THE INTERNATIONAL SHOE STILL FITS THE VIRTUAL FOOT: A DUE PROCESS FRAMEWORK FOR PHILIPPINE INTERNET PERSONAL JURISDICTION PROBLEMS

Oscar Franklin B. Tan

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*Oscar Franklin B. Tan***

"Oh! East is East and West is West and never the twain shall meet,
Till earth and sky stand presently at God's great judgment seat."
–Rudyard Kipling, The Ballad of East and West (1889)[1]

"While these electronic communications play havoc with geographic boundaries, a new boundary, made up of the screens and passwords that separate the virtual world from the 'real world' of atoms, emerges."
–David Johnson and David Post, Stanford Law Review (1996)[2]

"[T]echnologies are already removing geography as a barrier to work.... Taking advantage of the time zone differential, [software companies in India] work on problems while the United States is asleep and have solutions ready for customers first thing the next morning...."
–Microsoft CEO William "Bill" Gates (1999)[3]

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* First awardee, Professor Bienvenido C. Ambion Prize for Best Paper in Private International Law (2004). Parts of this paper draw from Oscar Franklin Tan, Sticks and Stones May Break Bones But Can E-Mail Ever Hurt Me?: Exploring the Application of Tort Doctrine to the Internet's Constitutional Dilemmas (Mar. 2003) (unpublished 2003 Baviera Prize paper on file with the Dean's Office and Professor Araceli Baviera).

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[1] A VICTORIAN ANTHOLOGY (London: Edmund Clarence Stedman ed., 1895).

[2] David Johnson & David Post, *Law and Borders –The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996).

Adam's depiction on the ceiling of the Sistine Chapel[4] may well portray a litigant at the dawn of the Internet era. As the dancing phosphors on computer screens around the globe cast a new, electronic sunrise, Adam's descendant finds himself liberated from his humble mortal shell, transcended into a new, virtual realm where physical boundaries matter no longer. Nevertheless, he finds that the weary governments of flesh and steel[5] stretch their long arms even into the Internet.

When the virtual defendant tries to ashamedly cover his nakedness in the face of the sovereign, he finds new meaning in Michelangelo's masterpiece. Will the touch of a fingertip be enough for the seeming god to pull him back into the world of flesh and steel? Must the sovereign clasp him firmly by the hand first? Or must the defendant be bodily carried, kicking and screaming, before he deigns to face the real-world judge?

At any given time, "tens of thousands of [Internet] users are engaging in conversations on a huge range of subjects," and it is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."[6] Michelangelo's vignette from Genesis asks whether classic Conflicts of Law doctrine remains applicable in the face of radically transforming human interaction. How substantial is a substantial Internet contact? To assert personal jurisdiction, again, does the brush of a sovereign's fingertip suffice, or must he grip firmly with both hands?

The question is compelling because with the obvious increase in contacts resulting from the Internet and other communications advances, one is tempted to conclude that personal jurisdiction rules must be relaxed rather than allow wrongdoers in distant jurisdictions to act with impunity. However, the other end of the policy consideration is equally important: Innocent defendants should not be unexpectedly burdened by litigation in

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[3] BUSINESS@THE SPEED OF THOUGHT 155 (1999).

[4] http://sun.science.wayne.edu/~mcogan/Humanities/Sistine/Panels/adam.jpg (last visited Feb. 28, 2004).

[5] John Perry Barlow, *The Declaration of Independence of Cyberspace* (transmitted throughout the Internet beginning February 8, 1996), *quoted in* Aron Mefford, *Lex Informatica: Foundations of Law on the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 211, 218 (1997).

[6] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

faraway courts, or worse, be forced to default for lack of means to litigate effectively.[7]

This paper aims to show that current Conflicts of Law doctrine centered on *International Shoe v. Washington* still fits the virtual foot. First, it shall discuss the history of personal jurisdiction, focusing on the doctrinal transformation from the traditional *Pennoyer v. Neff* doctrine to the modern *International Shoe* test. Second, it shall give a brief overview of the Internet, the key technological evolutions it has triggered, and the legal mindset applied to understand it. Third, it shall identify emerging problem areas in international Internet litigation, and gauge the application of *International Shoe*. Finally, it shall summarize the lessons gleaned from each of these areas into an Internet-ready International Shoe framework.

I. THE INTERNET AND JURISDICTION: TELEPHONE LINES INSTEAD OF TERRITORY

A. OVERVIEW

In 2004, asking for a description of the Internet is one step short of asking for a description of the wheel. Nevertheless, Justice John Paul Stevens' opening to *Reno v. ACLU* contains a residual sense of the wonder that accompanied the World Wide Web's infancy:

> The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET," which was designed to enable computers operated by the military, defense contractors, and universities conducting defense related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication." (internal citations omitted)[8]

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[7] Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1824 (2003).

[8] Reno v. American Civil Liberties Union, 521 U.S. 844, 850-51 (1997).

In 1983, *Time* magazine changed its "Man of the Year" award *pro hac vice* to "Machine of the Year," and feted the personal computer:

> [T]he entire world will never be the same… [T]he microprocessor would create myriad new industries, and an international computer network could bring important agricultural and medical information to even the most remote villages. "What networks of railroads, highways and canals were in another age, networks of telecommunications, information and computerization... are today," says Austrian Chancellor Bruno Kreisky. Says French Editor Jean-Jacques Servan-Schreiber… "It is the source of new life that has been delivered to us."[9]

The computer revolutionized human industry, first by handling complex but repetitive computations in eyeblinks, and second by storing and organizing vast amounts of data with equal efficiency.[10] Barely a decade after *Time* brought the social changes the machine wrought into the global consciousness, the computer's computational power soon paled under the shadow of its communicative power.

Today, this latter power has blossomed into the Internet, and has grown to the point that a child can potentially attract the same audience as an international media conglomerate, a phenomenon the *Harvard Law Review* dubbed "cyber-reach."[11] Indeed, where libel cases often involved an individual suing a newspaper, recent Internet defamation cases have featured corporations attempting to pin down an anonymous online gadfly.[12]

This power, moreover, has many facets. First, the capacity of Internet transmission only increases each month. Where the ancient Bulletin

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[9] Otto Friedrich, *Machine of the Year: The Computer Moves In*, ¶ 9 (Jan. 3, 1983), *reprinted at* http://ei.cs.vt.edu/~history/Time.MOTY.1982.html.

[10] For example, the ENIAC fueled United States Army ballistics research in 1943, and its descendant UNIVAC saved the United States Census Bureau from drowning in paperwork in 1946. Ryan Weston, *UNIVAC: The Paul Revere of the Computer Revolution*, *in The History of Computing*, ¶¶ 2-3, *at* http://ei.cs.vt.edu/~history/UNIVAC.Weston.html (last visited Feb. 28, 2004).

[11] Note, *The Long Arm of Cyber-reach*, 112 HARV. L. REV. 1610, 1610 (1999), *available at* http://www.harvardlawreview.org/issues/112/7_1610.htm; http://cyber.law.harvard.edu/is02/readings/mcswain.doc.

[12] Lyrissa Lidsky, *Silencing John Doe: Defamation & Disclosure in Cyberspace*, 49 DUKE L.J. 855, 893-895 (2000), *cited in* Margo Reder & Christine O'Brien, *Corporate Cybersmear: Employers File John Doe Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. & TECH. L. REV. 195, 210-11 (2002).

Board Systems ("BBS") could only support simple text and small files,[13] detailed, full-color pictures and even video clips are now easily posted on websites or sent via electronic mail. Entire websites are now dedicated to housing personal, digital photo albums one can invite friends to view,[14] and to online slam books that showcase one's friends.[15] On Christmas Day of 2003, the European Space Agency "webcast" live the arrival of its Beagle II probe on Mars.[16] Other Internet events include live footage of solar eclipses[17] to 24-hour webcasts from the United Nations.[18] Coupled with modern credit card and finance systems, even money and securities are easily sent across the world with the press of a button.[19]

Second, all this Internet communication is done in real-time, or very close to it. Internet chat and instant messenger programs,[20] for example, allow conversations with someone on the other end of the world while one

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[13] *See* John Kahn, *Defamation Liability of Computerized Bulletin Board Operators and Problems of Proof*, at 4 (Feb. 1989), *at* http://www.eff.org/Legal/bbs_defamation_liability.paper. "The process of reaching, or 'accessing' one of these bulletin boards is quite simple: all that is required is a computer, a computer program that allows the computer to communicate over the phone lines, and a 'modem' (a device which converts the computer's electrical signals into acoustic impulses, defined infra). Once she has accessed the BBS, the caller is free to trade useful non-copyrighted computer programs, exchange ideas on a host of topics, post electronic mail for later reading by others, and much more. The ease with which most BBSes may be accessed and the wealth of interests to be found there ensure that they will continue to be important sources of information and discourse."

[14] *See, e.g.*, http://www.ofoto.com.

[15] *See, e.g.*, http://www.friendster.com.

[16] European Space Agency, *Mars Express*, *at* http://esa.capcave.com/esa/marsexpress (last visited Feb. 28, 2004).

[17] *Live! Eclipse 2003: Project Antarctica*, *at* http://www.live-eclipse.org (last visited Feb. 28, 2004).

[18] *The United Nations Webcast*, *at* http://www.un.org/webcast (last visited Feb. 28, 2004).

[19] *See, e.g.*, http://www.paypal.com; Bank of the Philippine Islands, *BPI Trade Online*, *at* http://www.bpitrade.com (last visited Feb. 28, 2004).

[20] These use small windows on one's computer screen where one types short messages that are displayed in real-time for all users to see. As messages fill the window, the result is similar to the transcript of a conversation, except one can instantaneously add to it. Instant messenger programs facilitate one-on-one "chats," and even keep a real-time list of friends whose Internet connections are on and thus available to talk. *See* http://messenger.yahoo.com; http://www.aol.com/aim/home.html (last visited Feb. 28, 2004). In chat programs, one enters chat "rooms" dedicated to particular topics, with more people participating in the conversation and adding to the transcript. *See, e.g.*, http://www.mirc.com (last visited Feb. 28, 2004).

types a pleading or checks websites. More than simple messages, one can even play video games and explore virtual communities with other Internet users from around the world.[21] In fact, the Philippine franchise of a "Massively Multiplayer Online Role-Playing Game ('MMORPG')" recently hit the market last year, *Ragnarok Online* and its Dungeons and Dragons setting.[22] Finally, various free services can bring data from the Philippine and New York Stock Exchanges with just a few minutes' delay.[23]

Finally and perhaps most importantly, all of the above cost a fraction of the equivalent long-distance telephone calls and satellite television fees.[24] For example, the Metro Manila internet service provider ("ISP") Tri-Isys offers unlimited, 24-hour Internet access for only PHP440 a month, inclusive of six e-mail accounts and free website space.[25] The Internet thus lowers the transaction costs for just about any activity, and this is the entire rationale for the Internet retailing giant Amazon.com and auction site eBay.com.[26] The radically decreased transaction costs also gave rise to "spam"[27] or Internet junk mail. It costs very little to send unsolicited

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[21] *See, e.g.*, http://www.battle.net/intro.shtml (last visited Feb. 28, 2004). "What is Battle.net? Battle.net provides an arena for Blizzard customers to chat, challenge opponents and initiate multiplayer games, at no cost to the user. There is no hourly or monthly fee to use Battle.net, and there is no startup charge. To play a supported game over the Internet with other players worldwide, simply select the Battle.net option from within the game." The owner, Blizzard Entertainment, hosts the hit games *Starcraft, Diablo II, and Warcraft III*. Today, few popular video games come without multiplayer Internet capability.

[22] *See, e.g.*, http://www.level-up-games.com/ragnarok/html/index.jsp (last visited Feb. 28, 2004). *See also* Jack Balkin, *Law and Liberty in Virtual Worlds*, 1 N.Y.L. SCH. L. REV. 63 (2005).

[23] *See, e.g.*, http://www.nyse.com (last visited Feb. 28, 2004); http://www.pse.org.ph/html/MarketInformation/getstockinfo.jsp (last visited Feb. 28, 2004).

[24] Tri-Isys Internet, *Subscription Plans*, *at* http://www.tri-isys.com/products-services/subplan.html (last visited Feb. 28, 2004).

[25] For a discussion of international telephone calls placed through the Internet and other advances that reduce communications costs, *see, e.g.*, Zorayda Ruth Andam & Christian Gerard Castillo, *Regulating Communications in a Converging Environment: Technology, Markets and Dilemmas*, 79 PHIL. L.J. 392, 397-399 (2004).

[26] http://www.amazon.com (last visited Feb. 28, 2004); http://www.ebay.com (last visited Feb. 28, 2004).

[27] *See* http://www.webopedia.com (last visited Feb. 28, 2004). "Electronic junk mail or junk newsgroup postings. Some people define spam even more generally as any unsolicited e-mail. However, if a long-lost brother finds your e-mail address and sends you a message, this could hardly be called spam, even though it's unsolicited. Real spam is generally e-mail advertising for some product sent to a mailing list or newsgroup.

e-mail to thousands of people with the Internet, making such profitable even if only a fraction of those targeted make purchases.[28] The costs, however, are eventually passed to Internet subscribers who pay for the extra computer network resources consumed,[29] a result not unlike the aftermath of a global Internet virus attack.[30]

One conclusion is drawn from these vignettes of cyber-reach: Territorial boundaries are increasingly irrelevant to many ordinary activities, from sending amateurish love poetry to purchasing books to drowning complete strangers in virtual junk mail.[31]

"In addition to wasting people's time with unwanted e-mail, spam also eats up a lot of network bandwidth. Consequently, there are many organizations, as well as individuals, who have taken it upon themselves to fight spam with a variety of techniques. But because the Internet is public, there is really little that can be done to prevent spam, just as it is impossible to prevent junk mail. However, some online services have instituted policies to prevent spammers from spamming their subscribers.

"There is some debate about the source of the term, but the generally accepted version is that it comes from the Monty Python song, 'Spam spam spam spam, spam spam spam spam, lovely spam, wonderful spam…' Like the song, spam is an endless repetition of worthless text. Another school of thought maintains that it comes from the computer group lab at the University of Southern California who gave it the name because it has many of the same characteristics as the lunchmeat Spam:

- Nobody wants it or ever asks for it.
- No one ever eats it; it is the first item to be pushed to the side when eating the entree.
- Sometimes it is actually tasty, like 1% of junk mail that is really useful to some people."

[28] Lorrie Cranor & Brian LaMacchia, *Spam!*, 41 COMM'N ACM 74 (1998), *at* http://www.acm.org/pubs/citations/journals/cacm/1998-41-8/p74-cranor.

[29] *See* David Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. REV. 325 (2001), *available at* http://www.spamlaws.com/articles/usf.pdf; Stop-Spam.org, *Other Anti-Spam Sites: Discussions and Essays*, *at* http://www.stop-spam.org/On-Line_Spam/antispam_essays.shtml (last visited Feb. 28, 2004).

[30] AFP, *Mydoom exceeds Sobig.F as worst Internet virus*, PHIL. DAILY INQUIRER, Jan. 30, 2004, at A11. "Mydoom, which clogged the Internet with more than 100 million infected e-mails in its first 36 hours, continued to multiply, Finland's F-Secure said… 'Current estimates show that currently between 20 and 30 percent of all e-mail traffic worldwide is generated by this worm.'"

[31] The basic address-codes of the Internet such as "36.21.0.69" or "leland.stanford.edu" have no association with any particular geographic location. Post & Johnson, *supra* note 2, at 1376.

B. APPLYING THE PROPER LEGAL METAPHOR

For most people, a computer is a black box, a technological marvel they use daily while barely understanding its workings. This makes a legal analogy or metaphor a powerful foundation for understanding cyberlaw issues. However, this also means that an inappropriate metaphor can wreak havoc on one's reasoning. Justice Benjamin Nathan Cardozo cautioned:

> Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.[32]

Many authors, for example, frame discussion in George Orwell's *1984* or Jeremy Bentham's *Panopticon*.[33] However, decentralization is a defining characteristic of the Internet, and no State or any single entity for that matter is capable of playing its Big Brother or overseer. The most general images of the World Wide Web have, in fact, changed over time. American Vice-President Al Gore popularized "the information superhighway" in 1994,[34] which emphasized the transmission of e-mail messages and files from user to user. "Information superhighway" became the buzzword of mid-nineties judicial pronouncements.[35] In a few years,

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[32] Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94 (1926). For example, an 1899 Minnesota case stated, "In these days there ought to be no one to question the statement that a telephone is simply an improved telegraph." Northwestern Telephone Exchange Co. v. Chicago, M. & St. P. Railroad Co., 76 Minn. 334, 344 (1899). Certainly, in 2004, one cannot say that the Internet is in turn simply an improved telephone.

[33] GEORGE ORWELL, 1984 (1949); JEREMY BENTHAM, *Panopticon*, *in* THE PANOPTICON WRITINGS (Miran Bozovic ed., 1995), *available at* http://cartome.org/panopticon2.htm; MICHAEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 195-228 (Vintage Books, 1995), *available at* http://www.cartome.org/foucault.htm. *See* CTRL [SPACE]: RHETORICS OF SURVEILLANCE FROM JEREMY BENTHAM TO BIG BROTHER (Thomas Levin et al., ed., 2002).

[34] Al Gore, Speech delivered at the University of California Los Angeles Information Superhighway Summit (Jan. 11, 1994), *available at* http://www.uibk.ac.at/sci-org/voeb/texte/vor9401.html. Clay Calvert, *Regulating Cyberspace: Rhetoric, Reality, and the Framing of Legal Options*, 20 HASTINGS COMM. & ENT. L.J. 541, 544-546 (1998). *See* Kenneth Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889, 908-911 (1998).

[35] *See, e.g.,* Compuserve v. Patterson, 89 F.3d 1257, 1260 (6th Cir. 1996). "Compuserve is… the second largest such provider currently operating on the so-called 'information super highway.'" *Id.* at 1260 n.1, *quoting* United States v. Baker, 890 F.Supp. 1375, 1379 n. 1 (E.D. Mich. 1995). "Computer networks are systems of interconnected computers that allow the exchange of information between the connected computers.

however, this became obsolete with improvements in Internet browser technology and the consequent rise of websites. The metaphor of the road lost relevance when the stops along the way, or the websites, overshadowed the road and an actual final destination.[36]

Displacing "information superhighway" was novelist William Gibson's "cyberspace,"[37] and in no less than the United States Supreme Court's landmark decision:

> Taken together, these tools (e-mail, chat rooms and websites) constitute a unique medium – known to its users as "cyberspace" – located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.... It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."[38]

Reno v. ACLU now focused on the stops over the road itself, and implied that the Internet was somehow a separate place of its own. This had an important impact on legal thinking. For example, with the shift from treating Internet use as normal transmission of text and pictures albeit through a new medium to that of an activity in a virtual, frontier community, the *Reno* Court applied the *Miller*[39] "community standard" test of obscenity, and even included a discussion on "Internet zoning."[40] Perhaps most significantly, thinking in terms of a public highway and in terms of a virtual Wild West lead to very different conclusions regarding government regulation. The latter sentiment is expressed in manifestos such as John Perry Barlow's "Declaration of Independence of Cyberspace":

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of

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The Internet is the world's largest computer network, often described as a 'network of networks.'"

[36] Jonathan Blavin & Glenn Cohen, *Gore, Gibson and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265, 270-75 (2002). Internet use ten years ago, for example, focused on aspects such as Usenet and newsgroups, which are now a much smaller part of the more multimedia-oriented Internet.

[37] Adria Allen, Comment, *Internet Jurisdiction Today*, 22 NW. J. INT'L L. & BUS. 69, 69 (2001). Gibson wrote the 1984 novel *Neuromancer*.

[38] Reno v. American Civil Liberties Union, 521 U.S. 844, 851 (1997).

[39] Miller v. California, 413 U.S. 15, 24 (1973).

[40] Reno, 521 U.S. 844 (1997) (O'Connor, J., *dissenting*). *See* Patrick Egan, Note, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyberspace?*, 30 SUFFOLK U. L. REV. 117 (1996).

> the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.[41]

The concept of cyberspace as a distinct place was articulated by Professors David Johnson and David Post, who proposed that this new, unique dimension should be governed by its own equally unique laws:

> Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and: (1) the power of local governments to assert control over online behavior; (2) the effects of online behavior on individuals or things; (3) the legitimacy of a local sovereign's efforts to regulate global phenomena; and (4) the ability of physical location to give notice of which sets of rules apply....
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> ...
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> ...[A] local sovereign is called upon to defer to the self-regulatory judgments of a population partly, but not wholly, composed of its own subjects.[42]

Even this image has changed, in turn. Professor Lawrence Lessig criticized the idea that "cyberspace" has "[n]ot quite a sovereignty, but something close"[43] since real-world authorities can simply regulate the computer programs – the "code" – through which the virtual world is entered.[44] And, although the Internet changes the application of law conceived from a geographic framework, Professor Jack Goldsmith criticized:

> The problem is that the Net is not a separate place, and Net users are not removed from our world. They are no more removed than telephone users, postal users, or carrier-pigeon users. They are in front of a screen in real space using a keyboard and scanner to communicate with someone else, often in a different territorial

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[41] Barlow, *supra* note 5, *quoted in* Philip Adam Davis, *The defamation of choice-of-law in cyberspace: Countering the view that the Restatement (Second) of Conflict of Laws is inadequate to navigate the borderless reaches of the intangible frontier*, 54 FED. COMM. L.J. 339, 349 n.62 (2002). The metaphor "cyberspace" has taken on a new romantic appeal after the science fiction blockbuster movie, *The Matrix*. *See* http://whatisthematrix.warnerbros.com (last visited Feb. 28, 2004).

[42] Post & Johnson, *supra* note 2, at 1370, 1393.

[43] Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1403 (1996). *See* Jack Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998).

[44] Lessig, *supra* note 43, at 1408.

> jurisdiction. And these real-space communications can cause real-world harms.[45]

Advances in software, moreover, have made the Internet accessible to the ordinary person, where it was previously the haven of computer programmers and the similarly computer-adept. Thus, the community long since expanded from this relatively homogenous online "elite" class. With the increasing permeability of the borders, the transition between the real world and cyberspace is less pronounced; recent depictions reflect links to the real world more strongly, such as cultural influences.[46] Thus, the Internet is seen less as a separate "cyberspace" of Cartesian machines and online personas divorced from reality and more of "real-space" in synch with the physical world.

One cannot take metaphors too literally, and must critically examine the technological nuances they simplify, especially if evolutions in the Internet architecture have already rendered them obsolete. The search for a metaphor that captures something as simple as sending e-mail, for example, cannot ignore a number of legally significant technical details such as the nature of the equipment through which the signals pass through.

A comparison, for example, to a newspaper publisher, newsstand or library is misleading because the sheer volume of messages transmitted by an Internet service provider precludes screening them in any way, precluding their liability for defamation or obscenity.[47] A comparison to a traditional medium such as television, radio or stage plays ignores the instantaneous, interactive communication the Internet makes possible. Perhaps the best illustration is that of a man standing in the middle of a large, crowded public park, conducting a conversation with a megaphone.[48] To complete the image, one should add, however, Halloween costumes and robotic stenographers standing beside each person.

Nevertheless, this brief dissection of the recent years' worth of

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[45] Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119, 1121 (1998).

[46] Blavin & Cohen, *supra* note 36, at 282-85. *See* Note, *Communities Virtual and Real: Social and Political Dynamics of Law in Cyberspace*, 112 HARV. L. REV. 1586 (1999).

[47] Cubby, Inc. vs. CompuServe Inc., 776 F.Supp. 135 (S.D.N.Y. 1991); Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997); Stoner v. eBay, Inc., No. 305666 (Cal. Super. Ct. Nov. 7, 2000); Kathleen R v. Livermore, 87 Cal. App. 4th 684 (Cal. Ct. App. 2001). *See* Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998).

[48] *The Long Arm of Cyber-reach*, *supra* note 11, at 1632.

metaphors highlights that a radically new cyberlaw need not be constructed in many cases, since cyberspace is not a unique dimension hermetically sealed from this Earth, and since virtual acts cause familiar, real effects. Although the technology and the factual circumstances are completely alien to the times of Blackstone, the underlying doctrines that govern their effects may not be.

C. HOW THE INTERNET CHALLENGES THE APPLICATION OF EXISTING DOCTRINE

The Internet is indeed revolutionary, but one cannot afford to be dazzled into the misperception that centuries' worth of legal wealth is suddenly debased when one enters it. A simple example suffices to demonstrate.

Defamation is as old as speech itself; and its essence does not change if done by shouting across a fence, by writing with an ink-dipped quill on parchment, through a million copies of a sleazy tabloid, or through electronic mail. The malicious intent and defining elements remain the same,[49] and it will always be a real human being that suffers shock and humiliation.

The legal linkages drawn between the doctrinal elements and the factual milieu, however, decidedly change. An e-mail account, for example, can be created for free, in less than a minute, and anonymously under a pseudonym.[50] This last factor defines the Internet as a medium, and allows Netizens to focus on each others' messages independently of the speakers,[51] and allows the open discussion of certain topics such as homosexuality and drug addiction without fear or humiliation.[52] Moreover, anonymous speech readily falls under the Constitutional aegis,[53] and American jurisprudence has placed a high bar before a plaintiff's unmasking of an online defendant when

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[49] *See* II LUIS REYES, THE REVISED PENAL CODE 932 (15th ed. 2001).

[50] *See, e.g.,* http://mail.yahoo.com; http://www.hotmail.com.

[51] Dendrite Int'l v. Doe No. 3, 342 N.J. Super. 134 (App. Div. 2001).

[52] MADELEINE SCHACHTER, LAW OF INTERNET SPEECH 236-37 (2001), *cited in* Jennifer O'Brien, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Online Speakers in Online Defamation Cases,* 70 FORDHAM L. REV. 2745, 2759 (2002).

[53] Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999); McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960).

it is possible.[54] Finally and more pragmatic, the cost of obtaining the online gadfly's real world identity may outweigh the benefits of suing in the first place.

Second, the dynamics of the public/private figure doctrine work differently because of cyber-reach, since everyone who wields it is arguably a public figure in the virtual landscape, his words and electronic footprints there for all the World Wide Web to see. Defamation against a public figure is given the benefit of the doubt, and actual malice must be proven. *Gertz v. Robert Welch, Inc.*[55] reasoned that an individual becomes a public figure due to pervasive fame, notoriety or special prominence, injects himself or is drawn into a particular controversy, or enjoy greater access to channels of communication and can answer speech with more speech more effectively. In the cyber-reach enhanced fora of the Internet, these all ring true for a particular but no less public segment. Moreover, Philippine public figure doctrine is even more liberal. In addition to the person-focused American categorizations,[56] Philippine jurisprudence adds an event-focused one that extends to even private persons:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not voluntarily choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety.[57]

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[54] Melvin v. Doe, 49 Pa. D. & C. 4th 449, 477 (2000); John Doe v. 2TheMart.com, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); Dendrite International v. Doe No. 3, 342 N.J. Super. 134 (App. Div. 2001); Immunomedics v. Jean Doe, 342 N.J. Super. 160, (App. Div. 2001); Richard Raysman & Peter Brown, *Discovering the Identity of Anonymous Internet Posters* (Sep. 11, 2001), *at* http://eon.law.harvard.edu/stjohns/anon-net.html; George Long, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177 (1994).

[55] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[56] Ayer Productions v. Capulong, G.R. No 82380, 160 SCRA 861, April 29, 1988. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), *cited in* Lopez v. Court of Appeals, G.R. No. 26549, July 31, 1970; Babst v. National Intelligence Board, G.R. No. 62992, 132 SCRA 316, Sep. 28, 1984.

[57] Borjal v. Court of Appeals, 301 SCRA 1, G.R. No. 126466, Jan. 14, 1999, *citing* Rosenbloom v. Metromedia, 403 U.S. 29, 44-45 (1971). *See, however,* Lemuel Lopez, *The Right to Privacy in Inquiries in Aid of Legislation*, 78 PHIL. L.J. 163 (2003). This article cites *Ayer* but appears to disbelieve *Borjal's* citation of *Rosenbloom*, erroneously discussing only half of this country's public figure doctrine.

Third, the ease with which cyber-reach is used changes the way acts are weighed. On the surface, a letter mailed to and published by a newspaper and another sent via e-mail might appear to have the same legal weight, but this is hard to justify. The speed and low cost of the medium make its use more casual, for one, something readily seen by the "smiley" faces seen even in business e-mails to bosses and superiors. The line between libel and slander arguably blurs, given written communication done as casually as any conversation.[58] The context of such casually made statements is also harder to establish in the absence of the facial expressions and mannerisms that would accompany an animated conversation.[59] Finally, heated "flame wars"[60] or the Internet equivalent of impassioned debates and shouting matches are perceived as far less serious than the sight of two men arguing animatedly at a street corner. All this changes the way contacts would be weighed in a Conflict of Laws problem, and even the idea that a single contact is enough to establish jurisdiction.

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[58] This blur seems to be supported by an old case that held that extemporaneous defamatory remarks made over radio constitute slander, but similar remarks read from a prepared text constitute libel. People v. Santiago, G.R. No. 17663, 5 SCRA 231, May 30, 1962.

An American case, however, ruled that defamation in an Internet chatroom is libel, since the messages displayed on the screen count as something written and permanent. Mathis v. Cannon, 252 Ga. App. 282, 556 S.E.2d 172 (2001).

[59] *See* Karen Frank, *Potential Liability on the Internet*, 437 PLI/PAT. 417, 437 (1996); E-mail from Scott Fahlman (sef+@cs.cmu.edu) to Don Boray, Subject: Re: smileys, ¶ 2 (Apr. 29, 1995), *at* http://www.newbie.net/SmileyFAQ/Fahlman.html. The latter explains the "emoticons" or now-familiar smiley faces that grace e-mails around the world.

[60] "Rather than pausing and reflecting on a message as one might do with a letter received on paper, it's just so easy to hit your R key and tell somebody you don't really know what you really think of them. Even otherwise calm people sometimes find themselves turning into raving lunatics. When this happens, flames erupt.

...

"Flame wars can be tremendously fun to watch at first. They quickly grow boring, though. And wait until the first time you're attacked!" *Flame, Blather and Spew*, ¶¶ 2-4, *at* http://www.cosy.sbg.ac.at/doc/eegtti/eeg_78.html#SEC79 (last visited Feb. 28, 2004).

II. THE CURRENT CONFLICT OF LAWS TEST FOR DETERMINING PERSONAL JURISDICTION

A. FROM PENNOYER TO INTERNATIONAL SHOE

"In International Law, jurisdiction is defined as the right of a state to exercise authority over persons and things within its boundaries, subject to certain exceptions." Legislative jurisdiction refers to a State's power to regulate or control, through laws, interests of persons in things, events, or situations. Judicial jurisdiction refers to the judiciary of a State's legal authority to hear and adjudicate cases.[61] This paper shall focus on the latter, specifically on a forum court's authority over individuals with respect to their Internet activity.

Jurisdiction springs from sovereignty and a State's exclusive power within its domain. Thus, traditional notions of jurisdiction were grounded in territory and delimited by physical boundaries, as articulated in the 19th century case *Pennoyer v. Neff*:[62]

> [N]o State can exercise direct jurisdiction and authority over persons or property without its territory... the laws of one State have no operation outside of its territory... "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals."[63]

Generally, a court obtains jurisdiction over a defendant when he appears voluntarily before it,[64] or when he is served with summons, personal or substituted.[65] *Pennoyer* etched three categories of proceedings into jurisprudence:

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[61] JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 46 (1995).

[62] 95 U.S. 714 (1877).

[63] *Id.* at 722-23.

[64] RULES OF COURT, Rule 14, § 20.

[65] §§ 6-16. The American Supreme Court emphasized that *International Shoe* and its progeny never removed the distinction between a physically present and a physically absent defendant. Thus, regardless of minimum contacts, a forum acquires jurisdiction over a defendant served with summons while in its territory, even temporarily. Burnham v. Superior Court of California, 495 U.S. 604, 621 (1990).

> [U]nder *Pennoyer* state authority to adjudicate was based on the jurisdiction's power over either persons or property. This fundamental concept is embodied in the very vocabulary which we use to describe judgments. If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated *"in personam"* and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called *"in rem"* or *"quasi in rem."* The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.[66]

Each category mandates different rules for the valid acquisition of jurisdiction. For example, service of summons by publication is repugnant to due process in *in personam* proceedings,[67] but not in others where jurisdiction may be acquired over the *res* independent of the defendant's person.[68] The latter springs from the State's power and interest over property or the personal status of persons within its territory.[69] The *Pennoyer* trichotomy forms part of Philippine Remedial Law's bedrock,[70] and the case itself was

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[66] Shaffer v. Heitner, 433 U.S. 186, 200 (1977). Decades after *Pennoyer*, Professors Arthur von Mehren and Donald Trautman criticized the increasing irrelevance of these categorizations, and coined the post-*Pennoyer* categories of personal jurisdiction, general and specific. Arthur Von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-36 (1966), *cited in* Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 414 (1984). "A distinction has traditionally been drawn between jurisdiction over 'persons' and jurisdiction over 'things,' but for several reasons this distinction does not seem apt or particularly useful... We shall speak, therefore, simply of jurisdiction to adjudicate, with the understanding that jurisdiction always involves an exercise of power – in the sense of defining rights and duties – with respect to one or more persons."

See Geoffrey Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

[67] I FLORENZ REGALADO, REMEDIAL LAW COMPENDIUM 238-39 (2002), *citing* Pantaleon v. Asuncion, G.R. No. 13141, 105 Phil. 761, May 22, 1959; Citizen's Surety & Insurance Co., Inc. v. Melencio-Herrera, G.R. No. 32170, Mar. 31, 1971; Magdalena Estate, Inc. v. Nieto, G.R. No. 54242, Nov. 25, 1983; Filmerco Communication Company, Inc. v. Intermediate Appellate Court, G.R. No. 70661, Apr. 9, 1987.

[68] RULES OF COURT, Rule 14, § 15.

[69] JORGE COQUIA & ELIZABETH AQUILING-PANGALANGAN, CONFLICT OF LAWS 23 (2000).

[70] Asiavest Ltd. v. Court of Appeals, G.R. No. 128803, 296 SCRA 539, Sep. 25, 1998. "[I]n an action *in personam* wherein the defendant is a *non-resident* who does not voluntarily submit himself to the authority of the court, personal service of summons within the state is essential to the acquisition of jurisdiction over her person.... On the other hand, in a proceeding *in rem* or *quasi in rem*, jurisdiction over the person of the

repeatedly cited by Philippine jurists over the last century.[71] Finally, although Conflict of Laws jurisdiction cases are sparse in Philippine jurisprudence, one of the few, *Perkins v. Dizon*,[72] cited *Pennoyer* in establishing jurisdiction in a *quasi in rem* proceeding where nonresident parties were excluded from title to shares of stock of Benguet Consolidated.

If the Internet partakes of the essence of Paradise, however, then continued adherence to *Pennoyer* amidst increasingly virtual human interaction is likened to a legal flaming sword that blocks Adam from returning to the Garden of Eden. The Second Restatement of Conflict of Laws, for example, presents broader criteria for asserting jurisdiction over an individual:

1) presence
2) domicile
3) residence
4) nationality or citizenship
5) consent
6) appearance in an action
7) doing business in the State
8) an act done in the State
9) causing an effect in the State by an act done elsewhere

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defendant is not a prerequisite to confer jurisdiction on the court provided that the court acquires jurisdiction over the *res*. Nonetheless summons must be served upon the defendant not for the purpose of vesting the court with jurisdiction but merely for satisfying the due process requirements. Thus, where the defendant is a non-resident... service of summons may be effected by (a) personal service out of the country, with leave of court; (b) publication, also with leave of court, or (c) any other manner the court may deem sufficient." REGALADO, *supra* at 65, 7-9. This section is part of an introductory chapter entitled, "General Principles."

[71] Narvaez v. Commander of the Philippine Squadron of the United States Navy, G.R. No. 5464, 16 Phil. 62, Mar. 22, 1910; Alba v. De La Cruz, G.R. No. 5246, 17 Phil. 49, Sep. 16, 1910; Roxas v. Enriquez, G.R. No. 8539, 20 Phil. 31, Dec. 24, 1914; El Banco Espanol Filipino v. Palanca, 37 Phil. 94, G.R. No. 11390, Mar. 26, 1918; Lopez v. Director of Lands, G.R. No. 22136, 47 Phil. 23, Dec. 17, 1924; Boudard v. Tait, G.R. No. 45193, 67 Phil. 170, Apr. 5, 1939; Perkins v. Dizon, G.R. No. 46631, 69 Phil. 186, Nov. 16, 1939; Fontanilla v. Dominguez, G.R. No. 48132, 73 Phil. 579, May 20, 1942 (Moran, J., *concurring*); Azurin v. Quitoriano, G.R. No. 1065, 81 Phil. 261, Jul. 22, 1948; In Re: Celestino Co, G.R. No. 10761, 104 Phil. 889, Nov. 29, 1958; In re: Victor Ngo, G.R. No. 25805, 136 Phil. 356, Feb. 27, 1969; Tiongco v. Veterans Bank, G.R. No. 82782, 212 SCRA 176, Aug. 5, 1992.

[72] 69 Phil. 188, *quoted in* Sahagun v. Court of Appeals, G.R. No. 78328, 198 SCRA 44, Jun. 3, 1991. Interestingly, this *Perkins* is related to a landmark American personal jurisdiction case. Perkins v. Benguet Mining Co., 342 U.S. 437 (1952).

10) ownership, use or possession of a thing in the State.
11) other relationships to the State which make the exercise of judicial jurisdiction reasonable[73]

A Philippine court would likely continue to uphold the *Pennoyer* trichotomy,[74] the American jurisdiction where *Pennoyer* was born has since moved from a focus on territory to a modern examination of a defendant's contacts with the forum.[75] "In a continuing process of evolution this (American) Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such (foreign) corporations."[76] Eventually, the shifting jurisprudential sands settled on the leading case *International Shoe v. Washington*:[77]

> Historically the jurisdiction of courts to render judgment in personam is grounded on their *de facto* power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, *he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."* (emphasis added and internal citation omitted)[78]

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[73] Restatement (Second) of Conflict of Laws, § 27, *cited in* SALONGA, *supra* note 61, at 47.

[74] COQUIA & AQUILING-PANGALANGAN, *supra* note 69, at 34.

[75] Hanson v. Denckla, 357 U.S. 235, 252 (1958). "In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. Washington*." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980), *quoting* Pennoyer v. Neff, 95 U.S. 714, 720 (1887). More emphatically, it read, "while abandoning the shibboleth that '[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established....'"

See Mollie Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 253 (1989). "To bridge the ever-widening gap between the law and commercial economic reality, the courts created certain fictions that allowed them to introduce much-needed flexibility into the jurisdictional standard while remaining ostensibly faithful to *Pennoyer*."

[76] McGee v. International Life Insurance Co., 355 U.S. 220, 224 (1957).

[77] International Shoe Co. v. Washington, 326 U.S. 310 (1945)

[78] *Id.* at 317, *citing* Pennoyer v. Neff, 95 U.S. 714, 733 (1887).

Along its trajectory lay the subsequent case *Shaffer v. Heitner*, which then applied *International Shoe's* pronouncement on *in personam* proceedings to *in rem proceedings:*

> [I]n order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*. (internal citations omitted)[79]

Shaffer itself, however, dealt with a *quasi in rem* proceeding:

> For the type of *quasi in rem* action typified by *Harris v. Balk* and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum. (emphasis added)[80]

Shaffer thus completed the replacement of *Pennoyer's* trichotomy with *International Shoe's* minimum contacts doctrine:

> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.[81]

Thus, presence is no longer a jurisdictional prerequisite that demands *physical* presence within territorial metes and bounds,[82] but a

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[79] Shaffer v. Heitner, 433 U.S. 186, 209 (1977). "The overwhelming majority of commentators have also rejected *Pennoyer's* premise that a proceeding 'against' property is not a proceeding against the owners of that property. Accordingly, they urge that the 'traditional notions of fair play and substantial justice' that govern a State's power to adjudicate in personam should also govern its power to adjudicate personal rights to property located in the State." *See, e. g.*, Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956)…." *Id.* at 206.

[80] *Id.* at 209-10.

[81] *Id.* at 213.

symbolic gauge for Due Process and a prospective defendant's reasonable expectation of being sued in a particular forum.[83] Although the American Court noted an inevitable trend towards the expansion of jurisdiction towards foreign corporations and other nonresidents,[84] *Hanson v. Denckla* emphasized:[85]

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than ***a guarantee of immunity from inconvenient or distant litigation***.... However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts".... (emphasis added)[86]

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[82] *Id.* at 204. "[T]he relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer rest, became the central concern of the inquiry into personal jurisdiction." *See, however,* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). "Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we...."

[83] International Shoe v. Washington, 326 U.S. 310, 317-18 (1945). "[T]he 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. L. Hand, J., *in* Hutchinson v. Chase & Gilbert, 2 Cir., 45 F.2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."

"The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant." Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 413-414 (1984). This assertion echoes Shaffer v. Heitner, 433 U.S. 186, 218 (1977); World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286, 291 (1980); Burger King, Corp. v. Rudzewicz, 471 U.S. 462 (1985); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-09 (1987).

See William Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. L.J. 599, 609 (1993). "Having disqualified 'interstate federalism' and the First Amendment, the Court has made it clear that the Due Process Clause is the only constitutional source for the limitations on the judicial jurisdiction of American courts. The Court has not been clear, however, about whether the jurisdictional limitation is grounded in 'substantive' or 'procedural' due process. There is reason, however, to believe that it is neither, and that there is a separate third category of 'jurisdictional' due process."

[84] McGee v. International Life Insurance Co., 355 U.S. 220, 223-24 (1957).

[85] Hanson v. Denckla, 357 U.S. 235 (1958).

[86] *Id.* at 252. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987). "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the

It must be noted that even before *International Shoe*, technology certainly contributed to the relaxation of *Pennoyer's* doctrinal rigidity. In the 1927 *Hess v. Pawloski* ruling, for example, the Court ruled that Massachusetts could validly assert jurisdiction over a Pennsylvania resident for the narrow purpose of enforcing its laws against his negligent handling of a "dangerous machine" called an automobile in a Massachusetts highway.[87] Later, *International Shoe's* "progeny" explicitly recognized the influence of technological advances on jurisprudence:

> Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[88]

The Sixth Circuit summarized:

> 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

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long arm of personal jurisdiction over national borders." This policy concern, independent of the tests used to gauge it, has been stated in Philippine jurisprudence. Saudi Arabian Airlines v. Court of Appeals, G.R. No. 122191, 297 SCRA 469, Oct. 8, 1998.

[87] Hess v. Pawloski, 274 U.S. 352, 356-58 (1927).

[88] McGee, 355 U.S. at 223-24, *quoted in* World-Wide Volkswagen, 444 U.S. at 293. *See* Hanson, 357 U.S. at 251-52. "As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome." Burger King, 471 U.S. at 476. "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."

Justice Brennan cites this portion of *McGee* to support his contention that, beyond minimum contacts, other considerations exist such as the burden on the defendant of litigating in a distant forum. World-Wide Volkswagen, 444 U.S. at 300-01 (Brennan, J., *dissenting*). In the same dissent, he also cites a State's interest in providing its citizens with means of redress.

presence of an agent; yet all have been held to constitute the transaction of business in a state.[89]

Today, personal jurisdiction based on sufficient contacts may be established as either general or specific jurisdiction.[90] General jurisdiction is asserted when a defendant's contacts with a forum are so "continuous and systematic"[91] that there can be no Due Process objection to taking jurisdiction, whether or not the contacts relate to the cause of action. The bar is high, however,[92] and barring this, specific jurisdiction is asserted following a more stringent, three-prong *International Shoe* test:[93]

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[89] Southern Machinery Co. v. Mohasco Industries, 401 F.2d 374, 382 (6th Cir. 1968).

[90] Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 414 (1984), *citing* Arthur Von Mehren & Donald Trautman, *supra* note 66, at 1136-64 (1966); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81.

Professor Mary Twitchell uses the terms "dispute-blind" and "dispute-specific." Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 680 (1988).

[91] Perkins v. Benguet Mining Co., 342 U.S. 437, 439 (1952). "The corporation has been carrying on in Ohio a continuous and systematic, but limited, part of its general business. Its president, while engaged in doing such business in Ohio, has been served with summons in this proceeding. The cause of action sued upon did not arise in Ohio and does not relate to the corporation's activities there. For the reasons hereafter stated, we hold that the Fourteenth Amendment leaves Ohio free to take or decline jurisdiction over the corporation." Helicopteros, 466 U.S. at 416.

[92] Shute v. Carnival Cruise Lines, 897 F.2d 377, 380-81 (1990) *citing* Helicopteros, 466 U.S. at 414; Cubbage v. Merchent, 744 F.2d 665, 667-68 (9th Cir.1984); Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1330-31 (9th Cir.1984); Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240, 1242-43 (9th Cir.1984). Twitchell, *supra* note 90, at 651-52.

[93] The personal jurisdiction test, including the distinction between general and specif ion, was summarized by the United States Supreme Court in *Helicopteros*, 466 The Ninth and First Circuits have identical three-prong tests. Data I s Tech. Assocs., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977); United I l Machine Workers of America v. 163 Pleasant Street Corp., 960 I Cir. 1992).

l Shoe v. Washington, 326 U.S. 310, 321 (1945). "But to the extent tl exercises the privilege of conducting activities within a state, it enjoys the ben 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... [T]he activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual... 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

> 1) the defendant conducted activity in the forum State and purposefully availed of the "benefits and protections of its laws"[94]
>
> 2) the plaintiff has a cause of action "arising out of"[95] or is related to such activity[96]
>
> 3) exercise of jurisdiction by the forum would be "reasonable and just according to our traditional conception of fair play and substantial justice"[97]

The distinction between general and specific jurisdiction emphasizes one point: A *single but substantial* contact suffices to justify the exercise of jurisdiction.[98] Specific jurisdiction must thus be very clearly articulated today, given how easily a brush of fingertips can take place in the Internet.

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our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there."

See No Bad Puns, supra note 7, at 1823 n.5 (2003), *citing* Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 378 (5th Cir. 2002); Shute, 897 F.2d 377 at 381; Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 712-13 (1st Cir. 1996). The test was apparently first formulated in a 1958 student article that was soon adopted by federal courts. Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545, 1551 n.38 (1994), *citing* Bert Harte et al., Note, *Jurisdiction over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 GEO. L.J. 342, 351-52 (1958); L.D. Reeder Contractors v. Higgins Indus., 265 F.2d 768, 773-74 n.12 (9th Cir. 1959); Data Disc, Inc. v. Systems Technology Assocs., 557 F.2d 1280, 1287 (9th Cir. 1977); Southern Machinery Co. v. Mohasco Industries., 401 F.2d 374, 381 (6th Cir. 1968); United Electrical, 960 F.2d at 1089; Dollar Sav. Bank v. First Sec. Bank, 746 F.2d 208, 211-13 (3d Cir. 1984).

[94] Hanson v. Denckla, 357 U.S. 235, 253 (1958); International Shoe, 326 U.S. at 319.

[95] International Shoe, 326 U.S. at 321. "Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit…"

[96] McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957). "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."

[97] International Shoe, 326 U.S. at 321.

[98] McGee, 355 U.S. at 223. "These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum - thus in effect making the company judgment proof."

McGee seemed to add another factor to the jurisdiction equation: State regulatory interest. This aspect of *McGee* was reiterated in later cases. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) (Brennan, J., *dissenting*). "Surely *International*

Such articulation is far from straightforward; Professor Richard Cappalli criticizes that *International Shoe* reshaped doctrine so inarticulately that the actual test is not even evident in *International Shoe* itself.[99] The American First Circuit has described current personal jurisdiction doctrine as "a riddle wrapped in a mystery inside an enigma,"[100] and added that, "[t]he greys are dominant and even among them the shades are innumerable."[101]

B. PRONG 1: PURPOSEFUL AVAILMENT OF THE BENEFITS AND PROTECTIONS OF A FORUM'S LAWS

Applying purposeful availment is arguably *International Shoe's* greatest challenge in the virtual 21st century, considering Internet communication gives a website owner a *potential* presence in *every* jurisdiction in the world, at little cost in both time and money. This seeming dilemma merits careful scrutiny of precedents from the world of flesh and steel.

From *International Shoe*, purposeful availment was first reiterated in *Hanson v. Denckla:*

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting

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Shoe contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations. *McGee v. International Life Ins. Co.*, for instance, accorded great importance to a State's 'manifest interest in providing effective means of redress' for its citizens." Burger King, Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (Brennan, J.). "A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *See* Lani Cossette, Note, *New Long Arm Authority Over Foreign Banks Raises Due Process Concerns But Remains a Viable Tool to Prevent Money Launderers from Abusing the U.S. Financial System*, 71 GEO. WASH. L. REV. 272, 278 (2003).

[99] Richard Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97, 104-05 (1992).

[100] Donatelli v. Nat'l Hockey League, 893 F.2d 459, 462 (1st Cir. 1990); Sarah Cebik, *"A Riddle Wrapped in a Mystery Inside an Enigma": General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1.

[101] United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp., 960 F.2d 1080, 1088 (1st Circ., 1992), *quoting* Estin v. Estin, 334 U.S. 541 (1948).

activities within the forum State, thus invoking the benefits and protections of its laws.[102]

A Circuit Court termed purposeful availment "the *sine qua non* for *in personam* jurisdiction."[103] It was more extensively discussed by the Supreme Court in *Burger King v. Rudzewicz*,[104] which treated purposeful availment as the first threshold issue for specific jurisdiction:

> 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...." On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.[105]

Purposeful availment aims to filter out lawsuits arising from merely "irregular or casual,"[106] "random, isolated, or fortuitous,"[107] and "random, fortuitous, or attenuated"[108] contacts,[109] and those arising purely from the "unilateral activity of another party or a third person."[110] Further, later cases held that purposeful availment under *Burger King* may exist even if the actual transaction or main contact was not consummated in that forum.[111] Finally, *Burger King* emphasized that "mechanical" tests and "conceptualistic theories

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[102] Hanson v. Denckla, 357 U.S. 235, 253 (1958). *See* Shaffer v. Heitner, 433 U.S. 186, 216 (1977); Kulko v. California Superior Court, 436 U.S. 84, 96 (1978).

[103] Southern Machinery Co. v. Mohasco Industries, 401 F.2d 374, 381-82 (6th Cir. 1968), *quoted in* Compuserve v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996).

[104] Burger King, 471 U.S. at 476. "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."

[105] *Id.* at 476-77.

[106] International Shoe v. Washington, 326 U.S. 310, 321 (1945).

[107] Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984).

[108] Burger King, 471 U.S. at 480. *See* Travelers Health Association v. Virginia, 339 U.S. 643, 647 (1950).

[109] Perkins v. Benguet Mining Co., 342 U.S. 437, 439 (1952); Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 416 (1984).

[110] Helicopteros, 466 U.S. at 417.

[111] Shute v. Carnival Cruise Lines, 897 F.2d 377, 381 (9th Cir. 1990), *citing* Burger King, 471 U.S. at 476; Lanier v. American Board of Endodontics, 843 F.2d 901, 907 (6th Cir.).

of the place or of performance"[112] were woefully insufficient. Instead, the American Court reiterated:

> [W]e have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum. (internal citation omitted)[113]

"Purposeful availment requires that the defendant engage in some form of affirmative conduct allowing or promoting the transaction of business within the forum state."[114] Nevertheless, despite this emphasis on "highly realistic" searches for "affirmative conduct," a *Harvard Law Review* article criticized: "Little availment, and almost no purpose, will generally suffice."[115]

For example, in *Hahn v. Vermont Law School*,[116] a former law student sued the Vermont school in Massachusetts after he failed an exam. The First

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[112] Burger King, 471 U.S. at 478, *citing* International Shoe, 326 U.S. at 319; Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 316 (1943).

[113] Burger King, 471 U.S. at 480, *quoting* Hoopeston Canning, 318 U.S. at 316-17. Note that in *Burger King*, Justice Brennan, here the author of the majority opinion, wrote of other factors beyond minimum contacts. Burger King, 471 U.S. at 476-77, *citing* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Keeton, 465 U.S. at 780; Calder v. Jones, 465 U.S. 783, 788-89 (1984); McGee v. International Life Insurance Co., 355 U.S. 220, 223-24 (1957). "Once it has been decided that a defendant purposefully established minimum contacts... these contacts may be considered in light of other factors... Thus courts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the 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 most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."

See R.D. Rees, Note, *Plaintiff Due Process Rights in Assertions of Personal Jurisdiction*, 78 N.Y.U. L. REV. 405, 422-28 (2003).

[114] Shute v. Carnival Cruise Lines, 897 F.2d 377, 381 (9th Cir. 1990), *citing* Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 840 (9th Cir. 1986).

[115] *No Bad Puns, supra* note 7, at 1827. *See* Lawrence Dessem, *Personal Jurisdiction After Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 64 (1987).

[116] Hahn v. Vermont Law School, 698 F.2d 48 (1st Cir. 1983).

Circuit exercised jurisdiction, finding that the school's prior mailing of an application and then an acceptance letter constituted purposeful availment. *Waterval v. District Court*[117] involved a Virginia lawyer and a client who had moved from Virginia to Colorado but continued the relationship. The Colorado Supreme Court ruled that the lawyer's phone calls and other correspondence directed at Colorado constituted purposeful availment. *Sinatra v. National Enquirer, Inc.*[118] held that a defendant who consented to make false statements during an interview purposefully availed of benefits in every forum the publication circulated in, since the interview was aimed at promoting his business. Many other cases set similarly low bars.[119]

SUBPRONG 1? PRODUCT LIABILITY AND STREAM OF COMMERCE

Product liability cases, finally, constitute a thorny but increasingly important subcategory of purposeful availment. *World-Wide Volkswagen Corp. v. Woodson* ruled that the manufacturer of a car sold in New York could not be sued for alleged design defects in Oklahoma absent sales or other activity in the latter. Indeed, the car had only been used in Oklahoma once, at the time of the accident the case discussed.[120] *Volkswagen*, however, crafted a framework where a defendant with no direct contact with the forum might nevertheless have undertaken a specific, economic purposeful availment it called "stream of commerce:"

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale... is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its

[117] Waterval v. District Court, 620 P.2d 5 (Colo. 1980).

[118] Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1195-1198 (9th Cir. 1988).

[119] *No Bad Puns*, *supra* note 7, at 1828 n.32, *citing* Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 379-81 (5th Cir. 2002); Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087-88 (9th Cir. 2000); Nelson v. Park Indus., Inc., 717 F.2d 1120, 1125-27 (7th Cir. 1983); Meade Instruments Corp. v. Reddwarf Starware LLC, 47 U.S.P.Q.2d 1157, 1158-59 (C.D. Cal. 1998); PLUS Sys., Inc. v. New Eng. Network, Inc., 804 F. Supp. 111, 118-19 (D. Colo. 1992); Bakery Equip./ Design Ltd. v. Sunrise Bakers L.L.C., No. 227575, 2002 WL 31058352, at *2-3 (Mich. Ct. App. Sept. 13, 2002); BLC Ins. Co. v. Westin, Inc., 359 N.W.2d 752, 754 (Minn. Ct. App. 1985) ; Kopke v. A. Hartrodt S.R.L., 629 N.W.2d 662, 675-76 (Wis. 2001).

[120] World-Wide Volkswagen 444 U.S. at 295-97.

> product in other States.... The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. (internal citations omitted)[121]

The Court applied this test and found that the manufacturer sold its cars only through dealers in New York, New Jersey and Connecticut. Although a person might foreseeably take a car from New York to Oklahoma, the Court considered this the unilateral act of a third person, which cannot be purposeful availment on the defendant's part.[122]

Volkswagen, it must be noted, distinguished purposeful availment from foreseeability:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[123]

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[121] *Id.* at 297-98 (1980), *citing* Hanson v. Denckla, 357 U.S. 235, 253 (1958); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N. E. 2d 761 (1961). The first quoted sentence became very important in interpreting the *Volkswagen* holding. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987) (Brennan, J., *concurring in part*)

Volkswagen's cited Illinois opinion, *Gray*, was the "seminal" American stream of commerce case, and its influence has gone far beyond product liability, though its holding has been qualified in several areas. Diane Kaplan, *Paddling Up the Wrong Stream: Why the Stream of Commerce Theory is not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503, 505-07 (2003); Murphy, *supra* note 75, at 243-44. *Gray* was cited in much older personal jurisdiction cases. Shaffer v. Heitner, 433 U.S. 186, 226 (1977) (Brennan, J., *concurring and dissenting*).

[122] World-Wide Volkswagen 444 U.S. at 298, *citing* Hanson, 357 U.S. at 253. The Court found for Volkswagen, and the holding stated this was because it had not established minimum contacts with Oklahoma.

After *Volkswagen*, some courts described its brand of economic purposeful availment as targeting a particular market. *See* Stoutco, Inc. v. Amma, Inc., 570 F. Supp. 1376, 1379 (N.D. Ind. 1983); Strick Corp. v. A.J.F. Warehouse Distribs., Inc., 532 F. Supp. 951, 956 (E.D. Pa. 1982).

[123] World-Wide Volkswagen Corp., 444 U.S. at 297. Some State decisions after *Volkswagen*, however, interpreted foreseeability as a sufficient basis to exercise jurisdiction. Asahi Metal Indus., 480 U.S. at 110 (1987), *citing* Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984); Hedrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983).

Professor Michael Richman criticized that foreseeability cannot substitute for minimum contacts. Otherwise, a vendor could only avoid being sued in a distant forum by deliberately being hostile to customers who might bring his product to a foreign jurisdiction. Nevertheless, he criticized *Volkswagen's* "circular dictum" since it cited foreseeability as relevant, anyway.[124]

In *Calder v. Jones*,[125] a California resident sued a reporter and an editor of the *National Enquirer* for libel, and the Court noted the newspaper enjoyed its largest circulation in California. The defendants argued that just because they could foresee the article's circulation in California, this was not sufficient to justify California's jurisdiction, citing *Volkswagen*. The *Calder* Court agreed that mere foreseeability was insufficient, but instead held that the defendants' acts went beyond mere untargeted negligence in a three-prong standard:

> 1) "[T]heir intentional, and allegedly tortious, actions..."
>
> 2) "...were expressly aimed at California..." which was the focal point of the harm[126]
>
> 3) "[T]hey knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation."[127]

See United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp., 960 F.2d 1080, 1088 (1st Cir. 1992), *citing* World-Wide Volkswagen, 444 U.S. at 297. "The Court has also introduced concepts of reasonableness and foreseeability into minimum contacts analysis..." Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 715 (1st Cir. 1996), *citing* United Electrical, 960 F.2d at 1089. "Foreseeability is a critical component in the due process inquiry, particularly in evaluating purposeful availment, and we think it also informs the relatedness prong. As the Supreme Court said in *Burger King*...."

[124] Richman, *supra* note 28, 622-23.

[125] Calder v. Jones, 465 U.S. 783 (1984).

[126] Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 730 (E.D. Pa. 1999).

[127] Calder, 465 U.S. at 789. *Calder* further rejected that an employee's status did not insulate him from liability, and that each defendant's contacts with the forum must be assessed individually. *Id.* at 790. It must be noted that a Seventh Circuit District Court considered *Calder's* effects doctrine as one of two modes of establishing minimum contacts, the other being purposeful availment following *Asahi*. However, intent is indispensable under *Calder*, which is precisely the rationale of purposeful availment, *Asahi* or precedents alike. Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F.Supp.2d 1154, 1162-63 (W.D. Wisc. 2004).

Calder was a defamation case, but the next landmark product liability ruling, *Asahi Manufacturing Co. v. Superior Court*, seemed to reiterate *Volkswagen* as well. *Asahi* ruled that a Japanese tire valve manufacturer could not be sued through a cross-claim in California simply because a Taiwanese firm that bought its valves incorporated these into its own products, which it then sold in California. It discussed *Volkswagen:*

> Some courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product in the stream of commerce. Other courts have understood the Due Process Clause and the above-quoted language in *World-Wide Volkswagen* to require the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce. (internal citations omitted)[128]

Asahi upheld the latter interpretation, reiterating precedents that found additional factors establishing purposeful availment:

> Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence that Asahi designed its product in anticipation of sales in California. (internal citations omitted)[129]

However, the holding stated unreasonableness, or the third prong of the *International Shoe* test, and not lack of purposeful availment as its basis.[130]

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[128] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 110 (1987).

[129] *Id.* at 112-13, *citing* Hicks v. Kawasaki Heavy Industries, 452 F. Supp. 130 (MD Pa. 1978); Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta, 553 F. Supp. 328 (ED Pa. 1982).

[130] Asahi, 480 U.S. at 116. "Because the facts of this case do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice, the judgment of the Supreme Court of California is reversed..."

See, however, Shute v. Carnival Cruise Lines, 897 F.2d 377, 382 (9th Cir. 1990). "The *Sinatra* court's premise that solicitation of business in the forum state will support a finding of purposeful availment has substantial support in *Asahi.* Justice O'Connor, writing for a four-Justice plurality, noted that conduct such as 'designing the product for the market in the forum State, establishing channels for providing regular advice to customers in the forum State, advertising in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State' may evidence purposeful availment. The plurality relied upon the absence of these factors to conclude that Asahi did not purposefully avail itself of the California market." *See* Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1195 (9th Cir. 1988).

Probing deeper, one realizes that a majority of five justices actually dissented against the purposeful availment holding. Justice Brennan, joined by Justices White, Marshall and Blackmun, stated that the majority holding on purposeful availment reflected the minority view among Federal Appellate Courts, and that many of the latter had retreated from *Volkswagen.* He reasoned that manufacturers benefit from the sales of their products in other jurisdictions whether or not they take additional action to tap those markets.[131] On the other hand, Justice Stevens, joined by Justices White and Blackmun, felt that purposeful availment need not have been discussed since unreasonableness was clear, but that in any case, the regular eventual delivery of over 100,000 units a year to California sufficed to establish purposeful availment.[132]

Asahi captures the increasing complexity of factors a court must scrutinize when faced with international commerce. For example, one might

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[131] Asahi, 480 U.S. at 116-17 (Brennan, J., *concurring in part*) "I do not agree with the interpretation in Part II-A of the stream-of-commerce theory, nor with the conclusion that Asahi did not 'purposely avail itself of the California market...' This is one of those rare cases in which 'minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities...' A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct."

[132] *Id.* at 122-23 (Stevens, J., *concurring in part*) "I do not join Part II-A for two reasons. First, it is not necessary... Part II-B establishes, after considering the factors set forth in *World-Wide Volkswagen Corp. v. Woodson*, that California's exercise of jurisdiction over Asahi in this case would be 'unreasonable and unfair.' This finding alone requires reversal; this case fits within the rule that 'minimum requirements inherent in the concept of `fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities...' Second, even assuming that the test ought to be formulated here, Part II-A misapplies it to the facts of this case... Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' even though the item delivered to the forum State was a standard product marketed throughout the world."

criticize Justice Stevens' opinion and cite the Court's own finding that Asahi's sales to the Taiwanese firm composed only 0.44 to 1.26% of its income, a figure further dissipated when one considers that California was only one of the many markets the latter sold its products in.[133] On the other hand, one notes that such percentages do not reflect the value of these global sales.

Indeed, one author proposed that stream of commerce doctrine is properly disentangled from *International Shoe* minimum contacts because the latter consider whether it is fair and just for a nonresident defendant to be sued in a forum, while the former considers the obligations and benefits incurred by a vendor in a transactional chain. Although both doctrines establish jurisdiction, they focus on completely different factors, and an admixture leads to confusion. For example, a more purist and expansive conception such as Justice Brennan's actually ignores contacts, and focuses on a vendor's benefits once his products enter a particular market, whatever his further actions, or lack of any.[134] Another author proposed that stream of commerce be applied using a sliding scale, using a higher bar for defendants who have less control over the final distribution of their products.[135]

If anything, a review of precedents only points to the jurisprudential entrenchment of a very low bar for purposeful availment, such that one cannot expect to have it raised in the face of technological progress. Moreover, the economic transformations described in *McGee* half a century ago have only increased their pace, and courts will have to address purposeful availment in the context of increasingly diverse issues from

[133] *No Bad Puns*, *supra* note 7, at 1836. These kinds of details have been noted by the American Court before. *See* Calder v. Jones, 465 U.S. 783, 785 (1984). "The Enquirer is a Florida corporation with its principal place of business in Florida. It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California."

[134] Kaplan, *supra* note 121, at 589-601. Kaplan discussed the evolution of stream of commerce doctrine from the original Illinois ruling to the sharp division in the *Asahi* Court. *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).

[135] Murphy, *supra* note 75, at 315.

migrant labor[136] to transnational class suits.[137] And, of course, there remains the thorny problem of the potentially unlimited reach of the Internet.

C. PRONG 2: CAUSE OF ACTION ARISING OUT OF DEFENDANT'S ACTIVITY

The "arising out of" prong has two functions:

> First, relatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases. Second, it ensures that the element of causation remains in the forefront of the due process investigation.[138]

At first blush, the second prong seems less complex than the first, and appears on its surface a simple test of relatedness. That is, if one cannot establish general jurisdiction following *Perkins* and *Helicopteros Nacional* due to a dearth of contacts, then one should strive to establish specific jurisdiction, first by finding a single but substantial contact following *McGee*, and then establishing its relation to one's cause of action.

This, however, is precisely the problem: What *is* "simple" relatedness? Current doctrine is not so distant from Justice Stewart's "I know it when I see it."[139]

Unlike purposeful availment, however, "arising out of" has no *Burger King* or even *Asahi* to harmonize lower court rulings; *Helicopteros Nacional* even explicitly stated that the Court was not asserting any view as the issue had not been presented before it.[140] Nevertheless, few factual milieus are as

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[136] Sunil Bhave, *Opening the Courtroom Doors for Migrant Workers: The Need for a Nationwide Service of Process Amendment to the Migrant and Seasonal Agricultural Worker Protection Act*, 47 ST. LOUIS U. L.J. 899, 919 (2003).

[137] *See* Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41 (2003).

[138] Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 207 n.8 (1st Cir. 1994).

[139] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), *quoted in* Lawrence Moore, S.J., *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 583 n.1 (2001). "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

[140] Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 415-16 n.10 (1984). *See* William Richman, Review Essay, *Jurisdiction in Civil Actions*, 72 CAL. L. REV. 1328, 1337-38 (1984). "[I]s jurisdiction proper where the case fails to satisfy the requirements

simple as *McGee's* single contact scenario, and there are often more contacts than are apparent. Thus, a diversity of "arising out of" tests are used by the various federal appellate courts,[141] and most are reminiscent of the causal chains from Tort doctrine.[142]

Seeking parallels from Philippine Civil Law as a starting point, a defendant's conduct is deemed related to a plaintiff's damage when it is:

> [A]ny cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which would not have occurred and from which it ought to have been foreseen or reasonably anticipated by a person of ordinary case that the injury complained of or some similar injury, would result therefrom as a natural and probable consequence.[143]

THE NINTH CIRCUIT AND THE "BUT FOR" TEST OF RELATEDNESS

The first test for such relatedness in personal jurisdiction is the "but for" test, where, in original Torts context, the conduct must be "the efficient cause which set in motion the chain of circumstances leading to the injury."[144] The "but for" test was adopted by the Ninth Circuit in its leading case *Shute v. Carnival Cruise Lines*,[145] which involved a lady who injured herself during a cruise from Los Angeles to Mexico. She was allowed to sue in Washington, where the defendant had made advertisements, held promotional seminars, and paid commissions to travel agents. It deemed this purposeful availment, and that "but for" such "significant and continuing efforts to solicit business"[146] there, the plaintiff would never have taken the

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for either general or specific jurisdiction, but partially satisfies the requirements for both? In such a case, can the court 'blend' or combine the defendant's claim related and non-claim related contacts with the forum? In *Helicopteros Nacionales de Colombia v. Hall (Helicol)*, the United States Supreme Court missed a marvelous opportunity to explore this issue."

[141] Rose, *supra* note 93, at 1568-70.

[142] Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 714 (1st Cir. 1996).

[143] People v. Desalina, 57 O.G. 8694, *quoted in* Pilipinas Bank v. Court of Appeals, G.R. No. 105410, 225 SCRA 268, Jul. 25, 1994.

[144] I CEZAR SANGCO, PHILIPPINE LAW ON TORTS & DAMAGES 104 (1993).

[145] Shute v. Carnival Cruise Lines, 897 F.2d 377, 385 (9th Cir. 1990). However, it implicitly adopted it prior to *Shute* in Cubbage v. Merchent, 744 F.2d 665 (9th Cir. 1984). The Ninth Circuit is recognized as the "most forceful defender" of the "but for" test. Nowak v. Tak How Investments, Ltd., 94 F.3d at 714.

[146] Shute, 897 F.2d at 385 n.7.

cruise and been subjected to the defendant's alleged negligence. The Ninth Circuit explained:

> The "but for" test is consistent with the basic function of the 'arising out of' requirement – it preserves the essential distinction between general and specific jurisdiction. Under this test, a defendant cannot be haled into court for activities unrelated to the cause of action in the absence of a showing of substantial and continuous contacts sufficient to establish general jurisdiction.[147]

The "but for" test is also used by the Fifth, Sixth, and Seventh Circuits, making it the most widely applied one.[148] However, one author criticizes that causation from Torts is more abstract when applied to jurisdiction, which involves a shift from concrete events to human relationships. Further, it is difficult to apply a "but for" causation test where there is no actual chain of events, but multiple or cumulative injury, where a single act causes multiple injury in different jurisdictions, such as in libel, and where many minor causes insufficient to produce an effect on their own nevertheless produce it cumulatively, respectively.[149]

The "but for" test is broader than it seems, and unqualified application is possibly disastrous for Internet cases. Its theoretical scope is so unbounded[150] that any of the places through which Internet transmissions pass through could be argued under "but for" tests, and even the site of one's Internet or e-mail provider's main computers would have little connection.[151]

THE FIRST CIRCUIT AND THE PROXIMATE CAUSE TEST OF RELATEDNESS

The leading alternative to the "but for" test is the proximate cause test, with the First Circuit as its self-recognized main proponent.[152] Where the "but for" test possibly embraces every possible link in the casual chain,

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[147] Shute, 897 F.2d at 385.

[148] *Id.* at 383. Rose, *supra* at 93, 1568-69, *citing* Creech v. Roberts, 908 F.2d 75, 80 (6th Cir. 1990); Lanier v. American Bd. of Endodontics, 843 F.2d 901, 909 (6th Cir.); Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209 (7th Cir. 1984); Prejean v. Sonatrach, Inc., 652 F.2d 1260 (5th Cir. Unit A 1981); Coats v. Penrod Drilling Corp., 5 F.3d 877, 883-84 (5th Cir. 1993).

[149] Rose, *supra* at 93, 1570-77.

[150] Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 715 (1st Cir. 1996).

[151] *No Bad Puns, supra* note 7, at 1842-43.

[152] Nowak, 94 F.3d at 715.

the proximate cause test uses only those contacts which are sufficiently material or relevant. However, these do not follow Philippine Civil Law's familiar substantial factor test, which asks, "Was defendant's conduct a substantial factor in producing plaintiff's injuries?"[153] More specifically, the proximate cause test demands an, "'important, or [at least] material, element of proof' in the plaintiff's case;"[154] in a contract case, for example, "the defendant's forum-based activities must be 'instrumental in the formation of the contract.'"[155] This follows from Professor Lea Brilmayer's "substantive relevance," which emphasizes legal, evidentiary weight over "centrality to the plot line," or whether a person narrating the facts of the case would include a particular event and its geographic location.[156]

In the leading First Circuit case *Nowak v. Tak How Investments, Ltd.*, the court allowed a suit in Massachusetts against a Hong Kong hotel operator with no other place of business, after a Massachusetts tourist drowned in its swimming pool. The court noted that Tak How advertised in American and international publications that circulated in Massachusetts and made solicitations through direct mail, and even specifically advertised its pool as an attraction. It ruled:

> If the resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contacts and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage.[157]

Discussing the test itself, the First Circuit prefers it because it easily correlates with foreseeability, which acts as a self-limiting factor not found in the "but for" test.[158] Moreover, using the Rules of Evidence sense of

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[153] SANGCO, *supra* note 78, at 105, *quoting* Whitnez v. Hintz, 437 Pa 448, 263 A.2d 889.

[154] United Electric Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992), *quoting* Marino v. Hyatt Corp., 793 F.2d 427, 430 (1st Cir. 1986).

[155] United Electric 960 F.2d at 1089, *quoting* Hahn v. Vermont Law School, 698 F.2d 48, 51 (1st Cir. 1983).

[156] Lea Brilmayer, Colloquy, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1452-58 (1988); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 88-96. "A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits." The latter article was cited by the United States Supreme Court. Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 414 n.9 (1984).

[157] Nowak, 94 F.3d at 715-16.

[158] *Id.* at 715. *See* text accompanying note 123, discussing the First Circuit's interpretation of *Volkswagen's* foreseeability discussion.

materiality gives a specific yet familiar legal benchmark. However, this proxy for relevance is not perfect since some results may go against judges' intuition. For example, the advertisements in *Shute* would be immaterial to proving negligence of the cruise ship's personnel. Thus, *Nowak* qualified Brilmayer's rule in application:

> When a foreign corporation directly targets residents in an ongoing effort to further a business relationship, and achieves its purpose, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result. The corporation's own conduct increases the likelihood that a specific resident will respond favorably....
>
> This concept represents a small overlay of "but for" on "proximate cause...." It may be that other kinds of fact patterns will be found to meet the basic factor of foreseeability, but we have no occasion here to pronounce more broadly....
>
> While the nexus between Tak How's solicitation of Kiddie Products' business and Mrs. Nowak's death does not constitute a proximate cause relationship, it does represent a meaningful link between Tak How's contact and the harm suffered.... [W]e intend to emphasize the importance of proximate causation, but to allow a slight loosening of that standard when circumstances dictate.[159]

This forced qualification actually arises from Professor Mary Twitchell's early criticism: *International Shoe* described contacts that "arise out of or are connected with the activities within the state," and the evidentiary benchmark may gloss over the phrase's second half.[160] Professor Twitchell also argued that the basis is difficult to administer, since the court may have to examine elements from another jurisdiction's substantive law.[161] As a final critique, creative draftsmanship may sidestep the test; for example, a lawyer

[159] Nowak, 94 F.3d at 715-16.

[160] Twitchell, *supra* note 90, at 654, *quoting* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). *See* Moore, *supra* note 139, *citing* Vons Cos. v. Seabest Foods, Inc., 926 P.2d 1085 (Cal. 1996). "[The California Supreme Court stated] *Helicopteros Nacionales de Columbia v. Hall* uses the disjunctive, 'related to or 'arise[] out of'' so the United States Supreme Court has not required the degree of relatedness that Professor Brilmayer suggests." *See* Mark Maloney, Note, *Specific Personal Jurisdiction and the "Arise From or Relate to" Requirement... What Does it Mean?*, 50 WASH. & LEE L. REV. 1265, 1280-81 (1993). "Justice Brennan's *Helicopteros* dissent may have called for a standard even more expansive than 'but for.' His dissent never discussed a threshold of causal relatedness, but only distinguished, and would hold sufficient, contacts that 'formally 'give rise' to the cause of action and contacts that are 'related to' the cause of action."

[161] Twitchell, *supra* note 90, at 657.

in *Shute* might plead that the advertisements in Washington failed to warn the plaintiff of the danger of slipping and falling during the cruise.[162]

OTHER PROPOSED "ARISING OUT OF" TESTS

A Missouri court noted: "The fundamental criticisms are that the but for test is too broad and the proximate cause/substantive relevance test is too narrow."[163]

Professor William Richman decried an "excessively conceptualistic analysis of the notion of claim-relatedness"[164] and eschewed the perceived extremes for a sliding scale, "the more unrelated to the claim the contacts are, the greater the quality and quantity the contacts must be; the more related to the claim the contacts are, the lesser the quality and quantity the contacts must be."[165] He argues that such a scale handles not only the clear general jurisdiction scenario of *Perkins* and the equally clear specific jurisdiction scenario of *McGee*, but even hypothetical near-misses:

> Suppose the defendant, an Illinois corporation, manufactures a nonprescription antacid tablet in Illinois. Its plant, warehouse, central offices, and sales manager are all in Illinois. It ships its product into every state, including California, and obtains substantial revenue from its sales there. Further, it has assigned five salesmen or detail men to the California territory; they call on doctors, hospitals, and pharmacies in California and solicit orders for the product. The plaintiff, a California resident who has taken the medication for years, attends a convention in New York, where he purchases the impure or adulterated drug and is injured. He sues the defendant in California.[166]

In this case, the hypothetical Illinois corporation is clearly not subject to general jurisdiction in California, yet the actual "related" contact

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[162] Rose, *supra* note 93, at 1579-84, 1579 n.228. *See* Saudi Arabia v. Nelson, 507 U.S. 349 (1993). "[T]his is merely a semantic ploy… a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it."

[163] Davis v. Baylor University, 976 S.W.2d 5, 8 (Mo. Ct. App. 1998), *quoted in* Moore, *supra* note 139, at 593.

[164] Richman, *Jurisdiction in Civil Actions*, *supra* note 140, at 1345.

[165] Moore, *supra* note 139, at 593, *citing* Richman, *Jurisdiction in Civil Actions*, *supra* note 135, at 1345; William Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. L.J. 599, 615 (1993).

[166] Richman, *Jurisdiction in Civil Actions*, *supra* note 140, at 1344.

for specific jurisdiction took place in New York. The sliding scale has not been explicitly used in a federal decision, but its intuition is felt in *Nowak's* "meaningful link"[167] and other dicta.[168] Professor Lawrence Moore, S.J., however, praised how the California Supreme Court applied a sliding scale to emphasize fairness, following the factors in *Asahi.*[169]

Richman's Cartesian plane is clear intuitively, but its exact gradations are likely impossible to mark, leaving each case to, in effect, turn on its particular facts.[170] Professor Linda Simard took the above hypothetical scenario:

> Suppose, however, a subsequent case arises involving a defendant that has a continuous but smaller quantity of sales in California... [M]ust the court compare the number of California sales for each defendant to determine how related the cause of action must be? Should the court compare the percentage of California sales to overall sales for each defendant? Is the profit earned in California more or less important than the number of sales in the state? Should the court compare the nature of the goods sold by each defendant to determine the "quality" of the contacts? ... While the sliding scale model seems to avoid "an excessively conceptualistic analysis of the notion of claim-relatedness," it may open the door for courts to exercise jurisdiction over claims that have little connection to the forum state.[171]

Professor Simard further criticized that the sliding scale leaves out the important time element. Theoretically, for example, if the hypothetical corporation made sales in California only *after* the injury in New York, the sliding scale might still allow a suit there, which would be proper only if general jurisdiction could be established.[172]

Finally, the "could have been" test is more expansive than even the "but for" test. This would accept a contact that had a reasonable probability or increasing the probability of giving rise to the cause of action. This runs

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[167] Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 716 (1st Cir. 1996).

[168] Rose, *supra* note 93, at 1584, *citing* LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1303 (6th Cir. 1989); Shute v. Carnival Cruise Lines, 897 F.2d 377, 385, n.7 (9th Cir. 1990).

[169] Moore, *supra* note 139, at 601.

[170] Rose, *supra* note 93, at 1584.

[171] Linda Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, But is it Constitutional?*, 48 CASE W. RES. L. REV. 559, 581 (1998).

[172] *Id.* at 581-82.

along the lines of tort causation theories discussed by authors such as Professor Michael Wright:

> In other cases... the risks created by different sources are independent and alternative. In these cases... some courts allow recovery for the separate risks that possibly led to the manifested injury, by imposing several (separate) liability for a proportionate share of the manifested injury, based on each defendant's contribution to the total risk that led to the injury.[173]

For example, in *Cubbage v. Merchent*, the Ninth Circuit allowed a suit in California by a California resident against an Arizona hospital because the latter had advertised in a telephone directory that circulated in both States, even though there was no showing that the advertisement had actually led the plaintiff to seek the defendant's services.[174] This test is not explicitly used in any circuit, but analogous cases exist.[175] However, this even broader but more abstract test is problematic for similar reasons as the "but for."

Clearly, although rigid adherence to a rule is not desired, "arising out of" needs to be spelled out with greater precision than every synonym of "related," "substantial," and "I know it when I see it." Further, Professors Richman and Simard have articulated the need to account for contacts dismissed as unrelated under specific jurisdiction in the "near-miss" cases that fall short of general jurisdiction. These are all the more crucial given the more numerous possible online fingertip brushes and butterfly kisses today. At the very least, badges of relatedness for different kinds of cases would have to be identified, to achieve both fairness and predictability.

C. PRONG 3: REASONABLE AND JUST ACCORDING TO FAIR PLAY AND SUBSTANTIAL JUSTICE

Reasonableness was the essence of *International Shoe* and its Due Process thrust, and *Burger King* has made it the last check after purposeful availment and relatedness have been established. For example:

> [A] defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction must present a compelling case

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[173] Richard Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Discussing the Concepts*, 73 IOWA L. REV. 1001, 1073 (1988).

[174] Cubbage v. Merchent, 744 F.2d 665 (9th Cir. 1984).

[175] Rose, *supra* note 93, at 1582.

> that the presence of some other considerations would render jurisdiction unreasonable.[176]

This policy concern, at least, has been accepted by the Philippine Court, though in a recent case that referenced *forum non conveniens* doctrine.[177] *Saudi Arabian Airlines v. Court of Appeals* held:

> [U]nless the balance is strongly in favor of the defendant, plaintiff's choice of forum should rarely be disturbed.[178]

This is not to say the last check is unimportant, however. Far from it, *Burger King* continued:

> Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional... Nevertheless, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.[179]

Thus, for example, Justice Brennan dissented in *Asahi* stating:

> This is one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' ... defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities."[180]

At first glance, the third prong appears a seeming abstract afterthought regarding justice and equity, something akin to Justice Antonin

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[176] Burger King, Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985). *Burger King* held that Due Process is not a "territorial shield to interstate obligations that have been voluntarily assumed." *Id.* at 474.

[177] Although *forum non conveniens* is also concerned with fairness, it differs in two ways. First, it places the burden on the defendant, once the plaintiff has established minimum contacts. Second and more importantly, *forum non conveniens* is left to the court's discretion, unlike the more substantial question of jurisdiction itself. Lee Scott Taylor, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1180 (2003).

[178] Saudi Arabian Airlines v. Court of Appeals, G.R. No. 122191, 297 SCRA 469, Oct. 8, 1998, *citing* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). The American case cited is not part of the *International Shoe* line, but dealt with *forum non conveniens*.

[179] Burger King, 471 U.S. at 477-78, *citing* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).

[180] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (Brennan, J., *concurring in part*).

Scalia's "th'ol' 'totality of the circumstances' test."[181] *Volkswagen* emphasized the importance of predictability,[182] but there is more of it than apparent in the third prong because, in effect, *Burger King* squeezed every additional factor picked up along the trail of *International Shoe's* progeny into reasonableness:

> 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." Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the 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 most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies."[183]

Further, federal appellate courts have adopted these factors in their tripartite tests. For example, the First Circuit calls them the five "Gestalt" factors,[184] and described:

> The purpose of the gestalt factors is to aid the court in achieving substantial justice, particularly where the minimum contacts question is very close. In such cases, the gestalt factors may tip the constitutional balance.[185]

Many attempts have been made to further articulate reasonableness. Professor Richard Cappalli, for example, defined fairness in terms of Lockean reciprocal duties owed by an individual to all others, and the assertions of government power over individual liberty that make ordered

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[181] United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

[182] World-Wide Volkswagen, 444 U.S. 286 at 297.

[183] Burger King, 471 U.S. at 476-77, *citing* World-Wide Volkswagen 444 U.S. at 292 (1980). Professor Richman has discussed the present five factors more extensively. Richman, *supra* note 28, at 627-33. Just a few years after *International Shoe*, a lesser-cited case listed an early set of additional factors, but as part of *forum non conveniens* doctrine. Travelers Health Association v. Virginia, 339 U.S. 643, 648-49 (1950).

[184] United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp., 960 F.2d 1080, 1088 (1st Circ. 1992), *citing* Burger King, 471 U.S. at 477; Donatelli v. Nat'l Hockey League, 893 F.2d 459, 465 (1st Cir. 1990).

[185] Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 717 (1st Cir. 1996), *citing* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 107 (1987); Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994).

society possible.[186] Professor Kevin McMunigal borrows from Criminal Law and talks about *mens rea* and the net social gain of imposing punishment.[187]

What some decisions have done, however, is to allow the third prong to seep into the first or the second, guarding against excessive breadth or lack of precision in either. This is precisely what *Nowak* rejected. Criticizing the Ninth Circuit, the First argued:

> A "but for" requirement, on the other hand, has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain. True, as the Ninth Circuit has noted, courts can use the reasonableness prong to keep Pandora's jar from opening too wide. But to say that the harm that might be done by one factor can be prevented by another is not, after all, an affirmative justification for the former.[188]

Regarding stream of commerce, Professor Lawrence Dessem argues that ordinary individual consumers should have some recourse against a foreign manufacturer regardless of foreseeability. He points out that the third prong can counterbalance such a policy, either by examining whether the burden on the defendant is unreasonable following *Burger King*, or by applying *forum non conveniens*.[189]

With technology increasing an individual's potential number of contacts, it may be preferable to apply the reasonableness prong as *Burger King* originally described, as a last resort intended to filter out only the extraordinary cases. Leaving room to add more factors to the existing five, it only has to be unpredictable and unforeseeable only when extenuating facts call for dynamism. Its application must remain the exception, and doctrinal changes that follow from technological evolution must focus on the general rules of the first two prongs, unless new third prong exceptions are intended. For example, Professors Richman and Simard's need to incorporate the "near-misses" that fall short of general jurisdiction should be articulated in terms of relatedness.[190]

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[186] Cappalli, *supra* note 99, at 107-09.

[187] Kevin McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 230-34 (1998).

[188] Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 715 (1st Cir. 1996), *citing* Shute v. Carnival Cruise Lines, 897 F.2d 377, 386 (1990).

[189] Dessem, *supra* note 115, at 84-92.

[190] Simard, *supra* note 171, at 614-15. *See* Maloney, *supra* note 160, at 1299-1300.

III. FITTING THE INTERNATIONAL SHOE ONTO THE INTERNET

In its most recent decisions, the Supreme Court has quoted the commentators who have vocally proposed the modernization of the Philippines' Conflict of Laws doctrines.[191] These citations, however, have not translated into their application. In *Saudi Arabian Airlines v. Court of Appeals*, for example, the Court held that the Philippines had jurisdiction over a foreign airline because it filed a motion for dismissal that prayed for other reliefs, resulting in acquiescence to Philippine jurisdiction. The same case, however, revealed that it was a *resident* foreign corporation, with an office address in Makati City. Moreover, it cited the "pragmatic consideration" of taking jurisdiction rather than forcing the plaintiff who was a resident citizen to seek redress in Saudi Arabia, "where she no longer maintains substantial connections."[192] The Court included no citation for this doctrine, however. One notes that *International Shoe* examines a *defendant's* minimum contacts with a forum, and the initial choice of forum belongs to the plaintiff.

So far, the Court has applied procedural arguments as in *Saudi Arabian Airlines* or inquiries regarding agency as per the *Signetics* doctrine.[193] Other times, it has applied characterizations, as in *Commissioner of Internal Revenue v. British Airways Overseas Corp.*, where it determined the situs of air

[191] *See, e.g.,* Bank of America NT&SA v. Court of Appeals, G.R. No. 120135, Mar. 31, 2003, *citing* COQUIA & PANGALANGAN, *supra* note 69, at 40-41. Saudi Arabian Airlines v. Court of Appeals, G.R. No. 122191, 297 SCRA 469, Oct. 8, 1998, *citing* COQUIA & PANGALANGAN, *supra* note 69, at 65; SALONGA, *supra* note 61, at 3.

[192] Saudi Arabian Airlines, 297 SCRA at 487-88.

[193] Signetics Corp. v. Court of Appeals, G.R. No. 105141, 225 SCRA 737, Aug. 31, 1993; Hahn v. Court of Appeals, G.R. No. 113074, 266 SCRA 537, Jan. 22, 1997; French Oil Mill Machinery Co., Inc. v. Court of Appeals, G.R. No. 126477, 295 SCRA 462, Sep. 11, 1998. While this is a more specific discussion best left for another article, this author suggests that use the broader conceptual concepts of general and specific jurisdiction rather than rely solely on related but narrower concepts such as doing business or not doing business in the Philippines.

See Avon Insurance Plc. v. Court of Appeals, G.R. No. 97642, 278 SCRA 312, 322, Aug. 29, 1997. "As it is, private respondent has made no allegation or demonstration of the existence of petitioners' domestic agent, but avers simply that they are doing business not only abroad but in the Philippines as well. It does not appear at all that the petitioners had performed any act which would give the general public the impression that it had been engaging, or intends to engage in its ordinary and usual business undertakings in the country."

carriage for taxation based on where the airline tickets were sold.[194] The Court reiterates classic doctrine as its default however, and restated as late as 1998:

> [I]n an action *in personam* wherein the defendant is a *non-resident* who does not voluntarily submit himself to the authority of the court, personal service of summons within the state is essential to the acquisition of jurisdiction over her person. This method of service is possible if such defendant is physically present in the country. If he is not found therein, the court cannot acquire jurisdiction over his person and therefore cannot validly try and decide the case against him.[195]

The obsolescence of *Pennoyer* will inevitably become too heavy to bear, however, and the Court will one day have to apply the Due Process-focused *International Shoe* test to the increasingly complex Internet contacts now intertwined with modern life. At that point, it cannot afford to adhere to existing doctrine, as it will have to be further adapted to reflect precisely this complexity.

A. PRONG 1 APPLIED TO THE INTERNET

As stated, the biggest headaches in digitizing *International Shoe* lie in purposeful availment. If "[l]ittle availment, and almost no purpose, will generally suffice,"[196] the test becomes absurd given the superficial but numerous contacts an individual can make using the Internet. *McGee* held that a single but substantial contact justifies jurisdiction, while others such as *Hahn* and *Waterval* have considered a single letter or a few telephone calls

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[194] Comm'r of Internal Revenue v. British Airways Overseas Corp., G.R. No. 657734, 149 SCRA 395, 408, Apr. 30, 1987. "The absence of flight operations to and from the Philippines is not determinative… The test of taxability is the 'source'; and the source of an income is that activity... which produced the income. Unquestionably, the passage documentations in these cases were sold in the Philippines and the revenue therefrom was derived from a activity regularly pursued within the Philippines. And even if the BOAC tickets sold covered the 'transport of passengers and cargo to and from foreign cities', it cannot alter the fact that income from the sale of tickets was derived from the Philippines."

[195] Asiavest Ltd. v. Court of Appeals, G.R. No. 128803, 296 SCRA 539, Sep. 25, 1998. "An exception was laid down in *Gemperle v. Schenker* wherein a non-resident was served with summons through his wife, who was a resident of the Philippines and who was his representatives and attorney-in-fact in a prior civil case filed by him; moreover, the second case was a mere offshoot of the first case."

[196] *No Bad Puns*, *supra* note 7, at 1827. *See* Dessem, *supra* note 115, at 64.

equally substantial. A casual Internet exchange, however, requires a more realistic view of what "substantial" is.

Compuserve v. Patterson[197]

The United States Supreme Court has yet to rule on an Internet jurisdiction case, but its appellate courts have presented a number of frameworks. One of *International Shoe's* first brushes with the Internet played out in the Sixth Circuit's *Compuserve v. Patterson.* Compuserve was headquartered in Ohio and, in 1996, the second largest computer information service provider in the United States. Richard Patterson was a Texan customer who provided "shareware"[198] software through Compuserve's network. In 1993, Patterson e-mailed Compuserve that the names and trademarks of programs the latter was marketing were infringing the trademarks of his own programs. Patterson demanded USD100,000 to settle his claim; Compuserve refused and filed for a declaratory judgment in Ohio. To give a sense of proportion of the interests involved, Compuserve claimed it stood to lose over USD10 million if Patterson's claim were upheld, while Patterson claimed he had sold less than USD650 worth of software through Compuserve to a dozen Ohio residents from 1991-1994.[199]

Compuserve readily recognized the increasing economic complexity described in *McGee* and stated:

> The Internet represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends. It enables anyone with the right equipment and knowledge – that is, people like Patterson – to operate an international business cheaply, and from a desktop.[200]

The Sixth Circuit found purposeful availment:

> 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

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[197] 89 F.3d 1257 (6th Cir. 1996).

[198] "'Shareware' is software which a user is permitted to download and use for a trial period, after which the user is asked to pay a fee to the author for continued use." *Id.* at 1260.

[199] *Id.* at 1260-61.

[200] *Id.* at 1262, *citing* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980); McGee v. International Life Insurance. Co., 355 U.S. 220, 223 (1957).

state which is home to the computer network service he chose to employ.[201]

Subscribing to Compuserve, it held, resulted in a contract intended to be governed by Ohio law. *Compuserve* also noted Justice O'Connor's plurality *Asahi* opinion, and noted that not only did Patterson place his software in Ohio's stream of commerce, he established a continuous relationship that was far from a "one-shot affair."[202] Implicitly addressing the argument in Justice Stevens's separate opinion, it held that Patterson's "*de minimis*" sales in Ohio did not mean that minimum contacts were not established, since this is determined by quality and not number,[203] and in any case, Patterson made sales to other jurisdictions through Ohio.[204] Moreover, Patterson himself initiated the e-mail communications that resulted in the lawsuit.[205]

Compuserve, however, was hardly a revolutionary Internet ruling. Patterson, who marketed software through a third party and threatened a large infringement suit, was hardly representative of the average Internet user. In fact, discussing reasonableness, *Compuserve* emphasized precisely distinguished him:

> [W]e need not and do not hold that CompuServe may, as the district court posited, sue any regular subscriber to its service for nonpayment in Ohio, even if the subscriber is a native Alaskan who

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[201] Compuserve, 89 F.3d at 1263.

[202] *Id.* at 1265, *quoting* Southern Machinery Co. v. Mohasco Industries., 401 F.2d 374, 385 (6th Cir. 1968). "[B]usiness is transacted in a state when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state; and the defendant has purposefully availed himself of the opportunity of acting there if he should have reasonably foreseen that the transaction would have consequences in that state."

[203] "Nature and quality" of contacts was cited in *International Shoe* itself. International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

[204] Compuserve, 89 F.3d at 1265, *citing* Reynolds v. International Amateur Athletic Federation, 23 F.3d 1110, 1119 (6th Cir.); Southern Machinery, 401 F.2d at 383-86.

[205] Compuserve, 89 F.3d at 1266. "[W]e note this court's own finding of purposeful availment based (in part) on analogous litigation threats in *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988). The *American Greetings Corp.* case involved an Ohio corporation's suit, in Ohio, against a California shareholder who had threatened to file a lawsuit to invalidate an amendment to the company's articles of incorporation… this court stated, the defendant himself had 'originated and maintained the required contacts with Ohio.'"

> has never left home. Each of those cases may well arise someday, but they are not before us now.[206]

Simply, had Patterson instead deputized an Ohio-based agent and used a telephone or ordinary mail, the ruling would not have changed.[207] Thus, the decision was important mainly for two reasons: First, because it explicitly ruled that a suit could be brought against a nonresident defendant based purely on Internet contacts; and second, because it adhered closely to the three-prong *International Shoe* test, a structure the immediately following cases also followed.

A number of cases after *Compuserve* would likewise have been the same had contacts been made through some other medium.[208] In *Edias Software International, L.L.C. v. Basis International, Ltd.*,[209] Arizona found that Basis had purposefully availed of its laws when it contracted with Arizona-based Edias to distribute thousands of dollars worth of its software, a relationship evidenced by numerous e-mail, telephone, and fax contacts, as well as visits to Arizona. *Digital Equipment Corp. v. AltaVista Tech., Inc.*[210] involved a software licensing case where the court deemed the technological issues incidental to its resolution, and treated it as an ordinary contract dispute.[211] In *Cody v. Ward*,[212] Connecticut took jurisdiction over a California resident who made misrepresentations regarding stocks in fifteen e-mails and four telephone calls to Connecticut. *Resusication Technologies, Inc. v. Continental Health Care Corp.*[213] ruled similarly on 80 e-mails and two calls. In *Agency Rent-A-Car Sys., Inc. v. Grand Rent-A-Car Corp.*,[214] New York asserted jurisdiction because of the defendants' use of the New York-based Avis's computerized reservation system.[215] *Playboy Enterprises, Inc. v. Chuckleberry*

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[206] Compuserve, 89 F.3d at 1268.

[207] David Prebut, *State and Local Taxation of Electronic Commerce: The Forging of Cyberspace Tax Policy*, 24 RUTGERS COMPUTER & TECH. L.J. 345, 354-55 (1998).

[208] Cheryl Conner, *Compuserve v. Patterson: Creating Jurisdiction Through Internet Contacts*, 4 RICH. J.L. & TECH. 9 (1998), *available at* http://www.richmond.edu/~jolt/v4i3/conner.html.

[209] 947 F. Supp. 422 (D. Ariz. 1996).

[210] 960 F. Supp. 456 (D. Mass. 1997).

[211] *Id.* at 463.

[212] 954 F. Supp. 43 (D. Conn. 1997).

[213] IP 96-1457-C-M/S, 1997 WL 148567 (So. Dist. Indiana 1997).

[214] 98 F.3d 25 (2nd Cir. 1996).

[215] *Id.* at 30, *citing* Compuserve, 89 F.3d at 1262-63. "In addition, it appears that most, if not all, licensees heavily rely upon AVIS's New York-based computer system for reservations…."

Publishing, Inc.[216] held that making pictures available on the Internet through a computer network located in Italy nevertheless violated an American injunction.[217]

Some of these subsequent early cases, however, turned precisely on the technological concerns. For example, in *People v. Lipsitz*,[218] New York took jurisdiction over nonresident defendants charged with e-mail fraud and false advertising because they used a New York-based Internet provider to send the messages in question.[219] The decision, however, based itself on *Compuserve*, but this effectively held a relatively automated e-mail service analogous to the more substantial relationship in that case. Nevertheless, the later case *Bochan v. La Fontaine*[220] found jurisdiction in Virginia, the location of computer servers integral to the publication of the alleged defamatory messages.[221] However, the criticism against *Lipsitz* is borne out even by the

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"Having considered the totality of the circumstances – the daily contacts with AVIS in New York, the monthly payments and reports sent there, the business conducted with VSA, the money sent to the advertising trust, the rotating memberships on the Advertising & Policy Committee, AVIS's oversight of licensees, and the booking of reservations in New York – we conclude that licensees 'transact business' in New York...."

[216] 939 F.Supp. 1032 (S.D.N.Y. 1996).

[217] *Id.* at 1040. "While this Court has neither the jurisdiction nor the desire to prohibit the creation of Internet sites around the globe, it may prohibit access to those sites in *this* country...

"I therefore conclude that Tattilo has violated subsection 1(c) of the Injunction by using its PLAYMEN Internet site to distribute its products in the United States. The clear intent of the Injunction was to prohibit Tattilo from selling its PLAYMEN magazine and related products to United States customers. Tattilo has knowingly attempted to circumvent the Injunction by selling its products over the Internet. Cyberspace is not a 'safe haven' from which Tattilo may flout the Court's Injunction."

[218] 663 N.Y.S.2d 468 (1997).

[219] *Id.* at 578-79, *citing* Compuserve, 89 F.3d at 1257. "[W]here a person or business conducts a business within the forum state by being a subscriber to a local Internet service provider and selling a product through that provider, jurisdiction is proper." Lipsitz, 663 N.Y.S.2d at 578-80. "[F]or Internet consumer fraud claims, the Internet medium is essentially irrelevant, for the focus is primarily upon the location of the messenger and whether the messenger delivered what was purchased.

"There is no compelling reason to find that local legal officials must take a 'hands off' approach just because a crook or a con artist is technologically sophisticated enough to sell on the Internet. Invocation of 'the Internet' is not the equivalent to a cry of 'sanctuary' upon a criminal's entry into a medieval church...."

[220] 68 F.Supp.2d 692 (E.D. Va. 1999).

[221] *Id.* at 699. "Under this analysis, a *prima facie* showing of a sufficient act by the La Fontaines in Virginia follows from their use of the AOL account, a Virginia-based service, to publish the allegedly defamatory statements. According to Bochan's expert,

very early case of *Pres-Kap, Inc. v. System One, Direct Access, Inc.*,[222] where Florida refused to take jurisdiction over a New York defendant who had incidentally used the Delaware plaintiff's computer system in Florida to make purchases from the latter's automated airline ticketing service.[223] *Pres-Kap* had the following dictum, noteworthy for a 1994 case:

> Lawyers, journalists, teachers, physicians, courts, universities, and business people throughout the country daily conduct various types of computer-assisted research over telephone lines linked to supplier databases located in other states. Based on the trial court's (contrary) decision below, users of such "on-line" services could be haled into court in the state in which supplier's billing office and database happen to be located, even if such users, as here, are solicited, engaged, and serviced entirely instate by the supplier's local representatives.[224]

Compuserve's limited value is illustrated by the early cases that actually grappled with the scope of a web site's reach. *Inset Systems, Inc. v. Instruction Set, Inc.*[225] precisely took the radical position that a website can purposefully avail of the laws of every jurisdiction with Internet access:

> 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. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available

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because the postings were accomplished through defendant's AOL account, they were transmitted first to AOL's USENET server hardware, located in Loudon County, Virginia. There, the message was apparently both stored temporarily and transmitted to other USENET servers around the world."

[222] 636 So.2d 1351 (Fla.App.1994).

[223] *Id.* at 1353, *citing* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985). "It is settled law that 'an individual's contract with an out-of-state party alone can[not] automatically establish sufficient minimum contacts in the other party's home forum' to support an assertion of *in personam* jurisdiction against the out-of-state defendant, even where, as here, the foreign defendant allegedly breaches that contract by failing to make the required payments in Florida. The additional factor in this case that the computer database for the contracted-for information happens to be located in Florida cannot change this result."

[224] Pres-Kap, 636 So.2d at 1353, *citing* Burger King, 471 U.S. at 478.

[225] 937 F. Supp. 161 (D. Conn. 1996).

> continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.[226]

Moreover, *Maritz, Inc. v. Cybergold, Inc.*[227] found that a defendant maintained a presence in Missouri because its website could be accessed from there and had in fact made 131 transmissions to Missouri residents. This presence allowed it to transmit information that amounted to tortious infringements in Missouri.[228] *Hasbro, Inc. v. Clue Computing, Inc.*[229] found specific jurisdiction because the defendant's website "purposefully directed its advertising at all the states," and did nothing to avoid the forum. How such purposeful direction could be found in a website but not in other parallel, national-level mass media has been criticized in the academe.[230]

On the other hand, *Hearst Corp. v. Goldberger*[231] held that merely describing legal services on a website independent of actual sales was merely

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[226] *Id.* at 165, *citing* Hanson v. Denckla, 357 U.S. 235, 253 (1958); International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[227] 947 F. Supp. 1328 (D. Mo. 1996).

[228] *Id.* at 1332-34, *citing* Compuserve, 89 F.3d at 1262; Inset Systems, 937 F. Supp. at 165. "It is unnecessary to decide whether defendant's activities satisfy the 'transaction of any business' test because the Court concludes that defendant is amenable to service under the 'commission of a tortious act' provision in Missouri's long-arm statute…

"…With CyberGold's website, CyberGold automatically and indiscriminately responds to each and every internet user who accesses its website. Through its website, CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally. Thus, CyberGold's 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 defendant." Maritz, 947 F. Supp. at 1333.

[229] 994 F.Supp. 34, 44-45 (D. Mass. 1997), *citing* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987). "Clue Computing purposefully directed its advertising at all the states. It did nothing to avoid Massachusetts… Indeed, Clue Computing has availed itself of the benefits of doing business in the forum state by advertising its work for Digital on its Web site, in an effort to attract more customers… Clue Computing has taken no measures to avoid contacts in the forum state, but rather, has encouraged them. It does not appear that Clue Computing has done anything to avoid jurisdiction in terms of its non-Web (non-advertising) contacts with Massachusetts. Additionally, Clue Computing's Web site is interactive, encouraging and enabling anyone who wishes, including Massachusetts residents, to send email to the company."

Hasbro contains a fairly detailed recount of the post-*Zippo* line. 994 F.Supp. at 40-42.

[230] William Vetter, *Preying on the Web: Tax Collection in the Virtual World*, 28 FLA. ST. U. L. REV. 649, 693 (2001); Kevin Smith, *Internet Taxes: Congressional Efforts to Control States' Ability to Tax the World Wide Web*, 7 RICH. J.L. & TECH. 3, 60 (2000).

[231] 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

akin to placing an ad in a national magazine, and did not in itself establish minimum contacts. *Bensusan Restaurant Corp. v. King*[232] made a similar ruling, emphasizing the non-interactivity and passivity that merely posted the calendar of events for "The Blue Note" jazz club and the addresses of ticket outlets.[233] Significantly, *Bensusan* cited *Asahi*, and that such passivity paralleled placing a product in a forum's stream of commerce without taking more purposeful action.

Heroes Inc. v. Heroes Foundation,[234] dealing with a broader set of facts, declined to rule on whether the defendant's posting of its e-mail address and toll-free number on its website alone established minimum contacts, as there were other contacts involved in the case such as advertisements in *The Washington Post*.[235] Finally, *McDonough v. Fallon McElligott, Inc.*[236] rejected the contention that a website subjected its owner to general jurisdiction before every court in the world.

Zippo Manufacturing Co. v. Zippo Dot Com, Inc.[237]

Compuserve as a landmark case was soon superseded by *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, which influenced rulings across

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

[233] *Id.* at 301, *citing* Asahi, 480 U.S. at 112. "As set forth above, King has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide – or even worldwide – but, without more, it is not an act purposefully directed toward the forum state. There are no allegations that King actively sought to encourage New Yorkers to access his site, or that he conducted any business – let alone a continuous and systematic part of its business – in New York. There is in fact no suggestion that King has any presence of any kind in New York other than the Web site that can be accessed worldwide."

[234] 958 F. Supp. 1 (D.D.C., 1996).

[235] *Id.* at 5. "Because the defendant's home page is not the only contact before the Court, see above, the Court need not decide whether the defendant's home page by itself subjects the defendant to personal jurisdiction in the District. In weighing the importance of this particular contact, however, the Court notes that the defendant's home page explicitly solicits contributions, and provides a toll-free telephone number for that purpose. The home page also contains the defendant's allegedly infringing trademark and logo, the subject of the plaintiffs underlying claims. And the home page is certainly a sustained contact with the District; it has been possible for a District resident to gain access to it at any time since it was first posted."

[236] 1996 WL 15139 (S.D. Cal. 1996).

[237] 952 F. Supp. 1119 (W.D. Pa. 1997).

America as though promulgated by its Supreme Court.[238] Zippo Manufacturing was the Pennsylvania manufacturer of the famous Zippo lighters. Zippo Dot Com, on the other hand, was the California owner of the website names "zippo.com," "zippo.net," and "zipponews.com." The latter operated a news service for about 140,000 paying subscribers to whom it sent Newsgroup messages, a mode very similar to modern e-mail. The news items did not appear on the websites themselves, but these did contain an application through which one could subscribe to the service. Manufacturing filed a trademark claim in Pennsylvania.[239]

Zippo first distinguished itself from *Inset* and *Bensusan*, holding it was not merely about advertising, and from *Maritz*, holding any interactivity in question went beyond the Zippo Dot Com websites due to the Newsgroup message service. Rather, it considered itself part of the *Compuserve* line, where the jurisdictional issue would be decided by whether Dot Com was "doing business over the Internet" in Pennsylvania. *Zippo* found purposeful availment, noting seven of Dot Com's Internet providers and about 3,000 subscribers were located there.[240] It rejected the argument that the fact that some subscribers resided in Pennsylvania was merely fortuitous following *Volkswagen*, since Dot Com consciously and continuously processed Pennsylvania residents' subscriptions.[241] It also rejected the argument that only two percent of its subscribers resided in Pennsylvania, since *International*

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[238] Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F.Supp.2d 1154, 1159 (W.D. Wisc. 2004), *citing* Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452-54 (3d Cir. 2003); ALS Scan v. Digital Service Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002); Revell v. Lidov, 317 F.3d 467, 470 (5th Cir. 2002); Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002); Soma Medical International v. Standard Chartered Bank, 196 F.3d 1292, 1296-97 (10th Cir. 1999); Multi-Tech Systems, Inc. v. VocalTec Communications, Inc., 122 F.Supp.2d 1046, 1050 (D.Minn. 2000); Nida Corp. v. Nida, 118 F.Supp.2d 1223, 1229-30 (S.D.Fla. 2000).

Kent Halkett, *Determining Personal Jurisdiction in Internet-Related Jurisdiction*, 26-MAY L.A. LAW. 21, 22 (2003); Frederick Bicknese, Comment, *Websites and Personal Jurisdiction: When Should a Defendant's Internet Selling Activities Subject it to Suit in a Plaintiff-Buyer's State*, 73 TEMP. L. REV. 829, 839, 842 (2000). "This single, rather short opinion by Judge McLaughlin of the Western District of Pennsylvania has influenced the thinking of nearly every federal district court in the nation, at least one federal court of appeals, and several state courts.... Courts have cited Zippo as the leading authority on Internet-jurisdiction so often it is as if the United States Supreme Court issued the opinion."

[239] Zippo, 952 F. Supp. at 1121-22.

[240] *Id.* at 1125-26.

[241] *Id.* at 1126-27. "If Dot Com had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple – it could have chosen not to sell its services to Pennsylvania residents."

Shoe pointed to the nature and quality of contacts, and *McGee* allowed even a single but substantial contact to establish minimum contacts. Finally, *Zippo* held that damage resulting from the alleged infringement was felt in Pennsylvania.[242]

Zippo became famous not for its holding, but for a sliding scale test it enunciated:

> 1) Internet contacts where the defendant clearly does business over the Internet through "the knowing and repeated transmission of computer files," clearly attaining minimum contacts as in *Compuserve*.
>
> 2) The middle ground of "interactive Web sites where a user can exchange information with the host computer," where "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange."
>
> 3) Passive websites that do "little more than make information available to those who are interested" and are akin to advertisement, as in *Bensusan*.[243]

Strangely, *Zippo* itself never applied this test, and never stated where in the spectrum Dot Com lay. The passing mention of its sliding scale test also failed to articulate how exactly to determine jurisdiction for the middle ground cases, which covers most common websites. Later cases tried to interpret this. For example, in *OnlinePartners.Com, Inc. v. Atlanticnet Media*

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[242] *Id.* at 1127.

[243] *Id.* at 1123-24. "[T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. *E.g. CompuServe, Inc. v. Patterson,* 89 F.3d 1257 (6th Cir. 1996). At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. *E.g. Bensusan Restaurant Corp., v. King,* 937 F.Supp. 295 (S.D.N.Y. 1996). The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."

Corp.,[244] a California court found purposeful availment because a defendant using "Gaynet.com" offered information services, chat room access and other membership services. It also noted the site's content and felt it was directed at least in part at California's significant gay population.[245] *GTE New Media Services Inc. v. Ameritech Corp.*[246] found that a defendant providing online Yellow Pages services lay closer to the "clearly doing business" end, due to a high level of interactivity and substantial commercial income reaped from its website.[247] *Bochan v. La Fontaine* emphasized that actual sales is not a factor, and found jurisdiction in Virginia solely due to the defendant's website's interactivity.[248] Significantly, in *Experimental Aircraft Association, Inc. v. Doctor*,[249] a Texas court found general jurisdiction over a hobby association that sold products in Texas, conducted an annual air show there, and sponsored a website that was moderately interactive, and allowed membership applications via e-mail and online purchasing of the

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[244] 2000 WL 101242 (N.D. Cal. Jan. 20, 2000)

[245] *Id.* at *2, *citing* Zippo, 952 F. Supp. at 1124; Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997). "Internet jurisdiction cases have looked at the active nature of a defendant's Web site to find jurisdiction.... Similarly, here, where defendant operates a Web site that advertises defendant's services, and that offers and provides a subscription service accessible to, and joined by, California residents, personal jurisdiction is proper over defendant in California.

"Here, defendant's Web site is not only an active subscription service, but plaintiff has shown that defendant's Web site would have, by its content, been directed at least in part to the population of this District, and plaintiff has provided evidence of membership by a resident of this District..."

[246] 21 F. Supp. 2d 27 (D.D.C. 1998).

[247] *Id.* at 39, *citing* Zippo, 952 F. Supp. at 1124; Cybersell, 130 F.3d at 418. "This case falls in the 'middle ground' where the RBOC defendants' Internet contact is an interactive website seeking information from users which the will later be used for commercial gain. The court concludes that the non-resident RBOC defendants, which own or maintain a website that is both (1) highly interactive with users in the District of Columbia and (2) significantly commercial in 'quality' and 'nature,' warrant the exercise of personal jurisdiction."

[248] Bochan v. La Fontaine, 68 F.Supp.2d 692, 701 (E.D. Va. 1999). "Harris, as the owner of Computer Works, has solicited business in Virginia by promoting and advertising his computer hardware company on the Internet through its website, accessible to Virginia Internet users 24 hours a day. This website is interactive in several ways, although no sales are concluded through it.

"Though defendant does not conduct sales on his website, the website is sufficiently interactive to factor significantly in the jurisdictional analysis....

"It is not material that Harris's solicitations have yielded no sales in Virginia."

[249] 76 S.W.3d 496 (Tex. App. – Houston 2002). This case was discussed in James George & Anna Teller, *Conflict of Laws*, 56 SMU L. REV. 1283, 1299-1300 (2003).

association's products.[250] On the other hand, in *Townsend v. University Hospital-University of Colorado*,[251] a Texan court rejected the assertion that a Colorado hospital's website subjected them to *general* jurisdiction in Texas, because it only had simple contact information and was not used for any transactions.[252]

In *Cybersell, Inc. v. Cybersell, Inc.*, an Arizona court found that a Florida defendant had conducted no commercial activity there:

> Cybersell FL did nothing to encourage people in Arizona to access its site, and there is no evidence that any part of its business (let alone a continuous part of its business) was sought or achieved in Arizona... No Arizonan except for Cybersell AZ "hit" Cybersell FL's web site. There is no evidence that any Arizona resident signed up for Cybersell FL's web construction services. It entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. The only message it received over the Internet from Arizona was from Cybersell AZ. Cybersell FL did not have an "800" number, let alone a toll-free number that also used the "Cybersell" name. The interactivity of its web page is limited to receiving the browser's name and address and an indication of interest – signing up for the service is not an option, nor did anyone from Arizona do so. No money changed hands on the Internet from (or through) Arizona. In short, Cybersell FL has done no act and has consummated no transaction, nor has it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona, thereby invoking the benefits and protections of Arizona law.[253]

Cybersell, however, while citing *Zippo*, enunciated a similar "something more" standard that refocuses on intent:

> [N]o court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state. Rather, in each, there has been "something more" to

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[250] Experimental Aircraft, 76 S.W.3d at 507, *citing* Zippo, 952 F. Supp. at 1124; Compuserve, 89 F.3d 1257 1265-66.

[251] 83 S.W.3d 913 (Tex. App. – Texarkana 2002). This case was discussed in George &Teller, *supra* note 249, at 1300.

[252] Townsend, 83 S.W.3d at 922, *citing* Mink v. AAAA Dev. L.L.C., 190 F.3d 333, 336 (5th Cir. 1999).

[253] Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997).

> indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.[254]

The above excerpt emphasizes that *Zippo* is primarily applied to commercial cases, but interactivity alone seems insufficient even in these cases. The problem is more pronounced in noncommercial cases, such as *Barrett v. Catacombs Press.*[255] *Barrett* was a *tort* case, where arguments from an e-mail debate allegedly spilled over to defamatory messages on the defendant's websites, whose addresses were in turn referenced in the defendant's Newsgroup messages. The court refused jurisdiction because the websites containing the defamatory messages were passive. Further, the court considered Newsgroup messages passive for jurisdictional purposes, since anyone could join a Newsgroup discussion, indicating a lack of purposeful availment.[256] Similarly, the first Canadian appellate-level Internet

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[254] *Id.* at 418.

[255] 44 F. Supp. 2d 717 (E.D. Pa. 1999).

[256] *Id.* at 722, 727-28, *citing* Zippo, 952 F. Supp. at 1124; Cybersell, 130 F.3d at 418-19. "Plaintiff also alleges that Defendant subsequently posted messages with a hypertext link back to her Web site on several listserves or USENET discussion groups including: (1) a Dental Public Health list maintained by a computer at the University of Pittsburgh, which has national distribution; (2) to the owner of the Chiro-List which has about 350 chiropractors across the country; (3) at 'sci.med.dentistry'; (4) at 'misc.health.alternative,' a USENET group that is believed to have tens of thousands of participants; and (5) at 'misc.kids.health,' a USENET news group that probably has thousands of participants.

"Thus, we follow the *Cybersell* line of cases and choose not to exercise jurisdiction based on the Defendant's two 'passive' Web sites. The Defendant's Web sites may include defamatory information about the Plaintiff as the creator of the Quackwatch Web site, but the fact that such information is accessible worldwide does not mean that the Defendant had the intent of targeting Pennsylvania residents with such information. Indeed, Plaintiff has failed to provide any evidence that Defendant's Web sites intended to target Pennsylvania residents.

...

"We agree with the Plaintiff that posting of messages to listserves and USENET discussion groups technically differs from the maintenance of a 'passive' Web page because messages are actively disseminated to those who participate in such groups. However, for jurisdictional purposes, we find that these contacts are akin to a 'passive' Web site and insufficient to trigger this court's jurisdiction. Here, the nature and quality of the contacts made by the Defendant were accessible around the world and never targeted nor solicited Pennsylvania residents. Every listserve or discussion group that the Defendant posted a message to was concerned with health care issues and was national in scope. Not unlike the maintenance of a 'passive' Web site, anyone who is interested could become a member of such listserves or USENET groups, and we cannot see how from that fact alone, it can be inferred that the Defendant directed its efforts towards Pennsylvania residents."

case, *Braintech Inc. v. Kostiuk*,[257] rejected a Texas Court's award of damages against a British Columbia resident who made defamatory messages on a stock investment bulletin board, because it considered such a board passive.[258] *Telco Communications v. An Apple a Day*[259] found jurisdiction in a case involving similarly passive defamation, but only because it sidestepped *Zippo* by quoting *Inset* and concluding that the defendant was conducting business in the forum – effectively a finding of general jurisdiction instead [260]

Note that *Barrett* has an extensive summary of prior Internet jurisdiction cases. 44 F. Supp. 2d at 724-26. *Barrett* itself was discussed in-depth in Katherine Nekirk, *Squeezing Cyberspace into International Shoe: When Should Courts Exercise Jurisdiction Over Noncommercial Online Speech?*, 45 VILL. L. REV. 353 (2000).

[257] Braintech Inc. v. Kostiuk, [1999] 171 D.L.R. (4th) 46 (B.C.C.A.).

[258] *Id.* at 61, *citing* Zippo, 952 F. Supp. at 1122. "It is equally clear the bulletin board is 'passive' as posting information volunteered by people like Kostiuk, accessible only to users who have the means of gaining access and who exercise that means.

"In these circumstances the complainant must offer better proof that the defendant has entered Texas than the mere possibility that someone in that jurisdiction might have reached out to cyberspace to bring the defamatory material to a screen in Texas. There is no allegation or evidence Kostiuk had a commercial purpose that utilized the highway provided by Internet to enter any particular jurisdiction.

"It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained."

This case was cited in Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1369-1370 (2001). *See* Vaughn Black & Mike Deturbide, *Braintech Inc. v. Kostick: Adjudicatory Jurisdiction for Internet Torts*, 33 CANADIAN BUS. L.J. 427 (2000).

[259] 977 F.Supp. 404 (E.D. Va. 1997).

[260] *Id.* at 406, *citing* Zippo, 952 F. Supp. at 1124; Bensusan Restaurant Corp., v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996); Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996). "The Court finds instructive several recent cases which have addressed the effect of the Internet and its effect of expanding jurisdictional bounds… In a recent, well-reasoned opinion from the Western District of Pennsylvania, the Court discussed the 'sliding scale' that courts have used to measure jurisdiction…. 'A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction….' On nearly identical facts, however, a Connecticut district court held that maintaining a toll free number on an Internet site did provide a basis for jurisdiction….

"The Court agrees with the interpretation of Internet sites and information present in *Inset Systems.* In that case, the court held that the posting of an Internet advertisement satisfied a showing of 'repeatedly solicit' under the Connecticut long-arm statute."

These cases seemed to forget the essence of a defamatory tort and created an artificial dichotomy between a website and traditional print media. As the later case *Millennium Enterprises, Inc. v. Millennium Music L.P.*[261] criticized:

> [T]he middle interactive category of Internet contacts as described in *Zippo* needs further refinement to include the fundamental requirement of personal jurisdiction: "deliberate action" within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state. This, in the court's view, is the "something more" that the Ninth Circuit intended in *Cybersell* and *Panavision*.[262]

Dagesse v. Plant Hotel N.V.[263] further noted:

> The *Zippo Manufacturing* analysis is most helpful when the web site at issue fits neatly into one of the extremes at either end of the spectrum.... [A]pplication of the *Zippo Manufacturing* framework provides no clear answer to the jurisdictional question posed by [a website in the intermediate category].[264]

By 2004, *Hy Cite Corp. v. Badbusinessbureau.com*,[265] summarized the criticism:

> As even courts adopting the *Zippo* test have recognized, a court cannot determine whether personal jurisdiction is appropriate simply by deciding whether a website is "passive" or "interactive" (assuming that websites can be readily classified into one category or the other). Even a "passive" website may support a finding of jurisdiction if the defendant used its website intentionally to harm the plaintiff in the forum state. Similarly, an "interactive" or commercial website may not be sufficient to support jurisdiction if it is not aimed at residents in the forum state. Moreover, regardless how interactive a website is, it cannot form the basis for personal jurisdiction unless a nexus exists between the website and the cause of action....[266]

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[261] 33 F. Supp. 2d 907 (D. Or. 1999).

[262] *Id.* at 921, *quoted in* Geist, *supra* note 258, at 1376.

[263] 113 F.Supp.2d 211 (D.N.H. 2000).

[264] *Id.* at 222.

[265] L.L.C., 297 F.Supp.2d 1154, 1160 (W.D. Wisc. 2004).

[266] *Id.* at 1160, *citing* Panavision International, LP v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998); GTE New Media Services, Inc. v. BellSouth Corp., 199 F.3d 1343, 1349-50 (D.C.Cir. 2000).

Hy Cite added that *Zippo* had no direct legal foundation for enunciating the sliding scale test. The Supreme Court, it noted, did not apply different standards depending on the type of contacts, and *Burger King* in fact rejected mechanical tests.

Arguably, *Zippo* has elements of stream of commerce doctrine, which some courts interpret as placing less importance on intent as they do on economic benefits received, as per the *Asahi* separate opinions. This problem is pronounced when one considers that, unlike *Compuserve*, the cases that relied on *Zippo* relied solely on it, with little or no discussion of the traditional Supreme Court precedents in the *International Shoe* line.[267] *Zippo* also links interactivity to commercial potential instead of actual income, implying that once a site is sufficiently interactive, it purposefully avails of every jurisdiction,[268] making the test a superfluous return to *Inset* [269] and inadvertently casting a chilling effect over the Internet[270] by discouraging what are now common website features.

One author even proposes that an online store should be deemed passive unless it specifically targets particular jurisdictions, since ordering online involves mainly buyer-initiated, automated transactions.[271] Professor Michael Geist, on the other hand, notes that the active and passive website dichotomy may not be as black and white as it seems. Courts that count chat rooms as inherently passive, as discussed above, defeat defamation claims. On the other hand, seemingly passive, noncommercial websites may be actively but invisibly collecting users' personal data and e-mail addresses, which have significant commercial value especially for advertisers. Moreover, Professor Geist notes that old rules that define the dichotomy become obsolete in just two or three years; today, programming advances

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[267] Daniel Steuer, *The Shoe Fits and the Lighter is Out of Gas: The Continuing Utility of International Shoe and the Misuse and Ineffectiveness of Zippo,* 74 U. COLO. L. REV. 319, 339 (2003).

[268] *No Bad Puns, supra* note 7, at 1834.

[269] Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 727 (E.D. Pa. 1999). *Zippo* was originally a test for specific jurisdiction, though numerous courts since used it for general jurisdiction. Dagesse, 113 F.Supp.2d at 222 n.12. Logically, a finding of sufficient interactivity under *Zippo's* sliding scale can do nothing but effectively establishes general jurisdiction in every forum with Internet access.

[270] William Crane, *The World-Wide Jurisdiction: An Analysis of Over-Inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix It,* 11 DEPAUL-LCA J. ART & ENT. L. 267, 301 (2001). Moreover, an actual chilling effect in the Constitutional context of free speech was what was feared in *Barrett.* Barrett, 44 F. Supp. 2d at 722, 731.

[271] Bicknese, *supra* note 238, at 856.

allow even children to add interactive features to websites at very little cost.[272]

Despite these problems, however, some courts still adhere to *Zippo* or variant sliding scales. *Rambam v. Prytulak*,[273] for example, was a defamation case decided in 2004, but still focused on the passivity or interactivity of the website in question.[274] The 2003 case *In re: Ski Train Fire in Kaprun, Austria*[275] examined whether a foreign defendant did business in New York, but nevertheless focused on the degree of interactivity of its website instead of the actual volume of sales.[276] Similarly, the 2003 case *Connexus Credit Union v. Connex Credit Union*[277] cited *Zippo* when it stated:

> Assertion of personal jurisdiction depends primarily on the application of evolving law concerning the effect of internet web sites on personal jurisdiction analysis. The internet interactions by defendant in Wisconsin defy easy categorization because they are limited to transactions with members who previously established a relationship with defendant in Connecticut and, because of membership restrictions, do not involve any solicitation of Wisconsin residents to enter into a relationship with defendant.[278]

Hints of continued *Zippo* influence can be seen in other 2003 cases bearing the telltale words "passive" and "interactive."

Tort theory and *Calder v. Jones*[279]

Professor Geist opined:

> The widespread approval for the *Zippo* test should come as little surprise. The uncertainty created by the Internet jurisdiction issue led to a strong desire for a workable solution that provided a fair balance between the fear of a lawless Internet and one burdened by over-regulation. The *Zippo* test seemed the best available alternative.[280]

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[272] Geist, *supra* at 258, 1379-80.

[273] 2004 WL 25229 (Cal.App. 2 Dist. 2004).

[274] *Id.*, *citing* Pavlovich v. Superior Court, 29 Cal.4th 262, 274 (Cal. Sup. Ct. 2002).

[275] In re: Ski Train Fire in Kaprun, Austria on November 11, 2000, 2003 WL 22909153 (S.D.N.Y. 2003).

[276] *Id.* at *3-4, *citing* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124 (W.D.Pa. 1997).

[277] 219 F.R.D. 465 (W.D. Wisc. 2003).

[278] *Id.* at *467, *citing* Zippo, 952 F.Supp. 1119.

[279] 465 U.S. 783, 789 (1984).

[280] Geist, *supra* at 258, 1371.

Due to its limitations, by 2000, courts were no longer strictly applying the *Zippo* sliding scale. They began relying on other criteria, and increasingly on the three-prong "effects" standard of *Calder v. Jones.*[281] The tort-based doctrine is easier to apply broadly than the product liability doctrine of *Volkswagen* and *Asahi*, but it shifts a stronger emphasis back onto the actor's intent, the same factor emphasized in these. The trend, thus, has moved away from *Zippo* and back towards *International Shoe.*[282]

It must be noted, however, that interactivity is not irrelevant to intent. *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.* noted:

> The website's level of interactivity may be one component of a determination whether a defendant has availed itself purposefully of the benefits or privileges of the forum state. For example, a finding that a defendant uses its website to engage in repeated commercial transactions may support the exercise of personal jurisdiction, so long as there is a corresponding finding that the defendant is expressly targeting residents of the forum state....[283]

Hy Cite dealt with a website that allowed consumers to post complaint messages regarding companies, and made a more incisive discussion regarding intent as opposed to interactivity. For example, rather than classifying messages as interactive or passive as in *Braintech*, the decision noted that consumers rather than the web site operator composed the messages. Thus, discussions of editorial control aside, there could be no intent on the defendant's part to direct content to any particular jurisdiction. Further, although the defendant placed the messages under headings that used trademarked names, the court felt that this alone did not amount to purposeful availment directed at any particular jurisdiction.[284]

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[281] Amanda Reid, *Operationalizing the Law of Jurisdiction: Where in the World Can I Be Sued For Operating a World Wide Web Page?*, 8 COMM. L. & POL'Y 227, 238 (2003).

[282] Joanna Carlini, Note, *Liability on the Internet: Prescription Drugs and the Virtual Pharmacy*, 22 WHITTIER L. REV. 157, 164 (2000).

[283] Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F.Supp.2d 1154, 1161 (W.D. Wisc. 2004).

[284] *Id.* at 1165-66. *Hy Cite* further noted: "[I]t could be inferred that plaintiff is alleging that *defendant* is creating the headings for the consumer complaints and that these headings themselves constitute trademark infringement. However, I agree with the majority of courts that simply placing the name of trademark on a website is not enough to show that a defendant has intentionally targeted the forum state. To hold otherwise would subject millions of internet users to suit in the state of any company whose trademarked name they happen to mention on a website."

Moving to newer, post-*Zippo* decisions, in *Blakey v. Continental Airlines*,[285] the airline's first female captain sued due to defamatory, sexist messages by co-workers on the Crew Members Forum, the electronic bulletin board maintained by Continental on which assignments and schedules were placed. Blakey sued in New Jersey, because her major flight activities had been out of Newark International Airport. The computers that supported Crew Members Forum, however, belonged to Compuserve, which were located outside New Jersey. The state supreme court, citing *International Shoe*, noted that the quality of the message is more important than the medium used, thus:

> If... the offending communications had been placed in *The New York Times* or *U.S.A. Today*... we would have little difficulty in exercising jurisdiction over the defamatory statements. The messages would have been published in New Jersey, albeit in print versus electronic form. A claimant who was in the process of vindicating her rights in a forum in New Jersey would surely feel the effect here. It would be a paradox if electronic communications, with their instantaneous messaging, would lessen the jurisdictional power of a state.[286]

As an even stronger reiteration of this rationale, the recent *Falwell v. Cohn*[287] decision found no purposeful availment towards Virginia in a website with critical comments against Virginia-based Rev. Jerry Falwell. The court found that Falwell was a "self-admitted" national figure, and the website had no content specifically intended for a Virginia audience. More concretely, in *Young v. New Haven Advocate*,[288] Virginia refused to find jurisdiction over two Connecticut newspapers that posted some of their content on their companion websites, which were accessible in Virginia although the newspapers themselves circulated only in Connecticut. Following the train of thought in *Hanson* and *McGee*, *Hy Cite* noted:

> Territorial boundaries remain significant even in the internet context.... "Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet."[289]

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[285] 751 A.2d 538 (N.J. 2000).

[286] *Id.* at *68.

[287] Civ. Act. No. 6:02CV0040 (W.D.Va. 2003), ***available at*** http://www.citizen.org/documents/falwellDismissalOrder.pdf.

[288] 315 F.3d 256 (4th Cir. 2002).

[289] Hy Cite 297 F.Supp.2d at 1162.

Contrary to *Bochan*, later cases began emphasizing actual over potential sales. *Asser v. Rea*[290] reinterpreted *Zippo* to more strongly emphasize actual commercial activity and "doing business" on one end of the scale and mere advertisement on the other.[291] *Mink v. AAAA Development L.L.C.*[292] dismissed a suit in Texas against a Vermont corporation because no orders were actually taken through its website, even though it provided an e-mail address and toll-free number, a mailing address, and an order form that users could print out.[293] *Desktop Technologies, Inc. v. Colorworks Reproduction & Design, Inc.*[294] similarly dismissed a Pennsylvania suit against a Canadian company that never sold anything there, through its website or otherwise.[295] In *People Solutions, Inc. v. People Solutions, Inc.*,[296] for example, Texas refused to take jurisdiction in a Texas company's infringement suit against a California

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[290] 2004 WL 171598 (Cal. App. 1 Dist. 2004).

[291] *Id.* at *4, *citing* Pavlovich v. Superior Court, 58 P.3d 2 (Cal. Sup. Ct. 2002).

[292] 190 F.3d 333 (5th Cir. 1999).

[293] *Id.* at 336-37, *citing* Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). "Essentially, AAAA maintains a website that posts information about its products and services. While the website provides users with a printable mail-in order form, AAAA's toll-free telephone number, a mailing address and an electronic mail ('e-mail') address, orders are not taken through AAAA's website. This does not classify the website as anything more than passive advertisement which is not grounds for the exercise of personal jurisdiction.

"This case does not fall into the spectrum of cases where a defendant clearly conducted business over the Internet nor does it fall into the middle spectrum of interactivity where the defendant and users exchange information through the Internet…."

[294] 1999 WL 98572 (E.D. Pa. 1999).

[295] *Id.* at *5-6, *citing* Zippo, 952 F. Supp. at 1125; Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997); Panavision International, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998). "The level of interactivity in this case is insufficient to justify exercising specific personal jurisdiction over Defendant. Courts have repeatedly recognized that there must be 'something more' than simply registering someone else's trademark as a domain name and posting a web site….

"Defendant's Internet presence and e-mail link are its only contacts with Pennsylvania. As established earlier, Defendant maintains the web site to advertise and post information about its services and employment opportunities. The web site does not exist for the purpose of entering into contracts with customers outside of Canada or for the purpose of attracting customers from Pennsylvania. Instead, its web site specifically states that it is servicing clients in British Columbia, Alberta and Yukon. Defendant has never entered into any contracts in Pennsylvania, made sales or earned income in Pennsylvania, or sent messages over the Internet to users in Pennsylvania. While visitors to the web site are able to exchange information over the web site via Internet FTP and e-mail, receiving a file through Internet FTP or an e-mail does not constitute placing an order."

[296] 2000 WL 1030619 (N.D. Tex. 2000).

company that operated an interactive website. Although one could obtain product demonstrations and place orders on the site, the company had simply not actually made sales in Texas.[297] In *Winfield Collection, Ltd. v. McCauley.*,[298] Michigan declined to find *general* jurisdiction in a Michigan company's copyright suit against a Texan resident who maintained an interactive website. The defendant's sales were actually made over the widely-used Internet auction site eBay. Given the nature of an auction, he could exercise no control over it, and could not specifically target Michigan bidders.[299] Echoing earlier cases, *Winfield Collection* specifically criticized:

> [T]he distinction drawn by the *Zippo* court between actively managed, telephone-like use of the Internet and less active but "interactive" web sites is not entirely clear to this court.... It seems to this court that the ultimate question can still as readily be answered by determining whether the defendant did, or did not, have sufficient "minimum contacts" in the forum state. The manner of establishing

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[297] *Id.* at *3-4, *citing* Zippo, 952 F. Supp. at 1124; Mink, 190 F.3d at 336. "Defendant has sold no products exclusively through its web site. It further has sold no products or contracted for services with anyone in Texas through the web site or as a result of any Texan's interaction with the web site.

"[T]he court finds that Defendant's web site is of the type that falls into the 'middle ground' identified in *Zippo*.... Although Defendant appears to have the potential to interact with, sell products to, and contract with Texas residents on its web site, the evidence does not support a finding that this level of activity has taken place. Personal jurisdiction should not be premised on the mere possibility, with nothing more, that Defendant may be able to do business with Texans over its web site; rather, Plaintiff must show that Defendant has 'purposefully availed itself' of the benefits of the forum state and its laws. Defendant's web site alone does not subject it to personal jurisdiction here; therefore the court must consider any additional contacts Defendant has with the forum."

[298] 105 F. Supp. 2d 746 (E.D. Mich. 2000).

[299] *Id.* at 751, *citing* Zippo, 952 F. Supp. at 1124; Panavision, 141 F.3d 1316, 1320-21. "[T]he court is not prepared to broadly hold, as Plaintiff implies, that the mere act of maintaining a website that includes interactive features *ipso facto* establishes personal jurisdiction over the sponsor of that website anywhere in the United States.

"The 'effects doctrine' holds that jurisdiction may attach if the conduct of the defendant was aimed at or has an effect in the forum state. However, Plaintiff identifies no continuing relationship between Defendant and anyone or anything in Michigan, save the craft pattern purchases made from Plaintiff itself. The only contact that McCauley is proven to have had with the State of Michigan is fortuitous and *de minimus:* the results of two auction sales underpinning the instant dispute, and over which Defendant had little, if any, control."

> or maintaining those contacts, and the technological mechanisms used in so doing, are mere accessories to the central inquiry.[300]

It must be noted, however, that recent cases have demanded concrete evidence to support the existence of actual commercial transactions. In *Asser v. Berber*,[301] for example, the court rejected a claim that the defendant's online stock advice service had thousands of clients from California, simply because it was not substantiated. Similarly, the court did not give weight to printouts of related web site forum messages by the defendant because no California recipients were identified.[302]

The search for actual activity parallels but works better than a mere search for passivity as in *Bensusan. Millennium Enterprises, Inc. v. Millennium Music L.P.*, for example, held:

> Unlike newspaper, mailing, radio, television and other media containing advertisements and solicitations, most Internet advertisements and solicitations are not directed at a specific geographic area or market; to the contrary, advertising on the Internet targets no one in particular and everyone in particular in any given geographic location.[303]

Hy Cite Corp. v. Badbusinessbureau.com, L.L.C stated that mere solicitation can constitute purposeful availment directed at Wisconsin, but it noted that no Wisconsin businesses advertised on the defendant's website, the site had no content tailored for Wisconsin, sent no unsolicited e-mails to Wisconsin residents, received no donations from Wisconsin residents, and that the defendant had not advertised his site in Wisconsin through other media. While Wisconsin users did use the site to post messages, their being from Wisconsin was incidental, and the particular consumer complaint posting discussed in the case did not establish minimum contacts with Wisconsin. It also refused to find general jurisdiction based only on Internet contacts, absent a showing that the site particularly targeted Wisconsin

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[300] Winfield Collection, 105 F. Supp. 2d at 750. After 2000, passivity was no longer an easy way out of the jurisdiction question. Frank Arenas, *Cyberspace Jurisdiction and the Implications of Sealand*, 88 IOWA L. REV. 1165, 1189-90 (2003), *citing* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1184 (N.D. Cal. 2001).

[301] 2004 WL 171601 (Cal.App. 1 Dist. 2004).

[302] *Id.* at *3-4.

[303] Millennium Enterprises, Inc. v. Millennium Music L.P., 33 F. Supp.2d 907, 914 (D. Or. 1999), *quoted in* Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F.Supp.2d 1154, 1158 (W.D. Wisc. 2004). Note, however, that some websites, by nature, are tied to particular communities or businesses that operate only in particular locales.

residents or resulted in substantial sales from there.[304] In general, later rulings declined to exercise jurisdiction simply because a website could be accessed from the forum, such as *Molnlycke Health Care AB v. Dumex Medical Surgical Products. Ltd*,[305] *Euromarket Designs, Inc. v. Crate & Barrel, Ltd*,[306] and *In re: Ski Train Fire in Kaprun, Austria*.[307] This logic disposes, for example, of the Internet aspect of *Arth Brass & Aluminum Castings, Inc. v. Harsco Corp.*,[308] where it was ruled that Texas could not take jurisdiction over an Ohio corporation simply because it was listed in an Internet register of American and Canadian manufacturers along with its products,[309] and that of *Comer v. Comer*[310] where a similar argument against a lawyer listed in an "interactive" Internet service was deemed "too clever by half."[311] Similarly, in *Cerebrus Partners, L.P. v. Gadsby & Hannah, LLP*,[312] the Supreme Court of Rhode Island ruled that a claim on a law firm's website that its lawyers can handle cases anywhere in the United States evidences no intent directed against any particular state – it refused to even treat this advertisement as a contact.[313]

Further, the defamation doctrine better handles commercial cases that are more tortious in nature. The use of *Calder* was established in the early case of *Panavision International, L.P. v. Toeppen*.[314] Here, California took jurisdiction over an Illinois resident who "cybersquatted" or registered California-based Panavision's name, in order to prevent the company from using "Panavision.com" on the Internet unless it purchased the registration. The California court reasoned the effects were felt in California, as per *Calder*, although the "scam" was committed outside it.[315] (A later case, however, held that such a suit should not be filed in the state of the company with whom registrations are made, as opposed to the state of the

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[304] Hy Cite 297 F.Supp.2d at 1161, 1163-64 (W.D. Wisc. 2004).

[305] 64 F.Supp.2d 448, 451 (E.D.Pa. 1999).

[306] 96 F.Supp.2d 824, 833 (N.D.Ill. 2000).

[307] 2003 WL 22909153, at *3 (S.D.N.Y. 2003).

[308] 2004 WL 103126 (Tex.App.-Corpus Christi 2004).

[309] *Id.* at *3.

[310] 295 F.Supp.2d 201 (D. Mass. 2003).

[311] *Id.* at 209, *citing* Back Bay Farm, LLC v. Collucio, 230 F.Supp 2d 176, 185 n. 10 (D.Mass. 2002); Merced v. JLG Indus., Inc., 170 F. Supp 2d 65, 72 (D.Mass. 2001); Callahan v. Harvest Board International, Inc., 138 F. Supp 2d 158, 168 (D.Mass. 2001); Hasbro, Inc. v. Clue Computing, Inc., 994 F.Supp. 34, 40 (D.Mass. 1997); Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F.Supp. 456, 471 (D.Mass. 1997).

[312] 836 A.2d 1113 (Sup. Ct. R.I. 2003).

[313] *Id.* at 1123.

[314] 938 F. Supp. 616 (C.D. Cal. 1996); Aaron Guin, *Transactions: Internet Jurisdiction and Forum Selection Clauses*, TENN. J. BUS. L. 33, 36-37 (2000).

[315] Panavision, 938 F. Supp. at 622, *citing* Calder v. Jones, 465 U.S. 783 (1984).

trademark owner.[316]) The same approach was used in *Nissan Motor Co. Ltd. v. Nissan Computer Corp.*,[317] where Nissan, the California car manufacturer, sued a Massachusetts-based website that used a seal similar to its own and had car-related content. California would not have jurisdiction strictly following *Zippo* because the website did not sell anything. The California court, however, used *Cybersell's* "something more," and held it purposefully directed its content towards California, where it caused damage to Nissan's trademark and derived substantial advertising revenue from consumer confusion.[318] *Euromarket Designs Inc. v. Crate & Barrel Ltd.*[319] similarly granted an Illinois corporation's infringement claim in Illinois against an Irish retailer. Finally, *Cello Holdings L.L.C. v. Lawrence-Dahl Companies*[320] found purposeful availment when a "cybersquatter" advertised domain names he had registered over his website, and also because he actually contacted the trademark owner by phone and e-mail.[321] Finally, *Hy Cite Corp. v. Badbusinessbureau.com* refused to find specific jurisdiction in Wisconsin simply because it was the plaintiff's principal place of business. Demanding further evidence that Wisconsin was the particularized location of the harm, the court made a comparison to a natural person's residence: "A corporation does not suffer harm in a particular geographic location in the same sense that an individual does."[322]

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[316] America Online, Inc. v. Chih Hsien-Huang, 106 F. Supp. 2d 848 (E.D. Va., 2000).

[317] 89 F. Supp. 2d 1154 (C.D. Cal. 2000).

[318] *Id.* at 1159.

[319] 96 F. Supp. 2d 824 (N.D. Ill. 2000).

[320] 89 F.Supp.2d 464 (S.D.N.Y. 2000).

[321] *Id.* at 471, *citing* Compuserve, 89 F.3d 1257, 1266 (6th Cir. 1996); Panavision, 141 F.3d at 1322. "Storey purposefully availed himself of the benefits of doing business in New York. He telephoned Cello twice and sent an e-mail to Cornell, and thus he 'reached out' and 'originated' contacts with New York. He offered numerous domain names, including 'cello.com,' on a website that was open to everyone, including citizens of New York. This suit arises out of or is related to these contacts. He sold audio equipment online in what he describes himself as an effort 'to promote sales internationally through the internet.' Under all these circumstances, he certainly should have anticipated being haled into court here in New York."

[322] Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F.Supp.2d 1154, 1166-67 (W.D. Wisc. 2004), *quoting* Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1486 (9th Cir. 1993), *and citing* Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1112 (9th Cir. 2002) ; IMO Industries, Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998); Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1079 (10th Cir. 1995) ; Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1391 (8th Cir. 1991) ; Southmark Corp. v. Life Investors, Inc., 851 F.2d 763, 773 (5th Cir. 1988).

Thus, the modern trend is to return to intent, into which the technological context is subsumed. *Winfield Collection*, for example, exhibits a better appreciation of eBay Internet auction mechanics than the 2003 ruling *Malcolm v. Esposito*,[323] which held that the owner of an auctioned item had perfected a contract in Virginia simply because the buyer was in Virginia when he made the Internet transaction.[324] *Zippo* actually addressed a very narrow slice, and the problems arose when courts began applying its sliding scale to the entire website pie.

This return to intent allows Internet contacts to be seamlessly discussed alongside traditional ones. *Ungar v. The Palestinian Authority*,[325] for example, found that the terrorist group Hamas had minimum contacts with the United States due to its agents' activities there and its use of American institutions such as banks. One such activity was the official Hamas website, which was paid for and maintained in the United States, and "serves as a main vehicle for Hamas to raise money, recruit members, and spread its message."[326]

Fixing Prong 1 for the Internet

Although intent has returned to the forefront of purposeful availment in the aftermath of *Zippo*, the fact remains that the collective weight of American jurisprudence has set a very low bar for Prong 1, to the point that a single letter or telephone call into a forum has been deemed sufficient contact. The sheer number of cases makes it difficult to suddenly raise the bar with the advent of the Internet.[327] Recent cases, however, reemphasized *International Shoe's* emphasis on the nature and quality of contacts involved. Given the ease and low cost of even global Internet communication and its casual nature,[328] one must distinguish, at least for Internet contacts, that some contacts are really insignificant, regardless of

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[323] 2003 WL 23272406 (Va. Cir. Ct. 2003).

[324] *Id.* at *3. The court also stated, "In analyzing due process concerns in the Internet context, the Fourth Circuit has adopted what has come to be known as the *Zippo* model. However, this Court does not find the *Zippo* model particularly instructive for the case at bar, because the facts in *Zippo* and most cases following it relate to the Defendant's conduct on his own website. In the instant case, the Defendants do not operate eBay; rather, they simply use the website as a venue for car auctions."

[325] 2003 WL 21658605 (D.R.I. 2003).

[326] *Id.* at *12.

[327] *No Bad Puns*, *supra* note 7, at 1834-36.

[328] Michael Marron, *Discoverability of "Deleted" E-mail: Time for a Closer Examination*, 25 SEATTLE U.L. REV. 895, 906 (2003).

what purpose or intent they evidence. Even a long distance telephone call is far more burdensome than an e-mail that transmits the same content.

Examining the *Zippo* against the *Calder* and *Panavision* rationales, one can categorize the intent in the various cases into two categories: commercial and noncommercial. The first group of sale and contract cases involve little more intent than making transactions through websites and being open to customers from all countries. This is a very minimal intent which cannot be unduly penalized without undercutting the entire potential of e-commerce – in most cases, website operators cannot even distinguish the residences of users despite early rulings such as *Hasbro, Inc. v. Clue Computing, Inc.* that they should avoid interacting with them so as not to be haled into their courts.[329] Although *McGee* emphasized the need for redress over even just a single contact, this is better appreciated in the context of Justice Stevens' separate opinion in *Asahi* where he examined the percentages and volumes of the defendant's products that were shipped to California. This concretizes the "actual sales" discussions of *People Solutions* and *Winfield*, since it is better to judge the purposeful availment of a commercial transaction based not on the individual transaction, but on the proportion represented by similar transactions to the same area – it is a curious businessman who seeks to beat a path to a community and intend to make only one sale. Actual monetary figures and not percentages should be used, however, since 1% of a large multinational's sales in one country could well be more significant than half the sales of a fledgling enterprise.

Assuming such commercial contacts fall short of general jurisdiction, this reasoning would result in a stream of commerce version of the Learned Hand formula:

> **B > C, where B are the actual benefits received by the vendor and C is the rough cost of defending the claim**

This was vividly discussed in *Compuserve*, which made a distinction between an ordinary Compuserve subscriber who had unpaid fees and Patterson, who was pursuing a USD100,000 infringement suit. *Compuserve* likewise did not base purposeful availment solely on Patterson's *de minimis* software sales to a dozen Ohio residents. In a commercial context, this is simple enough a guiding principle to measure when a defendant's availment of the benefits and protections of a foreign jurisdiction's laws is significant, such that he should not be surprised to find himself in litigation there.

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[329] Nekirk, *supra* note 256, at 380.

Although it considers the defendant's financial burden, this is not a blurring of Prong 3 since most rulings have found that a defendant should expect some litigation proportionate the commercial extent of his purposeful availment.

Noncommercial contacts such as defamation, infringement and other tort actions are easier to understand, since when one understands the context of the technology involved, the intent to be gauged is not quite so different from those in traditional cases. Judging who the intended recipient of an e-mail, for example, is little different from judging the intended recipient of a letter or telephone call. The more difficult technological scenario is where one uses relatively undirected media, such as a web site, an e-mail list, or a chat room, where anyone can access or participate, as in *Barrett v. Catacombs Press.*[330]

Decisions such as *Blakey* drew parallels with newspapers, which also have large circulations, but differ because their physical distribution is much easier to track. However, one returns to the metaphor of the Internet. Today, we no longer understand it as merely a conduit or "information superhighway," but neither do we take the extreme position that it is a hermetically sealed dimension completely divorced from the world of flesh and steel. Rather, social experience shows that various parts of the Internet are distinctly connected to particular real-world locations. Thus, the more recent decisions *Falwell v. Cohn* and *Young v. New Haven Advocate* searched for more specific links, rather than recognizing that a website has the potential to be accessed from anywhere in the world. Similarly, aside from being essentially passive, the website in *Bensusan* posted show schedules that were of interest only in that particular locale. This follows from the *Calder* three-prong standard and its restatement in the cases that adopted *Panavision*, which look for a logical focus where the "effects" are felt. Thus, for example, a suit against Inq7.net, the Internet arm of the *Philippine Daily Inquirer*, would be proper in the Philippines, but an overseas Filipino might justify filing a similar suit in a foreign jurisdiction with a recognized large Filipino community. Even content on websites of a recognized international flavor such as CNN.com may have a logical focus for litigation, depending on each case and defendant.[331]

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[330] 44 F. Supp. 2d 717, 722, 727-28 (E.D. Pa. 1999).

[331] This analysis, of course, leaves out cases where explicit forum selection clauses are involved. *See* Guin, *supra* note 314, at 42. "[F]orum selection clauses will be upheld as valid whenever the maker of the clause makes the provision clear that jurisdiction in

C. PRONG 2 APPLIED TO THE INTERNET

Although "arising out of" carries its own doctrinal disputes and still lacks a United States Supreme Court ruling to settle these, it has been treated with less depth than Prong 1, with most cases focusing on purposeful availment then finding that the contacts arise out of the same acts that constituted it. This was especially true of the *Zippo* cases, and, for example, *Hasbro, Inc. v. Clue Computing, Inc.* devoted only one sentence to relatedness: "In evaluating 'relatedness,' courts seem prepared to acknowledge that mere advertising satisfies the causation prong of personal jurisdiction analysis."[332] In part, this is not so difficult in cases that discussed only one kind of contact that happened to be an Internet contact such as a website. This was the case in *Bensusan Restaurant Corp. v. King,* to cite another example, which enumerated the three-prong test, but discussed mainly purposeful availment in the context of a passive website.[333] In other cases, since purposeful availment is the threshold prong, courts have declined to discuss the other factors if the case can be dismissed based on Prong 1 alone, which was what happened in *Cybersell, Inc. v. Cybersell, Inc.* [334] and the defamation cases *Barrett v. Catacombs Press*[335] and *Braintech Inc. v. Kostiuk.*[336]

The early *Compuserve* decision, adhering more closely to *International Shoe* than *Zippo*, remains the most vivid Internet context depiction of Prong 2. It restated:

> Even though we have found that Patterson purposefully availed himself of Ohio privileges, we must also find that CompuServe's claims against him arise out of his activities in Ohio if we are to find the exercise of jurisdiction proper. If a defendant's contacts with the

claims arising out of the contract will be limited to the exclusive jurisdiction provided in the forum selection clause. Without thoughtful drafting, ineffective forum selection clauses place Internet transactions at the mercy of still-developing Internet jurisdiction case law. In such situations where forum selection clauses are ineffective or non-existent, courts will likely return to an analysis similar to that in *Zippo*, limiting jurisdiction only to those situations where Internet web sites provide for the formation of contracts and/or significant commercial interaction between the consumer and the Internet business."

332 Hasbro, Inc. v. Clue Computing, Inc., 994 F.Supp. 34, 42 (D. Mass. 1997).

333 Bensusan Restaurant Corp., v. King, 937 F. Supp. 295, 300-01 (S.D.N.Y. 1996).

334 130 F.3d 414, 419-20 (9th Cir. 1997).

335 44 F. Supp. 2d 717, 722, 727-28 (E.D. Pa. 1999).

336 [1999] 171 D.L.R. (4th) 46, 65 (B.C.C.A.).

> forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts.[337]

The same early case vividly illustrates the possible treatment of relatedness in an Internet context. The lower court felt the presence of the software in the Ohio-based network was entirely incidental:

> In the district court's opinion, Patterson could have claimed trademark or trade name protection for his software against CompuServe even if he had placed his software on another computer network altogether, or in a retail store. Patterson's discovery of the similarity in program names may have come to his attention through the CompuServe system, the court below noted, but it concluded that "the way in which the parties discovered they might have a clash of legal interests is not relevant to the issue of jurisdiction."[338]

The appellate court disagreed:

> As the district court points out, Patterson could have placed his software anywhere and had the same result. Nevertheless, it is uncontroverted that Patterson placed, marketed, and sold his software **only** on Ohio-based CompuServe. Thus, any common law trademark or trade name which Patterson might have in his product would arguably have been created in Ohio, and any violation of those alleged trademarks or trade names by CompuServe would have occurred, at least in part, in Ohio. (emphasis in original)[339]

However, again, the facts of *Compuserve* were very different from those of most other Internet cases. One recalls the Court also found relatedness because Patterson was not an ordinary user, but effectively a principal who used Ohio-based Compuserve as a distributor, and because he threatened litigation precisely based on that relationship, making him a proper defendant in Ohio. The cases that followed *Compuserve* reveal problems when the same reasoning is applied to a factual milieu without the active, continuous relationship evidenced there. *People v. Lipsitz* held:

> [F]or Internet consumer fraud claims, the Internet medium is essentially irrelevant, for the focus is primarily upon the location of the messenger and whether the messenger delivered what was purchased.[340]

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[337] Compuserve v. Patterson, 89 F.3d 1257, 1267 (6th Cir. 1996).

[338] *Id.*

[339] *Id.*

[340] People v. Lipsitz, 663 N.Y.S.2d 468, 474 (1997).

Divorcing this "messenger" from the actual perpetrator's intent, it found purposeful availment and relatedness when the defendant subscribed to a local Internet provider. *Bochan v. La Fontaine* found the physical location of the computers used to transmit messages "integral."[341] This would mean that minimum contacts would fail any time a defendant instead used a foreign Internet provider, an absurdity avoided by *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*[342] and the entire line of *Calder* and *Panavision* "effects" cases, and foreshadowed by *Pres-Kap, Inc. v. System One, Direct Access, Inc.*[343] *Lipsitz's* reasoning, moreover, illustrates how extreme a "but for" test can go, as seen in dictum in *Telco Communications v. An Apple a Day:*

> But for the Internet service providers and users present in Virginia, the alleged tort of defamation would not have occurred in Virginia. The conspiracy and tortious interference counts, to some degree, also required contacts in Virginia. Numerous investors and brokers are located in Virginia, and the presence of facilities in Virginia was necessary for those individuals to access the press releases.[344]

Taking this to an extreme, then, "but for" interconnected networks in Paris, Beijing, and San Francisco, one could argue that a set of e-mails could not reach their destinations and a certain website could not be browsed.[345] A tech-savvy plaintiff could render Prong 2 superfluous for Internet cases, especially in conjunction with the "effects" test for purposeful availment. Even someone unfamiliar with the Internet can see the danger – would one, for example, apply the same doctrine to the likewise globally interconnected facilities of cellular phone services? In this context, the proximate cause test better avoids overbroad application, since it demands that a legally relevant element of the case is associated with the forum.[346]

Extreme applications aside, since Prong 2 serves mainly to distinguish between specific and general jurisdiction, the more complex scenarios are those where such a website is asserted to, effectively, establish general jurisdiction, as in *Inset* and similar cases, but most courts resolved these as purposeful availment problems. More recent cases that distinguished between general and specific jurisdiction are enlightening. In

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[341] Bochan v. La Fontaine, 68 F.Supp.2d 692, 699 (E.D. Va. 1999).

[342] 939 F.Supp. 1032 (S.D.N.Y. 1996).

[343] 636 So.2d 1351 (Fla.App. 1994).

[344] Telco Communications v. An Apple a Day, 977 F.Supp. 404, 408 (E.D. Va. 1997).

[345] *No Bad Puns, supra* note 7, at 1842-43.

[346] *Id.* at 1843-44.

Pontchartrain Mortgage Corp. v. Mortgage Asset Research Institute, Inc.,[347] for example, a Louisiana district court refused to find general jurisdiction over a Virginia-based data exchange service for banks simply because it had three or four clients in Louisiana. Specific jurisdiction was improper because the action arose from a report sent through the service by a member outside Louisiana and read by a California bank.[348]

It is even more difficult, however, to address cases where there are a larger number and variety of contacts involved, and the scenario is closer to the "near-misses" described by Professors Richman and Simard. There are two sets of such cases: 1) Where there are a variety of Internet contacts, and many seem insignificant taken individually; and 2) Where Internet contacts are only part of the defendant's contacts with the forum.

The first category was illustrated in *Barrett v. Catacombs Press.* If one accepts the court's premise that the defamatory messages on websites there were passive, the further discussion illustrates Prong 2:

> Finally, we find that the addition of two e-mail contacts by the Defendant to the Plaintiff is insufficient.... The first e-mail was sent by the Defendant in order to engage Plaintiff in an e-mail discussion about issues discussed on his Quackwatch Web site. Plaintiff refused to respond to her e-mail. However, when Plaintiff later came across her Web site, he did then e-mail Defendant the following message threatening a lawsuit:
>
> "I have just read and downloaded your page at http://home.cdsnet.net/fluoride/quacks.htm. The information you have taken from Privitera's book contains statements about me that are false and defamatory. I have informed him of this fact and, since he has refused to retract them, I expect to sue him in a California court for libel. Unless you remove what his book says about me from your web page, I will add you as a co-defendant...."
>
> In response, the Defendant sent an e-mail stating that she had modified the content of her Web site to some degree.

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347 2004 WL 137590 (E.D.La. 2004)

348 *Id.* at *2. "[T]he plaintiff alleges that MARI's three to four Louisiana clients make them susceptible to personal jurisdiction in the State of Louisiana. In addition, plaintiff asserts that the nature of defendant's internet business also makes the exercise of personal jurisdiction in compliance with the Fourteenth Amendment's Due Process clause. This Court disagrees."

> ...Here, we find that the sent e-mails do not occur in a context of a "substantial connection," nor amount to the level of purposeful targeting required under the minimum contact analysis.[349]

The court considered the prior e-mail correspondence sufficiently removed from the defamation the case actually tried, and might even have considered it relatively casual. This is again distinguished from the more active, continuous relationship and correspondence seen in *Compuserve*. Again, once the context of the technology involved is understood, what constitutes the difference can be gauged using existing tests such as the "but for" and proximate cause, to examine the quality of the contacts involved.

The second category is illustrated by cases like *Heroes Inc. v. Heroes Foundation*, which measured the contacts made by a website along with others such as conventional advertising.[350] The results are more pronounced in cases such as *Experimental Aircraft Association, Inc. v. Doctor*, which used a website as one contact considered to find general jurisdiction,[351] but without using the overly simple *Inset* logic that a website is capable of establishing general jurisdiction simply because it can be accessed anywhere.[352] Again, once one understands the technology, the Internet contacts can be scrutinized along with the others. What changes, perhaps, is the radically increased number of contacts made possible by the Internet, which makes Professor Richman's sliding scale test more important. It is foreseeable that at least in some cases, there will be some contacts that fall short of general jurisdiction and likewise fall short of the active, continuous contact described in *Compuserve*, but intuitively amount to minimum contacts as a "near-miss."

Finally, a smaller number of cases has dealt with scenarios similar to the "near-miss," caused by corporate mergers. In *Asser v. Berber*, for example, a Maryland resident sued a Texas resident over stock investment advice received from the latter's website. However, the suit was filed in California, the place of business of the company that absorbed the latter's after the

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[349] Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 729 (E.D. Pa. 1999).

[350] Heroes Inc. v. Heroes Foundation, 958 F. Supp. 1, 5 (D.D.C. 1996).

[351] Experimental Aircraft Association, Inc. v. Doctor, 76 S.W.3d 496, 507 (Tex. App. – Houston 2002).

[352] Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996).

advice in question was dispensed. The court ruled that there was no relation between the merger and the damage the plaintiff allegedly suffered.[353]

C. PRONG 3 APPLIED TO THE INTERNET

The place of reasonableness and "traditional notions of fair play and substantial justice" should not change simply because a case involves the Internet, by nature. Prong 3 is a final check not intended to be used often; the strong reasonableness in *Asahi* is an exception to the general result. Perhaps what is important to reiterate is that adjustments for the Internet's breadth should not be lumped into Prong 3 alone, or the three-prong test would turn into a one-prong analytical muddle.

Again, *Compuserve* provides a vivid discussion of reasonableness:

> The district court analogized the instant case to a standard consumer suit in which CompuServe might have brought suit in Ohio "to collect a small amount of user fees from a Texas resident who, while seated at his computer terminal, became a member of the CompuServe network."
>
> That is not, however, the case at bar. Here, we have an entrepreneur who purposefully employed CompuServe to market his computer software product. It may be burdensome for Patterson to defend a suit in Ohio, but he knew when he entered into the Shareware Registration Agreement with CompuServe that he was making a connection with Ohio, and presumably he hoped that connection would work to his benefit. Further, Ohio has a strong interest in resolving a dispute involving an Ohio company, which will involve the Ohio law on common law trademarks and trade names. CompuServe alleges that more than $10 million could be at stake in this case, and it also contends that this case will have a profound impact on its relationships with other "shareware" providers like Patterson, who also directed their activities toward Ohio-based CompuServe. We have no reason to believe otherwise.[354]

One notes that if one ensures that the relevance and significance of contacts are addressed in Prongs 1 and 2 instead of being left to Prong 3, including the proportion of the defendant's burden of litigation to the economic benefits he purposefully availed of, then most technology-specific facts become less relevant to reasonableness. Many Prong 3 concerns, in

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[353] Asser v. Berber, 2004 WL 171601, at *3-4 (Cal.App. 1 Dist. 2004).

[354] Compuserve v. Patterson, 89 F.3d 1257, 1268 (6th Cir. 1996).

fact, do not concern the immediate facts around which the lawsuit revolves. Recalling *Burger King's* five factors:

1) the burden on the defendant

2) the forum State's interest in adjudicating the dispute

3) the plaintiff's interest in obtaining convenient and effective relief

4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies

5) shared interest of the several States in furthering fundamental substantive social policies

The second point was already discussed in *Compuserve.* The third point is described in the *Calder* and *Panavision* line, since these involved suits filed in the plaintiff's state, whose law would likely govern the case. *Inset Systems, Inc. v. Instruction Set, Inc.* also held that the plaintiff's state had a strong interest in finding jurisdiction because the case pertained to its statutes and common law, and the distance from the defendant's residence was minimal.[355] *Maritz, Inc. v. Cybergold, Inc.* likewise held that Missouri had a strong interest in determining whether the plaintiff, a Missouri corporation, had suffered a violation of its trademark rights under federal law.[356]

The same reasoning applied to defamation cases as well. In *Bochan v. La Fontaine*, for example, the defendants' defamatory comments described the local activity of someone they knew was from Virginia, hence they could reasonably foresee that the "effects" would be predominantly felt there.[357] Similarly, in *Telco Communications v. An Apple a Day*, the court noted that the defendants knew that the plaintiff was a corporation in Virginia, and reasonably knew that their press releases concerning it would be disseminated there.[358]

The fourth point was demonstrated in *Agency Rent-A-Car Sys., Inc. v. Grand Rent-A-Car Corp.*, where New York was deemed a reasonable forum

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[355] Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996).

[356] Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1334 (D. Mo. 1996).

[357] Bochan v. La Fontaine, 68 F.Supp.2d 692, 702 (E.D. Va. 1999).

[358] Telco Communications v. An Apple a Day, 977 F. Supp. 404, 408 (E.D. Va. 1997).

also because it was the only venue of common activity among the parties, who hailed from ten different states.[359]

Finally, *Hasbro, Inc. v. Clue Computing, Inc.* was the rare case that discussed all five "gestalt" factors:

> The first factor relating to the defendant's burden in appearing clearly weighs in the defendant's favor... Here, the defendant will be required to litigate this case in the Massachusetts court despite the fact that Robison, Clue Computing's sole full-time employee and only witness resides in Colorado. However, the defendant in this case is able and willing to travel, as evidenced by Robison's self-proclaimed frequent and extensive business travel. In addition, modern technology allows for easier communication between the states, enabling Robison to perhaps conduct his affairs from Massachusetts. The First Circuit recently indicated that "this factor is only meaningful where a party can demonstrate some kind of special or unusual burden...."
>
> The second factor... weighs in favor of keeping the lawsuit in Massachusetts. Parker Brothers and Hasbro Interactive, both located in Massachusetts, are economic entities subject to Massachusetts law. They are the entities that suffer most from the alleged tortious use of their trademark rights in "clue.com...."
>
> The third gestalt factor... weighs in the plaintiff's favor. Hasbro, located in nearby Rhode Island, and Parker Brothers and Hasbro Interactive, both located in Massachusetts, find it convenient to pursue this action in the state of Massachusetts. Hasbro's witnesses concerning the alleged trademark dilution will likely come from the Parker Brothers and Hasbro Interactive divisions in Beverly, Massachusetts.
>
> The fourth factor... is [generally] considered "a wash." If this case is dismissed, it is unlikely that the parties will be able to resolve the dispute without judicial intervention in some forum. The most efficient path for the judicial system, then, is to move forward with the lawsuit in the present forum....
>
> The fifth and last gestalt factor concerns substantive social policies. In this case, the substantive social policy at issue is the assertion of personal jurisdiction in trademark cases based upon Internet activities and the resulting burden of forcing businesses with web sites to litigate in foreign jurisdictions. While I share the concern of

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[359] Agency Rent-A-Car Sys., Inc. v. Grand Rent-A-Car Corp, 98 F.3d 25, 32 (2nd Cir. 1996).

> commentators in ensuring maintenance of some limits to the reach of personal jurisdiction, I do not believe that this is a case that will open a floodgate....
>
> ...The only factor in the defendant's favor is its burden in appearing. However, the burden of the defendant's appearance is primarily important as a gestalt factor to avoid harassing litigation. In this case, there is no evidence that the plaintiffs have brought this lawsuit in order to harass or vex the defendant. Recognizing that deference should be given to the plaintiff's choice of forum, I find that the assertion of jurisdiction by this court is reasonable.

CONCLUSION

Due Process is the most romantic of all the Constitutional rights. As the defining case of *Meyer v. Nebraska*[360] stated:

> "No state... shall deprive any person of life, liberty or property without due process of law."
>
> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[361]

After a long review of a half-century of Conflict of Laws doctrine, one finds that the key to this "orderly pursuit of happiness by free men" in the context of international Internet litigation remains the same Due Process discussed in *International Shoe.* Law, after all, reflects human behavior, and a decade of cyberspace hardly undoes millennia of human experience.[362]

It must be noted that Due Process as the delimitation of jurisdiction is found in Philippine jurisprudence, in an old *ponencia* by Justice George

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[360] 262 U.S. 390 (1923).

[361] *Id.* at 399.

[362] "[A] constitution, to quote from Justice Cardozo, 'state or ought to state not rules for the passing hour, but principles for an expanding future.'" J.M. Tuason & Co., Inc. v. Land Tenure Administration, G.R. No. 21064, 31 SCRA 413, 427, Feb. 18, 1970 (Fernando, J.).

Malcolm. In 1936, he wrote that a State, generally, only taxes the property and activities within its territory[363] or it violates Due Process,[364] a general rule forgotten today when Due Process is invoked mainly in exceptions involving oppressive or confiscatory taxation. Taxation is actually broader-minded out of necessity in terms of jurisdiction, compared to the narrow Philippine judicial jurisdiction cases. For example, in 1965, *Philippine Guaranty Co., Inc. v. Commissioner of Internal Revenue* held:

> The power to tax is an attribute of sovereignty... Considering that the reinsurance premiums in question were afforded protection by the government and the recipient foreign reinsurers exercised rights and privileges guaranteed by our laws, such reinsurance premiums and reinsurers should share the burden of maintaining the state.[365]

Parenthetically, *International Shoe* also forms the bedrock of interstate taxation in American jurisprudence, pointing a finger at older but more expansive Philippine tax rulings.[366]

Jurisprudence aside, the legal understanding of the Internet has changed with the metaphors jurists have fancied. First, it was seen as a mere conduit called the "information superhighway," then as a unique new dimension called "cyberspace." Today, one recognizes that the Internet is very much a part of the world of flesh and steel. Although it makes the transmission of large amounts of information possible, cheaply and frequently, the fact remains that its use bears clear relation to the physical world.

The doctrine produced by the shift from *Pennoyer's* adherence to territorial borders to the more expansive *International Shoe* doctrine remains very much applicable in and around "cyberspace." The pre-Internet test is summarized as follows:

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[363] William Vetter, *Preying on the Web: Tax Collection in the Virtual World*, 28 FLA. ST. U. L. REV. 649, 664 n.71 (2001), *citing* THOMAS VAN DERVORT, INTERNATIONAL LAW AND ORGANIZATION, 10-13 (1998). "The 1648 Treaty of Westphalia ending the Thirty Years War is generally cited as the initial formal expression of the 'new' regime of absolute internal state sovereignty within fixed geographic boundaries."

[364] Manila Gas Corp. v. Collector of Internal Revenue, G.R. No. 42780, 62 Phil. 895, 900, Jan. 17, 1936.

[365] Philippine Guaranty Co., Inc. v. Collector of Internal Revenue, G.R. No. 22074, 13 SCRA 775, 780, April 30, 1965.

[366] Quill Corp. v. Heitkamp, 504 U.S. 298 (1992); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

A) General jurisdiction is found if continuous and systematic contacts with the forum exist.

B) Specific jurisdiction is found if at least one substantial contact with the forum exists, determined if:

1) the defendant conducted activity in the forum State and purposefully availed of the "benefits and protections of its laws"

2) the plaintiff has a cause of action "arising out of" or is related to such activity[367]

3) exercise of jurisdiction by the forum would be "reasonable and just according to our traditional conception of fair play and substantial justice" examining:

a) the burden on the defendant

b) the forum State's interest in adjudicating the dispute

c) the plaintiff's interest in obtaining convenient and effective relief

d) the interstate judicial system's interest in obtaining the most efficient resolution of controversies

e) shared interest of the several States in furthering fundamental substantive social policies

Much confusion in early Internet decisions resulted from a lack of appreciation of the technological context. For example, the Internet has become so ingrained in daily life that no judge today would come to the *Inset* conclusion that a website can establish general jurisdiction in every forum in the world. Rather, tempering the romantic Wild West metaphors of "cyberspace," some rulings even acknowledge that websites can be very strongly associated with a particular community, territory or enterprise, although they can be accessed from anywhere in the world.

[367] McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957). "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."

Compuserve, the earliest American Internet decision, clearly cut through its facts' electronic wrappings and uncovered the human actors underneath. Thus, its rationale would stand if transposed to another case where the same individuals acted through different media. E-mail, while faster and cheaper, is certainly not so different from handwritten notes once one demystifies the technology. Many other early decisions obtained similar results, and others blundered because they misunderstood or underestimated science's latest offspring.

Zippo articulated the most influential "bright-line" test for Internet jurisdiction, but was flawed because it was applied with a fixation with the technology to the point that the traditional Due Process elements were overlooked. Thus, decisions obtained results that a defamatory message posted on the Internet was "passive" and could not justify specific jurisdiction, something clearly indefensible if transposed onto an ordinary newspaper. Only with a return to the *Calder* "effects" doctrine and the traditional *International Shoe* line were these anomalies corrected.

Recognizing that one faces the same human actor working through a radically different technology, one can apply the same three-prong *International Shoe* test to Internet cases with minimal consideration to account for potentially very different facts. Because of the power of cyber-reach, Internet cases have focused mainly on Prong 1. Purposeful availment using Internet media can be divided into two categories: commercial and noncommercial. For the first, intent must be understood in the context of a commercial Learned Hand test, and purposeful availment must be found mainly when the economic benefits the defendant avails of are at least in proportion to the burden of potentially resulting litigation. Noncommercial cases such as defamation and infringement cases lie much closer to their pre-Internet equivalents, and are easily addressed by the *Calder* "effects" test once the technology is properly subsumed into the act.

A similar filtering of irrelevant facts is proper for Prong 2. For example, an unrestrained "but for" test would embrace every jurisdiction where a computer involved in the transmission of an Internet message is incidentally located. Once one refocuses on the actual acts impelled by human intent instead of the resulting flow of electronic impulses, the traditional causation tests such as the "but for" and proximate cause become readily applicable. However, one would do well to reconsider Professor Michael Richman's sliding scale test, because it casts new insight into the "near-misses" that will likely result from the greatly increased number of possible contacts due to the Internet.

Finally, if the first two prongs are properly applied to technology-laden facts, reasonableness remains the final fuse to guard against extreme results, as in *Asahi*. It should not be applied as a counterweight to a Prong 1 and Prong 2 that cannot handle Internet-related facts to the point that they become superfluous. Instead, Prong 3 deals with factors beyond the immediate facts at hand, such as the circumstances of the parties.

Thus retooled and imbued with tech-savvy, *International Shoe* remains quite able to address Internet cases. Recent decisions, in fact, have shown how it can fairly weigh a single set of contacts to arrive at specific jurisdiction as in *McGee*, and weigh Internet contacts as part of a larger set of continuous and systematic defendant actions to find general jurisdiction as in *Perkins*.

British novelist Arthur Clarke once said that, "Any sufficiently advanced technology is indistinguishable from magic."[368] The Internet has not so radically outpaced human comprehension that one is left bewildered by a glass slipper left as the only trace of a mystical Cinderella's passing. Rather, one realizes that the *International Shoe* still fits.

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[368] Arthur Clarke, *Hazards of Prophecy: The Failure of Imagination*, *in* PROFILES OF THE FUTURE: AN INQUIRY INTO THE LIMITS OF THE POSSIBLE (1962).