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## Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site, 15 J. Marshall J. Computer & Info. L. 819 (1997)

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## COMMENTS

# PERSONAL JURISDICTION IN CYBERSPACE: THE CONSTITUTIONAL BOUNDARY OF MINIMUM CONTACTS LIMITED TO A WEB SITE

### I. INTRODUCTION

The issue of personal jurisdiction becomes more significant as the Internet becomes available to more people around the globe.<sup>1</sup> In the past, the Internet was primarily used for accessing information.<sup>2</sup> Now,

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1. Richard Raysman & Peter Brown, *Resolving Jurisdiction and Venue Issues on the Internet*, N.Y. L.J., Sept. 10, 1996, at 3. The Internet has grown rapidly in recent years, causing an enlarged body of Internet jurisprudence. *Id.* Disputes that once existed only in traditional commerce are now cropping up throughout the world as a result of on-line interaction. *Id.* The parties in these disputes have only had contact over the Internet, a place without physical boundaries. *Id.* Because of the "boundaryless" nature of the Internet and on-line disputes between parties, two critical issues have surfaced. *Id.* "First, to what extent is it possible to enforce laws against a defendant residing beyond a court's territorial boundaries, based on conduct which takes place on-line? Second, where should a plaintiff sue when it claims its rights have been violated in cyberspace?" *Id.*

2. Barbara Kantrowitz & Adam Rogers, *The Birth of the Internet*, NEWSWEEK, Aug. 8, 1994, at 56. The mid to the late 1960's introduced the beginnings of the Internet. *Id.* A group of computer scientists were creating the first network sponsored by the Department of Defense's Advanced Research Project Agency ("ARPA"). *Id.* Under the project name ARPANET, the project's objective was to create a system that would allow researchers from different areas to share ideas through computers. *Id.* At the time, computers could only communicate with each other through the use of magnetic strips or punched cards. *Id.* Computer Scientists wanted to make computers more efficient by connecting them into networks and pushed for an experimental network that would link them to scientists across the country. Kantrowitz & Rogers, *supra* at 57.

In 1968, J.C.R. Licklider and Robert Taylor published a paper that suggested that computers could be used as communication tools. *Id.* They pushed for an experimental network and began by linking four locations: UCLA, University of California, Santa Barbara, the Stanford Research Institution, and the University of Utah. *Id.* The first network site, or node as it is commonly called, was established at UCLA in September 1968. *Id.* The first demonstration took place on November 21, 1968 when the scientists gathered to watch their computer hook up with the computer at Stanford located hundreds of miles away. *Id.*

as the Internet has developed,<sup>3</sup> the Internet has become a means for business advertising.<sup>4</sup>

Businesses often use their trademark or copyrighted work to advertise on the Internet. While many businesses advertise on a city or state level, once a business places its intellectual property on the Internet, it opens itself to liability<sup>5</sup> on a global level.<sup>6</sup> World-wide exposure has

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at 57. By 1971, there were almost two dozen sites, including sites at Harvard and MIT. Kantrowitz & Rogers, *supra* at 57. In three years time, sixty-two sites had been created and by 1981, there were over two hundred. *Id.*

Lawrence Roberts is credited with much of the development of the network. *Id.* One of his tasks was to get unwilling scientists to participate in the network. *Id.* It caught on quickly, as did electronic mail and on-line debate and conversation. *Id.* By the early 70's, a new challenge arose in that other countries wanted to join. Kantrowitz & Rogers, *supra* at 58. They needed to create a way to link up networks around the world. *Id.* Vint Cerf, a professor at Stanford, and Robert Kahn, from ARPA, developed a set of standards, known as protocols, that could be used by multiple networks. *Id.* During the next decade, new networks were created, including USENET news groups. *Id.* In the late 80's, as computers became cheaper and easier to use, anyone with a modem could get on-line. *Id.* At that time, the National Science Foundation established a network, the NSFNET. Kantrowitz & Rogers, *supra* at 58. The NSFNET stands as the technical backbone of the Internet in the United States. *Id.* With its job completed, ARPANET went out of commission in 1990. *Id.*

3. William J. Cook, *Four Internet Jurisdiction Cases Break Rule of Thumb*, CHI. LAW., Oct. 1996, at 77. The author discusses the rapid changes the Internet has made since 1994 in growth and the results this growth has played on personal jurisdiction by the increased aggressiveness of intellectual property owners on the Internet. *Id.* Specifically, today's Internet world exhibits a 49-million-member Internet community that includes 90,173 networks. *Id.* See Larry Krumeraker, *Surveyors of Cyberspace*, INTERNET WORLD, June 1996, at 70 (discussing the statistics of the Internet). A survey taken semi-annually found that 129 countries currently have "direct connectivity" to the Internet, which is an increase of 39 countries since the last survey. *Id.* "A copy of the most recent survey letter [of the Internet] is available at <http://www.mids.org/ids2/ids2.504>." *Id.*

4. Dennis F. Hernandez & David May, *Personal Jurisdiction and the Net: Does Your Web Site Subject You to the Laws of Every State in the Union?*, L.A. DAILY J., July 15, 1996, at 5. "The World Wide Web, a component of the Internet, is a cheap and relatively simple medium for advertising and communications with a global audience." *Id.* A business can advertise with its own Web site for \$50 a month and be accessible to potentially 25 million Internet users. *Id.* See MARTIN MOORE, *THE INTERNET UNLEASHED: THE FUTURE OF THE INTERNET* 34-35 (1st ed. 1994). Many businesses use the Internet to sell and advertise their products. *Id.* An Internet user is able to look at or read about the product and then order it electronically. *Id.* Some businesses even have Internet accounts available to their consumers. *Id.* Furthermore, businesses also sell their product through Internet Service Providers such as CompuServe, Prodigy, and America Online. *Id.* See *infra* note 48 for further information on Internet Service Providers.

5. Eric D. Suben, *Intellectual Property On-Line*, 43 APR FED. LAW. 22, 22 (1996) (analyzing the changes personal computers have made in how we communicate, and the potential liability that arises in the array of intellectual property displayed on the Internet).

6. Jeff Weingart, *Jumping Jurisdictional Hurdles*, CONN. L. TRIB., Oct. 7, 1996, at 13. Until recently, many businesses from different areas of the country may not have been aware of each other. *Id.* However, because of the Internet, these businesses have been able to rapidly expand their reach throughout the world. *Id.* Therefore, it is natural to see

forced intellectual property owners to become more aggressive in defending their rights<sup>7</sup> because intellectual property rights are easily violated over the Internet.<sup>8</sup> Thus, businesses advertising on the Internet should seriously consider the potential problems involved before establishing themselves on the Internet.<sup>9</sup>

A problem the judicial system has dealt with for generations is how to maintain an individual's right to due process while exercising personal jurisdiction.<sup>10</sup> This problem has become more difficult since the Internet easily and frequently enables millions of individuals to reach others on a global level.<sup>11</sup> The judicial system must now consider either applying

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conflicts arise from Internet related cases involving intellectual property. *Id.* Suben, *supra* note 5, at 22. The risks of publishing globally may expose a business advertising with their Web site to potential law suits around the world. *Id.*

7. Cook, *supra* note 3, at 77 (discussing the aggressiveness of intellectual property owners to protect their intellectual property rights due to the Internet's rapid growth).

8. Alan Brill, *A Lawyer's Place In Cyberspace*, AM. LAW., Dec., 1995, at 10. One of the many legal problems on the Internet is jurisdictional. *Id.* Because of the millions of computer connections around the world that are linked to the Internet, it is very easy to cross jurisdictional boundaries on the Internet. *Id.*

9. Weingart, *supra* note 6, at 13. Internet related intellectual property cases, like all cases, must be able to meet personal jurisdiction over the defendant in order to pursue their substantive claims. *Id.* However, it can be difficult to establish personal jurisdiction when the defendants only contact has been over the Internet. *Id.* Thus, intellectual property owners who establish their intellectual property on a Web site "should not be taken any less seriously than rolling out a more traditional international advertising campaign." *Id.* Furthermore, intellectual property owners who maintain a Web site should ensure that their intellectual property displayed on the Web site does not infringe on third parties intellectual property rights. *Id.*

10. Michael W. Kier, *Todd Shipyards Corp. v. Cunard Line, Ltd.: Procedural Due Process and an Arbitrator's Punitive Damage Award*, 42 CASE W. RES. 1085, 1094 (1992). The Supreme Court Justices recognize the dynamic nature of the due process concept. *Id.* "Like other constitutional principles, due process is shaped and defined by societal values which are constantly evolving and which reflect the vitality of ever-changing circumstances." *Id.* See Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 101 (1988). "The purpose of the due process right would be to ensure reliable factual determinations, to guard against prosecutorial overreaching, and to ensure that charging decisions conform to the community's fundamental sense of justice." *Id.* BLACK'S LAW DICTIONARY 1203 (6th ed. 1990) (defining procedural due process). Procedural due process is defined from the Fifth and Fourteenth Amendments of the Constitution, which provides the right of life, liberty and property. *Id.* "Minimal procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must be notified." *Id.* "Man, when perfected, is the best of animals, but when separated from law and justice, he is the worst of all." ISIDORE STARR, JUSTICE: DUE PROCESS OF LAW 209 (1981) (quoting Aristotle from Plato's book, *The Republic*).

11. Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 347-48 (1996). "When an Internet user injures a person through cyberspace, the question becomes where the injured person may recover from the Internet user in a manner that comports with due process

the traditional due process limits to cyberspace<sup>12</sup> or redefining the due process limits.<sup>13</sup> The major concern of the courts must be the potential effects of imposing personal jurisdiction on a nonresident defendant whose contacts are limited to the Internet.

One example that displays the framework and limits of due process on the Internet is found in the Sixth Circuit's recent reversal of *CompuServe v. Patterson*.<sup>14</sup> Other examples are the alarming decisions of *Inset v. Instruction*<sup>15</sup> and *Maritz v. Cybergold*<sup>16</sup> where the courts strayed from the *CompuServe* due process analysis. Potentially, the *Inset* and *Maritz* decisions could affect the development of the Internet.

This comment discusses the limits of personal jurisdiction arising from cyberspace contacts by concentrating on four areas. First, this comment establishes the framework of traditional personal jurisdiction. Second, this comment examines how the courts are integrating cyberspace contacts with the personal jurisdiction framework. Third, this comment analyzes a standard to provide the constitutional limits of cyberspace contacts integrated with personal jurisdiction, and applies that standard to current case law. Fourth, this comment considers the potential effects of decisions made by the judicial system involving cyberspace contacts and proposes a standard by applying the personal jurisdiction framework to cyberspace contacts.

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limitations. Or stated less abstractly, the inquiry is: which court may assert personal jurisdiction over a non-resident defendant?" *Id.*

12. Zembeck, *supra* note 11, at 380, concludes that the traditional framework of personal jurisdiction and due process limitations can effectively apply to the cyberspace regime. Furthermore, "[a]s courts and lawyers further understand cyberspace communication, a coherent body of jurisdictional jurisprudence will rapidly develop. Until that time, existing paradigms ensure fundamental fairness in the networked communication medium of cyberspace." *Id.* at 380-81.

13. See Kier, *supra* note 10, at 1094 (discussing societal effects on how due process is defined).

14. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (reversing the U.S. District Court's decision holding that Patterson's minimum contacts with the state of Ohio satisfies due process).

15. *Inset Systems, Inc., v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (holding that a Web site that advertises purposefully avails the defendant to the forum state and satisfies minimum contacts).

16. *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (holding that personal jurisdiction is proper when the minimum contacts are limited to a Web site that advertises a service that is not yet available and creates a mailing list for the future service).

## II. BACKGROUND

### A. THE FRAMEWORK OF PERSONAL JURISDICTION

In order to apply personal jurisdiction to cyberspace contacts, it is necessary to establish the traditional framework of personal jurisdiction. A court's exercise of personal jurisdiction over a nonresident may either be general<sup>17</sup> or specific,<sup>18</sup> however, the limits of due process are more likely reached by specific jurisdiction.<sup>19</sup>

Specific jurisdiction for an out-of-state defendant is satisfied by a two pronged test.<sup>20</sup> First, the defendant must be susceptible to the forum state's long-arm statute.<sup>21</sup> The primary purpose of the long-arm statute is to reach out-of-state and bring a nonresident defendant into the state to defend a lawsuit.<sup>22</sup> Second, when the long-arm statute is

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17. JOSEPH W. GLANNON, *CIVIL PROCEDURE EXAMPLES AND EXPLANATION* 5 (2d ed. 1992). General jurisdiction is jurisdiction that arises when the defendant has substantial in-state contacts. *Id.* The substantial contacts will allow a defendant to be sued for any claim, even claims that are unrelated to the substantial activities of the defendant in the forum. *Id.* Furthermore, general jurisdiction is found when the defendant's activities are so "substantial and continuous" within the forum, that the defendant would expect subjection to any suit and not be at any inconvenience to defend the suit within the forum. *Id.* at 7. See Zembek, *supra* note 11, at 349 (discussing that all Internet related actions would meet due process limitations if the defendant's activities fell under general jurisdiction requirements of substantial presence within the forum).

18. GLANNON, *supra* note 17, at 5. Specific jurisdiction is jurisdiction that arises out of a single act by the defendant, and is jurisdiction that extends to the limits of minimum contacts. *Id.* See *infra* notes 26-36 and accompanying text discussing the requirements for minimum contacts test.

19. *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1115 (6th Cir. 1994) (discussing that personal jurisdiction can be either general or specific, depending upon the type of contacts the defendant has made with the forum state).

20. *Reynolds*, 23 F.3d at 1115. "A court, therefore, must satisfy a two-pronged test: the defendant must be amenable to suit under the forum state's long-arm statute and the due process requirements of the Constitution must be met." *Id.*

21. *Id.*

22. GLANNON, *supra* note 17, at 26. In addition to the limitations of due process, the long-arm statute gives authority to state courts to exercise jurisdiction over an out-of-state defendant based primarily upon the defendant's contact with the forum state. *Id.* at 24. The model for the state long-arm statute is based from the Enumerated Act. *Id.* at 25. The Enumerated Act has served as a long-arm statute model for the majority of the states, and defines personal jurisdiction based upon conduct. *Id.* The Enumerated Act states:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's

(1) transacting any business in this state;

(2) contracting to supply services or thing in this state;

(3) causing tortious injury by an act or omission in this state;

(4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; [or]

(5) having an interest in, using, or possessing real property in this state; or

successful, the due process requirements under the Constitution<sup>23</sup> must be satisfied.<sup>24</sup>

Due process requires the defendant to have minimum contacts with the forum state.<sup>25</sup> The minimum contacts test requires three elements for finding personal jurisdiction.<sup>26</sup> First, the defendant must have purposefully availed himself to the forum state.<sup>27</sup> Specifically, purposeful availment is found when the defendant's action is purposefully directed towards the forum state and shows a substantial connection with the

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(6) contracting to insure any person, property, or risk located within this state at the time of contracting.

UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03, 13 U.L.A. 355 (WEST 1986).

Although the primary purpose of the long-arm statute is to reach out-of-state and bring a nonresident defendant into the state to defend a lawsuit, it is necessary to be careful not to assume that every assertion of long-arm jurisdiction meets the constitutional requirements of due process. GLANNON, *supra* note 17, at 25-26. Furthermore, "[a]ll long-arm statutes that base personal jurisdiction on specific minimum contacts require that the claim sued upon arise out of the contact itself." *Id.* at 26.

23. U.S. CONST. amend. XIV. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." *Id.*

24. *Reynolds*, 23 F.3d at 1115.

25. See *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (establishing the standard for minimum contacts to meet the requirement of personal jurisdiction for due process). *International Shoe*, a shoe corporation with its business principally in Missouri, had one of their agents working in Washington State. *Id.* at 312-13. The case arises from the State of Washington denying *International Shoe's* agent recovery of contributions under the Unemployment Compensation Act. *Id.* *International Shoe's* agent, during the years from 1937 to 1940, employed thirteen salesmen who each lived in Washington, whose business activities were confined within the state. *Id.* at 313. *International Shoe* sued the State of Washington, and Washington State claimed the suit infringed upon the due process clause of the Fourteenth Amendment. *Id.* at 312. The Supreme Court affirmed the lower court's judgment in favor of *International Shoe* by examining what constitutes substantial activities to establish minimum contacts when the defendant is not present within the state. *Id.* at 316. The Supreme Court held that *International Shoe's* agent had substantial activities within the State of Washington which satisfied minimum contacts and due process. *Id.* at 321.

26. *Reynolds*, 23 F.3d at 1116. The courts have established a three-part test for minimum contacts to determine whether specific jurisdiction may be exercised:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities [in the forum state]. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

*Id.*

27. *Id.* "Jurisdiction is proper under the purposeful availment requirement where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state." *Id.*

forum state.<sup>28</sup>

Second, the claim must arise from the defendant's activities with the forum state.<sup>29</sup> If the defendant's contacts with the forum state are not related to the controversy, then the minimum contacts analysis fails, and the plaintiff's action cannot stand.<sup>30</sup>

Third, the court's exercise of jurisdiction over an out-of-state defendant must be reasonable.<sup>31</sup> The factors for determining reasonableness are as follows: the burden that is placed on the defendant;<sup>32</sup> the forum state's interest in the outcome;<sup>33</sup> the interests of the plaintiff in obtaining relief;<sup>34</sup> the most efficient resolution due to the interstate judicial system's interest;<sup>35</sup> and, the furthering of any social policies that are shared among the states.<sup>36</sup>

When all three factors of the minimum contacts analysis are satisfied, then due process is also satisfied.<sup>37</sup> A court then may exercise per-

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28. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). The court reasoned that when the purposeful availment requirement is satisfied, the defendant is protected from being brought into court "as a result of random, fortuitous, or attenuated contacts." *Id.* When there is a substantial connection with the forum state, or when the defendant deliberately is involved with significant activities, or has created continuing obligations with residents of the forum state, then there has been purposeful availment with the forum, such that the defendant "should reasonably anticipate being haled into court there." *Id.* at 475-76. However, the court will not find substantial activities for purposeful availment if the activity is unilateral. *Id.* at 474. Furthermore, because of the substantial changes in technology and commercial life, through the substantial use of mailings and wire communications across state lines, the presence of the defendant's activities within the forum state is not necessary for purposeful availment. *Id.* at 476.

29. *Reynolds*, 23 F.3d at 1116. "The cause of action must arise from the defendant's activities" towards the forum state. *Id.*

30. *Id.*

31. *Id.* "The acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable." *Id.* Thus, a court's exercise of personal jurisdiction over a defendant must comport with "traditional notions of fair play and substantial justice." *Reynolds*, 23 F.3d at 1117. See also *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). Furthermore, due process has been relaxed due to the change in commercial transactions and technology, which has caused an increase in the "nationalization of commerce" through the increase of interstate business. *Id.* The modern change in commercial transactions has made it far less burdensome for a nonresident to be sued across state lines. *Id.* See *CompuServe*, 89 F.3d at 1268 (discussing that when the first two elements of a prima facie case of minimum contacts are satisfied, purposeful availment and activities of the defendant arising from the claim, then there is an inference that the third factor of reasonableness is satisfied).

32. *Reynolds*, 23 F.3d at 1117.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Reynolds*, 23 F.3d at 1117.

37. See *supra* note 26 and accompanying text for the minimum contacts requirements.



sonal jurisdiction over an out-of-state defendant.<sup>38</sup>

## B. CYBERSPACE

The inherent nature of cyberspace has challenged the traditional application of minimum contacts for personal jurisdiction. The inherent feature of cyberspace is its world-wide nature.<sup>39</sup> For example, when an Internet user posts information on his Web site, that information becomes an Internet publication that is available world-wide almost instantaneously.<sup>40</sup> Furthermore, the nature of cyberspace allows Internet users to access a Web site<sup>41</sup> without any awareness of the jurisdiction in which the Web site resides.<sup>42</sup> Moreover, the Internet allows users to jump from jurisdiction to jurisdiction on an international level within seconds.<sup>43</sup> Because there are no physical boundaries on the Internet, and because of the Internet's world-wide nature, those posting information on the Internet are not posting information to be read by others in a specific jurisdiction. Thus, the very nature of cyberspace challenges traditional applications of personal jurisdiction when applied to cyberspace's global exposure.

Notwithstanding the difficulty of interpreting traditional applications of personal jurisdiction over the Internet, the legal rights of Internet users must be protected to the extent the U.S. Constitution will allow. According to recent cases that involve personal jurisdiction on the Internet, intellectual property owners have been affected by the constitutional limitations of courts exercising personal jurisdiction. Thus, even though personal jurisdiction is a challenge in cyberspace, the Internet is not above the law.<sup>44</sup>

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38. *World-Wide Volkswagen*, 444 U.S. at 291. A state court may only exercise personal jurisdiction over a nonresident defendant when minimum contacts exist between the defendant and the forum state. *Id.* Furthermore, minimum contacts will protect the defendant from litigating in a distant and inconvenient forum. *Id.* at 292.

39. Carl Oppedahl, *Remedies in Domain Name Lawsuits: How is a Domain Name Like a Cow?*, 15 J. MARSHALL J. COMPUTER & INFO. L. 437, 438 (1997). "The Web allows anyone to be an instant publisher, and the publication is not only instant but world wide." *Id.*

40. *Id.* at 39.

41. See *Intermatic, Inc., v. Toeppen*, 947 F. Supp. 1227, 1231 (N.D. Ill. 1996). A Web site or Web page is basically a "computer data file" operating from a Web server. *Id.* A Web site may contain "any message, name, word, sound or picture, or combination of such elements," or even several pages of information. *Id.*

42. Zembeck, *supra* note 11, at 356.

43. *Shea v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1995) (explaining how a user can select highlighted text within a Web site called a "link" which allows the user to automatically traverse between different Web sites regardless of their jurisdiction). *Intermatic*, 947 F. Supp. at 1232. A "hyperlink" is a designated space on any given site that by clicking on the space, the "hyperlink" will automatically link to another site on the Internet. *Id.*

44. Zembeck, *supra* note 11, at 347 (discussing the boundaries of cyberspace).

Although "prima facie evidence"<sup>45</sup> may exist that an Internet user's rights have been violated, courts must first have personal jurisdiction to bring the violator to court.<sup>46</sup> To rule on personal jurisdiction issues that involve the Internet, courts must have a sound understanding of the relationship between Internet users,<sup>47</sup> service providers,<sup>48</sup> and content providers<sup>49</sup> regarding the Internet. The challenges of finding personal jurisdiction on the Internet will unfold once an understanding is gained of how the Internet operates and effective comparisons of existing law are made with cyberspace.<sup>50</sup> One theory in the law that is similar to posting information on the Internet is the theory of placing a product into the "stream of commerce."

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45. BLACK'S LAW DICTIONARY 1190 (6th ed. 1990). "Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient." *Id.*

46. Raysman & Brown, *supra* note 1, at 3. To enter judgment against the parties, a court must have personal jurisdiction over the parties, subject matter jurisdiction over the claims, and proper venue. *Id.*

47. Karen S. Frank, *Potential Liability On The Internet*, 437 PLI/PAT 417, 422 (Mar. 1996). Internet users are individuals either loading onto or accessing information from the Internet. *Id.*

48. *Id.* Service providers are companies that allow Internet users or subscribers access to the Internet. *Id.* MOORE, *supra* note 4, at 35. Service providers include CompuServe, Prodigy, and American Online and generally provide most of the service that is available on-line. *Id.* Service providers are easily accessible, providing one has access to a computer with a modem. *Id.* Service providers allow the Internet user access to download texts and software by e-mail, shopping access, and informational news. *Id.*

49. Frank, *supra* note 47, at 422. Information is loaded onto the Internet by Content Providers. *Id.* One form of content providers are Web page providers. *Id.* A Web page or a Web site contains files for Internet users to access and download. *Id.* An Internet user may access or link to various Web sites by clicking on highlighted text within a Web site. *Id.* at 422-23. The series of linked web sites is the World Wide Web which is a part of the Internet. Frank, *supra*, at 424. Other types of content providers are Digital Libraries/Information Sources and bulletin board operators. *Id.* at 423. The Digital Libraries may be files from universities and are available on the Internet. *Id.* A bulletin board Service uploads information in a manner for their subscribers to easily access. *Id.* at 423.

50. Zembek, *supra* note 11, at 357. Most people, lawyer and layman alike, still think of cyberspace as a place, rather than a form of communication. *Id.* Failure to recognize the nature of the Internet, along with a lack of understanding regarding the basic reasoning behind jurisdictional due process limits, have caused the courts to displace these issues within existing jurisprudence. *Id.* It is necessary in future jurisdictional disputes for the courts to achieve predictable results. *Id.* This requires that courts recognize the cyberspace reality as a form of communication. See Hernandez & May, *supra* note 4, at 5 (discussing the logic of fully understanding the issue of personal jurisdiction on the Internet once the mechanics of the Internet are understood).

C. THE "STREAM OF COMMERCE" ACCORDING TO *ASAHI V. SUPERIOR COURT OF CALIFORNIA*

Traditionally, the "stream of commerce"<sup>51</sup> has dealt with product liability lawsuits where manufacturers and distributors send products across state and international lines.<sup>52</sup> Intellectual property on the Internet is similar to a product being distributed into the stream of commerce, except intellectual property being posted on the Internet is instantaneously available on a world-wide basis.<sup>53</sup> The Supreme Court's latest decision dealing with the stream of commerce is *Asahi v. Superior Court of California*.<sup>54</sup>

In *Asahi*, a Japanese manufacturer sold its product to a distributor.<sup>55</sup> The distributor then sold that product world-wide,<sup>56</sup> which the court termed as placing a "product into the stream of commerce."<sup>57</sup> A product liability suit arose out of California<sup>58</sup> and the U.S. Supreme Court held that the California court's exercise of personal jurisdiction violated the Due Process Clause.<sup>59</sup> Moreover, Justice O'Connor and Justice Brennan delivered differing plurality opinions on the issue of what constitutes purposeful availment when dealing with the stream of

51. BLACK'S LAW DICTIONARY 1421 (6th ed. 1990). "Term used to describe goods which remain in interstate commerce though held with in a state for a short period of time. If such goods remain in the stream of commerce, they are not subject to local taxation." *Id.* Furthermore, stream of commerce activity that occurs locally is considered part of the interstate movement. *Id.*

52. For examples and a discussion of product liability lawsuits dealing with the stream of commerce, see *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp.*, 444 U.S. 286; *Quesenberry infra* note 170, at 191; Martin F. Noonan, *Civil Procedure—Personal Jurisdiction: Evolution Current Interpretation of the Stream of Commerce Test in the Third Circuit*, 40 VILL. L. REV. 779 (1995).

53. See Bruce T. Atkins, *Trading Secrets in the Information Age: Can Trade Secret Law Survive the Internet?*, 96 U. ILL. L. REV. 1151 (1996) (discussing how the very presence of information on the Internet has access to millions of Internet users the instant the information is published); *Oppedahl, supra* note 39, at 438 (discussing the instantaneous nature of the Internet).

54. *Asahi*, 480 U.S. 102 (1987).

55. *Id.* *Asahi* is the manufacturer of tire tube valve assemblies who then sells the assemblies to several tire distributors. *Id.*

56. *Id.*

57. *Id.* at 112. See *supra* notes 51 and 63 and accompanying text discussing the placement of a product into the stream of commerce.

58. *Asahi*, 480 U.S. at 102-03. The California Supreme Court held that *Asahi's* intentional act of placing the product into the stream of commerce by delivering them to the distributor, coupled with an awareness that some of its products would reach California, was sufficient grounds for California's State Court to exercise jurisdiction under the Due Process Clause. *Id.*

59. *Id.* at 116 (holding that California's exercise of personal jurisdiction over *Asahi* exceeds the limits of due process).

commerce.<sup>60</sup>

Justice O'Connor's opinion adopted a narrow interpretation of the stream of commerce.<sup>61</sup> O'Connor's opinion found that placing a "product into the stream of commerce, without more,"<sup>62</sup> did not meet the purposeful availment requirement for minimum contacts.<sup>63</sup> O'Connor explained that the awareness of a defendant that its product has entered a forum state by the stream of commerce does not equate to an act purposefully availing oneself to a forum state.<sup>64</sup> O'Connor further explained that additional conduct is conduct that "may indicate an intent or purpose to serve the market in the forum state."<sup>65</sup> Thus, under O'Connor's opinion, beyond placing a product into the stream of commerce, additional action by the defendant towards the forum state is required to satisfy minimum contacts.<sup>66</sup>

Justice Brennan's opinion of the stream of commerce maintains a broader interpretation than that of Justice O'Connor.<sup>67</sup> Brennan's opinion began by rejecting the additional contact requirement of O'Connor, reasoning that "the stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale."<sup>68</sup> Brennan states that as long as a defendant is "aware that the final product is being marketed in the forum State" through the stream of commerce, the defendant cannot be surprised to defend a suit within the forum.<sup>69</sup> Thus, under Brennan's

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60. *Asahi*, 480 U.S. at 108-13 (discussing Justice O'Connor's opinion of the stream of commerce, joined by Chief Justice Rehnquist and Justices Powell and Scalia); *Id.* at 116-21 (discussing Justice Brennan's opinion of the stream of commerce, joined by Justices White, Marshall, and Stevens).

61. See Quesenberry, *infra* note 170, at 201-02 (discussing O'Connor's opinion of the stream of commerce).

62. *Asahi*, 480 U.S. at 112. See *supra* note 51 and *infra* note 63 and accompanying text for further information on placing a product into the stream of commerce.

63. *Asahi*, 480 U.S. at 112. "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* Furthermore, the awareness of the defendant that "the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* See Earl M. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 DUKE L.J. 669, 683 (Sept. 1987) (analyzing the *Asahi* decision and purposeful availment with knowledge of a product's ultimate destination as its placed into the stream of commerce).

64. *Asahi*, 480 U.S. at 112.

65. *Id.*

66. *Id.* See *infra* notes 161-163 and accompanying text discussing the additional action required in *Asahi's* "stream of commerce" analysis.

67. See Quesenberry, *infra* note 170, at 202-03 (discussing Brennan's opinion of the stream of commerce).

68. *Asahi*, 480 U.S. at 116-17.

69. *Id.* at 117.

opinion, awareness of one's product in the stream of commerce entering a forum state satisfies the minimum contacts requirement.

#### D. INTEGRATING CYBERSPACE WITH PERSONAL JURISDICTION

Recently, the appellate court in *CompuServe v. Paterson*<sup>70</sup> applied Justice O'Connor's opinion in *Asahi* to Internet contacts creating a framework for integrating cyberspace with personal jurisdiction.<sup>71</sup> Other cases are applying the framework found in *CompuServe*, where the defendant is either involved in clear commercial activity on the Internet or the defendant's Internet activity is characterized as passive. A discussion of *CompuServe* and other cases that apply the *CompuServe* framework follow.

1. *Commercial Activity on the Internet*
  - a. *CompuServe v. Patterson*

Recently, the appellate court reversed the district court's holding in *CompuServe v. Patterson*.<sup>72</sup> The district court held that Patterson's Internet contacts were too tenuous to establish personal jurisdiction.<sup>73</sup> In reversing the district court's decision, the appellate court found that Patterson had established minimum contacts with the forum state which satisfied personal jurisdiction by applying O'Connor's opinion in *Asahi*.<sup>74</sup> The appellate court's holding in the *CompuServe* reversal establishes the factors necessary to satisfy minimum contacts that are limited to the Internet.<sup>75</sup> Thus, *CompuServe's* reversal addresses a framework for integrating cyberspace contacts with personal jurisdiction.

CompuServe is a computer information service provider for the Internet, based in Columbus, Ohio, and the second largest provider of its

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70. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (reversing the U.S. District Court's decision holding that Patterson's minimum contacts with the state of Ohio satisfies due process).

71. *Id.* at 1262. This case presents a novel question of first impression of whether contacts that are "almost entirely electronic in nature, are sufficient, under the Due Process Clause," to support personal jurisdiction. *Id.*

72. *CompuServe*, 89 F.3d at 1257. U.S. Appellate Court, Sixth Circuit, Judge Bailey Brown reversed and remanded the District Court's decision on July 22, 1996, holding that Patterson's minimum contacts with the state of Ohio satisfies due process. *Id.*

73. *CompuServe v. Patterson*, No. C2-94-91, 1994 U.S. Dist. LEXIS 20352, at \*1 (S.D. Ohio Aug. 11, 1994), *rev'd*, 89 F.3d 1257 (July 22, 1996) (holding that Patterson's minimum contacts were too tenuous to establish personal jurisdiction).

74. *CompuServe*, 89 F.3d at 1257.

75. *See id.* at 1263-69 (discussing the minimum contacts in *CompuServe*). Based upon the unique nature of this case, the court also explained that it did not hold that: "Patterson would be subject to suit in any state where his software was purchased or used;" and that CompuServe could not "sue any regular subscriber to its service for nonpayment in Ohio." *Id.* at 1268.

kind.<sup>76</sup> Patterson is a subscriber to CompuServe's services and is based out of Houston, Texas.<sup>77</sup> Patterson entered into a "shareware"<sup>78</sup> contract with CompuServe where Patterson provided software to CompuServe to sell over the Internet.<sup>79</sup> In addition to Patterson's software, CompuServe began to sell its own software with a name similar to Patterson's software.<sup>80</sup> Patterson notified CompuServe electronically, claiming that CompuServe violated Patterson's trademark with similarly named software.<sup>81</sup> Although CompuServe changed the name of its software, Patterson continued to complain.<sup>82</sup>

When Patterson demanded \$100,000 for trademark infringement, CompuServe filed a declaratory judgment action in Ohio's federal

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76. *Id.* at 1260.

77. *Id.*

78. LANCE ROSE, *THE INTERNET UNLEASHED: COPYRIGHT ON THE NETWORKS* 1082 (1994). Express licenses are found on computer networks in connection with software. *Id.* Shareware is one popular marketing method that utilizes the rapid, wide distribution abilities of the networks. *Id.* The shareware license, an important part of the shareware package, grants two different kinds of free licenses to the general public: a trial use license and an electronic distribution license. *Id.*

The trial use license allows users who download the shareware package to use the software on a test basis during a specified time frame. *Id.* If the user wishes to continue using the software after the trial period, he is then expected to pay a registration fee. ROSE, *supra*, at 1082.

The electronic distribution license basically allows unrestricted distribution of the shareware package over the networks. *Id.* However, no fee may be charged for distributing the package. *Id.* Although such free licenses are generally granted to the public, shareware copyright owners frequently require contact from certain distributors for permission to distribute the software. *Id.*

79. *CompuServe*, 89 F.3d at 1260. Patterson became a shareware provider, entering into a "Shareware Registration Agreement" ("SRA") with CompuServe. *Id.* The SRA allows subscribers to CompuServe access to the software that Patterson creates and sends to CompuServe. *Id.* The SRA incorporates two other agreements, the CompuServe Service Agreement and the Rules of Operation, which expressly provide the agreements are entered into in Ohio, and to "be governed by and construed in accordance with" Ohio law. *Id.* Patterson's SRA was transmitted electronically from his computer in Texas, where Patterson manifested his assent to the agreement, then transmitted to CompuServe's system in Ohio. *Id.* at 1260-61. From 1991-94, CompuServe electronically received 32 master software files from Patterson, where the files were stored in CompuServe's system and displayed for CompuServe's subscribers. *CompuServe*, 89 F.3d at 1261. The subscribers have opportunity to download the software from CompuServe, which CompuServe takes a 15% fee and the balance is given to Patterson. *Id.* at 1260-61.

80. *Id.* at 1261. Patterson's software was designed to help Internet subscribers navigate around the Internet, where Patterson's software is named WinNAV, Windows Navigator, and Flashpoint Windows Navigator. *Id.* In December 1993, after Patterson learned of CompuServe marketing similar software, named CompuServe Navigator, Patterson notified CompuServe that it was violating Patterson's common law trademarks that he owned. *Id.*

81. *CompuServe*, 89 F.3d at 1261.

82. *Id.*

court.<sup>83</sup> Patterson responded with a 12(b)(2) motion, claiming lack of personal jurisdiction,<sup>84</sup> which the district court granted.<sup>85</sup> However, the appellate court reversed<sup>86</sup> after applying the minimum contacts analysis and determining that personal jurisdiction<sup>87</sup> over Patterson was consistent with due process.<sup>88</sup>

First, the court considered whether Patterson purposefully availed himself of the privilege of doing business in Ohio.<sup>89</sup> The court ruled that Patterson satisfied this requirement by: (1) being party to a shareware contract which was governed by Ohio law,<sup>90</sup> and (2) exchanging multiple Internet communications with CompuServe's service in Ohio.<sup>91</sup>

Second, the court considered whether CompuServe's claim arose from Patterson's activities with the forum state.<sup>92</sup> Though Patterson could have marketed his software by other means, the court found that because Patterson had limited his software marketing solely through CompuServe's service in Ohio, this established activities arising from the cause of action within the forum state.<sup>93</sup> Furthermore, the court found that Patterson's electronic communication sent to CompuServe in Ohio, in which Patterson accused CompuServe of trademark infringement, also satisfied the requirement that CompuServe's claim arose out of the

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83. *Id.* CompuServe is asking for a declaration that it had not infringed Patterson's trademarks and not "guilty of unfair or deceptive trade practices." *Id.* Based upon Patterson's trademark allegations, CompuServe claims a threat of \$10.8 million of software sales revenue. *Id.*

84. *CompuServe*, 89 F.3d at 1260.

85. *Id.*

86. *Id.* at 1269.

87. *Id.* at 1263.

88. *Id.* See *supra* note 23 (quoting the Due Process Clause as contained in the U.S. Constitution).

89. *CompuServe*, 89 F.3d at 1263.

90. See *supra* notes 78-79 and accompanying text discussing information on shareware agreements and Patterson's shareware involvement.

91. *CompuServe*, 89 F.3d at 1264. In *CompuServe*, the court found purposeful availment primarily because of the shareware contract Patterson entered with CompuServe. *Id.* The contract stated that it was to be "governed by and construed in light of Ohio law," in agreement for CompuServe to post Patterson's software on the Internet. *Id.* at 66. Purposeful availment was found because: (1) Patterson electronically transmitted his software on several occasions from Texas to CompuServe's system in Ohio; (2) Patterson purposefully advertised his software through CompuServe's system in Ohio; and (3) Patterson sold as a third party provider to Internet users who downloaded Patterson's software from the CompuServe system in Ohio. *Id.* at 1264. Scott Petty, *Which Court Has Jurisdiction Over Cyberspace?*, INTELL. PROP. TODAY, Nov. 1996, at 13 (analyzing the factors that purposefully availed Patterson of the privilege of doing business in Ohio).

92. *CompuServe*, 89 F.3d at 1267.

93. *Id.* The result of marketing exclusively in Ohio will arguably limit the claims to arise out of Ohio. *Id.*

forum state.<sup>94</sup>

Finally, the court considered whether the facts satisfied the reasonableness test.<sup>95</sup> The court found that even though it may have burdened Patterson to defend a suit in Ohio, the suit was reasonable for the following reasons: (1) CompuServe's interest was \$10 million in potential damages;<sup>96</sup> (2) the decision would have a substantial impact on other contracts for providers like Patterson;<sup>97</sup> and (3) Patterson's knowledge that he benefited from the shareware contract and that it connected him to Ohio law.<sup>98</sup>

*b. Zippo Manufacturing v. Zippo Dot Com*

*Zippo*<sup>99</sup> is a recent case with minimum contacts similar to *CompuServe*.<sup>100</sup> In *Zippo*, the plaintiff is a Pennsylvania corporation named Zippo Manufacturing ("Manufacturing") and is known for manufacturing the "Zippo" tobacco lighter.<sup>101</sup> The defendant, Zippo Dot Com ("Dot Com"), is a California corporation that operates a Web site along with a news service.<sup>102</sup> Dot Com's use of the word Zippo in its Web site,<sup>103</sup> news service heading,<sup>104</sup> and domain name<sup>105</sup> that is advertised to Pennsylvania residents is the basis for which Manufacturing has

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94. *Id.* CompuServe's claim arose because Patterson sought an injunction from CompuServe's software sales from their system in Ohio. *Id.* See *supra* note 80 and accompanying text discussing the trademark conflict between CompuServe and Patterson.

95. *CompuServe*, 89 F.3d at 1267-68.

96. *Id.* at 1268.

97. *Id.*

98. *Id.* See *supra* note 79 and accompanying text discussing Patterson's shareware contract.

99. *Zippo Manufacturing Comp. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

100. *Id.* at 1125. "This is a 'doing business over the Internet' case in the line of *CompuServe . . .*" *Id.*

101. *Id.* at 1121.

102. *Id.*

103. *Zippo*, 952 F. Supp. at 1121. "Dot Com's Web site contains information about the company, advertisements and an application for its Internet news service." *Id.*

104. *Id.* There are three levels offered in the news service that are "public/free, Original, and Super." *Id.* To subscribe to the "Original" or "Super" news server the Internet user does the following:

. . . fills out an on-line application that asks for a variety of information including the person's name and address. Payment is made by credit card over the Internet or the telephone. The application is then processed and the subscriber is assigned a password which permits the subscriber to view and the subscriber then receives a password which permits the Internet user to download/or download Internet newsgroup messages that are stored on the Defendant's [Zippo Dot Com] server in California.

*Id.*

105. *Zippo*, 952 F. Supp. at 1121. Dot Com has received the exclusive right to use the domain names "zippo.com, zippo.net, and zipponews.com" on the Internet. *Id.*



brought suit against Dot Com for trademark infringement and dilution.<sup>106</sup> Dot Com moved for a 12(b)(2) motion for lack of personal jurisdiction.<sup>107</sup>

The court recognized that Dot Com's minimum contacts were "almost exclusively over the Internet."<sup>108</sup> Dot Com's Internet contacts with Pennsylvania consisted of Dot Com posting its Internet news service on its Web site and then contracting with Pennsylvania Internet users who were interested in receiving the news service.<sup>109</sup> Further, to make available the news service for those Pennsylvania Internet users who contracted with Dot Com, Dot Com has "entered into agreements" with seven Pennsylvania Internet access providers.<sup>110</sup>

Although Dot Com's contacts with Pennsylvania residents were through its Web site, the court still found personal jurisdiction by determining Dot Com's minimum contacts.<sup>111</sup> First, similar to the reasoning in *CompuServe*, the court in *Zippo* found that Dot Com purposefully availed itself of the laws of Pennsylvania.<sup>112</sup> The court reasoned that the contractual agreements with Pennsylvania residents and Internet access providers put Dot Com on notice, making a conscious choice to conduct business with the residents of Pennsylvania, and thus purposefully availing itself of the state's laws.<sup>113</sup>

Second, the court considered whether Manufacturing's claim arises out of Dot Com's activities within Pennsylvania.<sup>114</sup> The court found that because Manufacturing is a Pennsylvania corporation, the trademark infringement would substantially occur in Pennsylvania when Dot Com's

106. *Id.* (claiming that the name "Zippo" found in the domain names, locations on the Web site, and in the newsgroup heading was the basis for trademark infringement).

107. *Id.* at 1120.

108. *Id.* at 1121.

109. *Zippo*, 952 F. Supp. at 1126.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* Pennsylvania residents' applications were processed repeatedly and passwords were assigned by Dot Com. *Zippo*, 952 F. Supp. at 1126. Dot Com was aware that electronic communications would be sent into Pennsylvania as a direct result of Internet contracts. *Id.* "The transmission of these files was entirely within its control. Dot Com cannot maintain that these contracts are 'fortuitous' or 'coincidental' . . . . When a defendant makes a conscious choice to conduct business with the residents of a forum state, 'it has clear notice that it is subject to suit there.'" *Id.* (citing *World Wide Volkswagen*, 444 U.S. at 297). Dot Com chose to sell its services to residents in Pennsylvania. *Id.* There was no obligation to sell those services. *Id.* If the risk of personal jurisdiction in a forum is deemed too great, then a corporation may cut its connections to that forum. *Zippo*, 952 F. Supp. at 1126-27. The choice not to sell services to residents of Pennsylvania should have been made if Dot Com did not want to be subject to the jurisdiction of Pennsylvania. *Id.*

114. *Id.* at 1127.

messages were viewed by the state's residents.<sup>115</sup> Thus, the court concluded that Manufacturing's claim arose from Dot Com's messages being transmitted over the Internet in Pennsylvania.<sup>116</sup>

Finally, the court considered the question of the reasonableness of finding personal jurisdiction.<sup>117</sup> The court's considerations were Pennsylvania's interests in adjudicating trademark infringement disputes of corporations within the jurisdiction.<sup>118</sup> Further, Dot Com "consciously chose to conduct business in Pennsylvania, pursuing profits from the actions that are now in question."<sup>119</sup> For these reasons, the court found that finding personal jurisdiction was reasonable.

## 2. *Passive Activity on the Internet*

### a. *Bensusan v. King*<sup>120</sup>

Bensusan, a New York corporation, owns the federal registered trademark known as THE BLUE NOTE, which is the name of Bensusan's jazz club in New York City.<sup>121</sup> King, a resident of Missouri, owns a small jazz club named "The Blue Note" in Columbia, Missouri.<sup>122</sup> King posted a Web site on the Internet to promote business by displaying his jazz club event dates and information to order tickets by phone.<sup>123</sup>

King created a link with Bensusan's Web site, providing information about Bensusan's jazz club.<sup>124</sup> Furthermore, the link provided direct access with Bensusan's jazz club Web site.<sup>125</sup> Since Bensusan holds a trademark over THE BLUE NOTE mark,<sup>126</sup> Bensusan filed a lawsuit

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115. *Id.* "[A] cause of action for trademark infringement occurs where the passing off occurs." *Id.* (citing Tefal, S.A. v. Products Int'l Co., 529 F.2d 495, 496 n.1 (3d Cir. 1976)).

116. *Zippo*, 952 F. Supp. at 1127.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 299 (S.D.N.Y. filed Sept. 9, 1996) (holding that personal jurisdiction over King, a nonresident of New York, would violate the due process clause where King's only contact with New York was a Web site on the Internet).

121. *Id.* at 297.

122. *Id.*

123. *Id.* at 297-98.

124. *Id.* King's Web site included a disclaimer stating: "The Blue Note's Cyberspot should not be confused with one of the world's finest jazz clubs the Blue Note, located in the heart of New York's Greenwich Village. If you should find yourself in the big apple give them a visit." *Bensusan*, 937 F. Supp. at 297-98. Along with the disclaimer was a hyperlink, which directly accessed Bensusan's Web site. *Id.* at 298. When Bensusan objected to King's Web site, King dropped the hyperlink and the statement "If you should find yourself in the big apple give them a visit" from his Web site. *Id.*

125. *Id.* at 298.

126. *Id.* at 297.

against King in the New York District Court for trademark violation.<sup>127</sup>

The *Bensusan* court found that Bensusan could not sue King in a New York court.<sup>128</sup> The court reasoned that King did not have sufficient contacts with New York to allow the exercise of personal jurisdiction over King.<sup>129</sup> The court analyzed whether minimum contacts that are limited to a Web site on the Internet are sufficient to allow a state to exercise personal jurisdiction over a defendant.<sup>130</sup>

The court found that maintaining a Web site on the Internet did not purposefully avail King to the laws of New York.<sup>131</sup> Rather, the court found that maintaining a Web site was like placing a product in the stream of commerce, which may be felt nationwide or even worldwide.<sup>132</sup> Furthermore, the court noted that merely placing a product into the stream of commerce is not enough for a court to find purposeful availment.<sup>133</sup> Thus, the court in *Bensusan* held that additional conduct towards the forum state is necessary to exercise personal jurisdiction when Internet contacts are involved.<sup>134</sup>

b. *Hearst v. Goldberger*

*Hearst v. Goldberger*<sup>135</sup> is a recent case similar to the *Bensusan* decision.<sup>136</sup> Hearst is a corporation in New York and the owner and publisher of *Esquire Magazine*,<sup>137</sup> owning the ESQUIRE trademark.<sup>138</sup> Goldberger is an attorney in New Jersey who had the idea of creating a

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127. *Bensusan*, 937 F. Supp. at 298.

128. *Id.* at 300-01. Even if New York's long-arm statute allowed jurisdiction for the courts, personal jurisdiction over King would violate the due process as applied by the minimum contacts analysis. *Id.* at 300.

129. *Id.* at 301.

130. *Id.* at 297.

131. *Bensusan*, 937 F. Supp. at 301.

132. *Id.* "King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide but, without more, it is not an act purposefully directed toward the forum state." *Id.*

133. *Id.*

134. *See Bensusan*, 937 F. Supp. at 301 (following O'Connor's opinion in *Asahi* for additional contact with the forum state and then distinguishing *Bensusan's* facts from *CompuServe's* facts, where additional activity was established in *CompuServe*).

135. *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

136. *See Bensusan*, 937 F. Supp. at 300 (discussing the nature of a Web site being similar to "placing a product into the stream of commerce").

137. *Hearst*, 1997 WL 97097, at \*3 (stating that *Esquire Magazine* has been published since 1933).

138. *Id.* (stating that Hearst is owner of the registered trademarks ESQUIRE and ESQ., and owner the registered domain names *viaesquire.com*, *esquiremag.com*, and *esquireb2b.com*).

Web site that provided attorneys "legal support services" by computer.<sup>139</sup> Goldberger decided to name his service "ESQ.WIRE1" and registered the domain name *esqwire.com*.<sup>140</sup> After the Web site was accessible and was advertising Goldberger's future service,<sup>141</sup> Hearst filed a complaint against Goldberger in a New York District Court,<sup>142</sup> and subsequently Goldberger moved to dismiss the complaint for lack of personal jurisdiction and failure to state a claim.<sup>143</sup>

The court found that Goldberger's contacts with New York were limited to Goldberger's Web site.<sup>144</sup> The *Hearst* court followed the *Bensusan* decision, stating that "Goldberger has 'simply created a Web site and permitted anyone who could find it to access it,'" finding that "a [W]eb site, without more," is not sufficient contacts to provide personal jurisdiction.<sup>145</sup> Further, the court addressed various e-mail messages sent to and from New York in conjunction to the Web site, but discounts the e-mail messages for two reasons.<sup>146</sup> First, the e-mail messages occurred subsequent to Hearst bringing this suit.<sup>147</sup> And second, the court considered the e-mail messages analogous to telephone or letter communications, finding that communications of this type "are not sufficient to establish personal jurisdiction under . . . the due process clause."<sup>148</sup> Thus, the *Hearst* court held that personal jurisdiction in New York was not proper, finding that upholding personal jurisdiction over Goldberger "would, in effect, create national (or even worldwide) jurisdiction."<sup>149</sup>

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139. *Id.* "In 1992, Goldberger came up with the idea to create an electronic law office infrastructure network that would provide individual attorneys, via computer, with legal support services equivalent to those available to lawyers practicing in large law firms." *Id.*

140. *Id.* at \*4. Goldberger registered for the Internet domain name *esqwire.com* in Sept. 1995 and later published a world-wide Web site in June 1996. *Hearst*, 1997 WL 97097, at \*4.

141. *Id.* Goldberger's web site includes a brief description of Goldberger's future services, a summary of Hearst's present lawsuit activities against Goldberger, and computer links to court filings and other related documents. *Id.* Goldberger's future services are described at his Web site as follows:

ESQ.wirek will provide virtual law firm support services, legal information services and products to enable attorneys to practice law anywhere on the planet, with the simple click of a mouse. We are looking for attorneys in every jurisdiction in the world to become a part of this revolutionary virtual legal community. For more information, please e-mail [esqwire@esqwire.com](mailto:esqwire@esqwire.com).

*Id.*

142. *Id.* at \*5.

143. *Hearst*, 1997 WL 97097, at \*5.

144. *Id.* at \*8.

145. *Id.* at \*16.

146. *Id.* at \*12.

147. *Id.* (stating that contacts are only relevant prior to litigation).

148. *Hearst*, 1997 WL 97097, at \*13.

149. *Id.* at \*20. The *Hearst* court stated in its conclusion that it saw some truth with the *Maritz* court's statement of: "while modern technology has made nationwide commercial

In summary, these cases establish a framework for integrating cyberspace contacts with personal jurisdiction by applying the "additional activity" standard set forth in Justice O'Connor's opinion in *Asahi*. Most importantly, the *CompuServe* reversal sets precedent by requiring "additional activity" for cyberspace contacts to establish personal jurisdiction.

### III. ANALYSIS

The remainder of this comment analyzes and argues for the more restrictive standard of "additional activity," as given by O'Connor in *Asahi* in conjunction with recent Internet case law. Furthermore, this comment will consider the problems of holding for personal jurisdiction when minimum contacts are limited to the Internet, and the possible effects on the Internet's future.

#### A. ADDITIONAL ACTIVITY AS A STANDARD FOR PERSONAL JURISDICTION IN CYBERSPACE

The Internet cases discussed above demonstrate what type of Internet activity will make a defendant susceptible to another forum's jurisdiction. The *CompuServe* court followed Justice O'Connor's opinion in *Asahi*<sup>150</sup> to develop its minimum contacts analysis.<sup>151</sup> In *Asahi*, O'Connor's opinion of requiring additional activity is a perfect analogy for the type of contacts involved with personal jurisdiction in cyberspace.

##### 1. Analogizing the Stream of Commerce

In *Asahi*, O'Connor's opinion of what will satisfy personal jurisdiction in the stream of commerce is an analogous standard for Internet

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transactions simpler and more feasible, . . . it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts." *Id.* at \*20 (citing *Maritz*, 947 F. Supp. at 1334). However, the *Hearst* court felt somewhat differently by stating:

[T]hat to allow personal jurisdiction based on an Internet web site 'would be tantamount to a declaration that this Court, and every other court throughout the world, may assert [personal] jurisdiction over all information providers on the global World Wide Web. Such a holding would have a devastating impact on those who use this global service.

*Id.* at \*20 (citing *Playboy Enter., Inc. v. Chuckleberry Publ'g., Inc.*, 939 F. Supp. 1032, 1039-40 (S.D.N.Y. 1996)).

150. *Asahi*, 480 U.S. at 102.

151. *CompuServe*, 89 F.3d at 1265 (comparing the stream of commerce theory in *Asahi*). "Admittedly, merely entering into a contract with CompuServe would not, without more, establish that Patterson had minimum contacts with Ohio. By the same token, Patterson's injection of his software product into the stream of commerce, without more, would be at best a dubious ground for jurisdiction." *Id.* However, because Patterson both placed his product into the stream of commerce and entered into a contract with CompuServe, the *CompuServe* court held there were ample contacts to exercise personal jurisdiction. *Id.*

personal jurisdiction.<sup>152</sup> For example, like the Japanese manufacturer in *Asahi* selling its product to a distributor,<sup>153</sup> an Internet user may post intellectual property (Internet user's product) on its Web site through an Internet service provider.<sup>154</sup> Furthermore, like the distributor in *Asahi* placing the "product into the stream of commerce,"<sup>155</sup> a service provider makes available the Internet user's Web site world-wide and essentially places the Web site into the "stream of commerce."<sup>156</sup>

Now, consider the difference between a product liability stream of commerce found in *Asahi* and the Internet's stream of commerce. The Internet's stream of commerce is much more ubiquitous and instantaneous than the product liability type stream of commerce.<sup>157</sup> If O'Connor's opinion expressed the necessity of having additional contacts for the product liability's stream of commerce,<sup>158</sup> then additional contacts for the Internet's stream of commerce is essential.<sup>159</sup>

As defined by Justice O'Connor's opinion in *Asahi*, contacts that involve the "stream of commerce"<sup>160</sup> require additional action by the defendant towards the forum state.<sup>161</sup> In *CompuServe*, Patterson's software was placed on the Internet through CompuServe's service or "placed into the stream of commerce."<sup>162</sup> Thus, Patterson's shareware

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152. See, e.g., Gupta, *infra* note 166, at 533 (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 steam of commerce).

153. *Asahi*, 480 U.S. at 112.

154. See *supra* notes 47-49 and accompanying text describing the functions of Internet Providers and Web site postings.

155. *Asahi*, 480 U.S. at 112.

156. See *Intermatic*, 947 F. Supp. at 1239 (discussing the "in commerce" requirement of the Federal Trademark Dilution Act of 1995). "Because Internet communications transmit instantaneously on a worldwide basis there is little question that the 'in commerce' requirement would be met in a typical Internet message." *Id.* The court found that the "use of the Internet is sufficient to meet the 'in commerce' requirement of the [Lanham] Act." *Id.* at 38. See *Bensusan*, 937 F. Supp. at 300 (comparing the placement of a Web site on the Internet to a product being placed into the stream of commerce). See, e.g., *supra* note 151, comparing Patterson's product placed on the Internet with placing a "product into the stream of commerce."

157. See Robert A. Bourque & Kerry L. Konrad, *The Tangled Web: First Wave of Internet Cases Provides More Questions than Answers*, 8 No. 11 J. PROPRIETARY RTS. 2, at \*2 (1996) (discussing the question of being subject to personal jurisdiction on the Internet due to the nature of the Web's implications of instant global publication).

158. See *Asahi*, 480 U.S. at 112.

159. See, e.g., *CompuServe*, 89 F.3d 1257; *Zippo*, 952 F. Supp. 1119; *Bensusan*, 937 F. Supp. 295; *Hearst*, 1997 WL 97097 (explaining that the additional activity standard is necessary for Internet contacts).

160. *Asahi*, 480 U.S. at 112.

161. *Id.* See, e.g., *CompuServe*, 89 F.3d at 1265 (explaining that "without more" beyond placing a product into the stream of commerce, the defendant's act is not purposefully directed to the forum).

162. *Id.* at 1265.

contract with CompuServe was the additional action required to meet the purposeful availment requirement for minimum contacts.<sup>163</sup> Moreover, O'Connor's opinion of the "stream of commerce" makes for a well suited analogy when minimum contacts involve the Internet.<sup>164</sup>

The *CompuServe* reversal lays the precedent for Internet stream of commerce cases by following O'Connor's opinion of requiring "additional activity."<sup>165</sup> However, "additional activity" raises two central questions. First, why is additional activity required, and second, what will constitute additional activity?

## 2. Why "additional activity?"

Additional activity beyond a product entering a forum through the stream of commerce is an important requirement for the minimum contacts analysis because of the very nature of the Internet.<sup>166</sup> By nature, once information is posted on the Internet, that information is instantly in the stream of commerce on a world-wide basis.<sup>167</sup>

Traditionally, the stream of commerce is used for product liability claims where a manufacturer's product is distributed across state and international boundaries.<sup>168</sup> In *Asahi*, Justice Brennan's opinion required a defendant to be aware of a product entering a forum through the stream of commerce to establish minimum contacts with that forum.<sup>169</sup> Many commentators have regarded Brennan's opinion, as opposed to O'Connor's opinion, to be best suited to a stream of commerce analysis dealing with product liability claims.<sup>170</sup>

163. *Id.* at 1264-65. See *supra* notes 79 and 91 and accompanying text discussing Patterson's involvement with the shareware contract and why Patterson satisfied the purposeful availment requirement.

164. See, e.g., *CompuServe*, 89 F.3d at 1266 (stating that "Patterson's injection of his software product into the stream of commerce, without more, would be at best a dubious ground for jurisdiction"); *Bensusan*, 937 F. Supp. at 300 (stating that "[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").

165. *CompuServe*, 89 F.3d at 1266 (citing O'Connor's plurality opinion, *Asahi*, 480 U.S. at 112).

166. Sonia K. Gupta, *Bulletin Board Systems and Personal Jurisdiction: What Comports with Fair Play and Substantial Justice?*, 1996 U. CHI. LEGAL F. 519, 533-34 (1996) (discussing why Justice O'Connor's opinion of the stream of commerce provides a better minimum contacts analysis for Internet related activity).

167. *Supra* note 156; Atkin, *supra* note 53, at 1151 (discussing how the very presence of information on the Internet instantly has access to millions of Internet users).

168. *Supra* note 52.

169. See *Asahi*, 480 U.S. at 116-21.

170. For instances where commentators follow Brennan's opinion see, e.g., Timothy C. Lynch, *Roman Candles and Bottle Rockets: The Eighth Circuit Blows Up the "Stream of Commerce Plus" Analysis in Barone v. Rich Bros. Interstate Display Fireworks, Inc.*, 29

However, the stream of commerce dealing with the Internet is different, because the product or intellectual property posted on the Internet is directly and instantaneously dispersed literally everywhere in the world.<sup>171</sup> Although the Internet user may be aware his product is being dispersed world-wide, the awareness is general because of the world-wide nature of the Internet.<sup>172</sup> Further, because of the Internet's world-wide nature without physical boundaries, the Internet user has no notice of which jurisdiction his product may enter.<sup>173</sup> Without notice given to an Internet user, many Internet personal jurisdiction cases are following the O'Connor requirement of having additional activity within a forum beyond the Internet's stream of commerce contact.<sup>174</sup> Thus, because of the Internet's world-wide nature without physical boundaries, O'Connor's opinion that requires the defendant to have additional activity provides the Internet user with adequate notice of infringement within a forum.

### 3. What is "additional activity?"

In *Asahi*, Justice O'Connor indicates what type of activity can be considered additional activity when a product is placed in the stream of commerce to satisfy purposeful availment.<sup>175</sup> O'Connor's opinion states:

Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State,

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CREIGHTON L. REV. 1371 (1996); Elizabeth Jones, *Lesnick v. Hollingsworth & Vose Co.—The Pure Stream of Commerce no Longer Flows Through the Fourth Circuit*, 29 U. RICH. L. REV. 421, (1995); Gary A. Magnarini, *Jurisdiction over Foreign-Nation Manufacturers Tracking the Resurgent "Stream of Commerce" Theory*, 68 FLA. BJ. 38 (1994); Stephen E. Quesenberry, *Civil Procedure—Muddying the Stream of Commerce Theory—Ashai Metal Industry Co. v. Superior Court*, 36 U. KAN. L. REV. 191 (1987); R. Lawrence Dessem, *Personal Jurisdiction After Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41 (1987); Erik T. Moe, *Asahi Metal Industry Co. v. Superior Court: The Stream of Commerce Doctrine, Barely Alive but Still Kicking*, 76 GEO. L. J. 203 (1987).

171. Atkins, *supra* note 53, at 1151 (discussing how the very presence of information on the Internet has access to millions of Internet users the instant the information is published).

172. Atkins, *supra* note 53, at 1151.

173. See David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370-76 (1996). "The rise of the global computer network is destroying the link between geographical location and . . . the ability of physical location to give notice of which sets of rules apply." *Id.* at 1370. See Brill, *supra* note 8, at 10.

174. See generally *CompuServe*, 89 F.3d 1257; *Zippo*, 952 F. Supp. 1119; *Bensusan*, 937 F. Supp. 295; *Hearst*, 1997 WL 97097 (explaining that the additional activity standard is necessary for Internet contacts). But see *infra* notes 194-277 and accompanying text for a discussion on Inset Systems, Inc. v. Instruction Set, Inc. and Maritz, Inc. v. Cybergold, Inc., two cases subject to dispute in this article.

175. *Asahi*, 480 U.S. at 112.



establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.<sup>176</sup>

Again, *Asahi* is in the context of product liability stream of commerce, where today's technological world is faced with the question of what "additional activity" constitutes for Internet stream of commerce.<sup>177</sup> To illustrate the confusion that may arise in the minds of many unacquainted with the Internet, consider O'Connor's example of advertising as additional activity.<sup>178</sup>

In a products liability stream of commerce, a defendant who advertises in a particular forum is given notice that the defendant is susceptible to the laws of that forum when the defendant has consciously sought to advertise there.<sup>179</sup> In the case of Internet stream of commerce, the defendant does not have notice of which forum it has advertised due to the Internet's instantaneous world-wide nature without physical boundaries.<sup>180</sup> Thus, in instances of advertising, additional activity in product liability stream of commerce cases have shown to provide a different result than in the Internet's stream of commerce cases.<sup>181</sup>

Currently, personal jurisdiction disputes with minimum contacts limited to a Web site on the Internet have made distinctions as to what type of additional activity will avail a defendant of a forum's laws.<sup>182</sup> For example, in *Zippo*, the court distinguished Web sites as being either interactive or passive.<sup>183</sup> An interactive Web site will usually provide

176. *Id.*

177. See generally *CompuServe*, 89 F.3d 1257 (finding that a shareware contract over the Internet was additional activity, and thus met the minimum contacts analysis); *Zippo*, 952 F. Supp. 1119 (finding that contracts made over the Internet between Internet users and Zippo Dot Com to use Zippo's Web site news service was additional activity, and thus met the minimum contacts analysis); *Bensusan*, 937 F. Supp. 295 (finding that simply maintaining a Web site on the Internet, though it may have infringing material, is not enough to satisfy minimum contacts); *Hearst*, 1997 WL 97097 (finding that a Web site that has information for a future Web site service and that invites Internet users to e-mail Web site owner for more information is not enough additional activity to establish minimum contacts).

178. *Asahi*, 480 U.S. at 112 and the above quote in the text from Justice O'Connor's opinion.

179. *Id.*

180. See *Johnson & Post*, *supra* note 173, at 1370-76.

181. *E.g.*, *Hearst*, 1997 WL 97097, at \*10-12 (finding that "a Web site is most analogous to an advertisement in a national magazine" and thus, does not satisfy minimum contacts because it may be viewed in all states and is not targeted solely to the residents of a particular state).

182. See, *e.g.*, *Zippo*, 952 F. Supp. 1119; *Hearst*, 1997 WL 97097, at \*9-20.

183. *Zippo*, 952 F. Supp. at 1124. "[O]ur review of the available [Internet] 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." *Id.*

some type of service that involves "repeated transmission of computer files over the Internet," and may require an Internet user to enter into a contract.<sup>184</sup> A passive Web site will merely advertise or display information which can be accessed by Internet users in foreign jurisdictions.<sup>185</sup> The interactive Web site that is found to infringe on another will usually satisfy the minimum contacts analysis, where the passive Web site will not meet the minimum contacts requirement.<sup>186</sup> Essentially, an interactive Web site is one that provides additional activity while a passive Web site does not show additional activity, and thus does not meet the minimum contacts requirement.

In the Internet cases of *CompuServe* and *Zippo*, the court found additional activity by finding that the defendants had entered into contracts over the Internet.<sup>187</sup> In addition, in *Bensusan* and *Hearst*, the court found no Internet contracts and found no additional activity beyond posting material on a Web site.<sup>188</sup> Although the posted Web site material may have infringed on the rights of others, the posting was passive without additional activity, and thus there was no notice to the defendant due to the Internet's world-wide nature of no physical boundaries.<sup>189</sup>

The more ambiguous concern is the "middle ground" type of activity between a passive Web site and an interactive Web site.<sup>190</sup> In *Zippo*, the court states: "The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer."<sup>191</sup> In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.<sup>192</sup> Various courts and commentators have drawn the line differently for this "middle ground," as to what additional activity will be necessary to provide a court with personal jurisdiction.<sup>193</sup> Below, consider the analysis of Internet cases that held for personal jurisdiction where the additional activity sits in the middle ground, and how the cases contradict other court's conclusions.

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184. *Id.*

185. *Id.* "A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction." *Id.*

186. *Zippo*, 952 F. Supp. at 1124.

187. *Supra* note 177.

188. *Supra* note 177.

189. *See Johnson & Post, supra* note 173, at 1370-76.

190. *Zippo*, 952 F. Supp. at 1124.

191. *Id.*

192. *Id.*

193. *Id.*

## B. THE LIMITS OF ADDITIONAL ACTIVITY: A CASE ANALYSIS

## 1. Inset Systems v. Instruction Set

Another case dealing with minimum contacts on the Internet is *Inset Systems v. Instruction Set*.<sup>194</sup> Inset Systems ("Inset") is based in Connecticut and develops and markets its own software product.<sup>195</sup> Instruction Set ("Instruction") is based in Massachusetts and is a provider of computer technology.<sup>196</sup> Both corporations provide their services throughout the world,<sup>197</sup> however, Instruction does not conduct business or have any employees in Connecticut.<sup>198</sup> The only contact Instruction has with Connecticut is through its Web site on the Internet.<sup>199</sup>

This suit ensued after Inset attempted to register its federal trademark INSET as a domain name, and learned that Instruction had already obtained *inset.com* as a domain name.<sup>200</sup> Inset brought an action against Instruction in Connecticut for trademark infringement due to Instruction's advertising in Connecticut over the Internet using the domain name *inset.com*.<sup>201</sup> Instruction filed a motion for lack of personal jurisdiction, and the court held for personal jurisdiction by analyzing the state's long-arm statute and the minimum contacts requirement.<sup>202</sup>

The court reasoned that both the state's long-arm statute and minimum contacts were satisfied because of Instruction's Web site that was available in Connecticut.<sup>203</sup> Instruction's Web site advertised its business and included the telephone number 1-800-US-INSET to solicit customers, which was located by using the *inset.com* domain name.<sup>204</sup> The court found that because Instruction "purposefully directed its advertising activities toward the state," Instruction purposefully availed itself of the forum's laws.<sup>205</sup> Further, the court found that finding personal jurisdiction was reasonable in this case because of the short traveling distance between Connecticut and Massachusetts.<sup>206</sup>

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

195. *Id.* at 162.

196. *Id.*

197. *Id.*

198. *Id.*

199. *See Inset*, 937 F. Supp. at 163.

200. *Id.*

201. *Id.*

202. *Id.*

203. *See id.* at 164-65.

204. *See Inset*, 937 F. Supp. at 163, 165.

205. *Id.* at 165.

206. *Id.*

a. *Problems with the Inset Decision*

The problem with the *Inset* decision is that Instruction's Web site is passive just as the Web sites in question in *Bensusan* and *Hearst*, which held personal jurisdiction was not proper.<sup>207</sup> A passive Web site is one that merely advertises or displays information which can be accessed by Internet users in foreign jurisdictions.<sup>208</sup> Conversely, an interactive Web site is one that will usually provide some type of service that involves "repeated transmission of computer files over the Internet," and may require an Internet user to enter into a contract.<sup>209</sup> In *Inset*, Instruction's Web site does not promote additional activity such as entering a contract over the Internet, nor does the Web site transmit computer files or provide a service over the Internet.<sup>210</sup> The Web site merely advertises information to promote sales for Instruction, and is thus passive.<sup>211</sup> Thus, the court should not have held for personal jurisdiction over Instruction because the Web site is passive and the only contact with Connecticut's forum.

The court's reasoning that personal jurisdiction was reasonable because of the short distance between Massachusetts and Connecticut is misplaced.<sup>212</sup> The court's reasoning is misplaced because the court conferred personal jurisdiction due to Instruction's passive Web site.<sup>213</sup> Again, a passive Web site merely displays information for Internet users to view.<sup>214</sup> Furthermore, the Web site is available to every Internet user in the world. Thus, because a passive Web site is not considered additional activity within a forum, the court's reasoning is misplaced for finding personal jurisdiction reasonable.

b. *Additional Activity found in the Inset decision*

Instruction's additional activity is limited to Instruction advertising

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207. *Bensusan*, 937 F. Supp. at 300; *Hearst*, 1997 WL 97097, at \*20 (finding that the Web sites in question were passive, and that to hold for personal jurisdiction there needs to be additional activity or an interactive Web site).

208. *Zippo*, 952 F. Supp. at 1124.

209. *Id.*

210. *See Inset*, 937 F. Supp. at 165 (finding that a Web site that advertises displaying a toll free telephone number on a Web site, and that is available on the Internet, not only to Connecticut residents but to all states, will satisfy the purposeful availment requirement).

211. *Id.*

212. *Id.*

213. *Id.* "[F]air play and substantial justice may defeat the reasonableness of jurisdiction even if the defendant has the requisite minimum contacts with the forum. However, where minimum contacts have been established the defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.*

214. *Zippo*, 952 F. Supp. at 1124.

and soliciting business on its Web site.<sup>215</sup> Instruction advertises over the Internet by posting information about Instruction's business that includes a toll-free telephone number with the claimed infringing name INSET in the number.<sup>216</sup> Similarly, in *Hearst*, the defendant used its Web site for advertising and included in the Web site an e-mail address for those interested in the defendant's future services, where the e-mail address included the claimed infringing name.<sup>217</sup> The court in *Hearst* would not allow personal jurisdiction over the defendant, holding that this "would, in effect, create national (or even worldwide) jurisdiction, so that every plaintiff could sue in plaintiff's home court every out-of-state defendant who established an Internet [W]eb site."<sup>218</sup> Although the defendant in *Hearst* was advertising on the Internet, the court in *Hearst* did not see the type of advertising on the Internet as the type to purposefully avail a defendant to a forum's laws.<sup>219</sup> Rather, the *Hearst* court stated that advertising on the Internet "may be viewed by people in all fifty states (and all over the world too for that matter), but it [the advertising] is not targeted toward the residents of New York or any other particular state."<sup>220</sup>

In *Inset*, Instruction is comparable to the defendant in *Hearst*, where Instruction's Web site advertisement did not avail Instruction to the particular forum of Connecticut because of the Internet's world-wide nature. Under O'Connor's opinion in *Asahi*, the additional activity required is activity that puts the defendant on notice that the defendant is susceptible to a particular forum's laws.<sup>221</sup> If the *Inset* court had followed O'Connor's opinion in *Asahi*, the court likely would have held differently by finding that Instruction's advertising through its Web site is not targeted particularly to the residents of Connecticut. Thus, by following the O'Connor opinion, advertising on a Web site does not meet the requisite additional activity for minimum contacts because of the world-wide nature of the Internet.

## 2. *Maritz v. Cybergold*

Comparable to the court in *Inset*, the court in *Maritz v. Cybergold*<sup>222</sup> did not follow either *CompuServe* or O'Connor's opinion in *Asahi*. Rather, the *Maritz* court followed the *Inset* decision to strengthen its

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

216. *Id.* at 163.

217. *Hearst*, 1997 WL 97097, at \*4.

218. *Id.* at \*20.

219. *Id.* at \*10.

220. *Id.*

221. *Asahi*, 480 U.S. at 112.

222. *Maritz*, 947 F. Supp. 1328 (holding that personal jurisdiction is proper when the minimum contacts are limited to a Web site).

case for minimum contacts that are limited to a Web site.<sup>223</sup> If the *Maritz* court had considered posting information on the Internet as similar to placing a product in the stream of commerce under *CompuServe*,<sup>224</sup> the *Maritz* decision would likely have reached a different result.

In *Maritz*, the defendant Cybergold, a corporation located in Berkeley, California, was offering a future e-mail service on its Web site, maintained through a server located in California.<sup>225</sup> The Web site advertised Cybergold's future e-mail service and invited visitors of the Web site to sign up on a mailing list for its future service. The plaintiff Maritz is a corporation located in Missouri that provides an e-mail service under its trademark name GOLDMAIL.<sup>226</sup> When Maritz sued Cybergold in Missouri with the claim of trademark infringement, Cybergold moved for a 12(b)(2) motion for lack of personal jurisdiction.<sup>227</sup> The court in *Maritz* ruled for personal jurisdiction by applying the minimum contacts test.<sup>228</sup>

a. *Problems with the Maritz Decision*

i. *"Quality and nature" and "quantity" of the contacts*

First, the court considered the "quality and nature" and "quantity" of Cybergold's contacts.<sup>229</sup> The court found that Cybergold's contacts were solely through the maintenance of Cybergold's Web site.<sup>230</sup> By accessing Cybergold's Web site, the Internet user could choose to receive Cybergold's future e-mail service by signing themselves to a mailing list.<sup>231</sup> Further, the court reasoned that because Cybergold knew that its Web site could reach Internet users in Missouri as well as globally, Cybergold's contacts met the "quality and nature" and "quantity" of the contacts to satisfy personal jurisdiction.<sup>232</sup>

A problem with the *Maritz* ruling is that the court followed the *Inset* court's reasoning for finding minimum contacts.<sup>233</sup> Accordingly, the

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223. *Id.* at 1334.

224. *See, e.g., supra* note 132 comparing the placement of a Web site on the Internet to a product being placed into the stream of commerce.

225. *Maritz*, 947 F. Supp. at 1330.

226. *Id.* at 1336.

227. *Id.* at 1329.

228. *Id.* at 1334. *See supra* note 26 and accompanying text for minimum contacts analysis.

229. *Maritz*, 947 F. Supp. at 1333. *See Hanson v. Denckla* 357 U.S. 235, 253 (1958) (discussing the direct relationship between the purposeful availment requirement with the "quality and nature" of the minimum contacts).

230. *Id.*

231. *Id.* at 1333-34.

232. *Id.* at 1334.

233. *Maritz*, 947 F. Supp. at 1334.

*Maritz* court compared its facts to *Inset*<sup>234</sup> and used similar reasoning that, because Cybergold knew its Web site would advertise to Internet users in Missouri and on a global level, Cybergold's contacts purposefully avail Cybergold to Missouri's laws.<sup>235</sup> Rather, if the *Maritz* court had followed O'Connor's opinion in *Asahi*,<sup>236</sup> the *Maritz* court would have focused on the additional activity of Cybergold that was particular to Missouri residents.<sup>237</sup> Although the court did recognize that Cybergold's Web site was not completely passive, i.e., the mailing list,<sup>238</sup> the court focused on the Web site's ability to advertise and continuously reach Internet users globally.<sup>239</sup> Because of the world-wide nature of the Internet, the additional activity is the key element to analyze minimum contacts.<sup>240</sup> Thus, by following the additional activity analysis for Internet cases, as instituted by Justice O'Connor in *Asahi*, courts will focus on the key elements of whether a defendant purposefully avails himself to a particular forum.

ii. *Cause of action arising from "activities" within the forum*

The court considered whether the cause of action arose from Cybergold's Web site activities in Missouri.<sup>241</sup> The court reasoned that the promotional efforts of Cybergold's future e-mail service through Cybergold's Web site was part of the claimed infringement of Cybergold's trademark.<sup>242</sup> Further, the court reasoned that, although the service was not yet operational, Cybergold's development of a mailing list was also part of the claimed infringement in Missouri.<sup>243</sup> Thus, the court ruled that Cybergold's Web site activities with Missouri resulted in *Maritz's* cause of action.<sup>244</sup>

Again, the court's decision that *Maritz's* claim arose from Cybergold's action within Missouri is misplaced because the *Maritz* court misplaces the nature of a Web site being felt world-wide.<sup>245</sup> For example, the *Maritz* court has failed to distinguish that the Internet activities must be directed solely to Missouri instead of generally by Cybergold's

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234. *Id.*

235. *Maritz*, 947 F. Supp. at 1333.

236. *Asahi*, 480 U.S. at 112.

237. *Maritz*, F. Supp. at 1330. "Plaintiff asserts that the website 'invites Missourians to put their names on Cybergold's mailing list and get up-to-date information about the company and its forthcoming Internet service.'" *Id.*

238. *Id.* at 1333.

239. *Id.*

240. *Supra* note 177.

241. *Maritz*, 947 F. Supp. at 1333.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 1333-34.

Web site because of the world-wide nature of a Web site. If the *Martiz* court had followed O'Connor's opinion in *Asahi* that requires additional activity,<sup>246</sup> then the *Maritz* court would have focused on Cybergold's additional activities directed specifically to Missouri that caused the alleged claim. Thus, because of the world-wide nature of the Internet, O'Connor's opinion in *Asahi* that requires an analysis of additional contacts is best suited when determining minimum contacts on the Internet.

iii. *"Traditional Notions of Fair Play and Substantial Justice"*

Finally, the court concluded that "traditional notions of fair play and substantial justice" was not violated by exercising personal jurisdiction over Cybergold.<sup>247</sup> The court found that Maritz's trademark interest was substantial and that Cybergold's actions of purposeful availment to the Missouri forum did not violate due process.<sup>248</sup> Thus, the court found that personal jurisdiction was proper.<sup>249</sup>

In *Maritz*, the court found that the "traditional notions of fair play and substantial justice" standard was satisfied partly because it found that Cybergold's Web site constituted purposeful availment.<sup>250</sup> However, the purposeful availment requirement was found by the *Maritz* court without following O'Connor's opinion in *Asahi* that requires additional activity directed to the forum state. Rather, the *Maritz* court followed the *Inset* court's decision.<sup>251</sup> By separating the additional activity toward the forum state from the Internet's stream of commerce contact that is felt world-wide, a better analysis can be made of whether a defendant has purposefully availed itself to a forum's laws.<sup>252</sup> Thus, when a better analysis is made for purposeful availment with Internet contacts, then the standard of "traditional notions of fair play and substantial justice" is better applied when determining minimum contacts that are limited to a Web site.

b. *Additional Activity found in the Maritz decision*

The difference between an interactive Web site and a passive Web site is essentially what this comment has termed "additional activity," where the defendant takes action that is specifically directed to a forum while on the Internet. The degree of action over the Internet that makes a defendant susceptible to a forums laws depends on the "nature and

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246. *Asahi*, 480 U.S. at 112.

247. *Maritz*, 947 F. Supp. at 1334.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Supra* note 177.



quality of commercial activity that an entity conducts over the Internet."<sup>253</sup> In *Maritz*, Cybergold's additional activity is limited to Cybergold advertising and soliciting its future e-mail service on its Web site, where the Web site invites visitors to sign up on an e-mail mailing list to receive updates on the progress of the future e-mail service.<sup>254</sup> Thus, the additional activity at issue is a Web site that advertises and solicits an e-mail mailing list, where Cybergold is sending updates of his future service to those on the mailing list.

Similarly, in *Hearst*, the defendant used its Web site for advertising the defendant's future service, where the defendant received and sent e-mail messages with the forum state.<sup>255</sup> In *Hearst*, the court addressed whether the Web site activity of advertising, e-mail messages, and soliciting were sufficient to satisfy minimum contacts.<sup>256</sup>

First, the court considered a Web site "analogous to an advertisement in a national magazine," stating that a Web site is viewed by people world-wide, but is not targeted to a particular state.<sup>257</sup> Because the Web site is not targeted to a particular state, a Web site, like a national magazine, is not sufficient to provide personal jurisdiction.<sup>258</sup>

Second, the court in *Hearst* discussed the applicability of e-mail messages as satisfying minimum contacts.<sup>259</sup> In *Hearst*, the defendant's e-mail messages were sent subsequent to the plaintiff filing the complaint, however, the court still addressed whether the e-mail messages were adequate to satisfy minimum contacts.<sup>260</sup> The court considered the e-mail messages analogous to telephone or letter communications, finding that communications of this type "are not sufficient to establish personal jurisdiction under . . . the due process clause."<sup>261</sup> The court stated neither the defendant's Web site, "which is the equivalent of an advertisement in a national publication, nor his e-mails, which are equivalent to letters or telephone calls, are sufficient to provide this Court with personal jurisdiction over [the defendant]."<sup>262</sup>

Moreover, the court in *Hearst* considered whether the type of soliciting on a Web site where no product or service is sold would confer personal jurisdiction, where the commercial transaction type of soliciting is completely different. Because the court in *Hearst* did not yet have a

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253. *Zippo*, 952 F. Supp. at 1124.

254. *Maritz*, 947 F. Supp. at 1330.

255. *Hearst*, 1997 WL 97097, at \*4-5.

256. *Id.* at \*10-15.

257. *Id.* at \*10.

258. *Id.*

259. *Id.* at \*12-13.

260. *Hearst*, 1997 WL 97097, at \*12.

261. *Id.* at \*12.

262. *Id.* at \*13.

product or service to sell,<sup>263</sup> the court stated that conferring personal jurisdiction for soliciting of this type on a Web site would "offend traditional notions of fair play, because it would lead to nationwide jurisdiction over the Internet."<sup>264</sup> Web sites by their nature are inherently by and large advertisements and a type of solicitation. Thus, if a court holds that advertising or the non-commercial type of soliciting on a Web site will satisfy minimum contacts, then the Web site's nature of being an advertisement or a non-commercial solicitation will lead to nationwide jurisdiction.

In *Maritz*, Cybergold is comparable to the defendant's Web site in *Hearst*. Cybergold's Web site advertises and is set up to receive an e-mail mailing list for its future service,<sup>265</sup> where the defendant in *Hearst* is also set up to receive e-mail from those interested in the future service.<sup>266</sup> Further, Cybergold's non-commercial soliciting is similar to the defendant in *Hearst* because Cybergold's service is not yet operational and has not yet sold a product or service.<sup>267</sup> Thus, the facts in *Maritz* and *Hearst* are similar.

Although the facts in *Maritz* and *Hearst* are similar, the courts came to different conclusions: where the *Maritz* court held for personal jurisdiction,<sup>268</sup> the *Hearst* court did not.<sup>269</sup> The reason for this fundamental difference is the courts' reasoning. The *Maritz* court held for personal jurisdiction by applying the traditional minimum contacts standard without considering the implications of its holding that "would, in effect, create national (or even worldwide) jurisdiction."<sup>270</sup> In contrast, the *Hearst* court recognized the world-wide nature of the Internet by following the O'Connor standard in *Asahi* that requires additional activity for stream of commerce contacts.<sup>271</sup> Thus, although the facts in *Maritz* and *Hearst* are similar, the different standard used in *Maritz* as opposed to *Hearst* for minimum contacts explains the different rulings.

By following O'Connor's opinion in *Asahi*, the focus to determine if the defendant has purposefully availed himself to a forum is based on the additional activity toward that forum,<sup>272</sup> rather than accepting the Internet's stream of commerce contact that is world-wide as adequate. Ac-

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263. *Id.* at \*15.

264. *Id.*

265. *Maritz*, 947 F. Supp. at 1330.

266. *Hearst*, 1997 WL 97097, at \*4.

267. *Maritz*, 947 F. Supp. at 1330; *Hearst*, 1997 WL 97097, at \*4.

268. *Maritz*, 947 F. Supp. at 1337.

269. *Hearst*, 1997 WL 97097, at \*21.

270. *Id.* at \*20.

271. *See id.* at \*15-16 (following *Bensusan's* reasoning of requiring additional conduct under O'Connor's opinion in *Asahi*).

272. *Asahi*, 480 U.S. at 112.

cordingly, the *Maritz* court would likely have considered Cybergold's Web site that was set up to receive an e-mail mailing list for its future service as insufficient to establish minimum contacts. The e-mail mailing list did not form an Internet contract<sup>273</sup> nor was any service or product sold because the service was not yet available.<sup>274</sup> Further, e-mail's have been analogized as mere phone and letter communications which is not enough to confer jurisdiction.<sup>275</sup> Essentially, Cybergold's contact with Missouri residents is limited to the Web site's e-mail mailing list for its future service.<sup>276</sup> An e-mail mailing list to receive updates for a service that is not yet operational does not show the type of commercial activity that will confer personal jurisdiction because there was not yet a commercial transaction. Because the *Martiz* court did not follow O'Connor's opinion in *Asahi*, the court was not able to focus properly on the proper Internet contacts that were directed toward the forum state, and then determine the level of commercial activity of those contacts. Thus, by applying O'Connor's opinion in *Asahi*, focus can be made upon the type of additional activity that is directed to a forum state beyond the stream of commerce contact.<sup>277</sup>

### C. POTENTIAL EFFECTS ON THE INTERNET'S FUTURE

Decisions like *Inset* and *Maritz* could have negative implications on the Internet's technological progress.<sup>278</sup> Courts that hold that Web site advertising and soliciting satisfy minimum contacts, "in effect, create national (or even world-wide) jurisdiction"<sup>279</sup> because of the world-wide nature of the Internet. Because of this result, the liability of Internet users would hinder Internet development.<sup>280</sup> Furthermore, due process<sup>281</sup>

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273. *Supra* note 177.

274. See *Maritz*, 947 F. Supp. at 1330 (discussing Cybergold's service that is not yet operational).

275. *Hearst*, 1997 WL 97097, at \*12.

276. See *Maritz*, 947 F. Supp. at 1333 (describing Cybergold's Web site as one that "seeks to develop a mailing list of Internet users").

277. See *Asahi*, 480 U.S. at 112 (discussing how the additional conduct is the inquiry for a stream of commerce minimum contacts analysis).

278. See generally MOORE, *supra* note 4, at 51 (discussing the purpose of the National Information Infrastructure ("NII") and the projected future of the Internet). The NII's purpose is to make the Internet available to everyone. *Id.* Furthermore, the Internet has become the testing ground for new ideas and new technologies. *Id.* Although the Internet is not part of the NII, the future of the Internet is predicted to be "supported by the giant telecommunications' firms of the United States." *Id.* However, the low cost of the Internet, that is making the Internet so readily available to everyone, is predicted to increase in cost as the unstable commercial world becomes a large part of the Internet. *Id.*

279. *Hearst*, 1997 WL 97097, at \*20.

280. See generally MOORE, *supra* note 4, at 50 (discussing the low cost of the Internet as a means for the Internet being widely available to everyone). Although Internet user costs are low, the cost will increase as the Internet is effected by the commercial world. *Id.*

could hardly be served if each state can exercise personal jurisdiction<sup>282</sup> over an Internet user who maintains a Web site.<sup>283</sup> Thus, if *Inset* and *Maritz* are followed by other courts, the result can open Internet users to lawsuits on a national or possibly an international level.

In contrast, if courts follow O'Connor's opinion in *Asahi* of requiring additional activity by considering Web sites as either interactive or passive,<sup>284</sup> the effects on the Internet's growth will be well served. Instead of being bombarded by Internet lawsuits, courts will have increased control over what type of Internet lawsuits are susceptible to personal jurisdiction. Moreover, the Due Process Clause will be satisfied under the minimum contacts analysis. Importantly, technology on the Internet will continue to develop and grow.

By applying the *CompuServe* decision and O'Connor's opinion in *Asahi*, a framework for personal jurisdiction in the cyberspace regime is established. *CompuServe's* minimum contacts analysis provides the necessities for proper application to the cyberspace regime while maintaining flexibility of the test.<sup>285</sup> Furthermore, O'Connor's opinion in *Asahi* on the "stream of commerce" provides an analogy for the nature of a Web site compared to a "product placed into the stream of commerce."<sup>286</sup> Thus, when courts view a Web site as similar to a product placed in the

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281. See *supra* note 23 explaining the Due Process Clause as contained in the U.S. Constitution.

282. See Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 460 (1992) (analyzing the limits of the state power to exercise personal jurisdiction over a nonresident defendant under the minimum contacts test).

283. *McDonough v. Fallon McElligott, Inc.*, No. 95-4037, 1996 WL 753991, at \*3 (S.D. Cal. filed Aug. 5, 1996). The court held on the Internet issue: "Because the Web enables easy world-wide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exist; the Court is not willing to take this step." *Id.* In *McDonough*, Fallon McElligott is an advertising corporation in Minnesota while McDonough resides in California. *Id.* at \*1. McDonough claims that Fallon infringed McDonough's copyrighted photograph creation of Charles Barkley. *Id.* McDonough is suing Fallon for the alleged copyright infringement in the Southern District of California. *Id.* The court discusses whether Fallon had any contacts with the State of California to satisfy the minimum contacts test. *McDonough*, 1996 WL 753991, at \*2-3. The court found that Fallon's contacts with California were insufficient. *Id.* at \*6. The court held that Fallon has had almost no contact with the state of California relating to this action, and litigating the matter in California would be inefficient and unfair. *Id.* at \*6.

284. See *supra* notes 153-62 and accompanying text discussing the stream of commerce analogy.

285. See *supra* notes 91-95 and accompanying text discussing the factors necessary to find minimum contacts limited to the Internet.

286. See *supra* notes 63, and 153-62 and accompanying text discussing the stream of commerce analogy with a Web site. *E.g.*, *supra* note 132 and accompanying text for the nature of a Web site in the stream of commerce.

stream of commerce, under O'Connor's opinion in *Asahi*, then personal jurisdiction can easily be applied to the cyberspace regime.<sup>287</sup>

#### IV. CONCLUSION

This comment argues to follow the more restrictive view of minimum contacts dealing with the stream of commerce, instituted by Justice O'Connor in *Asahi*,<sup>288</sup> as applied to Internet cases illustrated in the *CompuServe*,<sup>289</sup> *Bensusan*, *Zippo*, and *Hearst* decisions. These decisions have illustrated the difference between interactive and passive activity on the Internet. While some courts have held for personal jurisdiction where the minimum contacts are limited to a passive Web site.<sup>290</sup> Other courts have held this "would eviscerate the personal jurisdiction requirement" as it exists today by denying due process.<sup>291</sup> As a standard, due process is better served by applying O'Connor's opinion in *Asahi* for cyberspace contacts.

In *Inset* and *Maritz*, the courts failed to apply O'Connor's opinion in *Asahi* to determine minimum contacts. Because of the nature of a Web site, the *Inset* and *Maritz* holding results in a forfeiture of due process. Thus, the courts must apply the O'Connor opinion in *Asahi* to maintain due process rights for those who conduct activities on the Internet.

We must understand that cyberspace is everywhere, just as a product being placed in the stream of commerce can be felt nationwide. When a court misapplies personal jurisdiction in cyberspace, the court subjects Internet users to nationwide or even international jurisdiction. However, if O'Connor's opinion in *Asahi* is applied to determine minimum contacts, then limits are placed on personal jurisdiction forums and due process will be satisfied.

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287. See *supra* note 50 and accompanying text discussing the importance on properly integrating the Internet with personal jurisdiction.

288. *Asahi*, 480 U.S. at 112.

289. *CompuServe*, 89 F.3d 1257.

290. *Maritz*, 947 F. Supp. at 1337.

291. *McDonough*, 1996 WL 753991.