

Campbell Law Review

Volume 22
Issue 2 *Spring 2000*

Article 3

April 2000

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Recommended Citation

Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts?*, 22 CAMPBELL L. REV. 341 (2000).

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PERSONAL JURISDICTION AND THE INTERNET: IS A HOME PAGE ENOUGH TO SATISFY MINIMUM CONTACTS?

KEVIN R. LYN*

I. INTRODUCTION

Let's face it, the Internet has become a fixture in everyday life. Among its many uses, the Internet allows schoolchildren to learn about the world, lets adults conveniently keep track of their investments, and expands the exposure of small businesses. We constantly hear people talk about "surfing the Net," and it is difficult to turn on the television or open a magazine or newspaper without seeing an ad for an online service telling you how *easy* the Internet is to use and why you *need* to be online.

Okay, so you're the owner of a small business, the "Hollywood Coffee House," in Smalltown, Maine. Your logo includes the characters "Emmy Latté" and "Oscar Cappuccino" as a pair of dancing coffee mugs wearing formal wear. You're currently looking for ways to increase your exposure to the local community since business has leveled off. A representative from an online service provider approaches you and convinces you that the solution to your problem is to set up an Internet home page. With a home page for your business, you can have Emmy Latté and Oscar Cappuccino highlighting the weekly coffee special or announcing the band playing on live entertainment night. You can even have a little audio message with Emmy and Oscar singing a catchy jingle. This ad will be accessible twenty-four hours a day, seven days a week, three hundred and sixty-five days a year at a much lower cost than ads in the newspaper or on radio or television. What have you got to lose?

Well, your home page turns out to have been well worth the nominal investment. New customers from the local area start appearing, saying that they saw your home page and just had to stop in. Monthly receipts show a noticeable increase and your business has never been better. Then one day, you're served with complaints issued by the Academy of Television Arts and Sciences

* Mr. Lyn wishes to express his gratitude to Ms. Vicki Parrott for her help in writing this article.

and the Academy of Motion Picture Arts and Sciences alleging that “Emmy Latté” and “Oscar Cappuccino” infringe on the respective registered federal trademarks owned by these groups. Of course, you’ve heard of them: the Emmy and the Oscar. The complaint also alleges trademark dilution and unfair competition. Then you notice that the complaint requires you to appear in a California district court, where the complainants are based. You’ve never been anywhere near California, your business has nothing to do with California, and all you know of California is that it’s over somewhere on the west coast by the Pacific Ocean! Reading further, you find that the reason they say that you are subject to jurisdiction in California is that your Internet home page is accessible by residents of California and, as such, you have sufficient contacts with California to be required to appear there.

Does this scenario sound far-fetched or even absurd? Just ask Mr. Richard King, the owner of a small nightclub in Columbia, Missouri called the Blue Note, who created a home page to promote his club to the local community.¹ The complainant in his case, Bensusan Restaurant Corp., was the owner of the federal trademark “The Blue Note” and the operator of a well-known jazz club in New York under the same name.² Bensusan sued King in New York for trademark infringement, trademark dilution, and unfair competition by claiming jurisdiction over King based on his home page, which Bensusan alleged to be accessible by residents of New York, which he further alleged was foreseeable by King.³ However, fortunately for King, the New York District Court found that his home page did not represent a significant tie to the forum state and dismissed the case for lack of personal jurisdiction.⁴ However, others have not been so lucky.⁵ It is important to note that King had to deal with the hassle and expense of defending himself in court in a different state because he had created a simple Internet home page for his business.

What does this mean for the average Internet user, if there is such a person? Since state boundaries are irrelevant on the Internet, how do the courts view jurisdiction where the Internet is

1. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2nd Cir. 1997).

2. *Id.*

3. *Id.* at 300.

4. *Id.* at 301.

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

concerned? Is there a general consensus among the courts? How can the owner of an Internet home page take steps to see that he/she will not have to defend a lawsuit in a court in a distant state? These are important questions for any Internet user, especially those planning on conducting business over the Internet. Since the Internet is a relatively new phenomenon, the law is far from settled in this area and thus represents an issue of considerable concern to those online.

This paper reviews the Internet in general and the law concerning personal jurisdiction. Recent federal cases are considered in which Internet home pages have been both successfully and unsuccessfully asserted as a basis for personal jurisdiction. Thereafter, the law in this area is summarized and the various viewpoints on the issue are presented, including opinions posted on the Internet itself. Lastly, this paper summarizes the issue of personal jurisdiction and the Internet and presents some possible recommendations for the Internet user.

II. THE BASIS OF PERSONAL JURISDICTION

Modern notions of personal jurisdiction in United States law stem from the landmark case of *International Shoe Co. v. Washington*⁶ decided by the Supreme Court in 1945. Prior to *International Shoe*, the exercise of personal jurisdiction was based on the court's power over the defendant's person where "his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him."⁷ A more flexible and expanded view of personal jurisdiction arose from *International Shoe*, wherein personal service on the defendant became sufficient to render jurisdiction so long as the defendant had certain minimum contacts with the forum such that requiring his presence in the courts of the forum did not offend "traditional notions of fair play and substantial justice."⁸

Under the *International Shoe* standard, the exercise of personal jurisdiction over a foreign defendant requires a two-prong analysis.⁹ First, it must be decided whether the forum state's long-arm statute permits the defendant to be haled into the courts

6. 326 U.S. 310 (1945).

7. *Id.* at 316 (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)).

8. *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

9. *See e.g.*, *Superguide Corp. v. Kegan*, 987 F. Supp. 481 (W.D.N.C. 1997).

of the forum state.¹⁰ Long arm statutes vary between states. However, they typically reach nonresident defendants who:

either transacted business within the forum state; committed a tortious act within the forum state; or committed a tortious act outside of the forum state that resulted in harmful consequences suffered within the forum state when coupled with additional requisites, such as either a persistent presence in the forum, a regular solicitation within the state, or a reasonable expectation of being haled into the forum state's courts.¹¹

Those states which do not specifically enumerate the types of contacts necessary to exercise personal jurisdiction over nonresident defendants have merely extended or interpreted their long-arm statutes to the full extent permissible under the Due Process Clause.¹² Secondly, if the language of the long-arm statute applies,¹³ it must then be determined whether the exercise of personal jurisdiction is consistent with the Due Process Clause of the Constitution.¹⁴ In other words, due process requires that the out-of-state defendant have certain "minimum contacts" with the forum state.¹⁵

If the defendant's contacts with the forum state are "continuous and systematic," the forum state may exercise general jurisdiction whereby the defendant may be haled into the courts of the forum state even if defendant's contacts are unrelated to the controversy.¹⁶ On the other hand, the courts of the forum state may exercise specific jurisdiction where the controversy "[arises] out of or [is] related to the defendant's contacts with the forum."¹⁷ Although specific jurisdiction is fact-specific and determined by the "relationship among the defendant, the forum, and the litiga-

10. *Id.*

11. Jeffrey R. Kuester and Jennifer M. Graves, *Personal Jurisdiction on the Internet: Where is Cyberspace?*, (visited Mar. 11, 1998) <<http://www.tkhr.com/articles/personal.html>>.

12. Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 *Fordham L. Rev.* 2241, 2251 (1997).

13. If the forum state's long-arm statute permits the exercise of jurisdiction to the full extent permissible under the Due Process Clause, the analysis becomes a single step: "If a court has constitutional jurisdictional power, it also has statutory power to assert jurisdiction." Kalow, 65 *Fordham L. Rev.* at 2251.

14. See e.g., *Superguide Corp.*, 987 F. Supp. 481.

15. *International Shoe Co.*, 326 U.S. at 316.

16. *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 415 (1984).

17. *Id.* at 414, n.8.

tion,"¹⁸ there must be "some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws."¹⁹ In addition, "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there."²⁰ However, the mere fact that the defendant places a product into the stream of commerce does not mean that the defendant has committed an act purposely directed at the forum state.²¹ A more affirmative action on the part of the defendant showing intent to target the forum state is required.²² Thus, "the purposeful availment requirement ensures [that] a defendant will not be haled into a jurisdiction solely as the result of random, fortuitous, or attenuated contacts."²³

Additionally, in determining whether to exercise specific jurisdiction, the courts of the forum state must examine whether requiring the defendant to appear in the forum state would be reasonable.²⁴ The Supreme Court has established a number of fac-

18. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) *superseded by statute as stated in* *In re Mid-Atlantic Toyota Antitrust Litigation*, 525 F. Supp. 1265, 1271 (D. Md. 1981).

19. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). *See also* *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985) (The forum state may exercise specific jurisdiction if the foreign defendant purposely directs his activities at the forum and the injury in controversy arises from or is related to this activity).

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

21. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion).

22. *Id.* For example, "additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, 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." Note that in his concurrence in *Asahi*, Justice Brennan argued that if the defendant is aware that his product introduced into the stream of commerce is being marketed in the forum state, then he is also aware that he "benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity" and should be subject to jurisdiction premised on the placement of a product into the stream of commerce. *Id.* at 117. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112

23. *Burger King*, 471 U.S. at 475 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1983); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980)).

24. The defendant should *reasonably* anticipate being haled into the courts of the forum state.

tors to be considered in making this determination, including “the burden on the defendant” of defending himself in the forum state, “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.”²⁵ Thus, by conducting a reasonableness analysis, the courts consider the interests of both the forum state and the defendant and weigh the respective factors in order to determine if exercise of jurisdiction over a foreign defendant would be fair and just.

III. THE INTERNET: A BRIEF SUMMARY

A. *The Structure of the Internet*

The origin of the Internet dates back to a 1969 project during the Cold War initiated by a subdivision of the Pentagon called the Defense Advanced Research Projects Agency to link together the computers and related networks of defense-related research entities as a multinodal network.²⁶ Known as ARPAnet, it was designed to be “a decentralized, self-maintaining series of redundant links between computers and computer networks . . . with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable,”²⁷ say in the event of a nuclear war.

A key feature of ARPAnet was the transmission of communications by packet switching.²⁸ With packet switching, a single communication is broken down into a number of smaller packets of data, each containing its own address header identifying the final destination of the packet.²⁹ Each packet then proceeds separately from the source computer to the destination computer through the network, wherein each computer receiving, process-

25. *World-Wide Volkswagen*, 444 U.S. at 292.

26. Robert Craig Waters, “An Internet Primer,” 44 Fed. Law. 33, 35 (1997).

27. Craig Peyton Gaumer, *The Minimum Cyber-Contacts Test: An Emerging Standard of Constitutional Personal Jurisdiction*, 85 Ill. B.J. 58, 59 (1997) (quoting *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996)).

28. Joseph F. Ruh, Jr., “The Internet and Business: A Lawyer’s Guide to the Emerging Legal Issues” (visited Mar. 3, 1998) <<http://www.cla.org/Publications/RuhBook/chp1.htm>>.

29. Ruh, *supra* note 28.

ing, and forwarding the packets is called a packet switch.³⁰ The packets comprising the communication may all take different paths through the network, each passing through many different packet switches, before arriving at the destination computer.³¹ The packets are then reassembled into the original communication by the destination computer as they arrive, meaning that the source computer and the destination computer are not required to operate at the same speed.³²

The packet switching concept used on the ARPAnet was further enhanced by the adoption of a common communication protocol³³ used by all computers for data transmission.³⁴ Instead of requiring the same software, which would require network-wide compatible computers to run that software, the common protocol allowed the network to work “across platforms.”³⁵ In other words, packet switching was standardized when performed by any computer abiding by that protocol.³⁶ Known as the Transmission Control Protocol / Internet Protocol (TCP/IP), this protocol, combined with a policy of permitting other networks to interconnect with the ARPAnet, is perhaps primarily responsible for the phenomenal growth leading to the modern Internet.³⁷ Thus, the term “Internet” represents the overall global network of numerous smaller networks using the TCP/IP protocol.³⁸

In order to link to the Internet, individual users or networks must connect to computer networking devices known as servers.³⁹ These connections are usually made over common telephone lines.⁴⁰ Thus, the server becomes the “traffic director” for the network of computers connected to it, controlling the flow of information between the computers in an organized manner when both

30. Ruh, *supra* note 28.

31. Ruh, *supra* note 28.

32. Ruh, *supra* note 28.

33. Ruh, *supra* note 28. A protocol is merely a set of rules which governs the handling of message transmissions by the network, including how errors in transmission are treated.

34. Ruh, *supra* note 28.

35. Waters, *supra* note 26, at 36. A network works “across platforms” when it can operate on different types of computers.

36. Waters, *supra* note 26, at 36.

37. Ruh, *supra* note 28.

38. Ruh, *supra* note 28.

39. Waters, *supra* note 26, at 38-39.

40. Waters, *supra* note 26, at 38-39.

sending and receiving information.⁴¹ In other words, a server functions as a “gateway” to the Internet for the individual user and as a packet switch within the Internet.

In order to identify the source of information flowing from it or to designate it as the destination of information, each server has a designated and unique numerical Internetworking Protocol address (IP address).⁴² However, the IP address is more commonly represented by a textual mnemonic address, known as a domain name, following the Domain Name System (DNS) international standard.⁴³ The domain name, like the IP address, is unique to the particular server and is the preferred method of designating the server’s address since it more easily remembered than a numerical sequence.⁴⁴ For example, the domain name “www.example.com” may be representative of the IP address “123.45.678,” both of which would be the unique address of the particular server. The user’s files or the files of other networked users are contained in subsequent directories and subdirectories on the server. For example, www.example.com/user1/homepage1/ represents an address on the above server wherein the user’s directory “user1” contains the subdirectory “homepage1” which, in turn, contains the files comprising the user’s home page.

A home page is simply a computer program representation of a document which, when stored on a server, can be accessed by a remote computer over the Internet and displayed on the accessing computer as though it were the original document.⁴⁵ When the remote computer receives information from the Internet, a home page for example, this act is known as downloading.⁴⁶ When the information is downloaded, it is received at the remote computer as a number of packets from the server, reassembled, and stored in a temporary memory in the computer as it is being displayed on the computer’s monitor.⁴⁷

41. Lief Swedlow, Note, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 Okla. City U. L. Rev. 337 (1997).

42. James H. Aiken, Comment, *The Jurisdiction of Trademark and Copyright Infringement on the Internet*, 48 Mercer L. Rev. 1331, 1332 (1997).

43. Waters, *supra* note 26, at 39.

44. Aiken, *supra* note 42, at 1332.

45. Waters, *supra* note 26, at 39.

46. Waters, *supra* note 26, at 40.

47. Waters, *supra* note 26, at 40.

B. *The Internet Jurisdictional Problem*

With the basic structure of the Internet in mind, the jurisdictional dilemma with Internet home pages is best described by example. Suppose the defendant develops a home page on his home computer located in State A. On completion, he uploads the home page to his server and “publishes” the document. This is similar to the owner of the Hollywood Coffee House, having a home page established by an online service provider. When this home page document is published, it becomes freely available on the Internet. Subsequently, plaintiff in State B, while on the Internet, locates the address of defendant’s home page and downloads it onto his computer. Seeing some content on defendant’s home page that he does not like, plaintiff now alleges that defendant’s home page has infringed on his rights in some way and sues defendant in a district court in State B. This is the situation alleged, in the original example, by the Academy of Television Arts and Sciences and the Academy of Motion Picture Arts and Sciences in their trademark action. Is there a sufficient basis for the courts of State B to exercise personal jurisdiction over the defendant? The answer to this question, in part, depends on the way that Internet interactions are defined.⁴⁸

Courts and scholars perceive the operation of the Internet under three basic paradigms: the virtual presence view, the single point presence view, and the nonterritorial view.⁴⁹ Under the virtual presence view, the Internet is seen as an interconnected web of computers capable of transmitting and receiving information, similar in structure to a spider’s web.⁵⁰ By connecting to any one point on the web, the user can interact with any other point through many different combinations of interconnecting lines between points.⁵¹ Conversely, each point on the web is physically connected to the user’s computer.⁵² Thus, the central theme of the virtual presence view is that, once the user places content on the Internet, that content becomes simultaneously present at each and every point on the web.⁵³ In other words, courts following this view see the user’s posting of content on the Internet as establish-

48. Swedlow, *supra* note 41, at 337.

49. Swedlow, *supra* note 41, at 337.

50. Swedlow, *supra* note 41, at 337.

51. Swedlow, *supra* note 41, at 337.

52. Swedlow, *supra* note 41, at 337.

53. Swedlow, *supra* note 41, at 337. Note that this is a very expansive view of presence in a forum under which it is a foregone conclusion that anyone with an

ing the user's presence in every forum where the Internet is available.⁵⁴ Returning to the original example in this paper, once the owner of the Hollywood Coffee House puts its home page on the Internet, the owner will be seen to have instantaneously established its presence in all states for the purposes of personal jurisdiction.

Under the single point presence view, the Internet is seen as a physically traveled highway for information.⁵⁵ Any content placed on the Internet by the user, and thus his presence, can only be in one place at any given time.⁵⁶ Furthermore, each server on the Internet is associated with its particular physical location.⁵⁷ Thus, a user is actually seen as traveling from a physical location of one server to the physical location of a subsequent server when transmitting a communication across the Internet.⁵⁸ A court following the single point presence view would look to the residence of a person or the location of his host server, as well as determining which party initiated the contact, in order to determine whether the exercise of personal jurisdiction would be proper.⁵⁹ For instance, under the facts of the original example, the Hollywood Coffee House web site was established in Maine and was electronically "visited" in Maine by the California plaintiffs. If the California court followed the single point presence view, Maine would be seen as the venue in which exercise of personal jurisdiction would be proper and the nonresident defendant, would not have to appear in California. However, there will be

Internet web site has established his presence in all states regardless of extenuating circumstances.

54. Swedlow, *supra* note 41. See, e.g., *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) ("By simply setting up, and posting information at, a website . . . , one has done everything necessary to reach the global internet audience." On this presumption, exercise of personal jurisdiction was deemed proper.).

55. Swedlow, *supra* note 41.

56. Swedlow, *supra* note 41. Note that this is a more restrictive view than the virtual presence view since the determination of presence in a forum is more fact specific, taking into account the circumstances surrounding the situation.

57. Swedlow, *supra* note 41.

58. Swedlow, *supra* note 41.

59. Swedlow, *supra* note 41. See e.g., *Hearst Corp. v. Goldberger*, No. 96-3620, 1997 WL 97097 (S.D.N.Y., Feb. 26, 1997) (The court found that defendant's Internet site was located on a server in New Jersey and that this site was "visited" by residents of New York. Thus, on these presumptions, the New York District Court held that it was proper to transfer the case to a New Jersey District Court where the defendant resided and established his web site.).

situations when the single point presence view will lead to exercise of personal jurisdiction over a nonresident defendant. For instance, suppose that the Hollywood Coffee House web site was “hacked” or it received a tortious communication from someone in a distant state. In this instance, if the owner filed a complaint in Maine and that court followed the single point presence view, it would likely find Maine to be the proper venue for exercise of personal jurisdiction over the nonresident defendant and require him to appear in Maine. This would be the probable conclusion under the single point presence view since the web site is located in Maine and the defendant established his presence in Maine by visiting the site to commit the tortious act.

Finally, there is the nonterritorial view or cyberspace model.⁶⁰ Under this view, the Internet is part of a “virtual reality” not related to a physical world and, thus, removed from any connection to a particular jurisdiction.⁶¹ In other words, if a person establishes a presence on the Internet, he is really nowhere for the purposes of personal jurisdiction.⁶² Thus, a court following this view would have to determine if any of the alleged acts of the defendant fell outside of the scope of the Internet, and then apply the conventional test for personal jurisdiction to those claims.⁶³ For instance, in the original example, the trademark claims alleged by the Academy of Television Arts and Sciences and the Academy of Motion Picture Arts and Sciences arose directly from the Hollywood Coffee House web site. No other acts outside the web site were alleged, so a court following the nonterritorial model would likely decline to exercise personal jurisdiction over the owner. Note that this view has not been specifically applied by a court, but is a theory advanced by scholars and proponents of a separate area of law governing the Internet.⁶⁴

In essence, the choice for most courts is between the virtual presence view and the single point presence view. However, while the virtual presence view has been followed by a number of

60. Swedlow, *supra* note 41.

61. Swedlow, *supra* note 41.

62. Swedlow, *supra* note 41. Note that this view is diametrically opposed to the virtual presence view where a person who establishes an Internet presence is viewed to be everywhere for the purposes of personal jurisdiction.

63. Swedlow, *supra* note 41.

64. Swedlow, *supra* note 41.

courts,⁶⁵ it has been criticized on the basis that it would be “tantamount to a declaration that this Court, and every other court throughout the world, may assert personal jurisdiction over all information providers on the global World Wide Web” based on an Internet web site alone.⁶⁶ The important point to note, though, is that there is still a conflict between courts as to which is the proper characterization of interactions on the Internet. Until this discrepancy is resolved, individual courts are essentially free to follow whichever view is deemed appropriate for the controversy at issue.

IV. RECENT FEDERAL COURT DECISIONS

The premise that the Internet has recently taken on major societal significance is demonstrated by the marked proliferation of litigation involving Internet issues over the past two years. For instance, during 1996 and 1997, there have been over two dozen federal decisions where personal jurisdiction was asserted on the basis of defendant’s Internet presence. Prior to 1996, there were but a mere handful of cases on this issue. In this paper, for brevity, a limited number of these cases are summarized for illustration and examination of the problem of personal jurisdiction and the Internet. Where necessary, salient features of other cases are included in the discussion.

A. *Cases Finding Sufficient Jurisdictional Contacts*

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,⁶⁷ the Pennsylvania manufacturer of “Zippo” tobacco lighters (Zippo) brought a trademark infringement and dilution action against an Internet news service (ZDC) based in California for its use of the domain names “zippo.com”, “zippo.net” and “zipponews.com.”⁶⁸ The defendant ZDC maintained no offices, employees or agents in Pennsylvania, but advertised its service via its Internet web page which was accessible to Pennsylvania residents.⁶⁹ However, the court found that ZDC did more than advertise on the Internet in

65. See, e.g., *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996); *State v. Granite Gates Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997).

66. *Hearst Corp.*, 1997 WL 97097, at *20 (quoting *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 939 F. Supp. 1032, 1039-40 (S.D.N.Y. 1996)).

67. 952 F. Supp. 1119 (W.D. Pa. 1997).

68. *Id.* at 1121.

69. *Id.* at 1126.

Pennsylvania: "Defendant . . . sold passwords to approximately 3,000 subscribers in Pennsylvania and entered into seven contracts with Internet access providers to furnish its services to [its] customers in Pennsylvania."⁷⁰ Accordingly, the court found that the Pennsylvania long-arm statute included the defendants under the portion permitting the exercise of jurisdiction where the non-resident defendant contracts to supply services or things to state residents.⁷¹ The court upheld the exercise of personal jurisdiction, concluding that ZDC was engaged in "electronic commerce" with Pennsylvania residents by their actions, which constituted the purposeful availment of doing business in Pennsylvania.⁷²

In *American Network, Inc. v. Access America/Connect Atlanta, Inc.*,⁷³ a New York Internet access provider (ANI) brought a trademark action against a Georgia-based Internet access provider (AACA) claiming infringement of ANI's "American.net" domain name.⁷⁴ Similarly to the situation in *Zippo Manufacturing Corp.*, AACA was entirely based in Georgia and had no property in New York, but advertised its service via an Internet web page which was accessible to New York residents.⁷⁵ Out of AACA's 7500 worldwide subscribers, only 6 were residents of New York.⁷⁶ On subscription to AACA's service, the customers were mailed a software package and a written copy of the subscription agreement.⁷⁷ New York's long-arm statute includes a provision which provides for jurisdiction over a nonresident tortfeasor who causes harm within the state if the tortfeasor has reason to expect in-state consequences and derives substantial revenue from interstate or international commerce.⁷⁸

The court found that the viewing of the allegedly infringing mark by New York residents in New York did cause harm within the state and, having posted its home page on the Internet, AACA should have foreseen consequences within New York.⁷⁹ Further-

70. *Zippo Mfg. Co.*, 952 F. Supp. at 1126.

71. *Id.* at 1122.

72. *Id.* at 1125-26.

73. 975 F. Supp. 494 (S.D.N.Y. 1997).

74. *Id.* at 495. The defendant was using the domain name "America.net".

75. *Id.*

76. *Id.* at 496. These 6 subscribers accounted for 0.08% of defendant's total subscribers and produced only \$150 of defendant's total \$195,000 monthly revenue.

77. *Id.*

78. *Id.* at 496-97.

79. *American Network, Inc.*, 975 F. Supp. at 497-98.

more, while the court specifically stated that a web site alone would not have been sufficient to exercise jurisdiction, it found that by entering into agreements with the New York subscribers and by sending the software packages to those subscribers, the defendant AACA derived a commercial benefit from interstate commerce and “purposely directed activity towards New York.”⁸⁰ In addition, since AACA published statements on its home page claiming that it could help customers “across the U.S.,” along with other indications of its nationwide marketing aim, “it was foreseeable that it might be haled to defend itself in a jurisdiction where those materials were not only seen but where, as here, it actually secured customers and sent them materials, provided services to them, and received payment from them.”⁸¹ On this basis, the court held that the exercise of personal jurisdiction over the defendant was proper.⁸²

*Inset Systems, Inc. v. Instruction Set, Inc.*⁸³ also involved a trademark action brought by a Connecticut corporation (Inset) against a Massachusetts corporation (ISI). In *Inset Systems, Inc.*, the plaintiff Inset alleged that the defendant was using its trademark as an Internet domain name.⁸⁴ The defendant ISI had no employees or offices within Connecticut, nor did it regularly conduct business in Connecticut.⁸⁵ Inset only discovered ISI’s use of the “Inset” trademark in ISI’s domain name and 800 number when Inset itself attempted to obtain the same Internet domain address.⁸⁶ The court found that advertising via the Internet was sufficient to satisfy the Connecticut long-arm statute which reaches any causes of action arising from business solicitations within the state.⁸⁷ In addition, the court found that there were at least 10,000 Internet access sites in Connecticut and, therefore, that ISI’s Web page⁸⁸ constituted advertisement of a “sufficiently repetitive pattern” to establish minimum contacts with Connecticut such that ISI could reasonably expect to be haled into court

80. *Id.* at 499.

81. *Id.*

82. *Id.*

83. 937 F. Supp. 161 (D. Conn. 1996).

84. *Id.*

85. *Id.* at 162-63.

86. *Id.* at 163. Defendant ISI was using the domain name “Inset.com” and the toll-free number “1-800-US-INSET”.

87. *Id.* at 164.

88. *Id.* at 165. Along with ISI’s toll-free number which was also directed at all states.

there.⁸⁹ Furthermore, the court found that since the distance between Massachusetts and Connecticut was minimal, its finding of minimum contacts was sufficient to comport with “notions of fair play and substantial justice,” and upheld personal jurisdiction over the defendant.⁹⁰

B. Cases Finding Insufficient Jurisdictional Contacts

In *Bensusan Restaurant Corporation v. King*,⁹¹ the owner of a famous New York jazz club, “The Blue Note,” brought a trademark action against defendant King, the owner and operator of a small jazz club in Columbia, Missouri under the same name.⁹² King had a Web site promoting his club, which listed ticket outlets in Columbia and had a charge-by-phone number for his club’s ticket office.⁹³ In addition, King’s Web site contained a disclaimer referring to the New York club and a hyperlink⁹⁴ to Bensusan’s Web site.⁹⁵ Following Bensusan’s objection to the Web site, King removed the hyperlink and deleted the sentence “If you should find yourself in the big apple give them a visit.”⁹⁶

With regard to the second prong of New York’s long-arm statute covering torts committed within the state, the court found that King’s web site was authorized, created, and maintained in Missouri, and that any New York resident accessing King’s web site would have to perform several affirmative steps in order to do so.⁹⁷ Even then, the New York residents would have to call the toll-free number to order the tickets before picking them up in Columbia,

89. *Inset Sys., Inc.*, 937 F. Supp. at 164.

90. *Id.* at 165-166.

91. 937 F. Supp. 295 (S.D.N.Y. 1996).

92. *Id.*

93. *Id.* at 297.

94. A hyperlink is underlined text in a home page which may be highlighted in a different color from the surrounding text and is linked to another home page on the Internet. By clicking on the hyperlink with the computer’s mouse, the computer is told to automatically find that home page and download it. Waters, *supra* note 26, at 40-41.

95. *Bensusan Restaurant Corp.*, 937 F. Supp. at 297-98. (“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.”)

96. *Id.* at 298.

97. *Id.* at 299.

Missouri.⁹⁸ Thus, if anything, the alleged infringing activity would have occurred in Missouri and not New York.⁹⁹

The third prong of the New York long-arm statute, covering a tort committed outside of the state with subsequent injury within the state, additionally requires that the tortfeasor reasonably expect the harm to be incurred within the state and that the defendant derive substantial revenue from interstate or international commerce.¹⁰⁰ Here, the court found that neither of the two additional requirements were met since King had no intent to serve the New York market and essentially all of his revenue was locally derived.¹⁰¹ The court finally concluded that “mere foreseeability of an in-state consequence and a failure to avert that consequence [was] not sufficient to establish personal jurisdiction”¹⁰² and specifically rejected the notion that a web site automatically established the defendant’s presence in New York.¹⁰³

In *Cybersell, Inc. v. Cybersell, Inc.*,¹⁰⁴ an Arizona-based Internet advertising and marketing service and owner of the federally registered trademark “Cybersell” filed a complaint alleging trademark infringement against a Florida business providing consulting services for strategic business management and marketing on the Internet.¹⁰⁵ The defendant’s web site was a “passive” site which included a local Florida telephone number and an invitation for potential clients to submit e-mail in order to get more information on the services offered.¹⁰⁶ The defendant did nothing to encourage Arizona residents to access their web site, no Arizona residents except for the plaintiff visited defendant’s site, no contracts were formed, no sales or phone calls were exchanged, and no income or messages were received from residents of Arizona.¹⁰⁷ Despite Arizona’s long-arm statute requirement that the exercise of personal jurisdiction should be allowed “to the maximum extent permitted by the Constitution,” the court found that personal jurisdiction was not allowed in this case since the defendant had insufficient contacts to constitute “purposeful availment” of

98. *Id.*

99. *Id.*

100. *Id.*

101. *Bensusan Restaurant Corp.*, 937 F. Supp. at 300.

102. *Id.*

103. *Id.* at 301.

104. 130 F.3d 414 (9th Cir. 1997).

105. *Id.* at 415-416.

106. *Id.*

107. *Id.* at 419.

the laws of Arizona.¹⁰⁸ In addition, the court specifically stated that its rejection of the personal jurisdiction issue was based on the defendant's passive web site since to hold otherwise would mean that "every complaint arising out of . . . the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located."¹⁰⁹

In *McDonough v. Fallon McElligott, Inc.*,¹¹⁰ the plaintiff was a California photographer who sued a Minnesota advertising agency for copyright infringement based on the unauthorized use of one of the plaintiff's photographs in advertisements created for a client of the defendant.¹¹¹ Defendant had neither offices, agents, employees, clients, nor accounts in California and did not pay taxes there.¹¹² However, defendant maintained an Internet web site and, even though the infringing material did not appear on the web site, plaintiff asserted that the web site established sufficient contacts with California for the exercise of personal jurisdiction.¹¹³ Under the California long-arm statute, which permits the exercise of jurisdiction as long as it is "not inconsistent with the Constitution of this state or of the United States,"¹¹⁴ the court held that the defendant had not purposely availed itself of California benefits since the allegedly infringing advertisement "was not drawn from California sources, did not concern California activities, and was not specifically targeted at California."¹¹⁵

V. ANALYSIS

So what is the common thread which determines whether the court will exercise personal jurisdiction over a nonresident defendant? What advice would an attorney give to a client when the client is in the process of developing an Internet presence for himself or his business? As is evident from the sample of cases previously presented, the question of personal jurisdiction based on an Internet home page is a relatively new issue with which the lower courts are currently struggling. However, a framework for analyzing personal jurisdiction is slowly beginning to emerge.

108. *Id.* at 416-420.

109. *Id.* at 420.

110. 40 U.S.P.Q.2d (BNA) 1826 (S.D. Cal. Aug. 5, 1996).

111. *Id.* at 1827.

112. *Id.* at 1828.

113. *Id.*

114. *Id.*

115. *Id.* at 1830.

A. Trends in Internet Jurisdictional Analysis

The first consideration in this analysis is to recognize that any attempt to establish a framework for analyzing a personal jurisdiction problem based on an Internet home page will be at the mercy of a particular court's view of the operation of the Internet. If a court subscribes to the virtual presence view, the intent of the defendant is irrelevant since his home page establishes his presence in all states at the instant it is published.¹¹⁶ Here, the defendant's only option is to argue that haling them into the foreign court would be unreasonable.¹¹⁷ The court's adoption of the virtual presence view in an Internet jurisdiction case would decrease the predictability of the outcome since the reasonableness determination is uncertain and is not within the control of the nonresident defendant.¹¹⁸ Fortunately, however, even courts that have exercised this view and found jurisdiction to be proper have relied on something more than merely the defendant's web page.¹¹⁹

The single point presence view, on the other hand, is less susceptible to unpredictable results since it relies to a greater extent on the facts of the particular situation.¹²⁰ In addition, the intent of the defendant is more likely to be taken into account by the court.¹²¹ Under this view, the defendant may at least structure

116. Kalow, *supra* note 12, at 2267. Note that the virtual presence view is similar to Justice Brennan's "stream of commerce" argument in his concurrence in *Asahi*. In Brennan's terms, an Internet home page could subject the defendant to jurisdiction in every state since he released his home page into the stream of commerce by the act of publishing it. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

117. Kalow, *supra* note 12, at 2266.

118. Kalow, *supra* note 12, at 2266. See, e.g., *Inset Sys., Inc.*, 937 F. Supp. 161; *State v. Granite Gate Resorts, Inc.*, 576 N.W.2d 715 (Minn. Ct. App. 1997).

119. See, e.g., *Inset Sys., Inc.*, 937 F. Supp. 161 (defendant's toll-free number included on the web site and directed at all states); *Granite Gate Resorts, Inc.*, 576 N.W.2d 715 (defendant's web site was accessible 24 hours per day and 7 days per week, the web site was accessed by Minnesota residents, and the web site was used to solicit subscribers and develop a customer list).

120. Swedlow, *supra* note 41.

121. See, e.g., *Bensusan Restaurant Corp.*, 937 F. Supp. 295. Note that the single point presence view is similar to the plurality opinion written by Justice O'Connor in *Asahi Metal Industry Co.* favoring the two prong analysis of purposeful availment and reasonableness of the exercise of jurisdiction. See *Asahi Metal Indus. Co.*, 480 U.S. 102. In the plurality's terms, an Internet home page would not be sufficient for the exercise of jurisdiction unless the defendant purposely directed the communication over the Internet to the forum state and,

his conduct to control, to an extent, where he will or will not be subject to suit.¹²²

With the limitations of the two basic Internet operational views in mind, it would be helpful to assess what Internet activities will be within the reach of typical state long-arm provisions in accordance with the first prong of the personal jurisdiction analysis. To repeat, the most commonly applicable provisions of a state long-arm statute are transaction of business within the forum state, commission of a tortious act within the forum state, and commission of a tortious act outside of the forum state that results in harmful consequences within the forum state.¹²³

Under the "transaction of business within the forum state" provision, the general consensus among courts to date is that a passive web site is like a national magazine advertisement and is not sufficient to justify a finding of business transactions within a forum state.¹²⁴ The courts are more likely to find transaction of business when another factor is present in addition to the defendant's web page.¹²⁵ Some additional factors that courts have found to be sufficient are transmission of computer files unrelated to the home page to the forum state,¹²⁶ letters, meetings, negotiations, and discussions demonstrating intent to conduct business within the forum state,¹²⁷ and subscription contracts with forum residents and agreements with Internet access providers within the forum state.¹²⁸

subsequently, the exercise of personal jurisdiction would be reasonable under the circumstances. See Kalow, *supra* note 12, at 2270.

122. Kalow, *supra* note 12, at 2269.

123. Kuester & Graves, *supra* note 11.

124. Kuester & Graves, *supra* note 11. See, e.g., *IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258 (N.D. Ill. 1997), *reversed on other grounds*, *IDS Life Ins. Co. v. SunAmerica, Inc.*, 136 F.3d 537 (7th Cir. 1998); *Agar Corp., Inc. v. Multi-Fluid, Inc.*, 983 F. Supp. 1126 (S.D. Tex. 1997).

125. Kuester & Graves, *supra* note 11. See, e.g., *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456 (D. Mass. 1997) (a licensing agreement between plaintiff and defendant plus sales to forum residents); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1 (D.D.C. 1996) (newspaper advertisements in the forum state), *but, cf.*, *Richard Howard, Inc. v. Hogg*, No. 12-96-5, 1996 WL 689231 (Ohio App. 3 Dist., Nov. 19, 1996) (transaction of business found in e-mail transmissions soliciting business within the forum state).

126. See *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

127. See *Resuscitation Techs., Inc. v. Continental Health Care Corp.*, No. IP 96-1457-C-M/S, 1997 WL 148567 (S.D. Ind., Mar. 24, 1997).

128. See *Zippo Mfg. Co.*, 952 F. Supp. 1119.

Under the "commission of a tortious act within the forum" provision,¹²⁹ a Massachusetts court has held that a web page may be enough to demonstrate a tortious act within the forum if the defendant had knowledge that the tort would enter the forum through the Internet.¹³⁰ In another situation where a defendant's home page contained offensive material directed at a forum state resident, the court found that the defendant knew that the plaintiff was located in the forum state and the defendant should have reasonably known that this information would be viewed in the forum state by posting it on the Internet.¹³¹ Thus, it seems that the mere fact that the defendant knows which forum state the plaintiff resides in may be sufficient for the courts to infer the defendant's knowledge that the tort would occur in the forum state as a result of the plaintiff's use of the Internet.¹³²

Finally, under the "commission of a tort outside the forum" provision, a number of courts have emphasized that the additional factors required under many state long-arm statutes, such as a persistent presence in the forum, a regular solicitation of business within the state, or a reasonable expectation of being haled into the forum state's courts, may be established by the defendant's Internet contacts with the forum state.¹³³ For instance, a Connecticut court has held that merely advertising via the Internet is sufficient to constitute regular solicitation of business within the state.¹³⁴ However, the fact that an Internet home page is available to forum residents for 24 hours a day, 7 days a week, is often the specific characteristic which leads to this conclusion.¹³⁵ An Internet home page has been deemed to be a persistent contact

129. Courts generally interpret the "commission of a tort within the forum" provision to require the defendant's physical presence within the state when the tort is committed. *See, e.g.,* *Cody v. Ward*, 954 F. Supp. 43 (D. Conn. 1997); *Bensusan Restaurant Corp.*, 937 F. Supp. 295.

130. *Kuester & Graves, supra* note 11. *See* *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456 (D. Mass. 1997).

131. *See* *Telco Communications v. An Apple A Day*, 977 F. Supp. 404 (E.D. Va. 1997).

132. *See, e.g.,* *Digital Equip. Corp.*, 960 F. Supp. 456; *Telco Communications*, 977 F. Supp. 404.

133. *Kuester & Graves, supra* note 11.

134. *Inset Sys., Inc.*, 937 F. Supp. at 164.

135. *Kuester & Graves, supra* note 11 (citing *Digital Equip. Corp.*, 960 F. Supp. 456; *Telco Communications*, 977 F. Supp. 404). The court in *Digital* also found that other characteristics of web sites, such as offers of software or free advertising space for Internet users also constitutes solicitation of business within the forum state.

with the forum state for the same reason.¹³⁶ As with the “commission of a tort within the forum” provision, the defendant’s knowledge of the forum state of the plaintiff’s residence has been deemed sufficient for defendant to reasonably expect injury to the plaintiff in the forum state as a result of his actions and, subsequently, to reasonably anticipate being sued there.¹³⁷

As previously addressed, the determination of whether the defendant’s conduct is sufficient to fall within the reach of the forum state’s long-arm statute is just the first prong of the personal jurisdiction analysis. In the second prong of the analysis, the court in the forum state must then decide whether the exercise of personal jurisdiction over the nonresident defendant would be reasonable and consistent with due process.¹³⁸ In the examination of due process based on Internet contacts alone, courts generally agree that a passive web site which amounts to a mere advertisement is insufficient to establish purposeful availment or minimum contacts on the part of the defendant.¹³⁹ In order to find that the Due Process Clause has been satisfied, the courts seem to require a more interactive web site, such as a home page comprising more than a mere advertisement, or additional non-Internet contacts with the forum state.¹⁴⁰ The courts have found that a web site is not passive when there is actual and active solicitation.¹⁴¹ However, a common thread running through many of the Internet personal jurisdiction cases has been that the purposeful availment and minimum contacts requirements of due process are more likely to be satisfied where there is additional conduct or

136. Kuester & Graves, *supra* note 11 (citing *Heroes, Inc.*, 958 F. Supp. 1). See also *Telco Communications*, 977 F. Supp. 404.

137. Kuester & Graves, *supra* note 11 (citing *America Network, Inc.*, 975 F. Supp. 494). See also *Hearst Corp.*, 1997 WL 97097, at *15. (However, the court in *Hearst* found that the defendant’s advertisement on the Internet, where his products and services were not yet available, did not constitute a solicitation of business within the forum state or give rise to a reasonable expectation of being sued there. The injury would have arisen from the sale of the product or service, but the lack of products or services meant there was neither any solicitation of business nor derivation of revenue on which to demonstrate such injury.)

138. See *e.g.*, *Superguide Corp. v. Kegan*, 987 F. Supp. 481 (W.D.N.C 1997).

139. Kuester & Graves, *supra* note 11 (citing *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356 (W.D. Ark. 1997); *McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q.2d (BNA) 1826 (S.D. Cal., Aug. 5, 1996)). See also *Hearst Corp.*, 1997 WL 97097.

140. Kuester & Graves, *supra* note 11.

141. Kuester & Graves, *supra* note 11. See, *e.g.*, *Heroes, Inc.*, 958 F. Supp. 1; *Maritz, Inc.*, 947 F. Supp. 1328; *Granite Gate Resorts, Inc.*, 1996 WL 767431.

contact separate from the Internet between the defendant and the forum state in addition to the defendant's Internet home page.¹⁴² This additional conduct is the direct contact between the owner of the web site and the forum resident separate from the Internet, which is generally necessary to conduct trade in products and services.¹⁴³ Furthermore, to satisfy the reasonableness aspect of the due process analysis, some courts have favored situations where the nonresident defendant was aware of the state of the plaintiff's residence, knew his actions would cause an injury to the plaintiff, and was aware that the injurious activity would be transmitted into the forum state via the Internet.¹⁴⁴

A central framework needs to be developed in order to deal with the issue of personal jurisdiction being achieved through Internet contacts. Assuming the defendant's conduct has met the test under the state's long-arm statute, the court in *Zippo Manufacturing Co.*¹⁴⁵ has articulated and, perhaps, come the closest to establishing a framework for determining whether the exercise of personal jurisdiction would be consistent with due process through assessing web sites based on a spectrum of Internet contacts.¹⁴⁶

If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. E.g. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996). The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer.

142. Kuester & Graves, *supra* note 11.

143. See, e.g., *Zippo Mfg. Co.*, 958 F. Supp. 1119 (A significant number of subscribers in the forum state plus contracts with Internet service providers in the forum state); *Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Internet gambling site accessed by forum residents and existed to solicit subscribers and develop customer mailing list); *Cody*, 954 F. Supp. 43 (Telephone calls and electronic mail messages between plaintiff and nonresident defendant).

144. Kuester & Graves, *supra* note 11. See, e.g., *Telco Communications*, 977 F. Supp. 404; *Digital Equip. Corp.*, 960 F. Supp. 456; and *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996).

145. 952 F. Supp. 1119.

146. Kuester and Graves, *supra* note 11.

In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *E.g. Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).¹⁴⁷

This analysis has been utilized with approval in some subsequent cases¹⁴⁸ and represents a significant step in approaching and analyzing the Internet personal jurisdiction problem.

Following the *Zippo* court's articulation of this Internet personal jurisdiction framework, and returning to the original example in this paper, it seems most likely that the Hollywood Coffee House home page will be found to be a passive web page and the forum state will decline to exercise personal jurisdiction over the owner. Even though some courts may deem the web page to fall within the reach of the forum state's long-arm statute, it would not be consistent with due process to require the owner to appear in the distant forum just because its web page is accessible to residents of that forum. This seems to be the well-recognized and reliable result of the *Bensusan* case.¹⁴⁹ However, it is important not to lose track of the fact that the only issue considered here is personal jurisdiction. Both the Academy of Television Arts and Sciences and the Academy of Motion Picture Arts and Sciences may still pursue their trademark actions against you in Maine. With the nationwide, or even global, exposure afforded by the implementation of an Internet home page comes a greater risk of exposure to litigation and this risk should be considered before the development of an Internet home page, whether the owner intends to use the web page for personal matters or to conduct business.

B. Suggestions for Internet Users

The lack of a binding standard for determining the proper exercise of personal jurisdiction based on Internet contacts means there will be some uncertainty in any advice provided to the owner of a personal or business-oriented home page. Any such determination will depend on the specific facts of each case. However, some actions have been suggested by various commentators as means for limiting the exercise of personal jurisdiction over owners of Internet home pages. One simple way is to try to avoid a controversy in the first place. Since a common cause of action

147. *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

148. *See, e.g., Cybersell, Inc.*, 130 F.3d 414; *Agar Corp., Inc.*, 983 F. Supp. 1126.

149. 937 F. Supp. 295.

involves trademark infringement and dilution claims against owners of Internet domain names, a simple precaution would be for the Internet user to perform a trademark search for his domain name and federally register that domain name before establishing a home page.¹⁵⁰ This may be cost-effective insurance against trademark claims further down the road, especially if the user is planning to do a significant amount of business over the Internet, since the jurisdiction problem does not arise without an underlying claim.¹⁵¹

It has suggested that notices of the physical location or forum state of the owner's accessible Internet files should be placed prominently on the web page.¹⁵² Defendants would have actual notice of the owner's state of residence, so this would help to gain personal jurisdiction over nonresidents who infringe on the file owner's rights.¹⁵³ Along the same lines, expressly limiting the reach of your web site by including a prominent statement to the effect that the territorial reach is limited to your state or by specifically excluding certain states that you wish to avoid, may limit the venue of your defense against the claims of nonresident plaintiffs to your local courts.¹⁵⁴

Another suggestion is to limit, if possible, the use of "autoresponders"¹⁵⁵ on a web page. Inquiries from territories outside your state of residence should be carefully addressed, indicating that your company does not do business in their locality.¹⁵⁶ If, for efficient operation of the Internet web site, messages must be sent by autoresponder, the message should disclaim any contacts with jurisdictions into which you do not want to be summoned.¹⁵⁷ Furthermore, the amount of detail on the web page should be limited since the more information provided, the more

150. Charlie Henn & Kevin Lyn, *Trademark on the Web* (last modified Mar. 17, 1998) <<http://www.unc.edu/courses/law357c/cyberprojects/spring98/cyber/cyberspace.htm>>.

151. Henn & Lyn, *supra* note 150.

152. Swedlow, *supra* note 41.

153. Swedlow, *supra* note 41.

154. Marshall K. Dyer, *Omnipresence "Persona"-fied: A Review of Personal Jurisdiction Principles and Their Application to Cyberspace* (visited Oct. 19, 1997) <<http://www.emitech.com/dyer/persjur.html>>.

155. Dyer, *supra* note 154. An autoresponder is a feature which may be added to a home page that systematically and automatically sends information over the Internet to anyone requesting it through that home page.

156. Dyer, *supra* note 154.

157. Dyer, *supra* note 154.

likely it is that a court will construe the web page to constitute a solicitation of business in any state.¹⁵⁸

As was suggested in the *Bensusan* case,¹⁵⁹ if you own a web site whose domain name may conflict with another web site or company, you should provide a disclaimer and a link to that web site.¹⁶⁰ While saying something nice about that company or site may be helpful in possibly avoiding a disagreement resulting in litigation,¹⁶¹ recent cases have begun to take Internet trademark issues more seriously, and the web site owner's best course of action would be to investigate trademark implications of home page content prior to publishing that web page on the Internet.¹⁶²

As with the *Compuserve* case,¹⁶³ it has been observed that if you run an Internet business through your online service, and you have additional dealings with the service provider, you may be subject to jurisdiction in the forum state of the provider.¹⁶⁴ To avoid this possibility, you could switch to a local service provider or, if you have enough influence to do so, you could request an equitable jurisdiction clause which would require you to sue your provider in its home state and would, in turn, require the provider to sue you in your home state.¹⁶⁵

In final examination, it seems that the owner of an Internet home page can gauge his conduct under traditional notions of personal jurisdiction and be fairly certain of the outcome of any personal jurisdiction controversy which may arise. Although there still may be some courts which will disagree, the *Zippo* analysis seems to be finding some favor with the courts in some of the later cases and may well represent the basis of a future consensus on the issue. It is important to note that the exercise of personal

158. Dyer, *supra* note 154.

159. 937 F. Supp. 295.

160. Marie D'Amico, *Personal Jurisdiction and the Web: Where Can You Sue Someone for Online Disputes?* (visited Oct. 19, 1997) <<http://www.madcapps.com/Writings/FAQJuris.htm>>. Though not investigated for the purposes of this paper, the author is aware that there are current controversies involving the use of trademarked logos on a web page in order to provide a hyperlink to the web page belonging to the owner of the trademark (Ticketmaster). To be on the safe side, a text-only hyperlink should be used to link to other web sites where the company or web site's logo may be trademark protected.

161. D'Amico, *supra* note 160.

162. Henn & Lyn, *supra* note 150.

163. 89 F.3d 1257 (6th Cir. 1996).

164. D'Amico, *supra* note 160.

165. D'Amico, *supra* note 160.

jurisdiction is often decided on conduct occurring outside of the realm of the Internet more so than strictly on the basis of a home page. The reality is that most Internet-based businesses will eventually need to establish some definitive contact with the patrons of their products or services. Thus, when this definitive contact is established, traditional and Internet personal jurisdiction analyses seem to become one in the same.

VI. CONCLUSION

The modern concept of personal jurisdiction has slowly evolved from the days of *Pennoyer v. Neff*¹⁶⁶ in 1877 to *International Shoe*¹⁶⁷ in 1945, to *World-Wide Volkswagen*¹⁶⁸ and *Asahi*¹⁶⁹ in the 1980's into a world of well-defined and recognized borders. In the physical reality of everyday life, there are certain rules by which the citizenry may gauge their conduct in order to avoid being required to appear in a distant forum. In the 1980's and 1990's, a new virtual world called the Internet has emerged. This entity is lacking the physical boundaries which clearly define the physical world. The Internet is a global phenomenon, which has developed without governance or a controlling body of law from its inception. Due to the explosive growth of the Internet and its technology, which are progressing by leaps and bounds on a daily basis, the courts have been caught off-guard and are currently scrambling to update traditional jurisprudence to account for this change.

The Internet is significantly complex and there are many intricacies and subtleties which do not lend themselves to the extreme generalities typically used to describe it. Learning the basic technology of the Internet, not to mention its many complexities, presents a formidable task for the judiciary. There are different viewpoints as to the operation of this technology which, in themselves, contribute to a degree of uncertainty in resolving current controversies. What is certain, however, is that real world tortious conduct can occur, does occur, and does cause real injury over the Internet. Without physical boundaries to define its limits, the Internet is confusing for the courts even in the basic determination of personal jurisdiction. The approach to this problem, so far, has been for the courts to adapt traditional notions and

166. 95 U.S. 714 (1877).

167. 326 U.S. 310 (1945).

168. 444 U.S. 286 (1980).

169. 480 U.S. 102 (1987).

limitations of personal jurisdiction to Internet controversies. The most interesting feature of this adaptation of personal jurisdiction jurisprudence is that it draws heavily from the Supreme Court's line of reasoning evident in *World-Wide Volkswagen* and *Asahi*.¹⁷⁰ This is the point to which the evolution of traditional personal jurisdiction had progressed for real world controversies prior to the explosion in the popularity of the Internet. Since the analysis of Internet personal jurisdiction is picking up where the Supreme Court left off with traditional personal jurisdiction, the courts will find a definitive operational medium to encompass this progressive technology. So, just as modern notions of personal jurisdiction evolved over the course of a century, Internet jurisprudence for personal jurisdiction requires some time to develop and mature. As we have seen, the courts are currently making significant progress in that direction.

170. See *supra* text accompanying note 22. See, e.g., David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. Marshall J. Computer & Info. L. 819 (1997); Kalow, *supra* note 12.