and the defendant's contacts; (4) the state's interest in providing a forum; and (5) the convenience of the parties." *Id.*; *see also* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985) (discussing the "fair play and substantial justice" factors).

340. *Id.* at 721 (holding that the defendants "demonstrated a clear intent to solicit business from markets that include[d] Minnesota" by advertising their service on the Internet and soliciting business from Minnesota residents).

341. *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp 1328 (E.D. Mo. 1996).

342. *Granite Gate*, 568 N.W.2d at 719 (citing *Maritz*, 947 F. Supp. at 1333).

343. *See id.* at 718-19.

344. *See id.* at 719-20.

345. *See id.* at 720.

346. *Id.*

an intent to reach out to and solicit business from the American market.<sup>347</sup>

Thirdly, the court found that the cause of action arose from Granite Gate's contacts with Minnesota, the forum state. As the misleading advertisement (stating that online gambling was "legal" in Minnesota) was the source of the consumer protection action, and that advertisement was accessible in Minnesota, the court claimed the nexus requirement was satisfied.<sup>348</sup> In the fourth factor of the minimum contacts test, the court found that Minnesota had an interest in regulating gambling within its state and enforcing consumer protection laws.<sup>349</sup> Finally, with regard to the convenience of the parties, the court noted that Granite Gate would not be inconvenienced by defending itself in Minnesota. As the company itself noted on its web site, Granite Gate reserved the right to sue the customers of WagerNet in either the customer's home forum or in Belize.<sup>350</sup> Granite Gate argued that this fact alone should not be determinative.<sup>351</sup> While the court of appeals agreed, it also found that the district court did not rely on this fact alone to determine that Granite Gate would not be inconvenienced by defending suit in Minnesota.<sup>352</sup>

#### PART V: PURPOSEFUL AVAILMENT VS. REASONABLENESS

##### A. *Serving the Global Marketplace*

As the cases above indicate, electronic media, known collectively as the Internet, has given the individual an almost incomprehensible power to communicate with a potential audience of millions. The Internet has also reduced the cost and convenience of communicating with a worldwide audience to virtually nil. Yet, this medium may carry with it the seeds of its own demise. While an individual may now be able to contact millions of people with a minimal investment, that same individual may now unwittingly expose himself to the laws of countries around the world. This puzzle is forcing courts to re-examine the touchstones of jurisdictional fairness. It also seems to have stirred up the age-old tug-of-war built into the personal jurisdiction analysis between the defendant's interest in determining in which forums he may be liable to suit and the legal system's interest in determining the most convenient forum for the suit. Each interest presents its own difficulties.

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347. *See id.*

348. *See id.* at 720-21.

349. *See id.* at 721.

350. *See id.*

351. *See id.*

352. *See id.*

With regard to electronic contacts and the minimum contacts analysis, the question becomes even more difficult. On a web site advertising a product, for example, a court may choose one of three paths. First, a court may decide that a web site will always serve as a minimum contact in any forum able to receive the message. This path would mean essentially world-wide personal jurisdiction. Realistically, it would eviscerate the protections to the defendant inherent in the minimum contacts doctrine. This path unfairly favors the interests of forum citizens over the interests of the likely defendant. Conversely, a court may also come to the opposite conclusion—that a web site might never serve as a minimum contact necessary for the exercise of personal jurisdiction. In this view, a defendant would be permitted to conduct business around the world while never being forced to defend in any jurisdiction other than its own. This path would present a major problem to individuals who had been injured by the defendant, but could not afford to pursue their claims in a distant forum. This option unfairly favors the interests of the defendant over the interests of forum citizens. Finally, there is the middle path—the case-by-case assessment. This is the path to which the courts have steered since the Supreme Court declared in *International Shoe* that the test for personal jurisdiction cannot be simply “mechanical or quantitative.”<sup>353</sup> This is the path that respects existing precedent, but incorporates the changing notions of fairness to the defendant.

As has already been stated, existing personal jurisdiction precedent is still viable and provides a worthwhile model for the present-day analysis. Yet, the delicate balance of the minimum contacts analysis is shifting in very important ways and courts and practitioners should take note of two very important changes. First, courts must realize that the “purposeful availment” requirement first articulated in *Hanson v. Denckla*<sup>354</sup> might not present such a high hurdle in the information age. Secondly, and more importantly, the balance of jurisdictional analysis will increasingly shift to the second part of the due process standard—whether the exercise of jurisdiction comports with traditional notions of “fair play and substantial justice.” The Internet is expanding the notion of what constitutes a “minimum contact” within the Supreme Court’s analytical framework. As a result, courts will begin to measure whether the exercise of personal jurisdiction is fair to the defendant based on the “other factors” noted in such cases as *Burger King v. Rudzewicz*.<sup>355</sup> While “purposeful availment” is still a viable requirement to be strongly considered

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353. *International Shoe v. Washington*, 326 U.S. 310, 319 (1945).

354. 357 U.S. 235, 252 (1958).

355. 471 U.S. 462, 476-77 (1985).

in any due process analysis, its use as a leading indicator will be greatly diminished during the information age.

The modern analysis for personal jurisdiction has undergone many alterations over the years as courts around the world seek to be fair to defendants in the face of technological change. The United States is a perfect example of how courts have adjusted their doctrines to fit with reality. The Supreme Court's decision in *Hanson v. Denckla* was a tremendous leap forward for the rights of defendants, requiring courts to inquire about the activities of the individual and the convenience of the forum. At that time, no one could have foreseen the changes that would develop in communications, travel and commerce. Yet, the purposeful availment standard has served courts well over the years, distinguishing between individuals who were only tangentially connected to the forum and those that had deliberately sought to serve its citizens. This is an important distinction because, as I point out in Part VI, it is still possible to serve a local market over the Internet.

With the advent of the Internet, it is as easy to serve customers around the world as it is to serve customers around the block. Make no mistake, "minimum contacts" and the "purposeful availment" standard are still viable markers when gauging whether the exercise of jurisdiction comports with due process. Yet, the minimum contacts requirement is becoming a smaller hurdle for plaintiffs to overcome. And for some intentional torts, this hurdle is nothing more than a speed bump.

By way of example, consider the diminishing importance of the minimum contacts standard based on two previously mentioned cases, *Cybersell, Inc.*<sup>356</sup> and *Maritz, Inc. v. CyberGold, Inc.*<sup>357</sup> In *Cybersell*, the Ninth Circuit found that Cybersell Florida had not "purposefully availed" itself of the privilege of conducting activities in Arizona and proceeded no further in the analysis.<sup>358</sup> In this trademark infringement action, two Florida residents set up a consulting business to help other businesses market products on the web. As part of their marketing effort, they used a web site. The web site contained the allegedly infringing trademark and a local Orlando, Florida, telephone number as well as a link by which customers could e-mail the two defendants with questions.

In finding that Cybersell Florida had not purposefully availed itself of the laws of Arizona, the Ninth Circuit found it significant that there was no evidence adduced which showed any contacts with Arizona residents, other than the plaintiffs.<sup>359</sup> Although Cybersell Florida's web site

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356. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).

357. *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

358. *Cybersell, Inc.*, 130 F.3d at 419.

359. *See id.*

was accessible in Arizona, the defendants closed no deals, signed no contracts, received no telephone calls, sent no e-mail messages, and earned no income from Arizona. As a result, the court found that the defendants had made no effort to market to Arizona. Yet these factors are quite suspect when determining whether the defendants had "purposefully availed" themselves of the benefits and protections of the laws of Arizona. Many of these contacts, such as a telephone call or e-mail from Arizona by a prospective client, would have exclusively been within the control of a prospective client who might have contacted the defendants. These type of activities seem to be the type of unilateral activities which the court in *Hanson v. Denckla*<sup>360</sup> decided could not incur jurisdiction.

Compare that result with the results in *Maritz*.<sup>361</sup> In that trademark infringement action, the court found that the California defendant had "purposefully availed" itself of the benefits and privileges of the laws of Missouri.<sup>362</sup> The source of the trademark infringement was the defendant's web site. CyberGold had no businesses, offices, or employees in Missouri, and the only connection with the state was the fact that its web site was accessible there.<sup>363</sup> While the defendants did not have a toll-free number, they did have a link by which subscribers could contact the defendants and get more information about its soon-to-be-operational service.<sup>364</sup> The court also found it significant that there were 12,000 persons in Missouri with Internet access, and that Internet users from Missouri had accessed the defendant's web site 131 times since it became operational.<sup>365</sup> In its opinion, the court emphasized the durable nature of an Internet advertisement, and how comparisons to traditional forms of media were less than satisfactory.<sup>366</sup>

When these two cases are boiled down to their essentials, it appears that the different results were determined by whether anyone from the forum state answered the web advertisement. If the defendants in *Cybersell* had indeed received any inquiries regarding its business from Arizona, that case may have been resolved entirely differently. More perplexing is the status of unilateral contacts. The Supreme Court made it clear that the plaintiff or a third party, by his actions, cannot render the defendant liable to suit.<sup>367</sup> Rather it must be the activities of the defendant which

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360. 357 U.S. 235, 253 (1958).

361. *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

362. *Id.* at 1334.

363. *Id.* at 1330.

364. *Id.* at 1329.

365. *See id.* at 1331.

366. *See id.* at 1332.

367. *Hanson v. Deckela*, 357 U.S. 235, 253 (1958).

makes the contact with the forum. In each of these cases, the court's inquiry actually revolved around who answered the defendant's advertisement and what the defendant did with that information. The courts that have found the exercise of jurisdiction based on web contacts seem to emphasize the communicative power of the medium more so than those that do not.<sup>368</sup>

Some commentators have suggested that cases such as *Inset*, *Maritz*, and *Granite Gate* are an aberration, well outside the boundaries of established personal jurisdiction practice.<sup>369</sup> But upon closer examination, they are consistent with the ever-developing laws regarding personal jurisdiction and the Internet. In these cases, one can see that the defendants were seeking to serve a national or even international clientele. For example, while the court in *Inset* may not have made all the possible inquiries into the electronic contacts with the forum state (e.g., how many Connecticut citizens were accessing the Massachusetts company's web site, did the defendant have any Connecticut customers, etc.), the defendant was looking to sell products to a larger audience than simply Massachusetts, as evidenced by the toll-free number. The same held true in the *Maritz* decision. In that case, the defendant's business was to provide access to a distributed message database—a service that could be provided to and purchased by anyone in the world. Similarly, in *Granite Gate*, the defendants sought to offer a betting service to a wide audience. This service was not confined by the limitations of a state's or country's boundaries. As the court found, the defendants were seeking to market their service to “[i]nternational markets.”<sup>370</sup>

But in these cases, as in all personal jurisdiction analyses, this was not the end of the due process inquiry. Courts must also weigh the reasonableness of exercising jurisdiction. The *Inset* decision is a good example of a case in which the minimum contacts analysis and the reasonable-

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368. Some courts placed strong emphasis on how many users from the forum in question accessed the defendant's web site. *See id.* at 1333 (finding Missouri users had accessed defendant's web site 131 times); *see also* State v. Granite Gate Resorts, Inc., 568 N.W.2d 715, 718 (Minn. Ct. App. 1997) (finding at least 248 Minnesota computers accessed defendant's web site during a two-week period and that computers in Minnesota were among the most frequent users of defendant's service). Other courts placed strong emphasis on the pervasiveness and durability of the medium. *See Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164-65 (D.Conn. 1996) (finding that once an Internet advertisement is posted, it can be accessed again and again by potential customers).

369. *See* David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. MARSHALL J. COMPUTER & INFO. L. 819, 844-52 (1997) (finding that the court should not have exercised jurisdiction in *Inset* and *Maritz* because the web sites were “passive”).

370. *Granite Gate*, 568 N.W.2d at 720.

ness inquiry both strongly support the exercise of personal jurisdiction. In its due process analysis, the *Inset* court properly noted that the minimum requirements of "fair play and substantial justice" could still work to defeat the reasonable exercise of jurisdiction even if there were "minimum contacts" with the forum state.<sup>371</sup> As the distance between Connecticut and Massachusetts was minimal, the court found that the finding of minimum contacts was in line with "notions of fair play and substantial justice."<sup>372</sup> But, consider a case in which the minimum contact factors pointed to the reasonable exercise of jurisdiction and the "fair play and substantial justice" factors did not. What would happen then? As suggested in the next section, the Internet is raising these questions with increasing frequency.

### B. *The Shift to Reasonableness*

To understand the push towards reasonableness is to understand the underlying forces driving this sea change in personal jurisdiction analysis. Many individuals will be making their first online purchases over the next few years. With the Internet, individuals can communicate and conduct commerce with people they have never seen and in places they have never been. And unlike a fleeting advertisement in a trade publication that happens to circulate in a state or country, this advertisement will run twenty-four hours a day, seven days a week. Paradoxically, courts are being asked to consider whether defendants can be everywhere and nowhere at once. Can a court reasonably acknowledge that a persistent, continuous advertising campaign is being run in their state or country by a foreign entity, yet deny its own residents the power to protect themselves in their own court system? While these questions may sound novel, they are not. In fact, the only new fact in this equation is the medium itself.

Courts across the country and around the world have both addressed and successfully surmounted these same situations numerous times. The only real difference is that virtually every Internet case presents a unique case near the outermost borders of the due process analysis. As states and countries become more comfortable with the Internet, these sovereign entities will increasingly find that electronic contacts meet the re-

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371. *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D.Conn. 1996) (finding advertisement could reach at least 10,000 users in Connecticut alone and that an Internet advertisements could be accessed over and over by potential customers); see also *Maritz*, 947 F. Supp. at 1332 (finding that there were 12,000 Internet users alone in Missouri and that an Internet advertisement does not rely on any other forms of media for its effectiveness).

372. *Inset*, 937 F. Supp at 164.

quirement for minimum contacts. Without adequate protections, however, defendants will most certainly suffer from this rapid expansion of the definition of minimum contacts. However, the due process analysis has provided the defendant protection under this exact scenario. The second half of the due process analysis, whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice," provides courts with the power to protect a defendant in cases where he or she may have the requisite minimum contacts, but the exercise of jurisdiction would not be reasonable.

Recently, a United States District Court case was decided in the Northern District of California which underscores this exact approach to the personal jurisdiction analysis. In *Expert Pages v. Buckalew*,<sup>373</sup> the plaintiff ("Expert Pages"), a California corporation, brought an action in the United States District Court for the Northern District of California, against the defendant Jason Buckalew ("Buckalew"), a Virginia resident, for copyright infringement, unfair trade practices, breach of contract, trespass, and misappropriation.<sup>374</sup> Expert Pages was in the business of advertising litigation-related services on its web site.<sup>375</sup> On this site, consultants and expert witnesses paid the plaintiff a fee to be listed on the web site. In February 1997, Expert pages registered a copyright for its database.<sup>376</sup> The defendant, whom the court described as a "young adult,"<sup>377</sup> created a web site that provided similar information to that included on Expert Pages' site.<sup>378</sup> The complaint alleged that Buckalew violated Expert Pages' copyright by making an unauthorized copy of the website for the purpose of sending e-mail messages to the persons who advertised on the site.<sup>379</sup> The e-mail messages allegedly disparaged Expert Pages and offered Buckalew's service as an alternative.<sup>380</sup> The defendant filed a motion to dismiss for lack of personal jurisdiction.<sup>381</sup> In its analysis, the court found that Buckalew had the requisite minimum contacts with California, but that the factors of "reasonableness" militated against exercising jurisdiction over Buckalew and the motion to dismiss was granted.<sup>382</sup>

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373. *Expert Pages v. Buckalew*, 1997 WL 488011 (N.D.Cal. Aug. 6, 1997).

374. *See id.* at \*1.

375. *See id.*

376. *See id.*

377. *Id.*

378. *See id.*

379. *See id.*

380. *See id.*

381. *See id.*

382. *See id.* at \*5.



In its analysis, the court found that Buckalew had minimum contacts with California because his actions were calculated to cause injury to a California company.<sup>383</sup> Under a *Calder*<sup>384</sup>-type analysis, the court found that Buckalew had directed his actions at the State,<sup>385</sup> but, the court also found that the exercise of jurisdiction must accord with the reasonableness factors inherent in a due process analysis.<sup>386</sup> And these factors, weighted equally, did not favor the exercise of jurisdiction.

First, the court found that Buckalew had purposefully availed himself of the benefits and protections of California's laws, but only to "a very small extent."<sup>387</sup> However, the court found that the burden on Buckalew to defend in California against such a suit would be very high.<sup>388</sup> The court found that while Buckalew did have minimum contacts with California, those contacts were "barely greater than the constitutional threshold."<sup>389</sup> Moreover, the exercise of jurisdiction in this case would likely be determinative, because either party would face a substantial burden to litigate outside of its home jurisdiction.<sup>390</sup> As a result, the court found that Expert Pages, as a successful web business, was more capable of prosecuting an action in Virginia than Buckalew would be in California.<sup>391</sup> The court found that if the court would exercise jurisdiction, Buckalew would be "deprived of an opportunity to defend himself."<sup>392</sup> As Buckalew's contact with California was fairly limited, the court held that the exercise of jurisdiction would be unreasonable and granted his motion to dismiss.<sup>393</sup>

This case, once again, raises the specter of that age-old debate in personal jurisdiction analysis regarding the power of the individual to choose where he is amenable to suit (purposefulness) and the forum's

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383. *See id.* at \*2.

384. *Cader v. Jones*, 465 U.S. 783 (1984).

385. *Expert Pages*, 1997 WL 488011 at \*3.

386. *See id.* at \*2. These seven factors for evaluating reasonableness included: "1) the extent of the defendant's purposeful interjection into the forum state's affairs; 2) the burden on the defendant; 3) conflicts of law between the forum and defendant's home jurisdiction; 4) the forum's interest in adjudicating the dispute; 5) the most efficient judicial resolution of the dispute; 6) the plaintiff's interest in convenient and effective relief; and 7) the existence of an alternative forum." *Id.* (citing *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991)).

387. *Expert Pages*, 1997 WL 488011 at \*3.

388. *See id.* at \*4.

389. *Id.*

390. *See id.*

391. *See id.*

392. *Id.* at \*5.

393. *See id.*

power to protect its residents (reasonableness). And, as this case demonstrates, the winner still remains to be determined.

#### PART VI: SERVING THE LOCAL MARKET

Based on the aforementioned discussion, it may now appear that advertising on the Internet makes a business or individual amenable to service anywhere that their advertisement may reach. This assumption is simply untrue.

Compare a case like *Bensusan*<sup>394</sup> with a case like *Zippo*.<sup>395</sup> Both are trademark infringement suits. In *Bensusan*, the defendant King ran an entirely local operation in Columbia, Missouri, albeit over the Internet.<sup>396</sup> Although the court found that King published a web site which advertised his jazz club and that web site was accessible in New York, the defendant had not specifically targeted New York for business.<sup>397</sup> While the district court relied on the New York long-arm statute for much of its analysis, it did apply the due process analysis.<sup>398</sup> The court found that King had not purposefully availed himself of the benefits and protections of operating a business in New York.<sup>399</sup> This was evident from numerous facts both on and off the web site. First, the web site contained a disclaimer that King's club should not be confused with "The Blue Note" in New York.<sup>400</sup> Next, the web site only had a local Missouri phone number.<sup>401</sup> Furthermore, King had a ticketing policy which was targeted at local residents.<sup>402</sup> If a customer wanted to purchase tickets to a show at King's club, he would have to come to the club himself because King did not mail tickets out.<sup>403</sup> Finally, the court found that 99 percent of King's revenue was derived from local residents of Columbia, Missouri.<sup>404</sup> As a result, King was able to demonstrate, through his web site and his administrative policies, his deliberate and unambiguous attempt to market his services only to local residents.<sup>405</sup>

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394. See *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

395. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

396. See *Bensusan*, 937 F. Supp at 300.

397. See *id.* at 299.

398. See *id.* at 300-1.

399. See *id.* at 301.

400. See *id.* at 297-98.

401. See *id.* at 299.

402. See *id.*

403. See *id.*

404. See *id.* at 300.

405. See *id.* at 299.

In *Zippo*, on the other hand, Dot Com clearly attempted to market its service over the Internet using its web site. The service was an entirely web-based service that reached out across the country and quite possibly around the world.<sup>406</sup> Dot Com demonstrated its willingness to take subscribers wherever they were to be found.<sup>407</sup> Although the court used a “something more” analysis in its opinion, finding that Dot Com had 3,000 customers in Pennsylvania and that it had contracted with three Pennsylvania Internet Service Providers, there was little doubt that it was a business relying on interstate commerce.

As these cases illustrate, it is quite possible for an individual to run a local business, even if its web site is accessible in almost every jurisdiction around the world. This fact is not complicated in the least bit by an “interactive” web site. Even if the site contains an interactive link such as that described as the middle group of the three category models proposed in *Zippo*,<sup>408</sup> such a link does not immediately confer worldwide jurisdiction.

Interactive links are the one true danger of this medium. However, the importance of an automatic link cannot be *underemphasized* enough. In these cases, courts should ask questions that give determinative answers: what is the cause of action alleged and whom did the defendant seek to serve or reach with its web site or Internet contact? Many times the answer is inherent in the nature of the business advertised.

In *Maritz* and *Zippo*, the business was primarily dependent upon the web site for advertising a nationwide or worldwide service. The interactive web site was used to automatically solicit and add customers to its service. The interactive nature of the web site did not make these services national or international—it was the nature of the service offered. Compare this result with cases such as *Bensusan* and *Cybersell*. In each of these cases, an interactive link adding the user’s name to a mailing list may have tilted the court towards exercising jurisdiction, but it probably would not have been determinative. The reason is that these were inherently local services which could have only been provided locally. The presence of the Internet did not change that character one bit.

It is also noteworthy to consider what might have happened in some of the cases if the facts were changed slightly. In the *Cybersell* case, it is easy to imagine the defendants being held amenable to service in Arizona with a slight change of facts. Suppose *Cybersell* Florida put a toll-

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406. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1121 (W.D.Pa. 1997).

407. See *id.* Dot Com did not place any restrictions on who could register at the site.

408. See *id.* at 1124.

free number on their web site. Furthermore, suppose the defendants had been in business a little longer and had begun to receive calls and accept business from Arizona residents. At that point, it would be hard to argue that the defendants had not indeed availed themselves of the privilege of doing business in Arizona. Yet, the only difference would have been that Arizona residents had begun to respond to the advertisement which had been accessible to them. The defendant's would not have changed their marketing strategy. Instead, they would have been in business long enough to have had such a business opportunity. Similarly, in *Hearst v. Goldberger*,<sup>409</sup> the United States District Court for the Southern District of New York noted ironically that if Hearst had just waited until the defendant had begun to conduct business in the State of New York, the court would have likely been able to exercise jurisdiction based on the defendant's web site.<sup>410</sup>

Based on the personal jurisdiction cases which have been decided by United States courts to date, some patterns appear to be emerging with regard to the Internet. These decisions point to the likely conclusion that if an individual advertises a service on the Internet, that individual should have a fairly good idea of the market he seeks to serve—either local or national. If an individual seeks to serve a local market, that individual's web site and policies should reflect that decision. While a third party or a potential plaintiff may not unilaterally cause an individual to be amenable to jurisdiction in a forum, those activities may be highly indicative. If an individual starts out serving a local market and then begins to receive offers to do business in another jurisdiction, the individual should take care that his activities are lawful in the other jurisdiction. Ancillary spillover into the nationwide or worldwide market might well lead to the exercise of national or even international personal jurisdiction, regardless of deliberate intent.

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409. *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997).

410. *See id.* at \*11. In that case the court held that it could not exercise jurisdiction over the defendant who had placed a web site advertising law office infrastructure services using the domain name "ESQUIRE.COM" in violation of the plaintiff's trademark. The defendant resided in New Jersey and worked in Philadelphia. The defendant's service was not yet up and running at the time of the suit. The web site just advertised a soon-to-be-offered service. The court found that it could not exercise jurisdiction under any of the New York long-arm statutes which included transacting business in the state of New York. The court noted, "It appears that Hearst has placed itself in a "Catch 22" situation. If Hearst had waited until Goldberger contracted to sell his attorney support services to New Yorkers, long-arm jurisdiction likely would have been appropriate. . . . But if Hearst had waited, it would have been faced with laches-type defenses and possible greater harm to its ESQUIRE trademark." *Id.* (citation omitted).

## PART VII: CONCLUSION

With all the changes that the multifaceted Internet has brought, it still has not altered the standards or definitions of the personal jurisdiction analysis. The traditional model of personal jurisdiction extending from *International Shoe* is still intact. Those precedents are still good law, and should successfully guide courts well into the next century. On the other hand, the Internet is pushing the envelope with regard to the outermost boundaries of personal jurisdiction. More specifically, the Internet is challenging an individual's ability to maintain careful control over where his activities may render him amenable to personal jurisdiction. With increasing frequency, courts are being faced with factual situations where a defendant's contacts with the forum state meet the requirements of "minimum contacts," yet do not comport with traditional notions of "fair play and substantial justice" inherent in the due process analysis (or the international standard of reasonableness). Consequently, cases involving the Internet will increase pressure on this second prong of the due process analysis and courts should use this prong to successfully protect defendants.

*Michael S. Rothman*