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Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce

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PERSONAL JURISDICTION IN CYBERSPACE: SOMETHING MORE IS REQUIRED ON THE ELECTRONIC STREAM OF COMMERCE*

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I. INTRODUCTION

The Internet[1] is growing faster than all communication technologies that preceded it.[2] It took radio thirty-eight years to reach fifty million listeners. It took television thirteen years to achieve fifty million viewers. The Internet gained fifty million users only four years after becoming accessible to the general public.[3] It is

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1. The Internet is an international network of linked computers and computer systems. *See* Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997); Henry H. Perritt, Jr., *Basic Technological Terms and Concepts*, *in* WHAT LAWYERS NEED TO KNOW ABOUT THE INTERNET 1996, at 23, 27 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G4-3976, 1996).

2. SECRETARIAT ON ELECTRONIC COMMERCE, U.S. DEP'T OF COMMERCE, THE EMERGING DIGITAL ECONOMY 4 [hereinafter COMMERCE DEP'T REP.].

3. *Id.*

estimated that forty million people used the Internet in 1996,[4] that 100 million are using it in 1998,[5] and that the number of users is expected to reach 200 million in 1999.[6] Some experts predict one billion people may be connected by 2005.[7] More significantly for this symposium, business use of the Internet is growing fastest of all.[8]

The explosive growth of online business has raised concerns about applying existing substantive and procedural doctrine, both largely defined by geography, to a world without physical borders.[9] The law of personal jurisdiction, which emerged from nineteenth-century territorial principles,[10] presents particularly difficult and challenging problems. Although some commentators propose new regimes to solve these problems,[11] others believe existing doctrine can adequately accommodate most Internet jurisdiction disputes.[12] Other commentators exploit unfolding developments in cyberspace to renew attacks on existing jurisdictional doctrine, which they view as fundamentally flawed and inherently anachronistic.[13]

Even if flawed and anachronistic, current doctrine is being applied by courts to resolve Internet jurisdictional disputes.[14] Although courts have reached inconsistent

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4. COMMERCE DEP'T REP., *supra* note 2, at 2; *see Reno*, 117 S. Ct. at 2334 (noting about 40 million Internet users at the time of trial in 1996).

5. COMMERCE DEP'T REP., *supra* note 2, at 7.

6. *Reno*, 117 S. Ct. at 2334.

7. COMMERCE DEP'T REP., *supra* note 2, at 7.

8. *Id.* at 12-40.

9. *See, e.g.*, Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, ¶¶ 2-6, 61 (Feb. 1, 1997) <http://www.student.virginia.edu/~vjolt/vol1/burk.html> (suggesting that the geographic transparency of the Internet may require new approaches to jurisdictional analysis); David R. Johnson & David Post, *Law And Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (treating cyberspace as a distinct entity requiring a new legal regime but one that is reconcilable with existing territorially based legal systems); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996) (suggesting that traditional jurisdictional analysis must be informed by the new technology and concluding that civil jurisdiction can accommodate the new world of cyberspace); Amy Harmon, *The Law Where There Is No Land*, N.Y. TIMES, Mar. 16, 1998, at C1 (describing the emergence of cyberlawyers to deal with new issues presented by cyberspace).

10. *See* Pennoyer v. Neff, 95 U.S. 714 (1878).

11. *See, e.g.*, Perritt, *supra* note 9, at 93-109 (reviewing proposed legal institutions).

12. *See, e.g.*, Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2242 (1997) (asserting that Internet jurisdictional disputes can be properly addressed within the traditional personal jurisdiction framework); Christine E. Mayewski, Note, *The Presence of a Web Site as a Constitutionally Permissible Basis for Personal Jurisdiction*, 73 IND. L.J. 297, 327 (1997) (noting that existing jurisdictional principles are applicable to cases involving electronic commerce and the commission of tortious behavior); Richard S. Zembeck, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 342, 380 (1996) (proposing that traditional legal concepts are well-suited to deal with the challenges of cyberspace communications).

13. *See, e.g.*, Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. (forthcoming 1998) (arguing for statutory reform under the full faith and credit statute coupled with renewed emphasis on the fairness factors).

14. *See* discussion *infra* Part III.

results on substantially similar issues,[15] there is an emerging judicial consensus on at least two issues raised by the new technology. First, the Internet poses no novel jurisdictional issues when used to direct communications to a specific forum state resident by e-mail. In these instances, it is treated like other interpersonal communications.[16] Second, a passive web site is insufficient without "something more" to establish either general or specific jurisdiction[17] over the web site creator in a plaintiff's chosen forum. The something-more requirement is derived from Justice O'Connor's plurality opinion in *Asahi Metal Industry Co. v. Superior Court*,[18] the Supreme Court's leading non-Internet stream of commerce case.[19]

It also seems well settled that intentional torts effected through the Internet subject tortfeasors to jurisdiction when they specifically target forum state residents in a calculated effort to cause harm.[20] Internet cases adopting this analysis rely on *Calder v. Jones*,[21] the leading Supreme Court jurisdiction case on the forum effects of intentional torts.

There also appears to be an emerging consensus to subject web site creators to jurisdiction when they do something beyond merely putting up a web site accessible in the forum state. These "web-site-plus" cases have been inconsistent, and the courts must articulate usable standards defining the quality and nature of the additional conduct required.

This Article will examine whether existing doctrine can accommodate the special circumstances presented by jurisdictional disputes arising from Internet contacts. Part II briefly describes modern jurisdictional doctrine, emphasizing constitutional due process. Part III focuses on the emerging Internet jurisdiction case law. First, it describes areas of judicial consensus. Then it analyzes the "web-site-plus," "forum effects," and other cases that have deeply divided the lower federal courts. Part IV suggests two modifications of existing approaches to Internet jurisdiction. First, courts should more closely analyze whether the plus factors and forum effects are truly related to a plaintiff's cause of action. Second, courts should place increased emphasis on the "fair play and substantial justice"[22] branch of the current jurisdictional due process test. Adoption of these suggestions will enable current doctrine to resolve most Internet jurisdiction disputes in a fair and equitable manner.

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15. *See* discussion *infra* Parts III.C-E.
16. *See* discussion *infra* Part III.A.
17. *See* discussion *infra* Part II.A.
18. 480 U.S. 102 (1987).
19. *See* discussion *infra* Part II.C.
20. *See* discussion *infra* Part III.D.
21. 465 U.S. 783 (1984).
22. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

II. MODERN JURISDICTIONAL DOCTRINE

A. General and Specific Jurisdiction

The assertion of personal jurisdiction must be proper under both statutory and constitutional law. First, a statute—generally a state long-arm provision—must apply. Second, any statutory assertion of jurisdiction must comport with due process. There are two types of personal jurisdiction that may be asserted—general and specific.[23] General jurisdiction is exercised over a cause of action arising outside the forum state. Specific jurisdiction is exercised over a cause of action directly arising out of, or perhaps merely relating to,[24] a defendant's forum state activity.

General jurisdiction is permissible under the Due Process Clause[25] when the defendant's connection and activities in the forum state are so substantial that the defendant would expect to be subject to suit there on any claim and would suffer no inconvenience from defending there.[26] If a defendant is domiciled in, incorporated or organized under forum state law, or has its principal place of business in the forum state (the commercial equivalent of an individual's domicile), there is little doubt that the constitutionally required substantially "systematic and continuous" connection is satisfied. If a nonresident defendant, however, is merely doing business in the forum state, significant interpretational problems are presented. How much business is enough to be considered substantially systematic and continuous? The United States Supreme Court has decided only two general jurisdiction cases in the post-*International Shoe* era.[27] Neither case is particularly helpful in formulating an easily applicable definition of "substantially systematic and continuous," and the lower federal and state courts are deeply divided on the quality and quantity of activity required to trigger an assertion of general jurisdiction.[28]

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23. Professors von Mehren and Trautman are generally credited with articulating the distinction between general and specific jurisdiction. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

24. Although frequently invoking the "related to" language, the Supreme Court has twice avoided deciding whether specific jurisdiction can be predicated on conduct merely "related to" a defendant's forum state conduct. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (enforcing a forum selection clause), *rev'g* 897 F.2d 377 (9th Cir. 1990) (adopting a "but for" test for "related to" jurisdiction); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415 (1984) (relying on concession). For a review of the approaches taken by the lower courts in analyzing "related to" specific jurisdiction, see Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265 (1993).

25. U.S. CONST. amend XIV.

26. *Compare Helicopteros*, 466 U.S. at 415-19 (declining general jurisdiction), *with* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445-48 (1952) (upholding general jurisdiction).

27. *See Helicopteros*, 466 U.S. 408; *Perkins*, 342 U.S. 437.

28. For an analysis and conceptual approach to general jurisdiction, see Lea Brilmayer et al., *A*

Specific jurisdiction by state courts, or federal courts exercising diversity jurisdiction, must be authorized by a long-arm statute.[29] When Congress has not provided for nationwide service of process, federal courts exercising federal question jurisdiction are also generally limited to the reach of the long-arm statute of the state in which the federal court is located.[30] Many state long-arm statutes, either expressly or by interpretation, reach to the limits of due process.[31] When a long-arm statute reaches to the limits of due process, the two-step analysis collapses into a single inquiry under the Due Process Clause.[32]

B. Modern Jurisdictional Due Process

Although the modern era reaches back to *International Shoe Co. v. Washington*[33] for the seminal articulation of the "minimum contacts test," the current two-branch test of jurisdictional due process is of more recent origin.[34] Beginning with its decision in *World-Wide Volkswagen Corp. v. Woodson*,[35] the United States Supreme Court articulated a two-branch due process test for state court personal jurisdiction.[36] The first branch, frequently described as the power or traditional minimum contacts branch,[37] focuses on the connection or affiliation of the nonresident defendant with the forum state and the relationship between that nexus and the litigation.[38]

The Supreme Court explained that beyond the requirement of minimum

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General Look at General Jurisdiction, 66 TEX. L. REV. 723, 735-48 (1988), and Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 630-43 (1988).

29. *See, e.g.*, Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997) ("[T]he court must first look to the long-arm statute of the forum state . . . ."), *aff'g* 937 F. Supp. 295 (S.D.N.Y. 1996); CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) ("[F]ederal courts apply the law of the forum state, subject to the limits of the Due Process Clause of the Fourteenth Amendment.").

30. *See, e.g.*, Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 105 (1987) (stating that "a federal court normally looks either to a federal statute or to the long-arm statute of the State in which it sits"); Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 620 (C.D. Cal 1996) (stating that where there is no applicable federal statute, federal courts must apply law of the state in which it sits), *aff'd*, No. 97-55467, 1998 WL 178553 (9th Cir. Apr. 17, 1998).

31. *See, e.g.*, Gordy v. Daily News, L.P., 95 F.3d 829, 831 (9th Cir. 1996) (expressly); Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 260, 423 S.E.2d 128, 130 (1992) (by interpretation).

32. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1997); Federal Ins. Co. v. Lake Shore Inc., 886 F.2d 654, 657 n.2 (4th Cir. 1989) (applying South Carolina's long-arm statute).

33. 326 U.S. 310 (1945).

34. For my previous outline of the modern evolution of jurisdictional due process, see Howard B. Stravitz, *Sayonara to Minimum Contacts*: Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 731-83 (1988).

35. 444 U.S. 286 (1980).

36. *Id.* at 291-92.

37. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-10 (1987); Hanson v. Denckla, 357 US. 235, 251 (1958); Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 423-24 (1981); Stravitz, *supra* note 32, at 777.

38. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-76 (1985).

contacts, due process requires evaluation of other factors to test whether an assertion of jurisdiction comports with "'fair play and substantial justice.'"[39] This branch is frequently referred to as the fairness, convenience, or reasonableness branch.[40]

The Court has developed several tests to determine traditional minimum contacts under the power branch: (1) whether the defendant "'purposefully direct[s]' his activities at residents of the forum and [whether] the litigation results from alleged injuries that 'arise out of or relate to' those activities";[41] (2) whether the defendant "'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'";[42] and (3) whether "'defendant's conduct and connections with the forum State are such that he should reasonably anticipate being haled into court there.'"[43] It is not necessary that each test be satisfied separately to find that a defendant has purposefully established minimum contacts.[44]

If a defendant purposefully directs activities toward forum state residents, *Burger King* further states that "it is presumptively not unreasonable to require [the defendant] to submit to the burdens of litigation in that forum as well."[45] The presumption may be either enhanced or overcome by evaluation of other factors to determine whether the assertion of jurisdiction comports with "'fair play and substantial justice.'"[46] The other factors are: (1) the burden on the defendant; (2) the adjudicative interest of the forum state; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the systemic interest of the national judicial system in obtaining the most efficient resolution of the litigation; and (5) the systemic interest in furthering substantive social policies.[47]

Consequently, *Burger King* plainly contemplates a positive threshold finding of traditional minimum contacts under the power branch before a court proceeds to the fairness branch. The Fourth Circuit followed *Burger King*'s two-step framework in *Chung v. NANA Development Corp.*,[48] in which Judge Wilkinson wrote as follows:

> Because personal jurisdiction here fails the threshold test of "minimum contacts," we need not separately consider the convenience of any particular forum to the respective parties . . . . Factors such as the

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39. *Id.* at 476 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).
40. *See* Stravitz, *supra* note 32, at 753-54, 776-77, 780-82.
41. *Burger King*, 471 U.S. at 472-73 (citations omitted).
42. *Id.* at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
43. *Id.* at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).
44. *See, e.g.*, Calder v. Jones, 465 U.S. 783, 787 & n.6, 789 (1984) (upholding jurisdiction over an author and editor based exclusively on the forum effects test).
45. *Burger King*, 471 U.S. at 476.
46. *Id.* (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).
47. *Id.* at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).
48. 783 F.2d 1124 (4th Cir. 1986).

> burden on the defendant, the plaintiff's interest in obtaining effective relief, and the forum state's concern with adjudicating the dispute are generally addressed only after "it has been decided that a defendant purposefully established minimum contacts with the forum State . . . ."[49]

Many other lower federal and state courts also expressly find it unnecessary to reach the reasonableness factors if minimum contacts are lacking.[50] Some courts, however, even in the absence of minimum contacts, consider second-branch factors.[51]

Justice Brennan, who authored *Burger King*, did not, however, contemplate a high threshold to establish minimum contacts. He indicated that the second-branch factors may tip the jurisdictional balance in close cases. Justice Brennan stated that they "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required,"[52] but they also "may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities."[53]

As the Court's leading advocate of jurisdictional analysis focusing on the relative convenience of the parties and the interests of the forum state,[54] Justice Brennan attempted to make the first branch an easy obstacle to hurdle, while

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49. *Id.* at 1129-30 (quoting *Burger King*, 471 U.S. at 476). In *Federal Insurance Co. v. Lake Shore Inc.*, 886 F.2d 654, 661 (4th Cir. 1989), the Fourth Circuit, after a finding of no minimum contacts, concluded in *dicta* that the reasonableness factors were an independent ground for *dismissal* under FED. R. CIV. P. 12(b)(2).

50. The First Circuit adheres to this view, expressly labeling the "reasonableness" factors "secondary rather than primary" and stating that "[a] reviewing court must first examine the defendant's contacts with the forum. If the same do not exist in sufficient abundance, that is, if the *constitutionally necessary first-tier minimum is lacking, the inquiry ends*." Donatelli v. National Hockey League, 893 F.2d 459, 465 (1st Cir. 1990) (emphasis added); accord McGlinchy v. Shell Chem. Co., 845 F.2d 802, 817 & n.10 (9th Cir. 1988); Batton v. Tennessee Farmers Mut. Ins. Co., 736 P.2d 2, 5-6 & n.1 (Ariz. 1987) ("Because we find that Tennessee Farmers has not purposefully engaged in forum activities . . . we do not address [the] additional factors."); Felix v. Bomoro Kommanditgesellschaft, 241 Cal. Rptr. 670, 676-77 (Ct. App. 1987) ("Having determined that defendant's contacts with California are insufficient to justify jurisdiction, we need not undertake the additional process of balancing the inconvenience of defending the action in this state against the interests of plaintiff in suing locally and of the state in assuming jurisdiction."); Missouri *ex rel.* Wichita Falls Gen. Hosp. v. Adolf, 728 S.W.2d 604, 609 (Mo. Ct. App. 1987) ("We do not find that sufficient minimum contacts are present here to require exploration of additional factors.").

51. *See, e.g.*, Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 374-75 (8th Cir. 1990) (expressly interpreting *Asahi* as mandating analysis of the "reasonableness" factors even in the absence of minimum contacts).

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

53. *Id.* at 478.

54. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting) ("Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations.").

placing principal emphasis on the fair play and substantial justice branch.

C. *Stream of Commerce Split*

Justice Brennan's views proved partially prophetic in *Asahi Metal Industry Co. v. Superior Court*,[55] the Supreme Court's leading stream of commerce case.[56] Divided into conflicting four-justice pluralities, the Court was unable to decide whether a Japanese component parts manufacturer established minimum contacts with California. All members of the Court except Justice Scalia,[57] however, concluded that California's assertion of jurisdiction was "unreasonable and unfair."[58] Justice Brennan agreed that this was "one of those rare cases"[59] in which the fair play and substantial justice factors trump minimum contacts.[60]

Asahi articulated three standards for establishing minimum contacts in a stream of commerce case. Justice O'Connor's opinion concluded that "[t]he placement of a product into the stream of commerce, *without more*, is not an act of the defendant purposefully directed toward the forum State."[61] Her opinion, however, recognized that "[a]dditional conduct of the defendant," such as specifically designing, advertising, advising, or marketing with specific reference to the forum state, may be sufficient to establish minimum contacts.[62] In contrast, Justice Brennan articulated a pure stream of commerce view by suggesting that the mere awareness that a product is being distributed in the forum state is sufficient to establish minimum contacts without any showing of something more.[63] Justice Stevens did not join either plurality, but wrote separately suggesting that "a regular course of dealing [by a defendant] that results in deliveries . . . annually over a period of several years" should be jurisdictionally sufficient even for a "standard product marketed throughout the world."[64] Justice O'Connor's views have prevailed for jurisdictional disputes on the electronic stream of commerce.[65]

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55. 480 U.S. 102 (1987).

56. For an excellent analysis of the stream of commerce theory of personal jurisdiction, see Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239 (1988).

57. Justice Scalia only joined Justice O'Connor on minimum contacts. *Id.* at 105. Since Justice O'Connor found no minimum contacts, Justice Scalia must have viewed second-branch analysis as unnecessary.

58. *Id.* at 116.

59. *Id.* at 116 (Brennan, J., concurring in part).

60. *See id.*

61. *Id.* at 112 (emphasis added).

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

63. *Id.* at 117 (Brennan, J., concurring in part).

64. *Id.* at 122 (Stevens, J., concurring in part).

65. *See* discussion *infra* Part III.E.

D. Effects Test

In *Calder v. Jones*[66] the Court upheld jurisdiction in California over two Florida individuals because their activity in Florida was deliberately targeted at, and calculated to cause injury to, the California plaintiff.[67] In doing so, the Supreme Court expressly approved the "forum effects" test of the Second Restatement of Conflicts of Laws.[68] The Florida individuals were the author and editor of an alleged libelous article published in the National Enquirer. Neither the editor nor author had any material personal contact with California. Accordingly, there was no basis for the Court to find that either of them purposefully availed themselves of the benefits and protection of California law. Nevertheless, it was reasonably foreseeable that their Florida conduct would cause harm in California. Therefore, by expressly aiming their intentional conduct at California knowing that the subject of their story would suffer maximum harm there, the Florida defendants should have reasonably anticipated being haled into court in California.[69] The effects test has been the focus of much controversy in jurisdictional disputes arising from use of the Internet.[70]

III. PERSONAL JURISDICTION IN CYBERSPACE

Although Internet cases are flooding the federal district courts, there have been only four federal appeals court decisions resolving online jurisdictional disputes.[71] Even though some cases exclusively rely on long-arm statutes to resolve these disputes,[72] the vast majority of decisions engage in both statutory and constitutional analysis. Because many state long-arm statutes reach to the limits of due process, the two-step analysis generally transforms into a single constitutional inquiry.[73] Accordingly, this discussion will focus on jurisdictional due process.

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66. 465 U.S. 783 (1984).

67. *Id.* at 787 n.6, 788-89, 791.

68. *Id.* at 787 n.6, 789.

69. *Id.* at 790 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

70. *See* discussion *infra* Part III.D.

71. Panavision Int'l, L.P. v. Toeppen, No. 97-55467, 1998 WL 178553 (9th Cir. Apr. 17, 1998), *aff'g* 938 F. Supp. 616 (C.D. Cal. 1996); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997) (relying on New York long-arm statute), *aff'g* 937 F. Supp. 295 (S.D.N.Y. 1996); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996). *Cf.* Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998) (tribal court subject matter jurisdiction).

72. *See, e.g., Bensusan*, 126 F.3d at 27 (New York statute); E-Data Corp. v. Micropatent Corp., 989 F. Supp. 173, 175 (D. Conn. 1997) (Connecticut statute); Telco Communications v. An Apple A Day, 977 F. Supp. 404, 405 (E.D. Va. 1997) (Virginia statute).

73. *See supra* notes 29-30 and accompanying text.

A. When the Internet is Analogous to Other Communications Media

If the Internet is used to direct communication to a particular forum state resident, for example, when an e-mail message is sent and delivered, the Internet is not any different than other forms of direct communication. Courts have had little difficulty applying conventional analysis in these circumstances. For example, if a fraudulent misrepresentation is made to a forum state securities purchaser by a nonresident broker, it hardly matters whether the misrepresentation is made by traditional or electronic mail.[74] Similarly, a contract can be breached by e-mail as well as more traditional methods of person-to-person communication.[75] In these instances, the misrepresentation or breach is purposefully directed at a forum state resident, the forum plaintiff's cause of action directly arises out of the electronic communication, and the nonresident sender of the e-mail should, under traditional analysis, reasonably anticipate forum state litigation.

B. No General Jurisdiction

With one notable exception,[76] courts have universally rejected the argument that putting up a generally accessible web site permits assertion of general jurisdiction over the web site creator.[77] The argument, albeit unsuccessful, is that because the web site is always available online to forum state residents, the web site owner is maintaining substantially systematic and continuous contact with the forum state. This line of cases illustrates a fundamental distinction between the new digital world of the Internet and its analog predecessors. Only through the Internet can a potential defendant maintain contact at all times with a forum state. Outside the Internet context, advertisements in national periodicals are limited by time and

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74. *See, e.g.*, Cody v. Ward, 954 F. Supp. 43, 44-45 (D. Conn. 1997) (Connecticut securities fraud action based on California defendants e-mail and telephone calls).

75. *See, e.g.*, Hall v. LaRonde, 66 Cal. Rptr. 2d 399 (Cal. Ct. App. 1997) (upholding jurisdiction over a contract dispute negotiated exclusively by e-mail and telephone).

76. *See* Mieczkowski v. Masco Corp., No. 5:96CV286, 1998 WL 125678, at *6 (E.D. Tex. Mar. 18, 1998) (interactive web site that responds to consumer product inquires is sufficient without more to establish general jurisdiction).

77. *See, e.g.*, Green v. William Mason & Co., No. CIV.A.96-1730, 1998 WL 120257, at *5-6 (D.N.J. Mar. 5, 1998) (rejecting jurisdiction in New Jersey over a California bank based on a web site and toll-free telephone number, which plaintiff argued were equivalent to an office in New Jersey); Weber v. Jolly Hotels, 977 F. Supp. 327, 333-34 (D.N.J. 1997) (no general jurisdiction based on web site in New Jersey in an action for injury suffered at an Italian hotel); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (advertising in a trade journal available on the Internet insufficient to confer jurisdiction over a Hong Kong manufacturer in a wrongful death action in Arkansas); IDS Life Ins. Co. v. Sunamerica, Inc., 958 F. Supp. 1258, 1268 (N.D. Ill. 1997) (no general jurisdiction over California defendant on an unfair competition claim unrelated to defendant's web site, other national advertising, and toll-free telephone number); McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q.2d 1826, 1828 (S.D. Cal. 1996) (rejecting general jurisdiction over a Minnesota advertising agency in a copyright dispute over a photograph not transmitted over defendant's web site).

space. Even though the case law regarding the extent of continuous and systematic business contact necessary to establish general jurisdiction is unsettled, it appears that most courts are correctly deciding Internet disputes in this context.

C. Forum State Databases

One feature of the Internet that makes it jurisdictionally unique is that a user generally has no knowledge of the physical location of the web site being downloaded. Because the same electronic information may be stored and transferred from different locations, knowledge of any particular geographic location is generally irrelevant to the user. Nevertheless, the courts are divided over whether a subscriber to an Internet service can be sued in the jurisdiction in which the service maintains its database.[78]

In the seminal modern Internet jurisdiction case, *CompuServe, Inc. v. Patterson*,[79] the Sixth Circuit upheld jurisdiction in Ohio over a Texas citizen who had entered into an agreement with CompuServe, an Internet provider located in Ohio. The agreement[80] provided for CompuServe to distribute Patterson's software online. For three years Patterson uploaded and advertised his software on CompuServe's system, apparently resulting in sales to twelve Ohio residents and an unstated number of other CompuServe subscribers.[81] When CompuServe began distributing its own similar software, Patterson threatened to sue CompuServe for trademark infringement and deceptive trade practices.[82] In response, CompuServe filed a diversity action in an Ohio federal court seeking declaratory relief that it had not infringed Patterson's common-law trademark or committed deceptive trade practices.[83] Patterson successfully moved to dismiss for lack of personal jurisdiction in the district court. The Sixth Circuit reversed, finding jurisdiction proper under both the Ohio long-arm statute and the Due Process Clause because the agreement between Patterson and CompuServe created a substantial connection with Ohio.[84] More significantly, the agreement, which was ongoing in nature, contained an Ohio choice-of-law provision.[85]

Although severely criticized by Professor Burk,[86] the court's analysis,

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78. *Compare* CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (upholding jurisdiction), *with* Pres-Kap, Inc. v. System One Direct Access, Inc., 636 So. 2d 1351 (Fla. Dist. Ct. App.), *rev. denied*, 645 So. 2d 455 (Fla. 1994) (denying jurisdiction).

79. 89 F.3d 1257 (6th Cir. 1996).

80. *Id.* at 1260. The agreement is a "Shareware Registration Agreement," under which CompuServe made available Patterson's software to its subscribers. *Id.*

81. *Id.* at 1261.

82. *Id.*

83. *Id.*

84. *Id.* at 1264-65.

85. *Compuserv*, 89 F.3d at 1260.

86. See Burk, *supra* note 9, ¶¶ 35-39, in which Professor Burk points out that Patterson's common-law trademark and deceptive practices case did not directly arise out of his contract with

according to another commentator, is not materially distinguishable from the Supreme Court's own analysis in *Burger King*.[87] Patterson certainly directed his activities at Ohio in a manner sufficient both to invoke the benefits and protections of Ohio law, and to reasonably anticipate litigation in Ohio related to the contract.

The other forum database case was *Pres-Kap, Inc. v. System One, Direct Access, Inc.*,[88] in which a Florida appellate court refused to uphold jurisdiction over a New York travel agency that contracted with the Florida plaintiff for access to its computerized airline reservation system. When the system malfunctioned, the New York defendant stopped making payments under the contract, and the Florida database provider sued for breach in Florida. The only Florida contacts were the payments and the physical location of the system in Florida. Finding that there was no showing that the New York "defendant was even aware of the exact electronic location of the . . . computer database,"[89] which in any event "would have been of little importance to it," the court found that there was no reasonable expectation of Florida litigation over a contract solicited, negotiated, and serviced by the plaintiff in New York.[90] The court also observed that nonresident subscribers to online services should not be automatically subject to jurisdiction in their suppliers' home states. This early online decision was also similar to *Burger King*, except that there apparently was no choice-of-law provision in the contract.[91]

D. Forum Effects of Intentional Torts

As discussed earlier, *Calder* endorsed the forum effects test for specific personal jurisdiction.[92] If a nonresident defendant deliberately directs activity toward the forum in a calculated effort to cause a plaintiff harm there, the defendant should reasonably anticipate being haled into court in the forum.[93] Although two recent commentators characterized the effects test as the root cause of all contradictory Internet-jurisdiction decisions,[94] that test, when properly understood and applied, can be a useful tool in resolving online jurisdictional disputes.

CompuServe. Although this point is reasonable, it takes an unduly narrow view of the nature of the dispute between Patterson and CompuServe. *Cf.* Moore v. New York Cotton Exchange, 270 U.S. 593 (1926) (taking an expansive view of transactionally related claims for ancillary jurisdiction). Even if Professor Burk is correct that Patterson's claims, and CompuServe's reactive declaratory judgment action, did not directly arise out of their contract, they were certainly "related to" the contract. *See supra* note 23.

87. *See* Sheehan, *supra* note 13 ("[T]he case for jurisdiction over Patterson may be stronger than in *Burger King* because Patterson actually intended to sell his products in Ohio . . . .").

88. 636 So. 2d 1351 (Fla. Dist. Ct. App.), *rev. denied*, 645 So. 2d 455 (Fla. 1994)

89. *Id.* at 1353.

90. *Id.*

91. It was clear, however, that there was no forum selection clause. *See id.* at 1352-53.

92. *See* discussion *supra* Part II.D.

93. *See* Calder v. Jones, 465 U.S. 783, 790 (1984).

94. Robert W. Hamilton & Gregory A. Castanias, *Tangled Web: Personal Jurisdiction and the Internet*, LITIG., Winter 1998, at 27, 29.

Under *Calder* knowledge that a plaintiff will suffer maximum and foreseeable harm in the forum state is critical to the jurisdictional calculus. Unfortunately, in *EDIAS Software International, L.L.C. v. BASIS International Ltd.*[95] an Arizona federal court plainly misapplied the *Calder* effects test in upholding jurisdiction over a New Mexico software company. Plaintiffs were two European business entities and an Arizona limited liability company, all named EDIAS Software International. EDIAS, collectively treated as one entity by the court, entered into a contract to distribute defendant's software in various European countries. The contract was signed in New Mexico, and was governed by New Mexico law. After becoming dissatisfied with EDIAS's performance, BASIS, the New Mexico defendant, terminated the agreement, and e-mailed its reasons for doing so to its regular European customers and its own employees. BASIS also posted these reasons on its web site and a CompuServe forum. Claiming Arizona as its principal place of business, EDIAS sued BASIS for breach of contract and libel in Arizona. BASIS disputed the plaintiff's assertion that Arizona was its principal place of business, claiming that Arizona was merely the location of a vacation home for plaintiff's president.[96] Nevertheless, the court upheld jurisdiction in Arizona on the effects test. This decision is fundamentally flawed. If EDIAS suffered harm, it was plainly in Europe, the only place where it did business, and not in Arizona, where it had no business.

In contrast, the Ninth Circuit properly applied the effects test in *Panavision International, L.P. v. Toeppen*,[97] a domain name[98] dispute involving a notorious "cybersquatter,"[99] or "cyberpirate."[100] Panavision is a limited partnership headquartered in California. It holds federally registered trademarks for "Panavision" and "Panaflex," which it uses in its motion picture, television camera, and photographic equipment business.[101] When Panavision attempted to register "Panavision.com" as a web site, it was unable to do so because Toeppen, an Illinois citizen, had previously registered that domain name. When Panavision demanded that he stop using their registered trademark as a domain name, Toeppen demanded $13,000 to give it up. Rather than submitting to extortion, Panavision filed an

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95. 947 F. Supp. 413 (D. Ariz. 1996).

96. *Id.* at 416.

97. No. 97-55467, 1998 WL 178553 (9th Cir. Apr. 17, 1998), *aff'g* 938 F. Supp. 616 (C.D. Cal 1996).

98. Domain names are the way Internet users communicate with other computers and web sites. Each web site on the Internet has an unique electronic address. For a useful description of domain names, see Charles H. Fleischer, *Will the Internet Abrogate Territorial Limits on Personal Jurisdiction*, 33 TORT & INS. L.J. 107, 114-15 (1997).

99. A cybersquatter is someone who registers a domain name that, at least in part, includes a registered trademark of someone else, and who attempts to extract payment for relinquishing the domain name to the trademark holder. *See* Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097, at *18-19 (S.D.N.Y. Feb. 26, 1997).

100. *Panavision*, 1998 WL 178553, at *1.

101. *Id.* at *2.

action in a California federal court raising trademark dilution claims.

Affirming the district court's assertion of California jurisdiction over Toeppen, the Ninth Circuit found that the trial court properly applied the *Calder* effects test. The court's language is instructive:

> Toeppen purposefully registered Panavision's trademarks as his domain names on the Internet to force Panavision to pay him money. The brunt of the harm to Panavision was felt in California. Toeppen knew Panavision would likely suffer harm there because, although at all relevant times Panavision was a Delaware limited partnership, its principal place of business was in California, and the heart of the theatrical motion picture and television industry is located there.[102]

Perhaps *Panavision* is a unique case. Unlike a national business entity, which may suffer harm in many geographic locations, Panavision was principally engaged in California activities. Therefore the injury suffered was primarily focused in California, and Toeppen should have known that his action would cause harm to Panavision where the entertainment industry was centered. Unfortunately, other courts have misplaced reliance on the effects test when the harm suffered by plaintiffs was not principally focused on the forum state.[103]

The effects test is useful in establishing minimum contacts only when a defendant directs online activity in a targeted manner to cause harm. In these circumstances, the nonresident defendant should reasonably anticipate forum state litigation. However, a defendant should not expect to be sued *any* place where an alleged tortious web site is accessible. The harm must be targeted as in *Calder* and *Panavision* for the Due Process Clause to have any meaningful application to Internet activity.

E. The Web-Site-Plus Cases

Most courts have decided that the mere maintenance of a passive web site, which is analogous to a national newspaper advertisement with an 800-telephone number, is insufficiently purposeful to establish minimum contacts in any forum where the web site is accessible.[104] The leading case articulating this view is

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102. *Id.* at *5 (citations omitted).

103. *See, e.g.*, Quality Solutions, Inc. v. Zupanc, No. 1:97-CV-1228, 1997 WL 835481 (N.D. Ohio Dec. 23, 1997) (upholding jurisdiction under the Ohio long-arm statute because a web site caused tortious injury); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1331 (E.D. Mo. 1996) (web site for prospective online service caused harmful effect in Missouri satisfying long-arm statute).

104. *See, e.g.*, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997) ("[a]ll that it did was post an essentially passive home page on the web"); Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997), *aff'g* 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (general access passive web site); SF Hotel Co. v. Energy Ins., Inc., 985 F. Supp. 1032, 1035 (D. Kan. 1997) (general access passive web site); Transcraft Corp. v. Doonan Trailer Corp., 45 U.S.P.Q.2d (BNA) 1097 (N.D. Ill. 1997). *But see*

Bensusan Restaurant Corp. v. King,[105] in which the district court expressly endorsed Justice O'Connor's *Asahi* stream of commerce view: "Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, *without more*, it is not an act purposefully directed toward the forum state."[106] Although O'Connor's requirement of something more is unnecessary in the ordinary product liability context,[107] it appears both necessary and appropriate for the electronic stream of commerce. Because a web site is accessible at all times to Internet users in any particular forum, it is reasonable to require additional conduct, beyond putting up the web site, to establish minimum contacts. Otherwise, personal jurisdiction over web site creators would have no rational limits. The issue that has profoundly divided the lower courts is how much more is required? The current hodgepodge of case law is inconsistent, irrational, and irreconcilable. Some courts find that the requirement of something more is satisfied by any additional activity, no matter how marginal.[108] Other courts properly require that additional conduct be meaningful and related to the forum plaintiff's claims. In these instances, defendants generally ship offending products into the forum state in addition to maintaining a web site,[109] or enter into agreements to provide online services to substantial numbers of forum state residents.[110]The web-site-plus cases will continue to produce unacceptable results unless the courts take a new approach to resolving online jurisdictional disputes.

IV. SOLUTION: BACK TO *BURGER KING*'S INTENDED FRAMEWORK

Disputes over personal jurisdiction arising from Internet contact cannot be resolved by equally objectionable extremes—jurisdiction everywhere or jurisdiction nowhere. Some reasonably predictable middle position is desirable. There appears to be no rational ground on which to reconcile the spate of conflicting opinions, particularly when the web-site-plus analysis is invoked. When

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Heroes, Inc. v. Heroes Found., 958 F. Supp. 1 (D.D.C. 1996) (passive web site sufficient); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 163-64 (D. Conn. 1996) (same).

105. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

106. *Id.* at 301 (emphasis added); *accord* Hasbro, Inc. v. Clue Computing Inc., 45 U.S.P.Q.2d (BNA) 1170, (D. Mass. 1997).

107. *See* Stravitz, *supra* note 32, at 788-90 & n.328.

108. *See, e.g.*, American Network, Inc. v. Access America/Connect Atlanta, Inc., 975 F. Supp. 494, 498-99 (S.D.N.Y. 1997) (six New York subscribers generating $150 per month in revenues was found sufficient); Superguide Corp. v. Kegan, 44 U.S.P.Q.2d (BNA) 1770, 1775 (W.D.N.C. 1997) (passive web site plus presumed numerous North Carolina hits); *Heroes*, 958 F. Supp. at 4-5 (web site plus advertisement in a local newspaper held sufficient); *Maritz*, 947 F. Supp. at 1333 (finding 131 "hits" to defendant's allegedly infringing web site for a future online service sufficient).

109. *See, e.g.*, Gary Scott Int'l, Inc. v. Baroudi, 981 F. Supp. 714 (D. Mass. 1997) (maintaining a web site plus shipping infringing products into state).

110. *See, e.g.*, Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1121 (W.D. Pa. 1997) (maintaining a web site plus contracts with three thousand Pennsylvania subscribers, representing two percent of defendant's customer base).

the *Calder* effects analysis is employed, however, courts can and should be more circumspect in finding forum effects. Only when a nonresident defendant intentionally engages in conduct expressly targeted at the forum state or its residents can a court rationally conclude that a defendant should reasonably anticipate being haled into court there. Negligent or other unintended effects are too easily accomplished when business is conducted over the Internet, and should not be a sufficient basis for asserting jurisdiction. Perhaps courts can improve their consistency by adopting this modest limitation on the effects test. Meaningful progress, however, will require more fundamental change.

Although most courts deciding Internet jurisdictional disputes engage in two-branch due process analysis, many of their opinions seem primarily grounded on conventional views of minimum contacts. The fair play and substantial justice branch either gets short shrift or is added as an afterthought to buttress a decision already made.

As noted earlier, *Burger King* intended to focus jurisdictional due process on the second branch.[111] Certainly Justice Brennan intended the second branch to tip the jurisdictional balance in close cases. But a closer reading of his *Burger King* opinion reveals that he intended the so-called "other factors" to play an even more significant role. Dissenting in *World-Wide Volkswagen*, Justice Brennan expressed the view that the minimum contacts test, with its intense focus on the defendant's connection to the forum state, was outmoded.[112] It is even more outmoded today, almost twenty years later.

Any Internet contact, except perhaps a passive web site, should be sufficient to pass muster under the minimum contacts branch. Acceptance of this view eliminates the need to engage in inherently subjective determinations of purposefulness. This is true outside the Internet context as well.

Shifting emphasis to the second-branch convenience factors will allow jurisdiction to be asserted unless the chosen forum is fundamentally unfair. Modern modes of transportation and communication have eliminated most burdens in litigating away from one's home base. This is especially true for defendants who frequently engage in interstate and international business transactions.

Focusing the crucial due process analysis on the second branch may not substantially improve predictability. But at least the inquiry will focus on fair play and substantial justice, which are the objectives that the Due Process Clause is intended to promote.

V. CONCLUSION

Because the Internet transcends geography, it is the ideal context in which to finally discard the territorial ghost of *Pennoyer*, and focus jurisdictional analysis

111. *See supra* notes 43-46, 49-51 and accompanying text.

112. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 307-12 (1980).

squarely on whether a chosen forum will provide all parties with fair play and substantial justice.

Borrowing Winston Churchill's description of Russia in the 1930s, the First Circuit once described the doctrinal vagaries of personal jurisdiction as a "riddle wrapped in a mystery inside an enigma."[113] Internet jurisdictional disputes present the courts with an opportunity to solve the "riddle," unwrap the "mystery," and explain the "enigma."

113. Donatelli v. National Hockey League, 893 F.2d 459, 462 (1st Cir. 1990) (quoting Winston Churchill).