

2-1-1997

What Constitutes Minimum Contacts in Cyberspace After *Compuserve, Inc. v. Patterson*: Are New Rules Necessary for a New Regime?

Joanna B. Bossin

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

Joanna B. Bossin, *What Constitutes Minimum Contacts in Cyberspace After Compuserve, Inc. v. Patterson: Are New Rules Necessary for a New Regime?*, 13 GA. ST. U. L. REV. (1997).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol13/iss2/4>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

WHAT CONSTITUTES MINIMUM CONTACTS IN
CYBERSPACE AFTER *COMPUSERVE, INC. V.*
PATTERSON: ARE NEW RULES NECESSARY
FOR A NEW REGIME?

INTRODUCTION

It is well-settled that a court must possess both personal jurisdiction and subject matter jurisdiction in order to render a valid, binding judgment.¹ The common law test for personal jurisdiction is based on the fundamental premise of "physical presence," either actual or constructive;² this concept can become diluted when no physical forum is involved, such as on the Internet.³ For example, physical presence does not exist in cyberspace;⁴ thus, attempts to validate personal jurisdiction over a defendant by trying to establish minimum contacts between that defendant and a geophysical forum may strain traditional jurisdictional concepts when the contacts are essentially cyber-contacts with no foundations in a physical place.⁵ Yet, on-line activity cannot exist wholly independent of the real world and its legal constructs, for "[t]he interactions between users in cyberspace have effects in real world jurisdictions, and the inhabitants of cyberspace are also citizens of a physical jurisdiction."⁶

While many commentators suggest that new rather than traditional laws should and will govern the Internet,⁷ this

1. See, e.g., STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 60 (1992).

2. E.g., William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 199 (1995).

3. *Id.*

4. *Id.* at 198-99.

5. *Id.*; cf. David R. Johnson, *Traveling in Cyberspace*, LEGAL TIMES, Apr. 3, 1995, at 26 (discussing the attempt by federal officials to establish personal jurisdiction over a California couple for distributing obscene material over the Internet by using a Memphis, TN "local community standard" for obscenity).

6. Byassee, *supra* note 2, at 199.

7. See, e.g., Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1656-64 (1995); Benjamin Wittes, *Law in Cyberspace; Witnessing the Birth of a Legal System on the Net*, LEGAL TIMES, Jan. 23, 1995, at S27. See generally Owen Fiss, *In Search of a New Paradigm*, 104 YALE L.J. 1613 (1995) (discussing the implications of the

Comment proposes that, as a purely procedural matter in most civil cases, a traditional minimum contacts analysis can successfully govern personal jurisdiction over the Internet. Section I of this Comment provides an introduction to the Internet and to the jurisdictional problems that communications and transactions via the Internet create for courts attempting to establish personal jurisdiction over a non-resident defendant. Section II discusses the evolution of the United States Supreme Court's personal jurisdiction jurisprudence and its long-held position that a forum state can assert personal jurisdiction over a non-resident defendant when that defendant has minimum contacts with that forum state "such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'"⁸ Section III analyzes *CompuServe, Inc. v. Patterson*.⁹ Although *CompuServe* is rather obscure and unpublished, at least one legal commentator recognizes it for its analysis of jurisdictional issues on the Internet.¹⁰ Section III also discusses the *CompuServe* district court's failure to correctly apply the traditional minimum contacts analysis, while Section IV addresses the circuit court's reversal of that decision on appeal. Finally, Section V explains why jurisdictional issues on the Internet should be governed by a traditional analysis.

I. INTRODUCTION TO THE INTERNET

The term "cyberspace," coined by author William Gibson in his novel *Neuromancer*,¹¹ is today used to refer to a non-physical place where interaction between computers occurs as if happening in the real world, but in fact only constitutes "virtual reality."¹² The majority of on-line services, such as CompuServe and America On-Line, are interconnected through a global network called the Internet.¹³ The Internet has no main

Internet on the First Amendment and emerging schools of thought).

8. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted)).

9. *CompuServe, Inc. v. Patterson*, No. C2-94-0091 (S.D. Ohio Aug. 11, 1994), *rev'd*, No. 95-3452, 1996 WL 405356 (6th Cir. July 22, 1996).

10. Edward A. Cavazos, *Litigation On-Line: Cyber Issues Loom*, AM. LAW., May 1995, at 56.

11. Byassee, *supra* note 2, at 198 n.5.

12. *Id.* (citing Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, THE HUMANIST, Mar. 26, 1991, at 15).

13. Donna A. Gallagher, Comment, *Free Speech on the Line: Modern Technology*

1997] WHAT CONSTITUTES MINIMUM CONTACTS IN CYBERSPACE 523

repository of information, but rather is a vast network of smaller networks throughout the world that connects "educational, governmental, and commercial sites to provide users with one-on-one and group interactions, information, and innumerable services."¹⁴ The Internet also facilitates countless news groups¹⁵ and bulletin boards¹⁶ that allow thousands of people every day to discuss topics ranging from "copyright law to musings on the life and times of Bob Dylan."¹⁷

Thus, a potential problem with trying to mold the new world of the Internet using traditional common law jurisdictional principles is that the Internet is free space, which no single entity controls or owns.¹⁸ As such, commentators have suggested that new rules should govern the Internet instead of strained traditional jurisdictional principles since cyberspace is essentially a new and distinct jurisdiction of its own.¹⁹ However, a defendant's on-line access and purposeful use of the computer medium to derive direct economic benefit from such access may be enough to establish minimum contacts with a forum state, regardless of whether minimum contacts with that state were established via the Internet.²⁰

and the First Amendment, 3 COMM. L. CONSPPECTUS 197, 198 (1995).

14. *Id.*

15. There are approximately 8000 news groups, which are Usenet discussion forums, that focus on a variety of different topics, such as urban folklore, backgammon, and legal practice areas. Mark Eckenwiler & Benjamin Wittes, *Cyberspace's Lingua Franca*, LEGAL TIMES, Jan. 23, 1995, at S32. Usenet is a worldwide system of news groups operating via the Internet. *Id.* Usenet allows users to compose messages that are sent to the thousands of computers across which Usenet operates, "each of which receives a copy of the messages posted on every other system that participates in Usenet." *Id.*

16. A bulletin board system (BBS) is "[a] computer or computer system that users log in to, to post and read messages and exchange files and software. Many BBS's are operated by hobbyists off of home computers." *Id.*

17. David Post, *New Rules for the Net?*, AM. LAW., July/Aug. 1995, at 112.

18. See Gallagher, *supra* note 13, at 197.

19. See Branscomb, *supra* note 7, at 1656-64; Wittes, *supra* note 7, at S27-28. See generally Fiss, *supra* note 7.

20. Michael J. Santisi, Note, *Pres-Kap, Inc. v. System One, Direct Access, Inc.: Extending the Reach of the Long-Arm Statute Through the Internet?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 433, 451 (1995).

II. A HISTORY OF ESTABLISHING PERSONAL JURISDICTION USING A MINIMUM CONTACTS ANALYSIS

In the landmark personal jurisdiction case of *Pennoyer v. Neff*,²¹ the Supreme Court established that under the authority of the Constitution, “the laws of one State have no operation outside of its territory . . . and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.”²² Thus, *Pennoyer* introduced the Due Process Clause of the Fourteenth Amendment—which provides that no “State [shall] deprive any person of life, liberty, or property, without due process of law”²³—to the notion of service of process.²⁴ In cases decided after *Pennoyer* in which personal jurisdiction is at issue, courts must ask whether it is constitutional under the Due Process Clause to assert jurisdiction over a non-resident defendant.²⁵

In establishing criteria for asserting personal jurisdiction over a nonresident corporation, the Court in *International Shoe Co. v. Washington*²⁶ relaxed its rigid standard from *Pennoyer* that the defendant’s presence within the state was a prerequisite to the state validly rendering a binding judgment against him.²⁷ It held that “[s]ince the corporate personality is a fiction, . . . it is clear that unlike an individual its ‘presence’ . . . can be manifested only by activities carried on in its behalf by those who are authorized to act for it.”²⁸ Thus, a corporation’s activities in the forum state give rise to its presence there.²⁹

The Court stated that the determination of whether a corporation’s activities within a forum justify a suit against that corporation cannot be a mechanical inquiry.³⁰ It reasoned that “[w]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and

21. 95 U.S. 714 (1877).

22. *Id.* at 722.

23. U.S. CONST. amend. XIV, § 1.

24. *Pennoyer*, 95 U.S. at 733-34.

25. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102 (1987); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

26. *International Shoe*, 326 U.S. 310 (1945).

27. *Id.* at 316.

28. *Id.*

29. *Id.* at 316-17.

30. *Id.* at 319.

orderly administration of the laws which it was the purpose of the due process clause to insure.³¹ Thus, *International Shoe* established that notions of territoriality and state sovereignty could possibly disappear entirely from a personal jurisdiction analysis.³² As a result, the doors to nationwide service of process would open, limited only by the intangible ideas of “‘minimum contacts’ and ‘fair play and substantial justice.’”³³

Justice Thurgood Marshall stated in *Shaffer v. Heitner*³⁴ that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”³⁵ Thus, a proper jurisdictional standard should take into account “the relationship among the defendant, the forum, and the litigation,” thereby increasing a state court’s ability to assert personal jurisdiction over a nonresident defendant.³⁶

In *World-Wide Volkswagen Corp. v. Woodson*,³⁷ the Supreme Court further refined the notion of fair play and substantial justice in the context of goods placed in the stream of commerce. The Court reasoned that a defendant’s contacts with the forum state must be “such that he should reasonably anticipate being haled into court there”;³⁸ the defendant must “purposefully avail[] [himself] of the privilege of conducting activities within the forum State.”³⁹ Thus, the Court held that the Oklahoma state court could not constitutionally assert jurisdiction over two New York corporations because the corporations did not “carry on [any] activity whatsoever in Oklahoma[,] . . . solicit [any] business there either through salespersons or through advertising reasonably calculated to reach the State[,] . . . [or] serve or seek to serve the Oklahoma market.”⁴⁰ Thus, a court

31. *Id.*

32. 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067 (2d ed. 1987).

33. *Id.*

34. 433 U.S. 186 (1977).

35. *Id.* at 212. The Supreme Court in *Shaffer* reversed an assertion of quasi-in-rem jurisdiction over a non-resident defendant, *Id.* at 216-17, and held that when applying jurisdiction in rem, a court must apply the same Due Process standard of fairness via the minimum contacts analysis set forth in *International Shoe* as when asserting in personam jurisdiction. *Id.* at 206-07. The Court acknowledged that jurisdiction over a thing is similar to “jurisdiction over the interests of persons in a thing.” *Id.* at 207.

36. *Id.* at 204.

37. 444 U.S. 286 (1980).

38. *Id.* at 297.

39. *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

40. *Id.* at 295.

may validly assert personal jurisdiction over a non-resident defendant under a stream of commerce theory if additional conduct indicating an intent to do business within the forum state is present.⁴¹

The Supreme Court examined minimum contacts from a contract theory in *Burger King Corp. v. Rudzewicz*⁴² and held that a Florida court had jurisdiction over a non-resident defendant because he deliberately entered into a long-term franchise contract with Burger King that was governed by Florida law.⁴³ The Court reasoned that a defendant has effectively been put on notice that his activities in a forum state may subject him to jurisdiction in that state if he has "purposefully directed"⁴⁴ his activities toward residents of the state and "the litigation results from alleged injuries that 'arise out of or relate to' those activities."⁴⁵

III. *COMPUSERVE, INC. V. PATTERSON*: ONE COURT'S APPLICATION OF TRADITIONAL JURISDICTIONAL RULES TO THE NEW REGIME OF CYBERSPACE

A. *Summary of Facts*

The plaintiff, CompuServe, was an Ohio-based provider of computer information services.⁴⁶ CompuServe sought a declaratory judgment in federal district court in Ohio that it was not liable to defendants Richard Patterson and his business, FlashPoint Development,⁴⁷ for trade name infringement, and

41. See *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 112-15 (1987).

42. 471 U.S. 462 (1985).

43. *Id.* at 487.

44. *Id.* at 472 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

45. *Id.* at 473 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

46. *CompuServe v. Patterson*, No. 95-3452, 1996 WL 405356 (6th Cir. July 22, 1996). It is unclear from the case whether CompuServe is incorporated in Ohio, has its principal place of business in Ohio, or both. The court simply states that CompuServe is "headquartered" in Ohio, *Id.* at 1. Another source calls Ohio CompuServe's "home state." Cavazos, *supra* note 10, at 56.

47. In *Calder v. Jones*, the Supreme Court reasoned that the defendants correctly stated that the Court should not judge their contacts with California on the basis of their employer's contacts with that state. 465 U.S. 783, 790 (1984). However, the Court concluded that "[e]ach defendant's contacts with the forum State must be assessed individually." *Id.* at 790. Each defendant's contacts with the forum state must be analyzed in light of the *International Shoe* requirements. *Id.* Although the district court in *CompuServe* referred to both defendants, it never made clear whether it was assessing the contacts of either Patterson, FlashPoint, or both. See

that it did not engage in unfair competition.⁴⁸ The defendant, a resident of Texas, moved to dismiss for lack of personal jurisdiction, and the district court granted the motion.⁴⁹

Patterson subscribed to CompuServe in Texas and also took advantage of CompuServe's "Shareware Registration Agreement (SRA)."⁵⁰ The SRA allows a user to place personally developed software on-line for use or purchase by other CompuServe subscribers.⁵¹ The SRA incorporates by reference the CompuServe Service Agreement and the Rules of Operation, each of which provides that it is entered into in Ohio.⁵² The Service Agreement further provides that "it is to 'be governed by and construed in accordance with' Ohio law."⁵³

By virtue of the SRA, from 1991 to 1994, the defendant sent a number of software master files to CompuServe via electronic transmission that were stored in CompuServe's system in Ohio.⁵⁴ He also advertised his software on CompuServe⁵⁵ and had stated that he filled twelve orders for his software for residents of Ohio, totaling less than \$650 in gross receipts.⁵⁶ The district court, however, found that it was unclear whether this software was the same as that at issue in this lawsuit.⁵⁷

The declaratory judgment proceeding arose out of a dispute over software that the defendant developed entitled "WinNav," "Windows Navigator," and "FlashPoint Windows Navigator."⁵⁸ CompuServe announced in late 1993 that it would be releasing a software program entitled "CompuServe Navigator,"⁵⁹ a name

CompuServe, Inc. v. Patterson, No. C2-94-0091 (S.D. Ohio Aug. 11, 1994). The Circuit Court stated, however, that "[a]lthough CompuServe sued Patterson and FlashPoint Development as though they were two legal entities, it is clear that, in fact, we are dealing with Patterson d/b/a FlashPoint Development." *CompuServe*, No. 95-3452, slip op. at 2 n.1. Thus, for the purposes of this Comment, the author refers to the defendant in the singular as well.

48. *CompuServe*, No. 95-3452, slip op. at 1-2.

49. *Id.* at 3-6.

50. *Id.* at 3-4.

51. *Id.*

52. *Id.* at 4.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *CompuServe*, No. C2-94-0091, at 4.

58. *CompuServe*, No. 95-3452, at 4-5.

59. *CompuServe*, No. C2-94-0091, at 3.

that defendant thought was too similar to his own.⁶⁰ As a result, the defendant cautioned CompuServe that if it released its software program, it would be violating his trademark rights.⁶¹

CompuServe changed the name of its software program, but the defendant continued to pursue his claims.⁶² Thus, CompuServe initiated this action for a declaratory judgment in Ohio federal district court that it did not violate the defendant's trademark rights or any property interests that Patterson or FlashPoint Development had in the software.⁶³ Patterson filed a motion to dismiss for lack of personal jurisdiction, and the district court granted the motion on the grounds that Patterson's contacts with Ohio were too tenuous for Ohio to assert jurisdiction over him.⁶⁴ The circuit court reversed; it found that CompuServe established that Patterson's contacts with Ohio were sufficient to support the exercise of personal jurisdiction over him.⁶⁵

B. Rationale

In a diversity action in federal court, a court must determine whether the long-arm statute of the particular state in which that court is located permits the court to assert jurisdiction over a non-resident defendant.⁶⁶ Once the court makes that determination, it must decide whether asserting jurisdiction comports "with 'traditional notions of fair play and substantial justice.'"⁶⁷ This constitutional test is, in essence, a minimum contacts analysis.⁶⁸ "Since the Ohio long arm statute is intended

60. *CompuServe*, No. 95-3452, at 2.

61. *Id.* at 4-5.

62. *Id.* at 5.

63. *Id.*

64. *CompuServe*, No. C2-94-0091, at 1.

65. *CompuServe*, No. 95-3452, at 2. The circuit court based its conclusion partly on the fact that it could not weigh Patterson's affidavit, "given that the district court addressed his motion to dismiss without holding an evidentiary hearing." *Id.* at 9-10 (citing *Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991)). The court further stated that the district court clearly erred in considering the affidavit, but even if it was to consider the affidavit, it would reach the same conclusion. *Id.* at 10 n.7.

66. FED. R. CIV. P. 4(k)(1)(A); see also *CompuServe*, No. 95-3452, at 4 (discussing application of forum state's long arm statute to personal jurisdiction analysis).

67. *CompuServe*, No. 95-3452, at 8-9 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

68. See *International Shoe*, 326 U.S. at 316.

1997] WHAT CONSTITUTES MINIMUM CONTACTS IN CYBERSPACE 529

to confer jurisdiction to the full extent allowed by the due process clause, the [two] inquiries are essentially the same."⁶⁹

The circuit court began its analysis by articulating the Sixth Circuit test for determining whether a defendant's contacts with a forum state are sufficient to assert personal jurisdiction over that defendant:⁷⁰

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.⁷¹

1. *Purposeful Availment*

The court first noted that physical presence within the forum state is not a necessary prerequisite to establish the purposeful availment requirement.⁷² Rather, the defendant satisfies that requirement when his contacts with the forum state proximately result from his own actions "that create a "substantial connection" with the forum State,' and when the defendant's conduct and connection with the forum are such that he 'should reasonably anticipate being haled into court there.'"⁷³ The court concluded that there was no question that Patterson purposefully directed his activities toward Ohio: he subscribed to CompuServe, took advantage of its Shareware Registration Agreement, electronically transmitted his software to CompuServe's system in Ohio, and advertised that software on CompuServe's

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

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

69. *CompuServe*, No. C2-94-0091, at 4; *see also CompuServe*, No. 95-3452, at 8 (explaining that it is settled law that the Ohio long-arm statute's power extends to the federal constitutional limits of due process by virtue of non-resident defendants' business transactions in the state).

70. *CompuServe*, No. 95-3452, at 9.

71. *Id.*

72. *Id.* at 10.

73. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985)).

system.⁷⁴ The real issue was whether Patterson's contacts with Ohio were substantial enough to warrant asserting personal jurisdiction over him; that is, the appropriate question was whether he should have reasonably anticipated being haled into an Ohio court on the basis of his contacts.⁷⁵

The court reasoned that since Patterson entered into a contract governed by Ohio law and perpetuated a business relationship with CompuServe there, his contacts with Ohio were substantial enough for him to have reasonably anticipated being haled into court there.⁷⁶ Furthermore, Patterson's choice to transmit his software to CompuServe's system in Ohio and his advertising and sales via that system indicated his purposeful business activity in Ohio.⁷⁷ The court rejected the district court's determination that the relationship was to be a one-shot deal and found instead that Patterson intended to continue marketing and selling his software on CompuServe.⁷⁸ Thus, by virtue of the fact that Patterson both consciously entered into an Ohio-governed contract with CompuServe and placed his products into the stream of commerce, the court found that Patterson purposefully

74. *Id.* at 11.

75. *Id.*

76. *Id.* at 12. To determine whether the defendant purposefully availed himself of the privileges of the forum state, the district court analyzed this case in light of *Burger King*, which it considered the leading case "involving interstate business negotiations and relationships," as well as other, lesser known cases in which the parties had contractual relationships with each other. *CompuServe*, No. C2-94-0091, at 9-10. That court distinguished *CompuServe* from other cases in which courts asserted jurisdiction over non-resident defendants because the contacts between the parties in those cases involved the offering of software to the forum state's residents, long-term contracts between the parties, injury caused by the defendant within the forum state, and ongoing interaction and continuous communication with the plaintiffs in the forum state. *Id.* at 10-13. In contrast, the district court found *CompuServe* to be more factually similar to cases in which courts held that the defendants had not purposefully availed themselves of the privilege of acting in the forum state. *Id.* at 11-13. Those cases involved contractual relationships that were essentially "one-shot" deals and "did not involve . . . lengthy negotiations, a future interdependent business relationship, or . . . substantial communications between the parties." *Id.* at 12. Thus, the district court held that the defendant had not purposefully availed himself of the privilege of acting in Ohio because the contract between CompuServe and Patterson was a standardized contract in which no substantial negotiations took place and because the dealings between CompuServe and Patterson were minimal in nature. *Id.* at 13.

77. *CompuServe*, No. 95-3452, slip op. at 12.

78. *Id.* at 13.

1997] WHAT CONSTITUTES MINIMUM CONTACTS IN CYBERSPACE 531

directed his activities toward Ohio and availed himself of the privileges of doing business there.⁷⁹

The district court's conclusion, that asserting jurisdiction over Patterson was improper, hinged upon whether the "additional activity of offering software to Ohio residents through CompuServe, even though it may not be the software actually involved in this case, constitute[d] . . . purposeful doing of business in the State of Ohio."⁸⁰ The district court held, however, that Patterson's software sales to Ohio residents were too minimal to constitute purposeful availment.⁸¹

The circuit court rejected this determination as well, asserting that "the 'quality' of [the] contacts,' and not their number or status, . . . determines whether they amount to purposeful availment."⁸² The contacts were "deliberate and repeated,"⁸³ regardless of the amount of revenue they yielded from Ohio residents.⁸⁴ Furthermore, the court noted that the district court's analysis failed to account for sales Patterson made to residents of other states via CompuServe's system in Ohio.⁸⁵

Finally, the court found purposeful availment on the basis of Patterson's litigation threats against CompuServe.⁸⁶ Not only did Patterson purposefully avail himself of the privileges of doing business in Ohio, but he also "originated and maintained"⁸⁷ contacts with Ohio by threatening an unfair competition and trademark infringement lawsuit.⁸⁸

79. *Id.* at 13-14.

80. *CompuServe*, No. C2-94-0091, at 14.

81. *Id.*

82. *CompuServe*, No. 95-3452, at 14 (quoting *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir. 1994) (emphasis added), *cert. denied*, 115 S. Ct. 423 (1994)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 15-16. In *American Greetings Corp. v. Cohn*, the Sixth Circuit Court of Appeals held that litigation threats formed the basis for purposeful availment. 839 F.2d 1164 (6th Cir. 1988). There, an Ohio corporation sued one of its shareholders, a California resident, who had threatened to file suit to invalidate an amendment to the corporation's articles of incorporation. *Id.* at 1165. This circuit court reversed the district court's dismissal for lack of personal jurisdiction. *Id.* at 1170. The court found purposeful availment because of the shareholder's letters and phone calls to Ohio, threatening suit and seeking money for his claim. *Id.*

87. *CompuServe*, No. 95-3452, at 16.

88. *Id.*

2. *The Cause of Action Must Arise from Defendant's Activities in the Forum State*

The second prong of the test for asserting jurisdiction over a non-resident defendant is whether the "cause of action arises out of the defendant[']s contacts with the forum state."⁸⁹ The district court "view[ed] the presence of [Patterson's WinNav] software on the CompuServe network as entirely incidental to the alleged dispute between the parties."⁹⁰ Thus, the district court held that CompuServe did not satisfy the second prong of the test;⁹¹ the alleged trademark dispute could have occurred between the parties regardless of whether Patterson was a CompuServe customer.⁹² The circuit court, however, recognized that Patterson's contacts with Ohio were related to his cause of action: he placed his software on CompuServe's system for sale to other users, and "the proceeds of those sales flowed to [Patterson] through Ohio."⁹³ The cause of action was one for trademark infringement and unfair competition by virtue of CompuServe's use of similar markings and product names when marketing its software.⁹⁴ Finally, the circuit court pointed out that, although Patterson could have placed his software anywhere and still have sued CompuServe for tradename infringement, it was uncontroverted that Patterson only sold his software through CompuServe's Ohio system.⁹⁵

3. *Reasonableness*

Finally, the circuit court considered whether its assertion of jurisdiction over Patterson would "comport with 'traditional notions of fair play and substantial justice'" in other words, whether it was reasonable for the court to assert jurisdiction over him.⁹⁶ The district court noted that one of the Supreme Court's concerns in *Burger King* was "the perceived impropriety of exercising jurisdiction over out-of-state consumers to collect small

89. *CompuServe*, No. C2-94-0091, at 14.

90. *Id.*

91. *Id.* at 15.

92. *Id.* at 14-15.

93. *CompuServe*, No. 95-3452, at 17.

94. *Id.*

95. *Id.* at 17-18.

96. *Id.* at 18 (quoting *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1117 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 423 (1994) (citations omitted)).

amounts of money due under non-negotiated agreements.”⁹⁷ In light of that concern, that court noted that, had this case been brought by CompuServe simply to collect a small amount of user fees from Patterson, the court would have been unwilling to exercise jurisdiction over him.⁹⁸ Thus, the court held that, although this case was different, it was “no more connected with purposeful activities within the State of Ohio than the standard customer dispute,”⁹⁹ and therefore, it would be unreasonable for this court to assert jurisdiction over the defendant.¹⁰⁰

The circuit court recognized that this analogy misinterpreted Patterson’s relationship with CompuServe; rather, he was a businessman who purposefully used CompuServe to sell his software.¹⁰¹ It further noted that courts must consider the following factors when making a “reasonableness” determination: “the burden on the defendant, the interest of the forum state, the plaintiff’s interest in obtaining relief, and the interest of other states in securing the most efficient resolution of controversies.”¹⁰² In light of those factors, the court found that although Patterson might be burdened by defending suit in Ohio, he knew his contract was governed by Ohio law and had originally hoped that the connection would financially benefit him.¹⁰³ Furthermore, “Ohio has a strong interest in resolving a dispute involving an Ohio company.”¹⁰⁴

IV. WHY THE CIRCUIT COURT CORRECTLY DECIDED *COMPUSERVE*

Perhaps a fundamental flaw in the district court’s reasoning in *CompuServe* is that the court found that the connection between the defendant’s activities and the forum state must be more than incidental.¹⁰⁵ Thus, it found that asserting personal jurisdiction over Patterson was unreasonable because his contacts with Ohio

97. *CompuServe*, C2-94-0091, at 15.

98. *Id.* at 6.

99. *Id.*

100. *Id.*

101. *CompuServe*, 95-3452, at 19.

102. *Id.* (quoting *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169-70 (6th Cir. 1988) (citing *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 113 (1987))).

103. *Id.*

104. *Id.* The court noted that Texas has an interest in this dispute as well, because “CompuServe is a subsidiary of H & R Block, and both of those entities have divisions which are located in Texas.” *Id.* at 19 n.8.

105. *CompuServe*, C2-94-0091, at 9.

were "entirely incidental."¹⁰⁶ The court reasoned that the contract between CompuServe and Patterson was a "take it or leave it" type of contract, which did not anticipate future dealings between CompuServe and its customers.¹⁰⁷ Furthermore, the court found that the dealings between the defendant and residents of Ohio were minimal in nature.¹⁰⁸ Thus, the court held that Patterson had not purposefully availed himself of the privilege of doing business in Ohio.¹⁰⁹

The circuit court recognized, however, that Patterson's connection with Ohio was not at all incidental.¹¹⁰ First, he sought out CompuServe and its services, and his contract with CompuServe stated that it was governed by the laws of Ohio.¹¹¹

106. *Id.* at 14.

107. *Id.* at 13.

108. *Id.* at 13-14.

109. *Id.* at 14.

110. *CompuServe*, No. 95-3452, at 17.

111. *Id.* at 11. Although the court never specifically stated that the provision in the contract was a forum selection clause, the court could arguably have interpreted it as such. If the court was working under that assumption, it could reasonably have held that the provision validly bound the defendant to defend the suit in Ohio.

In *Carnival Cruise Lines, Inc. v. Shute*, the Supreme Court held that a provision on a cruise ticket, which required that all disputes involving the cruise line be litigated in Florida, was valid. 499 U.S. 585, 593-95 (1991). The case involved a woman who was injured on the deck of a Carnival cruise ship off the coast of Mexico. *Id.* at 588. She and her husband sued in the United States District Court for the Western District of Washington, but that court granted the cruise line's motion for summary judgment because of the cruise ticket's forum selection clause. *Id.* The Court of Appeals for the Ninth Circuit reversed, concluding that it was reasonable for the cruise line to defend suit in Washington because it solicited business there. *Id.* The Supreme Court reversed on the basis that the forum selection clause was dispositive in this case, notwithstanding the cruise line's presence or lack of contacts in Washington. *Id.* at 592. The Court found that the court of appeals correctly began its analysis of the enforceability of such a clause with *Bremen v. Zapata Off-Shore Co.*, but that it incorrectly applied its holding. *Id.* at 593-94. The Court in *Bremen* reasoned that an agreement freely and voluntarily entered into, which was unaffected by fraud or undue influence, should be enforceable against the parties. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 (1972). Furthermore, the clause was a vital part of the agreement. The clause was bargained for and both parties were sophisticated. *Id.* at 14 n.16. Even if the clause had established a remote forum for litigating disputes, the party claiming unfairness would have had a heavy burden of proving that such unfairness existed. *Id.* at 15.

In applying the holding in *Bremen*, the appellate court found that, unlike the parties in *Bremen*, the respondents in *Carnival* were not business persons, nor were they able to negotiate the terms of the clause with the cruise line. *Carnival*, 499 U.S. at 592. The court of appeals concluded that the Carnival contract was routine and probably identical to every passenger's contract issued by Carnival and, therefore, should be unenforceable. *Id.* at 593.

1997] WHAT CONSTITUTES MINIMUM CONTACTS IN CYBERSPACE 535

Although the district court found persuasive the fact that Patterson's contract with CompuServe contemplated no on-going relationship between them,¹¹² the circuit court reasoned that Patterson had sent his software to CompuServe for three years and it appeared that he intended to continue doing so;¹¹³ therefore, he "purposefully transacted business in Ohio."¹¹⁴

Furthermore, Patterson used only CompuServe's Ohio-based system to advertise and sell his software to Ohio residents; the circuit court found that the quantity of such sales was irrelevant to the issue of purposeful availment.¹¹⁵ Had he advertised and sold his software to Ohio residents through some other means, independent of a contract with CompuServe, he still would have "serve[d] or [sought] to serve"¹¹⁶ the Ohio market.¹¹⁷ The

In contrast, the Supreme Court refused to "adopt the Court of Appeals' determination that a non-negotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining." *Id.* The Court held that the clause was reasonable, and therefore enforceable, for the following reasons: (1) a cruise line has an interest in limiting the arenas where it could potentially have to defend a suit; (2) a forum-selection clause facilitates judicial economy in that it spares litigants the time and expense of determining the correct forum in which to litigate; and (3) passengers will benefit from lower prices because the cruise line will save money from not having to defend suit in many different jurisdictions. *Id.* at 593-94. Furthermore, Florida was not a remote alien forum, and the cruise line did not obtain accession by the respondents to the clause by fraud or overreaching. *Id.* at 594-95.

In *CompuServe*, if the provision was in fact a forum-selection clause, it might be dispositive as to where litigation involving CompuServe should take place, regardless of a minimum contacts analysis. Thus, according to the Supreme Court's rationale in *Carnival*, the provision should be enforceable against the parties because it is reasonable. Because it is a large corporation serving many customers, CompuServe also has a special interest in limiting the fora where it may have to defend a suit. This interest could conceivably benefit CompuServe customers by allowing CompuServe to offer its services at a lower cost. Furthermore, such a provision would serve judicial economy by saving litigants time and money when determining where to file suit.

112. *CompuServe*, No. C2-94-0091, at 13.

113. *CompuServe*, No. 95-3452, at 13.

114. *Id.* at 12-13.

115. *Id.* at 14.

116. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). In *World-Wide Volkswagen*, the court noted that the defendant corporations "close no sales and perform no services there[,] . . . solicit no business there either through salesperson or through advertising reasonably calculated to reach the State[,] . . . [nor] sell cars . . . to Oklahoma customers or residents[, nor] . . . serve or seek to serve the Oklahoma market." *Id.* Thus, the Court could not validly assert jurisdiction over them. *Id.* at 299. However, all of these factors are present in *CompuServe*, in addition to the one-shot deal contract signed by Patterson. No. 95-3452, at 10-16.

117. *CompuServe*, No. 95-3452, at 17.

circuit court also correctly reasoned that, regardless of the sales Patterson made to Ohio residents, he received direct financial benefit from selling his software to residents of other states through CompuServe's Ohio-based system.¹¹⁸ Such direct benefit has been held to establish purposeful availment of the laws of the forum state.¹¹⁹

The circuit court also correctly held that the cause of action arose out of Patterson's contacts with Ohio. The cause of action is a declaratory judgment that CompuServe did not engage in trade name infringement of defendant's software,¹²⁰ and one of the contacts with the forum state included a contract with CompuServe that the defendant could advertise and sell his software using CompuServe's services.¹²¹ The Supreme Court in *Burger King Corp. v. Rudzewicz*¹²² explicitly stated that when a forum state seeks to assert jurisdiction over a non-resident defendant who has not consented to litigating claims there,¹²³ the defendant has fair warning of the suit if he has "purposefully directed"¹²⁴ his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities."¹²⁵ In *CompuServe*,

118. *Id.*

119. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 779-81 (1984); *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

120. *CompuServe*, No. 95-3452, at 1-2.

121. *Id.* at 12, 17.

122. 471 U.S. 462 (1985).

123. *Id.* at 472. The Court noted that the requirement that a court have personal jurisdiction over the defendant can be waived either expressly or impliedly by the defendant. *Id.* at 472 n.14. One way parties in a commercial setting can expressly waive personal jurisdiction is to stipulate in advance where disputes will be litigated. *Id.* (citations omitted).

124. *Id.* at 472 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

125. *Id.* (quoting *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 (1984)). "[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros*, 466 U.S. at 414 n.8. (citations omitted). But the state may assert jurisdiction over a non-resident defendant for any suit that does not arise out of or relate to its contacts with the forum, without offending due process, if the defendant's contacts with the forum are sufficient. *Id.* at 414. Thus, the state is said to be exercising 'general jurisdiction' over the defendant. *Id.* at 414 n.9 (citations omitted). In his dissent, Justice Brennan stated that the majority's opinion in *Helicopteros* was fatally flawed because it limited its analysis to only general jurisdiction over the defendant. *Id.* at 420-22 (Brennan, J., dissenting). He further stated that the Court only looked to whether the cause of action arose out of the defendant's contacts, and since it did not, the court applied a general jurisdiction analysis. *Id.* at 420. Thus, because the defendant's contacts with

1997] WHAT CONSTITUTES MINIMUM CONTACTS IN CYBERSPACE 537

Patterson purposefully advertised and sold his software to Ohio residents, and the declaratory judgment litigation resulted from alleged trade name infringement that arose out of or related to Patterson's purposeful activities in Ohio.¹²⁶ Whereas the district court "view[ed] the presence of [the] software . . . as entirely incidental to the alleged dispute between the parties,"¹²⁷ the circuit court found a clear connection between Patterson's contacts with the forum state and CompuServe's cause of action.¹²⁸

Finally, the circuit court correctly held that Ohio's exercise of jurisdiction over the defendant would have been reasonable; such an assertion comports with traditional notions of justice and fair play and is in line with the defendant's reasonable expectations about where he might have to defend his activities.¹²⁹ First, the court noted that when the first two prongs of the Sixth Circuit's minimum contacts test have been satisfied, an inference arises that the third factor is present as well.¹³⁰

Second, the court reasoned that Patterson was a businessman who purposefully used CompuServe to market and sell his software;¹³¹ it rejected the district court's analogy of this case to one where CompuServe might have brought suit to try to collect a small amount of fees from a user in Texas.¹³² Rather,

the forum were not continuous and systematic, the court held that it could not validly assert jurisdiction over the defendant. *Id.* at 420-22. Justice Brennan stated that "by refusing to consider any distinction between controversies that 'relate to' a defendant's contacts with the forum and causes of action that 'arise out of' such contacts, the Court may be placing severe limitations on the type and amount of contacts that will satisfy the constitutional minimum." *Id.* at 420. Thus, he stated that if a defendant's contacts are sufficiently related to the cause of action, it is reasonable for the State to assert jurisdiction over that defendant. *Id.* The majority, however, refused to acknowledge the distinction because "it was not properly before them since the parties and lower courts had treated the issue as one involving the 'arising out of' standard." Wright & Miller, *supra* note 32, at § 1067 n.79 (quoting *Helicopteros*, 466 U.S. at 415 n.10).

126. *CompuServe*, No. 95-3452 at 2-5.

127. *CompuServe*, No. C2-94-0091, at 14.

128. *CompuServe*, No. 95-3452, at 17.

129. *Id.* at 18-20.

130. *Id.* at 18-19.

131. *Id.* at 19.

132. *Id.* The court in *Pres-Kap, Inc. v. System One, Direct Access, Inc.* refused to assert jurisdiction over a non-resident defendant for its activity on-line. 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994). That court stated that subjecting on-line users and other people who access computer databases to personal jurisdiction in a distant forum state "is wildly beyond the reasonable expectations of such computer-information users." *Id.* at 1353. Likewise, the district court in *CompuServe* noted that

Patterson was defending this suit individually and on behalf of his business entity, FlashPoint Development.¹³³

Furthermore, the Court in *Burger King* held that if the plaintiff has established minimum contacts among the defendant, the forum, and the litigation, the burden shifts to the defendant to prove that exercising personal jurisdiction over him would unduly burden him.¹³⁴ A compelling factor that suggests an undue burden might be that the defendants are individual citizens who are less able to deal with litigation in a distant state than are commercial parties engaged in interstate business.¹³⁵ Arguably, since Patterson has his own company, he engages in more commercial transactions than the average on-line user or individual.

V. WHY JURISDICTIONAL ISSUES OVER THE INTERNET SHOULD BE GOVERNED BY A TRADITIONAL MINIMUM CONTACTS ANALYSIS

Although *CompuServe* involved personal jurisdiction issues occurring in virtual reality, the court correctly chose to apply traditional jurisdictional rules and principles to the facts. This decision reinforces the notion that courts can successfully use a traditional minimum contacts analysis to determine whether a defendant has directed his activities toward a forum state via the Internet. Other existing and emerging regulatory schemes for the Internet simply do not apply to personal jurisdiction issues. Congress, while recognizing the importance of the "information superhighway"¹³⁶ and its technological significance,¹³⁷ also realizes its potential for creating legal controversies.¹³⁸ Thus, various members of Congress have proposed bills in Congress to alleviate some of the potential danger and to regulate this

if CompuServe was trying to get a small amount of user fees from an out-of-state customer, the court could not reasonably assert jurisdiction over the defendant. *CompuServe*, No. C2-94-0091, at 16. But this case is very different from that scenario; not only was CompuServe trying to avoid a lawsuit that was originally threatened by Patterson, but also Patterson purposefully directed his activities toward Ohio residents. *CompuServe*, No. 95-3452, at 19.

133. *CompuServe*, No. 95-3452, at 2, 5.

134. 471 U.S. 462, 477 (1985).

135. Santisi, *supra* note 20, at 450 (citing *First Nat'l Monetary Corp. v. Chesney*, 514 F. Supp. 649, 653 (E.D. Mich. 1990)).

136. Gallagher, *supra* note 13, at 197 n.4.

137. Richard Raysman & Peter Brown, *Regulation of On-line Services*, 214 N.Y.L.J. 3 (1995).

138. *Id.*

1997] WHAT CONSTITUTES MINIMUM CONTACTS IN CYBERSPACE 539

otherwise vast and untamed network.¹³⁹ Some of these bills include the following: (1) the Internet Freedom and Family Empowerment Act of 1995;¹⁴⁰ (2) the Communications Decency Act of 1995;¹⁴¹ and (3) the Protection of Children from Computer Pornography Act of 1995.¹⁴²

The court in *United States v. Thomas*¹⁴³ decided an issue of personal jurisdiction in a case involving the Internet on the basis of various anti-pornography statutes.¹⁴⁴ That case involved a California couple who was prosecuted in Tennessee, under Tennessee obscenity standards, for distributing pornographic material over the Internet.¹⁴⁵ However, that case was a criminal case in which jurisdiction over the criminal defendant was circumscribed by several statutes, one of which provides that one who disseminates pornographic material will be tried in the jurisdiction that was harmed by the material.¹⁴⁶ Thus, the

139. *Id.*

140. *Id.* This proposed bill, H.R. 1978, passed as an amendment to the Telecommunications Act of 1995. The final version became § 509 of the Telecommunications Act of 1996, entitled "Online Family Empowerment." Pub. L. No. 104-104, § 509, 110 Stat. 137-39 (1996). This section amended Title II of the Communications Act of 1934, 47 U.S.C. § 230 (Supp. 1996). The provision gives users responsibility for what they put on the Internet and encourages development of parental control features. 110 Stat. 137-39. While it praises the Internet for being a truly diverse developmental tool, it reminds users that the government will actively enforce criminal laws; however, it also provides a "Good Samaritan" provision that "provides a defense to those Internet and on-line service providers who take active steps in prohibiting the dissemination of obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable material." *Id.*

141. Raysman & Brown, *supra* note 136, at 3. This bill has already been passed in the Senate and is awaiting passage in the House. *Id.* The bill "prohibits the transmission of 'obscene, lewd, lascivious, filthy or indecent' material by means of telecommunications device to any other person. The bill also forbids the initiation of any 'indecent comment, request, suggestion, proposal, image or other communication' to any person under the age of 18 regardless of whether the communication was prompted by that person," and it places liability on both the service provider, provided the requisite intent or knowledge to transmit such material exists, and the transmitter of the information. *Id.*

142. *Id.* "The bill prohibits any remote computer facility operator, electronic communications service provider or electronic bulletin board service provider, 'with knowledge of the character of the material,' from knowingly transmitting, attempting to transmit or causing or allowing to be transmitted, communications that contain indecent material to those under the age of 18." *Id.*

143. *United States v. Thomas*, CR-94-20019-G (W.D. Tenn. Dec. 13, 1994) (conviction and forfeiture order), *appeals docketed*, No. 94-6648 and No. 94-6649 (6th Cir. Dec. 21, 1994).

144. Byassee, *supra* note 2, at 204-08.

145. *Id.* at 204.

146. *Id.* at 208 n.60.

statutes that are currently being enacted by Congress will have no effect on courts that are trying to determine whether asserting jurisdiction over a non-resident defendant is proper in a civil case.

While seemingly clear and easily applicable, the statutes used in *Thomas* create problems as well.¹⁴⁷ For example, when applying a community standards rationale, the prohibition against disseminating pornographic material is not applicable to its distribution in cyberspace; there is no contact with or impact on the community, and both the sender and the recipient are in their own private homes.¹⁴⁸ In order to be truly effective in a cyberspace realm, new statutes must make clear that "transmitting" the material over the Internet is the crime, not the transporting of the material.¹⁴⁹ Yet, even if the current statutory law is ill-suited at this point to cases arising in cyberspace, at least one court has noted "the wisdom of leaving it to the legislature to define crime and prescribe penalties."¹⁵⁰

Some commentators desire an independent law for the Internet—an on-line government of sorts that considers the system's unique nature without having to bend old laws to fit the new regime.¹⁵¹ Lance Rose, an attorney who has written about the relationship between existing law and on-line activity, believes that an on-line government that governs only designated activities "can create a far better and more stable understanding of social rights and wrongs on-line than we see today, and a predictability of treatment that could enable many online operations to flourish as never before."¹⁵² However, at least one commentator believes that only within established political institutions will a self-sufficient, on-line government exist.¹⁵³

Some "netizens"¹⁵⁴ even take the law into their own hands in an attempt at self-governance.¹⁵⁵ One recent case involved two

147. *Id.* at 209.

148. *Id.*

149. *Id.* at 212.

150. *Id.* at 215 (quoting *United States v. LaMacchia*, No. Crim A. 9410092-RGS, 1994 WL 725216 (D. Mass. Dec. 28, 1994).

151. *Id.* at 216-19.

152. *Id.* at 219 (citing Lance Rose, *Little Governments in Cyberspace*, BOARDWATCH, June 1994, at 89-90).

153. *Id.* at 219.

154. Branscomb, *supra* note 7, at 1639 n.4 (defining netizens as "[C]omputer-competent citizens").

155. Byassee, *supra* note 2, at 216. One example of self-governance in the

1997] WHAT CONSTITUTES MINIMUM CONTACTS IN CYBERSPACE 541

attorneys who were advertising their services on-line.¹⁵⁶ The attorneys "spammed"¹⁵⁷ thousands of Usenet news groups with their advertisements. Because many users subscribe to more than one of these news groups, these users found a lot of junk mail with postage due when they opened their mailboxes.¹⁵⁸ The irate users sent angry e-mail messages, flooding the attorneys' mailboxes, and eventually the attorneys' network provider ordered them off of the network.¹⁵⁹

The problem with all of these Internet regulatory innovations is that they are geared toward solving the substantive problems emerging in cyberspace rather than focusing on the procedural elements that shape personal jurisdiction. Personal jurisdiction is a threshold analysis and must be constitutionally asserted before the substance of a suit can be litigated.¹⁶⁰

The minimum contacts analysis provides relatively obvious guidelines for when a court may assert jurisdiction over a defendant. Thus, to reinforce the proposition that traditional laws can and do fit the new, emerging regime of cyberspace, it is noteworthy that the circuit court in *CompuServe* reversed the district court's erroneous conclusion pursuant to a minimum contacts analysis. However, some lawyers are concerned that regarding personal jurisdiction and cyberspace, "there's no 'there' there,"¹⁶¹ and as such, a suit could be filed almost anywhere that the global Internet network reaches.¹⁶² As a result, "plaintiffs and defendants in copyright and trademark suits [may] battle for more favorable venues."¹⁶³ However, if substantive legal issues that have traditionally been governed by

cyberspace community is "flamewars," which are "public arguments among individuals in Usenet news groups that degenerate into multiple, and often long, personal attacks." *Id.* Another example of self-governance occurs when "indignant members of the Internet community may 'mail-bomb' [an offensive Net user's] Internet mail address . . . prompting the termination of the offender's account." *Id.*

156. Branscomb, *supra* note 7, at 1657.

157. *Id.* at 1657. "The term 'spamming' is meant to evoke the image of someone throwing a slice of Spam at a fan and watching the pieces fly out in every direction." *Id.* at 1657 n.68 (citations omitted).

158. *Id.* at 1657-58 (quoting *Cyberspace Upstarts Propose Etiquette Rules for Infobahn*, ATLANTA J. & CONST., June 14, 1994, at E3).

159. *Id.* at 1658; Benjamin Wittes, *Law in Cyberspace; Witnessing the Birth of a Legal System on the Net*, LEGAL TIMES, Jan. 23 1995, at S28.

160. YEAZELL ET AL., *supra* note 1.

161. Rosalind Resnick, *Cybertort: The New Era*, NAT'L L.J., July 18, 1994, at A21.

162. *Id.*

163. *Id.*

statute can be amended to deal more specifically with the cyber-regime, and if courts continue diligently to engage in minimum contacts analyses to protect procedural issues like jurisdiction in cases in which the underlying legal issues are not governed by statute, the fear of forum-shopping may be unfounded.

One commentator has suggested that perhaps cyberspace is not such a new phenomena after all,¹⁶⁴ the new communities allowed by cyberspace, such as bulletin board services and chat lines, have links with more traditional, geophysical associations.¹⁶⁵ A bulletin board is much like a town meeting to which a large number of people contribute, although the comments are relatively anonymous and each response is appended to what went before.¹⁶⁶ Similarly, chat lines are the functional equivalent of a private club.¹⁶⁷

Yet, although there are similarities between the real world and the virtual world, there are differences that should be appreciated.¹⁶⁸ Perhaps the district court in *CompuServe* and the *Pres-Kap* court were justifiably hesitant to hold that on-line activity can establish minimum contacts in a distant forum; those courts may have wanted to avoid harsh results before anyone really understands legally where cyberspace is taking us.¹⁶⁹ For example, while it may be relatively easy to argue that an individual or corporation has established minimum contacts via the Internet with a distant forum state because that defendant has purposefully directed his activities toward that state and its residents, it may be harder to determine how traditional personal jurisdiction rules will fit the Internet in a defamation or copyright case.¹⁷⁰

164. Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1746-47 (1995).

165. *Id.*

166. *Id.* at 1746.

167. *Id.* at 1746-47.

168. Byassee, *supra* note 2, at 199-200.

169. Lessig, *supra* note 163, at 1752-53. Not only may courts be hesitant, but they may also not understand the nature of the Internet enough to know whether some entity has established minimum contacts with a forum state. For example, in *Pres-Kap*, the court reasoned that "[i]t is true that the defendant may have benefitted financially from the subject contract, as well as prior similar contracts, but this was a financial gain arising from a New York, not a Florida-based business transaction." *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1353 (Fla. Dist. Ct. App. 1994). The court did not take into account the fact that the defendant routinely exchanged information with the plaintiff's computer database between Florida and New York pursuant to the performing of the lease contract. Santisi, *supra* note 20, at 444-45.

170. Mark Eckenwiler, *Criminal Law and the Internet*, LEGAL TIMES, Jan. 23, 1995,

One of the first on-line defamation cases was *Cubby, Inc. v. CompuServe Inc.*¹⁷¹ Although the allegedly defamatory material appeared in an on-line bulletin board rather than in a newspaper or magazine, the court relied on existing defamation cases to answer the legal issues.¹⁷² The court in *Cubby* held that distributors such as CompuServe could not be legally required to notice everything its users were putting on-line, especially when CompuServe had no knowledge of the defamatory material and had no opportunity to edit it.¹⁷³ Thus, *Cubby* established that liability is predicated on deliberation and intent and, although it did not deal with jurisdictional issues per se, the same test may likely result for such issues.

There exist at least two defamation cases, *Calder v. Jones*¹⁷⁴ and *Keeton v. Hustler Magazine*,¹⁷⁵ in which personal jurisdiction was at issue, but the allegedly defamatory statements appeared in more traditional media. In *Calder*, the Supreme Court held that a California court could validly assert jurisdiction over two newspapermen for libel that was intended to cause injury to the plaintiff in California, arising out of their intentional conduct in Florida.¹⁷⁶ Similarly, in *Keeton*, the Supreme Court held that a New Hampshire court could validly assert jurisdiction over an Ohio-based magazine publisher in a libel action brought by a New York resident.¹⁷⁷

The court of appeals in *Keeton* affirmed the dismissal of the petitioner's action, in part because petitioner filed her suit in New Hampshire.¹⁷⁸ She did this because the statute of limitations for libel had run in all other states and also because application of the "single publication rule" would enable her to recover damages in New Hampshire from injury to her that was caused in all states.¹⁷⁹ Yet, the Supreme Court held that since a court must focus on the relationship among the defendant, the forum, and the litigation, the contacts between respondent and

at S32.

171. 776 F. Supp. 135 (S.D.N.Y. 1991).

172. *Id.* at 139.

173. *Id.* at 140-41.

174. *Calder*, 465 U.S. 783 (1984).

175. *Keeton*, 465 U.S. 770 (1984).

176. *Calder*, 465 U.S. at 791.

177. *Keeton*, 465 U.S. at 780-81.

178. *Id.* at 773-74.

179. *Id.* at 773.

New Hampshire “must be such that it is ‘fair’ to compel respondent to defend a multistate lawsuit in New Hampshire seeking nationwide damages for all copies of the [defamatory material], even though only a small portion . . . [was] distributed in New Hampshire.”¹⁸⁰ Furthermore, because the allegedly defamatory statements injured the petitioner in New Hampshire, New Hampshire had a significant interest in redressing wrongs that occur within its boundaries, even though the petitioner had no ties with that State.¹⁸¹

At this stage of jurisdictional jurisprudence on the Internet, it is difficult to know in which contexts jurisdictional issues in defamation cases will arise. Since Usenet news groups span the globe,¹⁸² defamatory statements can injure a plaintiff in virtually every jurisdiction. Yet the fear of forum-shopping¹⁸³ is not unique to the Internet; a plaintiff like Kathy Keeton may file a defamation case in any jurisdiction most favorable to her claim.¹⁸⁴ Thus, these cases may give some idea as to how courts will approach the jurisdictional issue of where a defendant can be sued for putting allegedly defamatory material on the Internet—a medium that can transmit the material all over the world.

CONCLUSION

The circuit court in *CompuServe* correctly held that Patterson purposefully availed himself and his company of the privileges of doing business in Ohio. He deliberately directed his activities toward Ohio residents and received direct financial benefit as a result. But perhaps more significantly, the courts are doing exactly what some commentators suggest—letting the common law run its course in order to better understand exactly where cyberspace is heading. Just because the Internet may be replacing traditional mediums of communication does not mean

180. *Id.* at 775.

181. *Id.* at 776.

182. Eckenwiler & Wittes, *supra* note 15.

183. Resnick, *supra* note 161.

184. The Supreme Court allowed Keeton to file her defamation case in New Hampshire although it was the only state in which the statute of limitations had not yet run. *Keeton*, 465 U.S. at 778. The Court reasoned that she had been injured by the allegedly defamatory statements in every state in which the magazine circulated. *Id.* at 780-81.

1997] WHAT CONSTITUTES MINIMUM CONTACTS IN CYBERSPACE 545

that courts can and will do away with deeply rooted traditional notions of fair play and substantial justice.

Cases like *CompuServe*, in which personal jurisdiction is at issue, need not be complicated further by new laws specifically created for Internet governance which obligate courts to decide whether a defendant's contacts with the forum state are sufficient to establish jurisdiction in the context of virtual reality.

The point of discussing the correctness of the circuit court's ruling in *CompuServe* is to show that traditional rules of minimum contacts jurisprudence are not strained when applied to Internet cases; in fact, they are easily applied to such cases, and more than one feasible solution is possible. Moreover, trying to pigeon-hole a rule of law into some sort of metaphysical environment such as virtual reality is akin to trying to satisfy jurisdictional requirements through the means by which minimum contacts are established, rather than by the end result.

If the end result finds the defendant purposefully directing his activities toward the forum, then the court should not focus on the means by which he established those contacts. Regardless of what transmissions are floating through cyberspace, the end result of the transaction occurs on a physical computer in an actual place where a court may establish personal jurisdiction. The circuit court in *CompuServe* has established that the Internet can fit into the shoes of its personal jurisdiction predecessors to achieve consistent results.

Joanna B. Bossin

