Personal Jurisdiction and the Internet Quagmire: Amputating Judicially Created Long-Arms

TABLE OF CONTENTS

I. INTRODUCTION

The creation and rapid growth of the internet has been "hailed" as one of the greatest technological advances in recent history. But a homophone of "hailed," when spoken in the legal lexicon, has serious implications for the internet user. Specifically, when can an internet

user be "haled" into court due to one's internet contacts?

Consider the following warning, an electronic "caveat emptor," appearing each time a computer user surfer logged on to the internet to explore the online world:

> Warning: Use of the internet may result in your being haled into court anywhere in the United States.

This Comment will explore the expanding power courts have given the word "haled" and its relationship to computer communication: a relationship that is confusing, contradictory, and sometimes downright troubling. Personal jurisdiction via the internet is a rapidly expanding area of American jurisprudence that has developed, and is developing, in response to the explosive growth of computer communications. While the hypothetical internet disclaimer contained above could be viewed as little more than unsubstantiated fears of the legally paranoid, in the future it may be the disclaimer of the legally prudent.

II. DEFINITION OF THE PROBLEM

Today the movement of information across the country is accomplished with little more than the push of a keyboard or the click of a mouse. The seamless integration of home phone lines and computer networks is reality. Documents are mailed, business orders are taken, electronic mail messages are received and responses are sent, all from the comfort—and apparent safety—of one's own home computer.

But what of those seemingly innocuous information transfers? Are such transfers enough to comprise minimum contacts with a particular jurisdiction and, if so, which jurisdiction? The implications are far-reaching given the expanse of the internet and the litigious nature of the United States.

Unfortunately, the first cases concerning jurisdiction and the internet—and the current crop of jurisprudence—leave many unanswered jurisdictional questions. Conflict among the courts is commonplace. The internet and its omnipotence in communications, however, has ramifications that are unique to the medium of computer communication and are uncharted territory for the judiciary. The overreaching of even one court could have serious consequences for the most wary, the most cautious, and the most benign of internet users.

What of the layperson who sends email from her home; should she fear the long-arm of a state she has never visited and never intended to do business with?[1] The businessperson, the online publisher, the

1. *See, e.g.*, Hall v. LaRonde, 66 Cal. Rptr. 2d 399, 400 (Ct. App. 1997) ("Here

student, and the occasional internet surfer must realize that today, their actions online can have serious legal ramifications beyond the information superhighway.

There is little information and there are few answers to assist the internet user in understanding the power of the courts. The only thing certain is uncertainty. Simply put, there are no concrete definitions, guidelines or rules as to whether personal jurisdiction will be found where one has undertaken usage of the internet. No statutes exist to govern personal jurisdiction and its relation to the internet. Neither Congress, nor the Supreme Court, nor the state legislatures have spoken.[2]

That long-arm statutes differ among the fifty states is the homeostatic nature of jurisdictional law. But the unforeseen consequences of one's actions while dabbling on the internet can be costly if one is on the receiving end of a complaint filed hundreds or thousands of miles away. Computer messages are quick and cheap. Defending a lawsuit many miles from home is anything but.

Surely the courts cannot expect every internet user, whether a international conglomerate or an independent software retailer, to be versed in the long-arm statutory language of all fifty states. Such a state of affairs is troubling.

---

the long-arm of the Internet reaches from California to New York. We hold that the use of electronic mail and the telephone by a party in another state may establish sufficient minimum contacts with California to support personal jurisdiction."); *cf.* Alton v. Wang, 941 F. Supp. 66, 67 (W.D. Va. 1996) (Although plaintiff in Virginia alleged that resident of China repeatedly sent threatening letters and e-mail messages, and plaintiff received said letters and e-mail responses, "[a]ssuming for the purposes of this decision that the repeated correspondence would satisfy the minimum contacts required for due process . . . plaintiff nonetheless has failed to satisfy the Virginia long-arm statute because none of defendant's acts took place within the state of Virginia.").

2. *See, e.g.*, Jeffrey B. Sklaroff, *Personal Jurisdiction, the Internet and Electronic Communication: Where Does the Internet Defendant Do Business?*, 497 PRACTISING LAW INST. 463 (1997).

> Many of the courts to consider the issue of personal jurisdiction make sweeping statements concerning the need to tailor long-standing principles of personal jurisdiction to the specific technology of the Internet and electronic communication. Lest there be some inadvertent chilling effect on this burgeoning technology, some courts even suggest a need to establish "Internet specific" principles of personal jurisdiction by statutory enactment. In resolving the specific disputes that are presented to them, however, courts routinely apply standard, well-established statutory (local long-arm statues) and constitutional considerations to determine the threshold question of personal jurisdiction.

Id. at 476-77.

The backdrop of jurisdictional law, although not settled, used to revolve around those things common and tangible: presence within a state, sales across state lines, advertising, use of the mails, telephones, etc. But the internet? Can a person's presence on the World Wide Web constitute a presence within a state? Could there be a "stream of commerce" on the internet? Is the internet a stream? Are webpage advertisements "commerce"? Can one purposefully avail herself of the privilege of conducting business in one particular state when the internet, by definition, is instant communication on a global scale?[3]

In a time of rapid telecommunications advancement and ever-increasing electronic connections between people, places, schools, businesses, corporations, and countries, the strain to apply traditional notions of fair play and substantial justice may be too traditional to be useful in a time where people can be instantly connected with other people, things or places with one simple click of a computer mouse.

The recurring problem with the current crop of internet jurisdictional issues is not that lawyers and judges don't understand the nature of the technology, but that computer communication and the internet are anything but "traditional."

As individuals and industry render today's technology obsolete, the courts are under near-constant pressure to develop new rules for a new technology—technology that is testing the limits of the tried-and-true notions of personal jurisdiction based on the bedrock premise of *presence*.

The problem, of course, is the internet gives persons and companies national—and international—presence. Instantly a local newspaper can, with a minimum of time, effort, and dollars, be accessible anywhere, anytime, to any resident of any state (or for that matter, country) who has a computer, an operative telephone connection, and an internet domain.[4]

Early on in personal jurisdiction jurisprudence, the Supreme Court clearly stated that the presence of either the person or the presence of the

---

3. *See, e.g.*, Jane Bird, *The Great Telephony Shakeup and How it Affects Your Business*, MGMT. TODAY, Jan. 1, 1998, at 64. (stating that by the year 2005 a majority of the world's phone traffic could be run via the internet and that internet technology is beginning to dominate all aspects of technology development); Sudhir Chowdhary, *Communications India 97: Showcasing the Future Tech*, COMPUTERS TODAY, Jan. 1, 1998, at 38. (explaining how a deployment of 66 satellites, to be completed in 1998, will enable almost instantaneous, continuous, wireless communications with any point on Earth).

4. *See, e.g.*, David Noack, *America's Newsrooms Bend to the Internet*, EDITOR & PUBLISHER, Feb. 21, 1998, at 13, 13. ("Technology has increased competition. Everyone who wants to publish has a cheap, immediate and global distribution tool through an Internet account accessible from their living room. . . .").

person's property within the plaintiff's chosen forum state would be necessary to avoid offending the Due Process clause of the Constitution.[5] With time, however, the singular notion of presence, the foundational bedrock of traditional "notions" of fair play and substantial justice, was construed, formulated, modified and interpreted to allow for constitutionally acceptable jurisdiction in a country marked by rapidly advancing technology—technology that continues to develop today.[6]

Part III of this Comment will be a review of "traditional" notions of personal jurisdiction. Part IV of this Comment examines the early beginnings of the exercise of personal jurisdiction, the internet, and the initial interpretation of long-arm statutes. Part V of this Comment will examine a few cases highlighting problems concerning the judiciary's increasing reliance on long-arm statute interpretation and personal jurisdiction via internet contacts. Part VI looks to address the body of the Comment and the author's concerns. Part VII of this Comment is a brief conclusion.

III. TRADITIONAL NOTIONS OF PERSONAL JURISDICTION

A. Historical Case Analysis

The Supreme Court first articulated the scope of judicial power over person and property in *Pennoyer v. Neff*.[7] Central to the early decisions was presence in the forum state. "If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate."[8]

The courts soon expanded their jurisdictional powers. Physical presence within the forum state from the beginning was adequate ground for exercising personal jurisdiction, and remains so today.

Logically, the state also should have been able to exercise personal jurisdiction over its citizenry. The presence theory, however, disallowed state action against one of its own citizens if that citizen was beyond the jurisdictional reach of the courts, or, more simply, not present within the

5. Pennoyer v. Neff, 95 U.S. 714 (1877).
6. *See infra* note 36.
7. 95 U.S. 714 (1877).
8. *Id.* at 723-24. *See also* 20 AM. JUR. 2D *Courts* § 80 (1995 & Supp. 1998) ("Jurisdiction in rem is required when the decision sought will directly affect real property. A court of one state has no jurisdiction to establish, or to quiet title to real property situated in another state, or to make any other decision directly affecting real property located in another state, or the title to that real property.") (footnotes omitted).

state. That "defect" was remedied rather handily: domiciliary within the forum state was deemed to be enough presence within a particular state to allow a court to exercise personal jurisdiction over that particular citizen.[9]

B. Advance of the Long-Arm

By far the greatest expansion of the court's power in its exercise of personal jurisdiction over the polis came not by way of judicial pronouncement, but by the flexing of muscles by individual state legislatures in creating the long-arm statute.[10]

In *Hess v. Pawloski*,[11] the court affirmed the constitutionality of the legislature's ability to allow service of process against nonresident defendants in the commonwealth of Massachusetts who, through the operation of a motor vehicle, were involved in an action or proceeding growing out of an accident or collision while on a public way.[12] "The question is whether the Massachusetts enactment contravenes the due process clause of the Fourteenth Amendment."[13]

The Court held that the state's power to regulate the use of its highways was a power that extended to both residents and nonresidents of Massachusetts.[14] Furthermore, the state had the power to require that a motor vehicle operator appoint a registrar for service of process.[15] In addition, under the long-arm statute, use of Massachusetts's roads by a motor vehicle operator constituted an "implied" appointment of the

---

9. *See, e.g.*, Blackmer v. United States, 284 U.S. 421, 436-38 (1932); Milliken v. Meyer, 311 U.S. 457, 462 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.").

10. 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068 (2d ed. 1987).

> [T]he Supreme Court's decision in Hess v. Pawloski upholding the validity of a nonresident motorist statute encouraged states to utilize their police powers to enact a number of statutes asserting jurisdiction based not only on the operation of automobiles within a state but also on engaging in a variety of other hazardous activities or enterprises. As time progressed and liberal judicial construction and emboldened state legislatures gave broader scope to these statutes, the usefulness of the technique suggested by the nonresident motorist statutes became even more apparent.

Id.

11. 274 U.S. 352 (1927).

12. *Id.* at 356. According to the statute, "operation [of the motor vehicle] shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally." *Id.* at 354.

13. *Id.* at 355.

14. *Id.* at 356.

15. *Id.*

registrar as an agent who may be served.[16] Finding that the difference between an express and an implied appointment of a registrar was not "substantial," the Court held that the statute did not offend the due process clause of the Fourteenth Amendment.[17]

Hence, the law was constitutional, the long-arm statute was in accord with due process, and the courts now had personal jurisdiction over nonresident defendants should an accident occur on the highways of Massachusetts.[18]

C. Personal Jurisdiction and Corporate Entities

Exercising personal jurisdiction over corporate entities marked yet another expansion of the states' authority to utilize powers not inconsistent with the constitutional requirement of due process. The presence theory of *Pennoyer*[19] was the bedrock upon which jurisdiction over a person was founded. Since the legal entity of a corporation is considered a "person" in American jurisprudence, granting personal jurisdiction over an entire corporate entity was nothing more than a logical extension of *Pennoyer* and its progeny.

But just as the theory of domiciliary extended the reach of state courts to citizens outside the presence of the forum, the "doing business" theory granted similar power to the courts: foreign corporations were rendered amenable to process,[20] and, hence, subject to the jurisdiction of forums in which neither the corporate buildings nor the corporate officers or shareholders were "physically" present. The "doing business" theory certainly is applicable to internet-based businesses and to other businesses that complete transactions over the internet. Whereas the telephone and the mails were the business tools of yesteryear, the internet is the contact medium of the present and the future. The technological superiority of the internet does not allow users to evade the dictates of the "doing business" theory.

In *International Shoe Co. v. Washington*, the Supreme Court further

16. *Id. a*t 352.
17. *Id.*
18. *Id.* at 356-57.
19. Pennoyer v. Neff, 95 U.S. 714 (1877).
20. Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265 (1917) ("A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there.").

muscled the states' long-arms by articulating the minimum contacts analysis.[21] So long as suit in the forum state did not offend the "traditional notions of fair play and substantial justice,"[22] the Supreme Court held that "due process requires *only that* . . . if [the defendant] be not present within the territory of the forum, he have *certain* minimum contacts . . . ."[23]

The minimum contacts analysis, when applied to corporate entities, satisfied the due process clause by comporting with traditional notions of fair play and substantial justice. Hence, corporations, through their business activities, satisfied the requisite minimum contacts and were forced to respond to lawsuits in the state where the contact had originated.[24]

No longer would *physical* presence of person or property within a state be required to exercise jurisdiction.[25] The "quality" and "nature" of corporate activities and corporate contacts became the basis of jurisdiction, so long as due process was not offended.[26]

D. Exercising Jurisdictional Restraint

Although the Supreme Court made long-arm statutes increasingly powerful, the "purposeful availment" theory of *Hanson v. Denckla* placed important restrictions on the jurisdictional authority of state

---

21. 326 U.S. 310 (1945).

22. *See* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

23. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (emphasis added). In addition,

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.
>
> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Id. at 319 (citations omitted).

24. *Id.* at 320 ("It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.").

25. *Id.* at 316-17 ("For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.").

26. *Id.* at 319.

courts.[27] "Unilateral" activity by a defendant alone would not satisfy the minimum contacts doctrine. A defendant would have to "purposefully avail" himself of the "benefits and protections" of the forum state's laws.[28]

The "stream of commerce" theory in *World-Wide Volkswagen Corp. v. Woodson* was prescient in that it spoke of "technological progress."[29] Use of "foreseeability" alone in determining whether a court could exercise personal jurisdiction, the Supreme Court concluded, would be a violation of the due process clause.[30] However, due process considerations were satisfied if the state asserted personal jurisdiction over a corporation that had placed its products in the "stream of commerce" with the "expectation" they would be purchased in the forum state by state residents.[31]

In *Burger King Corp. v. Rudzewicz*,[32] the court created a hybrid requirement of purposeful availment and of continued, established minimum contacts with the forum state.[33] According to the Supreme Court, minimum contacts were still the "touchstone" of personal jurisdiction that comported with the mandate of the Constitution.[34] When minimum contacts analysis was developed, however, the Court could not have envisioned the rise and dominance of the internet. "Minimum contacts" today can mean as little as accessing a webpage.

Later cases refined notions of "specific" versus "general" jurisdiction.[35] Against the backdrop of jurisprudence contained herein,

---

27. 357 U.S. 235 (1958).
28. *Id.* at 253.

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

Id. (construing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
29. 444 U.S. 286 (1980).
30. *Id.* at 295.
31. *Id.* at 297-98.
32. 471 U.S. 462 (1985).
33. *Id.* at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'").
34. *Id.*
35. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987)

various formulations and permutations have continued to expand, refine, and delineate the power of courts over people and entities within and outside the United States.[36]

IV. PERSONAL JURISDICTION AND THE INTERNET: THE INITIAL CASES

A. Early Decisions: Advertising on the 'Net

In *Inset Systems, Inc. v. Instruction Set, Inc.*,[37] the judiciary analyzed whether advertising on the internet constituted contacts sufficient enough to hale a foreign corporation into a forum chosen by the plaintiff. Plaintiff Inset Systems, Inc., ("Inset"), a Connecticut corporation, sued for damages and injunctive relief against Instruction Set, Inc., ("Instruction Set"), a Massachusetts corporation, for Instruction Set's use of Inset's trademark, "INSET."[38]

On August 23, 1985, Inset filed for the registration of the trademark "INSET" and received that registration on October 21, 1986.[39] Sometime thereafter, Instruction Set obtained the internet domain address "INSET.COM."[40] Inset became aware of the use of its trademark by Instruction Set when Inset attempted to obtain that exact internet domain.[41] In addition to the registered federal trademark,

---

> [P]lacement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. . . . [A] defendant's awareness 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 also* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 418 (1984) (holding that mere purchases, even if made at regular intervals, are not sufficient to support in personam jurisdiction over a nonresident corporation if the purchases are unrelated to the cause of action).

36. 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069 (2d ed. 1987) states:

> Any attempt to catalogue all of the cases and situations [in which courts are called upon to apply jurisdictional statutes] would be futile and of limited utility. . . . Practitioners also should bear in mind the tremendous flexibility of both the due process requirements in jurisdictional inquiries and the language of most long-arm statutes. Although generalizations can be made as to some recurrent issues, the resolution of individual cases to a great extent will turn on the particular facts of a case and the decisional law of the jurisdiction.

Id.

37. 937 F. Supp. 161 (D. Conn. 1996).

38. *Id.* at 162-63.

39. *Id.* at 163 (Registration Number 1,414,031).

40. *Id.* at 163. The problem, of course, is one company's website address and online "name" utilized another company's trademarked name.

41. *Inset Systems*, 937 F. Supp. at 163. The court explained an "internet domain" as being:

Instruction Set's telephone number, "1-800-US-INSET," utilized Inset's registered trademark for advertisement and business purposes.[42] After filing suit, Instruction Set sought to dismiss the action via a 12(b)(2)[43] motion for lack of personal jurisdiction.

Plaintiff Inset believed jurisdiction was proper pursuant to Connecticut's long-arm statute[44] "because [Instruction Set] has repeatedly solicited business within Connecticut via its Internet advertisement and the availability of its toll-free number."[45]

Interestingly, the court found the presence of internet advertising persuasive evidence in concluding that Instruction Set's conduct satisfied personal jurisdiction requirements under Connecticut's long-arm statute. That decision was articulated by Justice Covello when he stated, "unlike hard-copy advertisements . . . which are often quickly disposed of and reach a limited number of potential customers, Internet advertisements are in electronic printed form so that they can be accessed again and again by many more potential customers."[46]

> [S]imilar to street addresses, in that it is through this domain address that Internet users find one another. A domain address consists of three parts: the first part identifies the part of the Internet desired such as world wide web (www), the second part is usually the name of the company or other identifying words, and the third part identifies the type of institution such as government (.gov) or commercial (.com), etc.

Id. at 163. The court realized that "[i]f a company uses a domain which is identical to the name or trademark of a company, an Internet user may inadvertently access an unintended company. . . . As a result, confusion in the marketplace could develop." *Id.* at 163.

42. *Id.* ("Inset did not authorize [Instruction Set's] use of its trademark, 'INSET,' in any capacity.")

43. FED. R. CIV. P. 12(b)(2) (motion to dismiss for lack of personal jurisdiction).

44. CONN. GEN. STAT. § 33-411(c)(2) (repealed 1997), but replaced by CONN. GEN. STAT. § 33-929(f) (1997), which states, in pertinent part,

> (f) Every foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: . . . (2) out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state . . . .

Id.

45. *Inset Systems*, 937 F. Supp. at 164.

46. *Id.* at 164. However, the court's analysis could apply anywhere, and, hence, mere presence on the internet could become grounds for national personal jurisdiction based solely on internet presence—a result that may offend traditional notions of fair play and substantial justice.

The court held advertising via the internet was a repetitive solicitation that satisfied the requirements of Connecticut's long-arm statute.[47] Hence, the Connecticut federal court exercised jurisdiction over Instruction Set via the long-arm statute.[48]

In establishing that Instruction Set satisfied the requisite minimum due process contacts, the court turned to the language of *Hanson v. Denkla*,[49] stating that the "essence" of minimum contacts was that a defendant "purposefully avail" itself of the privilege of conducting business in the forum state, thereby invoking the benefits and protections of Connecticut's laws.[50]

The court concluded that Instruction Set had "purposefully directed its advertising activities toward [Connecticut] on a continuing basis . . . [and] could reasonably anticipate the possibility of being haled into court here."[51] The activities outlined by the court included the defendant's advertisement via the internet and the defendant's toll-free number. Although the court did state that Instruction Set had purposefully directed advertising activity at Connecticut, the court, in language that seemed to contradict that pronouncement, stated "Instruction has directed its advertising activities via the internet and its toll-free number toward not only the state of Connecticut, *but to all states*."[52] In concluding that Instruction Set directed advertising activities to all states, the court drew a distinction between traditional forms of media solicitation and internet advertising. Justice Covello made note of the continuous availability of internet advertisements, inferring that such internet advertisements were perhaps more prevalent than customary radio and television ads. Therefore, such ads were evidence enough to hold that Instruction Set had purposefully availed itself of the privilege of doing business in Connecticut.[53]

Did the court go too far in extrapolating Instruction Set's motives by analyzing the medium used to communicate its message? Radio and television advertisements are, by their nature, directed at a particular

---

47. *Id.*
48. *Id.*
49. 357 U.S. 235 (1958).
50. *Inset Systems*, 937 F. Supp. at 164.
51. *Id.* at 165.
52. *Id.* (emphasis added). The court continued, "The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state." *Id.* Was the District Court of Connecticut implying that Instruction Set would be amenable to personal jurisdiction in every state of the Union based on its internet activities and toll-free telephone number?
53. *Id.* "Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. [Instruction Set] has, therefore, purposefully availed itself of the privilege of doing business with Connecticut." *Id.*

market. Internet advertising, however, is indiscriminate in nature and national in scope—its sheer breadth is inherent in the medium. The language of the court, if adopted by the majority of courts, would allow any court to hold internet advertising ipso facto indicates the internet advertiser intended to direct marketing activities at all forum states. Does not such a finding offend traditional notions of fair play and substantial justice—the very doctrine the court invokes?

Still, in furtherance of their conclusion, the *Inset* court found that exercising personal jurisdiction over the defendant would comport with traditional notions of fair play and substantial justice because the distance between the parties' respective home states was "minimal," and because Connecticut had an interest in adjudicating the matter.[54]

B. Business Transactions and the Internet

When it comes to personal jurisdiction, business transactions that give rise to the exercise of personal jurisdiction may be the easiest transaction to adjudicate. Unlike the uncertainty of advertisements, conducting business transactions over the internet is almost surely going to lead to the exercise of personal jurisdiction over the business owner should a lawsuit be filed. *CompuServe v. Patterson* considered business transactions conducted via the internet and, based on those transactions, decided to exercise jurisdiction.[55]

CompuServe, a computer information and internet service provider headquartered in Ohio, attempted to obtain personal jurisdiction over Patterson, a resident of Texas, via CompuServe's electronic tentacles.[56] Patterson, a subscriber of CompuServe, entered into an agreement with CompuServe whereby Patterson would make available "shareware"[57] computer programs on the CompuServe system.

---

54. *Id*.

55. 89 F.3d 1257, 1262 (6th Cir. 1996) ("This case presents a novel question of first impression: Did CompuServe make a prima facie showing that Patterson's contacts with Ohio, which have been almost entirely electronic in nature, are sufficient, under the Due Process Clause, to support the district court's exercise of personal jurisdiction over him?").

56. *Id.* at 1260-61.

57. "Shareware" is a general term that refers to computer programs that are distributed electronically free of charge. The creators of such programs suggest to users that, after a trial period specified by the creator, the user should in good conscience remit a pre-determined amount of money to the program's creator for his efforts in creating and distributing the program.

During the course of the agreement, Patterson transmitted thirty-two files to CompuServe, advertised his shareware on the CompuServe system, and allegedly sold about $650 of shareware to twelve residents of Ohio who subscribed to CompuServe.[58]

Patterson alleged that CompuServe began to market a computer program similar to his shareware.[59] CompuServe's and Patterson's computer programs were "designed to help people navigate their way around the larger Internet network."[60] In an email to CompuServe, Patterson alleged CompuServe's programs had "markings and names" similar to Patterson's own navigation program.[61] Patterson demanded "at least $100,000" to settle his "potential" claims of trademark infringement and deceptive trade practices.[62] CompuServe sought a declaratory judgment against Patterson in the Southern District of Ohio.[63]

Patterson claimed he had never been to Ohio, CompuServe's headquarters.[64] Patterson did, however, advertise his shareware on CompuServe, indicating his shareware price in at least one of the advertisements.[65] In addition, Patterson sold $650 worth of his shareware to twelve Ohio residents through the CompuServe system.[66]

The district court dismissed CompuServe's action for lack of personal jurisdiction over Patterson and denied CompuServe's motion for a rehearing.[67] CompuServe appealed.[68] Patterson did not file an appellate brief and did not appear for oral argument.[69]

On appeal, the court's decision turned on whether Patterson's electronic contacts with CompuServe in Ohio were sufficient to support

---

58. *CompuServe*, 89 F.3d at 1261.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*, 89 F.3d at 1261. CompuServe sought to obtain jurisdiction via diversity subject matter jurisdiction. *Id.*
64. *Id.* at 1260. Patterson was an attorney, a resident of Houston, Texas, and claimed he had never visited Ohio. *Id.*
65. *Id.* at 1261.
66. *Id.*
67. *Id.*

> The district court . . . granted Patterson's motion to dismiss for lack of personal jurisdiction in a thorough and thoughtful opinion. At various points in its consideration of the case, however, the district court expressly relied on Patterson's affidavit. The court below then denied CompuServe's motion for a rehearing, which it construed as a motion for reconsideration under Federal Rule of Civil Procedure 59(e).

Id. (footnote omitted).
68. *Id.*
69. *Id.*

personal jurisdiction.[70] The court briefly discussed Ohio's long-arm statute,[71] concluding that an Ohio court could exercise personal jurisdiction over a nonresident if that nonresident transacted "any business" in Ohio.[72] Further, the "transacting business" clause of Ohio's long-arm statute extended to the limits of constitutional due process.[73] The court also stated that CompuServe sought specific, rather than general, personal jurisdiction over Patterson since "CompuServe base[d] its action on Patterson's act of sending his computer software to Ohio for sale on its [CompuServe's] service."[74]

In its ruling on CompuServe's appeal, the Court of Appeals for the Sixth Circuit concluded it would be reasonable to exercise personal jurisdiction over a defendant based on the defendant's internet contacts in the plaintiff's chosen forum. The court held that Patterson's contacts with Ohio, through his use of the CompuServe system, were sufficient to support the exercise of personal jurisdiction.[75]

In so holding, the court engaged in an analysis of "three criteria" in deciding whether Patterson, a nonresident defendant, had sufficient contacts such that the district court's exercise of jurisdiction would comport with traditional notions of fair play and substantial justice.[76] The traditional notions as applied to Patterson were whether (a) Patterson purposefully availed himself of the "privilege" of acting in the forum state, (b) the cause of action arose from Patterson's activities in Ohio, and (c) Patterson's connection(s) with Ohio were substantial enough to render jurisdiction over Patterson "reasonable."[77]

Important to the court's analysis were actions by Patterson in which he "purposefully availed himself of the privilege of doing business" in

70. *Id.* at 1257. "The real question is whether these connections with Ohio are 'substantial' enough that Patterson should reasonably have anticipated being haled into an Ohio court." *Id.* at 1264.

71. OHIO REV. CODE ANN. § 2307.382(A) (West 1994) ("A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: (1) Transacting any business in this state. . . .").

72. *CompuServe*, 89 F.3d at 1262.

73. *Id.*

74. *Id.* at 1263.

75. *Id.* at 1268-69. "We conclude that Patterson has knowingly made an effort—and, in fact, purposefully contracted—to market a product in other states, with Ohio-based CompuServe operating, in effect, as his distribution center. Thus, it is reasonable to subject Patterson to suit in Ohio, the state which is home to the computer network service he chose to employ." *Id.* at 1263.

76. *Id.*

77. *Id.*

Ohio.[78] Such availment was satisfied when the contacts with the forum state were a proximate result of actions by the defendant and when, through such conduct and connection, the defendant should "reasonably anticipate being haled into court there."[79]

The court quickly noted that the purposeful availment requirement "does not, however, mean that a defendant must be physically present in the forum state."[80] Such a requirement would, of course, lead to the logical and necessary result that nonresident defendants could never be haled into court via internet contacts. In concluding that physical presence was not required, the court of appeals once again relied on the language of *Burger King*.[81]

Although the district court found that Patterson's contacts with Ohio were not substantial and did not amount to purposeful availment,[82] the court of appeals disagreed. The Sixth Circuit noted that Patterson's signed contract with CompuServe expressly provided a choice of law clause. Ohio law would govern the contract dispute; Patterson "purposefully perpetuated" a relationship with CompuServe via repeated communications with CompuServe's computer system in Ohio.[83]

Based on the foregoing analysis, one conclusion is that something more was required than mere presence on the internet. Justice Brown noted, "In fact, it is Patterson's relationship with CompuServe as a

---

78. *Id.*

79. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985)).

80. *Id.* at 1264.

81. *Id.* ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.") (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)). Another court stated,

> Physical presence of an agent is not necessary . . . for the transaction of business in a state. The soliciting of insurance by mail, the transmission of radio broadcasts into a state, and the sending of magazines and newspapers into a state to be sold there by independent contractors are all accomplished without the physical presence of an agent; yet all have been held to constitute the transaction of business in a state.

CompuServe v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996) (quoting Southern Mach. Co. v. Mohasco Indus., 401 F.2d 374, 382 (6th Cir. 1968)).

82. *CompuServe*, 89 F.3d at 1264 ("The district court . . . found no purposeful availment on the part of Patterson.").

83. *Id.* The relationship was "perpetuated" by Patterson because, among other things,

> Patterson himself took actions that created a connection with Ohio in the instant case. He subscribed to CompuServe, and . . . entered into the Shareware Registration Agreement. . . . Once Patterson had done those two things, he was on notice that he had made contracts, to be governed by Ohio law, with an Ohio based company. . . . Moreover, he initiated the events that led to the filing of this suit by making demands of CompuServe via electronic and regular mail messages.

Id. at 1264.

software provider and marketer that is crucial to this case. Though all this happened with a *distinct paucity of tangible, physical evidence*, there can be no doubt that Patterson purposefully transacted business in Ohio."[84]

Without such a relationship, the court admitted that "merely" entering into a contract with CompuServe would not satisfy the minimum contacts analysis; something more was required.[85] Even more surprising, the court concluded that if Patterson had made available his software on CompuServe, "Patterson's injection of his software product into the stream of commerce, without more, would be at best a dubious ground for jurisdiction."[86]

The court, in its citation, pointed to the tension between Justice O'Connor's opinion in *Asahi* that placement of a product into the "stream of commerce," with nothing more, would not be an act indicating "purposeful availment," and between Justice Brennan's concurring opinion rejecting the plurality's conclusion on the issue of product placement into the "stream of commerce."[87] Without Justice O'Connor's exposition on the placement of products into the stream of commerce, could a court hold that making shareware available on the internet ipso facto allows the proponent of the shareware amenable to personal jurisdiction in any court in the nation? Perhaps jurisdiction and the internet has less to do with traditional notions and more to do with working definitions.

Concluding that Patterson purposefully availed himself of Ohio privileges, the court was also required to find that CompuServe's claims against Patterson "arose" out of Patterson's activities in Ohio; without a sufficient nexus between Patterson's activities and CompuServe's claims, the exercise of jurisdiction would have been improper.[88] Patterson's contacts needed to be "related to the operative facts of the controversy."[89]

---

84. *CompuServe*, 89 F.3d at 1264-65 (emphasis added).
85. *Id.* at 1265.
86. *Id.* at 1265 (construing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987)).
87. Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 112 (1987).
88. *CompuServe*, 89 F.3d at 1267.
89. *Id.* ("If a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts.") (citations omitted).

The district court held that Patterson's contacts were entirely "incidental" and the dispute could have occurred if Patterson had placed his software on another network or in a retail store.[90] The court of appeals, however, in holding that Patterson's contacts with Ohio were related to the operative facts of the controversy,[91] reiterated the same facts it used to conclude that Patterson had purposefully availed himself of Ohio privileges.[92] Specifically, "Patterson's threats—which were contacts with Ohio—gave rise to the case before us . . . ."[93]

The court had little difficulty in meeting the third prong, reasonableness, and held that exercising jurisdiction would comport with traditional notions of fair play and substantial justice. Although the court considered defending a suit in Ohio burdensome for Patterson, Patterson "knew" that he was making a "connection" with Ohio when Patterson entered into the Shareware Registration Agreement.[94]

Despite the court's conclusion that the defendant did, in fact, know he was opening himself up to suit in a foreign state, certainly most internet users would be quite surprised to learn that their online contacts can lead to offline suits requiring their presence in far-away venues. Furthermore, the law in this area had barely begun to percolate at the time this decision was reached—how one was supposed to "know" that they are liable to suit in another jurisdiction is perplexing. To bolster their decision, the court held that Ohio had a strong interest in hearing this dispute.[95]

Finally, in concluding that exercising jurisdiction over Patterson would be reasonable, the court said "[s]omeone like Patterson who employs a computer network service like CompuServe to market a product can reasonably expect disputes with that service to yield lawsuits in the service's home state."[96]

Having concluded that jurisdiction was proper in light of Patterson's "purposeful availment," Patterson's activities in the forum state, and the

---

90. *Id*.
91. *Id.*
92. *See supra* note 83.
93. *CompuServe*, 89 F.3d at 1267.

> Moreover, as noted heretofore with regard to the purposeful availment test, CompuServe's declaratory judgment action arose in part because Patterson threatened, via regular and electronic mail, to seek an injunction against CompuServe's sales of its software product, or to seek damages at law if CompuServe did not pay to settle his purported claim.

Id.

94. *Id.* at 1268. Although the contract provided that it would be governed by Ohio law, *id.* at 1260, Patterson may not have known that he was also subjecting himself to the jurisdiction of the Ohio courts.
95. *Id.*
96. *Id.*

reasonableness of exercising personal jurisdiction, the district court was reversed. Patterson had become the unwitting victim of the very internet contacts he used to further his business interests.

The court noted that its holding did not subject Patterson "to suit in any state where his software was purchased or used."[97] In addition, "we . . . do not hold that CompuServe may . . . sue any regular subscriber to its service for nonpayment in Ohio . . . ."[98]

C. Tortious Acts Online

Approximately one month after the *Patterson* decision, the court in *Maritz v. Cybergold*[99] also allowed the plaintiff to gain personal jurisdiction over a defendant based, in part, on internet activities of the defendant.

Unlike *Patterson*, however, the exercise of personal jurisdiction was granted over a defendant with internet contacts who committed a "tortious act" within the forum state. The court found it unnecessary to decide whether Patterson's activities satisfied the "transaction of any business" test because the court concluded that the Cybergold was amenable to service under the commission of a tortious act provision in Missouri's long-arm[100] statute.[101]

Maritz alleged that CyberGold was infringing on Maritz's trademark, thereby violating the Lanham Act, 15 U.S.C. § 1125(a), and CyberGold's infringement was causing economic harm and injury to Maritz.[102] The court stated that a violation of the Lanham Act is tortious in nature and, hence, the court "conclud[ed] that Missouri's long-arm statute reaches the defendants, even assuming CyberGold's allegedly infringing activities were wholly outside of Missouri, because the

---

97. *Id.*
98. *CompuServe*, 89 F.3d at 1268.
99. Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996).
100. MO. REV. STAT. § 506.500.1(3) (1998).

> Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts. . . (3) The commission of a tortious act within this state. . . .

Id.
101. *Maritz*, 947 F. Supp. at 1331.
102. *Id.* "Plaintiff seeks a preliminary injunction to enjoin CyberGold's alleged trademark infringement and unfair competition." *Id.* at 1329.

allegedly infringing activities have produced an effect in Missouri . . . ."[103]

The court employed a slightly different test than the one used by the *CompuServe*[104] court. The *Maritz* court exercised personal jurisdiction in accordance with due process and inquired as to whether there were the requisite minimum contacts between nonresident CyberGold and the forum state.[105]

The *Maritz* court somewhat hesitantly analogized internet use with use of the mails and the telephone.[106] "Unlike use of the mail, the internet, with its electronic mail, is a tremendously more efficient, quicker and vast means of reaching a global audience."[107] The court realized the implications of internet usage; by the simple act of constructing and posting information at a website, an internet user has done everything necessary to reach the global internet audience.[108] This language implies more than the "simple act" of website construction and the posting of information would be required to exercise personal jurisdiction. If merely setting up a website were enough to satisfy due process and previous case law personal jurisdictional analysis, one could argue that simple use of the internet would subject the user to nationwide jurisdiction.

The court employed a five-factor test[109] in exercising personal jurisdiction over CyberGold. As for "traditional notions of fair play and substantial justice," the court felt its decision was in accordance with *Burger King*[110] because the "[d]efendant, who has availed itself to this forum has not shown that it is so burdened by defending itself in this forum that traditional notions of fair play and substantial justice are

---

103. *Id.* at 1331.

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

105. *Maritz*, 947 F. Supp. at 1332.

> Thus, the Court must turn to the issue of whether the Court's exercise of personal jurisdiction over defendant CyberGold under the facts of this case would violate due process. Due process requires that there be 'minimum contacts' between the nonresident defendant and the forum state before a court can exercise personal jurisdiction over the defendant.

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

106. *Maritz*, 947 F. Supp. at 1332. ("Because the internet is an entirely new means of information exchange, analogies to cases involving the use of mail and telephone are less than satisfactory in determining whether defendant has 'purposefully availed' itself to this forum.").

107. *Id.*

108. *Id.*

109. *Id.* (The test includes: "(1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its resident; (5) the convenience of the parties.").

110. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

implicated."[111]

The court appreciated the "nature and quality" of CyberGold's contacts via the website and realized the contacts "[were] clearly of a different nature and quality than other means of contact with a forum such as the mass mailing of solicitations into a forum . . . ."[112]

But the court also noted that CyberGold's characterization of its internet activity as "passive" was, in its opinion, inaccurate.[113] "[CyberGold's] intent is to reach all internet users, regardless of geographic location. . . . CyberGold has consciously decided to transmit advertising information to all internet users . . . ."[114] Specifically, CyberGold's posting information about its website and CyberGold's attempt to develop a mailing list were essential to its success as an internet service provider.[115]

Could a broader rule be extrapolated from this language? Perhaps if internet activity is not deemed "essential" by a particular court, the "quality and nature" of that internet contact would not be sufficient to support the exercise of personal jurisdiction. The court did not directly say so in its opinion, but it is a reasonable conclusion one could draw from the court's language.

The court also pointed out that CyberGold's website automatically and indiscriminately responded to all users that accessed it—actions that the court felt were not properly characterized as "passive."[116]

Because the website was not merely a passive advertisement and because CyberGold's activities were essential to its success as a business, the court held CyberGold's intent and "contacts are of such a quality and nature, *albeit a very new quality and nature for personal jurisdiction jurisprudence*, that they favor the exercise of personal jurisdiction over the defendant."[117]

The court also found that Cybergold had purposefully availed itself of the privilege of conducting business in Missouri,[118] that the litigation

111. *Maritz*, 947 F.Supp. at 1334.
112. *Id.* at 1333.
113. *Id.*
114. *Id.*
115. *Id.* If the internet activity is not "essential," are the "quality and nature" of the contacts insufficient to support the exercise of personal jurisdiction?
116. *Id.*
117. *Id.* (emphasis added).
118. *Id.* ("As to the second factor—the quantity of contacts—the Court finds that defendant has transmitted information into Missouri regarding its services approximately 131 times. The information transmitted is clearly intended as a promotion of

resulted from injuries, in part, that arose or related to CyberGold's website and the information posted at the website,[119] and that CyberGold "could reasonably anticipate the possibility of being haled into court [in Missouri]."[120]

Hence, on the allegation of a tortious act in connection with a company's internet usage, the judiciary exercised personal jurisdiction arising out of those contacts.

V. DIVERGENT OPINIONS, SIMILAR FACTS: NEW YORK, MINNESOTA

A. The Federal Court of Appeals

The Court of Appeals for the Second Circuit weighed in on personal jurisdiction and internet advertising in *Bensusan Restaurant Corp. v. King*.[121] The controversy surrounded the use of the name "The Blue Note."[122] Both Bensusan Restaurant Corporation, located in New York City, and King, a Missouri resident whose club was located in Columbia, Missouri, used "The Blue Note" name to identify their respective clubs.[123]

King advertised his cabaret club through a local internet service provider, ThoughtPort Authority, Inc.[124] Sometime after King's advertisement, Bensusan brought an action against King in the Southern District of New York for violations of the Lanham Act, violations of the Federal Trademark Dilution Act, and common law unfair competition.[125]

Bensusan sought jurisdiction over King pursuant to New York's long-arm statue[126] based upon the allegedly tortious actions of a non-

---

CyberGold's upcoming service and a solicitation for internet users, CyberGold's potential customers.") (footnotes omitted).

119. *Id.*

> This service and the promotional efforts that CyberGold is employing by posting the information its website (sic) are allegedly infringing on plaintiff's alleged trademark. . . . CyberGold's acts of developing a mailing list through its acceptance of addresses on its website are also a part of the allegedly infringing activity about which plaintiff complains.

Id.

120. *Id.* at 1334.

121. 126 F.3d 25 (2nd Cir. 1997).

122. *Id.* at 26.

123. The New York cabaret was an "enormously successful jazz club" in Manhattan; King's Columbia, Missouri club was a "small cabaret featuring live entertainment." *Id.*

124. *Id.* at 27.

125. *Id.* Specifically, Bensusan alleged violations of 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1) and 1125 (a), and violations of 15 U.S.C. § 1125(c)(3)(c) (1995). *Id.*

126. N.Y. C.P.L.R. § 302(a)(2)-(3) (McKinney 1997).

domiciliary who did not transact business in New York.[127] In addition to monetary damages, Bensusan sought to enjoin King from using "The Blue Note" in any "manner likely to cause confusion, or to cause mistake, or to deceive or from otherwise representing to the public in any way that [King's Club]" was affiliated, associated or connected with Bensusan's jazz club in New York City.[128] Although King placed a disclaimer on his website to distinguish the two nightclubs,[129] Bensusan was not satisfied and sued defendant King for his use of the name and his internet advertisement.[130]

The court declined to exercise jurisdiction after interpreting New York's long-arm in accord with a majority of the district judicial opinions from the circuit.[131] Judge Van Graafeiland concluded that plaintiff Bensusan had failed to allege the defendant had committed a tortious act in New York as required by the long-arm statute.[132] The key distinction for the court was the alleged acts took place by persons who were present in Missouri, not New York.[133] Furthermore, even if the plaintiff suffered injury in New York, it did not establish a "tortious act" in New York state according to N.Y. C.P.L.R. Section 302(a)(2).[134]

From the foregoing analysis, one might conclude that jurisdiction and the internet is a settled question. The *Bensusan* court required that a tortious act be committed within the jurisdictional boundaries of New York, and dismissed the suit when they found the alleged act had been committed in another state.

Credit the judge with foresight, but just as one court may exercise prudent restraint, others, in their zeal to grab defendants from the ether of cyberspace, may show little, if any, restraint.

---

127. *Bensusan*, 126 F.3d at 27.
128. *Id.*
129. The disclaimer read as follows: "The Blue Note, Columbia, Missouri, should not be confused in any way, shape, or form with Blue Note Records or the jazz club, Blue Note, located in New York. The Cyberspot is created to provide information for Columbia, Missouri area individuals only, any other assumptions are purely coincidental." *Id*.
130. *Id.*
131. *Id.* at 29.
132. *Id.*
133. *Id.*
134. *Id.*

B. Same Ciruit, Same Long-Arm Statute, Different Result

In another action, the federal district court based on the same long-arm statute as *Bensusan*, had a result opposite that of the *Bensusan* court. In *American Network, Inc. v. Access America/Connect Atlanta, Inc.*,[135] the Southern District of New York relied not only on traditional jurisdictional analysis but also on recent decisions involving jurisdiction and contacts via the internet. Plaintiff American Network, Inc., a New York corporation, provided internet services to some 18,000 customers, including 1,500 residents of New York City, American's principle place of business.[136] When selling internet services, the company used the trademark "American.Net" and "American Network, Inc."[137]

Defendant Access America/Connect Atlanta, Inc. ("Access America"), a Georgia corporation that also provided internet services, used the mark "america.net" on its homepage and, in addition, claimed several divisions of "America.Net" sold various internet services to different parts of the country.[138] Unlike plaintiff, defendant Access America claimed it had only six subscribers in New York, a small portion of its total business operations.[139]

Plaintiff American Network sued Access America for trademark infringement surrounding the use of the name "America.Net." Since federal trademark laws do not give rise to nationwide service of process,[140] plaintiff American Network utilized New York's long-arm statute[141] to successfully obtain personal jurisdiction over the Georgia corporation in New York federal court.[142] Defendant Access America argued that New York's long-arm statute did not apply and that

---

135. American Network, Inc. v. Access America/Connect Atlanta, Inc., 975 F. Supp. 494 (S.D.N.Y. 1997).

136. *Id.* at 496.

137. *Id.*

138. *Id.* at 495.

139. *American Network*, 975 F. Supp. at 496. ("Defendant [Access America] claims that it has 7,500 subscribers worldwide but only six in New York. It claims that those New York subscribers constitute only 0.08% of its customer base and contribute only $150 per month out of its monthly revenue of $195,000.").

140. *Id.*

141. N.Y. C.P.L.R. § 302 (McKinney 1997). The court did grant jurisdiction under New York's Civil Practice Law and Rules § 302(a)(3)(ii). That section allows for jurisdiction over any non-domiciliary who in person or through an agent: "[E]xpects or reasonably should expect the act to have consequences in the state and derives *substantial* revenue from interstate or international commerce . . . ." (emphasis added). But could .08% from New York ever be considered substantial revenue? Why didn't the court follow the lead of *Bensusan* in 1996? The *American* court was not concerned with New York revenue per se, but all interstate revenue, which the defendants admitted was substantial. Perhaps the New York customers provided a necessary element in the exercise of jurisdiction, but other elements, such as interstate revenue, were as important.

142. *American Network*, 975 F. Supp. at 498.

exercising jurisdiction would be violative of due process.[143]

The *American* court, despite the small number of New York customers, did allow jurisdiction, claiming "[i]t was reasonably foreseeable to defendant that publishing its home page on its Web site, with the offending mark, would have New York consequences."[144]

The *American* court outlined several due process considerations pertinent to its conclusion. Exercising jurisdiction would comport with due process because the defendant purposefully availed itself of New York laws by signing up and by mailing software packages and agreements to six New York customers.[145] The court found a sufficient nexus between defendant Access America and the claims raised by plaintiff.[146] The *American* court, in comport with *World-Wide*,[147] also found that the defendant could have "reasonably anticipated" being haled into New York "from claims arising from the use of its mark in selling its services, because defendant sold its services there."[148]

The court stated that there were "other factors," consistent with *Burger King*,[149] that warranted jurisdiction in New York.[150] The court noted that the inconvenience of litigating the matter in New York "may be substantial" to the defendant. However, the court concluded such substantial inconvenience was outweighed by New York's "clear

---

143. *Id.*

144. *Id.* Utilizing this rationale, however, *any* state could theoretically exercise jurisdiction under such a loose standard. Substitute "New York" for "international," since the effect of owning a webpage is the same no matter the state where the webpage was created.

145. *Id.* at 499.

> [Defendant] has signed up six New York subscribers to the services advertised on its home page. . . . Defendant also receives a total of $150 per month from those subscribers. . . . Those contacts show defendant's purposeful availment of New York. . . . If defendant sought to avoid subjecting itself to suit in New York, it could have chosen not to send those materials there.

Id. (citations omitted).

146. *Id.* ("The subscriptions are evidence of defendant's effort to market its services in New York. . . because it is defendant's effort to sell its services under its mark that has allegedly caused the confusion of which the plaintiff complains.").

147. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *see supra* note 29.

148. *American Network*, 975 F. Supp. at 499.

149. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

150. *American Network*, 975 F. Supp. at 500 ("Those factors include the burden on defendant, forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the efficient resolution of controversies, and the shared interest of the states in furthering fundamental substantive social policies.").

interest" in adjudicating the matter and plaintiff's place of business rendered New York's convenience for plaintiff "obvious."[151]

The defendant argued, to no avail, that the district court should follow *Bensusan* and either dismiss or transfer the action.[152] Although both *American Network* and *Bensusan* concerned New York jurisdiction of trademark infringement arising out of webpage advertisements, the *American* court believed the facts of the two cases to be "far different."[153] Are the two cases so different that finding no jurisdiction in *Bensusan* and exercising jurisdiction against the defendant in *American* were supported by the facts in each opinion?

The *American* court made much ado concerning the defendant's receipt of revenues of $150 per month from six New York customers.[154] Such revenues, the *American* court believed, were evidence of the defendant's purposeful availment of and defendant's directing activity towards New York.[155] At first blush, $150 and six customers does not appear to be much in terms of New York business. In *Bensusan*, the court noted that under section 302(a)(3) of New York's Civil Practice Law and Rules, the statutory requirement for jurisdiction is met when the defendant derives substantial revenue from interstate commerce.[156] The defendant in *American* admitted it derived substantial revenue from interstate commerce.[157] The amount of income derived from interstate commerce by the *American* defendant was critical under the terms of New York's long-arm statute.[158]

Unfortunately for Access America, the relatively small number of New York customers and the relatively small amount of New York revenue was of little importance; that the defendant had *any* customers and revenue from New York was the final nail in its jurisdictional coffin. In contrast, the defendant in *Bensusan* did not, according to the court, derive substantial revenue from interstate commerce as required by the New York long-arm statute.[159] The lack of interstate revenue, coupled

---

151. *Id.*
152. *Id.* at 500-501.
153. *Id.* at 500 ("In finding that the Missouri resident had not taken any acts purposefully availing itself of New York's laws, the [Bensusan] court observed that there was no evidence that he had done any business with New York residents or that either he or his club derived substantial revenue from interstate commerce.") (citations omitted).
154. *Id.* at 499.
155. *American Network*, 975 F. Supp. at 497.
156. Bensuasan Restaurant Corp. v. King, 126 F.3d 25, 29 (2nd Cir. 1997).
157. *American Network*, 975 F. Supp. at 497.
158. *See supra* note 141.
159. *Bensusan*, 126 F.3d at 29. In addition,

> To satisfy the [substantial revenue] requirement, Bensusan relies on the arguments that King participated in interstate commerce by hiring bands of national stature and received revenue from customers—students of the

with a lack of revenue and customers from New York, represent the total of statutory factual elements leading to the different outcomes in *Bensusan* and *American Network*.

Defendant Access America's other claims urging that the case not be tried in New York were unpersuasive.[160] What about the requirement in *Bensusan* that a defendant or his agent must be physically present in the state in order to be haled into court in New York? The *American* court only touched upon the issue. It seems, then, that the internet connections were vitally important to the exercise of jurisdiction, yet the nature of the contacts was of no consequence at all. For in *American* the defendant did not set foot in the state, much like the *Bensusan* defendant. One wound up in a New York Court, one did not. The internet contact was crucial, but it was not the linchpin of the jurisdictional question.

Should the internet connection have mattered at all? More precisely, why not leave the internet connection out of the picture, and instead decide the issue on the other contacts that were occurring in New York, namely, the customers, or lack thereof, in New York?

Both *Bensusan* and *American Network*, cases arising in the same jurisdiction and utilizing the same long-arm provision, show that the jurisdictional questions regarding internet and non-internet contacts have similarities. Specifically, the jurisdiction question is fact-specific and is heavily dependent upon the long-arm statutory language and judicial interpretation—a problem since this could lead to hundreds, if not thousands, of differing decisions applied to similar internet communications, transactions, webpages, etc.

> University of Missouri—who, while residing in Missouri, were domiciliaries of other states. These alleged facts were not sufficient to establish that substantial revenues were derived from interstate commerce, a requirement that "is intended to exclude non-domiciliaries whose business operations are of a local character."

Id. at 29 (citations omitted).

160. *American Network*, 975 F. Supp. at 501.

> [D]efendant does not identify, as it must, the witnesses that would be difficult to transport to New York. . . . Its asserted burdens in litigating the action in New York do not appear any more substantial than the burdens plaintiff says it would bear in litigating it in Georgia. Defendant therefore has not met its heavy burden of showing that transfer is warranted.

Id. (citations omitted).

C. Minnesota: Long Reach?

What about an internet presence lacking interstate money transactions: can a webpage that provides and records information serve as a jurisdictional guillotine for the unsuspecting web businessperson whom pokes his or her head across state lines?

A Minnesota opinion answered the question in the affirmative. In a decision that should render all internet advertisers wary, the Court of Appeals in *Minnesota v. Granite Gate Resorts, Inc.*,[161] exercised jurisdiction over a defendant who carried on no direct business with any resident of the state of Minnesota. Granite Gate was a Nevada corporation doing business as "On Ramp," a company that provided internet advertising.[162] Granite Gate's president, a Nevada resident, advertised "WagerNet," a forthcoming gambling service designed by him, on the On Ramp advertising page.[163] In addition to advertising the arrival of WagerNet, internet users had the option to subscribe and, after subscribing, the user would be given more information about the service.[164] A mailing list form was available for subscriber information and a toll-free telephone number was provided so that interested persons could contact On Ramp in Nevada for more information.[165]

The Minnesota attorney general filed a complaint against Rogers and Granite Gate, alleging deceptive trade practices, false advertising, and "consumer fraud by advertising in Minnesota that gambling on the Internet is lawful."[166] Rogers moved to dismiss for lack of personal jurisdiction, and refused to produce the names of those persons who had subscribed to the service.[167] After limited discovery, the court found the WagerNet mailing list had "the name and address of at least one Minnesota resident."[168] Consequently, the district court denied Roger's motion to dismiss for lack of personal jurisdiction.[169]

In affirming the lower court's ruling, the Minnesota court of appeals

---

161. 568 N.W.2d 715 (Minn. Ct. App. 1997).
162. *Id.* at 716.
163. *Id.* at 717. "On-Line sports wagering . . . is pleased to introduce WagerNet, the first and only on-line sports betting site on the Internet. WagerNet will provide sport fans with a legal way to bet on sporting events from anywhere in the world . . . 24 Hours a Day!" *Id.*
164. *Id.*
165. 568 N.W.2d at 717.
166. *Id.*
167. *Id.* Rogers also claimed that WagerNet was a Belizian corporation, and that subscriber information belonged solely to WagerNet. *Id.*
168. *Id*. However, that sole name and address may have been the investigator for the Minnesota Attorney General's Office. The investigator had dialed the toll-free number contained on the internet advertisement and, posing as an interested customer, spoke with a person identifying himself as Rogers. *Id.*
169. *Id.* at 718.

turned to the language of Minnesota's long-arm statute.[170] Minnesota's long-arm statute was similar to Ohio's long-arm in *CompuServe v. Patterson*[171] in that the Minnesota court of appeals asserted its long-arm jurisdiction to constitutional due process limits.[172]

Unlike other defendants, however, Granite Gate Resorts had not sold any products to Minnesota residents. The facts demonstrated that, to a large degree, the defendant had engaged in little more than advertising in the state of Minnesota, notwithstanding the retention of a single Minnesota citizen's address.[173] Judge Willis considered five factors in answering the jurisdictional question, the first two being the "quantity" of the defendant's contacts and the "nature and quality" of those contacts.

As to the first, quantity, the Minnesota court of appeals reiterated the district court's factual findings, namely, that Minnesota computers had accessed the defendant's website on numerous occasions and that the Minnesota computers accessed the defendant's website with a greater frequency than other states' computers.[174] Judge Willis held that those quantifiable contacts supported the notion that the defendants had purposefully availed themselves of the privilege of "conducting commercial activities" in Minnesota.[175]

The Minnesota court of appeals stated the "quality" of those numerous

---

170. MINN. STAT. § 543.19 (1996). The statute reads, in pertinent part:

> [A] court . . . may exercise personal jurisdiction over any foreign corporation or any nonresident individual, or the individual's personal representative, in the same manner as if it were a domestic corporation or the individual were a resident of this state. This section applies if, in person or through an agent, the foreign corporation or nonresident individual: (a) Owns, uses, or possesses any real or personal property situated in this state, or (b) Transacts any business within the state, or (c) Commits any act in Minnesota causing injury or property damage, or (d) Commits any act outside Minnesota causing injury or property damage in Minnesota . . . .

Id.

171. 89 F.3d 1257, 1262 (6th Cir. 1996).

172. *Granite Gate*, 568 N.W.2d at 718.

173. *Id.* at 717-18.

174. The district court found that (1) computers located throughout the United States, including Minnesota, accessed appellants' websites, (2) during a two-week period in February and March 1996, at least 248 Minnesota computers accessed and "received transmissions from" appellants' websites, (3) computers located in Minnesota are among the 500 computers that most often accessed appellants' websites, (4) persons located throughout the United States, including persons in Minnesota, called appellants at the numbers advertised on its websites, and (5) the WagerNet mailing list includes the name and address of at least one Minnesota resident. *Id.* at 718-19.

175. *Id.* at 718-20.

contacts supported the exercise of jurisdiction. The defendants unsuccessfully argued that their website was not and did not direct advertising activities into the state of Minnesota, i.e. there was no targeted advertisement to Minnesota, only the production of a webpage on the internet which Minnesota residents themselves chose to access.[176] The *Granite Gate* court rejected defendant's argument and instead relied on the somewhat frail contention that it was "irrelevant" whether a local user "pulls" an image from a business' computer, as opposed to a business sending a message to a particular local user.[177] It is puzzling to this author how such a distinction could be deemed irrelevant: sending a message from a business requires affirmative action directed towards a particular person or locale, whereas advertisement on the internet requires no such affirmative act. Indeed, one court has gone so far as to expressly reject in dicta the holding, and implicitly the logical conclusion of the Minnesota court of appeals. The words of the judge accurately reflect the concerns of many in the legal community:

> [T]o 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.' Upholding personal jurisdiction . . . 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 web site. The Court declines to reach such a far-reaching result in the absence of a Congressional enactment of Internet specific trademark infringement personal jurisdictional legislation.[178]

The Minnesota court, to its credit, did have an additional peg on which to hang its jurisdictional hat. The court stated that defendants who know their message will be "broadcast" in the state of Minnesota are subject to suit there.[179] The legal precedent relied upon by the court, however, concerned television and radio "broadcasts," not internet-related advertisements.[180] The court drew similarities between internet,

---

176. *Id.* at 719.

177. *Id.* (quoting Playboy Enter., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032, 1044 (S.D.N.Y. 1996)). As additional supporting authority in its opinion, the Minnesota court of appeals cited *Inset Systems, Inc. v. Instruction Set*, 937 F. Supp. 161 (D. Conn. 1996) and *Maritz, Inc. v. Cybergold, Inc*., 947 F. Supp. 1328 (E.D. Mo. 1996). *Id*.

178. Hearst v. Golberger, 1997 WL 97097, at *20 (S.D.N.Y. 1997) (citations omitted).

179. *Granite Gate*, 568 N.W.2d at 719-720.

180. *Id.* Interestingly, the Minnesota court of appeals included an en banc opinion from the Supreme Court of Arizona in is extrapolation of what "Minnesota courts have concluded" in relation to "broadcasts." *Id.* at 719-20. *See* Christine E. Mayewski, Comment, *The Presence of a Web Site as a Constitutionally Permissible Basis for Personal Jurisdiction*, 73 IND. L. J. 297, 309 ("Lower courts have, with much difficulty

broadcast, and direct mail advertisements, opining advertisers distribute messages and internet users must take affirmative action to receive the advertisers' product.[181] Also important were the profit motives of the defendants and the WagerNet website. The *Granite* court held that there was a clear effort to reach and seek potential profit from the citizens of Minnesota, and in personal jurisdiction jurisprudence, such effort was action enough to support a threshold finding of personal jurisdiction.[182]

Is it wise to rest the personal jurisdictional question on the judiciaries' understanding of the defendant's intentions? Stated differently, is not the motive of the defendant too thin a footing on which to rest personal jurisdiction?

Where the judge said that he "knew" the messages would be "broadcast" in Minnesota, clearly the court did not give internet technology its due, or perhaps failed to understand the nature of the technology. First, internet messages are not "broadcast" to a particular state.[183] Second, if the judge's holding were to be stretched to its logical extremes, the result is nationwide jurisdiction based on the placement of a website on the internet, a conclusion that is unacceptable and almost certainly offends the traditional notions of fair play and substantial

---

and little success, attempted to compare Internet communications to more traditional modes of communication.").

181. *Granite Gate*, 568 N.W.2d at 720.

182. *Id.*

183. *See, e.g.*, Robert W. Helm & David A. Vaughan, *Creating, Managing, and Distributing Offshore Investment Products: A Legal Perspective*, 1035 NUTS AND BOLTS OF FINANCIAL PRODUCTS 583, 642 (PRAC. L. INST.) (1998) (noting that states have recognized it is impossible to contain internet communications within traditional or conventional jurisdictional boundaries); Charles H. Fleisher, *Will the Internet Abrogate Territorial Limits on Personal Jurisdiction?*, 33 TORT & INS. L. J. 107, 113 (1997).

> The Internet is a vast and growing, unregulated, uncensored communications medium that operates without regard to state or national boundaries. The Internet is said to be 'distributed,' meaning that it is decentralized with no hub or operational core, no government, and no rule book. It has even been suggested that 'cyberspace' has many characteristics of a separate sovereign entity and either should, or inevitably will, be treated as such.

See also Gwenn M. Kalow, *From the Internet to the Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2242 (1997).

> Contacts initiated over the Internet are not actually conducted in a particular location, but rather in the ephemeral world of 'Cyberspace.' Courts have not only been faced with the challenge of deciding whether to apply new jurisdictional rules to Internet-related disputes, but also have encountered difficulties in properly analyzing these cases within traditional personal jurisdiction decisional models.

Id.

justice.

VI. THE LONG-ARM, THE INTERNET, AND THE JUDICIARY

The foregoing internet/personal jurisdiction opinions, and those that have followed, are usually decided on a basis similar to which most states' long-arm statutes grant jurisdiction: conducting business, tortious actions, and solicitation of business (or, more properly for the internet, advertising on webpages).

There is no need to review all the judicial opinions written on internet jurisdiction, nor is there a need to recite verbatim long-arm statute from each state in the Union.

A. Cases Before the Court—Ease of Ruling

Ordinarily, as a matter of fact and as a matter of law the "conducting business" genre of internet-based jurisdiction cases should be the easiest to decide. As a general rule there will be a course of conduct allowing for jurisdiction based on something other than mere presence on the internet. If one is conducting business, there usually will be a transfer of products, services, and fees from one person to another person and, in the case of diversity jurisdiction or in actions involving non-resident defendants, a transfer of things from jurisdiction to jurisdiction.

As the *CompuServe*[184] court illustrated, the existence of a contract gave the court important tangible evidence from which to conclude that defendant had, in fact, targeted his business practices to CompuServe headquarters in Ohio and had performed business transactions. If the evidence against the *CompuServe* defendant had been presented in a case that did not touch upon the novel issue of internet communications, there is little doubt the court would have exercised jurisdiction over him. Why? Because ordinary personal jurisdictional rules as applied to business would have easily resolved the jurisdictional question. No need to consider the more difficult internet issues; a transfer of money from Ohio to the defendant's residence should have been all that was necessary to exercise jurisdiction.

The tortious act cases are, as the previous examples have shown, more difficult. Furthermore, when the alleged actions constitute nothing more than a general web announcement or advertisement soliciting business, the factual issues involved, and the thorny legal problems these cases present, are the most difficult.[185]

---

184. CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); *see supra* note 55.

185. Other authors have concluded as much.

They are more difficult for several reasons. One, unlike a contract/internet case, in tort actions there may be no transfer of funds, information, or services between jurisdictions. The sole contact, if it can be called a "contact," in many tortious act or advertising lawsuits is the offending webpage. If a webpage constitutes minimum contacts for purposes of in personam jurisdiction, our current system of jurisdictional analysis will have been all but abrogated by the myriad of long-arm statutes among the states, for a webpage is instantly available everywhere as soon as it is available within the internet user's home state. Because an internet page is available everywhere, the person who created that webpage is thereby subject to every single long-arm statute of every state in the union. The advertising/tortious act cases only exacerbate the problem. Often courts search for the intent of the webpage creator in a feeble exercise to figure out whether the page was posted for amusement, for information, or for business. As the court in *Granite Gate*[186] so clearly showed, even where only one state resident accesses a webpage, if a court finds the intent to do business, jurisdiction may lie.

Using Minnesota's logic, the *San Diego Law Review* could be forced to defend a suit in a Minnesota court if the *Review* posted subscription information on its webpage and that information was accessed by, say, a law librarian, university professor, or college student. Whether we intended to do business in Minnesota is of no consequence in the tortious act/advertising lawsuits: all that matters is the webpage and that the *San Diego Law Review* knew, or should have known, that the

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

Mayewski, *supra* note 180, at 317-18. Susan L. Drucker, *The Tenets of Jurisdiction: Lost in CyberSpace?* 69 N.Y.S.B.J. 30, 31-32 (Dec. 1997) ("While the question of cyberjurisdiction reflects a court by court, jurisdiction by jurisdiction, patchwork at this time, there is however, evidence of a growing trend of the courts to extend personal jurisdiction over a defendant who has maintained an interactive Web site accessible in another jurisdiction.").

186. Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997)

webpage was available to Minnesotans.[187]

i. Unintended Result: Chilling Speech?

Important to advertisements on the internet may be the purpose of the advertisement. In *Granite Gate*,[188] the court felt it important that the purpose of the webpage was in large part profit-oriented. Many courts have expressed concern for those internet users who utilize the internet for serious speech purposes, but not for business or commercial speech. If mere solicitation, no matter the reason (i.e. information, subscription, discussion, as well as business) can serve as grounds for the exercise of personal jurisdiction, the resultant chilling of speech on the internet could be detrimental to what has been noted to be one of the greatest tools for rapid, precise, and lasting human communication.

B. Overreaching by the Judiciary

This Comment began by exploring the rise and expanse of personal jurisdiction.[189] The original proclamation of jurisdiction was made by judges responding to the what and where of personal jurisdiction. There were no long-arm statutes per se, and the power of the state and the court over non-resident defendants was virtually nil if the defendant did not have his or her person within the forum state. The judges and justices had no substantive words from the legislature delineating the power of the courts amidst the several states. The judiciary, however, did grant power over something else that could be found within the state, according to *Pennoyer v. Neff*.[190] That something was "property."

The court decided to exercise jurisdiction over it. As a result the concept of presence without the person was created in response to legislative deficiencies.

Soon after, the legislatures of the states began to enact long-arm statutes allowing citizens from a home state to hale into court citizens from a foreign state. In other words, the legislatures began to exercise their police powers.[191] No longer could people escape liability from harm done to people in other states simply because they committed the tortious act from another state.

The passing of long-arm statutes continues to the present day.

---

187. Actually, the *Granite Gate* court goes one step further: placing advertising material on a webpage constitutes "broadcasting" to a particular forum state, turning an innocent act into a definitive fact, a fact allowing one to be haled into a Minnesota court.

188. *Granite Gate*, 568 N.W.2d 715.

189. *See supra* note 7.

190. Pennoyer v. Neff, 95 U.S. 714 (1877).

191. *See supra* note 10.

Fast forward to today. With the advent of the internet, the authority of who decides the jurisdictional question has shifted yet again, from the present to the past, from the legislatures back to the judiciary. The shift has been sudden, much like the growth of the internet and the legal problems that have sprung from the internet. When faced with a plaintiff who sues based on internet presence, internet advertising, internet business contacts, etc., the judiciary is stuck with the same old rules and statutes that long ago had been based on *geographic* presence, not *technological* presence. In order to effectively rule on novel issues concerning the internet, and in order to pay heed to stare decisis, the judiciary was and is forced to interpret the old to fit the new.[192]

Ultimately, the resulting train wreck that is internet law and personal jurisdiction[193] had its seeds planted not yesterday, last week, or a year ago. The current morass of statutory jurisdictional law is a creation of state legislatures over the last century.

Our ancient and outdated notions of geography, territory, and presence have finally met their match against an entity that has no geography, is not confined to any one territory, and gives everyone an instant presence everywhere.

C. Is There a Problem?

As we move forward into the next century, one thing should be made

---

192. Darren L. McCarty, Comment, *Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction*, 39 WM. & MARY L. REV. 557, 558 (1998).

> With the increase in Internet activity, courts now must apply existing law to the unique aspects of Internet-based disputes. Defendants that challenge a court's exercise of personal jurisdiction based on Internet or computer contacts present some of the most intriguing legal issues. The law governing this issue is, however, in its infancy.

Id.

193. Other authors have noted the difficulty inherent in this new medium:

> What makes the Internet so interesting and problematic from a legal perspective is that, because it is so diverse, it operates like no other existing method of communication. Courts have encountered great difficulty in placing the Internet into an existing legal context—is it like television, print media, telephone or a highway? After a few minutes surfing the Internet, one will encounter actors that resemble publishers, postal services, phone companies, libraries, bookstores, flea markets, retailers, soapbox preachers and voyeurs. When applied to the online versions of these paradigms, however, established legal principles are rendered anachronistic.

H. Joseph Hamline & William Miles, *The Dormant Commerce Clause Meets the Internet*, 41 BOSTON BAR J., 8, 8 (1997).

clear: our current system of hodgepodge jurisdictional law, comprised among some fifty states encompassing thousands of pages of legal code, will cease to be effective jurisdictional law as national, international, and global telecommunications radically transform the way in which ordinary citizens and mega-corporations do business.

The current method by which internet jurisdictional cases are determined is a jurisdictional tool that relies on geography—in other word, an outmoded and antiquated method as it applies to the information superhighway.

D. Cursory Solutions

No one in Congress has proposed a solution to the current jurisdictional problem. In addition, the Supreme Court, long the ultimate arbiter in jurisdictional law, has not had a chance to rule, or has denied certiorari to, litigants challenging strong-arm tactics applying long-arm statutes.

Without the guide of Congress or the Court, here are, briefly, a few possible solutions to the very difficult problem of personal jurisdiction in a computerized business and personal society:

1. Maintain the status-quo. The disadvantages of maintaining the current tangled web of long-arm statutes is the purpose of this Comment. There is one advantage to doing nothing: plaintiffs will have virtual carte blanche over the forum for their lawsuit. Of course, that benefit comes at the expense of potential defendants' wallets and, to some degree, defendants' ability to hear cases and controversies in their own forum.

2. *Federal legislation.* The benefit is obvious. One rule of law that applies equally to all jurisdictions, applicable to the states in actions concerning jurisdiction and the internet. Such a system is already in place, to a certain degree, for actions concerning patents, trademarks, plant variety protection, and copyright cases,[194] all of which can be related to the internet.

But the problems with federal legislation are many. First, federal legislation would be the fraternal twin of maintaining the status quo. The legislation would apply everywhere at all times, the very complaint that cautions against state long-arm statutes. In other words, there is little difference between applying one state's long-arm statute to all internet communications, and allowing all the states to apply a federal law to all internet communications: the unwary internet user, despite

194. FED. R. CIV. P. 1338(a) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights, and trade-marks.").

knowing the United States Code, may still be hauled off to a foreign state under original jurisdictional laws passed by the Congress.

In addition, federalism concerns abound. Unlike trademark and copyright, which are governed by Acts of Congress, many issues related to jurisdictional internet communication problems concern civil actions that arise under state law, such as tort and contract. Federalizing actions that would normally be within the auspices of state law would wrest from citizens the ability to regulate their own affairs, including those that concern the internet. If a national law is rejected in favor of state-defined long-arm jurisdiction, judicial interpretation and not Congressional legislation will still be the final arbiter of personal jurisdiction via the internet.

3. *Remove Internet Contacts from the Jurisdictional Equation.* In other words, a national federal rule or Supreme Court order that, in determining whether personal jurisdiction should be exercised, the defendant's internet contacts shall not be given any weight. Perhaps something more than a mere internet information exchange would be required to exercise personal jurisdiction. For example, a money transfer would have to take place, a contract between two parties would be required, or an exchange of goods via conventional business practice would be required to hale a defendant into any particular forum state.

The advantage is obvious. A quick, easy rule to understand and implement nationwide. Simply put, as far as in personam personal jurisdiction goes, the internet doesn't count. Easy enough. But there are still problems.

First, such a rule smacks of federalism (i.e. denying a state legislature the ability to craft a long-arm statute that incorporates internet contacts), and, hence, the concern mentioned in the second suggestion is directly applicable.

Second, should internet contacts be discounted in such a cavalier fashion? For example, what of a hypothetical Florida resident who emails death threats to a young child in Arizona? Should the Arizona attorney general be prevented from haling the Florida mailer to Arizona? Exceptions could be made to allow personal jurisdiction flowing from internet activity where felony criminal conduct lies. In civil actions, then, internet contacts without more could not be used to hale one resident to the far away state of another. But this too has problems. What if the alleged conduct concerns trademark or copyright infringement? District courts already have original jurisdiction over

those matters.[195] Further, should a plaintiff be forced to travel to a trademark infringer's home state to prevent illegal conduct? On its face it seems only fair to require that a copyright violator be forced to defend herself where her actions allegedly caused damage.

And what of other business practices, like using the telephone or facsimile? Are they not akin to using the internet? Both technologies utilize telephone lines; why should a phone call satisfy a requisite minimum contact test whereas computer contact via the same phone line is not?

VII. CONCLUSION

Expansive ruling on internet communication, personal jurisdiction, and long-arm statutes at this still-early juncture in the information age would be premature. The judiciary's ever-expansive broad-based interpretations of long-arm statutes, however, does not bode well for the individual or the business internet user seeking to limit online liability. In short, the prudence and wisdom of the judiciary must counterbalance the failings of statutory law.

JOHN A. LOWTHER IV

195. *Id.*