Indiana Law Review

Volume 31 **1998** **Number 2**

NOTES

ANALYZING MINIMUM CONTACTS THROUGH THE INTERNET: SHOULD THE WORLD WIDE WEB MEAN WORLD WIDE JURISDICTION?

MICHAEL E. ALLEN*

INTRODUCTION

In the first 1996 Presidential debate, Senator Bob Dole directed his closing remarks to the youth of America. Given President Bill Clinton's lead in the polls, Senator Dole needed to make a big impact in the debate. So, what did he say to inspire America's young voters? "I ask for your support. I ask for your help. If you really want to get involved, just tap into my homepage—www.dolekemp.org."[1]

It seems that everyone, from would-be Presidents to household pets,[2] has a "Web page." Although the Internet began as a government research project, Senator Dole's closing remark illustrates the significant force it has today as a communication medium.[3] Use of the Internet has permeated to virtually all aspects of our culture.[4] Consistent with its origin, government and educational

---

* J.D. Candidate, 1998, Indiana University School of Law—Indianapolis; B.S., 1993, Purdue University—Indianapolis. Thanks to my wife, Sandra, and children, Whitney and Brady, for the support they have given me and the sacrifices they have made for me.

1. Senator Robert Dole, Presidential Debate, Hartford, Conn. (Oct. 6, 1996).

2. *See, e.g., Pets in the Whitehouse* (visited Feb. 17, 1998) <http://www.whitehouse.gov/WH/kids/html/pets.html> (the official Web page of Socks the cat as well as other pets that have occupied the Whitehouse).

3. Although Dole's Web site was not enough to turn the election around, it was enough to generate interest among the voters. Dole's Web site received 762,000 visits in a single four hour period the day after the debate. Press Release, 1996 Presidential Campaign Press Materials (October 7, 1996).

4. Consider the following passage from a report issued by President Clinton's Information Infrastructure Task Force:

> The Global Information Infrastructure (GII), still in the early stages of its development, is already transforming our world. Over the next decade, advances on the GII will affect almost every aspect of daily life—education, health care, work, and leisure activities. Disparate populations, once separated by distance and time, will experience these changes as part of a global community.

use of the Internet remains substantial.[5] Additionally, however, individuals are now making use of the Internet in practically every way imaginable.[6] Further, commercial use of the Internet is rapidly expanding and will likely become a significant part of the economy.[7]

The Internet has greatly enhanced our ability to interact with people and organizations in other states as well as internationally.[8] As a result of the various services available through the Internet, individuals and organizations are now able to disseminate a variety of information to a worldwide audience with relative ease and little cost. It was not until recently, however, that the Internet's seemingly limitless boundaries collided with our legal system's jurisdictional boundaries. There has been a flurry of recent cases where Internet users have asserted that they were not amenable to personal jurisdiction in the forum where they were sued, despite the fact their Internet activities allegedly had caused

---

> No single force embodies our electronic transformation more than the evolving medium known as the Internet. Once a tool reserved for scientific and academic exchange, the Internet has emerged as an appliance of every day life, accessible from almost every point on the planet. Students across the world are discovering vast treasure troves of data via the World Wide Web. Doctors are utilizing tele-medicine to administer off-site diagnoses to patients in need. Citizens of many nations are finding additional outlets for personal and political expression. The Internet is being used to reinvent government and reshape our lives and our communities in the process.

William J. Clinton & Albert Gore, Jr., *A Framework for Global Electronic Commerce* (July 1, 1997) <http://www.iitf.nist.gov/eleccomm/ecomm.htm> (endnotes omitted).

5. *See, e.g.*, *Yahoo!—Government* (visited Feb. 17, 1998) <http://www.yahoo.com/government/> (a directory of government resources available on the Internet's World Wide Web); *Yahoo!—Education* (visited Feb. 17, 1998) <http://www.yahoo.com/education/> (a directory of educational resources available on the Internet's World Wide Web).

6. Indeed, as stated in *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997), "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." In *Reno*, the court was faced with deciding the constitutionality of several provisions of the Communications Decency Act of 1996, 47 U.S.C. § 223, that sought to regulate much of the content on the Internet. *Id.* at 828-30. The court in *Reno* made extensive findings of fact which provide a comprehensive description of the Internet. *See id.* at 830-49.

7. *See* Clinton & Gore, *supra* note 4, stating:

> World trade involving computer software, entertainment products (motion pictures, videos, games, sound recordings), information services (databases, online newspapers), technical information, product licenses, financial services, and professional services (businesses and technical consulting, accounting, architectural design, legal advice, travel services, etc.) has grown rapidly in the past decade, now accounting for well over $40 billion of U.S. exports alone.
>
> An increasing share of these transactions occurs online. The GII has the potential to revolutionize commerce in these and other areas by dramatically lowering transaction costs and facilitating new types of commercial transactions.

8. *See supra* note 4.

harm in that forum.[9]

This Note will discuss a court's power to assert personal jurisdiction over a nonresident defendant based on that defendant's Internet activities. Part I will provide an overview of the Internet and suggest that an understanding of its true nature is critical to proper application of legal precedent to cases involving Internet use. Part II will describe the minimum contacts test that provides an analytical framework used to determine whether the assertion of personal jurisdiction over a nonresident defendant meets the constitutional requirements of due process. Part III will critically examine various approaches that have been used to analyze a nonresident's forum contacts through the Internet. Part IV will briefly discuss the fairness requirements of due process analysis in the context of cases involving the Internet. This Note will conclude by arguing that certain adaptions of the minimum contacts test are capable of fairly and efficiently handling personal jurisdiction questions arising out of Internet related activities. Due process demands, however, that a court clearly focus on the nonresident defendant's Internet activities giving rise to the action, rather than the global nature of the Internet itself.

I. THE INTERNET

The Internet defies definition. In a technical and physical sense, it is simply a computer network, albeit a very large one.[10] What many have come to think of as the Internet, however, goes well beyond the computers and communication lines that connect them. It has been analogized to a highway,[11] and the term "cyberspace" implies a separate universe apart from the physical world.[12] These

---

9. *See infra* notes 104-211 and accompanying text.

10. As described in *Reno*:

> 1. The Internet . . . is a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks. This is best understood if one considers what a linked group of computers -- referred to here as a 'network' -- is, and what it does. Small networks are now ubiquitous (and are often called 'local area networks'). For example, in many United States Courthouses, computers are linked to each other for the purpose of exchanging files and messages (and to share equipment such as printers). These are networks.
>
> 2. Some networks are 'closed' networks, not linked to other computers or networks. Many networks, however, are connected to other networks, which are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network in the system. This global Web of linked networks and computers is referred to as the Internet.

Reno, 929 F. Supp. at 830-31.

11. Quite often the Internet and other advancing communications mediums are referred to collectively as the "information superhighway." *See, e.g.*, R. Scot Grierson, *State Taxation of the Information Superhighway: A Proposal for Taxation of Information Services*, 16 LOY. L.A. ENT. L.J. 603 (1996).

12. *See, e.g.*, William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World*

analogies and characterizations, however, fail to capture the true essence of the Internet and actually frustrate an attempt to gain an understanding of it. In analyzing personal jurisdiction questions, notions that accentuate the boundless nature of the Internet have already resulted in the focus being shifted away from the activities of the defendant giving rise to the action to the global nature of the Internet.[13]

The Internet began in 1969 as a government funded project of the Advanced Research Project Agency ("ARPA") to facilitate the sharing of information among government and educational researchers, primarily those involved with the Department of Defense.[14] Originally the network was known as the ARPANET.[15] Over time, access to the ARPANET was expanded to additional universities, corporations, and finally, to people around the world to become what is now known as the Internet.[16] In 1996, it was estimated that as many as forty million people were accessing the Internet, and it was forecasted that the number of Internet users would grow to 200 million by 1999.[17]

Although electronic mail ("e-mail"),[18] newsgroups,[19] and listservs[20] are popular features of the Internet, the driving force behind the increased popularity and explosive growth of the Internet is clearly the World Wide Web ("Web").[21]

Precedent to the Virtual Community, 30 WAKE FOREST L. REV. 197 (1995) (arguing that the users of the Internet and other advanced networked communication mediums form 'virtual communities' to which existing law is not well-suited).

13. *See infra* notes 129-59 and accompanying text.

14. *Reno*, 929 F. Supp. at 831.

15. *Id.*

16. *Id.* For purposes of this Note, other proprietary networks that are not fully open to Internet users, such as Compuserve or America Online, are also considered to be part of the Internet. These proprietary networks charge subscribers a monthly fee for access to their system in return for access to a number of information services, as well as general Internet access. *See id.* at 833.

17. *Id.* at 831. For a description of the ways in which individuals gain access to the Internet, see *id.* at 832-34.

18. For a description of the use of e-mail through the Internet, see *id.* at 834.

19. A newsgroup allows a group of individuals to carry on an electronic discussion covering a topic of common interest to the group. Individuals can access the newsgroup and see the messages that have been placed on it. Individuals can also place messages on the newsgroup for others to view. *See id.* at 834-35.

20. A listserv is an e-mail address that reroutes messages to a predefined list of other e-mail addresses. Through a listserv, an Internet user can send a message to a listserv address to reach a large number of people. Conversely, Internet users that subscribe to a listserv will receive all messages sent to the listserv address. Typically, listservs operate like newsgroups allowing multiple users, who share a common interest, to carry on electronic discussions in a group setting. *See id.* at 834. Internet Relay Chat ("IRC") is another popular form of communication conducted primarily as a leisure activity through the Internet. Through IRC, individuals can communicate in real time in a one to one or group setting. *See id.* at 835.

21. *Id.* at 836-38.

Prior to the advent of the Web, finding information on the Internet could be an arduous task.[22] A Web "page" is a file stored on the Internet that may contain text, sound, pictures, and even full motion video. As a result of the Web's multimedia[23] capabilities, graphical point and click interface, and the seamless connectivity of Web pages, traversing the Web[24] is rapidly becoming one of the country's favorite pastimes.

The increasing popularity of the Internet has not escaped the attention of commercial enterprises. Small businesses now have the ability to reach far beyond the local markets they have served in the past.[25] In many cases, however, these businesses may simply be using the technology of the Internet to better serve local markets and may have no intention of expanding beyond intrastate business.[26] Nevertheless, a small business that posts a Web site to solicit a local market may be called on by a distant patron as a result of its "nationwide advertising campaign."[27] Similarly, a local entrepreneur who advertises her latest business venture on the Internet may unknowingly be infringing the trademark of a large corporation headquartered on the other side of the country.[28] When disputes arise out of situations such as these, it will be fundamental to the due process inquiry that a court make a serious effort to understand not only the technology of the Internet, but more importantly how the individual or business being accused of causing harm was using that technology.

II. THE MINIMUM CONTACTS TEST

Since *Pennoyer v. Neff*,[29] the Supreme Court has struggled with adapting the requirements of the Due Process Clause of the Fourteenth Amendment[30] to the

---

22. *See id.* at 838.

23. The combination of text, sound, pictures, and full motion video in a computer product is often referred to as multimedia.

24. For a description of how users navigate the Web, see *Reno*, 929 F. Supp. at 836-37.

25. *See supra* note 7.

26. *See* Frank Houston, *Going Local Online, the Big Fish Vie for the Cities*, COLUM. JOURNALISM REV., Nov.-Dec. 1996, at 11 (stating that, "[m]any . . . major players are betting that, as Internet usage increases, local markets, with their lucrative classified and local retail advertising, will be the real cash cows on the Web."). *See, e.g.*, *Yellowpages.com* (visited Feb. 17, 1998) <http://www.yellowpages.com> (advertising directory searchable by city); *Welcome to Sidewalk* (visited Feb. 17, 1998) <http://www.sidewalk.com> ("city guide to entertainment" developed by Microsoft).

27. *Cf.* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (characterizing advertising via a Web page as a substantial nationwide advertising campaign).

28. *Cf.* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) (dismissing for lack of personal jurisdiction action alleging defendant's Web site constituted trademark infringement), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

29. 95 U.S. 714 (1877).

30. The Fourteenth Amendment to the Constitution provides in part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST.

increased mobility of society and globalization of commerce.[31] In 1945, the Supreme Court abandoned the inflexible requirement of presence established in *Pennoyer*,[32] and the legal fictions that had been created to accommodate it,[33] in favor of a more flexible standard for determining the limitations the Due Process Clause places on a state's power to assert jurisdiction over those outside its borders. In *International Shoe Co. v. Washington*,[34] the Court created the "minimum contacts test" by stating

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.[35]

Applying the minimum contacts test proved more difficult than stating it, however, and the Court has since decided a number of cases applying the test to a variety of fact patterns.[36] From these cases, additional principles and approaches have been derived from the basic framework laid out in *International Shoe*.[37] An understanding of these cases is critical to a properly focused due process inquiry in any context.

Ultimately, the test that has evolved from *International Shoe* is a two step analysis.[38] The first step analyzes the defendant's contacts with the forum

---

amend. XIV, § 1.

31. *See generally* ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.02 (2d ed. 1990); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984).

32. *Pennoyer* basically established two propositions in its interpretation of the recently enacted Fourteenth Amendment. First, states possessed constitutional authority to assert jurisdiction over all persons and things present within their borders. 95 U.S. at 734. Second, states lacked constitutional authority to assert jurisdiction over persons and things not present within their borders. *Id.* at 731.

33. *See, e.g.*, Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917) (holding that a foreign corporation doing business in forum State could be deemed "present" in that state and amenable to personal jurisdiction under *Pennoyer*); Hess v. Pawloski, 274 U.S. 352 (1927) (upholding jurisdiction based on legal fiction that out-of-state motorist had, by using the highways of forum State, consented to jurisdiction and appointed a designated state official to accept process).

34. 326 U.S. 310 (1945).

35. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (other citations omitted).

36. *See infra* notes 50-102 and accompanying text.

37. *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.10 (2d ed. 1990); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599 (1993).

38. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980). The court must also have a statutory basis for asserting jurisdiction. There are basically two types of statutes that give state courts authority to serve process upon nonresidents. Some states provide enumerated acts which, if committed by a nonresident, give the states such authority. *See, e.g.*, IND. R. CIV. P.

asserting jurisdiction.[39] If it is not established that the defendant has sufficient contacts with the forum, the second step will not even be considered and the defendant will not be amenable to jurisdiction in the forum.[40] Conversely, if sufficient contacts between the defendant and the forum are established, a court will move to the second step and inquire whether forcing the defendant to defend in the forum meets the fairness requirements of *International Shoe*.[41] Once contacts are deemed sufficient, however, the burden is on the defendant who "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[42] Defendants have rarely prevailed on the fairness step once sufficient contacts were established.[43]

A. Analyzing Contacts

Commentators have offered various theories to explain the requirement that a nonresident have contacts with the forum before jurisdiction can be asserted.[44] Yet, while the purpose underlying the rule is arguably unclear, the Supreme Court's recurring theme has been that it must be foreseeable to the defendant that, as a result of his "conduct and connection with the forum State," he could be "haled into court there."[45] The Court has repeatedly emphasized that there must be some act by which the defendant has purposefully directed his activities

---

4.4(A). Other states extend the authority of the courts to the limits of due process. *See, e.g.*, ARIZ. R. CIV. P. 4.2(a). Additionally, federal courts are generally constrained by the long arm statutes of the state in which they sit. *See generally* FRIEDENTHAL, *supra* note 37, § 3.12.

39. *See infra* notes 44-96 and accompanying text.

40. *World-Wide Volkswagen*, 444 U.S. at 294. *But see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (indicating that a lesser showing of contacts may be required if the fairness issues strongly favor the assertion of jurisdiction). Most courts have followed the approach from *World-Wide Volkswagen* and employ a bifurcated approach with a threshold requirement of sufficient contacts. *See* FRIEDENTHAL, *supra* note 37, §3.10, at 122 n.9.

41. *Burger King*, 471 U.S. at 477.

42. *Id.*

43. *See, e.g., id.*; Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). *But see* Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102 (1987) (holding that jurisdiction over Japanese defendant was constitutionally unreasonable when forum State had weak interest in maintenance of suit despite finding that defendant had sufficient contacts).

44. *Compare* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 534 (1991) (arguing that personal jurisdiction in general is simply "a doctrine to limit a plaintiff's choices of possible fora.") *with* Richman, *supra* note 37, at 613 (suggesting that "the contacts requirement is simply a vestige of the Court's territorial power theory and has no modern, functional justification."). *See also* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 24-25 (1990) (stating "the interests that jurisdictional due process supposedly serves can be illusory, not within the clause's sphere of protection, or not actually served by limiting state court assertions of personal jurisdiction.").

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

at the forum State.[46] Further, the Court has stated that a principal purpose of the Due Process Clause is to allow "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[47]

The contacts question can be examined more directly in some cases, such as situations where the nonresident allegedly is doing business in the forum State or cases involving contract disputes between parties of different states.[48] In other cases, however, searching for the requisite purposeful direction can be more elusive and additional theories and tests have been established to focus the contacts inquiry.[49]

1. Doing Business and Contractual Relations.—If a nonresident business organization has substantial connections with the forum State, it may be amenable to jurisdiction for any cause of action regardless of whether it arises out of the contacts with the forum State.[50] This is referred to as general jurisdiction. In most cases, however, a nonresident will only be amenable to jurisdiction if the cause of action arises out of the forum contacts used to satisfy the minimum contacts test.[51] This is referred to as specific jurisdiction.[52]

In determining when a nonresident's business contacts with the forum State are sufficient to satisfy due process, the Court has often looked to whether the activities were "continuous and systematic."[53] The activities will have to be very substantial to render a nonresident defendant amenable to general jurisdiction.[54] Additionally, purchases made in the forum, standing alone, will almost certainly

---

46. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 252 (1958); *World-Wide Volkswagen*, 444 U.S. at 297; *Burger King*, 471 U.S. at 472-74.

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

48. *See infra* notes 50-76 and accompanying text.

49. *See infra* notes 77-96 and accompanying text.

50. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). Additionally, "domicile . . . for a natural person, and incorporation within the state . . . for a corporation" will be sufficient to render a defendant amenable to jurisdiction for any cause of action. Richman, *supra* note 37, at 616.

51. *See generally* Richman, *supra* note 37, at 617-18.

52. Consistent with the minimum contacts test in general, there are no bright line rules distinguishing specific and general jurisdiction. *See id.* at 615.

53. *See* International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945); *Perkins*, 342 U.S. at 445; Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984). The consideration of whether the defendant's activities in the forum were "continuous and systematic" is a required element of the minimum contacts test for general jurisdiction. The threshold question, therefore, is whether the cause of action arises out of the defendant's forum related activities. *See Perkins*, 342 U.S. at 445-46.

54. *See Hall*, 466 U.S. at 408 (holding that travel to and purchases in the forum State, along with checks drawn on a forum State bank, were not sufficient for jurisdiction); Richman, *supra* note 37, at 616. *But see Perkins*, 342 U.S. at 448 (holding that the forum State may "take or decline jurisdiction" based on corporation's forum activities that were unrelated to the claim).

not result in general jurisdiction, no matter how substantial.[55]

If the cause of action arises out of the forum related contacts, such that specific jurisdiction is being asserted, a lesser showing of continuous and systematic activities is required.[56] Moreover, in specific jurisdiction cases, the substance of the defendant's forum related conduct may be sufficient to satisfy due process, even if the activities were not continuous and systematic.[57] If a defendant has incurred substantial obligations in the forum, claims arising out of those obligations will likely result in jurisdiction.[58] In *McGee v. International Life Insurance Co.*,[59] for example, the Supreme Court held that even entering into a single contract to insure a resident inside the forum State was a sufficient contact to satisfy the minimum contacts test.[60]

If, however, the defendant did not affirmatively choose to do business in the forum, the result may be different. In *Hanson v. Denckla*,[61] Florida attempted to assert jurisdiction over a Delaware trust company. The Delaware company was the trustee of a trust established by a Pennsylvania resident who later moved to Florida.[62] The trust company maintained its relationship with the settlor after she moved to Florida.[63] The plaintiff had relied heavily on *McGee* in arguing that the trust company's business dealings with a Florida resident were sufficient contacts to satisfy due process.[64] The Court distinguished *McGee* by pointing out that the trust was initially established in Pennsylvania, not Florida.[65] In contrast, the defendant in *McGee* had affirmatively solicited business in the forum State.[66] Specifically, the Court stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the

---

55. *Hall*, 466 U.S. at 417 (citing Rosenberg Bros. v. Curtis Brown Co., 260 U.S. 516 (1923)).

56. FRIEDENTHAL ET AL., *supra* note 37, § 3.10; Richman, *supra* note 37, at 614. The focus of this Note is on the assertion of jurisdiction over a nonresident defendant based on that defendant's Internet activities where the cause of action arises out of those Internet activities. The discussion, therefore, will concentrate on the application of the minimum contacts test in the context of specific jurisdiction cases.

57. FRIEDENTHAL ET AL., *supra* note 37, § 3.10.

58. *Id.*

59. 355 U.S. 220 (1957).

60. *Id.* at 222-23.

61. 357 U.S. 235 (1958).

62. *Id.* at 238.

63. *Id.* at 252.

64. *Id.* at 250.

65. *Id.* at 251-52.

66. *Id.* at 251.

privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[67]

The single contract issue was eventually revisited in *Burger King Corp. v. Rudzewicz*,[68] and given the apparent conflict between *McGee* and *Hanson*,[69] the Court provided much needed guidance as to when contractual relations are sufficient contacts to give rise to jurisdiction. *Burger King* involved a suit filed in Florida by Burger King Corp. ("Burger King"), a Florida corporation, against one of its franchisees who was a resident of Michigan.[70] The Court began by emphasizing that a state "may exercise personal jurisdiction over a nonresident who purposefully directs his activities toward forum residents."[71] Further, the Court stated that "where the defendant . . . has created 'continuing obligations' between himself and residents of the forum, . . . it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well."[72]

The Court then proceeded to apply these principles to the question of whether a single contract was a sufficient contact to render the defendant amenable to personal jurisdiction in the forum. First, the Court declared that a contract with a party in the forum State does not automatically render the nonresident amenable to jurisdiction.[73] Next, the Court enumerated the factors to be considered in a contract case to make the contacts determination. Those factors are: (1) the prior negotiations, (2) contemplated future consequences, (3) the terms of the contract, and (4) the parties' actual course of dealing.[74] Finally, the Court concluded that it was reasonably foreseeable to the defendant that the contract could result in litigation in Florida.[75] In reaching this conclusion, the Court emphasized the long term nature of the contract, the defendant's dealings with Burger King's Florida offices, and the fact that the contract had a Florida choice of law provision.[76]

2. Stream of Commerce Theory.—The stream of commerce theory has been employed in contacts analysis primarily in products liability actions where a product manufactured or sold outside the forum State has caused injury in the forum State. The stream of commerce theory was first invoked by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*.[77] In *World-Wide Volkswagen*, the plaintiffs filed a products liability action in Oklahoma alleging

---

67. *Id.* at 253 (citations omitted).
68. 471 U.S. 462 (1985).
69. *See* Richman, *supra* note 37, at 612.
70. *Burger King*, 471 U.S. at 464-66.
71. *Id.* at 473.
72. *Id.* at 475 (citation omitted).
73. *Id.* at 478.
74. *Id.* at 479.
75. *Id.* at 482.
76. *Id.* at 481-82.
77. 444 U.S. 286 (1980).

that the injuries they sustained in an automobile accident there were the result of the defective design of an automobile they had purchased in New York .[78] The regional distributor and retail seller of the automobile, who were both named as defendants, argued that because they did no business in Oklahoma they had no contacts sufficient to support jurisdiction.[79] The Oklahoma Supreme Court upheld jurisdiction, reasoning that because of the inherently mobile nature of automobiles, their subsequent use in Oklahoma was foreseeable.[80] The Supreme Court granted certiorari and endorsed the stream of commerce theory, which had gained widespread acceptance in state courts since *Gray v. American Radiator & Standard Sanitary Corp.*,[81] stating "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[82] Ultimately, however, the Court concluded that the mere foreseeability that the automobiles could be taken to Oklahoma was not sufficient to satisfy due process.[83]

The Court revisited the scope of the stream of commerce theory in *Asahi Metal Industry Co. v. Superior Court of California*.[84] In *Asahi*, a four Justice plurality, led by Justice O'Connor, held that the stream of commerce theory requires more than mere foreseeability that a product will be purchased in the forum State, but also some additional conduct of the defendant specifically directed at the forum.[85] For example, Justice O'Connor reasoned that designing a product to serve the market in the forum, advertising in the forum State, establishing distribution channels or providing customer service in the forum

---

78. *Id.* at 288.

79. *Id.* at 289.

80. *Id.* at 290. Further, the Oklahoma Supreme Court justified the assertion of jurisdiction by inferring that the defendants were deriving substantial income from products that were used in Oklahoma. *Id.*

81. 176 N.E.2d 761 (Ill. 1961). *See generally* Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 259 (1989).

82. *World-Wide Volkswagen*, 444 U.S. at 297-98.

83. *Id.* at 298.

84. 480 U.S. 102 (1987).

85. *Id.* at 112 (O'Connor, J., plurality opinion). Admittedly, a plausible reading of Justice O'Connor's plurality opinion suggests more than an interpretation of the stream of commerce theory, but rather a "marked retreat" from that doctrine. *See id.* at 118 (Brennan, J., concurring in part and in the judgment). *See generally* Murphy, *supra* note 81, at 250; Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 122 (1991). A closer reading, however, suggests that the stream of commerce theory will allow a court to assert jurisdiction over a defendant who has placed a product into the stream of commerce and has also engaged in conduct directed at the forum State where neither act by itself would be a sufficient contact to satisfy due process.

State might indicate an intent to serve the forum.[86] Another four Justices, led by Justice Brennan, disagreed with Justice O'Connor's formulation of the stream of commerce theory.[87] Justice Brennan rejected the requirement of additional conduct and concluded that mere awareness that a product is being marketed in the forum State is sufficient to satisfy the minimum contacts test.[88] The Court's fragmented decision in *Asahi* has created much uncertainty as to the proper application of the stream of commerce theory.[89]

3. Effects Test.—In *Calder v. Jones*,[90] the Supreme Court created what has become known as the "effects test." *Calder* involved a defamation action filed in California against two individuals who had written and edited an article published in the National Enquirer[91] allegedly containing libelous statements about the plaintiff. The editor and writer argued that because the work they performed in relation to the article was carried out entirely in Florida, they had no contacts with California sufficient to support jurisdiction.[92] The Court rejected this argument and held that jurisdiction was proper in California based on the 'effects' of the defendants' Florida conduct in California.[93] In reaching its conclusion, the Court stressed the facts that the defendants were aware that the plaintiff resided in California and knew the brunt of the harm from their actions would be felt there.[94] Additionally, the Court emphasized that the "effects test" was appropriate because the defendants were being charged with committing an intentional tort expressly aimed at the forum State as opposed to "mere untargeted negligence" that resulted in harm in the forum.[95] This aspect of the *Calder* decision has created confusion about the validity of the effects test outside the libel area, and its application to other intentional torts remains unclear.[96]

---

86. *Asahi*, 480 U.S. at 112 (O'Connor, J., plurality opinion).

87. *Id.* at 116-21 (Brennan, J., concurring in part and in the judgment).

88. *Id.* A majority of the Court, including Justice Brennan, agreed that even if the defendant had sufficient contacts with the forum State, jurisdiction was unconstitutionally unreasonable and unfair. *Id.* at 113-16.

89. *See generally* Stephens, *supra* note 85; Murphy, *supra* note 81.

90. 465 U.S. 783 (1984).

91. The National Enquirer and its local distributing company were also named defendants. Neither the Enquirer nor the distributing company, however, objected to the jurisdiction of the California court. *Id.* at 785.

92. *Id.*

93. *Id.* at 789.

94. *Id.* at 790.

95. *Id.* at 789.

96. *Compare* Narco Avionics, Inc. v. Sportsman's Market, Inc., 792 F. Supp. 398, 408 (E.D. Pa. 1992) (rejecting use of effects test in patent infringement case and stating that there is "a critical difference between an intentional act which has an effect in the forum and an act taken for the very purpose of having an effect there") *with* Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1391 (8th Cir. 1991) (applying effects test in trademark infringement action). *See generally* Steven M. Reiss, *Applying the Effects Test Theory of Personal Jurisdiction in Patent Infringement*

B. Fair Play and Substantial Justice

If sufficient contacts are established, the courts will rarely deny jurisdiction based on considerations of fairness.[97] The defendant will have to present compelling arguments that forcing him to defend in the forum is so unfair and unreasonable that it violates due process.[98] This second element of the minimum contacts test ensures that a court's assertion of jurisdiction over a nonresident defendant comports with "the concept of 'fair play and substantial justice.'"[99] In *World-Wide Volkswagen*, the Court provided a detailed outline of the factors to be considered in analyzing the reasonableness of asserting jurisdiction over a nonresident defendant who has sufficient contacts such that jurisdiction is otherwise constitutionally permissible.[100] Those factors are: (1) the burden on the defendant, (2) the forum State's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering substantive social polices.[101] No one factor is necessarily controlling, but rather each factor should be balanced against the others in light of the circumstances of the case.[102]

III. ANALYZING INTERNET CONTACTS WITH THE FORUM

The key to ensuring that a defendant's due process rights are not violated is a properly focused inquiry into the defendant's contacts with the forum State to determine whether the defendant has purposefully directed his activities at the forum.[103] In cases where those contacts are through the Internet, this inquiry can quickly become confused by the boundless limits of the Internet. Indeed, if a court focuses on the global nature of the Internet, rather than the defendant's forum related contacts, the results will be questionable at best and unconstitutional at worst. As the following decisions illustrate, however, certain adaptations of the minimum contacts test have proven effective in cases involving the Internet.

Actions, 23 AIPLA Q.J. 99 (1995).

97. *See supra* notes 41-43 and accompanying text.

98. *See supra* note 42 and accompanying text.

99. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985).

100. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). The Court never actually reached the reasonableness issue, however, because it held that the defendants did not have sufficient contacts with the forum State. *Id.* at 299.

101. *Id.*

102. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 114 (1987) (according great weight to the burden on a foreign defendant in light of the forum State's weak interest in maintaining the suit).

103. *See supra* notes 45-47 and accompanying text.

A. Doing Business Through the Internet

Compuserve, Inc. v. Patterson[104] is an important decision to Internet users for at least two reasons. First, the court conducted a thorough and well reasoned analysis of the defendant's forum related contacts. Second, the defendant's activities illustrate the type of transactions that will likely comprise a large part of the business conducted through the Internet and other computer networks.[105]

In *Compuserve*, Richard Patterson, a Texas resident, subscribed to Compuserve, a national computer information service, headquartered in Ohio.[106] Compuserve's services included access to proprietary information as well as Internet access.[107] In addition to signing up for Compuserve's regular subscription service, Patterson also entered into a "Shareware Registration Agreement" ("SRA")[108] with Compuserve, whereby Compuserve would offer software products created by Patterson for sale.[109] Over a span of four years, Patterson electronically transmitted thirty-two software files to Compuserve's system in Ohio which were offered for sale pursuant to the SRA.[110] Additionally, Patterson advertised his software on the Compuserve system.[111] Compuserve began marketing a product that Patterson alleged had a name similar to a competing product he had previously developed and owned common law trademarks for.[112] Patterson notified Compuserve by e-mail of his allegations and demanded $100,000 to settle the dispute.[113] Compuserve filed a declaratory judgment action in an Ohio federal court, seeking a declaration that its products had not infringed on Patterson's common law trademarks.[114] The district court dismissed Compuserve's complaint concluding that Patterson's contacts with

---

104. 89 F.3d 1257 (6th Cir. 1996).

105. *See supra* note 7.

106. *Compuserve*, 89 F.3d at 1260.

107. *Id.*

108. Interestingly, the SRA was a standardized online agreement created by Compuserve that was consummated by Patterson typing "AGREE" at various points on the screen. Nevertheless, the court described it as a "written" agreement. *Id.* at 1264.

109. The software to be sold was "shareware." Shareware is software made available to potential purchasers initially free of charge. Other Compuserve subscribers could download the shareware and if they continued to use it, were required to pay for it. Compuserve would retain 15% of any proceeds from the shareware and forward the rest to Patterson. Payments, however, were made voluntarily (i.e., Compuserve did not monitor unauthorized use of shareware). *Id.* at 1260.

110. *Id.* at 1261.

111. *Id.*

112. *Id.*

113. *Id.* Additionally, Patterson sent Compuserve regular mail messages, *id.* at 1264, and also posted a message on one of Compserve's electronic forums available to all Compuserve subscribers outlining his case against Compuserve. *Id.* at 1266.

114. *Id.* at 1261.

Ohio "were too tenuous to support the exercise of personal jurisdiction."[115]

The appellate court in *Compuserve* clearly recognized the potential ramifications of its decision to the future of business to be transacted through the Internet.[116] The contacts the court deemed relevant were thoroughly detailed and the court carefully articulated the principles that have evolved since *International Shoe* it considered appropriate in analyzing those contacts. The court reviewed Patterson's relevant forum related contacts outlined above and stated, "the real question is whether these connections with Ohio are 'substantial' enough that Patterson should reasonably have anticipated being haled into an Ohio court."[117]

Following the edict of *Burger King*, the court pointed out that "Patterson . . . entered into a written contract with CompuServe which provided for the application of Ohio law, and he then purposefully perpetuated the relationship with CompuServe via repeated communications with its system in Ohio."[118] The court was careful to note that it was not basing jurisdiction on Patterson's purchase of services, but rather emphasized Patterson's use of CompuServe as a distributor for his software products.[119] Specifically, the court stated:

> The district court[] . . . disregard[ed] the most salient facts of [the] relationship: that Patterson chose to transmit his software from Texas to CompuServe's system in Ohio, that myriad others gained access to Patterson's software via that system, and that Patterson advertised and sold his product through that system. . . . [T]here can be no doubt that Patterson purposefully transacted business in Ohio.[120]

Significantly, the court was also careful to point out that it was not basing jurisdiction on the stream of commerce theory stating, "Patterson's injection of his software into the stream of commerce, without more, would be at best a dubious ground for jurisdiction."[121] Instead, the court analogized the case to *McGee*, describing Patterson's conduct as consciously reaching out to Compuserve in Ohio much like the defendant in *McGee* consciously solicited business in California.[122] Further, the court emphasized that the software marketing relationship Patterson had perpetuated was "ongoing in nature" and "not a one-shot affair."[123] The court's emphasis on the written agreement, the long term relationship between Patterson and Compuserve, and the Ohio choice of law provision are significant. These factors, especially the choice of law provision, evinced Patterson's knowledge that he was dealing with an Ohio business.

---

115. *Id.* at 1260.
116. *See id.* at 1262.
117. *Id.* at 1264.
118. *Id.*
119. *Id.*
120. *Id.* at 1264-65.
121. *Id.* (citations omitted).
122. *Id.* at 1266.
123. *Id.* at 1265 (citation omitted).

The connectivity of the Internet will likely result in many contractual relationships being formed entirely through electronic means.[124] Disputes arising out of such contractual relationships, however, do not necessarily present novel issues related to personal jurisdiction simply because the contract was entered into and carried out through the Internet. *Compuserve* provides an excellent model for the proper analysis of such cases. Courts should carefully analyze the relationship between the parties and look to the reasoning of *Burger King* to determine whether personal jurisdiction comports with due process. By emphasizing the relationship between the defendant and forum residents, rather than the method by which that relationship was formed, the inquiry will remain properly focused on whether the defendant's activities were purposefully directed at the forum State.

B. Application of the Stream of Commerce Theory to the Internet

In many cases, the defendant's contacts with the forum will consist primarily of information or products accessible by forum residents through the Internet. Unlike *Compuserve*, however, the defendant may not have established a formal relationship with a forum resident or conducted substantial business in the forum State. Extending the stream of commerce theory to such cases will provide an appropriate method for analyzing whether the defendant's forum contacts are sufficient to satisfy due process. Distributing products and information through the Internet is analogous to a manufacturer selling a product through the distribution channels of third parties. In either case, it is foreseeable that the information or products distributed could cause harm in a number of states.

Given the divergent views expressed by the Supreme Court in *Asahi*,[125] however, a court will initially have to decide how broadly the stream of commerce theory should be applied. Because it is foreseeable that information placed on the Internet can be accessed in every state, a broad interpretation of the stream of commerce theory will result in virtually no predictability as to where Internet users may be forced to defend themselves.[126] Therefore, the additional conduct required by Justice O'Connor's formulation of the stream of commerce theory[127] is necessary to maintain a "degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable

---

124. *See supra* note 7.

125. *See supra* notes 84-89 and accompanying text.

126. *Cf.* Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 116-21 (1987) (Brennan, J., concurring in part and in the judgment) (asserting that the defendant's mere expectation that its products will be marketed in the forum State is a sufficient contact to satisfy due process).

127. *Id.* at 108-13 (O'Connor, J., plurality opinion) (holding that conduct purposefully directed at the forum State is required in addition to placing a product into the stream of commerce).

to suit."[128]

A recent case illustrates how easily this predictability can be eroded by the improper application of the stream of commerce theory to cases involving the Internet. In *Inset Systems, Inc. v. Instruction Set, Inc.*,[129] Inset Systems, Inc. ("Inset") filed suit against Instruction Set, Inc. ("ISI") in Connecticut. Inset, a Connecticut corporation, had obtained a federally registered trademark for the mark "INSET" in 1986.[130] Subsequently, ISI, a Massachusetts corporation, registered the domain name[131] "INSET.COM" as its Internet address and established a Web site with that domain name to advertise its products and services.[132] ISI had also established the toll-free telephone number "1-800-US-INSET."[133] Both Inset and ISI provided computer services to customers throughout the world.[134] ISI, however, did not have any employees or offices in Connecticut, and did not conduct business in Connecticut on a regular basis.[135]

The court in *Inset* framed the issue as whether ISI, as a result of its Web site, had "purposefully avail[ed] itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws."[136] In deciding this question, the court characterized ISI's Web site as substantial advertising in Connecticut stating, "[ISI] has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states."[137] Further, the court stated, "[a]dvertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully

---

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

129. 937 F. Supp. 161 (D. Conn. 1996).

130. *Id.* at 163.

131. A domain name is analogous to a street address. A domain name is a string of characters used to identify the location of a particular Web site on the Internet. *See id.*

132. *Id.*

133. *Id.*

134. *Id.* at 162.

135. *Id.* at 163.

136. *Id.* at 164 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). The court in *Inset* did not expressly rely on the stream of commerce theory. Rather, the court held that the defendant's advertising through the Internet constituted doing business in the forum State. *Id.* at 165. There were no allegations, however, that the defendant had conducted sales or derived any economic benefit in the forum State. Nevertheless, the court concluded that jurisdiction was justified based on the defendant's expectation that its Web site could be accessed by forum residents. *Id.* The failure to require conduct directed at the forum in addition to the Web site achieved the same result as if a pure stream of commerce theory had been applied. *Cf.* Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 116-21 (1987) (Brennan, J., concurring in part and in the judgment) (rejecting requirement of additional conduct so long as a defendant has placed a product into stream of commerce with expectation that it will be marketed in the forum State).

137. *Inset*, 937 F. Supp. at 165.

availed itself of the privilege of doing business within Connecticut."[138]

The court's analysis in *Inset* was misguided and its holding reaches too far. The court reasoned that by placing the advertisement on the Internet, it was foreseeable that the ad would reach Connecticut, and therefore ISI "could reasonably anticipate the possibility of being hailed into court [there]."[139] Indeed, under the court's reasoning, by establishing a Web page, ISI rendered itself amenable to jurisdiction in every state for claims arising out of its Web site. By focusing on the boundless nature of the Internet, the court failed to make an appropriate inquiry into ISI's actual contacts with the forum State and consequently never fully analyzed the nature of those contacts.

Justice O'Connor's stream of commerce theory from *Asahi*,[140] however, provides an appropriate method for analyzing cases such as *Inset*. In *Bensusan Restaurant Corp. v. King*,[141] for example, Bensusan Restaurant Corp. ("Bensusan") filed suit in New York against Richard King. Bensusan owned and operated a jazz club in New York city known as "The Blue Note."[142] Bensusan had obtained a federally registered trademark for "The Blue Note."[143] The defendant, King, also owned and operated a jazz club known as "The Blue Note" located in Columbia, Missouri.[144] King had established a Web site that contained general information about his club such as a calendar of events and ticketing information.[145] Tickets could only be ordered in person or by phone, however, and could only be picked up the day of a show at the club.[146] Bensusan alleged that King's Web site constituted trademark infringement, trademark dilution, and unfair competition.[147]

In concluding that the assertion of jurisdiction over the defendant would violate due process, the court in *Bensusan* followed Justice O'Connor's stream of commerce theory.[148] The court stated, "[c]reating a [Web] 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."[149] Specifically, the court noted that King had not actively sought

---

138. *Id.*

139. *Id.*

140. *See supra* notes 85-86 and accompanying text.

141. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

142. *Id.* at 297.

143. *Id.*

144. *Id.*

145. *Id.* Additionally, King's Web site contained a disclaimer distinguishing his club from Bensusan's referring to the New York "Blue Note" as "one of the world's finest jazz club[s]." *Id.* at 297-98.

146. *Id.* at 297.

147. *Id.* at 298.

148. Actually, it was unnecessary for the court in *Bensusan* to discuss the due process issue because the court had already concluded that New York's long arm statute did not authorize the court to exercise jurisdiction over King. *Id.* at 300.

149. *Id.* at 301 (emphasis added) (citing Asahi Metal Indus. Co. v. Superior Court of

to encourage New York residents to access his site nor had he conducted any business in New York.[150]

The additional conduct required by Justice O'Connor's stream of commerce theory may be inherent to a Web site itself. For example, in *Bensusan*, the court noted that Internet users could not order tickets directly from King's Web site.[151] Additionally, the court pointed out that even if a New York resident ordered tickets by telephone, the tickets would have to be picked up at the Missouri box office because King did not fill ticket orders by mail.[152] Under the stream of commerce theory employed by the court in *Bensusan*, the ability of New York residents to order tickets through King's Web site would have evinced King's intent to serve the forum through his Web site.

In cases involving the Web, this distinction between a Web site that is "interactive" and one that is "passive" should be a key consideration in determining whether the additional conduct required by Justice O'Connor's stream of commerce theory is present. For example, in *Maritz, Inc. v. Cybergold, Inc.*,[153] the defendant was using an interactive Web site to solicit forum residents for a service it planned to offer through the Internet.[154] Unlike *Inset* or *Bensusan*, the Web site in *Maritz* was much more than a passive advertisement of the defendant's services. The interactive nature of the defendant's Web site satisfied two of the categories of additional conduct posited by Justice O'Connor in her formulation of the stream of commerce theory.[155] The Web site's ability to register forum residents for services demonstrated that it was a product designed for the market in the forum.[156] Moreover, its interactive nature allowed the Web site to serve as a distribution channel in the forum for the defendant's services.[157]

California, 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion)).

150. *Id.*

151. *Id.* at 299. The passive nature of the defendant's Web site was pointed out by the court in its discussion of New York's long arm statute. If, however, the Web site had been interactive and allowed New York residents to order tickets through the Web site, the court's discussion suggests it may have been willing to assert personal jurisdiction over the defendant.

152. *Id.*

153. 947 F. Supp. 1328 (E.D. Mo. 1996).

154. *Id.* at 1330.

155. *See supra* note 86 and accompanying text.

156. Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion).

157. *Maritz*, 947 F. Supp. at 1330. Unfortunately, in *Maritz*, the court appeared to give little weight to the fact the defendant's Web site was interactive and being used to actively serve forum residents. Instead, the court followed the reasoning of *Inset* and appeared to base jurisdiction on the notion that by creating a Web site, the defendant had purposefully directed its activities toward all states. *Id.* at 1333. It is unlikely the court's jurisdictional holding would have been different even if the defendant's Web site had been purely passive. In contrast, other courts have emphasized the distinction between interactive and passive Web sites in applying the minimum contacts test. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); SF Hotel Co., L.P. v. Energy Investments, Inc., 985 F. Supp. 1032 (D. Kan. 1997); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952

These cases illustrate the utility of Justice O'Connor's stream of commerce theory in performing the contacts analysis when the defendant's forum related contacts consist primarily of information or products accessible in the forum State through the Internet. Using Justice O'Connor's stream of commerce theory, the *Bensusan* court was able to clearly focus on the defendant's lack of purposeful direction toward the forum State. In contrast, the court in *Inset* based its holding on the inaccurate notion that because a Web site is accessible everywhere, the defendant has purposefully directed its activities everywhere, including the forum State. This is precisely the unlimited foreseeability rejected by the Court in *World-Wide Volkswagen*.[158] The additional conduct required by Justice O'Connor's stream of commerce theory is necessary to realize the predictability contemplated by *International Shoe* and its progeny.[159]

C. Internet Torts and the Effects Test

Application of the effects test in Internet cases is particularly problematic. In libel cases not involving the Internet, lower courts have reached varying conclusions as to the scope of the effects test.[160] Moreover, use of the effects test outside the area of libel has been described as an abolition of the two part minimum contacts test.[161] Given the increased ability to engage in interstate activity through the Internet, courts will be faced with competing concerns. Clearly, states have an interest in protecting forum residents from intentional conduct that could cause harm in the forum as a result of the far-reaching effects of the Internet. On the other hand, there should be a heightened concern over a court exceeding its constitutional authority by asserting jurisdiction over a nonresident who has not purposefully directed an act toward the forum State. Several recent cases demonstrate why courts should narrowly apply the effects test in Internet cases, especially those not involving defamation.

1. Defamation Through the Internet.—In *California Software Inc. v. Reliability Research, Inc.*,[162] California Software Inc. and Reliacomm, Inc. (collectively "plaintiffs"), both California corporations, filed suit in California

---

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

158. *See supra* note 83 and accompanying text.

159. *See Asahi*, 480 U.S. at 110 (O'Connor, J., plurality opinion); *World-Wide Volkswagen*, 444 U.S. at 297.

160. *Compare* Southmark Corp. v. Life Investors, Inc., 851 F.2d 763 (5th Cir. 1988) (narrow interpretation of *Calder*), *with* Shaw v. North Am. Title Co., 876 P.2d 1291 (Haw. 1994) (broad interpretation of *Calder*). *See generally* 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, 1124 (1996) (arguing that the narrow construction is the "better-reasoned view").

161. Green v. USF & G Corp., 772 F. Supp. 1258, 1262 (S.D. Fla. 1991) (stating that "it would seem to vitiate the two-part approach to jurisdiction to hold that in every case where a tort has occurred in the state, the exercise of jurisdiction comports with due process").

162. 631 F. Supp. 1356 (C.D. Cal. 1986).

against Reliability Research, Inc. ("RRI"), a Nevada corporation with its principal place of business in Vermont, and James White, the president of RRI. The complaint alleged, *inter alia*, that White, on behalf of RRI, had made libelous statements about the plaintiffs through the use of the telephone, mails, and a nationwide computer network.[163] Reliacomm and RRI were involved in an ongoing dispute concerning the ownership of a software product called resCue/MVS ("MVS") that they each intended to market.[164] White placed a message on a computer bulletin board service ("BBS")[165] that informed users they would be held financially responsible for any unauthorized use of MVS should RRI prevail in the ownership dispute.[166] The plaintiffs alleged that the BBS message contained libelous statements and dissuaded at least three companies from purchasing MVS from them.[167]

After generally discussing the principles involved in minimum contacts analysis, the court eventually decided that the effects test was the appropriate method to resolve the jurisdictional question.[168] Although the court generally discussed the requirement of purposeful direction, its reasoning was clearly based on *Calder*. Significantly, the court concluded that the BBS message alone was a sufficient contact with California to satisfy due process.[169] Specifically, the court stated, "[d]efendants made tortious statements which, though directed at third persons outside California, were expressly calculated to cause injury in California. As in *Calder*, the defendants knew that plaintiffs would feel the brunt of the injury, i.e., the lost income, in California."[170]

The defendants argued, however, that although the statements were made intentionally, they were made in response to prior messages that had been placed on the BBS by third parties inquiring about the status of the MVS software, distinguishing the case from *Calder*.[171] The court flatly rejected this argument stating, "the conversational format . . . does not affect the jurisdictional analysis."[172] In addressing this argument, the court pointed out that by

---

163. *Id.* at 1357-58. Larry Martin, the treasurer of RRI, was also named as a defendant. There was no evidence, however, of any relevant conduct on the part of Martin related to the claim, and the court concluded that there was no basis for asserting jurisdiction over him. *Id.* at 1364.

164. *Id.* at 1358. Reliacomm and RRI each claimed ownership of the software. California Software had entered into a sublicensing contract with Reliacomm and intended to market the software on behalf of Reliacomm. *Id.*

165. A Bulletin Board System allows users to place messages and view messages that have been placed on the system by other users. Essentially, newsgroups operate like bulletin board systems. *See supra* note 19.

166. California Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1358 (C.D. Cal. 1986).

167. *Id.*

168. *Id.* at 1360-63.

169. *Id.* at 1361.

170. *Id.* (citations omitted).

171. *Id* at 1363.

172. *Id.*

responding to the inquiries on the BBS the defendants made the messages "available to an audience wider than those requesting the information."[173] Moreover, the court emphasized that the defendants made the libelous statements with the knowledge that they stood to derive economic benefit as a result of the harm the plaintiffs would suffer.[174]

Although *California Software* does not involve use of the Internet, the court's application of the effects test to the BBS messages could have significant implications for Internet users if the court's application of *Calder* is followed. A message posted to a BBS, such as the one in *California Software*, is substantially similar to a posting made to a newsgroup or listserv.[175] Additionally, there are many BBS systems that are accessible through the Internet and many Web sites allow users to post messages much like a BBS. The court's rejection of the defendant's argument that the messages were "conversational" and therefore distinguishable from the intentionally harmful libel in *Calder* is significant. Virtually all of the content posted to newsgroups and listservs is conversational in nature. Under *California Software*, however, the argument that a libelous statement was not intentionally harmful because it was merely made in the midst of an electronic discussion would probably be unsuccessful.

Edias Software International, L.L.C. v. Basis International Ltd.,[176] is a more recent case involving libelous statements distributed through the Internet. Edias, an Arizona company, sued Basis, a New Mexico company, in Arizona over a contract dispute between the two companies.[177] Edias alleged that Basis had sent e-mail messages containing defamatory statements to Edias' customers and Basis' employees in Europe.[178] Edias also alleged that Basis placed additional defamatory statements on its Compuserve Web page and in a Compuserve CIS forum.[179] Although the court stated that Basis' contractual relations with Edias were probably a sufficient basis for jurisdiction,[180] it nevertheless analyzed the defamatory statements sent through the Internet to determine if they alone would satisfy the minimum contacts requirement under the effects test.[181]

The court in *Edias* seemed to require an even lesser showing of intentional harm than the court in *California Software*. In fact, the degree of harmful intent directed at a forum resident previously required by the Supreme Court[182] was watered down to foreseeability.[183] Specifically, the court stated, "if Basis could

---

173. *Id.*

174. *Id.* at 1362-63.

175. *See supra* notes 19-20.

176. 947 F. Supp. 413 (D. Ariz. 1996).

177. *Id.* at 415.

178. *Id.*

179. *Id.* at 416. A CIS forum is essentially a bulletin board system made available to Compuserve subscribers.

180. *Id.* at 418.

181. *Id.*

182. *See* Calder v. Jones, 465 U.S. 783, 789-90 (1984).

183. *Edias*, 947 F. Supp. at 420.

foresee that the result of the statements *might* be to deter potential Edias customers, then Basis could also foresee that the injury *might* be felt in Arizona."[184]

Both *California Software* and *Edias* show that the courts are ready and willing to broadly apply the effects test to cases involving defamatory statements distributed through the Internet. Although a greater degree of harmful intent was emphasized in *Calder*, these courts lowered the threshold to protect parties from the increased potential for harm that results from the worldwide availability of defamatory information posted to the Internet and other nationwide computer networks. As stated in *California Software*, "[u]nlike communication by mail or telephone, messages sent through computers are available to the recipient and anyone else who may be watching."[185] While this concern is not without merit, the court's conclusion in *Edias*—that the *foreseeability* that statements *might* cause harm in the forum State is sufficient to confer jurisdiction—is somewhat forbidding.[186]

2. Other Internet Torts.—In *Panavision International, L.P. v. Toeppen*,[187] a California federal court stretched the effects test well beyond the facts of *Calder*. *Panavision* vividly illustrates how the effects test can be used to transform an extremely tenuous contact with a distant state through Internet-related activity into a contact sufficient to satisfy the minimum contacts test. In this case, Panavision International, L.P. ("Panavision"), a Delaware limited partnership with its principal place of business in California, filed suit in California against Dennis Toeppen, an individual residing in Illinois.[188] Panavision owned the federally registered trademarks "Panavision" and "Panaflex," which it used in connection with its motion picture and television camera and photographic equipment businesses.[189] In 1995, Toeppen registered the domain name "PANAVISION.COM" and later set up a Web site displaying aerial views of Pana, Illinois.[190] When Panavision learned of Toeppen's registration of "PANAVISION.COM" as a domain name, Panavision notified Toeppen of its intent to use the "Panavision" trademark as a domain name.[191] Toeppen then informed Panavision he would relinquish the domain name for $13,000.[192] Subsequent to Panavision's informing Toeppen of its intent to register the "Panavision" trademark as a domain name, Toeppen also registered

---

184. *Id.* (emphasis added).

185. California Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1363 (C.D. Cal. 1986).

186. *Edias*, 947 F. Supp. at 420.

187. 938 F. Supp. 616 (C.D. Cal. 1996).

188. *Id.* at 618. Network Solutions, Inc. ("NSI"), the organization responsible for the registration of Internet domain names, was named as a defendant. *Id.* NSI apparently did not object to the jurisdiction of the California court.

189. *Id.*

190. *Id.* at 619.

191. *Id.*

192. *Id.*

the domain name "PANAFLEX.COM."[193] Significantly, Toeppen did not offer to sell any products or services through his Web sites.[194]

The court in *Panavision* was faced with a dilemma—it obviously sympathized with Panavision's plight, but was hard pressed to find a contact between Toeppen and California sufficient to satisfy due process. The court characterized Toeppen's registration of the domain name "PANAVISION.COM" as an intentional tort expressly aimed to cause harm to Panavision, thereby making the effects test available.[195] The court concluded that Toeppen had intentionally registered the domain name with the knowledge that this would result in harm in California as a result of Panavision's inability to use the domain name.[196]

The court's use of the effects test in *Panavision* presents a number of jurisdictional problems.[197] Current trademark laws do not provide any relief for noncommercial use of a federally registered trademark.[198] If Toeppen's registration of the domain name was not a commercial use of the trademark, it was not an infringement under trademark laws. Consequently, the court's characterization of Toeppen's conduct as tortious would obviously have been without merit. To get around this, the court was forced to reason that Toeppen's $13,000 demand to relinquish the domain name was a commercial use of the trademark.[199]

This creates another jurisdictional dilemma that the court failed to address. Panavision contacted Toeppen, which resulted in Toeppen simply informing Panavision of the price for which he would be willing to relinquish the domain name.[200] Based on the court's reasoning, if Toeppen had simply told Panavision he was not interested in selling the rights to the domain name, then his conduct would not have been "tortious" and he would not have been amenable to jurisdiction in California.[201] By reacting to the communication that Panavision

---

193. *Id.* The court also pointed out that Toeppen was a defendant in two other suits involving his use of federally registered trademarks as domain names, and that Toeppen had registered several other domain names that were similar to famous trademarks. *Id.*

194. *Id.*

195. *Id.* at 621.

196. *Id.*

197. The concerns with the effects test are not unique to cases involving the Internet. *See supra* notes 96, 160-61 and accompanying text. Because of our increased ability to engage in interstate activity through the Internet, however, the concerns of using the effects test outside the area of defamation are intensified.

198. *See* Panavision Int'l, L.P. v. Toeppen, 945 F. Supp. 1296, 1303 & n.5 (C.D. Cal. 1996) (stating, "registration of a trade[mark] as a domain name, without more, is not a commercial use of the trademark and therefore not within the prohibitions of the Act.").

199. *Panavision Int'l*, 938 F. Supp. at 621-22.

200. *Id.* at 619.

201. Apparently, if Toeppen had registered the domain name "PANAVISION.COM" as part of what the court considered a "legitimate business use," the court would not have had jurisdiction because Toeppen's conduct would not have been intended to harm Panavision. Specifically, the

initiated, however, Toeppen rendered himself amenable to jurisdiction wherever Panavision may have been located.

All of this serves to illustrate the impropriety of the court's application of the effects test in *Panavision*. While the end may appear to justify the means, the decision demonstrates the potentially unlimited power courts can have over nonresidents when the effects test is stretched too far beyond the facts of *Calder*. Additionally, as illustrated by *Edias*, lowering the threshold of harmful intent, even in defamation cases, may result in broader assertions of jurisdiction than the *Calder* Court intended. A liberal application of the effects test in cases involving the Internet presents a serious threat of nonresidents being forced to travel to distant forums to defend themselves for conduct that was not purposefully directed at those forums.

IV. FAIR PLAY AND SUBSTANTIAL JUSTICE ON THE INTERNET

Not surprisingly, most courts faced with personal jurisdiction questions involving the Internet have given little consideration to the second step of the minimum contacts test.[202] The courts routinely begin by emphasizing the forum State's interest in protecting the plaintiff from whatever harm may have been alleged in the case.[203] These interests, combined with the plaintiff's interest in obtaining relief in a convenient forum, are then balanced against the burden on the defendant of having to travel to the forum State.[204] Given the compelling burden placed on the defendant to show jurisdiction is unreasonable, it is difficult to argue that the results in these cases do not comport with the fairness requirements of *International Shoe* and its progeny.[205]

Nevertheless, the *Panavision* court's treatment of the fairness considerations is somewhat troubling. The court in *Panavision* treated the fairness

---

court distinguishes *Bensusan* by stating, "the parties had legitimate businesses and legitimate legal disputes. Here, however, Toeppen is not conducting a business but is, according to Panavision, running a scam directed at California." *Id.* at 622.

202. *See infra* notes 203-04 and accompanying text. *But see* Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997) (holding exercise of personal jurisdiction would be "constitutionally unreasonable" despite conclusion that defendant's Internet contacts were sufficient to satisfy due process); *cf.* Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 470-72 (D. Mass. 1997) (asserting jurisdiction but carefully considering the "fairness and reasonableness" of its decision).

203. *See* Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1268 (6th Cir. 1996); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996); California Software Inc. v. Reliability Research, Inc., 631 F. Supp 1356, 1363 (C.D. Cal. 1986).

204. *See Compuserve*, 89 F.3d at 1268; Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996); *Maritz*, 947 F. Supp. at 1334; *California Software*, 631 F. Supp at 1363-64; Edias Software Int'l, L.L.C. v. Basis Int'l, Ltd., 947 F. Supp. 413, 421 (D. Ariz. 1996).

205. The court in *Bensusan* did not reach the fairness issue because it concluded that the defendant did not have sufficient contacts with the forum State. *See supra* notes 140-52 and accompanying text.

considerations in a most conclusory fashion. Once again, the court relied on its characterization of the defendant's actions as tortious to justify its conclusory assertions stating, "[i]n the tort setting, if a nonresident, acting outside the state, intentionally causes injuries within the state, local jurisdiction is presumptively not unreasonable . . . ."[206]

The court noted the interests to be considered in analyzing fairness, but then failed to provide any discussion of how these competing interests were balanced.[207] Instead, the court simply stated, "[a]fter balancing the seven factors from *Burger King*, it is clear that jurisdiction over [the defendant] comports with 'fair play and substantial justice.'"[208] Although the court did briefly mention the potential burden of an individual residing in Illinois being haled into a California court, it quickly dismissed this concern with an oft-quoted line from *Burger King*—"in this era of fax machines and discount air travel requiring [the defendant] to litigate in California is not constitutionally unreasonable."[209]

Justice Brennan's statement from *Burger King*, however, must be considered in light of the facts and significance of that case. The defendant in *Burger King* had initiated and entered into a substantial contract with a resident of the forum State.[210] Moreover, in *Burger King*, Justice Brennan dedicated a substantial amount of his opinion to the fairness aspects of the minimum contacts test.[211] There will likely be many instances in the future where individuals establish tenuous contacts with a distant forum through the Internet. Courts should be cognizant of such cases and, despite the defendant's compelling burden on this issue, give elements of fairness the appropriate consideration.

CONCLUSION

This Note has demonstrated that certain adaptations of the minimum contacts test, if applied properly, are capable of fairly and efficiently handling jurisdictional issues involving the Internet. The cases discussed illustrate that when a court focuses on the defendant's contacts with the forum through the Internet, personal jurisdiction decisions are much more likely to comport with the requirements of the Due Process Clause. By contrast, when a court becomes sidetracked and focuses on the boundless limits of the Internet, the defendant's

---

206. *Panavision*, 938 F. Supp. at 622.

207. *Id.*

208. *Id.*

209. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985)).

210. The defendant in *Burger King* had obligated himself to payments exceeding $1 million payable over a 20-year period. *Burger King*, 471 U.S. at 466.

211. *See id.* at 477-78, 482-87. Indeed, Justice Brennan was a relentless advocate for the abolition of the bifurcated contacts plus fairness test in favor of an analysis that considered contacts in light of a balancing of the interests of the plaintiff, defendant, and forum. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299-313 (1980) (Brennan, J., dissenting). *See generally* Pamela J. Stephens, *The Single Contract as Minimum Contacts: Justice Brennan 'Has it His Way'*, 28 WM. & MARY L. REV. 89 (1986).

due process rights will often be lost in the confusion.

Compuserve provides an appropriate framework for due process analysis in cases involving parties that have entered into contractual relationships and conducted business through the Internet. Justice O'Connor's formulation of the stream of commerce theory has proven effective for analyzing situations where the defendant's forum related contacts consist primarily of information or products accessible in the forum State through the Internet. Use of the effects test should be limited to cases where defamatory information has been distributed through the Internet. Moreover, even in libel cases, straying too far from the facts of *Calder* may result in assertions of jurisdiction that do not comport with due process. Finally, the ease with which Internet users can establish tenuous contacts with distant forums should give courts reason to consider the fairness and reasonableness of forcing nonresidents to defend themselves in those forums, despite the defendant's compelling burden on this issue.

One of the principal purposes of the Due Process Clause is to promote "'the orderly administration of the laws,' . . . and give a degree of predictability to the legal system . . . ."[212] Shifting the focus away from the defendant in due process analysis will significantly impede this goal. Of course, interacting in the new global society the Internet is creating requires acceptance of an increased risk of being forced to defend a lawsuit in a distant forum. Proper application of the minimum contacts test will provide individuals using the Internet with at least "some minimum assurance as to where that conduct will and will not render them liable to suit."[213]

---

212. *World-Wide Volkswagen*, 444 U.S. at 297 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

213. *Id.*