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The Morass of Internet Personal Jurisdiction: Is It Time for a Paradigm Shift

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CASENOTE

THE MORASS OF INTERNET PERSONAL JURISDICTION: IT IS TIME FOR A PARADIGM SHIFT

Richard Philip Rollo[*]

'Twas brillig, and the slithy toves
Did gyre and gimble in the wabe:
All mimsy were the borogoves,
And the mome raths outgrabe.[1]

I. INTRODUCTION

As the masses rush to enter the Internet age, people are attempting to use the World Wide Web as a tool.[2] Businesses are creating Web sites in

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* To my family, who has always been there for me, and to Lisa, the center of my universe.

1. LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE 18-19 (Random House 1946).

2. *See* Max S. Oppenheimer, *In Vento Scribere: The Intersection of Cyberspace and Patent Law*, 51 FLA. L. REV. 229, 231 (1999) ("The Internet is an international network of interconnected computers.... The Internet has experienced extraordinary growth. The number of host computers ... increased from about 300 in 1981 to approximately 9,400,000 by ... 1996 .... [In 1996, a]bout 40 million people used the Internet... [and] that [number] is expected to mushroom to 200

an attempt to sell their products to the ever-increasing number of Internet users. Few realize the enormous risk they are taking. The Internet is a modern day Pandora's box. People are enticed to open it, but they do not know what they are unleashing.

When Bill Gates posed the question, "Where do you want to go today?"[3] in Microsoft's advertising campaign for the Windows95 operating system, few people would have answered, "to court in a distant state." Recently that is what is happening. Courts are asserting personal jurisdiction over individuals based upon Internet contacts within their state. This could mean that a mom and pop business in Florida could be forced to travel to Alaska to defend a lawsuit based upon an Internet Web site that offers their products for sale.

Although there is little case law in the area, it is clear that the federal circuits are employing different standards to determine personal jurisdiction issues derived from Internet contacts. This paper will discuss the differing approaches to personal jurisdiction currently being applied.

II. BACKGROUND: PERSONAL JURISDICTION

Black's Law Dictionary defines personal jurisdiction as the "power of a court over the person of a defendant."[4] The personal jurisdiction requirement is a constitutional requirement that limits the states' powers.[5] Without personal jurisdiction over the parties involved in a lawsuit, a court may not adjudicate the issue.[6] Generally, there are two ways to get (specific personal jurisdiction) over a non-resident: 1) physical presence within the state[7] and 2) sufficient minimum contacts with the state.[8]

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million by 1999. Individuals can obtain access to the Internet from many different sources .... Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving.... Taken together, these tools constitute a unique medium—known to its users as cyberspace—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.") (quotation marks omitted) (citing Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2334-36 (1997)).

3. In the mid 1990s, Microsoft's advertising slogan was "Where do you want to go today?"

4. BLACK'S LAW DICTIONARY 1144 (6th ed. 1990) ("Personal jurisdiction. The power of a court over the person of a defendant in contrast to the jurisdiction of a court over a defendant's property or his interest therein; *in personam* as opposed to *in rem* jurisdiction."). *See generally* JOSEPH W. GLANNON, CIVIL PROCEDURE (1997) (giving a general background and analysis of personal jurisdiction).

5. *See generally* U.S. CONST. amend. XIV, § 1 (due process clause) (stating the fourteenth amendment forbids states "from depriv[ing] any person of life, liberty or property, without due process of law").

6. *See, e.g.*, FED. R. CIV. P. 12(b)(2); International Shoe v. Washington, 326 U.S. 310, 316 (1945).

7. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

8. *See International Shoe*, 326 U.S. at 310.

In *Pennoyer v. Neff*, the 1877 Supreme Court stated that "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[9] This state power is "necessarily restricted by the territorial limits of the state in which it is established."[10] These few words encapsulated the court's approach to personal jurisdiction prior to 1945. The approach limited the states' adjudicative power to citizens and property within the state's geographical borders.[11]

The Supreme Court re-defined "presence"[12] in the landmark case of *International Shoe v. Washington* and promulgated a more flexible, minimum contacts test[13] to determine personal jurisdiction. The decision had the effect of broadening the states' powers beyond their geographical borders in certain instances.[14] *International Shoe* involved an action by the State of Washington to recover state unemployment contributions from the International Shoe Company.[15] The company was a Delaware corporation engaged in mail order shoe sales, having its principal place of business in St. Louis, Missouri.[16] The company did not have offices or warehouses in Washington[17] nor did it make any contracts to purchase or sell goods within the state.[18] During the years in question, the company employed eleven to thirteen salesmen within Washington who were under the control of supervisors located in St. Louis.[19] The salesmen lived in and solicited orders within the State of Washington for the shoe company.[20] The Washington Supreme Court took the position that the "regular and systematic solicitation of orders in [Washington] by [International Shoe's] salesmen, resulting in a continuous flow of [International Shoe's] product

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9. *Pennoyer*, 95 U.S. at 722 (holding that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory."); *see also International Shoe*, 326 U.S. at 316 (explaining the *Pennoyer v. Neff* approach to personal jurisdiction).

10. *Pennoyer*, 95 U.S. at 720.

11. *See id.*

12. *See International Shoe*, 326 U.S. at 317 (explaining that "the terms 'present' or 'presence' are used merely to symbolize those activities of the [defendant] within the state").

13. *See id.* at 316 (stating that "due process requires only that . . . [the defendant must] have certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice") (quotation marks omitted).

14. *See id.*

15. *See id.* at 311.

16. *See id.* at 313.

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.* at 314 (No salesman had the authority to enter into contractual agreements on behalf of the shoe company.).

into the state" was enough to bring International Shoe within the State's jurisdiction.[21] Citing earlier federal case law,[22] the Washington Supreme Court held that the solicitation coupled with "some additional activities"[23] within the state was enough to establish jurisdiction.

In the Supreme Court's majority opinion, Chief Justice Stone illustrated four general situations to explain the rule.[24] First, the minimum contacts test is satisfied when there are continuous and systematic contacts with the state that give rise to the lawsuit.[25] Second, the minimum contacts test is not met via casual presence or isolated activities for suits unrelated to the contacts.[26] Third, even if a defendant has continuous and systematic contacts with the state, the minimum contacts test is not met for suits unrelated to the contacts.[27] Fourth, the Court stated that there are some contacts that "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the [defendant] liable to suit."[28] This promulgated a two-factor test for determining minimum contacts: 1) the level of activity within the state and 2) the relationship of that activity to the cause of action.[29] This vague constitutional standard[30] led to cases attempting to identify the limit of a state's authority over extra-jurisdictional individuals.

Since *International Shoe*, the courts have struggled most with the "nature and quality" aspect of the minimum contacts test.[31] Some contacts have been deemed so meaningful that they alone created minimum contacts with the forum.[32] In *McGee v. International Life Insurance Co.*, the Supreme Court upheld personal jurisdiction based upon a single insurance contract.[33] In 1944, a California resident purchased a life insurance policy from an Arizona insurance company.[34] In 1948, the International Life Insurance Co., based in Texas, assumed the Arizona insurance company's policies.[35] The Texas insurance company then offered

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21. *Id.*
22. *See id.* (citing International Harvester Co. v. Kentucky, 234 U.S. 579, 587 (1914); People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 87 (1918); Frene v. Louisville Cement Co., 134 F.2d 511, 516 (D.C. Cir. 1943)).
23. *Id.*
24. *See id.* at 317.
25. *See id.*
26. *See id.*
27. *See id.* at 318.
28. *Id.*
29. *See* GLANNON, *supra* note 4.
30. *See International Shoe*, 326 U.S. at 323 (Black, J., concurring).
31. McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).
32. *See id.*
33. *See id.* at 223.
34. *See id.* at 221.
35. *See id.*

to continue the insurance by mailing a reinsurance certificate to the California resident.[36] The California resident agreed and continued to pay insurance premiums to the Texas insurance company until his death in 1950.[37] The Texas insurance company refused to pay because the policyholder apparently committed suicide.[38] The beneficiary of the policy filed suit in California against the Texas insurance company.[39] Neither the Texas insurance company nor the Arizona insurance company ever maintained an office or an agent in California.[40] Furthermore, the Texas company never solicited or did any other insurance business in California.[41] The Court, nevertheless, upheld personal jurisdiction based on the nature of the contact.[42] The suit was based upon the contact with California, therefore, personal jurisdiction was upheld for purposes of the contractual suit.[43] The Court relied upon a recent trend of cases expanding the scope of states' jurisdictional power over extra-territorial corporations and individuals.[44]

The expansive trend continued until the court declined to find personal jurisdiction in *Hanson v. Denckla*,[45] which relied heavily upon the *McGee* argument.[46] The case focused on a trust created in Delaware.[47] The settlor of the trust later became domiciled in Florida.[48] One group of claimants argued that Florida law controlled and the corpus passed via the residuary clause of the trust settlor's will.[49] The competing claimants argued that Delaware law controlled and the corpus passed pursuant to the settlor's exercise of an inter vivos power of appointment incorporated in the trust.[50] Foregoing some of the details, the case involved two competing decrees.[51] On January 14, 1955, a Florida court ruled that the trust was controlled by Florida law.[52] This decision was later upheld by the Florida Supreme Court, which invalidated the power of appointment created in the Delaware

36. *See id.*
37. *See id.* at 222.
38. *See id.*
39. *See id.* at 221.
40. *See id.* at 222.
41. *See id.*
42. *See id.* at 223.
43. *See id.*
44. *See id.*
45. 357 U.S. 235 (1958).
46. *See id.* at 250.
47. *See id.* at 238.
48. *See id.*
49. *See id.* (This was the position of the Florida court.).
50. *See id.* (This was the position of the Delaware court.).
51. *See id.*
52. *See id.* at 242.

trust.[53] On January 13, 1956 a Delaware court issued a declaratory judgement that the power of appointment was valid under Delaware law.[54] On January 14, 1957 the Delaware Supreme Court held that the Florida decision was not controlling, because Florida lacked personal jurisdiction over the trust companies and no jurisdiction over the trust res.[55] The case ended up in the United States Supreme Court. The majority failed to find sufficient contacts to support personal jurisdiction. The Delaware trust company at issue: 1) had no office in Florida, 2) never transacted business in Florida, 3) never solicited business in Florida, and 4) the trust assets were never held or administered in Florida.[56] The power of appointment was exercised while the settlor was located in Florida, but the court held that this did not supply an adequate contact to give Florida jurisdiction.[57] Chief Justice Warren stated in the majority opinion that

> [t]he 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 privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.[58]

While requiring 'purposeful availment,' the Court in *Hanson* failed to define the term. Nonetheless, courts have seized upon purposeful availment as one of the primary factors in the minimum contacts test. Soon the issue became whether or not a foreseeable contact with the forum should be deemed 'purposeful' and give rise to personal jurisdiction.[59]

Initially, courts were willing to equate foreseeability with purposefulness. In *Gray v. American Radiator & Standard Sanitary Corp.*, the Illinois Supreme Court upheld personal jurisdiction on the basis of a stream of commerce argument.[60] The basic stream of commerce argument draws an analogy between commerce and a river. If you know that a river flows in one direction (i.e. into another state) and place an object into the

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53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.* at 251.
57. *See id.* at 253.
58. *Id.*; *see also* International Shoe v. Washington, 326 U.S. 310, 319 (1945).
59. *See, e.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432 (1957) (holding that the foreseeable contact arising form a distributional chain is sufficient to establish personal jurisdiction without any other contact with the forum).
60. *See id.*

river, you know that it will be swept in that direction (i.e. into the other state). The *Gray* court was the first to hold that the purposeful availment requirement for personal jurisdiction could be satisfied by a showing that a commercial contact was foreseeable.[61] Titan Valve Manufacturing Company, an Ohio company, produced valves that were used in the construction of water heaters.[62] The valves were sold to American Radiator & Sanitary Corporation,[63] a Pennsylvania corporation.[64] American Radiator incorporated the valves into water heaters, which were sold to an Illinois consumer.[65] One of the water heaters exploded, injuring the plaintiff.[66] Titan's only contact with Illinois was as a supplier to American Radiator.[67] The court reasoned that by injecting their product into the stream of commerce, Titan could foresee "substantial use and consumption" within Illinois.[68] Furthermore, since the company derived benefits from these commercial transactions, it was enjoying the benefits of the laws of Illinois.[69] The court upheld personal jurisdiction.[70] "The fact that the benefit [Titan] derives from [Illinois] laws is an indirect one, however, does not make it any the less essential to the conduct of [its] business,"[71] and, therefore, the use of Titan's products in the course of commerce is a purposeful availment establishing personal jurisdiction.[72] This expansive reading of the *Hanson* case further increased a state's power over extra-territorial individuals.

In 1980, the United States Supreme Court revisited the stream of commerce argument in *World Wide Volkswagen Corp. v. Woodsen*.[73] The plaintiffs, residents of New York, bought an Audi automobile from Seaway Volkswagen, Inc., in New York.[74] While traveling in the Audi through Oklahoma, the plaintiffs were involved in an automobile accident and subsequently filed a product liability suit against Seaway in an Oklahoma court.[75] Based on the evidence at trial, this was the only contact between

61. *See id.*
62. *See id.* at 434.
63. *See id.*
64. *See id.* at 432.
65. *See id.* at 438.
66. *See id.* at 434.
67. *See id.* at 438.
68. *Id.* at 442.
69. *See id.*
70. *See id.* at 444.
71. *Id.* at 442.
72. *See id.*
73. 444 U.S. 286 (1980).
74. *See id.* at 288.
75. *See id.*

Seaway and Oklahoma.[76] Even though the contact was foreseeable, based upon the mobile nature of automobiles,[77] the Court held that this alone was insufficient to support personal jurisdiction.[78] The appropriate foreseeability issue is whether "the defendant's conduct is such that he should reasonably anticipate being haled into court there."[79] The Court distinguished *Gray*, and similar cases, as chain of distribution cases, in which a distributional chain moved the product.[80] The Court treated the chain of distribution cases differently than the stream of commerce cases, in which the consumer's actions moved the product.[81] In the former, personal jurisdiction is generally upheld,[82] whereas in the latter, it is not.[83] The dissenting Justices in the case argued that this distinction is artificial.[84] The dissent went on to say that "[s]ome activities by their very nature may foreclose the option of conducting them in such a way as to avoid subjecting oneself to jurisdiction in multiple forums."[85]

The rift between the majority and the dissent in *World Wide Volkswagen* was widened in *Asahi Metal Industry Corp. v. Superior Court of California*, in which the Supreme Court once again split on the stream of commerce issue.[86] The plurality opinion by Justice O'Connor, supported by four justices, concluded that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state."[87] Additional acts, such as advertising, or tailoring the product to the specific state, may be sufficient to indicate the intent necessary for purposeful availment.[88] The concurring opinion adopted the view that injecting a product into the stream of commerce, with no additional showing of proof, was sufficient to establish purposeful availment.[89] Additionally, Justice Stevens wrote a concurring opinion arguing that the stream of commerce issue was not currently before the Court.[90] The stream of commerce argument factors in greatly when considering Internet contacts with a state. The conflicting opinions

76. *See id.* at 289.
77. *See id.* at 295.
78. *See id.* at 299.
79. *Id.* at 297.
80. *See id.* at 298.
81. *See id.*
82. *See, e.g., Gray*, 22 Ill. 2d at 432.
83. *See, e.g., World Wide Volkswagen*, 444 U.S. at 286.
84. *See id.* at 316.
85. *Id.*
86. 480 U.S. 102 (1986).
87. *Id.* at 112.
88. *See id.*
89. *See id.* at 117.
90. *See id.* at 121.

illustrated in the Asahi opinion further cloud the Internet personal jurisdiction decisions.

Application of the minimum contacts test differs somewhat based upon the allegations involved.[91] With intentional torts such as defamation,[92] and libel,[93] the courts' approach to the minimum contacts test is noticeably different than with the products liability context from which many of the Supreme Court's personal jurisdiction opinions arise.[94] In *Hugel v. McNell*, the plaintiff brought a defamation action arising from a newspaper article published in the Washington Post.[95] The plaintiff lived in New Hampshire and had previous business relations with the defendant that ended on bad terms.[96] The defendant contacted the Washington Post, alleging that the plaintiff, recently appointed Deputy Director of Administration for the CIA, was involved in illegal securities transactions.[97] The front-page article circulated via the national news services and resulted in the plaintiff's resignation from his post.[98] The First Circuit Court of Appeals held the New Hampshire long arm statute granted personal jurisdiction, based on the argument that the defamation "resulted in injury to [the plaintiff's] business reputation within New Hampshire."[99] Relying upon the reasoning of California case law,[100] the court found that the allegations were sufficient to create personal jurisdiction.[101] The defendant "knew that release of the allegedly false information would have a devastating impact on Hugel, and it can be fairly inferred that they intended the brunt of the injury to be felt in New Hampshire."[102] The court concluded that the defendant could reasonably expect to be haled into court in New Hampshire.[103] Instead of finding purposeful availment, the court relied upon the allegation of an intentional tort.[104] Thus, if the injury was

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91. *See, e.g.*, Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (illustrating the Court's approach to libel (intentional tort) cases. The argument rests upon the assumption that the extrajurisdictional actions created a tort within the jurisdiction.).

92. *See, e.g.*, Hugel v. McNell, 886 F.2d 1 (1st Cir. 1989).

93. *See, e.g.*, *Keeton*, 465 U.S. at 770.

94. *See Hugel*, 886 F.2d at 4.

95. *See id.*

96. *See id.* at 2.

97. *See id.*

98. *See id.*

99. *Id.* at 3.

100. *See id.* at 4 (finding personal jurisdiction over non resident defendants "because (i) their intentional actions were aimed at the forum State, (ii) they knew that the article was likely to have a devastating impact on the plaintiff, and (iii) they knew that the brunt of the injury would be felt by the plaintiff in the forum State") (citing Calder v. Jones, 465 U.S. 783, 789-90 (1984)).

101. *See id.* at 5.

102. *Id.*

103. *See id.*

104. *See id.*; *see also* Calder v. Jones, 465 U.S. 783, 791 (1984) (upholding personal

intentional, the defendant must have purposefully availed himself of the forum state.

As it stands, the purposeful availment inquiry is generally determinative of the minimum contacts test.[105] In addition to this inquiry, the courts also look to

> (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 the dispute; and (5) the shared interests of the several states in furthering fundamental substantive social policies.[106]

III. BACKGROUND: THE INTERNET

By now, most Americans have some experience with the Internet.[107] Briefly, the Internet is a network of computers that spans more than ninety countries.[108] The Internet grew out of a Department of Defense project called ARPA,[109] and has evolved into a global communications device that connects millions of individuals, businesses, schools, and other organizations all over the globe.[110] With virtually instantaneous transfers of information, the Internet is a tool that can be used to communicate efficiently with the world as a whole.[111] There are numerous forms of

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jurisdiction based on intentional conduct); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984) (holding personal jurisdiction for a defendant who circulated Hustler magazine nationally even without minimum contacts with the forum state).

105. *See* Personal Jurisdiction and the Internet, 520 PLI/Pat 975, 979 (1998).

106. *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 467-77 (1985)).

107. *See* Shea v. Reno, 930 F. Supp. 916, 926 (S.D. N.Y. 1996) (estimating that 40 million individuals had access to the Internet in 1996, and estimating 200 million users by the year 1999); *see also* ACLU v. Reno, 929 F. Supp. 824, 830-31 (E.D. Pa. 1996).

108. *See Shea*, 930 F. Supp. at 925.

109. *See id.* at 925-26 ("What we now refer to as the Internet grew out of an experimental project of the Department of Defense's Advanced Research Projects Administration ("ARPA") designed to provide researchers with direct access to supercomputers at a few key laboratories and to facilitate the reliable transmission of vital communications. . . . What we know as "the Internet" today is the series of linked, overlapping networks that gradually supplanted ARPANet. Because the Internet links together independent networks that merely use the same data transfer protocols, it cannot be said that any single entity or group of entities controls, or can control, the content made publicly available on the Internet or limits, or can limit, the ability of others to access public content.").

110. *See* ACLU v. Reno, 929 F. Supp. at 831.

111. *See id.*

information retrieval[112] and communication on the Internet.[113] One of the most popular forms of communication on the Internet is the World Wide Web.[114] The Web is comprised of documents in "hypertext markup language" (HTML). The documents are not centrally stored, but are stored on computers spread all over the world.[115] The Web uses uniform resource locators (URLs) attached to each document as addresses on the Internet in order to find the information.[116] These addresses tell the location of the document on the Internet[117] (i.e. the server on which the document resides). Documents on the Web use the hypertext transfer protocol (HTTP)[118] and many contain links,[119] which enable a user to switch the current document to another related document (possibly on another server in another state). The links allow the user's Web browser to navigate between different servers and documents without the user knowing the location of the document. When a message is sent from one location to another on the Internet, the message can travel many different routes to its final destination.[120] For example, a message sent from Florida to Alaska could be sent to a switching station in Washington DC, then Atlanta, then Dallas, then Detroit, then Los Angeles, and then finally to Alaska. The message, once sent, is broken into subparts called "packets" which travel independently and are reassembled at the destination.[121] The packets typically travel along the same route, but they may take different routes to

112. *See Shea*, 930 F. Supp. at 928-29 (explaining briefly services such as File-Transfer Protocol (FTP), Gopher services, and the World Wide Web).

113. *See id.* at 927-28 ("Perhaps the most widely used Internet service is electronic mail, or 'e-mail' .... [A] user is able to address and transmit a message to one or more specific individuals. ... Internet users may also transmit or receive 'articles' posted daily to thousands of discussion groups.... The Internet also offers opportunities for multiple users to interest in real time."); *see also* ACLU v. Reno, 929 F. Supp. at 834 (explaining that there are basically 6 types of Internet communications "(1) one-to-one messaging (such as 'e-mail'), (2) one-to-many messaging (such as 'listserv'), (3) distributed message databases (such as 'USENET newsgroups'), (4) real time communication (such as 'Internet Relay Chat'), (5) real time remote computer utilization (such as 'telnet'), and (6) remote information retrieval (such as 'ftp', 'gopher', and the 'World Wide Web').").

114. *See Shea*, 930 F. Supp. at 929 ("Documents available on the Web are not collected in any central location; rather, they are stored on servers around the world running Web server software.... To gain access to the content available on the Web, a user must have a Web 'browser' ... capable of displaying documents in 'hypertext markup language' ('HTML'), the standard Web formatting language.").

115. *See id.* at 929.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.* (Links are "highlighted text or images that, when selected by the user, permit him to view another, related Web document.").

120. *See* ACLU v. Reno, 929 F. Supp. at 831.

121. *See id.* at 832.

the destination.[122] Thus, a message could be broken into hundreds of independently traveling packets that could collectively enter every state on their route to their destination. The particular path taken between the origin and the location is not chosen by the sender and it usually remains unknown.

IV. PERSONAL JURISDICTION AND THE INTERNET

A state's need for jurisdiction has increased with the advent of new technology.[123] Much of today's modern commerce is conducted via telephone wires, by individuals who never enter the forum.[124] This led to the Supreme Court's holding in 1985 that personal jurisdiction may not be avoided merely because the person is not present within the state.[125] With the explosion of computers in the 80's, the question soon became what Internet contacts are sufficient to support personal jurisdiction?

Many courts hold that the appropriate personal jurisdiction standard based upon Internet contacts is analogous to the stream of commerce standard in *Asahi*.[126] This analogy shaped two main tests employed to determine personal jurisdiction based on Internet contacts. There have been several cases in which personal jurisdiction has been found based upon Internet contacts,[127] and several similar cases in which personal jurisdiction

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122. *See id.*

123. *See* Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over non-residents has undergone a similar increase.").

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

125. *See id.*

126. *See* David L. Stott, *Personal Jurisdiction in Cyberspace: the Constitutional Boundary of Minimum Contacts Limited to a Web Site*; 15 J. MARSHALL J. COMPUTER & INFO. L. 819, 839 (Summer 1997) (citing Sonia K. Gupta, *Bulletin Board Systems and Personal Jurisdiction: What Comports with Fair Play and Substantial Justice?*, 1996 U. CHI. LEGAL F. 519, 533 (1996) (discussing how a "BBS operator injects the BBS into the stream of cyberspace" or commerce as an analogy with Justice O'Connor's opinion of the stream of commerce)).

127. *See* Personal Jurisdiction and the Internet, 520 PLI/Pat 975 (discussing the following cases: CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Thompson v. Handa-Lopez, Inc., No. CIV.A. SA97-CA1008EP, 1998 WL 142300 (W.D. Tex. Mar. 25, 1998); Mieczkowksi v. Masco Corp., No. 5:96CV286, 1998 WL 125678 (E.D. Tex. Mar. 18, 1998); Gary Scott Ralph Int'l, Inc. v. Baraoudi, 981 F. Supp. 714 (D. Mass. 1997); Hasboro, Inc, v. Clue Computing, Inc., No. CIV.A. 97-10065-DPW, 1997 WL 836498 (D. Mass. Sept. 30, 1997); Haelan Prods. Inc. v. Beso Biological, No. 97-0571, 1997 U.S. Dist. Lexis 10565 (E.D. La. July 11, 1997); Telco Communications Inc. v. An Apple A Day, Inc., 977 F. Supp. 404 (E.D. Va. 1997); People v. Lipsitz, 663 N.Y.S.2d 468 (Sup. Ct. NY Co. 1997); Resuscitation Techs., Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/s, 1997 WL 148567 (S.D. Ind. Mar. 24, 1997); Hall v. LaRonde, 66 Cal. Rptr. 2d 399 (Cal. Court. App. 1997); Digital Equip. Corp. v. Altavista Tech, Inc., 960 F. Supp. 456 (D. Mass. 1997); Cody v. Ward, 954 F. Supp. 43 (D. Conn. 1997); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997); Heroes, Inc. v. Heroes Found., 958 F.

has not been found.[128] The cases reflect the courts' struggle to conceptualize the nature of Internet contacts. There are three basic approaches to conceptualizing the Internet, the spider web approach, the highway approach, and the Cyberspace approach.[129]

A. *The Spider Web Approach*

The spider web approach treats the Internet as simultaneously contacting all points on the World Wide Web. "[A]t each point the Web touches a physical place; the location of the computer creates that place on the Internet. . . . [E]ach person who places his message on the Internet places his presence at every point on the . . . Web."[130] Thus, if a person located in California contacts a Web site in New York, the contact occurs in both New York and California.

The Spider web approach is consistent with the Brennan concurrence[131] in *Asahi*. The opinion described the stream of commerce as referring "not to unpredictable currents or eddies, but to the regular and anticipated flow

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Supp. (D.D.C. 1996); Humphrey v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431 (Minn., Dist Court. Dec. 11, 1996), *aff'd* 568 N.W.2d 715 (Minn. Court. App. 1997); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996); EDIAS Software Int'l, LLC v. BASIS Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996); Panavision Int'l L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996); California Software, Inc. v. Reliability Research, Inc., 631 F. Supp. 1356 (C.D. Cal. 1986); and Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996)).

128. *See id.*(discussing the following cases: Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Mallinckrodt Med., Inc. v. Sonus Pharms., Inc., No. 9701732 (PLF), 1998 WL 6546 (D.C. D.C. Jan. 5, 1998); SF Hotel Co. v. Energy Invs., Inc., No. 97-1306-JTM, 1997 WL 74948 (D. Kan. Nov. 19, 1997); Transcraft Corp. v. Doonan Trailer Corp., No. 97 C. 4943, 1997 WL 733905, 45 U.S.P.Q.2d 1097 (N.D. Ill. Nov. 17, 1997); Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997); Weber v. Jolly Hotels, 977 F. Supp. 327 (D. N.J. 1997); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356 (W.D. Ark. 1997); E-Data Corp. v. Micropatent Corp., No. Civ 3:96cv523 JBA, 1997 WL 8085282 (D. Conn. Sept. 30, 1997); Agar Corp. v. Multi-Fluid, Inc., No. 95-5105, 1997 U.S. Dist. LEXIS 7121, 45 U.S.P.Q.2d (BNA) 1444 (S.D. Tex. June 25, 1997); Graphic Controls Corp. v. Utah Med. Prods., Inc. No. 96-CV-0459E(F), 1997 WL 276232 (W.D.N.Y. May 21, 1997); Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997); IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258 (N.D. Ill. 1997), *aff'd in part vacated in part*, 136 F.3d 587 (7th Cir. 1998); McDonough v. Fallon McElligott, Civ. No. 95-4037, 1996 WL 753991 (S.D. Cal. Aug. 5, 1996); Pres-Kap, Inc. v. System One Direct Access, Inc., 636 So. 2d 1351 (3d DCA), *review denied*, 645 So.2d 455 (Fla. 1994); and Naxos Resources (U.S.A.) Ltd. v. Southam Inc., No. CV 96-2314, 1996 WL 662451 (C.D. Cal. Aug. 16, 1996).

129. *See generally* Leif Swedlow, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U.L. REV. 337 (Spring 1997).

130. *Id.* at 370.

131. *Asahi*, 107 S. Ct. at 1037 (Blackmum, Marshall, & White, J.J., concurring).

of products from manufacture to distribution to retail sale."[132] Brennan pointed to *Gray* as precedent for the stream of commerce argument,[133] and concluded that *World Wide Volkswagen* "preserved the stream-of-commerce theory."[134] The concurring opinion stated that merely placing a product into the stream of commerce without more is sufficient to establish purposeful availment if the normal course of business regularly carries the product into the forum state.[135] When placed in the context of the Internet, this is basically the spider web theory of the Internet. Because the Internet regularly carries information into every jurisdiction, someone placing a Web site (analogous to a product) on the Internet should anticipate being haled into court in every state. Although not citing to Brennan's *Asahi* concurrence, cases such as *Inset Systems, Inc. v. Instruction Set, Inc.*[136] and *Humphrey v. Granite Gate Resorts*[137] have seemingly adopted this approach. The Internet cases "require only the defendant's knowledge that its World Wide Web advertisement can reach forums where the World Wide Web reaches."[138] Brennan's approach requires that the defendant is "aware that the final product is being marketed in the forum state."[139] This greatly expands the power of every state. Under this approach, the sponsor of the Web site would be subject to regulation by every state. There is no guarantee that the state regulations will not conflict. The effect would be a significant disincentive to anyone wishing to place information on the Internet.

The approach is illustrated in *Inset Systems*.[140] Inset, a Connecticut corporation, developed computer products and provided related services.[141]

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132. *Asahi*, 480 U.S. at 117.

133. *See id.* at 120.

134. *Id.*

135. *See id.* at 117.

136. *See* 937 F. Supp. 161, 164-65 (D. Conn. 1996) (After concluding that ISI's Internet Web page, which contained a 1-800 telephone number, was directed toward both Connecticut and all other states, the court concluded that "once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet User. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.").

137. *See* No. C6-95-7227, 1996 WL 767431, at *4 (D. Minn. Dec. 11, 1996) (defendant maintained an informational Web site which included a mailing list, and a 1-800 number. After concluding that On Ramp's Internet Web page was directed toward both Minnesota and all other states, the court relied upon the *Inset* case to find personal jurisdiction.); *see also* Maritz v. Cybergold, 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (concluding that Cybergold's Internet Web page, which contained a mailing list, was directed toward both Missouri and all other states, the court relied upon the reasoning of the *Inset* case to find personal jurisdiction).

138. Christopher W. Meyer, *World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?*, 54 WASH. & LEE L. REV. 1269, 1314 (1997).

139. *Asahi*, 480 U.S. at 104.

140. 937 F. Supp. at 161.

141. *See id.* at 162.

Instruction Set, Inc., (ISI) was a Massachusetts corporation that also provided computer products and related services.[142] Inset registered the federal trademark INSET.[143] Subsequently, ISI obtained the Internet domain name[144] "INSET.COM" and maintained the telephone number "1-800-US-INSET."[145] Inset sued ISI in Connecticut. The United States District Court of Connecticut held that the Connecticut long arm statute granted jurisdiction,[146] and that granting jurisdiction would not violate the due process clause.[147] Inset argued that Internet advertising[148] coupled with the availability of a toll free telephone number demonstrates that ISI purposefully availed itself of the privilege of conducting business within Connecticut.[149] The court agreed stating that the Internet advertising and the toll-free telephone number were intended to communicate to every state and, thus, they were purposefully directed at Connecticut.[150]

The *Inset* view of Internet minimum contacts was expanded in *Humphrey v. Granite Gate Resorts*,[151] in which the United States District Court in Minnesota found that the act of "placing [an] ad on the Internet 24 hours [a day], seven days a weeks, 365 days a year" creates personal jurisdiction in any state.[152] Granite Gate Resorts doing business as On Ramp Internet Computer Services (On Ramp)[153] created a Web site providing information about wagering via the Internet.[154] The site contained an advertisement for WagerNet, a betting service provided by Global Gaming Ltd. of Belize,[155] and a legal disclaimer about betting via

142. *See id.*

143. *See id.* at 163.

144. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1121 n.1 (W.D. Pa. 1997) ("Domain names serve as a primary identifier of an Internet user. . . . Businesses using the Internet commonly use their business names as part of the domain name (e.g. IBM.com). . . . The designation ".com" identifies the user as a commercial entity.") (citations omitted).

145. *See Inset Systems*, 937 F. Supp. at 163.

146. *See id.* at 164.

147. *See id.* at 165.

148. *See id.* ("[S]ince March, 1995, ISI has been continuously advertising over the Internet, which includes at least 10,000 access sites in Connecticut.").

149. *See id.*

150. *See id.*

151. No. C6-95-7227, 1996 WL 767431, at *1 (D. Minn. Dec. 11, 1996).

152. *Id.* at 11.

153. *See id.* at 2.

154. *See id.*

155. *See id.* at 2 ("There is a $100 set up fee, for necessary hardware and software. For security and privacy, all members are issued a card system linked to their personal computer to access WagerNet. Once on-line the bettor selects the team/s and amount/s they wish to wager. WagerNet then matches your bet with [one] opposing bettor or bettors to cover your wager. WagerNet charges each bettor a transaction fee of ONLY 2.5% as opposed to the 10% fee charged by most bookmakers.").

telephones.[156] The advertisement explained the WagerNet betting system, and provided a phone number for additional information.[157] In addition, the Web site contained an option to become part of WagerNet's mailing list.[158] Another advertisement contained the toll free telephone number for All Star Sports Handicapping Service,[159] which provides predictions about upcoming sporting events.[160] The attorney general of Minnesota filed for an injunction against On Ramp seeking to prevent Minnesotans from accessing the site.[161] At the time, there were 507,050 Internet users in Minnesota, roughly eleven percent of the overall population.[162]

The district court employed a five factor test to determine the constitutional validity of the state exercising personal jurisdiction: 1) quantity of contacts, 2) nature and quality of the contacts, 3) relatedness between the contacts and the cause of action, 4) interest of the state, and 5) convenience of the parties.[163] Relying upon *Inset*,[164] the court stated that On Ramp's Web site coupled with a toll-free telephone number was enough to show purposeful availment of Minnesota law.[165] On Ramp argued that *Inset* was based upon the geographical proximity of Massachusetts and Connecticut (the location of the plaintiff and the defendant, respectively).[166] The *Granite Gate Resorts* court was unpersuaded by the argument and held that the 1,800 miles between Minnesota and On Ramp was deemed to have "no relevancy whatsoever."[167] The court concluded that in today's age of mass communication and high technology, it is not unreasonable for a Nevada company to travel to Minnesota to defend themselves.[168]

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156. *See id.*("NOTE: PLEASE CONSULT YOUR LOCAL, COUNTY, AND STATE AUTHORITIES REGARDING RESTRICTIONS ON OFF-SHORE SPORTS BETTING VIA TELEPHONE BEFORE REGISTERING WITH WAGERNET.").

157. *See id.*

158. *See id.* at 4.

159. *See id.*

160. *See id.*

161. *See id.* at 1.

162. *See id.*

163. *See id.* at 6.

164. *Inset Systems*, 937 F. Supp. at 165 (quoting *Inset*: "The Internet as well as toll-free numbers are designed to communicate with people and their business in every state. Advertisement 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 advertisement, the advertisement is available continuously to any Internet user. ISI has therefore purposefully availed itself of the privilege of doing business within Connecticut.").

165. *See* Humphrey v. Granite Gate Resorts, No. C6-95-7227, 1996 WL 767431, at *7 (D. Minn. Dec. 11, 1996).

166. *See id.*

167. *Id.*

168. *See id.*

The court first focused on the quantity of the contacts between On Ramp and Minnesota.[169] The contacts were primarily a result of "an electronic impulse from a [Minnesota] computer . . . sent to the computer where the Web page is stored; the information from the Web page then electronically sends itself into Minnesota to the computer user."[170] The Attorney General identified 248 contacts between different Minnesota computers and On Ramp during a two week trial period, which equate to approximately 6,448 contacts per year.[171] "Due to the two-way transfer of information on the Internet, this means that the Defendants transmitted words and images to Minnesota each time one of those [6,448] computers accessed Defendants' Web site."[172] The defendant claimed that the Internet contacts were unilateral, but the court concluded that the system automatically sent images when the Minnesota user contacted the URL address for VEGAS.COM, otherwise the user would only see a blank screen.[173] Additionally, the court concluded that seventy-five phone calls to the All Star Sports toll-free telephone number should be attributed to On Ramp's contacts with Minnesota.[174]

The second prong of the test focused on the nature of the contacts between On Ramp and Minnesota.[175] The court viewed the Web site as purposefully soliciting Minnesota residents, because it "logically appears to be maintained for the purpose . . . of being accessed and used by any and all Internet Users, including Minnesota residents."[176] With little analysis, the court concluded that the Web site certainly provides the minimum contacts necessary for personal jurisdiction purposes.[177]

The third and fourth prong considered the relatedness between the cause of action and the contacts,[178] and the states' interests, respectively.[179] The attorney general sought to regulate the out-of-state Web site for the protection of Minnesota's residents.[180] Via analogy to radio advertisements, the court concluded that the contacts were sufficiently related to the cause

169. *See id.* at 6-7.

170. *Id.* at 1.

171. *See id.* at 8 ("Defendant's Web sites are set up so that they can record all of the Internet protocol numbers or URL addresses of the computer accessing them. . . . The URL addresses uniquely identify the location of the [accessing] computer.").

172. *Id.*

173. *See id.* at 9.

174. *See id.* (explaining that the calls, at $25 per call, resulted in $1,525 worth of revenue).

175. *See id.* at 6.

176. *Id.* at 10.

177. *See id.*

178. *See id.*

179. *See id.* at 10-11.

180. *See id.* at 10.

of action.[181] The state has a valid interest, because if the attorney general cannot bring a consumer protection action in Minnesota, the suit may not be pursued at all.[182] "It is the duty of the state to protect its residents from such unfair business practices. If our courts are not open, the state will be without remedy in any court and the consumer protection act will be rendered useless."[183]

The final prong focused on the inconvenience of the parties.[184] The court seized upon a term in the WagerNet agreement claiming Belizean jurisdiction over all disputes.[185] The court argued that, relative to Belize, jurisdiction by Minnesota must be more convenient.[186] With that, the court concluded that the act of placing an advertisement on the Internet equates to purposeful availment of Minnesota laws, supporting personal jurisdiction.[187]

Although not discussed, the case implicitly involves a stream of commerce argument.[188] The defendants injected (posted) their Web site into the Internet where it would necessarily be swept into every state (and nation).[189] The court concluded, that although they did not specifically intend to target Minnesota, this purpose was imputed to it based on the foreseeability of its Web site 'entering' Minnesota.[190] Under the spider web approach to Internet jurisdiction, every state would have concurrent jurisdiction over virtually any Internet presence.[191]

B. *The Highway Approach*

The highway approach is a narrow view of the Internet. Under this approach, the Internet is treated like a highway system which allows a user to travel from one location to another. The basic premise is that an individual user cannot be at two places at once.

> In other words, the court would endeavor to literally follow the data stream either to its source or destination. Telephone

181. *See id.*

182. *See id.* at 11.

183. *Id.* (quoting State v. Reader's Digest Ass'n, Inc., 502 P.2d 290 (Wash. 1972)).

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *See generally* Asahi v. California, 480 U.S. 102 (1987); Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961).

189. *See* Humphrey v. Granite Gate Resorts, No. C6-95-7227, 1996 WL 767431, at *5 (D. Minn. Dec. 11, 1996).

190. *See id.* at 6-10.

191. *See generally* Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997).

> communication is viewed by means of this paradigm already. Personal jurisdiction is usually limited to the receiving end of a telephone call. The person initiating contact knows where his call is going, but the receiver does not always know (or care) where the call comes from. The caller purposefully directs his activity to the callee's forum.
>
> On the Internet, application of this method would require a court to determine who initiated the contact.[192]

An Internet user, by contacting a Web site, is traveling to a Web site. Thus, if a person in California contacts a Web site in New York, the contact occurs in New York but not in California. This conceptualization is consistent with Justice O'Connor's approach to the stream of commerce argument in the *Asahi* plurality opinion.[193] The plurality stated that the

> substantial connection between a defendant and the forum State necessary for a finding of minimum contacts must derive from an action purposely directed toward the forum state, and the mere placement of a product into the stream of commerce is not such an act, even if done with an awareness that the stream will sweep the product into the forum State absent additional conduct indicating an intent to serve the forum state market.[194]

When placed in the context of the Internet, merely placing a Web site on the Internet is not enough to establish personal jurisdiction; you must have additional conduct. If browsing the Internet is sufficient additional conduct to support jurisdiction, then this approach is analogous to the highway theory of the Internet. Cases such as *Pres-Kap v. System One*,[195] *CompuServe v. Patterson*,[196] and *Bensusan Restaurant Co. v. King*,[197] have adopted this approach to personal jurisdiction.

Pres-Kap, Inc. v. System One, Direct Access, Inc.,[198] was an early Florida district court case attempting to characterize the nature of computer based contacts.[199] Pres-Kap was a travel agency doing business solely in New York.[200] System One was a Delaware company which leased

192. Swedlow, *supra* note 129, at 375-76.

193. *See Asahi*, 480 U.S. at 103-04. Joined by the Chief Justice Rehnquist, Justice Powell, and Justice Scalia.

194. *Id.* at 103-04.

195. 636 So. 2d 1351 (3d DCA Fla. 1994).

196. 89 F.3d 1257 (6th Cir. 1996).

197. 937 F. Supp. 295 (S.D.N.Y. 1996).

198. 636 So. 2d 1351 (1994).

199. *See id.* at 1353.

200. *See id.* at 1352.

computer-based airline reservation systems.[201] System One provided terminals that provided access to System One's Miami-based computer system.[202] Pres-Kap negotiated and signed a contract with System One at a branch office in New York, which was forwarded to Miami where a System One representative signed the contract.[203] When the contract was breached, System One filed suit against Pres-Kap in Florida.[204] Pres-Kap's only contact with Florida was that they "(1) . . . forwarded all rental payments under the contract to [System One's] billing office in Miami, and (2) the computer database . . . which [Pres-Kap] accessed through computer terminals, [was] located in Miami."[205] The court held that Pres-Kap did not meet the minimum contacts test and was not subject to personal jurisdiction,[206] reasoning that "an individual's contract with an out-of state party alone cannot automatically establish sufficient minimum contacts"[207] in a forum. The fact that the computer database was located in Miami was insufficient to change the result.[208] In dicta, the majority asserted that even if Pres-Kap knew the computer database was located in Miami, it would not alter the reasonable expectation of not being haled into court in Florida.[209] Furthermore, the court reasoned that a contrary decision would be "wildly beyond the reasonable expectations of . . . computer-information users."[210]

A mere two years later *CompuServe v. Patterson* was decided by the Sixth Circuit Court of Appeals, seemingly inconsistently with the dicta in Pres-Kap.[211] Patterson was a Texas lawyer who also wrote shareware[212] programs. Patterson entered into an agreement with CompuServe,[213] an

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201. *See id.* at 1351.

202. *See id.* at 1352.

203. *See id.*

204. *See id.* at 1351.

205. *Id.* at 1353.

206. *See id.*

207. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985)).

208. *See id.*

209. *See id.*

210. *Id.* ("[A] contrary decision would, we think, have far reaching implications for business and professional people who use "on-line" computer services for which payments are made to out-of-state companies where the database is located. Across the nation, in every state, customers of "on-line" computer information networks have contractual arrangements with out-of-state supplier companies, putting such customers in a situation similar, if not identical, to the defendant in the instant case.").

211. 89 F.3d 1257.

212. *See id.* at 1260 ("Shareware makes money only through the voluntary compliance of an "end user"... who may or may not pay the creator's suggested licensing fee if she uses the software beyond a specified trial period.").

213. *See id.* ("CompuServe is a computer information service.... It contracts with individual subscribers, such as [Patterson], to provide inter alia, access to computing and information services

Ohio company. The agreement purportedly created an independent contractor relationship[214] between Patterson and CompuServe whereby Patterson was allowed to place his shareware programs on CompuServe's system for distribution.[215] Patterson submitted thirty-two Shareware programs which were downloaded by twelve Ohio residents.[216] CompuServe began marketing a similar software product which Patterson believed infringed upon his common law trademarks.[217] CompuServe eventually filed a declaratory judgment action in federal district court in Ohio.[218] Patterson's motion to dismiss for lack of personal jurisdiction was granted, and CompuServe appealed.[219]

Although the contacts were primarily electronic, the circuit court stated that "[s]o long as a commercial actor's efforts are 'purposefully directed' toward the residents of another state, we have consistently rejected the notion that an absence of physical contacts"[220] defeats personal jurisdiction. It is important to note that Patterson and CompuServe entered into a Shareware Registration Agreement ("SRA") and a CompuServe Service Agreement.[221] The agreements stated that they were entered into in Ohio.[222] The court held, based on a prima facie standard, that the contacts were substantial enough to result in personal jurisdiction.[223] The court was quick to limit it's holding;

> [B]ecause of the unique nature of this case, we deem it important to note what we do not hold. We need not and do not hold that Patterson would be subject to suit in any state where his software was purchased or used.... We also do not have before us any attempt by another party from a third state to sue Patterson in Ohio for, say a "computer virus" caused by his software.... Finally, we need not and do not hold that CompuServe may... sue any regular subscriber to its service for nonpayment in Ohio.[224]

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via the Internet.").

214. *See id.*

215. *See id.* ("The end-user pays that fee directly to CompuServe in Ohio, and CompuServe takes a 15% fee for its trouble before remitting the balance to the shareware's creator.").

216. *See id.* at 1261.

217. *See id.*

218. *See id.*

219. *See id.*

220. *Id.* at 1264 (quoting *Burger King*, 476 U.S. at 2184).

221. *See id.* at 1260.

222. *See id.*

223. *See id.* at 1268.

224. *Id.*

The determinative issue[225] for the court was the nature of the electronic contracts and electronic course of dealings. The district court relied upon *Health Communications, Inc. v. Mariner* to characterize the nature of the contact between Patterson and CompuServe, finding the relationship was "marked by a 'minimal course of dealing,' [and] was insufficient to satisfy the purposeful availment test."[226] The Court of Appeals differentiated *Health Communications*[227] however, and relied upon *Burger King*[228] to uphold personal jurisdiction.[229] This was a simple contract case[230] for the Court of Appeals. Patterson purposefully availed himself of doing business in Ohio by signing the SRA contract. He then "perpetuated the relationship with CompuServe via repeated communications with its system in Ohio."[231] The purposeful availment criteria was satisfied by Patterson signing the contract and not the subsequent electronic communications. Thus, one could read *CompuServe* as standing for the proposition that electronic contracts are contracts and should be treated as such.

Bensusan Restaurant Corp. v. King[232] involved the famous Blue Note jazz club, located in New York City.[233] The defendant, King, owned a jazz club in Missouri, also named "The Blue Note."[234] King posted a general access Web site[235] on the Internet containing general and ticketing information about the Blue Note club (in Missouri).[236] The ticketing information contained "the names and addresses of ticket outlets in Columbia and a telephone number for charge-by-phone ticket orders, which are available for pick-up on the night of the show."[237] Bensusan's complaint included allegations that King's Web site infringed upon their trademark "The Blue Note" (in New York).[238] The court viewed the issue as "whether the existence of a site on the World Wide Web . . . without anything more, [was] sufficient to vest [the New York Court] with personal jurisdiction over [King]."[239]

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225. *See id.* at 1264.

226. *Id.* (quoting 860 F.2d 460 (D.C. Cir. 1988)).

227. *See id.*

228. *See id.* (explaining *Burger King* in the parenthetical).

229. *See id.*

230. *See id.*

231. *Id.*

232. 937 F. Supp. 295 (S.D.N.Y. 1996).

233. *See id.* at 297.

234. *Id.*

235. *See id.* ("The Web site is a general access site, which means that it requires no authentication or access code for entry, and is accessible to anyone around the world who has access to the Internet.").

236. *See id.*

237. *Id.* at 298.

238. *See id.*

239. *Id.*

Although the holding was based upon New York's long arm statute,[240] the court stated that upholding personal jurisdiction would violate the Due Process clause.[241] Although the result in *Bensusan* is different than that in *CompuServe*, the district court distinguished the two cases factually.[242] The court stated that unlike *Bensusan, CompuServe* involved a defendant who: 1) specifically targeted the forum state, 2) contractually arranged to sell goods in the state, 3) advertised in the forum state, and 4) repeatedly sent software into the forum state.[243] The court in *Bensusan* applied a three factor test:[244] 1) whether there was purposeful availment by King,[245] 2) whether King should have reasonably anticipated being haled into court in New York based on his contacts with New York,[246] and 3) "whether [King] carries on a continuous and systematic part of its general business within the forum state."[247] The court reasoned that creating a Web site is analogous to placing a product into the stream of commerce.[248] Adopting the *Asahi* plurality approach, the court stated that even though the Web site has potentially world-wide effects, King did not purposefully avail himself of New York law by merely creating a Web site.[249]

Although most cases follow arguments growing out of the *Asahi* decision, other courts have proposed different tests for determining personal jurisdiction based on Internet contacts. The Zippo Manufacturing Company (Manufacturer), located in Pennsylvania, makes "Zippo" tobacco lighters.[250] Zippo Dot Com (Dot Com), located in California, operates an Internet Web site and has the exclusive right to use the Internet domain names "ZIPPO.COM," "ZIPPO.NET," and "ZIPPO.NEWS."[251] The right to use an Internet domain name was based upon registration of the name with Network Solutions.[252] Dot Com's Web site contained advertisements and provides news services for a fee.[253] Users wishing to purchase the Internet news service fill out an electronic application which includes their

240. *See id.* at 298-99.
241. *See id.* at 300.
242. *See id.*
243. *See id.*
244. *See id.*
245. *See id.* at 300-01; *see also Hanson*, 357 U.S. at 250-51.
246. *See Bensusan*, 937 F. Supp. at 301; *see also World Wide Volkswagen*, 444 U.S. at 286.
247. *Bensusan*, 937 F. Supp. at 301.
248. *See id.*
249. *See id.*
250. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1121 (W.D. Pa. 1997).
251. *See id.*
252. *See id.* at 1121 n.3 (Network Solutions "contracted with the National Science Foundation to provide registration services for Internet domain names. Once a domain name is registered to one user, it may not be used by another.").
253. *See id.*

address.[254] The payments are then made either via the Internet or by telephone.[255] Manufacturer sued Dot Com alleging trademark dilution, infringement, and false designation, among other state law counts.[256] The United States District Court in Pennsylvania first reviewed the development of personal jurisdiction, then summarized that the above cases can be viewed as creating a continuum upon which all Internet personal jurisdiction cases should be placed.[257] At one end of the spectrum are cases such as *CompuServe*, in which the defendant has contractual relations with individuals within the forum that involve substantial computer contacts.[258] At the other end of the spectrum are individuals who merely provide information on Web sites that are accessible to all, such as in *Bensusan*.[259] The gray area in the middle contains interactive Web sites that allow two-way exchange of information.[260] When dealing with this gray area, the case should be analyzed using a two factor test: 1) the level of interactivity of the site, and 2) the commercial nature of the site.[261] The court limited application of the test by dividing the above spectrum into three categories: 1) "Internet Advertising" cases such as *Inset* and *Bensusan*,[262] 2) "Interactivity" cases such as *Maritz, Inc. v. CyberGold, Inc.*[263] and *Granite Gate Resorts*,[264] and 3) "Doing Business over the

254. *See id.*

255. *See id.*

256. *See id.* at 1121.

257. *See id.* at 1124 ("[O]ur review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles.").

258. *See id.* ("At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contacts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet ....").

259. *See id.* ("A passive Web site that does little more than make information available to those who are interested in it is no grounds for the exercise of personal jurisdiction.").

260. *See id.*

261. *See id.* ("[O]ur review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.").

262. *See generally* Inset Sys. v. Instruction Set, 937 F. Supp. 161 (D. Conn. 1996); Bensusan Restaurant Co. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996).

263. 947 F. Supp. 1328 (E.D. Mo. 1996); *see also Zippo*, 952 F. Supp. at 1124-25 ("The defendant had put up a Web site as a promotion for its upcoming Internet service. The service consisted of assigning users an electronic mailbox and then forwarding advertisements for products and services that matched the users' interests to those electronic mailboxes.... The court reasoned that the defendant's conduct amounted to 'active solicitations' and 'promotional activities' designed to 'develop a mailing list of Internet users' and that the defendant 'indiscriminately responded to every user' who accessed the site.").

264. 1996 WL 7674361 (D. Minn. 1996).

Internet" cases such as *CompuServe*.[265] In *Zippo*, the court found that Dot Com was conducting business in Pennsylvania and, thus, personal jurisdiction was supported, but the decision was based upon the sale of 3,000 passwords to subscribers in Pennsylvania, and 7 contracts with Internet access providers in Pennsylvania.[266] Dot Com argued that the contacts in Pennsylvania were initiated by Pennsylvanians who contacted Dot Com's Web site, and thus the contacts were "'fortuitous' within the meaning of World Wide Volkswagen."[267] The court disagreed because Dot Com "repeatedly and consciously chose to process Pennsylvania resident's applications and to assign them passwords. Dot Com knew that the result of these contracts would be the transmission of electronic messages into Pennsylvania."[268] The knowledge that the applicants were from Pennsylvania gave Dot Com clear notice that it was going to be subject to suit in Pennsylvania.[269] The court's reasoning begs the question: if Dot Com's electronic application did not ask for the applicant's address, would the court then conclude that Dot Com did not have notice that they were going to be subject to suit in Pennsylvania? Does willful blindness deprive Pennsylvania of personal jurisdiction? The answer is not forthcoming.

1. The Additional Conduct Test

In *Bensusan*, the defendant placed a Web site on the Internet that contained general information about a jazz club in New York.[270] The site was not interactive.[271] The court stated that "the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York."[272] The court cited the *Asahi* plurality to support the statement that "[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state."[273] To adopt this approach would be to treat the World Wide Web as the courts have traditionally treated any other communication device. Just because the World Wide Web is more efficient and inexpensive than a telephone or radio or television does not mean that it is different. Or does it?

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265. *See Zippo*, 952 F. Supp. at 1125.
266. *Id.* at 1126.
267. *See id.*
268. *Id.*
269. *See id.*
270. *See Bensusan*, 937 F. Supp. at 297.
271. *See id.*
272. *Id.* at 299.
273. *Id.* at 301.

2. The Two-Factor *Zippo* Test

A more flexible approach was adopted in *Zippo*. The court considered the level of interactivity of the site and the commercial nature of the site.[274] The court cited three journal articles[275] as support for the two factor test. The *Zippo* opinion seems to adopt the personal jurisdiction test for advertising pronounced in Richard Zembek's article *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*.[276] Zembek's article proposes:

> [W]here an advertiser's promotional activity in the forum state . . . entails no physical presence of the advertiser . . . , the issue of whether the advertisement in the forum constitutes minimum contacts remains unanswered. These jurisdictional questions are resolved based upon the quality of the advertising contact in relation to the cause of action. . . . [I]t is important to note that courts have paid particular heed to the volume of business carried on in the forum by the non-resident. Where, however, an advertising activity is combined with a substantial sale in the forum state, a forum may constitutionally assert specific jurisdiction over a non-resident defendant.[277]

The largest benefit of the Zippo test is that it is very flexible. The simple analogy is that a commercial Web site is an advertisement and should be treated as such. This approach adopts the highway theory of the Internet. The individual that contacts a Web site is traveling to the site. Interactive Web sites send responses to the user. When they do, they are traveling to the user's site (forum state). The more interactive the Web site, the more the Web site contacts a forum state. Therefore, the more substantial the contact and the more likely that a minimum contact exists.

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274. *Zippo*, 952 F. Supp. at 1124 ("[O]ur review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature an quality of commercial activity that an entity conducts over the Internet.").

275. *See id.* at 1124 n.5 (citing Robert A. Bourque & Kerry L. Konrad, *Avoiding Jurisdiction Based on Internet Web Site*, N.Y.L.J. (Dec. 10, 1996); David Bender, *Emerging Personal Jurisdiction Issues on the Internet*, 453 PLI/Pat 7 (1996); Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339 (1996)).

276. Zembek, *supra* note 275, at 339.

277. *Id.* at 368-69 (citations omitted).

> Physical boundaries typically have framed legal boundaries, in effect creating signposts that warn that we will be required after crossing to abide by different rules. To impose traditional territorial concepts on the commercial uses of the Internet has dramatic implications, opening the Web user up to inconsistent regulations throughout fifty states, indeed, throughout the globe.[278]

C. *The Cyberspace Model*

The Cyberspace approach is the narrowest approach. Simply put, there is no physical presence associated with Internet contacts. All contacts exist in Cyberspace.[279] Thus, if a person in California contacts a Web site in New York, the contact does not occur in either New York or California. To date, no court has adopted the Cyberspace approach to the Internet. To do so would be to deprive all courts of jurisdiction over the Internet.

VI. CONCLUSION

The Cyberspace model of the Internet seems the most appropriate but this reeks havoc on the traditional model of jurisdiction. Historically, courts have used physical location as a limitation on jurisdiction. Under the *Pennoyer* regime, states' powers were limited by their borders.[280] If you were within a state, then you were subject to the state's authority. The *Pennoyer* test for personal jurisdiction reigned for numerous years.[281] Eventually, the judicial system was forced to expand the states' power by granting personal jurisdiction based on minimum contacts within the state. The minimum contacts test, like the *Pennoyer* test before it, has reigned for numerous years. Now, the Internet creates a difficult problem for the judicial system. The Internet is a medium in which activities are not tied to a physical location.[282] To date, the judicial system has attempted to deal with the Internet under the historical minimum contacts test by assigning physical locations to Internet events. This seems a temporary cure.

A good example of the difficulty is a Web page. Where is a Web page? You could argue that a Web page is located on the computer where the

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278. Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997).

279. The term Cyberspace was first coined by William Gibson in Neuromancer. Cyberspace is "[a] consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts. . . . A graphic representation of data abstracted from the banks of every computer in the human system." WILLIAM GIBSON, NEUROMANCER 51 (1984).

280. *See supra* note 9.

281. *See supra* note 12.

282. *See supra* note 2.

information is stored. But what if the information contained in a Web page is contained on numerous computers? What if there are multiple copies of the information? For instance, Web browser programs make copies of the Web pages visited by a user and store them in cache directories on the user's computer. Is the Web page now located on every computer that visits it? To assign a physical location to a Web page on the Internet would be to engage in an arbitrary fiction, which would inevitably lead to the spider web result in which every state has jurisdiction. As the number of copies of the information increases, the number of physical locations for the Web page would increase exponentially. Eventually, there would be copies in every jurisdiction. If the judicial system treats these copies as purposeful contacts, then the state in which the copy is located could assert personal jurisdiction. This gives rise to the same problems as the spider Web approach. An individual placing information on the Internet will be subject to regulation by every state and nation with no guarantee that the regulations will not conflict.

The simplest and most complete solution would be to federally regulate the Internet and adopt the Cyberspace model to the Internet. Under the doctrine of preemption,[283] federal regulations would prevent conflicting regulation by the states. Furthermore, adopting the Cyberspace model avoids the current difficulties associated with Internet based personal jurisdiction. The need for regulation is increasing dramatically in areas such as Internet gambling and money laundering. Furthermore, Federal regulation would avoid the conceptual problems associated with assigning physical locations to Internet events. After all, to say that when an individual navigates the Internet the individual consciously decides to enter into every state and nation is difficult to fathom. Rather, an individual sits down at a computer and merely presses keys. The individual's computer displays different information without indicating the location of that information. To federally regulate the Internet would add a great deal of certainty to Internet use.

283. *See* BLACK'S LAW DICTIONARY 1177 (6th ed. 1990) ("Doctrine adopted by the U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law. Examples are federal laws governing interstate commerce."). *See also* U.S. CONST. art. VI cl. 2 ("[T]he Laws of the United States. . . . shall be the supreme Law of the Land.").