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Personal Jurisdiction for Copyright Infringement on the Internet

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PERSONAL JURISDICTION FOR COPYRIGHT INFRINGEMENT ON THE INTERNET

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I. INTRODUCTION

For generations, the judicial system has dealt with how to maintain an individual's right to due process when exercising personal jurisdiction. This problem has become even more difficult with the development of the Internet,[1] which readily connects millions of people around the world. The Internet is a digital world without borders. An increasing number of courts have already realized that the Internet, more than any other medium, will challenge the determination of personal jurisdiction in both the national and international context.

Currently, one of the most important substantive legal issues in on-line communication is the infringement of copyrighted works.[2] The key issue in enforcing copyrights over the Internet is the question of jurisdiction. A finding of jurisdiction over an out-of state or foreign Internet user skyrockets the cost of a lawsuit by forcing a defendant to litigate in an unfamiliar forum.[3] Therefore, the determination of ju-

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1. The Internet is a network of shared information. Physically, the Internet uses a subset of the total resources of all the currently existing telecommunication networks. Technically, what distinguishes the Internet as a cooperative public network is its use of a set of protocols called TCP/IP (Transmission Control Protocol/Internet Protocol). *See also* Reno v. American Civil Liberties Union, No. 96-571, 1997 U.S. LEXIS 4037, at *11-*18 (June 26, 1997) (providing detailed description of how the Internet works).

2. Patrick F. McGowan, *The Internet and Intellectual Property Issues*, 455 PLI/PAT 303, 376 (1996). There is no dispute that the amount of trademark disputes about domain name registration is much higher. However, this is a much narrower problem between registrants and trademark holders.

3. J. Powers, *Jurisdiction in Cyberspace Limitless Jurisdiction?*, IN-

risdiction is critical, for it has a potentially devastating economic impact on the parties.

The exercise of personal jurisdiction can have other economic repercussions that stem from the ability of a plaintiff to target certain parties as defendants. A plaintiff may be likely to allege liability against a defendant who may not be directly involved in the act of copyright infringement, but may have deep financial pockets. In the context of litigation based on Internet activities, the "deep pockets" defendant is most likely the Internet service provider.[4] Although these defendants are attractive to plaintiffs for their finances, rules governing personal jurisdiction may prevent defendants from being forced into court if they are too remote from the plaintiff's injury.

The question of U.S. jurisdiction becomes even more important when one considers that the Internet reaches millions of people worldwide. The ability to infringe another's copyright over the Internet increases the quantity of potential foreign defendants. For example, a typical scenario arose in the case of *Playboy v. Chuckleberry*.[5] In *Playboy*, the United States District Court for the Southern District of New York sentenced an Italian defendant to shut down the access of a United States user to its Italian Web server.[6] Although the action involved an alleged trademark infringement, this case demonstrates that a copyright infringement action would probably present similar jurisdictional problems.[7]

Several authors have recently commented on the issue of

TERACTIVE MARKETING NEWS, Mar. 3, 1996. Possibly, the costs of a defense could have been one reason for the defendant in *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1261 (6th Cir. 1996), neither to file an appellate brief nor to appear at oral argument in the out-of-state forum.

4. An "internet service provider" ("ISP") is a company that provides individuals and other companies access to the Internet. An ISP owns or rents the equipment required to have points-of-presence on the Internet for the geographic area served. *See* <http://whatis.com> (visited Feb. 16, 1998).

5. Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996).

6. *Id.* The court ordered either to shut down the Internet site completely or refrain from accepting any new subscriptions from customers residing in the US. *Id.* The plaintiff alleged trademark infringement, false designation of origin, unfair competition based on infringement of Plaintiff's common law trademark rights, and violations of the New York Anti-Dilution Statute. *Id.*

7. *Id.* Although an injunction against the foreign defendant prohibited the sale of *Playmen* magazine in the United States, the lack of any jurisdictional analysis is highly questionable.

personal jurisdiction on the Internet.[8] However, only one of them has focused his analysis on personal jurisdiction *for copyright infringement* on the Internet.[9] This is surprising since the first wave of intellectual property lawsuits over the Internet were copyright infringement actions and the economic loss suffered by these infringed parties has been tremendous.[10]

This article discusses the limits of personal jurisdiction arising from copyright infringement on the Internet. After a brief introduction to the complexity of this problem, the background section examines the framework of traditional personal jurisdiction analysis.[11] This article then suggests that this traditional framework is well suited for today's contemporary copyright infringement on the Internet actions.[12] This article's central theory is that the greater the quality of contacts the defendant has with the forum state via the In-

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8. *Compare, e.g.*, David Bender, *Emerging Personal Jurisdictional Issues on the Internet*, 453 PLI/PAT 7 (1996); William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197 (1995); Robert A. Cinque, *Making Cyberspace Safe for Copyright: The Protection of Electronic Works in a Protocol to the Berne Convention*, 18 FORDHAM INT'L L.J. 1258 (1995); Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083 (1996); Todd H. Flaming, *The Rules of Cyberspace: Informal Law in a New Jurisdiction*, 85 ILL. B.J. 174 (1997); Gary L. Gassman, *Internet Defamation: Jurisdiction in Cyberspace and the Public Figure Doctrine*, 14 J. MARSHALL J. COMPUTER & INFO. L. 563 (1996); Gwenn M. Kalow, *From the Internet to the Court: Exercising Jurisdiction Over the World Wide Web Communications*, 65 FORDHAM L. REV. 2241 (1997); Byron F. Marchant, *On-line on the Internet: First Amendment and Intellectual Property Uncertainties in the On-line World*, 39 HOW. L.J. 477 (1996); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996); Mark Sableman, *Business on the Internet, Part I: Jurisdiction*, 53 J. MO. B. 137 (1997); David L. Stott, *Personal Jurisdiction in Cyberspace: The Constitutinal Boundary of Minimum Contacts Limited to a Web Site*, 15 J. MARSHALL J. COMPUTER & INFO. L. 819 (1997); Leif Swedlof, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337 (1997); Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339 (1996).

9. *See* James H. Aiken, *The Jurisdiction of Trademark and Copyright Infringement on the Internet*, 48 MERCER L. REV. 1331 (1997) (describing the existing case law and his conclusion as merely a citation of Chief Justice Warren's observation in *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958)).

10. William J. Cook, *Be Wary of Internet Casting Shadows on Copyright Holders*, CHICAGO LAWYER, April, 1996, at 60 (discussing how online data theft causes losses of more than 10 billion US-Dollars annually).

11. *See* discussion *infra* Part II.

12. *See* discussion *infra* Part III.

ternet, the greater the likelihood that personal jurisdiction will be found.[13] In order to support this theory, this article explains the factors that courts should consider when looking at the quality of contacts a defendant has with a forum state via the Internet.[14] A substantial portion of this article examines the type of activities that can subject an out-of-state content provider,[15] an Internet service provider,[16] or an out-of-state uploader[17] to personal jurisdiction. Finally, this article analyzes the existing case law and ascertains basic approaches for analyzing transmissions on Web servers,[18] electronic mail communications,[19] and the Usenet.[20]

II. BACKGROUND

Personal jurisdiction is a mandatory precondition to the adjudication of any lawsuit.[21] Personal jurisdiction, also referred to as *in personam* jurisdiction, is the court's authority over the personal rights and obligations of a defendant.[22] It is a "necessary predicate" before a court can hear the merits of a claim.[23] Absent personal jurisdiction, a court lacks the power to issue an *in personam* judgment.

Personal jurisdiction in a copyright infringement action[24]

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13. *See* discussion *infra* Part III.

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

15. *See* discussion *infra* Part III.A.1. A content provider is an individual who makes content available to third parties. An individual on-line user who has his own web site at his commercial on-line service, such as CompuServe, is a content provider, even if he does not operate the server. However, a larger content provider often operates a remote server as well. *See* <http://whatis.com> (visited Feb. 16, 1998).

16. *See* discussion *infra* Part III.A.2. A service provider in this context operates a server. The service provider is usually not identical to the content provider since they often lease their server space to third parties. *See also* supra note 4.

17. *See* discussion *infra* Part III.A.3.

18. *See* discussion *infra* Part III.A.

19. *See* discussion *infra* Part III.B.

20. *See* discussion *infra* Part III.C.

21. Perritt, Jr., *supra* note 8, at 13.

22. WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 260 (1995) (citing Pennoyer v. Neff, 95 U.S. 714, 727 (1877)).

23. Christopher Lyon, *The Ninth Circuit's Approach to Personal Jurisdiction in Intellectual Property Cases: How Long Is the Arm of California in Reaching Foreign Defendants?*, 15 LOY. L.A. ENT. L.J. 661, 662 (1995).

24. Federal copyright law is governed by 17 U.S.C. § 101 et seq. (1994). To establish a claim of copyright infringement, a plaintiff must prove both (1) ownership of a valid copyright, and (2) copying of constituent elements of

is determined in accordance with general principles of jurisdiction by applying the forum state's "long-arm statute."[25] However, the "general principles" of personal jurisdiction are anything but clear, and defining these principles has led to abundant amounts of litigation.[26] The United States Supreme Court has been criticized for the "obvious lack of clarity" in the area of personal jurisdiction.[27] The lack of clarity in personal jurisdiction, compounded by the public's general confusion over the Internet, cannot be expressed in a better way than by Harvard law professor David Shapiro, a jurisdiction expert, who stated that when it comes to personal jurisdiction and the Internet, "[t]he problem is unbelievabl[y] complex."[28]

In an attempt to add some clarity to the complexity, this article will examine some *current* decisions that address personal jurisdiction in the context of on-line communication.[29] Most of the existing cases that examine personal jurisdiction are trademark infringement actions regarding "domain name disputes."[30] Currently, no reported case explicitly addresses personal jurisdiction for copyright infringement, therefore, there is no specific legal precedent.[31] Thus, it is useful to review the general principles of the law of personal jurisdiction.

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work that are original. *See Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 361 (1991). A full discussion of what constitutes copyright infringement is beyond the scope of this article. This article focuses on personal jurisdiction where the alleged copyright infringement takes place over the Internet.

25. Russel J. Frackman, *Litigating Copyright Cases*, 419 PLI/PAT 7, 15 (1995).

26. *See* Lyon, *supra* note 23, at 662 ("[A]s of April 14, 1993, at least 19,043 cases heard [in] federal district courts . . . involved . . . personal jurisdiction." (quoting Mona A. Lee, *Burger King's Bifurcated Test for Personal Jurisdiction: The Reasonableness Inquiry Impedes Judicial Economy and Threatens a Defendant's Due Process Rights*, 66 TEMP. L. REV. 945, 968 n.2 (1993))).

27. Lyon, *supra* note 23, at 662. Today the affirmative bases of jurisdiction are constitutionally permissible merely because they are traditional.

28. *See* David A. Price, *Executive Update Lawsuits over Web Sites Plague Companies from Afar*, INVESTOR'S BUS. DAILY, October 15, 1996, at A4, *available in* WESTLAW, 1996 WL 11862853.

29. *See* Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *15-*20, (S.D.N.Y. Feb. 26, 1997). The court mentioned and addressed almost all previous decisions.

30. A domain name locates an organization or other entity on the Internet. *See* <http://whatis.com> (visited Feb. 16, 1998).

31. *See Hearst Corp.*, 1997 WL 97097, at *15-*20. Virtually every decision determined personal jurisdiction over the content provider, but not, for example, over an Internet service provider.

A. *Legal History*

Traditionally, American courts, state or federal, asserted jurisdiction in one of two ways: (1) a court has jurisdiction over a person when the person is physically present within the territorial boundaries of the court and the person is served with process while physically present, or (2) a court has jurisdiction over a thing (or a tangible item) if it exists within the court's territorial boundaries and is attached.[32] In addition to asserting jurisdiction over persons or things found physically within the forum state, more frequently, courts assert jurisdiction by following a state's long-arm statute.[33] Long-arm statutes typically authorize the exercise of jurisdiction to the extent permitted by the Constitution as interpreted by a line of Supreme Court decisions beginning with *International Shoe Co. v. Washington*.[34]

In *International Shoe*, the defendant, a Delaware company, was a shoe manufacturer with its principal place of business in St. Louis, Missouri.[35] The defendant's salesmen, who were located in the forum state, Washington, solicited orders from prospective buyers in Washington.[36] Then the salesmen transmitted the orders to the St. Louis office to be filled and shipped back to Washington.[37] The Supreme Court found that the continuous and systematic business activities of the defendant in Washington, resulted in many interstate sales, and therefore justified the exercise of personal jurisdiction.[38] Moreover, the Supreme Court held that the exercise of personal jurisdiction by a state court satisfies the due process clause if the defendant had "certain minimum contacts with . . . [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[39] This test, formulated by the Supreme Court,

32. Perritt, Jr., *supra* note 8, at 14. The author also describes the distinction between personal and real actions, as well as between local and transitory actions. These distinctions largely disappeared in the personal jurisdiction determinations of today's civil actions.

33. Perritt, Jr., *supra* note 8, at 15.

34. International Shoe Co. v. Washington, 326 U.S. 310 (1945); *see also* Perritt, Jr., *supra* note 8, at 15.

35. *International Shoe Co.*, 326 U.S. at 313.

36. *Id.*

37. *Id.* at 314.

38. *Id.* at 320.

39. *Id.* at 316 (citing Milliken v. Meyer. 311 U.S. 457, 463 (1940)).

focused on the defendant's past connection with the forum.[40]

In *World-Wide Volkswagen Corp. v. Woodson*,[41] the Supreme Court added an additional requirement—that a defendant should "reasonably anticipate" being hailed into the chosen court. In *World-Wide*, the defendant, a car dealership, sold a car to the plaintiff in New York.[42] Later, while driving in Oklahoma, the plaintiff had an accident where his car caught fire and caused serious injuries.[43] The plaintiff filed suit in Oklahoma.[44] The Supreme Court found that the defendant did not seek or serve the Oklahoma market and concluded that "those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction," did not exist.[45] The Court stated that the foreseeability of the accident is irrelevant and the test is not "that a product may find its way into the forum state," but "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hailed into court there."[46]

In *Burger King Corp. v. Rudzewicz*,[47] a Florida-based franchiser sued a Michigan individual in Florida for breach of contract after they entered into a franchise agreement. The Court evaluated whether the defendant purposefully established minimum contacts in the forum state by deciding whether the defendant could reasonably anticipate or foresee that any actions he may take in connection with the franchise could lead to litigation in Florida.[48] Based on the defendant's negotiation of a long term franchise with a Florida corporation, the Court found that the defendant "reached out beyond Michigan."[49] The contract documents emphasized that operations were conducted and supervised in Florida, and all notices and payments were to be sent to Florida.[50] Consequently, because modern commercial life allows for the conducting of business and communications across state

40. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).
41. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
42. *Id.* at 288.
43. *Id.*
44. *Id.*
45. *Id.* at 295.
46. *Id.* at 297.
47. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 468 (1985).
48. *Id.* at 480.
49. *Id.*
50. *Id.* at 478-81.

lines, the fact that the defendant never entered the forum state did not defeat jurisdiction. As long as efforts are "purposefully directed" at the residents of another state, the absence of physical contacts will not defeat jurisdiction.[51]

B. *State Long-Arm Statutes*

The decision in *International Shoe* lead to the enactment of state long-arm statutes that expanded the scope of a court's jurisdiction as broadly as permissible under the Constitution.[52] The Supreme Court, moreover, held that the Due Process Clause of the Fourteenth Amendment[53] limits the power of a state court to exert personal jurisdiction over a nonresident defendant.[54] Since then, all states have procured statutes by which jurisdiction may be obtained over nonresident individuals and corporations who could not otherwise be sued in the forum state.[55] State and federal courts use the forum state's long-arm statute to determine personal jurisdiction over both out-of-state defendants and foreign defendants.[56]

The wording of state long-arm statutes differs broadly. A few states have drafted long-arm statutes that place true jurisdictional limits on their courts.[57] Most other states, in contrast, have enacted long-arm statutes that extended their jurisdiction to the outer limits of what is constitutionally permissible.[58] For example, while the New York long-arm statute expressly enumerates specific causes of action that would give rise to personal jurisdiction,[59] the California statute merely states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[60]

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51. *Id.* at 476.
52. Gassman, *supra* note 8, at 572.
53. *See infra* note 61.
54. Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 108 (1987).
55. Gassman, *supra* note 8, at 572.
56. Surprisingly, some statutes are applicable only to state plaintiffs. *See* Gassman, *supra* note 8, at 572.
57. Counts & Martin, *supra* note 8, at 1119; *see, e.g.*, GA. CODE. ANN. § 9-10-91 (Harrison 1994); MINN. STAT. ANN. § 543.19(1)(d)(3) (West 1988); N.Y.C.P.L.R. § 302(a) (McKinney 1990).
58. Counts & Martin, *supra* note 8, at 1119.
59. N.Y.C.P.L.R. § 302(a) (McKinney 1990).
60. CAL. CIV. PROC. CODE § 410.10 (West 1973).

C. *Due Process*

The Supreme Court's interpretation of the Due Process Clause of the Fourteenth Amendment governs the determination of personal jurisdiction.[61] One reason for the need for the Due Process Clause is the previously mentioned broad wording of some of the state's long-arm statutes. Another reason is the court's overly broad interpretation of those long-arm statutes that specifically enumerate grounds for jurisdiction. Several jurisdictions, if not most of them, interpret their individual long-arm statute far beyond the actual wording of the statute up to the constitutional limit.[62] Not surprisingly, most courts in intellectual property actions have not denied personal jurisdiction on the basis of a statute's wording.[63]

Virtually all courts have analyzed the Due Process aspect of personal jurisdiction of non-resident defendants under the often cited "Contacts/Fairness" inquiry.[64] First, courts analyze the pre-litigation connections the defendant has with the forum state, or whether the defendant has sufficient "contacts" with the forum state.[65] Then, if there were contacts, the courts analyze whether the exercise of jurisdiction comports with traditional notions of "fair play and substantial justice."[66] This two step inquiry determines that personal

61. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

62. *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) (holding "[i]t is settled Ohio law, moreover, that the 'transacting business' clause of the [civil procedure] statute was meant to extend to the federal constitutional limits of due process, and as a result Ohio personal jurisdiction cases require an examination of those limits.").

63. *See, e.g.*, EGR, Inc. v. Stern, No. 94 C 3729, 1995 WL 107153, at *1 (N.D. Ill. Mar. 7, 1995). "Under Illinois law, it is well settled that the term tortious act 'inevitably includes that concept of injury, and for purposes of [the long-arm statute], the situs of the tort is the place where the injury occurs.'" Milwaukee Concrete Studios v. Fjeld Mfg., Co., 8 F.3d 441, 448 n.14 (7th Cir. 1993) (quoting Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1141 (7th Cir. 1975)). However, "[f]or the tort of infringement of an intellectual property right, the situs of the injury is the state in which the right's owner resides." *Fjeld*, 8 F.3d at 448.

64. *See, e.g.*, Gassman, *supra* note 8, at 573; CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996).

65. *See, e.g.*, Gassman, *supra* note 8, at 572; *CompuServe, Inc.*, 89 F.3d at 1263.

66. Gassman, *supra* note 8, at 572.

jurisdiction comports with the Due Process Clause of the Fourteenth Amendment.

D. *General and Specific Jurisdiction*

The Supreme Court, in *Helicopteros Nacionales de Colombia S.A. v. Hall,*[67] dissected personal jurisdiction into two categories: general and specific jurisdiction. If a party is not domiciled, incorporated, or does not have its principal place of business within a state, a forum has *general jurisdiction* only if the party has substantial and continuing contacts to that forum.[68] General jurisdiction allows a state to exercise jurisdiction over a party for any claim, even though the pending cause of action does not arise out of the defendant's forum-related activities.[69]

On the contrary, *specific jurisdiction* is exercised when a claim arises out of the defendant's contacts with the forum state.[70] Succinctly stated, specific jurisdiction exists, when a court agrees to entertain a cause of action which does arise from forum-related activities.[71] Specific jurisdiction is therefore narrower and more circumscribed in applicability than general jurisdiction in that the underlying cause of action by the plaintiff must be related to the defendant's contacts in

67. Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 410 (1984). *Helicopteros* involved a wrongful death suit brought in Texas based on a helicopter crash in Peru. *Id.* at 412. Neither of the plaintiffs were Texas residents, nor was the defendant a Colombian corporation. *Id.* at 411-12. All parties conceded that the claims did not arise out of the defendant's activities within Texas and therefore, the court could not exercise specific jurisdiction. *Id.* at 415. However, the Supreme Court determined defendant's connections with Texas were not sufficient to allow a Texas court to assert specific jurisdiction. *Id.* at 416. The court found that the defendant's contact in Texas, such as accepting checks drawn on a Texas bank in payment for services, purchasing helicopters and equipment, and sending employees to Texas for training, did not constitute doing business in Texas sufficient for general jurisdiction. *Id.* at 416-17. Thus, the Supreme Court analyzed the defendant's overall business contacts and concluded that they could not establish general jurisdiction. *Helicopteros*, 466 U.S. at 418-19.

68. BURNHAM, *supra* note 22, at 261 (distinguishing the Ninth Circuit who requires for general jurisdiction "substantial" or "continuous and systematic" activities in the state); *see also,* McDonough v. McElligott, Inc., No. CIV 95-4037, 1996 U.S. Dist. LEXIS 15139, at *1 (S.D. Cal. Aug. 6, 1996) (citing Data Disc, Inc. v. Systems Tech. Ass'ns, 557 F.2d 1280, 1285 (9th Cir. 1977)).

69. BURNHAM, *supra* note 22, at 261.

70. Gassman, *supra* note 8, at 571.

71. Lyon, *supra* note 23, at 664 (citing Roth v. Garcia Marquez, 942 F.2d 617, 621 (9th Cir. 1991)).

the forum state.[72] Thus, the standard for the exercise of general jurisdiction (continuous and systematic contacts with the forum state) is in almost any situation, harder to meet.[73]

III. ONLINE COMMUNICATION

Even though it is a creation of the newest technology, the same traditional principles of personal jurisdiction readily apply to the new medium of the Internet. Despite all the concern that the current set of laws would be inadequate to meet the demands of today's technology, the existing laws regarding personal jurisdiction are more than suitable to adapt to the needs of the Internet in the context of copyright infringement cases.

This article applies the traditional notions of personal jurisdiction and suggests the following theory: the likelihood that personal jurisdiction can be constitutionally exercised by the courts is directly proportionate to the nature and quality of the activity the defendant conducts over the Internet.[74] In other words, the greater the quality of contacts the defendant has with the forum via the Internet, the greater the likelihood that personal jurisdiction will be found. In order to apply this theory, the next inquiry focuses on the factors should courts look at to define the "quality" of contacts.

In addition to the traditional factors, this article suggests that courts should consider the following when evaluating the nature and quality of the contacts the defendant has with the forum via the Internet when confronted with a case of copyright infringement.[75] First, courts should examine whether the defendant Internet user had knowledge and control over where, if, and by whom the "infringing" work will be retrieved. Second, courts should consider the greater the likelihood that the physical location of the source of the infringement can be identified. Third, courts should examine the level of interaction between the plaintiff and the defendant, the commercial nature of defendant's on-line services and the amount of illicit information that is accessible to the plaintiff via the defendant's Internet usage. Following this

72. Lyon, *supra* note 23, at 664.

73. *Compare* Counts & Martin, *supra* note 8, at 1117 n.229.

74. This notion was articulated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), to support the underlying rationale for exercising jurisdiction over context of content providers.

75. *See supra* note 24.

approach, the higher the level of interaction between the plaintiff and the defendant, the more illicit information that is available on-line, the more likely the plaintiff can identify the physical situs of the "infringing" defendant, and the more likely the defendant had knowledge and control over who retrieved his work, the more likely personal jurisdiction should be found over the defendant.

To guide courts in the approach outlined above, this article examines the case law that exists pertaining to personal jurisdiction with respect to different Internet technologies. This article distinguishes the communication methods on the Internet into three main groups of applications: (1) Web servers,[76] (2) electronic mail communication,[77] and (3) the Usenet.[78] The three methods differ as to which party is the more active one in transmitting data. In order to receive information stored on a Web server, a user has to access the server and to select the file he wants to view. Thus, the user actively initiates the transmission of the information. In contrast, a user receives information in the electronic mail com-

76. A Web server is a computer that holds the files for one or more Web sites. A large Web site may reside on a number of servers located in many different geographic places. For purposes of this Article, "Web server" is used for all remote retrieval systems and thus also for the bulletin board service. *See* <http://whatis.com> (visited Feb. 16, 1998).

A bulletin board service ("BBS") is a computer that can be reached directly by telephone for the purpose of sharing or exchanging messages or other files. Many BBS's are devoted to specific interests; others offer a more general service. Essentially, a bulletin board service is a host computer that is accessible by dial-up telephone (one needs to know the telephone number). However, many BBSs have Web sites. Many Internet access providers have bulletin board services from which new Internet users can download the necessary software to get connected. *See* <http://whatis.com> (visited Feb. 16, 1998).

77. Electronic mail ("e-mail") communication combines the applications of e-mail and mailing lists. E-mail is the exchange of computer-stored messages by telecommunication. E-mail was one of the first uses of the Internet and is still probably the most popular single use. E-mail can be distributed over mailing lists to a large number of people. Some mailing lists allow you to subscribe by sending a request to the mailing list administrator. A mailing list that is administered automatically is called a list server. *See* <http://whatis.com> (visited Feb. 16, 1998).

78. Usenet is a worldwide network of posted discussion groups known as newsgroups and a set of rules for accessing and posting to them. There are thousands of newsgroups. A newsgroup can be hosted on servers that are outside the Internet and many are. A newsgroup is a posted discussion group on the Usenet. Newsgroups are organized into subject hierarchies, with the first few letters of the newsgroup name indicating the major subject category and sub-categories represented by a subtopic name. *See* <http://whatis.com> (visited Feb. 16, 1998).

munication passively. Instead of the receiver initiating the transmission, a third person or an automated mailing list server[79] forwards the mail and thus, initiates the transmission. A combination of both methods of communication over the Internet is the Usenet. A user actively post articles to be distributed automatically by a Usenet server to another Usenet server. However, in order to receive an article, a user has to access the server and to select the file he wants to view. The following analysis will articulate the importance of these distinctions as applied to personal jurisdiction.

A. *Web Servers*

The first group is the Web server. A Web server is a computer that holds the files for one or more Web sites. A large Web site may reside on a number of different servers in a number of different geographic locations.

Most of the Internet personal jurisdiction cases that exist today deal with this first group—operators or potential operators of Web servers.[80] The subject matter of the majority of these existing cases is the reservation of a domain name and the focus is mainly on the person responsible for the content of a Web site in the context of trademark infringement and libel. Although the cases are not directly on point, they do provide some insight into the personal jurisdiction analysis of persons charged with copyright infringement.

The following gives three examples of when a copyright infringement would arise in conjunction with a Web Server. First, if a user accesses an infringing work that is stored on an out-of-state Web Server and downloads the file into his computer, a copyright infringement occurs at the user's location.[81] A second scenario is if a domestic user uploads an infringing work to an out-of-state server, a copyright infringement occurs at the forwarding user's computer as well. These two situations identify several potential out-of-state

79. Mailing lists have become a popular way for Internet users to keep up with topics of interest to them. On the Internet, mailing lists include each person's e-mail address. The program is called "listserv" and the computer that operates the mailing list is the mailing list server. *See* <http://whatis.com> (visited Feb. 16, 1998).

80. *See, e.g.*, Inset Sys., Inc., v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996).

81. *See, e.g.*, Sega Enters., Ltd. v. Maphia, 984 F. Supp. 923, 938-39 (N.D. Cal. 1996) (explaining that infringement occurs either by downloading or, arguably, by browsing).

defendants. The first potential defendant is an out-of-state (or a foreign) content provider, who operates the server. The second potential defendant is an out-of-state user, not the operator of the server, but a user, who uploaded the infringing material. Finally, a third potential defendant is an out-of-state service provider, who connected to an out-of-state server containing illicit material or an out-of-state individual user who uploaded the material to the Internet. A court must individually analyze whether personal jurisdiction can be obtained over each of these defendants. This article will address an analysis for each of these three potential defendants.

As a general overview, this article argues that the greater the nature and quality of the contacts the defendant has to the forum state, the more likely a court will find personal jurisdiction. Specifically, as to out-of state content providers, it is unlikely that courts will find general jurisdiction over an out-of-state defendant, except in the rare case where a business operates exclusively over the Internet. Therefore, courts focus on specific jurisdiction; if a contractual contact exists or the defendant is clearly doing business with the forum state, then a court will almost never deny personal jurisdiction. The rule when a defendant commits a tortious act is not as clear and a finding of jurisdiction seems to be very fact specific. As to out-of-state service providers, as well as out-of-state uploaders,[82] it is unlikely that courts will find personal jurisdiction over these defendants.

1. *Out-of-State Content Provider*

Content providers are the most attractive defendants in Internet cases. Content providers control the server's material, make the material available to users, and typically have "deep pockets," in contrast to an individual user who merely downloaded or browsed through illicit material. So typically, neither copyright owners, nor the performing rights organizations (such as ASCAP or BMI),[83] would focus on pursuing

82. *See* discussion *infra* Part III.A.3.

83. ASCAP is the American Society of Composers, Authors and Publishers, an organization of over 68,000 composers, lyricists, and music publishers. BMI is a music performing rights organization representing more than 100,000 songwriters and composers and 50,000 music publishers with a repertoire of over 2,500,000 works. *See* <http://whatis.com> (visited Feb. 16, 1998).

individual users for infringement by downloading copyrighted works. Instead, content providers would be the focus of the infringement dispute. Not surprisingly, until now, almost every court that has addressed personal jurisdiction issues with regard to on-line activities has analyzed the content provider.[84]

a. *General Jurisdiction*

General jurisdiction requires that a defendant be domiciled, incorporated, have its principal place of business, or have substantial and consistent contacts with the forum.[85] General jurisdiction allows a state to exercise jurisdiction over a party for any claim, even though the pending cause of action does not arise out of the defendant's forum-related activities.[86] In general, the cases indicate that the mere existence of a defendant's Internet presence in the forum state should not be sufficient to find personal jurisdiction over that defendant.

The first commentators to address these new personal jurisdiction issues found the existence of a Web site *in itself* sufficient to obtain general jurisdiction over the content provider.[87] They stated that "where an injured party 'surfs' the Internet and finds harm-causing information, it appears that a civil action could lie in any jurisdiction where the information can be retrieved"[88] and "[i]n the long run, effective judicial pursuit of the international on-line [copyright] piracy may require that infringers be amenable to suit in every country in which the infringement is capable of being received (i.e., throughout the world), and that the entire, worldwide claim be actionable in any country."[89]

After the Internet confronted the courts with broad substantive intellectual property issues, the confusion about procedural questions of jurisdiction began with *United States v. Thomas*[90] in January 1996. The Sixth Circuit discussed a

84. *See, e.g.*, Bensusan Restaurant Corp. v. King, 937 F. Supp. 297 (S.D.N.Y. 1996).

85. Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408 (1984).

86. BURNHAM, *supra* note 22, at 261.

87. *See, e.g., infra* notes 88-89.

88. Marchant, *supra* note 7, at 491.

89. Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPYRIGHT SOC'Y U.S.A. 318, 322 (1995).

90. 74 F.3d 701, 709 (6th Cir. 1996). *See* Pres-Kap, Inc. v. System One, Di-

California defendant's challenge of venue in the Western District of Tennessee based on the defendant's convictions and sentences for violating federal obscenity laws.[91] After *Thomas*, several district courts issued conflicting and inconsistent decisions regarding personal jurisdiction based on Internet activities. Some district courts still favor the worldwide personal jurisdiction approach, while other courts tried to structure and narrow their personal jurisdiction analysis.

The District Court of Connecticut, in *Inset v. Instruction*,[92] asserted personal jurisdiction over an out-of-state defendant based merely on the existence of an Internet web site and an "800" telephone number, both of which only advertised defendant's services.[93] The plaintiff owned a federal trademark registration for "INSET" and discovered the use of its mark when it tried to obtain the domain name "INSET.COM" by the defendant Instruction Set Inc., a Massachusetts-based provider of computer technology.[94] Although, the court discussed the long-arm statute, it remains unclear if the court determined personal jurisdiction to be general or specific jurisdiction.[95] It appears that the court found general personal jurisdiction over the defendant since the court ignored a statutory element which is typical for a specific personal jurisdiction analysis, namely, if the cause of action arose out of the activities.[96]

The court compared the defendant's Internet advertisements about future services to "catalogs advertised in periodicals having Connecticut circulation" and noted that "once posted on the Internet, unlike television and radio advertis-

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rect Access, Inc., 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994), *and* Plus Sys., Inc. v. New England Network, Inc., 804 F. Supp. 111 (D. Col. 1992) for decisions dealing with contractual relationships permitting the use of databases.

91. *Thomas*, 74 F.3d at 709.

92. Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D.Conn. 1996).

93. *Id.* at 162.

94. *Id.* at 163.

95. *Id.* at 163-64.

96. Compare the three-part test of the Ninth Circuit for specific jurisdiction in *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993), with regard to the "arising out" element. The confusion in *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996), resulted out of the citation of the Connecticut long-arm statute, CONN. GEN. STAT. § 33-411(c)(2) (repealed Jan. 1, 1997), which provided that "[e]very foreign corporation shall be subject to suit in this state . . . on any cause of action arising . . . (2) out of any business solicited in this state . . . if the corporation has repeatedly so solicited," but is missing any discussion of the elements. *Inset Sys., Inc.*, 937 F. Supp. at 163.

ing, the advertisement is available continuously to any Internet user."[97] The court found this continuous advertising a solicitation of a "sufficient repetitive nature."[98] The court stated that the defendant directed its advertising to all states within the United States, therefore, finding it "purposefully availed itself of the privilege of doing business within Connecticut."[99] Then the court addressed the constitutional due process factor, and found minimum contacts, since "the distance between Connecticut and Massachusetts [is] minimal," as it is only a two hour travel time.[100]

Although the court in *Inset* found general jurisdiction over the defendant merely based on the existence of a Web site, this holding is not representative of the majority of the case law. Typically, this minimal presence is not enough to justify general jurisdiction. This is the holding in the vast majority of the case law, starting with *McDonough v. Fallon McElligott*.[101] The court in *McDonough* expressly refused to exercise general jurisdiction over an out-of-state defendant solely on the basis of its maintenance of a web site.[102] The alleged copyright infringement was the use of a photo in several national publications, but not on defendant's web site.[103] The court held, "[b]ecause the web enables easy world-wide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists; the Court is not willing to take this step."[104] The court therefore stated "[t]hus, the fact that [the defendant] has a Web site used by Californians cannot establish [general] jurisdiction by itself."[105]

Based on *McDonough,* the District Court for the Central District of California denied general jurisdiction in two subsequent decisions.[106] In *Naxos v. Southam*,[107] the court stated

97. Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996).
98. *Id.* at 161.
99. *Id.* at 165.
100. *Id.*
101. McDonough v. McElligott, Inc., No. CIV 95-4037, 1996 U.S. Dist. LEXIS 15139, at *11 (S.D. Cal. Aug. 6, 1996).
102. *Id.* at *11.
103. *Id.* at *2.
104. *Id.* at *7.
105. *Id.*
106. Naxos Resources Ltd. v. Southam Inc., No. CIV 96-2314, 1996 U.S. Dist. LEXIS 21759, at *1 (C.D. Cal. June 3, 1996); Panavision Int'l, L.P. v. Toeppen,

that neither the existence of a Web site, nor the publication of an allegedly defamatory newspaper article on the legal computer on-line services LEXIS and WESTLAW conferred general jurisdiction, but might be relevant for a specific jurisdiction analysis. In *Panavision v. Toeppen*,[108] a domain name dispute, the court did not even address the impact of a Web site on a general jurisdiction analysis.

In *Hearst Corp. v. Goldberger*,[109] the United States District Court for the Southern District of New York broadly addressed personal jurisdiction over a Web site operator who allegedly infringed on plaintiff's intellectual property rights. Like the majority of disputes over personal jurisdiction, the case involves a domain name dispute. Hearst Corporation, owner and publisher of "ESQUIRE Magazine," brought a trademark infringement action against the defendant, who operates a Web site under the domain name "esqwire.com."[110] It should be noted that the court considered defendant's domain registration as legitimate as compared to a mere "cybersquatter,"[111] one who attempts to profit from the Internet by reserving and later reselling or licensing domain names.[112] The court distinguished *Panavision v. Toeppen* where defendant was a cybersquatter.[113] Moreover, the court stated that a WESTLAW search revealed more than 1,100 incorporated businesses using the mark "Esq" or "Esquire."[114]

The *Hearst* court briefly examined New York's jurisdictional statute, section 301 of New York's Civil Practice Law and Rules, and stated this section traditionally applies only to persons actually present in New York, or to corporations "doing business" in this state.[115] However, the court never

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938 F. Supp. 616 (C.D. Cal. 1996).

107. *Naxos Resources Ltd.*, 1996 U.S. Dist. LEXIS 21759, at *1, *8.

108. Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 620 (C.D. Cal. 1996).

109. Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997).

110. *Id.* at *2. Hearst Corporation has published the magazine *Esquire* since 1933 and owns the trademark registration for the mark "Esquire" for such goods. *Id.* at *9.

111. *Id.* at *17.

112. Intermatic Inc. v. Toeppen, 947 F. Supp. 1227 (N.D. Ill. 1996).

113. Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996). *See infra* note 198 (defining "cybersquatter").

114. Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *15 (S.D.N.Y. Feb. 26, 1997).

115. JOSEPH MCLAUGHLIN, PRACTICE COMMENTARY TO CPLR 7-8 (1990).

decided the question of whether "doing business" applies to an individual person because it found the plaintiff had waived all general jurisdiction arguments, therefore circumscribing an analysis of section 301.[116]

Nevertheless, the *Hearst* court expressed that even if the plaintiff had not waived the section 301 argument, and even if New York would have applied the statute to an individual, general jurisdiction would still be lacking.[117] It stated that there is some truth in the *Maritz* court's argument that "while modern technology has made nationwide commercial transactions simpler and more feasible . . . it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts."[118] However, the court disagreed with the finding of personal jurisdiction in *Maritz* by stating that allowing jurisdiction, based merely on an Internet Web site, "would be tantamount to a declaration that this Court, and every other court throughout the world, may assert [personal] jurisdiction over all information providers on the global World Wide Web. Such a holding would have a devastating impact on those who use this global service."[119]

This article suggests that general jurisdiction should not be found merely based on a defendant's Internet presence in the forum state. At this time, three courts expressly denied general jurisdiction based on the maintenance of a web site.[120] They found that the establishment of general jurisdiction through a Web site, would make operators vulnerable to lawsuits everywhere even for unrelated activities. This would eviscerate the personal jurisdiction requirement as it cur-

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116. *Hearst Corp.*, 1997 WL 97097, at *8.

117. *Id.* (stating that the contacts do not establish jurisdiction under section 302, nor could they be sufficient under section 301).

118. *Id.* at *20. (citing Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1334 (E.D. Mo.1996) (quoting California Software, Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1363 (C.D. Cal. 1986))).

119. *Hearst Corp.*, 1997 WL 97097, at *20. The *Hearst* court summarized the rationale of the decisions in *Maritz* as follows: "through their web sites, defendants consciously decided to transmit advertising information to all Internet users, including those in the forum state, thereby (allegedly) committing trademark infringement in the forum state and purposefully availing themselves of the privilege of doing business within the forum state." *Id.*

120. *See* Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *5 (S.D.N.Y. Feb. 26, 1997). *See also* McDonough v. McElligott, Inc., No. CIV 95-4037, U.S. Dist. LEXIS 15139, at *1 (S.D. Cal Aug. 6, 1996); Naxos Resources Ltd. v. Southam Inc., No. CIV 96-2314, 1996 WL 635387, at *1 (C.D. Cal. June 3, 1996).

rently exists.[121] The existence of a web site that contains a copyrighted work, even an advertisement, will most likely not constitute general jurisdiction. This finding is consistent with the theory of the article that personal jurisdiction is proportionate to the nature and quality of defendant's contacts to the forum state. Clearly, the mere existence of a Web site is not a pervasive presence sufficient enough to amount to a "quality" contact.

A potential scenario could exist where merely a Web site may be sufficient to justify a finding of general jurisdiction. It is possible that a business could operate exclusively over the Internet (such as a search engine),[122] and that defendant's site could provide contractual services, extending into the realm of an interactive service.[123] In this scenario, the courts might be justified in a finding of general jurisdiction.

b. *Specific Jurisdiction*

Specific jurisdiction is exercised when a claim arises out of the defendant's contacts with the forum state.[124] In other words, specific jurisdiction exists when a court agrees to entertain a cause of action which arises from forum-related activities.[125] Specific jurisdiction requires that the plaintiff's underlying cause of action be related to the defendant's contacts in the forum state.[126] In general, the cases indicate that if a contractual relationship exists with the forum state, a court will almost never deny a finding of personal jurisdiction over the defendant. Also if the defendant is found to be doing business with the forum state, typically courts will find personal jurisdiction. When personal jurisdiction is dependent on the defendant's commission of a tortious act within the forum, there does not appear to be a general trend. The courts look to the specific facts of each case to determine whether

121. *McDonough*, U.S. Dist. LEXIS 15139, at *6; *Naxos Resources Ltd.*, 1996 WL 635387, at *2.

122. A search engine is a "robot" or "crawler" that goes to every page or representative pages on the Web and creates a huge index. Then, it is a program that receives a user's search request, compares it to the entries in the index, and returns the results to the user. *See* <http://whatis.com> (visited Feb. 16, 1998).

123. Bender, *supra* note 8, at 32.

124. Gassman, *supra* note 8, at 571.

125. Lyon, *supra* note 23, at 664 (citing Roth v. Garcia Marquez, 942 F.2d 617, 620 (9th Cir. 1991)).

126. *Id.*

personal jurisdiction is proper.[127]

i. *Specific Jurisdiction Based on Contractual Contacts*

It is widely accepted that the existence of a contract alone is not sufficient to obtain personal jurisdiction. However, almost every court that has addressed personal jurisdiction over out-of-state content providers has held that if the defendants had contractual relationships with plaintiffs or with state residents, personal jurisdiction would be found over the defendants.[128] Currently, the decisions addressing specific jurisdiction based on contractual contacts exist only in the context of trademark infringement and defamation. Although the circumstances and the substantive legal considerations of trademark infringement and defamation are not identical to copyright infringement actions, the procedural issues are equivalent.

For example, in *CompuServe Inc. v. Patterson*,[129] the Sixth Circuit found personal jurisdiction proper in Ohio over an Texas Internet user who subscribed to plaintiff's network service based in Ohio.[130] However, not only did the defendant subscribe to CompuServe, but unlike most users, he entered into a separate written agreement with the service to sell his software over the Internet.[131] The defendant advertised, sent

127. Gassman, *supra* note 8, at 572 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).

128. The court in *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351 (D. App. Fla. 1994), decided a different situation. The split panel of the intermediate Florida court held that Florida courts lacked personal jurisdiction over the user of a database located in Miami. *Id.* However, the decision offers little analysis as to why personal jurisdiction should not have existed. In *Plus System, Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Col. 1992), a Colorado-based ATM network sued its New England affiliate for refusing to implement a new royalty charge. *Id.* The district court found that the defendant's regular use of the plaintiff's computer system located in Colorado was a purposeful availment of Colorado and its law, and found personal jurisdiction over defendant. *Id.* at 118. However, there were other contacts, including a visit and tour of the Colorado computer facility by defendant's personnel, and a contractual choice of law clause that pointed to Colorado. *Id.* at 118-19; *see also* Perritt, Jr., *supra* note 8, at 24.

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

130. *Id.* The impact of this case is questionable since Patterson neither filed an appellate brief nor appeared at oral arguments. This is typically not a convincing defense.

131. In *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1261 (6th Cir. 1996), the court stated, "[f]inally . . . we need not and do not hold that CompuServe may, as the district court posited, sue any subscriber to its service for nonpay-

and stored the software on plaintiff's server in Ohio.[132] This case differs from others, because the defendant stored his content on plaintiff's server. Thus, the court based the personal jurisdiction analysis not on the content of defendant's server, but on the "contractual" relationship between the parties.[133]

The court stated that the Ohio long-arm statute was meant to extend to the fullest limit of the Constitution.[134] The court analyzed the defendant's specific jurisdiction under the commonly used three-part test: (1) a nonresident defendant must have purposefully availed himself of the privilege of conducting activities in the forum by some affirmative act or conduct, (2) plaintiff's claim must arise out of or result from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable.[135]

The court found the "purposeful availment" requirement satisfied because the defendant purposefully contracted with the plaintiff to market a product outside of his home state.[136] Therefore, CompuServe "operat[ed] in effect, as his distribution center."[137] The Sixth Circuit specifically did "not hold that Patterson would be subject to suit in any state where his software was purchased or used," but found that this relationship was intended to be ongoing.[138] The court found that the cause of action arose from his Ohio activities and that personal jurisdiction was reasonable under such circumstances, where, in effect, all of his sales and proceeds flowed through the forum state.[139] More significantly, the court clearly placed importance on the fact that the contractual agreements between the parties specifically stated that the parties would be subject to Ohio law.[140]

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ment in Ohio, even if the subscriber is a native Alaskan who has never left home." *Id.* at 1268.

132. *Id.* at 1261.

133. *Id.* at 1263-64.

134. *Id.* at 1262.

135. *Id.* (citing Reynolds v. International Amateur Athlete Fed'n, 23 F.3d 1110, 1116 (6th Cir. 1994) (quoting In Flight Devices v. Van Dusen Air, Inc., 466 F.2d 220, 226 (6th Cir. 1972))).

136. *Id.*

137. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996).

138. *Id.* at 1265.

139. *Id.* at 1266-69.

140. Peter Brown, *US Courts Use Internet to Assert Jurisdiction over Foreign Defendants; Jurisdiction Can Be Based on Acts in Cyberspace, But Which Acts?*, (April 11, 1997) <http://www.ljx.com/internet/p6courts.html>.

The next decision that found personal jurisdiction in the context of contractual on-line activities was *Edias v. Basis*.[141] This case did not involve an intellectual property infringement, but defamation. The court analyzed the defendant's "purposeful availment" under the Supreme Court's "effect test" and examined the contacts between the parties, including a long term business relationship, as well as the defamatory statements as grounds for jurisdiction.[142] According to the "effect test," jurisdiction is found for tortious acts caused by the nonresident, if intentional actions are expressly aimed at the forum state and cause foreseeable harm to the defendant.[143] The court found a purposeful availment by the defendant to the forum state based on the defamatory statements and the long term business relationship between the parties, individually sufficient for a finding of jurisdiction.[144]

The alleged defamatory statements identified the plaintiff and were transmitted to business partners via e-mail, a Web site, as well as a CompuServe forum.[145] Thus, according to the court, they were directed and expressly aimed at the forum state.[146] It also stated that modern technology made this nationwide transaction simpler.[147] Correspondingly, the court stated that this technology must broaden the permissible scope of forums.[148] Moreover, a defendant should not be able to take advantage of the Internet and simultaneously escape traditional notions of jurisdiction.[149] Similar to the *Panavision* court, the court in this case stated that a presumption of reasonableness exists and the defendant did not allege any sovereignty issues.[150]

In *Digital v. Altavista Technology*,[151] the court exercised

141. EDIAS Software Int'l, L.L.C. v. BASIS Int'l, Ltd., 947 F. Supp. 413, 422 (D. Ariz. 1996).

142. *Id.* at 420.

143. Calder v. Jones, 465 U.S. 783, 789 (1984).

144. EDIAS Software Int'l L.L.C. v. BASIS Int'l, Ltd., 947 F. Supp. 413 (D. Ariz. 1996).

145. *Id.* at 415.

146. *Id.* at 420.

147. *Id.* (citing California Software, Inc. v. Reliability Research, 631 F. Supp. 1356, 1363 (C.D. Cal. 1986)).

148. *Id.* (citing *California Software, Inc.*, 631 F. Supp. at 1363).

149. *Id.* at 420.

150. EDIAS Software Int'l L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413, 421 (D. Ariz. 1996).

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

personal jurisdiction in a trademark infringement action.[152] Although it seemed the court would address the Internet activities of the defendant by entitling a portion of its opinion "Personal Jurisdiction And The Internet," instead the personal jurisdiction analysis was based on the parties contractual relationship.[153] Plaintiff paid for an assignment of defendant's right to the trademark "AltaVista," then immediately licensed-back to the defendant the right to use the mark as part of its corporate name, as well as part of its domain name.[154] Both parties used the Internet for their services. Plaintiff operated one of the leading "search engines"[155] known as "AltaVista" and sold various software over the Internet.[156] The defendant offered some comparable products and a confusingly similar "search engine."[157] It seems that the court was not sure if the alleged breach of a licensing agreement itself would be sufficient to exercise personal jurisdiction. Obviously intending to find personal jurisdiction, the court stated "[i]n short, Digital's suit "arises from" an alleged breach of a contract with a Massachusetts corporation, and ATI's [the defendant] resulting Internet activities, including sales and advertising to Massachusetts residents taken together constitute transacting business here."[158] In finding personal jurisdiction, the court went too far. The personal jurisdiction analysis should have focused only on the licensing agreement and the court should have refrained from deciding "Personal Jurisdiction And The Internet."

The court in *Playboy v. Chuckleberry*[159] focused on a "contractual relationship" between the domestic Internet user and the defendant, an Italian content provider in assessing personal jurisdiction. In this case, a contractual relationship between the parties did not exist. The decision in-

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1997).

152. *Id.*

153. *Id.* at 462-63.

154. *Id.* at 459.

155. *See supra* note 122 (defining search engine).

156. Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 459 (D. Mass. 1997).

157. *Id.* at 461 (stating defendant's web site was "designed to look, feel, and function very much like Digital's AltaVista Web-site").

158. *Id.* at 465.

159. Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032, 1035-36 (S.D.N.Y. 1996).

volved a contempt proceeding against an Italian defendant for violation of a 1981 judgment enjoining it from publishing or distributing in the United States its "Playmen" magazine.[160] The server was an Italian company and the sever was located in Italy, yet the court did not address personal jurisdiction. Although not expressly mentioned in the case, it is likely that the court found that it retained jurisdiction over Defendant for the purposes of enforcing the 1981 injunction.

On the merits, the Court found that the defendant had violated the injunction.[161] One of the defendant's sites was a "pay site" meaning to access the site, the customer had to affirmatively subscribe to the service and pay the defendant.[162] The defendant knew that people in the United States were accessing its site, because he sent customers a "password" allowing access to the site via defendant violated the injunction.[163] Although the court did not decide the copyright issue, it stated that it was highly important that the defendant has offered pictorial images with sexual content on an Italian server and thus "has distributed its product within the United States."[164]

In *Zippo v. Zippo Dot Com*,[165] a case involving a domain name dispute, the court found personal jurisdiction over the defendant based on the contacts of third parties with the defendant.[166] Plaintiff, the manufacturer of "ZIPPO" lighters and the owner of the same mark, sued the defendant an operator of an Internet service for trademark infringement."[167] In order to use the defendant's service, a subscriber must submit his e-mail and his mailing address to receive a password from the defendant that allows access to the defendant's server.[168] Approximately two percent (3,000) of defendant's subscribers, were Pennsylvania residents.[169] While access to the first level of defendant's server was free of charge, the two other levels offered by the defendant did re-

160. *Id.* at 1035.
161. *Id.* at 1038-40.
162. *Id.* at 1035.
163. *Id.*
164. *Id.* at 1043.
165. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). The defendant used e.g. the domains "zippo.com," "zippo.net," and "zipponews.com" for his newsgroup service. *Id.*
166. *Id.*
167. *Id.* at 1121.
168. *Id.*
169. *Id.*

quire a financial payment.[170]

Thus, a contractual relationship between the defendant and third parties did exist. Nevertheless, the court held that this case was "not an Internet advertising case" and "not even an interactivity case in the line of Maritz" but, was "a doing business over the Internet case in the line of *CompuServe*."[171] It further stated that the contracts were not "fortuitous" because the defendant consciously and repeatedly chose to process Pennsylvania residents' applications and assign passwords.[172] Finally, the court concluded that the cause of action arose out of defendant's forum related conduct since "a significant amount of the alleged infringement and dilution, and resulting injury had occurred in Pennsylvania."[173]

In summary, the cases demonstrate that when there exist contractual contacts with the forum state, personal jurisdiction is uniformly found. If a content provider makes copyrighted works available to (contractual) subscribers, he will be subject to personal jurisdiction in places where a significant number of subscribers reside.[174] This finding is consistent with the theory of this article that personal jurisdiction is proportionate to the nature and quality of defendant's contacts to the forum state. A contractual relationship is clearly a "quality" contact with the forum justifying personal jurisdiction. One reason why a contractual relationship is a quality contact is because the defendant, a content provider, has knowledge and control over the information provided to the contractual subscribers. The defendant knows who the subscribers are and also knows the residence of the subscribers because of their contractual relationship. Typically the defendant derives revenue from those subscriptions and is more likely to keep current information about the subscribers. A contractual relationship with the forum state is a sufficient enough presence to constitute a "quality" contact.

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170. *Id.* at 1121.

171. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125 (W.D. Pa. 1997).

172. *Id.* at 1126.

173. *Id.* at 1127.

174. *See* Perritt, Jr., *supra* note 8, at 19. The author used CompuServe and America Online as examples for subscription-based commercial systems. *Id.* However, a content provider that charges for the use of a remote server has subscribers and a contractual relationship as well. *Id.*

ii. *Specific Jurisdiction Based on Non-Contractual Contacts: Doing Business and the Commission of a Tortious Act*

Since most specific long-arm statutes provide that courts may exercise jurisdiction over defendants who are either "doing business" within the state or "committing [a] tortious act," most courts have analyzed defendant's activities with regard to these two alternatives. The majority of the courts to address personal jurisdiction over out-of-state content providers have held that if the defendant is doing business with the forum state, the court has personal jurisdiction over the defendant. When personal jurisdiction is dependent on the defendant's commission of a tortious act within the forum, there does not appear to be a general trend toward a finding of personal jurisdiction. The courts look to the specific facts of each case to determine whether personal jurisdiction is proper. These cases, like the contractual decisions analyzed above, are actions for infringement and defamation.

In *Minnesota v. Granite Gates Resorts*,[175] the court found personal jurisdiction over the defendant because his activity amounted to doing business in the forum state. The court found personal jurisdiction based on the contacts of third parties with the defendant.[176] The court upheld jurisdiction in an action by the State Attorney General to enjoin defendant's gambling web site under the state's gambling and consumer protection laws.[177] The evidence showed that the web

175. Minnesota v. Granite Gates Resorts, Inc., CIV No. 95-7227, 1996 WL 767431, at *1 (Minn. Dist. Ct. Dec. 11, 1996), *aff'd* 568 N.W. 2d 715 (Minn. Ct. App. 1997), *cert. granted*, No. 97-89, 1997 Minn. LEXIS 1997 (Minn. Oct. 31, 1997).

176. *Id.* The Minnesota Attorney General's Office released a memorandum on the Internet, asserting that Minnesota courts have jurisdiction over persons outside the state who transmit information on-line that will be disseminated within. *Id.* The Office filed six lawsuits against promoters of illegal activities on the Internet such as gambling, credit repair, pyramid schemes and snake oil. *Id.*

177. *Id.* at *4. Section 609.025 of the Minnesota General Criminal Jurisdiction Statute, reads as follows:

> A person may be convicted and sentenced under the law of this State if the person:
> (1) Commits an offense in whole or in part within this state; or
> (2) Being without the state, causes, aids or abets another to commit a crime within the state; or
> (3) Being without the state, intentionally causes a result within the state prohibited by the criminal laws of this state.

MINN. STAT. § 609.025 (1994).

site advertised to offer a sports bookmaking service via the Internet which permitted individuals to place bets using a credit card and that Minnesota residents accessed defendant's web site to place such bets.[178]

The court used a multi-factor test to find defendant's purposeful availment.[179] The court stated the defendant's "activity certainly arises to the type of promotional activity or active solicitation to provide the minimum contacts necessary for exercising personal jurisdiction."[180] This statement illustrates that the court considered the activity a transaction of business rather than a tortious act. The court also rejected defendant's argument that they never mailed, sent, or advertised in Minnesota, by stating "[t]his argument is not sound in the age of cyberspace" and found the existence of defendant's web site a direct marketing campaign to the State of Minnesota.[181] However, the court expressly stated that Minnesota's interest in consumer protection requires jurisdiction and that it does "not view the contacts the same as what is necessary for a private litigant to pursue a case."[182] Since the court's decision is influenced heavily by "Minnesota's interest in a governmental action," it is of little value for private copyright infringement actions.

In *Heroes, Inc. v. Heroes Foundation*[183] the defendant, a charity, placed an ad seeking donations in the *Washington Post* and also had an Internet web site that was nationally accessible.[184] The United States District Court for the District of Columbia found in the claim for trademark infringement that defendant was "transacting business" and "causing tortious injury" in the forum.[185] The *Heroes* court, in reviewing defendant's activities, held that because of defendant's newspaper ad, it need not decide if the Internet web site alone would support jurisdiction.[186] However, the opinion left little doubt that the web site alone would have supported ju-

178. Minnesota v. Granite Gates Resorts, Inc., CIV No. 95-7227, 1996 WL 767431, at *2 (Minn. Dist. Ct. Dec. 11, 1996).
179. *Id.* at *6.
180. *Id.* at *10.
181. *Id.* at *6.
182. *Id.* at *9-*11.
183. Heroes, Inc. v. Heroes Found., 958 F. Supp. 1 (D.D.C. 1996).
184. *Id.* at 3.
185. *Id.* at 1.
186. *Id.* at 5.

risdiction.[187]

In *Maritz v. Cybergold*, [188] the court for the Eastern District of Missouri cited *Inset* approvingly in asserting personal jurisdiction over a California corporation that set up a Web site under the allegedly infringing domain name "cybergold.com." The Web site had, in fact, been accessed 131 times by Missouri users and was set up with the intent of soliciting Internet users, including those in Missouri, to sign up on Cybergold's mailing list.[189] The defendant's forthcoming mailing list was a new business concept which allowed subscribers to receive advertisements via e-mail that matched their selected interests.[190]

The court decided to analyze whether defendant's activities satisfy the "commission of a tortious act within this state" provision in Missouri's long-arm statute rather than "the transaction of any business test."[191] Although the statute requires an act "within this state," the court ignored this wording when it stated that even if the activities were wholly outside of the state, the statute reaches the defendant because the allegedly infringing activities have produced an "effect" in the state.[192] The "magic effect test" allows the court to adjudicate over the whole content of the Internet, because everything could potentially have some effect on Missouri. The court then analyzed the "minimum contacts" test under the five-factor test of the Eighth Circuit.[193] With regard to the nature and quality of the contacts with the forum state, the first factor, the court found the activity of maintaining a web site not completely "passive;" rather, it considered this as a solicitation.[194] The transmission of information 131 times into the state, constituted a purposeful availment of the privilege of doing business in Missouri, and as such Cybergold ought to have reasonably anticipated being sued there.[195] The court found other factors in favor of obtaining

187. *Id.*

188. Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1328-30 (E.D. Mo. 1996).

189. *Id.* at 1330.

190. *Id.*

191. *Id.* at 1331 (citing MO. REV. STAT. § 506.500).

192. *Id.* at 1331-32.

193. *Id.* at 1332 (citing Bell Paper Box, Inc. v. U.S. Kids, Inc., 22 F3d 816, 819 (8th Cir. 1994) (quoting Land-O-Nod Co. v. Bassett Furniture Indus., 708 F.2d 1338, 1340 (8th Cir. 1983)).

194. Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996).

195. *Id.* at 1334.

jurisdiction and denied any due process or venue objections.[196]

In *Panavision v. Toeppen,*[197] the Central District Court of California has asserted personal jurisdiction over an already famous "cybersquatter" living in Illinois, who demanded $13,000 for the domain name "panavision.com."[198] The court analyzed specific personal jurisdiction under the Ninth Circuit's commonly used three-part test.[199] The court focused on the "purposeful availment" factor and stated that the test differs depending upon the underlying cause of action.[200] Focusing on the defendant's intention to sell the domain name, the court found his underlying action to be a tort, rather than a contractual dispute.[201] Since it was a tort, the court applied the "effect test" doctrine to analyze the purposeful availment factor.[202] Thus, the court did not hold that Toeppen was "doing business" in California via the Internet.[203] Rather, it held that because of the defendant's intent to interfere with plaintiff's business, he had "expressly aimed his conduct at California" where defendant's principal place of business was located.[204] The court also held for the defendant as to the two other factors. First, the court stated that the action arises out of or results from defendant's forum-related activities, and second, that the jurisdiction is presumed reasonable, if a nonresident, acting outside the state, intentionally causes injury within the state.[205] Therefore, personal jurisdiction was found in favor of the defendant.

The court in *McDonough v. McElligott*[206] refused to exer-

196. *Id.*

197. Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 617 (C.D. Cal. 1996).

198. *See* Intermatic Inc. v. Toeppen, 947 F. Supp. 1227, 1227-28 (N.D. Ill. 1996) (defining cybersquatters as "individuals [that] attempt to profit from the Internet by reserving and later reselling or licensing domain names back to the companies that spent millions of dollars developing the goodwill of the trademark.").

199. Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 620-23 (C.D. Cal. 1996).

200. *Id.* at 620-21.

201. *Id.* at 621.

202. *Id.*

203. *Id.* at 622.

204. *Id.*

205. Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 622 (C.D. Cal. 1996).

206. McDonough v. McElligott, Inc., No. CIV 95-4037, 1996 U.S. Dist. LEXIS 15139, at *11 (S.D. Cal. Aug. 6, 1996).

cise specific jurisdiction over a nonresident defendant. However, the court did not analyze on-line activities to find the defendant's "purposeful availment," but instead focused more on the nationwide distribution of a magazine.[207] Thus, the case is less predicative of specific jurisdiction.

After the court in *Naxos v. Southam*[208] denied general jurisdiction based on the existence of a web site, the court annexed specific jurisdiction regarding an allegedly defamatory article in the *Vancouver Sun* (a Canadian newspaper).[209] The newspaper article was not available on defendant's web site, but on the server of the legal computer on-line services LEXIS and WESTLAW.[210] However, the court found even this minimal publication sufficient for the purposeful availment test.[211] This is surprising because LEXIS/NEXIS and WESTLAW have newspapers, periodicals, and information from almost any country in the world. Arguably, subscribers do not read foreign newspapers for defamatory statements at a hourly rate of almost $200. Nevertheless, the court denied personal jurisdiction because the forum state was not "the focal point both of the story and of the harm suffered."[212] The loose purposeful availment analysis and the denial of the "effect" test based on the focus of the Canadian entity is not very predicative as well.

The United States District Court for the Southern District of New York in *Bensusan Restaurant v. King*[213] was the first court that focused its specific jurisdiction analysis on defendant's maintenance of an Internet Web site accessible by users in New York.[214] The owner of the famous New York jazz club (and of the federally registered trademark) "The Blue Note" sued King, owner of a small Missouri jazz club

207. *Id.* at *15.

208. Naxos Resources Ltd. v. Southam Inc., No. CIV 96-2314, 1996 U.S. Dist. LEXIS 21759, at *1 (C.D. Cal. June 3, 1996).

209. *Id.* at *6-*7.

210. *Id.* at *2.

211. *Id.* at *9.

212. *Id.* at *9 (citing Calder v. Jones, 465 U.S. 783, 789 (1984)). To analyze, if the claim "arises from defendant's forum-related activities" the *Calder* court adopted the "effect test" of defamation cases. *Id.* at *9 (citing Edwards v. Pulitzer Publ'g, Co., 716 F. Supp. 438, 441 (N.D. Cal. 1989). The court found that the Canadian newspaper article addressed Naxos (Canada), rather than Naxos California. *Id.* at *10-*11.

213. Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996).

214. *Id.* at 299-301.

with the same name, over his Internet web site.[215] The web site included "a fanciful similar logo which [was] substantially similar to the logo utilized" by the plaintiff, a disclaimer, and a hypertext link to plaintiff's club.[216]

Judge Stein analyzed the defendant's activities under the provisions of New York's long-arm statute.[217] New York's statute permits personal jurisdiction over nonresidents only on an enumerated basis, and does not extend personal jurisdiction to the full extent of constitutional limits.[218] The court did not analyze the transaction of business within New York provision pursuant to section 302(a)(1) of the Civil Practice Law and Rules, but instead did so under section 302(a)(2) and section 302(a)(3)(ii).[219]

Section 302(a)(2) of New York's Civil Practice Law and

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215. *Id.* at 297-98.

216. *Id.* at 297. Thus, it was clearly not considered a "cybersquatter" case.

217. Section 302 of New York's Civil Practice Law and Rules provides:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings. [. . . .]

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

N.Y.C.P.L.R. § 302 (McKinney 1990).

218. *See* citations in Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *9 (S.D.N.Y Feb. 26, 1997).

219. Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996). It seems that the court did not even consider the web page as a business advertisement within New York.

Rules permits a court to exercise personal jurisdiction over any non-domiciliary who "commits a tortious act within the state" as long as the cause of action asserted arises from the tortious act.[220] In trademark infringement cases, the tortious conduct occurs where the defendant offers to sell the infringing product.[221] The court found that "[i]t takes several affirmative steps by a New York resident," to obtain access and use the information posted on the web site.[222] Thus, "the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York."[223]

The second jurisdictional basis asserted by plaintiff, section 302(a)(3)(ii) of New York's Civil Practice Law and Rules, permits a court to exercise personal jurisdiction over any non-domiciliary for tortious acts committed outside the state that cause injury in the state if the non-domiciliary "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."[224] The court asserted two reasons why the defendant's conduct did not fall under this provision.[225] First, the plaintiff did not allege that the defendant derived substantial revenue from interstate commerce.[226] Second, the plaintiff did not allege a "significant financial loss" in the New York club based on plaintiff's web site and did not assert defendant's foreseeability of a possible infringement.[227]

Finally, the court held that even if jurisdiction were proper under New York's long-arm statute, asserting jurisdiction would violate constitutional due process.[228] It ex-

220. N.Y.C.P.L.R. § 302 (McKinney 1990).

221. Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996).

222. *Id.* The court described that these steps include using resident's computer hard- and software, knowledge about the URL of the web site or, alternatively, a "search engine." *Id.* Additionally, the court found that in order to buy a ticket a user must travel to Missouri. *Id.*

223. *Id.*

224. *Id.*

225. MICHAEL C. SILBERBERG, *Personal Jurisdiction and the Internet*, N.Y.L.J. (Nov. 6, 1996) <http://www.ljx.com/internet/110796c2.html>.

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

227. *Id.*

228. *Id.*

plained that the defendant has done nothing to purposefully avail himself of the benefits of New York.[229] Defendant simply created a Web site and permitted anyone who could find it to access it.[230] According to this court, 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 towards a forum state.[231]

The court's decision in *Hearst Corp. v. Goldberger*[232] discussed the commission of a tort and found that the court did not have personal jurisdiction over the defendant. In *Hearst,* the United States District Court for the Southern District of New York issued a small landmark decision regarding specific personal jurisdiction based solely on the maintenance of a web site. After Judge Peck denied jurisdiction based on section 301, he focused on New York's "long-arm" statute section 302.[233] The court analyzed personal jurisdiction according to the wording of section 302. New York's long-arm statute specifically enumerates acts which are the basis for jurisdiction, in contrast to several other states' "broad" long-arm statutes.[234]

A New York court may exercise personal jurisdiction over any non-domiciliary who, in person or through an agent, transacts any business within the state or contracts anywhere to supply goods or services in the state pursuant to section 302(a)(1).[235] According to the court, section 302(a)(1) is typically invoked for a cause of action against a defendant

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229. *Id.* at 301.

230. *Id.*

231. *Id.* The court stated that 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." *Bensusan Restaurant Corp.*, 937 F. Supp. at 301 (S.D.N.Y. 1996).

232. Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *1, *10-*15 (S.D.N.Y. Feb. 26, 1997).

233. *Id.* at *8.

234. N.Y.C.P.L.R. § 302(a) (McKinney 1990); *see also* N.Y.C.P.L.R. § C302:1 (McKinney 1990) (practice commentary by Joseph McLaughlin); Beacon Enters., Inc. v. Menzies, 715 F.2d 757, 764 n.6 (2d Cir. 1983).

235. Section 302(a) of New York's Civil Practice Law and Rules provides:

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state . . . .

N.Y.C.P.L.R. § 302(a) (McKinney 1990).

who (1) breaches a contract with plaintiff or (2) commits a commercial tort against a plaintiff in the course of transacting business or contracting to supply goods or services in New York.[236]

The court found that defendant's activities did not involve a contract, since it was undisputed that the defendant had not sold any product or services, but rather had committed the tort of trademark infringement in the course of a commercial activity.[237] Defendant's web site consisted only of an announcement of the future availability of his web site to "offer law office infrastructure network services for attorneys."[238] Thus, it remained unclear what the defendant really planned to offer. According to the decision, the defendant neither offered any services nor sold or offered products at the time of the filing.[239] The only activity of relevance on the web site at the time of the filing was an alleged illicit domain.[240] Thus, the court found this activity "most analogous to an advertisement in a national magazine."[241]

In contrast to many states, New York law is clear in stating that advertisements in national publications are not sufficient to provide personal jurisdiction under section 302(a)(1) of New York's Civil Practice Law and Rules.[242] Even advertisements targeted at the New York market have been found insufficient to constitute a transaction of business for jurisdiction purposes under section 302(a)(1).[243] Moreover, the *Hearst* court found that the defendant's web site may be viewed by people in all fifty states and all over the world, but it is not targeted at the residents of New York.[244]

Section 302(a)(2) of New York's Civil Practice Law and

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236. Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *9 (S.D.N.Y. Feb. 26, 1997) (citing Beacon Enters., Inc. v. Menzies, 715 F.2d 757, 764 (2d Cir. 1983)).

237. *Id.* at *10.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *10 (S.D.N.Y. Feb. 26, 1997) (citing Davidson Extrusions, Inc. v. Touche Ross & Co., 516 N.Y.S.2d 78, 79 (App. Div. 1987)).

243. *Id.* (citing U.S. Mexican Dev. Corp. v. Condor, No. CIV. 91-5925, 1992 WL 27179, at *3-*4 (S.D.N.Y. Feb. 5, 1992) ("[A] non-domiciliary's solicitation of business or advertising within New York generally does not in and of itself constitute transaction of business within the state.").

244. Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *10 (S.D.N.Y. Feb. 26, 1997).

Rules provides personal jurisdiction over one who commits a tortious act within the state so long as the cause of action asserted arises from the tortious act.[245] A trademark infringement occurs where the "passing off" occurs, i.e., where the deceived customer buys the defendant's product in the belief that he is buying the plaintiff's.[246] However, courts have held that an offering for sale constitutes a "passing off," and have found the mere offer, without a sale, as sufficient to constitute personal jurisdiction over the alleged infringer.[247] The *Hearst* court, however, stated that even if the defendant's Internet web site could be considered an "offer for sale," the defendant had no product or service yet available for sale.[248] Therefore, the court denied jurisdiction under section 302(a)(2) based merely on his placing of the offer for future services on the Internet.[249]

Finally, section 302(a)(3) provides for jurisdiction over one who commits a tortious act outside New York, causing injury within New York if he (1) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (2) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.[250] Although, the plaintiff did not rely on section 302(a)(3), the court proceeded to "briefly address it for the sake of completeness."[251] The solicitation of business under section 302(a)(3)(i) requires a regular course of business conducted in the state, and thus, more than a "one shot" business transaction.[252] But the required solicitation of business within New York did not exist, since the defendant had nothing to sell. Hence, section 302(a)(3)(ii) also failed. The court stated, that even if the present web site is considered a solicitation, it did not occur in New York and thus, section

245. *Id.* at *13 (citing Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996)).

246. Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 639 (2d Cir. 1956).

247. Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996).

248. Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *14 (S.D.N.Y. Feb. 26, 1997).

249. *Id.*

250. N.Y.C.P.L.R. § 302(a) (McKinney 1990).

251. *Hearst Corp.*, 1997 WL 97097, at *14.

252. *Id.* at *15.

302(a)(3)(i) is not applicable.[253] The application, would "offend traditional notions of fair play, because it would lead to nationwide jurisdiction over the Internet."[254] The court, therefore, found that neither section 302(a) nor section 301 provided a basis for personal jurisdiction over the defendant.[255]

In effect, the cases demonstrate that when specific jurisdiction over out-of-state content providers is based on doing business, personal jurisdiction is found over the defendant the majority of the time. When jurisdiction is dependent on the defendant's commission of a tortious act within the forum, there does not appear to be a general trend toward a finding of personal jurisdiction, rather the determination of jurisdiction is fact specific. These findings are consistent with the theory of this article that personal jurisdiction is proportionate to the nature and quality of defendant's contacts to the forum state. Where a defendant clearly does business over the Internet with residents of the forum state, the defendant has knowledge of his customers. Since the defendant has knowledge of his client base, he therefore knows the recipients of the "infringing" materials. Doing business is a "quality" contact with the forum justifying personal jurisdiction.

In contrast, when dealing with the "commission of a tortious act" courts have had difficulty finding personal jurisdiction over content providers. One reason why courts are not uniformly finding personal jurisdiction could be that the case law for the commission of torts deals with the tort of libel, and not copyright infringement. Several commentators agree that the "effect test" used in the analysis of personal jurisdiction was designed to target libelous statements,[256] and is inappropriate for copyright infringement actions.[257] A copy-

253. *Id.*

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

255. *Id.*

256. *See* Calder v. Jones, 465 U.S. 783, 783 (1984) ("Petitioners are not charged with mere untargeted negligence, but rather their intentional, and allegedly tortious, actions were expressly aimed at California.").

257. The *Hearst* court declined to follow *Panavision,* especially with regard to this court's use of the "effect test." Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *14 (S.D.N.Y. Feb. 26, 1997). The "effect test" focuses on the defendant's intent, and except perhaps in the clearest case of a "cybersquatter" or where intent is undisputed, the *Hearst* court stated it would be a serious mistake for personal jurisdiction to turn on this issue. *Id.* The de-

right infringer, in contrast to an author of a defamatory statement, has no intention of causing injury in a jurisdiction other than the one where he resides. In fact, typically, the infringer has no knowledge as to where the author resides. For example, if an individual copies "Microsoft Word" in Paris on his personal computer, the copier simply does this to avoid buying the program in a Paris store. Furthermore, if the copier makes the software available on his Internet server in Paris, he has no intention of causing an injury in the State of Washington where the copyright owner resides. Whereas in a case of libel, the statements must be made where the plaintiff resides, or there is no injury to reputation.

Several authors have suggested alternatives to the "effect test" since it is not well suited for copyright actions. One commentator argued that the "stream-of-commerce theory" is the best framework to use for the personal jurisdiction inquiry, because the traditional legal framework is inadequate in the content provider context.[258] The "stream-of-commerce theory" is another theory of purposeful availment.[259] It has been used mainly in several product liability cases to analyze jurisdiction over the manufacturer. However, the theory in general, and with regard to copyright infringement, is more inappropriate than the traditional purposeful availment analysis. The commentator herself acknowledged that the Supreme Court expressed "only" three different views on the stream-of-commerce theory and in the view of many courts this has already been rejected.[260] Fur-

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fendant's intent is a major issue on the merits, but not a procedural one. *Id.*

258. Sonia Gupta, *Bulletin Board Systems and Personal Jurisdiction: What Comports with Fair Play and Substantial Justice*, 1996 U. CHI. LEGAL F. 519 (1996). Although she determines personal jurisdiction with regard to "BBS Operators," her arguments addresses mainly the BBS Operator function of "providing content" and somewhat the function of "providing storage for third parties content."

259. *Id.* One of the several versions of the stream-of-commerce theory was explained by Justice O'Connor:

> The placement of a product in the stream of commerce, without more, is not an act of the defendant purposefully directed toward the sufficient forum State .... Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State .... But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not (constitute) an act purposefully directed toward the forum State.

Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 116-121 (1987).

260. Gupta, *supra* note 258, at 524-26. The Supreme Court expressed both a

thermore, information on the Internet is available worldwide, except as it is restricted. Thus, a theory based on a manufactured "product" that has to be physically distributed to reach potential plaintiffs does not fit.

Another commentator offered that instead of the "effect test," print publication cases are appropriate for the Internet, and thus arguably copyright infringement cases."[261] Several courts already analyzed personal jurisdiction based on decisions regarding print publications. This is because print publications, like electronic ones, spread out and come in contact with a multiplicity of jurisdictions.[262] A print publication usually satisfies the minimum contacts analysis if it has substantial circulation in the jurisdiction or if the defendant publisher intended to cause injury in the jurisdiction.[263] A similar minimum contacts analysis applies when the defendant made tortious statements which are later published by another.[264]

Another author continued with this print publication argument by stating that the use of the Internet is like placing an advertisement in a "local" newspaper.[265] The author argued that a content provider who has established a site on the Internet intends to disseminate worldwide, the worldwide dissemination of information is a foreseeable and intentional act.[266] Following this argument, if the operation of a web site commits a tortious act in New York, such as copyright infringement, a defendant should be subject to specific personal jurisdiction.[267]

But the "print publication" analogy is inappropriate for copyright infringement actions. In a comparison to a print publication, a copyright infringer does not receive any revenue from the on-line usage, especially due to the lack of a

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"narrow," and a "broad" version, and Justice Stevens refused to join either opinion. *Id.* at 524-25.

261. Perritt, Jr., *supra* note 8, at 19. However, he finds intention only if it is a subscription-based commercial systems like CompuServe or America On-line and has a significant subscribers in the forum. *Id.*

262. *Id.* at 17. However, he finds intention only if it is a subscription-based commercial system like CompuServe or America On-line, and the system has significant subscribers in the forum. *Id.* at 19.

263. *Id.* at 18.

264. *See id.* (citing Calder v. Jones, 465 U.S. 783, 789 (1984)).

265. Bender, *supra* note 8, at 41. Although he mentioned that the discussion of the nature of the Internet was minimal. *Id.*

266. *Id.* at 32.

267. *Id.* (defining a defendant, the author specifically includes corporations, but is not limited as to whether individuals would also be included).

contractual relationship with the on-line user. Furthermore, even if an infringer wanted to make copyrighted works available to a global audience, he does not want to "distribute" the content like a print publication. Therefore, the print publication analogy is inadequate.

In conclusion, the finding of personal jurisdiction based on the commission of a tort in the forum state appears to be very fact specific when dealing with copyright infringement on the Internet.

2. *Out-of-State Internet Service Provider*

A second potential defendant is an out-of-state service provider. A service provider connects either an out-of-state server or an out-of-state individual user to the illicit material on the Internet. A service provider merely facilitates the connection. Unlike a content provider, a service provider has no control over the content of the material on the Internet. In general, it is not likely that courts will find personal jurisdiction over out-of-state Internet service provider defendants.

United States courts have found the operator of a Bulletin Board Service ("BBS")[268] liable for copyrighted works that were uploaded by third parties.[269] The operator of a BBS is parallel to an Internet service provider in that neither have control over the content, rather both merely administrate the connection. Arguably, a service provider could be sued, at least for indirect copyright infringement, if the copyright owner informed the service provider that his copyrighted work is accessible on the Internet.[270] The facts were ripe for such a scenario in *Playboy v. Chuckleberry*. Possibly, the plaintiff in *Playboy* could have sued a service provider as well as the content provider, assuming that Chuckleberry leased server space with a different company.

At this time, United States courts have never exercised personal jurisdiction over a service provider who has no direct control over the content. However, unless a service provider offers any services or products within the forum state, it is unlikely that courts will find "purposeful availment" and

268. *See supra* note 77 (defining Bulletin Board Service).

269. *See, e.g.*, Sega Enters., Ltd. v. Maphia, 984 F. Supp. 923 (N.D. Cal. 1996).

270. *See* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361 (N.D.Cal. 1995) (regarding indirect liability).

thus, courts will likely not exercise personal jurisdiction, even if the defendant is potentially liable. The decisions that have expressly denied general jurisdiction based on the existence of a web site, seem to support the denial of general jurisdiction over a service provider.[271]

Unless a service provider has contractual relationships with the plaintiff or third parties in the forum state, it will be difficult for courts to find specific jurisdiction as well. If a finding of jurisdiction is based on the "transaction of business," personal jurisdiction is justified if the service provider offered services to the forum's residents. This is not likely to occur since it is not the role of the service provider to have such direct contact with the plaintiff. For example, the defendant in *Granite Gates Resorts* advertised to promote an on-line gambling service, thereby offering contractual relationships to state residents.[272] The only way a court could justify hailing the service provider into court is if the service provider offered its services to the forum's residents.

Likewise, it is unlikely that a court finding personal jurisdiction based on a tortious act committed by the content provider would support personal jurisdiction over the service provider. Even if a service provider might be liable, he does not "expressly aim" any activity at a state other than where he is located. The "effect test," used to analyze purposeful availment when dealing with tortious acts, is inappropriate to determine personal jurisdiction for a service provider.[273] In *Maritz*, the court focused on the fact that the defendant's upcoming interactive service would allow the forwarding of advertising messages to the subscriber, like a mailing list.[274] Defendant's activity in *Maritz* was clearly distinguishable from that of a service provider, who merely connects a server or a user with the Internet. Furthermore, the arguments of *Maritz* were expressly mentioned and declined by the *Hearst* court because allowing personal jurisdiction based only on an Internet web site "would be tantamount to a declaration that this Court, and every other court throughout the world, may

271. *See, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996). In this decision, it is unclear whether or not general or specific jurisdiction existed. However, jurisdiction was obtained only due to the allegedly infringing web site. *Id.* at 162-65.

272. Minnesota v. Granite Gates Resorts, Inc., CIV No. 95-7227, 1996 WL 767431, at *1 (Minn. Dist. Ct. Dec. 11, 1996).

273. Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996).

274. Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo.1996).

assert [personal] jurisdiction over all information providers on the global World Wide Web."[275] It seems that courts realized that setting up a server without any other action by the defendant is not sufficient to establish purposeful availment.[276] Thus, courts should not be able to obtain subject matter jurisdiction over service providers.

In review, courts are not likely to find personal jurisdiction over Internet service providers. This finding is consistent with the suggestion of this article that the greater the quality of contacts the defendant has with the forum state, the greater the likelihood jurisdiction will be found. In this context, the defendant service provider's contacts with the forum are tenuous at best. There is no direct link between the plaintiff and the service provider. They are connected through the content provider. Since there is not a high quality of contact between the plaintiff and a service provider defendant, it is not surprising that courts would not find personal jurisdiction.

3. *Out-of-State Upload*

Another possible out-of-state defendant is a user who uploads a copyrighted work to a forum states' Bulletin Board Service ("BBS"). This scenario arose in several decisions, including *Playboy v. Frena* and *Sega v. Maphia*.[277] In both decisions, copyrighted works were allegedly uploaded and downloaded by third parties. However, the plaintiffs sued the "sysops,"[278] or systems operator, of a BBS and not the individual user, so the issue never became ripe before the courts.[279] In general, it is not likely that courts will find per-

275. Hearst Corp. v. Goldberger, No. CIV 96-3620, 1997 WL 97097, at *2 (S.D.N.Y. Feb. 26, 1997).

276. Gupta, *supra* note 258, at 519 (regarding the set up of a BBS); Perritt, Jr., *supra* note at 8, at 8 (stating that in a comparable situation (operator of an Usenet server), the operator may have no knowledge of what items are being offered and retrieved, and thus it is more difficult to conclude that the operator is responsible for the contact between the content and different jurisdictions).

277. Sega Enters. Ltd. v. Maphia, 984 F. Supp. 923 (N.D. Cal. 1996); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

278. A sysop, or "system operator," is the person who runs a computer server. The term is used mainly in the world of bulletin board services. In general, a sysop or system operator is one who runs the day-to-day operation of a server. *See* <http://whatis.com> (visited Feb. 16, 1998).

279. Sega Enters., Ltd. v. Maphia, 984 F. Supp. 923 (N.D.Cal. 1996); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

sonal jurisdiction over an individual defendant who is an out-of-state user who uploaded infringing material.

One court has addressed an action where the plaintiff sued the user of a remote database or network. In *Plus System v. New England Network*,[280] a Colorado court exercised personal jurisdiction over a New England regional automatic teller machine ("ATM") network. The *Plus System* court based jurisdiction upon the defendant's computer communications with plaintiff's computer in Colorado, a licensing contract, and visits by defendant's representative to Colorado to initiate the business relationship with plaintiff.[281] However, the decision contains no support for future courts to exercise jurisdiction over a user who has uploaded a copyrighted work. The *Plus System* court carefully noted that the defendant "availed itself of the State of Colorado by means which might be of insufficient quantum to justify personal jurisdiction if considered individually, but which clearly rise to purposeful availment when viewed collectively."[282] Moreover, the five year contractual relationship in *Plus System* has no similarities with the Internet, other than the fact that the communications occurred via a "telephone cable." *Plus System* provides insight that a court would probably not find personal jurisdiction over a user who has uploaded a copyrighted work since the mere use of a remote server is probably an "insufficient quantum" of evidence in itself to justify such a finding. Therefore, a finding of personal jurisdiction for this type of defendant is not likely.

In effect, courts are not likely to find personal jurisdiction over an individual defendant who is an out-of-state user who uploaded infringing material. This finding is consistent with the suggestion of this article that the greater the quality of contacts the defendant has with the forum state, the greater the likelihood jurisdiction will be found. In this context, the defendant's only contact with the forum is his posting on the BBS. This act is too remote to justify personal jurisdiction. Since there is not a high quality of contact between the plaintiff and the defendant, courts should not find personal jurisdiction over this type of defendant.

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280. Plus Sys., Inc. v. New England Network, Inc., 804 F. Supp. 111 (D. Colo. 1992).

281. *Id.*

282. *Id.* at 118.

B. *Electronic Mail Communication*

The second major category is communication by electronic mail ("e-mail"). E-mail communication differs from that of a Web server in that a recipient of e-mail is passive when using this method of communication. It is a third party that forwards the mail and hence initiates the transmission. This third party can be an individual third person or an automated mailing list server that automatically forwards any mail to the user. The user only receives the transmission passively.

The sender of a copyrighted work is a direct copyright infringer.[283] If he is located in the forum state, courts likely have subject matter jurisdiction and personal jurisdiction. However, the mere reception of a copyrighted work via e-mail should not be considered a direct copyright infringement. Thus, courts cannot exercise subject matter jurisdiction just because the recipient is physically located in the forum state. Since a finding of jurisdiction focuses on the nature and quality of defendant's conduct over the Internet toward the forum state, this article suggests that courts should focus on how much control the sender has over the where, if and by whom his work is received. The more control the sender has, the more likely courts should find personal jurisdiction over the sender in the forum the copyrighted work was received.

An examination of the case law supports this article's theory. When examining the case law, it is important to keep in mind that none of the cases have explicitly addressed the issue of e-mail and personal jurisdiction.[284] Although some courts have exercised personal jurisdiction over out-of-state defendants based on phone calls or electronic communication, virtually all of them involved libelous or defamatory statement actions,[285] or actions based on contractual relation-

283. *See Sega Enters.*, 984 F. Supp. at 931 ("The Ninth Circuit has held that "copying," for the purposes of copyright law, occurs when a computer program is transferred from permanent storage device to a computer's random access memory.").

284. Another pragmatic reason that it is difficult to rely on the existing case law for some consistency is that the forwarding of a tangible copyrighted work via the mail is not illicit, unless it is a distribution to the public under 17 U.S.C. § 106(3) (1994). Furthermore, the work could be an infringing importation under 17 U.S.C. § 602 (1994).

285. Compare the decisions in Gassman, *supra* note 8, at 563.

ships.[286] In these cases, personal jurisdiction was based on the situs of the defamatory statements or the location of the contracts; the existence of e-mail communication was only incidental to a finding of personal jurisdiction. Nonetheless, in cases that involved more control by the sender, the emphasis on the e-mail communication was greater than cases where the sender had little control over where the copyrighted information was received.

The cases seem to divide into two classes defined by the party transmitting the e-mail. There is the individual third person who sends an e-mail to a specific person or an automated mailing list server that automatically forwards the mail to any user. The individual transmitter typically has at least some knowledge of and control over who receives his e-mail. Moreover, it is likely that a recipient can identify the place of origin of the mailing. Therefore, a finding of personal jurisdiction for this type of defendant is more likely. In contrast, an automated mailing list server automatically forwards mail to any user on its list. This defendant has less knowledge as to the recipient of his e-mail and likewise it is more difficult for the recipient to identify the source of the mailing. It is less likely that a court will find personal jurisdiction over a defendant that uses this type of communication.

The case of *Cody v. Ward*[287] presented an interesting question of personal jurisdiction analysis. The District Court for the District of Connecticut exercised personal jurisdiction over an out-of-state resident in an action for fraudulent misrepresentation under the Connecticut Uniform Securities Act.[288] In *Cody*, the defendant used both e-mail, phone calls, and an automated mailing server, Prodigy.[289] The defendant posted 225 messages on Prodigy's on-line discussion forum "Money Talk" encouraging people to buy or hold shares of stock of the E.N. Phillips Company, telephoned the plaintiff four times, and sent the plaintiff fifteen e-mails.[290]

The Connecticut court discussed the application of the

286. *See, e.g.*, Plus Sys., Inc. v. New England Network, Inc., 804 F. Supp. 111 (D. Colo. 1992).

287. Cody v. Ward, 954 F. Supp. 43 (D. Conn. 1997).

288. *Id.* at 47.

289. *Id.* at 45.

290. *Id.*

forum state's long-arm statute[291] for transmitted misrepresentations.[292] Due to the forum state's lack of precedent, the court looked to the New York long arm statute for guidance, and stated that, under this statute, most courts in New York have declined to exercise jurisdiction over nonresidents for out-of-state misrepresentations.[293] Declining to follow this approach, the *Cody* court asserted jurisdiction over the defendant under Connecticut's long-arm statute, merely because many other states have asserted jurisdiction for transmitted misrepresentations.[294]

The *Cody* court found that the purposeful availment factor was met by the defendant as well.[295] However, the court expressly based the exercise of jurisdiction on misrepresentations made "to the plaintiff in a series of telephone calls and e-mails."[296] This article suggests that the court ruled this way because in a telephone call or a direct e-mail, the defendant has knowledge and control over whom is the recipient of the e-mail. This relationship was based on the defendant's knowledge about plaintiff's physical location.[297] Thus, the court concluded that the defendant's contacts with the plaintiff in Connecticut were substantial enough that he should reasonably have anticipated being sued here, especially if the plaintiff lost nearly $200,000.[298]

The court stated that it was "unnecessary to decide whether the defendant's Prodigy messages should be counted as purposeful contacts with Connecticut."[299] In contrast to the e-mail and phone calls, the defendant would have no knowledge as to where his messages would be transmitted on Prodigy. Therefore, this decision gives no support for an action of copyright infringement based only via a mailing list server like Prodigy. Furthermore, this finding supports the theory of this article. Even though there were 225 messages sent by the defendant on the Prodigy system, (in contrast to

291. CONN. GEN. STAT. § 52-59b(a)(2) (1969) (codified as amended 1982 P.A. 82-160 § 16).
292. Cody v. Ward, 954 F. Supp. 45, 46 (D. Conn. 1997).
293. *Id.* at 46.
294. *Id.*
295. *Id.* at 46-47.
296. *Id.* at 47.
297. *Id.* at 45, 47.
298. Cody v. Ward, 954 F. Supp. 45, 47 (D. Conn. 1997).
299. *Id.* at 47.

the four phone and fifteen e-mail messages) since the defendant had no knowledge of the recipient of these Prodigy messages, the court did not find jurisdiction based on those transmissions.

The case of *Resuscitation Technologies v. Continental Health Care*[300] addressed merely the first type of e-mail communication—e-mail from an individual third person to a known plaintiff.[301] The actual finding of jurisdiction was based on much more than electronic mail communication. The parties forwarded some eighty e-mails, communicated via telephone, and fax.[302] The parties did have knowledge about the physical location of the other party.[303] The court found that the goal of the interaction between the parties "was to combine their resources to form a new company."[304] The court found this interaction to equal a "quasi-business relationship" and determined personal jurisdiction existed on the basis of this business relationship. The court held "[w]ithout question . . . [defendants] reached beyond the boundaries of their own state to do business in Indiana."[305] Therefore, the mere fact that an intensive business relationship included e-mail, cannot be used to support a finding of personal jurisdiction. But, consistent with the theory of this article, where the defendant has knowledge as to the recipient of his e-mail, a court is more likely to find personal jurisdiction over this type of defendant.

In *Pres-Kap, Inc. v. System One, Direct Access Inc.*,[306] the defendant was an out-of state computer-information user who had a contractual business relationship with the plaintiff. The defendant did have knowledge or control over the recipients of his e-mail communication. Yet, the court still found personal jurisdiction over this computer-information user based on the physical location of the server.[307] It would appear that this finding would be inconsistent with the theory of this article because, arguably, it is impossible to locate

300. Resuscitation Techs., Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567, at *1 (S.D. Ind. Mar. 24, 1997).
301. *Id.*
302. *Id.* at *2.
303. *Id.*
304. *Id.* at *5.
305. *Id.* at *6.
306. Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351, 1353 (D. App. Fla. 1994).
307. *Id.*

the computer-information user. But, it is arguably foreseeable that a database server is located at the mailing or business address of the server. For example, WESTLAW's server might be in Eagen, Minnesota and LEXIS/NEXIS might be located in Dayton, Ohio. Therefore, the physical location of the mailing list server is inadequate for a finding of personal jurisdiction.

Even in a situation where the physical location of the subscriber and the mailing list server is identical, according to Henry H. Perritt, Jr., the exercise of personal jurisdiction over a defendant who has posted illicit material is inappropriate.[308] Perritt indicated that one who posts on the Internet has no knowledge of the extent of the list and thus the "dissemination of this posting to a particular person is usually neither purposeful nor foreseeable."[309] He concluded that absent special circumstances, the exercise of personal jurisdiction is inappropriate if based only on the dissemination of messages through the list.

In sum, in cases where the individual transmittor typically has at least some knowledge of and control over who receives his e-mail, and it is likely that the recipient can identify the place of origin of the mailing, a finding of personal jurisdiction for this type of defendant is more likely. In contrast, where a defendant is an automated mailing list server which automatically forwards mail to any user on its list, this defendant has less knowledge as to the recipient of his e-mail and likewise it is more difficult for the recipient to identify the source of the mailing. It is less likely that a court will find personal jurisdiction over a mailing list server defendant. There are several pragmatic reasons why courts should not find personal jurisdiction over these mailing list defendants simply based on their e-mail communications. Almost all mailing lists forward articles, including text and pictures, and, thus, copyrighted works. Many authors who disseminate their copyrighted works on mailing lists, enjoy a broad use of their works. This type of communication could be destroyed if a reply to an article could result in personal jurisdiction in a out-of-state forum if, for example, the reply contained too many parts of an article. Therefore, the dissemination of copyrighted works through a mailing list

308. Perritt, Jr., *supra* note 8, at 20.
309. *Id.*

should not result in a finding of personal jurisdiction.

C. *Usenet*

The third major category is communication by the Usenet.[310] The Usenet is a combination of the other two methods if communication over the Internet, the Web Server and electronic mail. A user actively post articles to be distributed automatically by a Usenet server to another Usenet server. However, in order to receive an article, a user has to access the server and to select the file he wants to view. While using the Usenet the user is both active and passive with the transmission.

The foregoing analysis of dissemination over electronic mail communication and Web servers illustrated that personal jurisdiction is even less appropriate if an out-of-state user has posted a copyrighted work on a Usenet server,[311] where it will be automatically disseminated on Usenet servers throughout the world. The author who posted a work on the Usenet has no knowledge and control where, if, and by whom the work will be retrieved. Personal jurisdiction over the user who posted the message would have, in the words of the court in *Playboy* a "devastating impact on those who use this global service."[312] Furthermore, the exercise of personal jurisdiction over the user would be a declaration that the court may assert jurisdiction over all information, or at least all information on the Usenet.[313]

In this context, Perritt argued that "the act resulting in the receipt of the message in a particular place is the act, not of the publisher, but of the retriever."[314] He stated that dissemination "in these circumstances should not subject the publisher to personal jurisdiction in places where the information is retrieved."[315] Therefore, unless the publisher has other contacts to the forum state, courts should not be able to exercise personal jurisdiction merely based on his activity on the Usenet.

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310. *See* <http://whatis.com> (visited Feb. 16, 1998) (defining "Usenet").

311. *Id.*

312. Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032, 1040 (S.D.N.Y. 1996).

313. The *Playboy* court expressly denied such a holding. *Playboy Enters., Inc.*, 939 F. Supp. at 1040.

314. Perritt, Jr., *supra* note 8, at 20.

315. *Id.*

That courts have not found personal jurisdiction based on use over the Usenet is consistent with the theory of this article. A finding of personal jurisdiction should be proportionate to the nature and quality of activity the defendant conduct over the Internet. When examining the Usenet, the quality of contacts over the Internet is poor since the defendant has no knowledge or control over where, if, and by whom the infringing work would be retrieved. Therefore, not surprisingly, courts did not exercise personal jurisdiction over the defendant when the method of communication was the Usenet.

IV. CONCLUSION

In effect, courts have little experience in resolving the appropriateness of personal jurisdiction in cases involving copyright infringement on the Internet. Thus, the personal jurisdiction analysis regarding Internet activities is highly uncertain and unpredictable. The analysis depends heavily on the individual facts and circumstances.

However, courts should not be able to obtain personal jurisdiction over individual users who transmit allegedly copyrighted works by a mailing list, on Usenet newsgroups,[316] or upload them to remote servers within the forum state. Furthermore, courts should not be able to exercise personal jurisdiction over out-of-state Internet service providers. The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the activity that the defendant conducts over the Internet.[317] Moreover, except in rare cases where a business operates only over the Internet, such as a search engine, it is unlikely that courts will find general jurisdiction over an out-of-state defendant. Therefore, courts have to focus on specific jurisdiction.

Thus, the following sliding scale represents a basic personal jurisdiction principle. At one end of the sliding scale is a situation where a defendant clearly does business over the Internet with the forum state's residents. If the defendant enters into a contract with residents of a foreign jurisdiction over the Internet, personal jurisdiction is proper. Courts

316. *See supra* note 78 (defining newsgroup).

317. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Penn. 1997).

should be able to exercise personal jurisdiction if a contract exists and copyrighted works are accessible on-line.

At the opposite end of the scale is a situation where a defendant has simply posted copyrighted works on a BBS that is accessible to users in foreign jurisdictions. The passive web site (a site that does little more than make information available to anyone interested) should not be considered sufficient for the exercise of personal jurisdiction.

Finally, in the middle of the scale exists a very fact specific scenario pertaining to an interactive remote server.[318] When the user can do more than merely accessing content, such as exchanging information with the host computer, the exercise of jurisdiction should be determined by an examination of several factors, such as the level of interactivity, the commercial nature of the service, and the amount of (illicit) information available. Under this analysis, the operator of the remote server offering interactive services faces personal jurisdiction if the server provides information that allegedly contains copyrighted works that can be accessed from the forum state.

318. For example, see the service in *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1330 (E.D. Mo. 1996).

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