PERSONAL JURISDICTION AND THE INTERNET: "SHOEHORNING" CYBERSPACE INTO *INTERNATIONAL SHOE*

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The bigger the real-life problem, the greater the tendency for the disciplined to retreat into a reassuring fantasy-land of abstract theory and technical manipulation.[1]

I. INTRODUCTION

As the twentieth century comes to a close, most of us will reflect upon the many changes which have impacted our lives and the way we do business. One surely to come to mind is the technological boon of the Internet. Although many will admit to not truly understanding this impressive new communication system, others have quickly perceived the monumental benefit available through the use of the Internet.

Personal and commercial use of the Internet is at an all time high.[2] Additionally, sales and business transactions over the Internet are becoming the rule and not the exception.[3] This explosion of use has created a large number of

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[1]Tom Naylor, *Famous Quotes*, (visited April 5, 1998) <http://www.geocites.com /Athens/7186/FRAMES.HTM>. This quote was found while the author was searching the Internet for general information and it seemed an appropriate explanation for most of our fears regarding the Internet and Internet related issues.

[2]*See generally* Christopher W. Meyer, Note, *World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?*, 54 WASH. & LEE L. REV. 1269, 1334-35 (discussing the expanding use of the Internet and the effects of advertising and personal jurisdiction in commercial settings).

[3]*See* G. Bruce Knecht, *Reading the Market: How Wall Street Whiz Found a Niche Selling Books on the Internet*, WALL ST. J., May 16, 1996, at A1 (suggesting that in 1996 alone

formidable legal issues.[4] As Internet based suits become prevalent, attorneys will naturally turn to long-standing legal doctrines to assert necessary defenses.[5] The great debate today is how to apply the fifty-year old doctrine of personal jurisdiction to the Internet.[6]

The Internet has experienced extraordinary growth in the last few years. In the early 1980's there were less than 300 computers linked to the Internet, by 1989 the number was approximately 90,000 computers and by 1993 the number was over 1,000,000.[7] Today there are over 9,400,000 host computers[8] world wide. When those users connecting via modem[9] are factored in, the number is approximately 40 million people world wide.[10] With the total number of operators expecting to rise to 200 million by the year 1999,[11] a determination of personal jurisdiction as applied to the Internet will be a significant de-

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there were over $324 million in sales on the Internet); *see also* Mary Kathleen Flynn, *A Tiny Winery's Giant Reach*, U.S. NEWS & WORLD REP., Oct. 30, 1995, at 84 (discussing an experts prediction that sales on the Internet will reach $6.9 billion by the year 2000).

[4]*See* Leif Swedlow, Note, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337, 337-39 (1997) (commenting briefly on various Internet related lawsuits including: defamation, copyright infringement, trade secret and trademark violations, advertising and certain criminal acts).

[5]*See* Lori E. Eisenschmidt and Michael Rustad, *The Commercial Law of Internet Security*, 10 HIGH TECH. L.J. 213, 260 (1995) (addressing how basic legal doctrines will be utilized as defenses in Internet lawsuits). *But see* Sean M. Flower, Note, *When Does Internet Activity Establish the Minimum Contact Necessary to Confer Personal Jurisdiction?*, 62 MO. L. REV. 845, 851 (1997) (discussing the conflicting commentary regarding whether a defense of lack of personal jurisdiction may be asserted in an Internet setting).

[6]*See* Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH., 341-42 (1996) (discussing how courts and commentators are struggling with the implications of personal jurisdiction and the Internet).

[7]*See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

[8]*See infra* note 18.

[9]"A modem (a contraction of 'modulator' and 'demodulator') is a device that translates digital information into a signal for transmission over a telephone line ('modulation') and translates a signal received over a telephone line into digital information ('demodulation')." Shea v. Reno, 930 F. Supp. 916, 926 n.4 (S.D.N.Y. 1996).

[10]*See ACLU*, 929 F. Supp. at 831.

[11]*See id.*

cision. Eventually when the Supreme Court addresses this issue, the result will have notable effects on the continued development and utilization of the Internet.[12]

Courts have expanded and contracted traditional personal jurisdictional analysis to evolve with technological changes that have created a more mobile society.[13] Prior rigid legal boundaries gave way to trains, planes and automobiles.[14] Frontiers were further diminished by telephones and fax machines causing the legal community to react again.[15] Therefore, the new important question becomes how should the doctrines of personal jurisdiction change to

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[12]*See* Robert A. Bourque and Kerry L. Konrad, *The Tangled Web: First Wave of Internet Cases Provides More Questions Than Answers*, 8 NO. 11 J. PROPRIETARY RTS. 2 (1996). These commentators noted that:

> Until the courts reach consensus on questions of personal jurisdiction, no Web site operator can be certain that it will not be subject to suit in any jurisdiction where at least one Internet user can access its site. For the less than deep-pocketed Web site operator, the risk of being forced to stand trial at any time in some remote jurisdiction may be sufficient to overcome the perceived benefits of Internet publication and discourage its use of the Web.

Id.

[13]*See* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 341-43 (1990).

[14]*See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356 (1927) (permitting the ease of service of process when the defendant is a non-resident and the claim arises from an accident with a motor vehicle). Discussing the effects of technological changes on personal jurisdictional analysis, Professor Kogan noted:

> [T]he conceptual structure of the world of classical legal thought began to crumble with the acceleration of developments in technology and communications at the end of the nineteenth and beginning of the twentieth centuries. By the early twentieth century, a legal consciousness that attempted to understand interstate relations in purely physicalized, boundary-drawing terms no longer proved adequate to make sense of an increasingly mobile society.

Kogan, *supra* note 13, at 343.

[15]*See* Digi-Tel Holdings, Inc. v. Proteq Telecommunications, Ltd., 89 F.3d 519, 524 (8th Cir. 1996) (addressing certain cellular telephone calls in determining whether personal jurisdiction could be exercised); Bell Paper Box, Inc. v. U.S. Kids, Inc., 22 F.3d 816, 818 (8th Cir. 1994) (finding that fax machine contacts can be taken into consideration with all other contacts to determine if the defendant is amenable to the jurisdiction of the forum).

accommodate personal and commercial transactions on the Internet? Jurisdictional analysis that seemed suitable for an advancing and mobile society now threatens to attain virtually limitless applications of a courts power over individuals who will never enter the foreign forum.[16]

The last two years have produced several cases attempting to comprehend and incorporate Internet cases into personal jurisdictional analysis. However, the mere fact that an Internet communication or contact was found did not necessarily affect the outcome of the jurisdiction issue. In other words, many courts analyzed Internet contacts that would not affect the overall jurisdictional conclusion. Nonetheless, the methods of interpreting this issue have varied tremendously from court to court. This Comment will attempt to digest some recent cases involving Internet communications to demonstrate how traditional personal jurisdictional analysis accounted for such contacts. Further, this Comment will remark on the judicial quagmire created because certain pure Internet cases have produced conflicting results. Section II begins with an elementary review of the Internet, the World Wide Web and transactions occurring through this medium. Next, section III will outline the history and development of the traditional and modern doctrines of personal jurisdiction. Section IV will survey some of the recent decisions where the issue of personal jurisdiction on the Internet has been challenged. Finally, section V of this Comment reflects the author's analysis and thoughts regarding a possible solution for evaluating personal jurisdiction and Internet contacts.

II. THE NATURE OF THE INTERNET

A. BASICS FOR THE TECHNOLOGICALLY IMPAIRED

Called the "network of networks", the Internet is defined as a system of computers "hooked to national or international high-capacity 'backbone' systems."[17] The Internet consists of nine million host[18] computers in over ninety

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[16]*See, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (finding that mere Internet advertising activities are considered directed to all states and give rise to sufficient minimum contacts to exercise jurisdiction). The author wishes to remind the readers that the phrase "foreign forum" suggests a forum different from the one in which a defendant resides within the United States and not necessarily an internationally foreign forum.

[17]Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, ¶ 7 (1997) (visited Jan. 24, 1998) <http://www.student.virginia.edu/~vjolt/vol1/BURK.htm> (describing the nature of the Internet).

[18]An Internet host is a computer system that (1) has a unique numerical address that no

countries linked by more than fifty thousand connected computer networks.[19] A basic network is a group of computers linked to each other for the purposes of sending and retrieving messages.[20] The Internet is formed by linking this network to another closed network which may be connected to a third network with access to the Internet.[21] In the end, the Internet is formed by grouping together many closed and open networks which contain all the information and data eventually found on the Internet.[22]

Originally designed as an experimental project of the Department of Defense's Advanced Research Projects Administration,[23] the Internet evolved into a decentralized, self-monitoring system.[24] The network operates entirely independent of human involvement.[25] As the Internet developed, additional research firms, universities and government agencies connected with it, enabling the rapid expansion of overlapping networks.[26] Since the Internet is controlled by no one[27] and monitored by a voluntary few, it is an entity and form of

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other computer uses, and (2) can both originate and receive information in the format the network requires. *See* BRYAN PFAFFENBERGER, WORLD WIDE WEB BIBLE 36 (2d ed. 1996).

[19]*See* Shea v. Reno, 930 F. Supp. 916, 925 (S.D.N.Y. 1996).

[20]*See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996); *see also* Burk, *supra* note 17, at ¶ ¶ 7-8.

[21]*See Shea*, 930 F. Supp. at 926.

[22]*See id.* at 926.

[23]Known by the acronym "ARPA," this military defense project was intended to provide researchers with direct access to supercomputers at a few key laboratories and to facilitate the reliable transmission of vital communications. *See id.* at 925. As the "ARPANET" developed it came to be called the "DARPA Internet," and then finally just the Internet. *See ACLU*, 929 F. Supp. at 831.

[24]*See id.* at 831. The motive behind a decentralized system was to allow vital research and communications to continue transmitting even if the network was damaged, in the event of a war. *See id.* at 831-32.

[25]*See id.* at 832.

[26]*See Shea*, 930 F. Supp. at 926. The ARPANet, as originally developed, ceased operations in 1990 and the current Internet operates completely independent of any control. *See id.*

[27]Since the computers are owned by various governmental, public institutions and nonprofit organizations, "the resulting whole is a decentralized, global medium of communications—or 'cyberspace'" which becomes an international link for communications and infor-

communication that stands in a class of its own.[28]

Individuals can "surf the net"[29] in a variety of ways. Many obtain access to the Internet through an educational institution or employer directly linked to the Internet.[30] Others rely on Internet service providers[31] or commercial on-line services.[32] Ultimately, even those who cannot make use of these conventional

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mation exchange. *ACLU*, 929 F. Supp. at 831.

[28]*See generally* Darren L. McCarty, Note, *Internet Contacts and Forum Notice: A Formula For Personal Jurisdiction*, 39 WM. & MARY L. REV. 557, 574-75 (1998) (noting how the combination of this vast communicative forum with low levels of governance produces a frontier of newly emerging legal questions). "The Internet is a cooperative venture, owned by no one, but regulated by several volunteer agencies." MTV Networks v. Curry, 867 F. Supp. 202, 203 n.1 (S.D.N.Y. 1994).

The Internet stands alone because it is not subjected to the same type of Federal regulation as its sister communication systems: radio, television and telephone. Radio has long since endured serious regulation by federal and local governments alike. *See, e.g.*, National Broad. Co. v. United States, 319 U.S. 190, 226 (1943) (finding that the Federal Communications Commission was well within its statutory and constitutional rights to regulate radio stations as it sees fit for the public welfare). Likewise, television, especially with the advent of cable, has experienced enormous regulation by the FCC. An example is the Cable Television Consumer Protection and Competition Act of 1992 which was the subject of the suit in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 117 S. Ct. 1174 (1997). Finally, the telephone is not only regulated by the FCC but is also regulated by local commissions in every state. *See State Telephone Regulation Report*, (visited Apr. 15, 1998) <http://www.telecommunications.com/page/strr.htm>.

[29]"Surfing the net" is the jargon for when individuals are searching for information and other materials on both the Internet and the World Wide Web.

[30]*See ACLU*, 929 F. Supp. at 832. Physical access to the Internet may occur in two ways: (1) an individual will use a computer tied into a network which is linked into the Internet; or (2) a "personal computer" through the use of a modem can tie into a larger network or service provider. *See id.*

[31]Internet service providers, often commercial entities charging access fees, provide modem access to computers linked directly to the Internet. *See* Shea v. Reno, 930 F. Supp. 916, 926 (S.D.N.Y. 1996); Robin Frost, *What Does it Cost?*, WALL ST. J., Dec. 9, 1996, at R10.

[32]Commercial on-line services provide access to both the Internet and materials on the services' own proprietary networks. *See Shea*, 930 F. Supp. at 926. Some well-known commercial on-line services include America Online, CompuServe, and Prodigy. *See id.*; PFAFFENBERGER, *supra* note 18, at 100-05. The nation's largest commercial on-line service, America Online, has become so popular that it can only accommodate 3.5% of its subscribers at one time. *See* David S. Hilzenrath, *At This Rate, They'll Be Swamped*, WASH. POST, Jan. 24, 1997 at D1. America Online finally faced serious problems, in the form of a class

methods, may utilize community networks,[33] local libraries[34] and "computer coffee shops"[35] to gain access.

The Internet is comprised of two general types of services: proactive and reactive.[36] Proactive services include e-mail,[37] and the Usenet news groups[38] while reactive services include "Gopher,"[39] "File Transfer Protocol" ("FTP"),[40] and the World Wide Web.[41] The primary difference between pro-

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action lawsuit, after many subscribers sued because they were unable to log-on after the service provider changed to one monthly rate with unlimited access. *See AOL Class Action Suit Goes On* (visited Feb. 20, 1998) <http://www.news.com/News/Item/0,4,18815,00.html> (discussing the causes and outcomes of the nationwide class action suit against AOL).

[33]Community networks called "free-nets" have been established in many communities to allow citizens to access the Internet as well as retrieve local-oriented information. *See ACLU*, 929 F. Supp at 833.

[34]Often libraries will offer modem access or direct-line computers to its patrons as part of its ordinary services. *See id.* at 832.

[35]New storefront Internet coffee shops offer patrons access to the Internet for a nominal fee. *See id.*; *see also* Marla Matzer, *The Cutting Edge/Cyberculture Cafe Society*, L.A. TIMES, Dec. 29, 1997, at D3.

[36]*See* Dennis F. Hernandez and David May, *Personal Jurisdiction and the Net* (visited Mar. 20, 1998) <http://www.gse.ucla.edu/iclp/dhdm.html> (posting an article from the UCLA Online Institute for Cyberspace Law and Policy reprinted with permission of the *L.A. Daily Journal*) (discussing the methods and manners of operation of different services on the Internet, including the diverse ways users locate and obtain information).

[37]Stipulated as one of "the most basic services on the Internet," e-mail allows one user to send communications and information to another. *Id.* E-mail is far more efficient then regular mail because it permits the user to send messages instantaneously and to a large group of users with little difficulty. *See generally* Todd Flaming, *An Introduction to the Internet*, 83 ILL. B.J. 311 (1995) (explaining basic principles of the Internet and how it can help with office management).

[38]Usenet news groups are an assemblage of e-mail users, with common interests, who "post" messages to a common forum or "bulletin board." *See* Hernandez & May, *supra* note 36.

[39]"Gopher" is a server system designed to retrieve information and data requested by the user. The server automatically responds to any and all requests. *See WWW FAQ: What are WWW, Hypertext and Hypermedia?* (visited Mar. 10, 1998) <http://www.boutell.com/faq/oldfaq/htext.htm>.

[40]An "FTP" server is similar to a "gopher" server and reacts after an accessor "reaches out" to the server. *See* Hernandez & May, *supra* note 34. It permits the transfer of very

active and reactive services is the manner in which a user will obtain information.[42] Proactive services allow users to both retrieve and receive messages and information, whereas reactive services only retrieve information after the user makes a request.[43]

Through these "services" the Internet is effectively transformed into the "information superhighway."[44] This categorization is appropriate because the Internet is essentially a network of connections that link individual computers via telephone lines and modems.[45] Additionally, connections between computers are virtual two-lane roads because information travels in both directions, in and out of the computer.[46]

Once computers are linked they must communicate in some way. Although several different languages exist for computers, computer designers standardized communication with one language specifically for the Internet.[47] A com-

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large amounts of information between two computers. *See Anonymous FTP* (visited Mar. 10, 1998) <http://hoohoo.ncsa.uiuc.edu/ftp/faq.html>; *see also* Swedlow, *supra* note 4, at 350-52.

[41]A "powerful global information system" which exists as a part of the Internet. *See About the World Wide Web* (visited Jan. 9, 1998) <http://www.w3.org/pub/WWW/WWW> (describing the Web's origin and history). As a component of the Internet, the World Wide Web, or Web, is used as a "method of organizing information distributed across the Internet." *See* Henry M. Cooper, *Stetson Law - Student Paper: Jurisdictional Trends in Cyberspace*, (visited Apr. 22, 1998) <http://www.law.stetson.edu/courses/hcooper.htm>.

[42]*See* Hernandez & May, *supra* note 36.

[43]*See id.* A reactive Web server is defined as: "a program that accepts requests for information framed according to the HyperText Transport Protocol (HTTP). The server processes these requests and sends the requested document." *Id.* (quoting QUE'S COMPUTER AND INTERNET DICTIONARY 554 (6th ed. 1995)).

[44]*See* Swedlow, *supra* note 4, at 348-49 (indicating how Vice-President Gore's use of the term "Information Superhighway" triggered its quick rise to household status, although a few computer experts had been using the phrase as early as 1985).

[45]*See id.* Only one computer in a network need have a modem because once that computer is connected to a server the entire network is then connected. *See id.*; *see also* Flaming, *supra* note 37, at 312.

[46]*See* Swedlow, *supra* note 4, at 348-49.

[47]*See id.* The language used is called Transfer Control Protocol/Internet Protocol and "it consolidates the input and output language of several types of networks in a computer's version of a concordant translating dictionary." *Id.*

puter using this "universal language" will adapt to any interconnected network with which it connects.[48] Since these connections allow a tremendous amount of information to exchange hands, the Internet almost instantaneously became extremely user-friendly, and a wave of Internet enthusiasts ascended into "cyberspace."[49]

B. THE WORLD WIDE WEB

Demanded by technological zealots, the World Wide Web ("Web") area of the Internet developed and eventually exploded in popularity.[50] The Web is the most well-known reactive service on the Internet.[51] Created as a platform for global online storage of information,[52] the Web permits users to locate and access information on the Internet with little difficulty.[53] Notwithstanding the elusive technical nature of the Internet,[54] the Web has developed into a vast display of communicative tools and hyperlinks[55] combined in a friendly graphi-

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[48]*See id.*

[49]The term cyberspace was first used in the early 1980's by William Gibson who wrote the award-winning science fiction novel called *Neuromancer*. *See* EDWARD A. CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW 1-3 (MIT Press 1994). Although cyberspace in the novel was a "consensual hallucination" that appeared as "real" or physical space, with the advent of the Internet, the term "caught on as a short hand way to describe [the Internet's] matrix of interconnected computers." *Id.*

[50]*See* PFAFFENBERGER, *supra* note 18, at 53-63; *see also About the World Wide Web*, *supra* note 39.

[51]*See* ACLU v. Reno, 929 F. Supp. 824, 836 (E.D. Pa. 1996).

[52]*See id.* Information stored on the Web may be retrieved in a variety of forms including: text, still images, sounds and video. *See id.* The Web "was originally developed to allow information sharing within internationally dispersed teams and the dissemination of information by support groups. Originally aimed at the High Energy Physics community, it has spread to other areas and attracted much interest in user support, resource discovery and collaborative work areas." *About the World Wide Web*, *supra* note 41.

[53]*See* Shea v. Reno, 930 F. Supp. 916, 929 (S.D.N.Y. 1996); *ACLU*, 929 F. Supp. at 837 ("The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information.").

[54]The Web is currently known as "the most advanced information system deployed on the Internet, and embraces within its data model most information in previous networked information systems." *About the World Wide Web*, *supra* note 41.

[55]"Hyperlinks are 'highlighted text or images that, when selected by the user, permit

cal interface.[56] Thus, with the use of a browser[57] and a mouse, the user points to a character or name on the screen which is linked to a Uniform Resource Location ("URL"),[58] and the computer displays the requested data or information.[59]

The relative ease with which a user can "publish" information on the Web is also responsible for the recent explosion in popularity.[60] Virtually anyone

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him to view another, related Web document.'" Cooper, *supra* note 41 (quoting Shea v. Reno, 930 F. Supp. 916, 929 (S.D.N.Y. 1996)).

[56]*See* PFAFFENBERGER, *supra* note 18, at 1. The Web is a means of creating a "geographically distributed pool of information" so that Internet users can make information available to others regardless of the actual physical distance separating them. *Id.*

[57]A browser is a service which "incorporates the web's pointer standard or 'URL' to find a particular web site on the [Web]." Cooper, *supra* note 41. For more information on URL, see *infra* note 58.

[58]A URL is the Web's equivalent of an e-mail address or a domain address for host computers. The URL allows a user to automatically transfer to the requisite host computer where the information or data sought is contained. *See* MTV Networks v. Curry, 867 F. Supp. 202, 204 n.2 (S.D.N.Y. 1994). "Hosts actually possess two fungible addresses: a numeric 'IP' address such as 123.456.123.12, and a alphanumeric 'domain name' such as microsoft.com, with greater mnemonic potential." *Id.* The standardized practice of domain naming by using URL's has contributed to the ease of operation of both the Internet and the Web. *See* Wallace C. Koehler, Jr., *Domain Naming Practices and World Wide Web Search Tactics*, SEARCHER, Feb. 1, 1998, at 54. The commentator discussed the following URL address and how to break down the address:

> In the URL "http://www.access.gpo.gov," for example, ".gov" is the top-level domain (TLD) for the site. The TLD is always the element farthest to the right in the URL prior to any forward slashes (/) representing directories. The URL element farthest to the right represents the largest grouping of resources to which the site in question belongs. To move from right to left across the URL is to move from the most general to the most specific. The ".gpo" element, for example, represents the second-level domain, while the ".access" and ".www" are third and fourth level domains respectively. The "http://" identifies the tool used to access the resource, in this case, hyper-text transfer protocol. Taken altogether, this URL identifies a specific resource located on a specific computer accessed using a specific tool.

Id. For further information see *How To Read a Domain Name*, (visited Apr. 15, 1998) <http://www.paemen.com/lc/internic/Dom/d2.html>.

[59]*See* Swedlow, *supra* note 4, at 351-52.

[60]*See* ACLU v. Reno, 929 F. Supp. 824, 837 (E.D. Pa. 1996). "Publishing on the Web

can set up a web site.[61] Many organizations and commercial businesses now have "home pages"[62] on the Web.[63] Home pages typically include a variety of information and documents relating to the publisher and may contain several hyperlinks[64] to other documents, web sites and computers.[65] Although information and web sites on the Web must be formatted according to the standards and rules of the Web, the techniques are simple enough for individual users to publish their own personal home page.[66] Thus, any person or entity with Internet access and a little ingenuity can become a site operator or user.[67]

Searching for information on the Web has developed at the same rate as the Internet and Web itself. Services known as "search engines"[68] allow users to locate web sites containing specific information or categories of information.[69] For example, if a user is interested in finding out more information regarding

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simply requires that the 'publisher' has a computer connected to the Internet and that the computer is running [World Wide Web] server software." *Id.*

[61]*See* Thomas E. Weber, *How Do I Create My Own Home Page?*, WALL ST. J., Dec. 9, 1996, at R25 (describing a simple guideline for anyone to create their own web site or home page); *see also About the World Wide Web*, *supra* note 41.

[62]A home page is a web site for either an individual or an entity where information is published regarding any topic the publisher sees fit. *See* Weber, *supra* note 61.

[63]*See ACLU*, 929 F. Supp. at 836.

[64]Hyperlinks allow for flexible organization of a web site and permit users to locate information in an efficient manner, even when the information is stored on numerous computers around the globe. *See id.* Links can also exist in the document itself, thus the reader can link from overview documents to more detailed documents or from the table of contents to particular pages. *See id.*

[65]*See id.* at 837.

[66]*See id.*

[67]*See* Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2245-47 (1997). "By creating a page on the [Web], a single individual can essentially publish a document—a letter, a speech, a photograph or even a movie—anywhere and everywhere across the globe." Weber, *supra* note 61.

[68]Examples of more popular search engines include: Yahoo!, Magellan, Altavista, Webcrawler and Lycos. *See ACLU*, 929 F. Supp. at 837.

[69]*See id.*

"personal jurisdiction" she would type in the phrase and the search engine would produce a document with hyperlinks to all of the sites containing information on personal jurisdiction. Then the user would browse the various sites and follow individual links until the desired information was found.[70] Thus, the Internet's ease of operation and technological wizardry have made it a "must have" communication system for both business organizations and individuals.[71]

C. "CYBERSPACE": THE NEW FRONTIER

Organizations and individuals are publishing on the Web at a remarkable rate. Although at first the Internet was only used for research by scientists and defense contractors, the modern Web is utilized for personal information, communication and commercial transactions. [72] The greatest feature of the Web is its ability to bring individuals from remote locations across the world together in a way no other communication device has ever accomplished.[73] However, this ability raises interesting questions regarding a user's presence and the actual location of information. [74]

The Internet challenges antiquated modes of thinking because of its unique ability to frustrate geographical boundaries. Since the exact boundaries of cyberspace are unknown,[75] some commentators have advanced the argument that

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[70]*See id.*

[71]*See* Burk, *supra* note 17, at ¶¶ 12-13 (discussing the increasing use of the Internet and the Web for private and commercial transactions and how such use will continue to increase world-wide as the Internet continues to facilitate the process).

[72]*See* David Thatch, Note and Comment, *Personal Jurisdiction and the World-Wide Web: Bits (and Bytes) of Minimum Contacts*, 23 RUTGERS COMPUTER & TECH. L.J. 143, 153-58 (1997) (discussing the increasing rise of personal and commercial activity on the Internet including: advertising, banking, financial investments, communication and sales).

[73]*See* Burk, *supra* note 17, at ¶ 11 (commenting on how using the Internet allows a user to have a "telepresence" although remaining in remote geographical locations).

[74]*See generally* Zembek, *supra* note 6, 344-46. "The immense reach of the internet clearly has the potential to eviscerate or circumvent any traditional jurisdictional and choice of law limitations." Richard Raysman and Peter Brown, *On-Line Legal Issues*, N.Y. L.J., Feb. 15, 1995, at 30 (1995). "The primary challenge posed by international information exchange is essentially political and is caused by the erosion of political boundaries . . . . This increasing porosity of national boundaries has made it difficult for nations to exercise traditional aspects of sovereignty . . . ." Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 49-50 (1993).

[75]The number of potential users of the Internet is unlimited, thus it is virtually impossi-

cyberspace is another jurisdiction.[76] This argument falls short because despite the fact that cyberspace does not truly exist in the physical world, it can not exist absent the physical world.[77] Furthermore, actions occurring in cyberspace affect real people in real jurisdictions.[78] Thus, notions and paradigms of traditional jurisdiction should be employed in cyberspace.[79]

Traveling through cyberspace allows a user to bounce from computer to computer, location to location and legal jurisdiction to legal jurisdiction without any actual knowledge of where exactly she has been.[80] This occurs because network operations are indifferent to physical location.[81] For example, a user located in New York gains access to the Internet via her home computer and modem, then uses a search engine to gain access to a web site for a company

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ble to define the exact size of cyberspace. *See* CAVAZOS & MORIN, *supra* note 49, at 9.

[76]*See generally* Swedlow, *supra* note 4, at 378-81 (discussing three paradigms of presence on the Internet, specifically the notion that the cyberspace model would create a frontier which would require its own laws and rules and would have its own jurisdiction).

[77]*See* Zembek, *supra* note 6, at 341; *see also* 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, 826 (1997) (noting that "even though personal jurisdiction is a challenge in cyberspace, the Internet is not above the law").

[78]*See, e.g.*, William S. Byassee, Comment, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 199 (1995) ("The interactions between users in cyberspace have effects in real world jurisdictions, and the inhabitants of cyberspace are also citizens of a physical jurisdiction."); Ryan Yagura, Comment, *Does Cyberspace Expand the Boundaries of Personal Jurisdiciton?*, 38 IDEA 301, 301-04 (1998) (commenting on how information on the Internet travels through and is stored in actual tangible media and actual individuals are affected by transactions occurring there).

[79]*See* Zembek, *supra* note 6, at 380. "As courts and lawyers further understand cyberspace communication, a coherent body of jurisdictional jurisprudence will rapidly develop. Until that time, existing paradigms ensure fundamental fairness in the networked communication medium of cyberspace." *Id.* at 380-81.

[80]*See* Kalow, *supra* note 67, at 2247. Exploring the Web may allow one to "hook up to a computer in the next building, a different city, or a far-away country— all the mechanics are hidden from your view. Suddenly, the Internet's riches are at your fingertips (and you don't need a computer science degree to access them)." *Id.*

[81]*See* Burk, *supra* note 17, at ¶ 14. In his discussion, Professor Burk states that actual physical location is "unimportant to the network's (Internet's) function or to the purposes of its creators . . . ." *Id.* Thus, there is no correlation between cyberspace and real space and virtually no method of determining a web site or site user's location. *See id.* at ¶ 17.

located in California. Has the user left the jurisdiction of New York and entered California or has the information left California and entered New York? The answer to this question, although not immediately apparent, does not have to invalidate traditional personal jurisdiction analysis.[82]

III. PERSONAL JURISDICTION

A court which hears a matter without the requisite jurisdiction is said to "speak a nullity."[83] Thus an inquiry into the courts ability to assert jurisdiction is requisite before the merits of a case can be heard.[84] Personal jurisdiction[85] is "the power of a court over the person of a defendant" in a matter before the tribunal.[86] The Supreme Court has used the Due Process clause fairly consistently as a basis for judicial jurisdiction.[87] Although the Court has not made it clear whether the restrictions on jurisdiction are grounded in procedural or sub-

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[82]*Compare* Thatch, *supra* note 72, at 152-53 (commenting that common law jurisdictional rules governing commercial transactions are not readily adaptable to transactions in cyberspace) *with* Swedlow, *supra* note 4, at 381-84 (urging courts to submit cyberspace transactions to traditional jurisdictional paradigms).

[83]*See* Vorhees v. Jackson, 35 U.S.(10 Pet.) 449, 467 (1836) (stating that "the court is prohibited from rendering judgment until certain pre-requisites have been complied with, the judgment is not merely voidable, but a nullity, unless these pre-requisites, being matters proper for the record, shall, by the record, appear to have been performed: most certainly is . . . that [of] jurisdiction or power not acquired over the rights of a person").

[84]*See id.*

[85]This Comment will not address Subject-Matter Jurisdiction, which is defined as the "court's power to hear and determine cases of the general class or category to which proceedings in question belong; the power to deal with the general subject involved in the action." BLACK'S LAW DICTIONARY 1425 (6th Ed. 1990).

[86]*See id.* at 1144.

[87]*See generally* William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 606 (1993). Section 1 of the Fourteenth Amendment contains the Due Process Clause which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. amend. XIV.

stantive due process, it is clear that the Court acknowledges two types of jurisdiction: general jurisdiction and specific jurisdiction.[88]

General jurisdiction over the person of a defendant is based on her presence in the forum.[89] Presence is determined after examining the defendant's "continuous and systematic" activities within a forum.[90] Once general jurisdiction over the defendant is obtained then a court may assert jurisdiction in any lawsuit, even one not relating to or arising out of the defendants activities in the forum.[91]

Even in the absence of presence, a defendant may still be amenable to a forum's jurisdiction under the court's exercise of specific jurisdiction.[92] To determine specific jurisdiction, a court will look to the "relationship among the defendant, the forum and the litigation."[93] Many states have enacted statutes permitting the exercise of specific jurisdiction in certain circumstances.[94]

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[88]The general/specific jurisdiction differentiation was first developed by Arthur T. Von Mehren & Donald T. Trautman in *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) and then judicially discussed in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

[89]*See* David Bender, *Personal Jurisdiction By Virtue of Establishing a Website*, 489 PLI/Pat 15, 54 (1997). Individuals are amenable to a court's general jurisdiction when they are domiciliaries of the state or in the case of a corporation, were incorporated in the state. *See id.* However, general jurisdiction may also be established when a non-resident has extensive forum contacts. *See* International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945). General jurisdiction will also be conferred when the defendant is personally served within the State, even if the defendant had no prior contacts with the forum. *See* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (holding that service of process within the state was sufficient basis to confer general jurisdiction). For further commentary on *Burnham*, see Frank R. Lacy, *Service of Summons and the Resurgence of the Power Myth*, 71 OR. L. REV. 319, 330-36 (1992).

[90]*See* Bender, *supra* note 89, at 54.

[91]*See id.*

[92]*See id.* at 55. Specific jurisdiction arises when the cause of action is directly related to the contacts with the forum state. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356 (1927) (upholding a finding of personal jurisdiction when the Pennsylvania resident's only contact with Massachusetts was driving a car and injuring a plaintiff there). Most modern long-arm statutes also confer specific jurisdiction over non-resident defendants when the cause of action arises from the contacts with the forum. *See* Thatch, *supra* note 72, at 146-47 (discussing the analysis involved when determining specific jurisdiction through the use of a long-arm statute).

[93]Bender, *supra* note 89, at 55.

[94]*See* Thatch, *supra* note 72, at n.14 (detailing the long-arm statutes for all fifty states).

These long-arm statutes vary from state to state but generally require that the defendant have some activity or contact with the forum greater than would be necessary to satisfy the constitution.[95] Understanding when and how a court may assert jurisdiction over the person of a defendant is a complicated and confounding process.[96] This section will review the major topics of personal jurisdiction and survey the principal cases necessary to apply personal jurisdiction to the Internet.

A. TRADITIONAL POWER AND PRESENCE FRAMEWORK

Initially, State courts could only exercise jurisdiction over a defendant based on the "power and presence" framework. Thus, without the "presence" of the defendant or defendant's property the court did not have the "power" to hear the case. The general rule is that a court has jurisdiction over persons who are domiciled in its forum.[97] The landmark case of *Pennoyer v. Neff*[98] set forth this simple legal proposition amidst a complicated factual predicament.

Pennoyer involved an action for the recovery of a tract of land in Oregon by Neff, a resident of California, from Pennoyer.[99] Pennoyer acquired the property through a sheriff's sale instituted to satisfy a judgment against Neff, which was issued by an Oregon court. [100] Neff challenged the legitimacy of the sheriff's sale arguing that the Oregon court lacked personal jurisdiction over him.[101] The Circuit Court of the United States for the District of Oregon invalidated the judgment against Neff on other grounds.[102] The Supreme Court affirmed,

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[95]*See id.* For a general survey of states long-arm statutes, see Andrew J. Zbaracki, Comment, *Advertising Amenability: Can Advertising Create Amenability?*, 78 MARQ. L. REV. 212 (1994).

[96]*See* Richman, *supra* note 87, at 610-11. Professor Richman notes that the Supreme Court has had difficulty expressing its basic policies for jurisdiction as well as the morass of judicial justifications for finding jurisdiction proper or improper. *See id.* at 610.

[97]*See* Pennoyer v. Neff, 95 U.S. 714, 722 (1878). This type of jurisdiction is traditionally referred to as *in personam* jurisdiction. *See* BLACK'S LAW DICTIONARY 791 (6th Ed. 1990).

[98]95 U.S. 714 (1878).

[99]*See id.* at 719.

[100]*See id.*

[101]*See id.*

[102]*See id.* at 720. The court specifically held that there were fatal defects in the statuto-

however, on the grounds that the Oregon Court lacked personal jurisdiction over Neff.[103]

Writing for the majority, Justice Field set forth an all-or-nothing standard by which a state has unquestionable jurisdictional authority over persons within its territory and no jurisdictional authority over persons not within its territory.[104] In so holding, the Court noted that Neff was not a resident of Oregon, nor was he served with process in Oregon, and he did not voluntarily appear in Oregon for the adjudication.[105] Although this framework was simple, the determination of jurisdiction was still limited by the Due Process Clause of the United States Constitution.[106]

B. THE EVOLUTION OF MINIMUM CONTACTS

Attempting to craft a more flexible standard,[107] the Court expanded its personal jurisdiction analysis to include the concept of "minimum contacts."[108] In the seminal case of *International Shoe Co. v. Washington*,[109] the Supreme Court held that, in order to satisfy due process requirements, a state can not exercise jurisdiction over a non-resident defendant unless there are "certain

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rily required order of publication. *See id.*

[103]*See id.* at 722.

[104]*See id.*

[105]*See id.* at 719-20.

[106]*See id.* at 732-33. For further commentary on *Pennoyer v. Neff* see Wendy Collins Perdue, *Sin, Scandal and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479 (1987).

[107]The original standard set in *Pennoyer v. Neff* had several problems, most notably "that a state could exert exclusive territorial jurisdiction over people and property." Crag Peyton Gaumer, *The Minimum Cyber-Contacts Test: An Emerging Standard of Constitutional Personal Jurisdiction*, 85 ILL. B.J. 58, 60 (1997). "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (discussing the old personal jurisdiction standard established in *Pennoyer*).

[108]Although many bases for personal jurisdiction developed over time, none is more enigmatic then the "minimum contacts" standard developed in *International Shoe*. The Court held that a state may exercise personal jurisdiction over a defendant as long as requisite "minimum contacts" existed. *See id.* at 316.

[109]326 U.S. 310 (1945).

minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[110] This conclusion resulted in the following two prong analysis: first, whether the defendant has the requisite "minimum contacts" with the forum; and second, whether an exercise of personal jurisdiction over the non-resident is reasonable under the Due Process Clause.[111] In so holding, the Court abandoned the outdated "power-and-presence" framework for a more flexible case by case analysis.[112]

The International Shoe company, incorporated in Delaware and headquartered in St. Louis, Missouri, manufactured and sold shoes.[113] Although International Shoe's manufacturing and distribution were done outside of the State of Washington, the company employed between eleven and thirteen people in the State of Washington between 1937 and 1940.[114] International Shoe had no offices or merchandise in Washington and only shipped shoes after orders taken by the sales staff were accepted by the St. Louis office.[115] Asserting that International Shoe owed unemployment compensation funds, the State of Washington filed suit in its own courts.[116] The issue became whether Washington could assert personal jurisdiction over International Shoe within the limitations of the Due Process Clause.[117]

The United States Supreme Court upheld Washington's assertion of personal jurisdiction, stating that due process is satisfied after assessing the "quality and nature of the activity in relation to the fair and orderly administration of

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[110]*Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The concept of "minimum contacts" is designed to protect "the defendant against the burdens of litigating in a distant or inconvenient forum [a]nd it . . . ensure[s] that the . . . courts do not reach out beyond the limits imposed on them . . . ." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

[111]*See International Shoe Co.*, 326 U.S. at 316.

[112]*See* Zembek, *supra* note 6, at 350-53. "Dispensing with the legal fiction of presence, the *International Shoe* decision focuses directly upon whether subjecting a non-resident defendant to personal jurisdiction comports with the demands of due process." *Id.* at 350-51.

[113]*See International Shoe Co.*, 326 U.S. at 313.

[114]*See id.*

[115]*See id.* at 314.

[116]*See id.* at 311.

[117]*See id.* at 312.

the laws" of the forum.[118] Further, the Court opined that "to the extent that a corporation exercises the privilege of conducting activities within a state, . . . that privilege may give rise to obligations," which could require the corporation to respond to the suit.[119]

Applying these standards, the Court concluded that International Shoe's activities were systematic and continuous throughout the years in question.[120] Further, the Court found that International Shoe's contacts resulted in a large volume of interstate business, in the course of which International Shoe received the benefits and protections of the laws of the state, including the right to resort to the courts for the enforcement of its rights.[121] Moreover, the Court concluded that the obligation sued upon arose from International Shoe's contacts and thus the maintenance of the suit was not unreasonable nor did it constitute undue procedure.[122]

Finally the Court noted that it is necessary to "estimate . . . the inconveniences" resulting to a corporation or individual forced to defend a claim "away from its home or principal place of business."[123] Further, the Court concluded that "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[124]

Hence the notion of a "sliding scale" or "*Shoe* spectrum"[125] developed to demonstrate how a forum's power over a defendant will change as the contacts increase.[126] *International Shoe* stands for two jurisdictional propositions.

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[118]*Id.* at 319.

[119]*Id.*

[120]*See id.* at 320.

[121]*See id.*

[122]*See id.*

[123]*Id.* at 317.

[124]*Id.* at 318.

[125]The term "*Shoe* spectrum" or "sliding scale" was developed to demonstrate how an individual, according to the number and frequency of her contacts, can move along a scale from no jurisdiction to specific jurisdiction to general jurisdiction. *See* Richman, *supra* note 87, at 613-15.

[126]*See id.* (detailing an understanding of principle personal jurisdictional doctrines and the development of the general/specific jurisdiction differentiation).

First, that an assertion of general jurisdiction is permissible if the defendant's contacts are continuous and of such a substantial nature that the defendant could have realistically anticipated defending any claim.[127] Secondly, that a defendant is amenable to a forum's specific jurisdiction when the minimum contacts are such that the defendant could have realistically anticipated defending that particular claim.[128] Thus, when requisite minimum contacts exist between the defendant and the forum state, it is possible to hale the defendant into court if the claim sued upon arises from the contacts with the forum.[129]

Since a specific jurisdiction analysis becomes more problematic when attempting to satisfy the due process concerns, a court must initiate an examination of the foreseeability that a defendants actions or contacts with a forum would permit her to anticipate litigation in that forum.[130] Thus, the Court revisited minimum contacts in *World-Wide Volkswagen Corp. v. Woodson.*[131] The minimum contacts framework was expanded to include foreseeability and a defendant's[132] purposeful acts.[133] Thus, the Court concluded that "[t]he Due

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[127]*See International Shoe Co.*, 326 U.S. at 318.

[128]*See id.*

[129]*See* Richman, *supra* note 87, at 638. For further discussion of specific jurisdiction see *supra* notes 85 to 92 and accompanying text.

[130]*See id.* at 621. In his discussion of the relevance of foreseeability, Professor Richman notes the following hypothetical case, originally posed by Judge Sobeloff in *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956):

> A California filling station owner who has never ventured outside his native state one day sells a tire to a Pennsylvania tourist; back home in Pennsylvania, the tire ruptures and causes the tourist severe injury. Should the California filling station owner be amenable to suit in Pennsylvania? Surely, he could foresee the tire would cause injury there; the tourist's license plates clearly made Pennsylvania a likely destination. Yet it seems unfair and perhaps counter-productive to require this very "local" person to defend in Pennsylvania. He did nothing to encourage out-of-state business. Further, the only way he could "structure his primary conduct" to avoid effects in Pennsylvania is deliberately to be inhospitable to out-of-state drivers – hardly a result that the law of jurisdiction should encourage.

Richman, *supra* note 87 at 621.

[131]444 U.S. 286 (1980).

[132]Although *World-Wide Volkswagen* discussed the "minimum contacts" of a corporation, the test applies to individuals as well. *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978) (finding that an individual's continuous and systematic contacts with a forum makes her amenable to general jurisdiction in the foreign forum).

Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to whether that conduct will and will not render them liable to suit."[134]

In *World-Wide Volkswagen Corp.*, the Court held that "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[135] Thus, a new factor was incorporated into the minimum contacts analysis of *International Shoe*, which dictated that a court could not assert jurisdiction absent a defendant's conduct which would constitute a foreseeable action in the forum.[136]

The *World-Wide Volkswagen* case concerned owners of a new Audi purchased in New York, who suffered damages after an accident in Oklahoma.[137] In determining whether to permit Oklahoma to exercise jurisdiction over the defendants, a New York dealer and distributor, the Court examined the reasonableness of bringing the defendant's within the jurisdiction.[138] The Court concluded that although the New York dealer and distributor could have foreseen

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[133]*See World-Wide Volkswagen Corp.*, 444 U.S. at 296-97.

[134]*Id.* at 297.

[135]*Id.*

[136]*See id.* at 297. The foreseeability discussed in *World-Wide Volkswagen* is the same foreseeability which permitted the Court to justify jurisdiction in *Burnham v. Superior Court*, 495 U.S. 604 (1990). The Court reasoned that mere service of process on a transient defendant was adequate for *per se* jurisdiction because the defendant had a reasonable expectation of amenability to suit in the forum. *See Burnham*, 495 U.S. at 624-25. For further discussion see *supra* note 89.

[137]*See World-Wide Volkswagen Corp.*, 444 U.S. at 288. After the accident, the owners brought a products-liability action asserting that a defective design and placement of the fuel system caused the accident. *See id.* The lawsuit joined the manufacturer, the importer, the local distributor (World-Wide) and the retailer (Seaway). *See id.* The manufacturer and importer did not challenge personal jurisdiction and remained defendants in the original suit. *See id.* at n.3.

[138]*See id.* at 292. The Court considered several factors including: "the burden on the defendant; . . . the forum State's interest in adjudicating the dispute; . . . the plaintiff's interest in obtaining convenient and effective relief, . . . at least when that interest is not adequately protected by the plaintiff's power to choose the forum; . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies . . . ." *Id.*

that a car would arrive in Oklahoma, it could not have foreseen a lawsuit.[139] Thus, the Court required that an individual or corporation must "purposefully avail itself of the privilege of conducting activities within the forum State" before asserting jurisdiction.[140]

Therefore, *World-Wide Volkswagen* stands for the proposition that without some foreseeability and purposeful activity by the non-resident defendant, the court will lack personal jurisdiction. This was the Court's first attempt at defining the "stream of commerce" doctrine.[141] Accordingly, a manufacturer, distributor, or retailer of defective goods would only be amenable to jurisdiction in a forum where the goods were sold through the chain of distribution.[142]

C. MODERN PERSONAL JURISDICTION ANALYSIS

The Supreme Court has continued to modify personal jurisdiction analysis in recent years. Minimum contacts analysis was muddled, no specific standard regarding reasonableness and purposeful availment had been articulated, and lower courts were struggling to understand exactly how the doctrines of personal jurisdiction should be applied.[143] Thus, the Court returned to personal jurisdiction in *Burger King Corp. v. Rudzewics* and *Asahi Metal Industry Co. v. Superior Court of California.* Additionally, the Court created a different jurisdictional standard for defamation cases in *Calder v. Jones.*

The Court in *Burger King Corp. v. Rudzewics*[144] held that minimum contacts could exist without a defendant physically entering the forum.[145] The

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[139]*See id.* at 297. Additionally, the Court stated that a forum court does not violate due process if it exercises jurisdiction "over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98. However, the Court found that since the distributor and retailer were only local to the New York area, a lawsuit in Oklahoma was not foreseeable. *See id.* at 298.

[140]*Id.* at 297 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958) (noting requisite changes to jurisdictional analysis due to technological progress)).

[141]*See* Richman, *supra* note 87, at 624.

[142]*See id.*

[143]*See* Richman, *supra* note 87, at 611.

[144]471 U.S. 462 (1985).

[145]*See id.* at 476.

Court formulated additional factors to add to the minimum contacts analysis.[146] Combining many factors from the growing line of cases, the Court determined that the following factors needed to be addressed before minimum contacts could be ascertained: foreseeability of the litigation; extent of purposefully directed activities; presence of consent to the jurisdiction; and association of the contacts to the underlying cause of action.[147] Thus, *Burger King* stands for the proposition that minimum contacts can be achieved without entering the particular forum.

When Burger King, a Florida corporation, disputed a franchise agreement with a former Michigan franchisee, it brought suit in federal court in Florida.[148] The Court concluded that although the defendant-franchisee had no physical ties to Florida, the "dispute grew directly out of 'a contract which had a substantial connection with that State.'"[149]

Acknowledging that defendants may avail themselves of a forum without physical presence, the Court opined that jurisdiction should not "be avoided merely because the defendant did not physically enter the forum State."[150] The Court reasoned that the defendant-franchisee negotiated with a Florida corporation, derived considerable benefits from the affiliation and voluntarily accepted exacting regulation of his business.[151] Thus, the Court held that the contacts with Florida were in no way "random, fortuitous or attenuated."[152]

A mere two years after *Burger King*, the Court proffered a fractured opinion in *Asahi Metal Industry Co., v. Superior Court of California*.[153] In another

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[146]*See* Swedlow, *supra* note 4, at 345.

[147]*See Burger King Corp.*, 471 U.S. at 471-77.

[148]*See id.* at 464-67.

[149]*Id.* at 479 (quoting McGee v. International Life, 355 U.S. 220, 223 (1957)).

[150]*Id.* at 476. The Court also noted that "a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within the state . . . ." *Id.*

[151]*See id.* at 479-80.

[152]*Id.* at 480.

[153]480 U.S. 102 (1987). Asahi Metal Industry Co. manufactured tire valve assemblies in Japan and sold them to several tire manufacturers including Cheng Shin Rubber Industrial Co. which produced and sold a tire that allegedly caused a motorcycle accident in California. *See id.* at 102. Although each claim of the main suit either settled or was dismissed, the last issue regarding Asahi's indemnity of Cheng Shin went before the Supreme Court. *See id.* The Court eventually held that Asahi did not avail itself of the State of California's

endeavor to refine the minimum contacts analysis, the plurality[154] found that mere placement into the stream of commerce, although aware of its final destination, would be insufficient to establish jurisdiction.[155]

The Court endorsed the two-prong due process test originally established in *International Shoe*: first, deciding if the actions availed the defendant of the laws of the forum State; and second, deciding if exercising jurisdiction would be fair and reasonable.[156] Further, the Court unanimously agreed that a finding of jurisdiction was unreasonable and improper.[157] However, the two plurality opinions decisively split as to the conduct necessary to fulfill the first prong of the test.[158]

Justice O'Connor opined that fulfillment of the first prong would require additional conduct by the defendant to "avail" itself of the forum State.[159] Specifically, the Justice stated that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed

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jurisdiction and that even if it did, the State's exercise of personal jurisdiction "would be unreasonable and unfair in violation of the Due Process Clause." *Id.*

[154]Justice O'Connor delivered the opinion of the Court, concluding that the state court's exercise of personal jurisdiction over petitioner would be unreasonable and unfair in violation of the Due Process Clause. *See id.* at 102. However, Justice O'Connor joined by Chief Justice Rhenquist, Justice Powell and Justice Scalia only agreed that assuming arguendo, the exercise of jurisdiction was reasonable that the minimum contacts prong of the analysis had not been met. *See id.* at 102-04. The second plurality led by Justice Brennan, joined by Justice White, Justice Marshall and Justice Blackmun concluded that minimum contacts had been met. Finally, Justice Stevens, joined by Justice White and Justice Blackmun held that no minimum contacts analysis was necessary and even assuming that the analysis should be formulated, the facts established a higher quantum of contacts then the plurality alleged. *See id.*

[155]*See id.* at 112.

[156]*See id.* at 113-16; *see also* Kalow, *supra* note 67, at 2253-54.

[157]*See Asahi Metal Indus. Co.*, 480 U.S. at 102-04.

[158]*See id.*

[159]*See id.* at 113. Examples of additional conduct include: special designs for a particular State, advertising, direct consumer access to advice and marketing through sales agents in a particular State. *See id.* This analysis is sometimes referred to as the "stream-of-commerce-plus" analysis. *See* Vermeulen v. Renault, U.S.A. Inc., 965 F.2d 1014, 1025 (11th Cir. 1992) (referring to Justice O'Connor's analysis in *Asahi* as "stream of commerce plus").

toward the forum State."[160] Further, Justice O'Connor added that a mere awareness that a product will enter another forum alone is not sufficient to create purposeful availment.[161] Therefore even without addressing the reasonableness prong, Justice O'Connor would have concluded that Asahi was not amenable to the court's jurisdiction.[162]

Justice Brennan's concurring opinion maintained a broader interpretation of the "stream of commerce" analysis. First, Justice Brennan rejected the additional contact requirement outlined in Justice O'Connor's opinion.[163] In so doing, the Justice reasoned that "the stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale."[164] Additionally, Justice Brennan found that a defendant's awareness that its final product is marketed in the forum State is enough to satisfy the "minimum contacts" prong of the Due Process analysis.[165] However, Justice Brennan concluded that Asahi was not amenable to the court's jurisdiction because to exercise such jurisdiction "would not comport with 'fair play and substantial justice.'"[166]

Although *Asahi* is not the current authoritative view of personal jurisdiction and questions remain regarding "the stream of commerce" analysis,[167] the

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[160]*Asahi Metal Indus. Co.*, 480 U.S. at 112.

[161]*See id.*

[162]*See id.* at 113.

[163]*See id.* (Brennan, J., concurring in part and concurring in the judgment).

[164]*Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

[165]*See id.* at 121 (Brennan, J., concurring in part and concurring in the judgment).

[166]*See id.* at 116 (Brennan, J., concurring in part and concurring in the judgment) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[167]The opinion in *Asahi* and the additional activity required for the purposeful availment prong has received varying responses from lower courts. Two circuit courts have adopted Justice O'Connor's decision. *See* Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992); Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 375 (8th Cir. 1990). *But see* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 (8th Cir. 1994) ("In short, *Asahi* stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the non-resident defendant."). Two other circuits have adopted the opinion of Justice Brennan. *See* Dehmlow v. Austin Fireworks, 963 F.2d 941 (7th Cir. 1992); Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989). A majority of the remaining circuits have merely refused to choose between the two plurality opinions. *See* Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1566 (Fed. Cir. 1994)

Court has concluded when jurisdiction is permitted in libel cases. In *Calder v. Jones*,[168] the Court held that the defendant's intentional conduct, calculated to cause injury within the state, conferred jurisdiction to the forum court.[169] *Calder* involved a professional entertainer, Shirley Jones, a California resident, and the defendant, *The National Enquirer* ("*The Enquirer*"),[170] a corporation with its principle place of business in Florida.[171] Jones brought suit[172] in a California court after The Enquirer ran a libelous article.[173] The Court held that *The Enquirer* was amenable to California's jurisdiction because California was "the focal point both of the story and of the harm suffered."[174]

The foregoing analysis has subsequently become known as the "effects test" because jurisdiction was based on the "effects" of *The Enquirer's* contact on the state of California.[175] The Court reasoned that *The Enquirer* should have known that its intentional actions would be felt by Jones "in the State in which she lives and works and in which the National Enquirer has its largest circula-

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(finding the facts at bar allowed a finding of jurisdiction under both analyses of *Asahi*); Renner v. Lanard Toys Ltd., 33 F.3d 277, 282 (3d Cir. 1994) (concluding that most circuits have chosen to avoid taking sides and instead look to the facts of individual cases); Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 944 (4th Cir. 1994) (determining that the efforts of the *Asahi* Court were inconclusive); Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 543-44 (6th Cir. 1993) (avoiding a choice of analysis and determining the case on its facts); Vermeulen v. Renault, U.S.A., Inc., 965 F.2d 1014, 1024-25 (11th Cir. 1992) (finding that the facts at bar allowed a finding of jurisdiction under both analyses of *Asahi*); Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1196 (9th Cir. 1988) (same).

[168]465 U.S. 783 (1984).

[169]*See id.* at 791.

[170]There were a total of three defendants including: *The Enquirer*; the reporter, South; and the editor, Calder, all deemed Florida residents. *See id.* at 785-86.

[171]*See id.* at 784-85. *The Enquirer* publishes a national weekly newspaper with a total circulation of over 5 million, of which at least 600,000 are sold in California. *See id.*

[172]The entire cause of action alleged libel, invasion of privacy and intentional infliction of emotional harm. *See id.* at 784.

[173]*See id.*

[174]*Id.* at 789. The Court concluded that the libelous story concerned a California resident, was drawn from California sources, and the brunt of the harm was suffered in California. *See id.* at 788-89.

[175]*See id.* at 789.

tion."[176] Additionally, the Court noted *Keeton v. Hustler Magazine, Inc.*,[177] decided the same day as *Calder*, to demonstrate that a defendants lack of contacts may still confer jurisdiction.[178] Thus, defendants in defamation cases are amenable to jurisdiction with fewer contacts than defendants in mere negligence cases such as *Asahi*.

International Shoe, *World-Wide Volkswagen*, *Burger King*, *Asahi* and *Calder* establish the essential parameters necessary to determine if personal jurisdiction exists over a non-resident defendant. *International Shoe* set forth the broad case by case analysis necessary to find jurisdiction while comporting with the Due Process Clause of the Constitution. Keeping this analytical framework in mind, most courts deciding Internet cases should be able to find necessary analogies with these traditional jurisdiction cases.

For example, when a defendant has contracted with the forum and used Internet contacts to further her business purpose, then appropriate analogies may be drawn from *International Shoe* and *Burger King*.[179] Similarly, when a suit is based on tortious conduct furthered by Internet contacts an analogy to *Calder* will suffice.[180] Finally, a determination that Internet contacts without purposeful action on the part of the defendant may utilize *World-Wide Volkswagen* and *Asahi* to determine whether jurisdiction is appropriate.[181] Applica-

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[176]*Id.* at 789-90. Statistically, California's sales of 604,431 were double the next highest state. *See id.* at 785 n.2.

[177]465 U.S. 770 (1984).

[178]*See Calder*, 465 U.S. at 788 (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773 (1984)). The facts in *Keeton* were similar to *Calder*, however the forum state was not the focus of the defendant's defamation. *See Keeton*, 465 U.S. at 772. Nonetheless, the Court found that, based on the defendant's distribution of some 10,000 to 15,000 copies of its magazine to the forum state it had "purposefully directed at [the forum]" and such distribution could not "be characterized as random, isolated, or fortuitous." *Id.* at 774.

[179]*See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (finding that a non-resident defendant who "contract[s] to supply services" may be amenable to personal jurisdiction in the forum); Joanne T. Hannaway, *"Doing Business" Over the Internet Leads to a Forum State's Appropriate Exercise of Personal Jurisdiction*, 9 LOY. CONSUMER L. REP. 211, 212 (discussing how *Burger King* offers an appropriate analogy to cases involving Internet contacts which encompass contracting or doing business in a forum).

[180]*See* Yagura, *supra* note 78, at 309-12 (discussing how *Calder* offers a proper analogy to libelous communications on the Internet, also interpreting several tortious contacts cases arising since *Calder*).

[181]*See* Jason L. Brodsky, Comment, *Civil Procedure—Surfin' the Stream of Commerce:* CompuServe v. Patterson, 89 F.3d 1257 (6th Cir. 1996), 70 TEMP. L. REV. 825, 850-52

tion of these analytical frameworks to Internet and cyberspace cases has created "a rapidly evolving, and hotly disputed, area of law."[182] However, traditional personal jurisdictional analysis does not have to be abandoned to answer these precarious legal questions.[183]

IV. ON-LINE LAWSUITS

In the past two years, several decisions have addressed the issue of whether or not Internet or electronic communications are sufficient to assert jurisdiction.[184] Most of these decisions applied traditional personal jurisdiction analyses, complying with controlling constitutional frameworks. Additionally, in most of the cases where jurisdiction was permitted, the results would have been

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(1997) (commenting that since the Internet is a stream of commerce, *World-Wide Volkswagen* and *Asahi* offer appropriate analogies to Internet cases).

[182]*See* Gaumer, *supra* note 107, at 62.

[183]*See* Karin Mika and Aaron J. Reber, *Internet Jurisdictional Issues: Fundamental Fairness in a Virtual World*, 30 CREIGHTON L. REV. 1169, 1187 (1997) (concluding that "computer links do not warrant disregarding existing jurisdictional standards). The balancing tests articulated by *International Shoe* and its Supreme Court progeny have survived and been suitable in making jurisdictional determinations regardless of communications improvements." *Id. But see* Thatch, *supra* note 72, at 152-53. "Since cyberspace is unlike any other forum of commerce ever known, transactions occurring on the Web will raise unique issues in the well-settled area of personal jurisdiction." *Id.* at 153.

[184]Some other cases decided recently but not discussed in this Comment include: Agency Rent-A-Car Sys., Inc. v. Grand Rent-A-Car Corp., 98 F.3d 25 (2d Cir. 1996) (holding that because of the defendant's constant use of a computer data base in the forum, jurisdiction was proper); Weber v. Jolly Hotels, 977 F. Supp. 327 (D.N.J. 1997) (finding that Internet advertising does not create continuous and substantial contacts with a forum); Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097 (S.D.N.Y. 1997) (finding that the posting of a web site advertising future services was insufficient to confer jurisdiction); Resuscitation Techn., Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. 1997) (holding that extensive e-mail communications and a non-binding letter of intent amounted to purposeful availment by the defendant of the laws of Indiana); Heroes, Inc. v. Heroes Found., No. 96-1260, 1996 WL 787411 (D.D.C. 1996) (concluding that soliciting donations and providing an 800 number on its web site made the defendant amenable to jurisdiction); McDonough v. Fallon McElligott, Inc., Civ. No. 95-4037, 1996 WL 753991 (S.D. Cal. 1996) (finding that even though defendant's web site was available to the state's citizens and some advertisements were purchased by state entities, computer interaction does not supply sufficient contacts for jurisdiction); Plus Sys., Inc. v. New England Network, Inc., 804 F. Supp. 111 (D. Colo. 1992) (concluding that because of the existence of a contract between the parties, the defendant reached purposeful availment bases on communications over the computer).

the same even if no web site or Internet communication were involved. In those instances, the courts utilized specific jurisdiction analysis to determine if the defendant was amenable to the jurisdiction of the forum.[185] As such, those cases do not unnecessarily expand or burden the jurisdictional framework.[186]

However, there has been a judicial split regarding cases involving "pure" Internet contacts.[187] It is important from both a doctrinal and analytical perspective to re-evaluate those instances where the courts have found jurisdiction based solely on the existence of a web site.[188] Finding the mere existence of a web site equivalent to purposeful availment of a forum would lead to a "chilling effect" on the continued growth and expansion of the Internet as a viable communications system as well as a commercial forum.[189]

A. INTERNET CONTACTS FOUND TO "PLAY FAIR"

The following are examples of cases where the finding of jurisdiction did not offend our "traditional notions of fair play and substantial justice."[190] Analogizing the facts and contacts in these cases with current jurisdiction cases

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[185]*See, e.g.*, Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997) (concluding that although defendant's web site alone did not permit jurisdiction, defendant's electronic contacts along with its contracts with residents of the state did permit a finding of purposeful availment).

[186]*See* Christine E. Mayewski, Note, *The Presence of a Web Site as a Constitutionally Permissible Basis for Personal Jurisdiction*, 73 IND. L.J. 297, 326-27 (1997). "Traditional personal jurisdiction doctrine is not unworkable in the context of . . . electronic interactions. Historically the doctrine has proved to be quite flexible: as technological advances have facilitated interstate relations, the scope of personal jurisdiction has expanded to include nonresident defendants in more and new situations." *Id.*

[187]*Compare* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997) *and* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) *with* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) *and* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996).

[188]*See, e.g., Inset Sys.*, 937 F. Supp. at 164-65 (finding that jurisdiction may be asserted over a defendant whose sole contacts with the forum were through the use of a web site).

[189]*See, e.g.*, McDonough v. Fallon McElligott, Inc., Civ. No. 95-4037, 1996 WL 753991 (S.D. Cal. Aug. 5, 1996) (noting that a finding of jurisdiction based on the existence of a web site alone would have a chilling effect on the continual development of the Internet).

[190]International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). For a discussion of this requirement see *supra* Section III. B.

permit a finding that the defendants are amenable to the jurisdiction of the forum. As such, in most of these instances, the finding of jurisdiction would have been warranted even absent the Internet contacts.

1. INTERNET CONTACTS RELATED TO CONTRACTUAL AGREEMENT

In most cases where Internet contacts were in connection with a contract existing between the parties, the courts were in agreement that jurisdiction was proper.[191] Thus, the analysis used by most courts in these instances closely mirrors traditional personal jurisdictional frameworks and does not threaten to expand notions of personal jurisdiction beyond acceptable paradigms. When contracts and existing relationships are involved specific jurisdiction models offer the courts guidance.[192]

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[191]*See generally* Flower, *supra* note 5, at 851-60 (surveying decisions which agree on the issue of jurisdiction over Internet contacts in relation to a contractual agreement). *But see* Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994) (finding that despite the existence of a contract, Internet and electronic contacts were insufficient to allow a finding of jurisdiction). For further commentary on *Pres-Kap* see Michael J. Santisi, Note, Pres-Kap, Inc., v. System One, Direct Access, Inc.: *Extending the Long-Arm Statute Through the Internet?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 433 (1995).

[192]*See generally* McCarty, *supra* note 28, at 590-93 (commenting on the importance of the specific jurisdictional framework in the context of Internet communications and contacts).

The case of *CompuServe v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), has been included in comments and notes of this type whenever the topic of pre-existing contracts is discussed. In *CompuServe*, the Court of Appeals for the Sixth Circuit concluded that Patterson was amenable to the jurisdiction of the forum because the contacts satisfied a specific jurisdiction analysis. *See id.* at 1262. Specifically the court concluded that the contacts instituted by Patterson and the existing Shareware agreement amounted to purposeful availment of the jurisdiction. *See id.* at 1265-66. The court then concluded that the claim arose from the contacts and the assertion of jurisdiction was fair under Due Process principles. *See id.* at 1267-68.

This case has been acknowledged by several commentators as important to understanding jurisdictional analysis of Internet contacts. *See* Charles H. Fleischer, *Will The Internet Abrogate Territorial Limits on Personal Jurisdiction?*, 33 TORT & INS. L.J. 107, 118 (1997) (analyzing the facts and holding of *CompuServe* and determining that the finding of jurisdiction was proper); Mayewski, *supra* note 186, at 312-13 (same); Stephen Wilske and Teresa Schiller, *International Jurisdiction In Cyberspace: Which States May Regulate The Internet?*, 50 FED. COMM. L.J. 117, 151-52 (1997) (same).

However, it has been noted that the decision in *CompuServe* is imperfect and does not

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[193] the court found personal jurisdiction over the defendant based on several contracts with citizens of the forum and electronic contracts on the Internet.[194] Plaintiff, Zippo Manufacturing ("Zippo") was a Pennsylvania corporation and defendant, Zippo Dot Com ("Dot Com") was a California corporation which operated a web site and news service.[195] Virtually all of Dot Com's contacts with Pennsylvania took place on the Internet.[196] Zippo brought suit against Dot Com because of its use of the word "Zippo" and other trademark infringements.[197] Engaging in a specific jurisdiction type analysis, the court set forth a three-prong test to determine whether it could exercise specific jurisdiction over the defendant. The court analyzed whether sufficient "minimum contacts" with the forum state existed; whether the contacts related to the claim asserted; and finally whether the courts jurisdiction was reasonable.[198]

First, the court held that Dot Com "purposefully availed" itself of the laws of Pennsylvania.[199] In so holding, the court reasoned that the existing contractual agreements with Pennsylvania residents and Internet providers constituted a conscious attempt to conduct business in the forum state sufficient to sustain

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contribute to a basic understanding of personal jurisdiction on the Internet and thus, the author has decided not to discuss it within this Comment. *See* Burk, *supra* note 15, at ¶¶ 35-39. Specifically, Professor Burk argues that "[*CompuServe* was] a profoundly flawed opinion" and that "[t]he court found jurisdiction proper only because it combined Patterson's Ohio sales with the contract - even though the contract had nothing to do with the suit." *Id.* at ¶¶ 36-37.

[193]952 F. Supp. 1119 (W.D. Pa. 1997).

[194]*See id.* at 1121.

[195]*See id.*

[196]*See id.* Dot Com contracted with a registration service for the exclusive right to the domain names "zippo.com," "zippo.net" and "zipponews.com." *See id.* n.3. The web site contained information about Dot Com, as well as advertisements and access to its Internet news service. *See id.* Dot Com had no offices or employees in Pennsylvania, but it had entered into agreements with Internet access providers in the state. *See id.* For more information on domain names, jurisdiction and trademark infringement, *see* Mac Roberts, *Trademarks, Domain Names & Jurisdictions: An Update*, M2 PRESSWIRE, Feb. 5, 1998.

[197]*See Zippo Mfg.*, 952 F. Supp. at 1121.

[198]*See id.* at 1122-23.

[199]*See id.* at 1126.

jurisdiction.[200] Next, the court decided whether Zippo's cause of action arose from Dot Com's contacts with Pennsylvania.[201] Determining that "a cause of action for trademark infringement occurs where the passing off occurs," the court concluded that the transmitted messages related directly to Zippo's claim and the injuries took place in Zippo's home state.[202] Finally, the court addressed the reasonableness prong by considering Pennsylvania's interests in adjudicating disputes of its resident corporations and the fact that Dot Com gained profits from the forum state and therefore was not substantially burdened.[203] Reasoning that Dot Com had done more than merely post or exchange information on the Internet through its web site, the court concluded that it was reasonable for Dot Com to defend itself in the forum.[204]

The court compared the defendant's actions and the contacts at issue with those in both *World-Wide Volkswagen* and *Burger King*. The court opined that Dot Com's contacts were not the type deemed "random, fortuitous or attenuated"[205] in *World-Wide Volkswagen* because Dot Com consciously chose to do business with Pennsylvania residents.[206] Further, the court stated that Dot Com's contacts were akin to those in *Burger King* because "when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper."[207]

This case maintains the personal jurisdiction analysis set forth in *International Shoe* and *Burger King*. *Zippo Manufacturing* involved existing contracts between the defendant and citizens of the forum. Further, the defendants Internet contacts and web site fulfilled the "purposefully availed" requirement

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[200]*See id.* The court found that Dot Com was aware of electronic communications sent into Pennsylvania, stating that: "[t]he transmission of . . . files was entirely within [Dot Com's] control [and] . . . [w]hen a defendant makes a conscious choice to conduct business with the residents of a forum state, 'it has clear notice that it is subject to suit there.'" *Id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

[201]*See id.* at 1127.

[202]*See id.* (quoting Cottman Transmission Sys. Inc. v. Martino, 36 F.3d 291, 294 (1994)).

[203]*See id.*

[204]*See id.* at 1127.

[205]*Id.* at 1126. *See supra* notes 148 to 152 and accompanying text.

[206]*See Zippo Mfg.*, 952 F. Supp. at 1121.

[207]*See id.* at 1124 (citing Burger King Corp. v. Rudzewics, 471 U.S. 462 (1985)).

of traditional personal jurisdiction. Specifically, the court in Zippo held that conduct through electronic communications will avail the defendant of the forum court's jurisdiction "[w]hen a defendant makes a conscious choice to conduct business with the residents of a forum state."[208] Further, such contacts put the defendant on "clear notice that it is subject to suit there."[209]

In *Digital Equipment Corp. v. AltaVista Technology, Inc.*,[210] again the existence of an agreement became a determinative factor in the personal jurisdictional analysis. Digital Equipment Corp. ("DEC") is a Massachusetts corporation operating an Internet search and service which owns the service mark "AltaVista."[211] AltaVista Technology, Inc. ("ATI") is a California corporation which licenses the right to use "AltaVista" as a part of its corporate name and in its web site address.[212] The complaint alleged trademark infringement and breach of the agreement between ATI and DEC.[213]

The court addressed the issue of personal jurisdiction before assessing the merits of the claim.[214] Acknowledging that "the medium through which many of the significant Massachusetts contacts occurred is anything but traditional,"[215] the court nevertheless determined that a traditional long-arm statute

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[208]*Id.* at 1126.

[209]*Id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

[210]960 F. Supp. 456 (D. Mass. 1997).

[211]*See id.* at 459.

[212]*See id.* ATI was formerly known as Tree Full of Owls, Inc. but changed it's name to ATI by amending its Articles of Incorporation in 1994. *See id.* Subsequently, in 1996 DEC paid for the assignment of ATI's rights to the trademark and immediately licensed back the right for ATI to use the name. *See id.* However, the agreement precluded ATI from using the name as a product or service offering. *See id.*

[213]*See id.* at 461. The claim arose because ATI allegedly changed its web site to look more and more like the AltaVista search engine site. *See id.* at 460-61. The court concluded that ATI's web site became a service when it provided both a search engine and advertising space. *See id.* at 461. By attaching the words "AltaVista" to these services and omitting the word Technology, ATI breached the license agreement. *See id.*

[214]*See id.* The initial claim of relief was for an injunction barring ATI from using its web site as eventually developed. *See id.* at 459.

[215]*Id.* at 462. Judge Gertner commented on the transient nature of contacts on the Internet as well as the impressive future that the Internet has as a "participatory marketplace of mass speech." *Id.* at 463 (quoting ACLU v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996)). Further the judge stated that "[g]iven the very new and unique nature of the technology, this Court will take heed . . . 'of the changes taking place in the law, the technol-

analysis would suffice.[216] Therefore, the court concluded that because a contract existed and the claim arose directly from that contract it was reasonable for ATI to expect to defend itself in Massachusetts.[217] The court considered that ATI had conducted business with a Massachusetts corporation and had breached the licensing agreement with that same corporation.[218] Finding as such, the court concluded that ATI deliberately conducted business with Massachusetts residents and had purposefully availed itself of that jurisdiction.[219]

Thus the court held that ATI was amenable to jurisdiction in Massachusetts. Although ATI's breach of contract and business relationship had reached the requisite minimum contacts level necessary to permit a finding of jurisdiction, the court in *Digital Equipment*, discussed ATI's intentional and tortious conduct as permissible to a finding of jurisdiction.[220] These types of injurious actions or communications may form another basis for personal jurisdiction in the forum state where a majority of the harm occurs.

2. TORTIOUS CONDUCT OR ACTS THROUGH USE OF THE INTERNET

The question of personal jurisdiction is sometimes made simpler when tortious acts or statements are made over the Internet. Relying on the reduced jurisdiction requirements in cases of libel, *Calder* and *Keeton* offer helpful analogies for cases where the defendant's tortious use of the Internet gives rise to the claim involved. Analyzing these cases demonstrates that personal jurisdiction would have been proper had the intentional conduct been performed absent the Internet or electronic communications. Nonetheless, the proficient and expeditious nature of Internet communications provide an opportunity for an

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ogy, and the industrial structure'" so as not to definitively create one analogy. *Id.* (quoting Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S.727 (1996) (Breyer, J., plurality opinion)).

[216]*See id.* at 464.

[217]*See id.* at 468.

[218]*See id.* at 469-70.

[219]*See id.*

[220]*See id.* at 470. The court struggled with the proper use and significance of the holdings in both *Calder* and *Keeton*. Ultimately, the court concluded that jurisdiction was proper based on the contracts, even if the facts were not sufficient to allow either tortious acts case to control. *See id.*

abundance of injurious activity on the Internet. Thus, a finding of personal jurisdiction in these instances would not affront due process concerns.

In *EDIAS Software International, L.L.C. v. BASIS International Ltd.*,[221] the court held that the defendant is subject to personal jurisdiction when the underlying claim is one of defamation.[222] BASIS contracted with EDIAS to distribute its software products in several European countries.[223] Subsequently, the relationship deteriorated and BASIS terminated the contract and issued several e-mails criticizing actions of EDIAS.[224]

Arguing that it lacked any contacts with Arizona,[225] BASIS moved to dismiss EDIAS' complaint for lack of personal jurisdiction.[226] The court denied the motion finding sufficient contacts to exercise jurisdiction.[227] In so holding, the court used the Ninth Circuit's three part test[228] to determine if exercising

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[221]947 F. Supp. 413 (D. Ariz. 1996).

[222]*See id.* at 420-21.

[223]*See id.* at 414-15. The contract was signed in New Mexico and stipulated that New Mexico law governed. *See id.* at 415.

[224]*See id.* BASIS sent its regular European customers e-mail which purported to explain why EDIAS lost its Authorized Distributor Status. The e-mail message stated:

> Why did EDIAS lose its Authorized Distributor Status? BASIS requires all of its distributors to sign agreements to ensure that they will provide their customers with BASIS' products at a fair price, complete technical support, and product information. EDIAS is unwilling to sign such an agreement to renew its distributor contract, so BASIS chose not to renew EDIAS' Distributor status.

Id. Additionally, a message was posted as a "Press release" on its web page in very similar language alluding that EDIAS was unwilling to commit to BASIS' principles of fairness and customer service. *See id.*

[225]The facts stated that "BASIS has no physical presence in Arizona, maintains no files in Arizona, holds no bank accounts in Arizona, and has never litigated in Arizona." *Id.* at 417.

[226]*See id.* EDIAS' complaint alleged breach of contract and the covenant of good faith and fair dealing as well as libel, defamation and tortious interference with contract. *See id.*

[227]*See id.* at 418.

[228]The test proffered by the Ninth Circuit was very similar to the test used in *Calder*. *See supra* Section III.C.

jurisdiction is appropriate.[229]

First, the court decided if BASIS had purposefully availed itself of Arizona's jurisdiction.[230] The court found that BASIS had availed itself because it had conducted business with EDIAS through phone calls and mail.[231] Further, the court opined that the long-standing relationship between the companies established that BASIS was aware of EDIAS' location, evinced by faxes, e-mails and employees having been sent to its offices.[232] Moreover, the court found that BASIS' libelous communications were sufficient to establish the additional contacts necessary to confer jurisdiction in Arizona.[233]

Next, the court readily settled the issue of whether EDIAS' claims had arisen from BASIS' activities in the forum.[234] And finally, the court found that its assertion of jurisdiction over BASIS was reasonable.[235] Balancing the factors affecting the reasonableness analysis, the court proffered that the extent of BASIS' availment of Arizona and the relatively low burden of litigating in Ari-

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[229]*See EDIAS Software Int'l*, 947 F. Supp. at 417. The test was a specific jurisdiction test which scrutinized: (1) whether the defendant purposefully availed itself of the forum; (2) whether the claim arose from the defendants activities with the forum; and (3) whether the exercise of jurisdiction is reasonable. *See id.* at 418.

[230]*See id.* at 417-20.

[231]*See id.* at 418.

[232]*See id.*

[233]*See id.* at 420. Not only did the court find that these communications were "additional contacts" but it also stated that the communications would confer jurisdiction under the "effects test" of *Calder*. *See id.*; *see also supra* Section III.C.

[234]*See EDIAS Software Int'l*, 947 F. Supp. at 421. The court stated that but for BASIS' contact with Arizona EDIAS would not have had a claim against BASIS. *See id.*

[235]*See id.* at 421-22. The court listed seven factors which it felt contributed to the overall reasonableness of asserting jurisdiction:

> 1) the extent of the defendants' purposeful interjection into the forum state's affairs; 2) the burden on the defendant of litigating in the forum; 3) the extent of conflict with the sovereignty of the defendant's state; 4) the forum state's interest in adjudicating the dispute; 5) the most efficient judicial resolution of the controversy; 6) the convenient and effective relief; and 7) the existence of an alternative forum.

Id. at 421 (citing Core-Vent Corp. v. Nobel Indus., 11 F.3d 1482, 1487-88 (9th Cir. 1993)).

zona made it reasonable to assert such a finding.[236]

The analysis used in *EDIAS Software* has not unreasonably expanded the personal jurisdictional framework because the court followed the guidelines set forth in *Calder* and *Keeton*. Recognizing that web sites and electronic communications have potentially larger audiences, the court concluded that "BASIS should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction."[237]

Similarly, the case of *Panavision v. Toeppen*[238] addressed personal jurisdiction in another intentional tort case. The *Panavision* court held that the defendant's tortious conduct amounted to trademark infringement regardless of whether actions occurred on the Internet or not.[239]

Defendant, Toeppen, was a resident of Illinois who registered the Internet domain names "panavision.com" and "panaflex.com".[240] Plaintiff, Panavision International, a California corporation, brought suit after Toeppen demanded money to stop using the domain names associated with Panavision.[241] The court concluded that Toeppen expressly aimed his conduct towards California and should have foreseen the "effects" of his intentional actions.[242] However,

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[236]*See id.* at 421-22.

[237]*Id.* at 420.

[238]938 F. Supp. 616 (C.D. Ca. 1996).

[239]*See id.* at 617-18. Shortly after this Comment was finished the United States Court of Appeals for the Ninth Circuit affirmed the district court's holding in *Panavision v. Toeppen*, No. 97-55467, 1998 WL 178553, at *1 (9th Cir. Apr. 17, 1998). The Ninth Circuit applied the same specific jurisdiction test that it used in *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997). *See Panavision*, 1998 WL 178553, at *4; *see also infra* notes 267 to 283 and accompanying text. The court distinguished Toeppen's actions from those of Cybersell FL and determined that Toeppen's tortious conduct did satisfy the effects test established in *Calder*. *See Panavision*, 1998 WL 178553, at *4-6. For further review of the effects test in *Calder see supra* notes 168 to 178 and accompanying text.

The Ninth Circuit concluded that Toeppen had "engaged in a scheme to register Panavision's trademarks as his domain names on the Internet and then to extort money from Panavision by trading on the value of those names." *Panavision*, 1998 WL 178553, at *13. Further, the court found that those actions were "aimed at Panavision in California" and thus satisfied the effects test set forth in *Calder* allowing a finding of personal jurisdiction. *See id.*

[240]*Panavision*, 938 F. Supp. at 618.

[241]*See id.* at 619.

the court did not find that Toeppen was "doing business" in California via the Internet.[243] Thus, Toeppen was amenable to the jurisdiction of California based on his intentional conduct and not merely his actions on the Internet.

Ultimately, this conclusion comports with the Court's decision in *Calder*, and thus does not represent an unwarranted extension of personal jurisdiction doctrine. Toeppen's intentional actions were "more akin to a tort claim than a contract claim," therefore the use of the *Calder* effects test was appropriate.[244] Although Toeppen's acts establishing web sites appears to create an unwarranted expansion of jurisdiction on the Internet, his "running a scam directed at California" fell squarely within the limitations of pre-existing jurisdictional jurisprudence.[245]

B. JURISDICTION AND ADVERTISING ON THE INTERNET

Few courts and commentators would express any concern over the outcomes in the previous cases.[246] Doing business or contracting over the Internet and intentional tortious conduct on the Internet can subject a defendant to the jurisdiction of a foreign forum. However, the crucial jurisdictional analysis arises when action or communications occur on the Internet absent any clear indication that the defendant was doing business or conducting tortious activities. Cases falling in this middle area have sparked heated debate over exactly what level of Internet activity is required to exercise jurisdiction.[247] Two Cir-

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[242]*See id.* at 621-22. Specifically, the court stated that "[j]urisdiciton is proper because Toeppen's out of state conduct was intended to, and did, result in harmful effects in California" and that "Panavision should not now be forced to go to Illinois to litigate its claims." *Id.* at 662 (citing Calder v. Jones, 465 U.S. 783, 790 (1984)).

[243]*See id.* at 622.

[244]*Id.* at 621 (citing Ziegler v. Indian River County, 64 F.3d 470, 474 (9th Cir. 1995) (holding that a §1983 claim was "more akin to a tort claim than a contract claim" and using the "effects test" to analyze the "purposeful availment" prong of the jurisdiction test)).

[245]*Id.* at 622.

[246]*See* Corey B. Ackerman, Note, World-Wide Volkswagen, *Meet the World Wide Web: An Examination of Personal Jurisdiction Applied To A New World*, 71 ST. JOHN'S L. REV. 403, 421-22 (1997) (discussing how Internet connections should be treated as phone, fax and regular mail contacts and that an assertion of personal jurisdiction under those established doctrines would not cause judicial problems); *see also* Flower, *supra* note 5, at 866-67; Meyer, *supra* note 2, at 1334-35; Stott, *supra* note 77, at 852-55.

[247]*See* Mayewski, *supra* note 186, at 317-18. This has been generally referred to as the "gray" or middle area because cases do not easily fit into one of the categories finding juris-

cuit Courts have spoken on the issue and produced decisions which demonstrate that mere "passive activity" on the Internet or a web site does not create personal jurisdiction in every state where the web site may be seen.

1. NO JURISDICTION IN NEW YORK AND ARIZONA

In *Bensusan Restaurant Corp. v. King*[248] the United States Court of Appeals for the Second Circuit affirmed the district court's dismissal for lack of personal jurisdiction over the defendant.[249] Although the Second Circuit Court of Appeals used a more conventional analysis,[250] it acknowledged the lower court's conclusion that, despite the fact that the Web page could be read in New York, the defendant had not made a discernible effort to serve a market in the forum State.[251]

King, a Missouri resident, set up a web site called "the Blue Note" to advertise his Missouri jazz club.[252] Bensusan, the New York corporation that owned "The Blue Note" jazz club in New York City, brought suit against King for trademark infringement.[253] The district court held that King had not "availed" himself of New York's long-arm statute[254] and that, even if the web

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diction nor do they fit neatly into the cases which have held jurisdiction was improper. *See id.*

[248]126 F.3d 25 (2d Cir. 1997).

[249]*See id.* at 26.

[250]The Second Circuit followed *Feathers v. McLucas*, 15 N.Y.2d 443 (1965), a New York Court of Appeals case, which held that New York's long-arm jurisdiction statute only reached the tortious acts performed by a defendant who was actually physically present in New York when the wrong was performed. *See Bensusan Restaurant Corp.*, 126 F.3d at 27-29.

[251]*See id.* at 27. The district court stated that "regardless of the technical feasibility" of establishing a web site in any State which may be accessed in any other State, "mere foreseeability of an in-state consequence and a failure to avert that consequence is not sufficient to establish personal jurisdiction." Bensusan Restaurant Co. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996).

[252]*See id.* at 297.

[253]*See id.* at 298.

[254]The court looked to both C.P.L.R. § 302(a)(2), which permits a court to exercise jurisdiction when a non-resident "commits a tortious act within the state" and C.P.L.R. § 302 (a)(3)(ii), which permits a court to exercise jurisdiction when a non-resident commits a tortious act and expects the results and derived economical benefit from interstate or interna-

site met the requirements, exercising jurisdiction would violate due process.[255]

First, the court reasoned that the long-arm jurisdiction statutes were not satisfied because King could not "expect or . . . reasonably expect the act to have consequences in the state" and did not "derive substantial revenue from interstate or international commerce."[256] Additionally, the court stated that the long-arm statute required "that a defendant make a 'discernible effort . . . to serve, directly or indirectly, a market in the forum state.'"[257] Without a "discernible effort", the court stated that King's mere knowledge of Bensusan's club did not establish the foreseeability needed to assert jurisdiction.[258]

Next, the court turned to the Due Process analysis of *International Shoe* and *Asahi*.[259] Using Justice O'Connor's analysis, the court announced that "King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state."[260] Finally, the court concluded that absent any allegations "that King in any way directed any contact to, or had any contact with, New York," the court would not exercise personal jurisdiction.[261]

Thus, the district court's holding, that Bensusan's Internet contacts without any additional activity beyond merely posting material to a web site, comports

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tional commerce. *See id.* at 299.

[255]*See id.* at 300.

[256]*See id.* at 299 (quoting American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428, 432-35 (2d Cir. 1971)). Since King's web site contained only general information about his club and an address and phone number where patrons could purchase tickets, the court concluded that he did not derive any economical benefit from New York. *See id.* at 300. Further, the court found that virtually 99% of King's patronage was from the local Columbia, Missouri area and out-of-state customers visited because of a prior connection with the area. *See id.*

[257]*Id.* (quoting Darienzo v. Wise Shoe Stores, Inc., 427 N.Y.S.2d 831, 834 (App. Div. 1980)).

[258]*See id.*

[259]*See id.* at 300-01.

[260]*See id.* at 301 (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1992)).

[261]*Id.*

with the holding in *Asahi*. Although the posting of material may have incidentally infringed on others' rights, without some supplementary actions the defendant did not avail himself of the foreign jurisdiction. This case can also be analogized to *World-Wide Volkswagen* because, even though Bensusan intended his advertisement to reach local users and visitors, he did not foresee the eventual arrival of the advertisement in New York.

Bensusan refused to expand traditional personal jurisdictional analysis beyond the limits judicially established by the Supreme Court. The activities which occurred in *Bensusan* were characterized as passive Internet postings.[262] This view tends to comport to the Supreme Court's admonition in *Hanson v. Denckla* that "progress in communications and transportation [does not] herald[] the eventual demise of all restrictions on the personal jurisdiction of state courts."[263]

The most recent Circuit Court decision was proffered by the Ninth Circuit Court of Appeals in *Cybersell Inc. v. Cybersell Inc.*[264] The federal appeals court held that Arizona could not exercise jurisdiction over a Florida advertiser whose sole contact with Arizona was through a web site.[265] In so holding, the court utilized a three-part specific jurisdiction test to determine if the defendant was amenable to personal jurisdiction.[266]

Cybersell involved two corporations both named Cybersell. The plaintiff, Cybersell AZ, an Arizona corporation brought suit against Cybersell FL, a Florida corporation for trademark infringement.[267] The facts in this case are typical of how small businesses are using and operating on the Internet and are an excellent example of how these types of cases are bound to flood the courtrooms in the near future.

Cybersell AZ incorporated in May 1994 and began business as a web ad-

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[262]*See id.* at 299. Passive activity on the Internet is usually denoted by the "passive placing" of a message on a web site. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) ("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 personal jurisdiction.").

[263]Hanson v. Denckla, 357 U.S. 235, 251 (1958).

[264]130 F.3d 414 (9th Cir. 1997).

[265]*See id.* at 415.

[266]*See id.* at 416. For more information on specific jurisdiction *see supra* notes 88 to 95 and accompanying text.

[267]*See Cybersell, Inc.*, 130 F.3d at 416.

vertising and marketing service.[268] Three months later, Cybersell AZ applied to register the name "Cybersell" as a service mark.[269] Additionally, Cybersell AZ published a web site from August 1994 to February 1995 when it was then taken down for reconstruction.[270] Cybersell FL began as a small business in the summer of 1995 to provide business consulting services to other firms hoping to advertise and market on the web.[271] Cybersell FL used a web page to market their services and had the logo "Cybersell" at the top of the page with a hyperlink designed to allow the viewer to e-mail messages back to the company.[272]

Once Cybersell AZ found Cybersell FL's home page, it sent an e-mail informing Cybersell FL that "Cybersell" was a registered service mark and should not be used.[273] Cybersell FL immediately changed its corporate name to WebHorizons and then later to WebSolvers, however the web page logo still proclaimed "Welcome to CyberSell!" causing the current litigation to proceed.[274] The district court of Arizona granted Cybersell's motion to dismiss for lack of personal jurisdiction and Cybersell AZ appealed.[275]

The Ninth Circuit addressed the first prong of the specific jurisdiction inquiry: whether the defendant had "[performed] some act or consummate[d] some transaction with the forum or perform[ed] some action by which he purposefully avail[ed] himself of the privilege of conducting activities in the fo-

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[268]*See id.* at 415.

[269]*See id.* The general definition of a service mark is "a symbol, design, word, letter, slogan, etc. used by a supplier of a service, . . . to distinguish the service from that of a competitor." WEBSTER'S NEW WORLD DICTIONARY 1227 (3d ed. 1994). The United States Supreme Court defined a service mark as "a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others." Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 192 n.1 (1985).

[270]*See id.*

[271]*See id.*

[272]*See id.* at 415-16. At the time Cybersell FL placed its web page on the Internet there was no home page in existence for Cybersell AZ and the PTO had not approved the application for the service mark. *See id.* at 415.

[273]*See id.* at 416. This occurred in November 1995 approximately four months after Cybersell FL had begun using the logo. *See id.*

[274]*See id.*

[275]*See id.*

rum."[276] The court concluded that Cybersell FL had not purposefully availed itself of the Arizona forum because its actions were more similar to those at issue in *Bensusan Restaurant Corp. v. King*.[277]

First, the court determined that Cybersell FL had not conducted any commercial activity in Arizona.[278] Finding that Cybersell FL's posting was essentially passive, the court concluded that posting alone can not infer deliberate activity in a forum.[279] The court examined the facts that no Arizona resident had signed up for any web services offered by Cybersell FL and that there were no contracts, sales made, phone calls or income earned from Arizona.[280] Further, the court stated that no e-mail messages or other Internet communications were sent to or from Arizona.[281] Thus, the court found that adopting the position of Cybersell AZ in this case would result in automatic personal jurisdiction "wherever the plaintiff's principal place of business is located."[282]

Finally, the court rejected Cybersell AZ's contention that Cybersell FL's actions gave rise to jurisdiction under the effects test set forth in *Calder v. Jones*.[283] The court found that there was nothing comparable between the actions in *Calder* and the web site posted in this case.[284] Further, the court concluded that the effects test does not apply with the same force in this case "because a corporation 'does not suffer harm in a particular geographic location in the same sense that an individual does.'"[285]

In *Cybersell*, the court noted that "so far as we are aware, no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser

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[276]*Id.* (citing Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995)).

[277]*See id.* 417-18.

[278]*See id.* at 419.

[279]*See id.*

[280]*See id.*

[281]*See id.*

[282]*Id.* at 420.

[283]*See id.* (citing Calder v. Jones, 465 U.S. 783 (1984) and Core-Vent Corp. v. Nobel Industries, 11 F.3d 1482 (9th Cir. 1993)).

[284]*See id.*

[285]*Id.* (quoting Core-Vent Corp. v. Nobel Industries, 11 F.3d 1486 (9th Cir. 1993)).

to jurisdiction in the plaintiff's home state."[286] However, the court discussed the case of *Inset Systems, Inc. v. Instruction Set, Inc.* and did not specifically distinguish the web site in that case from that in *Cybersell.* This may pose a problem because the facts and holding in *Inset* may lead to unwarranted findings of personal jurisdiction in future cases.

2. A DIFFERENT RESULT IN CONNECTICUT AND MISSOURI

A problem arises in the following two decisions which stand for the proposition that Internet contacts, alone, will suffice in reaching the minimum contacts required to assert personal jurisdiction. Although these cases are factually similar to *Bensusan* and *Cybersell*, the courts reached opposite conclusions. Attempting to explain the different results in these cases may provide the necessary framework for analyzing every jurisdictional question relating to Internet contacts.[287]

In probably the most expansive Internet decision to date, the District Court of Connecticut, in *Inset Systems, Inc. v. Instruction Set, Inc.*,[288] held that mere maintenance of a web site which enters the forum state could satisfy the "minimum contacts" necessary to find jurisdiction within the forum's long-arm statute.[289] In this case, plaintiff Inset, a Connecticut corporation, brought suit against defendant Instruction, a Massachusetts corporation, for trademark infringement.[290] Although Inset owned the federal trademark on "INSET," Instruction had "INSET" in both its domain name and 800 number.[291]

The court looked to its long-arm statute to determine if Connecticut could exercise jurisdiction.[292] Reasoning that the web site was akin to placing news-

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[286]*Id.* at 418.

[287]*See* Lori Irish Bauman, *Personal Jurisdiction and Internet Advertising*, 14 NO. 1 COMPUTER LAW. 1, at *5 (1997) (discussing how these particular cases reveal how the concept of personal jurisdiction will be affected by Internet technology); *see also* Ackerman, *supra* note 247, at 424; Meyer, *supra* note 2, at 1300.

[288]937 F. Supp. 161 (D. Conn. 1996).

[289]*See id.* at 164.

[290]*See id.* at 163.

[291]*See id.* Instruction had obtained the rights to use "INSET.COM" as its Internet address and "1-800-US-INSET" to further advertise its goods and services. *See id.*

[292]*See id.* at 163-64. Connecticut's long-arm statute states in pertinent part:

paper ads and that there were at least 10,000 access sites to the Internet in Connecticut, the court found that the long-arm statute conferred jurisdiction on Instruction.[293] Moreover, the court found that such a finding comported with the limitations of due process and *International Shoe*.[294] Thus, the court opined that "unlike television and radio advertising," the Internet offers continuous access to Instructions advertisement whereby Instruction has "purposefully availed itself of the privilege of doing business within Connecticut."[295]

Finally, the court determined that it was not unreasonable to require Instruction, a Massachusetts corporation, to defend itself in Connecticut.[296] In so holding, the court reasoned that the distance was minimal, and the action concerned issues of Connecticut law.[297] Thus, the court concluded that a finding of jurisdiction did not offend fair play and substantial justice.[298]

There are several problems with the *Inset* decision. Primarily, the web site at issue in *Inset* is virtually identical to the web site in *Bensusan*. Instruction's web site did not promote any additional activity that would create a situation such as in *Zippo Manufacturing*. Furthermore, Instruction did not enter into any contracts in Connecticut, nor did it transmit any computer files or services. Instruction merely maintained a web site with information for those users who wished to access the site.

Additionally, the court found Instruction's passive advertising on the Internet to reach the level of soliciting business in the forum as required by the

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> Every foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising . . . (2) out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state . . .

Id. at 163 n.2 (quoting CONN. GEN. STAT. § 33-411(c) (1994)).

[293]*See id.* at 164.

[294]*See id.*

[295]*Id.* at 165.

[296]*See id.*

[297]*See id.*

[298]*See id.*

long-arm statute of Connecticut.[299] However, mere advertising alone does not permit a finding of jurisdiction.[300] Thus, the court glossed over this requirement and effectively found purposeful availment from mere placing of an advertisement. Finally, the court's reasoning that the close proximity of Massachusetts and Connecticut allows the finding to be deemed reasonable is misplaced. Reasonableness factors have been discussed in several Supreme Court decisions[301] and the mere fact that a defendant resides in a state immediately adjacent to the plaintiff's resident state has never been held a reasonable basis for permitting jurisdiction to be found.

Following the analysis established in *Inset*, the United States District Court for the Eastern District of Missouri held, in *Maritz, Inc., v. Cybergold, Inc.*,[302] that Cybergold had availed itself of the personal jurisdiction of Missouri, although its only contact was through a web site.[303] Defendant, a California corporation, set up a Web site to allow users to submit their names and receive information about its forthcoming Internet service.[304]

Using Missouri's long-arm statute, the court concluded that personal jurisdiction was satisfied.[305] However, instead of deciding if Cybergold's activities satisfied the statute's "transacting business" prong, the court engaged in a five-

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[299]*See id.* at 164.

[300]*See, e.g.*, Rodriguez v. Fullerton Tires Corp., 115 F.3d 81, 84-85 (1997) (holding that mere advertising without some other activity or proof that defendant obtained economic gain from the forum). *But see, e.g.*, Nowak v. Tak How Inv., Ltd., 94 F.3d 708, 717 (1st Cir. 1996) (finding that advertising can equate to the minimum contacts necessary to fulfill specific jurisdiction).

[301]*See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). For a list of the factors *see supra* note 135.

[302]947 F. Supp. 1328 (E.D. Mo. 1996).

[303]*See id.* at 1334.

[304]*See id.* at 1330. The court also found that Cybergold maintained it's web site in Berkeley California and that it was presumably "continually accessible to every internet-connected computer in Missouri and the world." *Id.* Further, the court found that the web site maintained a list of internet users, including residents of Missouri, who wished to be on Cybergold's mailing list and those users would have access to advertisements by other entities paying Cybergold for this service. *See id.*

[305]The Missouri long-arm statute specifically provided that personal jurisdiction could be attained over any person, firm or corporation resident or not, if such entity had engaged in any specific enumerated act, of which "the transaction of any business within [the] state" was one. *Id.* at 1331 (quoting MO. REV. STAT. § 506.500 (1998)).

part "minimum contacts" analysis.[306]

Demonstrating the unique characteristics of the Internet, the court first analyzed the contacts derived from Cybergold's web site.[307] The court noted that the Cybergold designed its web site to solicit users and consciously intended to transmit information to any and all Internet users.[308] Thus, the court concluded that the contacts were such to "favor the exercise of personal jurisdiction over [Cybergold]."[309] Next, the court assessed the quantity of Cybergold's contacts and determined that the 311 transmissions[310] sent by Cybergold were sufficient to suggest that Cybergold had "purposefully availed" itself of Missouri's jurisdiction.[311]

Finally, the court analyzed the relation of the contacts to the underlying cause of action.[312] The court found that Cybergold's "invitation" to Internet users related to the alleged trademark infringement suit brought by Maritz.[313] Further, the court surmised that "[n]ot only did defendants act intentionally but, by communicating through the [computer] network, they made their messages available to an audience wider than those requesting the information" and such technological innovation "must broaden correspondingly the permissible

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[306]*See id.* at 1332. The court reiterated the United States Court of Appeals for the Eighth Circuit's five-prong test as follows: "(1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts: (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; (5) the convenience of the parties." *Id.* at 1332 (citing Bell Paper Box, Inc. v. U.S. Kids, Inc., 22 F.3d 816, 819 (8th Cir. 1994)).

[307]*See id.* at 1333. The court analogized internet web sites to mass mailings and 800 numbers. *See id.* at 1332-33. Finding web sites to be more efficient and quicker, the court concluded that such sites were "clearly of a different nature and quality than" the other forms of communication. *Id.* at 1333.

[308]*See id.*

[309]*Id.*

[310]Cybergold actually transmitted information 311 times, however, the court noted that 180 of those transmissions were solicited by plaintiff, Maritz. *See id.* at 1330-33 & n.4.

[311]*See id.* at 1333.

[312]*See id.*

[313]*See id.* The court found that although Cybergold's site was not yet fully operational, the act of forming the mailing list was a part of the infringement activities affecting Maritz. *See id.*

scope of jurisdiction exercisable by the courts."[314]

Thus, both *Inset* and *Maritz* do not correspond with previous Supreme Court decisions and may create a "chilling effect" on this expanding new technology. The holding in *Maritz*, like that of *Inset*, appears to stand for the proposition that mere use of the Internet avails all users to any jurisdiction.[315] In both cases, the courts attempted to use a minimum contacts analysis to assert general jurisdiction over the defendant. Such an attempt, disregards the constitutional protections addressed in *World-Wide Volkswagen* and *Asahi*.[316]

The Court in both *World-Wide Volkswagen* and *Asahi* addressed the need that the defendant could foresee that its "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[317] However, the defendants in *Inset* and *Maritz*, merely placed announcements or advertisements on their web pages.[318] Although both defendants presumably knew that any individual in any jurisdiction could access the web sites, the defendants were not in control of the distribution nor had any additional contacts with the forum as required under *Asahi*.

Furthermore, *Inset* and *Maritz* courts attempted to use long-arm statutes to determine whether jurisdiction was proper. The long-arm statute in *Inset* required that the defendant solicit business from the forum and the statute in *Maritz* focused on whether or not the defendant was transacting business in the forum. Neither court thoroughly and effectively satisfied the prongs of each respective long-arm statute, nor did the courts examine in any detail the requirement that the cause of action arise from the specific contacts.[319] This fact may be the key to the erroneous results in both of these cases. Specific jurisdictional analysis coupled with the purposeful availment requirement of Justice

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[314]*Id.* at 1334 (quoting California Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1363 (C.D. Cal. 1986)).

[315]*See* Flower, *supra* note 5, at 864 (discussing how the broad holding in *Maritz* may subject web users to the laws of every state).

[316]*See* Ackerman, *supra* note 247, at 424 (discussing how such a result "seems to violate the very essence of the Due Process Clause" and that "the *Inset* and *Maritz* courts erred by failing to conduct the in-depth analysis mandated by the traditional due process tests in order to determine whether there was a violation").

[317]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[318]Specifically, in *Inset* the defendant advertised goods and services and in *Maritz* the defendant announced its upcoming services and created a list of interested consumers.

[319]*See* Stott, *supra* note 77, at 845-49 (discussing the problems with both the decision in *Inset* and in *Maritz*).

O'Connor in *Asahi* may alleviate the unfavorable results and negative implications of decisions such as *Inset* and *Maritz*.[320]

V. ANALYSIS AND POSSIBLE SOLUTION

Requiring that all "pure" Internet related transactions conform to specific jurisdiction analysis would help alleviate the general problem with these types of dealings: the geographic independence of the Internet and its transactions. In *Hanson v. Denckla*, the Court stated that "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."[321]

Thus, although this passage does not require an individual to physically enter the forum, it allows an action to be maintained when a contract is signed, when defamatory communications are sent or when a defendant's actions produce foreseeable effects in a particular state.[322]

Requiring courts to follow a specific jurisdictional analysis translates into a fair framework for Internet transactions.[323] For example, it seems fair to require that a "cyber-tortfeasor"[324] defend false advertising, copyright infringement or libel cases when the Internet contacts created the problem. However, requiring a mere web site-user to be subjected to a child custody suit when her only contacts with the forum state were in a few e-mail messages to her estranged husband seems inherently unfair. Thus, as long as the forum state requires that a close relationship exist between the cause of action and the in-state contact there should be little by way of due process concerns.

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[320]*See id.* at 838-43 (finding that an appropriate analogy between Internet cases and Justice O'Connor's opinion in *Asahi* could clear up the confusion in the current Internet/Personal Jurisdiction jurisprudence). *But see* Bruce A. Lenox, Note, *Personal Jurisdiction in Cyberspace: Teaching the Stream of Commerce Dog New Internet Tricks:* CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996), 22 U. DAYTON L. REV. 331, 339-43 (1997) (finding that Justice Brennan's opinion in *Asahi* is better suited for personal jurisdictional inquiries on the Internet).

[321]Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[322]*See* Richman, *supra* note 87, at 617-18.

[323]*See* McCarty, *supra* note 28, at 577 (discussing the importance of requiring Internet contacts to comport with the requirements of specific jurisdiction).

[324]Cyber-tortfeasor is derived from the recent use of "Cybertort" as the moniker for Internet lawsuits. *See* Rosalind Resnick, *Cybertort: The New Era*, NAT'L L.J., July 18, 1994, at A1.

A specific jurisdictional framework also requires a court to look into the defendant's purposeful availment and whether or not exercising jurisdiction would be fair and reasonable. Thus, a court should resort to the analysis of Justice O'Connor in the *Asahi* decision. There are several reasons why this analysis is most suitable for Internet transactions.

First, the analysis of Justice Brennan is inappropriate. Following Justice Brennan's approach may subject every web site to jurisdiction in every state because it may be seen as mere placement of a product into the stream of commerce.[325] For example, applying Justice Brennan's approach to an Internet transaction, as long as the "publisher" of the web site knows that her page may arrive in any jurisdiction, she would be subject to suit in any of those forums. Thus, virtually all web sites and electronic communications would create jurisdiction because information is instantaneously accessible in countless jurisdictions.[326] Allowing such a result "would be tantamount a declaration that . . . [any] court throughout the world, may assert [personal] jurisdiction over all information providers on the global World Wide Web."[327]

Second, Justice O'Connor's opinion requires additional activity by the defendant to purposefully avail herself of the forum. This requirement is better suited to take into consideration the inherent characteristic of the Internet, whereby information is instantaneously available world-wide. Thus, adopting an additional activity requirement will not subject most web site operators who merely post information or publish on the Web to jurisdiction in all forums. This comports with the finding in *Bensusan* that "[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide - or even worldwide - but, without more, it is not an act purposefully directed toward the forum state."[328]

Thus, a site operator who targets a forum state either through specific con-

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[325]*See* Kalow, *supra* note 67, at 2266-67. *See supra* notes 152 to 156 and accompanying text.

[326]*See* Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097 at *20 (S.D.N.Y. 1997).

[327]*Id.* (quoting Playboy Enterprises, Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032, 1039-40 (S.D.N.Y. 1996)). Further, the magistrate stated that "[u]pholding personal jurisdiction over Goldberger in the present case would, in effect, create national (or even worldwide) jurisdiction, so that every plaintiff could sue in plaintiff's home court every out-of-state defendant who established an Internet web site. The Court declines to reach such a far-reaching result in the absence of a Congressional enactment of Internet specific trademark infringement personal jurisdictional legislation." *Id.* (footnote omitted).

[328]Bensusan Restaurant Co. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion)).

duct with the forum or economic gain from the forum, will be on notice that she may be haled to defend herself in that same forum. At the same time, the purposeful availment prong will allow a site operator to establish a web site without fearing a finding of personal jurisdiction in any and all forums in which the site is observed unless she makes an affirmative, conscious effort.

Furthermore, this requirement mirrors the mandate of *International Shoe* and its progeny that a defendant be able to reasonably anticipate litigation.[329] Arguably, some Internet users are highly educated and should thereby be aware of the expansive scope inherent in posting on the Internet, but this blanket statement is entirely too broad. The truth is that school age children are, at times, more adept at Internet and computer usage then adults and it would be irrational to hold such children legally accountable.[330]

Finally, Justice O'Connor's "stream of commerce" analysis contains the requisite exploration of reasonableness to determine whether jurisdiction is appropriate. Under this reasonableness prong, courts should look to the nature of communications on the Web to determine if a finding of jurisdiction is reasonable. Thus, unless the web site has advertised on a national level, or otherwise directed the web site to a specific forum, the assertion of jurisdiction would be unfair.

Reasonableness inquiries will take into consideration the fact that web sites and web users are located in a multitude of locations and that a web site publisher has little control over those accessing her site.[331] Thus it would be unfair and unjust to permit a forum to exercise jurisdiction when the publisher may not have designed a site to be utilized by certain "cyber-surfers."

VI. CONCLUSION

The future of business and communications in Cyberspace is clear. At its current growth rate, there will be approximately 200 million Internet users, by

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[329]*See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). This conclusion came from the language used in *International Shoe Co. v. Washington*, whereby the Court announced that "[w]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[330]*See* Mika & Reber, *supra* note 183, at 1186; Ed Bond, *Censorship and Indecency in Cyberspace*, L.A. TIMES, Feb. 27, 1996, at 3 (discussing how parents may not know as much about the Internet as their children when attempting to protect them from indecent web sites).

[331]*See supra* notes 75 to 80 and accompanying text.

1999.[332] Even though the current guidelines for personal jurisdiction were conceived long before the Internet became a household word,[333] its application in jurisdictional issues regarding Internet cases is still germane. Nonetheless, pure Internet transactions may necessitate a slight change in personal jurisdiction jurisprudence.

Courts do not have to fear jurisdictional questions when faced with Internet or electronic communications. As previously demonstrated, the majority of cases addressing this issue fall squarely within the limits and boundaries of jurisdictional paradigms. The Internet is equivalent to the technological changes which have come before it: the automobile, the telephone and the fax machine. *International Shoe* expanded and conformed to incorporate these modern inventions, so too shall the enigmatic world of cyberspace find room within the doctrines of personal jurisdiction.

Applying a hybrid of specific jurisdictional analysis and the additional activity requirement of Justice O'Connor's opinion in *Asahi* may offer a suitable framework for these contacts. Further, resolving unsuitable decisions, such as *Inset* and *Maritz*, will allow web site operators to foresee the possibility of being haled into a particular forum's court, and adjust their behavior accordingly. Permitting such decisions to remain good law could create jurisdictional nightmares. The consequences would include an overwhelming chilling effect on the continued development of the Internet and haphazard forum shopping. Moreover, unscrupulous plaintiffs may attempt to extort larger settlements by choosing the most inconvenient forum possible.[334]

Ultimately, as the question of jurisdiction has enormous constitutional implications, it is difficult to establish bright-line rules to apply to Internet transactions. Therefore, when faced with the issue, the Supreme Court should continue with its traditional Due Process analysis and craft a framework which will allow the ever-progressing metaphorical world of cyberspace to comport with "traditional notions of fair play and substantial justice."[335]

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[332]*See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996). *See supra* notes 7-12 and accompanying text.

[333]*See* Swedlow, *supra* note 4, at 393. The Supreme Court addressed the issue of personal jurisdiction in *Burger King*, *Asahi* and *Calder* all prior to 1987. *See supra* Section III.C. In 1990 the Court addressed the issue of transient service in *Burnham v. Superior Ct.*, 495 U.S. 604 (1990), *see supra* note 89, but has not addressed any other serious personal jurisdiction questions since. Further, the Internet started to gain popularity only after 1990.

[334]*See* Swedlow, *supra* note 4, at 374.

[335]International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).