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INTERNET JURISDICTIONAL ISSUES: FUNDAMENTAL FAIRNESS IN A VIRTUAL WORLD

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A World Wide Web site posted by the Attorney General of Minnesota reads: "Warning to all Internet Users and Providers: Persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws."[1] As this posting indicates, the technological developments of the Internet have presented the judicial system with new, almost inconceivable, issues dealing with *in personam* jurisdiction. Because of the burgeoning capabilities of computers, traditional jurisdictional boundaries have required re-examination.

Since the United States Supreme Court's decision in *International Shoe Co. v. Washington*,[2] *in personam* jurisdiction has been predicated on the standard of a presence in the state — whether the presence be of the actual person, or of continuous, ongoing, and tangible contacts with the state.[3] With the advent of computer technology, the definition of presence has been radically altered. Computer signals transmitted via phone line enable parties to have "virtual" presence anywhere their signal is received. This enables business deals to be negotiated without physical presence, or, in some cases, a tangible medium of transaction other than a computer database.[4] Additionally, crimes and torts have the potential of being committed without perpetrators ever doing more than logging on to their computers.[5]

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1. Mac Norton, *Speedtrap, Roadblocks, and Sobriety Checks on the Information Superhighway*, 30 ARK. LAW. 7, 7 (1996).

2. 326 U.S. 310 (1945).

3. *See* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 199 (1995).

4. John W. Verity & Robert D. Hof, *The Internet: How It Will Change the Way You Do Business*, BUSINESS WEEK, Nov. 14, 1994, at 80.

5. *See, e.g.*, Colin Poitras, *Trying to Find Him at Ripoff@Internet.Com*, HARTFORD COURANT, Dec. 28, 1995, at A; Bruce Haring, *Giving Chase in Cyberspace to Catch a Hacker*, USA TODAY, Jan. 16, 1996, at 4D.

These technological developments have the potential of causing innumerable horrors when construing "fundamental fairness" principles associated with conferring jurisdiction on a particular forum. If the concept of fairness of jurisdiction is related to a person's contacts with, and anticipation of, litigation in a particular state, there is a potential clash with the physical world when electronics enable a person to achieve a presence in all fifty states (or even the entire world) almost immediately from anywhere there might be a modem hook-up.

This Article explains Internet jurisdictional issues within the current framework that enables a state to assert *in personam* jurisdiction. This Article argues that existing jurisdictional tests are appropriate in determining the fairness of jurisdiction in cases involving the Internet, despite the vast outreach capacity of computers. This Article will first examine the development of law concerning *in personam* jurisdiction. Next, this Article will reflect on how courts have handled jurisdictional issues respecting other modes of communication, namely the mail and telephone. Third, this Article will argue that in traditional jurisdictional analysis, courts have placed primary emphasis on business contacts and purposeful conduct prior to asserting that a "minimum contact" standard has been met and that Internet bulletin board postings, alone, rarely fit into these categories. Finally, this Article will conclude by asserting that current jurisdictional standards can easily be applied to situations in which the contact point between states is an Internet transaction and that it is not necessary to redevelop jurisdictional tests to accommodate computer technology.

JURISDICTIONAL HISTORY

The United States Supreme Court has established modern personal jurisdiction law in four primary decisions.[6] The first of these decisions, and setting the standard for most "long-arm" jurisprudence, was *International Shoe Co. v. Washington*.[7] In *International Shoe*, the

6. Prior to what would be considered "modern personal jurisdiction law," the United States Supreme Court decided several jurisdictional issues that left "long-arm" jurisdiction in a somewhat uncertain state because of the need to switch from a theory where physical presence was required to one which accounted for mobility and virtual presence (such as a corporate entity). The first Supreme Court case that really dealt with the realities of travel and temporary presence within a state validated a Massachusetts statute that allowed Massachusetts to assert jurisdiction over a cause of action arising when a nonresident operated his motor vehicle in the state. Hess v. Pawloski, 274 U.S. 352, 356-57 (1927).

7. 326 U.S. 310 (1945). The International Shoe Company was a Delaware Corporation doing business primarily in Missouri but employing sales representatives in Washington. International Shoe Co. v. Washington, 326 U.S. 310, 313 (1945). The State of Washington sued International Shoe in an attempt to recover payments due to the unemployment compensation fund. *International Shoe*, 326 U.S. at 311-12. The

Supreme Court held that personal jurisdiction need not be predicated on physical presence in a state, but may be constitutionally exercised if a nonresident defendant has "minimum contacts" with the forum state.[8] The Court determined that such contacts must be determined by the relationship between the defendant and the forum state and in light of "traditional notions of fair play and substantial justice."[9] In defining "fair play and substantial justice," the Court established that fairness emanates from purposeful activities directed at a forum state that result in a person's (or business') gaining the benefit and protection of a forum state's laws.[10]

The Supreme Court has furthered the "presence" notion since *International Shoe*. In *Perkins v. Benguet Consolidated Mining Co.*,[11] the Court ruled that a state may exercise jurisdiction over a corporation having physical presence in the state even though the subject of litigation occurred elsewhere.[12] The defendant in *Perkins* was a Philippine corporation that, prior to World War II, had its principal place of business in the Philippines.[13] During the Second World War, the corporation's president returned to his home state of Ohio, and carried on parts of the corporation's business.[14] The corporation was sued in Ohio for shareholder earnings that were accumulated while the company had done business in the Philippines.[15] The Supreme Court found that Ohio was an appropriate forum for litigation because of the corporation's contact with, and presence in, the state.[16] This was true even though the plaintiff was not even a resident of Ohio.[17]

The Court continued to address the establishment of personal jurisdiction boundaries. In *McGee v. International Life Insurance Co.*,[18] the Court held that a single contact, if commercial in nature, could meet the "minimum contacts/fundamental fairness" test.[19] In *McGee*, the defendant, an Arizona corporation, renewed an insurance policy written for a California resident.[20] The defendant had neither an of-

State perfected service by serving a sales representative and sending notice by registered mail to the home office. *Id.* at 320.

8. *International Shoe*, 326 U.S. at 316.

9. *Id.*

10. *Id.* at 319. The Court ultimately held that International Shoe enjoyed the "privilege of conducting activities" with the state and thus enjoyed "the benefits and protection of the laws" of the state. *Id.*

11. 342 U.S. 437 (1952).

12. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952).

13. *Perkins*, 342 U.S. at 447.

14. *Id.* at 447-48.

15. *Id.* at 448-39.

16. *Id.* at 447-48.

17. *Id.* at 438.

18. 355 U.S. 220 (1957).

19. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

20. *McGee*, 355 U.S. at 221.

fice nor an agent in California and had no other contact with the state aside from the renewal of that one policy.[21] Nevertheless, the Court found jurisdiction appropriate on the basis that selling even one insurance policy in California created "a contract which had substantial connection" with California for jurisdictional purposes.[22]

Finally, in *Hanson v. Denckla*,[23] the Supreme Court refined the minimum contacts test by providing two guidelines to help in the test's application. First, the Court stated that the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[24] Second, the Court determined that exercise of personal jurisdiction requires that the defendant "purposefully avails itself of the privilege of conducting activities within the forum State."[25] This, the Court reasoned, meant that the defendant invoked the "benefits and protection" of the forum state's laws which, in turn, would result in a reasonable expectation of litigation in that forum.[26]

After *Hanson*, the evolution of personal jurisdictional standards was, for a time, confined to lower courts.[27] From the lower court decisions emerged two characterizations of personal jurisdiction — general and specific jurisdiction.[28] General jurisdiction may be asserted over a defendant if the defendant's contacts with the forum state are systematic and continuous.[29] This theory confers jurisdiction over defendants who do not necessarily commit a tort within the forum state, but have regular contacts, such as business dealings, within the state.[30] Specific jurisdiction generally applies to individuals who commit torts in forum states or to individual transactions that occur in a particular state. Such jurisdiction exists over a defendant if

> (1) [the defendant] has contacts with the forum state that which are related to the cause of action, (2) those contacts amount to purposeful availment of the privilege of conducting activities within the forum state, and (3) the exercise of juris-

21. *Id.* at 222.
22. *Id.* at 223.
23. 357 U.S. 235 (1958).
24. Hanson v. Denckla, 357 U.S. 235, 253 (1958). In *Hanson*, a woman executed a trust agreement in Delaware with a Delaware bank being trustee. *Hanson*, 357 U.S. at 239. After the woman moved to Florida and passed away there, legatees in Florida brought suit attempting to settle issues related to the disbursement of the trust. *Id.* at 239-40.
25. *Hanson*, 357 U.S. at 253.
26. *Id.*
27. Flavio Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545, 1549 (1994).
28. *Rose*, 82 CAL. L. REV. at 1549.
29. *Id. See, e.g., International Shoe*, 326 U.S. at 317-18.
30. *See, e.g.*, Applied Biosystems, Inc. v. Cruachem, Ltd., 772 F. Supp. 1458, 1470-71 (D. Del. 1991).

> diction appears reasonable to the court based on a weighing of factors similar to those used by federal courts in deciding forum nonconveniens motions.[31]

In *Helicopteros Nacionales de Columbia, S.A. v. Hall*,[32] the criteria for specific jurisdiction was adopted by the Supreme Court. Furthermore, in *Burger King v. Rudzewicz*,[33] the Court gave more insight into how the specific jurisdiction test should be applied. The Court stated that minimum contacts are met only where an alleged injury arises out of or relates to action by the defendant that are purposefully directed toward forum residents.[34] The Court emphasized that the analysis, similar to previous Supreme Court cases, remained whether the defendant purposefully established "minimum contacts."[35] The Court made it clear that the "'purposeful availment' requirement ensure[d] that a defendant would not be hauled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts."[36] Several factors were suggested as important to analyzing the fairness of asserting jurisdiction:

> [1.] the burden on the defendant,
> [2.] the forum State's interest in adjudicating the dispute,
> [3.] the plaintiff's interest in obtaining convenient and effective relief,
> [4.] the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and
> [5.] the shared interests of the several States in furthering fundamental substantive social policies.[37]

The numerous jurisdictional tests and considerations postulated by the Supreme Court and other lower courts have all been aimed at defining what is a "minimum contact" that enables jurisdiction to be fair. State "long-arm" statutes are, in many ways, a codification of fairness standards articulated by *International Shoe* and its progeny.[38] These statutes have developed to include such provisions as asserting jurisdiction over those conducting continuous business in

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31. *Rose*, 82 CAL. L. REV. at 1549.
32. 466 U.S. 408 (1984).
33. 471 U.S. 462 (1985).
34. Burger King v. Rudzwicz, 471 U.S. 462, 472 (1985). The Court reasoned that a state has an interest in ensuring state residents have a convenient forum to redressing injuries caused by non-resident actors. *Burger King*, 471 U.S. at 473.
35. *Burger King*, 471 U.S. at 474.
36. *Id.* at 475 (citations omitted).
37. *Id.* at 476-77.
38. For a discussion of the development of long-arm statutes, see Comment, *Developments in the Law-State Court Jurisdiction*, 73 HARV. L. REV. 909, 1000-06 (1960) (hereinafter "*Developments*"). For a discussion of long-arm statutes pre and post *International Shoe*, *see* David P. Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 537 (1963).

the state, those committing torts in the state, and those committing torts outside the state that have an effect within the state.[39]

Even given the attempts of "long-arm" statutes to fall in line with United States Supreme Court mandates, non-residents sued in foreign states have still consistently challenged asserted jurisdiction as "fundamentally unfair" and unconstitutional under the Due Process Clause.[40] Courts dealing with these challenges have applied jurisdictional ideology in various, sometimes confusing, ways. Some courts have interpreted their state long-arm statutes as conferring jurisdiction to the maximum extent allowed under the Due Process Clause, still finding, however, that jurisdiction had the potential of being unconstitutionally asserted.[41] Some state courts have interpreted their long-arm statutes as defining the constitutional minimum contacts required by *International Shoe*, thus holding their state long-arm statutes to be merely a codification of due process mandates and not requiring additional analysis.[42] Still others courts have interpreted their long-arm statutes as "conferring jurisdiction to the maximum extent allowed under the Due Process Clause" but still requiring a secondary assessment as to whether jurisdiction was fundamentally fair based on sufficient contacts with the state.[43]

If jurisdictional interpretation was not confusing enough, many of these latter courts convoluted the matter further by referring to the second prong of jurisdictional analysis as examining a defendant's "minimum contacts" with a state.[44] Under this interpretation, in or-

39. The latter two "long-arm" criteria stem from the decision of *Hess v. Pawlowski*, in which the Supreme Court validated that a single tortious act committed within a state could confer jurisdiction on that state. *Hess*, 274 U.S. at 356-57. The law developed from one in which the act was necessarily committed in the state to one in which effect in the state was sufficient. *See generally Development*, 73 HARV. L. REV. at 1002-06.

40. *See, e.g.*, Putnam v. Triangle Publications, Inc., 96 S.E.2d 445, 454-55 (N.C. 1957) (holding that a North Carolina "long-arm" provision was unconstitutional as applied to a nonresident publisher whose only contact with the state was shipping magazines into the state).

41. *See, e.g.*, Knight v. San Jacinto Club, Inc., 232 A.2d 462, 467 (N.J. Super. Ct. Law Div. 1967). Other states have used this means of interpretation but held that, as applied to particular litigants, the statute exceeded due process limitations. *See, e.g.*, Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223 (Tex. 1991).

42. *See, e.g.*, Kilcrease v. Butler, 739 S.W.2d 139, 140 (Ark. 1987); Mohler v. Dorado Wings, Inc., 675 S.W.2d 404, 405 (Ky. Ct. App. 1984); State v. Houston, 600 P.2d 886, 890 (Or. Ct. App. 1979); Mahnkey v. King, 489 P.2d 361, 363 (Wash. Ct. App. 1971).

43. *See, e.g.*, Chittendon Trust Co. v. LaChance, 464 F. Supp. 446, 447 (D. Vt. 1978); School Dist. of Kansas City v. Missouri, 460 F. Supp. 421, 433 (W.D. Mo. 1978), *appeal dismissed by* 592 F.2d 493 (8th Cir. 1979); Midland Forge, Inc. v. Letts Indus. Inc., 395 F. Supp. 506, 513-14 (N.D. Iowa 1975); Markham v. Gray, 393 F. Supp. 163, 165-66 (W.D.N.Y. 1975).

44. *See, e.g.*, Glidewell Motors, Inc. v. Pate, 577 P.2d 1290, 1291 (Okla. 1978) (stating "[W]e have held the Oklahoma long-arm statutes intended to allow the reach of

der for a state to assert jurisdiction over a non-resident, the state not only had to establish "minimum contacts" in conjunction with the state's long-arm statute, but also examine whether "minimum contacts" were sufficient so that the assertion of jurisdiction was "fundamentally fair" and not violative of the Due Process Clause.[45]

In *World-Wide Volkswagen Corp. v. Woodson*,[46] the United States Supreme Court engaged in a two-tiered analysis of personal jurisdiction. In *World-Wide*, a couple from New York purchased a car, in New York, from a New York dealership.[47] While driving to Arizona, the couple was in an accident in Oklahoma.[48] The couple filed suit in an Oklahoma court against the manufacturer, the importer, and the regional and local automobile dealerships from New York.[49] They alleged jurisdiction based on a long-arm provision allowing jurisdiction over torts committed outside the state having an effect within the state.[50] In finding that Oklahoma retained no jurisdiction over the regional and local dealers, the Court noted that the New York defendants sold cars only in New York and the regional district, which limited sales to a three state area.[51] Since no income was derived from Oklahoma, the Court found no purposeful availment of the laws of Oklahoma.[52] Consequently, jurisdiction was found inappropriate as violative of the Due Process Clause.[53]

Despite any terms a court might be inclined to use when interpreting whether jurisdiction has been appropriately asserted, the standard, no different than what was required by *International Shoe*, remains whether the assertion of jurisdiction would be fundamentally fair.[54] This, in turn, hinges on sufficient contacts with a state that

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personal jurisdiction of the Oklahoma courts to the outer limits permitted by the due process clause of the . . . Constitution. . . . We define those outer limits with reference to the rule of minimum contacts with this state by the person over whom jurisdiction is sought.").

45. *Id.*; *see also* Kaplan School Supply Corp. v. Henry Worst, Inc., 289 S.E.2d 607, 609 (N.C. App.), *review denied*, 294 S.E.2d 209 (N.C. 1982). Some courts use a two-tiered analysis absent the confusing terminology by simply stating that the court must have jurisdiction under the long-arm statute and the exercise of jurisdiction must not violate the Due Process Clause. *See, e.g.*, Williams v. Institute for Computational Studies at Colorado State Univ., 355 S.E.2d 177, 179 (N.C. App. 1987).

46. 444 U.S. 286 (1980).

47. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980).

48. *World-Wide Volkswagen*, 444 U.S. at 288.

49. *Id.*

50. *Id.* at 289-90.

51. *Id.* at 298.

52. *Id.*

53. *Id.* at 299. In a similar two-tiered analysis, the Supreme Court in *Burger King* found Florida jurisdiction appropriate over a Michigan franchise. *Burger King*, 471 U.S. 49-71.

54. The Court in *World Wide Volkswagen* describes the inquiry in terms of reasonableness, fairness and what "does not offend 'traditional notions of fair play and sub-

make litigation reasonably anticipated.[55] Thus despite the enactment of long-arm statutes and clarifications of standards, the resolution of jurisdictional issues is still determined on a case-by-case basis with many variables being considered.[56]

The history of jurisdictional constraints and subsequent modifications is intertwined with the history of mobility in this country.[57] It would be easy to assess as unfair the assertion of jurisdiction over a person who owned no business in a state, owned no property in a state and had never set foot in a state, especially if this were the late nineteenth century and it was a California resident attempting to assert jurisdiction over a New York resident. At that time, mobility was limited, not just in terms of traveling from state-to-state, but mobility via any form of modern day mass communications. "Fairness," in many respects is much more difficult to assess now, both because of actual physical mobility and because there are now so many more means to communicate and conduct business. However, despite increasing mobility and developing communications, the groundwork laid by the Supreme Court in their jurisdiction cases has been appropriate when addressing jurisdictional issues related to the technological developments in communications.

Jurisdictional analysis with respect to two media of communications—mail and telephones—is especially analogous when assessing potential issues related to jurisdiction over Internet postings. Mail and telephones are very much like the Internet because they have enabled people to cross state lines without the person's physical presence. In determining whether mailings or phone contacts have conferred jurisdiction on a particular forum, state and lower federal courts have applied the same balancing test articulated by the Supreme Court, focusing on whether jurisdiction would be fundamentally fair given all the circumstances of a particular situation.[58]

To that end, one of the primary factors considered by courts in assessing the overall fairness of jurisdiction has been whether the contact with the forum state has been of a business or of a personal, isolated nature. For the most part, courts treat business contacts with a

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stantial justice.'" *World-Wide Volkswagen*, 444 U.S. at 292 (quoting *International Shoe*, 326 U.S. at 316, and Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

55. Reasonable anticipation is often assumed when a defendant purposely directs activities at the forum state. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984).

56. *International Shoe*, 326 U.S. at 319.

57. *See generally Developments*, 73 HARV. L. REV. at 917-18.

58. *See infra* notes 60, 61, 64, 72, 92 and accompanying text.

state differently than personal, non-business contacts.[59] With respect to mail, a company or person conducting business in a state, even if it would only be by post, might very well be deriving "benefits and protections" of a particular state's laws by virtue of the profitability (or even lack of profitability) of the business. This, in turn, would trigger a "reasonable anticipation of litigation" in that particular forum.[60] Consequently, it would not be a hard decision to find that a company doing business in numerous states would have "minimum contacts" with those states even if there were no physical presence of the company except by way of mail.[61] In fact, the routine conducting of business in and of itself establishes continuous contact with a particular state that, under the rationale of *International Shoe*, translates into a sufficient minimum contact conferring jurisdiction.[62]

Non-business mail contacts, however, often fall into the "random," "fortuitous," and "attenuated," categorization of jurisdictional analysis.[63] All mailings are not necessarily business in nature and the cases in which a non-business letter is the alleged basis for jurisdiction tend to be premised on defamation.[64] They often involve a letter or letters being mailed into a forum state and causing some sort of

59. *McGee*, 355 U.S. at 222. *See also* Currie, 1963 U. ILL. L.F. at 540. States have a continuous regulatory interest in various businesses as well as aspects of doing business such as licensing, granting permits, taxation, and unemployment compensation.

60. *See* Zorn v. Fingerhut Corp., No. CIV A. 89-6558, 1989 WL 143839, at *1 (E.D. Pa. Nov. 22, 1989). In this case, a Minnesota resident sued a New Jersey corporation in Pennsylvania for injuries sustained when using an exercise apparatus which had been mailed to Minnesota. *Zorn*, 1989 WL 143839, at *1-2. In finding Pennsylvania retained jurisdiction, the court stated "having shipped directly, by mail or otherwise, products into the Commonwealth of Pennsylvania to various mail-order customers, defendant has purposely availed itself of the privilege of conducting activities within Pennsylvania involving the benefits and protections of its laws." *Id.* at *2.

61. *But see* Faulkner v. Carowinds Amusement Park, 867 F. Supp. 419, 424 (S.D. W. Va. 1994) (stating that "the plaintiff must engage in activities far more extensive than mail solicitations accompanied by an occasional visit to the forum state by a group representative.").

62. *See also McGee*, 355 U.S. at 223.

63. *But see* Fallang v. Hickey, 532 N.E.2d 117 (Ohio 1988) in which a doctor mailed a single letter into the State of Ohio allegedly defaming another doctor. The defendant claimed that the contact with Ohio was "random [and] fortuitous." *Fallang*, 532 N.E.2d at 119. The Ohio Supreme Court, however, did not agree and focused on the purposeful nature of mailing the letter into the state relying on the analysis employed in *Burger King*. *Id.* at 120. The court also noted that Ohio had the greatest interest in adjudicating the dispute because the injury occurred there. *Id.* at 119.

64. There are also non-defamation cases in which the plaintiff asserts that sporadic mailing constitutes a minimum contact. For instance, in Witbeck v. Bill Cody's Ranch Inn, 411 N.W.2d 439 (Mich. 1987), a Michigan resident sued in Michigan for injuries sustained in Wyoming. The plaintiff alleged sufficient contact based on an advertisement in a nationally distributed Triple AAA tour guide mailed to Michigan. *Witbeck*, 411 N.W.2d at 445. The court found insufficient contact with Michigan and held jurisdiction to be unconstitutional. *Id.* at 446.

reputational damage.[65] In addressing the "fairness aspect" of requiring a defendant to litigate in a particular forum, courts have balanced the totality of circumstances which are, essentially, the totality of contacts other than the mail or mailings themselves.[66] Such contacts might be a defendant's traveling into the state, the size of the audience the letter reaches, phone calls made in conjunction with the mailings, or perhaps offices situated in the forum state. Additionally, some courts take into consideration the forum state's interest in litigating a particular issue.[67]

In some instances, the use of mails (such as mailing a defamatory letter) is the central link upon which jurisdiction is asserted.[68] In other cases, use of the mails is peripheral to the focal point of the suit and is just one factor the court must consider in assessing the overall situation.[69] One letter, if business-oriented, may be enough to establish jurisdiction.[70] Likewise, one letter, if criminal in nature (such as extortion, bribery, or threat) makes jurisdiction fair even if the perpetrator never setting foot in the jurisdiction.[71] One letter, if tortious in nature (such as an allegedly defamatory letter) is usually not enough to make the assertion of jurisdiction fair, absent a defendant's other contacts with the state.[72]

The Internet, similar to the mails, has the same potential to be singular in nature or of being much more widespread. Depending on where or how a message is posted, its direction may be to a single person or it might be received by millions around the world.[73] For a

65. *See supra* note 63.

66. *See supra* note 61.

67. *See* Curtis Publ'g Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966). In *Curtis*, a New York writer was sued in Alabama over disparaging remarks made about Mississippi residents. *Curtis*, 360 F.2d at 345, 346. The court held Alabama had little interest in the resolution of the issue. *Id.* at 347.

68. *See* Norris v. Oklahoma City Univ., No. 93-16647, 1994 WL 127175, at *2 (9th Cir. Apr. 12, 1994), *cert. denied*, 115 S. Ct. 738 (1995), in which the plaintiff claimed she was defamed by letters sent with her law school transcripts into the State of California.

69. *See* Pilipauskas v. Yakel, 629 N.E.2d 733, 741 (Ill. Ct. App. 1994). In *Pilipauskas*, an Illinois resident brought suit in Illinois for injuries received in Michigan. *Pilipauskas*, 629 N.E.2d at 735. The allegation was that advertising mailed into Illinois constituted sufficient minimum contacts. *Id.* at 737-40.

70. *McGee*, 355 U.S. at 221, 223.

71. *See In re* Palliser, 136 U.S. 257, 265-66 (1890).

72. *See, e.g.*, Burt v. Board of Regents, 757 F.2d 242, 244-45 (10th Cir. 1985) (basing jurisdiction on the effect of the defendant's conduct rather than the letters), *vacated on grounds of mootness*, 475 U.S. 1063 (1986); Reuber v. United States, 750 F.2d 1039, 1050 (D.C. Cir. 1984) (stating that one letter was insufficient to justify the exercise of personal jurisdiction); Zinz v. Evans & Mitchell Indus., 324 A.2d 140, 142-44 (Md. Ct. Spec. App. 1974) (finding that one letter was insufficient to justify the exercise of personal jurisdiction). *But see Fallang*, 532 N.E.2d at 119-20.

73. *See generally* R. Timothy Muth, *Old Doctrines on a New Frontier: Defamation and Jurisdiction in Cyberspace*, 68 WIS. LAW. 10 (1995).

non-business, non-criminal "projected presence" received by millions internationally, there is no direct judicial precedent by which to analogize or predict a jurisdictional determination.[74] In analogizing the use of the mails to the Internet, a comparable mail scenario might be an individual mailing a defamatory letter to millions of people worldwide with some of them reading it and some of them throwing it away. A possible example of this is a magazine or newspaper publishing a defamatory article and circulating this article nationally or internationally. This would give the mailing a "presence" in different locations at one time.[75]

The Supreme Court has considered such a situation. In *Keeton v. Hustler Magazine, Inc.*,[76] the Court held that the defendant publisher could be subject to jurisdiction in any forum in the United States when there was a substantial circulation of the magazine throughout the United States.[77] In *Keeton*, the plaintiff was a resident of New York who claimed that she was libeled in five issues of *Hustler Magazine*.[78] The plaintiff sued *Hustler*, which was incorporated in Ohio and maintained its principal place of business in California.[79] The suit was originally brought in Ohio, but because the statute of limitations had run, the plaintiff brought the suit in New Hampshire.[80]

The Supreme Court found that the national circulation of the magazine was sufficient to confer jurisdiction on New Hampshire.[81] The Court theorized that the dissemination of magazines was not "random, isolated, or fortuitous," but was purposefully directed at the forum state and inevitably had an effect there.[82] The Court focused on the magazine's circulation, which was continuous and deliberate, and the fact that the magazine derived a profit from national sales. This led the Court to conclude that New Hampshire could constitutionally assert personal jurisdiction over New Hampshire.[83]

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74. That is not to say there are not issues relating directly to the Internet and whether those making Internet postings may be considered public figures in defamation suits. *See* Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991); Note, *Catching Jellyfish in the Internet: The Public Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461, 461 (1995).

75. *See generally* David J. Conner, Note, *Cubby v. Compuserve, Defamation Law on the Electronic Frontier*, 2 GEO. MASON IND. L. REV. 227 (1993) (discussing message presence on bulletin boards).

76. 465 U.S. 783 (1984).

77. Keeton v Hustler Magazine, Inc., 465 U.S. 770, 781 (1984).

78. *Keeton*, 465 U.S. at 772.

79. *Id.*

80. *Id.* at 772 n.1.

81. *Id.* at 781.

82. *Id.* at 774.

83. *Id.* at 781.

Similarly, in *Calder v. Jones*,[84] the Court held that personal jurisdiction over the writers and editors of a defamatory article was proper when the focal point of, and the resulting harm from, the allegedly libelous article was purposefully directed at the forum state of California.[85] In *Calder*, the defendants were employees of the *National Enquirer* whose place of business was Florida where the defendants resided.[86] The basis of the suit was a defamatory article impugning the reputation of entertainer Shirley Jones.[87] In finding California an appropriate jurisdiction, the Court focused on the intentional acts of the writers, stating that the writers knew that the article would have a substantial effect on the plaintiff, they knew the article would be circulated in the forum state, (California was their largest circulation), and they knew that the article would cause considerable harm there.[88] Considering both Jones's emotional distress and harm to her professional reputation, the Court determined that the majority of the harm was suffered in California.[89]

Both *Keeton* and *Calder*, out of the nature of publication, involved business contacts and substantial circulation. Given those factors, the Court's leaning toward finding jurisdiction fair in those situations was reasonable, even though *Calder* focused on the intentional projection of harm into California. Similar circulation of Internet postings, even if they are allegedly defamatory, do not require a financial motive and, as a consequence, *Keeton* and *Calder* are not directly analogous nor dispositive.

When attempting to assess just where Internet communications fit in technology-wise, it is difficult to determine whether Internet transmissions are more like mass-circulated literature (letters or magazines) or like telephone calls.[90] On one hand, because Internet communications must be read to have any meaning and are capable of mass-circulation, they are like the paper medium. On the other hand,

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84. 465 U.S. 783 (1984).

85. Calder v. Jones, 465 U.S. 783, 788-89 (1984). Calder was the President of the Enquirer. *Calder*, 465 U.S. at 786.

86. *Calder*, 465 U.S. at 785-86.

87. *Id.* at 784.

88. *Id.* at 788-90. Purposeful direction has always been an essential criterion when assessing the fairness of asserting jurisdiction over an individual. *See* St. Clair v. Righter, 250 F. Supp. 148, 154 (W.D. Va. 1966).

89. *Calder*, 465 U.S. at 789-90.

90. See Jeremy Stone Weber, Note, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235, 258-59 (1995), for a discussion on whether defamatory Internet postings are closer to libel or slander. *See also* It's In the Cards, Inc. v. Fuschetto, 535 N.W.2d 11, 14 (Wis. Ct. App. 1995) (stating that "[T]he messages [on the bulletin board] are not done on a monthly, weekly, or daily basis, but are sporadic. . . ."), *review denied*, 537 N.W.2d 574 (Wis. 1995).

because the mass-circulated paper medium (such as for-profit magazine or mass advertisement) generally has a business connection, an Internet bulletin board posting might be more analogous to a phone call; one, perhaps, that is primarily social in nature.[91]

Unlike the mails, however, ordinary telephone calls do not generally have the potential of achieving a "presence" in many places at the same time (except, perhaps, a conference call, which is still somewhat limited in scope). The courts analysis in determining long arm jurisdiction in respect to telephone connections has been somewhat different than courts analysis of the mails. A single, business-oriented phone call is not enough to establish jurisdiction absent any other business-related contacts.[92] Likewise, a defamatory call made into a jurisdiction is not enough to establish jurisdiction absent other contacts with the state.[93] Overall, courts assessing the jurisdictional implications of telephone calls appear to recognize that signals transmitted electronically do not fall into the category defined by *International Shoe* as constituting a "minimum contact." The use of the telephone is recognized even less than use of the mails as being alone able to constitute a continuous or deliberate contact with a forum state that has the potential of deriving any "benefits and protections" of that forum.[94]

Whether analyzing jurisdictional implications of using the mails or using the telephone, courts focus on the totality of the contacts, and of what nature those contacts happen to be. Mass-circulation may not be sufficient to confer jurisdiction unless related to business.[95] Purposefully directed harm may not be sufficient unless the harm is mass-circulated and causes some tangible damage.[96] A similar formula

91. See Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 418 (1992) and Note, *Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology*, 12 REV. LITIG. 231, 232-33 (1992), for a discussion of the logistics of leaving and viewing Internet messages.

92. *See, e.g.*, Coating Engineers (Private) Ltd. v. Electric Motor Repair Co., 826 F. Supp. 147, 149 (D. Md. 1993) (finding that phone contacts and phone listing do not amount to conducting business in Maryland); CDI Contractors, Inc. v. Goff Steel Erectors, Inc., 783 S.W.2d 846, 847 (Ark. 1990) (finding that phone and mail contacts were insufficient to satisfy due process); Central Clearing, Inc. v. Omega Indus., Inc., 356 N.E.2d 852, 855 (Ill. App. Ct. 1976) (stating three phone calls insufficient to satisfy due process); TSE Supply Co. v. Cumberland Natural Gas Co., 648 S.W.2d 169, 170 (Mo. Ct. App. 1983) (holding that one phone order and one letter of credit were insufficient contacts to justify the exercise of personal jurisdiction).

93. *See* Margoles v. Johns, 483 F.2d 1212, 1221-22 (D.C. Cir. 1973).

94. *See supra* notes 85-89 and accompanying text. *See also* Dollar Sav. Bank v. First Sec. Bank, 746 F.2d 208, 209 (3d Cir. 1984) (holding that wire money transfers did not translate into purposeful availment).

95. *See supra* notes 59-72 and accompanying text.

96. *See supra* notes 76-89 and accompanying text.

may be employed when assessing the jurisdictional implications of Internet postings. Clearly, the Internet may be used for soliciting business or for purposely defaming another individual; however, long-arm jurisdiction should not be automatic because of circulation or damage potential. As with the mails or telephone, courts should assess Internet connections in relation to all factors that tie a user to a particular state. This would necessarily include a court's looking to the purposeful nature of the conduct, the business orientation of the posting, or any wide-reaching effects that are achieved by the posting.

INTERNET JURISDICTIONAL CASES

To date, there have been few cases involving jurisdictional issues in conjunction with computer communications, and none addressing long-arm jurisdiction based on a single, allegedly defamatory posting done in the context of a social discussion on an Internet bulletin board.[97] Several cases have alleged defamation occurring over the Internet but jurisdiction was not an issue in any of the cases.[98] There are two cases that seem to generate the most discussion on the topic of jurisdiction over computerized transactions or postings.[99] Neither of these cases relates to defamation occurring over the Internet, but rather discuss the general jurisdictional implications of a computer link being the connection between states.[100]

In *Pres-Kap, Inc. v. System One, Direct Access, Inc.*,[101] the plaintiff was a travel agency having its database and billing office in Florida and providing travel reservation services to subscribers nationally.[102] The defendant in the case was a New York subscriber doing business solely in New York leasing Pres-Kap terminals and subscribing to the travel service.[103] When the defendant stopped

97. Arguably the defamation cases involve a social discussion, but they have been primarily related to business. *See infra* note 98.

98. *See, e.g.*, Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 805178 (N.Y. Sup. Dec. 11, 1995); It's In the Cards v. Fuschetto, 535 N.W.2d 11 (Wis. Ct. App. 1995); Suarez Corp. Ind. v. Meeks, No. 267513 (C.P. Cuyahoga Cty. 1994).

99. *See generally* Note, *Pres-Kap, Inc. v. System One, Direct Access, Inc.: Extending the Reach of the Long-Arm Statute through the Internet?* 13 J. MAR. J. COMPUTER & INFO. L. 433 (1995).

100. *See generally* Comment, *Automated Clearing House Growth in an International Marketplace: The Increased Flexibility of Electronic Funds Transfer and Its Impact on the Minimum Contacts Test*, 15 U. PA. J. INT'L BUS. L. 105 (1994), for a discussion on how electronic fund transfer technology effects minimum contacts analysis.

101. 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).

102. Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351, 1351 (Fla. Dist. Ct. App. 1994).

103. *Pres-Kap*, 636 So. 2d at 1352.

making payments, Pres-Kap sued for breach of lease and filed suit in Florida.[104]

In finding that Florida had no jurisdiction over the defendant, the court stated that the computer contacts and billings mailed to Florida were insufficient to confer jurisdiction on Florida.[105] The court commented that a contrary result would have "far reaching implications" by potentially subjecting all on-line users to jurisdiction in the state in which the provider had only a billing office or database.[106] This, the court stated, was beyond the expectations of the ordinary computer user and offended "traditional notions of fair play and substantial justice," especially in an age in which the ordinary computer user did not even know where a particular database was located.[107]

Some courts have reached contrary results. In *Plus System, Inc. v. New England Network, Inc.*,[108] the United States District Court for the District of Colorado held that Colorado could assert jurisdiction over a Connecticut "branch" of an Automated Teller Machine (ATM) system - a system that had a network connection with the forum state of Colorado.[109] In reaching its decision, the court emphasized the national scope of the ATM system, continuous phone contacts and the business-oriented contacts the defendant had with the forum state.[110] The court balanced all factors in determining the Connecticut based company "purposely availed itself" of Colorado.[111] Also significant in the court's decision was the fact that the parties had entered into a contract which declared Colorado law would apply should there be a dispute.[112]

In *California Software, Inc. v. Reliability Research, Inc.*,[113] the court was faced with a situation perhaps most directly analogous to defamation Internet cases. *California Software* involved litigation between two computer software companies, one of which alleged the other interfered with its ability to license and market a software product.[114] Among the causes of action alleged was libel occurring over

104. *Id.*
105. *Id.* at 1353.
106. *Id.*
107. *Id.*
108. 804 F. Supp. 111 (D. Colo. 1992).
109. Plus System, Inc. v. New England Network, Inc., 804 F. Supp. 111, 118-19 (D. Colo. 1992). Monthly payments were also made to an office in Colorado. *Plus System*, 804 F. Supp. at 118.
110. *Plus System*, 804 F. Supp. at 118-19.
111. *Id.*
112. *Id.* at 118.
113. 631 F. Supp. 1356 (C.D. Cal. 1986).
114. California Software, Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1358 (C.D. Cal. 1986).

the Internet.[115] The plaintiff, a California corporation, alleged that a corporate officer of the defendant, a Nevada corporation doing business in Vermont, posted defamatory remarks over an Internet bulletin board called the "Computer Reliability Forum."[116] The Computer Reliability Forum was operated by the defendants and the information on the bulletin board was disseminated nationally.[117] Among the remarks made on the bulletin board were representations of the defendant claiming there was a legal dispute over the plaintiff's software license. The plaintiff alleged that the defendant's postings influenced consumers not to buy the product from the plaintiff.[118]

In finding jurisdiction over the defendant based on the defamatory Internet postings, the court commented, that the "[D]efendants made tortious statements which, though directed at third persons outside California, were expressly calculated to cause injury in California."[119] The court focused on the intentional nature of the defendant's actions and stated that the manipulation of third persons caused the plaintiff to be prevented from consummating a business transaction in California. The defendants, consequently, should have anticipated "answering for the veracity of their statements" in California.[120]

Although *Pres-Kap*, *Plus System*, and *California Software* seem to reach inconsistent results, none of the courts applied a jurisdictional balancing test differently than any other court contemplating a tangible medium of communication or physical presence in a state. Although the national scope of computer communications was considered as a factor in the balance by all of the courts, no court went so far as to hold that such scope was, or should be, the determinative factor in jurisdictional decisions. In fact, in finding jurisdiction "fundamentally unfair," the court in *Pres-Kap* focused on the *lack* of any other contact other than computer contact in their decision *despite* the business relationship that existed between the parties.[121] Although the outcome of *Plus System* is different, the analysis is similar to *Pres-Kap*. The *Plus System* court focused on the quality and quantity of contacts — mailings, network connection, personal visits, national scope of the business, site of the contract signing, and choice of law provision.[122] Similarly, the court in *California Software* balanced the

115. *California Software*, 631 F. Supp. at 1358.

116. *Id.*

117. *Id.* It was established that the message was received in Washington, New York, and Canada. *Id.*

118. *California Software*, 631 F. Supp. at 1358-59.

119. *Id.* at 1361.

120. *Id.* at 1362.

121. *See supra* notes 101-07 and accompanying text.

122. *See supra* notes 108-12 and accompanying text.

quality and quantity of contacts.[123] This included the interference the defendant caused to Plaintiff's business relationships and the knowledge that the postings were certain to cause effect in California. Although the *California Software* court focused on the broad dissemination of information provided on the computer bulletin board, this contact was only significant as it related to how the California company was economically disadvantaged. In addition, the defendants had also engaged in "purposeful direction" by sending letters into California that discouraged customers from buying Plaintiff's product.

Subjecting Internet users to *in personam* jurisdiction in distant forums based on bulletin board participation would be erroneous without balancing other traditional factors that would link an individual to a particular state. There have been clear jurisdictional lines drawn in terms of business versus non-business activities; thus, it would be reasonable for states to extend jurisdiction over Internet users who engage in business activities on the computer.[124] Similarly, it would not be unreasonable to assert jurisdiction over an individual who uses the Internet to engage in an international or national criminal scheme.[125] However, both of those categories of individuals would be subject to jurisdiction in a multitude of states without there having been an Internet connection. The Internet connection alone should not be the sole basis of a state's asserting jurisdiction. Additionally, the Internet connection should not be the primary basis for asserting jurisdiction absent more traditional links to a particular forum in the way of business or other continuous activity within the state. Moreover, while the purposeful direction of a defamatory comment has been one of the bases for asserting the constitutionality of long arm jurisdiction, such purposeful direction without more has generally been regarded as an insufficient contact to make jurisdiction "fundamentally fair."[126] Such should be the same analysis applied to singular Internet postings.

123. *See supra* notes 113-23 and accompanying text.

124. *See, e.g.*, Scherman v. Kansas City Aviation Center, Inc., No. Civ. A. 92-2211-GTV, 1993 WL 191369 (D. Kan., May 14, 1993). In *Scherman*, the court found that Kansas had jurisdiction over Georgia corporations based on Internet posting for sale of a plane received in Kansas. The court stated that "the advertising of the . . . aircraft in the database sent into Kansas, when combined with a contract entered into . . . with a Kansas resident to be performed in part in Kansas, provides the minimum contacts necessary." *Scherman*, 1993 WL 191369, at *5.

125. *See* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996) for an example of a prosecution involving the dissemination of pornography over the Internet. In *Thomas*, the defendants were California residents prosecuted in Tennessee. *Thomas*, 74 F.3d at 705. Because the material was received in Tennessee, Tennessee was found to be the proper venue. *Id.* at 709-10. This is not to be confused with jurisdiction. Because the defendants were prosecuted for violation of a federal statute, jurisdiction in the federal courts was appropriate and there was no need for "long-arm" analysis.

126. *See supra* notes 81-89 and accompanying text.

Furthermore, the mandate of *International Shoe* includes a reasonable anticipation of litigation. Despite the fact that Internet postings, even if defamatory, may be wide in scope, it does not mean that computer users are aware of where their postings might be read or that they are purposefully directing "harm" into a particular state. Such computer users could not reasonably anticipate litigating in a state in which they might not have known a posting was made. Arguing that Internet users are highly educated or should somehow be aware of the legal implications of their posting presupposes too much legal sophistication for these individuals aggregately. In fact, computer usage is so simplistic and prevalent that it is not uncommon to find elementary-age children adept at using the Internet.[127] It would be illogical to assume that school-age children would understand the legal repercussions of their postings, even if provided with an explicit warning concerning the consequences of their actions, such as the warning posted by the Attorney General of Minnesota.[128]

Taken to an extreme, predicating jurisdiction solely or primarily on a computer link would potentially subject various small businesses, or, in a not too extreme interpretation, every attorney in the United States, to jurisdiction in all fifty states. The use of Lexis, Westlaw, Internet research sites, e-mail, and even web site advertising could arguably suggest continuous and systematic business contacts on which to base not just specific jurisdiction, but perhaps even general jurisdiction.[129] As a result of this "virtual" presence everywhere in the nation, there would be immense potential for forum-shopping or even harassment through the judicial system simply because of the existence of resources that are available via technological developments.[130]

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127. *See generally* Judy Pennington, *Volunteers in the Schools Invest in the Future*, BATON ROUGE ADVOC., May 7, 1996, at 6 (special section); James J. Rodriguez, *Forming a Digital Community, School Kids Link Up with Seniors on Line*, L.A. DAILY NEWS, Feb. 3, 1996, at SC1.

128. *See supra* note 1 and accompanying text.

129. *See generally* Mac Norton, *Speedtraps, Roadblocks, and Sobriety Checks on the Information Superhighway*, 30 ARK. LAW. 7 (1996).

130. *See generally* Comment, *Networking in Cyberspace: Electronic Defamation and the Potential for International Forum Shopping*, 16 U. PA. J. INT'L BUS. L. 527 (1995). In fact, an entire field of legal expertise could be dedicated to determining in which state is the most favorable law, potential for damages, or where a particular statute of limitation has not run. Because of the lack of geographical boundaries of the Internet, a defamation suit could conceivably be brought in a jurisdiction where the statute of limitations has not run while the plaintiff attempts to elect having the court apply the law of yet another state having some link to the litigation via the Internet. See generally Comment, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045 (1993) and Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983) for a further discussion of problems relating to choice of law.

CONCLUSION

Despite the Internet warning of the Minnesota Attorney General and the technological developments that allow virtual presence through Internet connections, computer links do not warrant disregarding existing jurisdictional standards. The balancing tests articulated by *International Shoe* and its Supreme Court progeny have survived and been suitable in making jurisdictional determinations regardless of communications improvements. The Internet, although having a vaster scope of communication potential, is simply another technological development that does not warrant unique legal treatment nor a re-evaluation of well-established jurisdictional principles that predicate jurisdiction on fundamental fairness and more tangible contacts than electronic transmissions.