

The Presence of a Web Site as a Constitutionally Permissible Basis for Personal Jurisdiction[†]

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Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted.¹

INTRODUCTION

The World Wide Web² presents an incredible opportunity for businesses of every size to peddle products and services to an interstate, and even international, audience at relatively little expense.³ For many medium- and large-sized businesses, maintaining a Web site⁴ is now considered a necessity.⁵ Should businesses that embrace this technological advancement be required to travel to

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1. Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961). Thirty-six years ago, the Gray court, considering “the facts of economic life as it is lived today,” applied the stream-of-commerce doctrine to uphold personal jurisdiction over a parts manufacturer from another state. *Id.*

2. The World Wide Web (“Web” or “WWW”) can be described as a collection of a vast number of electronic documents, stored in millions of computers all over the world. The technology behind the World Wide Web allows any individual to view the content of any document on the Web without worrying about the format of the document, the software program that created it, or the type of computer used to create it. The World Wide Web is one service available on the Internet. See *infra* Part I.B. For more detailed information about the Internet, including the World Wide Web, see *Reno v. ACLU*, 117 S. Ct. 2329, 2334-37 (1997). See also BRYAN PFAFFENBERGER, *WORLD WIDE WEB BIBLE* 33-51 (2d ed. 1996); *About the World Wide Web* (visited Sept. 15, 1997) <<http://www.w3.org/WWW>>.

3. At last count, the potential global audience was estimated at 23 million. See Dennis F. Hernandez & David May, *Is Mere Internet Presence Sufficient State Contact?*, L.A. DAILY J., July 15, 1996, at 5, 5. See *infra* note 94 for information on the cost of setting up a Web site.

4. A “Web site” is a document or set of linked documents (“pages”) with special features that allow it to display information graphically to a user of the WWW. The first, or main, “page” of a Web site is the “home page.” All forms of commercial activity can be accomplished on the WWW. For a general summary of legal issues relating to the use of a Web site, see *ONLINE LAW: THE SPA’S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET* 366-69 (Thomas J. Smedinghoff ed., 1996).

5. See Laura B. Smith, *Frontier Economics: Internet Presence Almost Necessity*, PC WK., Dec. 11, 1995, at E1. According to Smith, experts have predicted that the Internet will account for 1.3% of the nation’s economy, or \$45.8 billion, by the year 2000. See *id.*

a distant forum to defend suit anywhere their Web site may be accessed?⁶ Two divergent views have emerged from the United States district courts. On the one hand, a finding of personal jurisdiction over a nonresident based solely on the existence of a Web site is undesirable because it would presumably lead to nationwide, or indeed worldwide, jurisdiction over all Web site owners.⁷ On the other hand, businesses that operate Web sites have voluntarily declared themselves open for business to the entire world.⁸ Moreover, the ability of World Wide Web communications to contain advanced forms of content, coupled with the speed at which such communications reach a vast audience, dramatically increases the amount of harm that may be inflicted on innocent parties, even if unintentional.⁹ Broadening the scope of personal jurisdiction may thus be a permissible response to this unprecedented technological advancement.

Since the U.S. Supreme Court's last ruling on a personal jurisdiction issue, technological developments have continued to bring people around the world closer together.¹⁰ World Wide Web communications in particular do not easily fit into the existing personal jurisdiction analytical framework because such communications occur independent of geography. Resolution of the personal jurisdiction issue could have profound implications for the future of a global commerce that increasingly relies on the existence of the World Wide Web. Only one federal appeals court has thus far decided a jurisdiction case in this context,¹¹ but the number of such cases entering district courts in the past year indicates that many more are likely to follow. For these reasons, guidance is needed from the Supreme Court regarding the appropriate prioritization of the different considerations involved in the personal jurisdiction analysis.

This Note discusses the current philosophical split in the district courts and argues for a broader interpretation of personal jurisdiction in the context of

6. This question has attracted the attention of several commentators. See, e.g., John Gibeaut, *Questions of Authority: Jurisdiction Cases Crop Up as Internet Sales Erase Borders*, A.B.A. J., June 1997, at 42; Karol A. Kepchar, *How Far is the Courts' Reach in Solving Cyberspace Disputes?*, LEGAL INTELLIGENCER (Philadelphia), Mar. 26, 1997, at 7, available in LEXIS, News Library, LgInt File; Mark R. Kravitz, *Personal Jurisdiction and the Internet*, CONN. L. TRIB., Apr. 21, 1997, available in LEXIS, Legnews Library, Clt File. See also *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *66 n.21 (S.D.N.Y. Feb. 26, 1997), for a more comprehensive list of articles that have been published on the subject.

7. See *Hearst*, 1997 U.S. Dist. LEXIS 2065; *IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258, 1268 (N.D. Ill. 1997); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

8. See, e.g., *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996); *accord California Software, Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356 (C.D. Cal. 1986).

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

10. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), was the last U.S. Supreme Court decision on the permissible scope of personal jurisdiction under the Due Process Clause.

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

electronic communications, particularly those involving the World Wide Web.¹² Part I explains the analytical framework for resolving personal jurisdiction questions and describes the analogy-defying characteristics of the World Wide Web. Part II synthesizes the cases that have addressed personal jurisdiction in the World Wide Web context, honing in on the cases that involve Web site advertising. Part III argues in favor of a broader reading of personal jurisdiction in disputes that arise out of the existence of a Web site. Finally, Part IV concludes that expanding the scope of personal jurisdiction in this context is appropriate and consistent with the concerns of the Due Process Clause.

I. BACKGROUND

A. Analyzing a Personal Jurisdiction Problem

When a plaintiff wishes to sue an out-of-state defendant in the state of its choosing, personal jurisdiction is likely one of the first obstacles the plaintiff must overcome. Before a nonresident defendant can be called on to defend suit in a distant forum or accede to a default judgment,¹³ the court selected by the plaintiff must have personal jurisdiction over the defendant.¹⁴

Two requirements must be satisfied in order for a court¹⁵ to establish jurisdiction over a nonresident defendant. The court must first determine whether the forum state's long-arm statute allows jurisdiction, and second, whether the

12. For support of the view that existing legal paradigms can adequately address the problems of the Internet, see Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339 (1996).

13. It is possible that the forum chosen by the plaintiff may be so disadvantageous to the defendant that the defendant's right to due process would be violated. The nonresident defendant may elect not to appear, and hope that when the plaintiff attempts to enforce the judgment against him in his home state, the defendant's state court will refuse to enforce the judgment for want of jurisdiction. Respect for other states' judgments is required by the Full Faith and Credit Clause of Article IV of the U.S. Constitution, unless the court rendering the judgment lacked personal jurisdiction over the defendant. See 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.01, at 2-4 (2d ed. 1991); GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 12, at 42 (2d ed. 1994).

14. See SHREVE & RAVEN-HANSEN, *supra* note 13, § 8[B][1], at 25. Defendants may challenge the court's assertion of personal jurisdiction by filing a pretrial motion such as a motion to dismiss. Since the personal jurisdiction is a preliminary litigation matter, the extent of factual inquiry at this stage is generally limited. See *id.* § 11, at 37-41.

15. The Fourteenth Amendment applies the Due Process Clause to state courts. Federal courts are limited by the Due Process Clause of the Fifth Amendment, but arguably not to the same degree. See *id.* § 8[B][2], at 25-26. However, Rule 4 of the Federal Rules of Civil Procedure requires federal courts to look to the jurisdictional rules of the local state court (which include the constitutional limitations) in most cases. See FED. R. CIV. P. 4(k)(1)(A) ("Service of a summons . . . is effective to establish jurisdiction over the person of a defendant . . . who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located."); see also SHREVE & RAVEN-HANSEN, *supra* note 13, § 8[B][2], at 26.

assertion of personal jurisdiction over the nonresident defendant complies with the requirements of the Due Process Clause of the U.S. Constitution.¹⁶ Many states' long-arm statutes simply allow personal jurisdiction to the extent permitted by the Due Process Clause.¹⁷ In these states, the above inquiry collapses into one step. Assuming the long-arm statute is satisfied, all states must address the constitutional requirements for personal jurisdiction. This Note will therefore assume, when necessary, that the applicable state long-arm statute has been satisfied.

In order for personal jurisdiction to be established over a nonresident defendant, the Due Process Clause requires that the defendant have sufficient "minimum contacts" with the forum state such that personal jurisdiction complies with "traditional notions of fair play and substantial justice."¹⁸ The Supreme Court has developed two additional analytical tools, the concepts of "general" and "specific" jurisdiction, to assess the sufficiency of the defendant's contacts with the forum.¹⁹ General jurisdiction permits a plaintiff to sue a defendant in the forum state even for claims unrelated to the defendant's contacts with the forum.

16. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1. A cause of action can be considered a "property" interest that may not be deprived through state proceedings lacking due process. *See* 1 CASAD, *supra* note 13, § 2.02[1], at 2-7 to 2-10; SHREVE & RAVEN-HANSEN, *supra* note 13, § 8[B][1], at 24 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982)). Although the Supreme Court has clearly identified the constitutional origin of the personal jurisdiction requirement, it has been less successful in articulating its underlying policies and justifications. Territorial sovereignty, defendant's inconvenience, protecting the defendant from jurisdictional surprise, preservation of states' regulatory interests, and defendant's receipt of economic benefits from association with the forum have all been given varying levels of emphasis from one decision to next. *See* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 34, at 95-96 (2d ed. 1993).

17. California, Louisiana, and Missouri are examples of states that allow personal jurisdiction to the extent permitted by the Constitution. New York is an example of a state that imposes additional requirements. *See* RICHMAN & REYNOLDS, *supra* note 16, § 33, at 84-86. *See also* David Hatch, *Personal Jurisdiction and the World-Wide Web: Bits (and Bytes) of Minimum Contacts*, 23 RUTGERS COMPUTER & TECH. L.J. 143, 147 n.14 (1997), for thorough coverage of state long-arm statutes.

18. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The dominant theory of personal jurisdiction for 70 years dictated that states could entertain suits against their own citizens, and over nonresidents only if they could be "found and served" within that forum. *See Pennoyer v. Neff*, 95 U.S. 714 (1877). As technological developments such as the automobile increased the mobility of American society, courts invented alternate means to support jurisdiction over nonresident defendants. In 1945, the U.S. Supreme Court decided *International Shoe Co. v. Washington*, the decision that abolished the in-state presence requirement and replaced it with a less formalistic, "fact-centered" approach commonly referred to as the "minimum contacts" test. *See* SHREVE & RAVEN-HANSEN, *supra* note 13, § 12, at 41-49.

19. *See* SHREVE & RAVEN-HANSEN, *supra* note 13, § 16[B], at 72 n.9, § 18, at 79. Some commentators have also advocated a "sliding-scale" approach to address cases that fall between the two paradigms. For example, as the significance of a defendant's forum contacts increases, a weaker connection between the cause of action and the forum is permissible, and vice versa. The Supreme Court, however, has not thus far addressed the constitutionality of such an approach. *See* RICHMAN & REYNOLDS, *supra* note 16, § 36[B], at 99.

In contrast, specific jurisdiction exists when the nonresident's contacts with the forum state give rise to the controversy at hand.²⁰ In such a case, jurisdiction is limited to the cause of action resulting from the defendant's contacts with the forum.²¹

General jurisdiction requires numerous and substantial contacts with the forum state.²² Therefore, it is unlikely that the existence of a defendant's Web site, alone, would be sufficient to establish personal jurisdiction for claims unrelated to the Web site.²³ However, since the existence of a Web site has given rise to litigation involving, for example, free speech,²⁴ defamation,²⁵ trademark,²⁶ copyright,²⁷ and contract²⁸ claims, specific jurisdiction has been an active battleground for cases involving the existence of Web sites and will be the focus of this Note.

Evaluating the constitutionality of specific jurisdiction is generally a two-step process.²⁹ Courts must determine (1) whether the nonresident defendant has purposefully availed herself or himself of the privilege of doing business in the

20. See SHREVE & RAVEN-HANSEN, *supra* note 13, § 17, at 73.

21. See *id.*

22. For example, if a defendant conducts nearly all of its activities in the forum even though it is not incorporated there, general jurisdiction should be proper. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), is a good example. In *Perkins*, the defendant was a Philippine corporation conducting extensive business in Ohio due to the Japanese occupation of the Philippines. Ohio was the residence of key corporate officers, and its banks handled corporate funds. Although the plaintiff's claim related to the defendant's Philippine operations, the Supreme Court upheld jurisdiction in Ohio. See SHREVE & RAVEN-HANSEN, *supra* note 13, § 18, at 79.

23. See *McDonough v. Fallon McElligott, Inc.*, No. CIV. 95-4037, 1996 WL 753991, at *3 (S.D. Cal. Aug. 5, 1996) (stating that creating a Web site does not provide the necessary minimum contacts with a forum state to give rise to jurisdiction there because such a result would eviscerate the personal jurisdiction requirement as it currently exists); see also *IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258 (N.D. Ill. 1997); *Naxos Resources (U.S.A.) Ltd. v. Southam Inc.*, 24 Media L. Rep. (BNA) 2265 (C.D. Cal. 1996). But see *Haelan Prods. Inc. v. Beso Biological*, No. 97-0571, 1997 U.S. Dist. LEXIS 10565 (E.D. La. July 11, 1997) (noting that while a Web site, without more, would be insufficient to establish general jurisdiction, the combined existence of the defendant's Web site, toll-free number, and advertisements in a national magazine was sufficient to confer general jurisdiction).

24. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

25. See *Edias Software Int'l, L.L.C. v. Basis Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996).

26. See *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

27. See *McDonough*, 1996 WL 753991.

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

29. This assumes the court has already determined that the claim arises from the defendant's contacts with the forum state, as required for specific jurisdiction. See SHREVE & RAVEN-HANSEN, *supra* note 13, § 17, at 73.

forum state,³⁰ and (2) whether jurisdiction over the defendant would be reasonable.³¹

1. The "Purposeful Availment" Requirement

To satisfy the "purposeful availment" requirement, a defendant must have such minimum contacts or "purposeful direction of activities"³² toward the forum state that it would "reasonably anticipate being haled into court" there.³³ While it is clear that physical presence of the defendant³⁴ in the forum state is no longer a requirement,³⁵ the extent to which nonphysical contacts can confer jurisdiction

30. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws.").

31. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The *Asahi* Court indicated that reasonableness was an inquiry separate from the sufficiency of defendant's contacts with the forum. See RICHMAN & REYNOLDS, *supra* note 16, § 37[a], at 105.

32. *Burger King*, 471 U.S. at 472 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

33. *World-Wide Volkswagen*, 444 U.S. at 297.

34. It should be noted that although consideration is sometimes given to the plaintiff's and the claim's contacts with the forum, it is generally the sufficiency of the defendant's contacts that is the focus of the purposeful-availment, or minimum-contacts, analysis. See, e.g., *Keeton*, 465 U.S. 770 (noting the plaintiff had no contact with the forum other than that the magazine in which she was defamed was distributed there); see also RICHMAN & REYNOLDS, *supra* note 16, § 36[d], at 100-01.

35. The *International Shoe Co. v. Washington* decision replaced the rigid physical presence test with a broader fairness approach, but did not make clear whether the contacts between the defendant and the forum state needed to be physical in nature in order to satisfy due process. Recognizing a trend toward expanding the scope of personal jurisdiction, due in part to the proliferation of business being conducted via interstate mail, the Court in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), upheld personal jurisdiction over a nonresident defendant based on one significant, nonphysical contact with the forum state—a life insurance contract. That decision may be considered the high water mark of the permissible scope of personal jurisdiction, but it has been cited favorably in several decisions involving Internet contacts.

A year after *McGee*, the Court decided *Hanson v. Denckla*, 357 U.S. 235, in which the "purposeful availment" language originated. Thus, it was becoming apparent that due process did not require the relationship between the defendant and the forum state to have actual physical components, as long as the contacts were purposeful in nature. Subsequent decisions stressed the importance of the defendant's own purposeful, forum-based activity. The realities of the increasingly national economy meant that defendants could cause injury in a distant forum based on more attenuated contacts. Establishing purposeful availment became problematic in interstate commerce situations. The Court responded by suggesting minimum-contacts might be satisfied if a defendant either received economic benefit from the forum, or caused injury to the forum by expressly aimed tortious actions. See generally SHREVE & RAVEN-HANSEN, *supra* note 13, §§ 12-15. In *Burger King Corp. v. Rudzewicz*, the Court recognized that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus

over a defendant who is not present in the forum state seems heavily fact dependent. Factors the Supreme Court has considered relevant in determining whether a defendant's contacts with the forum are sufficient to indicate purposeful availment include: whether the defendant could foresee that it would be required to defend suit in the forum state;³⁶ whether the defendant initiated the contact with the forum state or sought business there;³⁷ and whether the defendant established the contact with the forum purposefully.³⁸

Purposefulness is most difficult to establish when the cause of action results, in whole or in part, from the mere presence of the nonresident defendant's product or service in the forum state. State courts developed the "stream-of-commerce" theory³⁹ to address these situations where an out-of-state business's only contact with the forum was through a defective product that caused injury.⁴⁰ This doctrine holds that a retailer of defective goods should be amenable to suit wherever its products are distributed through the stream of commerce, directly or indirectly.⁴¹ Otherwise, an out-of-state retailer could avoid suit in the forum by employing middlemen to distribute its product in the forum, and still receive the economic benefit of the sale of its goods.⁴²

The Supreme Court first addressed the stream-of-commerce rationale in *World-Wide Volkswagen Corp. v. Woodson*.⁴³ That case involved a product that entered the forum not through normal distribution channels, but through the foreseeable action of the consumer.⁴⁴ Still, the Court held that jurisdiction was not proper over the nonresident defendant because it was merely "fortuitous" that the defendant's product would have entered the forum—the defendant's "conduct and connection with the forum State" were not such that it should have

obviating the need for physical presence." *Burger King*, 471 U.S. at 476. The Supreme Court has upheld personal jurisdiction where the defendant has sent into the forum a contract offer (*McGee*), a business partner (*Burger King*), or a defamatory news article (*Keeton*).

36. Foreseeability is a relevant, but not sufficient, basis for the exercise of personal jurisdiction. See *World-Wide Volkswagen*, 444 U.S. at 286.

37. See RICHMAN & REYNOLDS, *supra* note 16, § 36[f], at 103 (comparing the results in *McGee* and *Hanson*).

38. See *World-Wide Volkswagen*, 444 U.S. at 286; see also RICHMAN & REYNOLDS, *supra* note 16, § 36[g], at 104.

39. Two of the leading cases were *Buckeye Boiler Co. v. Superior Court*, 458 P.2d 57 (Cal. 1969), and *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961). See R. Lawrence Dessem, *Personal Jurisdiction After Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 51-52 (1987), for discussion of the stream-of-commerce theory in the lower courts.

40. See I CASAD, *supra* note 13, § 7.02[2][c][ii], at 7-26 to 7-36; RICHMAN & REYNOLDS, *supra* note 16, § 36[g], at 104.

41. See RICHMAN & REYNOLDS, *supra* note 16, § 36[g], at 104.

42. See *id.*

43. 444 U.S. 286.

44. In *World-Wide Volkswagen*, the plaintiffs bought a car from the defendant, a regional retailer located in New York whose territory included New York, New Jersey, and Connecticut. While driving the car from New York to Arizona, the plaintiffs were involved in an automobile accident in Oklahoma. The plaintiffs sued in Oklahoma state court, contending the accident was, at least in part, due to a defect in the car. See *id.* at 288.

reasonably anticipated being haled into court there.⁴⁵ In refusing jurisdiction, the Court apparently sought to provide guidance to nonresident defendants for determining what level of conduct would render them liable to suit in a distant forum.⁴⁶ In addition, the Court sought to avoid a situation where a "seller of chattels would in effect appoint the chattel his agent for service of process."⁴⁷

The Supreme Court most recently discussed the stream-of-commerce theory in *Asahi Metal Industry Co. v. Superior Court*,⁴⁸ but did not resolve the issue. That case presented a complex set of facts involving a defendant who was neither a resident of the forum state, nor of the United States. The defendant was a Japanese parts manufacturer who sold its component parts (motorcycle-tire tube valves) to a motorcycle-tire tube manufacturer based in Taiwan, which in turn sold the tubes in California.⁴⁹ The plaintiff was injured in California while riding a motorcycle containing the allegedly defective tube and valve assembly.⁵⁰ However, by the time the case reached the Supreme Court, the plaintiffs had settled their claim with the tube manufacturer, leaving only the tube manufacturer's indemnification claim against Asahi.⁵¹ Justice O'Connor, representing a four-member plurality,⁵² argued that the defendant's mere act of placing its product into the stream of commerce was not sufficient to indicate purposeful availment, even though the defendant knew that its product would ultimately enter California. Assertion of personal jurisdiction by California over Asahi was therefore improper.⁵³ Justice O'Connor viewed purposeful availment as requiring not only awareness, but additional contacts purposefully directed at the forum indicating an intent or purpose to serve the market in the forum state. According to the O'Connor view, such additional contacts could include: evidence that the product was specifically designed for the market in the forum state, advertising in the forum state, existence of customer service in the forum state, or marketing through a sales agent whose territory included the forum state.⁵⁴

Five justices rejected O'Connor's strict interpretation of the purposeful availment requirement.⁵⁵ Justice Brennan, representing another group of four

45. *Id.* at 297.

46. *See id.*

47. *Id.* at 296. Justices Brennan and Marshall, in dissents, recognized that the rapid expansion of interstate travel and commerce made it more reasonable and less burdensome to expect the defendant to defend suit in a distant forum. *See id.* at 299 (Brennan, J., dissenting); *id.* at 313 (Marshall, J., dissenting).

48. 480 U.S. 102 (1987).

49. *See id.* at 106-07.

50. *See id.* at 105-06.

51. *See id.* at 106.

52. The Chief Justice, Justice Powell, and Justice Scalia joined the minimum-contacts portion of Justice O'Connor's opinion. *See id.* at 105.

53. *See id.* at 112-13.

54. *See id.* at 112.

55. Justice Brennan was joined by Justices White, Marshall, and Blackmun. *See id.* at 116 (Brennan, J., concurring in part and concurring in the judgment). Justice Stevens suggested that minimum contacts did exist, but concluded that a decision regarding minimum contacts was unnecessary because, as he reviewed the record, the facts failed the reasonableness step. *See*

Justices, argued that a showing of "additional conduct" was unnecessary.⁵⁶ Justice Brennan viewed the stream of commerce itself not as "unpredictable currents or eddies," but as a more predictable flow from which a manufacturer could reasonably anticipate the destination of its product.⁵⁷ Justice Brennan reasoned that the possibility of a lawsuit could not come as a surprise to one who participates in the stream of commerce as long as the participant is aware that its product is being marketed in the forum state.⁵⁸ Further, Justice Brennan reasoned that the manufacturer receives economic benefit from the forum state regardless of whether it engages in "additional conduct" or merely relies on the stream of commerce. Therefore, litigation in the forum state would not present a burden "for which there is no corresponding benefit."⁵⁹

In response to the Supreme Court's lack of clarity, the circuit courts have varied in their approaches to the stream-of-commerce theory. Some circuits have endorsed the Brennan view that awareness that a product has entered the stream of interstate commerce satisfies minimum-contacts.⁶⁰ At least one circuit has adopted the O'Connor view and required additional contacts.⁶¹ The remaining circuits have devised their own tests or avoided the issue.⁶² However, in recent years, the lower courts have applied the stream-of-commerce analogy to non-products liability cases involving interstate or international commerce.⁶³

2. The "Reasonableness" Factors

In addition to the requirement that the defendant's contacts with the forum indicate purposeful availment, due process requires that it be reasonable for the defendant to defend suit in the forum state.⁶⁴ In general, this "reasonableness" test requires a court to weigh the burden to the defendant of having to litigate in

id. at 121-22 (Stevens, J., concurring in part and concurring in the judgment).

56. *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment).

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

58. *See id.* (Brennan, J., concurring in part and concurring in the judgment).

59. *Id.* (Brennan, J., concurring in part and concurring in the judgment).

60. The Fifth, Seventh, and Eighth Circuits have followed the original stream-of-commerce theory advocated by Justice Brennan in *Asahi*. *See* Martin F. Noonan, *Evolution and Current Interpretation of the Stream of Commerce Test in the Third Circuit*, 40 VILL. L. REV. 779, 793-96 (1995).

61. The First Circuit has adopted the O'Connor view. *See* *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992).

62. The Federal, Third, Sixth, Ninth, and Eleventh Circuits have devised their own tests or avoided the issue. *See* Noonan, *supra* note 60, at 793-94, 801.

63. *See* *Lori Elizabeth Jones, Notc, Lesnick v. Hollingsworth & Vose Co.—The Pure Stream of Commerce No Longer Flows Through the Fourth Circuit*, 29 U. RICH. L. REV. 421, 421-22, 449 (1995) (citing breach-of-contract, trademark infringement, and fraud cases).

64. *See Asahi*, 480 U.S. at 113; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); RICHMAN & REYNOLDS, *supra* note 16, § 34, at 95. The "reasonableness" test refers to the second part of the *International Shoe* test: "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

the forum versus the interests of the forum state, the plaintiff, and the "interstate judicial system" in litigating there.⁶⁵ The Supreme Court has traditionally regarded the purposeful-availment analysis as the more important step,⁶⁶ having given comparatively little attention to the reasonableness factors.⁶⁷ However, it is significant that eight of the nine *Asahi* justices agreed that jurisdiction could not be upheld over *Asahi* under the reasonableness analysis, despite their disagreement on the contacts issue.⁶⁸ It is therefore possible that as electronic communications continue to increase and become more complex, purposeful availment will become even more difficult to assess, and the reasonableness analysis will take a more prominent role.⁶⁹

Between *World-Wide Volkswagen* and *Asahi*, the Supreme Court decided three cases that seemed to place more emphasis on reasonableness factors.⁷⁰ These cases may provide guidance to courts assessing whether Internet contacts are enough to satisfy due process. *Keeton* and *Calder*, both libel actions, indicate that the interests of the plaintiff and the forum state may influence the minimum-contacts analysis. *Burger King* was a contract action in which the Court seemed to indicate that strong reasonableness factors could compensate for relatively weak contacts with the forum state to favor jurisdiction over the nonresident.

In *Keeton*, New York resident Kathy Keeton sued Hustler, an Ohio corporation, in New Hampshire because it was the only state left where the libel claim was not barred by its statute of limitations.⁷¹ The Supreme Court concluded

65. The five factors of this balancing test are: (1) the burden on the defendant of defending in a distant forum; (2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining "convenient and effective relief"; (4) the interest of the interstate judicial system in efficient resolution of controversies; and (5) the "interest of the several states in furthering fundamental substantive social policies." *Burger King*, 471 U.S. at 476-77.

66. See, e.g., *id.* (arguing that once minimum contacts have been established, those contacts may be considered in light of the reasonableness factors).

67. See Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 441-42 (1991). Lower courts have differed on how much weight to give the different reasonableness factors. Some courts require a stronger showing of reasonableness when facts indicating purposeful availment meet the bare minimum, and vice versa. See RICHMAN & REYNOLDS, *supra* note 16, § 37[c], at 109-10. See also Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083, 1131 nn.319-23 (1996), and RICHMAN & REYNOLDS, *supra* note 16, § 37, at 105-09, for further explanation of the reasonableness factors.

68. Only Justice Scalia refused join the reasonableness portion of Justice O'Connor's opinion. See *Asahi*, 480 U.S. at 114-16.

69. This may be especially true since courts likely desire to limit the extent of the factual inquiry on a jurisdictional challenge.

70. Two of these decisions, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and *Calder v. Jones*, 465 U.S. 783 (1984), were decided prior to the formulation of the Court's five-factor reasonableness test, which first appeared in *Burger King*. Still, *World-Wide Volkswagen* had earlier indicated that fairness or reasonableness was a required component of the jurisdiction analysis. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

71. See *Keeton*, 465 U.S. at 772-73.

that Hustler's regular circulation of magazines in the forum justified the exercise of jurisdiction in a libel action based on the contents of the magazine, because regular sales of the magazine were not "random, isolated, or fortuitous."⁷² In assessing the reasonableness factors, the Court found that New Hampshire, though not the residence of either party, had an interest in redressing injuries suffered by defamation victims and protecting New Hampshire consumers.⁷³ Further, the Court addressed the plaintiff's lack of connection with the forum by stating that the plaintiff's contacts with the forum "are important only insofar as they 'enhance defendant's contact with the forum.'"⁷⁴ Thus, although the *Keeton* decision may have been limited to the facts involved, it certainly suggests that factors other than a defendant's contacts with the forum may support jurisdiction.

Calder, on the other hand, was an example of a situation where plaintiff's contacts with the forum significantly enhanced the importance of defendant's contacts. California resident Shirley Jones sued *National Enquirer* magazine in California on the basis of an article published by the magazine about Jones.⁷⁵ Jones joined as individual defendants the article's author and editor, who were both citizens of Florida.⁷⁶ The Supreme Court concluded that jurisdiction was proper over the individual defendants because their activities had caused "effects" in California—the article had relied on California sources and injured the reputation of a California resident whose career was centered in California.⁷⁷ Thus, *Calder* seems to indicate that jurisdiction over nonresidents is favored if the forum state is the locus of injury to the plaintiff.

Finally, the Court's *Burger King* decision gave some attention to the reasonableness factors. Michigan defendant John Rudzewicz entered into a franchise agreement with Burger King, headquartered in Florida, to operate a Burger King restaurant in Michigan.⁷⁸ When the business at Rudzewicz's Burger King declined and Rudzewicz fell behind on franchise payments, Burger King sought to terminate the agreement and sued in its home state.⁷⁹ While Rudzewicz's contacts with Burger King's district office were more frequent, he had visited the Florida headquarters, negotiated with the Florida headquarters, and agreed to a choice-of-law clause which called for the application of Florida law in the event of suit.⁸⁰

Writing for the majority, Justice Brennan had no trouble concluding that Burger King could sue Rudzewicz in Florida without violating his due process rights, because Rudzewicz had purposefully directed activities toward that

72. *Id.* at 774.

73. See RICHMAN & REYNOLDS, *supra* note 16, § 23, at 44. Note that libel actions are governed by the "single publication rule" whereby a libel victim may recover in one forum damages for the harm caused everywhere due to the defamation. See *id.*

74. *Id.* § 23, at 45 (quoting *Keeton*, 465 U.S. at 770). The Court suggested the case of *Calder* as an example. See *id.* § 23, at 45 n.1.

75. See *Calder*, 465 U.S. at 784.

76. See *id.* at 785-86.

77. See *id.* at 788-89.

78. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 466-67 (1985).

79. See *id.* at 468.

80. See *id.* at 480-81.

state.⁸¹ Attending to the reasonableness factors, Brennan indicated that once Burger King had demonstrated that Rudzewicz had purposefully established a business relationship with Florida, Rudzewicz bore the burden of presenting other factors that would “outweigh the considerations discussed above and . . . establish the *unconstitutionality* of Florida’s assertion of jurisdiction.”⁸² Furthermore, Justice Brennan rejected the court of appeals’s conclusion that the restaurant had eminently superior bargaining power, noting that Rudzewicz was an experienced accountant, had advice of counsel throughout negotiations, and had been able to secure modest concessions from Burger King in the deal.⁸³ Therefore, the defendant had not shown that litigating in Florida would impair his ability to defend the lawsuit.⁸⁴

In sum, the post-*World-Wide Volkswagen* cases seem to indicate that the Supreme Court has been less concerned with counting the defendant’s forum contacts and more concerned with balancing the location and severity of the harm caused by the defendant’s activity against the inconvenience to the defendant of litigating outside its home state. To be sure, the personal jurisdiction analysis is flexible and highly fact specific. However, as the *International Shoe* Court recognized many years ago,⁸⁵ such flexibility is necessary for a doctrine that must keep pace with technological developments which continue to break down territorial barriers to commerce and communication.

B. What’s Different About Web Sites?

The U.S. Supreme Court has recognized that the Internet is a “unique and wholly new medium of worldwide human communication.”⁸⁶ The World Wide

81. See *id.* at 479-80 (noting that instead of electing to open up a local restaurant, the defendant had deliberately reached beyond the borders of his home state to do business with a multistate corporation).

82. *Id.* at 482 (emphasis in original). The Court stated that reasonableness considerations could “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.” *Id.* at 477. For reactions to this decision, see generally Rex R. Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in Burger King Corp. v. Rudzewicz*, 1986 ARIZ. ST. L.J. 585, and Pamela J. Stephens, *The Single Contract as Minimum Contacts: Justice Brennan “Has It His Way”*, 28 WM. & MARY L. REV. 89 (1986). Note that this was not the first time that the Supreme Court decided that a contract provided the basis for personal jurisdiction. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

83. See *Burger King*, 471 U.S. at 485.

84. See *id.* at 483.

85. The *International Shoe* Court acknowledged that “[i]t is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.” *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

86. *Reno v. ACLU*, 117 S. Ct. 2329, 2334 (1997) (quoting and affirming *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)). The Court stated that justifications for federal regulation of broadcast media, such as the scarcity of available frequencies at inception and its “‘invasive’ nature” do not apply to the Internet. *Id.* at 2343.

Web⁸⁷ is among the best-known⁸⁸ and most heavily commercialized⁸⁹ of the communication tools available on the Internet. Lower courts have, with much difficulty and little success, attempted to compare Internet communications to more traditional modes of communication.⁹⁰ There are at least five characteristics of the Web that combine to make it a unique form of communication unlike more traditionally accepted communication tools: ease of use, low cost, speed, content capabilities, and absence of geographical constraints.

The Web is easy to use because of its graphical presentation,⁹¹ but also because it enables a user to access all of the features of the Internet using one software

87. See *supra* note 2.

88. See *supra* note 3.

89. See *ACLU v. Reno*, 929 F. Supp. at 842, *aff'd*, 117 S. Ct. 2329. Established businesses and entrepreneurs alike are taking advantage of the Web. Such entities operate Web sites in order to advertise products and services as well as to directly solicit business. See *id.* For example, Pepsi, Time Warner, Eddie Bauer, and Columbia House are just a few of the major commercial entities using the Web. See Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 *FORDHAM L. REV.* 2241, 2247 nn.35-40 (1997). According to Kalow, the Eddie Bauer and Columbia House Web sites allow users to purchase products via the Internet. See *id.*

90. In *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1332-33 (E.D. Mo. 1996), the court, granting jurisdiction, rejected comparisons of Internet communications to mail and 800 telephone numbers. Unlike traditional mail, electronic mail is tremendously more efficient and reaches a vast audience much more quickly. See *id.* Internet communications are also quicker and more efficient than an 800-number, the court said, because an 800-number must still be advertised in print media, and because of the expanded capabilities (including downloading and printing of documents) of the Internet. See *id.* Finally, the court pointed out that a user may access a Web site without knowing its exact address. See *id.* at 1333.

The court in *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996), granting jurisdiction, distinguished Web sites from TV and radio advertisements, which broadcast advertisements only at specific times, and from newspapers, which are disposed of quickly. In contrast, Web sites are continuously available to all Web users, and may be accessed repeatedly. See *id.*

In *Haelan Products Inc. v. Beso Biological*, No. 97-0571, 1997 U.S. Dist. LEXIS 10565, at *1-*2 (E.D. La. July 11, 1997), the court, granting jurisdiction, described Internet domain names (the unique addresses of Web sites) as like telephone numbers, only having more significance because the domain name often contains a trademarked corporate name, and there is no satisfactory equivalent of a telephone directory on the Internet.

In *American Library Ass'n v. Pataki*, 969 F. Supp. 160, 161 (S.D.N.Y. 1997), the court determined that the case implicated the Commerce Clause because the Internet, as a new instrument of interstate commerce, was analogous to a "highway or railroad."

The court in *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 U.S. Dist LEXIS 2065, at *30-*40 (S.D.N.Y. Feb. 26, 1997), refusing jurisdiction, compared a Web site which did not yet promote the sale of products to an advertisement in a national magazine. The court said the magazine advertisement was appropriate because such advertisements may be viewed by people in all 50 states (and the world, for that matter) but do not target the residents of any particular state. See *id.* at *30-*35.

91. Use of the World Wide Web does not require knowledge of computer programming, for example.

program.⁹² In addition, many searching tools are available on the Web to assist users in finding the information they desire.⁹³ Thus, Web users need not be particularly computer literate, nor must they be experts on research techniques, in order to use the resources available on the Web effectively.

Setting up a computer to connect to the Web is also relatively cheap and easy to do.⁹⁴ Most new computers today are sold ready to access the Web. Therefore, Web users represent a diverse cross section of the world population. While its low cost and ease-of-use enable small, entrepreneurial businesses to take advantage of the Web marketplace, it also allows promoters of fraudulent schemes and deceptive advertisers to do the same.⁹⁵

Two key distinguishing features of Web communications are its ability to handle multiple forms of content and its lack of geographic restrictions. Web users view text and graphic information together in a type of interactive document called a "site" or "page."⁹⁶ Text displayed on a page may be read sequentially like a book or pamphlet, or the user can "jump" to a new site by "pointing and clicking" on a highlighted portion of the text. This "linking" capability has no bounds: users can jump from a page located in Indiana to one in Singapore without the restraints of time and geographic distance.

Moreover, the content of a Web communication may be richly enhanced to contain not only text, but video clips, audio recordings, or photo images. Therefore, Web sites are potentially more interesting and entertaining to a user than a mere newspaper or magazine. Web sites may even be more attractive than television or radio because of the degree of control the user has in selecting which sites and which information to access. Furthermore, Web site content is often more current than the day's newspaper because it can be changed or updated at any time by the entity operating the Web site, and the changes are effected immediately.⁹⁷

92. See LAURA LEMAY, *TEACH YOURSELF WEB PUBLISHING WITH HTML 3.0 IN A WEEK 9* (2d ed. 1996). Using a Web browser, one has access to the WWW in addition to electronic mail and the other older information systems on the Internet, such as Usenet news groups, Gopher databases, FTP, Telnet, and WAIS databases. See *id.*

93. See *id.* at 13, 17. Web users may seek out information in one of three ways: by typing in the exact address of a Web site (called its "domain name," see *infra* note 145), by linking from one Web site to the next, or by using a search engine (such as AltaVista, Infoseek, or WebCrawler) to look for Web sites that match certain keywords. Recently, some Web sites have implemented "push" technology, making it even easier for users to search the Web. See Noel D. Humphreys, *New Push Software Likely Will Subject Companies to Jurisdiction*, METROPOLITAN CORP. COUNS., May 1997, at 4, available in LEXIS, Curnws Library, Legnew File. This technology enables Web users to save specific searches with a push technology vendor (such as PointCast). See *id.* The vendor then executes the search periodically and sends the results directly to the Web user. See *id.*

94. For instance, a local Indiana Internet access provider, On Ramp Indiana, currently charges \$50 per month to house a Web site and provide unlimited Internet access.

95. See Christopher Wolf & Scott Schorr, *Cybercops are Cracking Down on Internet Fraud: Federal and State Officials Have Stepped Up Efforts in the Battle Against Info-Highway Robbery*, NAT'L L.J., Jan. 13, 1997, at B12.

96. See LEMAY, *supra* note 92, at 19-20. Before the Web, users navigated the Internet's services via text commands and "arcane tools." *Id.* at 6.

97. See *id.* at 7.

As alluded to above, the inherently interactive nature of the World Wide Web provides capabilities superior to many other forms of communication. The World Wide Web has therefore attracted the attention of a broad cross section of individuals around the world. As a result of the Web's popularity, many businesses now seek to exploit its commercial potential. However, the lack of geographic restrictions may also breed a feeling that one is not subject to the legal restrictions of the "physical" world. As the use of the World Wide Web continues to grow and expand, the amount of litigation involving Web sites will continue to increase.

II. HOW THE DISTRICT COURTS HAVE TREATED THE EXISTENCE OF A WEB SITE

As mentioned earlier, litigation involving Internet communications has arisen in a variety of contexts.⁹⁸ Prior to 1996, plaintiffs in Internet-related suits generally sued defendants where they lived.⁹⁹ As the Internet has become more popular, however, defendants are increasingly being required to travel to the plaintiff's forum state to defend suit.¹⁰⁰

Where courts have been able to determine that the nonresident defendant has either transacted business (albeit electronically) in the forum or purposefully targeted the plaintiff with injurious activity, they have been able to apply existing personal jurisdiction principles fairly comfortably to find jurisdiction proper. The greatest difficulty has occurred when the facts of a case have not easily fit either of the above paradigms: the defendant did not clearly transact business in the forum, and it was not clear that the defendant had purposefully sought to harm the plaintiff. This section will set the stage by summarizing Internet cases that seem to fit easily into the traditional "transacting business" and "tortious conduct" paradigms.¹⁰¹ Then, the more difficult cases that do not easily fit either category will be explored in detail.

A. Conducting Electronic Commerce Constitutes Purposeful Availment

Three recent cases stand for the proposition that a nonresident defendant can engage in business in a forum state via electronic contacts, and that those contacts may be sufficient to support exercise of personal jurisdiction by the

98. See generally *supra* notes 24-28 and accompanying text.

99. See William J. Cook, *Four Internet Jurisdiction Cases Break Rule of Thumb*, CHICAGO LAW., Oct. 1996, at 76.

100. Some of the cases that have conferred jurisdiction over nonresidents include *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), *Edias Software International, L.L.C. v. Basis International Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996), *Panavision International, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996), and *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

101. These paradigms are a result of the typical structure of state long-arm statutes. See *supra* note 17 and accompanying text.

forum state. They are *CompuServe, Inc. v. Patterson*,¹⁰² *Resuscitation Technologies, Inc. v. Continental Health Care Corp.*,¹⁰³ and *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*¹⁰⁴

In *CompuServe*, Richard Patterson, a Texas software developer and attorney, entered into an agreement with CompuServe, an Ohio-based computer network service, whereby CompuServe distributed Patterson's software via its computer network service and received a portion of the revenue generated by its sales to other users of the CompuServe system.¹⁰⁵ Patterson alleged that two similar software applications distributed by CompuServe infringed on his common-law trademarks.¹⁰⁶ CompuServe filed an action in Ohio seeking a declaratory judgment that it had not infringed on Patterson's trademarks.¹⁰⁷

The Court of Appeals for the Sixth Circuit (based in Cincinnati) found that Patterson had purposefully directed commercial activities toward Ohio and received economic benefit from doing so.¹⁰⁸ The court focused on the manner in which Patterson used the Internet to develop a business relationship with CompuServe. Using the Internet, Patterson had entered into a Shareware Registration Agreement with CompuServe,¹⁰⁹ transmitted copies of his software product electronically to CompuServe's Ohio-based computer system, and advertised his software on that system.¹¹⁰ Patterson received revenue from his use of CompuServe's system, which was relayed to him from Ohio.¹¹¹ Finally, Patterson communicated his threats of initiating legal action against CompuServe via the electronic network.¹¹² Thus Patterson could have reasonably anticipated being subject to suit in Ohio, and it was not unreasonable for him to defend there.¹¹³

The court found support for its decision in prior cases that had held that, although mere solicitation of business or entering into a contract within the state was not alone sufficient to confer jurisdiction, the fact that the defendant "contemplated the ongoing marketing" of his product "in the forum state and

102. 89 F.3d 1257. Similar cases involving electronic contacts other than the Internet are *Plus System, Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992), and *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).

103. IP 96-1957-C-M/S, 1997 U.S. Dist. LEXIS 3523 (S.D. Ind. Mar. 24, 1997).

104. 952 F. Supp. 1119 (W.D. Pa. 1997).

105. *See CompuServe*, 89 F.3d at 1260.

106. *See id.* at 1261.

107. *See id.*

108. *See id.* at 1266-67.

109. *See id.* at 1260. Such an agreement provides that the on-line service provider (CompuServe) agrees to distribute software to its members for the creator. The service members are expected to compensate the software creator through the service provider, who takes a cut of the fee before forwarding it to the creator. In this case the shareware agreement stipulated that it was being entered into in Ohio. *See id.* Note that the court does not dispute the validity of this electronic contract. *See id.* at 1264.

110. *See id.* at 1267.

111. *See id.*

112. *See id.*

113. *See id.* at 1268.

elsewhere” was significant.¹¹⁴ While the district court analogized Patterson to a consumer of CompuServe’s services and emphasized the small number of sales made to Ohio residents, the court of appeals viewed Patterson as an entrepreneur seeking to take advantage of the interstate market for profit.¹¹⁵ The fact that Patterson sought to benefit economically from his relationship with CompuServe and had taken several steps in that regard outweighed any concern arising from the fact that Patterson’s connections with Ohio were based solely upon his contract and subsequent communications with CompuServe.

In *Resuscitation Technologies, Inc.*, the business relationship between the parties grew out of the existence of plaintiff Resuscitation Technologies, Inc.’s (“RTI”) Web site.¹¹⁶ Defendant Continental had neither owned property in Indiana nor conducted any prior business there.¹¹⁷ Continental, a venture capitalist, first became aware of RTI when it was searching the Web for business opportunities.¹¹⁸ RTI’s Web site described it as a start-up medical device company located in Indiana and in need of capital.¹¹⁹ Continental responded to the Web site by sending electronic mail to RTI requesting further information.¹²⁰ After that initial contact, the parties corresponded by electronic mail, telephone, and regular mail.¹²¹ Documents were faxed back and forth, and conference calls were conducted, in furtherance of the negotiations between the parties.¹²² Ultimately, however, negotiations broke down and Continental threatened suit, alleging that RTI had breached its agreement.¹²³ RTI sought declaratory judgment in its home state of Indiana.¹²⁴

114. *Id.* at 1266 (citing *Southern Mach. Co. v. Mohasco Indus.*, 401 F.2d 374, 383-86 (6th Cir. 1968)). Also significant to the court was the fact that the defendant “consciously reached out from Texas to Ohio” to subscribe to CompuServe. *Id.* The court noted that the Supreme Court has found that “the purposeful direction of one’s activities toward a state has always been significant in personal jurisdiction cases.” *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985)).

115. *See id.* at 1265-68 (“Someone like Patterson who employs a computer network service like CompuServe to market a product can reasonably expect disputes with that service to yield lawsuits in the service’s home state.”). Alan Field, *Beware Clients with an Internet Presence: Decision Could Drag Them into an Undesirable Forum*, INTELL. PROP. L. NEWSL. (Am. Bar Ass’n Section of Intellectual Property Law, Chicago, Ill.), Fall 1996, at 3, 3-4, 30-31, explains the differences in the two courts’ reasoning. While the district court focused on the fact that only twelve Ohio residents had purchased Patterson’s software in four years, the court of appeals emphasized the quality, not the quantity, of Patterson’s contacts. The court of appeals considered Patterson’s repeated electronic mail communications to CompuServe evidence of a business relationship, with CompuServe acting as the distributor for Patterson’s software product. *See id.* at 4.

116. *See Resuscitation Techs., Inc. v. Continental Health Care Corp.*, IP 96-1957-C-M/S, 1997 U.S. Dist. LEXIS 3523, at *3 (S.D. Ind. Mar. 24, 1997).

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* at *3-*4.

121. *See id.*

122. *See id.* at *4.

123. *See id.* at *7.

124. *See id.* at *8.

In support of its motion to dismiss for lack of personal jurisdiction, Continental emphasized that it was RTI who solicited Continental's business through the existence of its Web site.¹²⁵ The district court denied the motion to dismiss, finding that although RTI initiated contact through its Web site, the anticipated benefit of the Web site solicitation, namely a consummation of a business deal, had occurred.¹²⁶ The ensuing electronic contacts, "numerous and continuous over a period of months," indicated an intent by both parties to transact business in Indiana.¹²⁷ Since, "without question, . . . Continental . . . reached beyond the boundaries of [its] own [state] to do business in Indiana," it was not unreasonable for Continental to be haled into an Indiana forum.¹²⁸ This approach of measuring the quality of the electronic contacts with reference to the intended outcome of the activity was originally formulated by the *Zippo* court.

In *Zippo*, the court extended the *CompuServe* rationale to a situation where the electronic contacts at issue were not those between the plaintiff and the defendant, but those involving the defendant and residents of the forum state.¹²⁹ The plaintiff, Zippo, manufacturer of the well-known Zippo cigarette lighters, sued the defendant, Dot Com, for trademark infringement in the district court of its home state, Pennsylvania.¹³⁰ Dot Com, a California corporation, operated a Web site and Internet news service using domain names including the word "zippo."¹³¹ Dot Com's Web site advertised its news service and provided a form for Web users to subscribe to the service. The process of subscribing to the news service could be completed electronically: the Web user could submit his or her credit card number to Dot Com via the Internet.¹³²

The *Zippo* court, in finding jurisdiction proper over the California defendant, distinguished its case from the troublesome "Web site advertising" cases, discussed *infra* Part II.C, because Dot Com had actually contracted electronically with approximately 3000 individuals and Internet access providers in Pennsylvania, knowing that they resided in Pennsylvania.¹³³ The end result of these electronic transactions was that subscribers received electronic messages via Dot Com's news service—messages that contained the word "zippo," the subject matter of the litigation.¹³⁴

The court rejected Dot Com's efforts to minimize the significance of its Web site and characterize the Pennsylvania resident's contacts with it as "fortuitous."¹³⁵ The court compared the nature of the contacts at issue with those

125. *See id.* at *4.

126. *See id.* at *14-*15, *20.

127. *Id.* at *17.

128. *Id.*

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

130. *See id.* at 1121.

131. *See id.*

132. *See id.*

133. *See id.* at 1125-26.

134. *See id.* at 1126.

135. *Id.* It is true that technically, a Web user initiates contact with a Web site by "visiting" the site. However, this technical reality does not forelose the argument that the defendant solicited business by operating a Web site in the first place. This is the approach of the *Inset*, *Maritz*, and *Heroes* courts, discussed *infra* Part II.C.

involved in *World-Wide Volkswagen Corp. v. Woodson*,¹³⁶ stating that Dot Com's contacts with Pennsylvania would have been fortuitous within the meaning of *World-Wide Volkswagen* if, for example, Dot Com did not have any Pennsylvania subscribers, but an Ohio subscriber forwarded a Dot Com file it had received to a friend in Pennsylvania; or if the Ohio subscriber brought his portable computer with him to Pennsylvania on a trip and used it there to access Dot Com's service.¹³⁷ Since the court concluded that Dot Com consciously chose to do business with Pennsylvania residents, albeit from its Web site, the nature and quality of its electronic contacts were sufficient to indicate purposeful availment.¹³⁸ Citing language from *Burger King Corp. v. Rudzewicz*,¹³⁹ the court stated: "when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper."¹⁴⁰ The court added, "[d]ifferent results should not be reached simply because business is conducted over the Internet."¹⁴¹

These "electronic commerce" cases involve activities that would have achieved the same end result—completion of a business transaction between two parties—whether conducted electronically or through a more traditional method. Therefore, courts have been quite comfortable applying traditional jurisdictional principles to Internet commerce situations.

B. Electronic Contacts Can Equal Tortious Conduct Sufficient to Establish Purposeful Availment

Three recent cases illustrate that certain electronic communications, including the existence of a Web site, can be of such injurious character that they form the basis of personal jurisdiction in the forum where the majority of harm occurs: *Panavision International, L.P. v. Toeppen*,¹⁴² *Edias Software International, L.L.C. v. Basis International Ltd.*,¹⁴³ and *Digital Equipment Corp. v. AltaVista Technology, Inc.*¹⁴⁴ In *Panavision*, Toeppen registered as a domain name¹⁴⁵ the name of Panavision's product, which was a registered trademark. Toeppen then established a Web site at that address so that when Web users searched the Web for the Panavision's product name, Toeppen's Web site would appear. As a

136. 444 U.S. 286 (1980).

137. See *Zippo*, 952 F. Supp. at 1121.

138. See *id.*

139. 471 U.S. 462 (1985).

140. *Zippo*, 952 F. Supp. at 1124 (citing *Burger King*, 471 U.S. at 475).

141. *Id.* The *Zippo* decision has been regarded by courts and commentators as an appropriate framework for the jurisdictional inquiry in the context of the Internet. See, e.g., *Resuscitation Techs., Inc. v. Continental Health Care Corp.*, IP 96-1957-C-M/S, 1997 U.S. Dist. LEXIS 3523 (S.D. Ind. Mar. 24, 1997); Kepchar, *supra* note 6, at 7; Michael J. Wagner & Matthew G. Allison, *Internet Law*, NAT'L L.J., July 7, 1997, at B5.

142. 945 F. Supp. 1296 (C.D. Cal. 1996).

143. 947 F. Supp. 413 (D. Ariz. 1996).

144. 960 F. Supp. 456 (D. Mass. 1997).

145. A domain name is the location of a Web site, for example, "http://www.joe.com." See *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *7 (S.D.N.Y. Feb. 26, 1997).

result, Panavision was unable to post its own Web site using its product name. Toeppen demanded \$13,000 from Panavision to discontinue his use of the name.¹⁴⁶ Because Toeppen was running a scam directed at California, the court felt this case sounded more in tort than contract.¹⁴⁷ California had jurisdiction over Toeppen under the “effects test” established in *Calder v. Jones*¹⁴⁸ because Toeppen’s injurious activity was expressly aimed at the California corporation and the injury would mainly be felt in California, where plaintiff’s products were best known. That defendant’s conduct took place over computer networks was a secondary consideration to its intentional, directed, and injurious nature.¹⁴⁹

In *Edias*, the parties entered into an agreement whereby the Arizona plaintiff, Edias, would distribute the defendant Basis’s software in Europe.¹⁵⁰ Basis was located in New Mexico. After relations went sour, Basis posted electronic mail messages to its employees and European customers stating its reasons for terminating its relationship with Edias and posted a message to its Web page blaming Edias for the failure of the agreement.¹⁵¹ Edias sued in Arizona for breach of contract, and also alleged that Basis’s electronic communications constituted libel, defamation, tortious interference with contract, and violation of the Lanham Act.¹⁵² Of particular note is that the Arizona court found jurisdiction over Basis proper, agreeing with the plaintiff that the allegedly defamatory statements established personal jurisdiction under the effects test because they were directed at Arizona and allegedly caused foreseeable harm to the plaintiff.¹⁵³ Further, the court pointed out that Web pages and electronic messages are available to an audience potentially much larger than just the sender and receiver. The court concluded: “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.”¹⁵⁴

146. See *Panavision*, 945 F. Supp. at 1300.

147. See *id.*

148. 465 U.S. 783 (1984). In *Calder*, the plaintiff, Shirley Jones, sued a number of defendants concerning a story that had been published about her in a national tabloid. The defendants resided in Florida, but the Supreme Court upheld California’s jurisdiction noting that the plaintiff’s relationship with the forum intensified the importance of the defendants’ forum contacts—the story was written about a California resident and the brunt of the harm would be felt in California. See *id.* at 788-89; see also *Core-Vent Corp. v. Nobel Indus.*, 11 F.3d 1482, 1486 (9th Cir. 1993) (“Personal jurisdiction can be predicated on intentional actions . . . expressly aimed at the forum state . . . causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.”). For an interesting discussion of the *Calder* holding, see Counts & Martin, *supra* note 67, at 1123.

149. The negligent/intentional distinction is the main point of contrast in meeting the purposeful-availment requirement when the injury occurs in the forum state due to an out-of-state act by the defendant. See 1 CASAD, *supra* note 13, § 7.02[2][b], at 7-10 to 7-11.

150. See *Edias Software Int’l, L.L.C. v. Basis Int’l Ltd.*, 947 F. Supp. 413, 415 (D. Ariz. 1996).

151. See *id.*

152. See *id.*

153. See *id.* at 419-20.

154. *Id.* at 420.

Digital involved a similar business relationship gone sour.¹⁵⁵ Both parties were providers of certain Internet services. The plaintiff Digital, a Massachusetts corporation, and the defendant AltaVista Technology, Inc. ("ATI"), a California corporation, entered into a licensing agreement whereby the parties allocated certain rights as to the use of the trademark "AltaVista." The scope of this agreement was hotly disputed by the parties. Consistent with its broader view of the agreement, ATI altered its Web site so that it was nearly identical to Digital's AltaVista search service.¹⁵⁶

The *Digital* court, while recognizing that ATI had purposefully structured its affairs to try to avoid the Massachusetts forum,¹⁵⁷ also considered that ATI had conducted business with a Massachusetts corporation, had allegedly infringed that corporation's trademark, and had breached the licensing agreement with that corporation. Such factors were a proper indication of purposeful availment because the bulk of injury would occur in Massachusetts. ATI knew its Web site would attract Massachusetts residents, and Massachusetts residents did access the site, causing harm to Digital's trademarks.¹⁵⁸ However, the court also noted that many consumers outside Massachusetts would also be harmed by the confusion resulting from the defendant's allegedly infringing use of the plaintiff's trademark.¹⁵⁹

Noteworthy is that the *Digital* court wrestled with the significance of *Keeton* and *Calder* in assessing the sufficiency of the defendant's contacts with Massachusetts, concluding that "the case before me is a poignant combination of *Calder*'s 'hits hardest at home' and *Keeton*'s 'hits hard everywhere' 'effects' tests."¹⁶⁰

Similar to the electronic commerce cases, the harm caused by the defendants above could have been accomplished through more traditional means. Nonetheless, the speed and efficiency at which electronic communications can access a wide audience multiplies the effect of injurious activity in the Internet context. These characteristics point in favor of the exercise of personal jurisdiction.

C. The "Web Site Advertising" Cases

While it is fairly clear that doing business on the World Wide Web or conducting tortious activity electronically can subject a defendant to personal jurisdiction in a forum with which it otherwise has no significant contacts, Internet communications cases that fall between these two categories pose more difficulty. In particular, the so-called "Web site advertising" cases have spawned a fierce debate regarding the level of Internet activity that is necessary for a court to exercise personal jurisdiction over an out-of-state defendant.¹⁶¹ The unique

155. *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456 (D. Mass. 1997).

156. *See id.* at 459-60.

157. *See id.* at 468.

158. *See id.* at 469-70.

159. *See id.* at 470 n.30.

160. *Id.*

161. *See supra* note 6 and accompanying text.

features of the World Wide Web, in particular its geographic independence, have rendered critical courts' interpretations of the scope of such terms as "purposeful" and "fortuitous."¹⁶² District courts in Connecticut, Missouri, Minnesota, the District of Columbia, and Florida have indicated that the existence of a Web site for advertising purposes may be sufficient to establish personal jurisdiction.¹⁶³ In contrast, courts in New York have required, in addition to the existence of a Web site, other significant evidence that the defendant purposefully directed activity toward the forum.¹⁶⁴

1. The "Pro-Jurisdiction" Cases

Cases that have granted personal jurisdiction chiefly on the existence of a Web site have done so primarily by analyzing the degree to which the site was commercial or interactive in nature. These cases have also emphasized that Web sites are available continuously and repeatedly to Web users. *Inset Systems, Inc. v. Instruction Set, Inc.*¹⁶⁵ represents the broadest reading of personal jurisdiction rules in this context thus far.¹⁶⁶ In *Inset*, both the plaintiff and the defendant were international players in the computer services industry. The defendant's principal place of business was Massachusetts; the plaintiff's, Connecticut. The defendant obtained a Web site address and an 800 telephone number containing the word "INSET." The plaintiff owned the federal trademark "INSET," and learned of the defendant's use of the name when it attempted to establish a Web site at the same address.¹⁶⁷ Although the defendant otherwise conducted no business in Connecticut, and did not maintain an office, sales force or employees within the state, the district court held that jurisdiction was proper because defendant's Web site and 800 telephone number were designed to communicate with people "not only [in] the state of Connecticut, but [in] all states," the Web site advertisement was "available continuously to any Internet user," and the Web site could reach as many as 10,000 users in Connecticut alone.¹⁶⁸ According to the court, these

162. See Kepchar, *supra* note 6, at 7.

163. See *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1 (D.D.C. 1996); *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996); *State by Humphrey v. Granite Gate Resorts, Inc.*, 1996 WL 767431 (Minn. Dist. Ct., Dec. 11, 1996), *aff'd*, 568 N.W.2d. 715 (Minn. App. 1997); *Wagner & Allison, supra* note 141, at B5 (citing *M&B Beverage Corp. v. New York N.Y. Hotel, L.L.C.*, 96-2481-CIV (S.D. Fla. Dec. 13, 1996), which held that a defendant's Internet advertising was evidence that the defendant had purposefully directed activities toward the forum in an effort to maximize profits).

164. See *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996); see also *IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258 (N.D. Ill. 1997); cf. *McDonough v. Fallon McElligott, Inc.*, No. CIV. 95-4037, 1996 WL 753991 (S.D. Cal. Aug. 5, 1996) (refusing to grant general jurisdiction on the basis of existence of a Web site).

165. 937 F. Supp. 161.

166. See Mark A. Epstein, *Dealing with Jurisdictional Issues Presented by the Internet: Guidance for Trademark Owners*, MULTIMEDIA STRATEGIST, Aug. 1996, at I, 4.

167. See *Inset*, 937 F. Supp. at 162-63.

168. *Id.* at 165.

facts indicated the defendant had “purposefully availed itself of the privilege of doing business within Connecticut.”¹⁶⁹ Since the defendant had purposefully directed its advertising activities toward Connecticut on a continuing basis, it could reasonably anticipate being haled into court there, the court concluded.¹⁷⁰ Although not explicitly stated, one can surmise that the court, lacking very substantial evidence of purposeful availment, decided this case primarily on reasonableness grounds.¹⁷¹

The defendant in *Heroes, Inc. v. Heroes Foundation*¹⁷² maintained a Web site that provided information about its charitable organization. The plaintiff, another charitable organization located in Washington, D.C., brought suit in the District of Columbia alleging trademark infringement. The plaintiff had owned the registered mark “HEROES” and corresponding logo since 1964; its mission was to aid the families of firefighters and police officers killed in the line of duty in the District of Columbia, Maryland, and Virginia areas.¹⁷³ The defendant began using the name “HEROES FOUNDATION” and a similar logo for a charity with the same purpose in 1990. In 1993, the defendant also started using the name to solicit donations to fight cystic fibrosis.¹⁷⁴ The court rejected the defendant’s attempt to “soft-pedal” the significance of its Web site,¹⁷⁵ noting that the Web site specifically invited Web users to make donations to the defendant by calling an 800-number or sending an electronic mail message to the defendant.¹⁷⁶ In addition to its Web site, the defendant’s contact with the District of Columbia included the publication of an advertisement in the *Washington Post* newspaper.¹⁷⁷ The court upheld jurisdiction over the defendant based on the existence of the newspaper advertisement, which, as the court noted, was published in a newspaper of local, not national, circulation and the Web site. Regarding the presence of the Web site, the court found relevant the fact that the site explicitly solicited contributions, provided a toll-free number, and contained the allegedly infringing trademark and logo.¹⁷⁸ The court also characterized the Web site as a “sustained contact with the District,” since it had been “possible for a District resident to gain access to it at anytime since it was first posted.”¹⁷⁹ Thus, the court concluded that by soliciting donations via the Web site and the local newspaper advertisement, the defendant had purposefully availed itself of

169. *Id.*

170. *See id.*

171. For example, the court noted that the commute time for the defendant to Connecticut would be less than two hours, and that the case presented issues of Connecticut common and statutory law. Therefore, adjudication in Connecticut would dispose of the case efficiently. *See id.*

172. 958 F. Supp. 1 (D.D.C. 1996).

173. *See id.* at 2.

174. *See id.*

175. *See id.* at 4.

176. *See id.* at 5.

177. *See id.* at 3-4.

178. *See id.* at 5.

179. *Id.*

the privilege of conducting business within the district, and could reasonably anticipate being haled into court there.¹⁸⁰

*Maritz, Inc. v. CyberGold, Inc.*¹⁸¹ involved an even more "interactive"¹⁸² Web site than *Heroes* or *Inset*, moving it closer to a "transacting business" case like *Zippo* or *CompuServe*. CyberGold was a California firm that planned to create electronic mailing lists of Internet users and provide an information-distributing service over the Internet. Maritz, a Missouri corporation, brought suit in a district court in its home state, alleging trademark infringement. Although its service was not yet operational, CyberGold's Web site advertised and solicited customers for its new service.¹⁸³ The court analyzed the quality and quantity of defendant's contacts with Missouri in upholding jurisdiction over the defendant.¹⁸⁴ As to the quality of the electronic contacts, the court first observed that the "contacts provided by the maintenance of a website on the internet are clearly of a different nature and quality than other means of contact with a forum," because the Internet is capable of rapidly accessing a global audience.¹⁸⁵ Next, the court noted that the Web site at issue automatically responded via electronic mail to users who signed up on its mailing list. Thus, the court rejected defendant's characterization of its Web site as merely a "passive" activity, observing that defendant's "intent [was] to reach all Internet users, regardless of geographic location."¹⁸⁶ The interactive nature of the defendant's Web site, and the fact that the defendant's objective in operating the Web site was to conduct business with residents of any state, favored the exercise of personal jurisdiction.¹⁸⁷ As to the quantity of contacts, the court observed that at least 130 Missouri residents had accessed the defendant's Web site.¹⁸⁸ An additional factor that favored jurisdiction was that the defendant's communications with Web users constituted part of the activity the plaintiff claimed infringed on its trademark.¹⁸⁹ In assessing the reasonableness factors, the court noted that Missouri had a strong interest in determining whether one of its corporations' trademarks was being infringed.¹⁹⁰ Finally, the court stated that the defendant had not established that its burden of defending in Missouri would be so severe as to implicate the traditional notions of fair play and substantial justice.¹⁹¹

In *State by Humphrey v. Granite Gate Resorts, Inc.*, the State of Minnesota brought deceptive trade practices, false advertising, and consumer fraud claims

180. *See id.*

181. 947 F. Supp. 1328 (E.D. Mo. 1996).

182. An interactive Web site is one that, for example, integrates the electronic mail capabilities of the Internet with the Web site, enabling the Web user and Web site operator to exchange electronic messages. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

183. *See Maritz*, 947 F. Supp. at 1330.

184. *See id.* at 1332.

185. *Id.* at 1333.

186. *Id.*

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.* at 1334.

191. *See id.*

against the Nevada operators of a Web site that advertised a future on-line betting service.¹⁹² Like the *Heroes* Web site, the defendant's Web site here provided Web users the opportunity to be placed on an electronic mailing list and advertised a toll-free telephone number.¹⁹³ Addressing the quality of the defendant's contacts with Minnesota, the court stated: "Defendants attempt to hide behind the Internet and claim that they mailed nothing to Minnesota, sent nothing to Minnesota, and never advertised in Minnesota. This argument is not sound in the age of cyberspace. . . . [T]hat advertisement is available 24 hours a day . . . to any Internet user"¹⁹⁴ Furthermore, the facts that the Web site gave a direct number to call, and that Minnesota residents were on the mailing list were "more than sufficient evidence that Defendants [had] made a direct marketing campaign to the State of Minnesota."¹⁹⁵ The fact that Minnesota had an interest in determining whether its residents had been defrauded or fraudulently induced to enter a transaction also seemed to play a role in the court's finding of jurisdiction.¹⁹⁶

To summarize, the "pro-jurisdiction" courts appear to recognize that the unique features of the World Wide Web render it a much more powerful advertising and solicitation tool than other mediums. These courts generally have found jurisdiction proper when the defendant clearly had an objective of using the Web to conduct business, although commerce may not yet have taken place.¹⁹⁷ The number of contacts the defendant has actually made with forum residents through an interactive Web site is also considered. Lastly, the significance of the Web site is enhanced if it contains content, such as a company name or logo, that is the subject of the litigation.

2. The "No-Jurisdiction" Cases

At least one district court has flatly refused to find jurisdiction proper based on a Web site that merely solicits business, but does not actually engage in commerce.¹⁹⁸ Jurisdiction over a nonresident Web site owner was denied by a U.S. district court in New York in *Bensusan Restaurant Corp. v. King*, a case

192. *State by Humphrey v. Granite Gate Resorts, Inc.*, 1996 WL 767431, at *1 (Minn. Dist. Ct. Dec. 11, 1996), *aff'd*, 568 N.W.2d 715 (Minn. App. 1997).

193. *See id.* at *2.

194. *Id.* at *6.

195. *Id.* at *7. The defendant knew that at least 248 computers located in Minnesota had accessed its Web site, and that two of the top 500 people accessing its site were from Minnesota. *See id.* at *8.

196. *See id.*

197. For example, the *Maritz* court noted that "[t]he information transmitted [by the defendant] is clearly intended as a promotion of CyberGold's upcoming service and a solicitation for internet users, CyberGold's potential customers." *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996). Although the *Heroes* court did not decide jurisdiction was proper on the basis of a Web site alone, it noted that the defendant's Web site "explicitly solicit[ed] contributions, and provid[ed] a toll-free telephone number for that purpose." *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 5 (D.D.C. 1996).

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

with facts similar to *Inset*.¹⁹⁹ King owned a small club in a Missouri college town called The Blue Note. He posted a Web site that advertised the club, provided ticket information, and listed a telephone number for ticket orders. The plaintiff, operator of The Blue Note jazz club in New York City and owner of the federal trademark "The Blue Note," sued for trademark infringement based on a logo displayed on King's Web site.²⁰⁰ The court found that King had done nothing to purposefully avail himself of the benefits of New York because, even though a New York resident could access the Web site, it would have taken several steps for the user to purchase tickets for the Missouri club, including placing a phone call to Missouri and picking up tickets there.²⁰¹ Due process was not satisfied because King had not made a specific effort to target its product toward New York, although it was foreseeable to him that New York residents could access the site and be confused.²⁰²

The same U.S. district court declined jurisdiction again in *Hearst Corp. v. Goldberger*.²⁰³ In *Hearst*, lawyer-defendant Ari Goldberger, a resident of New Jersey, established a Web site, using the domain name "Esqwire.com," which he envisioned as becoming a "virtual law firm" through which he would offer legal services and products.²⁰⁴ The New York publishers of *Esquire* magazine sued for trademark infringement.²⁰⁵ The Web site invited users interested in more information to contact the defendant via electronic mail, however it is unclear whether it provided users with the opportunity to send mail directly from the site.²⁰⁶ Although New Yorkers had accessed the Web site, the court, comparing the Web site to an advertisement in a national magazine,²⁰⁷ emphasized that the defendant had not yet sold any products or services in New York or elsewhere.²⁰⁸ Significantly, the court went out of its way to expressly reject the reasoning of the *Inset*, *Maritz*, and *Heroes* courts,²⁰⁹ stating that such reasoning would "be tantamount to a declaration that this Court, and every other court throughout the

199. *See id.*

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

201. *See id.* at 299.

202. *See id.* at 299-301 ("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."). Note also that the court explicitly distinguished the *CompuServe* case as containing "vastly different facts." *Id.* at 301.

203. No. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997).

204. *Id.* at *3.

205. *See id.* at *15.

206. *See id.* at *4.

207. According to the opinion, New York law is clear that advertisements in national publications are not sufficient to provide personal jurisdiction under its long-arm statute. *See id.* at *10. Further, the court cited several cases that held that such advertisements did not satisfy constitutional due process requirements. *See id.* at *11 n.13.

208. *See id.* at *10.

209. *See id.* at *20.

world, may assert [personal] jurisdiction over all information providers on the global World Wide Web."²¹⁰

The district court appears to require O'Connor-style "additional contacts" in order for it to exercise personal jurisdiction on the basis of a Web site.²¹¹ This district's opinions emphasize a technical feature of the World Wide Web: that it is the Web user who initially "contacts" defendant's Web site by one of the methods discussed in Part II.²¹² This court also apparently refuses to distinguish between passive and interactive Web sites, since it rejects not only the reasoning of the *Inset* court, but also explicitly disagrees with *Maritz* and *Heroes*.

III. FINDING PERSONAL JURISDICTION ON THE BASIS OF A WEB SITE

In the context of Web site communications, the jurisdictional inquiry centers around determining when electronic contacts become "purposeful" rather than "fortuitous," such that they satisfy the constitutional requirements for personal jurisdiction. This section argues that the approach of the "pro-jurisdiction" courts is an appropriate response to the unique nature of Web site communications and is consistent with existing due process principles.

The magnificent speed and efficiency with which Web site communications reach a vast global audience multiplies greatly the effect of such communications in comparison to more traditional methods of communication. Due to the nature of the Internet, the possibility of harm seems particularly great in cases of

210. *Id.* (quoting *Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1039-40 (S.D.N.Y. 1996)). Interestingly, however, the *Hearst* court hinted that special congressional legislation might be appropriate: "The Court declines to reach such a far-reaching result in the absence of a Congressional enactment of Internet specific trademark infringement personal jurisdiction legislation." *Id.* Further, while the *Hearst* court cites *Playboy*, that case did not concern personal jurisdiction. *Playboy* involved an Italian publisher who was subject to an injunction prohibiting it from selling or distributing its *Playmen* magazine in the United States. The Italian publisher created a Web site for its magazine. The U.S. court enforced the injunction against the Web site with respect to U.S. citizens, rejecting defendant's argument that he was merely posting images on a computer in Italy, rather than distributing them to anyone in the United States. See also James S. DeGraw, *Italian Internet Site Operator Violates U.S. Injunction*, 11 COMPUTER L. ASS'N BULL. 1, 14 (1996).

211. See *supra* Part I.A.1.

212. See *supra* note 95 and accompanying text.

trademark and copyright infringement.²¹³ However, the possibility of extreme harm is not limited to such cases, as was evidenced by *Granite Gate* and *Edias*.²¹⁴

The unique characteristics of Web site communications resist analogy to more familiar means—several courts have considered and rejected analogies to telephone, radio, television, and newspaper. The *Hearst* court's comparison of a Web site to an advertisement in a nationally distributed magazine is only partially satisfactory. The similarity between these two mediums ends with the observation that both are available to a national, even global, audience while the content of either is rarely, at least initially, directed at any particular forum. Magazines are distributed only periodically, and are typically disposed of quickly. Meanwhile, Web sites are distributed once to all who use the Web, and are then available continuously until removed by the Web site operator. Web users may, in addition, "bookmark" a Web site so that they may return to it frequently without having to remember its exact whereabouts. Further, magazine advertisements are one-dimensional and require an additional step to be taken to contact the advertiser. In contrast, Web sites are capable of providing much more interesting content, including sound and video. Web sites also allow an immediate response by enabling users to contact the advertiser directly from the Web site via electronic mail. The likelihood that an individual will see, remember, return to, and respond to an advertisement in a magazine is therefore likely to be significantly lower than with a Web site. These factors, combined with the immense diversity of the global Web audience, greatly increase the odds that a Web site will produce business for the Web advertiser. As evidence, many commercial entities now view their Web sites as an essential part of doing business.

Hence, the *Hearst* court's view of the Web site advertiser as one who innocently posts a "billboard" for Web users to view if they so desire may have been accurate in the early days of the Internet,²¹⁵ but is no longer valid. As the *Inset*, *Maritz*, and *Heroes* courts have recognized, businesses that operate Web sites have intentionally elected to solicit business from potentially anyone in the world. Further, there is a good argument that businesses that choose to use another's trade name for their own profit intend to do business with that entity's customers.

213. For a discussion of why this is so, see James H. Aiken, Comment, *The Jurisdiction of Trademark and Copyright Infringement on the Internet*, 48 MERCER L. REV. 1331 (1997). Aiken argues that the *Inset*, *Maritz*, and *Zippo* cases should be viewed as models for future litigation. See *id.* at 1350. Note that even the *Hearst* court recognized the particular problems of trademark owners. First, the nature of the Web favors the use of corporate names as domain names. Trademark-protected names are often at risk because of their broad recognition. Thus, domain names also have become a valuable corporate asset. See *Hearst*, 1997 U.S. Dist. LEXIS 2065, at *2. Second, as the *Hearst* court noted, the trademark owner is often in a Catch-22 situation: if it waits until a Web site is actually used to conduct commerce with Web users in its own jurisdiction, personal jurisdiction over the defendant might be appropriate but the trademark owner would probably be faced with laches-type defenses, not to mention greater harm to its mark. See *id.* at *11.

214. Thus, a narrow rule limiting the expansion of jurisdiction to one type of cause of action, as indirectly proposed by the *Hearst* court is inappropriate. See *supra* note 210.

215. See Cook, *supra* note 99.

The *Inset* holding (that the existence of a passive Web site and an 800-number alone support jurisdiction over a nonresident) may represent the outer limits of personal jurisdiction in the Internet context. However, the “sliding scale” approach, employed by the *Zippo* court, of assessing the commercial and interactive nature of the Web site versus the quantity of contacts with the forum, seems appropriate for the Web site advertising cases. Additionally, since in these cases it is more difficult to find evidence that the defendant purposefully directed activity toward a given forum, a finding that the defendant’s Web site contributed significantly to its entire business operation strongly supports purposeful availment.²¹⁶

Those who argue for adoption of the *Hearst* court’s view claim that little “mom and pop” businesses who operate a Web site merely with the intent of serving their own locale will be forced to defend suit anywhere their Web site is accessed, if a broader view of personal jurisdiction is adopted.²¹⁷ For example, the defendant in *Bensusan Restaurant Corp. v. King* probably had no intention of soliciting business in New York. However, if his Web site did happen to attract New York customers, King most likely would not have turned them down. Further, if musicians from New York contacted King after having viewed his Web site (perhaps they stumbled on it by mistake while looking for the Web site of the famous New York jazz club), King would probably consider the opportunity to have them play at his Missouri club. Such situations are likely to be common in the Web site context. However, a constitutional jurisdictional result can still be reached using a framework such as that proposed by the *Zippo* court,²¹⁸ without requiring additional contacts or launching an inquiry into intent. Under a *Zippo*-style analysis, personal jurisdiction over King in New York would probably still be denied because King’s Web site was not interactive and there was no evidence that New Yorkers had accessed his Web site. In contrast, had King designed his Web site such that interested musicians could and did respond electronically, that activity, combined with the knowledge that many musicians reside in the New York area, may have rendered jurisdiction proper in New York.

The approach of the “pro-jurisdiction” courts is consistent with the fundamental principles of due process. The World Wide Web can appropriately be viewed as an established channel of distribution under the stream-of-commerce theory because entities that operate a Web site have consciously decided to enter the realm of interstate, and even global, commerce—even if their primary objective is to serve a local market. A Web site is more akin to a product than a mere advertisement because of the Web site’s unique content and interactive capabilities. As indicated by the *Zippo* court, the operation of an interactive Web site creates contacts with a forum that are more than merely fortuitous. Therefore, the issues and policy concerns that gave rise to the stream-of-commerce rationale are also applicable here.

216. For example, in *Maritz* and *Zippo*, the defendant’s business operated entirely from a desktop. By contrast, in *Bensusan* and *Inset*, the defendant’s Web site merely supplemented its “normal” business.

217. See, e.g., Kalow, *supra* note 89.

218. See *supra* Part II.A.

The approach of Justice Brennan, as indicated in his *Asahi* opinion,²¹⁹ is most consistent with the reasoning of the *Inset*, *Maritz*, and *Heroes* courts, and is appropriate for this context. Web site operators are well aware of the global expanse of the Internet, and the potentially huge return on the relatively minimal investment required to set up a Web site. Web site operators therefore should not be able to evade jurisdiction simply by using the Internet to conduct business, while still reaping the economic benefits. The view of Justice O'Connor, more in line with the *Bensusan* and *Hearst* decisions, is inappropriate due to the characteristics of Web site communications discussed above. It is unreasonable to require plaintiffs to demonstrate affirmatively that Web site operators have specifically targeted a particular forum state over others. On the contrary, it is much more feasible for Web site operators, such as the defendant in *Bensusan*, to specify that they wish to limit the scope of their solicitation to a particular region by refusing to honor requests from residents of forums in which they do not wish to be subject to jurisdiction, or by limiting their Web site to password-only access.

The concern that the *Inset-Maritz-Heroes* approach will expose defendants to national, or worldwide, jurisdiction is overstated. Cumulatively, these cases based jurisdictional decisions on a set of rational factors intended to evaluate the extent to which the Web site owner expected to reap economic reward from the existence of its Web site. This analysis, having taken guidance from *Keeton* and *Calder*, also considers the location of the greatest amount of harm. Therefore, forum-shopping should not be any greater of an issue than in other contexts. Finally, if the result of *Asahi* is any indication, an evaluation of the reasonableness factors may serve to defeat jurisdiction in appropriate cases, regardless of whether the Brennan or O'Connor approach to purposeful availment is followed.

CONCLUSION

Web site communications differ from other modes of communication in significant ways. The speed and efficiency with which complex messages reach a vast global audience drastically multiplies the impact of such messages. For commercial entities, economic gains may be realized more quickly and in larger quantity. At the same time, unscrupulous Web users can inflict harm on intellectual property owners, consumers, and others much more effectively than through other methods. The features of Web site communications, and their potential rewards and consequences, thus favor a more expansive, rather than a more restrictive, view of personal jurisdiction.

Traditional personal jurisdiction doctrine is not unworkable in the context of these electronic interactions. Historically the doctrine has proved to be quite flexible: as technological advances have facilitated interstate relations, the scope

219. Neither the Brennan view, nor the O'Connor view, represents the law, since both views only gathered the support of four justices. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (Brennan, J., concurring in part and concurring in the judgment); *id.* at 105 (O'Connor, J., plurality opinion).

of personal jurisdiction has expanded to include nonresident defendants in more and new situations. The development of the Internet, and particularly the World Wide Web, is a new context which, because it operates without regard to geographic territory, calls for further expansion of the permissible scope of personal jurisdiction. An indication from the Supreme Court of the proper meaning of "purposeful availment" would greatly aid courts that must deal with such electronic contacts.

Existing jurisdictional principles can be easily applied to cases involving electronic commerce and the commission of tortious behavior through electronic means because suitable analogies exist. The so-called "Web site advertising" cases have posed greater difficulty for the courts because a suitable analogy has not been found. Of the two approaches to jurisdiction that district courts have developed, the more appropriate approach is that which favors the exercise of personal jurisdiction over entities that solicit business through a Web site. Granted, it is somewhat troubling to hold these entities responsible for the potential cost of defending litigation in any forum where transaction of business may be the ultimate objective. However, considering the minimal effort required to establish a Web site and the potential results of Web activities, it is even more troublesome to allow such entities to reap the benefits of conducting business on the Web while avoiding jurisdiction in any state except where they are physically located.

