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Daniel V. Logue

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1997]

Notes

IF THE *INTERNATIONAL SHOE* FITS, WEAR IT:
APPLYING TRADITIONAL PERSONAL JURISDICTION
ANALYSIS TO CYBERSPACE IN *COMPUSERVE*,
INC. V. PATTERSON

I. INTRODUCTION

Within the last few years, cyberspace¹ has experienced unparalleled growth.² As a result, the Internet³ has become a global force, replacing

1. See EDWARD A. CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD* 1 (1993) (defining "cyberspace"). The term "cyberspace" was originally coined in the early 1980s by science-fiction writer William Gibson in his award-winning science fiction novel, *Neuromancer*. See *id.* (discussing origin and use of term "cyberspace"). Gibson used the term to describe a "consensual hallucination" that appeared like physical space, but was actually a computer-generated construct created through computer data systems and networks. See *id.* Today, the word "cyberspace" refers to the collection of on-line virtual communities as a whole. See William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 198 n.5 (1995) ("As commonly used today, cyberspace is the conceptual 'location' of the electronic interactivity available using one's computer.").

2. See *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (discussing Internet development and expansion), *aff'd*, 117 S. Ct. 2329 (1997). By 1981, only "300 computers were linked to the Internet." See *id.* In 1989, the number of connected computers increased to around 90,000. See *id.* (discussing growth of Internet). Then, in 1993, over 1 million computers were connected to the Internet. See *id.* Currently, it is estimated that over 9.4 million computers are linked to the Internet. See *id.* It has been projected that by 1999, the number of Internet users will have grown to 200 million. See *id.*; see also George P. Long, III, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, 1180 (1994) (noting unprecedented expansion of Internet).

3. See *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 925-26 (describing development of Internet), *aff'd*, 117 S. Ct. 2501 (1997). The "Internet" is the term formally used to describe the collection of more than 50,000 networks that link together almost ninety countries. See *id.* at 925 (discussing nature and development of Internet). Originally developed by the Department of Defense's Advanced Research Projects Administration ("ARPA"), the Internet was an experimental project designed to provide researchers with direct access to supercomputers located at certain laboratories and to facilitate communication between them. See *id.* Universities, research facilities and commercial entities that were interested in this unique method of electronic information transfer began to develop their own networks and link them to the ARPA Network, which became known as the "ARPAnet." See *id.* at 925-26. Supplanted by the growth of the independent networks, ARPAnet ceased operations in 1990. See *id.* at 926. Therefore, what is commonly now referred to as the Internet is a series of linked networks that "merely use the same data transfer protocols." *Id.*

Through the Internet, an individual can access the World Wide Web, which has become "the best known method for locating and accessing information" by computer. *Id.* at 929. The World Wide Web refers to documents available on serv-

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physical interaction with virtual communities.⁴ Given its magnitude and revolutionary nature, the question arises as to whether cyberspace transgresses the bounds of traditional legal doctrine.⁵

One area of the law that cyberspace seems inherently in conflict with is that of personal jurisdiction.⁶ While traditional personal jurisdiction doctrine is rooted in concepts of sovereignty and territoriality, interaction in cyberspace does not involve any contact with the physical world.⁷ Nevertheless, because the Internet cannot exist separately from the physical world and its use has consequences in that world, it appears that cyberspace should fall within the scope of traditional jurisdictional principles.⁸

ers around the world, all of which use Web server software. *See id.* Any individual can use the Internet to access a specific document at its uniform resource locator ("URL"). *See id.*

4. *See Byassee, supra* note 1, at 198 (noting effect of Internet on society). It has been noted that the revolution created by the Internet has hardly begun to affect society. *See id.* (stating that "changes in how average citizens carry on their everyday lives have barely begun"). Thus, "the next ten years will position the computer as a primary tool of societal interaction." *Id.*; *see also* Bill Slocum, *Cyber-Retailers Hitting the Web for Wider Markets*, N.Y. TIMES, Oct. 6, 1996, at 1 (featuring store proprietor who closed store front and conducts business over Internet).

5. *See generally* Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 341 (1996) (noting discussion of applicability of present law to cyberspace).

6. *See* 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 1.01(2) (2d ed. 1991) (discussing necessity of personal jurisdiction in our legal system). Personal jurisdiction, also referred to as *in personam* jurisdiction, is the power to subject a particular defendant to the decision of a particular court. *See id.* (noting that traditional jurisdiction doctrine is based on notion that "court must have jurisdiction of the person of the parties before it can obligate them to comply with its orders"). Thus, a court's power to adjudicate a dispute depends upon whether the court has personal jurisdiction "of the person of the defendant." *Id.* For a detailed discussion of personal jurisdiction doctrine, *see infra* notes 16-65 and accompanying text.

7. *See Byassee, supra* note 1, at 198 n.5 ("Cyberspace is a place 'without physical walls or even physical dimensions' in which interaction occurs as if it happened in the real world and in real time, but constitutes only a 'virtual reality.'" (quoting Lawrence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, THE HUMANIST, Mar. 26, 1991, at 15)); Esther Dyson, *Put Friction Back in Cyberspace*, FORBES ASAP, Dec. 2, 1996, at 99 ("Life has friction, texture, distance, direction; those inconvenient physical conditions are a part of human life that we'll miss sorely as we move into the digital environment . . ."); Jonathan Freedland, *The Writing on the Toilet Wall*, THE GUARDIAN, Feb. 14, 1995, at 18 (noting that Internet is nonphysical entity). For a discussion of the concepts that form the basis of personal jurisdiction doctrine, *see infra* note 20 and accompanying text.

8. *See Byassee, supra* note 1, at 199 (stating that although cyberspace transcends geographical boundaries, "it cannot exist independently of the real world"); Zembek, *supra* note 5, at 341-42 (asserting that cyberspace cannot exist separate from physical world); *see also* Erik J. Heels & Richard P. Klau, *Let's Make a Few Things Perfectly Clear: Cyberspace, the Internet, and That Superhighway*, STUDENT LAW., May 1995, at 17 ("Never forget that the Internet is simply a bunch of interconnected wires, with computers at the ends of the wires, and with people in front of the computers.").

In *CompuServe, Inc. v. Patterson*,⁹ the United States Court of Appeals for the Sixth Circuit concluded that cyberspace is subject to traditional jurisdiction analysis and that cyberspace contacts may provide a basis for the assertion of jurisdiction.¹⁰ This Note discusses the application of traditional jurisdictional principles to litigation arising from electronic contacts on the Internet. Part II delineates the requirements for establishing personal jurisdiction in accord with due process, focusing specifically upon the principles enumerated by the Supreme Court.¹¹ Part III discusses the facts and procedural history of the Sixth Circuit's decision in *Patterson*.¹² Part IV provides a critical analysis of the *Patterson* decision and suggests that the Sixth Circuit properly applied existing precedent in evaluating whether Internet contacts serve as a basis for the exercise of personal jurisdiction.¹³ Finally, Part V discusses the effect that *Patterson* will have in future Internet jurisdiction cases and upon the cyberspace community.¹⁴ Part V also asserts that *Patterson* establishes much needed precedent in an area threatened by mass litigation.¹⁵

II. BACKGROUND: LIMITATIONS ON PERSONAL JURISDICTION

A. Constitutional Limitations on the Assertion of Personal Jurisdiction

For over fifty years, *International Shoe Co. v. Washington*¹⁶ has served as the foundation for determining whether a state court may exercise per-

9. 89 F.3d 1257 (6th Cir. 1996).

10. See *id.* at 1264-65 (applying traditional jurisdiction analysis to cyberspace contacts).

11. For a discussion of the traditional principles of jurisdiction and the requirements for establishing jurisdiction in cyberspace, see *infra* notes 16-86 and accompanying text.

12. For a discussion of the facts and procedural history of *Patterson*, see *infra* notes 87-111 and accompanying text.

13. For a critical discussion of the court's analysis in *Patterson*, see *infra* notes 112-63 and accompanying text.

14. For a discussion of the social and legal impact of the *Patterson* decision, see *infra* notes 164-74 and accompanying text.

15. For a discussion of the necessity of the *Patterson* decision in the wake of recent technological developments, see *infra* notes 167-74 and accompanying text.

16. 326 U.S. 310 (1945). Under *International Shoe*, the Supreme Court developed the standard for deciding whether a court may exercise personal jurisdiction over a nonresident defendant. See *id.* at 317-20 (developing minimum contacts test for determining whether court's exercise of jurisdiction is proper). In *International Shoe*, the State of Washington sued a Missouri-based Delaware corporation to collect unpaid unemployment compensation. *Id.* at 311. The Supreme Court held that by employing salesmen to solicit business in the state of Washington, the defendant established sufficient contacts with the state to reasonably permit the state to exercise jurisdiction over the defendant. See *id.* at 320. For a more thorough discussion of *International Shoe*, see Rex R. Perschbacher, *Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 513, 515-18 (1995) (providing social and political setting in which *International Shoe* was decided and discussing Supreme Court's holding).

sonal jurisdiction over a nonresident defendant.¹⁷ In departing from the physical presence requirement established in *Pennoyer v. Neff*,¹⁸ *International Shoe* redefined personal jurisdiction analysis.¹⁹ Under *International Shoe*, jurisdiction over a nonresident defendant is proper when the defendant has sufficient “minimum contacts” with the forum state, such that exercising jurisdiction does not “offend traditional notions of fair play and substantial justice.”²⁰

In the fifty years following *International Shoe*, the Supreme Court has made several attempts at refining the minimum contacts test.²¹ The stan-

17. See CASAD, *supra* note 6, § 1.02 (discussing concept of personal jurisdiction and noting that *International Shoe* has served as foundation of modern personal jurisdiction law).

18. 95 U.S. 714 (1878), *overruled in part* by *Shaffer v. Heitner*, 433 U.S. 186 (1977). Under *Pennoyer*, the exercise of jurisdiction over nonresident defendants was only proper when the defendant was physically present in the forum state. See *Pennoyer*, 95 U.S. at 722; see also JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.3, at 98 (2d ed. 1993) (noting *Pennoyer*'s physical presence requirement for exercise of jurisdiction). The presence requirement was rooted in state sovereignty and constitutional concerns. See *id.* In *Pennoyer*, the Supreme Court stated that

[t]he several states of the Union are not, it is true, in every respect independent. . . . But, except as restrained and limited by [the Constitution], they possess and exercise the authority of independent States, and the principles of public law . . . are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory.

Pennoyer, 95 U.S. at 722. The Supreme Court further held that “no State can exercise direct jurisdiction and authority over persons or property without its territory.” *Id.*

19. See Leslie W. Abramson, *Clarifying “Fair Play and Substantial Justice”: How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 442 (1991) (demonstrating how *International Shoe* changed approach to personal jurisdiction). The *International Shoe* decision did not replace the presence requirement, it merely redefined it for the twentieth century. See Perschbacher, *supra* note 16, at 517 (emphasizing that term “physical presence” merely symbolizes activities that are significant enough to satisfy due process principles). The emergence of interstate travel in the early twentieth century revealed the limitations of *Pennoyer*'s nineteenth-century jurisdictional doctrine and created the need for a new theory. See FRIEDENTHAL ET AL., *supra* note 18, § 310, at 123 (noting that more flexible standard for assertion of personal jurisdiction was suited to progressively more mobile society). When the Supreme Court abolished the physical presence requirement, it refocused jurisdictional concerns on the premise that “a nonresident’s enjoyment of the privilege of conducting business in the forum state carries with it an obligation to respond to suit there.” *Id.* § 3.10, at 121.

20. *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Subsequent Supreme Court decisions have separated the *International Shoe* standard into a two-step due process analysis by requiring a showing of “minimum contacts” before considering whether the exercise of jurisdiction comports with “traditional notions of fair play and substantial justice.” See FRIEDENTHAL ET AL., *supra* note 18, § 3.10, at 121 (discussing Supreme Court’s refinement of *International Shoe* standard); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294, 298-99 (1980) (holding that fairness concerns are irrelevant when minimum contacts do not exist).

21. See *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 108-12, 116 (1987) (holding that mere placement of products into stream of commerce is

dard applied when determining whether minimum contacts exist depends upon whether the court seeks to establish general or specific jurisdiction over the defendant.²² General jurisdiction refers to a court's ability to assert jurisdiction over a nonresident defendant for any lawsuit, "[e]ven when the cause of action does not arise out of or relate to the [defendant's] activities in the forum State."²³ To establish general jurisdiction, there must be substantial contacts between the defendant and the forum state.²⁴ In contrast, specific jurisdiction involves an assertion of jurisdic-

insufficient to satisfy minimum contacts requirement); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985) (stating that "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" are relevant in determining whether minimum contacts exist with forum state); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-19 (1984) (finding that minimum contacts did not exist when defendant merely purchased goods and sent personnel for training in forum state); *Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (holding that exercise of jurisdiction was valid when defendant circulated libelous article in forum state); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (allowing exercise of jurisdiction over publisher in state where its national publication was regularly sold and distributed); *World-Wide Volkswagen*, 444 U.S. at 296-98 (stating that minimum contacts are not established when nonresident defendant does not direct activity toward forum state); *Shaffer v. Heitner*, 433 U.S. 186, 207-12 (1977) (finding that state must pass *International Shoe's* "minimum contacts" test before asserting jurisdiction over nonresident defendant); *Hanson v. Denckla*, 357 U.S. 235, 250-53 (1958) (holding Delaware trust company's affiliation with Florida too tenuous to support assertion of jurisdiction because of lack of contacts); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (finding single insurance contract sufficient to establish minimum contacts between nonresident defendant and forum state). For a more thorough discussion of *International Shoe* and its progeny, see FRIEDENTHAL ET AL., *supra* note 18, §§ 3.1-13, at 94-147.

22. See Zembek, *supra* note 5, at 348-49 (discussing different threshold requirements for general versus specific jurisdiction). In 1966, Professors Arthur T. von Mehren and Donald T. Trautman formally made the distinction between general and specific jurisdiction. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-45 (1966) (identifying two categories of personal jurisdiction as specific and general). Mark M. Maloney, Note *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1268 (1993) (identifying two distinct contexts that satisfy minimum contacts prong). The Supreme Court recognized the distinction between specific and general jurisdiction in *Helicopteros*. *Helicopteros*, 466 U.S. at 414 nn.8-9.

23. *Helicopteros*, 466 U.S. at 414 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952)). The premise for general jurisdiction was originally articulated in *International Shoe*, in which the Supreme Court noted: "[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *International Shoe*, 326 U.S. at 318.

24. See FRIEDENTHAL ET AL., *supra* note 18, § 3.10, at 124 (discussing stricter test to establish general jurisdiction); see also *Helicopteros*, 466 U.S. at 415-16 (holding that continuous and systematic general business contacts with state were necessary to establish general jurisdiction); *Perkins*, 342 U.S. at 447 (requiring that contacts be sufficiently substantial "where the cause of action arose from activities entirely distinct from [defendant's] activities in [forum state]"); *International Shoe*,

tion the cause of action is based upon the defendant's activity in the forum state.²⁵

Determining whether a court may exercise specific jurisdiction involves a two-part analysis.²⁶ First, a court must decide whether jurisdiction is appropriate under the forum state's long arm statute.²⁷ Second, and only if a court has determined that the statute permits the exercise of jurisdiction, the court must then determine whether the assertion of jurisdiction comports with due process.²⁸ The Supreme Court has developed a three-part test to determine whether the assertion of specific jurisdiction over a defendant is constitutional: "(1) the defendant must purposefully avail itself of the privilege of conducting business in the forum; (2) the

326 U.S. at 320 (holding jurisdiction to exist when defendant's forum state activities were "systematic and continuous").

25. See *Helicopteros*, 466 U.S. at 414 n.8 (discussing concept of specific jurisdiction). In *Patterson*, the court determined it had specific jurisdiction over the defendant. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996). Thus, this Note will focus on specific jurisdiction requirements.

26. See Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083, 1117 (1996) (discussing use of two-part analysis to determine if court can exercise specific jurisdiction).

27. See *id.* at 1117-18 (describing first step in evaluating jurisdictional validity); see also *Helicopteros*, 466 U.S. at 413 (commenting that trial court must first determine if present situation is within scope of long arm statute).

Long-arm . . . statutes predicate jurisdiction over nonresident defendants upon a variety of contacts with the forum, including the transaction of business in the state, the commission of any one of a series of enumerated acts within the state . . . or . . . the commission of a particular act outside the forum that has consequences within it.

FRIEDENTHAL ET AL., *supra* note 18, § 3.12, at 139. For instance, New York's long arm statute, which is similar to the statutes enacted in many states, provides:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state . . . ; or
4. owns, uses or possesses any real property situated within the state.

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

28. See Counts & Martin, *supra* note 26, at 1118-19 (discussing second part of analysis in determining validity of jurisdiction). Some state long arm statutes provide: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1997). In these states, the jurisdictional analysis is reduced to a consideration of due process concerns. See JAMES FLEMING, CIVIL PROCEDURE § 2.6, at 63 (4th ed. 1992) (noting that because state long arm statutes allow exercise of jurisdiction to extent permitted under Constitution, jurisdictional inquiry is reduced to due process concerns).

cause of action must arise out of the defendant's activities in the forum; and (3) the exercise of jurisdiction must be fundamentally fair."²⁹

1. *Purposeful Availment Requirement*

The first prong of specific jurisdiction analysis focuses upon whether the defendant's contacts with the forum state were intentional.³⁰ Founded upon fairness concerns, the purposeful availment requirement limits the exercise of jurisdiction to those defendants who have enjoyed the benefits and protections of the forum state and, thus, "should reason-

29. Zembek, *supra* note 5, at 352-53; *see also* Sawtelle v. Farrell, 70 F.3d 1381, 1388-89 (1st Cir. 1995) (stating that United States Court of Appeals for the First Circuit utilizes three-part analysis to decide whether court may exercise specific jurisdiction); Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1485 (9th Cir. 1993) (noting that United States Court of Appeals for the Ninth Circuit uses three-part test in determining whether exercise of specific jurisdiction is permissible); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1546 (11th Cir. 1992) (requiring that defendant's contacts with forum state satisfy three criteria to constitute minimum contacts for purposes of specific jurisdiction); Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968) (establishing three criteria for determining outer limits of specific jurisdiction).

The "purposeful availment" requirement was derived from a case in which the Supreme Court held that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla* 357 U.S. 235, 253 (1958); *see also Southern Machine*, 401 F.2d at 381 (deriving "purposeful availment" requirement from *Hanson*). The Supreme Court has continually utilized the "purposeful availment" requirement in assessing the existence of specific jurisdiction. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109, 112 (1987) (requiring that contact be brought about by act of defendant purposefully directed toward forum state); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (holding minimum contacts to exist where "defendant 'deliberately' has engaged in significant activities within a State"); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) (finding that existence of minimum contacts was "unquestionable" when defendant purposefully directed actions toward forum state).

The requirement that the cause of action arise from the defendant's conduct within the state derives from a case in which the Supreme Court held that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the] State [of California]." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *see also Southern Machine*, 401 F.2d at 381 (deriving second prong of minimum contacts test from *McGee*). The "fair play and substantial justice" requirement is applied to general jurisdiction cases as well. *See Abramson, supra* note 19, at 445 n.22 (noting that "fair play and substantial justice" element is considered in both general and specific jurisdiction cases).

30. *See* Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545, 1554 (1994) (explaining that purposeful availment hinges on whether defendant's involvement in forum state was intentional); *see also Asahi*, 480 U.S. at 109 ("Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State") (quoting *Burger King*, 471 U.S. at 475) (emphasis in original)); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) ("[T]he mere unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State.").

ably anticipate[] being haled into court there.”³¹ Moreover, the purposeful availment requirement furnishes personal jurisdiction with a “degree of predictability” by limiting jurisdiction to those who intentionally direct their activities toward the forum state and are aware of the potential for having to litigate there.³²

Therefore, application of the purposeful availment test involves a fact-specific inquiry.³³ For example, in *Burger King Corp. v. Rudzewicz*,³⁴ the Supreme Court held that by purposefully entering into a long-term franchise agreement with the plaintiff, a Michigan resident had purposely

31. *World-Wide Volkswagen*, 444 U.S. at 297. Some commentators argue that the purposeful availment requirement is premised on the notion of consenting to jurisdiction. See Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 699-703 (1987) (arguing that defendant surrenders to state’s judicial authority when defendant engages in purposeful activity within that state). Under this theory, a defendant engaging in activities in the forum state is said to “surrender herself to its judicial authority.” *Id.* at 699-700. Thus, the theory is based upon the notion of an exchange:

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

32. *World-Wide Volkswagen*, 444 U.S. at 297. In discussing the purposeful availment requirement, the *World-Wide Volkswagen* Court stated that:

[w]hen a corporation “purposefully avails itself of the privilege of conducting activities within the forum State,” it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State.

Id. For a further discussion of *World-Wide Volkswagen*, see *infra* notes 40-43 and accompanying text.

33. See *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996) (noting that “jurisdictional inquiry is often a difficult fact specific analysis”); *Sawtelle*, 70 F.3d at 1388 (“When embarking upon the fact-sensitive inquiry of whether a forum may assert personal jurisdiction over a defendant, the court’s task is not a rote, mechanical exercise.”); *Pritzker v. Yari*, 42 F.3d 53, 60 (1st Cir. 1994) (“The inquiry into minimum contacts is also highly idiosyncratic, involving an individualized assessment and factual analysis of the precise mix of contacts that characterize each case.”); *Stuart v. Spademan*, 772 F.2d 1185, 1194 (5th Cir. 1985) (concluding that “totality of the facts” did not support exercise of jurisdiction); *Johnson Controls, Inc. v. Irving Rubber & Metal Co.*, 920 F. Supp. 612, 617 (M.D. Pa. 1996) (stating that, with few exceptions, jurisdictional questions are decided on specific facts of each case); *Travelers Indem. Co. v. TEC Am., Inc.*, 909 F. Supp. 249, 251 (M.D. Pa. 1995) (same); *Reliable Tool & Mach. Co. v. U-Haul Int’l, Inc.*, 837 F. Supp. 274, 279 (N.D. Ind. 1993) (“In determining whether minimum contacts exist . . . the court must consider all of the facts and circumstances of the individual case.”); *Associated Bus. Tel. Sys. Corp. v. Danihels*, 829 F. Supp. 707, 711 (D.N.J. 1993) (stating that purposeful availment determination involves “a fact specific inquiry wherein there will be no clear cut answers”).

34. 471 U.S. 462 (1985).

established sufficient contacts with the state of Florida.³⁵ Although the Court considered the existence of a contract significant, it held that the mere existence of a contract could not automatically support an exercise of jurisdiction because personal jurisdiction does not turn on such a “‘mechanical’ test[]” or “‘conceptualistic theor[y].”³⁶ The Court, therefore, adopted a “highly realistic” approach and, based on the defendant’s solicitation of the contract, the specific contract terms and the course of dealings, concluded that the defendant’s Florida contacts were not “‘random,’ ‘fortuitous,’ or ‘attenuated.’”³⁷

As a result of the technological and economic progress of the twentieth century, courts have attempted to expand the purposeful availment prong to incorporate contacts arising between a nonresident defendant and the forum state through a “stream of commerce” analysis.³⁸ When

35. See *id.* at 487. In *Burger King*, the defendants were issued a Burger King franchise in Michigan pursuant to a written contract with the plaintiff. See *id.* at 466. Contract negotiations between the plaintiff and the defendant took place with representatives from both the plaintiff’s Michigan and Florida headquarters. See *id.* at 467. In exchange for the franchise, the defendants became obligated to pay the plaintiff \$1 million over the course of twenty years. See *id.* Although the defendants’ franchise was prosperous at first, business began to decline within the first year of operation. See *id.* at 468. At that time, the defendants began to default on their monthly payments. See *id.* After several officials from the plaintiff’s headquarters in Florida failed in their attempts to negotiate with the defendants, the plaintiff ordered the defendants to vacate the premises. See *id.* Upon the defendants’ refusal to vacate, the plaintiff filed an action for trademark infringement and sought injunctive relief against the defendants. See *id.* at 468-69.

36. See *Burger King*, 471 U.S. at 478; see also *International Shoe*, 326 U.S. at 319 (“It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit . . . cannot be simply mechanical or quantitative.”). For a list of lower court decisions applying a non-mechanical analysis in assessing purposeful contacts, see *supra* note 33 and accompanying text.

37. *Burger King*, 471 U.S. at 480 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1953); *Keeton v. Hustler Magazine, Inc.* 465 U.S. 770, 774 (1984); *World-Wide Volkswagen*, 444 U.S. at 299).

38. See Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 Ky. L.J. 243, 255-58 (1988-1989) (discussing concept of personal jurisdiction arising out of contacts made through ordinary course of commerce). The term “stream of commerce” refers to a product sold by a manufacturer traveling through “an extensive chain of distribution before reaching the ultimate consumer.” *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 298 (3d Cir. 1985). Under the “stream of commerce” analysis, a manufacturer may be held amenable to jurisdiction in a forum in which the manufacturer’s products are sold indirectly through importers or distributors. See Erik T. Moe, Comment, *Asahi Metal Industry Co. v. Superior Court: The Stream of Commerce Doctrine, Barely Alive But Still Kicking*, 76 GEO. L.J. 203, 204 (1987) (noting that stream of commerce theory posits that use of intermediary does not insulate manufacturer from jurisdiction). “In such cases, it was felt the presence of a distributor should not shield a manufacturer, whose products had caused harm to residents of the forum state, from the reach of the forum state’s long-arm rule.” *Daetwyler*, 762 F.2d at 299.

The stream of commerce theory was first introduced into the area of personal jurisdiction to sustain jurisdiction in products liability cases. See *id.* at 298 (noting

addressing contacts arising from the stream of commerce, however, the Supreme Court has held that the mere foreseeability that a product may enter the forum state does not amount to purposeful availment.³⁹ For instance, in *World-Wide Volkswagen Corp. v. Woodson*,⁴⁰ the plaintiffs purchased a car in New York from the defendant, a New York auto retailer, and were later injured in a car accident while driving through Oklahoma.⁴¹ In denying Oklahoma's jurisdiction over the defendant, the Supreme Court held that "the mere 'unilateral activity of those who claim

that stream of commerce theory "evolved to sustain jurisdiction in products liability cases"). In one of the first cases to apply the stream of commerce theory, an Ohio manufacturer was held subject to jurisdiction in Illinois, where one of its water heater valves exploded and injured an Illinois resident. See *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 762, 767 (Ill. 1961). The Illinois Supreme Court applied the stream of commerce theory:

With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.

Id. at 766. The *Gray* court also discussed the need for a stream of commerce theory in the face of technological and economic progress:

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in light of the facts of economic life as it is lived today. Otherwise the need for adaption may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired.

Id.

Nevertheless, application of the stream of commerce theory has caused a great deal of confusion in both state and federal courts. See *Murphy, supra*, at 257-73 (discussing origins of and confusion caused by stream of commerce theory); Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 110-13 (1991) (describing split among jurisdictions in application of stream of commerce theory); *Moe, supra*, 211-15 (noting division among lower courts applying stream of commerce theory).

39. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) ("[A]wareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."); *World-Wide Volkswagen*, 444 U.S. at 296-97 (holding that foreseeable contacts alone cannot support exercise of jurisdiction).

40. 444 U.S. 286 (1980).

41. See *id.* at 288-89 (describing details of accident giving rise to lawsuit). In *World-Wide Volkswagen*, the plaintiffs, residents of New York, purchased a new Audi automobile from the defendant. See *id.* at 288. Within a year, the plaintiffs moved from New York to their new home in Arizona. See *id.* While passing through Oklahoma, another car struck the rear of the plaintiffs' car, causing a fire severely burned one of the plaintiffs and their two children. See *id.* The plaintiffs subse-

some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state."⁴² Thus, although it was foreseeable that the plaintiffs might travel to Oklahoma, the Court reasoned that foreseeable contacts alone do not provide a defendant with reasonable notice of the possibility of litigation in the forum state.⁴³

In *Asahi Metal Industries Co. v. Superior Court*,⁴⁴ however, the Court left uncertain the status of the foreseeability argument in stream of commerce cases.⁴⁵ In *Asahi*, tire valves sold by the defendant, a Japanese manufacturer, were used in a motorcycle tire that exploded and caused injury to the plaintiff, a California resident.⁴⁶ The *Asahi* Court was divided on the

quently filed a products liability action against the defendant in the state of Oklahoma. *See id.*

42. *Id.* at 298 (quoting *Hanson*, 357 U.S. at 253).

43. *See id.* at 298-99 (finding that foreseeability of plaintiff's actions did not support exercise of jurisdiction). Although the *World-Wide Volkswagen* Court found foreseeability alone to be insufficient, it did include foreseeability as a relevant factor in the due process inquiry:

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

... The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98.

44. 480 U.S. 102 (1987).

45. *See* FRIEDENTHAL ET AL., *supra* note 18, § 3.11, at 137 (stating that *Asahi* Court did not develop clear standard for determining minimum contacts for manufacturing cases). For a further discussion of the uncertainty arising out of *Asahi* with regard to the stream of commerce theory, see *infra* note 50 and accompanying text.

46. *See Asahi*, 480 U.S. at 105-07 (emphasizing that item which caused accident was manufactured in foreign country). The action was originally brought against Cheng Shin Rubber, the manufacturer of the motorcycle's tire tube. *See id.* at 106. Cheng Shin cross-complained, seeking indemnification from Asahi, the manufacturer who supplied Cheng Shin with valve assemblies for its tire tubes. *See id.* Because the plaintiff settled with Cheng Shin prior to trial, only the indemnity action against Asahi remained. *See id.*

The Court discussed the nature of Asahi's valve sales:

Asahi's sales to Cheng Shin took place in Taiwan. . . . Cheng Shin bought and incorporated into its tire tubes 150,000 Asahi valve assemblies in 1978; 500,000 in 1979; 500,000 in 1980; and 100,000 in 1982. Sales to Cheng Shin accounted for 1.24 percent of Asahi's income in 1981 and 0.44 percent in 1982. Cheng Shin alleged that approximately 20 percent of its sales in the United States are in California. Cheng Shin purchases valve assemblies from other suppliers as well, and sells finished tubes throughout the world.

Id. at 106. The Court also considered an affidavit from a manager at Cheng Shin stating that "'Asahi was fully aware that valve stem assemblies sold to my Company and to others would end up throughout the United States and in California.'" *Id.* at 107 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 702 P.2d 543, 549-50 n.4 (Cal. 1985)).

issue of whether the defendant's conduct established minimum contacts with California.⁴⁷ Justice O'Connor stated for the plurality that Asahi's mere awareness that its valve assemblies would be used in California was not sufficiently purposeful conduct to establish minimum contacts.⁴⁸ In contrast, Justice Brennan opined that the defendant's knowledge that its product was being marketed in California was sufficient to support a finding of minimum contacts.⁴⁹ Thus, although the Court has held that pur-

47. *Id.* at 105 (noting division within Court over whether minimum contacts were established between defendant and forum state). Chief Justice Rehnquist, Justice Powell and Justice Scalia agreed with Justice O'Connor's conclusion that minimum contacts did not exist between the defendant and the state of California. *See id.* Justice White, Justice Marshall and Justice Blackmun joined in Justice Brennan's concurring opinion, in which he argued that the defendant's awareness that its products were present in California was sufficient to satisfy the purposeful availment requirement. *See id.* at 116 (Brennan, J., concurring). In a separate concurring opinion, Justice Stevens refused to endorse the plurality view on the basis that it was unnecessary to discuss purposeful availment when reversal could be supported on fairness grounds. *See id.* at 121-22 (Stevens, J., concurring). In addressing whether the exercise of jurisdiction was reasonable, however, eight Justices agreed that allowing California to exercise jurisdiction over the defendant would be unfair. *See id.* at 105.

48. *See id.* at 112-13 (finding that minimum contacts were not established due to lack of purposeful contact). In commenting upon the stream of commerce theory, Justice O'Connor specifically stated that

[t]he "substantial connection" between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Id. at 112 (citations omitted).

49. *See id.* at 121 (Brennan, J., concurring) (arguing that sufficient contacts existed to provide jurisdictional basis). In addressing the stream of commerce theory, Justice Brennan stated that

[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. . . . A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, . . . jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause.

Id. at 117 (Brennan, J., concurring). Justice Brennan further discussed that, at that time, the position of the plurality regarding the stream of commerce theory represented the minority view among the federal courts of appeals. *See id.* at 118 (Brennan, J., concurring).

purposeful conduct on the part of the defendant is required to establish minimum contacts, there is uncertainty over whether the stream of commerce theory satisfies the contacts requirement after *Asahi*.⁵⁰

2. Cause of Action

Under the second prong of specific jurisdictional analysis, courts must establish that the cause of action arose from or relates to the defendant's contacts with the forum state.⁵¹ Because the "arise from or relate to"

50. See *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993) (holding that because of *Asahi* Court's uncertainty with regard to stream of commerce theory, analysis of *World-Wide Volkswagen* Court should be followed); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir. 1992) (stating that *Asahi* "casts some doubt on the future viability of the stream of commerce theory"); see also Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 245 (1988) (stating that some courts have interpreted *Asahi* "as sounding the death knell for the stream of commerce theory," while other courts have "simply ignored *Asahi's* pronouncements"); Moe, *supra* note 38, at 205-06 (noting that *Asahi* Court's failure to achieve consensus has caused confusion as to application of stream of commerce theory in future cases).

In proposing a solution to the uncertainty of the stream of commerce theory, one commentator has argued for the application of Justice Brennan's "awareness" requirement. See *id.* at 223-28 (arguing that Justice Brennan's "awareness" approach is favorable because "it closes a potential jurisdictional loophole available to a defendant who willfully or negligently ignores the destination of its products"). The commentator concluded that although the stream of commerce theory is still viable, it is Justice Brennan's approach that should be followed. See *id.* Under Justice Brennan's approach, the exercise of jurisdiction over manufacturers who place their product in the stream of commerce is permissible when the manufacturer was "aware of [the] ultimate destination" of the product. *Id.* at 223-24. Thus, the commentator argued that Justice Brennan's approach is consistent with prior Supreme Court precedent because it allows for the exercise of jurisdiction when the manufacturer defendant has benefitted from the forum state. See *id.* at 224. The difficulty with Justice Brennan's approach, however, is that it depends upon the ability of the plaintiff to show that the defendant was aware of the destination of its product. See *id.* at 225. In response to this dilemma, the commentator suggested application of the "know" or "should have known" standard in order to allow the court to base their finding of knowledge upon the facts of the case. See *id.* (quoting *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 200 (5th Cir. 1980)). Under this approach, courts are better able to ensure fairness because the purposeful availment requirement can be met through a review of the totality of the circumstances. See *id.* at 226 ("[T]he analysis should include an examination of the quantity and continuity of forum sales, form market share, forum revenue, . . . length of exposure to the forum market, and whether the product was destined for United States or international markets.").

51. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (stating that exercise of specific jurisdiction is proper where litigation "arise[s] out of or relate[s] to" defendant's forum activities (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). The "arise from or relate to" requirement originated in *International Shoe*, when the Supreme Court held that conducting activities in a state "may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, [requiring] the [defendant] to respond to a suit brought to enforce [those obligations] can . . . hardly be said to be undue." *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

requirement defines the necessary relationship between the forum state and the defendant, it “is the essence of specific jurisdiction.”⁵² Thus, a proper application of the “arise from or relate to” requirement is essential to ensuring that the due process requirements have been met.⁵³ Because of the absence of a clear test, two general theories of interpretation for the “arise from or relate to” requirement have been developed.⁵⁴

The first theory of interpretation employs a “but for” analysis in determining whether the cause of action arose from the defendant’s activities in the forum state.⁵⁵ Under this theory, “a cause of action ‘arises from’ the defendant’s forum-state activities when ‘but for’ those activities the cause of action would not have arisen.”⁵⁶ The second theory of interpretation involves a determination of whether the defendant’s forum activities have substantive relevance to the cause of action.⁵⁷ To be substantively relevant to the cause of action, the defendant’s forum state activities must be the “proximate cause” of the litigation.⁵⁸ The existence of two differ-

52. Maloney, *supra* note 22, at 1271.

53. *See id.* (“[A] misapplication of ‘arise from or relate to’ is tantamount to a misapplication of due process.”); *see also* Stan Mayo, Note, *Specific Jurisdiction: Time for a “Related to” Analysis*, 4 REV. LITIG. 341, 342-43 (1985) (noting that proper application of due process cannot occur without proper application of “arise from or relate to” requirement).

54. *See Helicopteros*, 466 U.S. at 415 n.10 (1984) (declining to address “arising out of” or “related to” requirement). *But see* Maloney, *supra* note 22, at 1276-77 (noting present requirement of “arise from” or “relate to” test). For a discussion of the two general theories, *see infra* notes 55-59 and accompanying text.

55. *See* Maloney, *supra* note 22, at 1277. This analysis is also referred to by some courts as the “made possible by” or the “lie in the wake of” test. *See id.* (citing *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1216 (7th Cir. 1984); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 231 (6th Cir. 1972)).

56. *See Alexander v. Circus Circus Enters., Inc.*, 939 F.2d 847, 853 (9th Cir. 1991) (describing “but for” test as requiring relationship between cause of action and defendant’s forum contacts be such that “but for” defendant’s contacts with forum state, cause of action would not have occurred); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382-86 (9th Cir. 1990) (holding “but for” test requires showing that cause of action would not have occurred “but for” defendant’s forum activities).

57. *See* Maloney, *supra* note 22, at 1282 (applying substantive relevance test to “arise from or relate to” requirement).

58. *See id.* at 1282-83 (explaining that proximate cause test used in tort law is applied for determining “substantive relevance”). In order to constitute a proximate cause, the defendant’s activities must not only have a “but for” relationship to the cause of action, but the litigation must also be a foreseeable consequence of the defendant’s actions. *See id.* at 1283 (discussing nature of proximate cause test). Because the “but for” test does not require foreseeability, application of the proximate cause standard results in a denial of jurisdiction in many instances when the “but for” test would allow the exercise of personal jurisdiction. *See id.* at 1282.

Debate over which causation test should be applied in jurisdictional analysis centers upon the issue of which test better promotes the principles announced in *International Shoe*. *See id.* at 1299-1301 (arguing that “but for” approach better advances core principals of *International Shoe* and its progeny); Rose, *supra* note 30, at 1588-90 (advancing substantive relevance test as much more consistent with due process jurisdictional principals). Some commentators argue that the “but for”

ent tests, however, has led to some confusion in determining whether a defendant's conduct gives rise to a cause of action.⁵⁹

3. Reasonableness

The third prong of the minimum contacts test examines the reasonableness of requiring a defendant to litigate in the forum state.⁶⁰ The Supreme Court has outlined five factors to consider in determining whether an assertion of jurisdiction is fair: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interests the several states have in furthering fundamental substantive social policies.⁶¹

approach is more consistent with modern jurisdiction principals because it focuses less on structure and more on flexibility. See Maloney, *supra* note 22, at 1300 ("The modified 'but for' test will allow courts to achieve flexibility without completely sacrificing structure."). On the contrary, other commentators argue that the substantive relevance, or proximate cause, test is more consistent with due process requirements because it provides a greater degree of certainty to the jurisdictional inquiry. See Rose, *supra* note 30, at 1588-89 (stating that substantive relevance test is most consistent with case law and has great merit of clarity). Thus, according to the second group of commentators, the proximate cause standard allows for a greater degree of predictability as to where a person may be subject to suit. See *id.* at 1586-88 (arguing that proximate cause test is appropriate for jurisdictional analysis because it provides clarity and certainty as to where one may be held subject to suit). Neither group of commentators, however, has helped the courts reach a consensus as to which standard to apply. See Maloney, *supra* note 22, at 1282-89 (noting disparity in circuit court decisions using both tests).

59. See Maloney, *supra* note 22, at 1270-71 (arguing for application of "arise from or relate to" requirement in "firm and consistent" manner).

60. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-14 (1987) (considering reasonableness of litigating against Asahi in forum state).

61. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (listing five factors to consider in determining fairness). The *World-Wide Volkswagen* Court stated that

[i]mplicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute . . . the plaintiff's interest in obtaining convenient and effective relief . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citations omitted).

Traditionally, the Supreme Court has treated the first factor, the burden on the defendant, as "a primary concern." *Id.*; see also *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n.10 (1982) (commenting that restrictions on state sovereignty act to preserve individual liberty interests); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (stating that jurisdictional requirements both limit state power and guarantee immunity from inconvenient litigation); Charlotte Hoffmann, *Personal Jurisdiction and the Due Process Clause: An Evaluation of the Fairness Factors*, 19 PAC. L.J. 1459, 1477 (1988) (noting that empha-

Although these five factors are supposed to be balanced against mini-

sis on burden to defendant has been characterized as abandonment of federalism concerns). *But see Burger King*, 471 U.S. at 482-84 (holding Michigan franchise subject to jurisdiction of Florida court without concern for burden on defendant). The *Burger King* Court noted that

[b]ecause "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

Id. at 474 (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

In dealing with a foreign defendant, however, the Supreme Court in *Asahi* reemphasized the significance of the burden to the defendant:

Certainly the burden on the defendant in this case is severe. *Asahi* has been commanded by the Supreme Court of California not only to traverse the distance between *Asahi's* headquarters in Japan and the Superior Court of California . . . but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

Asahi, 480 U.S. at 114. For a further discussion of the facts of *Asahi* and the Supreme Court's holding, see *supra* notes 46-50 and accompanying text.

Although the first factor has been applied inconsistently, the Supreme Court has traditionally given considerable weight to the second factor of the fairness analysis. See William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 629 (1993) (noting that Supreme Court has given second factor "considerable attention"). Most often, the Court uses this prong of the analysis to stress the value of providing residents with a forum to pursue their claims. See *id.* ("A common theme is the state's interest in providing a forum for state residents to pursue claims against outsiders.").

For examples of situations in which the Supreme Court found sufficient state interests, see *Burger King*, 471 U.S. at 483; *McGee*, 355 U.S. at 223. For examples of situations in which the Supreme Court found the state's interest insufficient, and thus, the exercise of jurisdiction unfair, see *Asahi*, 480 U.S. at 115; *Shaffer v. Heitner*, 433 U.S. 186, 214-15 (1977).

Although fairness concerns dominate the analysis of the second factor, the availability of an alternate forum in which the plaintiff can bring suit is often the central consideration under the third factor. See *Asahi*, 480 U.S. at 114 (finding assertion of jurisdiction unreasonable when alternate forum was available and more convenient for litigation); *McGee*, 355 U.S. at 223 (holding defendant amenable to suit in part because of plaintiff's inability to finance suit in another state).

The fourth element, however, is essentially concerned with efficiency in resolving the lawsuit. Three separate factors are considered: (1) the place where the claim arose; (2) the avoidance of piecemeal litigation; and (3) choice of law principles. See Abramson, *supra* note 19, at 460-61 (discussing factors considered under efficient resolution factor). The first factor focuses on the location of critical witnesses and evidence. See *id.* ("Where the forum is the place where the claim arose, where all or most likely witnesses reside, or where critical evidence exists, litigating the lawsuit in such a forum seems reasonable."). The second factor questions whether related claims may also be adjudicated in the forum state, so as to avoid piecemeal litigation. See *id.* at 463 (explaining that single adjudication of legal issues fosters efficient resolution of controversies). Finally, the third factor considers whether it is more efficient to adjudicate claims in the forum whose substantive law applies to the case. See *id.* at 464-65 ("If the court determines that the forum state's substantive law applies to the case, then efficiency is served by proceeding in that forum.").

minimum contacts concerns, the Supreme Court traditionally has placed greater emphasis on the contacts prong of the analysis.⁶² For instance, in *World-Wide Volkswagen*, the Supreme Court rejected Oklahoma's attempt at exercising jurisdiction over a nonresident defendant because of a lack of sufficient contacts.⁶³ In doing so, the *World-Wide Volkswagen* Court ignored both Oklahoma's strong state interest in adjudicating the claim and the fact that the majority of the evidence was located in Oklahoma.⁶⁴ Simi-

Consideration of the fifth element of the analysis requires an examination of the "procedural and substantive interests of other [states or] nations in a state court's assertion of jurisdiction over an alien defendant." *Asahi*, 480 U.S. at 115. For a discussion of the application of this factor to both foreign and domestic defendants, see Abramson, *supra* note 19, at 465-68.

62. See Richman, *supra* note 61, at 634 (stating that fairness inquiry plays subsidiary role to contacts prong); see also Hoffmann, *supra* note 61, at 1459-61, 1485 (arguing that application of minimum contacts test alone, without consideration of fairness factors, is sufficient to satisfy due process requirements).

The Supreme Court's lone exception to the "contacts-over-fairness" trend is found in *Asahi*, in which the burden to a foreign defendant was held to outweigh the defendant's relationship with the forum state. *Asahi*, 480 U.S. at 114-15. Although the *Asahi* Court ultimately found it unreasonable to subject the defendant to jurisdiction in California, the justices differed in their understanding of the relationship between the minimum contacts and fairness prongs. See Hoffmann, *supra* note 61, at 1459-61 (discussing two divergent positions that have arisen out of *Asahi* with regard to relationship between contacts and reasonableness prongs). In Justice O'Connor's view, a finding of sufficient minimum contacts is a threshold requirement for consideration of the fairness factors. See *Asahi*, 480 U.S. at 114 ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."); Hoffmann, *supra* note 61, at 1460 ("Under [Justice O'Connor's] approach, an examination of other factors cannot establish the validity of an assertion of jurisdiction; the fairness factors may be considered only to affirm or defeat jurisdiction.").

In his concurring opinion, Justice Stevens rejected the approach taken by Justice O'Connor:

An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional. [Justice O'Connor's opinion] establishes . . . that California's exercise of jurisdiction over *Asahi* in this case would be "unreasonable and unfair." This finding alone requires reversal; this case fits within the rule that "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." Accordingly, I see no reason in this case for the plurality to articulate "purposeful direction" or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.

Asahi, 480 U.S. at 121-22 (Stevens, J., concurring) (citations omitted).

63. *World-Wide Volkswagen*, 444 U.S. at 299.

64. *Id.* at 305 (Brennan, J., dissenting). In his dissent, Justice Brennan concludes that requiring the defendant to litigate in Oklahoma is both fair and reasonable. See *id.* at 305-07 (Brennan, J., dissenting). Justice Brennan stated that [t]he interest of the forum State and its connection to the litigation is strong. The automobile accident underlying the litigation occurred in Oklahoma. The plaintiffs were hospitalized in Oklahoma when they brought suit. Essential witnesses and evidence were in Oklahoma. The

larly, in *Burger King*, the Supreme Court upheld Florida's exercise of jurisdiction over a Michigan resident by emphasizing the defendant's ties to Florida and minimizing the inconvenience of having the defendant litigate there.⁶⁵

B. *Applying Minimum Contacts in Cyberspace*

To date, only a small body of case law has developed addressing jurisdictional issues arising from contacts made through the Internet.⁶⁶ Most of the cases addressing on-line issues have involved either First Amendment, copyright, criminal or privacy issues.⁶⁷ Nevertheless, a few courts

State has a legitimate interest in enforcing its laws designed to keep its highway system safe, and the trial can proceed at least as efficiently in Oklahoma as anywhere else.

Id. at 305 (Brennan, J., dissenting); *see also* *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415, 418 (1984) (denying Texas court's jurisdiction although plaintiffs had no alternative American forum).

65. *Burger King*, 471 U.S. at 483-84. In response to the defendant's inconvenience argument, the Court stated that "such considerations most frequently can be accommodated through a change of venue." *Id.* at 484; *see* *Keeton v. Hustler Magazine*, 465 U.S. 770, 781 (1984) (upholding jurisdiction based on contacts even though plaintiff lacked substantial connection with forum state).

The *Burger King* Court commented upon the relation between minimum contacts and fairness:

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other [fairness] factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice" [The fairness factors] sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Burger King, 471 U.S. at 476-77 (citations omitted).

66. *See* *Zembek*, *supra* note 5, at 357 (noting limited number of cases that have addressed establishment of personal jurisdiction through Internet contacts).

67. *See* *United States v. Morris*, 928 F.2d 504, 511 (2d Cir. 1991) (holding that release of program adversely affecting Internet violated Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213 (codified at 18 U.S.C. § 1030 (1994))); *Religious Tech. Ctr. v. Netcom On-Line Servs., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995) (holding Internet provider was not directly liable for unauthorized copies of copyrighted work made and stored in its computer while transmitting computer bulletin board service's (BBS) Usenet posting to and from Internet); *Sega Enters. Ltd. v. Maphia*, 857 F. Supp. 679, 685 (N.D. Cal. 1994) (holding that copyright law supported seizure of on-line pirated video game software); *United States v. LaMacchia*, 871 F. Supp. 535, 544 (D. Mass. 1994) (holding federal wire fraud statute inapplicable to copyright infringement action against pirate BBS operator); *Steve Jackson Games, Inc. v. United States Secret Serv.*, 816 F. Supp. 432, 441 (W.D. Tex. 1993) (holding governmental search and seizure of on-line systems limited by Electronic Communication Privacy Act and Privacy Protection Act of 1986, Pub. L. No. 99-508, 100 Stat. 1851 (codified as amended in scattered sections of 18 U.S.C.) and the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified as amended at 42 U.S.C. §§ 2000aa-1 to -12 (1994))), *aff'd*, 36 F.3d 457 (5th Cir. 1994); *Cubby, Inc. v. Com-*

have addressed the issue of jurisdiction arising from on-line contacts.⁶⁸

In addressing on-line contacts, the courts have applied traditional jurisdiction principles and analysis.⁶⁹ The novelty of basing jurisdiction on contacts arising out of the on-line environment, however, has created some confusion among these courts.⁷⁰

1. *Finding Personal Jurisdiction*

One of the first cases to address the issue of jurisdiction arising from computer-related contacts was *Plus System, Inc. v. New England Network, Inc.*⁷¹ In *Plus System*, the United States District Court for the District of Colorado held that the defendant, a Connecticut automatic teller machine (ATM) organization, was amenable to jurisdiction in Colorado because the defendants used the plaintiff's computer in Colorado through telephone lines.⁷² In reaching this conclusion, the court reasoned that

puServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (limiting CompuServe's liability as publisher of on-line material); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063-94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) (assigning liability to Prodigy as publisher).

68. See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D. Conn. 1996) (concluding that nonresident defendant's advertising through Internet was sufficient to support Connecticut's exercise of jurisdiction); *Plus Sys., Inc. v. New England Network, Inc.*, 804 F. Supp. 111, 120 (D. Colo. 1992) (finding that nonresident defendant was subject to jurisdiction in Colorado when defendant communicated with plaintiff's computers located in Colorado); *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1353-54 (Fla. Dist. Ct. App. 1994) (holding nonresident defendant's use of on-line services located in Florida was insufficient basis to support exercise of jurisdiction by Florida court).

69. See, e.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1266 (6th Cir. 1996) (finding that defendant purposefully availed himself to forum state); *Plus Systems*, 804 F. Supp. at 120 (finding defendant's connection with forum state substantial enough to make exercise of jurisdiction reasonable).

70. Compare *Patterson*, 89 F.3d at 1257 (holding that on-line contact was sufficient to support exercise of jurisdiction), and *Inset Systems*, 939 F. Supp. at 164 (finding nonresident defendant's use of domain name sufficient to subject defendant to jurisdiction in forum state), with *Pres-Kap*, 636 So. 2d at 1353 (refusing to exercise jurisdiction in breach of contract action when defendant's only contact with forum state was use of plaintiff's on-line computer database).

71. 804 F. Supp. 111 (D. Colo. 1992).

72. *Id.* at 118-19. In *Plus System*, the plaintiff, Plus System, Inc., was a Delaware corporation with its principal place of business in Colorado. See *id.* at 114. Plus System administered and provided support for a national automated teller machine (ATM) network comprised of approximately 4500 depository financial institutions. See *id.* The financial institutions utilize regional networks that are connected through a national network organized and maintained by Plus System. See *id.* Thus, the Plus System network enables customers owning an ATM card marked with the "Plus" trademark to access their financial institution from any ATM machine bearing the same "Plus" mark. See *id.* at 114-15. Plus System is responsible for routing each individual customer's financial transaction to the proper network and settling all accounts on the network. See *id.* at 115. In return for its routing and settling services, Plus System is paid a small fee per transaction by the bank issuing the card used in the transaction. See *id.*

[t]he intangible nature of [Plaintiff's] services should not be perceived as detracting from their very real and valuable function; in the days of inferior technology, there could be no dispute over minimum contacts had Defendant physically flown to Colorado with its ATM machine and asked Plaintiff to perform switching services on it. Similarly, Defendant's use of Plaintiff's computer system to effect the same result is no less an availment of Colorado and its laws.⁷³

Thus, the *Plus System* court applied traditional jurisdiction analysis in determining that the defendant did purposefully avail itself of the benefits and protections of Colorado's laws.⁷⁴

In another recent decision, *Inset Systems, Inc. v. Instruction Set, Inc.*,⁷⁵ the United States District Court for the District of Connecticut held that a nonresident defendant's use of an Internet domain name was sufficient to subject it to jurisdiction in Connecticut.⁷⁶ The defendant, a Massachusetts corporation, was sued for using the plaintiff's trademark as its Internet domain name.⁷⁷ The court based its finding of jurisdiction on the ra-

As administrator, Plus System imposed an additional 3-cent service charge for certain types of transactions. *See id.* According to Plus System, the defendant, New England Network, Inc. ("NENI"), a membership corporation responsible for maintaining one of the local networks comprising a part of the Plus System network, failed to implement this additional charge in its network. *See id.* at 114-15. Plus System instituted a diversity action in the United States District Court for the District of Colorado to obtain a declaratory judgment and damages against NENI for its inaction. *See id.* at 115. In its motion for summary judgment, NENI, a Connecticut corporation, challenged the district court's exercise of personal jurisdiction. *See id.* at 115.

73. *Id.* at 119. The *Plus System* court also held that Colorado's exercise of jurisdiction over the defendant was reasonable:

We . . . find that the Defendant's activities or their consequences have a substantial enough connection with Colorado to make the exercise of jurisdiction reasonable. Defendant and its sponsored institutions receive their services and make payments to PLUS in Colorado. All of Defendant's communications with Plaintiff were directed to Plaintiff in Colorado. The consequences of the dispute between Plaintiff and Defendants have a substantial enough connection with Colorado to make the exercise of jurisdiction reasonable.

Id. at 119-20.

74. *Id.* at 117-19.

75. 937 F. Supp. 161 (D. Conn. 1996).

76. *Id.* at 164. A "domain name" is analogous to a street address in that it constitutes one's Internet address. *See id.* at 163 (discussing nature of domain names and their use). Domain names consist of three parts: "the first part identifies the part of the Internet desired, such as the world wide web (www); the second part is usually a name identifying the company or user; and the third part identifies the type of institution, such as government (.gov) or commercial (.com)." *Id.*

77. *See id.* at 163. The plaintiff, Inset Systems, Inc., is a computer software corporation incorporated and having its principal place of business in Connecticut. *See id.* at 162. On October 21, 1986, the plaintiff was issued and became the registered owner of the federal trademark "INSET." *See id.* at 163. Soon thereafter, the defendant, Instruction Set, Inc., began using "INSET.COM" as its Internet

tional that, in establishing its Internet site, the defendant purposefully directed its activities not only toward Connecticut, but to all states.⁷⁸ Furthermore, the *Inset Systems* court reasoned that because the defendant advertised its business through the Internet, which “can reach as many as 10,000 Internet users within Connecticut . . . [the defendant] purposefully availed itself of the privilege of doing business within Connecticut.”⁷⁹

2. *Finding Lack of Personal Jurisdiction*

Unlike the courts in *Inset Systems* and *Plus System*, the Florida District Court of Appeal in *Pres-Kap, Inc. v. System One, Direct Access, Inc.*,⁸⁰ refused to grant jurisdiction in a breach of contract action involving the use of an on-line computer database.⁸¹ In *Pres-Kap*, the defendant, a New York travel agency, contracted for the use of the plaintiff’s computer reservation system located in Florida.⁸² Although the defendant forwarded monthly payments to the plaintiff’s billing office in Miami, all other business between the parties was conducted through the plaintiff’s New York office.⁸³ As a result, the court reasoned that because the majority of the

domain address. *See id.* It was not until the plaintiff attempted to obtain the same Internet address in March, 1995, that the plaintiff became aware of the defendant’s Internet domain address. *See id.* Because the plaintiff had not authorized the defendant’s use of its trademark, the plaintiff filed suit against the defendant to recover damages for trademark infringement. *See id.*

78. *See id.* at 165.

79. *Id.* The *Inset Systems* court also found that holding the defendant amenable to jurisdiction in Connecticut was reasonable. *See id.* The court based its finding of reasonableness upon the minimal distance between Massachusetts and Connecticut and Connecticut’s substantial interest in adjudicating the dispute because it involved issues of Connecticut common and statutory law. *See id.* Thus, the court concluded that “its finding of minimum contacts in this case comports with notions of fair play and substantial justice.” *Id.*

80. 636 So. 2d 1351 (1994).

81. *See id.* at 1353-54.

82. *Id.* at 1352. In *Pres-Kap*, the plaintiff was a Delaware corporation with its principal place of business in Florida. *See id.* at 1351. The plaintiff provided travel agents nationwide with access to its computerized database for the purpose of making travel reservations. *See id.* Upon entering into a lease agreement with the plaintiff, a travel agency is provided computer terminals that allow the agency to access the plaintiff’s database in Florida. *See id.* at 1351-52. With the plaintiff’s service, a travel agent is able to book airline, automobile and hotel reservations in connection with the agency’s operations through the phone lines. *See id.* at 1352.

From 1982 to 1989, the defendant entered into three similar lease contracts with the plaintiff’s predecessor, a division of Eastern Airlines. *See id.* In the previous contracts, a forum selection clause was included that required the defendant to submit to jurisdiction in Florida in the event of a dispute. *See id.* The present contract, however, did not include such a clause. *See id.*

83. *See id.* Business relations between the plaintiff and defendant in *Pres-Kap* arose from a nationwide marketing effort by the plaintiff. *See id.* A representative from the plaintiff’s New York office solicited the defendant’s business and initiated contract negotiations. *See id.* In December 1989, the defendant executed the lease agreement in New York and forwarded it to the plaintiff’s Florida office, where it was executed by a representative of the plaintiff. *See id.*

business under the contract was conducted in New York, the defendant could not have reasonably expected litigation in Florida.⁸⁴ Moreover, the court held that the defendant's awareness of the location of the computer database was irrelevant because any financial benefit derived by the defendant "was a financial gain arising from a New York, not a Florida based business transaction."⁸⁵ Thus, the *Pres-Kap* court based its denial of jurisdiction on a lack of sufficient contacts between the defendant and the forum state.⁸⁶

Early in 1991, the defendant notified the plaintiff's New York office that the reservation system was malfunctioning. *See id.* Upon the plaintiff's failure to repair the equipment, the defendant discontinued its monthly payments under the lease agreement. *See id.* The plaintiff filed this action to recover for breach of the lease agreement. *See id.*

84. *See id.* at 1353. The court discussed the contacts involved in the present case:

[T]he record clearly shows that the defendant is a New York corporation doing business in New York as a travel agency with no offices outside of New York; that the plaintiff, through its New York office, solicited the defendant's business in the state of New York where the subject contract, as well as prior contracts, were negotiated by the parties and executed by the defendant; that the computer equipment supplied under the contract was delivered to the defendant in New York; and when the defendant experienced difficulties with the computerized equipment, complaints were directed to the New York office of the plaintiff.

Id. at 1352. Based on the "totality of the circumstances," the *Pres-Kap* court concluded that the defendant's reasonable expectation was not that it would be held subject to jurisdiction in Florida, but that "New York courts would be resorted to in the event of a dispute." *Id.* at 1353. Thus, the court held that compliance with the minimum contacts due process requirement had not been met. *See id.*

85. *Id.* at 1353. The *Pres-Kap* court explained that although the defendant may have benefited financially from the use of the Florida-based computer service, such financial benefit arose from a New York-based business transaction. *See id.* Thus, according to the *Pres-Kap* court, the defendant's knowledge of the location of the computer database was irrelevant because such knowledge would not change the defendant's reasonable expectations of having disputes arising under the agreement resolved in a New York court. *See id.*

86. *See id.* at 1352-53. In considering its decision, the *Pres-Kap* court expressed its reservations as to a contrary finding. *See id.* at 1353. According to the court, holding such a defendant amenable to suit would have far-reaching implications for users of on-line services because it would render them subject to suit in any state where the supplier's database is located. *See id.* Specifically, the court found that such a decision would affect the "[l]awyers, journalists, teachers, physicians, courts, universities, and business people throughout the country [that] daily conduct various types of computer-assisted research." *Id.* According to the court, the exercise of jurisdiction over such users would be "wildly beyond the[ir] reasonable expectations . . . and, accordingly, the result offends traditional notions of fair play and substantial justice." *Id.*

In his dissenting opinion, Judge Barkdull ignored such concerns, arguing that the defendant's prior contracts put it on notice "that it could reasonably expect to be sued in the courts of Florida." *Id.* at 1354 (Barkdull, J., dissenting). Moreover, Judge Barkdull argued that the exercise of such jurisdiction was reasonable given the financial benefit the defendant received from the use of the Florida-based service. *See id.* (Barkdull, J., dissenting).

III. FACTS AND PROCEDURAL HISTORY

In *Patterson*, the plaintiff, CompuServe, was a computer information service located in Columbus, Ohio.⁸⁷ It provided subscribers with access to computing and information services through the Internet.⁸⁸ In addition, CompuServe also operated as an electronic conduit to provide subscribers with computer software products that originated from CompuServe itself or from other third-party providers.⁸⁹ Computer programs distributed in this manner are commonly referred to as "shareware."⁹⁰ These third-party providers (commonly referred to as "shareware providers") contract with CompuServe to store and market their software on CompuServe's system.⁹¹ In return, CompuServe receives a fifteen-percent fee from every copy of shareware sold before remitting the balance to the shareware's creator.⁹²

The defendant, Richard S. Patterson, was a CompuServe subscriber from Houston, Texas, who developed and marketed computer software under the name of Flashpoint Development.⁹³ In 1991, Patterson entered

87. See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260 (6th Cir. 1996).

88. See *id.* CompuServe is one of the leading commercial on-line services "with over 4.3 million subscribers." *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 841 (E.D. Pa. 1996). Through CompuServe, a subscriber can electronically access more than 1700 information services. See *Patterson*, 89 F.3d at 1260 (discussing CompuServe).

89. See *Patterson*, 89 F.3d at 1260.

90. See *id.* Shareware is software, usually written by independent authors and small publishing houses, marketed and distributed over the Internet under a licensing agreement. See CAVAZOS & MORIN, *supra* note 1, at 63-64 (defining shareware and discussing how it is used). The licensing agreement permits use of the software for a specified time period, at the end of which users are asked to register the software with the author if they intend to continue to use it. See *id.* at 63. The software is usually registered by sending a registration fee. See *id.* Thus, voluntary compliance by the user is required for shareware to generate revenue because a user may or may not pay the creator's suggested licensing fee upon the expiration of the specified trial period. See *Patterson*, 89 F.3d at 1260 (noting that shareware only makes money if subscribers voluntarily pay licensing fees). Some commentators have suggested that software distribution will eventually occur entirely on-line, with shareware replacing over-the-counter sales. See David A. Andelman, *Joining the Ends of the Universe*, MGMT. REV., Feb. 1996, at 54, 54 (predicting that in ten years over 90% of software distribution will occur on-line); see also *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996) (explaining that "[m]uch software is ordered over the Internet by purchasers who have never seen a box").

A user registering shareware obtained through CompuServe is required to pay the registration fee directly to CompuServe. See *Patterson*, 89 F.3d at 1260 (discussing CompuServe's procedure for licensing shareware to subscribers). From this amount, CompuServe takes a 15% fee for its services and remits the balance to the shareware's creator. See *id.*

91. See *Patterson*, 89 F.3d at 1260.

92. See *id.* CompuServe currently receives \$3,000,000 in annual revenue from shareware registration. Brief for Appellant at 4 n.2, *Patterson* (No. 95-3452).

93. See *Patterson*, 89 F.3d at 1260. Although Patterson became a member of CompuServe from his computer in Texas, the CompuServe Service Agreement

into a shareware registration agreement ("SRA") with CompuServe, in which he agreed to become a shareware provider.⁹⁴ Although the agreement was made through the Internet, the SRA provided that it was made and entered into in Ohio.⁹⁵ Moreover, the SRA also stated that Ohio law would govern in the event of a dispute.⁹⁶

Under the terms of the SRA, from 1991 through 1994, Patterson transmitted and deposited thirty-two master software files, which were stored in CompuServe's system and made available to CompuServe subscribers for purchase.⁹⁷ The programs, "WinNav," "Windows Navigator" and "Flashpoint Windows Navigator," were designed to help users navigate their way around the Internet.⁹⁸ Patterson also placed advertisements for his software on the CompuServe system, at least one of which included price terms.⁹⁹ During the four years Patterson's software was available on CompuServe's system, twelve Ohio residents purchased less than \$650 worth of Patterson's software.¹⁰⁰

In 1993, CompuServe developed and began marketing a program similar to Patterson's under the name "WinNav."¹⁰¹ Consequently, in December of 1993, Patterson contacted CompuServe through electronic mail and informed them that "WinNav," "Windows Navigator" and "Flashpoint Windows Navigator" were common law trademarks owned by himself and

("Service Agreement") provides that the contract was made and performed in Ohio. *See id.*

94. *See id.* The *Patterson* court noted that although it contained standardized language prepared by CompuServe, the shareware registration agreement ("SRA") required Patterson to type the word "Agree" at various points in the document in order to demonstrate Patterson's recognition of the terms and conditions of the agreement. *See id.* at 1260-61.

95. *See id.* at 1260. The Service Agreement provided that "it is to 'be governed by and construed in accordance with' Ohio law." *Id.* (quoting Center for Democracy & Technology, *CompuServe Service Agreement* (visited Jan. 21, 1998) <http://www.cdt.org/privacy/online_services/CompuServe/CompuServe.html>). In discussing the Service Agreement, the *Patterson* court noted that it appeared to be a standardized agreement prepared by CompuServe. *See id.*

96. *See id.* As with the Service Agreement, Patterson entered into the SRA with CompuServe from his computer in Texas. *See id.* at 1261. Thus, Patterson assented to the terms of the SRA in Texas and, thereafter, transmitted his assent to the CompuServe computer system in Ohio. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.* CompuServe asserts, however, that Patterson marketed his software exclusively through their system. *See id.* CompuServe also contends that although only 12 copies of Patterson's software were sold to Ohio residents, over 1800 copies of Patterson's software programs were distributed its subscribers. *See CompuServe, Inc. v. Patterson*, No. C2-94-91, 1995 U.S. Dist. LEXIS 7530, at *4 (S.D. Ohio Mar. 23, 1995).

101. *See Patterson*, C2-94-91, 1994 U.S. Dist. LEXIS 20352, at *3 (S.D. Ohio Aug. 11, 1994).

his company.¹⁰² CompuServe then ceased use of the "WinNav" trademark and changed the name to "CompuServe Navigator."¹⁰³ Patterson continued to complain, claiming that his trademark extended to use of the term "Navigator."¹⁰⁴ CompuServe ultimately began negotiations with Patterson concerning the trademark violations, whereupon Patterson demanded at least \$100,000 to settle his potential claims.¹⁰⁵ In response, CompuServe filed a declaratory judgment action in the United States District Court for the Southern District of Ohio.¹⁰⁶

In this action, CompuServe sought a declaration that it had not infringed any common law trademarks owned by Patterson or FlashPoint Development.¹⁰⁷ Patterson then filed a consolidated motion to dismiss CompuServe's complaint on several grounds, including lack of personal jurisdiction.¹⁰⁸ The district court, finding the contacts between Patterson

102. See *Patterson*, 89 F.3d at 1261. Similar to conventional mail, electronic mail, commonly referred to as "e-mail," allows computer network users to correspond with one another on-line. See CAVAZOS & MORIN, *supra* note 1, at 5 (discussing nature and use of electronic mail). E-mail is sent to a user's Internet address and is delivered into the recipient's mailbox, where it becomes available to the recipient the next time he or she is on-line. See *id.* Although there are several means available for communicating on-line, e-mail is one of the most widely used services. See *Shea ex rel. American Reporter v. Reno*, 930 F. Supp. 916, 927 (S.D.N.Y. 1996) (noting prominence of e-mail among modes of communication over Internet), *aff'd*, 117 S. Ct. 2501 (1997). In fact, e-mail is beginning to gain wide acceptance as a means of communication among the business community. See Gilbert Chan, *Small Firms Continue to Spur Growth in State*, SACRAMENTO BEE, Mar. 24, 1997, at IB11 (noting that 28% of small business owners use e-mail); Beth W. Orenstein, *E-mail Gains Enthusiastic Backers in Business Circles*, E. PA. BUS. J., Mar. 3, 1997, at 10 (discussing rise in use of e-mail among area businesses). One of the main ways in which e-mail benefits business is the reduction in cost, as paper flow is dramatically reduced and long distance phone calls are no longer necessary. See Orenstein, *supra*, at 9 (noting that companies making greater use of e-mail have experienced reduction in amount of paper used). Moreover, the ease with which e-mail can be composed and sent allows business to run more efficiently. See *id.* (discussing how companies have grown dependent upon e-mail in daily operations).

In his e-mail to CompuServe, Patterson asserted that CompuServe's actions infringed upon his trademark and, thus, constituted an unfair trade practice. See *Patterson*, 89 F.3d at 1261. Patterson's marks, however, were not federally registered trademarks. See Brief for Appellant at 4, *Patterson* (No. 95-3452).

103. See Brief for Appellant at 5, *Patterson* (No. 95-3452).

104. See *id.* CompuServe has used the mark "Navigator" in the sale of more than 76,000 copies of software from 1989 to date. See *id.*

105. See *Patterson*, 89 F.3d at 1261. In its brief, CompuServe asserted that negotiations were conducted with Patterson through both on-line and written communications. See Brief for Appellant at 5, *Patterson* (No. 95-3452). CompuServe estimated it would lose \$10.8 million in software sales revenue if Patterson's trademark allegations were true. See *id.*

106. See *Patterson*, 89 F.3d at 1261.

107. See *id.*

108. See *id.* Patterson's motion to dismiss was based on several grounds, including lack of subject matter jurisdiction, insufficiency of process and failure to state a claim upon which relief could be granted. See *CompuServe, Inc. v. Patterson*, No. C2-94-91, 1994 U.S. Dist. LEXIS 20352, at *21 (Aug. 11, 1994).

and Ohio too tenuous, granted Patterson's motion and dismissed the case for lack of personal jurisdiction.¹⁰⁹ CompuServe's motion for a rehearing

109. *See Patterson*, 89 F.3d at 1261. In making its decision, the district court only considered the pleadings and papers filed in support of and in opposition to the motion to dismiss. *See id.* The district court applied a three-part test for determining whether jurisdiction over the defendant was proper: (1) whether the defendant purposefully availed itself of the privilege of acting in the forum state; (2) whether the cause of action arose in the forum state; and (3) whether the defendant has substantial enough contacts with the state that the exercise of jurisdiction over the defendant is reasonable. *See Patterson*, 1994 U.S. Dist. LEXIS 20352, at *7.

In applying the first prong, the district court held that the contacts between Patterson and CompuServe were of such a minimal nature that there was no showing of purposeful availment. *See id.* at *17. The district court reached this decision through analogizing the present case to prior cases involving interstate business negotiations and relationships. *See id.* at *11. The court found that, unlike the Supreme Court's decision in *Burger King*, no extensive negotiations took place between Patterson and CompuServe prior to the agreement. *See id.* at *16. Rather, the district court held that CompuServe's contractual terms were standardized and offered "on a 'take it or leave it' basis." *Id.* Moreover, the district court found that the contract between the parties did not contemplate an ongoing business relationship, but rather a "minimal course of dealing." *Id.* at *17 (quoting *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1118 (6th Cir. 1994)). Based upon these findings, the court found that the defendant did not purposefully avail himself of the benefits of Ohio law. *See id.*

Under the second prong, the district court held that the dispute did not arise out of Patterson's contacts with Ohio. *See id.* at *18-19. The court reasoned that the presence of Patterson's software on CompuServe's server was irrelevant because the defendant could have claimed a trademark violation against CompuServe regardless of where his software was stored. *See id.* Moreover, the court held that Patterson's use of CompuServe's network to inform the plaintiff of the clash in legal interests was also irrelevant to the jurisdictional inquiry. *See id.* at *19.

In assessing the reasonableness of subjecting Patterson to jurisdiction in Ohio, the district court concluded that "it would be manifestly unreasonable for this or any Ohio court to exercise jurisdiction over this case." *Id.* at *20-21. The court further reasoned that the minimal contacts between Patterson and Ohio would make the exercise of jurisdiction inherently unreasonable. *See id.* at *20. The district court stated that

[i]f this were simply a suit brought by CompuServe to collect a small amount from a Texas resident who, while seated at his computer terminal, became a member of the CompuServe network, the Court would have a very difficult time concluding that the exercise of jurisdiction over that customer in the State of Ohio was proper. Although the nature of the controversy between the parties in this case is different, the Court concludes that it is no more connected with purposeful activities within the State of Ohio than the standard customer dispute

Id.

Upon deciding that it lacked personal jurisdiction over Patterson, the district court found it unnecessary to address the other issues raised in Patterson's motion to dismiss. *See id.* at *21. The court then dismissed the claim, concluding that "CompuServe is free to reinstitute this action in a court where personal jurisdiction over the defendant can be obtained." *Id.*

was denied.¹¹⁰ CompuServe subsequently appealed the district court decision to the Sixth Circuit.¹¹¹

IV. ANALYSIS

A. *Narrative Analysis*

On appeal, the Sixth Circuit reversed the district court's decision, finding that Patterson's contacts with Ohio were sufficient to support the exercise of personal jurisdiction.¹¹² In reversing the district court, the appellate court applied traditional jurisdictional analysis and concluded that it was reasonable to hold Patterson amenable to suit in Ohio.¹¹³ Therefore, finding that personal jurisdiction over Patterson was present, the court remanded the case to the district court for further proceedings.¹¹⁴

1. *Scope of Ohio's Long Arm Statute*

As a preliminary measure, the court needed to determine whether state law permitted the district court to exercise jurisdiction over Patterson.¹¹⁵ Under Ohio's long arm statute, an Ohio court may exercise per-

110. *See* CompuServe, Inc. v. Patterson, No. C2-94-91, 1995 U.S. Dist. LEXIS 7530, at *9 (S.D. Ohio Mar. 13, 1995). According to the district court, a motion for rehearing could only be granted upon a showing that there was a mistake of law or fact, or that new evidence exists that could not have previously been discovered. *See id.* at *2. In its memorandum in support of the motion for rehearing, CompuServe argued that the district court failed to appreciate certain facts in making its decision. *See id.* at *4. The district court found this argument was without merit because CompuServe was merely asking the court to reconsider evidence already presented at trial. *See id.* at *6. CompuServe's second argument was based on the discovery of new evidence relating to the number of software packages Patterson sold through CompuServe's systems. *See id.* The district court denied the petition for a rehearing because the new evidence could have been discovered previously. *See id.* at *7.

111. *See Patterson*, 89 F.3d at 1261. On appeal, Patterson failed to file an appellate brief and was not present at oral arguments. *See id.*

112. *See id.* at 1260. Because the district court failed to conduct an evidentiary hearing before ruling on Patterson's motion to dismiss, the appellate court was required to consider the pleadings and affidavits in a light most favorable to CompuServe. *See id.* at 1262 (citing *Theunissen v. Matthews*, 935 F.2d 1454, 1458-59 (6th Cir. 1991)). Moreover, because of the district court's failure to hold an evidentiary hearing, the appellate court could not consider Patterson's affidavit in the analysis. *See id.* at 1263. Therefore, to defeat Patterson's motion to dismiss, CompuServe was only required to make a prima facie showing of jurisdiction. *See id.*

113. *See id.* at 1263. The *Patterson* court addressed the proper analysis to apply: "As always in this context, the crucial federal constitutional inquiry is whether, given the facts of the case, the nonresident defendant has sufficient contacts with the forum state that the district court's exercise of jurisdiction would comport with 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

114. *See id.* at 1268-69.

115. *See id.* at 1262 (applying law of forum state subject to limitations of Due Process Clause). In order to exercise jurisdiction over a nonresident defendant, a federal court in a diversity action must determine whether the defendant is amena-

sonal jurisdiction over a nonresident if the claim arises from a business transaction.¹¹⁶ To determine the scope of the statute, the *Patterson* court relied upon prior Sixth Circuit decisions that have established the “transacting business” clause as permitting the exercise of jurisdiction to the federal constitutional limits of due process.¹¹⁷ Thus, because Patterson conducted business in Ohio through his relationship with CompuServe, the *Patterson* court held that exercising jurisdiction over Patterson was permissible under Ohio law.¹¹⁸

In addition to this inquiry, however, the court also considered whether exercising jurisdiction over Patterson would violate his due process rights.¹¹⁹ Therefore, the court also had to determine whether exercising jurisdiction over Patterson would “comport with ‘traditional notions of fair play and substantial justice.’”¹²⁰

2. Due Process Analysis

In its due process analysis, the *Patterson* court adopted the test articulated in *Southern Machine Co. v. Mohasco Industries, Inc.*,¹²¹ to determine whether exercising jurisdiction over Patterson was consistent with due process requirements.¹²² Under *Southern Machine*, jurisdiction is only proper

ble to suit under the state’s long arm statute. *See id.* (citing *Reynolds v. International Amateur Athletic Fed’n*, 23 F.3d 1110, 1115 (6th Cir. 1994)).

116. *See id.* at 1262 (applying Ohio long arm statute). Under section 2307.382(A)(1) of the Ohio Revised Code, an Ohio court “may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person’s transacting any business in this state.” OHIO REV. CODE ANN. § 2307.382(A)(1) (Anderson 1995). For a discussion of long arm statutes and their application, see FRIEDENTHAL ET AL., *supra* note 18, § 3.12-13, at 138-47.

117. *See Patterson*, 89 F.3d at 1262 (citing *Reynolds*, 23 F.3d at 1116). In *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 224-25 (6th Cir. 1972), the Sixth Circuit established that the Ohio legislature intended section 2307.382(A)(1) to extend to the constitutional limits. *See id.* The transacting business clause of section 2307.382(A)(1) provides that “[a] court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person’s: (1) Transacting [of] any business in this state.” OHIO REV. CODE ANN. § 2307.382(A)(1). The *In-Flight* court recognized that it was an established Ohio rule that interpretations of comparable legislation enacted elsewhere should be given significant weight. *In-Flight*, 466 F.2d at 225. The *In-Flight* court reasoned that because the Ohio legislature adopted language similar to the Illinois long arm statute, which was enacted prior to the Ohio statute and construed as extending jurisdiction to the limits of due process, the Ohio statute must be construed to achieve an identical result. *Id.*

118. *Patterson*, 89 F.3d at 1262-63 (concluding it was reasonable to subject Patterson to suit in Ohio).

119. *See id.* at 1262 (noting Ohio personal jurisdiction cases require examination of due process limits because Ohio long arm statute allows for exercise of jurisdiction to extent permissible under Constitution).

120. *Id.* at 1263 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

121. 401 F.2d 374 (6th Cir. 1968).

122. *Patterson*, 89 F.3d at 1263. In *Southern Machine*, a nonresident defendant contracted to have the plaintiff manufacture and sell machine attachments on

when (1) a nonresident defendant purposely avails himself or herself of the privileges of the forum state; (2) the cause of action arises from the defendant's activities in the state; and (3) the defendant's acts create such a substantial connection with the forum state as to make the exercise of jurisdiction reasonable.¹²³

a. Purposeful Availment Requirement

In addressing the first prong of the *Southern Machine* due process test, the *Patterson* court concluded that Patterson purposefully availed himself of the privilege of doing business in Ohio.¹²⁴ To satisfy the purposeful availment requirement, a court must decide whether the nonresident defendant's contacts with the forum state created a substantial connection with that state, such that these contacts should make the defendant "reasonably anticipate being haled into court there."¹²⁵ Although the *Patterson* court found the connection between Patterson and Ohio to be undeniable, the court found it difficult to characterize the connection as "substantial."¹²⁶ Nevertheless, after considering the fact that Patterson de-

which the defendant owned the patent rights. *Southern Machine*, 401 F.2d at 378 (discussing relationship between plaintiff and defendant). After determining that the Tennessee long arm statute authorized jurisdiction, the court applied traditional jurisdictional analysis to the facts to determine whether subjecting the defendant to jurisdiction in Tennessee was consistent with due process. *See id.* at 382 ("We are applying a constitutional standard defined in the broadest terms of 'general fairness' to the defendant."). Upon conducting its jurisdictional analysis, the *Southern Machine* court found that because the defendant had intentionally contracted with a Tennessee corporation, whose only manufacturing plant was in Tennessee, the defendant had purposefully availed itself of the privilege of doing business in Tennessee. *See id.* at 383. Moreover, finding that Tennessee had a substantial interest in the litigation, the court held that it was not unreasonable to subject the defendant to suit there. *See id.* at 385 ("[W]hen the contract is with a resident of Tennessee, the State's interest in resolving a suit based on the contract . . . cannot be doubted.").

123. *See Southern Machine*, 401 F.2d at 381 (stating criteria for outer limits of *in personam* jurisdiction). The *Southern Machine* test was based upon the principles established in both *McGee* and *Hanson*. *See id.* (noting origin of criteria for establishing *in personam* jurisdiction). The three-prong approach adopted by the Sixth Circuit in *Southern Machine* had already been adopted by the Fifth, Eighth and Ninth Circuits. *See id.* at 381 n.17 (noting that other circuits have adopted similar approach).

124. *Patterson*, 89 F.3d at 1263-67. In commenting upon the relevance of the purposeful availment requirement, the *Patterson* court stated that "the question of whether a defendant has purposefully availed itself of the privilege of doing business in the forum state is 'the *sine qua non* for *in personam* jurisdiction.'" *Id.* at 1263 (quoting *Southern Machine*, 401 F.2d at 381-82).

125. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985)). The court emphasized that the purposeful availment requirement does not require that the defendant be physically present in the forum state. *See id.* at 1264. The only requirement is a showing that the defendant purposefully directed his or her efforts toward residents of another state. *See id.* (noting that physical presence is not required for personal jurisdiction).

126. *Id.* The court relied on the fact that Patterson subscribed to CompuServe and entered into the shareware agreement on his own accord. *See id.*

liberately entered into a written agreement with an Ohio corporation to market his wares in Ohio and elsewhere, the court concluded that Patterson did create a substantial connection with Ohio.¹²⁷ Thus, because Patterson should have reasonably anticipated that his actions would have consequences in Ohio, the court held that Patterson had purposely availed himself of the privileges of that state.¹²⁸

b. Cause of Action Arising from Patterson's Activities

Pursuant to the second prong of *Southern Machine*, the *Patterson* court next determined that CompuServe's claim arose out of Patterson's activities in Ohio.¹²⁹ Under the "cause of action requirement," an action must

Moreover, the court noted that it was Patterson who was repeatedly sending his software to Ohio. *See id.* The court also considered the fact that Patterson initiated the events that led to the filing of the suit by informing CompuServe of the possible trademark violations. *See id.* Although the *Patterson* court found Patterson's actions as unquestionably directed toward Ohio, the court stated that "[t]he real question is whether these connections with Ohio are 'substantial' enough that Patterson should reasonably have anticipated being haled into an Ohio court." *Id.*

127. *See id.* (distinguishing contract cases relied upon by district court). In contrast to the district court, the *Patterson* court found the de minimis amount of software sales in Ohio irrelevant. *See id.* at 1265 (focusing upon deliberate and repeated nature of Patterson's contacts and not on fact that such contacts yielded little revenue in Ohio). The court reasoned that focusing solely on the amount of sales in Ohio ignores the sales Patterson may have made to others elsewhere. *See id.* at 1265-66 (noting relationship of Ohio to sales made in other forums). Thus, the court took into consideration Patterson's software sales to both Ohio residents and nonresidents alike in assessing whether Patterson had established substantial contacts with Ohio. *See id.* (considering effects of sales made in other forums on establishment of personal jurisdiction in Ohio). For a further discussion of the district court's holding on the issue of substantial contacts, see *supra* note 125 and accompanying text.

In concluding that Patterson created a substantial connection with Ohio, the *Patterson* court analogized the present case to an Ohio Supreme Court case in which the court held that substantial contacts were created when a nonresident defendant made long-distance telephone calls to Ohio, shipped goods there for sale and utilized distribution facilities there for distributing its products. *See Patterson*, 89 F.3d at 1265 (analogizing to *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.*, 624 N.E. 2d 1048 (Ohio 1994)). The *Patterson* court reasoned that, like the nonresident defendant in the Ohio case, Patterson frequently contacted Ohio and repeatedly sent goods there, and thus, in effect, appointed CompuServe as his electronic distributor. *See id.* (analogizing relationship between Patterson and CompuServe to relationship between manufacturer and distributor). Therefore, the court found Patterson's conduct substantial enough to support Ohio's exercise of jurisdiction. *See id.*

128. *See Patterson*, 89 F.3d at 1265 (focusing upon fact that Patterson both initiated contact with CompuServe and injected his product into stream of commerce).

129. *Id.* at 1267. "Patterson's contacts with Ohio are certainly related to the operative facts of that controversy." *Id.* The *Patterson* court commented upon the "arise out of" requirement:

Even though we have found that Patterson purposefully availed himself of Ohio privileges, we must also find that CompuServe's claims against him arise out of his activities in Ohio if we are to find the exercise of jurisdic-

arise out of the same operative facts as the defendant's contacts with the forum state.¹³⁰ Although the district court held that Patterson's contacts with Ohio were unrelated to CompuServe's alleged trademark violations, the appellate court disagreed.¹³¹ The appellate court noted that because common law trademark rights are obtained through actual use in commerce, Patterson's trademark would have been created in Ohio.¹³² Therefore, the circuit court reasoned that any trademark violation would have occurred, at least in part, in Ohio.¹³³

c. Reasonableness Requirement

In considering the third prong of the *Southern Machine* analysis, which is the reasonableness of requiring Patterson to defend himself in an Ohio court, the *Patterson* court found that Patterson's status as an entrepreneur, along with Ohio's interest in resolving the dispute, outweighed any burden of having to litigate in a foreign jurisdiction.¹³⁴ In evaluating the reasonableness of exercising jurisdiction, the court considered three factors: (1) the burden on the defendant; (2) the interest of the forum state; and (3) the plaintiff's interest in obtaining relief.¹³⁵ In balancing these factors, the *Patterson* court found that Ohio's interest in resolving the dispute and CompuServe's interest in obtaining relief, outweighed any burden

tion proper. If a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts.

Id. (citations omitted).

130. *See id.* (citing *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir. 1994)).

131. *See id.*

132. *See Patterson*, 89 F.3d at 1267 (noting that Patterson marketed and sold software only through Ohio-based CompuServe).

133. *See id.* (discussing effect of Ohio contacts on location of alleged trademark violations). In concluding that the cause of action arose from Patterson's actions, the *Patterson* court also considered the fact that CompuServe's declaratory judgment action arose out of Patterson's threats, through regular and electronic mail, to bring suit against CompuServe if CompuServe did not pay him \$100,000 for using his marks. *See id.* at 1261, 1267. The court held Patterson's threats satisfied the "arise out of" requirement because these contacts with Ohio gave rise to the present case. *See id.* at 1267.

134. *Id.* at 1267-68. In considering whether it was reasonable to subject Patterson to jurisdiction in Ohio, the *Patterson* court stated that because the first two prongs of the *Southern Machine* test were satisfied, an inference of reasonableness could be made. *See id.* (citing *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988); *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 384 & n.30 (6th Cir. 1968)). Thus, the *Patterson* court reviewed the case under a presumption that the reasonableness prong had been met. *See id.*

135. *See id.* In its initial discussion of the reasonableness requirement, the court enumerated an additional factor for consideration: "the interest of other states in securing the most efficient resolution of controversies." *Id.* (quoting *American Greetings*, 839 F.2d at 1169-70). The court, however, failed to address this factor in assessing the reasonableness of subjecting Patterson to jurisdiction in Ohio. *See id.*

placed upon Patterson.¹³⁶ Accordingly, the *Patterson* court reasoned that although it may be burdensome for Patterson to defend a suit in Ohio, he was made aware of such a possibility through his connections with Ohio.¹³⁷

3. *Court's Limitation of Its Decision*

Realizing the novel issue presented under the facts of the case, the *Patterson* court found it important to limit the scope of its holding.¹³⁸ The court provided:

We need not and do *not* hold that Patterson would be subject to suit in *any* state where his software was purchased or used; that is not the case before us. We also do not have before us an attempt by another party from a third state to sue Patterson in Ohio for, say a "computer virus" caused by his software, and thus we need not address whether personal jurisdiction could be found on those facts. Finally, we need not and do not hold that CompuServe may, as the district court posited, sue any regular subscriber to its service for nonpayment in Ohio, even if the subscriber is a native Alaskan who has never left home. Each of those cases may well arise someday, but they are not before us now.¹³⁹

Thus, the court attempted to ensure that its holding would not be construed to support the exercise of jurisdiction when contacts are too tenuous.¹⁴⁰

B. *Critical Analysis*

In *Patterson*, the Sixth Circuit correctly concluded that Patterson was subject to personal jurisdiction in Ohio.¹⁴¹ Consistent with the court's determination, Patterson's contacts with Ohio were clearly sufficient to support a finding of minimum contacts.¹⁴² Moreover, the court properly

136. *Id.* The court noted Ohio's strong interest in resolving dispute involving Ohio trademark law and CompuServe's strong interest regarding the impact of the decision on its relationships with other "shareware" providers who direct their activities toward Ohio. *See id.* The court realized Texas' interest in resolving a dispute involving one of its citizens. *See id.* at 1268 n.8. The court also emphasized that CompuServe is a subsidiary of H&R Block and both of these entities have divisions located in Texas. *See id.*

137. *Id.* at 1268.

138. *Id.*

139. *Id.* (citations omitted).

140. *See id.* (stating that "because of the unique nature of this case, we deem it important to note what we do not hold").

141. *Id.* at 1268-69.

142. For a further discussion of the *Patterson* court's determination that Patterson established sufficient contacts to support the exercise of jurisdiction in Ohio, see *infra* notes 144-52 and accompanying text.

weighed the reasonableness factors in concluding that the exercise of jurisdiction over Patterson was fair.¹⁴³

1. *Patterson's Contacts with the State of Ohio*

Although *Patterson* presented a novel and seemingly complex issue, the Sixth Circuit adopted the correct approach in focusing solely upon the nature and quality of Patterson's contacts with Ohio.¹⁴⁴ Thus, as long as

143. For a discussion of the reasonableness of subjecting Patterson to jurisdiction in Ohio, see *infra* notes 153-63 and accompanying text.

144. See *Patterson*, 89 F.3d at 1263-67 (discussing purposeful nature of Patterson's contacts with Ohio). Several commentators have addressed the complexity of reconciling cyberspace with traditional jurisdictional principles. See KENT D. STUCKEY, INTERNET AND ONLINE LAW § 10.02[2], at 10-5 (1996) (stating that Internet allows interaction without "many of the physical acts that traditionally provide sufficient minimum contacts"); Byassee, *supra* note 1, at 199 (noting that cyberspace activity strains legal principles governing judicial power over individuals); Counts & Martin, *supra* note 26, at 1126 (predicting difficulties in applying purposeful availment analysis in cyberspace); Michael J. Santisi, Note, Pres-Kap, Inc. v. System One, Direct Access, Inc.: *Extending the Reach of the Long-Arm Statute Through the Internet?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 433, 433 (1995) (stating that "computers have added another dimension to the area of personal jurisdiction law"); see also I. Trotter Hardy, *The Proper Legal Regime For "Cyberspace,"* 55 U. PITT. L. REV. 993, 994 (1994) (noting that customary legal paradigms are often inadequate to resolve conflicts arising in cyberspace). The primary concern centers around the fact that Internet contacts take place without physical interaction, which has traditionally formed the basis for the exercise of jurisdiction. See Byassee, *supra* note 1, at 199 ("Activity in cyberspace . . . creates new relationships among individuals that differ from their analogues in the more usual, physical existence."); Zembek, *supra* note 5, at 350 ("The ultimate question is whether an internet user's electronic contact, at near light speed, allows a court to exercise specific jurisdiction over the non-resident defendant, when the electronic contact was so slight that the forum was unaware of an internet user's virtual presence."). Moreover, the lack of understanding of how contacts occur through the Internet adds to the confusion. See Zembek, *supra* note 5, at 365 (arguing that district court's decision in *Patterson* "fail[ed] to apply the appropriate legal paradigm to the developing law of cyberspace").

As one commentator notes, however, an Internet user is capable of contracting for services in the forum state and deriving financial benefit from that contract. See Santisi, *supra*, at 435 (noting that Internet allows active performance of contract without entering forum state); see also Zembek, *supra* note 5, at 346 ("Traditional legal notions do fit complex cyberspace questions once one realizes that both the actors and activities are real."). An Internet user, therefore, is capable of directing activity toward the forum state that can cause serious consequences for that state. See Byassee, *supra* note 1, at 199 (stating that "inhabitants of cyberspace are . . . citizens of a physical jurisdiction"). Consequently, the Internet should simply be thought of as a new communication medium through which obligations are created for individuals throughout the world. See Zembek, *supra* note 5, at 347 & n.41 (noting that "Cyber-activity is not above the law").

Under the minimum contacts inquiry, the essential question is whether the nonresident defendant has established "certain minimum contacts with . . . [the forum state] 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) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The minimum contacts approach is premised upon the notion that the exercise of the privilege of conducting business within a state may give rise to the

the defendant has purposefully directed his or her activity toward the forum state, the means through which he or she does so is less important to the jurisdictional inquiry.¹⁴⁵ Thus, the court properly addressed the Internet as a new communication medium, which is capable of causing substantial effects in the physical world.¹⁴⁶

obligation to respond to suit in that state. *See id.* at 319 (noting reasonableness of requiring corporations to respond to suits stemming from exercise of privileges in forum state). Therefore, because on-line contacts may give rise to consequences in another state, cyberspace is not above the law of personal jurisdiction and should be evaluated upon the traditional jurisdiction principles enunciated in *International Shoe* and its progeny. *See Zembek, supra* note 5, at 347-48 (noting that injured party must recover from Internet user in manner that comports with due process limitations). The only caution, however, is making certain that courts apply the traditional principles with a proper understanding of the nature of how contacts occur through cyberspace. *See id.* at 357 (stating that "failure to comprehend the nature of the internet" has caused courts to misunderstand applicability of existing jurisprudence).

145. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (finding jurisdiction proper when "commercial actor's efforts are 'purposefully directed' toward residents of another State"). The fact that the majority of Patterson's contacts with Ohio were through the Internet does not change the jurisdictional inquiry of whether the nature and quality of the nonresident defendant's conduct is sufficient to render the defendant subject to suit in the forum state. *See International Shoe*, 326 U.S. at 318 (noting that it is nature and quality of acts that render defendant liable to suit in forum state). In *Burger King*, the Supreme Court reiterated the principle enunciated in *International Shoe* that a nonresident defendant need not be present in the forum state to allow the exercise of jurisdiction. *See Burger King*, 471 U.S. at 476 (noting that substantial amounts of business are transacted without physical presence in forum state). The *Burger King* Court noted that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Id.* The Court further noted that "[as] long as a commercial actor's efforts are 'purposefully directed' toward residents of another State . . . an absence of physical contacts can[not] defeat personal jurisdiction there." *Id.* Thus, the proper focus of jurisdictional analysis is not on the medium used to establish those contacts, but on whether the nonresident defendant's activities have created a substantial connection with the forum state. *See id.* at 475.

146. *See Zembek, supra* note 5, at 347 (noting consequences of cyberactivity on physical world). Because the Internet exists in connection with the physical world, courts must analyze it in terms of other technological innovations to resolve jurisdictional issues. *See id.* at 367 (arguing that "existing paradigms . . . can resolve cyberspace's complex jurisdictional issues"). Thus, to determine the proper jurisdictional paradigms to apply to cases arising in cyberspace, the courts must ask "are there cases where courts have addressed jurisdiction in the context of other, conceptually parallel technological advances, that would aid in resolving personal jurisdiction questions that arise from cyberspace?" *Id.* at 368. For a further discussion of the jurisdictional paradigms courts should use in addressing contacts arising in connection with technological advances, see *id.* at 368-80.

In discussing jurisdictional issues raised by the Internet, another commentator recommends that "[w]ith online services . . . the focus should not be on the method of communication or contact, but rather on the activity that can be conducted via the service, and how that activity affects relevant parties in the forum." STUCKEY, *supra* note 144, § 10.02[2], at 10-8 to -9; see also Counts & Martin, *supra* note 26, at 1133 (concluding that jurisdictional analysis should focus on realities of

In analyzing Patterson's contacts with Ohio, the Sixth Circuit appropriately concluded that Patterson purposefully established substantial relations with the state of Ohio.¹⁴⁷ As explained in *World-Wide Volkswagen*, the purposeful availment requirement is satisfied when the defendant's contacts with the forum state are such that he or she "should reasonably anticipate being haled into court there."¹⁴⁸ In the instant case, Patterson intentionally reached beyond the borders of Texas and retained the services of an Ohio Internet provider.¹⁴⁹ Further, Patterson's contract with

cyberspace communication). *But see* Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 81 (1996) (arguing that "[t]raditional notions of jurisdiction are outdated in a world divided not into nations, states, and provinces but networks, domains, and hosts"). Proper application of such precedent, however, will require courts "to have a clear understanding of the technology that permits global cyberspace communication." Counts & Martin, *supra* note 26, at 1116-17.

147. *See Patterson*, 89 F.3d at 1263-67.

148. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

149. *See Patterson*, 89 F.3d at 1266 (finding Patterson made purposeful contacts with Ohio). Accordingly, the Sixth Circuit analyzed the purposeful availment issue within the framework of *Burger King*. *See id.* In *Burger King*, the Supreme Court held that two Michigan defendants who entered into a franchise agreement with the plaintiff, a Florida corporation, had established minimum contacts with the state of Florida. *See Burger King*, 471 U.S. at 478-82 (finding defendant's purposefully availed themselves of benefits of forum state's laws). The Court noted that the defendants "reach[ed] out beyond' Michigan" in order to benefit from affiliation with the plaintiff's nationwide organization. *Id.* at 479-80. As a result, the Court found that the defendants had purposefully directed their activity toward the forum state and had established sufficient minimum contacts. *See id.* at 480 (finding it reasonable for defendants to litigate in forum).

Similarly, in *Patterson*, the defendant "reached out" beyond Texas and contracted with CompuServe for the purpose of selling his software. *See Patterson*, 89 F.3d at 1266. Patterson could have subscribed to an Internet provider in Texas, but instead chose to deal with CompuServe. *See id.* Similar to the defendant's actions in *Burger King*, Patterson's conduct demonstrated an intent to benefit from the particular services CompuServe had to offer. *See Zembek, supra* note 5, at 364 n.123 (noting Patterson could have used a local Internet provider). Thus, Patterson's contacts with Ohio were not random or fortuitous, but rather purposefully directed toward the state of Ohio for the purpose of financial gain. *See Patterson*, 89 F.3d at 1266-67 (holding that "Patterson purposefully availed himself of the privilege of doing business in Ohio").

Although it could be argued that Patterson's conduct merely amounted to placing his software into the stream of commerce, Patterson's contacts with Ohio were more than just foreseeable. *See id.* at 1265 (finding "ample contacts exist to support the assertion of jurisdiction"). In *Asahi*, the Supreme Court stated 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." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987). The *Asahi* Court continued, stating that "[a]dditional conduct of the defendant may indicate an intent . . . to serve the market in the forum State, for example . . . marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.*

In *Patterson*, the defendant, Patterson, entered into an agreement with CompuServe in which CompuServe essentially agreed to act as Patterson's electronic distributor. *See Patterson*, 89 F.3d at 1260, 1265. Thus, Patterson's contacts with

CompuServe was not for a single transaction, but instead provided the framework for an ongoing relationship between a shareware provider and a software distributor.¹⁵⁰ Moreover, for three years Patterson maintained continual relations with CompuServe from which he derived commercial benefit.¹⁵¹ Thus, from these multiple relations with CompuServe, and pursuant to *Burger King*, Patterson should reasonably have been aware that his contacts with Ohio might give rise to suit there.¹⁵²

Ohio were more than foreseeable. *See id.* at 1265 (holding that Patterson did not merely place his product into stream of commerce).

150. *See Patterson*, 89 F.3d at 1265 (“Patterson sent software to CompuServe repeatedly for some three years, and the record indicates that he intended to continue marketing his software on CompuServe.”). In discussing the significance of contracting for future services, the *Burger King* Court found that the defendants’ entrance into a contract involving continuing relations further evidenced purposeful conduct on behalf of the defendants. *Burger King*, 471 U.S. at 480. The Court further held that the long-term relationship between plaintiff and defendants was not “random” or “fortuitous.” *Id.* Moreover, the Court also found that the course of dealing between the plaintiff and defendants supported the exercise of jurisdiction because the defendants continually communicated with the plaintiff’s Florida office when problems arose. *See id.* at 480-81 (noting that decision-making authority vested in forum state).

In the present case, Patterson operated under the SRA for three years. *See Patterson*, 89 F.3d at 1261. When the dispute between Patterson and CompuServe arose, “Patterson repeatedly sent both electronic and regular mail messages to CompuServe about his claim.” *Id.* at 1266. Under *Burger King*, this additional information further supports a finding of purposeful availment. *See id.* (discussing *Burger King* holding).

151. *See Patterson*, 89 F.3d at 1265-66.

152. *Burger King*, 471 U.S. at 475 (holding that “[j]urisdiction is proper . . . where the [defendant’s] contacts . . . create a ‘substantial connection’ with the forum State”).

The Sixth Circuit also properly concluded that the cause of action arose “out of and related to” Patterson’s activities in Ohio. *See Patterson*, 89 F.3d at 1267. The dispute in *Patterson* centered around the existence of a common law trademark. *See Patterson*, 89 F.3d at 1267. Under common law trademark principles, rights are acquired through actual use of the trademark in commerce. *See J. THOMAS MCCARTHY, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 16.01[1]*, at 16-3 (3d ed. 1992) (“At common law, ownership of a trademark . . . in the United States is obtained by actual use of a symbol to identify the goods or services of one seller and distinguish them from those offered by others.”); *see also United States v. Steffens*, 100 U.S. 82, 94 (1879) (noting that common law trademark rights are appropriated only through actual use in commerce); *Yunker v. Nationwide Mut. Ins. Co.*, 191 N.E.2d 145, 149 (Ohio 1963) (stating that only actual use in business gives rise to trademark rights). Therefore, because Patterson marketed and sold his software exclusively on CompuServe’s server in Ohio, Patterson established his trademark rights under Ohio law. *See Patterson*, 89 F.3d at 1267. Accordingly, any violation of that trademark would have occurred in Ohio. *See Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 639 (2d Cir. 1956) (stating that trademark infringement occurs where product is “passed off”); *Schieffelin & Co. v. Jack Co. of Boca, Inc.*, 725 F. Supp. 1314, 1319 (S.D.N.Y. 1989) (stating that trademark infringement occurs where product is purchased). *But see Acrison, Inc. v. Control & Metering Ltd.*, 730 F. Supp. 1445, 1448 (N.D. Ill. 1990) (stating that damage to intellectual property rights occurs where owner suffers damage).

2. Reasonableness of Subjecting Patterson to Suit in Ohio

The Sixth Circuit correctly determined that subjecting Patterson to jurisdiction in Ohio would be reasonable. As a practical matter, allowing Ohio to exercise jurisdiction in the present case would subject Patterson to a substantial financial burden.¹⁵³ Given the conveniences of modern transportation and communication, however, any burden that Patterson would suffer would not amount to a denial of due process.¹⁵⁴ Moreover, Patterson's intentional contacts with Ohio provided him with sufficient notice of the possibility of suit in Ohio.¹⁵⁵ It would therefore be unfair to

153. See *Patterson*, 89 F.3d at 1268. The *Patterson* court failed to embellish upon the burden to Patterson in considering the reasonableness of subjecting him to Ohio's jurisdiction. See *id.* (limiting consideration of reasonableness to statement that it "may be burdensome for Patterson to defend a suit in Ohio"). Instead, the court characterized Patterson as an entrepreneur aware of the risk of possibly having to litigate in Ohio. See *id.*

The *Patterson* court's lack of concern over the burden to the defendant is consistent with the Supreme Court's holding in *Burger King*. See *Burger King*, 471 U.S. at 483-84 (concluding that subjecting Michigan residents to jurisdiction in Florida was merely inconvenient). The *Burger King* Court held that the burden to the Michigan defendants in having to defend themselves in a Florida court did not "achieve constitutional magnitude." *Id.* at 484. The Supreme Court, however, has traditionally afforded greater consideration to the burden on the defendant in considering the reasonableness factors. See *World-Wide Volkswagen*, 444 U.S. at 291-92 (noting that burden to defendant is "always a primary concern"); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (stating that jurisdictional requirements both limit state power and guarantee immunity from inconvenient litigation). For a further discussion of the Supreme Court's emphasis upon the burden on the defendant in weighing the reasonableness factors, see *supra* note 61 and accompanying text.

154. See *Burger King*, 471 U.S. at 483-84 (finding that Michigan defendants were merely inconvenienced by having to defend suit in Florida court); see also *Hanson*, 357 U.S. at 251 (noting that progress in communications and transportation has decreased burden of defending suit in foreign tribunal); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (stating that transportation and communication development reduced burden to defendant litigating in foreign jurisdiction).

155. See *Patterson*, 89 F.3d at 1262-69 (finding that person employing computer network service to market products should expect suit in state where service is located). In *World-Wide Volkswagen*, the Supreme Court addressed the issue of the burdens associated with requiring a defendant to litigate in a foreign jurisdiction:

The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows 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.

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State" it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing expected costs on to customers, or, if the risks are too great, severing its connection with the State.

World-Wide Volkswagen, 444 U.S. at 297 (citations omitted).

have allowed Patterson to avoid interstate obligations that he voluntarily assumed.¹⁵⁶

Additionally, CompuServe's interest in obtaining relief and Ohio's interest in adjudicating the dispute outweighed any inconvenience Patterson may have experienced.¹⁵⁷ Because CompuServe stood to lose over \$10 million if Patterson's allegations were true, CompuServe clearly had a strong interest in obtaining convenient and effective relief.¹⁵⁸ Furthermore, Ohio's interest in adjudicating the matter was also substantial because the case involved an Ohio company as well as trademarks that arose under Ohio common law.¹⁵⁹

Because all three prongs of the jurisdictional inquiry were satisfied, the defendant was properly subjected to jurisdiction in Ohio.¹⁶⁰ The fact that the majority of Patterson's contacts with Ohio occurred through electronic communications should not affect the jurisdictional inquiry.¹⁶¹ Patterson's actions created a substantial connection with Ohio from which he

156. See *Burger King*, 471 U.S. at 474 (noting that "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed"). In voluntarily entering into the contract with CompuServe, Patterson was afforded the "benefits and protections" of Ohio's laws. *Id.* at 476. In such a case, requiring the defendant to suffer the burdens of litigation in that forum is not unreasonable. See *id.* (holding that persons who avail themselves of privileges of conducting business in forum state should submit to litigation in forum state).

157. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the . . . defendant.").

158. See *Patterson*, 89 F.3d at 1268. Early in the development of modern personal jurisdiction law, the Supreme Court recognized the plaintiff's interest in obtaining convenient and effective relief. See Richman, *supra* note 61, at 631 (noting Supreme Court's early recognition of plaintiff's interest in obtaining relief). In *McCree*, the Supreme Court based its finding of jurisdiction, in part, upon the fact that the plaintiff would be "at a severe disadvantage if . . . forced to . . . [litigate in] a distant State." *McCree*, 355 U.S. at 223. The Supreme Court affirmed its position in *Asahi*, in which it held that a consideration of the plaintiff's interest may override serious burdens placed on a nonresident defendant. *Asahi*, 480 U.S. at 114. For a further discussion of the plaintiff's interest in obtaining convenient and effective relief, see *supra* note 61 and accompanying text.

159. See *Patterson*, 89 F.3d at 1268; see also *Burger King*, 471 U.S. at 482-84 (concluding that Florida's interest in providing forum for its residents was so substantial that it outweighed burden upon defendant); *McCree*, 355 U.S. at 223 (noting that state often has a "manifest interest in providing effective means for redress for its residents"). For a further discussion of the forum state's interest in adjudicating claims, see *supra* note 61 and accompanying text.

160. See *Patterson*, 89 F.3d at 1263-68.

161. See *id.* at 1265 (finding that quality of contacts, and not their status, determines existence of personal jurisdiction); see also *Cody v. Ward*, 954 F. Supp. 43, 47 (D. Conn. 1997) (finding that nature of telephone call and e-mail messages established minimum contacts); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126-27 (W.D. Pa. 1997) (determining that minimum contacts were established through quality of defendant's Internet contacts).

gained financial benefit.¹⁶² As a result, Patterson was obligated to defend any suit in Ohio if a dispute arose from his actions there.¹⁶³ Thus, the Sixth Circuit properly applied existing jurisdictional principles in holding Patterson amenable to jurisdiction in Ohio.

V. SOCIAL AND LEGAL RAMIFICATIONS OF THE *PATTERSON* DECISION

Because cyberspace is void of physical boundaries and contacts, it has traditionally been considered inherently at odds with fundamental principles of personal jurisdiction.¹⁶⁴ In holding Patterson subject to jurisdiction in Ohio, however, the Sixth Circuit has essentially determined that on-line jurisdiction exists.¹⁶⁵ Therefore, the Sixth Circuit has managed to reconcile the inconsistencies by establishing a framework for determining

162. See *Patterson*, 89 F.3d at 1263-69 (overruling district court's finding that Patterson's contacts were insufficient). For a discussion of the Sixth Circuit's jurisdictional analysis, see *supra* notes 112-40 and accompanying text. For a further discussion of the district court's holding, see *supra* note 109 and accompanying text.

163. See *Patterson*, 89 F.3d at 1268-69 (holding that connections between Patterson and Ohio were substantial, and that it was reasonable for Ohio court to assert personal jurisdiction); see also *Burger King*, 471 U.S. at 487 (obligating defendant to litigate in forum state after finding "substantial and continuing relationship" with forum); *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (finding "sufficient contacts" with forum state to make it "reasonable and just" for defendant to litigate in forum).

164. See Burnstein, *supra* note 146, at 81-82 ("Cyberspace confounds the conventional law of territorial jurisdiction and national borders."); see also Richard Raysman & Peter Brown, *Resolving Jurisdiction and Venue Issues on the Internet*, N.Y. L.J., Sept. 10, 1996, at 3 (commenting that "[t]he boundaryless nature of the Internet" raises concerns over whether it is "possible to enforce laws against a defendant residing beyond a court's territorial boundaries, based on conduct which takes place on-line"). In discussing the inherent discrepancies between the Internet and cyberspace, one commentator stated that

[t]raditional notions of jurisdiction are outdated in a world divided not into nations, states, and provinces but networks, domains, and hosts. Cyberspace confounds the conventional law of territorial jurisdiction and national borders. In cyberspace, it does not matter at all whether a site lies in one country or another because the networked world is not organized in such a fashion.

Burnstein, *supra* note 146, at 81-82. Further, it can be concluded that as a result of this discrepancy, "[w]ell-known jurisdictional doctrines such as 'purposeful availment' lose meaning in cyberspace. . . . The networked world is different and requires a different approach." *Id.* at 82; see also Byassee, *supra* note 1, at 219 (concluding that traditional jurisdictional analysis is inappropriate for virtual communities).

165. See William J. Cook, *Four Internet Jurisdiction Cases Break Rule of Thumb*, CHI. LAW., Oct. 1996, at 76 (asserting that *Patterson* has provided basis for establishing Internet jurisdiction); Raysman & Brown, *supra* note 164, at 3 (stating that, through *Patterson*, "the Sixth Circuit expanded the scope of the minimum contacts test to include personal contacts that were almost entirely electronic in nature"); Mark E. Staib, *In Personam Jurisdiction in Cyberspace*, LITIG. NEWS, Jan. 1997, at 1, 12-13 (noting that *Patterson* court properly applied traditional jurisdictional principles in deciding that on-line contacts meet federal due process requirements).

when a defendant's electronic contacts give rise to obligations in a given state.¹⁶⁶

In addition to establishing a framework for jurisdictional analysis in cases of its kind, *Patterson* provides a basis for ensuring fairness in on-line litigation. Thus, by determining that on-line contacts may provide a basis for jurisdiction, *Patterson* offers assurance to Internet users that nonresident defendants will not be permitted to avoid obligations arising from their on-line activities.¹⁶⁷ Moreover, the Sixth Circuit's emphasis on limiting jurisdiction to situations in which the defendant intentionally created contacts with the forum will also serve to ensure that Internet users will not be subject to jurisdiction anywhere in the world.¹⁶⁸

166. See Cook, *supra* note 165, at 76 (arguing that owners of intellectual property rights on Internet can expect courts to weigh *Patterson* decision factors in deciding jurisdictional inquiry). Prior to the existence of case law concerning jurisdiction and the Internet, "an unfortunate Internet jurisdiction rule of thumb developed: Internet lawsuits are brought at the defendant's location." *Id.* This rule resulted in a clear advantage to infringers of intellectual property rights and subjected plaintiffs to substantial expense and inconvenience. See *id.* (discussing effects of applying default rule in deciding jurisdictional inquiry based on Internet contacts).

167. See *id.* (arguing that plaintiffs can now firmly enforce their rights). In discussing the lack of suits arising from Internet activity, one commentator stated that

[i]n the old days, circa 1988 to 1994, Internet ftp sites, Usenet groups, and pirate computer bulletin boards openly trafficked unauthorized copyrighted and trade secret materials. The individuals behind this traffic articulated their above-the-law attitude as the "spirit of the Internet."

Back then . . . [l]itigation was infrequent because the relatively small sales losses [resulting from illegal postings] did not justify the legal fees necessary to chase infringers.

Id. With the recent explosion in the Internet community, however, "[c]opyright owners now face the complete destruction of their potential market as a result of unauthorized Internet postings." *Id.* With the advent of the *Patterson* decision, "[o]wners of intellectual property posted on the Internet can now aggressively enforce their rights." *Id.*

168. See *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1353 (Fla. Dist. Ct. App. 1994) (stating concern that allowing on-line contacts to serve as basis for exercise of jurisdiction would subject on-line users to jurisdiction anywhere in world). In *Pres-Kap*, the Florida District Court of Appeal voiced its concern over the far-reaching implications of allowing on-line contacts to establish a basis for jurisdiction. See *id.* The court's concern was primarily based upon its unwillingness to hold the user of a computer database subject to suit in any state "in which [the] supplier's . . . database happen[s] to be located." *Id.* As Zembek notes in his article, however, on-line contacts give rise to legal obligations and should not be used as a shield to liability. See Zembek, *supra* note 5, at 347-48 ("[W]hether or not an individual acted under the cloak of an e-person in a virtual land is irrelevant to the inquiry of whether a court may determine the party's respective obligations.").

One on-line defendant has already benefited from the protections established under *Patterson*. See *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (following *Patterson* and finding defendant did not purposefully direct activities toward forum state). In *Bensusan*, the defendant, a Missouri resident, posted a "website" on which he promoted his club, "The Blue Note." See *id.*

Because of the Sixth Circuit's limitation of its holding, commercial Internet users are most likely to be affected by *Patterson*.¹⁶⁹ Because commercial users constitute the majority of Internet users, however, *Patterson* will have a substantial effect upon the Internet as a whole.¹⁷⁰ Although

at 297. The plaintiff, a New York corporation, owned and operated a New York club also called "The Blue Note." *See id.* Upon accessing the defendant's website and finding a logo substantially similar to that it used as a trademark, the plaintiff filed suit in New York alleging trademark infringement. *See id.* at 297-98 (noting basis for defendant's claim). Relying upon the reasoning in *Patterson*, the District Court refused jurisdiction over the defendant on the basis that he had not "purposefully avail[ed] himself of the benefits of New York" in merely maintaining his website. *Id.* at 301. The court specifically stated:

King has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state. There are no allegations that King actively sought to encourage New Yorkers to access his site, or that he conducted any business—let alone a continuous and systematic part of its business—in New York. . . . Bensusan's argument . . . is insufficient to satisfy due process.

Id. (citation omitted). The district court discussed *Patterson*:

Although [*Patterson*] . . . reached a different result, it was based on vastly different facts. In that case . . . [t]he user . . . specifically targeted Ohio by subscribing to the service and entering into a separate agreement with the service to sell his software through the Internet. Furthermore, he advertised his software over the service and repeatedly sent his software to the service in Ohio. . . . This action, on the other hand, contains no allegations that King in any way directed any contact to, or had any contact with, New York or intended to avail itself of any of New York's benefits.

Id. at 301 (citations omitted). *But see* *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333-34 (E.D. Mo. 1996) (subjecting California resident to jurisdiction in Missouri based solely upon defendant's maintenance of Internet website).

169. *See* David J. Goldstone, *Legal Jurisdiction in Cyberspace: Locating the Seams on the Web*, LEGAL BACKGROUNDER, Jan. 24, 1997, at 1 (noting that the "crux of the [*Patterson*] court's opinion is that '[s]omeone like Patterson who employs a computer network service . . . to market a product can reasonably expect disputes with that service to yield lawsuits in the service's home state'" (quoting *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996))); *see also* John Fellas, *Do Electronic Links Support Personal Jurisdiction? Sixth Circuit Answers Affirmatively*, N.Y. L.J., Sept. 30, 1996, at S4 (noting that "[t]he central factor underlying the [*Patterson*] court's decision . . . was that Patterson's relationship with CompuServe was akin to that between a manufacturer of a product and a distributor of a product in another state").

170. *See* JILL H. ELLSWORTH & MATTHEW V. ELLSWORTH, *MARKETING ON THE INTERNET: MULTIMEDIA STRATEGIES FOR THE WORLD WIDE WEB* 14-15 (1995) (examining domain distribution on World Wide Web). By the second quarter of 1995, commercial users constituted 65% of all Internet users. *See id.* (noting growth in commercial sector of Internet users); *see also* Koh Su Haw, *E-Commerce: Technology Can Bypass the Legal Pitfalls*, BUS. TIMES, Oct. 14, 1996, at 16 (reporting study predicting that Internet cash transactions will reach nine billion by year 2000). For more recent statistics on the composition and growth of the Internet, see Paul Clerkin, *NUA Internet Surveys* (visited Apr. 1, 1997) <<http://www.nua.ie>>.

Patterson's holding may have a "chilling effect" on commercial growth on the Internet, it may also stimulate further commercial activity by providing greater awareness of the legal obligations of on-line users.¹⁷¹ Hopefully, however, the threat of having to litigate in a foreign forum will encourage commercial users to utilize forum selection clauses in their transactions, thus eliminating jurisdictional debate and uncertainty.¹⁷²

In adapting traditional minimum contacts analysis to litigation arising from Internet activity, *Patterson* has brought the jurisdictional wheel full circle. Fifty years ago, *International Shoe* redefined jurisdictional principles to address the nationalization of interstate commerce.¹⁷³ In holding that Internet contacts may serve as a basis for establishing jurisdiction, *Patterson* has provided a flexible approach for addressing the globalization of commerce.¹⁷⁴

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171. See Haw, *supra* note 170 at 16 (stating that until ambiguity in legal aspects of doing business on Internet are resolved, growth of electronic commerce is unlikely).

172. See STUCKEY, *supra* note 144, at § 10.02[2], at 10-10 (noting that forum selection clauses "must be 'freely negotiated' and not 'unreasonable and unjust' so that their enforcement does not offend due process"); Burnstein, *supra* note 146, at 101 ("Forum selection clauses can bring order and stability to cyberspatial contracts by substituting the highly-developed real-space legal order for the uncertain and almost haphazard regime likely to result if courts are left to choose law in cyber-disputes.").

Until a clear body of Internet jurisdiction jurisprudence develops, one commentator recommends several other methods to avoid being held subject to jurisdiction in a foreign state. See Parry Aftab, *Jurisdiction in Cyberspace: Due Process Standards Vary*, N.Y. L.J., Jan. 27, 1997, at S4 (discussing means of protection from personal jurisdiction for commercial Internet users). In his article, this commentator suggested that those with a commercial presence on the web can use disclaimers on their site that would limit access to residents of certain jurisdictions. See *id.* In addition, he suggested that access could be limited through the use of passwords, which allow access only to residents of certain states or countries. See *id.* (offering means through which one may limit exposure to unwanted forums).

173. *International Shoe Co. v. Washington*, 326 U.S. 310, 316-18 (1945) (extending jurisdictional principles to allow exercise of jurisdiction without physical presence in forum state). For a further discussion of the Supreme Court's decision in *International Shoe* and its significance to personal jurisdiction jurisprudence, see *supra* notes 20-21 and accompanying text.

174. See Lori Irish Bauman, *Personal Jurisdiction and Internet Advertising*, COMPUTER LAW., Jan. 1997, at 5 (stating that "due process analysis need not remain static in the face of technological change").