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NOTE

WORLD-WIDE VOLKSWAGEN, MEET THE WORLD WIDE WEB: AN EXAMINATION OF PERSONAL JURISDICTION APPLIED TO A NEW WORLD

During the last fifteen years, public use of the Internet¹ and the World Wide Web² has increased tremendously.³ Not surpris-

¹ The Internet can best be described as an intangible network of networks interconnecting millions of computers around the world. See *Have You Been Surfing the Internet Yet?*, MGMT. SERVICES, July 1996, at 21, available in LEXIS, Busfin Library, ABI File. The forerunner of the Internet was created in the summer of 1969 by the Department of Defense's Advanced Research Project Agency. *Id.* The goal was "to build a computer network that would enable researchers around the country to share ideas." Barbara Kantrowitz & Adam Rogers, *The Birth of the Internet*, NEWSWEEK, Aug. 8, 1994, at 56. Originally termed the "ARPANET," this network linked military computers, defense contractors, and universities. *A Changeling's Tale*, THE ECONOMIST, July 1, 1995, at S7; see also Patricia Schnaidt, *History of the Future*, NETWORK COMPUTING, Oct. 1, 1994, at P35 (noting that within one and one-half years of its first connection, "the Internet had grown to link 10 research facilities"). In 1990, ARPANET was replaced by the more technologically advanced NSFNET. See APRIL MARINE ET AL., INTERNET: GETTING STARTED 5 (1993).

Today an estimated 40 million people have access to the Internet, and 60 percent of the host computers are located in the United States. See *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996). The government has speculated that the number of users will grow to 200 million by the year 1999. *ACLU*, 929 F. Supp. at 829; *Shea v. Reno*, 930 F. Supp. 916, 926 (S.D.N.Y. 1996). At least 75 countries have full Internet access, and another 77 countries can send and receive e-mail. *The Internet Affects All Areas of Modern Life*, ONLINE PRODUCT NEWS, May 1995, available in LEXIS, Market Library, IACNWS File. For a complete discussion of the origin and functioning of the Internet and World Wide Web, see generally PETER H. SALUS, *CASTING THE NET* (1995); Edwin Diamond & Stephen Bates, *The Ancient History of the Internet*, AM. HERITAGE, Oct. 1995, at 34-35.

² The World Wide Web ("Web") "is currently the most advanced information system deployed on the Internet." *An Executive Summary of the World Wide Web Initiative* (visited Mar. 5, 1997) <<http://www.w3.org/pub/WWW/summary.html>>

ingly, businesses have begun to exploit the Internet for commercial purposes.⁴ Specifically, businesses are using the Internet to communicate with consumers and other businesses throughout the United States and the world.⁵ At the same time, the ever expanding reach of the Internet has presented difficult new legal questions, in particular, issues involving personal jurisdiction over Internet users.⁶

[hereinafter *Executive Summary*]. It is a "global, seamless environment in which all information ... that is accessible from the Internet can be accessed in a consistent and simple way" *Overview of the World Wide Web*, (visited Mar. 5, 1997) <http://www.cio.com/webmaster/sem2_web.html>. The information contained in these documents, called "Web pages," can be stored in different formats such as text, sound, graphics, or video. *Id.* Using software called a browser, a person "can access many existing data systems via existing protocols[] or via http and a gateway." *Executive Summary, supra*. Each Web page has its own "address" indicating which "server" computer the page is stored. See Thomas Mace, *The Perfect Internet Connection*, PC MAG., July 1, 1996, at 196; Judith Hurwitz, *Using Object Request Brokers (ORBS) to Fortify Distributed Computing over the Internet*, DBMS, July 1996, at 12. Web pages often contain "links," which are highlighted sections of text or images, that refer to a related Web page. See *Executive Summary, supra*. When a person viewing the Web page "clicks" on the link (or selects the link with a mouse), the browser automatically contacts the server upon which the selected Web page is stored and allows the user to view the linked Web page. *Id.*

The World Wide Web is the creation of a European think tank, Conseil European pour la Recherche Nucleaire ("CERN") made up of computer scientists, for the purpose of facilitating the work of physics researchers. BRYAN PFAFFENBERGER, PUBLISH IT ON THE WEB 32-33 (1996). The Web is just one "information service that links documents across the internet" STEVE LAMBERT & WALT HOWE, INTERNET BASICS (1993) 17.

³ See *ACLU*, 929 F. Supp. at 831 (stating that in 1981 there were roughly 300 computers connected to Internet and today there are over nine million); *MTV Networks v. Curry*, 867 F. Supp. 202, 203 n.1 (S.D.N.Y. 1994) (stating that Internet audience is doubling each year).

⁴ See Dale M. Cendali & James D. Arbogast, *Net Use Raises Issues of Jurisdiction*, NAT'L L.J., Oct. 28, 1996, at C7, C11 (stating that "already brisk commerce over the Internet is expected to increase exponentially as secure credit card transactions and other forms of electronic payment are perfected"); Jill H. Ellsworth, *Staking a Claim on the Internet*, NATION'S BUS., January 1, 1996, at 29 (stating that "[b]usinesses are flocking to gain a presence on the World Wide Web, where small firms are on equal footing with the big players"); Glyn Moody, *Adapting Your Business Needs to the Internet*, COMPUTER WKLY., June 22, 1995, at 61 (stating that "[t]oday it is becoming more and more common to see commercial users in all parts of the Internet"); *What Are You Doing On the Web? (Reasons Business People Use the World Wide Web)*, INC., June 1, 1996, at 124 (citing recent study indicating that half of people in United States and Canada using World Wide Web do so for business purposes).

⁵ See *ACLU*, 929 F. Supp. at 844 (stating that Internet is "a unique and wholly new medium of worldwide human communication").

⁶ See, e.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1268-69 (6th Cir. 1996) (deciding jurisdiction was proper in service provider's state in action against subscriber); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996)

This Note analyzes the jurisdictional issues pertaining to the Internet and examines the adequacy of applying existing personal jurisdiction doctrines to the use of the Internet. Part I briefly introduces the traditional principles used in resolving personal jurisdiction issues. Part II reviews several recent cases involving personal jurisdiction and the Internet. In Part III, this Note criticizes several of these cases for inconsistent application of personal jurisdiction jurisprudence. Finally, Part IV explores the reasons why due process requirements are not satisfied when the sole contact a defendant has with a forum state is a Web page.

I. TRADITIONAL TESTS FOR PERSONAL JURISDICTION: THE REQUIREMENT OF "MINIMUM CONTACTS"

The fundamental exercise of personal jurisdiction by a court over a nonresident rests upon the long-arm statute⁷ of the state in which the court sits.⁸ Even if the long-arm statute grants per-

(dismissing complaint for lack of personal jurisdiction in trademark infringement case where only contact with state was defendant's Web page); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (holding that jurisdiction was proper in trademark infringement case where only contact was defendant's Web page); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (upholding jurisdiction where defendant's contacts consisted of repetitive solicitations via Internet).

⁷ Each state enacts its own long-arm statute listing the types of cases which confer personal jurisdiction over a nonresident defendant who is not "present" within the state. See *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 639 n.14 (1990) (Brennan, J., concurring) (discussing Justice Scalia's opinion that states may expand reach of their personal jurisdiction to limits established by Federal Constitution by enacting long-arm statutes); *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 105 (1987) (noting that under Rule 4(e) federal court must look "either to a federal statute or to the long-arm statute of the State in which it sits to determine whether a defendant is amenable to service, a prerequisite to its exercise of personal jurisdiction"); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 713 (1982) (Powell, J., concurring) (indicating that state's long-arm statute is "the applicable jurisdictional provision under the Rules of Decisions Act").

⁸ Rule 4(e) of the Federal Rules of Civil Procedure states that "[u]nless otherwise provided by federal law, service upon an individual ... may be effected ... (1) pursuant to the law of the state in which the district court is located" FED. R. CIV. P. 4(e)(1). Similarly Rule 4(h) provides that "[u]nless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership ... shall be effected (1) in a judicial district ... in the manner prescribed for individuals by subdivision (e)(1)" FED. R. CIV. P. 4(h)(1); see also *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1996) (stating that "[a] court sitting in diversity applies the law of the forum state in determining whether it has personal jurisdiction over the defendants"); *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir. 1996) (noting that federal district courts must look to fo-

sonal jurisdiction over a defendant in a given case, the court must still ascertain whether the assertion of such jurisdiction comports with the Due Process Clauses of the Constitution.⁹ The Due Process Clauses of both the Fifth¹⁰ and Fourteenth¹¹ Amendments protect an individual from binding judgments in a foreign jurisdiction "with which he has ... no meaningful 'contacts, ties, or relations.'"¹² The historical requirement of a physical presence¹³ within a state to properly assert jurisdiction¹⁴

rum state's long-arm statute in order to resolve issue of personal jurisdiction); *Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1532 (10th Cir. 1996) ("In diversity cases, federal courts have *in personam* jurisdiction as permitted by State law").

In some instances, a forum state may exercise jurisdiction over a nonresident on the basis of the "bulge" exception. See FED. R. CIV. P. 4(k)(1)(B). Specifically, this exception provides that if a party does not have sufficient minimum contacts with the forum state, but is within a 100 mile radius of the federal courthouse in which the action was filed, the court may exercise personal jurisdiction over that party. Discussion of the "bulge" exception of Rule 4(k) is outside the scope of this Note.

⁹ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (noting that states may exercise personal jurisdiction upon defendant only if that defendant had established certain minimum contacts with forum state and such exercise did not offend traditional notions of fair play and substantial justice); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980) (citation omitted) ("The Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the State has no contacts, ties, or relations.'"); *Shaffer v. Heitner*, 433 U.S. 186, 203 (1977) ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'"); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

¹⁰ The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V.

¹¹ The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

¹² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); see also *World-Wide Volkswagen*, 444 U.S. at 291 ("The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant.").

¹³ "[A] defendant in a civil suit can be subjected to [a state's] jurisdiction *in personam* only by service within the district." *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 468 (1945) (citing *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 330 (1838)). The defendant need not be physically present within the state for personal jurisdiction "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another state" *Burger King*, 471 U.S. at 476; "[u]nder the general provisions of law, a United States district court cannot issue process beyond the limits of the district." *Pennsylvania R.R.*, 324 U.S. at 467-68 (citing *Harkness v. Hyde*, 98

was modified by *International Shoe Co. v. Washington*¹⁵ and its progeny. Under current personal jurisdiction jurisprudence, a person may be deemed "present" within a forum state in satisfaction of the Due Process Clause, if that person has certain "minimum contacts"¹⁶ with the forum state, "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹⁷

The determination of whether minimum contacts are sufficient to satisfy due process depends "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws."¹⁸ The resolution of this question requires a court to examine whether the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,"¹⁹ such that it could reasonably anticipate being haled into the forum

U.S. 476, 478 (1878)). The term "virtual presence" has been used to describe the situation where Internet contacts are examined as the basis of jurisdiction. See Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 350 (1996).

¹⁴ See *International Shoe*, 326 U.S. at 316 (1945); see also *World-Wide Volkswagen*, 444 U.S. at 291 (stating that "[a] judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere").

¹⁵ 326 U.S. 310 (1945).

¹⁶ The "minimum contacts" requirement has been said to serve two related functions: protecting "the defendant against the burdens of litigating in a distant or inconvenient forum" and ensuring that the states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns" *World-Wide Volkswagen*, 444 U.S. at 291-92.

¹⁷ *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The "fair play and substantial justice" standard is deemed satisfied by certain minimum contacts because a person or corporation that conducts "activities within a state ... enjoys the benefits and protection of the laws of that state." *Id.* at 319. Obligations, if any, that may arise out of their activities within the state can "hardly be said to be undue." *Id.* at 319.

¹⁸ *Id.* at 319. This minimum contacts test "is not susceptible of mechanical application; rather, the facts of each case must be weighed" *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 92 (1978).

¹⁹ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts....or of the 'unilateral activity of another party or a third person.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *World-Wide Volkswagen*, 444 U.S. at 299; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)). A court may also consider choice of law provisions in a contract when determining whether defendant invoked the "benefits and protections" of a state's laws. See *Burger King*, 471 U.S. at 481 (criticizing Court of Appeals for giving insufficient weight to choice of law provisions).

state's courts.²⁰ The Supreme Court has stated that mere foreseeability,²¹ or putting an item into the stream of commerce, are not alone dispositive.²² Instead, something more is required, such as determining whether the cause of action arose from the defendant's activities within the forum state.²³

Finally, to ensure that "traditional notions of fair play and substantial justice" are satisfied, a court will consider factors

²⁰ See *World-Wide Volkswagen*, 444 U.S. at 297; see also *Kulko*, 436 U.S. at 97-98; *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).

²¹ See *World-Wide Volkswagen*, 444 U.S. at 295 (stating that "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause). "If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there" *Id.* at 296. "[T]he foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

²² See *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 112 (1987) (plurality opinion) (stating that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State"). Additionally, the defendant's awareness that his product may or will be swept into the forum state in the stream of commerce does not convert the act into one that is "purposefully directed toward the forum State." *Id.* But see *Asahi*, 480 U.S. at 116-17 (Brennan, J., concurring) (arguing that jurisdiction based upon "mere placement of a product into the stream of commerce is consistent with the Due Process Clause" so long as defendant is aware that his product is being marketed in forum state). It appears that the circuit courts have struggled over whether to adopt the approach from *World-Wide Volkswagen* or from *Asahi*. In *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir. 1989), the Fifth Circuit decided to adopt the approach from *World-Wide Volkswagen*. See *Irving*, 864 F.2d at 386. The *Irving* court, after noting that *Asahi* was a plurality opinion, stated that "[b]ecause the Court's splintered view of minimum contacts in *Asahi* provides no clear guidance in this issue, we continue to gauge [defendant's] contacts with [the state] by the stream of commerce standard as described in *World-Wide Volkswagen*." *Id.* The court in *Irving* further held that a Yugoslavian company which sold asbestos to an American broker, which in turn sold it to another company exposing it to plaintiff, was subject to personal jurisdiction in Texas because the Yugoslavian company "reasonably should have anticipated being haled into a Texas court given its contacts with that forum." *Id.* The First Circuit, in *Benitez-Allende v. Alcan Alumínio Do Brasil, S.A.*, 857 F.2d 26 (1st Cir. 1988), adopted the rule of the plurality in *Asahi* by holding that placement of a product into the stream of commerce, with additional conduct by defendant, was sufficient to vest the court with jurisdiction. See *Benitez-Allende*, 857 F.2d at 29-30.

²³ When a suit does not arise out to the defendant's contacts with the forum, "general jurisdiction" must be established. See *Burger King*, 471 U.S. at 473 n.15; *Helicopteros*, 466 U.S. at 414 n.9. To establish "general jurisdiction" over a defendant, the defendant's contacts with the state must be continuous and systematic. See *Helicopteros*, 466 U.S. at 415-16. In contrast, when a suit does arise out of the defendant's contacts with the forum, the court is said to be exercising "specific jurisdiction" over the defendant. *Id.* at 414 n.8.

such as: the "burden on the defendant" in being subjected to the forum state's jurisdiction;²⁴ "the forum state's interest in adjudicating the dispute";²⁵ "the plaintiff's interest in obtaining convenient and effective relief";²⁶ "the interstate judicial system's interest in obtaining the most efficient resolution of controversies";²⁷ and the forum state's interest in furthering its social policies.²⁸ Thus, personal jurisdiction over a defendant is properly acquired when both the state's long-arm statute and the constitutional demands of Due Process are satisfied.²⁹

II. INTERNET AND WEB PAGE CASES

A. *E-mail as "Minimum Contacts"*

Perhaps the most famous case to date in the area of personal jurisdiction and the Internet is the Sixth Circuit's decision in *CompuServe, Inc. v. Patterson*.³⁰ Defendant Patterson, a CompuServe subscriber, entered into a "Shareware Registration Agreement"³¹ with CompuServe, an Internet service provider

²⁴ *Burger King*, 471 U.S. at 476-77 (quoting *World-Wide Volkswagen*, 444 U.S. at 292). This consideration has perhaps taken on less significance as modern transportation has made it easier for a defendant to defend in a foreign jurisdiction. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

²⁵ *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292); see also *McGee*, 355 U.S. at 223 (stating that "[i]t cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims").

²⁶ *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292); see also *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 92 (1978) (stating that interests of plaintiff and forum state are not sole interests to be considered).

²⁷ *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

²⁸ *Id.*; see also *Kulko*, 436 U.S. at 98 (recognizing that California's interest in protecting welfare and environment in which its minor children are to be raised is "unquestionably important").

²⁹ See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996).

³⁰ 89 F.3d 1257 (6th Cir. 1996). For extensive commentary on this case, see Cendali & Arbogast, *supra* note 4, at C7; William J. Cook, *Four Internet Jurisdiction Cases Break Rule of Thumb*, CHICAGO LAW., October 1996, at 76; Joseph J. Ortego, *Contracts, Internet Contacts and Personal Jurisdiction*, N.Y. L.J., Sept. 17, 1996, at 1.

³¹ The CompuServe Shareware Registration Agreement ("SRA") is an online contract, entered into via computer, between new shareware providers, such as Patterson, and CompuServe. See *CompuServe*, 89 F.3d at 1260-61. Patterson was required to "type 'AGREE' at various points in the document, '[i]n recognition of [their] on line agreement to all the above terms and conditions.'" *Id.* The court assumed, for its analysis, that the contract was valid. See *id.* at 1263-64.

headquartered in Ohio,³² to distribute his software.³³ This agreement incorporated Patterson's preexisting "CompuServe Service Agreement" which expressly provided that the contract was entered into and governed by the laws of Ohio.³⁴ After three years, Patterson discovered that CompuServe was marketing a program similar to his own and notified CompuServe, via e-mail,³⁵ that they were infringing upon his common law trademarks and were guilty of deceptive acts and practices.³⁶ CompuServe filed for declaratory judgment in the United States District Court for the Southern District of Ohio.³⁷ Patterson responded by filing a motion to dismiss for lack of personal jurisdiction.³⁸ Attached to this motion was a supporting affidavit which stated that he had never been to Ohio.³⁹ The District Court granted Patterson's motion to dismiss and CompuServe appealed.⁴⁰

The issue before the Sixth Circuit was whether CompuServe

"Shareware" is "software distributed at no charge and paid for voluntarily at the time of registration or upon receiving documentation file or more functionality." *Shareware, Freeware, and More*, IDAHO STATESMAN, May 23, 1996. A shareware creator may submit original software to a service provider such as CompuServe, who will then make it available to all of its subscribers. See *CompuServe*, 89 F.3d at 1260-61. Subscribers wishing to purchase the software receive it through the telephone wire and are expected to submit payment to the service provider. *Id.* The service provider sends payment to the "shareware creator" after taking a fee. *Id.*

³² *CompuServe*, 89 F.3d at 1260. A service provider allows subscribers to access its server as the Internet. See *ACLU v. Reno*, 929 F. Supp. 824, 833 (E.D. Pa. 1996). CompuServe is considered one of the major service providers in the United States along with America Online, Microsoft Network, and Prodigy, combining to serve an estimated 12 million subscribers. *Id.*

³³ *CompuServe*, 89 F.3d at 1261. Patterson's software was a program to help other users "navigate" their way around the World Wide Web. *Id.*

³⁴ *Id.* at 1263-64.

³⁵ E-mail stands for electronic mail and is "comparable in principle to sending a first class letter ... [it] is not routed through a central control point, [but rather it] can take many and varying paths to the recipients." *ACLU*, 929 F. Supp. at 834; see also *CompuServe*, 89 F.3d at 1261 n.5 (explaining e-mail).

³⁶ *CompuServe*, 89 F.3d at 1261. During the three year period, Patterson electronically transferred 32 "master software files" to CompuServe in Ohio. *Id.* After Patterson's notice, CompuServe subsequently changed the name of its program. *Id.*

³⁷ *Id.* CompuServe relied on diversity subject matter jurisdiction. *Id.*

³⁸ *Id.*; see also FED. R. CIV. P. 12(b)(2). Motions to dismiss for lack of personal jurisdiction are made under Rule 12(b)(2) of the Federal Rules of Civil Procedure which provides: "Every defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading ... except that the following defenses may ... be made by motion: ... (2) lack of jurisdiction over the person" *Id.*

³⁹ *CompuServe*, 89 F.3d at 1261.

⁴⁰ *Id.*

made a *prima facie* showing⁴¹ that Patterson's electronic contacts with Ohio were sufficient, under the Due Process Clause, to establish minimum contacts.⁴² The court noted that CompuServe was seeking to establish specific personal jurisdiction since the basis for the action arose out of Patterson's "contact" with Ohio.⁴³ The court applied a three part test to determine whether the exercise of personal jurisdiction would satisfy due process according to *International Shoe* and its progeny.⁴⁴ The court first examined whether the defendant purposefully availed himself of the privilege of acting in the forum state or causing a consequence in the forum state;⁴⁵ second, whether the cause of action arose from those acts or consequences;⁴⁶ and third, whether the acts or consequences "[had] a substantial enough connection with the forum to make the exercise of jurisdiction ... reasonable."⁴⁷

Under the "purposeful availment" inquiry, the court reasoned that since Ohio law governed this case, because Patterson had entered into a written contract with CompuServe with an express choice of law clause,⁴⁸ and since Patterson continued a three year relationship with CompuServe, during which time he repeatedly sent them software,⁴⁹ Patterson had "purposely

⁴¹ Only a *prima facie* showing by the plaintiff is required before the court holds an evidentiary hearing. *Id.* at 1262. As a result the district court ruling on a motion to dismiss must "consider the pleadings and affidavits in a light most favorable to the plaintiff" *Id.* at 1262. At an evidentiary hearing the plaintiff must establish jurisdiction by a preponderance of evidence. *Ball v. Metallurgie Hoboken-Overpelt*, S.A., 902 F.2d 194, 197 (2d Cir. 1990).

⁴² *CompuServe*, 89 F.3d at 1263. The *CompuServe* court noted that under the Ohio long-arm statute, Ohio courts may exercise personal jurisdiction over a non-resident who transacts business in Ohio to the extent allowed by due process. *Id.* at 1262.

⁴³ *Id.* at 1263.

⁴⁴ *Id.*

⁴⁵ *Id.* The court stated that "purposeful availment" is satisfied when contacts are created by the defendant's own actions, creating a "substantial connection" with the forum, and when the contacts are such that he "should reasonably anticipate being haled into court there." *Id.* at 1263 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75).

⁴⁶ *CompuServe*, 89 F.3d at 1263.

⁴⁷ *Id.*

⁴⁸ The court uses the term "written contract," assuming that it was binding without actual signatures. See *CompuServe*, 89 F.3d at 1264; See also *supra* notes 31-36 and accompanying text (detailing agreement between Patterson and CompuServe). For a discussion on validity of "point and click" and similar contracts, see Cendali & Arbogast, *supra* note 4, at C11.

⁴⁹ *CompuServe*, 89 F.3d at 1265. The court stated that "Patterson deliberately set in motion an ongoing marketing relationship with CompuServe, and he should

availed himself of the privilege of doing business in Ohio."⁵⁰ The court also determined that the cause of action arose out of the defendant's activities in Ohio since any common law trademark claim Patterson might have had was created in Ohio.⁵¹ Additionally, Patterson's e-mail demands to CompuServe in Ohio helped give rise to the suit.⁵² On the basis of these factors and after consideration of the burdens placed on Patterson,⁵³ the interests of Ohio,⁵⁴ and the interests of CompuServe,⁵⁵ the court concluded that assertion of personal jurisdiction was reasonable.⁵⁶

B. *Personal Jurisdiction Cases Involving Web Pages as "Minimum Contacts"*

1. *Inset Systems, Inc. v. Instruction Set, Inc.*

*Inset Systems, Inc. v. Instruction Set, Inc.*⁵⁷ involved a trademark infringement suit brought in the United States District Court for the District of Connecticut.⁵⁸ Unlike *CompuServe*, the defendant's contacts with the forum state consisted solely of its Web page; e-mail was not involved.⁵⁹ The plaintiff, Inset Systems, was a Connecticut corporation and the defendant, Instruction Set, was a Massachusetts corporation.⁶⁰ Each corporation

have reasonably foreseen that doing so would have consequences in Ohio." *Id.*

⁵⁰ *Id.* at 1266.

⁵¹ *Id.* at 1267 (observing that because Patterson sold and marketed his software exclusively on CompuServe's system, his common law trademark was created in Ohio).

⁵² *Id.* ("Thus, Patterson's threats—which were contacts with Ohio—gave rise to the case before us").

⁵³ *CompuServe*, 89 F.3d at 1268 (emphasizing that although it may be burdensome, Patterson knew upon entering agreement that he was "making a connection with Ohio," which he hoped would be lucrative).

⁵⁴ *Id.* (deeming Ohio's interests substantial because action would involve Ohio company and Ohio law). The forum state's interest is a factor that must be taken into account. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

⁵⁵ *CompuServe*, 89 F.3d at 1267 (finding CompuServe's interests were substantial because at least \$10 million was at stake). This consideration is part of the analysis undertaken by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*. See 444 U.S. 286, 292 (1980).

⁵⁶ *CompuServe*, 89 F.3d at 1268-69.

⁵⁷ 937 F. Supp. 161 (D. Conn. 1996).

⁵⁸ *Id.* at 162.

⁵⁹ See *id.* at 162-63 (stating that defendant neither employed employees in state nor conducted business in state on regular basis).

⁶⁰ *Id.* at 162.

had its principal place of business in its respective state of incorporation⁶¹ and the defendant maintained no offices or employees in Connecticut, nor conducted regular business there.⁶² In 1985, the plaintiff registered for and received ownership of the federal trademark "INSET."⁶³ Thereafter, the defendant began using " 'INSET.COM' as its Internet domain address"⁶⁴ and "1-800-US-INSET" as its telephone number.⁶⁵ The plaintiff brought an action alleging infringement of its federal trademark and various violations of state unfair competition law, requesting damages and injunctive relief.⁶⁶ The defendant moved to dismiss for lack of personal jurisdiction.⁶⁷

The district court addressed the jurisdictional issue by inquiring into whether the defendant's conduct satisfied Connecticut's long-arm statute⁶⁸ and the minimum contacts requirement

⁶¹ *Id.* at 162.

⁶² *See Inset*, 937 F. Supp. at 162-63.

⁶³ *Id.* at 163.

⁶⁴ *Id.* Domain addresses are similar to street addresses, in that it is through a domain address that Internet users find one another. A domain address consists of three parts: the first part identifies the part of the Internet desired such as world wide web ("www"); the second part is usually the name of the company or other identifying words; and the third part identifies the type of institution such as government (".gov") or commercial (".com"). *Id.* Problems typically arise when domain names or universal resource locations use words similar to a trademark. *See id.* The Web browser may likely "confuse" the source of the Web page from the owner of the trademark. *See id.*; *see also* Richard K. Herrmann, *Crossing the Virtual Line on the Internet*, 14 DEL. LAW., Spring 1996, at 6, 8, 16 (citation omitted) (stating that "domain name is for all practical purposes an address or an indication of presence on the Internet. It is the 'vanity tags of all vanity tags,' for it indicates a global existence").

⁶⁵ *Inset*, 937 F. Supp. at 163.

⁶⁶ *Id.* at 162. The trademark action was brought under the Federal Trademark Act, 15 U.S.C. §§ 1051-1127. *Id.* The alleged state actions included unfair competition and injury to business reputation. *See id.*

⁶⁷ *See Inset*, 937 F. Supp. at 162 (basing motion on FED. R. CIV. P. 12(b)(2)). Alternatively, the defendant also alleged improper venue under Rule 12(b)(3). *Id.*

⁶⁸ Connecticut's long-arm statute provides that:

Every foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) Out of any contract made in this state or to be performed in this state; or (2) out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state

CONN. GEN. STAT. ANN. § 33-411(c) (West 1996) (This section was repealed on January 1, 1997 pursuant to 1994, P.H. 94-186, § 214).

of the Due Process Clause of the Fourteenth Amendment.⁶⁹ The court, in denying the motion to dismiss,⁷⁰ first analogized the facts of the case to two advertising cases previously decided by the court.⁷¹ The *Inset* court reasoned that the defendant, by the very nature of the Web,⁷² "ha[d] been continuously advertising"⁷³

⁶⁹ *Inset*, 937 F. Supp. at 163.

⁷⁰ *Id.* at 163 (reiterating test set forth in *Lombard Bros. Inc. v. General Asset Mgmt. Co.*, 460 A.2d 481, 483-84 (Conn. 1983)). The test set forth in *Lombard* requires an inquiry into the authorization jurisdiction under the long-arm statute and then to sufficiency under due process. *See Lombard*, 460 A.2d at 484; *see also* *Bensmiller v. E.I. DuPont de Nemours & Co.*, 47 F.3d 79, 81 (2d Cir. 1995) (noting, under Connecticut law, that determination of whether court has personal jurisdiction over foreign corporation requires both long-arm and due process analysis); *Hill v. W.R. Grace & Co.*, 598 A.2d 1107, 1109-11 (Conn. 1991) (denying motion to dismiss because long-arm statute reached defendant and there was no violation of due process).

⁷¹ *See Inset*, 937 F. Supp. at 163-64 (discussing *McFaddin v. National Executive Search, Inc.*, 354 F. Supp. 1166 (D. Conn. 1973); *Whelen Eng'g Co. v. Tomar Elecs., Inc.*, 672 F. Supp. 659 (D. Conn. 1987)). The court in *Inset* indicated that *McFaddin* stood for the proposition that Connecticut's long-arm statute was satisfied when defendant placed advertisements for its franchises in newspapers appearing in Connecticut over a six month period. *Inset*, 937 F. Supp. at 164. The court in *Inset* failed to point out, however, that the defendant in *McFaddin* "maintained general business connections with Connecticut" by having a franchisee located within Connecticut and having had negotiated part of the contract being sued upon in Connecticut. *See McFaddin*, 354 F. Supp. at 1170. The *McFaddin* court then concluded that all of the defendant's activities in Connecticut were "relevant in assessing minimum contacts." *Id.* (citing *Michael Schiavone & Sons v. Galland-Henning Mfg. Co.*, 263 F. Supp. 261, 263 (D. Conn. 1967)).

Similarly, *Whelen* involved a defendant who consistently advertised within Connecticut, but in addition, sold its products in Connecticut. *See Whelen*, 672 F. Supp. at 661. Due to the independent basis for the extension of minimum contacts in *Whelen* and *McFaddin*, the *Inset* court's reliance on these cases seems misplaced. *Cf. Powell v. Sealectro, Inc.*, 205 F. Supp. 6, 8 (D. Conn. 1962) (stating that mere solicitation of business is not sufficient to satisfy due process). *But see Traveler's Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950) (holding that long-arm jurisdictional basis relying on mail solicitation for insurance certification satisfied minimum contacts requirement).

⁷² The *Inset* court reasoned that because advertisements on the World Wide Web could be accessed repeatedly by the 10,000 users in Connecticut and were in electronic form, they could be accessed by a greater number of potential customers than traditional print advertising. *Inset*, 937 F. Supp. at 164; *see also Edias Software Int'l, L.L.C. v. Basis Int'l Ltd.*, 947 F. Supp. 413, 419-20 (D. Ariz. 1996) (using accessibility of web page as part of minimum contacts analysis).

⁷³ *Inset*, 937 F. Supp. at 164; *see Hagar v. Zaidman*, 797 F. Supp. 132, 136 (D. Conn. 1992) (stating that "[a] foreign corporation is subject to suit under [Connecticut's long-arm statute] for causes of action that arise from business solicited in Connecticut if the solicitation has been repeated"); *cf. Lombard*, 460 A.2d at 487 (holding that placement of advertisement by defendant in two out of state newspapers, which would likely enter forum state, did not constitute repeated solicitation).

in Connecticut and therefore had solicited in a “sufficient[ly] repetitive nature to satisfy ... Connecticut[’s] long-arm statute.”⁷⁴

The court then addressed the issue of minimum contacts by first inquiring into whether the defendant “reasonably anticipat[ed] being haled into court” in Connecticut⁷⁵ and, second by determining whether “maintenance of the suit in the forum state ... offend[ed] traditional notions of fair play and substantial justice.”⁷⁶ The court held that due process was satisfied because the defendant reasonably could have anticipated being haled into court in Connecticut since it had “purposefully availed itself of the privilege of doing business within Connecticut” through its Web page.⁷⁷ Further, the court reasoned that maintenance of the suit did not offend traditional “notions of fair play and substan-

⁷⁴ *Inset*, 937 F. Supp. at 164.

⁷⁵ *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)); see *Thomason v. Chemical Bank*, 661 A.2d 595, 603 (Conn. 1995) (stating that “[a] plaintiff need only demonstrate that the defendant could reasonably have anticipated being haled into court here by some person who had been solicited in Connecticut and that the plaintiff’s cause of action is not materially different from an action that might have resulted directly from that solicitation”) (emphasis omitted); *Frazer v. McGowan*, 502 A.2d 905, 908 (Conn. 1986) (stating that section 33-411(c) is “consistent with the constitutional demands of due process, it is the totality of the defendant’s conduct and connection with this state that must be considered, on a case by case basis, to determine whether the defendant could reasonably have anticipated being haled into court here”) (citation omitted); see also *In re Connecticut Asbestos Litig.*, 677 F. Supp. 70, 76 (D. Conn. 1986) (noting that defendant’s reasonable expectation of being haled into state court if its products caused injury was sufficient to satisfy minimum contacts).

⁷⁶ *Inset*, 937 F. Supp. at 164 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

⁷⁷ *Inset*, 937 F. Supp. at 165. In reaching this conclusion the court compared the facts in *Inset* to *Whelen Engineering Co. v. Tomar Electronics, Inc.*, 672 F. Supp. 659 (D. Conn. 1987). *Inset*, 937 F. Supp. at 164. The court in *Whelen* found that the defendant had purposefully availed itself of the privilege of doing business in the forum state where it had advertised and had “provided products on order.” *Whelen*, 672 F. Supp. at 664. The court in *Inset* reached the same conclusion upon finding that the defendant, like the defendant in *Whelen*, had made its advertisements available continuously to any interested person. *Inset*, 937 F. Supp. at 165. The court in *Inset* did not address the fact that its defendant, unlike the defendant in *Whelen*, had not sold any products in Connecticut. Compare *Bross Util. Serv. Corp. v. Aboubshait*, 489 F. Supp. 1366, 1371-72 (D. Conn. 1980) (stating that “[t]he transmission of communications between an out-of-state defendant and a plaintiff within the jurisdiction does not, by itself, constitute the transaction of business in the forum state”), *aff’d*, 646 F.2d 559 (2d Cir. 1980), with *Hagar*, 797 F. Supp. at 136 (stating that “[w]hile there is no precise test for invoking [Connecticut’s long-arm statute], when a foreign corporation places advertisements in a newspaper whose circulation includes Connecticut, that is sufficient to invoke [the long-arm statute]”).

tial justice,⁷⁸ because the defendant resided near Connecticut and the state had an interest in adjudicating the dispute.⁷⁹

2. *Maritz, Inc. v. Cybergold, Inc.*

A similar conclusion was reached by the United States District Court for the Eastern District of Missouri in *Maritz, Inc. v. Cybergold, Inc.*⁸⁰ *Maritz* involved a trademark infringement suit brought by Maritz, a Missouri corporation, against Cybergold, a California corporation.⁸¹ Cybergold moved to dismiss for lack of personal jurisdiction,⁸² claiming its only contact with Missouri was its Web page, which provided information regarding Cybergold's mailing list service.⁸³ Maritz countered that the Web page acted as a "state-wide advertisement" soliciting Missouri residents to put their names on the mailing list.⁸⁴ The district court conducted a two part inquiry analyzing both Missouri's long-arm statute⁸⁵ and the satisfaction of due process.⁸⁶ After concluding

⁷⁸ See *Inset*, 937 F. Supp. at 165; see also *International Shoe*, 326 U.S. at 316.

⁷⁹ *Inset*, 937 F. Supp. at 165. The plaintiff asserted that the defendant was less than two hours away and had retained counsel within Connecticut. *Id.* The state had an interest in adjudicating the dispute because the action concerned issues of Connecticut law. *Id.* The court mentioned all five considerations to be analyzed under *Burger King Corp. v. Rudzewicz*, but addressed only two of them. *Id.*; see *supra* note 24-29 and accompanying text (detailing five *Burger King* factors).

⁸⁰ 947 F. Supp. 1328 (E.D. Mo. 1996).

⁸¹ *Id.* at 1329. The action was based on a violation of the Lanham Act, 15 U.S.C. § 1125(a)(1) which provides in part that:

[a]ny person who, on or in connection with any goods or services ... uses in commerce any word, term, name, symbol, or device ... which (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person ... shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1) (1996). The Lanham Act provides federal causes of action for intellectual property infringement. See *Barnes Group Inc. v. Connell Ltd. Partnership*, 793 F. Supp. 1277, 1303 (D. Del. 1992). This includes infringement by Internet use. See *Edias Software Int'l v. Basis Int'l*, 947 F. Supp. 413, 420-21 (D. Ariz. 1996).

Plaintiff sought an expedited hearing for a preliminary injunction to enjoin the defendant from using "Cybergold" in connection with its planned Internet Service. *Maritz*, 947 F. Supp. at 1329.

⁸² See *Maritz*, 947 F. Supp. at 1328; see also FED. R. CIV. P. 12(b)(2) (listing lack of personal jurisdiction among defenses).

⁸³ *Maritz*, 947 F. Supp. at 1330. This mailing list would presumably include many Internet users who were residents of Missouri. *Id.*

⁸⁴ *Id.*

⁸⁵ Missouri's long-arm statute provides, in pertinent part, that:

Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enu-

that the defendants' activities satisfied the "commission of a tortious act" provision of the Missouri long-arm statute,⁸⁷ the court then applied a five part due process test to determine whether Cybergold had minimum contacts with the forum state.⁸⁸

Under its due process analysis, the court considered: "(1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; [and] (5) the convenience of the parties."⁸⁹ The court reasoned that because Cybergold "consciously decided to transmit advertising information to all Internet users,"⁹⁰ and

merated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state ...

(3) The commission of a tortious act within this state

MO. ANN. STAT. § 506.500 (West 1949 & Supp. 1997).

⁸⁸ See *Maritz*, 947 F. Supp. at 1329. The two step inquiry is required when deciding a motion to dismiss for lack of personal jurisdiction. See, e.g., *CPC-Rexcell, Inc. v. La Corona Foods, Inc.*, 912 F.2d 241, 243 (8th Cir. 1990); *Nollman v. Armstrong World Indus., Inc.*, 603 F. Supp. 1168, 1170 (E.D. Mo. 1985); *In re Estate of Halverton*, 840 S.W.2d 280, 282 (Mo. Ct. App. 1992); *M & D Enters., Inc. v. H.C. Fournie*, 600 S.W.2d 64, 68 (Mo. Ct. App. 1980).

⁸⁷ *Maritz*, 947 F. Supp. at 1331. Consequently, the court found it unnecessary to determine whether the defendant's contacts satisfied the "transaction of any business" provision of the long-arm statute. *Id.* The court also stated that "a violation of the Lanham Act [is] tortious in nature," and compared *Maritz* to two tort cases, *Pebabody Holding Co. v. Costain Group PLC*, 808 F. Supp. 1425, 1433-34 (E.D. Mo. 1992) and *May Dept Stores Co. v. Wilansky*, 900 F. Supp. 1154, 1159-60 (E.D. Mo. 1995), that permitted jurisdiction. *Maritz*, 947 F. Supp. at 1331-32. The court concluded that jurisdiction was proper "because the allegedly infringing activities have produced an effect in Missouri ... [causing] *Maritz* economic injury." *Id.* at 1331; see also *Dotzler v. Perot*, 899 F. Supp. 416, 419 (E.D. Mo. 1995) (noting that statute allows courts to exercise personal jurisdiction over nonresident tortfeasor who commits extraterritorial tortious acts which have consequences within state); *Schwartz & Assoc. v. Elite Line, Inc.*, 751 F. Supp. 1366, 1369 (E.D. Mo. 1990) (same); cf. *State ex rel William Ranni Assoc., Inc. v. Hartenbach*, 742 S.W.2d 134, 138 (Mo. 1987) (noting that "[b]ecause someone in Missouri conceivably could suffer a financial loss as a result of ... out-of state activities does not make Ranni amenable to the courts of this state").

⁸⁸ *Maritz*, 947 F. Supp. at 1332. This test was articulated in *Land-O-Nod Co. v. Bassett Furniture Indus., Inc.*, 708 F.2d 1338, 1340 (8th Cir. 1983). Accord *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977).

⁸⁹ *Maritz*, 947 F. Supp. at 1332.

⁹⁰ *Id.* at 1333. The court rejected Cybergold's contention that its activities were passive by analogizing the defendant's activities to a situation in which an interested party mailed the defendant a request for information. *Id.* In that situation, Cybergold would have to actively mail back the information. *Id.* It is submitted that

its contacts were "of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence,"⁹¹ the exercise of personal jurisdiction over the defendant was warranted.⁹² Specifically, the "quantity of the contacts" factor was deemed satisfied because Cybergold's Web page had been accessed by Missouri residents 131 times.⁹³ Furthermore, since the alleged injuries arose out of Cybergold's Web page, the cause of action was deemed related to the contacts.⁹⁴ After comparing this case to *Inset*, the court further concluded that Cybergold had "purposefully availed itself of the privilege of doing business" within Missouri, and that "traditional notions of 'fair play and substantial justice' " were satisfied.⁹⁵

3. A Different Result in *Bensusan Restaurant Corp. v. King*

A similar scenario was presented to the United States District Court for the Southern District of New York, in *Bensusan Restaurant Corp. v. King*.⁹⁶ In *Bensusan*, the court granted the defendant's motion to dismiss for lack of personal jurisdiction⁹⁷ solely on the basis of its interpretation of New York's long-arm

the court overlooked the subtle distinction that unless an Internet user accesses Cybergold's Web page, an act over which Cybergold has no control, no information will ever be transferred. It takes an affirmative act by another party, the Internet user, to cause the information to be transferred to Missouri. This conflicts with *Burger King* where the Court held that a defendant should not be haled into a jurisdiction based upon the "unilateral activity of another party or third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)); see also *Breiner Equip. Co. v. Dynaquip, Inc.*, 539 F. Supp. 204, 206 (E.D. Mo. 1982) (stating that "[n]either use of the mails, telephone calls, nor unilateral activities on the part of the plaintiff ... is enough to subject a defendant to service of process in Missouri").

⁹¹ *Maritz*, 947 F. Supp. at 1333.

⁹² *Id.*

⁹³ *Id.* The court disregarded the 180 times that the plaintiff accessed Cybergold's website because "[if] such contacts were to be considered, a plaintiff could always try to create personal jurisdiction." *Id.* at 1333 n.4.

⁹⁴ *Id.*

⁹⁵ *Maritz*, 947 F. Supp. at 1334, see notes 57-79 and accompanying text (discussing *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996)). After stating the considerations set forth in *Burger King*, 471 U.S. at 477, the court concluded that Missouri had an interest in resolving the dispute because it involved an alleged infringement of a Missouri corporation's trademark, the plaintiff had a strong interest in adjudicating in Missouri, and the defendant had not shown a significant burden. *Maritz*, 947 F. Supp. at 1334.

⁹⁶ 937 F. Supp. 295 (S.D.N.Y. 1996).

⁹⁷ See *id.* at 298 (noting that defendant moved for dismissal under FED. R. CIV. P. 12(b)(2)).

statute.⁹⁸ Bensusan, a New York corporation and owner of a federally registered trademark, "The Blue Note," brought an action against King, an owner of a Missouri club called "The Blue Note."⁹⁹ King's alleged infringement was the posting of a Web page¹⁰⁰ containing general information, a calendar of events, and ticket information for his Club in Missouri, plus a logo allegedly similar to Bensusan's.¹⁰¹ Bensusan asserted that personal jurisdiction existed under New York's long-arm statute.¹⁰²

New York's long-arm statute confers jurisdiction over a defendant who "commits a tortious act within the state"¹⁰³ or who "commits a tortious act without the state causing injury to person or property within the state."¹⁰⁴ The court began by noting

⁹⁸ *Bensusan*, 937 F. Supp. at 297. New York's long-arm statute, Civil Practice Law and Rules section 302(a) 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 ... 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 ...
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act ...
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

N.Y. C.P.L.R. 302(a) (McKinney 1990). For a discussion of New York's long-arm statute, see DAVID D. SIEGEL, *NEW YORK PRACTICE* §§ 84-94 (2d ed. 1991).

⁹⁹ *Bensusan*, 937 F. Supp. at 297. Bensusan brought the action for trademark infringement, trademark dilution, and unfair competition. *Id.* at 298.

¹⁰⁰ The Web page was located on a computer server in Missouri. *Id.* at 297.

¹⁰¹ *Id.*

¹⁰² *Id.* at 298; see *supra* note 98 (setting forth relevant provisions of N.Y. C.P.L.R. 302(a)).

¹⁰³ N.Y. C.P.L.R. 302(a)(2) (McKinney 1990). This provision has been narrowly construed. See *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443 (1965) (dismissing action in *Feathers v. Lucas* for lack of jurisdiction under 302(a)(2) by holding that although plaintiffs were injured in New York, where storage tank exploded, the situs of tortious act, negligence, was in Kansas, where storage tank was manufactured). This narrow interpretation prompted the enactment of N.Y. C.P.L.R. 302(a)(3). See SIEGEL, *supra* note 98, § 87, at 134.

¹⁰⁴ N.Y. C.P.L.R. 302(a)(3) (McKinney 1990). The plaintiff must also show that the defendant's actions satisfied the requirements under subparagraph (i) or (ii) of C.P.L.R. 302(a)(3). See *supra* note 98.

that trademark infringement occurs "where the deceived customer buys the defendant's product"¹⁰⁵ and that an "offering for sale of even one copy of an infringing product in New York, even if no sale results, is sufficient to vest a court with jurisdiction over the alleged infringer."¹⁰⁶ The court concluded that the tortious act was without the state, however, because a New Yorker purchasing tickets for King's club would have to pick them up in Missouri, thereby placing the situs of the tort in Missouri and not New York.¹⁰⁷

Likewise, in analyzing the long-arm provision for tortious acts occurring outside the state,¹⁰⁸ the court determined that the conditions for jurisdiction were not satisfied.¹⁰⁹ The court found that King did not derive substantial revenue from interstate commerce,¹¹⁰ King could not have foreseen consequences in New York,¹¹¹ and finally, that Bensusan had not suffered loss in New York.¹¹² Accordingly, because the *Bensusan* court found jurisdiction to be improper under New York's long-arm statute, therefore, the court did not have to entertain the question of whether the assertion of personal jurisdiction would have satisfied due process.¹¹³ Nevertheless, the court noted in dictum that

¹⁰⁵ *Bensusan*, 937 F. Supp. at 299 (quoting *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 639 (2d Cir. 1956).

¹⁰⁶ *Id.* (citing *Editorial Musical Latino Americana, S.A. v. Mar Int'l Records, Inc.* 829 F. Supp. 62, 64-65 (S.D.N.Y. 1993); *German Educ. Television Network, Ltd. v. Oregon Pub. Broad. Co.*, 569 F. Supp. 1529, 1532 (S.D.N.Y. 1983); *Hertz Sys., Inc. v. Hervis Corp.*, 549 F. Supp. 796, 797-98 (S.D.N.Y. 1982); *Honda Assocs., Inc. v. Nozawa Trading Inc.*, 374 F. Supp. 886, 889 (S.D.N.Y. 1974)).

¹⁰⁷ *Bensusan*, 937 F. Supp. at 299 (noting that affirmative effort to market product is entirely distinct from supplying accessible information).

¹⁰⁸ See N.Y. C.P.L.R. 302(a)(3) (McKinney 1990).

¹⁰⁹ See *Bensusan*, 937 F. Supp. at 299-300 (analyzing requirements set forth in C.P.L.R. 302(a)(3)(ii)).

¹¹⁰ See *id.* at 300 (concluding that King's participation in interstate commerce by hiring bands of national stature was not equivalent to deriving substantial revenue from interstate commerce).

¹¹¹ *Id.* (citation omitted) (noting King's knowledge of location of Bensusan's club was not sufficient to satisfy requirement that defendant "expects or should reasonably expect the act to have consequences in the state").

¹¹² See *id.* (citations omitted) (stating that indirect financial loss of injured party residing in New York does not satisfy statutory requirement of "significant economic injury").

¹¹³ See *id.* It should be noted that section N.Y. C.P.L.R. 302(a)(3)(ii) must be read in conjunction with the due process requirements set forth in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), and subsequent cases, which significantly curtail the broad language found in N.Y. C.P.L.R. 302(a)(3). Due process requires that a nonresident defendant "purposefully avail" itself of the

“asserting personal jurisdiction over King in this forum would have violated the Due Process Clause of the United States Constitution.”¹¹⁴

III. INTERNET CASES YIELD ALARMING RESULTS

A review of the four cases discussed above highlights the difficult issues encountered by courts in Internet jurisdiction cases.¹¹⁵ It is submitted that the *CompuServe* court had less difficulty finding jurisdiction because the contacts with the forum state were more significant than the mere existence of a Web page.¹¹⁶ Principally, there also existed intentional communication and contact with CompuServe, a chosen entity in a known jurisdiction.¹¹⁷ Thus, the main factual difference between *CompuServe* and the other cases is that Patterson, instead of signing a contract and mailing his software, used e-mail to effectuate a communication.¹¹⁸ In the future, it is likely that courts will treat e-mail in the same manner that they currently treat telephone calls, mail, and faxes when assessing a defendant's minimum

benefits and privileges of the forum state so that it should “reasonably anticipate being haled into court there.” See *World-Wide Volkswagen*, 444 U.S. at 297; *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 112 (1987). In addition, where personal jurisdiction is at issue, the defendant's due process rights should be the court's primary concern. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982). See generally SIEGEL, *supra* note 98, § 88, at 135-40 (discussing cautious posture of Supreme Court in unintentional tort cases).

¹¹⁴ *Bensusan*, 937 F. Supp. at 300. The court stated that:

King has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.

Id. at 301.

¹¹⁵ See *Zembek*, *supra* note 13, at 348 (stating that “courts will struggle with novel cyberspace jurisdictional issues because cyberspace communications turn the notion of territorial sovereignty on its head”); see also *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1331 (E.D. Mo. 1996) (stating that “comparison of the maintenance of a website to the active solicitation through mass mailings is to some extent unsatisfactory”).

¹¹⁶ See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260-61 (6th Cir. 1996) (stating that Patterson entered into a Shareware Registration Agreement with CompuServe and then “electronically transmitted” 32 master software files to CompuServe over a three year period).

¹¹⁷ *Id.* at 1260 (noting that agreement between Patterson and CompuServe expressly stated it was entered into in Ohio).

¹¹⁸ See *id.* at 1261 n.5 (describing “e-mail”).

contacts with a forum state.¹¹⁹ Such treatment is reasonable because using e-mail is, in essence, just another *affirmative* mode of communicating and thereby transacting business.¹²⁰ In this respect, the assertion of jurisdiction based on e-mail presents less problems than the facts encountered in the other three cases and, therefore, is beyond the scope of this Note.¹²¹

In contrast to *CompuServe* are the *Inset* and *Maritz* decisions. In both cases, the courts simply concluded that a commercial Web page, by its very nature, "solicits" business within the state sufficient to satisfy the long-arm statute. These two courts essentially established that a Web page was the equivalent to "advertising" which was directed at the state. Neither court conducted an in-depth inquiry as to whether any of the forum's residents had actually accessed the defendant's Web page¹²² or judged the quality of any such contacts.¹²³ Thus, having concluded that contacts existed, it was easy for the courts to find that due process was satisfied. It is submitted that both the *Inset* and *Maritz* cases present frightening prospects for the fu-

¹¹⁹ See Cendali & Arbogast, *supra* note 4, at C9. Courts have been open to treating e-mail like other forms of communication to such an extent that "e-mail service of process was allowed last spring by a London Court." Wendy R. Leibowitz, *Geography Isn't Destiny, High Tech is Reshaping Legal Basics; Bit By Bit, Computers and the Internet are Changing the Nuts and Bolts of Law*, NAT'L L.J., Sept. 23, 1996, at A1.

¹²⁰ *But see* Cendali & Arbogast, *supra* note 4, at C9 (explaining that it may be more difficult to confer jurisdiction in e-mail cases, rather than regular mail or telephone calls, because e-mail addresses do not indicate location of recipient thus rendering it impossible to prove given defendant "knowingly reaching out to the forum"); *see also* JOHN R. LEVINE, *THE INTERNET FOR DUMMIES*, 28-30 (2d ed. 1995) (explaining that e-mail addresses consist of merely mailbox name and host name of recipient's computer system).

¹²¹ *But see Decision Brings Web Sites More Exposure to Distant Suits*, INTERACTIVE MARKETING NEWS, Oct. 11, 1996, available in WESTLAW, 1996 WL 7820203 (stating that *Patterson* court's "broad reading of jurisdiction ... is troubling in application").

¹²² This is significant because it cannot be said that a defendant is soliciting business through a Web page in a state if that Web page has never been accessed there. Perhaps the *Inset* court did not address this issue because it was satisfied with the fact that there were at least 10,000 *potential* Internet users in Connecticut that could have seen the page. *See Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996). It is submitted that this is unacceptable reasoning because it is tantamount to the conclusion that anyone who prepares a catalogue, intended for mailing, has "solicited" business from a state solely due to the fact that there are 10,000 mailboxes in the state.

¹²³ *See* N.Y. C.P.L.R. 302(a)(3) ("commits a tortious act without the state *causing* injury to person or property within the state") (emphasis added).

ture of conducting business over the World Wide Web. Each court's interpretation of their respective long-arm statutes and minimum contacts analysis tends to indicate that both courts would find personal jurisdiction in most, if not all cases where the sole contact with the forum state was a Web page.¹²⁴ If both cases are followed, findings of personal jurisdiction in future Web page cases appear destined to become the norm.

On a doctrinal level, this is problematic because a primary goal of *International Shoe* is to ensure predictability in the legal system, thereby "allow[ing] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."¹²⁵ By declaring that a Web page, because of its very nature, seeks to conduct business in every forum, courts applying the conclusion-based analysis of *Inset* and *Maritz*, will prevent defendants from structuring their activity predictably.¹²⁶ As exemplified by the *Inset* and *Maritz* decisions on the one hand, and *Bensusan* on the other, jurisdiction may rest solely on how broadly a forum's courts decide to interpret its long-arm statute.

On an analytical level, the failure to understand and apply the unique factual situation presented by Web pages may have led to a misapplication of due process. When the courts in *Inset* and *Maritz* concluded that the defendants had purposefully availed themselves of the privilege of doing business within their respective forum states,¹²⁷ they analytically departed from the traditional due process requirements.¹²⁸ Traditionally, the

¹²⁴ See *Inset*, 937 F. Supp. at 164 (holding that "advertising via the Internet is solicitation of a sufficient competitive nature, to satisfy the Connecticut Long-Arm statute"); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1332-34 (E.D. Mo. 1996) (stating that Cybergold web page established contacts necessary for personal jurisdiction to be exercised).

¹²⁵ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Such predictability is desirable because it provides an opportunity to allow a "purposefully availing" defendant to "alleviate risk of burdensome litigation by procuring insurance" or allocate costs to consumers. See *id.*

¹²⁶ But see *Ortego*, *supra* note 30, at 1 (noting that "[b]usinesses can still structure their operations with at least some minimum assurance as to where they may be liable to suit" after *CompuServe*). It is suggested that this statement can no longer be made following the decisions in *Inset* and *Maritz*.

¹²⁷ See *Inset*, 937 F. Supp. at 164-65; *Maritz*, 947 F. Supp. at 1330-34.

¹²⁸ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (instructing that "purposeful availment" exists when defendant has "engaged in significant activities within a state, or has created 'continuing obligations' between himself and residents of the forum") (citations omitted). The Supreme Court in *Burger King* also

“purposeful availment” requirement for personal jurisdiction calls for “significant activities,”¹²⁹ a “substantial connection,”¹³⁰ or the defendant’s creation of “continuing obligations” with residents of the forum,¹³¹ such that the defendant is “shielded by ‘the benefits and protections’ of the forum’s laws.”¹³² It is this shield that gives rise to reciprocal obligations which might include responding to a suit brought against a defendant in the forum state.¹³³ It is submitted that in both *Inset* and *Maritz* there were no “significant activities,” “substantial connections,” or establishment of “continuing obligations,” but instead only a “passive” Web page.¹³⁴ It is further opined that a closer examination of the factual situations—setting up a Web page and simply posting it to a server—does not reveal the existence of “significant activity” within a forum so as to create the reciprocal obligations required

stated that actions by the defendant must “create a ‘substantial connection’ with the forum State.” *Id.* at 475 (citation omitted). For an overview of relevant jurisprudence, see William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599 (1993).

¹²⁹ See *Burger King*, 471 U.S. at 475-76 (stating that where defendants have deliberately engaged in significant activities within forum, they have purposefully availed themselves of forum state); see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (stating that selling and distributing substantial number of copies of publication within any state is substantial activity subjecting defendant to personal jurisdiction); cf. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (stating that to be subject to personal jurisdiction, each defendant must purposefully avail itself “of the privilege of conducting activities within the forum state”).

¹³⁰ *Burger King*, 471 U.S. at 475 (holding that jurisdiction is proper where defendants’ activities create “substantial connection” with forum state); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (same); cf. *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 97 (1978) (rejecting personal jurisdiction as there was “virtually no connection with the forum state”).

¹³¹ See *Burger King*, 471 U.S. at 475-76; see also *Keeton*, 465 U.S. at 781 (implying that regular sale and distribution of magazines in forum state creates continuing obligations); *McGee*, 355 U.S. at 223 (finding that delivery of insurance contracts and mailing of premiums to forum state created continuing obligation); *Travelers Health Ass’n v. Virginia*, 339 U.S. 643, 648 (1950) (holding that insurance contracts “systematically and widely delivered” into forum state created continuing obligations in forum state).

¹³² See *Burger King*, 471 U.S. at 476; see also *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (stating that “to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state”).

¹³³ See *Burger King*, 471 U.S. at 476; *International Shoe*, 326 U.S. at 319. Both cases suggest that the privileges provided to a defendant who purposefully avails itself the forum state make it fair and reasonable that such defendant “submit to the burdens of litigation in that forum as well.” *Burger King*, 471 U.S. at 476.

¹³⁴ See *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1330 (E.D. Mo. 1996); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996).

to satisfy due process.

It is suggested that the reasoning employed by the *Inset* and *Maritz* courts, allowing them to conclude that the mere posting of a Web page satisfied due process, may be irresistible to states seeking to expand their long-arm jurisdiction. For example, while the defendant in *Maritz* did not conduct activities in Missouri beyond those performed in connection with any other state,¹³⁵ the non-state specific jurisdictional analysis exercised by that court can now be considered and relied upon by all other courts in similar suits. Thus, the reasoning used in *Maritz* could be applied to reach the unacceptable and seemingly unfair result that a corporation, e.g., Cybergold, could be subjected to jurisdiction in all fifty states merely by posting a Web page on the Internet.¹³⁶ This result seems to violate the very essence of the Due Process Clause.¹³⁷ It is asserted, therefore, that the *Inset* and *Maritz* courts erred by failing to conduct the in-depth analysis mandated by the traditional due process tests in order to determine whether there was a violation. Accordingly, it is suggested that the *Inset* and *Maritz* courts, by minimizing minimum contacts, interpreted their long-arm statutes beyond the limits of due process.

IV. MINIMUM CONTACTS SHOULD NOT BE MINIMIZED

The concepts of due process and minimum contacts required for personal jurisdiction should not be eroded simply because business can be conducted more easily and efficiently on a na-

¹³⁵ See *Maritz*, 947 F. Supp. at 1331.

¹³⁶ See Matthew R. Burnstein, Note, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 88 (1996) (stating that "[b]ecause material is accessible universally, jurisdiction might lie almost anywhere").

¹³⁷ See U.S. CONST. amend. V. Courts have long held, as stated in *International Shoe*, that a state court's assertion of personal jurisdiction may not violate the "traditional notions of fair play and substantial justice" in order to comply with due process. *International Shoe Co. v. Washington*, 326 U.S. 310, 316; *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). Contemporary courts also adhere to these standards of due process before subjecting a defendant to personal jurisdiction. See *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 609-10 (1990) (relying on "traditional notions of fair play and substantial justice" standard). The Court in *International Shoe* also stated that satisfaction of due process depends upon "the quality and nature of the activit[ies]" of a defendant in a forum state such that the defendant "enjoys the benefits and protection of the laws of that state." *International Shoe*, 326 U.S. at 319. The defendant's enjoyment of these benefits and protections gives rise to a reciprocal obligation of defending a lawsuit in the forum state. See *id.*

tional level than it could fifteen years ago.¹³⁸ The Due Process Clause was intended to protect the liberty interests of individuals and to guarantee "fair and orderly administration of the laws."¹³⁹ Due process is satisfied in the context of jurisdiction by protecting individuals from "the binding judgments of a forum with which [the individual] has established no *meaningful* 'contacts, ties, or relations.'"¹⁴⁰ Thus, due process requires that defendants be given "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign" in order to guarantee their protection.¹⁴¹ "[T]his 'fair warning' requirement is satisfied if the defendant has '*purposefully directed*' [its] activities at residents of the forum."¹⁴² Accordingly, insistence upon "fair warning" before jurisdiction will vest, establishes a degree of predictability and allows defendants to structure their activity in such a way that they will know in advance, with a reasonable degree of certainty, where they will and will not be subject to suit.¹⁴³ Both *Inset* and *Maritz* not only upset this predictability, but also ignore the other requirements necessary to satisfy due process.

First, from the standpoint of predictability, both decisions have the potential to be very disruptive. It has been generally settled that advertising on a national level does not alone confer sufficient minimum contacts to vest a court with general jurisdiction¹⁴⁴ and the posting of a Web page for commercial purposes

¹³⁸ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980). The Court in *World-Wide Volkswagen* explained that "the eventual demise of all restrictions on the personal jurisdiction of state courts" was not warranted merely because interstate commerce and the need for jurisdiction over nonresidents had increased and modern transportation made litigation in distant places less burdensome and more feasible. *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

¹³⁹ *International Shoe*, 326 U.S. at 319.

¹⁴⁰ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe*, 326 U.S. at 319) (emphasis added); see also *supra* note 136 (noting that any state may have jurisdiction because of universal accessibility to World Wide Web).

¹⁴¹ *Burger King*, 471 U.S. at 472 (alteration in original) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). This warning requirement provides the legal system with a degree of predictability and defendants with discretion in structuring their activities. *Burger King*, 471 U.S. at 472.

¹⁴² *Id.* (emphasis added) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

¹⁴³ *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

¹⁴⁴ See *Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994) (stating that "mere placement of advertisements in nationally

seems to be equivalent to national advertising, given its reach across the country and the world. Both courts disagreed, however, finding that Web pages differ from national advertising.¹⁴⁵ It is asserted that the facts demonstrate the contrary. Unlike mail solicitations, or other forms of direct advertising, which require the individual or corporation to actively direct or aim materials into a particular state, creating and posting a Web page does not involve any directing or aiming.¹⁴⁶ Web pages are merely stored on a server computer and remain there until accessed.¹⁴⁷ The fact that they can be accessed at any time only

distributed papers or journals does not rise to the level of purposeful contact with a forum required by the Constitution"); *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1131 (10th Cir. 1991) (stating that "[b]y itself ... national advertising that reaches the forum state is not always sufficient to establish minimum contacts"). *But see Fidelity & Cas. Co. v. Philadelphia Resins Corp.*, 766 F.2d 440, 447 (10th Cir. 1985) (indicating that if advertisement is related to cause of action, jurisdiction may be properly taken).

¹⁴⁵ *See Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1332-33 (E.D. Mo. 1996) (recognizing similarities between Web sites and national advertising, but noting that speed and reach of Web sites create more differences than similarities); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (stating that while similarities between Web sites and national advertising do exist, diverse capabilities of Web sites create key difference).

Some argue, however, that conventional advertising cases present closely analogous factual situations to advertisements found on the Internet. *See, e.g.*, *Zembek, supra* note 13, at 368-70 (using hypothetical to explain that solicitation to sell computer program posted on "newsgroup" resembles nationwide advertisement distributed in all fifty states, and that any contract for sale entered into is contract created by mere unilateral activity of buyer). In fact, courts have recently held that national advertising campaigns involving the Internet did not involve systematic and continuous contact with the forum sufficient for personal jurisdiction. *See IDS Life Ins. Co. v. Sunamerica, Inc.*, 1997 WL 7286, at * 8 (N.D. Ill. 1997).

¹⁴⁶ *See id.* (stating that having Internet site, even with other forms of advertisement, is insufficient evidence that defendant directed any advertisements directly to forum state). An analogy can be drawn between Web cases and cases that have analyzed placing a product into the "stream of commerce." *See, e.g.*, *Asahi Metal Indust. Co., v. Superior Ct. of Cal.*, 480 U.S. 102, 112 (1987) (plurality opinion) (suggesting that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State"); *Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (holding that authors of libelous article distributed in one state could be subject to suit in plaintiff's forum because they *aimed* their actions intentionally toward forum state and knew that brunt of injury would be felt there); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (rejecting plaintiff's contention that there was jurisdiction by stating that "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause"). It is asserted, therefore, that posting a Web page resembles placing an advertisement into the "stream of media" because the Web page, like the advertisement, may be accessed everywhere, or nowhere.

¹⁴⁷ *See Shea v. Reno*, 930 F. Supp. 916, 927-28 (S.D.N.Y. 1996) (stating that Web

changes their availability, but does not transform them into a targeted activity. For example, a local pizza parlor in New York should hardly be viewed as aiming its activities at California, or any other state, merely by posting a Web page which can be accessed outside of New York. Finding otherwise would not only render the Due Process Clause meaningless in jurisdictional analyses, but in all likelihood would severely curtail the World Wide Web as a viable business tool. Thus, the distinction between Web pages and national advertisements should not be enlarged unnecessarily, by simply concluding that when one posts a Web page, one is directing the Web page all over the country and therefore subjecting themselves to personal jurisdiction in all fifty states. The possibility of being subjected to nationwide jurisdiction by merely posting a Web page would eliminate the predictability¹⁴⁸ that guides an individual in structuring his or her conduct;¹⁴⁹ a protection the Due Process Clause is intended to provide.

The Due Process Clause further requires that there be foreseeability such that a defendant should "reasonably anticipate being haled into court" in a foreign jurisdiction.¹⁵⁰ "[T]here

pages are stored on servers and are accessed when one selects "link" to that page). An individual who posts a Web page thus has no control over who accesses their Web pages nor in what jurisdiction this access takes place. This situation differs from what occurs in a closed system like WESTLAW or LEXIS-NEXIS. In these types of systems, the system's owner has direct control who will have access to their system of information by distributing their software and individualized passwords. WESTLAW can determine where each one of its users resides and from where they access the system. WESTLAW can also block particular databases from certain users if and when they so choose. Those who post material on the World Wide Web and Usenet Newsgroups (bulletin boards), however, do not currently possess the technology to prevent individuals in certain forums from access.

¹⁴⁸ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (discussing fact that fair warning generates predictability, which is beneficial to defendant); *World-Wide Volkswagen*, 444 U.S. at 297 (addressing benefits of predictability). Arguably, however, a degree of predictability would still exist if a Web page did in fact confer jurisdiction because then the defendant could "predict" with certainty that by posting such a page, it would be liable to suit in all fifty states. This argument carries little merit because it virtually robs the word "predictability" of its meaning.

¹⁴⁹ See *Burger King*, 471 U.S. at 472 (stating that benefit of predictability represents ability of defendant to structure its activities). The argument that the defendant can still structure its conduct by simply not using the World Wide Web is unacceptable and unreasonable from a policy stand point. Use of the World Wide Web for business purposes should be encouraged, not chilled, in order for the United States to compete in a global market.

¹⁵⁰ *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). It is the "defendant[s] conduct and connection" with the forum that causes them to reasonably anticipate being haled into court. *Burger King*, 471 U.S. at 474.

[must] be some act by which the defendant purposefully avails itself of the privilege of *conducting activities* within the forum State, thus invoking the *benefits and protections* of its laws¹⁵¹ in order for a defendant to “reasonably anticipate” litigation in a foreign jurisdiction. It is submitted that this requirement cannot be met where the sole contact with the forum state is a Web page. First, the posting of Web pages can hardly be viewed as “conducting activities” within a forum.¹⁵² Although posting a Web page indicates a desire to have Internet users visit the site, there is generally no expectation that a resident of a particular

¹⁵¹ *Id.* at 475 (emphasis added) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The benefit and protection derived by the defendant from conducting activities within the forum state gives rise to the reciprocal obligation of responding to litigation regarding disputes arising out of those activities in that state. *Burger King*, 471 at 476.

¹⁵² See *Hanson*, 357 U.S. at 253. It has been held that the application of the rule that unilateral activity of residents of the forum state with nonresident defendants cannot satisfy the contact requirement varies according to the “quality and nature” of the defendant’s activity. *Id.* However, it is required that a defendant “purposefully avail itself ... of conducting activities within the forum state.” *Id.* In *International Shoe*, the Court held that the criteria used to determine whether activities justify subjection of a defendant to litigation are not “simply mechanical or quantitative.” *International Shoe*, 326 U.S. at 319. The test for such activities is not whether the activity that the defendant has conducted through its agents in other states is “a little more or a little less.” *Id.* Instead, “the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure” must be examined. *Id.*

The Court in *International Shoe* examined whether the activities conducted by the defendant were irregular or casual, but found instead that they were “systematic and continuous” and “resulted in a large volume of interstate business.” *Id.* at 320. The Court held that personal jurisdiction in the forum state was proper. *Id.* In *Hanson*, the Court held that there was no personal jurisdiction since there was no evidence that the defendant performed any acts in the forum state. *Hanson*, 357 U.S. at 251. Similarly, in *World-Wide Volkswagen*, the Court held that because the defendant “close[d] no sales and performe[d] no services ... solicited no business there either through salespersons or through advertising reasonably calculated to reach the State” personal jurisdiction was improper. *World-Wide Volkswagen*, 444 U.S. at 295. The *World-Wide Volkswagen* Court also stated that basing jurisdiction on “one, isolated occurrence” would violate due process. *Id.* The Court in *McGee v. International Life Insurance Co.* held that there were sufficient activities within the forum state to make personal jurisdiction proper because the contract for insurance was delivered in California, premiums were mailed from there and the insured resided in California upon death. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

It is asserted that these criteria for conducting activities are not satisfied by merely posting a Web page on the Internet which can reach many assessors without the poster controlling who is reached. Individuals who post Web pages do not conduct activities within particular states and are not “continually and systematically” conducting business. See *International Shoe*, 326 U.S. at 320.

state will actually do so. Only when a meaningful exchange occurs between the Internet browser and the owner of the Web page can there be activity. Second, one does not derive "significant benefits and protections" from the other forum simply by virtue of the posting. This can only occur when there is some meaningful exchange between the business and a consumer. The sole act of consumers visiting the sight would be equally insufficient if no business activity occurred. Thus, in the absence of any benefits or protections, no reciprocal obligation to respond to a suit should arise.¹⁵³

Finally, the vesting of personal jurisdiction requires "purposeful availment."¹⁵⁴ This condition cannot be satisfied by the "unilateral activity of another party or a third person,"¹⁵⁵ but

¹⁵³ See *id.* at 319, 320. These "benefits and protections" are derived from "systematic and continuous" activities conducted by a defendant and include the right to go to that state's courts seeking enforcement of rights. *Id.* at 320. As a result of performing activities within a state such defendants then may avail themselves of the benefits and privileges of the forum state. *World-Wide Volkswagen*, 444 U.S. at 295. In *Kulko v. Superior Court of California*, the Court held that the defendant did not avail itself of the benefits and privileges of the forum's laws because the defendant did not benefit directly or seek these benefits for himself. *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 92 (1978). The *Burger King* Court stated that reciprocal obligations should arise only if the defendant receives benefits and protections from the forum state. *Burger King*, 471 U.S. at 474-76.

The activities performed by those defendants who do avail themselves of the "privileg[es] of conducting business" in the forum state "are shielded by the benefits and protections of the forum's laws." *Id.* at 476. Since these defendants are receiving something from the state it is not unreasonable for them to be required to respond to a suit against them as a result of their activities in that forum. *Id.*; see *Hanson*, 357 U.S. at 253. These benefits and protections require reciprocal obligations on the part of the availing defendant. *International Shoe*, 326 U.S. at 319. If these reciprocal obligations are connected with the activities the defendant conducts within the state, responding to a suit brought to enforce these activities is not undue. *Id.* On the other hand, it would be unfair to allow a defendant who benefits from a forum state's privileges and protections to avoid responding to litigation regarding "obligations that have been voluntarily assumed." *Burger King*, 471 U.S. at 474. However, these cases should be read to state that if such benefits and protections are not enjoyed by the defendant then they should have no reciprocal obligations to the state such as responding to a suit.

¹⁵⁴ See *id.* at 475 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) (stating that " 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts"); see also *supra*, notes 20, 141-143 and accompanying text (discussing fair warning component of Due Process Clause).

¹⁵⁵ *Burger King*, 471 U.S. at 475 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)); *Hanson*, 357 U.S. at 253 (stating that there must be some act by which defendant avails itself of benefits of conducting activity in forum state, not unilateral activity by third person).

instead requires that the defendant create a "substantial connection" or "continuing obligation," or engage in "significant activities" such that the defendant enjoys the benefits and privileges of conducting activities in that forum.¹⁵⁶ It is difficult to conclude that simply posting a passive Web page creates a "substantial connection" or "continuing obligation" within a particular forum or constitutes "significant activity."¹⁵⁷

¹⁵⁶ See *Burger King*, 471 U.S. at 475-76 (citations omitted).

¹⁵⁷ See *id.* at 475-76 (stating that "substantial connection" and/or creation of "continuing obligations" create personal jurisdiction). "Substantial connection" has been held to exist when an insurance contract was delivered in the forum, its premiums were paid from the forum and the insured resided in the forum when he died. *McGee*, 355 U.S. at 223. Similarly, in *Burger King*, the Court held that there existed substantial connections because the "franchise dispute grew directly out of 'a contract which had a substantial connection with that State.'" *Burger King*, 471 U.S. at 479 (emphasis added) (quoting *McGee*, 355 U.S. at 223). The Court stated that a contract is "an ordinary but intermediate step serving to tie up prior negotiations with future consequences which themselves are the real object of the business transaction," *Burger King*, 471 U.S. at 479 (quoting *Hoopston Canning Co. v. Cullen*, 318 U.S. 313, 317 (1943)), and therefore created a substantial connection with the forum. However, there did not exist a substantial connection between the defendant and the forum state in the *Kulko* case, where the Court held that although a separation agreement stated that the wife resided in the forum and support payments should be sent there, it also stated that the wife could move at her will to another state. *Kulko*, 436 U.S. at 93-94. The Court further stated that finding personal jurisdiction in such a situation "could arbitrarily subject one parent to suit in any State of the Union where the other parent chose to spend time." *Id.* at 93. This is similar to the Web site posters who could arbitrarily be subjected to personal jurisdiction in any state where an accessor may reside. It is asserted, therefore, that such connections between Web posters and forums are not *substantial* and should not subject such posters to jurisdiction in these forums.

"Continuing obligations" are deliberately created by the defendant and exist between such defendants and the residents of the forum state. *Burger King*, 471 U.S. at 476; *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950). In *Travelers Health Association*, the Court held that continuing obligations existed between the defendant and its many certificate holders because the insurance certificates were "systematically and widely delivered in Virginia." *Travelers Health Ass'n*, 339 U.S. at 648. The Court found that the transactions between the defendant and residents were not "mere isolated or short-lived transactions" but continuously and widely distributed. *Id.* Since these obligations were voluntarily created by the defendant who could have used the Virginia courts to enforce the obligations of the residents, it follows that the defendant should fulfill its obligations to Virginia by responding to suits against it. See *id.* In *Keeton*, the Court held that regular sales and distribution of a magazine constituted continuing obligations and proper personal jurisdiction. *Keeton*, 465 U.S. at 781.

It is asserted that such continuing obligations do not exist for Web posters as they simply place a Web site on the Internet. If users wish to access such sites they must take affirmative steps to do so. Web sites are not systematically delivered to residents of a state nor are particular states targeted; access is only possible if a user desires it.

It is unfortunate that some courts are reaching conclusions concerning personal jurisdiction and Web pages that are unfaithful to the requirements of due process. A continued trip down this path of broad application will serve only to dilute the protections of due process by making the traditionally required minimum contacts even more minimal.

CONCLUSION

There is surely one thing about which all must agree: it is unacceptable for the same factual situation to yield conflicting and potentially devastating results on an issue affecting all commercial entities and individuals operating on the World Wide Web. Assuming that all Web pages are the same,¹⁵⁸ the issue of personal jurisdiction based upon the posting of a Web page is truly unique. Unlike past activities which necessitated fact dependent inquiries,¹⁵⁹ the answer to all Web page jurisdiction questions should be the same, either a simple "yes" or "no". As suggested above, the answers in such cases require consistency within the constraints of due process. It is submitted that something more should be required before there is a finding of personal jurisdiction when the sole "minimum contact" with a forum state is a Web page. New rules are not necessary provided that the courts fully appreciate how Web pages operate, and respect what is actually required by *International Shoe* and its progeny. Absent such action, the growth of beneficial and innovative commercial enterprises over the Internet may be impeded.

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¹⁵⁸ Web pages created for commercial entities are all the same in the sense that they all contain at least some element of advertising. See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996) (discussing fact that commercial Web pages are used for advertising purposes). However, these pages may differ in the amounts of actual business solicitation they perform. See *id.* (discussing fact that business over the Internet varied widely) For example, some Web pages display products, while others can also list toll free phone numbers for purchase of merchandise or even allow orders to be placed directly through the Web page. See *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1330 (E.D. Mo. 1996) (discussing different uses of Web sites).

¹⁵⁹ See *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 92 (1978) (stating that facts of each case must be examined to determine whether requisite circumstances exist).