

Western New England Law Review

Volume 23 23 (2001-2002)
Issue 2

Article 1

1-1-2002

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Recommended Citation

Nathan A. Olin, *THE A-B-CS OF TARGETING: A FORMULA FOR RESOLVING PERSONAL JURISDICTION-INTERNET ISSUES WITHIN THE DISTRICT OF MASSACHUSETTS*, 23 W. New Eng. L. Rev. 237 (2002), <http://digitalcommons.law.wne.edu/lawreview/vol23/iss2/1>

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Volume 23
Issue 2
2002

WESTERN NEW ENGLAND LAW REVIEW

THE A-B-CS OF TARGETING: A FORMULA FOR RESOLVING PERSONAL JURISDICTION-INTERNET ISSUES WITHIN THE DISTRICT OF MASSACHUSETTS

NATHAN A. OLIN*

INTRODUCTION

If the Internet is an explosion, we are living smack-dab in the middle of the mushroom cloud. In less than four years, there will be over 765 million Internet users.¹ By 2003, consumer e-commerce revenues could approach \$150 billion and annual business-to-business e-commerce revenues could reach \$2.8 trillion.² At present, more than five million e-mail messages are sent around the

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1. Am. Bar Ass'n Global Cyberspace Jurisdiction Project, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* 4 (July 10, 2000), at <http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf> [hereinafter *Global Cyberspace Jurisdiction Report*] (citing *Europe and Asia Play Catch-up with the U.S.* (Jan. 11, 2000), at http://www.e-land.com/estats/011100_wwinternetuse.html).

2. *Id.* (citing Boston Consulting Group & Shop.org, *New BCG Study Re-Evaluates Size, Growth and Importance of Business-To-Business E-Commerce* (Dec. 21, 1999), and Vanessa Hua, *E-Shopping: Online Predictions; Despite Huge States, Net Sales Estimates No More Than Educated Guess*, EXAMINER, Dec. 6, 1999).

world each minute.³ Indeed, cybergrowth has been compared to bacterial replication and rabbit procreation.⁴

Just as the Internet boom has impacted nearly every aspect of daily life, it has also affected traditional, property-based law. The growing pains associated with this exponential legal transformation have prompted one court to observe that applying established legal concepts to cyberspace "is somewhat like trying to board a moving bus."⁵ Within the District of Massachusetts, Judge Nancy Gertner puts it this way:

To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps "no there there," the "there" is *everywhere* where there is Internet access. When business is transacted over a computer network via a Web-site accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere.⁶

Civil procedure in general, and the doctrine of personal jurisdiction in particular, is no exception. Thus, it is no coincidence that, in recent years, the variety of lower federal courts that have tried to apply familiar personal jurisdictional principles to a new computerized world have often reached inconsistent results.⁷ The United

3. *Id.* at 3 (citing Carleton Foirina, *The Communications Revolution*, in COMMONWEALTH CLUB OF CALIFORNIA MONTHLY NEWSLETTER, July 19, 1999, available at <http://www.commonwealthclub.org>).

4. *Id.* at 2.

5. *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

6. *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997); see also *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 37 (D. Mass. 1997) (noting that "[t]he explosive growth of the Internet has sparked new debates in the law" and that "'Cyberspace' poses new issues regarding copyrights and Internet sites, First Amendment inquiries, trademark, and personal jurisdiction issues").

7. Compare, e.g., *Inset Sys., Inc. v. Instruction Set*, 937 F. Supp. 161, 166 (D. Conn. 1996) (exercising personal jurisdiction in Connecticut over Massachusetts defendant that did little more than establish passive web-site), with *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) ("[c]reating a [web-]site, like placing a product into the stream of commerce, may be felt nationwide-or even worldwide-but, without more, it is not an act purposefully directed toward the forum state"), *aff'd*, 126 F.3d 25 (2d Cir. 1997). See also *Telco Communications v. An Apple A Day*, 977 F. Supp. 404, 406 (E.D. Va. 1997) (observing that *Bensusan* and *Inset* reached opposite holdings "[o]n nearly identical facts"); Robert W. Hamilton & Gregory A. Castanias, *Tangled Web: Personal Jurisdiction and the Internet*, 24 No. 2 LITIG. 27, 34 (1998) (noting that many courts other than *Inset* and *Bensusan* "recently have rendered personal-jurisdiction decisions involving the Internet, and they weave a tangled web"); Dale M. Cendali & Rebecca L. Weinstein, *Personal Jurisdiction and the Internet*, in SECOND ANN. INTERNET L. INST., 975, 989-90 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. 60-0001, 1998) (contrasting inconsistent holdings).

States Supreme Court—which was not shy in discussing personal jurisdiction in the decade immediately preceding the Internet explosion—has yet to weigh in on the current debate, as does the First Circuit Court of Appeals.

This Article examines traditional concepts of personal jurisdiction, as applied within the federal courts, in relation to cyberspace. Central to the discussion are three Supreme Court opinions: (1) *Asahi Metal Industry Co. v. Superior Court*,⁸ the Court's most recent, in-depth personal jurisdictional foray, in which a plurality of the Court found that the "placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State"; (2) *Burger King Corp. v. Rudzewicz*,⁹ in which the Court analyzed personal jurisdiction issues in the context of contractual breaches; and (3) *Calder v. Jones*,¹⁰ in which the Court looked at personal jurisdiction through the lens of intentional conduct. These three cases—*Asahi*, *Burger King*, and *Calder*—provide a simple A-B-C formula for resolving nearly every personal jurisdiction-Internet dispute within the District of Massachusetts. This foundation is based principally on a defendant's targeting, or purposefully directing, his or her actions at the forum state.

Part I of this Article sets forth the legal framework in which the personal jurisdiction-Internet dispute arises. Specifically, Part I provides a personal jurisdiction primer and discusses the Supreme Court's A-B-C trilogy. Part II analyzes the personal jurisdiction-Internet paradigm and comments on several related legal concepts. Part III discusses how personal jurisdiction-Internet disputes have been resolved thus far in the District of Massachusetts.

I. THE LEGAL FRAMEWORK

It is helpful to begin by describing several fundamental personal jurisdiction concepts. The discussion will then turn to the Supreme Court's A-B-C trilogy: *Asahi*, *Burger King*, and *Calder*.

A. Personal Jurisdiction Primer

Among the basic concepts in the area of personal jurisdiction are the following: the issue of general, versus the more common specific, jurisdiction; the requirement that jurisdiction over a non-

8. 480 U.S. 102, 112 (1987).

9. 471 U.S. 462, 463 (1985).

10. 465 U.S. 783, 791 (1984).

resident comport with the long-arm statute of the forum state; and the application of a sophisticated due process inquiry.¹¹ Each of these concepts is highly relevant to the application of personal jurisdiction in cyberspace.

1. General vs. Specific Jurisdiction

A fundamental concept in the personal jurisdiction inquiry is the distinction between “general” and “specific” jurisdiction. Briefly, general jurisdiction requires that a defendant has such “continuous and systematic” contacts with a forum that he is subject to personal jurisdiction in that state for just about any action that can be brought against him.¹² Specific jurisdiction, on the other hand, may be established only if the *specific* cause of action arises out of the forum related activity.¹³

A good example of what has traditionally been required to establish general jurisdiction can be found in the Supreme Court’s 1952 decision, *Perkins v. Benguet Consolidated Mining Co.*¹⁴ In *Perkins*, the Court upheld an Ohio court’s assertion of general jurisdiction over a Philippine company, finding that the president of the company had maintained an office in Ohio from which he conducted activities on behalf of the corporation, kept company files, held directors’ meetings, and carried on correspondence relating to the business.¹⁵ The Court also found that the president had distributed salary checks drawn on two active Ohio bank accounts, engaged an Ohio bank to act as transfer agent, and while in Ohio, “supervised policies dealing with the rehabilitation of the corporation’s properties in the Philippines.”¹⁶ “In short, the foreign corporation, through its president, ‘had been carrying on in Ohio a continuous and systematic, but limited, part of its general business,’ and the exercise of general jurisdiction over the Philippine corporation by [the] Ohio court was ‘reasonable and just.’”¹⁷

At the other extreme in the traditional analysis, the Supreme

11. See *Noonan v. Winston Co.*, 135 F.3d 85, 89 (1st Cir. 1998) (citing, *inter alia*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984)).

12. See *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999).

13. See *id.* (applying a three-part test in determining whether the claim arises out of the forum-related activity).

14. 342 U.S. 437 (1952).

15. *Id.* at 447-48.

16. *Id.* at 448.

17. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984) (quoting *Perkins*, 342 U.S. at 438, 445).

Court has found an absence of general jurisdiction in Texas over a foreign company where the contacts of the company were limited.¹⁸ The company's chief executive officer attended contract negotiations in Texas, and the company accepted checks drawn on a Texas bank, purchased expensive equipment and training services from a Texas company, and sent personnel to Texas for training.¹⁹ At best, therefore, the Texas courts could only attempt to assert specific jurisdiction over the foreign defendant, an issue the Supreme Court did not reach.²⁰

Although the issue of general (versus specific) jurisdiction is often analyzed under the due process inquiry, it is relevant now since the courts have almost universally rejected the argument that merely entering cyberspace by putting up a web-site permits general jurisdiction over the site creator.²¹ There is, however, at least one possible exception. In *Mieczkowski v. Masco Corp.*,²² the court held that an interactive web-site that responds to consumer product inquiries, coupled with the defendant's "traditional business contacts" with Texas, establishes general jurisdiction.²³ *Mieczkowski*, however, has been distinguished²⁴ and criticized²⁵ by courts and rejected by at least one commentator.²⁶

2. Long-Arm Statutes

As every law student knows by January of the first year, to establish personal jurisdiction over a non-resident defendant, the

18. *See id.* at 418 n.12.

19. *Id.* at 416.

20. *See id.* at 418 n.12 (noting that there was no assertion of specific jurisdiction).

21. *See, e.g.*, *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir. 1999); *Am. Eyewear, Inc. v. Peeper's Sunglasses & Accessories, Inc.*, 106 F. Supp. 2d 895, 899 (N.D. Tex. 2000); *Molnlycke Health Care AB v. Dumex Med. Surgical Prods. Ltd.*, 64 F. Supp. 2d 448, 451 (E.D. Pa. 1999).

22. 997 F. Supp. 782 (E.D. Tex. 1998).

23. *Id.* at 788 (noting that the greater "level of interactivity" makes it more than just a passive site).

24. *See, e.g.*, *ESAB Group, Inc. v. Centricut, LLC*, 34 F. Supp. 2d 323, 330-31 (D.S.C. 1999) (distinguishing *Mieczkowski* and holding that "[g]eneral in personam jurisdiction must be based on more than a defendant's mere presence on the Internet even if it is an 'Interactive' presence").

25. *See Coastal Video Communications Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562, 571 (E.D. Va. 1999) (indicating that distinguishing *Mieczkowski* and its general jurisdiction analysis "is not complete").

26. *See Howard B. Stravitz, Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 934 (1998) (noting that *Mieczkowski* is the "one notable exception" to the no general jurisdiction rule).

plaintiff has the burden of proving that the defendant's conduct satisfies two things: (1) the applicable long-arm statute and (2) the due process requirements of the United States Constitution.²⁷ A sophisticated long-arm statute analysis can often make or break a Rule 12(b)(2) motion to dismiss.

Essentially, there are two types of long-arm statutes.²⁸ Statutes in states such as New Jersey, Arizona, and Missouri have been interpreted to allow the exercise of personal jurisdiction to the full extent permitted by the due process clause.²⁹ Other states such as Connecticut and New York, are more micro-managerial.³⁰ Their long-arm statutes define specific instances in which personal jurisdiction is properly exercised: for example, when the cause of action arises from the defendant's transacting any business in the state, when the case derives from the assertion that the defendant caused tortious injury by acting within the state, or when the matter is tied to the defendant's having or owning real property in the state.³¹ In Massachusetts, the approximately 250-word long-arm statute follows the micro-managerial model:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's

- (1) transacting any business in this commonwealth;
- (2) contracting to supply services or things in this commonwealth;
- (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,

27. *Sawtelle v. Farrell*, 70 F.3d 1381, 1387 (1st Cir. 1995).

28. *See, e.g.*, *Cent. Pa. Teamsters Pension Fund v. Burten*, 634 F. Supp. 128, 130 (E.D. Pa. 1986); Michael J. Dunne & Anna L. Musacchio, *Jurisdiction over the Internet*, 54 *BUS. LAW.* 385, 387-88 (1998).

29. *See, e.g.*, *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998) (indicating that "New Jersey[s] long-arm statute permits the exercise of personal jurisdiction to the fullest limits of due process"); *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997) ("The Arizona long-arm statute provides for personal jurisdiction co-extensive with the limits of federal due process."); *Portnoy v. Defiance, Inc.*, 951 F.2d 169, 171 (8th Cir. 1991) (noting that Missouri's "statutory language was intended to provide for jurisdiction within the specific categories enumerated in the statute, to the full extent permitted by the due process clause of the Fourteenth Amendment") (citation and internal quotation marks omitted).

30. *See, e.g.*, *CONN. GEN. STAT.* 52-59b (2001); *N.Y. C.P.L.R.* 302 (McKinney 2001).

31. *See* *CONN. GEN. STAT.* 52-59b (2001); *N.Y. C.P.L.R.* 302 (McKinney 2001); *see also* Dunne & Musacchio, *supra* note 28, at 387-88.

- or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;
- (5) having an interest in, using or possessing real property in this commonwealth;
- (6) contracting to insure any person, property or risk located within this commonwealth at the time of contracting;
- (7) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim; or
- (8) having been subject to the exercise of personal jurisdiction of a court of the commonwealth which has resulted in an order of alimony, custody, child support or property settlement, notwithstanding the subsequent departure of one of the original parties from the commonwealth, if the action involves modification of such order or orders and the moving party resides in the commonwealth, or if the action involves enforcement of such order notwithstanding the domicile of the moving party.³²

While many find the complex due process inquiry to raise the most interesting questions (even this Article focuses almost exclusively on due process principles), long-arm statutes should not be overlooked. For example, in *Bensusan Restaurant Corp. v. King*,³³ an early Internet case discussed more fully below, the trial court determined that personal jurisdiction was improper under both the New York long-arm statute and the due process clause of the Fourteenth Amendment.³⁴ On appeal, the Second Circuit, while not discounting the district court's "scholarly" due process analysis, affirmed the court's conclusion simply because the exercise of personal jurisdiction was proscribed by the statutory law of New York.³⁵

3. Due Process Inquiry

In a specific jurisdiction case, the plaintiff has the burden of proving that the defendant's conduct, in addition to satisfying the state's long-arm statute, also comports with due process.³⁶ Case law in the First Circuit breaks the due process inquiry into three elements:

32. MASS. GEN. LAWS ch. 223A, § 3 (1998).

33. 937 F. Supp. 295 (S.D.N.Y. 1996).

34. *Id.* at 299-301.

35. *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

36. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

First, an inquiring court must ask whether the claim that undergirds the litigation directly relates to or arises out of the defendant's contacts with the forum. Second, the court must ask whether those contacts constitute purposeful availing of the benefits and protections afforded by the forum's laws. Third, if the proponent's case clears the first two hurdles, the court then must analyze the overall reasonableness of an exercise of jurisdiction in light of a variety of pertinent factors that touch upon the fundamental fairness of an exercise of jurisdiction.³⁷

An affirmative resolution of each of the three elements is necessary to support a finding of specific jurisdiction.³⁸

Initially, in a contract claim, the court asks "whether the defendant's forum-based activities are instrumental in the formation of the contract" or, in a tort claim, "whether the plaintiff has established cause in fact . . . and legal cause . . ." ³⁹ At a later stage of the inquiry, the court must analyze certain "Gestalt" factors: the burden on the defendant in appearing; the interest of the forum state in adjudicating the dispute; the interest of the plaintiff in obtaining convenient and effective relief; the interest of the judicial system in obtaining the most effective resolution of the controversy; and the common interests of all sovereigns in the promotion of substantive social policies.⁴⁰

It is a portion of the second stage of analysis—the purposefulness of the defendant's conduct—that has much resonance in the Internet arena. In the First Circuit's vernacular, the court must ask whether the defendant's web-based contacts (perhaps among other

37. *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999). Other circuits often collapse the inquiry into two components. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99 (2d Cir. 2000) ("The required due process inquiry itself has two parts: whether a defendant has minimum contacts with the forum state and whether . . . the exercise of jurisdiction is reasonable under the circumstances of a particular case.") (citation and internal quotation marks omitted); *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1999) (similar); *see also Brown v. Slenker*, 220 F.3d 411, 417 (5th Cir. 2000) ("The Due Process Clause permits the exercise of personal jurisdiction over a non-resident defendant if: 1) that defendant has minimum contacts with the forum state; and 2) the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.") (citation and internal quotation marks omitted).

38. *Phillips Exeter Acad.*, 196 F.3d at 288; *see also id.* at 288 n.1 ("[T]he relative strength or weakness of the plaintiff's showing on the first two elements bears upon the third element (the overall fairness of an exercise of jurisdiction).").

39. *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 35 (1st Cir. 1998) (citations and internal quotation marks omitted).

40. *See United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088 (1st Cir. 1992).

traditional contacts) “constitute purposeful availment of the benefits and protections afforded by the forum’s laws.”⁴¹ Asked another way, did the defendant, through his Internet activity, intend to target the foreign state?

B. *The Supreme Court’s A-B-Cs*

Knowledge of a trilogy of Supreme Court cases from the 1980s is essential to resolving current personal jurisdiction-Internet disputes. These three cases are referred to herein, in reverse chronological order, as the A-B-Cs: *Asahi Metal Industries Co. v. Superior Court*,⁴² *Burger King Corp. v. Rudzewicz*,⁴³ and *Calder v. Jones*.⁴⁴ Each of these cases, to a certain extent, focuses on the purposefulness component of the due process inquiry; they ask to what extent has the defendant targeted the forum state? Before specifically analyzing these cases, however, it is necessary to discuss purposeful availment further.

1. Purposeful Availment

Modern notions of personal jurisdiction begin with *International Shoe Co. v. State of Washington*⁴⁵ which established the “minimum contacts” test.⁴⁶ In *Hanson v. Denckla*,⁴⁷ the Court supplemented *International Shoe* by holding that an act “by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,” is also necessary to the due process inquiry.⁴⁸ Two decades later, in *Kulko v. Superior Court*,⁴⁹ the

41. *Philips Exeter Acad.*, 196 F.3d at 288.

42. 480 U.S. 102 (1987).

43. 471 U.S. 462 (1985).

44. 465 U.S. 783 (1984).

45. 326 U.S. 310 (1945).

46. *Id.* at 316. Historically, a court’s in personam jurisdiction power was “grounded on [its] de facto power over the defendant’s person” and, therefore, the defendant’s “presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him.” *Id.* (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)). In *International Shoe*, however, the Court recognized that the *capias ad respondendum* had given way to personal service of summonses or other form of notice. Thus, the Court held that “due 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 and internal quotation marks omitted).

47. 357 U.S. 235 (1958).

48. *Id.* at 253 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

49. 436 U.S. 84 (1978).

Court reinforced *Hanson*, applying again a “purposeful availment” test as a standard for fulfilling minimum contacts.⁵⁰

In *Kulko*, the plaintiff was a California mother who sought to increase child support payments from the defendant-father who lived in New York.⁵¹ Finding that the “purposeful availment” test should be limited to wrongful activity causing injury in the forum state (California), the Court held that the father, who merely “allow[ed] [his children] to spend more time in California than was required under a separation agreement[,] can hardly be said to have ‘purposefully availed himself’ of the ‘benefits and protections’ of California’s laws.”⁵² In other words, it was not the defendant, but the plaintiff, who had targeted California.

A few years after *Kulko*, the Court continued the process of the “purposeful availment” analysis. In *World-Wide Volkswagen Corp. v. Woodson*,⁵³ the Court held that a New York automobile retailer and wholesaler could not be haled into an Oklahoma court in a products liability case involving one of its cars.⁵⁴ Justice White’s majority opinion stated that it is “critical” to any due process analysis

that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there The Due Process Clause, by ensuring the “orderly administration of the laws,” . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

When a corporation “purposefully avails itself of the privilege of conducting activities within the forum State,” . . . it has clear notice that it is subject to suit there⁵⁵

Clearly, the “purposeful availment,” or targeting, prong of the due process inquiry, is “alive and well.”⁵⁶ In this respect, the First Circuit’s separation of purposeful availment from the other prongs of the inquiry—as compared with other jurisdictions which collapse

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

51. 436 U.S. at 86-88.

52. *Id.* at 94.

53. 444 U.S. 286 (1980).

54. *Id.* at 295.

55. *Id.* at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citations omitted)).

56. *Welinsky v. Resort of the World D.N.V.*, 839 F.2d 928, 930 (2d Cir. 1988).

the analysis⁵⁷—makes eminent sense.

2. *Asahi*: Stream of Commerce

The “A” case in this targeting triumvirate, *Asahi Metal Industry Co. v. Superior Court*,⁵⁸ is the Supreme Court’s famous “stream of commerce” decision.⁵⁹ *Asahi* concerned an indemnification dispute between a Taiwanese tire company (Cheng Shin) and a Japanese tire valve manufacturer (*Asahi*) that was residual to a product liability action initiated in a California court and later settled in other respects.⁶⁰ The Supreme Court reversed the California state court judgment holding that California had jurisdiction over Cheng Shin’s claim against *Asahi*.⁶¹ *Asahi*’s only contact with California was selling tire valves to Cheng Shin in Taiwan, followed by Cheng Shin’s inserting some of the *Asahi* valves into tires it sold in California.⁶² The sales alleged in *Asahi* were numerous and continuing.⁶³

Justice O’Connor, delivering the judgment of the unanimous Court, found that California’s exercise of jurisdiction over Cheng Shin’s claim against *Asahi* was beyond the limits of the due process clause.⁶⁴ In one part of the opinion, Justice O’Connor, speaking for a plurality of four—herself, Chief Justice Rehnquist, Justice Powell, and Justice Scalia—stated that

[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State [A] defendant’s awareness that the stream of commerce may or will sweep the product into the forum State, does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.⁶⁵

Accordingly, because *Asahi*’s only “contact” with California

57. See *supra* note 37 and accompanying text for a description of the First Circuit’s analysis.

58. 480 U.S. 102 (1987).

59. “Stream of commerce” principles were actually first formulated by the Illinois Supreme Court in *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961), and further analyzed by the Supreme Court in *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98.

60. 480 U.S. at 105-06.

61. *Id.* at 108.

62. *Id.* at 106.

63. See, e.g., *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 682-83 (1st Cir. 1992) (explaining *Asahi*).

64. See *Asahi*, 480 U.S. at 115-16.

65. *Id.* at 112.

was its awareness that Cheng Shin sold tires with Asahi valves to consumers in California, Asahi did not purposefully establish any contacts in California such that it should have reasonably anticipated being haled into court in that state.⁶⁶

Justice O'Connor gave some examples of the "something more" that would constitute a purposeful direction of action into a forum state: designing a product for a particular state's market; advertising; establishing channels for advice to customers in the state; or using a distributor as a sales agent in the forum.⁶⁷ However, as the recent Global Cyberspace Jurisdiction Project report points out, "[i]ntuitively, it would seem unlikely that many parts manufacturers would engage in such conduct."⁶⁸ Even so, it was clear to Justice O'Connor that activity must be *purposefully directed* toward the forum in order to confer jurisdiction on a potential defendant.⁶⁹ Several circuits, including the First Circuit, have squarely addressed the stream-of-commerce issue since *Asahi* and adopted Justice O'Connor's plurality view.⁷⁰

3. *Burger King*: Contractual Issues

Purposeful direction was also at the center of the "B" case in the trilogy. In *Burger King Corp. v. Rudzewicz*,⁷¹ the defendant, a Michigan businessman (Rudzewicz), had allegedly breached his franchise agreement with the corporation.⁷² The corporation, therefore, sued Rudzewicz in Florida even though he had not been

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

67. *Id.* at 111-12.

68. *Global Cyberspace Jurisdiction Report*, *supra* note 1, at 45.

69. *Asahi*, 480 U.S. at 112. Another four Justices, Brennan, White, Marshall, and Blackmun, disagreed, stating that placing a product into the stream of commerce is a purposeful act directed at the forum state as long as the defendant is aware the product is being marketed in the forum state. *Id.* at 116-17 (Blackmun, J., concurring in part and concurring in the judgment). Justice Stevens, joined by White and Blackmun, reasoned, in a concurring opinion, that placing a product into the stream of commerce may rise to the level of a purposeful availment depending on the volume, value, and hazardous character of the product. *Id.* at 122 (Stevens, J., concurring); *see also* Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 682-83 (1st Cir. 1992); Benitez-Allende v. Alcan Aluminio Do Brasil, S.A., 857 F.2d 26, 29-30 (1st Cir. 1988) (both explaining the *Asahi* opinion).

70. *See* Madara v. Hall, 916 F.2d 1510, 1516-17 (11th Cir. 1990); Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 375-76 (8th Cir. 1990); *cf.* Keds Corp. v. Renee Int'l Trading Corp., 888 F.2d 215, 220 (1st Cir. 1989); Hugel v. McNeil, 886 F.2d 1, 4 (1st Cir. 1989).

71. 471 U.S. 462 (1985).

72. *Id.* at 468-69. Burger King, the national hamburger chain, is headquartered in Miami. *Id.* at 464.

present in Florida in any jurisdictionally significant way.⁷³ The Court, siding with the corporation, agreed that Rudzewicz had purposefully availed himself of the privilege of conducting activities in Florida.⁷⁴ According to the Court, “[s]o long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”⁷⁵

The Court’s determination in *Burger King* was based on a variety of factors: Rudzewicz was a sophisticated businessman; the contract was long-term, of high value, and closely supervised; Rudzewicz had himself solicited the franchise and actively negotiated the contract’s terms; the contract had a choice of Florida law provision; and Rudzewicz’s payments under the contract—the center of the dispute—were to be sent to Miami.⁷⁶ As in *Asahi*, the theme underlying these factors was that Rudzewicz had targeted Florida; therefore, purposefully availing himself of that state’s laws.⁷⁷

4. *Calder*: Intentional Effects

The third case in the trilogy, the “C” case, is *Calder v. Jones*.⁷⁸ Like *Burger King* and *Asahi*, *Calder* too focuses on “intentional” conduct, the purposefulness component of the due process inquiry.⁷⁹ *Calder* was a libel action brought by the California actress, Shirley Jones, against the editor and an author of the National Enquirer, neither of whom had been in California in any meaningful way.⁸⁰ Critical to the Court’s finding that personal jurisdiction over these two individuals was indeed warranted were two things: (1) the story focused on California, the center of Jones’ life and Hollywood career; and (2) all aspects of the defendants’ alleged conduct (writing, editing and, ultimately, libeling) were intentional acts targeting a California resident.⁸¹ Thus, the Court held that it was reasonable for the defendants to “anticipate being haled into court there to

73. See *Global Cyberspace Jurisdiction Report*, *supra* note 1, at 53 (discussing *Burger King*).

74. *Burger King*, 471 U.S. at 482.

75. *Id.* at 476.

76. *Id.* at 478-82, 485.

77. See *id.* at 482.

78. 465 U.S. 783 (1984).

79. See *id.* at 789.

80. *Id.* at 784-86; see also *Global Cyberspace Jurisdiction Report*, *supra* note 1, at 49 (discussing *Calder*).

81. See *Calder*, 465 U.S. at 789-90.

answer for the truth of [their] statements.”⁸²

II. PERSONAL JURISDICTION ENTERS THE CYBER-AGE

This section of the Article will analyze some early attempts to resolve thorny personal jurisdiction-Internet issues and comment on several related legal concepts. Throughout, analogy will be made to the targeting framework.

A. *Early Personal Jurisdiction-Internet Decisions*

Because the Internet has shattered many traditional concepts of space, the legal system has been forced, for better or worse, to formulate new working jurisdictional rules. Absent legislative action, responsibility for this formulation has fallen largely on the courts.⁸³ *Bensusan Restaurant Corp. v. King*⁸⁴ and *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*⁸⁵ represent two initial judicial attempts at this task. In both cases, the courts looked principally at the complexity of the defendant’s web-sites. While subsequent cases have followed *Zippo* and *Bensusan*’s analyses, the courts are increasingly looking to the targeting of the forum state in accordance with the A-B-C trilogy previously discussed.⁸⁶

1. *Bensusan*

In *Bensusan*,⁸⁷ the Second Circuit upheld the trial court’s determination that the operator of a “small” Missouri jazz club named “The Blue Note” could not be sued for trademark infringement in New York by the famous Manhattan club of the same name solely because the defendant had established an Internet web-site linking the two entities.⁸⁸ According to the trial court, “[c]reating a site, like placing a product into the stream of commerce, may be felt

82. *Id.* at 790.

83. However, the recent Global Cyberspace Jurisdiction Report recommends a set of basic default rules, described below, that might serve as a legislative foundation of a fair system of jurisdictional jurisprudence for cyberspace commerce. *Global Cyberspace Jurisdiction Report*, *supra* note 1, at 18-26; see *Legal Experts Call for Global Commission to Resolve E-Commerce Jurisdiction Issues*, 69 U.S.L. Wk. 2048 (July 18, 2000) (describing the Global Cyberspace Jurisdiction Report). Also, Congress has enacted a statute dealing with certain in rem “cybersquatting” issues. See discussion *infra* Part II.B.2.

84. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2d Cir. 1997).

85. 952 F. Supp. 1119 (W.D. Pa. 1997).

86. See *supra* Part I.B.

87. 126 F.3d 25 (2d Cir. 1997).

88. *Id.* at 29.

nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.”⁸⁹ The Missouri club owner did not target New York, the court found, since information on the web-site described a distinctly Missouri connection.⁹⁰

2. *Zippo*: Look to the Web-Site

In *Zippo*, the plaintiff was a Pennsylvania manufacturer of the well known “Zippo” tobacco lighters.⁹¹ It sued the defendant—a California Internet news service provider operating under the name of “Zippo Dot Com, Inc.”—in Pennsylvania for various violations of the Federal Trademark Act.⁹² According to the facts of the case, the defendant had, worldwide, about 140,000 paying subscribers to its news service, two percent of whom were from Pennsylvania.⁹³ The defendant had also entered into agreements with seven Pennsylvania Internet providers to permit their subscribers access to the defendant’s news service.⁹⁴

The key to the court’s resolution of the personal jurisdiction inquiry was the quantum of interactivity the defendant’s web-site offered. The court was almost mathematical in its analysis. According to Judge Sean McLaughlin, “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.”⁹⁵ The three-part “sliding scale” of interaction established by *Zippo* was expressed as follows:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. *At the opposite end* are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. *The middle ground* is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the

89. *Bensusan*, 937 F. Supp. at 301.

90. *See id.*

91. 952 F. Supp. 1119, 1121 (W.D. Pa. 1997).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1124.

exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.⁹⁶

Based on this standard, the court found that the defendant in *Zippo* was “doing business over the Internet” and, thus, the exercise of jurisdiction over the defendant in Pennsylvania was proper.⁹⁷

3. A Return to Targeting

To a large extent, *Bensusan* and *Zippo* reflect the A-B-C cases’ focus on the purposefulness of the defendants’ conduct. An individual who intentionally targets a forum by entering into contracts with forum residents, such as *Zippo*, or electronically links itself to the plaintiff, as did *Bensusan*, is doing more to establish a tie to the forum than one who simply puts up a passive web-site. In this respect, *Zippo* appropriately rejected *Inset Systems, Inc. v. Instruction Set*,⁹⁸ a case where the court exercised personal jurisdiction over an out-of-state defendant whose contacts with the forum consisted only of posting a passive web-site—albeit one accessible to an estimated 10,000 forum residents—and maintaining a toll-free telephone number.⁹⁹

Still, *Zippo* and *Bensusan* are not without their critics. One team of commentators postulates, “[i]f, in order to avoid the risk of being haled into [every] court across the country, you must limit your company’s use of the Web to simply a passive, static Website, then why bother?”¹⁰⁰ Others, too, have rejected a per se adherence to these cases’ mathematical analyses.¹⁰¹

96. *Id.* (emphasis added) (citations omitted).

97. *Id.* (emphasis added) (citations omitted).

98. 937 F. Supp. 161 (D. Conn. 1996).

99. *See Zippo*, 952 F. Supp. at 1125. Other courts, too, have specifically rejected the *Inset* analysis. *See, e.g.*, *JB Oxford Holdings, Inc. v. Net Trade, Inc.*, 76 F. Supp. 2d 1363, 1367 (S.D. Fla. 1999); *Hearst Corp. v. Goldberger*, 1997 WL 97097, at *20 (S.D.N.Y. Feb. 26, 1997); *Fix My PC, L.L.C. v. N.F.N. Assocs., Inc.*, 48 F. Supp. 2d 640, 644 (N.D. Tex. 1999); *Rannoch, Inc. v. Rannoch Corp.*, 52 F. Supp. 2d 681, 686-87 (E.D. Va. 1999). As stated by a district judge in Oregon: “lacking in *Inset* . . . [is] the principle that a defendant must ‘purposefully direct’ its activities at or take ‘deliberate action’ in or create ‘substantial connection’ with the forum state so as to provide fair warning that such activities may subject defendant to jurisdiction in a distant forum.” *Millennium Enters., Inc. v. Millennium Music L.P.*, 33 F. Supp. 2d 907, 922 (D. Or. 1999).

100. Robert W. Hamilton & Gregory A. Castanias, *Tangled Web: Personal Jurisdiction and the Internet*, 24 No. 2 LITIG. 27, 34 (1998).

101. *See Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 471 (D. Mass. 1997) (finding it “troubl[ing] . . . to force corporations that do business over the Internet, precisely because it is cost-effective, to now factor in the potential costs of defending against litigation in each and every state”); *Global Cyberspace Jurisdiction*

There is, thankfully, a movement afoot to look deeper than the mere level of interactivity or passivity of a particular web-site. For example, in *Millennium Enterprises*, the court refused to conclude that the *potential* of doing business within a state via an interactive web-site constituted the *actual* doing of such business.¹⁰² In cases such as *Millennium Enterprises*, the focus is shifting more squarely to the targeting of forum residents actually undertaken, i.e., the defendant's intent. Such a methodology gets back to *Asahi*, *Burger King*, and *Calder's* doctrinal roots.¹⁰³

Some cases in this movement have explicitly latched onto *Asahi's* stream of commerce language, particularly Justice O'Connor's admonition that "something more" than the mere placement of a product into the stream is required.¹⁰⁴ Thus, in *Cybersell, Inc. v. Cybersell, Inc.*,¹⁰⁵ the court noted that the Florida defendant, although posting an essentially passive web-site allegedly infringing on the Arizona plaintiff's trademark, had done essentially no more than that:

[It] did nothing to encourage people in Arizona to access its site, . . . there [was] no evidence that any part of its business . . . was sought or achieved in Arizona . . . [I]t entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona.¹⁰⁶

Report, supra note 1, at 60 ("If each web site subjected its sponsor to global jurisdiction, many would forego use of the technology for fear of its secondary costs."); *cf. id.* at 63 (noting that, because of *Zippo*, courts have become "clearly . . . convinced that the nature of a defendant's web site is relevant to the jurisdictional issue, but a failure to articulate why it is relevant makes it difficult to determine where the jurisdictional line should be drawn in cases that fall between *Zippo's* two extremes").

102. See *Millennium Enters., Inc.*, 33 F. Supp. 2d at 922.

103. See *Rothschild Berry Farm v. Serendipity Group L.L.C.*, 84 F. Supp. 2d 904, 910 (S.D. Ohio 1999) (holding that an interactive site not used by forum residents was insufficient to sustain personal jurisdiction); *Global Cyberspace Jurisdiction Report, supra* note 1, at 65 ("Reliance . . . on the nature of the web site alone is misplaced. If an interactive site is not targeted to a specific forum, courts should focus on how the site is actually used.") (footnote omitted).

104. See, e.g., *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (using the "something more" analysis); *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 540 (E.D. Pa. 1999) (using the "something more" analysis); *Rothschild Berry Farm*, 84 F. Supp. 2d at 910; *Fix My PC, L.L.C. v. N.F.N. Assocs., Inc.*, 48 F. Supp. 2d 640, 642-43 (N.D. Tex. 1999) (using the "something more" analysis).

105. 130 F.3d 414 (9th Cir. 1997).

106. *Id.* at 419; see also *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (citing *Asahi* plurality).

Other courts that have also attempted to limn the “something more” that might be required under *Asahi*, however, have met with varying results.¹⁰⁷ One commentator has argued that the “hodgepodge” of district court decisions on this point “is inconsistent, irrational, and irreconcilable.”¹⁰⁸ While the author does not hold such a bleak view, the point is well taken; more uniform direction from either the courts of appeal or Congress is needed. Indeed, as the Global Cyberspace Jurisdiction Project report points out:

The difficulty with the application of the stream of commerce doctrine in Cyberspace is that the theory is designed to deal with jurisdictional issues in a very particularized context, claims of injury caused by the negligence of a parts manufacturer. . . . The theory . . . is not relevant when . . . the claim is that the defendant infringed the plaintiff’s trademark, a claim analogous to the commission of an intentional tort from which the defendant derives no economic benefit.¹⁰⁹

In short, reliance on *Asahi* alone, while useful, is not the complete answer.

To be sure, *Burger King*’s focus on intentional affiliation helps, and one court of appeals has, at least implicitly, followed *Burger King*’s path.¹¹⁰ In *CompuServe*, an Ohio computer information service (CompuServe) sued a Texas marketer of software (Patterson) in Ohio.¹¹¹ The suit sought a declaratory judgment as to the applicability of a “Shareware Registration Agreement” the parties had mutually entered into.¹¹² The agreement, which called for the application of Ohio law, allowed Patterson to place his software on

107. *Compare Fix My PC, L.L.C.*, 48 F. Supp. 2d at 644 (finding web-site plus toll-free number and anecdotal evidence that plaintiff’s customers mistakenly called defendant not enough to establish personal jurisdiction), *with Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 4-5 (D.D.C. 1996) (reasoning that web-site plus toll-free number and solicitations sufficient to establish purposeful availment), *and Cybersell, Inc.*, 130 F.3d at 418-19 (describing “something more” as having toll-free number, entering into contracts in the forum, and selling goods in the forum).

108. Stravitz, *supra* note 26, at 939 & n.108 (citing, as examples, four district court decisions: *Am. Network, Inc. v. Access Am./Connect Atlanta, Inc.*, 975 F. Supp. 494, 498-99 (S.D.N.Y. 1997); *Superguide Corp. v. Kegan*, 987 F. Supp. 481, 486 (W.D.N.C. 1997); *Heroes, Inc.*, 958 F. Supp. at 4-5; *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996)).

109. *Global Cyberspace Jurisdiction Report*, *supra* note 1, at 47-48.

110. *See CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263-64 (6th Cir. 1996).

111. *Id.* at 1260-61.

112. *Id.*

CompuServe's system for others to buy.¹¹³ Although less than \$650 of Patterson's software was actually purchased by Ohio residents, the court held that the Buckeye State could assert jurisdiction over him because, like the defendant in *Burger King*, Patterson "knowingly made an effort" and, in fact, purposefully contracted "to market a product in other states, with Ohio-based CompuServe operating, in effect, as his distribution center."¹¹⁴ Targeting, once again, ruled the day.

In fact, a host of personal jurisdiction-Internet cases have successfully applied the *Burger King-CompuServe* paradigm.¹¹⁵ The theme of these cases is that intentionally-based, contractual affiliation is a workable methodology for resolving many, if not all, personal jurisdiction-Internet disputes.

Finally, targeting remains clearly at the center of those personal jurisdiction-Internet cases following *Calder*.¹¹⁶ The most famous of these is *Panavision*.¹¹⁷ In *Panavision*, the California owners of the PANAVISION (R) and PANAFLEX (R) marks sued an Illinois man who had registered the domain names panavision.com and panaflex.com in California.¹¹⁸ Relying on *Calder*, the Ninth Circuit held that the defendant had manifested an intention to do business in California—and was thus subject to personal jurisdiction there—by attempting to extort money from the California plaintiffs.¹¹⁹ Like the defendants in *Calder*, this Illinois cybersquatter knew that the brunt of harm to the plaintiff would be felt in California, "the heart of the theatrical motion picture and television industry."¹²⁰ Accordingly, as in *Calder*, the court found that the exercise of jurisdiction over a defendant in California—the targeted jurisdiction—was proper.¹²¹

113. *Id.*

114. *Id.* at 1263.

115. *See, e.g.*, *Multi-Tech Sys., Inc. v. VocalTec Communications, Inc.*, 122 F. Supp. 2d 1046, 1050-51 (D. Minn. 2000); *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790, 793-95 (W.D. Tenn. 2000); *Quokka Sports, Inc. v. Cup Int'l Ltd.*, 99 F. Supp. 2d 1105, 1111-12 (N.D. Cal. 1999); *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356, 1364-65 (W.D. Ark. 1997).

116. *See, e.g.*, *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000); *Bailey*, 86 F. Supp. 2d at 796-97; *McMaster-Carr Supply Co. v. Supply Depot, Inc.*, No. 98C1903, 1999 WL 417352, at *4 (N.D. Ill. June 16, 1999).

117. *Panavision Int'l, L.P., v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998).

118. *Id.*

119. *Id.* at 1321-22.

120. *Id.* at 1321.

121. *Id.* at 1324. Since *Panavision*, the Ninth Circuit has intertwined the "something more" of *Asahi* with the "intentional conduct" of *Calder* to describe "[e]xpress

B. *Related Legal Concepts*

Before proceeding to analyze the District of Massachusetts cases, several loose ends should be addressed. This subsection comments briefly on three additional issues: (1) the role of the Eastern District of Virginia in the analysis; (2) the Anticybersquatting Consumer Protection Act of 1999 (“ACPA”); and (3) the Global Cyberspace Jurisdiction Project report’s proposed default rules.

1. A Note on the Eastern District of Virginia

There is a tempting “solution” to tricky personal jurisdiction-Internet issues—that is, channeling many federal Internet-based cases through the Eastern District of Virginia. The rationale for this theory goes something like this: Network Solutions, Inc. (“NSI”) registers most United States-based domain names; NSI is located in eastern Virginia; because many web-site disputes involve domain names, they touch (however incidentally) on NSI and, in turn, the Eastern District of Virginia; ergo, there is personal jurisdiction in the Eastern District of Virginia over any such dispute. Indeed, in rem proceedings regarding domain names are already being funneled into the Eastern District of Virginia.¹²²

While superficially appealing, establishing a special Internet district in non-in rem cases is a bad idea. First, personal jurisdiction in most such cases would be based solely on a standard contract with NSI. It is settled, however, at least in the Fourth Circuit, where the Eastern District of Virginia sits, that a mere contract between a forum resident and a non-resident defendant does not provide sufficient minimum contacts for personal jurisdiction.¹²³ In this respect, rejecting the Eastern District of Virginia as a jurisdictional clearinghouse in these type of cases is similar to the near universal rejection of the District of Columbia District as the forum for

aiming[:] . . . a concept that in the jurisdictional context hardly defines itself . . . [yet] is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” *Bancroft & Masters, Inc.*, 223 F.3d at 1087.

122. See, e.g., *Caesars World, Inc. v. Caesars-Palace.com*, 112 F. Supp. 2d 505 (E.D. Va. 2000); *Heathmount A.E. Corp. v. Technodrome.com*, 106 F. Supp. 2d 860 (E.D. Va. 2000); *Lucent Technologies, Inc. v. lucentucks.com*, 95 F. Supp. 2d 528 (E.D. Va. 2000).

123. See *Ellicott Mach. Corp. v. John Holland Party Ltd.*, 995 F.2d 474, 478 (4th Cir. 1993); see also *Am. Online, Inc. v. Huang*, 106 F. Supp. 2d 848, 856 (E.D. Va. 2000) (citing *Ellicott Mach.* and concluding that domain name registration agreements with NSI from which plaintiffs’ claim arises are insufficient contacts with Virginia for purposes of personal jurisdiction over non-resident defendant).

all cases where contact with a federal agency is involved.¹²⁴

Second, domain names are “relatively minor portion[s] of the Internet’s architecture, and a minuscule presence in [Virginia].”¹²⁵ In the A-B-C lexicon, there is little evidence that the average defendant (in say Florida) who is sued by the average plaintiff (in say Massachusetts) over domain name usage purposefully availed herself of, or intended to target, Virginia.¹²⁶ If anything, the Florida defendant in this hypothetical is targeting Massachusetts.

Finally, to paraphrase a recent “government contacts” case, “[t]o permit courts to assert personal jurisdiction over nonresidents whose sole contact with the [Eastern District of Virginia] consists of dealing with [NSI] not only would pose a threat to . . . public participation in [cyberspace], but also would threaten to convert the [Eastern District of Virginia] into a national judicial forum.”¹²⁷ This practical argument—no matter how much busy docket clerks in other parts of the country might disagree—is perhaps the strongest reason to avoid the temptation to ship most Internet cases to the Eastern District of Virginia.

2. The ACPA

The ACPA, which was signed by President Clinton on November 29, 1999,¹²⁸ targets bad faith registration or use of domain names.¹²⁹ In addition to providing statutory damages (in the tens of thousands of dollars) for cybersquatting violations, the ACPA creates a federal in rem action against domain names.¹³⁰ However, the in rem provisions kick in only after the trademark owner has made unsuccessful efforts to identify a forum somewhere in the United States that has personal jurisdiction over the registrant.¹³¹ The ACPA has already been upheld by some lower courts,¹³² and, as

124. See, e.g., *Zeneca Ltd. v. Mylan Pharm., Inc.*, 173 F.3d 829, 831 (Fed. Cir. 1999); *Lamb v. Turbine Design, Inc.*, 538 S.E.2d 437 (Ga. 2000); *Envtl. Research Int’l, Inc. v. Lockwood Greene Eng’rs, Inc.*, 355 A.2d 808, 813 (D.C. 1976).

125. *Am. Online*, 106 F. Supp. 2d at 858 (citing *Network Solutions, Inc. v. Unbro Int’l, Inc.*, 529 S.E.2d 80, 85 (Va. 2000)).

126. See *id.*

127. *Zeneca*, 173 F.3d at 831 (quoting *Envtl. Research*, 355 A.2d at 813); accord *Lamb*, 538 S.E.2d at 439.

128. 15 U.S.C. 1125(d) (2000).

129. See § 1125(d)(1)(A)(i) & (ii).

130. § 1125(d)(2)(A).

131. § 1125(d)(2)(A)(ii). See generally Mark A. Thurmon, *Federal Courts and the Internet*, 2000 WL 23831154 (June 29, 2000) (describing ACPA).

132. See, e.g., *Caesars World, Inc. v. Caesars-Palace.com*, 112 F. Supp. 2d 505 (E.D. Va. 2000).

indicated, is funneling (for better or for worse) in rem domain disputes to the Eastern District of Virginia.¹³³

3. The Global Cyberspace Jurisdiction Project report's Proposed Default Rules

In the summer of 2000, the Global Cyberspace Jurisdiction Project in its report to the American Bar Association proposed a number of "jurisdictional default rules." With regard to personal jurisdiction, the report proposes, among other things, the following:

1.1.1. Every Internet party should be subject to personal . . . jurisdiction somewhere. In reasonable circumstances, more than one state may be able to assert . . . personal . . . jurisdiction in electronic commerce transactions, as they have historically in physical transactions.

1.1.2. Personal . . . jurisdiction should not be asserted based solely on the accessibility in the state of a passive web site that *does not target* the state.

1.1.3. . . . [P]ersonal . . . jurisdiction should be assertable over a web site content provider ("sponsor") in a state, assuming there is no enforceable contractual choice of law and forum, if:

1.1.3(a). the sponsor is a habitual resident of that state or has its principal place of business in that state;

1.1.3(b). *the sponsor targets that state* and the claim arises out of the content of the site; or

1.1.3(c). a dispute arises out of a transaction generated through a web site or service that does not target any specific state, but is interactive and *can be fairly considered knowingly to engage in business transactions there*.¹³⁴

As can be seen from the emphasized portions, the report relies heavily on targeting and intentional conduct as guiding principles. In this respect, the report also states that while a global definition of "targeting" needs to be achieved, "[g]enerically, targeting should cover technological practices that sponsors use to purposefully avail themselves of the commercial benefits of the targeted states."¹³⁵

133. See *supra* Part II.B.1 for a discussion of the role of the Eastern District of Virginia in personal jurisdiction-Internet issues.

134. *Global Cyberspace Jurisdiction Report*, *supra* note 1, at 20-21 (emphasis added).

135. *Id.* at 21 n.51.

C. Summary

To summarize, the Eastern District of Virginia should not be utilized as a catch-all forum for Internet cases, even though the ACPA appears to be herding many in rem cases in that direction. In addition, *Zippo*'s mathematical adherence to a web-site's activity appears to be giving way to a new trend in personal jurisdiction-Internet cases—a focus on targeting—and the foundation for that trend is the A-B-C cases. Indeed, the Global Cyberspace Jurisdiction Project is also looking to targeting as a primary guiding principle. The next and final section of this Article explores how these trends are appearing within the District of Massachusetts.

III. PERSONAL JURISDICTION AND THE INTERNET WITHIN THIS DISTRICT

One of the few, non-pending personal jurisdiction-Internet decisions from the District of Massachusetts, *Hasbro, Inc. v. Clue Computing, Inc.*,¹³⁶ adopted *Zippo*'s sliding scale and, as a result, emphasized the level of interaction employed by a particular web-site, over targeting, in determining a personal jurisdiction issue.¹³⁷ Luckily, *Hasbro* and others have also relied, to varying degrees, on *Asahi*, *Burger King*, or *Calder*.¹³⁸ It is the view of the author that a more specific zeroing-in on the "targeting" paradigm might be an appropriate next step. In other words, the A-B-Cs of targeting should provide a workable formula for resolving most personal jurisdiction Internet issues within the District of Massachusetts.

A. Existing Massachusetts Decisions

As of this writing, only a handful of non-pending personal jurisdiction Internet decisions exist from the District of Massachusetts.¹³⁹ For the most part, these cases are relatively straightforward. However, they have not yet been comprehensively

136. 994 F. Supp. 34 (D. Mass. 1997).

137. *Id.* at 39-40, 45.

138. See, e.g., *New Eng. Horsemen's Benevolent & Protective Ass'n, Inc. v. Rockingham Ventures, Inc.*, No. 97-12701, 1999 WL 350653, *4 (D. Mass. Jan. 11, 1999); *Hasbro*, 994 F. Supp. at 42; *Gary Scott Int'l, Inc. v. Baroudi*, 981 F. Supp. 714, 717 (D. Mass. 1997); *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 469-70 (D. Mass. 1997); see also discussion, *infra*, regarding *New Eng. Horsemen's* and *Gary Scott*.

139. See *supra* note 138 for a list of those cases. Interested readers should also review a recent personal jurisdiction-Internet decision. *Northern Light Tech., Inc. v. Northern Lights Club*, 97 F. Supp. 2d 96 (D. Mass. 2000), *aff'd*, 236 F.3d 57 (1st Cir. 2001).

analyzed within the A-B-C paradigm.¹⁴⁰

In *Digital*, an early, straightforward case in this district, the court held that it had jurisdiction over the California licensee of the "AltaVista" trademark in a breach of contract and tort case brought by the trademark owner, the Massachusetts-based Digital Equipment Corporation.¹⁴¹ Although *Digital* is important for its comprehensive exegesis of the law in this burgeoning area, it had a relatively simple framework based primarily on a contract, which the parties had voluntarily entered into and which specified that Massachusetts law would apply to their transactions.¹⁴² Moreover, there was evidence that the defendant had made at least three sales of software products to Massachusetts residents "in the course of and related to its operation of a Web-site."¹⁴³ Finally, with regard to the plaintiff's tort claim of trademark infringement, the court found (via a reference to *Calder*) that the defendant had targeted Massachusetts since it knew that the object of its harm, the Digital computer company, was located in Massachusetts.¹⁴⁴

Several other Massachusetts federal cases also employ basic analyses. In one, a Massachusetts association representing individuals involved in New England's horse racing industry filed a breach of contract action in the district court against a New Hampshire racetrack.¹⁴⁵ In finding that personal jurisdiction existed, the court noted that the track maintained an Internet web-site that included directions to the track from Boston.¹⁴⁶ There were, however, numerous other Massachusetts contacts.¹⁴⁷ For example, most of the horses that run at the track were stabled in Massachusetts and owned by members of the plaintiff's association, a majority of the track's vendors were Massachusetts residents, the track had advertised in both the Boston Globe and the Boston area yellow pages, and, in fact, the contract at issue involved the track's sending simulcast signals to Massachusetts tracks.¹⁴⁸ Accordingly, even though

140. For a cogent summary of several personal jurisdiction-Internet cases within this district, see Lawrence H. Reece, III, *Personal Jurisdiction and the Internet*, 28 MASS. L. WKLY. 282 (Oct. 11, 1999).

141. 960 F. Supp. at 472.

142. *See id.* at 463-64, 466.

143. *Id.* at 464.

144. *Id.* at 470.

145. *New Eng. Horsemen's Benevolent & Protective Ass'n v. Rockingham Ventures, Inc.*, No. 97-12701, 1999 WL 350653, *4 (D. Mass. Jan. 11, 1999).

146. *Id.* at *2.

147. *Id.*

148. *Id.* at *1-2.

Asahi's plurality was not mentioned in the opinion, it could clearly be viewed as an Internet plus "something more" case. Indeed, the court was so persuaded by the extensive contacts of record that it took the bold step of concluding that Massachusetts had general jurisdiction over the track.¹⁴⁹

Similarly, in a trademark infringement action, the court found that Internet advertising, in addition to a plethora of other forms of direct contact to the state, provided ample basis for the court to assert personal jurisdiction over the non-resident defendant.¹⁵⁰ Examples of other types of direct state contact included the defendant's making a dozen sales of his allegedly infringing product (humidors) in Massachusetts, as well as his planning to sell a large number of humidors to a pharmacy chain that had stores in Massachusetts.¹⁵¹ As in *New England Horsemen's*, the court's conclusion could be justified by the *Asahi* "something-more" plurality. The court, however, cited *Burger King* and stated that in choosing "to market and sell his humidors nationwide[,] . . . [the] defendant accepted both the benefits and the risks of nationwide business."¹⁵² A simple reference to *Calder* might have also sufficed.

These straightforward cases notwithstanding, the final District of Massachusetts case discussed in this section, *Hasbro*,¹⁵³ while factually complex, also demonstrates the value of the A-B-C paradigm. The plaintiff in *Hasbro* was the well-known toy company that has its largest facility in Massachusetts.¹⁵⁴ It manufactures the "Clue" board game and other Clue-game products.¹⁵⁵ The defendant, Clue Computing, was a small Colorado computer consulting company that had registered the "clue.com" domain name.¹⁵⁶ It had chosen the name "Clue" as a joking reference to the intelligence of its founders; i.e., unlike others who are "clueless," they had a clue.¹⁵⁷ According to the court, Clue Computing had served less than a dozen clients during its existence and had never gar-

149. *Id.* This is not to suggest that *New Eng. Horsemen's* is factually on par with *Mieczkowski*, the Eastern District of Texas case which, as indicated, has been criticized for its general jurisdiction-Internet hypothesis. See *supra* notes 21-23. Rather, *New Eng. Horsemen's* is a penultimate example of a defendant's carrying on in Massachusetts "a continuous and systematic presence."

150. Gary Scott Int'l v. Baroudi, 981 F. Supp. 714, 716-17 (D. Mass. 1997).

151. *Id.*

152. *Id.* at 717.

153. 994 F. Supp. 34 (D. Mass. 1997).

154. *Id.* at 38.

155. *Id.*

156. *Id.* at 37-38.

157. *Id.* at 37 n.1.

nered more than \$80,000 to \$100,000 in annual revenues.¹⁵⁸ Unfortunately for the company, however, it had a fairly interactive web-site which allowed visitors to submit email instantly, as well as advertised the company as a global business that could provide services “anywhere on the planet.”¹⁵⁹ The web-site also boasted that the company had provided services (albeit through another entity) to Digital Equipment Corp., the Massachusetts-based computer company.¹⁶⁰ Accordingly, the court held that personal jurisdiction over the defendant was appropriate.¹⁶¹

Hasbro, perhaps, approaches the outer borders of what will justify personal jurisdiction in Internet cases within this district. It also demonstrates an inherent problem with trying to operate a small, cyber-business with a goal of marketing around the globe.¹⁶² In doing so, one runs the risk of being subjected to personal jurisdiction in many different fora. This was so in *Hasbro* even though, as the First Circuit recently recognized, there is “very little similarity between Hasbro’s products and services and those of Clue Computing.”¹⁶³

Still, the case makes complete sense, when one views it in light of the A-B-C paradigm. First, in accordance with the *Asahi* plurality, “something more” than the placement of the defendant’s services into the stream of commerce was involved; the defendant had created an association with a company doing business in Massachusetts and employed an interactive web-site.¹⁶⁴ Second, that alliance was an intentional, contract-based relationship which linked it to another business within Massachusetts, arguably similar to the relationship at issue in *Burger King*.¹⁶⁵ Third, and perhaps most importantly, through the association, the defendant—like the National Enquirer editor and author in *Calder*—had targeted Digital, which the defendant knew was a Massachusetts entity and under whose accounts the defendant’s employee had traveled.¹⁶⁶ In fact, the

158. *Id.* at 37.

159. *Id.* at 38.

160. *Id.* at 37-38.

161. *Id.* at 46.

162. As the court acknowledged, no one from Clue Computing had ever traveled to Massachusetts, it had only one full-time employee, and it had made only eight calls to the state. *Id.* at 37-38.

163. *Hasbro, Inc. v. Clue Computing, Inc.*, 232 F.3d 1, 2 (1st Cir. 2000). Thus, the First Circuit ultimately upheld judgment in favor of Clue Computing on Hasbro’s infringement and dilution claims. *Id.* at 3.

164. *Hasbro*, 994 F. Supp. at 45.

165. *See id.* at 37-38, 44.

166. *See id.* at 37-38.

court pointed out that the defendant's work for Digital comprised, in effect, one-third to one-half of the defendant's 1995 income.¹⁶⁷ Even though *Hasbro* relies heavily on *Zippo*, the first personal jurisdiction-Internet case it cites,¹⁶⁸ in the final analysis it represents a successful utilization of the A-B-C approach.

B. *Where to Go Next?*

The above decisions from the District of Massachusetts indicate that these complex jurisdictional issues should, as always, be resolved in a case-by-case manner. Because the facts of each case differ, the courts are prudently wary of adopting an all-or-nothing approach. Nevertheless, the Massachusetts decisions appear to be concentrating on the A-B-Cs of targeting. Such continued emphasis would be a proper evolution of personal jurisdiction-Internet issues within the District of Massachusetts.

CONCLUSION

As with just about everything in cyberspace, legal issues involving personal jurisdiction and the Internet are exploding at breakneck speed. What happens next year (or next week) can make today's news obsolete. For example, at the end of 1996, only 40 million English speakers and 10 million non-English speakers were on-line.¹⁶⁹ By the end of 2000, those figures had grown to approximately 192 million and 211 million, respectively,¹⁷⁰ and, by 2005, estimates show that about 320 million English speakers and 820 million non-English speakers will be using the Internet.¹⁷¹

Despite this rapid evolution, the Supreme Court's fundamental focus on targeting provides a staid template for resolving personal jurisdiction-Internet issues within the District of Massachusetts. To be sure, one should keep a wary eye on the expansion of legislation, such as the ACPA or other "default rules," which might alter the landscape significantly. However, adherence to the A-B-Cs of

167. *Id.* at 45.

168. *See id.* at 39-40 (summarizing *Zippo's* web-site interactivity analysis). *But see* Millennium Enters. v. Millenium Music, L.P., 33 F. Supp. 2d 907, 922 (D. Or. 1999) (declining to adopt *Hasbro's* reasoning).

169. Global Reach, *Evolution & Projections of Online Linguistic Populations at* <http://glreach.com/globstats/evol.html> (last revised Mar. 18, 2001).

170. Global, <http://glreach.com/globstats/evol.html>.

171. Global, <http://glreach.com/globstats/evol.html>. Figures such as these—which indicate that non-English Internet growth is far out-pacing English Internet growth—point to the need for *world-wide* proposals such as those outlined in the Global Cyberspace Jurisdiction Report.

targeting should allow one practicing in the Commonwealth's federal courts to resolve most personal jurisdiction-Internet problems that may arise. In any event, the technological and legal evolution should be fun to watch.