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Casting the Net: Another Confusing Analysis of Personal Jurisdiction and Internet Contacts in Telco Communications v. An Apple A Day

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CASTING THE NET: ANOTHER CONFUSING ANALYSIS OF PERSONAL JURISDICTION AND INTERNET CONTACTS IN *TELCO COMMUNICATIONS V. AN APPLE A DAY* *

I. INTRODUCTION

The fascination of the Internet and "cyberspace" is its sense of boundlessness.[1] A user seemingly can go anywhere, be anyone, and do anything in a virtual world of information and interactivity. Actions on-line, however, often may have real world ramifications.[2] The demarcation line between the physical and cyberspace "worlds" is not so pronounced that actions occurring in one have no effect in the other.

Above all the fantastic claims of "virtuality" and reference to some other-worldly "cyberspace," one must not forget that the

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* 977 F. Supp. 404 (E.D. Va. 1997). Since *Telco* is a district court opinion and is subject to appellate review, the focus of this article is not a full analysis of the case, but an overview of traditional personal jurisdiction law, the treatment of Internet-based contacts with a forum, and the rapidly expanding rift among the circuits reconciling the traditionalist approach to new technology. Thus, this article is not an "ordinary" casenote, but a survey of current issues in the field using *Telco* as a recent case that establishes a gauge to measure the widening circuit split.

1. *See* Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2242 (1997) (asserting that the Internet is "void of territorial boundaries" and that communication on-line is "not actually conducted in a particular location, but rather in the ephemeral world of 'Cyberspace'"); *see also* Jason L. Brodsky, *Civil Procedure—Surfin' the Stream of Commerce:* CompuServe v. Patterson, *89 F.3d 1257 (6th Cir. 1996)*, 70 TEMP. L. REV. 825, 825 (1997) (stating that the Internet is "faceless, nameless, and exists in a reality beyond physical boundaries"); Lief Swedlow, Note, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337, 338 (1997) (analogizing the "cyberspace frontier" to the "wild west").

2. *See* Swedlow, *supra* note 1, at 338 (detailing the lawsuits developing from interstate computer activity). For example, fashion designer Tommy Hilfiger, whose clothing line profits from a substantial inner city market, was forced to issue a public statement after a false report alleged that he had made racist comments during an interview. The report, which drew national attention, originally stemmed from a single Usenet post written by an individual who distributed the information around the world to hundreds of on-line Newsgroups. *See Rumors: All the Fashion*, INTERNET WORLD, July 1997, at 127.

Internet is a communications tool that exists but for the grace of telephone lines, satellites, and computer terminals.[3] When a person logs on to the Internet in Missouri and links to a site in Virginia, she is not traveling into some unreal and incorporeal dimension. She is using a computer terminal in one state and using interstate phone connections to receive electronic transmissions from another computer in Virginia.[4] While the Internet is a multimedia device combining aspects of print, television and radio communication, it nonetheless is composed of a physical infrastructure and can be used for a wide variety of real world applications.[5]

Today, courts are beginning to face an assortment of cases in which one party has used the Internet to injure another party.[6] Software piracy, defamation, fraud, intellectual property infringement or misappropriation, and breach of contractual agreement through the Internet are quickly finding their way

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3. For purposes of this article, the author assumes that the reader has a basic understanding of the Internet and how it is used in its various forms, including a minimal understanding of the use of e-mail, web browsing, chat services and transmission of information between computer terminals. The cases in this article almost exclusively rely on knowledge of the World Wide Web (a graphical user interface, or GUI, that is only part of the Internet) and e-mail capabilities. If the reader should require or desire a brief overview of Internet structure and function, the author directs attention to Kalow, *supra* note 1, at 2243-49. Additionally, the reader may obtain an in-depth analysis of Internet functions, regulatory systems and telecommunications history in Ilene Knable Gotts & Alan D. Rutenberg, *Navigating the Global Information Superhighway: A Bumpy Road Lies Ahead*, 8 HARV. J.L. & TECH. 275 (1995).

At this point, the author also notes that the term "cyberspace" has become passe in professional circles in favor of the terms "e-commerce" and "electronic transmissions." Since this terminology comports with the author's own belief that Internet use should have physical world referents rather than the ephemerality of "cyberspatial" dimensions, the term "cyberspace" will not be used.

4. *But see* Kalow, *supra* note 1, at 2247 ("An Internet user traveling from site to site is exploring an on-line world with no physical boundaries."). This approach to conceptualizing Internet communications fails to reconcile the simple fact that such transmitted information must reside on a machine located in physical space and that access to this "world" requires the use of another machine in a specific and identifiable location.

5. *See* Gotts & Rutenberg, *supra* note 3, at 276-77 (discussing the multimedia nature of the Information Super Highway); Swedlow, *supra* note 1, at 349-52 (detailing various uses of the Internet, including Usenet, Internet Relay Chat (IRC), File Transfer Protocol (FTP), e-mail and other uses).

6. *See* Swedlow, *supra* note 1. One interesting side note is that some commentators believe that "computer crimes are simply old crimes committed in new ways." Gotts & Rutenberg, *supra* note 3, at 295.

into court as more people and businesses go on-line.[7] A primary issue in some of these cases is whether a court may assert personal jurisdiction when the defendant is not a resident of the forum and her only contact with the forum is through use of the Internet.[8] Thus far, courts have been left to rely upon traditional personal jurisdiction analysis under state long-arm statutes and due process considerations, while attempting to reconcile the Internet with existing media sources for which case law exists.[9]

In September, 1997, the United States District Court for the Eastern District of Virginia denied a nonresident defendant's motion to dismiss an action in defamation and other tortious

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7. In 1998, e-commerce is expected to yield revenues of over three billion dollars, create over 500,000 new jobs, and substantially increase economic growth. *See* Gotts & Rutenberg, *supra* note 3, at 275. This revenue increase represents a growth rate in excess of 500% over the past four years and is attributed to movement in the computer and telecommunications market. *See id.* The current regulatory structure, however, has been incapable of staying abreast of the rapid developments, leading to a number of abuses and hidden issues that remain unresolved. *See id.* at 277-78.

8. *See infra* Part II.B (discussing various cases in which the issue of personal jurisdiction arose in the exclusive context of Internet contacts).

Personal jurisdiction or jurisdiction in personam is defined as the "[p]ower which a court has over the defendant's person and which is required before a court can enter a personal or in personam judgment." BLACK'S LAW DICTIONARY 766 (6th ed. 1990). Personal jurisdiction is a threshold issue, and if the court cannot meet the requirements, then it is estopped from asserting any authority over a defendant. *See, e.g.*, FED. R. CIV. P. 12(b)(2) (granting defendants an initial defense to challenge an assertion of a court's personal jurisdiction). A more in-depth treatment of personal jurisdiction over nonresident defendants and Internet contacts will be provided in Part II, *infra*.

9. A great deal of contention among scholarly articles exists in regard to whether Internet jurisdiction should be premised on traditional models or novel theories. *See* Corey B. Ackerman, *World-Wide Volkswagen, Meet the World Wide Web: An Examination of Personal Jurisdiction Applied to a New World*, 71 ST. JOHN'S L. REV. 403, 432 (1997) ("New rules are not necessary provided that the courts fully appreciate how Web pages operate, and respect what is actually required by *International Shoe* and its progeny.") (italics added); *see also* Kalow, *supra* note 1, at 2271 (stating that the plurality decision of *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987), should be used in Internet jurisdiction cases). *But see* Brodsky, *supra* note 1, at 856 (rejecting the stream of commerce approach to Internet jurisdiction and stating that the "unique new medium" requires a new test beyond traditional analysis); Gotts & Rutenberg, *supra* note 3, at 277 (stating that the "current regulatory structure simply is inadequate to handle the traffic of the information superhighway" and that cooperation among government and self-regulators will be necessary); Swedlow, *supra* note 1, at 372 (stating that courts require a new working paradigm for Internet jurisdiction analysis). The divergence stems in part from the circuit split that has arisen when courts examine Internet jurisdiction. *See infra* Part II.B.

injury for lack of personal jurisdiction, even though the only contact the defendant had with Virginia consisted of several Internet advertisements. The court in *Telco Communications v. An Apple A Day*[10] asserted personal jurisdiction over the defendant and found that the contacts satisfied Virginia's long-arm statute and met due process considerations. The court considered an Internet advertisement a continuous and regular solicitation of business in the forum and held that the defendant necessarily relied upon the use of Virginia facilities to achieve the injury.[11] The evidence, however, indicated that Virginia was not even the intended target for the advertisement that was released, and that the defendant did not seek to distribute the advertisement in the forum.[12]

The purpose of this article is to examine *Telco*'s holding among a series of recent decisions analyzing Internet jurisdiction. Although the case is a district court opinion and, therefore, is subject to appellate review, *Telco*'s analysis of the developing law of "Internet jurisdiction" is a valuable indication of Virginia's and the Fourth Circuit's opinions on the issue. It also clearly indicates the need for all circuits to address the issue of Internet contacts. Part II of this article traces the history of personal jurisdiction and its evolution in over a century's worth of Supreme Court precedent. Following this discussion, recent case law involving Internet jurisdiction is provided to familiarize the reader with the application of the traditional personal jurisdiction test to Internet contacts and the disparity in circuit decisions addressing this issue. Part III is a narrative of the *Telco* decision and its authority. Part IV provides an analysis of the personal jurisdiction analysis of *Telco* and its reliance on prior Internet jurisdiction case law that truly was not dispositive of the issues presented. The following conclusions will be presented: (1) *Telco*'s analysis rests upon unsubstantiated paradigms, rather than legal authority, of Internet concepts; (2) part of the court's analysis fails to satisfy the long-arm statute as it traditionally has been interpreted; and (3) the due process requirement of reasonable foreseeability cannot be met as provided by the court's holding. The final section of this article will

10. 977 F. Supp. 404 (E.D. Va. 1997).
11. *See id.* at 406-07.
12. *See id.* at 407. For a full discussion of the case, see *infra* Part III.

examine *Telco*'s position among Internet jurisdiction cases and the complexity of providing a simultaneously meaningful and simple solution to the jurisdictional issues presented throughout this article.

II. PERSONAL JURISDICTION: SUPREME COURT HISTORY AND RECENT DEVELOPMENTS IN INTERNET JURISDICTION

Personal jurisdiction is an issue of foremost importance.[13]

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13. Unless a federal statute applies, both state and federal courts must look to the long-arm statute of the state in which the court sits for purposes of determining personal jurisdiction over a defendant that does not reside in the forum in which the court sits. *See* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 713 (1982) (Powell, J., concurring); *see also* FED. R. CIV. P. 4(e) (federal rule determining whether a defendant is subject to service, which itself is a prerequisite to personal jurisdiction).

Generally, application of a long-arm statute consists of two steps: (1) application of the long-arm statute's language to the circumstances of the case; and (2) a due process analysis under the Fifth and Fourteenth Amendments to determine if the Constitution would permit an assertion of jurisdiction. *See Insurance Corp. of Ir.*, 456 U.S. at 713 (Powell, J., concurring). In some states, the long-arm statute has been extended to the full extent Constitutionally permitted by the Due Process Clause, such that the two step analysis collapses into a single question of due process constraints. *See* Synergetics v. Marathon Ranching Co., 701 P.2d 1106, 1109-10 (Utah 1985) (collapsing the personal jurisdiction issue into a single due process analysis since the long-arm statute is permitted to extend to the full limit of Constitutional limitations). Long-arm statutes themselves may limit personal jurisdiction to specific situations below the extent permitted by the Constitution; these limits often require business activity, contracting, tortious acts and certain types of injuries to occur before jurisdiction applies. *See, e.g.*, VA. CODE ANN. § 8.01-328.1 (Michie 1992) (Virginia's long-arm statute).

Briefly, the due process analysis examines minimum contacts under the standard established by *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). While minimum contacts do not require that the defendant be "physically present" in the forum, the contacts must show that the defendant has "purposefully avail[ed] himself of the privilege of conducting activities in the forum state such that he invokes the benefits and protections of the law." Hanson v. Denckla, 357 U.S. 235, 247 (1958). Moreover, the defendant's contacts must be of a "quality and nature that he would anticipate being haled into that jurisdiction's court." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980). Finally, the contacts must be such that jurisdiction in the forum is "reasonably foreseeable" by the defendant. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985).

The Supreme Court has held that contacts that are "random, fortuitous, or attenuated" are insufficient for personal jurisdiction. *Id.* at 475; *see also* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987) (plurality opinion) (stating that placement of an item in the stream of commerce is itself insufficient for jurisdictional purposes without purposeful availment). Most importantly, the contacts must satisfy "traditional notions of fair play and substantial justice." *International Shoe Co.*, 326

Without such jurisdiction, a court lacks authority to dispose of any matter relating to the case at hand.[14] Traditionally, jurisdiction over a party involved has not presented significant obstacles. The basis for jurisdiction is asserted, and if there is no challenge, the court proceeds to try the more "important" issues that comprise the dispute.[15] Even when a defendant challenges personal jurisdiction, the court swiftly may resolve the contention by giving the plaintiff both the burden of proof and the full benefit of its assertions of personal jurisdiction over the defendant.[16] Provided that the court adheres to a liberal application of personal jurisdiction analysis, a defendant often must realize that challenging jurisdiction is an accepted tactic, but one that rarely succeeds.[17]

This is not to say that personal jurisdiction always has been simplistic or even that it has become so today. Instead, an assertion of personal jurisdiction represents the end-product of an analysis that examines a defendant's activities and her expectations of suit in a particular forum.[18] The test incorporates

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U.S. at 316.

Additionally, the contacts generally must have some relation to the cause of action (specific jurisdiction), although a court may exercise general jurisdiction when the cause of action and contacts are unrelated but the contacts are "continuous and systematic." *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 46 U.S. 408, 415-16 (1984) (finding that general jurisdiction was improper since defendant's contacts with the forum were neither continuous nor systematic).

14. *See supra* note 8.

15. For example, a defendant in federal court is permitted under Rule 12(b) of the Federal Rules of Civil Procedure to challenge personal jurisdiction in its initial pleading, but the defendant is not required to assert such a challenge. *See* FED. R. CIV. P. 12(b). If the challenge is not made, then there is a permanent waiver of the defense under Rule 12(h) and the court proceeds on the merits of the case. *See* FED. R. CIV. P. 12(h).

16. Once a defendant raises a question of personal jurisdiction, the plaintiff bears the burden of showing that jurisdiction is permitted. *See* Mylan Lab., Inc. v. Akzo, N.V., 2 F.3d 56, 59-60 (4th Cir. 1993); *see also Woodson*, 444 U.S. at 291 (requiring plaintiff to demonstrate that personal jurisdiction over defendant is proper if it comports with due process). The affirmations of the plaintiff's complaint alleging jurisdiction, however, are construed in the most favorable light towards the plaintiff in the determination of the issue. *See Mylan Lab*, 2 F.3d at 59-60.

17. The vague, discretionary notions of "purposeful availment," "substantial contacts," and "reasonably foreseeable," when combined with a judicial attitude favoring the plaintiff's presentation of the matter, create a stacked deck against the defendant's challenges to personal jurisdiction in all but the most egregious failures to show that any contacts really did exist. *See* Memorial Hosp. Sys. v. Fisher Ins. Agency, Inc., 835 S.W.2d 645, 649-50 (Tex. Ct. App. 1992).

18. *See supra* note 13. The due process analysis alone considers a number of

both hard facts and qualitative measures of foreseeability, fairness, and purposeful availment—a test that may be resolved quickly by recourse to physical contacts within a forum, but may require meticulous examination when the defendant does not reside physically in the forum.[19] Even beyond distinguishing between physical presence and presence through conduct, the Supreme Court has made further differentiations based upon connections between the injuries and the forum. When the cause of action is related to the forum contacts, specific jurisdiction exists. General jurisdiction lies when the injury and the contacts are unrelated.[20] The battleground for jurisdictional issues has been drawn under these standards, and the result is a line of cases that delineate the boundaries of the law in this area.[21]

This section examines the series of Supreme Court cases that have defined personal jurisdiction and demonstrated its evolving nature. As culture has advanced and technological innovation progressed such that the population is no longer restrained in its ability to travel and communicate with distant localities, personal jurisdiction analysis has also advanced to determine when a party is "present and conducting itself" in a forum, such that jurisdiction is fair and reasonably foreseeable.[22] The latter

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factors when courts examine the relationship of the defendant, plaintiff, and forum. *See* Marquette Nat'l Bank v. Norris, 270 N.W.2d 290, 295 (Minn. 1978). These factors include the quantity, quality and nature of the contacts as well as the connection of the contacts with the cause of action and interests of convenience and resolution. *See id.*

19. *See supra* note 13.

20. The Supreme Court has only had the opportunity to address general jurisdiction twice, the principal case being *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). Two main questions are posed in general jurisdiction cases: (1) Are there minimum contacts? (2) If so, may the court assert jurisdiction even though the injury is unrelated? The first is an analysis similar to that provided in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and the second will rely, in part, on the language of the state long-arm statute. General jurisdiction remains an ill-defined concept that rarely requires use.

In contrast, specific jurisdiction arises when minimum contacts are related to the injury and comprises the overwhelming majority of jurisdiction cases. Since the Internet cases discussed in this article involve "on-line" injuries such as intellectual property infringement, defamation, and breach of contract that occur in the plaintiff's forum, specific jurisdiction should be presumed for these cases.

21. *See infra* Part II.A.

22. *See International Shoe*, 326 U.S. at 313-15 (noting that telephone and automobile travel had added significantly to the ability to reach distant forums). The modern

part of this section examines the most recent technological innovation—the Internet—and how the recent case law has struggled in its attempt to provide a consistent treatment in light of traditional analysis.[23]

A. *Personal Jurisdiction and the Supreme Court*

Personal jurisdiction first received its status as a recognized constitutional limitation on courts in 1877 when the Supreme Court decided *Pennoyer v. Neff*,[24] and has continued to receive treatment throughout the decades. Initially rooted in the physical presence of a person or corporation in a forum, personal jurisdiction analysis evolved under the Supreme Court's guiding hand as technology advanced and parties could conduct activities or cause injuries in distant forums without being physically present. The developing case law molded a concept of "presence" defined by both a person's purposeful contacts, physical or communicative, with a forum, and due process concerns.[25] The result presents a series of Supreme Court cases capturing the development of the law, each case building upon its predecessors.

The cornerstone of personal jurisdiction law as defined by the Supreme Court was hewn in *Pennoyer v. Neff*. While the case has since been modified by further concerns,[26] *Pennoyer* provided the initial stepping stone for further analysis: a defendant must be present physically in the forum or appear on a voluntary basis in order to settle a personal claim against him or her.[27] Pennoyer held land in the forum, but resided in another state. The plaintiff brought claims against Pennoyer himself, but attempted to assert jurisdiction through Pennoyer's land

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conception is that increasingly powerful and efficient technology permits one to engage in "interstate commerce without leaving the office" on an everyday basis. Brodsky, *supra* note 1, at 825.

23. The Internet is the widest reaching of all communications technologies to date and provides greater opportunity to reach out rapidly to distant forums than before possible. *See* Swedlow, *supra* note 1, at 338. The popularity and power of the medium is attested by its growth in the economic sector. *See supra* note 7.

24. 95 U.S. 714 (1877).

25. *See* discussion *infra* Part II.A.

26. The concerns have developed as the result of increasing technology and ability to reach other jurisdictions without having to physically travel to them. *See* Swedlow, *supra* note 1, at 338; *see also International Shoe*, 326 U.S. at 313-15.

27. *See Pennoyer*, 95 U.S. at 733.

holdings. The Court held that jurisdiction would be premised either upon physical presence for *in personam* jurisdiction, or the presence of property for *in rem* jurisdiction, but that the two were not interchangeable.[28] Since Pennoyer neither physically resided in the forum nor voluntarily consented to jurisdiction, the Court held that personal jurisdiction could not be asserted in the forum in an action against Pennoyer's person.[29]

In 1945, the Supreme Court decided *International Shoe Co. v. Washington*[30] and laid the foundation for modern personal jurisdiction. Since the time of *Pennoyer*, telephones and automobiles have extended vastly the ability of persons to travel and contact distant places without having to reside there. When the State of Washington brought an action against International Shoe, the latter asserted that there could be no personal jurisdiction because the company had no permanent employees, offices, or sales force in the state.[31] In response, Washington asserted that International Shoe salesmen had traveled into Washington, made intermittent sales that were shipped into the state to state residents, and operated temporary offices in the state. On this basis, Washington claimed that the company had voluntarily consented to jurisdiction in the state through its activities.[32] The Supreme Court agreed and asserted personal jurisdiction by introducing the "minimum contacts" doctrine.[33] The decision permitted a state to assert personal jurisdiction over a non-resident defendant when the defendant had established certain contacts with the state, such that the interest and power of the state was evoked without violating "traditional notions of fair play and substantial justice" inherent in the defendant's due process rights.[34]

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28. *See id.* at 733-34.
29. *See id.*
30. 326 U.S. 310 (1945).
31. *See id.* at 313-15.
32. *See id.* at 313-15, 319-20.
33. *See id.* at 316. The Court announced that when the defendant has maintained minimum contacts in a state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" personal jurisdiction is permitted. *Id.*
34. *Id.*

Later, *McGee v. International Life Insurance Co.*,[35] would provide a high water mark for personal jurisdiction. Expanding minimum contacts to the breaking point, the Court held that personal jurisdiction in California was proper since the Texas-based defendant maintained a single insurance policy in the state.[36] Although the policyholder had purchased the original insurance policy from an insurer in Arizona that was subsequently purchased by the defendant, the dispositive point was that the defendant had failed to cancel the policy—and in fact had issued a reinsurance policy—after it purchased the Arizona business and continued to accept payments from the plaintiff in California.[37] Further, the defendant committed a breach of contract in the state when it refused a claims payment. From this, the Court concluded that minimum contacts were met since the defendant had purposefully availed itself of California business and committed an injury directed at the forum.[38]

In 1984, the Supreme Court withdrew from *McGee*'s expansive position in *Helicopteros Nacionales De Colombia, S.A. v. Hall*.[39] Filing the case in Texas, the plaintiff brought wrongful death claims stemming from an accident in South America. While the defendant performed business in the state, the accident itself was indirectly related to that business. The Court determined that since the defendant was a non-resident and the cause of action neither occurred in the forum nor was it related to the contacts, further precautions were necessary to meet due process.[40] The Court held that these circumstances would be

35. 355 U.S. 220 (1957).

36. *See id.* at 223. *But see generally* Hanson v. Denckla, 357 U.S. 235 (1958) (denying personal jurisdiction over non-resident defendant when plaintiff insurance policy holder unilaterally moved to another state after purchasing policy).

37. *See McGee*, 355 U.S. at 221-22 (noting that defendant had no contacts in California besides plaintiff's policy issued from the former Arizona company).

38. The Court noted that an expanding national economy, ability to conduct interstate commercial transactions, and communication had become exceedingly easier in the twentieth century such that an extension of personal jurisdiction should occur as well. *See id.* at 223. Notice should be given, however, to the contractual nature of the injury, which assuages a degree of the extremism of the factual interpretation which found personal jurisdiction proper, especially since the defendant should have reasonably foreseen that a claim issue would arise in the forum. *See id.* at 223-24; *see also* Russell J. Weintraub, *A Map Out of the Jurisdictional Labyrinth*, 28 U.C. DAVIS L. REV. 531, 535 (1995) (commenting on the extensive reach of the *McGee* holding).

39. 466 U.S. 408 (1984).

40. *See id.* at 415-16.

defined under the rubric "general jurisdiction" and required that when the action was unrelated to the nonresident's contacts, the contacts with the forum must be continuous, regular, and systematic, rather than random, fortuitous, or by chance.[41] Since Helicopteros' contacts with Texas were not part of an ongoing relationship, the contacts were not sufficient to meet general jurisdiction requirements.[42]

In *World-Wide Volkswagen Corp. v. Woodson*,[43] the Supreme Court declined to assert personal jurisdiction over New York dealership defendants. The dealership had sold a car to New York residents, who subsequently were involved in an accident while traveling through Oklahoma. While the international manufacturer of the car was subject to jurisdiction since it had dealerships in Oklahoma, the local dealers of New York were not subject to jurisdiction.[44] The Court held that there was no evidence of any dealer contact with the forum other than the car sold to the plaintiffs, and that while the dealers could have predicted one of their cars would end up in Oklahoma, defending a suit in the forum was not reasonably foreseeable and violated due process.[45] Thus, merely putting an item into the stream of commerce was not enough to satisfy due process analysis.[46]

Five years later, in 1985, the Court reexamined the *International Shoe* holding in the case *Burger King Corp. v. Rudzewicz*.[47] After intensive negotiation of a long term franchise agreement with a Florida-based business, the Michigan-based defendant breached the agreement and was sued in Florida. The Court held that Florida courts had jurisdiction upon

41. *See id.* at 414 n.9, 416-17. Note that minimum contacts still controlled the question of personal jurisdiction, although cases of general jurisdiction required a greater demonstration of "substantial" contacts with the forum.

42. *See id.* at 416.

43. 444 U.S. 286 (1980).

44. *See id.* at 288-89 (noting that the manufacturer and importer, unlike the dealer and regional distributor, had direct business connections with the forum and did not challenge jurisdiction).

45. *See id.* at 297-98. While the both the manufacturer and dealer could reasonably foresee that the stream of commerce would carry the product into the forum, the lack of any direct contact with the forum by the dealer made the possibility of suit not reasonably foreseeable. *See id.*

46. *See id.*

47. 471 U.S. 462 (1985).

finding that the modern nature of business relations, communication, and the ability to reach distant forums without leaving one's home required a reaffirmation of *International Shoe*'s "traditional notions" doctrine in view of recent developments.[48] The concept of "fair play and substantial justice" was extended to examine the defendant's ability to foresee distant litigation, purposeful availment of the benefits and business of the forum's residents, consent to jurisdiction, and the nexus between the contacts and the cause of action.[49]

In *Asahi Metal Industry Co. v. Superior Court*,[50] the Supreme Court returned in part to the *World-Wide Volkswagen* stream of commerce analysis when it refused to find personal jurisdiction over a foreign defendant who manufactured component parts (tire valves) for another manufacturer who distributed a finished product (tires) internationally.[51] After a defective motorcycle tire valve resulted in an accident, Asahi, a Japanese company, was required to defend itself in California. On review, the Court held that although Asahi could foresee that its products would and did end up in California, the mere knowledge that a product was likely to be carried by the stream of commerce into a particular forum was insufficient for personal jurisdiction.[52] More than this mere knowledge was required, and in this case, Asahi had no direct contacts with California and had not availed itself of the market.[53] Thus, jurisdiction would have been in violation of the "traditional notions" expounded by *International Shoe*.[54]

Before moving on to the recent Internet cases, two other Supreme Court cases are important for the analysis in this article. First, *Keeton v. Hustler Magazine, Inc.*,[55] permitted per-

48. *See id.* at 471-78.

49. *See id.* at 478-87. Since Rudzewicz had an on-going relationship with Burger King, contemplated a long term business relation, agreed to a forum selection clause, and the contacts and the breach of contract action were directly related, the Court held that Rudzewicz reasonably should have foreseen being haled into court in Florida such that due process was not violated. *See id.* at 487.

50. 480 U.S. 102 (1987).

51. *See id.* at 116.

52. *See id.* at 112-13.

53. *See id.*

54. *See id.* at 116.

55. 465 U.S. 770 (1984).

sonal jurisdiction over a non-resident publishing company for an action in defamation. The court held that the magazine's monthly sales to approximately 10,000 forum residents demonstrated that the defendant had purposefully availed itself of the laws, business, and protection of New Hampshire.[56] Second, in *Calder v. Jones*,[57] the Supreme Court held that a California action over a Florida tabloid was proper.[58] Although the tabloid was based and printed in Florida and the allegedly defamatory article written in the state, the publishers also knew that it had its largest sales in California, and that the greatest injury to the person targeted would be in California.[59] In addition to the publishers' purposeful availment of California, the Court noted that an effects test figured into the determination of personal jurisdiction. Since the defamation would have its greatest injury in the forum and as such was targeted for the effect, jurisdiction would be proper on this basis.[60]

The *Calder* test for personal jurisdiction consists of an effects test, a but-for test, and a reasonableness test.[61] The effects test involves finding that the defendant (1) made an intentional act (2) aimed at the forum (3) causing foreseeable harm in the forum.[62] Once this "purposeful availment" section is satisfied, the court looks at the relation of the injury and the contact under the but-for test and then examines the parties' interests and the fairness of jurisdiction under the reasonableness prong.[63] This test especially is useful in defamation cases where a defendant may have no other contacts with a forum, but has targeted a resident with the knowledge that the extent of the injury will be incurred in that forum. While the "but for" test has been used in the Ninth Circuit,[64] the test is mentioned rarely in other circuits.

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56. *See id.* at 774-75, 781.
57. 465 U.S. 783 (1984).
58. *See id.* at 791.
59. *See id.* at 789-90.
60. *See id.*
61. *See* Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 621-22 (C.D. Cal. 1996).
62. *See id.* at 621.
63. *See id.* at 622.
64. *See* Edias Software Int'l, L.L.C. v. Basis Int'l Ltd., 947 F. Supp. 413, 420 (D. Ariz. 1996).

The history of personal jurisdiction decisions by the Supreme Court demonstrates a continuously evolving theory of "presence." As travel and communications capabilities have expanded the ability to reach and affect other forums, the Court has liberalized personal jurisdiction rules from the original "physical presence" requirements found in *Pennoyer*. Today, the analysis would appear to dictate that a defendant is subject to personal jurisdiction only if she: (1) resides in the forum; (2) consents to jurisdiction; or (3) has purposefully established minimum contacts with the forum such that an exercise of personal jurisdiction neither offends "traditional notions of fair play and substantial justice," nor is so unlikely that the defendant reasonably cannot foresee being haled into court there.[65] The latter analysis in turn will rely upon the relationship and interests of the defendant, plaintiff, and forum, as well as the nexus between the injury alleged and the contacts established.

B. *Personal Jurisdiction and the Internet*

While the core concept of the Internet has existed for some time, the last few years have witnessed a veritable explosion of interest and use of the Internet.[66] Simply speaking, the Internet is a network of networks—a network that currently serves approximately fifty million people and expects to double its audience by the turn of the millennium.[67] The Internet is a global communications medium that permits world-wide access and communications capabilities with anyone else that is connected to the Internet. E-mail, video-conferencing, chat rooms, file transfer, and even simple websites permit users to convey and send information quickly and efficiently virtually anywhere in the world, and with the capability for interaction. The seemingly exponential increase in use has been spurred in part by evolving technology, increased infrastructure, and, most impor-

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65. *See* Swedlow, *supra* note 1, at 341-47.

66. *See supra* note 7. Ironically, the "Internet" began as a communications network for the military several decades ago and then expanded in the 1970s as a communications tool primarily for civil government and university use. Even as late as the mid-1980s, before rapid growth began, few developers foresaw the commercial potential of the Internet which has begun to blossom in the past few years. *See* Jeff Ubois, *Mass Appeal*, INTERNET WORLD, April 1997, at 62, 64.

67. *See supra* note 7.

tantly, the realization by commercial entities and other persons of the communications power of the Internet and the World Wide Web.[68]

The primary issue of Internet law has been the difficulty in defining its structure.[69] Application of various paradigms are all somewhat incomplete since the Internet is not quite like any of its communications predecessors.[70] Instead, the Internet is a multimedia medium, incorporating aspects of both broadcast and print media while available instantaneously to a global audience. In fact, the Internet has developed into a "world" formulated in "cyberspace" outside of the physical boundaries traditionally observed.[71] This "other-realm" conception has clashed with jurisdictional rules that rely on contacts defined by physical parameters, whether that contact is a residence, a contract signed in the forum, an injury that occurs on the highway, or a magazine that is sold at the corner store. Thus, the cases that have examined jurisdiction involving Internet contacts have had to determine if use of the Internet's capabilities provides "presence" sufficient to satisfy the minimum contacts and due process analyses of traditional jurisdiction jurisprudence.

Overall, there are three types of Internet jurisdiction cases. First, there are those cases that refuse to exercise jurisdiction over persons who only use the Internet to post or access information generally accessible to others on-line. Second, there are cases that establish jurisdiction for virtually any use of the Internet, even if only for the creation of a website. Finally, there are Internet cases where specific use of the medium demonstrates direct analogies to "physical" analogs in which jurisdiction has held or not.

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68. *See generally* Gotts & Rutenberg, *supra* note 3 (discussing the history of telecommunications innovation and regulatory treatment in light of the recent leaps taken to advance the Information Super Highway).

69. *See generally* Swedlow, *supra* note 1, at 340 (examining the possibility of three models of Internet structure and rejecting current views of structuralism as inadequate to meet the legal obligations thrust upon it).

70. *See* Kalow, *supra* note 1, at 2243-49 (discussing the unique aspects of the Internet).

71. *See supra* notes 3-4.

1. Refusal to Find Personal Jurisdiction on the Basis of Internet Presence[72]

A number of cases have refused to exercise jurisdiction over a defendant for her use of the Internet or on-line capabilities. In these cases, the important facts to note are that the use of the on-line medium is the primary contact with the forum in question, and that the deciding courts clearly recognize that the use is geographically inconsequential insofar as the particular forum is concerned.

First, in *Bensusan Restaurant Corp. v. King,*[73] the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit refused to exercise personal jurisdiction over the defendant for his maintenance of a web page that allegedly offended trademark rights of the plaintiff. The plaintiffs owned and operated The Blue Note jazz club in New York and had trademark protection for the name. King opened a jazz club under the same name in Missouri and later developed a web page, accessible over the Internet, which listed ticket information, a local number for reservations, a disclaimer that the restaurant was not associated with The Blue Note in New York, and a hyperlink to the New York restaurant's website.[74] King had no contacts with New York and the clientele of the restaurant was almost exclusively state residents. Further, the tickets advertised on the web page had to be purchased using a Missouri number and picked up in Missouri.[75]

Both the trial and appellate court declined to exercise personal jurisdiction. The issue was whether a website, which was generally accessible to anyone and which contained a local Missouri phone number, was an offer to sell merchandise in

72. The author apologizes in advance for the length and detail of the following subsections. Personal jurisdiction analysis is fact intensive insofar as it must focus on the individual's contacts with a forum. By including many of these facts in the following material, the author hopes to provide a clear analysis of the courts' rationales for asserting jurisdiction without sending the reader to the case reporters to resolve any lingering questions.

73. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997).

74. *See* 937 F. Supp. at 297-98.

75. *See id.* at 300.

New York.[76] The trial court found no tortious injury caused by defendant's actions in the forum since any injury required affirmative acts by the Internet user to obtain tickets and those acts would occur in Missouri.[77] Further, there was no injury from an act outside the forum since New York's long-arm statute required such jurisdiction to rely upon a showing of defendant's substantial revenue from interstate commerce, which King's clientele did not demonstrate.[78] Thus, King could not reasonably foresee suit in New York and the due process component was not met since there had been no purposeful availment of the forum.[79] In so holding, the court analogized posting a website to placing a product in the stream of commerce, such that access in a forum may be foreseeable, but the defendant has not availed himself to suit in the forum.[80] On appeal, the Second Circuit affirmed the trial court's decision and noted the practical use of traditional jurisdiction paradigms as applied to the Internet.[81]

Presenting a somewhat different case, *Pres-Kap, Inc. v. System One, Direct Access, Inc.*,[82] involved the lease of electronic reservation equipment used to access another forum. System One provided on-line electronic reservation equipment to travel agencies and maintained a database in Florida for access. System One's office in New York initiated contact with Pres-Kap travel agency and negotiated a contract. Besides accessing the database and sending payments to Miami, Pres-Kap had no contact with Florida and dealt exclusively with System One's New York office.[83] When System One brought an action for

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76. *See id.* at 297.

77. *See id.* at 299.

78. *See id.* at 300.

79. King's website, as demonstrated by the ticket procedure, was found to serve a local audience in Missouri rather than an attempt to take advantage of the New York audience. *See id.* at 301. While the website was similar to a national advertisement, the court analogized it to placing a product in the stream of commerce such that there was no purposeful availment. *See id; see also* discussion of *WorldWide Volkswagen* and *Asahi Metal, supra* Part II.A.

80. *See Bensusan Restaurant,* 937 F. Supp. at 301.

81. The appellate court agreed entirely with the district court's analysis while noting that attempt to define the law applicable to the Internet was "like trying to board a moving bus." Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997).

82. 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).

83. *See id.* at 1352-53.

breach of lease agreement in Florida, Pres-Kap challenged the court's jurisdiction.

The District Court of Appeal of Florida held that it had no personal jurisdiction over Pres-Kap.[84] The court found that the minimum contacts were insufficient, that suit was not reasonably foreseeable in the forum and that jurisdiction would violate "traditional notions of fair dealing and substantial justice."[85] The court found that merely accessing the server and mailing payments to Florida were insufficient contacts and that the totality of circumstances did not demonstrate the necessary "presence" for jurisdiction.[86] In closing, the court warned that finding personal jurisdiction would herald a substantial danger to the livelihood of on-line communications and legal power over those who utilized them.[87]

Several other cases have adhered to limiting "Internet jurisdiction." In *Naxos Resources Ltd. v. Southam, Inc.*,[88] the court denied general jurisdiction over a nonresident defendant whose only contacts with the forum were several third tier subsidiaries and an allegedly defamatory article written by the defendant, which was available in California through LEXIS and WestLaw.[89] The court held that publication in electronic form is not sufficient for the purposeful availment requirement of personal jurisdiction and the effects test of *Calder*.[90] Similarly, in *Cybersell, Inc. v. Cybersell, Inc.*,[91] the Ninth Circuit held that the trial court did not have specific jurisdiction over a web

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

85. *Id.* at 1353.

86. *See id.* at 1352-53. The court noted that Pres-Kap may have had no knowledge that the server they were accessing was in Florida and thus could not even know that they were "availing" the company of Florida based facilities. *See id.* at 1353. However, even if Pres-Kap had known the Florida location of the database, the court questioned whether the result under the due process analysis would change. *See id.*

87. "[A] contrary decision would . . . have far-reaching implications for business and professional people who use 'on-line' computer services. . . . " *Id.* at 1353.

88. No. CV 96-2314 WJR (Mcx.), 1996 WL 662451, at *1 (C.D. Cal. Aug. 16, 1996) (unpublished opinion).

89. *See id.* at *4.

90. *See id* at *7 (noting that most of the activity and even the injury were directed at plaintiff's affiliates in Canada rather the California branch); *see also supra* notes 61-64 and accompanying text (discussing the *Calder* test).

91. 130 F.3d 414 (9th Cir. 1997).

developer in a trademark infringement case.[92] Noting that access to a website depends upon an affirmative act by the person browsing the web, the court held that a website was similar to an advertisement, which in and of itself was insufficient to provide jurisdiction without further evidence.[93] Finally, in *Hearst Corp. v. Goldberger*,[94] the court found that a generally accessible website, as opposed to a pay or limited site requiring restricted use controlled by the website owner, cannot alone provide a basis for jurisdiction.[95] Websites again were analogized to advertisements in national magazines which are not targeted to any particular forum and as such lack indicia of purposeful availment without further evidence.[96]

2. Internet Presence Established for Jurisdiction

In contrast to the cases requiring a high standard for finding personal jurisdiction when the Internet is involved, a few cases have held that the mere use of a website is sufficient to grant jurisdiction. The factors important to these analyses include the courts' reference to the overall number of Internet users that may access a website and a fascination with the unique nature of the Internet medium.

In *Maritz, Inc. v. Cybergold, Inc.*,[97] a California web developer posted advertisements on his website to promote a national service he intended to develop. Upon plaintiff's discovery of the site, a suit was filed for trademark infringement in Missouri. Other than the anticipated participation of Missouri residents

92. *See id.* at 420.

93. *See id.* at 418-19. In its opinion, the Ninth Circuit noted that "no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state." *Id.* at 418 (citations omitted). Indeed, the plaintiff in *Cybersell* failed to come forward with any evidence of contacts beyond the advertisement.

94. No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997) (unpublished opinion).

95. *See id.* at *12. The court noted that a website is "most analogous to an advertisement in a national magazine . . . [and thus] is not targeted at the residents of New York or any other particular state." *Id.* at *10. The court noted that "[n]ational advertisements also have been held to not constitute sufficient 'minimum contacts' to satisfy constitutional due process requirements." *Id.* at *11 n.13 (citations omitted).

96. *See id.*

97. 947 F. Supp. 1328 (E.D. Mo. 1996).

in the defendant's future service and 131 hits from Missouri to the defendant's web page, Maritz had no connection with Missouri.[98]

The federal district court in Missouri held that personal jurisdiction would extend over Maritz.[99] The court found that the trademark infringement was a tortious injury in the forum and that due process was met.[100] The court noted a disparity in mail and telephone analogies as applied to the Internet, but focused on the unique ability of an Internet advertisement to be continually accessed at any time for any number of times, the existing 12,000 Missouri Internet users that *potentially* could access the site, and the proposed use of the final site that would include use by Missouri residents.[101] The court also mentioned the forum's interests in the dispute's resolution and hinted that the developing nature of communication should throw the jurisdictional doors wide open.[102]

Similarly, in *Inset Systems, Inc. v. Instruction Set, Inc.*,[103] the court considered a domain name dispute involving trademark infringement. In that case, a Massachusetts web developer posted a web advertisement with a toll free phone number for computer support under a domain name that was similar to the plaintiff's registered trademark.[104] The Massachusetts developer had no contacts with Connecticut and no evidence existed that anyone from Connecticut had visited the website or called the number listed.[105] When the Connecticut suit was

98. *See id.* at 1333-34.
99. *See id.* at 1334.
100. *See id.* at 1331.
101. *See id.* at 1332-33 (finding that the website "automatically and indiscriminately responds to each and every internet user who accesses" it); *see also* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997) ("Some courts have also given weight to the number of 'hits' received by a web page from residents in the forum state, and to other evidence that Internet activity was directed at, or bore fruit in, the forum state.").
102. *See Maritz*, 947 F. Supp. at 1333-34. In this regard, the court cited *California Software, Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356, 1363 (C.D. Cal. 1986), to the effect that "while modern technology has made nationwide commercial transactions simpler and more feasible, . . . it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts." *Maritz*, 947 F. Supp. at 1333-34.
103. 937 F. Supp. 161 (D. Conn. 1996).
104. *See id.* at 162-63.
105. *See id.* at 165.

filed, the defendant asserted that there was no basis for personal jurisdiction.[106]

In what has been considered the high water mark of Internet jurisdiction, the district court held that personal jurisdiction would apply for the mere use of the Internet to post an advertisement accessible to Internet users in the forum.[107] The court noted that there were 10,000 Connecticut Internet users who could possibly access the advertisement and, unlike traditional advertisements, Internet advertisements had permanent accessibility so long as the web developer did not replace them.[108] Applying Connecticut's long-arm statute, the court found that the "permanent accessibility" feature represented repeated solicitation of the forum and that the Massachusetts company had purposefully availed itself of the forum through the advertisement such that due process concerns were met.[109] As such, the court found that the defendant, by use of its Internet advertisement and phone number, had directly solicited business everywhere the Internet was accessible and had purposefully continued displaying the advertisement to gain business from the forum.[110]

In *Panavision International, L.P. v. Toeppen*,[111] the court held that trademark infringement, through the use of an Internet domain name on the defendant's website, was sufficient to assert long-arm jurisdiction. The court was careful to distinguish registration of a domain name from "doing business" within the forum. From this delineation, the court crafted a distinction between contractual/commercial actions and tort actions, finding that trademark infringement occurred in the latter.[112] Because the court determined that the infringement

106. *See id.* at 162.

107. *See id.* at 165.

108. "[U]nlike hard-copy advertisements . . . 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." *Id.*

109. *See id.*

110. *See id.*

111. 938 F. Supp. 616 (C.D. Cal. 1996).

112. "Toeppen is not conducting a business but is . . . running a scam directed at California." *Id.* at 622. Toeppen had registered domain names for web pages that were similar or the same as plaintiff's registered trademarks and then attempted to extort $13,000 from the plaintiff to permit it to use the domain names for its own

was a tort, it proceeded to apply the *Calder* effects test to what it perceived to be an intentional tort aimed at California. Since California was the residence of the plaintiff, the injury was certainly foreseeable.[113] After satisfying the "but for" and reasonableness requirements of the three part jurisdictional test, the court asserted jurisdiction over the defendant, although agreeing that he had no other contacts besides the website and had not "done business" in the forum.[114]

3. Internet Cases Dealing with Personal Jurisdiction under Traditional Contact Analysis

A number of cases have examined Internet contacts under circumstances in which a party also maintained other contacts in the forum, either through interaction on the Internet or in the "physical" world. These cases have consistently held that personal jurisdiction is proper whenever the nonresident defendant not only maintains an Internet site or uses its services, but also engages in "contract-type" conduct or similar business behavior that is continuous, regular, or systematically targeted towards the forum. These cases predominately involve either interactive business conducted over the Internet or conduct for the purposes of establishing an Internet business.

While not fully illustrative of the later analysis of this article, a brief mention of several of these cases is helpful because the reader certainly will encounter them in any subsequent research into the field of Internet jurisdictional issues. First, *CompuServe, Inc. v. Patterson*[115] involved a defendant who had an agreement with an Ohio based on-line premium service to sell and market his software. During the relation, the defendant electronically sent and stored thirty-two files to the server in Ohio, sold less than $650 worth of software to Ohio residents, and sent e-mail demands to CompuServe in Ohio requesting compensation for alleged software and trademark infringement.[116] After recognizing the relaxing rules of jurisdic-

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website. *See id.* at 619.

113. *See id.* at 620-23.

114. *See id.* at 622.

115. 89 F.3d 1257 (6th Cir. 1996).

116. *See id.* at 1261.

tion, the court found the actions demonstrated purposeful availment of the forum's business and asserted personal jurisdiction.[117]

Second, in *Edias Software International v. Basis International, Ltd.*,[118] the *Calder* effects test was used to find jurisdiction over a nonresident defendant whose defamatory e-mail was posted on the Internet. The contacts with the forum included numerous communications, more than $800,000 in sales to Arizona residents, e-mail messages, a website accessible in Arizona, and evidence of employee visits to the forum.[119] Upon providing several Internet paradigms and asserting that e-mail is similar to other kinds of communication,[120] the court asserted that the defendant had purposefully availed itself of Arizona and the effects test granted jurisdiction upon full showing of a "but for" relationship between the claims and the contacts as well as the reasonableness of asserting jurisdiction.[121]

Third, in *State v. Granite Gate Resorts, Inc.*,[122] the court established jurisdiction over a company using the Internet to promote an off-shore betting operation. The defendants operated a website, as well as on-line advertisements, that contained toll-free numbers, credit card solicitations, mailing list inquiries, and other services for Internet users to contact.[123] At trial, the court noted that Minnesota contained over 500,000 Internet users, that the defendant had transmitted his website to Minnesota residents 248 times and that Minnesota residents had used the toll-free 800 number, a 900 number, and placed themselves on the mailing list.[124] The interactivity of the services, coupled with the intentional posts to solicit business with the knowledge that Minnesota residents were participating, led the court

117. *See id.* at 1268.
118. 947 F. Supp. 413 (D. Ariz. 1996).
119. *See id.* at 417.
120. The court noted the similarity of the Internet with mail and phone communications and then offered metaphorical comparisons with a shopping mall, a highway, and a telephone system. *See id.* at 419.
121. *See id.* at 422.
122. No. C6-95-7227, 1996 WL 767431, at *1 (Minn. Dist. Ct. Dec. 11, 1996), *aff'd*, 568 N.W.2d 715 (Minn. Ct. App. 1997).
123. *See id.* at *3.
124. *See id.* at *1, *5.

to find that the defendant had purposefully availed itself of the forum.

Finally, in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[125] the court asserted personal jurisdiction over a web "premium" news service in a trademark infringement action. The court provided a "sliding scale" of Internet jurisdiction based on a spectrum ranging from low end (posting) to high end (using the Internet for business purposes or financial gain).[126] The court found that the defendant had contracted with seven Internet Service Providers located in Pennsylvania to carry his site and that 3,000 Pennsylvania residents had made payments to the defendant for full access to the premium portions of its site.[127] Although the contracts and the website were the only contacts with Pennsylvania, the court found that operation of the premium service was a high-end use of the Internet conducted for business purposefully targeted at the forum, that the contacts were continuous and substantial, and that the assertion of jurisdiction was reasonable.[128]

Examining the case law, the reader easily can discern that when a court must decide an issue of personal jurisdiction concerning a nonresident defendant whose primary or only contacts exist through the Internet, the analysis is layered with slippery definitions. The court in such a position must examine the state long-arm statute's language and determine the meaning of "doing business," "purposeful availment" and "minimum contacts" in regard to the Internet—a thorny issue when one realizes that there is no clear paradigm for the Internet and that the case law is far from uniform.[129] Regardless, a court must decide when called upon and this is the very position the District Court for the Eastern District of Virginia found itself in during the latter half of 1997.

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125. 952 F. Supp. 1119 (W.D. Pa. 1997).

126. Under the sliding scale, "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* at 1124.

127. *See id.* at 1125-26.

128. *See id.*

129. *See* Swedlow, *supra* note 1, at 339.

III. *TELCO COMMUNICATIONS V. AN APPLE A DAY*[130]

Telco Communications was a Virginia corporation which held a Missouri based subsidiary called Dial & Save of Missouri. The subsidiary was engaged in selling discount long distance telephone service in the state of Missouri. An Apple A Day was a Missouri based corporation with no contacts in Virginia, which operated as a telemarketer for consumer electronics. Apple was owned and run by Christina Steffen. After Apple discovered that Telco's subsidiary was using the "Dial & Save" mark, Apple brought suit in the Eastern District of Missouri for trademark infringement in late 1996. Apple alleged that it was the owner of the service mark "Dial & Save" and that Telco and its subsidiary had infringed its rights.[131]

After this action was filed, Steffen's husband, Myles Lipton, wrote several press releases in Missouri and placed them on Business-Wire for distribution in the target states of Connecticut, New York and New Jersey. Although desiring only limited distribution to the target areas, Steffen signed a standard press release form for Business-Wire, which permitted any information relayed to Business-Wire to be distributed at no additional charge to four other categories of outlets: financial disclosure circuits; on-line services and the Internet; financial databases and services; and the BW Analyst Wire.[132] This information was contained in the advertisements that Business Wire sent to customers. The advertisements also discussed the breadth of distribution, which included distribution outlets such as consumer information facilities, some of which were located in Virginia.[133]

After the press releases, Telco brought suit against Apple in the United States District Court for the Eastern District of Virginia, alleging defamation, tortious interference with con-

130. 977 F. Supp. 404 (E.D. Va. 1997). Recall, *supra* note *, that *Telco* is a district court opinion and is subject to appellate review. The analysis hereunder is viewed in part as a concatenation of prior "Internet jurisdiction" law and in part as a means to evaluate the direction that this area of the law is headed.

131. *See Telco*, 977 F. Supp. at 405.

132. *See id.* at 407.

133. These facilities included America Online, Nationsbank, the Virginia Retirement System, and numerous investors and brokers. *See id.*

tract, and conspiracy to harm.[134] Telco averred that Apple's press releases and calls to a Maryland securities analyst had defamed Telco such that the company's stock prices were reduced. Following a number of court orders, Apple eventually arrived in Virginia and asked the court to dismiss the proceedings for lack of personal jurisdiction.[135]

Telco asserted that personal jurisdiction over Apple extended by virtue of the Virginia long-arm statute.[136] First, it asserted that Virginia Code § 8.01-328(A)(4) applied because Apple had "caused a tortious injury in Virginia by an act or omission outside Virginia" and that Apple "regularly [did] or solicit[ed] business, or engage[d] in any other persistent course of conduct, or derive[d] substantial revenue from goods or services rendered" in the state.[137] Second, it asserted that Virginia Code § 8.01-328(A)(4) applied because Apple caused "a tortious injury by an act or omission" in Virginia.[138]

In order to analyze these claims, the court adhered to a two-step process that first assessed whether the facts fell within the long-arm statute and then whether due process concerns were

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134. Telco asserted five causes of action: (1) statutory defamation; (2) common law defamation; (3) tortious interference with a contractual relationship and reasonable business expectation; (4) statutory conspiracy to harm business; and (5) common law conspiracy to harm business. *See id.* at 405.

135. On May 2, 1997, the court granted Telco a Temporary Restraining Order and a default was entered on May 28, 1997. *See id.* After denying Apple's motions to dismiss and for transfer to Missouri on June 12, the court granted Apple's motion to set aside the default because Telco had failed to plead the requisite amount in controversy for diversity actions under 28 U.S.C. § 1332. *See id.* In September, the court considered Apple's Motion to Dismiss for lack of personal jurisdiction pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. *See id.*

136. The Long-Arm Statute provides in pertinent part:

> A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:
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> . . .
>
> 3. Causing tortious injury by an act or omission in this Commonwealth;
>
> 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he 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 this Commonwealth; . . .

VA. CODE ANN. § 8.01-328.1 (Michie 1992).

137. *Telco*, 977 F. Supp. at 405.

138. *Id.*

met.[139] While the court noted that Virginia's long-arm statute extended to the full constitutional range of due process, it also stated that the contacts of a nonresident defendant may be so tenuous that, although meeting due process concerns, they fail inclusion under the long-arm statute. Telco carried the burden of showing that personal jurisdiction did extend to Apple.[140]

Perplexingly, Apple failed to assert that jurisdiction would offend due process concerns.[141] Thus, the court looked only to the first prong of the personal jurisdiction analysis and applied the facts of the case to the long-arm statute. In both instances, it held that the press releases served as sufficient contacts to assert jurisdiction.

In the first instance, the court found that it could assert personal jurisdiction over Apple under § 8.01-328(A)(4).[142] Since Apple did not contest that a tortious injury to Telco in Virginia resulted from Apple's conduct outside the state, the court limited its inquiry to whether Apple engaged in business activity or any other persistent course of conduct or derived substantial revenue from Virginia.[143] The court readily agreed that this examination would be based solely on Internet activity, specifically that Apple "used a commercial entity to merely post [its] press release."[144] The court rejected Apple's argument under *Bensusan Restaurant Corp. v. King* and relied on *Inset Systems, Inc. v. Instruction Set* to find that it had jurisdiction.[145] Using *Inset*, the court found that the post was an Internet advertisement that could be accessed constantly by Virginia residents.[146] The court then held that "posting a Website advertisement or solicitation constitutes a persistent

139. *See id.*

140. *See id.*

141. "Defendants do not assert that this Court's exercise of jurisdiction would offend Due Process." *Id.*

142. *See id.* at 405-07.

143. *See id.* at 405; *see also* VA. CODE ANN. § 8.01-328.1 (Michie 1992).

144. *See Telco,* 977 F. Supp. at 406.

145. *See id.* at 406-07; *see also supra* Part II.B(1)-(2) (discussing *Bensusan Restaurants* and *Inset Systems*).

146. *See Telco,* 977 F. Supp. at 407; *see also supra* notes 101, 108 (Internet advertisements sufficient to provide jurisdictions). *But see supra* notes 93, 95 (Internet advertisements insufficient to provide jurisdiction).

course of conduct, and that the two or three press releases [rose] to the level of regularly doing or soliciting business."[147]

Second, the court also discovered that it could assert jurisdiction under Virginia Code § 8.01-328(A)(3) since it found that Apple caused a tortious injury in Virginia.[148] While the court agreed that this section generally requires a defendant to be physically present in the state, it cited *Krantz v. Air Line Pilots Association International*[149] as support for the premise that this requirement has been diminished. Under this broadening category, a defendant that necessarily relies on a Virginia facility to accomplish the injury in the state may be found to satisfy this subsection of the long-arm statute.

Krantz involved an airline pilot that was denied employment with United Airlines after members of the Air Line Pilots Association flooded United with responses asking that they not employ Krantz. In a prior strike at another airline, Krantz had crossed the picket line and was blacklisted by the Association as a scab. Upon notification of Krantz's application with United, Nottke, an Association member, accessed a database housed in Virginia and transmitted information concerning Krantz's application, which was then distributed to others nationally to protest United's review of Krantz for employment.[150] The court found that although the nonresident defendant's only contacts with Virginia consisted of electronic communications with the database, personal jurisdiction was proper since the defendant

147. *Telco,* 977 F. Supp. at 407. The court also relied upon *First American First, Inc. v. National Association of Bank Women,* 802 F.2d 1511 (4th Cir. 1986), in which nationally distributed defamatory letters were mailed from Illinois and into Virginia. Since the content of the letters was targeted at a Virginia resident, the injury was held to occur in Virginia and personal jurisdiction was proper. *See id.* at 1517. This analysis is similar to the *Calder* test followed by the Ninth Circuit. *See supra* notes 61-64 and accompanying text (discussing *Calder* test) *Compare First American First,* 802 F.2d at 1511, *with* Panavision Intn'l, L.P. v. Toeppen, 938 F. Supp. 616, 620 (C.D. Cal. 1996).

In *Telco,* the Fourth Circuit's decision in *First American First* was cited by both parties, but the analysis was in favor of the plaintiff and the court did not engage in any analysis except to say that the facts were similar. *See Telco,* 977 F. Supp. at 407.

148. *See Telco,* 977 F. Supp. at 407-08; *see* VA. CODE ANN. § 8.01-328.1 (Michie 1992).

149. 427 S.E.2d 326 (Va. 1993).

150. *See id.* at 327-28.

required the use of Virginia facilities to accomplish the act of derogating the plaintiff's name and preventing his employment.[151]

Relying on a comparison with *Krantz*, the court found that the injury to Telco necessarily required that Virginia facilities, such as the consumer information outlets, receive and distribute the press releases.[152] Since the defendants reasonably knew from Business Wire's advertisements that this distribution would occur, the court did not agree that the facilities were not needed to accomplish the tort in Virginia.[153] Finding that *Krantz* was applicable, the court held the defamation, conspiracy, and tortious interference claims all required contacts with Virginia facilities that distributed to the state's investors and brokers. Moreover, the court found that the injury to Telco occurred in the state because it was located in Virginia.[154]

Although Apple did not challenge the due process analysis of jurisdiction, the court addressed the issue in closing.[155] While recognizing that mere foreseeability is insufficient to assert jurisdiction, the court stated that the defendants could reasonably have expected being haled into Virginia court with the knowledge that their press releases would be distributed to Virginia residents over the Internet.[156]

IV. ANALYSIS OF *TELCO COMMUNICATIONS*

The *Telco* decision is painted in broad strokes of jurisdictional theory. At once, the case recognizes the conflicting results of Internet jurisdiction cases and then wilfully steps forward to assert a novel result heretofore unseen in prior cases. Unlike its predecessors, *Telco* involves an assertion of jurisdiction over defendants who themselves did not use the Internet, but em-

151. *See id.* at 328-29 (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984)).

152. *See Telco,* 977 F. Supp. at 408.

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id. But see supra* notes 79, 93 & 95 (finding that advertisements, similar to the ones used by Apple, were analogous to placing a product in the stream of commerce and could not provide reasonable foreseeability of suit).

ployed another to post the information for them.[157] While the earlier cases exclusively have dealt with defendants actively involved with use of the Internet, *Telco* presents a situation in which the defendants have sought another party to provide the Internet contacts. Since such a decision would find jurisdictional grounds over a number of those who are at least one step removed from active use of the Internet, the basis of the decision is necessary to examine and dissect.

First, the court's analysis of jurisdiction under Virginia Code § 8.01-328(A)(4) requires attention. Recalling that Apple did not challenge that an act had been committed outside Virginia causing injury to Telco in the state, the issue remaining was whether the Internet posts were sufficient to demonstrate regular and continuous solicitation of business in the state.[158] In its analysis, the court examined three recent cases involving Internet jurisdiction: *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, *Bensusan Restaurant Corp. v. King*, and *Inset Systems, Inc. v. Instruction Set*.[159] While recognizing *Zippo*'s pliable "sliding scale" rule for Internet jurisdiction, the court paid little more than lip-service to this "well-reasoned opinion" that explicitly denies jurisdiction when a website merely is used to post information.[160] Although the court agrees in the same paragraph that Apple's Internet activity was limited to posting information, they fail to provide any analysis or application of *Zippo*'s sliding scale to Apple's conduct. Using such an analysis, the court would have had to find that the Internet activity was a "low end" use that did not permit an assertion of personal jurisdiction.[161] Instead, however, the court plows ahead into a

157. *See supra* Part II.B. In the cases discussed earlier, the defendants were web developers or were actively using the Internet to send personal e-mail, rather than relaying information to another party to post information for them.

The author also notes at this point that *Telco* involves specific, rather than general jurisdiction, since the defamatory injury was related to the alleged Internet contacts. *See supra* notes 13 and 20 (discussing personal jurisdiction analysis).

158. *See Telco*, 977 F. Supp. at 405-06; *see also* VA. CODE ANN. § 8.01-328.1 (Michie 1992). Recall the requirements of due process as discussed in *supra* note 13.

159. *See Telco*, 977 F. Supp. at 406; *see also supra* Part II.B(1)-(3).

160. *See Telco*, 977 F. Supp. at 406; *see also supra* Part II.B(3) and accompanying notes.

161. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124-26 (W.D. Pa. 1997) (describing the *Zippo* sliding scale test). The sliding scale test directly correlates jurisdiction with the nature and quality of commercial Internet use.

dichotomy of the cases standing at opposite ends of the Internet jurisdiction spectrum: *Bensusan Restaurant* and *Inset Systems*.[162]

Apple relied on *Bensusan Restaurants*[163] when it asserted that a defendant must be physically present in the forum for jurisdiction to attach, and the court noticed the factual similarities before it declined to follow the rule of the case.[164] The case, however, is not particularly illustrative for *Telco*. *Bensusan Restaurants* did involve an Internet advertisement, but the claim was one of trademark infringement and the New York long-arm statute is not identical to Virginia's statute.[165] Most importantly, when the New York court was deciding whether an out-of-state action caused an in-state injury, the court also was required to determine whether the defendant derived "substantial revenue from interstate commerce."[166] Due to the "local" nature of the defendant's business, as advertised on the Internet, and the almost exclusively local clientele, the

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The defendants in *Telco* used the Internet to post press releases for their business, but there is no indication that these posts were interactive or anything different than an advertisement that would appear in a regional trade magazine that happened to have subscribers in Virginia. Rather than using the Internet to run a commercial venture or to establish two-way business communications, the defendants, at most, used the Internet to publicize its business in a way that approximates the lower end of the sliding scale spectrum. *See Telco*, 977 F. Supp. at 406-07.

162. After agreeing that Apple merely posted information, the court proceeded to completely ignore the existing case law explicitly stating that an advertisement, whether in a national magazine or on the Internet, is insufficient for due process concerns. *See supra* notes 79, 93 and 95.

The court's dichotomy is appropriate since the question was whether Internet contacts alone could suffice for an assertion of jurisdiction. Unlike the cases in *supra* Part II.B(3), *Telco* contained no evidence demonstrating that the defendants had any other business contacts in Virginia. In the absence of any business contracts, commercial dealings or active pursuit of Virginia commerce, the court could only decide the issue on Internet contacts that contained no evidence of direct dealing with the forum. This is not to say, however, that the cases in Part II.B(3) are not instructive, since this section includes *Zippo Manufacturing*, which would permit a sliding scale analysis, and *Edias Software*, which examined a defamation case similar to that in *Telco* except that the *Edias* defendant had other business contacts in the forum. *See Zippo Mgf. Co.*, 952 F. Supp. at 1124-26 (addressing *Zippo Manufacturing* test); *see also* Edias Software Int'l v. Basis Int'l, Ltd., 947 F. Supp. 413, 417-22 (D. Ariz. 1996).

163. *See supra* Part II.B(1).

164. *See Telco*, 977 F. Supp. at 406-07.

165. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 298-99 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997).

166. *Id.*

court found that the qualification was not met. The holding was not that the defendant had to be physically present for jurisdictional purposes, but that the defendant's Internet site and business were not sufficient to meet the interstate commerce revenue requirements of the New York statute.[167] Additionally, the court found that the site was similar to placing a product in the stream of commerce, such that the mere foreseeability of distant access was insufficient for due process.[168]

In contrast, the issue in *Telco* did not concern whether Apple had substantial revenues in interstate commerce, but whether it was actively soliciting business in the state. Unlike the defendant in *Bensusan Restaurants* whose clientele was composed entirely of Missouri residents, Apple's post intentionally was distributed to reach a multi-state area and solicit business outside its own forum.[169] Since Apple could not plausibly assert its requirement of physical presence in those states, it is hard to discern why this claim was raised in Virginia. Additionally, *Telco* presents an issue of defamation and has greater similarity to the line of cases examining the *Calder* effects test than the cases examining trademark infringement.[170] Unlike the latter cases, the defamation cases generally find that the

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167. *In Bensusan Restaurants,* the court focused on the "initial matter" of the substantial revenues obtained in interstate commerce in determining whether King had established any type of presence in New York, but made no mention of the necessity or unnecessary existence of physical presence. *See id.* at 301. The court in *Telco,* however, noted that the defendant stated that *Bensusan Restaurants* required that a "nonresident defendant must be physically present in a state" for personal jurisdiction. *Telco,* 977 F. Supp. at 407.

168. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112-16 (1987) (describing *Asahi Metal*'s stream of commerce analysis).

169. *See Telco,* 977 F. Supp. at 407.

170. *See supra* note 61-64 and accompanying text (detailing the *Calder* test); *see also* Panavision Intn'l, L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996) (classifying trademark infringement as a tortious injury and then using the *Calder* test to assert jurisdiction); Edias Software Intn'l v. Basis Intn'l, Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (using the *Calder* test to assert jurisdiction in a defamation case in which the defendant had established business contacts in the forum); Naxos Resources v. Southam, Inc., No. CV 96-2314 WJR (Mcx.), 1996 WL 66245 1, at *1 (C.D. Cal. Aug. 16, 1996) (unpublished opinion) (finding that allegedly defamatory article available on WestLaw and LEXIS alone was not sufficient for jurisdiction, especially where the target of the article may have resided in another forum).

Although the *Telco* court cites *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984), no cite is provided to either *Calder v. Jones*, 465 U.S. 783 (1984), or the *Calder* test. See *Telco*, 977 F. Supp. at 408-08 (explaining where a defamatory injury occurs for purposes of jurisdiction).

conduct targets itself at the forum in which the defamed resides, such that a single act of defamation represents a purposeful contact with the forum.[171] If Apple's posts indeed were defamatory, then the conduct was targeted at Telco in Virginia purposefully and the advertisements were not mere posts placed in the general stream of information. If so, this also would defeat Apple's reliance on *Bensusan Restaurant* and its "stream of commerce" rationale as applied to websites.

Further, the court failed to cite a number of prior Internet jurisdiction cases which would have been instructive. The *Telco* court could have analogized the defendant's transmissions to Virginia facilities to the transmissions of the defendants in *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, in which mere electronic access to a facility subject to a leasing agreement did not subject the defendant to personal jurisdiction in the forum housing the facility.[172] Additionally, while the *Telco* court focused on the possible number of hits that an on-line advertisement could receive, the court failed to analyze the analog to this proposition: that access only occurs through an affirmative act of a user who is seeking out information.[173] Additionally, no argument was made concerning whether the information was generally available or restricted to paying customers and, even if the information was placed on a premium service, that this alone still was insufficient to assert jurisdiction.[174] The *Telco* court, however, apparently neither entertained nor considered such arguments and instead relied on comparisons with

171. *See supra* notes 57 and 147 and accompanying text (finding that act of defamation provides grounds for assertion of personal jurisdiction).

172. *See* cases *supra* notes 82-87 and accompanying text (discussing *Pres-Kap*'s finding that mere electronic access or use of a facility in the forum did not provide personal jurisdiction). *But see* discussion of *Krantz*, *supra* notes 149-51 and accompanying text.

173. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-19 (9th Cir. 1997)

174. *See* Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 97097, at *1 (S.D.N.Y. Feb. 26, 1997) (unpublished opinion) (differentiating between general access and premium access sites for purposes of personal jurisdiction); Naxos Resources Ltd. v. Southam, Inc., No. CV 96-2314 WJR (MCx.), 1996 WL 662451, at *1 (C.D. Cal. Aug. 16, 1996) (unpublished opinion) (holding that defamatory material available nationally on LEXIS and WestLaw could not provide sufficient contacts for personal jurisdiction); *see also* cases cited *supra* notes 88-90, 94-96 and accompanying text. While these opinions were unpublished, the arguments they provide remain viable though without precedential weight.

Bensusan Restaurants without deeper analysis of the issues underlying Internet contacts.

Further, the court's reliance on *Inset Systems* is equally suspect. Similar to other cases extending broad jurisdiction on the basis of Internet contacts, *Telco* highlights the "unique" nature of the Internet and evokes the impression that an advertisement on-line is analogous to continuously soliciting whomever accesses the site.[175] Additionally, the court points out the ever-expanding reach permitted by the advancement of technology and the ability to affect injury from a distance.[176] The problem, however, is that merely showing the possibility of access is not the same as demonstrating actual access.[177] No evidence in *Telco* avers that anyone in Virginia besides Telco even saw the advertisement. While the facts and reasoning of *Inset Systems* and *Telco* are vastly similar, neither decision explains why an Internet advertisement is a continuous and systematic solicitation without further contacts.[178]

Such a decision rests on no legal authority, but acceptance of a conceptual paradigm expedited on a whim.[179] An attack on this concept must be theoretical, not legal, and must argue

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175. *See supra* Part II.B(2).

176. This focus resembles the argument present in *International Shoe Co. v. Washington*, 326 U.S. 310, 316-20 (1945), for expansion of personal jurisdiction. *See* discussion *supra* notes 30-34 and accompanying text. It should be noted, however, that courts declining to assert personal jurisdiction on the basis of Internet "advertisements" have focused instead on stream of commerce arguments similar to those in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112-13 (1987). *See* discussion *supra* notes 43-46, 50-54 and accompanying text. Since the latter cases have modified the *International Shoe* minimum contacts doctrine, there is a strong argument that *World-Wide Volkswagen* should govern jurisdiction based on the World Wide Web.

177. These cases often point to the number of Internet users who could potentially see the advertisement, not the number of users which actually do see the advertisement. *Compare* Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164-65 (D. Conn. 1996) (relying on 10,000 possible forum Internet users who could conceivably access the infringing page), *with* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1331 (E.D. Mo. 1996) (using the known existence of 131 hits from the forum to establish that forum residents were accessing infringing page). Since the electronic capabilities of the Internet permit a website to keep a running log of the electronic identity and location of those who log on, it is mysterious why courts resort to potentialities rather than actualities.

178. *See Inset Systems*, 937 F. Supp. at 165.

179. No case researched for this article provided any legal authority for finding an Internet advertisement different from an advertisement in a national magazine.

from analogy. While an in-depth analysis of the paradigmatic structure of the Internet is beyond the scope of this article, suffice to say that the battling concepts require some analysis and discussion in the case law before wholesale acceptance of a particular model of Internet functionality.[180] Both *Inset Systems* and *Telco* succumb to this unquestioning attitude and thus fling open the doors to wholesale jurisdiction. Whether the advertisements in *Telco* indeed were indicative of continuous solicitation is not a legal question, but a conceptual question which is not fully resolved and certainly not completely justified.

Another issue arises in connection with the court's analysis of Virginia Code § 8.01-328(A)(3) and its assertion that jurisdiction would hold since the injury occurred as a result of action in Virginia. While most jurisdictions hold that a defendant need not be physically present to satisfy requirements of this type,[181] the general consensus is that some direct contacts must be established in the forum before finding that the actions occurred in the forum. Formation of a contract in the state and regularly transacted business with another in the forum are excellent examples of the types of direct, purposeful contact required.[182] Here, Apple wrote the releases in Missouri, sent the releases from Missouri, made calls from Missouri, and did not directly initiate any contact with Virginia. The court found, however, that Apple knew that Virginia facilities would distribute its advertisements and, relying on *Krantz v. Air Line Pilots Association International*,[183] found that the use of the facilities was an indispensable link between the actions and the injury.[184] The difference, however, is that the defendant in *Krantz* personally and directly contacted and sent information to a Virginia facility.[185] Apple sent its information to Business

180. For an in-depth discussion of structural models and their application to Internet jurisdiction, see generally Swedlow, *supra* note 1.

181. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1264-65 (6th Cir. 1996) (stating that a defendant may create a presence in a jurisdiction by its business actions and that physical presence is not required).

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

183. 427 S.E.2d 326 (Va. 1993).

184. *See Telco*, 977 F. Supp. at 408; *see also* discussion *supra* Part III.

185. *See Krantz*, 427 S.E.2d at 327-29

Wire, located outside Virginia, and then the information was sent by Business Wire to various facilities, some in Virginia, for further distribution. Apple had no direct contact with any Virginia facility and did not request such, although it may have been aware that the information would eventually be distributed there.[186] Using a stream of commerce argument, Apple could have argued that *Krantz* was inapposite and that its use of Virginia facilities was indirect at best and not purposeful.[187]

Finally, the defendants failed to contest the due process elements of jurisdiction. The case provides no rationale or reasons why the defendants waived any challenges to due process considerations. While the court's analysis clearly supports the speculation that it would have met due process constraints of minimum contacts, reasonable foreseeability and "traditional notions of fair play and substantial justice," the decision would rest on the basis of its findings under the long-arm statute.[188] The court found minimum contacts through the purposeful solicitation of Virginia residents through Internet advertisements, that reasonable foreseeability stemmed from defendant's knowledge that distribution would occur in Virginia facilities and that the defendant's conduct should have led it to expect being haled into court in the forum. The problem, however, is that the analysis above demonstrates that the "contacts" elucidated by the court in part rely upon vague and disputed conceptual analyses as well as indirect contact with the forum. Holding that these contacts should provide reasonable anticipation of jurisdiction is questionable. To hold that a party with knowledge that its Internet post will be distributed to another forum provides reasonable foreseeability is suspect given the widely conflicting case law on whether on-line posting alone confers jurisdiction.

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186. *Compare* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1980) (declining to assert personal jurisdiction on the basis of a stream of commerce analysis), *with* Calder v. Jones, 465 U.S. 783 (1984), and Keeton v. Hustler Magazine, 465 U.S. 770 (1984). The injury in *Telco* is the same as that in the latter cases while the contacts and business distribution resemble that of *Asahi* insofar as the *Telco* defendant was not selling a national publication in Virginia where the injury occurred.

187. The argument here would have relied upon an analysis in the line of *Asahi Metal. See supra* Part II.A and note 13; *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980).

188. *See Telco*, 977 F. Supp. at 404, 408.

The answers are not easy and, unfortunately, *Telco* has not left behind a convincing legacy of justification.

V. CONCLUSION

Telco Communications v. An Apple A Day is one part of a quickly evolving puzzle of Internet case law. The issues have been drawn and decided before the concepts underlying them have been solidified. *Telco* provides an observation of how courts may treat Internet contacts in light of traditional personal jurisdiction analysis and inconsistent models of current technology. At stake is the future development and vitality of the most powerful communications tool to date.

The principal concern of Internet jurisdiction cases is the breadth of scope, and *Telco* is illustrative: what conduct, through the use of the Internet, satisfies long-arm jurisdiction? If the definition sweeps broadly, then the Internet opens one to jurisdiction everywhere where an injury can be shown—just as the Internet is without bounds, so too is jurisdiction over those who utilize it. The litigious nightmare of being subject to suit everywhere hardly needs elaboration and the inability to insulate oneself from suit would either require "localization" of Internet services or abstention from on-line activity.[189] Either choice would severely inhibit the continued growth of the Internet under threat of litigation in a distant forum.

The opposite alternative, however, is equally unnerving. Few will disagree that the Internet provides the ability to communicate and act globally with rapidity. Prior circumstances clearly demonstrate that the Internet can be used detrimentally and at a cost to others. Defamation, consumer fraud, and intellectual property infringement are all fair game for on-line abuse. An assertion that jurisdiction should not extend to the defendants involved often would seem counterintuitive to plaintiff and forum interests in resolution and convenience.

Inevitably, the third choice leads to the middle ground—the road of reason—to decide the issue. Again, however, the choice is difficult. For example, adopting *Zippo*'s sliding scale of

189. *See* Gotts & Rutenberg, *supra* note 3, at 343.

Internet jurisdiction provides the opposite ends of the spectrum, but still requires that the courts draw arbitrary lines in the middle—lines based in part on the very concepts which remain couched in ambiguity and which have established the ends of the very spectrum they lie upon.[190] Further, such arbitrariness would appear to require in-depth analysis of Internet contacts, user statistics and degrees of interactivity, turning personal jurisdiction into a "mini-trial" of contact evidence and dispute. Further, courts would be forced to draw consistent arbitrary lines in the sliding scale or else risk fogging the notion of reasonable foreseeability.

The case law after *Telco* continues to demonstrate the unstable environment of Internet jurisdiction. While several courts have favored the *Zippo* sliding scale analysis,[191] other courts continue to base jurisdiction on the number of forum Internet users who could possibly access a site.[192] Further, no concrete analysis of paradigms has evolved and disparate analogies between the Internet and other forms of media remain.[193] Additionally, the very meaning of "doing business" on the Internet has been left without clear boundaries.[194] *Telco* left behind an

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190. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997).

191. *See* SF Hotel Co. v. Energy Inv., Inc., 985 F. Supp. 1032, 1034-36 (D. Kan. 1997) (using the *Zippo* sliding scale test to decline an assertion of personal jurisdiction); Transcraft Corp. v. Doonan Trailer Corp., No. 97 C 4943, 1997 WL 733905, at *1, *9 (N.D. Ill. Nov. 17, 1997) (mem.) (comparing websites to national advertisements and declining to assert personal jurisdiction under the *Zippo* sliding scale test).

192. *See* Animation Station, Ltd. v. The Chicago Bulls, LP, No. 97 Civ. 7527 (JSR), 1998 WL 32459, at *1 (S.D.N.Y. Jan. 27, 1998) (finding that defendant's use of infringing trademarks on a website dedicated to the Chicago Bulls permitted Illinois jurisdiction since defendant could have foreseen that Illinois residents would access the site, although there was no evidence of such); Superguide Corp. v. Kegan, 987 F. Supp. 481, 487 (W.D.N.C. 1997) ("While the number of hits . . . is not now before the court, a reasonable inference . . . is that such are numerous inasmuch as North Carolina is one of the populated states. . . .").

193. *See* Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1093 (8th Cir. 1998) (comparing Internet advertisements to broadcasts over national airwaves); Weber v. Jolly Hotels, 977 F. Supp. 327, 333-34 (D.N.J. 1997) (declining to assert general jurisdiction over a defendant for Internet advertisements which the court analogized to advertisements in trade publications); *see also Superguide Corp.*, 987 F. Supp. at 486 (comparing the passive nature of Internet commerce to a fisherman in a boat waiting for the fish to come to him).

194. *Compare* Quality Solutions, Inc. v. Zupanc, No. 1:97-CV-1228, 1997 WL 835481, at *1, *1 (N.D. Ohio Dec. 23, 1997) (holding that an Internet site containing an infringing trademark constituted a regular solicitation of business in the forum),

ominous warning that Internet jurisdiction was far from receiving a lucid analysis and the subsequent fragmented holdings[195] buttress the continued call for a unified solution.

No simple answer exists to Internet jurisdiction. *Telco* has sided at the far, and perhaps the farthest, end of the spectrum. Like *Inset Systems*, it will provide cannon fodder for plaintiffs seeking broad jurisdictional authority until a more comprehensive and consistent rule is provided. Until then, the wary Internet developer perhaps should either monitor its site carefully or begin packing its bags for Virginia.

Donnie L. Kidd, Jr.

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with Gary Scott Int'l, Inc. v. Baroudi, 981 F. Supp. 714, 716 (D. Mass. 1997) (finding personal jurisdiction under the "doing business" requirement only when the Internet site is used to solicit actual sales of a particular product or service).

195. *See* cases cited *supra* notes 191-94.