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Who? What? When? Where? Personal Jurisdiction and the World Wide Web

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I. Introduction

"I have a Web site I'm working on."^[2]

{1} Almost everyone, it sometimes seems, is "working on a Web site." The Internet,^[3] a seamless web of communication, has broken down barriers of distance and time among people. At the same time it has made increasingly porous the conventional boundaries between the tangible and the abstract. Many business entities have created their own World Wide Web pages^[4] on the Internet, in order to deliver their advertising messages instantaneously to potential customers anywhere in the world.^[5] Increasingly, lawsuits are being filed against these businesses engaged in electronic commerce.^[6]

{2} The Internet's indifference to physical borders is challenging and rapidly reshaping traditional notions of "presence" within geographical boundaries.^[7] As a result, novel questions have begun to arise regarding personal jurisdiction over defendants in Internet-related cases.

{3} Recent court decisions have demonstrated confusion and division in the judiciary's grappling with plaintiffs' attempts to establish personal jurisdiction over a defendant whose contacts with the forum state^[8] exist primarily, or exclusively, through the defendant's Internet webpage.^[9]

{4} Additionally, a website's status as "passive"^[10] or "interactive"^[11] also presents issues of first impression in a jurisdictional analysis. However, not all courts give meaningful attention to the difference between "passive" and "interactive" webpages and their differing capacities to "contact" persons in a

particular forum. The failure to do so has resulted in inconsistent, and sometimes flawed, court rulings.^[12] This article will examine those cases, focusing primarily on two federal district court decisions considering "passive" webpages -- *Inset v. Instruction Set, Inc.*^[13] and *Bensusan Restaurant Corp. v. King*.^[14]

{5} *Inset* involved a defendant whose only "contacts" with the forum state were the defendant's maintenance, for advertising purposes, of a World Wide Web site accessible to persons residing in Connecticut and to people throughout the world, along with a toll-free telephone number.^[15] The *Inset* court found that the defendant's website was a sufficient contact to establish personal jurisdiction over the defendant in Connecticut.^[16] As in *Inset*, the defendant in *Bensusan* also maintained a "1-800" telephone number along with a website advertising its jazz club.^[17] The court in *Bensusan*, however, decided that maintenance of a webpage available to New York residents, without additional activity by the defendant in the forum, did not rise to the level of "minimum contacts" necessary for a finding of personal jurisdiction comporting with due process.^[18]

{6} The cases of *Inset* and *Bensusan* contain strikingly similar factual scenarios, but the courts deciding those cases nevertheless arrived at different conclusions regarding whether a World Wide Web page is sufficient to establish "minimum contacts" in a forum.^[19] These opinions from the Connecticut and New York Federal District Courts demonstrate the lack of consistency within the judiciary as it struggles with this factually new area of the law.

{7} To determine whether personal jurisdiction exists over a defendant, federal courts apply the law of the forum state^[20], subject to the limits of the Due Process Clause of the Fourteenth Amendment.^[21] Due process requires that a defendant have minimum contacts with the forum state so that a court's assertion of personal jurisdiction over a defendant is fair and just.^[22] Personal jurisdiction, which limits the forum in which a plaintiff may sue a defendant on a particular claim,^[23] requires that a non-resident defendant have established a relationship with the forum state sufficient that the defendant may reasonably anticipate being sued there.^[24]

{8} A nonresident defendant may be subject to personal jurisdiction under either general jurisdiction or specific jurisdiction.^[25] General jurisdiction may be established over a party, regardless of the connection between the underlying controversy and the forum state, if that party's contacts with the state are sufficiently "significant" or "systematic and continuous."^[26] Specific jurisdiction, however, requires a fact-specific inquiry as to whether a court's assertion of personal jurisdiction over a nonresident defendant comports with due process requirements mandating the defendant's "minimum contacts" with the forum state.^[27]

{9} The U.S. Supreme Court in *International Shoe Co. v. Washington* set forth a flexible test for determining specific personal jurisdiction over a defendant: the defendant must have "minimum contacts" with the forum state such that the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice.^[28] In order to reduce the vagueness inherent in the *International Shoe* standard, the Supreme Court has since developed a three-part test to help courts apply the "minimum contacts" criteria. In determining that the assertion of specific personal jurisdiction complies with due process, a court must find that the defendant purposefully availed himself of the privilege of conducting business in the forum; that the cause of action arose out of the defendant's activities in the forum; and that the exercise of jurisdiction is fundamentally fair.^[29] To determine the fundamental fairness of asserting jurisdiction the Court has established the following five criteria: (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.^[30]

{10} Parts II and III of this article will analyze the conflicting holdings and rationales in *Inset* and *Bensusan* and the courts' treatment of the Internet as a uniquely interactive vehicle for companies and individuals to

transcend traditional notions of physical "presence." Part IV concludes that, in spite of this electronic medium's novel mode of communication, the existing legal framework established by the Supreme Court for personal jurisdiction analyses, when applied by a judiciary knowledgeable as to the Internet's abilities and limitations, is adequate to address the issues presented in this emerging area of the law.

II. *Inset v. Instruction Set, Inc.*[31]: An Expansive View of Jurisdiction

{11} The *Inset* court's expansive view of Internet-based personal jurisdiction affirms the recognition that advertising, combined with electronic communications, is able to reach human targets with unprecedented ease and speed, without the need for traditional physical methods of delivery.[32] This general and incontrovertible recognition led the court to examine critical questions regarding what constitutes an Internet advertiser's legal "presence" in a forum when that party's only contact with the forum state involves the maintenance of a website.[33]

{12} In *Inset*, the plaintiff Inset Systems Inc. ("Inset") filed a lawsuit against Instruction Set, Inc. ("ISI") in the Connecticut Federal District Court.[34] A Connecticut corporation with its only office in Brookfield, Connecticut, Inset develops and sells computer software services around the world.[35] ISI, a Massachusetts corporation, markets computer technology and support to companies worldwide, and maintains its sole office in Natick, Massachusetts.[36] ISI has neither employees nor offices in Connecticut, and does not conduct business in Connecticut on a regular basis.[37]

{13} On August 23, 1985, Inset filed for registration of the federal trademark "INSET." [38] Some time thereafter, ISI began to use the designation "INSET" as part of its webpage domain name, "INSET.COM", having created that "passive" webpage in order to advertise its products through the Internet.[39] On June 30, 1995, Inset sued ISI, alleging that ISI's use of "INSET.COM" as its Internet domain name, and its use of the toll-free number "1-800-US-INSET", infringed upon Inset's federally registered trademark.[40] ISI moved to dismiss the complaint, arguing that the court lacked personal jurisdiction under the Connecticut long-arm statute and pursuant to the "minimum contacts" requirements of the Due Process Clause.[41]

{14} In examining the jurisdictional issue in *Inset*, District Court Judge Covello first addressed whether Connecticut law established the state's personal jurisdiction over ISI.[42] Connecticut's long-arm statute provides that a foreign corporation is subject to suit within the state on a cause of action arising out of any business solicited in the state, if the corporation repeatedly solicits business within the forum state.[43] Considering whether ISI solicited business repeatedly within Connecticut, the court relied on two Connecticut Federal District Court decisions in which a "repetitious pattern of business" was found sufficient to satisfy the requirements of the long-arm statute, permitting jurisdiction over non-resident defendants.[44] In one of the cases, the defendant, during a six-month period, had placed at least six advertisements in a newspaper whose circulation included Connecticut.[45] The statute had similarly been held to be satisfied where a party had advertised in thirty periodicals with circulation in Connecticut during eighteen months, and where thirty catalogs were delivered to Connecticut residents and two sales of the allegedly infringing products to Connecticut residents had occurred, even though the sales may not have been the results of the solicitation activities.[46]

{15} In comparing ISI's advertising on the Internet to the hard-copy promotional materials utilized by the defendants in the two instances above, Judge Covello pointed out the relentless nature of electronic advertising and distinguished it from other kinds of advertising:

[S]ince March, 1995, ISI has been continuously advertising over the Internet, which includes at least 10,000 access sites in Connecticut. Further, unlike hard-copy advertisements noted in the

above two cases, which are often quickly disposed of and reach a limited number of potential consumers, Internet advertisements are in electronic printed form so that they can be accessed *again and again* by many more potential consumers.[\[47\]](#)

This ISI activity, the court found, clearly constituted solicitation of Connecticut residents of a sufficiently repetitive nature to confer jurisdiction over ISI under Connecticut's long-arm statute.[\[48\]](#)

{16} Having determined that ISI was subject to Connecticut's long-arm jurisdiction, the court next considered whether a finding of personal jurisdiction over ISI would violate ISI's due process rights. In asserting personal jurisdiction over a defendant, a court will find due process requirements satisfied only if the nonresident corporate defendant's "minimum contacts" with the forum state are sufficient that having "purposefully availed" itself of the benefit of conducting business in the state, the defendant should have reasonably anticipated being haled into the forum state's court.[\[49\]](#) Additionally, the maintenance of a lawsuit in the forum state must not offend traditional notions of fair play and substantial justice.[\[50\]](#)

{17} Regarding the question of whether ISI had sufficient "minimum contacts" with Connecticut to satisfy the constitutional requirements of due process, ISI argued that it lacked sufficient contacts with Connecticut because it did not conduct business in the state on a regular basis and because it had no offices or employees in the state.[\[51\]](#) Inset, however, asserted that ISI's webpage and toll-free-number sufficiently established ISI's conducting of business within Connecticut.[\[52\]](#)

{18} In addressing the crux of the "minimum contacts" test, Judge Covello considered whether ISI acted in such a manner as to "purposefully avail" itself of the benefits and protections of Connecticut by conducting business activities within that state.[\[53\]](#) In Connecticut, the court pointed out, the "purposeful availment" test has been satisfied when a corporation has displayed a pattern of product promotion and sales in Connecticut by supplying potential customers with catalogs advertised in periodicals circulated in Connecticut, by providing products ordered by Connecticut residents, and by demonstrating a readiness to solicit Connecticut customers through telephone communications.[\[54\]](#) Comparing that kind of promotional activity to ISI's electronic advertising on its Internet webpage, Judge Covello once again focused on the pervasive nature of ISI's advertising measures and emphasized the differences between website advertisement and other modes of advertisement:

In the present case, (ISI) has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available *continuously* to any Internet user.[\[55\]](#)

{20} According to Judge Covello, the difference between the Internet and other forms of media advertising is the Internet's ability to reach customers with advertising information, unconstrained by traditional limitations of time or space. This difference put the defendant on notice that it could reasonably anticipate being sued in Connecticut, and thus clearly mandated a finding that ISI "purposefully availed" itself of the benefits of conducting business in Connecticut.[\[56\]](#) Finally, the court addressed whether a finding of personal jurisdiction over ISI complied with requirements of fair play and substantial justice.[\[57\]](#) In so doing it considered the relative burdens on the parties of litigating in each forum, the forum state's interest in adjudicating the dispute, and the interstate judicial system's interest in efficiently resolving controversies.[\[58\]](#) Because the defendant's place of business was less than two hours from the Hartford, Connecticut federal courthouse and the defendant had retained Connecticut counsel the burden on the defendant in litigating the matter in Hartford was minimal. Connecticut, the court found, had an interest in adjudicating issues involving common and statutory law, and adjudication in Connecticut would resolve the matter efficiently.

{21} Therefore, the court ruled that its exercise of personal jurisdiction over ISI comported with notions of fair play and substantial justice. Accordingly, the court determined that ISI's advertising on the Internet, through its webpage, established the repeated solicitation of business in Connecticut required by Connecticut's long-arm statute and also complied with constitutional due process requirements.[59]

{22} In determining that the Internet webpage constituted a sufficiently strong contact with Connecticut to establish personal jurisdiction over the defendant, Judge Covello manifested an understanding of the world as a place in which physical presence -- and in many instances personal experience and individual thought -- are being replaced by a reality determined by potent advertising messages and electronically-natured systems such as the Internet. In its analysis of whether ISI was subject to personal jurisdiction in Connecticut, the court in *Inset* noted that ISI's Internet webpage differed from traditional methods of advertising such as television, radio and newspapers.[60] Judge Covello found particular relevance in two inherent physical limitations of non-Internet advertising media.

{23} First, television and radio advertising is time-specific because the contact between the medium and the recipient is not continuous, and thus must occur during pre-scheduled moments.[61] Second, in order to be received, the hard-copy newspaper or magazine containing the advertisement must be present within the same physical space as the reader, and must be read before its disposal occurs.[62]

{24} To a degree, the position that the Internet is different from other advertising media, in that it is not constrained by the physical time and space limitations of traditional vehicles such as newspaper or television, may seem persuasive.

{25} Indeed, some Internet commentators have gone far beyond Judge Covello in emphasizing the newness and singularity of this medium. It has been argued that the Internet alters not only the physical aspects of traditional methods of communication, but more importantly that its interactive capability allows and encourages individuals to adopt new online identities. This feature results in the creation of multiple "selves," unconstrained by the geographical boundaries of a single, corporeal existence.[63]

{26} In *Life On The Screen*[64], Sherry Turkle argues that the Internet encourages us to re-construct the "self." In describing this "cultural work in progress"[65] Turkle identifies an emerging sense of "decentered and multiple" identities as one crosses the boundary from the human to the technological.[66] Consider Turkle's recounting of how one woman re-creates her identity: the woman forges a personal relationship with a man she "met" on the Internet, and she is in a state of confused anxiety as she plans her first meeting with him.

An interior designer nervously admits in my interview with her that she is not at her best because she is about to have a face-to-face meeting with a man with whom she has shared months of virtual intimacy in chat sessions on America Online. She says she is "pretty sure" that her electronic lover is actually a man (rather than a woman pretending to be a man) because she does not think "he" would have suggested meeting if it were otherwise, but she worries that neither of them will turn out to be close enough to their very desirable cyberselves: "I" didn't exactly lie to him about anything specific, but I feel very different online. I am a lot more outgoing, less inhibited. I would say I feel more like myself. But that's a contradiction. I feel more like who I wish I was. I'm just hoping that face-to-face I can find a way to spend some time being the [o]nline me." [67]

{28} The woman has developed an online self that is very real to her. When she is faced with a choice of which identity to adopt in her actual meeting with the other person, she expresses a preference towards, and perceives as plausible, her new "self."

{29} Another commentator's account supports the theory that the Internet fosters not only the fragmentation and multiplicity of identity, but also allows for the emergence of a non-physical self, the Internet creates a seemingly complete "presence" without the need for a physical component.[68] The following is a description of a "real life" introduction of persons who had only previously "met" on the Internet:

I remember the first time I walked into a room full of people [in real life] who knew many intimate details of my history and whose own stories I knew very well. Three months after I joined, I went to my first WELL[69] party at the home of one of the WELL's [o]nline moderators. I looked around at the room full of strangers when I walked in. It was one of the oddest sensations of my life. I had contended with these people, shot the invisible breeze around the electronic watercooler [sic], shared alliances and formed bonds, fallen off my chair laughing with them, become livid with anger at some of them. But there wasn't a recognizable face in the house. I had never seen them before.[70]

{30} These illustrations expose the undeniable power of the Internet to create and deliver a powerful, albeit non-physical "presence" to anyone, anywhere, at any time. It is this unique aspect of the Internet which appears to have influenced Judge Covello's assessment of the nature of ISI's "contacts" to Connecticut and its subsequent establishment of the court's personal jurisdiction over ISI.[71]

{31} Claims that the Internet is totally different from traditional media--that it is changing the meaning of physical "presence"-- may be too global and overblown. Engaging in a close analysis of the issues presented in each particular case involving use of an Internet website is important. Such a closer and more satisfactory examination occurred in *Bensusan Restaurant Corp. v. King*. [72]

III. *Bensusan Restaurant Corp. v. King*[73]: Limitations on Personal Jurisdiction

{32} Bensusan Restaurant Corporation operated "The Blue Note," a New York jazz club.[74] Bensusan sued Richard King, a Missouri resident and owner of a Missouri jazz club, also known as "The Blue Note." [75] Bensusan claimed that King's website on the Internet infringed on Bensusan's right in its trademark "The Blue Note," and asserted claims for trademark infringement, trademark dilution and unfair competition.[76] Bensusan filed the action in the Federal Court for the Southern District of New York.[77] King moved to dismiss the complaint, asserting that his site on the World Wide Web was insufficient for the New York court to establish personal jurisdiction over him under the New York long-arm statute and the Due Process Clause of the United States Constitution.[78]

{33} To advertise his club, King established a passive[79] Internet website in April 1996.[80] The website allegedly contained "a fanciful logo" which Bensusan asserted was substantially similar to his New York Blue Note logo.[81] King's website contains general information about the club in Missouri, a calendar of events, and ticket information, including the names and addresses of ticket outlets in Columbia, Missouri for The Blue Note Club.[82] The site also contains a telephone number for charge-by-phone ticket orders, which are available for pick-up on the night of the show at The Blue Note box office in Columbia.[83]

{34} Federal District Court Judge Stein first addressed whether personal jurisdiction over King was proper under Section 302(a)(2) of the New York long-arm statute, which permits a New York court to exercise personal jurisdiction over a non-resident defendant who commits a tortious act within New York.[84]

{35} In addressing whether copyright infringement, the alleged tortious act, occurred in New York, Judge Stein examined the process involved in providing the website information to New York consumers.[85] The court noted that in order for the site visitor to utilize the information advertised on King's website, a visitor had to actively engage in several procedures.[86] A person had to access the website, then telephone the

Missouri box office to order performance tickets, and finally pick up the tickets in Missouri since King did not mail tickets to purchasers.[87] Accordingly, the alleged trademark infringement would occur in Missouri, not New York, since any "confusion"[88] as to the two Blue Note clubs would arise as a result of the acts of the user in New York.[89] In concluding that the alleged tortious act was not committed in New York, the court found that King had not actively directed any "infringing activity" towards New York: "The mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York." [90]

{36} Bensusan next attempted to establish that King had transacted business in New York, and thus satisfied Section 302 (a)(3) of the New York long-arm statute.[91] In order to subject a defendant to personal jurisdiction under that statutory provision, a plaintiff must show that the defendant derived substantial profits from its participation in interstate business and that the defendant reasonably expected its tortious act to have consequences in New York.[92] Bensusan alleged that King participated in interstate commerce by hiring nationally-known bands and that he could reasonably have foreseen the occurrence of confusion in New York of the two Blue Note clubs, because King knew that Bensusan's club was located in New York.[93] The court rejected this argument for two reasons. First, ninety-nine percent of King's revenue came from local residents of Columbia, Missouri, and the statute required not mere participation by the defendant in interstate commerce, but that the defendant derive "substantial" revenue from interstate commerce.[94] Additionally, King's website did not constitute "a discernable effort . . . to serve, directly or indirectly, a market in the forum state," and thus it was not foreseeable that King's webpage advertising would have consequences in New York.[95] Lastly, the court did not find that Bensusan had suffered any significant economic injury as a result of King's webpage activities.[96] Accordingly, Judge Stein found that King's website did not support the exercise of personal jurisdiction over King under the New York long-arm statute.[97]

{37} Although the court found that jurisdiction was not proper under New York law, it nonetheless addressed whether asserting personal jurisdiction over King would violate due process.[98] Judge Stein first acknowledged that due process requires that the non-resident defendant purposefully establish "minimum contacts" with the forum state such that the "maintenance of the suit does not offend traditional notions of fair play and substantial justice." [99] In determining whether a defendant has "minimum contacts" with a forum state, the court considered the following factors: "1) whether the defendant purposefully availed himself of the benefits of the forum state; 2) whether the defendant carried on a continuous and systematic part of its general business within the forum state; and 3) whether the defendant's conduct and connection with the forum state are such that he should have reasonably anticipated being haled into court there." [100]

{38} The court found that King had done nothing to "purposefully avail" himself of the benefits of New York.[101] In support of the court's position, Judge Stein pointed to the passive nature of King's website:

King, like numerous others, simply created a website 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 (emphasis added).[102]

{39} Further, since the maintenance of the website did not establish that King *actively* sought to encourage New Yorkers to access this site, the court found that King could not have conducted a "continuous and systematic" part of its business in New York.[103]

{40} Again, Judge Stein recognized the website's limitations in its ability to establish a "presence" in New York: "There is in fact no suggestion that King has any presence of any kind in New York other than the website that can be accessed worldwide." [104] Finally, the court held that even if it was foreseeable to King that users could access his webpage in New York, and could thus be confused as to the two jazz clubs' relationship, that by itself was insufficient to satisfy due process.[105] This reasoning led to a finding that the

assertion of personal jurisdiction over King violated due process, and the court granted King's Motion to Dismiss for lack of personal jurisdiction.[106]

{41} The *Bensusan* court's analysis differs markedly from that of the *Inset* court. Unlike Judge Covello, in *Bensusan*, Judge Stein decided that King's creation of a "passive" website, without more, did not establish that King had purposefully availed himself of the benefits of conducting business in New York.[107] The remainder of this article will be devoted to examination of the conflicting rationales of *Inset* and *Bensusan*.

IV. "Presence" Through the Internet

{42} The effect of the "presence," which may be established by the "interactivity" possible between the user and the Internet, should not be underestimated either in legal analysis or in a broader social construction. Bill Gates, founder and C.E.O. of Microsoft, has enthusiastically acknowledged the "intimate and ongoing" relationship between individuals made possible through the interactive qualities of the Internet.[108] Mr. Gates recently expressed his intent to develop a much "deeper" relationship with consumers through the Internet:

Our relationship to date has been if the people buy a product, which historically was a box, they'd take it home and use it, and then a few years later they'd get another one. That will change to where you're connected up to the Internet. We'll ask you to register and . . . we'll upload a few profile bits about how you're using the applications and what your hardware isAnd with the interactive content you go from contacting us every two years down to contacting us *two or three times a day*, where you're saying, 'What are the top stories that I care about . . . ?'[109]

Mr. Gates has additionally described his vision of the future:

The information highway will extend the electronic marketplace and make it the ultimate go-between, the universal middleman. Often the only humans involved in a transaction will be the actual buyer and sellerWhen you want to buy something you'll be able to tell your computer to find it for you at the best price offered by any acceptable source or ask your computer to 'haggle' with the computers of various sellersServers distributed worldwide will accept bids, resolve offers into completed transactions, control authentication and security, and handle all other aspects of the marketplace, including the transfer of funds. *This will carry us into a new world of low-friction . . . stores and services that until now have profited just because they are 'there'- in a particular geographic location- may find they have lost that advantage.*[110]

{43} Bill Gates' scenarios describe an Internet containing interactive qualities representing a boundary-less force establishing a "presence" so significant that each day, it will inform us repeatedly of what is "important" to us, and can actually purchase for us all of the products that we wish to buy. The "deepness" of the relationship between an interactive Internet and humans thus results in its increased role in our decision-making as well as in a reduction in the "friction" generally present in our daily lived experience.

{44} It is the notion of a continuous presence created by electronic-based media that seemed to influence Judge Covello in rendering a finding of personal jurisdiction, based only on a defendant's maintenance of a "passive" Internet website.[111] In *Inset*, ISI's webpage had no interactive capabilities.[112] Other than posting advertising material, ISI could not conduct any additional activity on its website such as transmitting computer files to consumers, utilizing e-mail to communicate with webpage visitors, or entering into contracts with customers for the sale of goods or services.[113] The *Inset* court, however, failed to take into account the difference between a "passive" and an "interactive" website in its jurisdictional analysis.

{45} The "interactive" website differs substantially from a "passive" website in that it can engage in

communication with potential consumers who are situated in a particular geographic location, and can establish a pattern of geographically-specific activity through its contacts with those persons.[114] This scenario allows for the formation of "relationships" between users and the webpage advertiser, with the potential of establishing the type of conduct which may ultimately constitute sufficient "minimum contacts" with the forum state.

{46} Judge Covello's opinion in *Inset* is further flawed as its due process analysis consisted of a conclusory finding that ISI purposefully availed itself of doing business in Connecticut. This finding was based on ISI's "continuous" advertisement on its "passive" Internet webpage, without any additional contacts specifically with Connecticut.[115] As a result, the court concluded, ISI could reasonably have anticipated being haled into court in Connecticut.[116] The *Inset* opinion reflects a broad-stroked jurisdictional test applied in a manner exhibiting an overreaction to the novel factual scenario before the court. The opinion lacked the type of sensitive fact-based analysis which is necessary in Internet-related jurisdictional issues.

{47} In *Bensusan*, the court's reliance on Justice O'Connor's plurality opinion in *Asahi Metal Indus. Co., Ltd. v. Superior Ct. of California*[117] utilized a jurisdictional analysis well-suited to the determination of whether Internet-based activities constitute "minimum contacts" with a forum state. In *Asahi*, a California resident was injured while riding as a motorcycle passenger, when the vehicle's tire suddenly exploded.[118] The plaintiff sued Chen Shin Rubber Industrial Co., ("Chen Shin"), a Taiwan manufacturer of components in tire tubes, and filed the lawsuit in California Superior Court.[119] Chen Shin distributed its product world-wide.[120] Chen Shin then sought indemnification from Asahi, a Japanese manufacturer of tire tube valve assemblies who sold the assemblies to Chen Shin.[121]

{48} In *Asahi*, the Court addressed the issue of whether a non-resident foreign defendant's awareness that the product it manufactured, sold and delivered outside the United States might reach California in the "stream of commerce"[122] constituted "minimum contacts" so that exercising personal jurisdiction over that defendant would be reasonable.[123] The Supreme Court set forth a two-prong analysis which it developed to determine whether a finding of personal jurisdiction comports with due process: 1) whether the defendant purposefully availed himself of the laws of the forum state, and 2) whether the assertion of personal jurisdiction over the defendant would be fair and reasonable.[124]

{49} Justice O'Connor's plurality opinion in *Asahi* held that a non-resident defendant's placement of a product into the "stream of commerce,"[125] without additional conduct[126] in the forum state, did not satisfy the "purposeful availment" prong of the "minimum contacts" analysis.[127] The Court also found that the assertion of jurisdiction over Asahi would be unreasonable because of the heavy burden on the Japanese defendant, Asahi, to litigate in a California court.[128] Additionally, the Court considered the slight interests of the Taiwan corporation, Cheng Shin, and the State of California in resolving an indemnification claim between two foreign parties in a California court.[129]

{50} By employing the jurisdictional analysis set forth by O'Connor in *Asahi*, the *Bensusan* opinion illustrates that a sufficiently flexible legal framework exists and should be applied in Internet cases raising questions of personal jurisdiction.[130] The "additional conduct" requirement to the "stream of commerce" test, along with a determination of reasonableness, supplies a suitable jurisdictional analysis that asserts personal jurisdiction over defendants whose Internet activity establishes intentional contacts with forum residents, and not over conduct providing merely "passive" advertising messages[131] worldwide. One method of determining whether personal jurisdiction over a defendant who maintains a webpage is proper is by the examination of the level of interactivity occurring within the website.[132] Two writers on this subject have suggested an examination of the "hits"[133] to a website, assigning importance or weight to hits according to their nature or "quality".[134] Application of this test enables a court to find personal jurisdiction solely based on maintenance of an Internet webpage if those contacts with forum state residents are sufficiently robust.

{51} In addition to the application of existing jurisdictional analyses to personal jurisdiction issues, it is important that judges become educated regarding an Internet webpage's interactive capabilities. This knowledge will aid in minimizing judicial overreaction to Internet-related cases such as that exhibited by Judge Covello in *Inset*.^[135] One example of a judiciary's education of Internet concepts may be found in the court's opinion in *ACLU v. Reno*.^[136] In *ACLU v. Reno*, various organizations brought a constitutional challenge against the Communications Decency Act of 1996.^[137] That Federal Law attempted to regulate the transmission of indecent or obscene material to children over the Internet.^[138] During a preliminary hearing, Judges Sloviter, Buckwalter and Dalzell obtained familiarity with the Internet through demonstrations conducted on computers in the courtroom, and learned, among other things, of differences between Internet communications and those received by radio or television.^[139]

{52} The Supreme Court has acknowledged that a personal jurisdiction analysis is an imprecise inquiry, and that the "minimum contacts" test is not susceptible to "mechanical application."^[140] As a result, the analytical framework provided by the Court in *International Shoe*,^[141] and subsequent Court opinions,^[142] along with Justice O'Connor's "additional contacts" requirement to the "stream of commerce"^[143] test in a "minimum contacts" analysis, is easily adaptable to questions of personal jurisdiction in Internet-related cases. Thus, courts' application of a jurisdictional framework established by the Court, along with a working knowledge of what type of "presence" the Internet can, and cannot, establish in a forum state, will ensure consistent judicial opinions in Internet cases, and foster the development of a uniform and coherent body of law.

V. Conclusion

{53} As more individuals and businesses develop webpages to advertise their products on the Internet, the amount of Internet-related litigation will increase proportionately. The Internet's indifference to boundaries, however, presents novel issues of what constitutes "presence" by a non-resident defendant in a forum state within the context of a personal jurisdiction analysis. Recent opinions illustrate courts' disagreement and confusion regarding the interactive capabilities of an Internet webpage to establish "minimum contacts" by the defendant in a forum state. Increased judicial familiarity with the nature of the Internet, together with the application of existing yet flexible legal precedent to Internet-related jurisdictional questions will encourage well-reasoned opinions in this emerging area of the law.

[] NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Yvonne A. Tamayo, Who? What? When? Where?: Personal Jurisdiction and the World Wide Web, 4 RICH. J.L. & TECH. 7, (Spring 1998), at <http://www.richmond.edu/~jolt/v4i3/tamayo.html>.

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[2] Charles Manson, reacting to news that he had been denied parole for the ninth time, commented: "That's cool. I'm involved in too many things. I have a Web site I'm working on," *Perspectives*, NEWSWEEK, April 7, 1997, at 25.

[3] The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. . . . The nature of the Internet is such that it is very

difficult, if not impossible, to determine its size at a given moment. It is indisputable, however, that the Internet has experienced extraordinary growth in recent years. In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked.

Today, over 9,400,000 host computers worldwide, of which approximately 60 percent are located within the United States, are estimated to be linked to the Internet. . . . In all, reasonable estimates are that as many as 40 million people around the world can and do access the enormously flexible Internet communication medium. That figure is expected to grow to 200 million Internet users by the year 1999.

No single entity, academic, corporate, governmental, or non-profit, administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers (which in turn exchange communications and information with still other computers). There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet.

[ACLU v. Reno](#), 929 F. Supp. 824, 830-832 (E.D. Pa. 1996), *aff'd*. 117 S.Ct. 2329 (1997).

[4] The World Wide Web provides a method of communication and information exchange on the Internet. It exists as a "platform" on the basis of which people and organizations can communicate through shared information. When information is made available, it is said to be "published" on the Web. The Web can be used to transmit text, data, computer programs, sound, visual images and moving video images. It is a series of documents stored in different computers all over the Internet.

A "Web site" or "Web page" is the equivalent of an individualized newsletter about a person or organization published on the World Wide Web and available to everyone on the Web. Web publishers have a choice to make their Web sites open to the general pool of all Internet users, or to close them, thus making the information accessible only to those with advance authorization. Many publishers choose to keep their sites open to all in order to give their information the widest potential audience. In the event that publishers choose to maintain restrictions on access, this may be accomplished by assigning specific user names and passwords as a prerequisite to access to the site. Or, in the case of Web sites maintained for internal use of one organization, access will be allowed only from other computers within that organization's local network.

See id. at 837.

[5] Advertisers spent \$217.3 million on the World Wide Web the first six months of 1997, N.Y. Times, August 4, 1997, at D8. It is estimated that consumer transactions on the Internet will reach \$300 billion by the end of this decade, *see* C. Levin, *Beware the Backlash*, PC MAGAZINE, Feb. 18, 1996, at 28.

Businesses are not the only entities to embrace the Internet in an effort to promote their products. Religious groups, for example, are flocking to cyberspace in large numbers. Consider the following spiritual websites:

Shoshana Zakar, *Havienu L'Shalom* (last modified Aug. 1998) <<http://www.havienu.org>> (Virtual Orthodox congregation)

First Church of Cyberspace (visited Sept. 6, 1998) <<http://www.execpc.com/~chender>> (Presbyterian webpage)

Engaged Buddhist-Dharma (visited Sept. 6, 1998) <<http://www.mrtc.org/~lesslie>> (Buddhist focus on human rights)

Hare Krishna-ISKCON (visited Sept. 6, 1998) <<http://www.shamantaka.org>> (Hindu site)

K. Haller, *Welcome to Partenia, Diocese Without Borders* (visited Sept. 6, 1998)

<<http://www.partenia.org/eng/index1.htm>> (Catholic site)

The Holy See (visited Sept. 6, 1998) <<http://www.vatican.va>> (Catholic site)

JEFF ZALESKI, *THE SOUL OF CYBERSPACE* 4, 22, 127, 130, 178, 214 (1997).

[6] *See infra* note 9.

[7] In *Pennoyer v. Neff*, 95 U.S. 714 (1877), the United States Supreme Court established the requirement that personal jurisdiction be based on the physical presence of the defendant within the state, *id.* The Court, however, later relaxed the traditional "physical presence" standard by recognizing a corporate defendant's "non-physical" presence, *see International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, the Court found that the activities of a corporation in a forum state could give rise to its "presence" there sufficient to establish personal jurisdiction over the defendant: "Since the corporate personality is a fiction . . . it is clear that unlike an individual its "presence" . . . can be manifested only by activities carried on in its behalf by those who are authorized to act for it," *id.* at 316.

[8] The term "forum state" will be used throughout this article to denote the state where the suit is filed, and where the plaintiff seeks to establish personal jurisdiction over the defendant.

[9] The following cases have addressed the issue of personal jurisdiction where a non-resident defendant's contacts with the forum state are based in whole or in part on an Internet website: *Calder v. Jones*, 465 U.S. 783, 788-89 (1984); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (single act of trademark infringement not enough to establish personal jurisdiction on non-resident); *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997) (passive website in forum not enough to establish personal jurisdiction without more); *CompuServe, Inc. v. Patterson*, 89 F. 3d 1257 (6th Cir. 1996) (personal jurisdiction established because defendant's acts were purposefully directed to forum, cause of action arose out those contacts sufficient to establish "minimum contacts"); *Superguide Corp. v. Kegan*, No. Civ. 4:97CV181, 1997 WL 754467 (W.D.N.C. Oct. 8, 1997) (personal jurisdiction found based on defendant's sale of credit cards and other Internet contacts in forum state); *Hasbro, Inc. v. Clue Computing, Inc.*, Civ. Act. No. 97-10065-DPW, 1997 WL 836498 (D. Mass. Sept. 30, 1997) (advertising and financial gains enough to exercise personal jurisdiction over defendant); *Telco Communications v. An Apple A Day*, 977 F. Supp. 404 (E.D. Va. 1997) (personal jurisdiction found where defendant placed defamatory statements on Internet site that reached the forum); *Weber v. Jolly Hotels, et al.*, 977 F. Supp. 327 (D. N.J. 1997) (advertisement on website, without more, does not establish "minimum contacts"); *American Network, Inc. v. Access Am./Connect Atlanta, Inc.*, 975 F. Supp. 494 (S.D.N.Y. 1997) (commission of tort in the forum along with additional contacts enough to assert personal jurisdiction); *Expert Pages v. Buckalew*, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997) (although defendant had "minimum contacts" with forum, no personal jurisdiction because "reasonableness" test was not met); *Agar, Inc. v. Multi-Fluid, Inc.*, Civ. Act. No.95-5105 983 F. Supp. 1126 (S.D. Tex.1997) (personal jurisdiction not found where "passive" website does not purposefully direct information to a particular jurisdiction); *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356 (W.D. Ark. 1997) (advertisement not sufficient contact to establish personal jurisdiction over non-resident defendant); *Resuscitation Tech., Inc. v. Continental Health Care Corp.*, No. IP 96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. March 24, 1997) (defendant subject to personal jurisdiction based on response to plaintiff's solicitation of money on website and numerous regular e-mail and telephone communications with plaintiff in forum state); *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp 1119 (W.D. Pa. 1997) (personal jurisdiction found where defendant advertised business through its website, made at least three sales to forum state residents, and entered into contract governed by law of forum state); *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997) (court lacked personal jurisdiction over a defendant when his website not operational); *Cody v. Ward*, 954 F. Supp. 43 (D. Conn. 1997) (telephone calls and e-mails to forum along with committing tortious act in forum sufficient to establish personal jurisdiction);

Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) ("electronic commerce" on Internet established "minimum contacts"); IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258 (N.D. Ill. 1997) (defendant's acts did not establish personal jurisdiction under "fair measure of permanence and continuity" standard of Illinois long-arm statute); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1 (D.D.C. 1996) (defendant's maintenance of webpage containing toll-free number, advertisement in newspaper with concentrated circulation in forum state, and explicit solicitation of donations online established personal jurisdiction); Edias Software Int'l, LLC v. Basis Int'l, Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (defendant subject to personal jurisdiction where website accessible to forum residents, product sales in forum, invoices, fax, e-mail sent to plaintiff, and defendant employee visited in forum state); Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996) (personal jurisdiction found under "effects" test where defendant's registration of webpage domain name constituted a "scam" aimed at plaintiff in forum state; under the "effects" analysis, a court may find personal jurisdiction where the intentional action was expressly aimed at a resident of the forum state, and the effects of the tortious act are suffered in the forum state); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (single tortious act directed at forum state sufficient for personal jurisdiction even though the defendant's actions were committed outside state); Playboy Enterprises v. Chuckleberry Publishing, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996) (prohibition of distribution or sale of magazine in U.S. extended to distribution or sale through Internet webpage); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (defendant "purposefully availed" himself of forum by continued solicitation and advertisements establishing personal jurisdiction); Hall v. LaRonde, 66 Cal. Rptr. 2d, 399, (Ct. App. 1997) (use of e-mail over Internet and telephone by defendant established "minimum contacts"); State v. Granite Gate Resorts, Inc., 568 N.W. 2d 715 (Minn. Ct. App. 1997) (defendant established "minimum contacts" through his Internet site being available to forum residents on twenty-four hours a day, seven days a week); Richard Howard, Inc. v. Hogg, No. 12-96-5, 1996 WL 689231 (Ohio App. 3d Dist. Nov. 19, 1996) (court found e-mail transmissions sufficient to establish "transaction of business" under forum state's long-arm statute); *cf.* Calder v. Jones, 465 U.S. 783, 788-89 (1984); Keeton v. Hustler, 465 U.S. 770 (1984) (defendant's circulation of magazine in forum state supported finding of personal jurisdiction in libel action); *but see* Naxos Resources (U.S.A.) Ltd. v. Southam, Inc., No. CIV. 96-2314, 1996 WL 662451 (C.D. Cal. August 16, 1996) (although defendant "purposefully availed" himself of California laws, no personal jurisdiction where defendant could not reasonably expect to be haled into California); McDonough v. Fallon McElligott, No. CIV. 95-4037, 1996 WL 753991 (S.D. Cal. August 5, 1996) (defendant's maintenance of website unrelated to cause of action found insufficient to establish personal jurisdiction where defendant had no clients in forum state and no other significant contacts within forum state); Pres-Kap, Inc. v. System One, 636 So.2d 1351 (Fla. D. Ct. App. 1994) (personal jurisdiction not established where defendant contracted for information on computer database located in forum state).

[10] A website was characterized as "passive" when it merely advertised or displayed information to Internet users, *see* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

[11] A website was said to be "interactive" when it allowed the user to exchange information with the host computer. An example of such a site would be one that permitted an Internet user to enter into a contract with the entity advertising its product through its website, *see id.*

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

[13] *Id.*

[14] 937 F. Supp. 295 (S.D.N.Y. 1996). On September 10, 1997, the Second Circuit Court of Appeals affirmed the district court's dismissal of Bensusan's complaint for lack of personal jurisdiction, *see Bensusan*, 126 F.3d 25. The appeals court based its decision on a finding that New York law proscribed personal jurisdiction over King, *see id.* at 27.

The court first examined Section 302(A)(2) of the New York long-arm statute, which allows for personal jurisdiction over a non-domiciliary defendant who commits a tortious act within the state, *see id.* That statutory provision, the court found, requires that a defendant be "physically present" in New York when performing the wrongful act, *see Bensusan*, 126 F.3d at 28, (citing *Feathers v. McLucas*, 209 N.E. 2d 68 (N.Y. 1965)); OFFICIAL PRACTICE COMMENTARY TO N.Y.C.P.L.& R., Section 302:17; *Platt Corp. v. Platt*, 217 N.E.2d 134 (N.Y. 1966) (citation omitted). Applying this standard to the acts giving rise to Bensusan's action against King- the creation of King's webpage, the use of the words "Blue Note" and the Blue Note logo on the website, and the hyperlink to Bensusan's website, led to a finding that King was not "physically present" in New York to commit the alleged tortious acts, since that conduct was performed in Missouri, not New York, *see Bensusan*, 126 F.3d at 29.

The court next considered Section 302(A)(3) of the New York long-arm statute, which provides for personal jurisdiction where a defendant performs an act outside the state but reasonably should have expected that the tortious act would have consequences in the state, and the defendant derives substantial revenue from interstate commerce. Finding that King's Blue Note club was "unquestionably a local operation" which did not engage in interstate commerce, the court found the statute inapplicable to King, *see id.* (citing REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK FOR THE JUDICIAL YEAR JULY 1, 1965 THROUGH JUNE 30, 1966, Legis. Doc. No. 90 (1967) (provision "intended to exclude non-domiciliaries whose business operations are of a local character")) (citations omitted). Accordingly, the court affirmed the district court's dismissal of Bensusan's complaint, *see id.*

[15] *See Inset*, 937 F. Supp. at 162.

[16] *See id.* at 165.

[17] *See Bensusan*, 937 F. Supp. at 297.

[18] *See id.* at 300.

[19] *See Inset*, 937 F. Supp. 161; *Bensusan*, 937 F. Supp. 295.

[20] States may define personal jurisdiction over non-residents through legislatively-enacted long-arm statutes. Long-arm statutes are "(v)arious state legislative acts which provide for personal jurisdiction, via substituted service of process, over persons or corporations which are non-residents of the state and which voluntarily go into the state, directly or by agent, or communicate with persons in the state, for limited purposes, in actions which concern claims relating to the performance or execution of those purposes. . . ." BLACK'S LAW DICTIONARY 942 (6th ed.1990).

[21] The Due Process Clause of the Fourteenth Amendment defines the general power of states to exercise personal jurisdiction over non-resident defendants, U.S. CONST. amend. XIV, § 1 states in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law," *see Asahi Metal Indus. Co., Ltd. v. Superior Ct. of California*, 480 U.S. 102, 108 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 196-200 (1977).

[22] *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[23] *See* JOSEPH W. GLANNON, CIVIL PROCEDURE EXAMPLES AND EXPLANATIONS (3d ed. 1997).

[24] *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

[25] *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

[26] See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 (1984).

[27] See *Burger King*, 471 U.S. at 472-73.

[28] See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[29] See *Burger King*, 471 U.S. at 475-76 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

[30] See *id.* at 476-77 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

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

[32] See *id.*

[33] See *id.*

[34] See *id.* at 163.

[35] See *id.* at 162.

[36] See *id.*

[37] See *id.* In fact, the *Inset* Court did not cite any instances of ISI conducting business in Connecticut during any period prior to the filing of or otherwise relevant to this lawsuit, *see id.*

[38] See *id.*

[39] See *id.* A domain name or address consists of three parts: the first part identifies the part of the Internet desired by the user such as World Wide Web (WWW); the second part is usually the name of the company or other identifying words; and the third part identifies the type of institution such as government (.gov) or commercial (.com), *see id.* at 163.

[40] See *id.* at 162. The complaint alleged violations under the Federal Trademark Dilution Act, 15 U.S.C. §§ 1051-1127 (1994), and also unfair competition and trademark infringement under Connecticut state law, as well as dilution and injury to business reputation, Conn. Gen. Stat. § 35-11i(c) (1997), and violations under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat., ch. 735a, § 42-110(a)-(q) (1997), *see id.*

[41] See *id.* The Motion to Dismiss also alleged improper venue under 28 U.S.C. § 1391(a) (1994), which provides in pertinent part: "(A) civil action . . . may . . . be brought only in a judicial district where any defendant resides, if all defendants reside in the same state . . ." Further, 28 U.S.C. § 1391(c) (1994), states in pertinent part: ". . . (A) defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced . . ." Having found that ISI was subject to personal jurisdiction in Connecticut, the court found that venue was properly established in Connecticut, *see id.* at 166.

[42] See *id.* at 164-65.

[43] Conn. Gen. Stat. § 33-411(c) (1994) states, in pertinent part: "Every foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it has engaged exclusively in interstate or foreign commerce, on any cause of action arising. . . (2) out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business,

whether the orders or offers relating thereto were accepted within or without the state. . . ," *see Inset*, 937 F. Supp. at 164.

- [44] *See Inset*, 937 F. Supp. 161. (citing *McFaddin v. National Executive Search, Inc.*, 354 F. Supp. 1166 (D. Conn.1973)); *Whelen Eng'g Co., Inc., v. Tomar Elec.*, 672 F. Supp. 659 (D. Conn. 1987)).
- [45] *See id.* (citing *McFaddin*, 354 F. Supp. at 1169).
- [46] *See id.* (citing *Whelen Eng'g, Inc.*, 672 F. Supp. 659).
- [47] *Id.* (emphasis added).
- [48] *See id.* (citing Conn. Gen. Stat. § 33-411(c)(2) (1994)).
- [49] *See id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).
- [50] *See id.*
- [51] *See id.*
- [52] *See id.*
- [53] *See id.*
- [54] *See id.* at 165 (citing *Whelen Eng'g Co., Inc., v. Tomar Elec.*, 672 F. Supp. 659, 664).
- [55] *Id.* (emphasis added).
- [56] *See id.*
- [57] *See id.*
- [58] *See id.*
- [59] *See id.*
- [60] *See id.* at 164-65.
- [61] *See id.*
- [62] *See id.*
- [63] *See id.*
- [64] SHERRY TURKLE, *LIFE ON THE SCREEN* (Simon & Schuster 1995).
- [65] *See id.*
- [66] *See id.* at 178.
- [67] *Id.* at 179.
- [68] *See* HOWARD REINGOLD, [THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER](#)

[69] WELL is an abbreviation for The Whole Earth 'Lectronic Link, "a computer conferencing system that enables people around the world to carry on public conversations and exchange private electronic mail (e-mail)," *id.* at 1.

[70] *Id.* at 2.

[71] *Inset v. Instruction Set, Inc.*, 937 F. Supp. 161. In his *Inset* opinion, Judge Covello pointed out the ever-present nature of the Internet and its transcending of the physical constraints of time and space inherent in traditional forms of media advertising:

Unlike television and radio, in which advertisements are broadcast at certain times only, or newspapers in which advertisements are often disposed of quickly, advertisements over the Internet are available to Internet users *continually*, at the stroke of a few keys of a computer. At this time there are at least 10,000 Internet connected computer users in the state of Connecticut.

Id. at 163 (emphasis added); *see also supra* text corresponding to notes 47 and 55.

[72] *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

[73] *Id.*

[74] *See id.* at 297.

[75] *See id.* at 295.

[76] *See id.* at 298.

[77] *See id.* at 295.

[78] *See id.*

[79] Although the *Bensusan* court did not specifically describe King's webpage as "passive," the website had no interactive abilities other than to advertise information regarding The Blue Note Club, *see id.* at 297. Webpages of that type have been generally recognized by courts as being "passive" in nature, *see* *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W. D. Pa. 1997). The court in *Zippo* stated: "A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction," *id.* at 1124 (citing *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996)). *See, e.g.*, *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356 (W.D. Ark. 1997); *Hearst v. Goldberger*, No. 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997); *Heroes Inc. v. Heroes Found.*, 958 F. Supp 1 (D.D.C. 1996); *Maritz v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996).

[80] *Bensusan*, 937 F. Supp. at 297. *See also* Richard King, *The Blue Note Cyberspot* (visited May 31, 1998) <<http://www.thebluenote.com>>.

[81] Richard King, *The Blue Note Cyberspot* (visited May 31, 1998) <<http://www.thebluenote.com>>.

[82] *See id.*

[83] *See id.* At the time the lawsuit was filed, the first page of the website informed a "visitor" that "The Blue

Note's Cyberspot should not be confused with one of the world's finest jazz club[s] [the] Blue Note, located in the heart of New York's Greenwich Village. If you should find yourself in the big apple give them a visit," *Bensusan*, 937 F.Supp at 298-9. Also included was a "hyperlink" which permitted an Internet user to connect directly to the New York Blue Note's website by "clicking" on the link, *see Bensusan*, 937 F.Supp at 298-9. After *Bensusan* objected to the website, King dropped the sentence "If you should find yourself in the big apple give them a visit" and removed the hyperlink, *Bensusan*, 937 F.Supp at 298-9.

"A 'hyperlink' is 'highlighted text or images that, when selected by the user, permit him to view another, related Web document. . .,'" *see id.* at 298, n.2. (quoting *Shea v. Reno*, 930 F. Supp. 916, 929 (1996)). "With these links a user can move seamlessly between documents, regardless of their location; when a user viewing the document located on one server selects a link to a document located elsewhere, the browser will automatically contact the second server and display the document," *id* at 299.

[84] *Id.* at 299. Section 302(a) of the New York Civil Practice Laws and Rules states in pertinent part:

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 ... 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 tortuous act within the state ... ; or
3. commits a tortuous act without the state causing injury to person or property within the state ... if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the state, or
(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . .

N.Y.CIV. PRAC. L. & R. § 302(a)(1)-(3)(Consol. 1978 & Supp. 1997).

[85] *See Bensusan* at 299.

[86] *See id.*

[87] *See id.* The court stated:

It takes several affirmative steps by the New York resident . . . to obtain access to the Web site and utilize the information there. First, the New York resident has to access the Web site using his or her computer hardware and software . . . [t]hen, if a user wished to attend a show in defendant's club, he or she would have to telephone the box office in Missouri and reserve tickets. Finally, that user would need to pick up the tickets in Missouri because King does not mail or otherwise transmit tickets to the user.

Id.

[88] Trademark infringement, the cause of action asserted in *Bensusan*, occurs, inter alia, when "the deceived customer buys the defendant's product in the belief that he is buying the plaintiff's," *id.* at 299 (quoting *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 639 (2d Cir. 1956)). *Bensusan* alleged that as a result of King's webpage, customers would be confused as to the relationship between the New York and Missouri jazz clubs, *see id.*

[89] *See id.*

[90] *Id.* (citing *Hertz Sys., Inc. v. Hervis Corp.*, 549 F. Supp. 796, 797 (S.D.N.Y. 1982)).

[91] *See id.* at 299.

[92] *See id.* (citing C.P.L.R. § 302(a)(3)(ii)).

[93] *See id.* at 300.

[94] *See id.* (stating that King's patronage consisted mostly of University of Missouri students. Further, most of its out-of-state customers, such as the University of Missouri's alumni, had an existing or prior connection to Missouri).

[95] *Id.* (citing *Darienzo v. Wise Shoe Stores, Inc.*, 427 N.Y.S.2d 831, 834 (N.Y. Sup. Ct. 1980)).

[96] *Id.* (stating the court determined that Bensusan's "conclusory allegation" of a loss in New York merely amounted to an "indirect financial loss... resulting from the injured person's reside(nce) or domicile in New York" not amounting to "significant economic injury" required by Section 302(a)(3)).

[97] *Id.*

[98] *Id.*

[99] *Id.* (citing *Darby v. Compagnie Nationale Air France*, 769 F.Supp. 1255, 1262 (S.D.N.Y. 1991), (quoting [International Shoe Co. v. Washington](#), 326 U.S. 310, 316, 565 S.Ct. 154, 158 (1945)).

[100] *Id.* at 301 (citing *Independent Nat'l Dist., Inc. v. Black Rain Communications, Inc.*, No. 94 Civ. 8464, 1995 WL 571449 at 5-6 (S.D.N.Y. Sept.28, 1995)).

[101] *See id.*

[102] *Id.* (citing [Asahi Metal Indus. Co., Ltd. v. Superior Ct. of California](#), 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion)).

[103] *Id.*

[104] *Id.*

[105] *See id.*

[106] The court granted King's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction and dismissed Bensusan's complaint, *see id.*

[107] *See id.* at 299.

[108] Presently, over ninety percent of desktop computers utilize Microsoft software. Recently, Microsoft integrated its new Explorer Web browser into its Microsoft operating system. As a result, computer users now can automatically access the Internet by utilizing Microsoft applications, Steven Levy, *The Microsoft Century*, NEWSWEEK, Dec. 2, 1996, at 58.

[109] Steven Levy, *Gates, Face to Face*, NEWSWEEK, Dec. 2, 1996, at 62.

[110] BILL GATES, *THE ROAD AHEAD* 3 (1995).

[111] *Cf. Inset v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

[112] *Cf. id.*

[113] *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125-1126 (W.D. Pa. 1997) (describing interactive capabilities of webpage).

[114] *See CompuServe, Inc. v. Patterson*, 89 F. 3d 1257, 1264-65 (6th Cir. 1996).

[115] *See Inset*, 937 F. Supp. at 165.

[116] *See id.*

[117] *Asahi Metal Indus. Co., Ltd. v. Superior Ct. of California*, 480 U.S. 102 (1987).

[118] *See id.* at 105-6.

[119] *See id.* at 106.

[120] *See id.*

[121] *See id.*

[122] The Court equated Chen Shin's world-wide product distribution to the placement of a product into the "stream of commerce," *see id.* at 111.

[123] *See id.* at 112.

[124] *See id.* at 112-114 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Keeton v. Hustler*, 465 U.S. 770, 774 (1984); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Court listed several factors to be considered in the "reasonableness" determination: the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in efficiently resolving controversies, and the shared interest of several states in furthering fundamental social policies, *see id.* at 113.

[125] *Id.* at 112.

[126] The "additional conduct" required in O'Connor's view is activity indicating an intent or purpose to serve the market in the forum state, thus putting the defendant on notice that the defendant may be susceptible to a particular forum's laws, *see id.* Examples include, "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State," *id.*

[127] Justice O'Connor found that the awareness of the defendant 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", and thus required a showing of additional conduct towards the forum state by the defendant, *id.*

[128] *See id.* at 114.

[129] *See id.* at 114-115. The plaintiff ultimately settled his lawsuit, leaving only the indemnification claim between Cheng Shing and Asahi to be resolved.

[130] The court in *Bensusan* added a third factor to the Asahi Court's due process analysis by considering whether the defendant conducted a systematic and continuous part of his general business within the forum state, *see Bensusan Rest. Corp. v. King*, 987 F.Supp. 295, 300-1 (S.D.N.Y. 1996).

[131] The case of [CompuServe, Inc. v. Patterson](#), 89 F.3d 1257 (6th Cir. 1996) established legal precedent in the Sixth Federal Circuit by requiring "additional activity" beyond a webpage to find personal jurisdiction in a forum state. In *CompuServe*, the court applied the *Asahi* "additional contacts" test to establish personal jurisdiction. Besides defendant's advertisement on the Internet through CompuServe, the court found the following "additional conduct" by the defendant in the forum state: defendant's contract with plaintiff was to be governed by forum state law; defendant electronically transmitted software to plaintiff's computer system in forum state; defendant advertised software through plaintiff's computer system in forum state; Internet users downloaded defendant's software from plaintiff's system in forum state; and defendant sent repeated regular and e-mail to plaintiff in Ohio regarding a dispute between the parties, *see CompuServe*, 89 F.3d. at 1264-1265.

See also *Zippo Mfg. Co.v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997) (establishing personal jurisdiction where defendant advertised services on webpage, sold passwords to 3,000 subscribers to defendant's Internet news service, and contracted with Internet access providers to furnish its services in forum state); *but see*, *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997) (finding that website advertising defendant's future services and e-mail sent to forum state residents after commencement of litigation not sufficient to establish "additional activity" for personal jurisdiction over defendant in forum state).

In *Hearst*, the court expressed its unwillingness to establish "worldwide" jurisdiction based on a "passive" website: "Upholding personal jurisdiction over (the defendant) in the present case would, in effect, create national (or even worldwide) jurisdiction, so that every plaintiff could sue in plaintiff's home court every out-of-state defendant who established an Internet website. The Court declines to reach such a far-reaching result. . . ." *Hearst*, 1997 WL 97097, at *20.

[132] [Zippo Mfg. Co.v. Zippo Dot Com, Inc.](#), 952 F. Supp. 1119, 1124 (W.D.Pa. 1997).

[133] A "hit" is the accessing or opening of a file on a website. NEWTON'S TELECOM DICTIONARY (1994). One proposed framework for evaluating "hits" on a website sets forth the following hierarchy:

First Level- "Business card" static site with no interactive qualities.

Second Level- Site allows viewer to browse and click on different parts of Web site, and to choose specific information to be downloaded.

Third Level- Web site solicits and obtains specific information about user, then provides site customized for viewer's interests.

Fourth Level- User purchases Web site information and provides credit card number by telephone or over Internet to Web publisher, then receives password enabling user to access Web site material.

Fifth Level- User purchases computer software through Web site then downloads software via the Internet to user's hard drive.

Sixth Level- User engages in financial transaction on Internet by transferring funds or buying or selling securities through Web site.

[134] See [Hanson v. Denckla](#), 357 U.S. 235, 253 (1958) (discussing direct relationship between purposeful availment test and "quality and nature" of "minimum contacts"); [International Shoe Co. v. Washington](#), 326 U.S. 310, 319 (1945) (quality and nature of contacts determines whether due process satisfied in personal jurisdiction inquiry); [Zippo Mfg. Co. v. Zippo Dot Com, Inc.](#), 952 F. Supp. 1119, 1124 (W.D.Pa. 1997) (suggesting that the well developed personal jurisdiction principles adequately provide a sliding scale test based on nature and quality of the defendant's commercial activity in the forum state); [Maritz, Inc. v. Cybergold, Inc.](#), 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (quality and quantity of contacts considered in "minimum contacts" analysis).

[135] See [Inset v. Instruction Set, Inc.](#), 937 F. Supp. 161 (D. Conn. 1996).

[136] See [ACLU v. Reno](#), 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd.* [117 S.Ct. 2329](#) (1997).

[137] See *id.*; Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35 (1996).

[138] See [ACLU v. Reno](#), 929 F. Supp. at 826.

[139] *Id.* at 844. The court concluded: "Although content on the Internet is just a few clicks of a mouse away from the user, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a (radio or television) dial", *id.*

[140] [Kulko v. Superior Court](#), 436 U.S. 84, 92 (1978) (citing [Hanson v. Denckla](#), 357 U.S. 235, 246). The Court has stated that the "minimum contacts" test "is one in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable," *id.* at 492.

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

[142] See [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462 (1985); [Helicopteros Nacionales de Colombia, S.A. v. Hall](#), 466 U.S. 408 (1984); [Keeton v. Hustler Magazine Inc.](#), 465 U.S. 770 (1984); [World-Wide Volkswagen v. Woodson](#), 444 U.S. 286 (1980); [Hanson v. Denckla](#), 357 U.S. 235 (1958); [McGee v. International Life Insurance Co.](#), 355 U.S. 220 (1957).

[143] [Asahi Metal Industry Co. v. Superior Court of California](#), 480 U.S. 102, 107 (1987).

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